The UK economy is mainly based on services, many providers of which are global leaders.

But as ***The UK, the WTO and Global Trade: Leading Reform on Services Trade*** explains, by comparison with goods, services suffer from serious trade barriers.

The author, David Collins, who holds the chair of international economic law at City University, proposes that the UK must now exploit its Brexit freedoms to champion greater trade liberalisation for services: a free trade framework, with deeper commitments on services and which is designed to open up digital trade.

Britain should therefore continue to promote bilateral and multilateral regional initiatives and Free Trade Agreements. Above all the UK should provide the leadership in the WTO to liberalise services trade globally.

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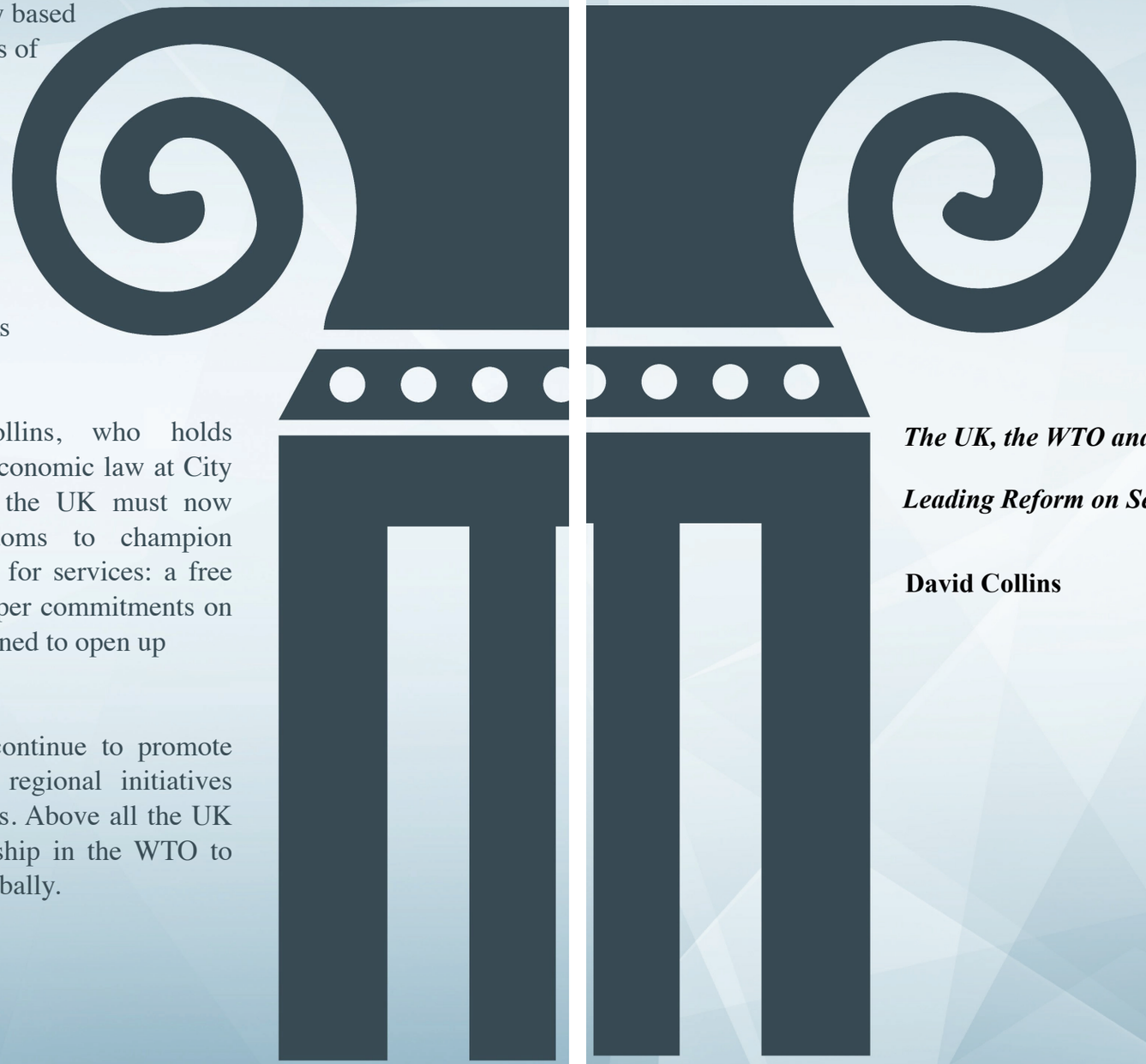

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The UK, the WTO and Global Trade:

Leading Reform on Services Trade

David Collins

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The UK, the WTO and Global Trade:

Leading Reform on Services Trade

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POLITEIA

2022

First published in 2022
by
Politeia
55 Tufton Street,
London, SW1P 3QL

E-mail: secretary@politeia.co.uk
Website: www.politeia.co.uk

ISBN: 978-1-9163575-9-4

Cover design by Sonia Pagnier

Politeia gratefully acknowledges support for this publication
from The Foundation for Social and Economic Thinking
(FSET) and
The Institute for Policy Research

Printed in Great Britain by:
Blissetts
Unit 1, Shield Drive
West Cross Industrial Park
Great West Road
Brentford, TW8 9E

The Author

David Collins is Professor of International Economic Law at City, University of London. He previously practised commercial litigation in Toronto and was a prosecutor for the Attorney General in Ontario, Canada. His publications include *Foundations of International Economic Law* (2019), *The Public International Law of Trade in Legal Services* (Cambridge, 2018), and for Politeia, *How to Level the EU's Playing Field – Trade Remedies for a Trade Deal* (2020) and *Negotiating Brexit: The Legal Basis for EU & Global Trade* (2018).

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I
Introduction: The UK and Global Services Trade

The UK's departure from the European Union (EU) presents a unique opportunity not only for the UK to forge its own independent trade policy, but also to exert its influence in international organizations at which, previously, it was only indirectly represented (through the EU). Among the most important of these for the purposes of economic prosperity is the World Trade Organization (WTO). The UK is well-positioned to champion deeper trade liberalization at the global level at this forum as the fifth largest economy in the G7 with a deep history of international commerce and a strong commitment to the rule of law. This is particularly the case in relation to trade in services, one of the UK's greatest strengths as a trading economy. Indeed, services account for 80 per cent of the UK's economic output and 82 per cent of its employment in 2021.[1]

Services trade has grown remarkably in the past decade, a trend which has accelerated since the Covid-19 pandemic. It is now estimated to account for around half of global trade. Yet for trading services the costs are about twice as high as trade costs for goods. This is largely the consequence of regulatory divergence, as well as unclear regulations and unwieldy procedures.[2] Multilateral rules for trade in services are less complete than for goods, enabling much inefficiency in terms not only of trade barriers but also in compliance costs due to a lack of transparency and predictability. Note that not only is the cost of trade in services high, but there can be additional costs given that rules can change with little notice, particularly where underlying technology is itself in flux.[3] Bilateral and regional arrangements have attempted to address this shortcoming in part.

Improving the global framework for services trade is a vital objective for the UK now that it has regained its seat at the WTO. As strong supporter of free trade and, historically, one of the world's leading financial services markets,

[1] P Brien, "Service Industries: Key Economic Indicators" House of Commons Library (24 March 2022)
[2] World Trade Organization, World Trade Report 2019
[3] See e.g. I Willemyns, *Digital Services in International Trade Law* (Cambridge University Press, 2022) Chapter One.

the UK can take a lead in negotiating for enhanced WTO services disciplines as well as pursuing services trade liberalization at the bilateral and regional level through its own Free Trade Agreements (FTA) as well as membership in regional arrangements such as the Comprehensive Progressive Trans-Pacific Partnership (CPTPP). Through these, the UK should seek to develop an international legal framework to promote fair and open trade across a range of services sectors, from telecoms and digital technology to banking, financial and professional services. This will benefit not only the UK but many countries around the world with mature and developing services sectors, both as importers and exporters.

Services liberalization will depend heavily on how international data flows are regulated. Rules on cross-border data impact heavily on services trade, for example, issues of digital trade, e-commerce and banking services, and finance, including blockchain / cryptocurrencies. Cross-border data flows also affect innovation and by extension foreign investment. However, the management of data engages key issues of safety and security which include privacy and consumer protection, such as data transfer, data storage, anonymization, data residency and cybersecurity. In order to succeed, trade agreements need to cater for both trade liberalization and the wider public interest (e.g. safety and security). These concerns are often in conflict, requiring careful balancing in domestic trade policy, as disciplined by international law.

A number of countries and the EU have adopted regulations impeding the movement of data, in some cases due to concern over national security and the related 'data sovereignty' (e.g. China and its Cyberspace Administration department) or personal privacy (the EU's cumbersome General Data Protection Regulation, GDPR).[4] Others have required that data is stored or processed in specific locations for the purposes of advantaging local firms (e.g. India), known as data localization.[5] The complex combination of approaches by various countries makes it difficult not only effectively to achieve public policy goals such as privacy and data protection across different jurisdictions

[4] MSMEs struggle to operate in the EU due to the complex regulatory compliance requirements under GDPR: Martin N, Matt C, Niebel C and Blind K (2019). How Data Protection Regulation Affects Startup Innovation. Information Systems Frontiers, 21: 1307–1324

[5] Digital Economy Report, UNCTAD, October 2021 at 137

because of issues of enforcement, but also for services firms to operate across borders, affecting their ability to export or invest abroad in order to maximize the advantages from global operations.

Legal services are vital to the UK, underpinning many other services, and notably financial services – the UK's most economically important sector. The UK's legal services market provides more than £60 billion per year to the UK's economy. Expertise in English law is in high demand around the world and the service of international clients is a key source of revenue for many UK lawyers. Yet legal services have been largely neglected in trade negotiations.[6] This has meant clients have less choice in accessing legal services and face higher fees, and ultimately is a drag on investment and productivity.

The WTO has failed to keep up with the challenges of the 21st Century.[7] In particular, the WTO's Work Programme on Electronic Commerce,[8] begun in the 1990s, has not dealt with many the challenges posed by data management, undermining global services trade.[9] Indeed, the regulation of digital trade at international level is incoherent and highly fragmented,[10] with rules derived variably from the WTO's General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) as well as the plurilateral Informational Technology Agreement (ITA). There is no global framework for trade in legal services, although some bilateral agreements are beginning to take notice of it.

This publication will consider the current multilateral trade in services framework under the WTO, the GATS, with specific attention paid to digital trade and to a lesser extent, legal services (II). It will then examine some of the UK's key regional arrangements covering these sectors (Part III). Turning back

[6] D Collins, *The Public International Law of Trade in Legal Services* (CUP, 2018)
[7] C Horseman, 'United Kingdom finds its role as 'critical friend' of World Trade Organization' Borderlex (24 March 2021)
[8] WTO, 'Work Programme on Electronic Commerce' WT/L/274 (1998)
[9] S Wunsch-Vincent and A Hold, 'Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral Versus Preferential Trade Negotiations' in M Burri and T Cottier (eds), *Trade Governance in the Digital Age: World Trade Forum* (CUP, 2012) at 181
[10] E Fahey, 'The EU as a Digital Trade Actor – The Challenge of Being a Global Leader in Standard-Setting' International Trade Law and Regulation 2021:1

to multilateralism, Part IV will explore recent and ongoing WTO Joint Initiatives regarding services, particularly in relation to digital trade. The need for wider WTO reforms will be discussed in Part V, specifically regarding its currently dysfunctional dispute settlement system, with has implications across all sectors of the economy. Building upon the first part of this publication, Part VI will provide an outline for the next steps forward for the UK in its efforts to take on the mantle of leadership in relation to services trade at the WTO and elsewhere. A brief conclusion follows in Part VII.

II
The Current Multilateral Trade in Services Framework: The WTO General Agreement on Trade in Services (GATS)

The GATS provides guarantees against non-discrimination and market access for services and services suppliers on an optional basis. This means that each member lists its commitments in its Schedule of Specific Commitments, as it wishes. As such, its success in liberalizing global services trade has depended on the extent to which WTO members have been prepared to schedule such commitments. Across the world, there remain extensive limits on discrimination and market access in relation to commercial presence (Mode 3) and movement of natural persons (Mode 4), meaning that generally speaking, GATS has not offered much to states, such as the UK, which have a heavily services-dominated economy.[11]

This shortcoming is partially due to the GATS positive list-style structure in which members list areas where they are prepared to make non-discrimination and market access provisions, with unlisted areas presumptively open to prohibition. Under its domestic services regulation provisions (Article VI and VII) GATS requires members not to impose unreasonable restrictions on the acceptance of professional qualifications for services providers, and, where possible, to establish formal agreements for the automatic recognition of such services providers, precluding excessive examinations and certifications. In theory this should help liberalize trade in, for example, legal services by enabling foreign qualified lawyers to practice internationally, but this is rarely the case. De facto controls on the delivery of services internationally can be of enormous significance in sectors that are notionally open to foreign providers. – These include mandatory periods of training or language competencies render the obtaining of a foreign license practically impossible. This can be problematic in the case of legal services, for example, where jurisdiction-specific training might mean that additional educational requirements are necessary to provide services in a given market. On the other hand, similarities in legal systems suggest that such requirements should be minimal or non-existent in many cases (e.g. among common law countries).

[11] P Van Den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization 5th Edition,* (CUP, 2021) Chapter 7.4

The recognition obligations only apply to services sectors for which members have made market access commitments in their schedule of concessions, leaving much room for services trade protectionism. Should a member fail to uphold its GATS commitments, an affected member can bring a complaint through the WTO dispute settlement system. These will be heard by ad hoc panels and are reviewable by the Appellate Body, of which more will be discussed below.

Negotiations for enhancing market access offers under the GATS are done under the auspices of the WTO Council for Trade in Services, which is responsible for facilitating the operation of the GATS and for furthering its objectives. The Committee on Specific Commitments is a standing body under the Council for Trade in Services and is mandated to oversee the implementation of WTO members' services commitments and to ensure their technical accuracy and coherence through regular examination of classification and scheduling issues. The Council and the Committee meet several times a year. As a member of the WTO, the UK has a seat on both the Council and the Committee and as such these are fora in which the UK's voice can be heard on matters relating to services trade liberalization. It is encouraging that the UK has already made notable contributions to meetings of the Council. For example, in July 2021, the UK shared data that its Office for National Statistics had collected in relation to services delivery in Least Developed Countries (LDCs). It also encouraged greater collective support for LDCs in services trade.[12]

[12] Council for Trade in Services, Report of the Meeting Held on 1 July 2021, World Trade Organization, S/C/M/146 at 2.11-2.13

III
Bilateral and Regional Services Disciplines

The limited coverage of the GATS has led a number of countries, including the UK, to put services, including digital and legal, in their bilateral and regional Free Trade Agreements (FTAs). The UK has negotiated several FTAs since its departure from the EU, some of which (as with Japan and Canada) were roll-overs of EU agreements. Other FTAs, as with Australia and New Zealand were entirely new.

i) EU: The UK-EU Trade and Cooperation Agreement (TCA)

Among the most significant of FTAs for the UK is the Trade and Cooperation Agreement (TCA) with the EU, finalized at the end of 2020. The TCA has a digital trade chapter that is encouraging in that it contains a number of provisions designed to promote free flow of data, facilitating the supply of much cross-border services. The chapter requires the UK and EU not to impose customs duties or tariffs on electronic transmissions (such as software) provided in its territory; not require businesses to obtain prior authorisation for any services purely because they are provided by electronic means; and not require the forced transfer of source code as a prerequisite to doing business in its territory. The TCA also contains material on data localization ensuring that signatories do not require that the use of computing facilities or processing of data takes place in its territory; not to make data transfers contingent on the use of computing facilities in its territory; and not to prohibit the storage or processing of data in the other party's territory.

Still, the TCA's rules on digital trade digital do not force the UK or EU to remove existing measures which might be regarded by some as barriers to trade. Many such measures are likely to continue to be permitted, primarily because of numerous public policy carve-outs. For example, although both parties make commitments on cross-border data flows, they remain able to impose conditions on transfers of personal data where these are considered justified to protect privacy. The EU's General Data Protection Regulation (GDPR) is very strict on this issue. Unfortunately for trade liberalisation, the UK has established the EU GDPR as part of its domestic law since leaving in the EU.

While the TCA's coverage for services generally has been limited – one area of modest success in the TCA is in relation to legal services. The EU Lawyer's Establishment Directive (98/5/EC) ceased to apply to UK lawyers at the end of the transition period. Today UK lawyers seeking to provide legal advice in the EU must deal with 27 separate regulatory regimes, as each Member State has its own rules relating to the legal profession. This means that a lawyer seeking to provide legal advice must satisfy the requirement of the relevant Member State they are seeking to enter. Thankfully, the principle of 'home title' practice was recognised in the TCA. Under the 'home title' principle, parties to the TCA agree to permit practice by lawyers of the other party under their home jurisdiction professional qualification with regards to advice on home country and public international law, as well as arbitration, conciliation and mediation both across borders and in person in the foreign country. On their own these are already sizable areas of the legal services market for most UK lawyers serving clients in the EU.

Unfortunately the text of the TCA appears to contemplate a restrictive interpretation of the home title rules. The relevant provision in the TCA (Article 194) expressly refers to the categories of Contractual Services Suppliers (CSSs) and Independent Professionals (IPs) but it omits other key categories of business visitors such as Intra-Corporate Transferees (ICTs) and Business Visitors for Establishment/Investment Purposes (BVEP/BVIP). Under principles of treaty interpretation, the legal services provisions in the TCA therefore appear only to apply to lawyers who qualify as either CSSs or IPs. This is a small group, excluding many of the services normally supplied on the crucial fly-in-fly-out basis, meaning that the foreign lawyer enters the country to represent a client in a brief transaction or arbitration hearing to leave again shortly thereafter. The TCA extends this to legal advice on home country (UK) and international law, but not host state law (the law of the relevant EU member state), unless that state wishes to grant this right, which typically requires registration and further qualifications. In terms of market access, the TCA's commitments on legal services, while better than most FTAs, do not offer much to UK lawyers compared to other non-EU lawyers dealing with the EU on GATS Most Favoured Nation (MFN) terms.

ii) The UK-Japan Comprehensive Economic Partnership Agreement (CEPA):

The CEPA, a roll-over of the EU-Japan agreement, contains extensive provisions on services as well as a modern chapter on digital trade. There are a number of provisions in this chapter reflecting new technologies, demonstrating that the UK takes liberalization of digital trade seriously and acting as a benchmark for future negotiations in this area with countries such as Canada and the US. These include clarity on the disclosure of source codes and cryptology; confirmation of the validity of e-contracts and e-signatures; overarching principles on access to and use of the internet; enhanced consumer protection/data protection provisions; clarity on use of government data and associated restrictions; a ban on unjustified data localisation. The UK-Japan CEPA is arguably still weak with regards to rules on protecting personal information (at least from the perspective of regimes such as that of the EU) and clarity regarding consumer protections where safeguards may be enforced. There is also a lack of clarity regarding liability when digital transactions cross multiple platforms involving numerous actors or entities. This latter point can be restrictive for the regulated professions and financial services more generally. The digital trade provisions of the CEPA expressly do not apply to legal services delivered digitally (Art 8.70.5) – there is no other mention of legal services in the text of the CEPA.

iii) Australia and New Zealand FTAs

The UK recently signed FTAs with both Australia and New Zealand – its first entirely new FTAs since Brexit. These are both comprehensive agreements with chapters covering services and digital trade as well as goods. As with most modern FTAs, the coverage of services in the Australia and New Zealand agreements are modest. The respective chapters on Cross-Border Trade in Services grant non-discrimination based on nationality and prohibit quantitative market access restrictions to most services, but there are numerous carve outs, for example, on services investment that involves the purchase of land and the delivery of social services such as public education, transport and health. The agreements prohibit Parties from requiring a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a

service, but again there are exceptions to this rule in certain sectors such as telecommunications. There are sensible rules for streamlining domestic regulation of services in the Australia and New Zealand FTAs, along the lines of that agreed in the WTO's new Domestic Services Regulation initiative, discussed further below. Parties to these agreements are encouraged, but not required, to recognize foreign qualifications of services providers, limited the capacity of professionals to supply services using expertise they have acquired at home (with legal services a good example, although 'home' state law practice is allowed). Both the Australia and New Zealand FTAs establish committees on trade in services with the UK with a view to negotiating further liberalization in the future. It is hoped that going forward, greater progress will be made in terms of temporary stay of business-people (beyond the current 90 days) as well as deeper recognition of foreign qualifications in professions such as legal services, precluding re-qualification or practice in certain fields.

The digital trade chapters of the Australia and New Zealand FTAs are world-leading, enabling free flow of data across borders and prohibiting data localization, with limited exceptions. Electronic contracts are also recognized as is cooperation on cybersecurity. The UK-Australia FTA also contains a novel "Innovation" chapter which outlines plans for cooperation in areas such as Artificial Intelligence and digital identities. It will be interesting to see if this chapter, or something like it, appears in future UK FTAs and what initiatives they lead to.

iv) Comprehensive Progressive Trans-Pacific Partnership (CPTPP)

Most significantly, formal talks on the UK's accession to the 11-nation CPTPP began in the summer of 2021 after several months of preliminary negotiations. The UK has now passed to the second stage of negotiations for accession during which its market access offers will be made. Joining the CPTPP is vital from the perspective of the UK's global role as a champion of free trade because the CPTPP may eventually become a near-global regime for trade governance in conjunction, or perhaps in competition with the WTO. The CPTPP has modern provisions on digital trade which are designed to facilitate digital trade, underscoring its attention to services trade generally. These are broadly in line with the protections found in the TCA and will not be repeated here. The

CPTPP departs from the TCA primarily by its lighter protection of personal data in favour of free flow of data.

The CPTPP's main privacy provision (Article 14.8.2) requires that parties adopt a legal framework for the protection of the personal information of the users of electronic commerce. A footnote to this provision states a party may comply with the obligation by adopting measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy. There are also transparency requirements regarding the publishing of laws governing the use of personal information and protections available to the users of e-commerce.

The CPTPP also includes GATS Article XIV-style general exceptions which expressly cover privacy (Article 14.11.3), requiring the satisfaction of a four-stage test which essentially mandates that the breach of the digital trade provision must be necessary to achieve "a legitimate public policy objective" (term undefined and presumptively open-ended). This provision adds that the relevant measure must not be a "disguised restriction on trade" evoking the chapeau of GATS Article XIV (the general exceptions provision of the GATS). GATS jurisprudence suggests that this will be a very difficult test to pass.[13]

This suggests that the privacy justification in the CPTPP's digital trade chapter is weak, although this may depend on how it is interpreted in practice through the CPTPP's dispute settlement. This same test applies, in slightly modified form, to the prohibition on data transfer restrictions and the prohibition on data localization rules (Arts 14.11 and 14.13). Comparatively weak privacy rules in the CPTPP (in contrast to the EU's General Data Protection Regulation, GDPR, for example) could be problematic for UK consumers who will need to trust that their data will not be misused in order to engage in e-commerce with CPTPP countries. It could also conceivably be harmful for the legal professional where legal professional privilege is vital to the delivery of effective legal advice and representation.

[13] E.g. United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (adopted on 20 April 2005)

Finally, article 14.15 of the CPTPP requires parties to exchange information and share experiences on regulations, policies, enforcement and compliance regarding electronic commerce, including personal information protection. This could lead to progress in establishing enhanced norms on privacy, perhaps covering such issues as legal professional privilege. As CPTPP membership grows this cooperation could become vital to driving trade liberalization.

On legal services, the CPTPP is among the most progressive trading arrangements in the world. Many of the barriers to trade in legal services are behind the border, including domestic regulations around licensing, certification and requalification. The CPTPP specifically encourages member countries to allow foreign lawyers to operate on a temporary fly-in, fly-out basis and on a fully integrated basis with domestic lawyers. Moreover, the CPTPP's Professional Services Annex, especially paragraphs 9 and 10, sets out a principles-based framework on legal services to support medium and long-term reform of the regulation of foreign lawyers and the legal services sector. This is further enhanced by the creation of a professional services working group that supports the implementation of the framework across the jurisdictions.

v) The Trade in Services Agreement (TiSA)

Negotiations for the TiSA among 23 developed economies were discontinued by 2017, having long suffered from accusations of insufficient transparency. Many had high hopes for the TiSA as a means of enhancing market access for services beyond the GATS. Much of what it would probably have contained with regards to improvements in clarity on domestic services regulation was thankfully captured by the WTO's plurilateral Domestic Regulation on Trade in Services Joint Initiative, of which more below. Given its strength in services, the UK participated in TiSA negotiations, hoping to improve upon GATS disciplines, in part by adopting a negative listing format of covered services rather than a positive one (presumptively including all services that are not expressly excluded).

IV
The WTO Joint Initiatives of Relevance to Services

The UK has participated in several WTO Joint Initiatives since Brexit. These are discussions among smaller groups of WTO members on important new developments in global trade. The topics which have been covered are e-commerce; investment facilitation for development; Micro, Small and Medium-Sized Enterprises (MSMEs); domestic regulation of trade in services and trade and environmental sustainability. The UK's involvement in each of these dynamic initiatives is a welcome way of pushing forward the trade liberalization agenda among like-minded parties where multilateral consensus is difficult. The most important for the purposes of advancing the global services economy are the Joint Initiatives on E-Commerce and on Services Domestic Regulation.

i) E-Commerce – Buying and selling services on-line

In November 2020, the UK issued a communication to the WTO regarding its views on the E-Commerce Joint Initiative.[14] The UK set out its preferred position on a number of the key topics including customs duties on electronic transmissions, personal information protection, cross-border transfer of information, location of computing (and financial computing) services, source code, cryptography, open internet access, cybersecurity, electronic contracts, and paperless trading.[15] The UK's position on these matters may be generally described as one which is in favour of minimizing restrictions on digital trade with a view to stimulating competition and economic growth.

The initial WTO Joint Statement on Electronic Commerce had been issued at the eleventh Ministerial Conference to initiate exploratory work towards future WTO negotiations on trade-related aspects of electronic commerce, with participation open to all WTO members in 2017.[16] As of late 2021, the draft

[14] Joint Statement on Electronic Commerce - Communication from the United Kingdom, 16/11/2020, Doc #20-8230 (restricted)
[15] J Braithwaite, 'WTO Joint Initiative on E-Commerce: UK Statement' 17 November 2020 (Geneva, Switzerland)
[16] Joint Statement on Electronic Commerce, WT/MIN(17)/60, 13 December 2017. Five meetings have been held as of 19 July 2018. See, http://www.meti.go.jp/english/press/2018/0719_001.html

agreement's online consumer protection article requires members to adopt or maintain measures that proscribe misleading, fraudulent and deceptive commercial activities that cause harm, or potential harm, to consumers engaged in electronic commerce. Members are further required to endeavour to adopt or maintain measures that aim to ensure suppliers deal fairly and honestly with consumers and provide complete and accurate information on goods and services and to ensure the safety of goods and services during normal or reasonably foreseeable use. The article also requires members to promote consumer redress or recourse mechanisms. The open government data article encourages members to expand the coverage of government data, such as datasets on demographics, transport, legal information and business registers made available for public access and use. It also requires members to endeavour, to the extent practicable, to ensure that government data they choose to make digitally and publicly available meets particular characteristics, and to endeavour to avoid imposing certain conditions on such data.[17] Earlier JSI negotiators confirmed that a provision on transparency has been placed on hold subject to the final scope and legal structure of agreement.[18]

The UK did not propose new text for the Joint Statement on commitments relating to electronic authentication and electronic signatures, open government data, online consumer protection or unsolicited commercial electronic messages because these negotiations were already at an advanced stage. The UK also refrained from tabling text in relation to telecommunications services, although it remains supportive of the inclusion of this topic in future discussions. The UK further encouraged participants in the negotiations to consider the creation of a small group on data, noting the importance of free flow of data as a facilitator of international trade, particularly during the Covid-19 pandemic.[19]

As noted earlier, free flow of data is one of the most sensitive aspects of e-commerce negotiations as it touches on privacy and data protection adequacy

[17] E-commerce talks: two "foundational" articles cleaned; development issues discussed, WTO News Item, https://www.wto.org/english/news_e/news21_e/jsec_12sep21_e.htm (13 September 2021)
[18] Further progress cited in e-commerce negotiations, WTO News Item, https://www.wto.org/english/news_e/news21_e/jsec_22jul21_e.htm (22 July 2021)
[19] Braithwaite, above n 15

with have implications for human rights and national security. There has accordingly been limited progress in this area. The UK's approach to data flows and data protection differs from that of the EU which strongly emphasizes privacy as an individual's right. On digital trade, the UK is more closely aligned with that of CPTPP members and the US, who believe strongly in the need to have free flow of data to drive global commerce. This is the right way forward for the UK, keeping it firmly on the side of open markets based on equivalence of standards – it is not interested in pushing its own regulatory agenda. Should the Joint Statement E-Commerce commitments take the form of a plurilateral (optional) WTO agreement on e-commerce, which may be likely in the near future, it will mark a significant achievement for the UK, along with the other participants in the E-Commerce Joint Initiative, including the EU and Canada.

ii) Services Domestic Regulation:

In September 2021, 67 participating members of the WTO concluded negotiations on a uniform set of regulatory disciplines, set out in the Reference Paper on Services Domestic Regulation (SDR).[20] The UK was one of 40 WTO members which accepted the outcome of the negotiations as binding commitments.[21] The disciplines contained in the SDR apply to measures concerning licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services; measures that are tied closely to the process of authorization to supply a service. These principles could be helpful for legal services providers operating internationally. They could also assist other internationally mobile professionals such as engineers, medical practitioners and other business services such as insurance agents. This would be advantageous to the UK as the home country of many such service providers.

[20] INF/SDR/1 (27 Sept 2021)

[21] The other WTO members are Albania, Argentina, Australia, Brazil, Canada, Chile, China, Colombia, Costa Rica, El Salvador, the European Union, Hong Kong China, Iceland, Israel, Japan, Kazakhstan, Republic of Korea, Liechtenstein, Mauritius, Mexico, Moldova, Montenegro, New Zealand, Nigeria, North Macedonia, Norway, Paraguay, Peru, Philippines, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, Switzerland, Chinese Taipei, Thailand, Turkey, Ukraine, United States, Uruguay

The SDR seeks to ensure that existing market access and national treatment commitments found in GATS are not negated by opaque and complex authorization procedures. The disciplines are designed to be flexible, enabling signatories to preserve space for differences in regulatory approaches, for example, by allowing participants to implement certain obligations 'to the extent practicable', or simply 'encouraging' them to take certain actions. Unfortunately, this means that these obligations are not legally binding and unenforceable, although they do indicate a direction of travel which could spur further liberalization in the future. Moreover, SDR rules apply only to sectors where participants have undertaken commitments in their GATS schedules of specific commitments, although members are able voluntarily to expand the application of the disciplines to additional sectors.[22] Participating members have agreed to incorporate the final set of SDR rules into their respective GATS schedules as 'additional commitments' under GATS Article XVIII which allows WTO members to negotiate commitments regarding measures on qualifications, standards, or licensing matters. SDR disciplines will become binding only on those WTO members who inscribe them into their GATS schedules. They will be applied on an MFN basis, meaning that services suppliers from all WTO members will be able to benefit equally from them. WTO members remain free to regulate their services sectors to pursue their domestic policy objectives. This is advantageous from the standpoint of sovereignty, although practically it may result in services markets being less open than would be ideal for UK services suppliers.

By way of an overview, two pressing questions recur in respect if professional services trade and digital trade as the central pillars of the modern services economy. These are mutual recognition of professional qualifications and issues relating to the management of personal data that has crossed international borders. Balancing consumer protection against the benefits of open markets in these circumstances will be a challenge for the UK and other advanced economies.

[22] Services Domestic Regulation Rationale and Content, Potential Economic Benefits, and Increasing Prevalence in Trade Agreements, WTO (November 2021)

V
Wider WTO Reforms

In order for services liberalization to be fully realized at the WTO, there are systemic procedural issues which must be addressed. The UK is well-placed to deliver positive change here as well. In 2019, the UK joined the Ottawa Group, a loose coalition of 14 nations seeking reform of the WTO. The primary objective of this group is the rehabilitation of the WTO's Appellate Body, which has ceased to function since late 2019 because there are no longer any Appellate Body members to adjudicate appeals from trade disputes arising from the panel hearings. The US in particular has resisted the appointment of new Appellate Body members because of its concerns that the WTO's highest court has engaged in illegitimate 'judicial activism' by extending its interpretive mandate in a number of areas, notably in relation to the understanding of public bodies in the context of subsidies. Joining the Ottawa Group reflects the UK's assertion of its status as a supporter of WTO reform, alongside the other big players of the EU and Japan.

The UK has sensibly not signed the Multiparty Interim Appeal Arbitration Arrangement (MPIA) instigated by the EU and signed by 22 other WTO members to deal with the Appellate Body crisis. The MPIA is a temporary system through which appeals from lower WTO panels can be adjudicated, using the arbitration rules in the WTO Dispute Settlement Understanding,[23] to ad hoc tribunals composed of former Appellate Body members. A number of panel recommendations have already been appealed to the MPIA, although no rulings have been issued.[24] While in one sense agreeing to the MPIA sends a positive signal that a member is committed to neutral, judicialized resolution of WTO disputes, it side-steps the issue of the need for permanent Appellate Body reform, potentially operating as a distraction or deterrent to genuine progress. The MPIA is also problematic because it is not 'self-executing.' Parties to a specific dispute need to re-consent to the MPIA allow appeal arbitration for it each time it is used. A party could conceivably refuse to apply it in a given dispute, undermining its predictability.

[23] Article 25
[24] E.g. China- Anti-Dumping and Countervailing Duty Measures on Wine from Australia, WT/DS602/3 (communication from China and Australia, 20 December 2021)

The UK's approach under Boris Johnson's government has been to position the UK as a potential bridge between the scepticism expressed by the US on the Appellate Body issue and the views of the progressive reform-minded WTO members such as the EU and Canada. Unfortunately, though, the UK has still not taken a stance on WTO Appellate Body reform, evidently preferring to 'wait and see.' Far from encouraging the US and other countries to address deficiencies in WTO dispute settlement, the UK appears instead to be sitting on the side-lines. The importance of ensuring that the most powerful WTO members are not able to set rules on their own, which necessitates a functional dispute settlement system governed by rule of law, has been emphasised by the UK government.[25] This is especially important to the UK now that the EU has initiated a dispute against the UK for breach of WTO rules in relation to alleged discrimination in the award of subsidies to offshore windfarms.[26] These statements now need to be translated into actions. Stronger efforts need to be made in engaging with the US and other sceptical WTO members (such as Japan) regarding the Appellate Body's future – the MPIA must not be viewed as a permanent solution to a critical problem in global trade governance. Services disciplines are meaningless if they cannot be enforced as obligations under international law.

[25] C Horseman, above n 7

[26] "EU challenges discriminatory practices of UK's green energy subsidy scheme at WTO" European Commission (28 March 2022), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2376

VI
Enhancing International Trade in Services: Next Steps

Having set out the existing framework for trade in services, including notably legal and digital, this section will consider what specific strategies the UK could employ to achieve progress in this area as a world leader in services and an influential member of the global community. The UK must continue to negotiate for greater market access for services delivery, in respect of Legal Services and Digital Trade both multilaterally at the WTO through the Council on Trade in Services and bilaterally in the context of FTA negotiations.

i) Legal Services

For legal services negotiations in particular, the UK should seek mobility provisions which facilitate the secondment of lawyers to offices of those partner firms. Legal services should accordingly be included in the permitted activities for short-term business visitors found in modern FTAs. There should be express acknowledgement in market access schedules of FTAs and the GATS, not simply of the right of lawyers to meet clients, but also to provide services and receive payment. These activities should be permitted without the need for visas, work permits, economic needs tests or other burdensome procedures which operate as barriers to services trade. The UK must also take into account the way law firms are structured in its services trade negotiations. Some jurisdictions may view law firm partners as employees, whereas others consider only associates fit into this category. This latter view renders the category of Independent Professional impractical for most lawyers. In the specific context of the UK's CPTPP accession negotiations given that agreement's relatively weak protections for privacy, the UK might consider seeking to establish legal professionals enhanced capacity to restrict data flows for the purposes of safeguarding clients' interests. Exclusion of legal services from the application of an agreement's digital trade commitments, as in the CEPA, would be another way of achieving this.

A dedicated GATS annex on legal services could achieve a significant degree of liberalization of legal services globally and this is something which the UK could instigate through the WTO. An annex-based approach to legal services containing even basic commitments, could help promote a coordinated reduction in regulatory barriers over time. This could avoid some of the problems associated with reciprocity which have impeded negotiations for specific commitments for legal services under the GATS itself. A legal services annex could establish, for example, standardized rules on Foreign Legal Consultants (FLC) – this would permit individuals who are fully qualified lawyers from one WTO member to establish and practice the law of their home state and international law in the territory of another member.[27]

ii) Digital Trade

On digital trade, the UK must continue to press for greater liberalization of data flows at the WTO and in bilateral arrangements subject to its own data policy and priorities. The UK-Singapore Digital Economy Agreement (DEA), signed in February 2022 is another step forward in this direction, eliminating many barriers to digital trade with Singapore, including bans on data localization and customs duties on electronic transfers. The innovation chapter of the new Australian FTA also hints at joint initiatives in developing technology to enhance standards of living.

Before it can drive digital trade liberalization on a global or regional scale, the UK must establish an appropriate data policy which meets its own circumstances and priorities as a services-dominated economy.[28] There are three key considerations for the UK when developing a strategy on data. First, national competitiveness. This will depend on innovation and technological capacities as well as business operational efficiency. Second, maintain and improve business attractiveness. This relies on access to relevant information, support for new business forms, logistical infrastructure (both physical and digital), and ability to hire people with relevant skills. So far, the UK has scored

[27] Collins, above n 6
[28] B Mercurio, 'On the Importance of Developing a Coherent Policy Facilitating and Regulating Cross-Border Data Flows' ITLR 2022:1 [forthcoming]

well on both fronts, as it continues to attract record quantities of foreign investment in technology, significantly more than the EU in US dollars .[29] But the UK cannot be complacent, particularly in relation to punishingly high taxes which stifle business growth. Finally, regulation. This must be reconsidered in light of new technology. Governments must ascertain how best to regulate in a fast-changing technological landscape, for example in relation to Artificial Intelligence. A balance must be struck where regulations provide the appropriate negative deterrence, for example protecting consumers' personal data, without harming the positive benefits of new innovations, collaboration, and enhanced business efficiency.[30]

The UK should consider the following objectives in pursuing digital services trade liberalization for itself and by extension, with its trading partners. First, increasing cooperation between regulatory and professional bodies (e.g. finance and legal) to improve regulatory coherence domestically and in negotiations with other states. It creates problems of uncertainty for investors and others involved in digital trading. Second, ensuring that privacy and security are paid sufficient regard in the UK's future regulatory digital framework, but not to the extent that this unduly impedes commerce, as it arguably has done in the case of the EU's GDPR. Third, creating a regulatory environment that supports trade and investment in services and gives effect to relevant commitments, such as transparency, accountability and enforcement, supplemented where feasible by assistance for MSMEs including contact points for foreign investors. This must involve departing from the GDPR in favour of a more nimble, less bureaucratic regime for data protection. Should this mean losing data adequacy recognition from the EU, so be it. Alternatives, such as using standard contractual clauses when dealing with the EU are feasible.[31] Fourth, the UK must work multilaterally and bilaterally to reduce behind-the-border barriers to trade and investment including divergence between regulatory regimes, barriers to cross-

[29] D Soffer, 'UK Tech Sector: Outperforming EU Giants Despite Brexit' TechRound (20 December 2021)
[30] Ibid.
[31] Information Commissioners' Office (UK), 'Keep data flowing from the EEA to the UK – interactive tool' (June 2021) <https://ico.org.uk/for-organisations/dp-at-the-end-of-the-transition-period/keep-data-flowing-from-the-eea-to-the-uk-interactive-tool/>

border data and knowledge flow as well as poor transparency. Fifth, the UK must continue to pursue bilateral, regional and multilateral agreements to liberalise cross-border data flows, subject to appropriate safeguards for matters such as national security and consumer protection.[32] Accession to the CPTPP is a positive step in this regard. Another important move in this area is to continue the aggressive pursuit of an FTA with the US, which has been stalled under the Biden Administration. One way forward in this regard would be for the UK to abandon plans to implement its Digital Services Tax on large media companies, most of which are US-based, serving users who live in the UK. The current global moratorium on digital services taxes, which may violate WTO law anyway, should be extended by the UK indefinitely.[33]

Regarding the final two points on engagement, the UK must undertake further leadership in relation to digital trade at the WTO. This should include firstly a commitment to renewing the moratorium on customs duties on electronic transmissions. Thankfully this was extended until March 2024 at the WTO's 12th Ministerial Conference in June 2022, but it needs to be made permanent. Another problem which should be addressed immediately at the WTO is the lack of consensus on the correct categorisation of digital products / services. This is one of the major obstacles for the advancement of ongoing initiatives for e-commerce rules.[34] The WTO's existing framework does not recognise that one product could be both a good and a service. Currently, digital products still have not been clearly distinguished within the traditional separation between goods and services, revealing the artificiality at the heart of treatment of goods and services in the GATT and GATS.[35] The UK must take advantage of its independent position and economic size to initiate discussions on greater clarity on how digital matters are to be categorized. This is a diplomatic matter – the UK needs to develop its own policy framework and take a stance, leading proactively.

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[32] Mercurio, above n 28

[33] See further D Collins, "The Compatibility of Digital Services Taxes with WTO Law" in D Collins and M Geist eds. *Research Handbook on Digital Trade* (Elgar, forthcoming 2023)

[34] Wunsch-Vincent and Hold (above n 9) at 183

[35] M Janow and P Mavroidis, 'Introduction to Special Issue on 'Digital Trade, E-Commerce, the WTO and Regional Frameworks' (2019) World Trade Review

Another strategy for the UK to consider is to reopen negotiations on the moribund TiSA and thereafter expanding it to cover digital trade – including some of the policies on avoidance of customs duties and data localization discussed earlier. While the major aim of TiSA -itself not a WTO initiative but using GATS as a starting point - was service market access liberalisation, it also aimed at deeper regulatory arrangements than available under GATS.[36] As with the ITA, the plurilateral nature of TiSA could be more effective in terms of liberalizing digital trade across a larger number of states since it will bind only those states that are ready to make the concessions.[37] Unfortunately, there may no longer be much appetite for TiSA negotiations and is doubtful that the UK could revive this on its own. Re-launching a similar initiative, re-branded under a different name, might stimulate renewed interest.

Keeping in mind the importance of the WTO and multilateralism in trade generally, there is an emerging need for one single comprehensive multinational agreement on digital trade, potentially addressing all issues that arise in relation to cross-border data flows and their impact on commerce in one instrument. The creation of an entire new WTO agreement would be difficult, but progress on the Joint Initiatives on E-Commerce and Services Domestic Regulation, discussed earlier, are encouraging. Such an instrument must go beyond the question of custom duties and market access, covering matters such as data localization as well as interoperability and electronic signatures as well as privacy and data protection. An agreement of this nature would need to provide governments with sufficient sovereign flexibility and policy space embracing concepts such as public interest and public morals as well as national security, which while indeterminate, are already well-established in WTO services disciplines.[38]

[36] J Marchetti and M Roy, 'The TISA Initiative: An Overview of Market Access Issues' (2013) WTO Staff Working Paper ERSD-2013–11.
[37] S Wunsch-Vincent and A Hold above n 9 at 49.
[38] Article XIV of the GATS

For such an agreement to flourish, there must be a functional, reliable dispute settlement system within the WTO. This will require a fully-equipped and operational Appellate Body. The UK must accordingly lend its weight to Appellate Body reform proposals as a matter of urgency. Such reforms should consider, for example: enforcing the 90-day time frame for appeals; the prohibition of advisory opinions and further elaboration on the circumstances constituting advisory opinions; clarifying that the Dispute Settlement Understanding does not justify expanding or narrowing the reach of WTO provisions or filling gaps in WTO coverage; clarifying that customary rules of interpretation of public international law do not justify gap-filling and expanding or narrowing the reach of WTO provisions; and directing the Appellate Body to reject party arguments that expand or narrow the reach of agreement provisions or fill gaps in agreements.[39] With the support of the US there is a good chance that the UK would be able to deliver meaningful progress in some of these areas.

As a global forum for trade relations, the WTO is capable of addressing services trade issues in a balanced manner, although this may be asking too much of it, even with exemplary leadership from members such as the UK. It may therefore be time to adopt the most radical solution of all, the establishment of an entirely new multilateral organization – a kind of WTO for digital matters,[40] and by extension digitally enabled services generally. As a respected champion of free markets and global trade, the UK could consider taking a lead in this initiative. On the other hand, it may be time to accept that the era of globalization in governance may have passed and that smaller, regional-based systems moving more incrementally may be more effective. This is why, once the UK has joined the CPTPP, it should encourage the accession of additional countries to that

[39] See e.g. B Hirsch, 'Resolving the WTO Appellate Body Crisis: Proposals on Overreach' National Foreign Trade Council (US) (December 2019), https://www.nftc.org/default/trade/WTO/Resolving%20the%20WTO%20Appellate%20Body%20Crisis_Proposals%20on%20Overreach.pdf

[40] C Beall, R Fay, 'In the Age of Connection, Disconnected Digital Governance Isn't Working' CIGI (28 December 2020), https://www.cigionline.org/articles/age-connection-disconnected-digital-governance-isnt-working

CIGI (28 December 2020), https://www.cigionline.org/articles/age-connection-disconnected-digital-governance-isnt-working

group, such as Korea and Taiwan, establishing a global consensus on data and services. In terms of content, some general principles could be included in a multilateral digital trade treaty, such as non-discrimination on digital goods and services and tariff elimination on cross border data flows. Other issues would be difficult to achieve global consensus, notably data localization where China as well as India remain resistant.[41]

[41] UNCTAD Digital Economy Report, above n 5

VII
Conclusion

Free from the oversight of the EU to establish its own trade policy, the UK has both the opportunity and obligation to offer real leadership in the global expansion the liberalization of trade in services. Having stalled for years, the need to enable services trade under international law has become more urgent in the pandemic era of remote delivery and the digitization of consumption. This has unsurprisingly coincided with a period in which personal data has become a vital resource, challenging traditional understandings of privacy and in some cases, threatening national security. Unfortunately this transformation in the modern economy has also unfolded while the WTO, the chief guardian of free trade, has drifted towards disutility because of a crippled dispute settlement system and a resurfacing of ill-disguised protectionism around the world. Regional initiatives, such as the CPTPP offer some hope for the UK and others. Ultimately global solutions will be needed. This is why and the newly independent UK must fully assert itself on this stage as a champion of free trade in services, for the betterment of its own economy as well as that of the world.