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Introduction to the Special Issue on UK-EU-Japan Trade and Economic Relations:

The UK's Post Brexit Trade Landscape: The EU and the Wider World

David Collins*

With the UK's departure from the EU having finally taken place on 31 January 2020, the UK's future international trading partners will be watching the second phase of negotiations between the UK and the EU with much interest and will be eager to establish (or re-establish) a strong trading relationship with the world's fifth largest economy. The amendment to the European Union (Withdrawal Agreement) Bill indicates that there will be no extension to the ongoing implementation period beyond 31 December 2020.¹ This tight schedule goes some way towards clarifying the nature of the UK's future trading relationship with the EU. It appears to be unlikely that the EU will relent on its previously stated red lines. It will not offer full access to its single market without ongoing regulatory alignment, oversight of the Court of Justice of the European Union and freedom of movement, all of which we have been rejected by UK Prime Minister Boris Johnson. A committed supporter of Brexit, he believes that the single greatest advantage of terminating the UK's membership in the EU is the capacity to diverge from the EU's regulations across a range of sectors. The EU and all 27 member states committed in the Political Declaration that they would engage in best efforts negotiations to conclude an FTA by the end of 2020. They further committed that such an agreement will apply provisionally prior to its formal ratification by all member states.²

This suggests that the initial UK-EU 2020 Free Trade Agreement (FTA) will most likely be a rather minimal or 'off the shelf' one, rather than the super deep Canada+ FTA that many had hoped for. It will probably contain many of the elements of Comprehensive Economic and Trade Agreement (CETA) which the EU concluded with Canada in 2017, meaning that it will be focused on the removal of tariffs on manufactured goods and agriculture, both of which are top priorities for the EU. There is some indication that the EU may insist on

* Professor of International Economic Law, City, University of London

¹ Article 33 (19 December 2019)

² Art 135 and 139 (17 October 2019)

full regulatory alignment in order to offer even a simple zero tariff goods agreement, yet its large trade surplus in goods suggests that this is unlikely, especially if the UK is prepared to make concessions on fishing rights. However it is unlikely that the FTA will contain many commitments on services beyond merely reconfirming obligations which already exist under the WTO's General Agreement on Trade in Services (GATS), with some provisions for mutual recognition of professional qualifications. This will be less beneficial for the UK which has a services trade surplus with the EU, which has a trade in goods surplus with the UK. Importantly, CETA allows the EU to require a local presence for the supply of a service, meaning that cross-border market access for British services suppliers will be heavily restricted relative to the UK's previous status as an EU Member.³ Some matters missing from CETA may find their way into the UK-EU FTA, such broader commitments on digital trade, as seen for example in the newer EU-Japan Economic Partnership Agreement (JEPA).⁴

Still, a goods focused UK-EU FTA for 2020 with limited regulatory alignment, will go some way to sustaining a prosperous economic relationship with the EU and should provide some comfort to the UK's global trading partners who participate in supply chains which are linked to EU-based firms. While the UK has a sizable trade in goods deficit with the EU, the elimination of tariffs on goods is beneficial to the UK as well because under a goods-focused FTA, British consumers will continue to obtain European products at the same prices they did before Brexit. The elimination of tariffs and conformity assessment procedures for goods (which is also achievable, in line with the CETA, by the end of 2020) will do much to eliminate any friction in relation to Great Britain / Northern Ireland trade, the political significance of which must not be understated.⁵ Set out in March 2019, the UK's schedule of applied tariffs on goods on a Most Favoured Nation (MFN),⁶ WTO-basis already contemplates zero tariffs on most goods, meaning that the EU would most likely get zero or near zero tariffs on most things anyway regardless of preferential treatment under a UK FTA.⁷ Moreover, with zero tariffs and mutual recognition of product standards secured under the FTA, UK exporters will be able to

³ As outlined in the Reservations of Article 9.7 of CETA.

⁴ Chapter 8 of the JEPA, generally.

⁵ Under Article 5(1) of the Withdrawal Agreement (19 October 2019) customs duties are payable on goods entering Northern Ireland from Great Britain if the relevant good is 'at risk of subsequently being moved into the Union'.

⁶ GATT Article I

⁷ <<https://www.gov.uk/government/news/temporary-tariff-regime-for-no-deal-brexite-published>> (last accessed December 2019)

ship to the EU as before, precluding the lengthy queues of trucks at borders which has so traumatized the British public in recent years.

While a 2020 goods focused UK-EU FTA subordinates, for the time being, the needs of UK service suppliers who rely on access to EU markets, these businesses will likely adapt, as many have already, by setting up offices in the EU or by working through intermediaries. These involve costs to be sure, but for many large suppliers this is manageable and a worthy trade-off for the (allegedly) superior regulatory environment which will unfold in the UK in the years ahead once it is free from Brussels's dominion. Furthermore, trade in services between the UK and the EU will likely be liberalized further over time. Indeed one of the other probable features of the new UK-EU FTA will be the establishment of committees and working groups to pursue negotiations on services, to be conducted on a sector-by-sector basis. Such discussions will concern the recognition of qualifications for services suppliers, such as lawyers and other professionals, enhancing access where it is notionally open but heavily circumscribed.⁸ It must be kept in mind that services are poorly liberalized in most FTAs and there is much work to be done in this area at the international level. No FTA in the world, at least today, grants the level of access currently available inside the single market.

As indicated above, in 2019 the UK has established a temporary MFN applied tariff regime along with a bound tariff rate identical to that of the EU's external tariff. Under this regime, 87 per cent of total imports to the UK would be eligible for tariff-free access. Other products, including some meat, dairy, textiles and finished cars, would be subject to tariffs with a view to protecting the UK's domestic industry. The UK's schedule of market access and non-discrimination commitments for services was disaggregated from that of the EU in December 2018.⁹ This will remain unchanged from its current commitments as contained within the EU's overall schedule of non-discrimination and market access commitments under the General Agreement on Trade in Services (GATS).¹⁰ It must be acknowledged that the UK's trade schedules have not been certified as a consequence of challenges by WTO Members notably in relation to Tariff Rate Quotas (a percentage of goods eligible for a lower tariff rate). This could lead to WTO complaints in the future. The UK also signed the WTO plurilateral Government Procurement Agreement (GPA), providing access to billions of dollars of

⁸ As seen for example in CETA Chapter 11 on the Mutual Recognition of Professional Qualifications

⁹ <<https://www.gov.uk/government/news/temporary-tariff-regime-for-no-deal-brex-it-published>> (last accessed December 2019)

¹⁰ Article XVII and XVI of the GATS respectively.

procurement contracts in the 20 other signatories to the agreement. The UK aims to establish in the very near future the Trade Remedies Authority for trade remedies investigations (dumping and subsidies) which are currently undertaken on the UK's behalf by the European Commission. The UK's non-tariff barriers, comprising such issues as health and safety regulations and conformity assessment processes will remain identical with that of the EU, at least for now. As suggested earlier, the UK may require that these regulations remain in conformity with those of the EU going forward in exchange for a deeper FTA with every indication, at least for now, that the UK will not do so. It is unclear how long the UK's temporary MFN tariffs will remain in place as keeping them there indefinitely could frustrate negotiations for concessions with potential trading partners.

Having left the EU, the UK seeks to establish preferential trade agreements with a number of key trading partners as soon as possible with a view to capitalizing on the expected growth of countries outside the EU which comprise an increasing percentage of the UK's trade profile. The Withdrawal Agreement specifically permits the UK to conclude such agreements during the implementation period with these coming into effect upon the implementation period's termination.¹¹ Priority for such negotiations will likely involve re-establishing the agreements to which the UK was a party as a Member of the EU. The EU has 37 trade agreements with 67 countries accounting for £138.7 billion or 10.7 per cent of UK's total trade (goods and services) in 2018.¹² Recent EU agreements with Canada, Korea and Japan are reasonably comprehensive comprising features such as trade in goods and tariffs as well as non-tariff barriers. There are a handful of super-deep economic agreements with Switzerland and Norway, both of which have full access to the single market despite not being members of the EU.

It is far from clear that these countries are willing to offer the same agreements to the UK that they did to the EU, which is clearly a much larger market, and which wields considerable bargaining power. Canada has conspicuously failed to re-negotiate CETA with the UK, despite earlier comments that it would do so. This is likely due to what is known as 'preference erosion' alluded to above; Canada appears to be content to enjoy the temporary low applied tariffs offered by the UK without offering any concessions in return through a preferential agreement. Encouragingly, the UK's Department of International Trade has

¹¹ Article 129(4)

¹² <<https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries-in-a-no-deal-brexite>> (last accessed December 2019)

already secured several successes in relation to the UK's future independent trade policy. Agreements have now been signed with approximately 40 countries that account for 64.2 per cent of the UK's trade. Continuity agreements covering £89.0 billion of trade have been finalized. These include trade agreements with the CARIFORUM trade bloc, Chile, the Eastern and Southern Africa (ESA) trade bloc, Faroe Islands, Norway, Israel, Liechtenstein, the Palestinian Authority, South Korea, Switzerland, Southern African Customs Union, and Mozambique. Mutual Recognition Agreements, which recognize each partners' conformity assessment procedures for the purposes of health and safety checks for goods have been signed with Australia, New Zealand and the United States. Additional trade agreements remain under discussion with partners such as Algeria, Bosnia & Herzegovina, Cameroon, Cote D'Ivoire, Egypt, Georgia, Ghana, Jordan, Kenya, Lebanon, Mexico, Moldova, Montenegro, Morocco, Serbia, Tunisia, Turkey, and the Ukraine.¹³ It must be recalled that in the absence of an FTA the UK will trade with each of these countries on the basis of WTO rules, potentially representing significant barriers to the free flow of traded goods and services. These countries are predominately developing and, in that respect, offer limited economic advantages to the UK in terms of a boost to GDP or as a substitute to any lost trade with the EU.

Trade discussions are also underway with the world's third largest economy: Japan, an issue which is of central importance to this special issue of International Trade Law and Regulation and which is the subject of the Trilatrade Project between City, University of London and Keio University in Tokyo, supported by the UK's Economic and Social Research Council. Rather than 'roll over' the JEPa with Japan, some have sensibly argued that the UK should seek an entirely new FTA with Japan which better fulfils the UK's specific needs. Indeed, Japanese Prime Minister Shinzo Abe has suggested that the JEPa should be tailored to address the particular relationship in place between the two countries rather than simply a cut and paste of the JEPa. Japan is also understandably eager to ascertain the nature of the UK's relationship with the EU before it embarks on full trade negotiations with the UK. The focus of the UK-Japan FTA should therefore be on services, investment and digital trade, rather than trade in agricultural products, which were of of greatest concern to the EU-27. The UK's position is more aligned with Japan than with the EU in relation to unjustified blockage of lawful data transfers. Japan also seeks more comprehensive and cost-effective rules to protect foreign investments which were not a priority for the EU but which would likely be well-

¹³ <<https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries-in-a-no-deal-brexite>> (last accessed December 2019)

received by the UK.¹⁴ A starting point for negotiations between the UK and Japan on e-commerce could be the US-Japan Digital Trade Agreement, signed in October 2019. The newer Digital Economy Partnership Agreement (DEPA) concluded among Singapore, New Zealand and Chile in early 2020 may also provide a useful blueprint for the kinds of legal commitments suitable to the Japanese and British economies. On other issues, the UK may also wish to consider retaining conventional investor-state dispute settlement in its FTA with Japan rather than follow the EU's lead with the untested Investment Court System.¹⁵ The JEPA is noteworthy for omitting investor-state dispute settlement entirely, possibly with a view to this being addressed at a later stage. In addition to Japan, the most highly anticipated of all the UK's FTAs (apart from that with the EU itself) is with the United States. There is every indication that the US is eager to conclude such an agreement quickly, although its precise contents, in particular the extent to which it will open its markets for UK services suppliers, remains to be seen.

Lastly, the UK's newfound independence from the EU means that it will operate as an autonomous member of the WTO, regaining its 'seat at the table,' as it were. It can only be hoped that the UK will take advantage of this new role to strengthen the multilateral trading system, which has come under much strain in recent years. In particular, the UK might lend its diplomatic and economic weight to encourage the US to re-lend its support to the beleaguered Appellate Body of the WTO, which has recently become dysfunctional due to the non-appointment of new tribunal members. The UK is also in a strong position to advance the stalled global agenda on crucial matters such as digital trade and trade in services, where it is a world leader.

This special issue of the ITLR, devoted to the Trilateral Project undertaken by The City Law School of City, University of London in conjunction with Keio Law School in Japan, will explore some of these issues in depth. In their contribution 'The EU as an Intentional or Accidental Convergence Actor? Learning from the EU-Japan Data Adequacy Negotiations' Elaine Fahey and Isabella Mancini of the City Law School examine the extent to which the EU's role in creating global norms on data transfer aligns with the interests of Japan and how this has played out in the context of the Japan-EU Economic Partnership

¹⁴ D Elms and HL Makiyama, "A Better Fit: Remodelling the EU-Japan EPA after Brexit" Initiative for Free Trade, November 2019 <http://ifretrade.org/pdfs/IFT-A_Better_Fit.pdf> (last accessed December 2019)

¹⁵ D Collins, "The UK Should Adopt Investor-State Dispute Settlement in its Post-Brexit International Investment Agreements" 14:3 Manchester Journal of International Economic Law 300-317 (2017)

Agreement (JEPA). Enrico Bonadio and Luke McDonagh, also of the City Law School and Tiffany M. Sillanpää consider in 'Intellectual Property Aspects of the Japan-EU Economic Partnership Agreement' the legal framework for intellectual property as outlined in the JEPA, noting that many of the protections afforded to intellectual property in this instrument merely replicate what is offered through the WTO's Trade Related Aspects of Intellectual Property (TRIPS Agreement). Turning to the WTO itself, Yoshinori Abe of Gakushuin University Law School discusses in 'Revisiting the *travaux préparatoires* of DSU Article 17: Some Suggestions Concerning the WTO Appellate Body Crisis' the current impasse within WTO's Appellate Body, observing that the EU is at the forefront of proposed reforms to this vital institution within international trade law. Moving from trade to an equally important sphere of global commerce, foreign direct investment, Rikako Watai of Keio Law School explains in 'National Security Review of Foreign Direct Investment: Recent Developments in the United States and Japan' how national security screening of foreign investment has grown from its initial stages in the US to become a comprehensive means of assessing wide range of activities of foreign companies across the world, with Japan's regime potentially inspiring equivalent frameworks in the UK and elsewhere. Finally, Anthony Rogers of the City Law School and Makoto Shimada of Keio Law School analyze a critical but complex aspect of private law in 'The Operation of Mitigation under Japanese and English Commercial law: A Comparative Analysis' shedding new light on an often misunderstood doctrine at the heart of contract law in both of these leading commercial jurisdictions.