*Brexit and International Trade: The Aspiration of Global Britain*

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**Abstract:**

This chapter examines some of the important legal issues surrounding the UK’s trade relationship with the EU and the rest of the world post-Brexit. Dealing first with the problematic Withdrawal Agreement, the chapter considers difficulties associated with the Irish border, solutions to which could create challenges with respect to the UK’s standing in the World Trade Organization. It then explores the implications of exiting the EU without a formal trade agreement under which trade between the two will take place on WTO terms. From there the chapter suggests that a conventional Free Trade Agreement could resolve many of the ongoing difficulties in trade negotiations, with an interim agreement feasible in a short time. The UK’s future trading strategy with the rest of the world is then discussed, concluding by drawing attention to some of the economic problems which may be presented by adopting a more open approach to trade outside of the EU.

**Key Words**: WTO, trade, FTA, Brexit, Customs Union

**I Introduction**

The UK’s trade relationship with the EU and the rest of the world have emerged as among the most crucial issues of the Brexit debate. The attempt by elements within the UK parliament to undermine the result of the 2016 referendum are also perhaps the most striking example of the potential injustice brought about by Brexit – an injustice not inherent in the UK’s departure from the EU, but one tied to the process by which it has been (or has not been) implemented by those in power. Trade aspects of the now twice-rejected Withdrawal Agreement (WA), proposed by Prime Minister Theresa May in November 2018 and again in March 2019, would have diverged starkly from the democratically expressed will of the British people, later enshrined acts of parliament. Ongoing efforts among British MPs to ensure that a ‘no-deal’ Brexit is avoided at all costs are similarly hostile to the result of the referendum in which there was no reference to a mandatory trade agreement with the EU as a condition of departure.

With the implications of Brexit’s unravelling the democratic process considered elsewhere in this book, this chapter will explore some of the chief legal issues engaged by the trade aspects of Brexit process, addressing the UK’s future relationship with the EU and with the rest of the world. It will begin by examining the crucial issue of trade across the Irish border and the so-called Backstop, in many respects the most controversial feature of the abandoned WA. From there this chapter will turn to the implications of the ‘no-deal’ scenario under which the UK would trade with the EU under the terms of the World Trade Organization (WTO). The chapter will then consider, at a high level of generalization, a UK-EU Free Trade Agreement (FTA) including a preceding interim agreement. It will conclude with a discussion of the UK’s future international trade policy, consisting of both rolling over the EU’s existing FTAs and forming new ones with key allies. These strategies raise challenges from the perspective of both trade law and economic policy, requiring the UK to confront fundamental issues regarding its own economy, some of which raise injustices of their own.

**II The Irish Border**

Problems associated with preventing a ‘hard’ or physical border for trade in goods across the UK’s only land border with the EU (Northern Ireland and the Republic of Ireland) have become the most intransigent aspect of the Brexit negotiations. Leaving the EU’s Customs Union would appear to require at least some additional checks at the border either for tariffs, standards conformity assessment and possibly Rules of Origin (ROO). It has been suggested, almost certainly with some strategic exaggeration, that any form of border inspections could operate to unravel the fragile peace process secured in Ireland and which mutual membership in the EU has functioned as an essential balm. The 2018 WA accordingly contemplated the UK staying inside the Customs Union until the end of 2020, astonishingly with no entitlement to participate in EU institutions of governance – unquestionably a shocking injustice if the WA had come to fruition. If by end 2020 no FTA had been concluded avoiding a hard border, then a ‘backstop’ consisting of a single customs territory between the EU and the UK would have been triggered. At this point, Northern Ireland would have been in a deeper customs relationship with the EU than the rest of the UK, more closely aligned with the rules and regulations of the EU Single Market.[[2]](#footnote-2) Breaking up the UK was rightly viewed by many in Northern Ireland as highly unjust. Moreover, the UK would have been unable to leave the backstop on its own – it would have required the consent of the EU – highly irregular under public international law and as such another severe injustice against the British. During the backstop period the UK would have been subject to EU regulations designed to ensure that the UK could not gain a competitive advantage – yet another Brexit injustice inflicted on the British economy. With the glaring injustices of the WA evident, some of the potential solutions to the Irish border issue and their international trade implications will now be discussed.

*i) Maximum Facilitation or ‘Alternative Arrangements’*

The UK’s policy for exiting the EU indicated that there will be no checks of any kind on the Irish border. Instead, there will be a small number of checks conducted at entry points between Northern Ireland and Great Britain.[[3]](#footnote-3) Since this arrangement is intended to be temporary, it is almost certain that some kind of customs border will need to be put in place in conjunction with Brexit. One of the proposed long-term solutions to the Irish border problem is to make use of modern technology such as bar codes scans along with trusted trader schemes and inspections removed from the actual border to minimize the intrusiveness of the border for goods for both tariffs and conformity assessment checks. This has variously termed ‘maximum facilitation’ or more-recently ‘alternative arrangements.’ It has been persuasively argued that this is achievable and that much of the controversy surrounding the Irish border as an obstacle to the conclusion of a trade agreement with the EU is unnecessary.[[4]](#footnote-4) This kind of plan fits well with, and is many respects contemplated by existing WTO rules. Article XVIII of the General Agreement on Tariffs and Trade (GATT) recognizes the need for minimizing the incidence and complexity of import and export formalities (for both tariff and non-tariff barriers) and for decreasing and simplifying import and export documentation requirements. Article 7 of the WTO’s Trade Facilitation Agreement further obliges WTO members to minimize customs formalities through technology, including pre-inspections, trusted trader schemes and electronic payment.

Regarding health and safety inspections for food products crossing the border, Article 2 of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS) provides that WTO members must ensure that regulations and inspection procedures must be applied only to the extent necessary to protect health and cannot be maintained without adequate scientific evidence. Furthermore, WTO members must ensure that their food regulations do not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail, including between their own territory and that of other WTO members. Similarly, Article 2 of the WTO’s Technical Barriers to Trade (TBT) Agreement states that technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate policy objective. Therefore, conformity assessment procedures (as at the Irish border) should not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. All of this suggests minimal intrusiveness and no ‘hard border’.

There has been some debate as to whether the EU or the UK’s simplified customs procedures for the Irish border could be construed as a violation of the Most Favoured Nation (MFN) provision of Article I of the GATT because it would amount to favouritism among two WTO members outside of a Customs Union or FTA. Some preferential, soft-touch treatment could be justified on the basis of the ‘frontier traffic’ (meaning common land border) exception of Article XXIV.3 of the GATT. While there is no definition of ‘frontier traffic’ in the GATT, nor has there been any caselaw, authoritative commentary suggests the area affected should usually be limited to a distance of 15 kilometres from the frontier.[[5]](#footnote-5) Although the concept of ‘frontier traffic’ should not be defined too narrowly, it seems that this exception was meant to cover goods produced and consumed near the border, or somewhere near to the border region. It would probably therefore not cover all of Ireland.

*ii) National Security*

Regarding the suggestion that simplified Irish border procedures (including completely ignoring the border as if the UK had stayed in the EU) could operate as a violation of the MFN provision because they are inherently preferential, it is worth drawing attention to the rarely used, but recently high profile,[[6]](#footnote-6) Essential Security provision of the GATT. Under Article XXI, WTO members are entitled to take such actions which are necessary ‘to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.’While this provision was intended only to be used on an exceptional basis, many people are concerned that a hard (or harder) border between the UK and Ireland would be detrimental to the maintenance of peace, potentially leading to a return to armed hostilities or even war. If derogation from MFN could prevent such eventualities, then this is precisely the kind of situation envisaged under Article XXI of the GATT. Article XXI is self-judging, meaning in theory it cannot be scrutinized by the WTO panels or the Appellate Body. This could enable the UK and the EU to agree to ignore the land border in Ireland entirely, as if Brexit had never happened. Presumably the EU would want to monitor the outcome of such an arrangement to assess whether this was being exploited illegitimately as a backdoor into the EU. Given that the volume of goods crossing the Irish border is not large, such risk is minimal. The temporary arrangement involving a small number of checks at entry points to Great Britain should be able to address this issue without cutting off Northern Ireland from the British economy.

**III No Deal - Trading with the EU under WTO Terms**

With negotiations between the UK and the EU still labouring at the time of writing, the realities of the ‘no deal scenario’, sometimes referred to in the media ominously as a ‘cliff edge’ or ‘crashing out of the EU’ need to be considered. First, it is necessary to clarify that when trade lawyers speak about leaving the EU ‘without a deal’ this normally means without a preferential trade agreement. Failing to secure some sort of a UK-EU FTA does not mean having no agreements on a wide range of non-trade areas where legal arrangements are essential. Encouragingly EU and UK negotiators have reached ‘side-agreements’ on many important matters including airplane landing rights and euro clearing. Notably this is despite the fact that observers had insisted that this would never take place. Some of the legal implications of the no-deal outcome deserve will now be explored.

*i)The UK as a Member of the WTO*

The UK became a member of the WTO on the day the WTO was established by virtue of its status as a contracting party to the original GATT 1947. The UK accepted the WTO agreements in accordance with Article XIV:1 of the WTO Agreement by ratification in December 1994. At that point the EU annexed a schedule of concessions, meaning specific trade commitments for the UK along with and all other EU Member States. With respect to the General Agreement on Trade in Services (GATS), the EU and its Member States, along with the UK, jointly submitted a schedule of specific commitments. After Brexit, the EU will no longer be responsible for exercising the UK’s rights and obligations as a WTO Member. These will be exercised by the UK on its own.

The UK attempted to present its WTO schedule for goods as a straightforward ‘rectification’ of the EU’s schedule for goods in the summer of 2018 – keeping its tariff on goods as they were while a member of the EU.[[7]](#footnote-7) Some WTO members, most of which were agricultural exporters, demanded renegotiation of the UK’s share agricultural tariff rate quotas within those schedules. These reflect certain quantities of imports which are eligible for a lower than normal tariff and have proven controversial. Still, objections of this kind are not fatal. The UK can trade on an uncertified schedule – the EU itself does this for services. In March 2018 the UK announced its temporary WTO tariff regime with a view to preparing a full review within a year. This means that the UK is keeping the EU’s Common External Tariff as its bound rate but is offering a zero applied rate on 87 per cent of goods imports – in compliance with WTO rules. The remaining 13 per cent of goods imports include automobiles which carry a 10 per cent tariff. Although the UK is abolishing tariffs on most textiles and footwear, it will maintain tariffs on clothing. Tariffs will also be levied on agricultural goods including lamb, beef, poultry, pork and dairy, although in many cases they will be below the EU’s Common External Tariff. There will be no tariff imposed on wine or fisheries. The UK is maintaining all agricultural quotas in areas where the EU has them. Country-specific quotas are also being maintained. The UK will keep EU level tariffs in sectors such as ceramics, fuel and fertilisers as there are thought to be foreign producers engaged in significant market distorting practices in these sectors. Lastly, the UK will levy average tariffs of below 1 per cent on various chemicals, mineral products and plastics and rubbers.[[8]](#footnote-8) Unfortunately these details, representing a very open, globally competitive economy were not published until after the Withdrawal Agreement was concluded, wasting bargaining leverage.

The UK submitted its draft schedule of commitments on services to the WTO in December 2018.[[9]](#footnote-9) The new schedule, disaggregated from that of the EU, essentially represents continuity as services commitments had already been made on a member state level. Under the GATS, WTO members must submit schedules that set out the extent to which they are prepared to open their markets to foreign service providers. For the EU’s each sector contains exemptions and opt-outs, with individual member states either declining to open their national markets in specific areas or setting out conditions for doing so. The UK’s schedule has less exceptions than those of most member states because it has a more open approach to services, reflecting its global strength in this sector. In January 2019, Russia, Taiwan and Costa Rica objected to UK’s draft schedule for GATS schedule. It is not clear what three countries oppose, as these documents are confidential. As with goods, the UK services schedules should come into effect on an uncertified basis upon Brexit, regardless of whether objections are raised during the review period.

The UK was also recently approved to re-join the WTO’s plurilateral (optional) Government Procurement Agreement (GPA). This will allow UK firms to continue to bid for the multi-trillion dollar procurement sector among the GPA’s 47 parties and allow suppliers from these countries to access the UK’s procurement market. Additionally, the UK has established its independent trade remedies system, the Trade Remedies Authority, which will be able to investigate complaints regarding unfair trade practices by other WTO members including anti-dumping and subsidization.

*ii) Trading with the EU on WTO Terms*

Failing to secure a trade agreement with the EU would be a sub-optimal outcome which would impose some costs on the UK and EU economies. These would probably be modest and short term in nature, characterized by difficulties in adapting to new circumstances where some trade barriers would be in place where they had not been before inside the EU’s Single Market and Customs Union.[[10]](#footnote-10) Most of the EU’s MFN (WTO) tariffs on industrialized goods are low; around 4 per cent. Tariffs on some goods, like automobiles and some agricultural products, will be substantially higher. On the other hand, as detailed above the UK will be able to offer lower tariffs to the world on goods which it does not produce and has no need to protect. Outside of the EU’s tariff bloc, many goods will end up being cheaper for British consumers because the UK will be able to source these goods from lower tariff jurisdictions.[[11]](#footnote-11) The EU’s coverage for services under the GATS is less complete, however the EU has made reasonably thorough commitments in relation to commercial presence (as opposed to cross-border supply). UK service suppliers should be able to access the EU market by establishing branch offices there, as many have done already.

One of the main controversies of trading with the EU on WTO terms concerns the applicability of non-tariff barriers on goods, meaning conformity assessment procedures for health and safety regulations. Brexit represents an unusual situation where there is no need for the EU as importing country to investigate the laws and processes of the exporting state prior to recognising its procedures as compliant because of pre-existing conformity flowing from the UK’s membership in the EU. It is sometimes asserted that upon Brexit the EU will be entitled to treat goods from the UK as from any third state, meaning that exporters will have to prove they are entitled to enter the EU market and until they do so there will be burdensome additional inspections by EU authorities at the border. This approach arguably transgresses Article 2.3 of the SPS Agreement and Art 2.2 of the TBT Agreement because it is arbitrary, as noted above. These agreements provide that non-tariff barriers should be based on the level of scientifically determinable risk in the product, which will not change in the days after Brexit because the products themselves will not change. This was one of the purposes of incorporating EU regulations into the law of the UK after Brexit through the European Union (Withdrawal Act) 2018. As regulatory circumstances change over time, the EU may apply some checks on UK products, but again they must be risk-led and no more restrictive than necessary. Clearly the EU is notionally free to do as it wishes regardless of legality because international law, of which the WTO is a category, has weak compliance mechanisms.[[12]](#footnote-12) At the time of writing, it appears as though there will be an emphasis on pragmatism on both sides by maintaining smooth customs inspections bolstered by enhanced infrastructure.[[13]](#footnote-13)

Neither party has any interest in frustrating border crossings upon a WTO-Brexit given the high volume of traded goods (especially from the EU to the UK). Many UK firms have acted to transfer product registration and safety certification to EU approved bodies, precluding the need for additional inspections at the border. The UK has retained its membership of the Common Transit Convention, allowing simplified cross-border goods trade. The UK government has introduced a range of procedures to simplify customs and VAT procedures for cross-border traders, belying claims of embargoes on EU-origin medicines and other essential EU imports. From the EU’s perspective, ports such as Rotterdam and Calais have made significant preparations for a WTO Brexit. Notably, Calais is launching a [‘smart border’](http://www.douane.gouv.fr/articles/a16171-the-smart-border) scheme that will prevent delays using a combination of pre-clearance of goods, number plate recognition and away-from-the-border checks.[[14]](#footnote-14)

**IV A UK–EU FTA**

Considering developments at the time of writing in which the WA has been rejected twice by the UK parliament and (largely unfounded) concerns regarding trading on WTO terms persist, the conclusion of a comprehensive FTA has emerged as the most sensible outcome in the Brexit negotiations.

*i) Interim Agreement*

It can take several years to conclude a formal FTA, even between countries with as close regulatory alignment as the UK and the EU. But such an agreement need not be concluded in its entirety in time for 29 March 2019. A transition or interim stage is possible to put into operation on reasonably short notice. At first glance, a transition period before the conclusion of a formal FTA could transgress the MFN principle of GATT Article I and GATS Article II because it would accord preferential treatment to one country outside of a formal FTA or Customs Union, as per the regional trading exception of GATT Article XXIV and GATS Article V. But GATT Article XXIV.5 d) permits an ‘interim agreement leading to the formation’ of a Customs Union or FTA,[[15]](#footnote-15) as long as it is done within ‘a reasonable length of time’ as specified in paragraph 5 c). According to the Understanding on the Interpretation of Article XXIV of the GATT 1994 the ‘reasonable length of time’ should exceed ten years only in exceptional cases. Regardless of the duration, a transition agreement between the UK and the EU will only be lawful (in terms of WTO compliance) if it results in a formal FTA with the EU. In other words, any transition / interim agreement must have a clearly articulated FTA as a point of conclusion or else it will not fulfil the regional trade exemption of WTO law and could represent a breach of MFN. It is important to add also that an interim agreement under Article XXIV requires agreement from both parties; the UK cannot simply trigger Article XXIV of the GATT of its own accord.

*ii) Contents of the UK-EU FTA*

Briefly turning to the substance of the permanent trade agreement, the UK-EU FTA should be modelled on that of the Comprehensive Economic and Trade Agreement (CETA) between the UK and Canada. It would be deeper, eliminating tariffs on all goods and facilitating greater mutual recognition of standards and conformity assessment procedures on a wide range of both goods and services, along with greater liberalization for financial services under a principle of ‘enhanced equivalence.’[[16]](#footnote-16) Mutual recognition of regulations and divergence therefrom over time would be managed by joint committees composed of representatives of both countries and experts in each sector, as envisaged by various provisions in the CETA on regulatory cooperation for goods and services.[[17]](#footnote-17) The FTA would also involve the creation of a bi-national judicial body to oversee decisions of these committees and other aspects of the agreement. Rulings of this tribunal, which would be composed by highly qualified individuals from both the UK and the EU, would be final, reviewable by neither the CJEU or the UK Supreme Court. In that sense it would be a truly international adjudicatory body, along the lines of those contained in many FTAs around the world. It would also fulfil the UK Prime Minister’s Mansion House promise to end the jurisdiction of the CJEU in the UK.

Again, like CETA, the UK-EU FTA would cover matters relating to intellectual property, competition, government procurement and investment. While it would be advisable for the UK to avoid including the EU’s untested Investment Court System dispute settlement system,[[18]](#footnote-18) this should not be fatal to the agreement should the EU insist on this mechanism as a condition for deeper market access. The FTA would include material on e-commerce and digital trade and would also contain an Annex on the Irish Border, either encapsulating the technological solutions mentioned earlier coupled with transposing required checks (such as ROO, of which more below) away from the border, or if needs be, an agreement to ignore the border entirely on the basis of national security. Given the low volume of goods crossing this border either of these solutions should be entirely feasible.

**V The UK’s Future Trade Policy**

One of the main advantages of Brexit for the UK, in addition to moving to a more pro-competitive economy through a more liberal regulatory landscape, is its capacity to sign FTAs with third states, capturing anticipated growth in the coming decades outside of the EU (especially in Asia) and the reality that trade with the EU comprises an ever-decreasing component of the UK’s total trade. With this in mind, it must first be pointed out that the now-rejected WA specified that the UK ‘may negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period.’[[19]](#footnote-19) But this feature was largely illusory because, lacking control over its own international trade policy, it is virtually inconceivable that any third country would be willing to enter into negotiations with the UK for an FTA. In other words, the UK would have lost the capacity to offer concessions to trading partners for the entirety of the WA’s application – including during the potential backstop phase – another attempted injustice levied against the UK by the EU with which many in the UK parliament were complicit.

*i)Rolling over Existing EU FTAs*

One of the crucial trade policies for the UK following Brexit is to secure the advantages already gained by the EU in its FTAs with third states which will no longer apply once the UK departs from the EU’s Customs Union. The EU has a total of 37 trade agreements with 67 countries, together counting for about 15 per cent of the UK’s trade in goods (imports and exports), although somewhat less in services. It is not clear, however, that these countries will be willing to simply offer the same agreements to the UK, sometimes described as ‘rolling over,’ because they may not be prepared to extend the same level of access to the smaller UK and its smaller market than they did to the EU with its size and considerable negotiating power.

There are a handful of legal problems which may be raised by this process. First, part of the difficulty associated with rolling over the EU’s FTAs involves ROO. These are rules which verify how much of a product is deemed to be from a party country, allowing it to qualify for preferential access. This can be complicated for composite products which are part of multi-state value chains, although compliance costs are less than is often thought, usually around 1 per cent of a product’s value.[[20]](#footnote-20) Re-negotiating ROO in the context of rollover requires what is known as ‘diagonal cumulation’ –all three states must agree on rules for cumulative content – meaning the UK, the EU and the third party. There is no indication that the EU will agree to cooperate in this process to benefit the UK, although failing to do so arguably evinces a lack of good faith.

A second potential problem relates to the issue of MFN in the case of services and investment commitments in FTAs. Some EU agreements, like the CETA with Canada, are worded such that there is a promise under the MFN provisions that later agreements offering deeper liberalization than the one at hand must be offered to existing partners.[[21]](#footnote-21) Pressure for greater liberalization applied retrospectively could jeopardize a UK-EU FTA were Canada to demand the same treatment. Likewise, if the UK manages to secure an FTA with Canada based on CETA, the MFN provision in this treaty, if kept in that format, could frustrate future UK arrangements because, again, the UK will have to offer these better arrangements to Canada, creating the need for regular renegotiation.

Lastly, there is some concern that rolling over the EU’s FTAs could compel the UK to adhere to EU standards on goods and potentially also services. The third state may not consent to the rollover with the UK unless these standards are duplicated. While this could be mitigated to a degree by mutual recognition of standards, this requirement could lead to a situation where the UK would be unable to diverge broadly from EU standards in order to form FTAs with third countries employing somewhat laxer regulations, such as the US or even more so, China.

At the time of writing, the UK has managed to roll-over only a small number of the EU’s FTAs including with those with non-EU European Economic Area (EEA) countries and CARIFORUM countries. An agreement with Canada duplicating the CETA is believed to be immanent.[[22]](#footnote-22)

*ii) New FTAs with Third Countries*

Seizing the international trade opportunities available outside the EU is vital to the success of Brexit. The UK began discussions leading to formal negotiations for FTAs with strategic partners some time ago. It has already signed Mutual Recognition Agreements (MRAs) with the United States, Australia and New Zealand.[[23]](#footnote-23) The UK should pursue further negotiations with other countries by presenting draft offers, essentially framework agreements to work as a baseline for future negotiations. These should be premised on the maximum removal of trade barriers, comprehensive sectoral coverage and regulatory coherence.[[24]](#footnote-24) As with any international treaties, the contents of these FTAs have the potential to impose injustices on the British public, as contemplated by other chapters in this book.

With respect to an FTA with the US, public fears relating to dangerous food products from the US should be assuaged robustly by promises that consumer safety will not be sacrificed. Consumer choice will allow UK citizens to purchase (most likely more expensive) foods from the EU should they wish. Likewise, offering carefully monitored access to the UK National Health Service (NHS) to supply by US healthcare firms could offer badly needed reforms to the struggling system, although it may be politically unpalatable in the UK, with many viewing any interference with the NHS as intrinsically unjust. Clearly tariff-free access to the US market represents a considerable prize to UK firms as would the elimination of barriers to trade in financial services where the UK enjoys global dominance.

The UK must consider joining regional trade agreements as part of its post-Brexit trade strategy. Most important of these is the Comprehensive and Progressive Trans Pacific Partnership (CPTPP) an economic integration agreement concluded by 11 Pacific Rim countries including Canada, Australia and Japan.[[25]](#footnote-25) In many respects acceding to this agreement could be the single greatest move which the UK could undertake in terms of its future international trade policy. The CPTPP is the most progressive, deeply-integrated of all the regionals, notably in relation to its material on digital trade which goes further than any other trade agreement.[[26]](#footnote-26) The UK is a world leader in e-commerce and should seek to liberalize this sphere of economic activity as broadly as possible. Yet departure from the EU’s tighter laws on data protection may represent a risk to some, requiring meticulous deliberation.

At the multilateral level, the UK is poised to take a leading role at the WTO through the Trade in Services Working Group in order to expand services coverage under the GATS. The UK might further assist with needed reforms to the WTO Dispute Settlement System. The UK is well-placed to encourage the US to support the Appellate Body, or as an alternative the UK could foster a plurilateral dispute settlement initiative at the WTO without the US. The UK should use its newly independent position at the WTO also to push for greater liberalization of digital trade through various working groups and other initiatives. Outside of the WTO, the UK could further assist in the expansion of services trade through the plurilateral Trade in Services Agreement (TiSA), the negotiations for which are currently stalled. Likewise, the UK could support the development of multilateral recognition initiatives in certain professions, with legal services as an obvious example,[[27]](#footnote-27) rather than through a series of bilateral ones via FTAs.

Each trading partner with which the UK will seek to deal will obviously have its own concerns which will be reflected in its negotiating stance and its capacity to make or seek compromises. This will require the UK to contemplate the type of trading country that it wishes to be and may require it to open itself up to competition at a global scale, which could be disconcerting for some businesses which have become comfortable sheltered inside the EU bloc. Without a trade deal, high EU tariffs on agricultural products could harm this sector of the British economy in a manner that some might consider an injustice. The UK’s temporary tariff schedule will expose some UK firms to tougher global competition even as they lower prices for consumers. The UK may struggle to export services (which account for more than 30 per cent of its trade) to high-growth developing countries which lack infrastructure and developed markets. It is important to recognize that mutual recognition for services under FTAs can only smooth access which has been granted, either under the FTA itself or through the GATS, which as noted above has incomplete coverage for most countries. Should the UK choose to align its regulatory policy on services (or goods) too closely with the US, for example, it may not be easy to achieve mutual recognition with the EU. US financial services may not be as closely controlled as many in the EU would wish, perpetuating what some might view as an unjust imbalance in favour of powerful firms.

The UK must consider carefully which markets it wishes to align itself most and what it is prepared to offer in exchange for market access. While it is likely that the UK will engage in greater levels of trade with the EU than either the US or China for some time, diverging from EU’s standards will bring other benefits, such as a more competitive economy and associated growth in GDP.[[28]](#footnote-28) In the long term this could help unlock lucrative global markets in like-minded countries. Similarly, if the UK ultimately ends up unilaterally removing tariffs on a wide range of goods on an MFN basis or even to preferential trading partners like the US or CPTPP parties could present challenges to many UK businesses. Lower taxes and streamlined regulations on a range of services at home may be a sensible complimentary strategy and could cushion setbacks resulting from a harder break with the EU, although these may also prove unpopular with large portions of the UK electorate, particularly those who voted against Brexit and who consequently view the entire process as unjust on a fundamental level. Finally, the UK might have to come to terms with the need to rebalance its economy away from services towards manufacturing, especially of the high-tech, creative variety where it stands a better chance to compete globally. Adaptation to this transformation could prove difficult. Freed from the EU, the UK must adopt a trade policy which is acceptable most if not all.

**VI Conclusion**

At the time of writing, the UK still appears to favour leaving the Customs Union and the Single Market with a view to establishing its own international trade policy in line with the result of the 2016 referendum and subsequent acts of parliament, although the date has been pushed back, perhaps unsurprisingly. This is a sensible if ambitious strategy which is predicated on the desire for regulatory autonomy from the EU and the anticipated economic growth of the rest of the world. With the problematic WA now defunct, there is an increased likelihood of failure to secure a trade agreement with the EU in time for Brexit. Trading with the EU under a no-deal WTO position is sub-optimal but will not be as harmful as is often claimed. Still, a formal FTA with the EU should be a top priority and CETA is a good starting point. A WTO-compliant interim agreement remains achievable before Brexit. Rolling-over the EU’s existing FTAs is another key strategy but may involve further engagement with the EU on ROO. Negotiating new FTAs with third states could require divergence from EU standards in some circumstances along with low tariffs on many sectors, compelling the UK to make critical choices about which foreign markets it seeks closest alignment as well as the type of economy it wants at home.

1. \* Professor of International Economic Law, City, University of London <david.collins@utoronto.ca> [↑](#footnote-ref-1)
2. The associated Political Declaration made no legally enforceable commitment to conclude an FTA, meaning that under the WA the UK would be subject to the EU’s rules potentially indefinitely. [↑](#footnote-ref-2)
3. ‘Check temporary rates of customs duty (tariffs) on imports after EU Exit’Department for International Trade (13 March 2019) [↑](#footnote-ref-3)
4. V Hewson and A Morgan, ‘A Hard Border? Managing the Irish Border Through Brexit’ 20:1 Irish Journal of European Law 38 (2017) [↑](#footnote-ref-4)
5. The original United States proposal on this provision announced at the London session of the Preparatory Committee 1947 stated: ‘Paragraph 2(a) [XXIV:3(a)] referred to facilities for frontier traffic, in cases where a frontier ran through a city etc.; … The area affected by this provision was usually limited to a distance of 15 kilometres from the frontier.’ [↑](#footnote-ref-5)
6. The US imposed steel tariffs against a number of countries in July 2018 on the basis of national security. [↑](#footnote-ref-6)
7. WTO: United Kingdom Submits Draft schedule to the WTO outlining post-Brexit goods commitments

   <https://www.wto.org/english/news\_e/news18\_e/mark\_24jul18\_e.htm> (24 July 2018) [↑](#footnote-ref-7)
8. ‘Check temporary rates of customs duty (tariffs) on imports after EU Exit’Department for International Trade (13 March 2019) [↑](#footnote-ref-8)
9. WTO Council for Trade in Services: Communication from the United Kingdom of Great Britain and Northern Ireland - Certification of Schedule of Specific Commitments (3 December 2018) [↑](#footnote-ref-9)
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12. Dispute Settlement Understanding Art 19 [↑](#footnote-ref-12)
13. ‘Brexit: French officials dismiss UK fears of Calais “go-slow”’ BBC News, 26 October 2018 <https://www.bbc.co.uk/news/uk-politics-45990243> [↑](#footnote-ref-13)
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15. The language is broadly similar to that of Article V GATS on regional trade agreements. [↑](#footnote-ref-15)
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19. Art 129(4) [↑](#footnote-ref-19)
20. G Gudgin and J Mills, ‘Customs Costs Post-Brexit. Long Version.’ Briefings for Brexit, (undated) <https://briefingsforbrexit.com/customs-costs-post-brexit-long-version/> [↑](#footnote-ref-20)
21. Art 8.7 [↑](#footnote-ref-21)
22. Western, above n 13 [↑](#footnote-ref-22)
23. ‘Signed UK trade agreements transitioned from the EU’ Department of International Trade (22 March 2019) <https://www.gov.uk/guidance/signed-uk-trade-agreements-transitioned-from-the-eu> [↑](#footnote-ref-23)
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