# A New Proposal for the UK's Post-Brexit Trade Agreement & UK Trade Relations with Third Countries

**Luis González García** specialises in international law, international trade and international dispute resolution, including investment treaty arbitration, international commercial arbitration and the resolution of state-state trade disputes. Prior to joining Matrix, Luis worked for ten years at the Office of the General Counsel for International Trade Negotiations of the Government of Mexico. As Deputy General Counsel he appeared as counsel and lead counsel for Mexico in investment treaty arbitrations under the NAFTA and BITs and legal advisor in the negotiation of the bilateral investment treaties with the United Kingdom, China, India, Spain, Panama, Ukraine and Russia.

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*If to do were as easy as to know what were good to do, chapels had been churches and poor men's cottages princes' palaces.*

W. Shakespeare, the Merchant of Venice.

### *Part 1: The UK–EU future trade relationship: A new model agreement?*

The UK wants to get the best possible access for goods and services to the European market. At the same time, it wants greater regulatory space in shaping its own trade policy. Yet, there is a problem, because the more access to the European single market, the more the UK has to align its legislation to EU law. This leaves much less policy space in shaping its own trade policy and regulations. How to find the right balance between maintaining flexibility in UK policy space and reducing it through a deep integration model with the EU is likely to be the UK's most challenging aspect in shaping its negotiating position.

The question then is, which trade model provides the best possible balance between these two competing aspects? In this article I suggest that most of the current EU trade models are either politically unviable or likely to cause serious trade disruptions with the EU and third countries. The discussion regarding the future trade model should not be limited to the so-called 'hard' and 'soft' Brexit. The UK-EU trade model should not be the result of copying and pasting current EU FTAs. Trade agreements are the result of historical, geo-political, legal and economic factors. The future UK–EU trade model is likely to take into account the current level of liberalisation, convergence of legislation and geography. This is why I believe that the future trade relationship between the UK and the EU is likely to have elements of a free trade area, customs union and the single market. I also suggest that, although tension exists between deep integration and reduction of policy space, any weakening of the UK regulatory space must be weighed against the gains from more access into the EU market.

What type of EU agreement should be the reference? First, the European Economic Area (EEA) is not a political viable option because it would mean that the UK had accepted to the 'four freedoms', made substantial contributions to the EU budget, accepted the supremacy of the EU law and the rulings of the European Court of Justice. Second, a comprehensive customs union with the EU is not an optimal solution in the long term because the UK would be required to align itself to the EU's common commercial policy (CCP), including the EU's external tariff, customs legislation and trade defence instruments. In addition, the UK would not be able to participate in the EU's decision-making process in trade matters. This means that the UK would have to accept the supremacy of EU law and the almost monopoly of the EU Commission in shaping trade policy. As a result, the UK would not have a say on the future shape of the CCP and have little flexibility in the negotiation of trade agreements with third countries. Finally, a simple integration free trade agreement (FTA) similar to CETA would probably be the easiest negotiation (an almost copying and pasting exercise) but will certainly not serve the UK's interests in maintaining the best access possible for UK goods and services to the EU. In fact it would be a profound regression of economic integration with the EU which could lead to trade disruption requiring UK companies to modify supply chains with potential higher prices of goods in the UK domestic market.

With this in mind, I believe that the only available and achievable trade model that the UK has at its disposal to maintain the best possible access to the single market, and at the same time one which could allow the UK in achieving its role as a global leader in world trade, is a bespoke ambitious deep integration trade agreement. I believe the future UK–EU trade model could incorporate elements of the EU Association Agreements and the EU's most recent FTAs. In my view, the UK and the EU could establish a free trade area with the objective to liberalize (zero import tariff) cross-border trade in agricultural, fishery, and industrial goods. This trade model (or any other single market model), however, means that UK exporters would have to comply with the administrative burden of rules of origin.

The scope of liberalisation under the proposed model would vary depending on the sector and discipline. For trade in goods, the UK could, for example, seek sector-specific customs union-type where both sides would maintain the same tariff towards third countries in order to get full access to the UK market. This means that UK would agree to replicate the EU most-favoured nation tariff schedule it maintains on certain sensitive goods.

A sector-specific trade regime would secure the best possible access to the EU market and at the same time give the UK freedom in the negotiation of FTAs with third countries. This, however, would come at a cost. The UK would have to align itself with parts of the customs regime and technical regulations of the EU. On balance I believe the benefits of deep economic integration with the EU market outweigh the costs.

For trade in services, I expect an almost perfect liberalisation (deeper than current EU FTAs and GATS) given the complete regulatory convergence, mutual recognition, regulatory transparency and cooperation of both sides. I use the word 'almost' because, under EU trade practice, liberalisation of services goes hand-in-hand with harmonisation of legislation, free circulation of capital and persons. This means that the UK would have to accept the obligation of complying with EU legislation and free movement of skilled workers, and independent professionals (mode 4 of supply under the GATS).

## Transitional arrangement

I believe that the UK will have less than 14 months to negotiate its future trade relationship with the EU. Given the complexity and scope of the negotiations this is likely to be insufficient time to conclude a comprehensive trade agreement. A transitional arrangement would thus be necessary to avoid trade disruptions. The transitional arrangement would be different for goods and services.

For trade in goods, I believe a comprehensive customs union with the EU should be put in place for three years to allow:

1. A complete review of the UK's industrial, agricultural and fisheries policies and regulations;
2. The private sector to adjust supply chains, accountancy and financial operations, and customs authorities to prepare for the administrative burden of having to handle a mountain of customs declarations and certificates of origin;
3. Set up the UK's international trade defence authority and, potentially, initiate trade defence investigations;
4. The UK to conclude interim trade agreements with EU trade partners; and
5. The UK to conclude negotiations regarding its WTO agricultural commitments with WTO members.

For services, the UK should be allowed to continue participating in the EU's single market for services under the same conditions as the EU Member States. This means that EU workers should retain the right to live and work in the UK post-Brexit. This is crucial to facilitate a smooth Brexit transition on trade and services.

### *Part 2: UK Trade Relations with Third Countries*

After Brexit the UK will have to shape new trade relationships with third countries and regularise its independent status in the WTO. In doing so, the UK will have to decide what import tariffs, trade defences, industrial, fisheries, and agricultural policies it wishes to follow. The two priorities in the UK's new trade policy should be to: (1) minimise any trade disruption with the EU; and (2) avoid losing the preferential treatment the UK currently enjoys under the EU's trade agreements (FTAs). The former was addressed in Part 1. The latter will be addressed in this article (Part 2), and is based on the assumption that the UK will not pursue a comprehensive customs union with the EU.

### Trade agreements with third countries

The EU has an extensive network of trade agreements of various types with around 50 countries. Some are comprehensive free trade agreements such as the FTAs with Canada, CARIFORUM states, Chile, Mexico and Korea. Once the UK exits the EU, the existing EU FTAs will no longer be applicable to the UK. This means that the UK will lose preferential market access to the EU's partner countries. Some commentators have suggested that, under international law, the UK could potentially remain a party to some of the EU FTAs post Brexit. In my opinion, there are legal and practical reasons why current EU FTAs cannot continue to apply to the UK automatically.

From a legal perspective, the EU FTAs would cease to apply to the UK because the UK's rights and obligations under these treaties only apply to the UK in its capacity as a Member State and not as a sovereign state in its own capacity. More importantly, core disciplines covered in all EU FTAs are those which are considered to be of exclusive competence of the EU, including the common commercial policy (CCP). Although the scope of the CCP is the cause of much controversy, there is no doubt that it covers at least the following disciplines: trade in goods, trade defences, foreign investment, services, the commercial aspects of intellectual property and competition. Consequently, once the UK leaves the EU, the rights and commitments the UK enjoys under the CCP will no longer apply to the UK because such rights emanate only as a result of the UK's status as a Member State. Even assuming that, in theory, the UK has residual rights under the EU FTAs, the territorial scope of the EU FTAs means that the UK territory will be excluded from the FTAs once Britain leaves the EU. All EU FTAs employ the term "the territory of each Party" or "the territory of the importing Party". The term "Party" is defined, on the one hand, the "European Union and its Member States" as one party, and the third country as the other party. The term "territory" is also defined in more or less the same terms. For example the EU-Mexico FTA provides that, "*[t]his Agreement shall apply to the territory in which the Treaty establishing the European Community is applied under the conditions laid down in that Treaty, on the one hand, and to the territory of the United Mexican States, on the other*." It is thus clear that the intent is that the FTAs only apply to states which are governed by the EU treaties. Once the UK exits the EU the EU treaties will no longer be applicable to the UK, hence, the EU FTAs cease to apply to the UK because the UK will be outside the territorial scope of the treaties.

It is also worth noting that a UK unilateral declaration or even an agreement between the EU, the UK and third countries to allow the UK to continue benefiting from the EU FTAs would not resolve the risk of trade disruption. Certain protocols would need to be put in place to cover the practicalities of dealing with, for example, tariff quotas, the separate rights and obligations of all parties, and the dispute resolution mechanism in case of an alleged breach of the treaty. From a practical perspective, the UK would need to negotiate new FTAs. Given the limited human capabilities to negotiate a considerable number of trade agreements with third countries in a short period of time, the UK could negotiate interim agreements (very similar terms as the EU FTAs) with a number of like-minded EU trade partners during the two year period. This would be crucial to minimise disruption and ensure British companies to continue benefiting from existing EU FTAs.

## The WTO

UK businesses would continue to trade with the rest of the world under WTO non-discrimination Most Favoured Nation (MFN) rules as soon as it exits the EU because the UK does not need to negotiate access to the WTO. Like the EU, the UK is an original member of the General Agreement on Tariffs and Trade (GATT) and a founding member of the WTO. The UK, thus, has rights and commitments in the WTO. These rights, however, are combined with those of the EU. This means that the UK and the EU would need to agree on how to disentangle their respective WTO rights, concessions and commitments. These include the disentanglement of the joint tariff rate quotas (TRQs) and the allocation of the EU's subsidy limits for agricultural goods (AMS). In my opinion, this process should be part of the Brexit negotiation under Article 50. Once the distribution of these commitments has been agreed on, the UK and the EU would need to embark on what should be a relatively straightforward negotiation with the members of the WTO who would need to agree to the UK-EU allocation of their WTO commitments. Once the UK reaches an agreement with the WTO members, it can submit its schedules to the WTO Secretariat. The process concludes with the certification of the schedules by the rest of the WTO members.

The extent to which the negotiation is simple or complex is likely to depend to a large extend on the reasonableness of the UK's WTO proposal, its diplomatic skills and whether the WTO members want to make the UK's life post Brexit easy or difficult.

It is also important to note that the UK will likely replicate the EU MFN schedule almost in its entirety. This, in my view, would be a positive approach by the UK because it would minimize any trade disruption with third countries. This means, however, that in a WTO default scenario (i.e. there is no UK-EU trade agreement in place on Brexit date) goods from the EU will be treated as goods from a third country, hence, subject to ad valorem and non-ad valorem tariff rates. This will likely result in higher domestic prices in the UK. Although this scenario can be avoided by lowering the MFN tariff on certain products it is not a preferable scenario in the long term because it will lower the negotiating power of the UK vis-à-vis third states. This makes it imperative that a conclusion of a UK-EU FTA during negotiation is achieved or, at the very least, a transitional arrangement to minimize trade disruptions in the UK.

## Generalised Scheme of Preferences (GSP)

To avoid trade disruption with the least developed countries (LDCs), the UK could continue (or even improve) the EU's unilateral tariff preferences to 'countries-most-in-need' under the GSP which allows tariff free and quota free treatment to the UK market to all least developed countries This is arguably (1) the easiest of the UK's trade tasks post-Brexit since no negotiation is required to implement the market access for LDCs, (2) a trade action which is and should continue to contribute not just to the GDP, investment and employment in the developing world but would also bring tangible benefits to British consumers by having access to a wide variety of high quality and cheaper products.

## Trade defences

After Brexit, the EU's trade defence measures will no longer be applicable to the UK. This means that UK industries, like the steel industry, could potentially suffer material injury from dumped imports. There are three main trade defences: antidumping, countervailing and safeguards actions. Today, antidumping is the EU's most important trade defence measure. It prevents dumped imports to cause or continue to cause injury to domestic EU industries. Currently, the EU has 93 antidumping cases. Most of the antidumping measures have been imposed on products originating in, or imported from Asia (mostly China). To minimise a negative impact on the UK industries, the UK will need to quickly develop its own trade defence mechanisms and impose its own antidumping, countervailing or safeguard measures in accordance with WTO law.

UK industries exporting to the EU could also be subject to EU trade defence measures after Brexit. To minimise the risk of trade wars between the UK and the EU post-Brexit, the two sides could agree not to initiate any trade defence investigation or measure against each other. For this to happen, the UK would have to accept the obligation of complying with the relevant parts of EU competition law aimed at eliminating predatory practices.

*Luis González García*

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