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# Is Imitation Really Flattery? The UK's Trade Continuity Agreements: A Reply to Joris Larik

Emanuel Castellarin\*

## Abstract

*The assessment of the United Kingdom's (UK) trade continuity programme is open to debate. Joris Larik argues that this programme should be seen as a success both for the UK (although a 'modest' one) and for the European Union (EU). However, the significance of the UK's trade continuity agreements should not be overstated, as the replication of the EU's trade agreements seems to result above all from pragmatic considerations. It is submitted that this programme cannot be described as a success for the UK and only allows limited conclusions to be drawn about the external influence of the EU's trade policy.*

In his in-depth and useful article on the United Kingdom's (UK) trade continuity programme, Joris Larik argues that this programme should be seen as a success both for the UK (although a 'modest' one) and for the European Union (EU).<sup>1</sup> While his analysis, which is based on thorough research, correctly describes the UK's trade continuity agreements, the assessment of the trade continuity programme is open to debate. I argue that this programme cannot be described as a success for the UK and that it does not allow far-reaching conclusions to be drawn about the external influence of the EU's trade policy. The opinion presented here relies on the preliminary observation that the significance of the UK's trade continuity agreements to assess the UK's trade policy post-Brexit, and, therefore, its convergence with the EU's trade agreements, should not be overstated. The replication of the EU's agreements seems to result above all from pragmatic considerations, which should be seen in the context of other recent developments of the UK's trade policy.

\* Professor, University of Strasbourg, France; Legal Secretary at the Court of Justice of the European Union, Luxembourg. Email: [emanuel.castellarin@gmail.com](mailto:emanuel.castellarin@gmail.com). The views expressed in the text are solely those of the author.

<sup>1</sup> Larik, 'Imitation as Flattery: The UK's Trade Continuity Agreements and the EU's Normative Foreign Policy', 34 *European Journal of International Law* (2023) 801.

## 1 How Significant Are Trade Continuity Agreements for the UK's Trade Policy?

The choice of the article's topic suggests that the UK's continuity programme deserves an analysis not only because of its practical implications but also because it sheds light on legal aspects of the UK's and the EU's respective trade policies and perhaps on general trends in international trade law. This presupposes the idea that the replication of the EU's trade agreements by the UK is not an inescapable outcome due to practical constraints but, rather, a fully-fledged and politically meaningful choice. In this respect, Larik takes into account the self-inflicted practical challenges faced by the UK (a lack of time, resources and political attention) to assess the success of the UK's continuity programme.<sup>2</sup> However, these practical factors also form a significant component of the rationale of the replication of the EU's trade agreements. This observation prompts caution in assessing the significance of this programme as an unambiguous indication of the UK's post-Brexit legal policy on trade issues.

The EU's trade agreements that have been replicated by the UK are diverse. Even if the EU's common commercial policy has a clear identity, it has produced several categories and 'generations' of trade agreements. The (almost) indiscriminate replication of these agreements as a whole shows the difficulty of identifying a single 'model' trade agreement that is preferred by the UK. Recent events also suggest that such a model does not yet exist. As with the EU law that has been retained, it may seem paradoxical that 'taking back control' has led to the choice of largely aligning with EU law. However, at the scale of the UK's trade policy post-Brexit, trade continuity agreements are a starting point as the UK can now set its own trade policy priorities. In this regard, the intriguing lack of replication of the EU's agreements with Algeria, Bosnia-Herzegovina and Montenegro suggests that alignment with the EU is far from being the only objective of the UK's trade policy. Trading terms that were acceptable for the EU in the light of its interests are not acceptable for the UK in the light of its.

Recent negotiations tend to confirm that the UK's trade policy partially does what the common commercial policy aims to prevent member states from doing – that is, competing in relations with the same trading partners. The case of Australia and New Zealand shows that the UK can be faster than the EU in concluding trade agreements.<sup>3</sup> While the UK has benefited from negotiations that started before Brexit, as it did for continuity trade agreements, the conclusion of these agreements was certainly eased by the fact that, on some tariff issues, the UK's interests are notoriously different from

<sup>2</sup> *Ibid.*, at 816–817.

<sup>3</sup> Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia, signed on 17 December 2021; Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand, signed on 28 February 2022. Both agreements entered into force on 31 May 2023 and are available at <https://commonslibrary.parliament.uk/research-briefings/cbp-9314/>. The European Union's (EU) negotiations with Australia and New Zealand have been ongoing since June 2018. The agreement with New Zealand was signed in July 2023, but neither agreement has been concluded yet. 'Negotiations and Agreements', *European Commission*, available at [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en).

those of the EU.<sup>4</sup> Therefore, it is foreseeable that, if the EU concludes trade agreements with these countries, these agreements will not be identical to the UK's. Similarly, the UK's negotiations with India and the USA suggest that the UK has the political will to negotiate differently trade agreements that the EU has not concluded, even if what is challenging for the EU is not necessarily easier for the UK.<sup>5</sup>

The UK's signing of a protocol of accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which occurred in June 2023, signals an even stronger divergence in strategy from that of the EU.<sup>6</sup> The EU has never officially considered becoming a party to the CPTPP, not least because it is negotiating its own trade agreements with most parties to that agreement with which it has not already concluded a trade agreement.<sup>7</sup> In the light of this development, the UK's trade policy post-Brexit appears essentially pragmatic, or even opportunistic, in the sense that it shows a readiness to take opportunities as and when they arise, regardless of a single preconceived model. From this point of view, for the time being, the UK's trade policy post-Brexit can perhaps be described first and foremost as a 'low-cost' trade policy that consists in opting in to 'turnkey' trade agreements that are, for the most part, almost ready for conclusion within a reasonable time, subject to some adjustments. As suggested by Larik, the choice of this approach, instead of the potentially original but lengthy conception of brand-new trade agreements, is perfectly understandable in practical terms.<sup>8</sup> Nonetheless, it also makes the UK's trade continuity agreements appear to be a down-to-earth adaptation to a specific situation with limited ideological pretensions.

## 2 Is the Trade Continuity Programme a Success for the UK?

The assessment of the current situation partly depends on the definition of trade agreements. Larik's comparison of the UK's and the EU's trade agreements relies on the presentations made respectively by the UK's public authorities, which explicitly exclude the EU-UK Trade and Cooperation Agreement,<sup>9</sup> and by the European Commission.<sup>10</sup> Both presentations should be put into perspective.

<sup>4</sup> In particular, the UK is, unlike the EU, a net importer of agricultural products.

<sup>5</sup> The UK held negotiations with the USA between May 2020 and October 2020. It started negotiations with India in January 2022. 'Progress on UK Free Trade Agreement Negotiations', *UK Parliament*, 26 January 2024, available at <https://commonslibrary.parliament.uk/research-briefings/cbp-9314/>.

<sup>6</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed on 8 March 2018. The accession protocol of the UK to the CPTPP was signed on 16 July 2023 and is available at <https://www.gov.uk/government/publications/accession-protocol-of-the-uk-to-the-cptpp>.

<sup>7</sup> See 'Negotiations and Agreements', *supra* note 3.

<sup>8</sup> Larik, *supra* note 1, at 816–817.

<sup>9</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, OJ 2021 L 149/10.

<sup>10</sup> Larik, *supra* note 1, at 803, 805 and 810–813. See 'UK Trade Agreements in Effect', *UK Parliament*, last updated 9 February 2024, available at [www.gov.uk/guidance/uk-trade-agreements-in-effect](http://www.gov.uk/guidance/uk-trade-agreements-in-effect).

First, the indicative list of trade agreements published on the Commission's website is a useful tool to make sense of the EU's most significant agreements that cover trade issues, in spite of the intricacies of specific denominations and applicable legal bases under EU law. Nevertheless, this list does not aim at exhaustiveness as it does not include, as acknowledged by Larik, 'technical' trade agreements.<sup>11</sup> This list also excludes some framework agreements that are essential for the functioning of economic agreements, most notably the Cotonou Agreement, which is not applicable to the UK but whose Article 37 provides for the negotiation of economic partnership agreements with 78 African, Caribbean and Pacific (ACP) countries.<sup>12</sup> EU-UK divergence in this regard will arguably increase once the EU concludes the EU-ACP post-Cotonou Agreement<sup>13</sup> and with the progressive entry into force of economic partnership agreements not covered by the UK's trade continuity programme.

Second and more importantly, the fact that the EU-UK Trade and Cooperation Agreement implies a significantly lower level of economic integration, as also correctly mentioned by Larik, should not be overlooked.<sup>14</sup> This agreement is correctly included in the Commission's list of trade agreements as it covers, *inter alia*, trade and trade-related issues. More precisely, it is the single most important trade agreement both for the EU and for the UK.<sup>15</sup> In this respect, it manifestly implies more trade barriers and less regulatory convergence than the *status quo ante*.<sup>16</sup> Furthermore, although third-country nationals can trade with the UK in terms that are similar to pre-Brexit ones, now they only have limited access to the EU's internal market through the UK and vice versa, which is a clear handicap for global value chains. Overall, excluding the EU-UK's Trade and Cooperation Agreement from the assessment of trade continuity agreements precisely on the grounds that it does not ensure full trade continuity is a textbook example of survivorship bias.

It is submitted that the pre-Brexit situation is the most natural benchmark to assess the current state of play. From this perspective, the current situation is difficult to describe as a success in terms of trade promotion. Of course, insofar as the UK does not seem to have clear long-term trade policy objectives, it is formally possible, depending on the chosen criteria, to present virtually anything as a success. However, the UK's trade continuity programme cannot be considered in isolation from the Brexit context: while overcoming an external handicap can be seen as a success, it is questionable that the same can be said about overcoming a self-inflicted one.

<sup>11</sup> Larik, *supra* note 1, at 810.

<sup>12</sup> Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, Doc. ACP/CE/en123, 23 June 2000, available at [www.consilium.europa.eu/en/policies/cotonou-agreement](http://www.consilium.europa.eu/en/policies/cotonou-agreement).

<sup>13</sup> *Ibid.*

<sup>14</sup> Larik, *supra* note 1, at 813.

<sup>15</sup> The EU is the UK's first trading partner, and the UK is the EU's third trading partner. See 'The European Union and Its Trade Partners', *EU Parliament*, available at [www.europarl.europa.eu/factsheets/en/sheet/160/the-european-union-and-its-trade-partners](http://www.europarl.europa.eu/factsheets/en/sheet/160/the-european-union-and-its-trade-partners).

<sup>16</sup> The current situation is further from the objective of 'encourag[ing] the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade'. Treaty on European Union (TEU), OJ 2010 C 83/13, Art. 21(2)(e).

It is also debatable that the standard of success of the UK's contingency programme can be defined by reference to that of the EU's trade policy. Admittedly, a trade policy can only succeed or fail in meeting its own challenges. From that perspective, one may say that, so far, the EU has failed in effectively addressing issues like forced labour and forced technology transfer in China, while the UK has brilliantly succeeded in avoiding being relegated to trade on the World Trade Organization's (WTO) most favoured nation (MFN) terms. But is this even a modest achievement, especially for the sixth most powerful world economic power? The level of difficulty in conceiving of innovative trade provisions and convincing trading partners to accept them, especially if it is the first time that they are accepting a certain kind of commitment, is an altogether different activity from simply cutting and pasting (or referring to) provisions that are already (or have just stopped being) in force.

In essence, the UK got, with minor exceptions, what it already had. The most important conceptual difference between trade continuity agreements and the EU's retained law is that, whereas the latter results from a unilateral act of the UK's, the conclusion of the former implied the consent of the UK's trading partners. It would have been 'legally conceivable' that these trading partners could insist on a full-scale renegotiation of the terms of the EU's trade agreements since they had no legal obligation to grant them to the UK. But has this option ever been realistic?

Overall, the UK 'succeeded' in maintaining a *status quo ante* that was not significantly contested. Specific adjustments to some agreements, like the one with Mexico, which do not feature in other agreements and which therefore have not likely been proposed by the UK, suggest that pressure did exist in some cases and even that the UK did not totally resist it. However, there is no indication that the UK was actually faced with the alternative of making supplementary concessions or accepting the WTO's MFN terms. Even assuming that the UK's trading partners had more interest in putting the UK in such a position than in also promoting continuity, only the biggest trading powers had a real possibility in negotiating with the UK on an economically equal footing. The only two top-10 countries by gross domestic product with a trade agreement in force with the EU are Canada and Japan, whose agreements were signed while Brexit was already underway. One can reasonably suppose that the UK's specific situation at that time was taken into account in the negotiations of those agreements, within the limits of uncertainty for subsequent developments, so that room for further bilateral negotiations soon after Brexit was limited.

Similarly, the trade continuity programme does not tell us much about the added value of the EU's common commercial policy's bargaining power that is supposedly maintained by the UK in spite of leaving the EU. It is debatable whether, in practical terms, in replicating the EU's trade agreements, the UK has received advantages that it would not have received otherwise. It is correct that the UK had no legal right to obtain all the benefits that it had as a member state. Nevertheless, the drafting of some provisions of the EU's trade agreements, such as those recalling common values, is unconditionally available to any state willing to draw inspiration from it. Besides, some of the benefits of the EU's trade agreements can be seen as a factual legacy for the UK. After all, the content of the EU's agreements is the result of decades of expertise

and concessions made and obtained in the name of the UK. The trade continuity programme only shows that the UK could obtain the current terms because, at the time of the conclusion of the corresponding EU's agreement, it was an EU member state. Only new trade agreements, which were not negotiated by the EU in the first place, can show to what extent the UK would obtain, on its own, the same terms that it could have obtained if it were still an EU member state.

### 3 Is the Trade Continuity Programme a Success for the EU?

Of course, from the EU's perspective, a significant degree of convergence with the UK's trade policy is better than manifest divergence. Nonetheless, the analogy between the replication of the EU's trade agreements and (accession) conditionality seems overstretched. Not only is it difficult to state that, in replicating the EU's trade agreements, the UK has received advantages that it would not have received otherwise, but there is also no indication that, in doing so, it modified its 'ordinary' behaviour and accepted terms negotiated by the EU that it would not have accepted otherwise. This observation puts in doubt the extent to which the UK's trade continuity programme results from the EU's influence on an otherwise reluctant trade power.

As Larik recognizes, the UK contributed to shaping and applying the EU's common commercial policy for more than four decades as one of the EU's most influential member states.<sup>17</sup> It does not come as a surprise that, provided that the Union Jack replaced the flag of Europe on the cover page, the content of the EU's trade agreements did not become unacceptable overnight. In other words, the UK did not 'import' a 'foreign' trade policy but simply continued its trade policy. The fact that the EU's common commercial policy was the UK's trade policy for decades will have unavoidable consequences for years. It is not clear why the UK should have disregarded the option to choose as a starting point for its trade agreements the EU's turnkey set of trade agreements, negotiated with the ambition of being state of the art at the time of their conclusion and suited to the needs of a big trade power with an open market economy. The replication of the EU's trade agreements can be interpreted, to some extent, as meaning that those agreements are well conceived and negotiated, but it mainly proves that, so far, the UK has not devised an alternative model. Apart from vague slogans, a 'strictly "free trade"' agenda has never come close to being translated into the specific provisions of a new trade agreement. Even if the UK had chosen to draw inspiration from other existing trade agreements – for example, those concluded by the USA – this choice would have required complex individual negotiations with every trading partner. Even without taking into account practical constraints, it is not clear for what political reason and for what specific purpose the UK should have wished to revolutionize its trade policy. In particular, the convergence with EU values, such as fundamental rights, should come as no surprise. Different trade powers can implement the same values differently, but Brexit did not modify the UK's values or the

<sup>17</sup> Larik, *supra* note 1, at 804.

EU's values, which are common to the member states, like when the UK was a member state.<sup>18</sup>

It is also worth noting that not all concessions made in trade negotiations are as costly as they may seem. In particular, not all provisions of trade agreements imply divisible concessions. Without even considering the legal effects of MFN clauses in bilateral agreements, once a state has accepted a given standard – for example, of labour, environment or intellectual property protection – in one trade agreement, the cost of accepting that standard in following trade agreements is much lower. The UK had a unique chance to insert in its trade agreements provisions regarding not purely economic trade-related issues with a very limited political cost both for itself and for its trading partners since most, if not all, the cost of the negotiation of those provisions had already been paid in the negotiations of the EU's trade agreements. In addition, Larik rightly recalls recent debates on the effectiveness of the provisions of the EU's trade agreements on sustainable development and environment and wisely warns that implementation is of paramount importance to assess the provisions regarding not purely economic trade-related issues.<sup>19</sup> It still remains to be seen whether the EU and the UK will ensure the same level of effectiveness for those provisions, which is the litmus test to determine whether both of them are willing to pay the same cost in the name of values.

Beyond the UK's specific situation, the assessment of the UK's trade continuity programme should also take into account the existence of a certain degree of general convergence in international trade agreements. Even if the EU's trade agreements have a significant overall influence, they are only part of a global trend. In this regard, the stalemate of multilateral negotiations has created a broad set of issues regarding both tariff and non-tariff barriers, whose selection for trade negotiations is simply the state of the art. In particular, inasmuch as recent agreements concluded by the main trade powers aim at eliminating trade barriers 'on substantially all the trade', as required by Article XXIV of the General Agreement on Tariffs and Trade and Article V of the General Agreement on Trade in Services,<sup>20</sup> they systematically cover at least some not purely economic trade-related issues.<sup>21</sup> This approach has largely been mainstreamed, at least on the basis of level-playing-field concerns – that is, as a means to fight against unfair competition or to take into account externalities of trade liberalization. In the light of this observation, the fact that the UK's trade continuity agreements have maintained chapters on such issues appears as an arguably unavoidable outcome.

<sup>18</sup> TEU, *supra* note 16, Art. 2.

<sup>19</sup> Larik, *supra* note 1, at 824.

<sup>20</sup> General Agreement on Tariffs and Trade 1994, 55 UNTS 194; General Agreement on Trade in Services 1994, 1869 UNTS 183. Admittedly, sectoral agreements are not practically inconceivable, as shown by the 2020 Phase One Trade Deal between the USA and China. It is dubious that this agreement, which has only been partially implemented, is compatible with World Trade Organization law.

<sup>21</sup> See, e.g., chapters 23 and 24 of the US-Mexico-Canada Agreement, signed on 30 November 2018 and 10 December 2019, in force since 1 July 2020, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>; chapters 19 and 20 of the CPTPP, *supra* note 6.

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Larik's optimistic conclusion that the UK's trade continuity programme is a success both for the UK and the EU<sup>22</sup> is perhaps an antidote to Brexit fatigue. This outcome is logical in the light of the premises chosen by the author – that is, that the replication of the EU's trade agreements by the UK was likely to be rejected by the UK and/or by its trading partners. However, these assumptions do not seem to find any solid support in the relevant context. Moreover, the article relies on debatable standards of assessment. Although this does not seem to be the author's intention, such a conclusion can fuel the narrative that being (for the UK) or having (for the EU) a former member state is an almost enviable situation, which does not stand up to scrutiny, at least in regard to the topic under discussion. Ultimately, only time will tell whether the UK's and the EU's respective trade policies will converge or diverge and how this will affect international trade law in general.

<sup>22</sup> Larik, *supra* note 1, at 828–829.