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‘Our European Friends and Partners’? Negotiating the Trade and Cooperation Agreement

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Introduction

One of the main straplines of the Conservative Party’s December 2019 general election campaign was ‘get Brexit done’. This contained the double notions of completing the highly-tortured process of ratifying the Withdrawal Agreement between the EU and the UK that had been the central political challenge of the past year and of the much more prosaic idea that with this completed, the country could get back to the simple and quiet life. In short, it was a gamble that most of the British voting public were essentially tired of hearing about meaningful votes and backstops and wanted to feel they could move on: a gamble that paid off handsomely for Boris Johnson.

But as subsequent events have demonstrated, even the rapid conclusion of the Withdrawal Agreement ratification for the UK’s formal exit from the European Union on 31 January 2020 could not produce a situation that might be reasonably described as ‘done’: while public opinion undoubtedly drifted from the high salience of preceding years, the two contracting parties almost immediately plunged into a new round of negotiations, to map out more properly their future relationship. Whereas the Withdrawal Agreement had been concerned solely with the resolution of the UK’s departure from the EU, this new treaty would establish a system for ongoing cooperation.

This article focuses on those negotiations and their ultimate production of a Trade and Cooperation Agreement (TCA) for the end of 2020, a feat that looked to be much less than likely even prior to the arrival of Covid-19 on European shores. In particular, it asks the question of whether it was simply the Withdrawal Agreement, part 2, in the sense of a replication of underlying interests and positions, or rather a fundamentally new stage in the relationship. It argues firstly that while there was a lot of continuity on the British side, this was a function of ongoing uncertainty about the position of EU (and European) relations within the broad context of the UK’s foreign and domestic policy: the drivers of negotiations were very largely negative ones of avoiding entanglements and commitments. By contrast, the EU displayed a more significant change in its approach – notwithstanding the continuities of negotiating personnel – that reflected the UK’s switch from being a member state to a becoming a third country. This resulted in an attitudinal change on the part of both negotiators and the EU27 in their willingness to accommodate British demands, such as they were.

The result was an Agreement that reflected the progressive normalization of the UK by the EU as an external partner, albeit one with various significant on-going challenges, and also the UK’s persistent inability to determine a clear and broadly-accepted logic for

Brexit: the basic conundrum of the 2016 referendum – leaving, but for what purpose? – remained as unclear at the start of 2021 as it had a year earlier.

The process of negotiation was fixed in part by the terms of the Political Declaration (DExEU, 2019) that accompanied the 2020 Withdrawal Agreement (OJEU, 2019), which specified an end date of 31 December 2020 to a transition period during which the UK would continue to follow all obligations and processes of EU membership, but without voting or representation rights (Eeckhout and Patel, 2017). This date had been fixed in the original version of the Withdrawal Agreement in late 2018 but was not amended following the various extensions to the Article 50 process. Even with the rapid turnaround of negotiating mandates a month after the entry into force of the Withdrawal Agreement at the end of January 2020, there were less than 10 months left for discussions. These were held within the framework of negotiating rounds – four between March and June; five between late July and September, after calls to ‘intensify’ the process – before a rolling set of daily meetings from mid-October until Christmas Eve tried to unblock progress. Much of this occurred remotely in the spring and autumn, due to Covid restrictions, leaving minimal opportunities for either principals or technical-level negotiators to interact. In parallel, both sides were also continuing their implementation work on the Withdrawal Agreement – and notably its Northern Ireland Protocol that would come into effect at the end of the transition period – and contingency work to prepare citizens and businesses in the event of no deal, something that looked increasingly pressing in the latter half of the year.

The article considers the TCA firstly from the perspective of the legacies of the Article 50 process that produced the Withdrawal Agreement, to consider how each party arrived at the start of the future relationship negotiations in March 2020. It then switches to an analysis of the final Agreement to reflect on the extent to which the EU and the UK achieved their objectives, before concluding with a discussion on the likely implications for the future of the relationship.

I. The Legacy of the Article 50 Process

The sharp proximity of the Withdrawal Agreement to the future relationship negotiations is a key factor in understanding the latter’s unfolding. Indeed, it should be recalled that the division and sequencing of these elements was the subject of one of the very first disagreements after the UK submitted its notification to withdraw under Article 50 TEU in March 2017. The UK considered that matters of ending membership were intrinsically linked to any future cooperation and so should be treated together (Allen Green, 2017). The EU’s position was that this would be an infringement of the remit of Article 50 (since it does not mention post-membership relations, covered elsewhere in the treaties) and so impossible. More politically, the very early identification and entrenchment of a set of EU negotiating objectives also pointed towards splitting up the steps: the declaration by EU leaders immediately after the 2016 referendum result (Council, 2016) highlighted the centrality of preserving the value of membership for the EU27, ahead of forging any new links with the UK. In practical terms this meant a tight focus within Article 50 negotiations on addressing the key liabilities of ending membership – citizens’ rights, finances and the Irish dimension – so that these could be ring-fenced from what already appeared an unclear set of British preferences about what might follow. The difference between the

two sides, billed by UK lead negotiator David Davis as 'the row of the summer', was resolved very quickly in the EU's favour in June 2017, laying the groundwork for the segmentation found in 2020.

The division mattered not only in the substantive remit of the negotiations but also in establishing a set of practices and understandings. The lessons learnt by each side during the Article 50 process are worth exploring here, given their impact on the unfolding of the future relationship stage. In both cases, the experience was one that incentivized continuation over starting afresh.

On the EU side, the decision to convert the Article 50 Task Force into the Task Force for Relations with the UK, under the leadership Michel Barnier, avoided the need to engage in securing a new set of personnel and carried over the preliminary work under the banner of the Political Declaration. The Task Force's success in concluding the Withdrawal Agreement was matched by member states' close proximity to the negotiation and the repeated accommodation of their views (see Laffan, 2019; Barnier, 2021). But the continuity also spoke to more general concerns about the reliability of the British as an interlocutor: from the surprise 2017 general election immediately after notification to the Democratic Unionist Party's blockage of the Joint Report later that year, from the collapse of the Chequers plan in 2018 and the protracted ratification crises in 2019 to Boris Johnson's reversal on the Northern Ireland Protocol, the pattern encountered by the EU was of a UK that needed to be handled with extreme caution. This was also evident in the negotiating mandate's language on 'good faith' negotiations and implementation (European Council, 2020a). The experience of the Article 50 negotiations had been that British rhetoric was rather different from British action – most obviously around the Protocol – so that clarity of text and commitment was essential.

By contrast, the British government and the Conservative party appeared willing to accept the rhetorical presentation by Johnson as an accurate reflection of how the negotiations had gone: tough talking and being firm, not least through doing everything possible to avoid further time extensions, had resulted in the EU making important concessions. In his own words, 'they said that we couldn't re-open the Withdrawal Agreement, Mr Speaker, they said we couldn't change a comma of the Withdrawal Agreement, they said we couldn't abolish the backstop, Mr Speaker, we've done both.' (Johnson, 2019). The brevity of Parliamentary consideration of the final version of the Withdrawal Agreement was both a function of the 'get Brexit done' message from Number 10 and of the minimal interest of Tory MPs to unpack the implications of what had been agreed. Seen in this light, the antagonistic discourse towards the EU not only had value for domestic audiences in reassuring them of the step-change from the May period, but also as a more general approach towards the future relationship negotiations. As with the EU, the UK maintained many of the same people around the continuing chief negotiator, David Frost. The success of Frost in communicating that he had the ear of Johnson – in a way that previous UK negotiators had not necessarily done (Kassim, 2021) – made him the obvious choice for the UK, just as it also reaffirmed the EU's priorities to pin the UK down on any text.

This combination of tight timings, issue segmentation, roll-over of key personnel and the differing lessons about what had worked drove both sides to enter the future relationship process very much in the mindset of a continuation of what had come before. This was to be reflected in the pattern of the negotiations through 2020, especially in the

persistent question about whether the Covid pandemic required more time to be given to talks; a question that the UK never gave any ground on, even at the point where full ratification had to be pushed back by the EU because of the need for European Parliament debate and approval. Each round of negotiation came with a barrage of media briefings, with periodic (if largely unproductive) nudges from principals on both sides.

At the same time, the shift of legal basis from Article 50 to Article 218 TFEU, and the concomitant change in status of the UK from member state to third country, must be noted. Not only did the UK lose its access to EU decision-making bodies of all kinds, but the EU had now secured its fundamental priorities in the Withdrawal Agreement. This would become progressively more consequential as talks continued.

II. Did the TCA Meet the Needs of all Sides?

That an agreement was reached at all – let alone one reached under such extreme time constraints and with much remote interaction – is certainly something of an achievement. In early 2020, as Covid's effects were becoming ever clearer, the view was largely that modern trade agreements are complex and time-consuming to negotiate, so full use of the two-year extension to the transition period would be in order (see Zuleeg *et al.*, 2020 for a typical example). The maintenance of the timeline highlights the absolute priority given to it by the UK side – driven by the need to keep moving through the Brexit process at pace – but also the related decision by the UK to ask for a relatively modest free trade agreement. A short wish list was seen variously as a way of underlining the UK's departure from the Union and as a tool to reduce the cross-leverage that the EU might try to exert, quite beyond the obvious reduction in matters to be resolved (Connelly, 2020). The focus on removing tariffs on trade in goods was only enlarged to meet some basic needs in transport, energy, police and judicial cooperation, and possible participation in EU programmes, with fisheries added in at the EU's insistence: the effective absence of services, security and many other areas stood in contrast to the much more ambitious agendas of other EU deals in train at the time. As so ably predicted by Hix (2018), a basic free trade agreement might not have been all that either side wanted, but it represented the most that they would be able to agree on together.

Of course, the timely conclusion of an agreement has no bearing on whether that agreement is suitable for its purpose: the growing swell of domestic UK discontent about the parallel implementation of the Withdrawal Agreement was only the most obvious example of this. While there had been clear and consistent signals throughout the negotiations about areas of agreement – zero tariffs and zero quotas on goods, the small opening on services, social security cooperation, the framework for participation in EU programmes, much of energy and transport – a number of disagreements were equally clear and consistent throughout the process.

The most symbolic of these – in economic terms – was fisheries. The UK's desire to remove itself entirely from the Common Fisheries Policy (CFP) ran up against the EU's insistence on continuing access under international law. Further complication came from most British fish being sold to EU member states and most fish eaten in the UK coming from the EU, thus connecting it to the trade stream of negotiations (UK in a Changing Europe, 2020). The final compromise of a phased downwards adjustment of the EU's percentage of permitted catch over five and a half years somewhat obscured the continuation

of the EU's involvement in management, albeit not directly under the CFP. In particular, the provisions allow for the EU to take retaliatory action if their share of quotas is reduced any further after the transition, much to the dismay of UK fishing bodies (NFFO, 2020).

Much more substantive was the question of 'level playing field' provisions. The removal of tariffs and quotas on goods had raised concerns for the EU that the UK might be able to take advantage of this by cutting standards in areas such as the protection of labour or environment or by cutting taxes and/or providing state aid, which would both undercut EU producers and compromise these areas. Therefore it pushed for 'sufficient guarantees ... so as to uphold corresponding high levels of protection' (European Council, 2020a), including dynamic alignment that would tie the UK to EU standards over time and the continuing use of EU state aid rules by the UK. The UK's concern was that this was effectively a continuation of the obligations of membership, and that a commitment to not abuse such policy areas would suffice; something that the experience of the Withdrawal Agreement had made equally unacceptable to the EU. Here the outcome ended up closer to the EU's preferences, even if the demand on state aid was dropped: both parties signed up to domestic enforcement and dispute settlement mechanisms, with a right to take unilateral action should the other party engage in unfair competition.

The complexity of this settlement stemmed in part from another pinch point in the negotiations: the role of the Court of Justice of the EU (CJEU). As another symbol of the failings of membership, giving the Court any say in dispute settlement or interpretation of the TCA was ruled out by British negotiators, even against the EU's rejoinder that where matters of EU law might be concerned there was a clear obligation on the EU to use the CJEU for definitive rulings. Despite having accepted the EU's line for the Withdrawal Agreement, the UK was not willing to move on this, ultimately securing a system of dispute settlement that dispensed with it. At the same time, the UK did have to give ground on the EU's desire to create a single framework of governance for the post-membership relationship, rather than separated, narrow subjects, akin to the Swiss model.

The overall pattern of these flashpoints is one of the UK being driven to secure symbolically significant concessions, even at the price of economic efficiency. The TCA avoided the worst-case effects of a non-agreement, without obviously compromising the 'performative divergence' of the rhetoric of 'Brexit means Brexit': it is at least as important that leaving the EU is seen to mean change as it is for any changes to actually occur.¹ The political value of removing the CJEU from the treaty, extracting the UK from the CFP and avoiding a system of dynamic alignment on level playing field was significant in allowing the government to push through ratification in the brief period before the end of 2020, not least in forestalling some of the more obvious objections that Conservative MPs might have had. As examples of being able to move the EU off its starting positions, they also let the government argue that they had succeeded where observers had said they had no good chance: the multiplicity of exit clauses (both for sub-elements and the entire treaty) also left them with much more accessible ways out down the line than were available in the Withdrawal Agreement (the TCA contains 13 such clauses).

¹Credit to Sam Lowe and the rest of Trade Twitter for the use of the term 'performative divergence'.

However, the success in moving the EU should not be confused with a securing of original British positions. At most, the final treaty took the harder edges off the EU's preferences, while still tying the UK into a system of governance and dispute settlement that could have major effects; a reflection of that initial EU concern about the UK's 'good faith'. In contrast to the unified dispute settlement mechanism of the Withdrawal Agreement, the TCA provides for various procedures for different sections, notably Article 411 with its rebalancing mechanism for 'material impacts on trade or investment' resulting from a party's non-compliance with the level playing field areas. This is a very fast system, allowing for almost immediate implementation of proportionate countermeasures and a tribunal ruling within two months. Moreover, persistent problems under this can result in a more systematic review of the heading, up to and including its termination.

Moreover, the initial decision to go for a small deal has left much on the table between the UK and EU. While there was a small side agreement on citizens' security, this is very limited in scope. Perhaps the biggest gap remains any cooperation on foreign policy or external security and defence, a decision that has already resulted in uncoordinated action on sanctions towards Myanmar and statements on the treatment of Uyghur Muslims in China (Guardian, 2021). The UK has talked more about using NATO as a conduit to maintaining links with most EU member states, as well as making more of the United Nations, but there appears to be no interest of the Johnson government to consider a specific bilateral instrument, primarily because of the antipathy to anything that is labelled as formal cooperation with the EU.

This divergence-for-the-sake-of-divergence remains the EU's biggest challenge from the experience of the TCA negotiation. As much as the Commission was able to protect all of the key interests of member states and the Union as a whole in the talks, including a robust dispute settlement mechanism, the process did not provide any improvement in the politics of the relationship with the UK. At no point was this clearer than in the events surrounding the Internal Market Bill in the autumn of 2020. The Bill was introduced in early September with the aim of addressing a number of areas of regulation of UK internal trade following withdrawal from the EU, but with the addition of provisions that specifically and explicitly disapplied parts of the Withdrawal Agreement in relation to Northern Ireland. These provisions had not been included in the earlier White Paper, suggesting that the 'break[ing of] international law in a very specific and limited way' (in the words of the Northern Ireland Secretary Brandon Lewis (BBC, 2020)) was motivated not only by a desire to weaken the UK's obligations to fulfil the Withdrawal Agreement itself, but also to apply pressure in the TCA negotiations.

This clear and unambiguous contravention of obligations under international law presented the EU with a very fundamental problem, not least since the EU itself is based in such obligations. For the UK even to suggest that treaties cannot bind signatories if they so choose – rather than for any usually accepted reason of *force majeure* or fundamental change of circumstance – was to call into question the entire exercise then in train. The strength of the EU's response may be marked by the extraordinary meeting of the Withdrawal Agreement's Joint Committee (Commission, 2020) and discussion at the European Council (2020b), both of which strongly pushed back on the UK's move, while also strengthening work on EU preparedness for all outcomes of the TCA negotiations, including no agreement. The removal of the offending clauses to the Bill only occurred in mid-December, when the government conceded the matter as part of the final days

of those negotiations, but still after the House of Commons had finished its approval: while the House of Lords had rebelled several times over the wording, that would not have been enough to halt passage if the government had not given way. This demonstration of the capacity and willingness of the UK government to renege on its commitments marks as much of a failure for the EU in securing a stable and constructive relationship with the UK as any substantive aspect of the TCA.

III. Beyond the Trade & Cooperation Agreement, but beyond to What?

The Trade & Cooperation Agreement was supposed to mark and institutionalize the start of a new phase of the relationship between the EU and the UK following the end of membership. At the level of a legal instrument, this was successful, with the completion of ratification in April 2021. But at the political level, the impression is much less positive. In particular, there appears to be no clear trajectory for future relations, either in the implementation of the Withdrawal Agreement and the TCA, or in the use of these or any other means to conduct a stable set of interactions.

The process of negotiation was one that did nothing to improve relations between the two sides, and indeed likely worsened them as trust was undermined and the willingness to make accommodations reduced. The EU's concern about British adherence to the norms of international law have already been covered, but an equivalent dynamic was also evident on the UK side, as the traditional representation of the EU as an opponent of British interests fitted better the new realities of non-membership. The perceived otherness of the UK now had a material basis, coupled to a political imperative of performative divergence.

In addition, the increasingly problematic implementation of the Withdrawal Agreement – not aided by the Commission's brief mistaken mention of the Article 16 procedure in relation to vaccines in January 2021 (BBC, 2021) – laid the groundwork for questions about whether the same would be true for the TCA. Even with the various adjustment periods contained within the latter, the EU has repeatedly noted that the UK has not appeared to be undertaking the necessary work on infrastructure or policies to ensure that provisions are fully operational in time (Šefčovič, 2021).

Ironically, despite these concerns over implementation, the conclusion of the TCA potentially draws a line under any active efforts on either side to move things along: Hix's (2018) constraints still apply on what might be possible or even desirable. The EU has now secured both its fundamental interests in the Withdrawal Agreement and protected itself in the TCA, and appears to have minimal interest in pushing for any more cooperation. Brexit was certainly an important part of the EU's work since 2015, but it always had to share attention with other priorities: the very success of the model used for Article 50 in containing and managing the UK meant that European Councils spent minimal time on the matter after the Salzburg meeting of September 2018. Even with all of the issues raised, the UK remains one of the less actively difficult neighbours of the EU.

For the UK, the persistent issue (Usherwood, 2017, 2019) remains one of a lack of a strategic purpose to leaving the EU. The 2016 referendum served up a decision without a rationale and the only person ever in a position to back up a plan with a robust Parliamentary majority, Boris Johnson, has yet to map out how withdrawal fits into a

coherent vision of the UK's role in the world. The trope of 'Global Britain' sits very uneasily with the wilful refusal to consider any explicit cooperation with the EU on political matters, or to pursue a comprehensive economic integration. The EU appears now in British discourse as a more fully externalized 'other', to blame for problems and to position as a competitor. That this has continued beyond the TCA negotiations suggests that this was not a tactic, but a default setting, and one that will carry on for the life of this government.

This means that as imperfect and challenging as the new architecture of the relationship might be, it is going to be the one that will have to be used for the foreseeable future: neither side has an acceptable alternative, even if they were ready to endure yet more negotiations. Therefore, the real test is going to be the extent to which the UK is prepared to push the limits of the treaties and the extent to which the EU will tolerate this. With little sign in the first months of 2021 that trust-building is a priority, it must be expected that the relationship is one that will worsen before it improves.

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