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REPORT ON THE TRILATTRADE PROJECT: TRADE, REGULATION & IP POST-BREXIT

Enrico Bonadio, David Collins, Elaine Fahey, Luke McDonagh and Anthony Rogers
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REPORT ON THE TRILATTRADE PROJECT: TRADE, REGULATION & IP POST-BREXIT

Enrico Bonadio, David Collins, Elaine Fahey, Luke McDonagh and Anthony Rogers*

Abstract

TRILATTRADE examines three thematic strands in UK-EU-Japan relations going forward: overall economic law; regulation theory and data transfers; and IP law and policy. The ESRC-funded TRILATTRADE research project seeks to model the legal framework of the trilateral UK-EU-Japan Trade, Regulation and IP relationship. Trade, regulation and IP constitute three core pillars of international, national and regional economic law and policy frameworks. This is relevant to the functional operation of trade and its innovation. The project addresses these core pillars with three interlocking thematic strands: 1. UK-Japan Trade; 2. UK-EU-Japan Regulatory Cooperation and Data Flows; and 3. UK-EU-Japan Intellectual Property. The project aims to generate trade and business opportunities as well as models for good global governance in law and policy as a future research agenda.

Keywords: *Brexit, EU-Japan, Trade, Regulation, Intellectual Property, Data flows, WTO law- UK-Japan*

Introduction: UK-EU-JAPAN Trade and Investment

City Law School organised on 18 September 2019 a kick-off conference in London the ESRC funded 'TRILATRADE' project with partner Keio Law School, Tokyo, Japan and a report thereof follows herein of the core sessions. As the introductory session of the TRILATRADE conference, Session One's panel considered general issues in relation to trade and investment while focusing on facets which may affect the economic relationship between the UK, the EU and Japan in the coming years.

Yoshinori Abe of Gakushuin University began the session by explaining the ongoing problems facing the World Trade Organization (WTO)'s Appellate Body, captured primarily by the United State's blockage of the appointment of new Appellate Body members. Abe outlined the major concerns of the US, some of which are arguably justified, including the over-long length of proceedings and the propensity to engage in judicial activism where rulings have exceeded the bounds of the dispute in question. He drew attention to the recent dispute between Japan and Korea in relation to radioactive food products in which the Appellate Body reversed the finding of the panel in a manner in which some believed exceeded its mandate and without sufficient clarity in terms of reasoning. He concluded by suggesting that the Appellate Body, and indeed the dispute settlement system of the WTO in its entirety, may have simply been asked to do too much as a consequence of the inherent vagueness of the language of the WTO agreements. Building from this discussion, Makoto Shimada of Keio University evaluated the controversial and much maligned investor-state dispute settlement (ISDS) provisions of modern Free Trade Agreements provisions as they may apply to the EU-Japan FTA (JEPA). Although the JEPA includes commitments on Foreign Direct Investment (FDI) liberalisation, the negotiation process for dispute settlement regarding foreign investment has not yet been finalised. For its part the EU seeks the establishment of its investment court system (ICS), consisting of a more judicial structure with a standing body of pre-appointed judges, whereas Japan appears to prefer conventional ISDS, where ad hoc tribunals chosen by the parties resolve the disputes in a manner more aligned with commercial arbitration. Finally, Rikako Watai of Keio University explored recent developments in relation to national security review of FDI, drawing on policies established in the United States (formerly the Committee on Foreign Investment in the United States, now the enlarged Foreign Investment Risk Review Modernization Act), the UK (found in the Enterprise Act) as well as the interesting approach of Japan. She drew attention to the growing concern that national security issues have been used as a justification for blockage of FDI, especially in the US in recent years. This dilemma has arisen in part because national security tends to be viewed in self-judging language, allowing wide latitude for governments to exclude foreign companies on a wide range of grounds. She suggested that there is a risk that this strategy will emerge in the EU and possibly also the UK as it embarks on its plans to attract foreign investment after Brexit. The UK government in particular has undertaken a review of its regulation of FDI seeking the views of the broader public, academic and business community indicating that this will become an important sphere of regulatory policy in the UK. The

presentations delivered by these three experts were lively and provocative, leading to a brief, but stimulating round of questions from the audience, notably from myself (asking whether the Canada-EU joint agreement on using the arbitration system available in the WTO dispute settlement system could operate as a suitable temporary replacement of the defunct Appellate Body) and from Frederik Ponjaert (who queried whether a number of high profile disputes brought against EU Member states could cause Japan to rethink its support of conventional ISDS.)

JEEPA, Brexit & International Political Economy

Session 2 focussed upon the political economy and economics of modelling trade and regulation post-Brexit between the UK, EU and Japan. In Session 2 on the theme of 'JEEPA, Brexit & International Political Economy', Frederik Ponjaert, University Libre de Bruxelles, outlined the relationship between Brexit and political economy generally. He argued that for the foreseeable future the UK-Japan bilateral partnership will reflect a second order dynamic largely determined by other first order concerns. As such, more than any endogenous factors within the UK-Japan dialogue, future developments he modeled will be determined by the 2 interrelated partnerships with the EU - *i.e. EU-Japan & EU-UK* and the 2 weightier European partnerships with the US - *i.e. EU-US & UK-US*. The second hypothesis was that among these exogenous factors the ultimate nature of the post-Brexit EU-UK partnership will be the most determining factor when considering the future prospects of the UK-Japanese partnership. In this, the UK's strategic outlook will in certain aspects come to resemble that of a third-country within the EU's neighborhood. Finally, within the short-to-medium term energies on all sides of the EU-UK-Japan triangle will be concentrated on damage control, risk mitigation and cost alleviation. This will prove to be an ill-suited environment for new initiatives, notably in the absence of both autonomous and tried-and-tested cooperation platforms upon which to build the renewed UK-Japan dialogue

Minako Morita-Jaeger, UK Trade Policy Observatory, University of Sussex outlined the case of Brexit business uncertainty and the difficulty for business of engaging with the nature of the Brexit negotiations with respect to UK-EU-Japan relations. JEEPA was creating jobs and investment whereas Brexit was a case of uncertainty and raised difficult choices for business. UK was globally the third largest trade partner for Japan both in terms of imports and exports and the largest trade partner among the EU 28 (33% of Japanese services imports from the EU and 41% of Japanese services exports to the EU). The UK is globally Japan's second FDI destination and the largest FDI destination in the EU (38% of Japan's FDI stock in the EU). The question is how Brexit uncertainty and JEEPA would negatively affect the UK's presence as the top trade and investment partner of Japan from the mid to long-term perspective. Brexit uncertainty had caused Japanese business already to make complex decisions on trade and investment in the UK. There were considerable benefits from broader and deeper FTAs which eliminated tariffs and

Sonali Chowdhry, Kiel Institute for the World Economy outlined the EP-Bruegel Study on the EU-Japan Economic Partnership Agreement. The EU-Japan Economic Partnership Agreement (EUJEPA) was the largest bilateral trade deal ever concluded by the EU in terms of market size, covering close to 30% of global GDP. It included commitments not only on trade in goods but also services and the promotion of bilateral investment. The EUJEPA offered another benefit, which is more difficult to quantify but potentially very important. It comes from the fact that, together with the existing agreement with Korea and the agreements under negotiation with other countries in the region, the EUJEPA will boost the economic presence and political relevance of the EU in the Asia-Pacific area, which is likely to host most of the world's economic growth and activity in the years ahead. EUJEPA was a well-crafted agreement that will help promote cooperation between the parties, in their bilateral relations and also in the multilateral context. EU and Japan share common values of liberal democracies and closer economic and political cooperation will reinforce their ability to shape the course of global developments in a manner that better reflects these shared interests and values.

David Collins, City Law School, outlined the developments in UK international trade as to roll-over of FTAs and the agreement of trade deals with several third countries. Key international actors/ economies such as the US, EU and Japan remained under development. Collins outlined how one of the aims of Brexit was for the UK to establish an independent trade policy to capitalize on the growth of markets outside of the EU and to leverage the UK's own competitive advantage in various sectors. This would require: 1) establishing its position as a Member of the WTO; and 2) establishing bilateral or regional Free Trade Agreements with other countries. The former consists of, *inter alia*, establishing a tariff schedule for goods and establishing a schedule of non-discrimination and market access for services which will be offered to all other WTO Members (including the EU) on an MFN basis. The latter consists: of i) replacing the EU's FTAs (rolling over or continuity agreements); and ii) establishing new FTAs. On the latter point, the UK cannot conclude FTAs with third countries which go into effect before departing from the EU, but it can negotiate and sign such treaties before Brexit. Issues surrounded the UK's uncertified tariff and market access schedules at the WTO, ongoing tariff rate quota disagreements. There were significant WTO structural problems generally going forward and the UK was affected by the Global lack of progress on services liberalization. He outlined how there was a lack of progress on continuity agreements due in part to: i) ongoing Brexit uncertainty: timing, extent of independence from EU; ii) opportunism by trade partners, e.g. Canada due to 'preference erosion' as a consequence of UK's low applied MFN tariffs; iii) difficulty in negotiating trade agreements, especially with larger partners, e.g. US; iv) domestic political issues and ratification. The UK had to come to terms with the extent to which it wishes to open various aspects of its economy to foreign competition, especially in sensitive sectors such as agriculture.

UK-EU-Japan Law, Regulation & Regulatory Standards

In Session 3, the panel on EU-Japan regulatory cooperation and the EU as a global data actor

focussed upon a diversity of questions ranging from general questions of international economic law to the EU's international relations ambitions in free trade agreements. The panel also examined the connection between data and the EU's international trade agreements and their intersection and also the EU's efforts to disengage therefrom but subsequently to transmit considerable global power. The nature of the engagement with a global bloc was significant in its far reaching composition as one of the world's largest FTAs. Its Strategic Partnership Agreement negotiated alongside its FTA had a complex dynamic which was interesting and rich and the discussion of much debate in other panels.

Fumihiko Azuma, Nagasaki University outlined the principles and structures of regulatory cooperation as a series of interactions. EU-Japan EPA regulatory cooperation chapter provides not only regulatory cooperation but also good practice and includes regulatory coordination, harmonization and convergence. Regulatory cooperation is institutionalized by the Committee on Regulatory Cooperation which meets at least once a year. Public consultations when adopting and opportunity for anyone to submit comments for improvements of regulatory measures in force are ensured. Each party shall endeavor to carry out ex-ante impact assessment and to publish it, and maintain retrospective evaluation. Levels of protection of non-economic values are left to each Party to determine and the Parties are not required to set high levels of protection, except environment and labour protections provided in the Sustainable Development Chapter and safety standards provided in the Annex on Motor Vehicles, etc. EU-Japan EPA regulatory cooperation chapter provides not only that between both Parties but between Parties and 3rd countries.

Maiko Meguro, University of Amsterdam, Ministry of Economy, Trade and Industry of Japan outlined the complex place of neoliberalism capture in international economic law. She outlined the complexity of interest representation in negotiations and unity in external action. Public interest representation. She further outlined how cross-border economic activities had significantly increased, on a progressive path to a more open and more connected world. Or at least, this is the common perception at the time. Yet, in the past few years, the wave of backlashes against the liberalist international order (liberalism being understood here as is defined by Deudney and Ikenberry 1999) has been sweeping the world, Brexit and the fate of the Trans-Pacific Partnership being illustrations thereof, thereby igniting debates about what seemed, until recently, an irreversible trend

Elaine Fahey and Isabella Mancini, City Law School outlined the evolution of EU as a global actor and reflected upon whether the EU was an intentional or accidental convergence actor in EU-Japan relations. Initially, the EU had sought to exclude data. After the adoption of its adequacy decisions in 2018. They argued that convergence and institutionalisation appeared as outcomes of the EU accepting to engage in data dialogues with Japan - not foreseen by the EU. It was an important coincidence that during trade negotiations Japan insisted on data - and the

EU accommodated the demands - resulting in 'accidentality' of ending up with negotiating adequacy decision with Japan. Convergence and institutionalisation were important 'accidental' outcomes of the adequacy decision and show the EU to be a flexible global trade actor. The European Union and Japan agreed to create the world's largest area of safe data flows and the scale of this innovation is worthy of reflection. The EU and Japan have recently agreed on a reciprocal recognition of the adequate level of protection. This process is of interest given the scale of the agreement but also the broader parameters of how a partner proposes a field not aligning with EU interests and ends up becoming subject to significant EU institutionalisation procedures. The EU-Japan negotiations are worthy of reflection given the scale of data transfer involved and the inevitable institutionalisation at play despite varying considerably from the EU's initial goals.

Machiko Kanetake, Utrecht Law School outlined the nature of the EU-Japan adequacy decision and the concept of equivalence in data protection in EU-Japan relations. She outlined reforms to Japanese protections in the Revised Information Protection act 2015, including guidelines and supplementary rules. She reflected upon a principles and rights based approach and a balancing approach. Equivalence had to be contextualised in this situation- there was a diversity of methodologies deployed, from the formalistic to the legalistic and political.

Selected IP Issues of the Trade Relations between UK, EU and Japan

Session 4 dealt with various intellectual property (IP) related issues of the trade relationship between the UK, EU and Japan.

The panel kicked off with a presentation by Kazuhiro Ando, Toyo University highlighting the differences between the Japanese and European music industries, and the different ways copyright laws in the two blocs regulate such industries. Ando argued that the music industry in Japan faces unique challenges. CD sales have long been the lifeblood of the industry but are falling. Management companies and artists are attempting to try to survive this difficult period by boosting concert, merchandizing, and fan club business activities (in a way which is far more pronounced than it is in Europe). Yet, some record labels in Japan have shifted activity from the record business to animation business.

The following talk was jointly given by Luke McDonagh and Enrico Bonadio, City Law School and focused on the IP aspects of JEPA (Chapter 14 of the agreement). McDonagh noted that this agreement extends the protection of copyright in Japan to up to 70 years after the death of the author of the copyright work (bringing it in line with EU/UK and US standards). However – McDonagh pointed out - neither the EU's Digital Single Market nor JEPA deal adequately with the problem of online licences for broadcasting and streaming. Indeed, licences are territorial for lucrative sports, tv, film, music – there is no single licence for this even in the EU Digital Single Market (which is why e.g. Netflix and Youtube libraries can vary from member state to Member

state). The lobbying power of rights-holders - McDonagh added - has frustrated attempts to do this – but as the provision of online services becomes more and more global it may become subject to trade negotiations just as goods have done. Bonadio then focused on the protection of geographical indications in JEPA. He noted that, while the EU has obtained strong protection in the Japanese territory for a long list of European geographical names for food and wines/spirits (including Champagne, Prosecco, Scotch Whisky, Prosecco, Parmigiano, Stilton, etc), Japan has got the same protection in the EU territory for far fewer indications (for example, for Kobe beef). Indeed, when it comes to the protection of such geographical names, the EU has always been “on the offensive” in the context of trade negotiations with other partners (see the agreement with Canada, South Korea, etc.). JEPA has been no exception. Bonadio then noted that post-Brexit UK will have to negotiate with Japan in order to keep the same protection for its own names (such as Scotch Whisky and Stilton cheese), which may not be an easy task. Plamen Dinev, City Law School gave the third presentation, focusing on the intersection between 3D printing and IP – a current growth area of technology that could impact upon international trade. He noted that 3D printing is now a multi-billion industry which has introduced significant changes to the way a large variety of products are made, with applications ranging from use in the automotive and medical sectors to domestic manufacturing. As the EU, UK and Japan are global leaders in this technology as well as top patent filers in the field— Dinev added - it is essential to ensure that their intellectual property systems are not only conducive to innovation and economic growth, but also compatible with all aspects of the technology and able to facilitate its wider adoption by the general public.

Finally, Diana Filatova, City Law School expanded on the role of arbitration in the field of IP, and the extent to which such method of dispute resolution could be relied on to determine IP disputes between manufacturers and distributors in the EU, UK and Japan. Arbitration is the major mechanism for resolving international IP disputes so knowledge of arbitration is crucial in the trade & IP context. Leading IP companies – Filatova reminded - are often involved in IP multijurisdictional litigation, with international arbitration increasingly being a more suitable option allowing parties to shorten time and cost of proceedings. Arbitration indeed possesses additional advantages in contrast to litigation including worldwide enforceability, freedom to choose an arbitrator with specialised knowledge, limited appeal option, and confidentiality. Nevertheless, Filatova argued that there are still some issues making arbitration quite a controversial method of IP enforcement, including the fact that in several jurisdictions certain IP aspects (eg validity of IP rights) cannot be subject to arbitration.

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