



**British Institute of  
International and  
Comparative Law**

# Trade (Law) in an Age of Trump and Brexit

## 5<sup>th</sup> December 2018

On 5<sup>th</sup> December 2018 BIICL hosted an event entitled 'Trade (Law) in an Age of Trump and Brexit'. The event analysed the future UK trade relationship with the EU and third states, the US-China 'trade wars' and the practical implications of both Brexit and Trump's Administration on the international trade regime and its structures. The panel, chaired by Julinda Beqiraj (Bingham Centre for the Rule of Law), included Federico Ortino (Kings College London and Clifford Chance), Yuka Kobayashi (SOAS, University of London), Lourdes Catrain (Hogan Lovells) and Lothar Ehring (Directorate-General for Trade, European Commission). The event was convened by Héctor Tejero Tobed (BIICL). The speakers shed light on the challenges that the new trend of protectionism and unilateralism in international affairs appears to have brought to the area of trade.

Julinda Beqiraj introduced the topic with a call for multilateralism in trade. Building on these words, Yuka Kobayashi addressed China's current role in international trade. She noted that although fragmentation and nationalism were the underlying themes of Brexit and Trump's Administration, China appeared to be the exception, by trying to align itself with international rules. She observed that China has been progressively more active in the WTO and more assertive in international negotiations. Kobayashi interpreted this as an assertion of power by China. In the context of the US-China trade war, she noted that both States are competing to be the next hegemonic power in trade. Indeed, she held that Trump's Administration can be China's opportunity to have an input in the world order by supporting globalisation and international institutions. An example of this is the Belt and Road Initiative, a commercial and security connectivity network through which China is reaffirming itself. Additionally, Kobayashi acknowledged the ideational side of US-China confrontation. Besides a material dispute, both States are competing for whose trade ideas and interpretation of the global order will win.

Federico Ortino based his intervention on the assumption that the UK will leave the EU with a deal. He examined the draft agreement of 14 November 2018 and its political declaration and focused on regulatory issues. Ortino outlined that the exact terms of the ambitions expressed in the political declaration could be found in any recent FTA negotiated by the EU. Equally, he noted that the same technical aspects and instruments of the declaration could be found in a regular FTA.

Furthermore, Ortino held that where references to regulatory alignment were made, it will in practice mean UK unilateral alignment with EU law. He emphasised that the future relation

between the UK and the EU, rather than creating a supranational entity that produces common harmonised rules, will ensure the autonomy of EU's decision making. Even if a highly integrated relationship of the EU with a third party which envisages some kind of bilateral rule-making is technically possible, Ortino noted that this is not a current political priority of the EU. He observed that there is no likelihood of bilateral rule-making power in any future agreement.

Lourdes Catrain brought her views from practice. First, she noted that, as far as multilateral system was concerned, Trump's Administration had entailed a complete breakthrough of US trade policy and rule of law. She observed that the US, once the leader in the WTO system, was now dismantling a regime it has previously used with a high rate of success.

In this context, Catrain stressed the importance of grounding EU's response to US trade war in the rule of law and the rules-based international order. She held that the European Commission found it very difficult to adopt its decision to act in retaliation against US tariffs on steel and aluminium imports. Nevertheless, she underlined that although the US is an essential trade partner for the EU, other countries such as China were also vital players.

Lothar Ehring focussed his intervention on the US and its trade wars with the EU and China, and on its attack to the WTO Appellate Body. Particularly, he addressed US's recent tariffs to steel and aluminium imports, its reliance on article XXI GATT, countermeasures by other States and the debate around this, such as the justiciability of article XXI or the relevance of the Swedish shoes case.

In addition, Ehring noted that both bad lawyering and propaganda had been effective in spreading US's views on WTO Appellate Body, namely that it had added obligations and diminished the rights of the US. On the contrary, he argued that the US is actually "bullying" judges at the WTO Appellate Body. He posited that, in a rule of law-determined system, open criticism of judges erodes their impartiality and independence, both of which are essential for adjudication. Further, he commented on the US position of not appointing new judges nor extending the terms of the current ones and observed some of the options available to address the challenges this poses. Finally, he speculated on the real prospects of the Appellate Body and suggested that the actors involved may have to come up with an answer to questions on where they were and what they did in 2019.

The interventions were followed by a vivid round of questions and comments which raised points such as market-economy status for China, and UK and EU's approaches to trade relations with China under the current trend of US protectionism and Brexit.

Héctor Tejero Tobed

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