

The sovereignty illusion: freedom to set one's own rules has a high price

As the clock ticks down to 31 December 2020, the UK government has [repeatedly invoked](#) the concept of 'sovereignty' to explain the UK's reluctance to enter into an FTA with the EU. In this blog, **Clair Gammage** and **Phil Syrpis** (University of Bristol Law School) explore the contradictions of navigating the post-Brexit world as a 'sovereign' state for the UK.

We are, by now, all too familiar with the language of 'take back control' and 'Global Britain' – rhetoric that is rooted in a particular understanding of sovereignty. However, the justificatory use of the concept of sovereignty to reject aspects of the potential trade deal is a 'red-herring': it is an illusory concept that detracts from and [presents obstacles to the conclusion of any deal](#). The very [nature of trade negotiation is rooted in interdependence](#) and is antithetical to the purist notion of independence conveyed by the [peculiar definition of sovereignty](#) that is undermining the Brexit negotiations.

In what follows, we contrast three situations – remaining part of the single market and customs union, having a free trade agreement between the UK and the EU, and leaving the EU with no future relationship deal. Our aim is to sketch the implications of each situation for borders and free trade and to problematise the very different notions of sovereignty in each situation.



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Single Market: Pooled Sovereignty

There are two ways to understand the concept of sovereignty in the context of the EU's Single Market. If sovereignty is about absolute power, then each Member State of the EU cedes a degree of that absolute power in exchange for certain benefits and incentives. In that respect, each Member State relinquishes the absoluteness of its sovereignty. However, sovereignty can readily be understood in a very different way. In an interdependent world, sovereignty can be *pooled*, giving states influence – and a degree of control – not only in their domestic market but also in the markets in which they trade. If sovereignty is understood as ['protecting a country's interests'](#), then the UK's sovereignty was not diminished, but rather enhanced, as a result of its membership of the EU Single Market.

In terms of borders, the consequences of membership of the single market are profound. Tariffs and most border checks on intra-EU trade are eliminated, and there is a common external tariff. States made the decision to work towards the creation of a European single market to realise the benefits which a larger market would yield. Nevertheless, they were, and remain, acutely aware of the risks and dangers in opening up their own domestic markets to people, goods and services from other states. So, an intensive infrastructure characteristic of a deep integration model has developed. In many areas, an agreement has been reached on harmonised standards. These are not imposed on the member states by the EU, rather they are created by common institutions in which the interests of each member state are represented. In many other areas, there is a presumption of mutual recognition – goods lawfully made in one member state are presumed to be lawful in all other member states (though this presumption may be rebutted where states can justify restrictions on free movement under a common legal framework).

Brexit can be seen as a demand to be free from this intensive infrastructure. The EU is depicted as creating rules, and enforcement mechanisms, which constrain the freedom of the member states. This EU strait-jacket is said to offer a contrast with the position the UK would enjoy outside the union. And, yet, as we shall see when we examine the alternatives, the free flow of goods and services within the Single Market (albeit subject to technical legal and regulatory frameworks) is only possible because each Member State has, to better protect its interests, relinquished a degree of its absolute power.

Free Trade Agreements: Interdependence Sovereignty

Early in the Brexit process, it became clear that the UK was not seeking to retain its place within the single market. Instead, it sought a relationship with the EU based on a free trade agreement, indicating a desire for a shallower type of integration. The pooling of sovereignty is, under this approach, perhaps a 'step too far', but the existence of large trade flows between the UK and the EU and the interdependence of the UK and the EU economies, indicates that there are transactional benefits for both sides of creating a new relationship which [eliminates the need for some, though not all, regulatory checks](#).

In all FTAs, the presumption in favour of mutual recognition which characterises the EU single market disappears. Instead, it is incumbent on traders to show that they comply with the agreed rules. FTAs vary in scope and ambition. The [Regional Comprehensive Economic Partnership](#) (RCEP), the largest FTA in the world, was recently concluded by countries in the Asia-Pacific region and adopts a comparatively shallow model of integration that requires and reflects significantly lower degrees of interdependence. The UK and the EU have greater ambition. The stated aspiration is to conclude a '[Canada-style](#)' deal – a type of FTA that liberalises beyond trade in goods and aims to achieve regulatory convergence on standards, including concerning labour and environment (the '[level playing field](#)' issues of the Brexit negotiations). Given that the EU will no longer have recourse to the intensive enforcement infrastructure available within the single market, it has sought to insist that the UK continues to meet the EU's standards (or to have broadly equivalent standards such as not to distort competition within the EU's market) as a precondition to the agreement of an FTA.

What has characterised the negotiations over the past months is that the UK and the EU have not sought to identify areas of common interest, in which mutual commitments can be made to facilitate trade. Instead, and even though we start from a position of alignment, the UK has loudly insisted on its 'sovereign' ability to make its own choices, and to remove itself from the EU's regulatory orbit. The notion of sovereignty has become a sticking point for the UK government in the negotiation toward a Canada-style FTA in two key areas: the level playing field (including non-regression clauses and the '[ratchet clause](#)') and fisheries.

There is a noteworthy contrast with the UK's negotiations with the EU and those which it is conducting with the wider world. In its other FTA negotiations, the UK has merely [rolled-over existing agreements](#), including its [preference schemes](#) with developing countries. The decision to simply roll-over existing FTAs, rather than seek to negotiate new terms with existing trade partners, provides reassurance and certainty to businesses but there are perhaps missed opportunities for the UK to leverage its sovereignty in these relationships. The recently signed [UK-Japan](#) and [UK-Singapore](#) agreements appear to mirror pre-existing EU agreements, leaving the UK with '[no change, no gain](#)'. Concerning fisheries, while the [deadlock between the UK and EU on fisheries](#) has not been overcome, the UK has already signed [four memoranda of understanding](#) with Greenland, Norway, Iceland and the Faroe Islands. Arguments based on 'absolute sovereignty' are thereby diminished and contradicted by the UK's readiness to enter into binding commitments with other states for mutual benefit.

World Trade Organisation terms: Absolute Sovereignty?

These two positions can be contrasted with the situation which would prevail in the event of no deal – the sort of outcome which has appeal to those making the most absolutist arguments about sovereignty.

In this situation, which would be the result of a failure to make commitments to the EU about its future regulatory choices, the UK would face the full panoply of tariffs and regulatory checks on its trade with the EU and with other states. The UK, as a member of the WTO in its own right, has [schedules of tariffs and concessions](#) which are in the process of being certified at the WTO. It is estimated that the pivot to 'no deal' will have a [bigger long-term economic cost than COVID](#) with the [LSE report](#) estimating that the economic fall-out in the no-deal scenario will be two to three times worse than the effects of COVID. The harmful economic effects will not just be felt in the UK; companies in the EU, [like BMW](#), are now expressing concerns about the higher economic cost associated with the shift to WTO tariffs.

Beyond the huge economic effects of no deal, there remain misconceptions about the WTO implicit to the arguments around absolutist conceptions of sovereignty. The WTO is a global institution that operates through committees, groups and coalitions: it is an institution that is fundamentally rooted in *negotiation*. So, while the UK will be a sovereign actor, it will nonetheless be bound by rules and standards negotiated alongside the other 163 Members. Its freedom to act is not unfettered; rather, the UK – like every other WTO Member – will be bound by the decisions taken by consensus. Furthermore, the core principles of Most Favoured Nation (MFN) and national treatment curtail the UK's ability simply to set its own terms of trade. As [Stephen Woolcock](#) pointed out, 'the WTO is a predominantly rules-based trading system based on consensus and cooperation, as opposed to a power-based system in which the unilateral use of market power alone determines outcomes'. Moreover, the WTO is a system in crisis: its dispute settlement system is no longer fully functional, the only [remaining Appellate Body member's term has now expired](#), and the escalating [China-US trade war](#) has threatened the existence of the institution. Brexit is yet another aggravating factor – a disruptor – to the regulatory structures governing global trade. The [UK's failed attempt](#) to lead the institution should come as a warning shot to the government that any attempt to articulate a Global Britain narrative may be met with scepticism by other nations. Despite these disruptors, there remains support for a [modernised WTO](#) and there is renewed hope that the shift in US Presidency, and the appointment of the new US Trade Representative, can [help steer the institution in a new direction](#). The UK should, therefore, carefully reflect on the role it seeks to play in the WTO going forward.

The technical rules of the WTO extend far beyond tariffs to issues like intellectual property, services, domestic support (subsidies), trade remedies, and regulatory disciplines like [technical barriers to trade](#) and sanitary and phytosanitary measures. Companies need to prove the origin of their products under complex rules of origins procedures and comply with the certification and customs procedures of each trading nation to gain market access. Even as an independent WTO member, it is unlikely that the UK can set a course that is separate to, or distinct from, the EU's 'rule maker' and '[standard-setter](#)' approach. It does, therefore, seem increasingly likely that the UK will either align with the EU to lead the way on regulatory issues or simply become a 'rule-taker' like other nations. Even under WTO terms, the UK is not going to have absolute control of its laws, regulations, and other trade policies.

Conclusion

The conclusions are stark, and in many ways, unsurprising. We have focused on the performativity of the 'sovereignty' narrative and problematised the (many) ways in which the UK government has justified Brexit decision-taking based on sovereignty. We have demonstrated that the freedom to set one's own trade rules comes at a significant cost, and in any event, that it is not, even within the confines of the WTO, absolute. The very real risk is that the UK has, at every stage in the Brexit process, sought to exchange the real power which it has to shape European and global standards for '[a chimaera](#)'.

This article gives the views of the authors, and not the position of LSE Brexit, nor of the London School of Economics.