

Trading with the UK post-Brexit EU, UK and the WTO

Petros C. Mavroidis

*Edwin B. Parker Professor of Law at Columbia Law School, New York City
& Professeur de droit à l'Université de Neuchâtel*

The Argument (into the Great Wide Open)

- ◉ In principle, both EU- as well as WTO law are applicable but none of them addresses the issue head on
 - EU law (50 TFEU) calls for negotiations in general
 - Jan Wouters will deal with this
 - WTO law is silent on break up of customs unions (CU)
 - EU is more than a CU but WTO covers FTAs and CUs only
- ◉ Unclear whether there is sequence or whether we could be facing two parallel processes
- ◉ Pragmatic solutions can be designed but depend on cooperation by the rest of the WTO membership

Working Hypothesis

- ◉ EU does not want to negotiate with WTO membership
 - EU schedule for EU-28 stays as is for EU-27
 - EU has certified EU-25 (need to certify EU-28 and make it EU-27)
- ◉ Hypothesis is mere facilitating condition
 - In this scenario only UK negotiates with WTO
 - If EU adjusts its schedule as well EU follows the path we detail below

UK-Rest of WTO

Rocky Road Ahead



MFN Trade in Goods (Three is a Crowd)

No Specific Solution, But ...

What Should Exiting a CU Mean?

- ◉ WTO addresses expansion of FTAs, CUs, not exit from them
 - Exit from FTAs, CUs should mean return to MFN trade
 - For FTAs, not an issue since they do not involve common external policy, hence no need to adjust schedules
- ◉ Since EU is a CU, we need to ‘construct’ the UK MFN rate
 - UK is a member of WTO → no need to apply for accession

Return to MFN Trade Means ...

- ◉ UK will have to deposit a new schedule
- ◉ Could base itself on EU schedule but would need to adjust
 - TRQs/AMS for farm goods (size → not much of an issue for EU)
- ◉ UK will use 1980 procedures to notify its new schedule
 - If parties agree to new schedule, end of story
 - If not, negotiations will start between UK and rest of the WTO
- ◉ Disagreement is quite likely
 - WTO members will anyway lose since TRQs negotiated will not allow them to circulate goods (not sold in UK) in EU market

The Benchmark for Compensation in UK/WTO Members Negotiations

- Benchmark in XXIV.6: trade created vs. trade lost
 - Negotiations are embedded in SECRET documents
 - We can infer in what reciprocity consists by comparing pre-existing tariff levels to notified bilateral deals
 - Could find application in CU break-up
- Negotiations based on XXVIII GATT (reciprocity)
 - If agreement is reached, end of story
 - If no agreement has been reached, UK can still go ahead and apply its notified tariffs, but risks retaliation
 - Litigation cannot be outright excluded
- Recall DG Dunkel:
 - Reciprocity cannot be described accurately, it can only be agreed upon



Preferential Trade (UK and Friends)

Mixity does not Guarantee Participation in Existing FTAs between EU and Third Parties

- ◉ EU FTAs are signed as mixed agreements
 - Difficult to see how it will be otherwise in future (2/15; Juncker)
- ◉ Does ‘mixity’ mean that UK has the right to continue as member of the FTA, and the only remaining question is under what terms?
 - EU law is the relevant body of law
 - Mixity does not mean UK has self-standing participation right in FTAs signed by EU already
 - UK can apply for entry and terms will have to be agreed with the EU and third countries

UK Can Sign its Own FTAs

- ◉ The relevant body of law is XXIV GATT
- ◉ De facto it is almost never respected
- ◉ Good news is that it is almost never litigated
 - Collective action
 - Strategic thinking
 - ‘Incomplete’ integration is beneficial for outsiders when substitutes are being traded (opposite for complements, but less of an issue)
- ◉ There is already talk that UK will be active on this front

UK GSP

- ◉ UK can stop providing preferences to developing countries
 - Might risk an NVC
- ◉ It is free to decide whether
 - It wants to adopt its own GSP
 - In this case, it must respect the disciplines embedded in the Enabling Clause
 - Drop preferences altogether

Is the Picture Any Different with Respect to Trade in Services?

- ◉ There are some UK-specific reservations in EU schedule
- ◉ UK could retain them in the new schedule that it will submit
 - 1980 Procedures obtain here as well
- ◉ If rest of WTO agrees, end of story
- ◉ If not, XXI GATS negotiations will kick start (*à la* XXVIII GATT but with compulsory recourse to binding arbitration if no agreement has been reached at the end)

UK-EU

The Sky is the Limit

Velvet Divorce and a New Start



Modelling

- Various authors have proposed various models for the future EU/UK relationship (Brexit)
 - De Grauwe (2016) discusses the pros and cons of Norway-, Turkey- etc. options
 - Pisani-Feri et al. (2016) explain why migration is not *conditio sine qua non* of single market

Beyond Brexit, an FTA, or a CU or Even a CM

- ◉ EU/UK can decide between various options
 - FTA
 - CU
 - Common Market (free movement of factors of production)
- ◉ WTO addresses conditions for establishment of first two, but has nothing to say on conditions for deeper integration
 - If at all, it facilitates deeper integration in this case, since migration (a hot potato in EU/UK relations) is not covered by Mode 4
- ◉ Risk of litigation is quite low (in case notified scheme does not meet XXIV GATT/V GATS standard)