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Negotiating International Trade Treaties after Brexit

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The outcome of the referendum of 23rd June 2016 has focused attention on two formidable tasks, namely the divorce arrangement between the United Kingdom and the EU and the agreement on the future relationship between the two parties. There is, however, a third layer of uncertainty and complexity that the UK would have to face as a non-Member State, that is its trade relations with third countries.

Renegotiating trade agreements

The existing trade relations between the UK and third countries are governed by two types of international agreements. The first consists of agreements concluded by the EU alone the content of which falls within the EU's exclusive competence.¹ These agreements only bind the UK as a matter of EU law pursuant to Article 216(2) TFEU. Trade agreements binding on the UK are also mixed, concluded by both the EU and the UK (along with the other Member States), given that parts of them fall within the scope of national competence.²

The implications of Brexit for the legal position of the UK under both types of agreements would be profound. As far as exclusive EU agreements are concerned, they would not be applicable to it once the UK ceased to be a Member State. As for the mixed agreements, most would have to be renegotiated as they are, in essence, of a bilateral character. They are concluded 'of the one part' by the EU and its Member States and, 'of the other part', by the third country and refer to the UK in its status as a Member State of the EU. The Free Trade Agreement with South Korea, for instance, defines the parties to it as 'the European Union or the Member States or the European Union and the Member States' (Article 1(2)). This is further borne out by the wording of these agreements, as reference is made to Member States as 'Contracting Parties to the Treaty on the European Union and the Treaty on the Functioning of the European Union, hereinafter referred to as the "Member States of the European Union"'. This is in contrast to other agreements with groups of countries where each country is referred to separately. For instance, the 2012 Association Agreement between the EU and Central American States defines its parties as 'the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, referred to as the "Republics of the Central American Party"' (Article 352).

¹ See, for instance, the EU-South Africa Agreement on trade in wine [2002] OJ L 28/4.

² See, for instance, the Free Trade Agreement with South Korea [2011] OJ L 127/6.

It follows that, once the UK left the EU and lost its status as a Member State, it would also cease to be a party to the Agreement. This argument is also borne out by a clause in a large number of mixed agreements on their territorial application. The EU-Central America Association Agreement, for instance, makes it clear that it applies only, as far as the EU is concerned, 'to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties'.³

The conclusion that such mixed agreements would have to be renegotiated is also supported by their context. These are package deals, and part of the package is the status of the UK as a Member State of the EU. Third contracting States may well argue that the withdrawal of the UK would amount to a fundamental change of circumstances pursuant to Article 62 of the Vienna Convention on the Law of Treaties.

The option of 'rolling over'

It has been argued that, instead of renegotiating substantive provisions of trade agreements, the UK would simply agree with third countries a 'rolling over' of the provisions of the existing agreements. This argument, however, would give rise to considerable uncertainty. Trade treaties are the outcome of long and complex negotiations and of package deals and compromises reached in a very specific policy context. Once the UK relied on the good will of a third country to extend these deals in a completely new context, it could not be certain that the latter party would resist the temptation to unravel specific aspects of the deal. It is difficult to envisage, for instance, the automatic rolling over of an existing trade agreement concluded by the EU without adjusting the quotas already applicable to trade between the UK and the third country concerned. Even if third countries felt no need to amend the substantive provisions of an existing agreement, the UK would be asking, in effect, to be bound by obligations previously negotiated by the EU in a completely different policy context. It is difficult to see how this arrangement would be consistent with the quest for flexibility in international trade negotiations that underpins the Brexit argument. The rolling over of existing trade agreements, therefore, would involve renegotiation of at least some of their provisions.

The profound difficulties of renegotiating

Renegotiating trade agreements is bound to be a long and complex process. First, the UK has not negotiated trade agreements for over 40 years. This is because the competence in this area has been transferred to the EU. Whilst there is no doubt that British diplomats and civil servants are highly skilled, this is a muscle that they have not flexed for a very long time. It is for this reason that there is a paucity of trade

³ [2012] OJ L 346/3 (Article 360).

negotiators in the UK. According to a former permanent secretary at the Foreign Office, Britain had only 20 'active hands-on' trade negotiators.⁴

Second, there is an increasing tendency in international treaty-making for big package deals. This is illustrated by the Deep and Comprehensive Free Trade Agreements that the Commission has been advocating since the mid 2000s. These are more ambitious than traditional trade agreements: rather than focusing on the more straight-forward trade restrictions (such as tariffs), they aim to reach the highest possible degree of liberalization in areas such as services and investment, to cover intellectual property rights and competition, and to include provisions on labour and environmental standards. In addition to the Agreement with South Korea, such treaties have been finalized with Singapore, Vietnam, and Canada. For instance, when it enters into force, the Comprehensive Economic and Trade Agreement with Canada (CETA) will grant EU firms access to public procurement of federal, provincial and municipal authorities (with certain exceptions) in Canada. This is the most extensive access that Canada has given to any of its trading partners. Such big deals require big markets to support them. And whilst the UK market is not inconsiderable, it cannot compare to a market of 500m people. Neither can it compare to a market access to which would also guarantee access to a market of 500m people.

Third, such agreements take longer to negotiate. A case in point is CETA: negotiations started in 2009 and the agreement is not yet in force. Long negotiations, however, are by no means confined to the EU: the trade agreement between Canada and South Korea, for instance, took 14 rounds of negotiation over 9 years to conclude. This point is borne out by the letter that eight former US Treasury Secretaries sent to *The Times*: '... as our experience in the United States with trade negotiations shows it is a difficult environment to negotiate and approve agreements and the risk of accidents is real'.⁵

During the negotiations of a settlement with the EU under Article 50 TEU, the UK would be prevented, under EU law, to negotiate separate trade agreements with third countries. This is because the UK would still be an EU Member State during this period and, as such, it would have no competence to negotiate trade deals with third countries (with the exception of Common Foreign and Security Policy, the power to negotiate international agreements is exercised by the Commission pursuant to Article 218(3) TFEU). Even if, in legal terms, a pragmatic solution were found enabling the UK to negotiate informally with third countries during the Article 50 TEU period, it would require the good will of the EU institutions. The UK would also find it profoundly challenging to negotiate with third countries whilst engaging with complex negotiations with the EU.

⁴ *Financial Times*, 4 July 2016.

⁵ *The Times*, 20 April 2016, p9

Even under the agreements negotiated by the EU and which have been praised as examples of what the UK could get, there are limits to trade liberalization. For instance, under CETA, UK beef and sheep exports to Canada above a certain quota are subject to a higher tariff. There are also restrictions on airlines and motor manufacturers. Would the UK fare better on its own? A country which is often praised as an example of an effective and lithe trade negotiator is Switzerland (with particular emphasis on its trade agreement with China). And yet, that agreement is unbalanced, whereas the trade agreements that the EU has concluded with South Korea or Canada are more ambitious and comprehensive.

Finally, the negotiation of trade agreements requires the will of the UK's interlocutors to enter into this process. This would be shaped inevitably by the above and other policy factors. This point was made by President Obama during his recent visit to the UK ('I think it's fair to say maybe some point down the line but it's not going to happen any time soon because our focus is on negotiating with the EU. ... The UK is going to be at the back of the queue'). This was not the first instance that the US policy on this point was expressed: the US Trade Representative, Mike Froman, had already stressed that the United States was focusing on regional trade negotiations (Trans-Pacific Partnership, TTIP), and said that Washington was 'not particularly in the market' for a trade agreement with a single nation like the UK. He stated that the US would apply the 'same tariffs and other trade-related measures – as China, or Brazil or India'.⁶

The position under WTO rules

The argument has been made that the application of WTO rules to the relations of the UK with the rest of the world would be both automatic and satisfactory. This argument, however, would give rise to considerable uncertainty and legal problems.

The rights, commitments and concessions of the UK under WTO rules are currently tied in with those of the EU. After it left the EU, the UK would no longer be covered by the common schedules which the EU submitted for all the Member States. Instead, it would have to draw up and submit its own schedules of concessions and commitments on market access, as well as its own list of exemptions from the MFN treatment obligation. These would have to be accepted by all other WTO members.

The WTO membership of the UK is not controversial. It would have, however, to be negotiated. And no negotiation is without complexities or surprises. There is, for instance, an inherent element of uncertainty in so far as one or more WTO member may be tempted to make life difficult for the UK – either in order to make a political point, or in order to modify their own schedules in response to the UK request. After all, this is a package deal - once an aspect of it is up for amendment, the whole package might be unraveled.

⁶ *Financial Times*, 28 October 2015.

From a substantive point of view, and the above difficulties notwithstanding, the application of WTO as a fall-back option would have a negative impact on the trade relations of the UK with the rest of the world. On the one hand, it would entail the increase of tariffs for a range of products. On the other hand, the liberalization that it would provide for in the areas of services is far more limited than that advocated by the UK. These points were made clearly by the WTO Director-General Roberto Azevêdo during the referendum campaign.⁷

Conclusion

Post-Brexit, it would take the UK considerable time and energy to redefine its trade relationships with the rest of the world. The legal and practical complexities would be staggering, and the UK would have to tackle them while lacking experience in international trade negotiations.

⁷ *Financial Times*, 26 May 2016.