The Practical Operation of UK Trade & Investment Policy post-Brexit

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Introduction

In discussions of Brexit, there has been plentiful coverage of alternative models for the UK's future relationship with the EU – the "Norwegian" (EEA) model, the Turkish" (customs union) model, or the "Swiss" (negotiated agreements) model. There is also continuing discussion of the UK's options in terms of the trading links that the UK could form, post-Brexit, with other trade partners. There has however been much less focus on another aspect - the practical and institutional preparations that will need to be made to equip the UK, after leaving the EU, to pursue its own independent trade and investment policy. These preparations will need to be made, regardless of the final outcome of negotiations on leaving the EU or on the UK's future partnership with it. This briefing paper examines that aspect.

Since 1973, the UK's trade policy – though not its investment protection policy[1] – has been pooled within the framework of the EU's Common Commercial Policy (CCP). Throughout these 44 years, successive British governments have been strong supporters of the CCP, and have generally succeeded in making its overall thrust one that upholds freer trade world-wide and a rules-based international trade policy framework. For more than a third of Britain's membership of the EU the post of Trade Commissioner has been held by a Briton (Christopher Soames, Leon Brittan, Peter Mandelson and Catherine Ashton).

The principal agent in the operation of the CCP has been the European Commission, in which trade is a key portfolio. It is the Commission that has been mainly responsible for developing the policy, conducting commercial relations with third countries, and negotiating trade agreements under mandates laid down by the EU member-states in the Council. Similarly, responsibility for the institutional framework for the day-to-day conduct of the CCP – the performance of WTO membership obligations, the operation of the tariff, the use of trade defence instruments, and measures of all kinds implementing trade and investment agreements – has been a matter for the EU, aided by the competent authorities in member-states. Beyond these central areas of the CCP there has also been the EU's role in trade-related activities such as the imposition of sanctions and strategic export controls. For the UK, Brexit will mean that all these EU responsibilities are repatriated to the UK and discharged by the UK authorities.

This briefing will divide this wide-ranging subject-matter into six broad areas:

- The UK's trading position outside the EU (including outside the EU Single Market and any customs union with the EU);

[1] Investment protection did not form part of the EU's Common Commercial Policy (CCP) until it was included in the CCP under the Treaty of Lisbon (2007)

- WTO membership and obligations;
- Legislation enabling the UK authorities to perform trade-related functions under the WTO agreements;
- Agreements with third countries, their conclusion and implementation;
- Trade and preferences for developing countries; and
- UK domestic institutional structures for trade policy.

The UK's trading position outside the EU

When Brexit takes effect, the UK will leave both the EU Customs Union and the EU Single Market.[2] This will have many and various effects, with economic consequences that have been the subject of much comment. For the purposes of this briefing paper, a key outcome will be that imports and exports moving between the UK and the EU will no longer be regarded as 'goods in free circulation' within the EU Customs Union, attracting no customs duty or import VAT and with no requirement for a customs declaration. They will instead become goods traded between the EU and a non-EU country, subject to new and less simple requirements that will fall on traders in both the UK and the EU. These effects will arise regardless of the new trading framework between the UK and the EU, unless a unique customs arrangement were to be agreed between the UK and the EU.[3]

The UK authorities will therefore need, before Brexit, to enhance the UK's administrative capacity to apply the full range of customs and VAT rules to the shares of UK merchandise trade (47 per cent of UK exports and 54 per cent of UK imports) that were previously treated as 'goods in free circulation' within the EU Customs Union. It will fall to HM Revenue & Customs to administer UK-EU tariffs and to take other steps such as establishing new customs posts, developing a new customs code, and tackling improvements to the UK's trade-processing systems.[4] Improvements could include updating of the Customs Handling of Import and Export Freight (CHIEF) system[5], and greater use of the Authorised Economic Operator (AEO) Scheme (providing businesses with simpler and faster customs procedures), assuming that the UK will develop its own AEO scheme matching that of the EU. All these will be important if delays, added costs and fresh burdens on business are to be minimised.

Some of these administrative challenges might be mitigated by an FTA between the UK and the EU. But an FTA would not dispose of them. A key point is that even an FTA with universal zero tariffs would still require expanded trade processing systems and machinery for dealing with rules of origin for trade with the EU. There is also the possibility of 'a customs agreement with the EU'[6], although there is no exact precedent for this and its precise components would require negotiation.

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[2] HM Government, 'The government's negotiating objectives for exiting the EU: PM speech', 17 January 2017; and HM Government, *Prime Minister's letter to Donald Tusk triggering Article 50*, 29 March 2017

[3] See House of Lords European Union Committee, *16th Report of Session 2016–17: Brexit: trade in goods*, HL 129, 14 March 2017, ch. 6

[4] *Ibid.*; see also correspondence between Andrew Tyrie MP, Chair of the House of Commons Treasury Committee, and officials of HMRC, published 31 March 2017

[5] Updating CHIEF is foreseen as a process extending over some years; see HM Government, 'Customs Handling of Import and Export Freight: the processing system of trader declarations', 7 March 2014

[6] HM Government, 'The government's negotiating objectives for exiting the EU: PM speech', 17 January 2017

WTO Membership and obligations

The UK was a founder party to the General Agreement on Tariffs and Trade (GATT) 1947. It has remained a member of the GATT ever since. The creation of the WTO did not render the GATT 1947 defunct. The GATT 1994 (which came into operation on the establishment of the WTO on 1 January 1995) consists of the GATT 1947 plus the seven Understandings on GATT Articles negotiated in the Uruguay Round, plus the Marrakesh Protocol and other instruments, as set out in Article 1 of GATT 1994.

It has sometimes been suggested that the UK is only a Member of the WTO through its membership of the EU, and that by leaving the EU it would lose its membership of the WTO and have to renegotiate it. This is wrong: the UK and all other EU members are Members of the WTO[7] in their own right, as is the EU itself. Those countries have chosen, for their own reasons, to submit common lists of tariff concessions, and of commitments on services under the General Agreement on Trade in Services (GATS), but this does not affect the individual WTO membership of EU countries. In 1995 the UK made a submission of its tariff and other commitments and is bound by them. These commitments are commitments by the UK to the other WTO member countries. The fact that they are almost identical to those of the other EU countries does not make them any less of a UK commitment to other WTO Members ("almost identical" because of the national limitations in the GATS schedule of the EU, which make each EU member's individual scheduled commitments slightly different). It follows that when the UK leaves the EU it will remain a Member of the WTO and its commitments on tariffs and services will at the outset be those to which it is now committed through the EU schedules.

The Secretary of State for International Trade has made clear that the UK's intention, on leaving the EU, will be to continue its existing WTO commitments in "schedules which replicate as far as possible [the UK's] current obligations"[8]. This intention will have to be notified to the WTO. It is at this point that the question arises, under the WTO agreements, as to how the UK can most easily seek to maintain its existing commitments and avoid questions as to whether they should be open to renegotiation. There are two considerations:

- The UK's position on leaving a customs union: The WTO agreements do not provide for the possibility of a WTO member leaving a customs union that it has previously joined, and resuming full responsibility for its own tariff and other obligations. Nor is there any precedent. Some possibly analogous issues are raised by Greenland's departure from the EU, and by the division of Czechoslovakia into the Czech and Slovak Republics; but the issues are not identical and the differences in scale make the cases far from comparable;
- The need for acceptance by other WTO members: Under the WTO agreements, a member's tariff and other commitments are subject to acceptance by all other WTO members. A member cannot claim a right to "set" its tariff and other obligations unilaterally, without at the very least the tacit acquiescence of other WTO members.

It would be open to other WTO members to question whether the UK, on leaving the EU, could simply "cut and paste" the WTO obligations to which it had committed as an EU

[7] The UK paid a WTO membership fee of 7.5 million Swiss francs in 2015

[8] Rt Hon. Dr Liam Fox MP, Secretary of State for International Trade and President of the Board of Trade: HC Deb 5 December 2016, vol 618, col WS316

member. The EU could probably face equal and opposite questions as to the maintenance of the EU's WTO commitments after losing one of its larger members.

The best approach to maintaining the UK's WTO commitments appears to be to pursue the path of simple rectification of the UK schedules. Rectification of schedules is a very common and frequently used procedure, which need not, in itself, attract attention or adverse comment. Rectification of unchanged schedules is essentially procedural – little more than changing the heading on a schedule. What is more, the procedures for rectifying schedules, and notifying rectifications to WTO members, are set out in two GATT/WTO Decisions which are essentially similar in form and content, with comparable procedures.[9]

If the transposition and rectification of goods tariff schedules and of GATS schedules of specific commitments for services are identical with the UK's commitments before leaving the EU, the onus would fall on a third party to challenge the rectification if dissatisfied with it. The possibility of this occurring cannot be ruled out: an aggrieved third party might, for instance, claim to disagree with the rectification and seek a negotiation of enhanced terms for itself and others. Such a third party might then seek consultations, or possibly a negotiation under the relevant provisions of the Decisions, or even initiate a dispute under the WTO Dispute Settlement Understanding. But the UK would be in strong position to resist such moves, on the grounds that it had simply transposed its long-standing commitments, rectifying them rather than modifying them.

There are however areas where problems could arise, in the following circumstances:

- "Modification" not "rectification": If the UK modified its tariff (e.g. by raising import duties on certain products) other WTO members would be entitled to seek compensation. For this reason, it would be prudent for the UK to adhere to its existing commitments;
- Agriculture: problems could arise over the UK's transposition from its commitments, as an EU member, in relation to tariff rate quotas (that is, reduced import duty up to a quota, TRQs), aggregate measurement of support (that is, the measure for domestic agriculture subsidies under the WTO, AMS) and export subsidy commitments (that is, a commitment under WTO rules that permitted agricultural subsidies will be reduced), where third parties might claim that the transposition (whether of the UK's commitments or the EU-27's remaining share) had the effect of depriving them of concessions;[10]
- Preferential tariffs: preferential trade agreements (such as those between the EU and the African, Caribbean and Pacific (ACP) countries) are exempt from the "most favoured nation" rules of the WTO so long as they cover "essentially all trade". But care would need to be taken to ensure that any UK continuation of existing preferences did not lead to claims for preferential tariff treatment (i.e. the extension of the same preference) on an MFN basis to all trading partners.

[9] For goods, see *GATT Decision L/4962 (1980), relating to GATT Article XXVIII (Modification of Schedules)*; for services, see *GATS Decision SL/84 (1980), relating to GATS Article XX1 (Modification of Schedules)*

[10] For a more detailed explanation of agricultural export subsidy commitments, see World Trade Organization, *'Export competition/subsidies'*, 20 May 2016

In all such areas, the more the UK can demonstrate that its obligations remain unchanged, subject simply to transposition and rectification, the stronger its defence against claims is likely to be.

The timing of transposition and rectification remains to be settled. Of key importance is that, when the UK leaves the EU, and subject to the terms of any withdrawal agreement under Article 50 TEU and any new UK-EU partnership agreement, there should be a smooth and seamless transition to the UK assuming all its WTO obligations in a transparent and efficient way. This transition will need to take account of the time-period for WTO members to object to notifications of rectifications, as given in the GATT/WTO Decisions referred to above.

In the same way, the UK will probably need to confirm that it remains bound by all the WTO Agreements, Decisions and Declarations signed at the end of the GATT Uruguay Round of Multilateral Negotiations (1994)[11] and by the WTO Trade Facilitation Agreement (2013). The main exception is likely to be the WTO Revised Agreement on Government Procurement (2012) which was entered into by the EU alone, and for which the UK might need to spell out its covered entities with greater clarity.

Legislation enabling the UK authorities to perform functions subject to multilateral agreements

As well as the GATT and the GATS (and more minor interpretative understandings and declarations) the WTO agreements include some other important agreements including those on Agriculture, the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), Textiles and Clothing, Technical Barriers to Trade (the TBT Agreement), Anti-dumping, Customs Valuation, Rules of Origin, Import Licensing Procedures, and Subsidies and Countervailing Measures, and Safeguards. Alongside the WTO agreements are the Conventions and other accords entered into in the World Customs Organisation, which cooperates closely with the WTO on customs administration questions. All these Agreements and Conventions have been implemented – where legislative measures are needed – by EU legislation, operative in the UK via the European Communities Act (ECA) 1972.

When the UK leaves the EU the UK authorities will need to have in place all the measures necessary for a smooth transition of all the key powers and legislative provisions from the EU to the UK. It is not yet clear how this will be achieved. In principle, the relevant EU legislation might be transposed into UK primary and secondary legislation under the proposed Great Repeal Bill[12]. Yet this would not necessarily be straightforward. Without examining all the multilateral agreements listed above, several questions would need to be tackled, including:

- Mixed responsibilities within the UK: the intra-UK devolution settlements are complex and each is different. However, responsibilities that are devolved to Scotland, Wales and Northern Ireland include health and social care (with possible implications for the SPS Agreement), agriculture and fisheries (with possible implications for aspects of agricultural trade) and the environment (with various possible implications).[13] A move from the supremacy of EU law under the

[11] See World Trade Organization, *The Legal Texts: Results of the Uruguay Round of Multilateral Negotiations* (Cambridge: Cambridge University Press, 1999), pp. vi-ix

[12] See HM Government, *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, 30 March 2017

[13] For a fuller treatment, see Senior European Experts, *Brexit & the Devolved Administrations*, 27 October 2016

ECA 1972 to a system subject to a mix of national and devolved measures will not be straightforward: the Prime Minister referred obliquely to this in her Lancaster House speech (17 January 2017[14]) when she referred to "working very carefully to ensure that - as powers are repatriated from Brussels back to Britain - the right powers are returned to Westminster, and the right powers are passed to the devolved administrations of Scotland, Wales and Northern Ireland". Putting this commitment into effect will raise extremely complex and politically sensitive questions relating to both the nature of policies to be applied by the devolved administrations and to the implications for UK trade policy;

- A Customs Bill: The pre-1973 UK Customs and Excise legislation enabling import duties to be levied is no longer operative[15], having been replaced by the Customs and Excise Management Act (1979) and other UK primary and secondary legislation enabling customs duties to be levied within the EU framework. It might in theory be possible to transpose all the EU legislation in such a way as to restore full powers to HM Revenue and Customs to operate the UK tariff. It seems more likely however that there will need to be new UK legislation, particularly as this is an area constitutionally requiring the sanction of Parliament to levy supply;[16]

- A Trade Bill: There are similar considerations in the area of trade and trade policy instruments[17] i.e. any measures requiring the use of powers in such fields as the SPS and TBT Agreements, imposition of quotas, granting of preferences, anti-dumping (including authority to assess dumping and dumping margins), import and export licensing procedures, and authority to take countervailing measures against subsidised exports from other countries. Again, it might in theory be possible to transpose all the EU legislation in such a way as to restore full powers to the UK government to operate across all these areas. But there could be practical and institutional difficulties. For one thing, the UK authorities will probably have different needs from those covered in current EU legislation. Two examples:

  - Anti-dumping: The UK's pre-EU membership legislation is no longer operative[18] and in any case pre-dated the relevant WTO Agreement (1994).[19] The UK will need to set up its own anti-dumping assessment authority, capable of making assessments of whether imports into the UK have been dumped by the exporting country. There are several complexities to this. First, there are over 90 current instances in which existing EU anti-dumping action may need to be continued by the UK on a new basis (new in the sense that the tests of dumping and resultant damage to the UK interests may be different from those applying to EU-28 interests). A further factor militating against simple transposition of EU law is that current EU legislation may itself

[14] See also HM Government, *The United Kingdom's exit from and new relationship with the European Union*, Cm 9417, 2 February 2017

[15] The *Import Duties Act 1958* was very largely repealed in the *European Communities Act 1972*

[16] The likelihood of a Customs Bill was suggested by Baroness Evans of Bowes Park in moving the Second Reading of the *European Union (Notification of Withdrawal) Bill*, when she said "From immigration to customs, this House and the other place will have a huge number of opportunities to help shape the future direction of our country" (HL Deb 20 February 2017, vol 779, col 15); it was confirmed in the White Paper cited above, *supra* n. 12

[17] A Trade Bill has been widely predicted: see 'Brexit faces fresh hurdles, leaked Whitehall papers reveal', Sam Coates, *The Times*, 14 March 2017

[18] The *Customs Duties (Dumping and Subsidies) Act 1969* was repealed by the *European Communities Act 1972*

[19] See *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* in World Trade Organization, *supra* n. 11, pp. 147-171

shortly require amendment (e.g. an update to EU legislation on trade policy instruments to cater for Market Economy Status for China);

- Import- and export-licensing: powers will be needed, whether for import quotas or for the operation of sanctions or for controls on exports of strategic or dual-use goods). At present the UK relies on a mix of powers in this area, including some under EU legislation (in force in the UK via the ECA 1972), some sanctions powers under the United Nations Act (1946) and some under import licensing measures dating as far back as the World War II emergency legislation in the Import, Export and Customs Powers (Defence) Act (1939)[20] and the Import of Goods (Control) Order (1954) made under it).

In both these instances, and in other related areas, it seems likely that the UK might require entirely fresh primary legislation:

- Migration of Intra-Corporate Transferees (ICTs): as a party to the GATS the UK is required to provide access to managers and specialist staff who are nationals of another party to the agreement, who are employed by a business established in the territory of that party, and who are posted to the UK branch of that business. Any new UK migration controls would need to provide for ways of honouring this GATS commitment;[21]

- Nuclear materials: there will need to be an agreement and UK domestic measures covering trade in and transport of nuclear materials once the UK has left Euratom.

Agreements with third countries

The EU has over 50 trade agreements of different kinds with trade partners or groups of trade partners, including free trade with ACP countries and advanced FTAs with South Korea, Canada and Singapore. On leaving the EU, the UK will no longer be a party to these agreements and the benefits and responsibilities arising from them, because the UK's rights and obligations under them only apply to the UK in its capacity as a Member State and not as a sovereign state in its own capacity. It would be open to the UK to negotiate fresh agreements with some or all of the parties, with similar content in areas such as trade in goods, trade in services, trade defence, foreign direct investment, the commercial aspects of intellectual property, and competition.

One area for debate and decision will be the role of Parliament and the devolved administrations in the negotiation and conclusion of trade agreements with third counties. Before the UK joined the EU, devolution (in its present sense) did not exist, trade policy was traditionally largely bipartisan, with a very limited role for Parliament. These circumstances have now changed, not least because of trade and investment policy becoming much more subject to political controversy than it was before 1973. It will be important, when preparing for the UK to conduct an independent trade policy, to ensure that the

[20] See HM Government, 'Import controls', 14 March 2017

[21] This commitment has already been recognised by the Government: see HM Government, *Limits on Non–EU Economic Migration: A Consultation*, 28 June 2010, p. 14; on linkages between trade in services and migration, see House of Lords European Union Committee, *18th Report of Session 2016–17: Brexit: trade in non-financial services*, HL 135, 22 March 2017

institutional arrangements for negotiating and securing ratification of agreements are clear and unambiguous, so that the role of Parliament and the devolved administrations and assemblies is known, and is subject to workable political conventions.

Trade and preferences for developing countries

This may well be the most straightforward task on the UK's trade agenda post-Brexit. The UK will be free to continue – or augment – the generalised scheme of preferences (GSP) which, as an EU member, it has operated towards least developed countries (LDCs). No negotiating is required to put in place the autonomous grant of preferences, although the UK will have to respect the provisions of the WTO Enabling Clause[22] and notify any non-reciprocal preferential schemes to the WTO for possible examination. Domestically, all that will be necessary will be for the UK authorities to have the relevant trade and customs powers, as outlined above.

UK domestic institutional structures for trade and investment policy

Trade and investment barriers in global markets have become more complex – particularly regulatory barriers in other countries. An independent UK trade and investment policy will allow fresh scope for tackling these in ways attuned to the specific interests of UK business. To ensure that this is done effectively, UK trade negotiators will need to draw on the experience of UK businesses competing in global markets. Post-Brexit, this could be done in new ways, drawing on examples of other countries' practices facilitating consultation. There are various models for this. One of the most advanced is the mandatory inter-agency system developed in the United States. As well as providing for mandatory consultation with interested parties and stakeholders, the US system also makes provision for reading rooms for trusted stakeholder representatives to read non-public texts. Following such an example, a new system of consultation – possibly mandatory – could be developed to ensure that UK trade and investment policy is firmly based on consultation with stakeholder interests and answerability to them. A clearer system governing expectations and practice in the UK's internal consultation processes could represent an important step towards maximising the UK's competitive advantage in trade policy.

Conclusion

This briefing cannot hope to cover all the challenges and opportunities that may arise in the practical operation of UK trade & investment policy post-Brexit. Its aim however is to show that, quite apart from the global political economy aspects of UK trade and investment policy, attention will also need to be given to a range of practical and institutional issues and tasks. It is only if these are dealt with efficiently that UK policy – whatever its macroeconomic objectives and guiding principles – can be conducted satisfactorily.

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[22] The Enabling Clause is WTO *Decision L/4903 (1979) on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, enabling developed WTO members to give differential and more favourable treatment to developing countries; it is the WTO legal basis for the Generalized System of Preferences (GSP).

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