

Brexit

Trade Governance and Legal Implications for Third Countries

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Abstract

While precise impact of Brexit on the EU/UK trade and investment agreements with third countries will depend primarily on the terms of the withdrawal agreement to be concluded between them, most scenarios suggest an extensive process of amendment of the text and/or commitments in multilateral and bilateral agreements. At the multilateral level, the UK will remain a WTO Member, but will no longer be represented by the EU. The separation of the UK obligations from the current EU lists of concessions and schedules of commitments will require amendments that, particularly regarding subsidies and quotas, may lead to a broader renegotiation process requiring consensus of all interested WTO members. At the bilateral level, the status of current EU PTAs with regard to the UK and its trading partners remains uncertain: Some elements suggest that these PTAs may no longer be valid for the UK, or that, even if legally valid, they will no longer cover the relationship between the UK and the third country. Further, EU agreements focusing on goods only will no longer apply

to the UK. For these agreements to continue to apply, the UK and the third country will need to amend some aspects of the text of the agreement as well as of the lists of commitments. Investment treaties concluded by the UK with third countries will remain valid, and no amendment is in principle necessary. Parties could require amendments to the text of the treaty, due to a fundamental change in circumstances. LDCs and developing countries who benefit from the EU GSP will continue under this regime for the remaining EU member, but that GSP framework will no longer be applicable to the UK. The UK may introduce a new GSP regime of its own. In all cases, third countries who consider that Brexit has diminished the value of their negotiated commitments have the opportunity to request compensation in sectoral commitments or changes in the text of the agreements, or ultimately terminate the agreement. The process of amending the trade and investment agreements requires comprehensive knowledge of their trade and investment flows with the EU and the UK.

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Brexit: Trade Governance and Legal Implications for Third Countries

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1. Introduction

The United Kingdom (UK) has decided to withdraw from the European Union (EU). The withdrawal from the Union—the first in its history—will not only have important implications for the UK and remaining EU members, but also for their partners around the world.¹

A key channel through which these third countries will be affected by Brexit is their trade and investment relationship with the EU and the UK. Trade and capital flows connect the economies of the EU and UK with the rest of the world, converting, for better or worse, seemingly domestic policy decisions in events of global economic significance. Further, the change in the EU and UK's trade and investment regime will also have legal implications for the rights and obligations of third countries. The trade flows of the EU and UK with the world are governed by the World Trade Organization (WTO), as well as through a network of 35 bilateral and regional trade agreements² granting reciprocal preferential treatment to over 50 countries across the globe. Brexit will hence not only have economic effects in the EU's and UK's partners through the potential shifts in actual trade and capital flows, but also legal implications in the rights and obligations of the EU and UK vis-à-vis third parties, and vice versa.

How exactly these relations with third countries are affected will ultimately depend on the terms in which the UK and EU agree to part ways.³ In particular, the conditions related to the EU's and UK's relationship with the world through trade or other agreements will greatly depend on the terms of the withdrawal agreement to be negotiated when the UK invokes Article 50 of the Treaty on European Union (TEU). As a result, the status and conditions of application of EU and UK trade and investment agreements with third countries after Brexit is not yet fully known. However, a number of substantial legal questions arise regarding how the rights of the EU/UK's trading partners may be affected by the withdrawal from the EU by one of its major members.

This note discusses the main legal aspects of the trade and investment relationship between the EU and UK with third countries with the view to identifying the potential courses of action for the parties to safeguard their trade and investment interests when Brexit takes place. Some questions that this note addresses include:

- How will the multilateral framework be affected?

¹ For a review of the potential economic impact of Brexit on trade and investment flows, see World Bank, 2016.

² “Trade agreements and other agreements with a trade component” as listed by the European Commission at <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/>

³ For the purposes of this analysis, we refer to “third countries” as those that have concluded a trade or investment agreement with the EU and/or its Members States. Under “trade agreements” we include arrangements pursuant to the establishment of a free trade area, customs unions, or the reductions or elimination of tariffs; we exclude from this analysis the relationship of the EU/UK with members of the European Economic Area (namely, Iceland, Liechtenstein and Norway) or other arrangements aimed at participating in the EU Single Market (such as with Switzerland). Trade relations between the UK and non-EU members of the EU Single Market are likely to be determined in the context of the UK withdrawal agreements.

- Do trade agreements concluded by third countries with the EU maintain their validity? Will they still apply to their trade with Britain, despite Brexit? How about investment treaties?
- Will trade and investment agreements continue to apply as they are, or will they be amended to reflect the new individual relationship with the UK? What aspects of the agreements are more likely to be amended?

2. Status of Trade and Investment Agreements

We start by considering whether trade and investment agreements between the UK and third countries remain in force after Brexit. We then broadly assess whether the existing conditions of application, set out in the country-specific list of commitments and reservations would be post-Brexit or whether amendments may be necessary. For this analysis, we focus our attention on the WTO agreements, preferential trade agreements (PTAs), bilateral investment treaties (BITs), and the Generalized System of Preferences (GSP). We do not evaluate here the rights and obligations between the UK and remaining EU Member States, or other economies participating in the EU single markets.

a. Validity of current trade and investment agreements after Brexit

The first question regarding the EU/UK agreements with third countries is whether they will remain in force when the UK is no longer a Member of the European Union. Will the UK and the third countries lose the preferential trade conditions that currently link them through trade and investment agreement? In this section, we explore whether the trade and investment agreements at the multilateral and bilateral levels to which the UK is a party will remain in force after Brexit.

UK's WTO membership

The UK was an original contracting partner to the GATT 1947, and a founding member of the WTO. As a result, the UK is and will remain a WTO Member, regardless of its relationship with the EU or other countries. While the precise terms of the UK's (and EU's) rights and obligations will likely require some clarifications after Brexit (see section b below), the WTO agreements will continue to apply to the UK's trade with the world.⁴ For this to change, the UK would have to withdraw from the WTO in the terms of Article XV of the Marrakesh Agreement, which does not appear as a likely scenario.⁵

⁴ Conf. Bartels, 2016. In that sense, WTO Director General Roberto Azevêdo has declared that “The UK is a member of the WTO today, it will continue to be a member tomorrow. There will be no discontinuity in membership. They have to renegotiate [their terms of membership] but that doesn't mean they are not members”, Sky News, 26 October 2016.

⁵ In fact, the International Trade Committee of the House of Commons has ratified the UK's adherence to the WTO, and called the UK's position in the WTO “the foundation stone for all [...] future trading relationships after Brexit” (House of Commons, 2017)

While there is no doubt of the UK's membership to the WTO, questions remain about the membership to the so-called WTO Plurilateral Agreements, in particular to the Agreement on Government Procurement (GPA). Currently, the EU is a party to the GPA, which in turns binds the UK. However, it is unclear whether the right and obligations of the GPA would continue to apply to the UK after Brexit⁶.

Preferential trade agreements

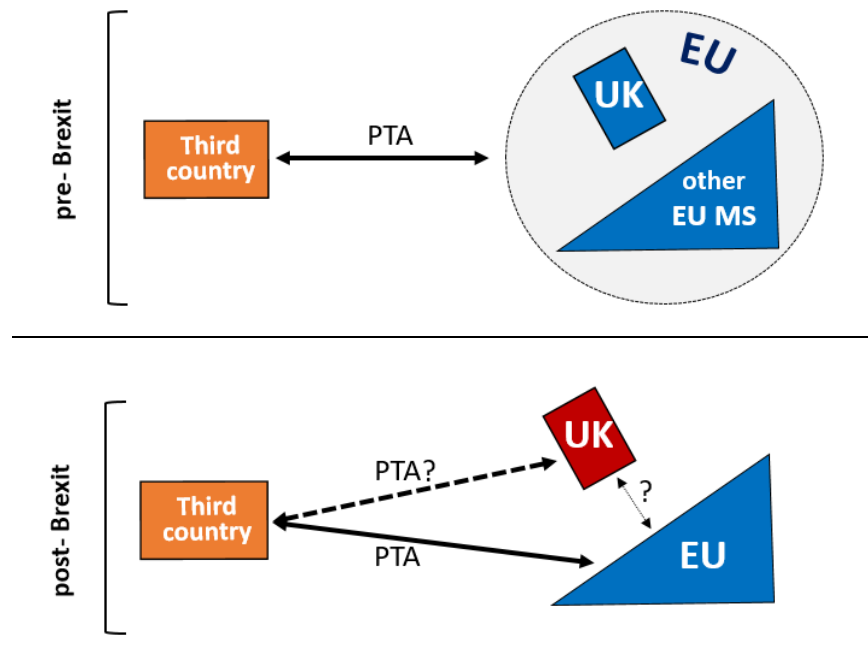
The question whether the current network of preferential trade agreements (PTAs) of which the UK is a party will continue to govern the relationship between the UK and third countries remains uncertain. On one hand, it may be considered that the UK is a party to such agreement only to the extent that it is an EU Member State, and that the UK will no longer benefit from such arrangements after Brexit. On the other hand, it can be argued that the UK is a party to the EU PTAs in its own right, and will remain a party to the agreement even after Brexit. Even in this case, however, questions remain about the actual applicability of the agreement to the UK territory after Brexit. In practice, to ensure the continuity of the PTAs between the UK and the third country, the two parties will likely need to agree on some amendments to the text as well as the commitments.

Continuation of EU PTAs

It can also be understood that, under international law, the UK is a party to the agreements in its own right and, and will remain a party to those agreements even after Brexit. The main argument for this is that the UK has concluded the PTAs in its own capacity as a sovereign state—not just by the fact of being an EU member state. Most EU PTAs agreements are signed, in addition to concerned third countries (the Republic of Korea, for example) by the EU and by each individual EU member state, including the UK. Under the terms of the Vienna Convention on the Law of the Treaties, the signature by the UK officials expresses the consent of the State to be bound by the treaty, in the terms of Articles 11 and 12 of the convention. As a result, the EU-South Korea Free Trade Agreements (FTA) would apply to the UK – South Korea trading relation, not because the UK is an EU member state, but because the UK concluded, as a sovereign state, a trade agreement with the Republic of Korea. This is so because most of these PTAs promoted by the EU include provisions, such as on services, investment attraction and protection, and regulatory disciplines, that go well beyond the competences of the EU and require the acceptance by the states that form part of the EU—so-called “mixed agreements” because they affect policy competences of both the EU and the EU member states.

⁶ Similarly, see House of Commons, 2017, and Cameron, 2016.

Figure 1. Third countries PTAs relations with the UK and EU



Under this interpretation, third countries would see their legal relationship with the UK split away from the current arrangement with the EU, but would continue on a preferential basis directly with the UK. Currently trade and investment flows of the third country with the EU/UK are governed by one single legal relationship with the EU and UK as a whole. After Brexit, the PTAs between the EU/UK and the third country would de facto entail two different legal relationships, one with the UK and one with the rest of the EU. Figure 1 depicts these legal relations.

In such cases, where both the UK and the remaining EU member states “share” one PTAs with a third country, it may be necessary to clarify how that relationship is structured: whether this will be set out in one single agreement with three different parties, or two separate bilateral agreements. The choice of that arrangement will have implications on the administration of the agreement/s. For example, the administration of the agreements may need separate councils, consultative bodies, secretariats, dispute settlement bodies, and so on.

Moreover, for some types of obligations, for example allocations under tariff rate quotas (TRQs), the replacement of an EU-wide obligation with separate obligations to the EU and UK has more than one possible solution, with the different solutions potentially having important commercial implications. This issue is discussed in more detail in the section on the UK’s WTO obligations below.

Territorial applicability of the agreements

However, even if the UK remains in fact a party to the agreements, it may be beyond the agreements' scope. Most the EU PTAs define their geographical applicability, for the EU and its member states, not by referring to the territory of the EU and its member states, but rather by reference to the Treaty of the EU and the TFEU. That is, the territorial scope of the PTAs is determined by the territories covered by the Treaty of the EU and the TFEU. That is the case, for example, for the EU-South Korea FTA⁷, the EU-Cariforum EPA, the EU-Colombia-Peru FTA, and EU-Canada CETA. That means that, after Brexit, the UK will no longer be covered by PTAs, even if was interpreted that the UK, as a sovereign state, remains a party to the agreement.

Exclusion from EU PTAs

Finally, some commentators have suggested that “agreements between the EU and third countries [. . .] for example on trade, would cease to apply to the withdrawing state, and it would thus need to negotiate alternative arrangements” (EPRS, 2016). The main argument lies on the fact that the EU PTAs are designed as bilateral agreements between the EU and its member states and the third party and, as such, they only apply to the EU and the States that belong to the EU. The EU-South Korea Free Trade Agreements (FTA), for example, defines the “EU Party” to the agreement with a reference to the distribution of competences between the EU and its member states under the Treaty on the Functioning of the European Union (TFEU)⁸.

In this sense, proponents of this interpretation suggest that the agreements apply to the EU member states in their capacity of EU member states, not as sovereign states. Under this reading, based on the division of competences between the EU and its member states, the UK will no longer be a party to the current EU PTAs.

There is greater certainty that goods-only agreements will in fact cease to apply to the UK once Brexit take place. Agreements covering only trade in goods fall within the exclusive competences of the EU, and are concluded solely by the EU and the third country, and do not involve the EU member states directly. These types of agreements are a rarity in current EU trade policy; a cursory review suggests that the main examples of these agreements are the EU customs union agreements with Turkey, San Marino, and Andorra.⁹ Since the UK is not a party to these agreements, as it is to mixed agreements, and they only apply to the UK because of its EU membership, these customs unions will no longer apply to the UK after Brexit. As a result, the trade relations between the UK and Turkey, San Marino, and Andorra will no longer be on a

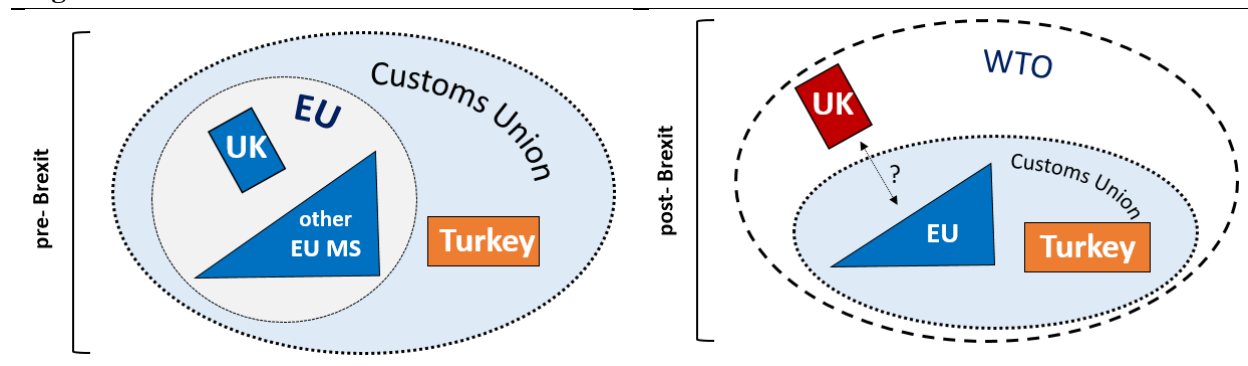
⁷ Article 15.15:1 of the EU-South Korea FTA reads: “*This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties, and, on the other hand, to the territory of Korea*”.

⁸ Article 1.2 of the EU-South Korea FTA reads: “*the Parties mean, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the “EU Party”), and on the other hand, Korea*”.

⁹ Other examples of EU trade agreements that do not involve the EU member states include the EC-Syria Cooperation Agreement of 1978, the Interim Partnership Agreement with Fiji and Papua New Guinea of 2009, and a set of agreements with EFTA countries (Norway, Iceland, and Switzerland) of 1973.

preferential basis, but it will revert—unless the UK and these parties celebrate another agreement to the contrary—to the WTO most-favored-nation treatment. Figure 2 reflects these changes.

Figure 2. Third countries customs unions with the UK and EU



In brief, it remains uncertain whether the network of trade agreements that currently govern UK’s trade and investment relations with the third countries will continue to apply after Brexit. In order to ensure continuation of the PTAs, it seems that some kind of understanding between the UK and the third party, reflected in the current agreement or other text, will be necessary. While it could be understood that, under international law, the PTAs will remain in force between the UK and the third parties, the UK would lie beyond the territorial applicability of the agreements. These include, for instance, the free trade agreements with South Korea, Chile, Colombia, Mexico, South Africa, and the agreement with Canada not yet in force. In practice, that would mean that, should the UK and the third country wish to continue the preferential treatment, they will need to amend some aspects of the PTAs to reflect the new situations. Furthermore, goods-only agreements, such as the custom union agreements with Turkey, San Marino, and Andorra, will cease to apply to the UK —unless the parties expressly agree on their continuation. Table 1 summarizes these findings and provides additional examples.

Table 1. Summary of EU/UK trade and investment agreements after Brexit

Agreement	Scope	Remains in force(*)	Amendments	Examples
WTO	Merchandise, services, IP, etc.	Yes	<ul style="list-style-type: none"> • Textual amendments needed to separate EU and UK lists of commitments. • Substantial amendments likely needed in commitment on subsidies and quotas. • Could be pursued as rectification or renegotiation by EU/UK depending on new conditions. • Third countries could demand broader renegotiation process. 	GATT, Agriculture agreement, GATS

	Merchandise only	No	n/a	EU-Turkey Customs Union
PTAs	Merchandise, services, investment, IP, etc.	Uncertain	<ul style="list-style-type: none"> • Need to amend geographical scope • Textual amendments needed to separate EU and UK lists of commitments. • Substantial amendments likely needed in commitment on tariff rate quotas. • No specific procedure. 	EU-Cariforum EPA, EU-Korea TA, EU-Colombia TA
BITs	Investment	Yes	<ul style="list-style-type: none"> • Not needed. • Parties could demand renegotiation of BIT terms. • No specific procedure. 	UK-Colombia BIT, UK Russian Federation BIT
GSP	Merchandise only	No	n/a	Everything But Arms

(*) Refers to the legal relationship between the third country and the UK.

Investment treaties

The situation of bilateral investment treaties appears somewhat more straightforward. EU member states, including the UK, continued to negotiate and conclude investment promotion and protection treaties with third countries on their own capacity until the entry into force of the Treaty of Lisbon assigned foreign investment policy as an exclusive competence of the EU (Art. 207 TFEU). The UK, in particular, has concluded over one hundred bilateral investment treaties since 1975, the last one with Colombia in March 2010. No investment treaty has been concluded by the EU or its member states since then, although currently negotiations are under way for an investment agreement with China.

Those investment treaties concluded by the UK with third countries will remain valid. Since the UK negotiated and signed them in their own capacity and independently of the EU, Britain's separation from the EU will not have any direct legal effect on these treaties.

Generalized System of Preferences

There are currently 98 developing countries who currently benefit from at least one of the GSP programs of the EU. The three main GSP schemes currently by the EU include: a standard GSP regime which offers tariff reductions to developing countries; the "GSP+" preferences, offered to countries that ratify and implement core international conventions relating to human and labor rights, environment and good governance, that improve on the conditions of the standard GSP; and the Everything But Arms (EBA) programs that grant duty-free quota-free access to essentially all products, except for arms and ammunitions to 48 least developed countries (LDCs).

LDCs and developing countries who benefit from the EU GSP will continue under this regime for the remaining EU Member. However, since these programs are part of EU's Common Trade

Policy, the current EU GSP schemes will no longer apply to the UK once Brexit takes place, and the UK will be able to introduce a GSP regime of its own. Developing countries and LDCs who benefit from preferential access to the EU single market will hence depend on the terms of an eventual UK GSP for their exports to the UK.

b. Conditions of applications of the agreements

While it appears that most trade and investment agreements currently involving the UK will remain in force, the question remains of whether the current conditions of application will continue or whether they may need to be amended as a result of Brexit. In what follows, we review this situation for the WTO agreements, PTAs, and BITs.

UK's WTO membership

As an original contracting party to the GATT and a founding member of the WTO, the UK will continue to be a member of the WTO after its separation from the EU. However, the EU currently represents the UK, and all other EU member states, at the WTO fora, negotiating both in its own and its member states' behalf. This entails that Britain's obligation with regard to trade in goods and services is currently reflected in the EU's list of concessions and schedules of commitments. These lists embody the EU's and UK's obligations in trade in goods, including on tariffs, tariff-rate quotas, and subsidies, and trade in services. In particular, they include exemptions to most favored nation treatment, and commitments with regard to national treatment, quantitative restrictions, and additional commitments.¹⁰

In withdrawing from the EU, the UK will need to record its own list of concessions and commitments, separate from those of the EU and its member states. In that sense, the WTO's chief, Roberto Azevêdo, has expressed that the UK's "will have to renegotiate" some elements of its WTO commitments.¹¹ Nevertheless, while it is clear that the current EU/UK lists of trade concessions will need to be amended, renegotiation is not the only available mechanism to that end. There are two main channels for modifying schedules of concessions under GATT rules:

- i) the modification or rectification of schedules ("rectification"): a simplified procedure that allows that changes resulting from formal modification or rectification could be certified by the Director-General if no objection is raised by any other member, provided that those changes are of a purely formal character and do not alter the scope of the concessions,¹² as set out in 1980 Procedures for Modification and Rectification of Schedules of Tariff Concessions; and

¹⁰ Bartels, 2016, offers a comprehensive discussion on the UK legal position in the WTO after Brexit, including the validity of its schedules of commitments.

¹¹ Sky News, "Brexit will not cause UK trade 'disruption' - WTO boss", 26 October 2016.

¹² See 1980 Procedures for Modification and Rectification of Schedules of Tariff Concessions, GATT document L/4962, of 28 March 1980.

- ii) the modification or withdrawal of trade concessions through renegotiation: the main procedure for tariff and non-tariff renegotiations under the GATT, which allows for interested WTO members to require compensation¹³, set out in Article XXVIII of the GATT. This process is launched when a WTO needs to make substantial modifications in their schedules that are likely to diminish the rights of other WTO members.

In this context, two initial scenarios appear a priori possible: 1) the EU/UK seek only to rectify the current EU list, by making two lists out of it with identical substantial content; or 2) the EU/UK wish to make substantial amendments to their respective lists, thus launching a renegotiation process. The choice for these two procedures, however, is not necessarily mutually exclusive, as a rectification process could lead to a renegotiation if a third WTO Member objects to the proposed amendments. Box 1 offers further details on the rectification and modification procedures.

<p>Box 1. Modification vs. Rectification of Concessions</p> <p>The GATT Contracting Parties adopted the 1980 Procedures for Modification and Rectification of Schedules of Tariff Concessions 27 (Decision on Rectification), which provides that changes resulting from formal modification or rectification could be certified by the Director-General if no objection is raised by any other Member within a 3 month period. This procedure is subject to the following conditions:</p> <ul style="list-style-type: none"> • The proposed rectification shall be limited to amendments or rearrangements which are of a purely formal character and which do not alter the scope of the concessions. • The proposed modifications resulting from action under Article II, Article XVIII:7, Article XXIV:6, Article XXVII or Article XXVIII, shall be a correct reflection of the modification. • If objections are raised (e.g., because another member considers the change alters the scope of the concession) on any of these grounds, the member wishing to modify/rectify its schedule could end up in Article XXVIII of the GATT 1994 renegotiations. <p>Source: WTO Secretariat, n/d.</p>

Rectification of schedules

While the rectification process would appear more straightforward in terms of procedure, it also raises some substantial legal questions regarding its feasibility. In principle, it is conceivable that the UK merely mirrors the current EU schedules, with only formal amendments to reflect that it is now an individual UK list. It could be expected that UK and the EU may have a preference for this simpler and straightforward procedure. The limit of this procedure is that the proposed

¹³ In this context, Article XXVIII of the GATT requires the modifying party to seek an agreement with any WTO who has an “initial negotiating right” or a “principal supplying interest”, as well as to consult with any other WTO member who has a “substantial interest” on the matter, as interpreted in the Understanding on the Interpretation of Article XXVIII of the GATT 1994.

changes do not “alter the scope” of the concessions, de facto diminishing the rights of other WTO Members.

Yet simply duplicating the current EU lists would entail a situation that likely goes beyond the mere rectification of schedules and does in fact alter the scope of the concessions. While some aspects of the EU list can be simply copied into a UK list, some commitments don’t lend themselves to such duplication. For example, it is entirely possible for the UK to replicate the current bound tariffs for the EU with only clerical corrections in the document; arguably, the same can be said about the schedules of concessions in trade in services.

However, some aspects of the trade schedules bring some practical challenges to the rectification process, which suggest that mere rectification may not be feasible or desirable. For instance: current commitments on reduction of agricultural subsidies are expressed in the form of a maximum “bound” monetary ceiling (so-called Total Aggregate Measure of Support—AMS) for each WTO Member. The EU schedule features an AMS value that is the maximum ceiling that the EU and all EU member states can collectively apply. How would that ceiling apply to two separate WTO Members? Would both the EU and UK be allowed to have the same value? This seems unlikely as it implies very large allowable protection for the UK. Can the AMS ceiling be reduced proportionally—but based in what criterion?

Commitments on tariff rate quotas (TRQs), expressed in volumes, pose similar challenges. The reproduction of the current EU TRQs in a UK schedule would entail disproportionately high quotas for the one UK country, which suggest that current TRQs would need to be “divided” between the EU and the UK. However, there is no precedent on how this should take place: Pro-rata? Based on what criteria? What period should be used as a basis for the calculation? The division of the TRQ would also have implication for third countries that are exporting to the EU or UK under that framework since, depending their export destination, they could see the quota expanded or reduced, thus affecting their current rights under the WTO agreements. The situation seems to elicit a discussion that goes beyond an editorial correction, for which a negotiation would seem necessary.

This suggests that the EU and UK may decide to follow the rectification procedure in order to “separate” their lists, as a simplified procedure than to open a renegotiation. However, should any WTO Member consider that their trade concessions are being diminished, it could object to the rectified schedules within three months from the communication of the rectification. The objection by a WTO Member would prevent the new rectified schedules to enter into force and could force the EU and UK to discuss the amendments to the schedules in a broader renegotiation process.

Renegotiation

Alternatively, the UK and EU could open a formal renegotiation process in the terms of Articles XXVIII GATT and XXI GATS. The renegotiation process is opened at the request of the party wishing to amend its schedule of trade concessions. This process allows WTO members with a

substantial interest¹⁴ to seek additional concessions and commitments in compensation for the amendments that reduce the scope of the concessions.

Box 2. Procedures for the Modification of Concessions

Article XXVIII:4 of the GATT allows members to request the renegotiation of its lists of concessions “in special circumstances.” Renegotiations can be requested any time, and the member concerned shall request the authorization from other members by sending a notification of its intention of modification or withdrawal of tariff concessions. The renegotiation shall be completed within a 60-day period if such negotiations involve only a single item or a very small group of items. A longer period of time may be granted by members if such negotiations involve a larger number of items.

A member seeking to modify or withdraw a concession (e.g., increase a particular tariff binding) shall negotiate with members having Initial Negotiating Rights (INRs) and Principal Supplying Interest (PSI) with a view to agreeing on compensation in order to maintain “a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this agreement prior to such negotiations.” Such compensation is negotiated between the parties primarily concerned and could consist, for example, in the reduction of bound tariff rate(s) applicable to another item or other items of interest to the party.

Source: WTO Secretariat, n/d.

Amendments that increase the level of concession (lower bound tariffs, for instance,) may be introduced with no major challenges, and will likely be welcomed by the WTO memberships. On the contrary, amendments that are perceived as diminishing the trade concessions (such as higher bounds tariffs, smaller TRQs, or higher subsidies ceilings) are likely to elicit requests of compensation by interested WTO Members. Compensation would take the form of greater concessions in other elements of the lists. If the member requesting modification and the one member having substantial interest¹⁵ seeking compensation cannot reach an agreement during the negotiation period with the modifying member, the requesting member may implement the modifications, which will allow the member with substantial interest to withdraw equivalent concessions initially negotiated with the member that initiated the renegotiation. Article XXI of the GATS provides for similar steps, with the addition of referring the matter to arbitration if the modifying member and the affected member are unable to reach an agreement on compensation.

In the case of the EU/UK, it would appear that the amendment of may lead to a process of modification of schedules. The UK will need to draw its own lists of concessions based, presumably, on the current EU lists. On the contrary, the EU will also need to amend its schedules to reflect the fact that the UK will no longer be covered by those lists. As mentioned earlier, the process of separating the UK rights and obligations from the current EU’s lists is

¹⁴ On the WTO members having a substantial interest, see Box 1 and footnote 14.

¹⁵ Article XXVIII provides explicitly that there is no precise definition of “substantial interest” (SI). It however clarifies that substantial interest should be understood as covering only those members who have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a “significant share” in the market of the member requesting to modify or withdraw the concession (Ad note to Article XXVIII of the GATT, para. 1.7). In GATT practice SI has normally been granted to those members who accounted for at least 10% of imports of the item for which modifications were being sought (WTO n/d).

likely to require the (substantial) modification of some concessions, in particular with relation to quotas and subsidy ceilings in the area of agriculture.

In practice, these issues suggest that Brexit will entail a process of renegotiation, at least with regard to particular measures in agricultural and fisheries products, for the modification of the schedules of both the EU and the UK. In any case, it appears that whether the EU and UK attempt to pursue the rectification of schedules, or request the renegotiations of their concessions, either procedure will allow a WTO member with an interest in the products concerned protect their rights vis-à-vis the UK and the EU, by objecting to the rectification, requesting for compensation, or ultimately withdrawing equivalent concessions.

Preferential Trade Agreements

In terms of their preferential commitments, PTAs bring about similar challenges to those of the WTO agreements: even if it is understood that the PTAs remain applicable to the UK after Brexit, the current lists of commitments include elements whose application to the UK and EU separately need to be clarified. As discussed above, in the case of schedules of concessions in PTAs, this is particularly the case for commitments on quotas and tariff-rate quotas. PTAs do not generally include obligations on subsidies.

PTAs do not generally include specific rules on rectification or renegotiation such as those under the WTO. Instead EU PTAs often include one single provision allowing for “amendments” of the agreement, including presumably the list of schedules.¹⁶ Some agreements, such as the EU-Korea FTA,¹⁷ expressly allow for amendments to the annexes to be decided by a joint Trade Committee established by the agreement.

It is clear that any third country to an agreement with the EU/UK who considers that their rights have been affected by Brexit can launch a procedure to seek compensation or additional commitments by the EU or the UK. Since these agreements do not feature specific rules of procedure on how these amendments may take place, it is to be assumed that the amendment procedures will be part of the consultation between the parties. For example, Caribbean countries, many of whom hold historical and cultural ties with the UK, and a large part of its diaspora is now established there, may wish to feature stronger trade and investment commitments with the UK, that were not possible under a broader negotiation with the entire EU membership.

¹⁶ For instance, Article 334 of the EU-Colombia trade agreement reads: “*Amendments.*

1. *The Parties may agree in writing to any amendment to this Agreement.*

2. *Any amendment shall enter into force and constitute an integral part of this Agreement according to the conditions established in Article 330, mutatis mutandis.*

3. *The Parties may further develop the commitments undertaken in this Agreement, or broaden its scope of application, by agreeing to amendments to this Agreement or by concluding agreements on specific sectors or activities, taking into consideration the experience gained during its implementation.”*

¹⁷ EU-Korea FTA Article 15.5.

Should renegotiation not be agreeable between the parties, most such trade agreements leave the option to unilaterally withdraw from it.¹⁸ Importantly, since Brexit would entail separate agreements between the third party and the UK, and between the third party and the EU (See figure 1 above), the agreement could be terminated for only one of those relationships, while remaining in force for the other.

Bilateral Investment Treaties

Unlike EU trade agreements and investment treaties promoted by other countries—notably, the United States and Canada—BITs concluded by the UK do not generally feature a list of sectoral commitments or reservations. Hence, the terms or conditions to be assessed for amendment by the parties concern not specific sectoral obligations, but rather the substantial obligations featured in the text of the agreement itself. That is, the discussion would relate to the text of the national treatment clause, rather than the sectoral reservations to national treatment. As a result, contrary to the situation of PTAs, there appears to be nothing in the investment treaties that would require an amendment as a result of Brexit. In principle, investment treaties concluded by third countries with the UK will continue their existence unaltered after Brexit.

However, third countries may consider that Brexit does have an impact on their economic relationship with the UK, and they could seek the conclusion of the agreement or a renegotiation of its terms. For instance, companies from third countries that are established in the UK will, after Brexit, no longer be able to do business in other EU member states with the benefits derived from the EU Single Market. In these conditions, third countries may consider that the original rights and obligations set out in the BITs are not proportionate to the new conditions, and could wish to revise the terms of the investment treaty that links them to the UK.

The parties to the UK investment treaties would need to express to their UK counterparts their desire to revise the terms of the agreements as a condition for the continuation of the treaty. A few investment treaties expressly include provisions on amendments,¹⁹ which could be triggered. Amendments to the treaties would be possible even if those treaties do not expressly address the possibility of amendments to its disciplines, simply by requiring amendments as an alternative to the termination of the treaty.²⁰

¹⁸ See, for instance, EU-Korea FTA, Article 15.11:3.

¹⁹ Article XIII:2 of the UK-Costa Rica BIT, for instance, reads “*El presente Convenio podrá ser modificado en, cualquier momento por mutuo acuerdo de las Partes. Las modificaciones resultantes entrarán en vigor una vez que cumplan con los trámites constitucionales respectivos y se produzca el canje de notas entre las Partes contratantes.*”

²⁰ The termination of the treaty could be invoked even if the agreement does not foresee this possibility, by invoking the *rebus sic stantibus* doctrine of international law. This doctrine allows for a termination on an international due to a fundamental change of circumstances. This principle is incorporated in the Vienna Convention on the Law of Treaties (“Vienna Convention” or VCLT), that recognizes the possibility of unilaterally terminating the agreements if there is a “fundamental change of circumstances” that was “essential” for the conclusion of the agreement and that it “radically [. . .] transform[s] the extent of [its] obligations” (Art. 62 VCLT)

3. Way Ahead for Third Countries

The cursory review of trade agreements suggests that Brexit will entail an extensive process of amendment of the text and commitments that currently apply to the UK and its trading partners. At the multilateral level, the UK will remain a WTO member, but will be need to clarify its specific terms and conditions. At the bilateral level, the status of current EU PTAs with regard to the UK and its trading partners remains uncertain, as the applicability of these agreements to a non-EU member state is not addressed. Some elements suggest that these PTAs may no longer be valid for the UK, or that, even if legally valid, they will no longer apply to the relationship between the UK and the third country. Further, good-only agreements, such as the customs union agreements with Andorra, San Marino, and Turkey will cease to apply to the UK. Some agreements, however, will continue to apply without the need for amendments, such as the bilateral investment treaties concluded by the UK.

In all those cases, however, third countries who consider that Brexit has diminished the value of their negotiated commitments have the opportunity to seek amendments to their agreements, in the form of compensation in sectoral commitments or changes in the text of the agreements.

For the PTAs to continue to apply, the UK and the third country will need to amend some aspects of the text of the agreement as well as of the lists of commitments. This situation could be addressed by concluding a totally new agreement, modifying the text and schedules of the current PTA, or, as a minimalistic option, signing some type of instrument that interprets some key provisions of the original text, such as the clause on territorial coverage, to adapt it to the new, bilateral, UK-third country relationship.

This process of amending the trade and investment agreements to accommodate the new circumstances of Brexit requires a comprehensive understanding of their trade and investment flows with the EU and the UK. In particular, third countries should be able to link the economic impact of Brexit in specific sectors, with the terms and commitments of their agreements. A number of steps can help third countries ensure that the value of their trade and investment agreements with the EU and UK remains unchanged after Brexit. The following points offer a preliminary list of key issues that third countries should consider in this regard:

- Trade flows: Third countries should identify in detail their exports to the UK and to the EU, and the regimes under which they take place. A thorough understanding of the exports to (and imports from) the UK will be necessary for eventual renegotiation of commitments under the WTO and PTAs.
- Agricultural and fisheries trade: since WTO disciplines on subsidies, as well as WTO and PTA commitments on quotas, fall largely on agricultural and fisheries products, agriculture and fisheries are likely to be at the center of any amendment of the WTO agreements, as well as PTAs. In these sectors, third countries should be aware, in addition to the trade flows, the level of utilization of quotas and the specific EU member state who

is importing those goods, and the level of subsidies to agricultural and fisheries products within each EU member state, and the UK in particular.

- Investment: The exit of the UK from the EU single market will entail that UK-based firms, including foreign-owned firms, will no longer benefit from the freedom of establishment—and vice versa. Third countries should hence be aware of the investment by their firms in the EU and the impact that Brexit may have on their businesses, including the potential costs for their investments. WTO discussions on trade in services, as well as commitments on establishment under PTAs and BITs will hinge on a comprehensive understanding of these investment relations between the third country and the EU and UK.
- Terms and conditions of each trade agreement: While the present review offers some general conclusions on the status of the trade and investment agreements involving the EU and UK, each of these legal instruments as its specific terms both with regard to the agreement's main disciplines as well as the lists of sectoral commitments in goods, services, and investment. A detailed understanding of the terms and conditions of the specific trade and investment agreements is essential for considering potential amendments, in particular in areas of key economic interest, such as agriculture, services trade and investment, or movement of individuals.

The specific conditions of Brexit and its impact on trade and investment flows will greatly depend on the terms of the withdrawal agreement between the UK and the EU—but it will undoubtedly bring important challenges as well as opportunities to the parties involved and their partners around the world. The trade and investment agreements linking the EU and UK with the rest of the world will be a key tool to minimize negative impact and maximize opportunities. The current analysis suggests that Brexit will entail an extensive process of amendment of the text and/or the list of commitments of the UK trade agreements at the multilateral and bilateral level. Third countries can use the opportunity of these talks to promote greater trade and investments flows with the EU and UK.

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