Background

The United Kingdom (UK) intends to leave the European Union (EU) following the referendum on EU membership on 23 June, 2016. The right to leave the EU is stated in Article 50 of the Treaty of Lisbon, which says that “[any] member state may decide to withdraw from the Union in accordance with its own constitutional requirements.”

Even though Article 50 provides the overall framework for Brexit, the fine details of any final agreement must be hammered out by the UK and the other member states. There is, however, no precedent for this process, as no country has ever left the EU before, and this adds to a climate of uncertainty. Article 50 refers to a two-year period, during which the parties must negotiate every aspect of the post-exit settlements. Nevertheless, this is not binding: it seems that Brexit could come into full effect without any agreement within the two-year timeframe, or that timeframe could be extended.

For some, the Brexit process is just about renegotiating a new trade deal between the UK and the EU. However, there are wider trade issues at play, particularly whether any new agreement is consistent with multilateral trade rules governed by the World Trade Organization (WTO).

Trade relations: the WTO, the EU and the UK

The WTO is a multilateral organisation that deals with the global rules of trade involving its 164 members and the way in which trade disputes are to be settled. Both the EU and its individual members are members of the WTO. They are all bound by the rules agreed collectively by WTO members. Therefore, whatever trading relationship or agreement is negotiated consistent with multilateral trade rules governed by the WTO.

This issue of Commonwealth Trade Hot Topics highlights some broad WTO-related factors that need to be considered as a post-Brexit UK reinstates the sovereignty of its trade policy. Given that there is uncertainty about almost every possible type of Brexit, including the nature of future trading arrangements between the UK and the EU, and between the UK and non-EU countries, this article does not aim to provide any definitive solutions. In addition, many important issues are likely to be subject to legal interpretations. This paper just sets out a number of developments that are unfolding and that have significant implications related to multilateral trade rules as the UK moves through the stages towards Brexit.

Staging Brexit at the WTO

Teddy Y. Soobramanien and Mohammad Razzaque*

* The authors of this article are respectively Economic Adviser, and Head of International Trade Policy, Commonwealth Secretariat. This paper has benefited from comments and suggestions received from Paul Baker, and discussions with Lorand Bartels, Jodie Keane and Brendan Vickers. Any views expressed in this article are those of the authors and do not necessarily represent those of the Secretariat and the persons named above.

1 The Treaty of Lisbon is an international agreement that amends the two treaties forming the constitutional basis of the European Union (EU). The Treaty of Lisbon was signed by the EU members on 13 December 2007, and entered into force on 1 December 2009.
3 As per Article 50.3, “The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”
between individual WTO members or groups of members must be consistent with the rules set out in different WTO agreements.

The WTO faces an unprecedented challenge in dealing with Brexit-related implications. The WTO has no past experience of disentangling the joint commitments of a group of countries that has split apart.\(^4\) As things stand, the 28 EU members have combined rights and obligations and these might have to be clarified between the UK and the other 27 EU countries. What is more, any division of obligations might have to be negotiated between the UK and the EU-27 and with any other WTO member that considers its interests being affected.

The timing and the sequencing of such events is critical. In all probability, nothing will change in the interim period from the moment Article 50 is triggered to the finalisation of a post-Brexit trade regime, unless there is an abrupt and unprecedented break from existing trading relations within the EU. The WTO will also need to be notified that a new trading arrangement is being negotiated.\(^5\)

One of the WTO’s fundamental principles is ‘Most Favoured Nation’ (MFN) treatment for its members, as stipulated in Article I of the 1994 GATT Agreement (General Agreement on Tariffs and Trade). In simple terms, this means that all WTO members are to be treated equally when it comes to market access related to goods, aiming to ensure that there is no discrimination among members. MFN is also the basis for the General Agreement on Trade in Services (GATS) (Article II) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4).

One notable exception to the MFN principle applies when members engage in Regional Trade Agreements (RTAs) and provide preferential or more favourable access to developing or least-developed countries (LDCs). Specifically, RTAs must be WTO consistent, which requires them to meet specific conditions laid out in Article XXIV of GATT 1994 – or Article V of GATS, depending on whether the agreement covers trade in goods and/or services.

This means that if the UK and the remaining EU countries negotiate new trade deals, these must meet certain conditions such as “liberalisation of substantially all trade” in the case of trade in goods or “substantial sectoral coverage” in the case of services. However, it should be noted that these provisions have been subject to various interpretations, and have not always generated consensus. The Article has had to be evoked in some disputes, such as the Turkey – Textiles case.\(^6\)

Another exception to the MFN principle is the preference granted to developing countries or LDCs that are covered by provisions such as the so-called ‘Enabling Clause’.\(^7\) The unilateral measures offered by preference-granting countries allows countries with weak trade and supply-side capacity to obtain ‘better-than-MFN’ market access. This has also been subject to further conditions to prevent discrimination among recipient countries. Article IX:3 of the Marrakesh Agreement Establishing the WTO (known as the WTO Agreement) also allows waivers to offer discriminatory preferential market access to developing countries. In essence, a waiver from WTO members allows individual members to not comply with normal commitments.

Although the WTO framework should be kept in mind at every stage of Brexit, its significance will be profound for the UK once it finally withdraws from the EU. The EU is a customs union, and its members apply a uniform and common trade regime for other third countries.\(^8\) At present, the EU consolidated schedule of concessions on goods and the GATS schedule of commitments in the WTO apply to the UK as they do to every other EU countries.\(^9\) If the UK ceases to be part of this customs union, then its

---


5 GATT 1994 art XXIV: 7. (a) “Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.” Also provided for in the Transparency Mechanism adopted by members in December 2006: 1 (a) “Members participating in new negotiations aimed at the conclusion of an RTA shall endeavour to so inform the WTO.”

6 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds34_e.htm

7 Differential and more favourable treatment reciprocity and fuller participation of developing countries, Decision of 28 November 1979 (L/4903).

8 It should also be noted that the EU has a large number of regional trade deals with other countries and these deals are WTO-consistent as pointed out above.

9 The EU’s last schedule in force is European Communities and their members – Schedule of Specific Commitments, GATS/SC/31, 15 April 1994. An EU-25 schedule (S/C/W/273, 9 October, 2006 and S/C/W/273/Suppl.1, 31, October 2006) was certified on 18 December 2006 (S/L/286, 18 December, 2006) but its entry into force awaits ratification by all EU members.
relations with the remaining EU countries and with the rest of the world will have to be re-defined and re-aligned with WTO rules.

**Schedule of Concessions – the Brexit starting point at the WTO**

As an individual WTO member, the UK must have its own schedule of concessions. For trade in goods, a schedule usually consists of maximum tariff levels that are often referred to as ‘bound tariffs’ or ‘bindings’ (GATT Article II). In the case of agricultural products, these concessions and commitments also relate to tariff-rate quotas, limits on export subsidies, and some kinds of domestic support. For trade in services, they list the sectors being opened, the extent of market access given within those sectors (e.g. whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies). All of these commitments are ‘bound’.

The schedule, in essence, sets out the trade policy space of a given WTO member in different sectors. Since the UK is part of the EU, the EU’s schedule is also the UK’s schedule. The current EU schedule was established as far back as 1995, more than 20 years ago, and commitments taken for reductions by the EU have already been undertaken. The number of EU member countries has tripled since the establishment of the WTO, but the schedule has not changed. Generally, in the case of trade in goods, applied tariffs by the EU are low, and bound tariffs are also at a low level, with the exception of a few sectors where there are tariff peaks.

Perhaps the simplest possible option is to take the existing EU schedule as the starting point. The extent to which the UK will be able to modify this existing schedule could be subject to legal interpretations. At the very least, the initial years of the UK’s independent trade policy is likely to attract close-scrutiny by many WTO members, given the EU’s involvement with so many countries in a large number of bilateral and regional trading arrangements. These countries will want to know how they will be affected post-Brexit.

A detailed analysis of the EU schedule will be essential to ensure the UK’s consistency with any trade policy and industrial strategies that it wants to put in place, as well as consideration of whether there is enough policy space to do so. Consideration of tariff provisions, for example, suggests that policy space in the EU schedule is limited as the simple average MFN tariffs (bound) is only 5.6 per cent, while the import weighted average rate is estimated to be 3.6 per cent.

The spread between bound and applied tariff rates would provide policy space. In the case of the EU, the difference between the two rates is either low or non-existent. However, there are tariff peaks in certain sectors. On the other hand, the EU’s active use of trade defence mechanisms, would imply that tariffs are not the only factor in accessing domestic market.

Considering trade defence mechanisms, in cases of unfair trade practices by other members post-Brexit, the UK might contemplate measures available under trade remedial instruments, or apply safeguard measures in the case of sudden surges in imports, as long as it can demonstrate injury to its industry. As a member of the EU, all relevant EU directives have been in place to tackle

### Table 1: European Union: Summary of tariff profile

<table>
<thead>
<tr>
<th>Summary</th>
<th>All sectors (%)</th>
<th>Agriculture (%)</th>
<th>Non-agriculture (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Simple average MFN tariffs (final bound)</td>
<td>5.0</td>
<td>12.5</td>
<td>3.9</td>
</tr>
<tr>
<td>Simple average MFN applied tariffs (2014)</td>
<td>5.3</td>
<td>12.2</td>
<td>4.2</td>
</tr>
<tr>
<td>Trade- weighted average tariffs</td>
<td>3.6</td>
<td>22.3</td>
<td>2.3</td>
</tr>
<tr>
<td>Binding coverage (since 1995)</td>
<td>-</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>Tariff quota (in %) since 1995</td>
<td>-</td>
<td>11.3</td>
<td>-</td>
</tr>
<tr>
<td>Special safeguards</td>
<td>-</td>
<td>23.9</td>
<td></td>
</tr>
</tbody>
</table>

*Source: WTO.***

---


11 There have, however, been differing views about the need for the UK to renegotiate its concessions with WTO members following Brexit. Useful discussions on this along with specific references to legal provisions can be found in Bartels, L. (2016). “The UK’s Status in the WTO after Brexit”. available at SSRN: https://ssrn.com/abstract=2841747

12 [http://stat.wto.org/TariffProfiles/E28_e.htm](http://stat.wto.org/TariffProfiles/E28_e.htm)
these issues. After Brexit, however, the UK will have to draft new laws and regulations to deal with these mechanisms. It is still possible to have specific trade policy measures, such as technical standard requirements for products, but these must be in line with the relevant WTO provisions as guided by the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) agreements.

As noted, exceptions to MFN are possible but these depend on the exact circumstances (e.g. a free trade agreement or a preferential scheme). Any modification to the schedule, however, could spur other WTO members to renegotiate the concessions. Article XXVIII of GATT 1994 provides for a situation where a WTO member modifies its schedule of concessions (Article XXVIII of GATT 1994 - Regulations concerning the modification of the schedule of trade regulations). The corresponding provision for GATS is contained in Article XXI.

The EU schedule of commitments on services, like any other country’s schedule, includes horizontal as well as specific commitments. Horizontal commitments stipulate limitations that apply to all the sectors included in the schedule. There would have to be careful examination of the way services are regulated internally within a country – an important factor in drafting a schedule of commitment and usually related to the free movement of natural persons and commercial presence – as well as general regulations reflected in horizontal commitments covering all services sectors. It is worth noting that the EU schedule of commitments contains country-specific provisions, as the EU does not have full competence on services, but only goods. This matters, given that the services sector is the most important sector of the UK economy and needs careful consideration in the context of negotiations with both the EU and the WTO.

The situation could be further complicated if, in adopting the EU schedule in the WTO, the UK’s trade relationship with the remaining EU member states is not clarified or covered at that time by a (possibly interim) arrangement, albeit a preferential one that is in line with the WTO rules.

In an extreme situation, a waiver might be sought. If the waiver was not achieved, EU-UK trade would be subject to MFN tariffs. In effect, this could imply the imposition of tariffs in those sectors where EU MFN rates are not zero. The UK’s unilateral decision to reduce them would be inconsistent with the MFN principle if applied only to existing EU members. At the same time, post-Brexit UK exports in many sectors will be subject to higher EU MFN tariffs, given that the EU will maintain its common external tariffs. That is why reaching a trade deal with the EU that is WTO-compatible is so important: it is perhaps the only way to avoid any major trade disruptions between the two parties.

If the UK adopts and modifies parts of the original EU schedule submitted, this could – once again – amount to a re-negotiation process as it would open up the concessions originally made. The same process for modifications will apply in most cases, although the process may be complex if major modifications are attempted that have an impact on other WTO members. If the UK decides to submit an entirely new schedule of commitments, this could be tantamount to a complete re-negotiation that could, in turn, resemble a process of re-accession to the WTO. This would be complicated and time-consuming, given the recent trend of lengthy accession negotiations and the heavy agenda of the WTO.

Keeping preferential access for developing countries

Once the schedule of commitments is clarified, an important issue is whether the UK will continue the kind of preferential trade regimes with certain developing countries it has had as a member of the EU. This is of particular relevance for the African, Caribbean and Pacific (ACP) countries and least developed countries (LDCs). For example, goods originating from LDCs can access the EU market (including the UK) under the ‘Everything-But-Arms’ (EBA) arrangements, which exempts them from customs duties.

The EU has negotiated seven regional economic partnership agreements (EPAs) with ACP countries that are at different stages of finalisation or implementation. During the period of its withdrawal negotiations, the UK will continue to implement the EU’s unilateral Generalised Scheme of Preferences policy (such as the EBA) and all bilateral and regional trade agreements. Upon the UK’s formal exit from the EU, all rights and obligations under these various agreements will cease to apply and the UK will devise its own trade policy.

A recent Commonwealth Trade Hot Topics (issue 137) demonstrated that any failure to provide EU-equivalent preferences could result in significant tax hikes for the exports of developing countries...
to the UK.\textsuperscript{13} Given the historic ties and socio-economic conditions of these countries, the UK’s maintenance of similar preferences for LDCs and ACP countries should not be controversial. One straightforward option would be for the UK to devise its own GSP for LDCs, providing duty-free and quota-free market access for all goods originating in LDCs, similar to that of the EU.

Future arrangements for ACP, however, could be more complex in nature. One key issue is whether the UK can adopt EPA-replicas with those ACP countries that have already signed deals with the EU. This could re-open negotiations on many issues, some of them contentious, and, as the UK would not have the same powerful bargaining position as the EU, the process could take years. There will have to be reciprocal trade arrangements and Article XXIV provisions will apply.

Another possible way forward is for the UK to request WTO waivers for its ACP partners, allowing it to offer unilateral trade preferences. There are precedents for such an arrangement, including the United States’ African Growth and Opportunity Act and the Caribbean Basin Initiative. This option would help to avoid the need to get into difficult negotiations with ACP countries at this stage, while ensuring continuity of preferential treatment for them. In the medium to longer term, the UK could consider negotiating development-friendly and WTO-compatible trade agreements with ACP regions. Although waivers in the WTO can be hard to secure, ensuring continuity of trade preference by the UK for ACP countries is likely to receive wide support from WTO members. Such a waiver request would have a strong basis, given the precedents for this kind of arrangement.

**Conclusion**

The process of Brexit at the WTO will be complex. One relatively straightforward option for the UK appears to be to adopt the EU schedule of concessions to begin with. However, some modifications might be needed, and this could have some consequences. It may be possible for the UK to go deeper in certain sectors in terms of liberalisation to reassure other WTO members that its intention is not to restrict trade. However, deeper unilateral liberalisation could affect its ability to negotiate new trade deals. Given the UK’s commitment to support for trade development, EU preferential access for developing countries needs to be preserved.

In all of these cases, some form of negotiations between the UK and other WTO members seems inevitable. Once the WTO status and schedule of commitments is clarified and/or agreed, the UK and the EU will have to work out their respective positions in the light of ongoing WTO negotiations, Trade in Services Agreement negotiations and other initiatives such as supporting Aid for Trade and the implementation of the Trade Facilitation Agreement. Although building a broad base of national consensus for its own negotiating position and developing a sovereign trade policy could be challenging, the post-Brexit UK will certainly have a more proactive role to play in the WTO and in advancing trade multilateralism.
International Trade Policy Section at the Commonwealth Secretariat

This Trade Hot Topic is brought out by the International Trade Policy (ITP) Section of the Trade Division of the Commonwealth Secretariat, which is the main intergovernmental agency of the Commonwealth – an association of 52 independent states, comprising large and small, developed and developing, landlocked and island economies – facilitating consultation and co-operation among member governments and countries in the common interest of their peoples and in the promotion of international consensus-building.

ITP is entrusted with the responsibilities of undertaking policy-oriented research and advocacy on trade and development issues and providing informed inputs into the related discourses involving Commonwealth members. The ITP approach is to scan the trade and development landscape for areas where orthodox approaches are ineffective or where there are public policy failures or gaps, and to seek heterodox approaches to address those. Its work plan is flexible to enable quick response to emerging issues in the international trading environment that impact particularly on highly vulnerable Commonwealth constituencies – least developed countries (LDCs), small states and sub-Saharan Africa.

Scope of ITP Work

ITP undertakes activities principally in three broad areas:

• It supports Commonwealth developing members in their negotiation of multilateral and regional trade agreements that promote development friendly outcomes, notably their economic growth through expanded trade.

• It conducts policy research, consultations and advocacy to increase understanding of the changing international trading environment and of policy options for successful adaptation.

• It contributes to the processes involving the multilateral and bilateral trade regimes that advance more beneficial participation of Commonwealth developing country members, particularly, small states and LDCs and sub-Saharan Africa.

ITP Recent Activities

ITPs most recent activities focus on assisting member states in their negotiations under the WTO’s Doha Round and various regional trading arrangements, undertaking analytical research on a range of trade policy, emerging trade-related development issues, and supporting workshops/dialogues for facilitating exchange of ideas, disseminating informed inputs, and consensus-building on issues of interest to Commonwealth members.

Selected Recent Meetings/Workshops Supported by ITP

10 - 12 November 2016: Workshop on Productive Capacity and LDC Graduation, held in Beijing, China in partnership with UN DESA and Peking University.

1 - 2 November 2016: Update of Post-Nairobi and Preparation for MC 11, held in Port Vila, Vanuatu in partnership with WTO, EIF and PIFS Secretariat

27 - 20 September 2016: Implementing the Sustainable Development Goals and Achieving Inclusive Trade, WTO Public Forum, held in Geneva, Switzerland

July – 21 July 2016: Fostering Green Economies through Trade, Investment and Innovation, UNTACD 14, held in Nairobi, Kenya

27-29 May 2016 : Tracking Progress and Acceleration Transformation, LDC IV Monitor, held in Antalya, Turkey.

12 - 13 May 2016: Caribbean Regional Consultation on Recent Developments in Trade, held in Port of Spain, Trinidad and Tobago.

10 - 12 May 2016: Oceans Economy and Trade: Sustainable Fisheries, Transport and Tourism, held in Geneva, Switzerland


30 - 31 March 2016: Commonwealth Expert Group on Trade: ‘Revitalising Global Trade and Multilateralism’, held in New Delhi, India.


12 - 13 November 2015: Emerging Global and Regional Trade Issues for the Commonwealth Pacific Region, held in Tonga.
Selected ITP Publications


Selected Ongoing Policy Research Projects

• Trade and Sustainable Development Goals
• Multilateral trade negotiations – specific issues for LDCs, SVEs and SSA
• Brexit and related trade policy issues
• The development impact of the Doha Round on least developed countries (LDCs)
• Aid for trade in small states and Sub-Saharan Africa
• Rise of emerging developing countries and implications for Sub-Saharan Africa and small vulnerable economies (SVEs)
• Development issues under EPAs
• Trade in services
• Regional trading arrangements in South Asia and their implications
• Trade in services issues for small states and low-income countries
• Implementation of the Istanbul Programme of Action for LDCs
• Intra-Commonwealth trade & development cooperation
• Non-tariff barriers in South Asia and Sub-Saharan Africa
• Global value chains and the effective participation of LDCs, SVEs and SSA
• LDCs and SVEs in South-South trade
### Previous Ten Issues of the Commonwealth Trade Hot Topics Series

<table>
<thead>
<tr>
<th>Issue</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>137</td>
<td>Post-Brexit UK - ACP Trading Arrangements: Some Reflections</td>
</tr>
<tr>
<td>136</td>
<td>Connectivity and Global Value Chain Participation: Cost and Capability Considerations</td>
</tr>
<tr>
<td>135</td>
<td>Modes of Service Delivery and Global Value Chain Participation</td>
</tr>
<tr>
<td>134</td>
<td>Graduation from LDC Status: Potential Implications for the Pacific Fisheries Sector</td>
</tr>
<tr>
<td>133</td>
<td>Trade Implications of Brexit for Commonwealth Developing Countries</td>
</tr>
<tr>
<td>132</td>
<td>Global Trade Slowdown, Brexit and SDGs: Issues and Way Forward</td>
</tr>
<tr>
<td>131</td>
<td>The Changing Global Trade Architecture: Implications for Sub-Saharan Africa’s Development?</td>
</tr>
<tr>
<td>130</td>
<td>Trade Implications of Climate Policy after the Paris Outcome</td>
</tr>
<tr>
<td>129</td>
<td>The Paris Climate Agreement: What Implications for Trade?</td>
</tr>
<tr>
<td>128</td>
<td>Trade and the SDGs: Making ‘Means of Implementation’ a Reality</td>
</tr>
</tbody>
</table>

---

Trade Hot Topics

ISSN: 2071-8527 (print) ISSN: 2071-9914 (online)

Commonwealth Trade Hot Topics is a peer-reviewed publication which provides concise and informative analyses on trade and related issues, prepared both by Commonwealth Secretariat and international experts.

Series editor: Dr Mohammad A Razzaque
Produced by Trade Division of the Commonwealth Secretariat

For further information or to contribute to the Series, please email m.razzaque@commonwealth.int