
Centre for International
Governance Innovation



British Institute of
International and
Comparative Law

Brexit: The International Legal Implications | Paper No. 1 – September 2017

Brexit and International Trade One Year after the Referendum

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Valerie Hughes

CIGI Masthead

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About the Series

Brexit: The International Legal Implications is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty on European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

About the Author

Valerie Hughes teaches international trade law at Queen's University. She was director of the Legal Affairs Division of the World Trade Organization (WTO) from 2010 to 2016 and served as director of the WTO's Appellate Body Secretariat from 2001 to 2005. Valerie held several positions with the Government of Canada, including assistant deputy minister at the Law Branch of the Department of Finance; general counsel of the Trade Law Division of the Department of Foreign Affairs and International Trade; and senior counsel, Constitutional and International Law Division of the Department of Justice. Valerie has also practised law in two large Canadian law firms, focusing mainly on international law.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Acronyms and Abbreviations

CETA	Comprehensive Economic and Trade Agreement
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
INR	initial negotiating rights
ISDS	investor-state dispute settlement
SPS	sanitary and phytosanitary
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRQ	tariff rate quota
WTO	World Trade Organization

Executive Summary

Although more than a year has passed since the United Kingdom voted to leave the European Union, most of the arrangements governing the international relations of a post-Brexit United Kingdom have yet to be worked out, be they with the European Union or with countries outside the European Union. With the UK departure deadline of April 2019 fast approaching, there remains a great deal of uncertainty about the contours of the United Kingdom's future trading relationships — transition or long-term — with the European Union and with non-EU countries around the world. In the face of this considerable uncertainty, recent legal decisions in the European Union and the World Trade Organization (WTO) may provide useful guidance for trade negotiators and legal advisers going forward.

First, the European Court of Justice issued an opinion in May 2017 providing insight on the legal competence within the European Union to conclude wide-ranging free trade agreements (FTAs) covering trade in goods, services, intellectual property rights, investment and other areas. Although the opinion was issued in relation to the provisions of the EU-Singapore FTA, the findings address EU and EU member state competence generally and will thus be highly relevant for any trade deal to be negotiated by the European Union in the future, including with the United Kingdom. Second, a WTO dispute settlement panel report adopted in April 2017 addressing China-EU trade provides rare guidance on the interpretation of WTO provisions and guidelines dealing with the modification of WTO members' schedules, reflecting their treaty commitments and concessions.

The panel report is binding only on China and the European Union, but the findings addressing modification provisions and procedures are likely to be relevant for WTO members more generally when one of them seeks to modify its WTO schedules going forward. Although the United Kingdom is a WTO member in its own right, it does not have WTO schedules in its own name; instead, its commitments and concessions are included in the EU schedules. Views differ as to whether, after Brexit, the United Kingdom would simply continue to exercise rights currently found in the EU schedules but under its own name, adjusted accordingly, or whether it would need

to secure WTO schedules in its own right. If the latter is the case, the recent WTO panel report will likely be highly relevant in this exercise.

Introduction

It has been just over a year since the people of the United Kingdom voted to leave the European Union.¹ The result of the referendum, which shocked many, both in the United Kingdom and abroad, raised numerous questions about the process for and implications of the United Kingdom's withdrawal from the union it joined in 1972. Several of those questions concern the United Kingdom's future trading arrangements, be they with the European Union and its remaining member states, or more broadly with members of the WTO. This paper focuses on the legal landscape that informs what those future trading relationships might be.

Speaking to the World Trade Symposium held in London on June 7, 2016 — two weeks before the Brexit referendum vote was held — WTO Director-General Roberto Azevêdo observed that although the United Kingdom would remain a member of the WTO even if it were to leave the European Union, its terms of trade for goods and services were founded on the United Kingdom's membership of the European Union and, therefore, a United Kingdom outside the European Union would need to negotiate these terms anew with all WTO members. The director-general painted a rather daunting picture of the road ahead for the United Kingdom, explaining that there was “no precedent for this — even the process for conducting these negotiations is unclear at this stage.” He pointed out that it would not be possible — as some had suggested — to simply cut and paste the commitments found in the European Union's terms of trade, noting that “no WTO member can unilaterally decide what its rights and obligations are.” Azevêdo cautioned that “it could take quite some time before the UK got back to a similar position...in terms of its trading relationships with other countries,” and observed that with

1 The vote took place on June 23, 2016.

respect to the United Kingdom's future trading relationships, "the only certainty is uncertainty."²

One year later, Azevêdo could probably recycle much of the language from that June 2016 speech were he to speak on the same subject today, for little has changed regarding the uncertainty surrounding the future of the United Kingdom's trading relationships.

Legal and Political Developments since June 2016

Legal Challenge to Initiating Brexit Process

There have, however, been a number of developments during the past year that inform some of the issues that arose in light of the Brexit vote. We know now, for example, that by virtue of the United Kingdom's constitutional arrangements, the UK government was not entitled to rely on its prerogative powers to authorize it to trigger article 50 of the Treaty on European Union (TEU), which initiates the procedure for an EU member state to withdraw from the European Union. Rather, the Supreme Court of the United Kingdom determined that an Act of Parliament is required to authorize UK ministers to do so.³ In making this decision, the court was asked by both sides in the case to assume that the exercise of the power to serve notice of withdrawal "cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn."⁴ The court did not pronounce on the point of irrevocability, but proceeded on the basis that the assumption was correct and

2 Roberto Azevêdo, "Trade and Globalisation in the 21st Century: The Path to Greater Inclusion" (Speech delivered at the World Trade Symposium, 7 June 2016), online: <www.wto.org/english/news_e/spra_e/spra126_e.htm>. The event was organized by the *Financial Times* and Misys.

3 *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant); Reference by the Attorney General for Northern Ireland: In the matter of an application by Agnew and others for Judicial Review; Reference by the Court of Appeal (Northern Ireland): In the matter of an application by Raymond McCord for Judicial Review*, [2017] UKSC 5, online: <www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>.

4 *Ibid* at para 26.

concluded that it "follows from this that once the United Kingdom gives Notice, it will inevitably cease at a later date to be a member of the European Union and a party to the EU Treaties."⁵

The requisite Act of Parliament was passed on March 16, 2017,⁶ and notice under article 50 was served on March 29, 2017.⁷ Thus, although there might be faint calls from time to time for an "exit from Brexit," there should be little doubt now that the United Kingdom will leave the European Union before April 2019.

British Election

What is less certain, however, is what the exit strategy will be. Until recently, it seemed fairly clear that the United Kingdom would pursue a "hard Brexit," such that remaining in the Customs Union or participating in the EU Single Market after Brexit were out of the question. Suggestions that the United Kingdom might follow the Norway⁸ or Switzerland⁹ models had also been rejected.¹⁰ Prime Minister Theresa May committed to pursue a comprehensive FTA covering goods and services and a new customs arrangement governing trade in goods with the European Union, and she rejected the notion that the

5 *Ibid*.

6 The bill was passed by Parliament on March 13, 2017, and received royal assent and became an Act of Parliament on March 16, 2017.

7 Letter from Prime Minister Theresa May to Donald Tusk, President of the European Council (29 March 2017), online: <www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>.

8 Under the Norway model, the United Kingdom would have access to the EU Single Market. In exchange, the United Kingdom would contribute to the EU budget, accept the EU core principle of free movement of people, and follow certain EU laws in areas such as employment, the environment and consumer protection. The United Kingdom would be bound by EU legislation in those areas, but would not have any say in their development.

9 Under the Switzerland model, there is no general right of access to the EU Single Market; instead, market access is governed by bilateral agreements covering specific sectors. Switzerland has negotiated more than 100 bilateral agreements, mostly covering access to goods and very limited access in services. For example, the banking sector is not covered. Switzerland's contribution to the EU budget is less than that of Norway, but it must observe the freedom of movement of people and must comply with some EU laws. Like Norway, Switzerland has no say in the development of those laws.

10 UK, Department for Exiting the European Union, *The United Kingdom's exit from, and new partnership with, the European Union* (Policy Paper delivered at Parliament, 2 February 2017) at 35, online: <www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-2>.

United Kingdom would be bound by the European Union's Common External Tariff.¹¹

May had also served notice that the United Kingdom was prepared to walk away from the negotiating table if the trade deal was not "the best deal for Britain," asserting that "no deal is better than a bad deal for the UK."¹² At the same time, she had observed that "immediate stability" would be "ensure[d]" by "lodging new UK schedules with the World Trade Organization, in alignment with EU schedules to which we are bound whilst still a member of the European Union."¹³ May also promised to achieve "continuity" in the United Kingdom's trading relationships with third countries covered by existing EU FTAs or preferential arrangements.¹⁴ More specifically, the British prime minister undertook to "seek to replicate all existing EU free trade agreements."¹⁵

Following the UK general election on June 8, 2017, however, when the Conservatives lost their overall majority, the prime minister's pursuit of a hard Brexit appeared to lose steam. At the same time, some UK Cabinet ministers are openly advocating to remain in the Single Market and Customs Union for a transition period of two to three years following the United Kingdom's exit from the European Union, followed by an implementation phase to allow a new UK-specific trade accord to be put in place.¹⁶ Under the circumstances, there is still considerable

uncertainty about the type and breadth of trading relationships the United Kingdom will have with the European Union (and hence with other countries) once it has left the European Union.

Of course, the United Kingdom is not the only player in the Brexit negotiations, and decisions about the United Kingdom's exit from the European Union will not be taken by the United Kingdom alone. The European Union will have to agree to any transition agreement, as well as to the terms of any future trade deal with the United Kingdom.

EU Negotiating Guidelines

Following the triggering of article 50 by the United Kingdom on March 29, 2017, the European Council adopted guidelines "defin[ing] the framework for negotiations under Article 50 TEU and set[ting] out the overall positions and principles that the Union will pursue throughout the negotiation."¹⁷ The European Council stated that it "stands ready to initiate work towards an agreement on trade, to be finalised and concluded once the United Kingdom is no longer a Member State," and that "any free trade agreement should be balanced, ambitious and wide-ranging," but "cannot, however, amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning."¹⁸ In terms of coverage, the council indicated that it "must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, *inter alia*, tax, social, environmental and regulatory measures and practices."¹⁹

Importantly, the guidelines also provide that the negotiations will be conducted by a single block — the European Union — and that there will be no individual negotiations with member states. Specifically, the guidelines provide that "the Union will approach the negotiations with unified positions, and will engage with the United Kingdom exclusively through the channels set out in these guidelines and in the negotiating directives. So as not to undercut the position of the Union, there will be no separate negotiations between individual

11 *Ibid* at 46. Although all EU member states are in the EU Customs Union, some countries outside the European Union have customs arrangements with the European Union whereby they follow the Common External Tariff. For example, Turkey is not part of the European Union, but has formed a Customs Union with it pursuant to which it must apply the same external tariff as does the European Union.

12 Conservative Party, *Forward, Together: Our Plan for a Stronger Britain and a Prosperous Future, The Conservative and Unionist Party Manifesto 2017* at 36, online: <www.conservatives.com/manifesto> [Conservative Party Manifesto].

13 *Ibid* at 15.

14 *Ibid* at 51, 54–55. The United States is the United Kingdom's single biggest export market on a country-by-country basis: *ibid* at 51.

15 *Ibid* at 15.

16 See e.g. Sarah Gordon & George Parker, "Philip Hammond seeks 'off-the-shelf' Brexit transition", *Financial Times* (27 July 2017), online: <www.ft.com/content/cc1dbf04-71fc-11e7-aca6-c6bd07df1a3c>; George Parker & Alex Barker, "'Status quo' Brexit transition plan reflects cabinet power grab", *Financial Times* (27 July 2017), online: <www.ft.com/content/df460e26-72b3-11e7-93ff-99f383b09ff9>. However, at the time of writing, there does not appear to be a consensus on this: Helen Warrell, "Liam Fox says free movement post-Brexit defies referendum result", *Financial Times* (31 July 2017), online: <www.ft.com/content/79132f52-7507-11e7-a3e8-60495fe6ca71>.

17 European Council, Press Release, "European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU" (29 April 2017) at para 5, online: <www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines>.

18 *Ibid* at paras 19–20.

19 *Ibid* at para 20.

Member States and the United Kingdom on matters pertaining to the withdrawal of the United Kingdom from the Union.²⁰

This statement refers to the entire set of negotiations necessary to secure the UK-EU “divorce,” including with respect to security, crime prevention, immigration and the rights of EU nationals living in the United Kingdom. But it also covers trade, and as such, brings to mind the difficulties that arose when Canada and the European Union sought to sign the Comprehensive Economic and Trade Agreement (CETA) in 2016, following seven years of negotiations. Although not required under EU law,²¹ the European Union had undertaken to sign CETA only once all 28 EU member governments agreed to the treaty text. When the Parliament of the Federation of Wallonia, a region of Belgium, opposed the deal and prevented Belgium from giving its consent to signature, this almost scuttled the agreement. Eventually, Wallonia’s agreement was secured and the treaty was signed in October 2016.²²

It is not clear at this point whether the European Union will commit to the remaining 27 member states that they will have veto rights over signature of an eventual trade agreement with the United Kingdom. Even if it does not do so, however, it is possible that one or more of the EU member states will seek to have a say in the contents of the deal. Should this occur, it could have significant implications for the UK-EU trade agreement negotiations. It is reasonable to expect that any UK-EU FTA will cover a wide array of subject areas, including the import and export of goods, customs, anti-dumping, countervailing and safeguard

measures, technical regulations, sanitary and phytosanitary (SPS) measures, investment, services including financial services, intellectual property, government procurement and competition, as well as institutional matters such as dispute settlement. The question arises as to whether all these subject areas fall within the exclusive competence of the European Union under the common commercial policy, whether any of them fall within the exclusive competence of the national governments of the member states, or whether any fall under shared EU/EU member-state competence. A recent opinion of the European Court of Justice sheds much light on this complex legal issue.

Opinion of the European Court of Justice on EU Competence in Concluding Wide-ranging FTAs

On July 10, 2015, the European Commission asked the European Court of Justice to opine on whether the provisions of the FTA negotiated and initialed with the Republic of Singapore fall within the exclusive competence of the European Union, a competence shared between the European Union and the member states, or a competence of the member states alone.²³ In December 2016, Advocate General Eleanor Sharpston issued an opinion to the court,²⁴ advising it to decide that the FTA could be concluded only by the European Union and the member states acting jointly.²⁵

Sharpston recognized the far-reaching implications a decision by the court along the lines of her advice would have on future trade negotiations to be conducted by the European Union. She understood that “a ratification process involving all the Member States alongside the European Union is of necessity likely to be both cumbersome and complex,” and acknowledged that it could “involve the risk that the outcome of lengthy negotiations

20 *Ibid* at para 2.

21 As explained by CIGI Senior Fellows Armand de Mestral and Markus Gehring in an article published in *The Globe and Mail* on October 21, 2016, “[R]equiring unanimity for CETA’s signature appears to be an entirely new practice, unheard of until very recently. Under the governing Treaty on the Functioning of the European Union (TFEU), Article 218.8 states that: ‘The Council shall act by a qualified majority throughout the procedure.’ The qualified majority is met when 55 per cent of states representing 65 per cent of their population vote in favour of a measure. Qualified majority voting has been gradually introduced into EU law to stop one country from blocking decisions....Mixed agreements [like CETA, which falls mostly within the EU’s competence but includes a few provisions falling within the competence of national governments] pose special problems in that, at least in the ratification stage, all countries need to agree. But so far unanimity has not been required for signing the treaty.”

22 Both governments proceeded thereafter to enact implementing legislation. The EU Parliament ratified CETA on February 15, 2017. Canadian implementing legislation received royal assent on May 16, 2017.

23 *Request for an opinion pursuant to article 218(11) TFEU*, made on July 10, 2015, by the European Commission. The EU-Singapore Agreement includes 17 chapters, as well as a protocol on rules of origin and understandings on taxation and other matters. The FTA covers trade in goods, trade and investment in renewable energy generation, trade in services, government procurement, investment including foreign direct investment, commercial and non-commercial aspects of intellectual property rights, competition, and labour and environmental standards.

24 The European Court of Justice is assisted by advocates general who deliver independent opinions on cases before the court.

25 Advocate General Eleanor Sharpston, opinion delivered at the European Court of Justice (21 December 2016), opinion procedure 2/15, ECLI:EU:C:2016:992 at paras 558–562, online: <www.eur-lex.europa.eu>.

may be blocked by a few Member States or even by a single Member State.” She conceded that this “might undermine the efficiency of EU external action and have negative consequences for the European Union’s relations with the third State(s) concerned.” Nevertheless, she reasoned that “the need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it. That question is to be resolved exclusively on the basis of the Treaties.”²⁶

Although opinions provided to the European Court of Justice by the advocates general are non-binding, they are generally very influential, and the court usually follows them. In this case, however, the court did not do so. The court determined that the competence of the European Union is broader than that allowed by Sharpston, and found that the shared competence with the member states is much narrower than what the advocate general concluded.²⁷ The court concluded that all the provisions of the EU-Singapore FTA fall within the exclusive competence of the European Union, with the exception of provisions dealing with non-direct investment and investor-state dispute settlement (ISDS). Provisions addressing the latter two subjects, the court said, fall within the shared competence of the European Union and the member states.²⁸

The court explained that under article 3(1)(e) of the TFEU, the European Union has exclusive competence in the area of common commercial

policy. Article 207(1) of the TFEU indicates that the common commercial policy “shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.” The court reasoned that “it follows that only the components of the envisaged agreement that display a specific link, in the above sense, with trade between the European Union and the Republic of Singapore fall within the field of the common commercial policy.”

Importantly, the court cautioned against taking too broad a view of what falls within the common commercial policy, noting that it is “settled case-law that the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy.” The court continued, observing that, “on the other hand, an EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it.”²⁹ Thus, the court established the following test for determining whether a provision falls within the sole competence of the European Union: “it must be established whether the commitments contained in that agreement are intended to promote, facilitate or govern such trade and have direct and immediate effects on it.”³⁰

This decision has significant implications for the future UK-EU trade negotiations, for there is now greater clarity about where the competencies lie with respect to subject areas and commitments one might expect to be included in an eventual UK-EU FTA. It suggests that the European Union will not be legally required to obtain agreement from the remaining 27 member states before committing to provisions governing trade in goods and services, trade remedies, SPS, competition and other areas, and would need approval only with respect to provisions dealing with ISDS and indirect foreign investment. Although the European Union may

²⁶ *Ibid* at paras 565–566.

²⁷ Sharpston concluded that the European Union enjoys exclusive external competence with regard to provisions of the FTA dealing with trade in goods, trade and investment in renewable energy generation, trade in services and government procurement except in relation to transport services, foreign direct investment, the commercial aspects of intellectual property rights (but not the non-commercial aspects of those rights), competition, and trade in rail and road transport services. She considered that the European Union’s competence is shared with the member states in several areas, including with respect to trade in air transport services, maritime transport services, and transport by inland waterway, types of investment other than foreign direct investment, government procurement insofar as it applies to transport services, non-commercial aspects of intellectual property rights, and labour and environmental standards.

²⁸ Advocate General Eleanor Sharpston, opinion 2/15 of the Court (Full Court), opinion pursuant to article 218(11) TFEU, “Free Trade Agreement between the European Union and the Republic of Singapore” (16 May 2017), ECLI:EU:C:2017:376 at para 305.

²⁹ *Ibid* at para 36.

³⁰ *Ibid* at paras 33–34, 37.

decide to offer a veto to all member states on the contents of the entire agreement, it does not appear to be obliged to do so under EU law. Thus, the CETA experience of facing an unexpected eleventh-hour member-state veto when it comes to signing an eventual EU-UK FTA is much less likely.

This assumes, of course, that the two sides will conclude an FTA prior to April 2019, or that a transitional arrangement governing trade is agreed upon by the time the United Kingdom exits the European Union. If there is no deal by that time, however, the UK-EU trading relationship will nevertheless be governed by WTO rules. Both the European Union and the United Kingdom are WTO members in their own right. WTO rules will also govern the trading relationship between the United Kingdom and non-EU countries that are WTO members, unless and until treaties are implemented between them stipulating otherwise. Any rights the United Kingdom has enjoyed under preferential trading arrangements that the European Union has with other countries will be lost upon the United Kingdom's exit from the union, and the United Kingdom will be obliged to negotiate its own such arrangements.

Default to WTO Rules

If the UK-EU trading relationship and the UK-non-EU member-state trading relationship were to default to WTO rules, what would those relationships look like?

WTO obligations comprise general rules that apply to all members and specific commitments made by individual members. The specific commitments are set out in documents called “schedules of concessions” or “schedules of commitments.” Goods schedules reflect specific tariff concessions and other commitments, and usually consist of maximum tariff levels (referred to as “bound tariffs” or “bindings”). In the case of agricultural products, these concessions and commitments also relate to tariff rate quotas (TRQs³¹), limits on export subsidies and some types of domestic support. Services

31 A TRQ refers to the application of a reduced tariff rate for a specified quantity of imported goods. Imports above the specified quantity are subject to a higher tariff rate.

schedules reflect market-access commitments and exemptions on a number of services sectors.

The United Kingdom was a contracting party to the General Agreement on Tariffs and Trade (GATT) 1947, and as such, was entitled to become an original member of the WTO upon meeting two conditions set out in article XI:1 of the Marrakesh Agreement Establishing the World Trade Organization.³² The first condition was acceptance of the Marrakesh Agreement and the Multilateral Trade Agreements; this was met by the United Kingdom on December 30, 1994, and these agreements came into force for the United Kingdom on January 1, 1995.³³ The second condition was to have schedules of concessions and commitments for goods and services annexed to the GATT 1994 and the General Agreement on Trade in Services (GATS), respectively. The United Kingdom did not annex UK-specific schedules, but it nevertheless met the second condition by virtue of its coverage under the schedules annexed by the European Union, which apply to all EU member states.

Views differ as to what the legal situation of the UK schedules will be once the United Kingdom leaves the European Union. Some argue that the United Kingdom's rights and obligations set out in the schedules are contingent upon its status as a member state of the European Union, with the result that it would need to develop new WTO goods and services schedules of its own, while others suggest that Brexit will not change the United Kingdom's rights and obligations set forth in the existing EU schedules, but only which WTO member exercises them. In other words, according to the latter view, the United Kingdom does not need new schedules because its schedules already exist in the form of EU schedules, although some elements currently applicable to the European Union as a whole (such as the right to subsidize agricultural production at certain levels and the TRQ commitments)

32 Article XI:1 of the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, (entered into force 1 January 1995) states: “The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.” See online: <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm>.

33 *Status of WTO Legal Instruments: 2015 edition* at 11, 41, online: <www.wto.org/english/res_e/booksp_e/wto_status_legal_inst15_e.pdf>.

would have to be adjusted to reflect rights and obligations applicable only to the UK.³⁴

The United Kingdom appears at this time to subscribe to the former view. The *Conservative Party Manifesto* of May 18, 2017, stipulates that the United Kingdom will lodge schedules with the WTO that will be “in alignment”³⁵ with the EU schedules. It can be assumed, therefore, that the United Kingdom will seek to replicate many of the tariff bindings found in the EU goods schedule. More difficult to “align” will be scheduled commitments related to TRQs, for they have been undertaken by the European Union with respect to imports into the European Union as a whole. The United Kingdom may not wish to commit to the same size quota applied by the European Union with respect to the entire union. Another challenge will be in the “alignment” of agricultural support commitments; determining the United Kingdom’s share of the European Union’s scheduled support commitments could be complicated.³⁶ Moreover, it cannot be assumed that the United Kingdom would wish to “cut and paste” the complete set of EU services commitments, which were negotiated by the European Union with the services industries of its entire membership in mind. The United Kingdom’s services industries are naturally of a different order than those of the EU membership. What is clear, however, is that if the United Kingdom wishes to lodge new goods and services schedules as the Conservative Party has suggested it will do, or if it seeks instead to exercise its rights under the EU schedules, but subject to adjustments such as with respect to TRQs, agricultural support and certain services commitments, in either case, all WTO members (including the European Union) must agree to the schedules submitted by the United Kingdom to the WTO. This is

because “no WTO Member can unilaterally decide what its WTO rights and obligations are.”³⁷

Beyond the issues respecting its own schedules, there is also the question of the United Kingdom’s right to access commitments found in other WTO members’ scheduled concessions, which are currently accessed by the United Kingdom via the European Union. It can be anticipated that at least some WTO members (including perhaps the European Union) will assert that the United Kingdom’s access is contingent upon the United Kingdom being a member of the European Union, which could trigger negotiations to determine new access rights specific to the United Kingdom.

Finally, the United Kingdom may wish to consider whether it needs to address its status with respect to certain other WTO instruments that were accepted on its behalf by the European Union.³⁸ For example, the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, which inserted the Trade Facilitation Agreement into Annex 1A of the WTO Agreement, was accepted by the European Union, which notified the WTO of its acceptance “so that it shall be binding upon the European Union.”³⁹

Modifications of Schedules in the WTO

Beyond the questions surrounding *what* rights and obligations the United Kingdom will have post-Brexit under its UK-specific schedules is the question of *how* to go about reaching agreement with WTO members on the content of those

34 See e.g. Lorand Bartels, “The UK’s Status in the WTO after Brexit” (2016), online: SSRN <<https://ssrn.com/abstract=2841747>>; Peter Ungphakorn, “Nothing simple about UK regaining WTO status post-Brexit” (27 June 2016), online: International Centre for Trade and Sustainable Development <www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit>.

35 *Conservative Party Manifesto*, *supra* note 12 at 15.

36 *Ibid* at 26. In the *Conservative Party Manifesto* of May 18, 2017, a promise is made to “commit the same cash total in funds for farm support until the end of parliament.”

37 Azevêdo, *supra* note 2. See also *European Communities – Customs Classification of Certain Computer Equipment* (1998), WTO Docs WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R at para 84 (Appellate Body Report), online: <<https://docs.wto.org>>, where the Appellate Body explained that “[t]ariff concessions provided for in a Member’s Schedule...are reciprocal and result from a mutually advantageous negotiation between importing and exporting Members.”

38 Article X:7 of the *Marrakesh Agreement Establishing the WTO* stipulates that “[a]ny Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General.”

39 *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization* (2015), WTO Doc WT/LET/1090, online: <<https://docs.wto.org>>.

schedules. While accession for new members is governed by article XII of the Marrakesh Agreement, and terms of accession are hammered out through bilateral and plurilateral negotiations and eventually agreed upon by the WTO Ministerial Conference, the United Kingdom's situation — as an existing member of the WTO, but without goods and services schedules in its own name — is different. There is no prescribed procedure to follow.

Article XXVIII of the GATT 1994 provides for *modification* of goods schedules, while article XXI of the GATS provides for *modification* of services schedules. Given the unique situation presented by Brexit, it is not clear whether these provisions govern the negotiation and/or agreement by the United Kingdom and WTO members of UK-specific WTO schedules, for these provisions address the modification of *existing* schedules, but not the approval of new ones. As noted above, there are differing views as to whether the United Kingdom needs to develop new schedules, or if the EU schedules constitute the UK schedules subject to some adjustments.⁴⁰ In any event, if articles XXVIII of the GATT 1994 and article XXI of the GATS do apply, or if members decide to follow them because there is no other practical means of approving the UK-specific schedules to be lodged by the United Kingdom, the process of reaching agreement with WTO members on the content of the UK schedules could be lengthy and complex.

Modification of Goods Schedules under Article XXVIII of the GATT 1994

According to article XXVIII of the GATT 1994, modification of goods schedules may be effected from time to time through negotiation and agreement with certain WTO members, namely those with whom the relevant concessions were “initially negotiated” (referred to as members with initial negotiating rights or INR) and any member that is determined to have a “principal supplying interest” (referred to as “principal suppliers”) in the concession(s). In addition, consultations must be held (although no agreement is necessary)

with members that are determined to have a “substantial interest” in the concession(s).⁴¹

The article XXVIII negotiations may include provision for compensatory adjustment.⁴² In such negotiations, the members concerned “shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for [under the GATT] prior to such negotiations.”⁴³ If agreement cannot be reached by a specified time, the modifying member can proceed with the modification, but member(s) determined to have INR, member(s) determined to be principal suppliers and member(s) determined to have a substantial interest will be entitled to withdraw “substantially equivalent concessions initially negotiated with the [modifying member].”⁴⁴ It is also possible to refer any disagreement about proposed modifications to the WTO membership for their examination, with a view to finding a resolution.⁴⁵

If article XXVIII applies or is followed with regard to securing UK-specific goods schedules, the task of identifying which members hold INR, which are principal suppliers, and which have a substantial interest in the concessions is likely to be far from straightforward, given the unique circumstances presented by Brexit. Nor will it be easy to determine, in the context of negotiations on compensation, the “level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for...prior to such negotiations.” Also challenging will be determining what constitutes “substantially equivalent concessions initially negotiated with the [modifying member]” that some members will be entitled to withdraw in the event of a failure to reach agreement. Those who maintain that

41 Additional details on some of the technical aspects of article XXVIII negotiations (such as the determination of which member has a principal supplying interest, time limits for steps in the process and data requirements) are found in the ad note to article XXVIII, the Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994 (which forms an integral part of the GATT 1994), and the Procedures for Negotiations under Article XXVIII, found in the *Analytical Index: Guide to GATT Law and Practice* (WTO, 1995) at 960–61.

42 *General Agreement on Tariffs and Trade*, 14 April 1994, arts XXVIII:2, XXVIII:4(a) (entered into force 1 January 1995) [GATT 1994].

43 *Ibid*, art XXVIII:2.

44 *Ibid*, art XXVIII:3.

45 *Ibid*, art XXVIII:4(d).

40 Bartels; Ungphakorn, *supra* note 34.

the United Kingdom currently has an existing goods schedule in the form of the schedule exercised by the European Union might argue that these questions should be resolved in the same way they would be if the European Union were seeking to modify its goods schedule, but it is possible that this view will not be universally held across the WTO membership.

Changes in goods schedules “which reflect modifications resulting from action under... Article XVIII” of the GATT 1994 must be certified by the director-general of the WTO pursuant to the Procedures for Modification and Rectification of Schedules of Tariff Concessions, which were adopted by the WTO GATT Council in March 1980 (referred to as the “1980 Procedures”).⁴⁶ Under these procedures, the director-general circulates a draft of the changes to all WTO members and, if no objection is raised by a WTO member within three months on the ground that the director-general’s draft *does not correctly reflect the negotiated modifications*, the draft becomes a certification and the changes to the schedule are thereby certified.⁴⁷ If an objection is filed, the relevant WTO members enter into negotiations to resolve the problem. In such circumstances, certification will not proceed unless and until the objection is withdrawn. It is possible, therefore, for a single WTO member to block certification of a modification carried out pursuant to article XXVIII of the GATT 1994.

The legal implications of certification following article XXVIII negotiations are discussed in the next section of this article in light of a recent WTO panel report where this issue was addressed.

Amendments and Rectifications of a Purely Formal Character

The complex negotiations under article XXVIII of the GATT 1994 would not be necessary if WTO members considered that the changeover from coverage via the EU goods schedule to applying a UK-specific goods schedule did not alter the “scope” of concessions, or that the schedule changes amounted to rectifications of a “purely formal character.” If that were the case, a simpler and (usually) faster procedure

may be followed to give effect to a UK-specific goods schedule. The 1980 Procedures provide in paragraph 2 that: “changes in the authentic texts of Schedules shall be made *when amendments or rearrangements which do not alter the scope of a concession* are introduced in national customs tariffs in respect of bound items. Such changes and other rectifications *of a purely formal character* shall be made by means of Certifications.”⁴⁸

Similar to modifications made as a result of article XXVIII negotiations, a draft containing the changes to the schedule is communicated by the director-general to all members. The draft becomes a certification and the changes to the schedule are thereby certified, provided that no objection is raised by a member within three months on the ground that the proposed rectification is “not within the terms” of paragraph 2.⁴⁹

If the United Kingdom lodges its goods schedule with a request that the director-general certify it pursuant to the procedures set forth immediately above, members will have to consider whether the UK-specific goods schedule reflects “amendments or rearrangements which do not alter the scope of a concession” or “other rectifications of a purely formal character.” If any member considers that the goods schedule submitted by the United Kingdom does not meet one or more of these criteria (that is, if the member considers that the proposed rectification is not within the terms of paragraph 2 set forth above), it may file an objection to the change within three months of circulation by the WTO director-general of the draft certification. Negotiations would ensue between the United Kingdom and any objecting member(s) with a view to having the objection(s) withdrawn. Certification will not proceed unless and until any objections are withdrawn.⁵⁰ As with the certification process following action under article XXVIII, a single member can block the certification of an amendment or rectification addressed in paragraph 2 of the 1980 Procedures.

⁴⁶ GATT, *Procedures for Modification and Rectification of Schedules of Tariff Concessions*, 28 March 1980, L/4962 at para 1, online: <www.wto.org/gatt_docs/English/SULPDF/90970413.pdf>.

⁴⁷ *Ibid* at paras 1 and 3.

⁴⁸ *Ibid* at para 2 [emphasis added].

⁴⁹ *Ibid* at para 3.

⁵⁰ Only a small number (13, or three percent) of matters pursued under the 1980 Procedures have not been concluded for various reasons, some of which have been due to objections filed by members. See *Current Situation of Schedules of WTO Members [Current Situation]*, online: <www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm#>.

If, however, no member raises an objection within the three-month period, certification of the modification will be automatic. In other words, even if WTO members consider that the above criteria in the 1980 Procedures have not been met, they may choose not to object so that the UK-specific schedule can be certified by the director-general regardless of conformity with paragraph 2 of the 1980 Procedures.

Modification of Services Schedules under Article XXI of the GATS

Regarding modification of services schedules, article XXI of the GATS provides that a member may modify or withdraw commitments in its services schedule upon notice to the Council for Trade in Services and subject to entering into negotiations with any “affected” member (defined as any member whose benefits under the GATS may be affected by the modification or withdrawal) “with a view to reaching agreement on any necessary compensatory adjustment.”⁵¹ Members concerned “shall endeavor” in such negotiations to “maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.”⁵² If agreement on compensatory adjustment is not reached within a certain period of time, the “affected Member” can go to arbitration to determine the compensatory adjustment, and the modifying member cannot modify or withdraw the commitment until it has made compensatory adjustment in conformity with the arbitration findings.⁵³ If the modifying member proceeds with the modification or withdrawal and does not comply with the arbitration findings, any affected member “may modify or withdraw substantially equivalent benefits in conformity with those findings” with respect to the modifying member.⁵⁴

Procedures governing modification of services schedules under article XXI were adopted by the

Council for Trade in Services in 1999.⁵⁵ They are somewhat different from the procedures stipulated in the 1980 Procedures followed when modifying goods schedules under article XXVIII. For services schedule modifications, any member “which considers that its interests under the Agreement may be affected by the proposed modification” (the “affected Member”) has 45 days following notification of the proposed modification to make a claim.⁵⁶ Thus, whether a WTO member is “affected” by the proposed modification in the services schedule is self-determined.

The member proposing to make the modification and the affected member must enter into negotiations, which may lead to the modifying member agreeing to pay compensation. If no agreement is reached in these negotiations by a certain time, the affected member has 45 days to request arbitration. In such case, the arbitration body examines the compensatory adjustments offered or requested and seeks to “find a resulting balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to the negotiations.” The schedule modification can proceed following the arbitration only if it is in accordance with the arbitration findings.⁵⁷

If, however, no member submits a claim that its interests may be affected by the proposed modification within the 45-day period, or if the “affected Member” does not request arbitration in a timely fashion following negotiations (i.e., within 45 days of completion of the negotiations), the modifying member can proceed with the proposed modification.⁵⁸

If it is determined that article XXI of the GATS does apply to the circumstances of the UK post-Brexit, or if WTO members decide to follow article XXI because there is no other practical means of agreeing on a UK-specific services

⁵¹ GATS, arts XXI:1, XXI:2(a).

⁵² *Ibid*, art XXI:2(a).

⁵³ *Ibid*, arts XXI:3(a), XXI:4(a).

⁵⁴ *Ibid*, art XXI:4(b).

⁵⁵ *Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules)*, adopted by the Council for Trade in Services on 19 July 1999, WTO Doc S/L/80, 29 October 1999, online: <www.wto.org/english/tratop_e/serv_e/sl80.doc> [Procedures for the Implementation of Article XXI].

⁵⁶ *Ibid* at para 3.

⁵⁷ *Ibid* at paras 4, 7, 9, 13, 15.

⁵⁸ *Ibid* at paras 3, 8.

schedule, it may be difficult, given the unique set of circumstances brought about by Brexit, to determine in any negotiations with the United Kingdom the “general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.”

Modification of GATS schedules that result from action under article XXI take effect by means of certification. A draft schedule indicating the changes is communicated by the WTO Secretariat to all members, who then have 45 days to raise an objection on the ground that “the draft schedule does not correctly reflect the results of the action under Article XXI.”⁵⁹ If no objection is raised, the WTO Secretariat issues a communication stating that the certification procedure has been completed and indicating the date of entry into force for the modification. If a timely objection is filed, the modifying member and the member who filed an objection must enter into consultations with a view to reaching a satisfactory solution. The certification procedure will be deemed concluded only upon withdrawal of the objection.⁶⁰ Similarly to the goods situation, certification of a modification to a services schedule can be blocked by a single WTO member.

As with goods schedules, it will be up to WTO members to determine whether they wish to actively exercise their rights under article XXI of the GATS and the procedures governing the modification of services schedules, or whether they would prefer to allow a UK-specific schedule lodged by the United Kingdom to be certified without objection. If they decide on the latter, the changeover from applying the EU services schedule to applying the eventual UK-specific services schedule could proceed relatively quickly.

59 *Ibid* at para 20.

60 *Ibid* at paras 20–22.

Recent WTO Case Law Regarding Modification of Goods Schedules

Although there have been many negotiations regarding modifications of schedules conducted pursuant to article XXVIII of the GATT 1994,⁶¹ much of the information about them remains classified information between the negotiating parties. Moreover, there is relatively little case law providing guidance on how to interpret the various elements of the provision. As such, there is little public information available to guide the United Kingdom in navigating its way through such negotiations, if that route is indeed followed. However, a recent panel report titled *European Union — Measures Affecting Tariff Concessions on Certain Poultry Meat Products*,⁶² adopted by the WTO Dispute Settlement Body on April 19, 2017, and not appealed, contains some useful insight on the article XXVIII process.

The dispute was brought by China, which challenged the European Union’s modification of its tariff concessions on certain poultry products. China argued that the European Union failed to negotiate or consult with all WTO members that had a principal supplying interest or a substantial interest in those products, contrary to article XXVIII:1 of the GATT 1994. China further alleged that the tariff rates and TRQs agreed and implemented as a result of the European Union’s modification negotiations with Brazil and Thailand failed to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for under the GATT 1994 prior to such negotiations, contrary to article XXVIII:2 of the GATT 1994.⁶³ China argued further that the EU violated article II:1 of the GATT 1994 by adopting tariff rates that exceeded the bound tariff rates listed in the EU goods schedule as, China reasoned, the tariff rates and TRQs negotiated and implemented by the European Union under article XXVIII were

61 *Current Situation*, *supra* note 50. There have been 41 requests to enter into renegotiations under GATT article XXVIII since the establishment of the WTO in 1995.

62 *European Union—Measures Affecting Tariff Concessions on Certain Poultry Meat Products* (2017), WTO Doc WT/DS492 (Panel Report), [EU–Poultry Meat (China)].

63 *Ibid* at para 3.1.

“ineffectual” to replace the bound tariff rates listed in the EU goods schedule preceding the modification negotiations.⁶⁴ Finally, China maintained that the European Union acted inconsistently with the procedures for negotiations under article XXVIII and the 1980 Procedures because there was no notification for certification, no notification of the date on which the changes to the goods schedule came into force and no notification of the draft modification of its schedule.⁶⁵

The panel determined that the European Union had not acted inconsistently with articles XXVIII:1, XXVIII:2 or II:1 of the GATT 1994.⁶⁶ The decision is not binding, except with respect to the European Union and China, and the facts are not necessarily like those that may present themselves in the context of the United Kingdom’s possible negotiation and establishment of its goods schedule. Nevertheless, certain findings of the panel may inform those future negotiations, should they take place.

Status of Procedures for Negotiations under Article XXVIII of the GATT 1994 and the 1980 Procedures

One such finding relates to the status of the Procedures for Negotiations under article XXVIII of the GATT 1994 and the 1980 Procedures. The panel agreed with the parties and third parties⁶⁷ to the dispute that these instruments, both of which were adopted in 1980 in the context of the GATT and prior to the establishment of the WTO in 1995, qualify as “decisions,” “procedures” or “customary practices” within the meaning of article XVI:1 of the Marrakesh Agreement. It provides that “the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to the GATT 1947.” The panel, therefore, considered that it was “under a duty to take account of these procedures in [their] interpretation of the relevant provisions of the GATT 1994.”⁶⁸ This suggests that members will look to apply both the Procedures

for Negotiations under article XXVIII and the 1980 Procedures in any future schedule modification negotiations under article XXVIII of the GATT 1994.

Determination of Members with Principal and Substantial Supplying Interest

In rejecting China’s complaint that the European Union had acted inconsistently with article XXVIII:1 of the GATT 1994 by failing to recognize China as having a principal supplying interest or supplying interest in the products subject to the tariff concessions being modified and failing to negotiate the modifications with China, the panel determined that the European Union had properly excluded China from the modification negotiations because the European Union was entitled to rely on *actual* import levels of the products in question and did not have to *estimate* what members’ shares *would have been* in the absence of non-discriminatory SPS measures restricting poultry imports from China.⁶⁹ The panel also noted that both disputing parties agreed that, for purposes of determining which member holds a substantial supplying interest, it is “more appropriate to examine import shares based on quantity, rather than value.”⁷⁰

Necessity to Reappraise Determination of Supplying Interest

Perhaps more relevant for an eventual UK process that might extend over a number of years, the panel also rejected China’s contention that the European Union should have made a *redetermination* of which members had a principal supplying interest or supplying interest in the products in question, based on actual imports from a more recent reference period rather than the reference period used by the European Union, given the length of time (i.e., three years) between the notification of intention to modify concessions and the conclusion of the negotiations. The panel observed that:

- the Procedures for Negotiations under Article XXVIII require a member seeking to modify concessions to send a notification to that effect for circulation to WTO members, which must include statistics on imports of

64 *Ibid.*

65 *Ibid.* China also alleged that the European Union acted inconsistently with articles I and XIII of the GATT 1994. These claims are not discussed in this article.

66 *Ibid* at para 8.1.

67 Brazil, Canada, Russia, Thailand and the United States.

68 EU–Poultry Meat (China), *supra* note 62 at paras 7.25–7.26.

69 *Ibid* at para 7.205. The WTO consistency of the SPS measures were not at issue in the dispute.

70 *Ibid* at para 7.98.

the relevant products by country of origin over a preceding three-year period; and

- any member which considers that it has a principal or substantial supplying interest in the concession(s) to be modified should communicate its claim to the notifying member within 90 days of the circulation of the import statistics.

Based on these requirements, the panel considered that the identification of members having a principal or substantial supplying interest seemed to be a necessary precondition for opening the negotiations on modifications, suggesting that in such circumstances, reappraisal cannot be a requirement. The panel also thought that if there were a requirement to reappraise after a certain period of time, one would have expected the procedures to have made reference to it, but they do not do so. The panel also observed that GATT/WTO practice does not support China's contention that there is an obligation to reappraise which members hold principal or substantial supplying interests.⁷¹

Importantly, however, the panel also called attention to what it called a “balance between several competing objectives” struck in the rules regarding the determination of which members hold a supplying interest, and it pointed to the ad note to article XXVIII:1, which it said gives expression to that balance. The ad note explains that “the object” of providing for participation in the negotiations of any member with a principal supplying interest is to “ensure that a [member] with a larger share in the trade affected by the concession than a [member] with which the concession was originally negotiated [i.e., the member with the INR] shall have an *effective opportunity to protect the contractual right* which it enjoys” under the GATT 1994.⁷² The ad note also provides “on the other hand” that “it is not intended that the scope of the negotiations should be such as to make negotiations and agreement under Article XXVIII *unduly difficult*.”⁷³

Given the silence regarding reappraisal and the need to strike a balance between the competing objectives in article XXVIII, and although the panel rejected China's claim for

reappraisal in this dispute, the panel declined to formulate a general legal rule on whether a member is under a legal obligation, in all cases, to reappraise which members hold a principal or substantial supplying interest following the initiation of the negotiations.⁷⁴

General Level of Reciprocal and Mutually Advantageous Concessions

Turning to article XXVIII:2 of the GATT 1994, whereby the members concerned “shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for [under the GATT] prior to such negotiations,” the European Union considered this to be a “best efforts” obligation for which members were accorded a “wide margin of discretion” in negotiating the level of compensation. China, by contrast, pointed to the word “shall” and disagreed with the European Union regarding the discretion afforded by the provision. Both parties, however, agreed that this provision constitutes a legally binding obligation and considered that if the compensation were negotiated in accordance with the calculation set out in paragraph 6 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994, it would be presumed to be compliant with article XXVIII:2. The panel agreed with the parties' view that this provision constitutes a legal obligation, observing that article XXVIII:2 provides no specific rules on determining compensation and that members approach such negotiations in “very different ways.”⁷⁵ The panel determined that the European Union was not obliged under article XXVIII:2 of the GATT 1994 and paragraph 6 of the understanding to calculate overall compensation on the basis of import levels over the three-year period immediately preceding the conclusion of the negotiations and found, therefore, that China had not demonstrated that the European Union had acted inconsistently with article XXVIII:2 in calculating overall compensation.⁷⁶

71 *Ibid* at paras 7.212–7.214, 7.227.

72 GATT 1994, *supra* note 42 at art XXVIII:1 [emphasis added].

73 *Ibid* at para 7.216 [emphasis added].

74 *Ibid* at para 7.218.

75 *Ibid* at paras 7.242–7.244.

76 *Ibid* at para 7.277.

Imports into More Recent EU Members

China also claimed that the European Union should have accounted for poultry imports into Romania, Bulgaria and Croatia in determining the level of overall compensation. Had it done so, China argued, compensation would have been higher when calculated in accordance with paragraph 6 of the understanding. The panel disagreed, observing that the negotiations on modification and the relevant import period notified both preceded those countries joining the European Union.⁷⁷

Level of Compensation Allocated among Supplying Countries

Perhaps of particular relevance in any future UK negotiation under article XXVIII is China's challenge of the compensation allocated *among* supplying countries (as opposed to the overall compensation negotiated). China claimed that by allocating all or the vast majority of the replacement TRQs to Brazil and Thailand, leaving a relatively small "all others" share and no country-specific share for China, the European Union had acted inconsistently with article XXVIII:2 of the GATT 1994 and paragraph 6 of the understanding. The European Union countered that article XXVIII and paragraph 6 of the understanding regulate the *overall* value for all members of the compensation provided and apply only at the level of the total amount of each TRQ. According to the European Union, those provisions do not apply to the allocation of TRQs among supplying countries, which, it maintained, is addressed exclusively in article XIII of the GATT 1994 (which deals with the administration of quantitative restrictions). The panel, having conducted a textual analysis of article XXVIII:2 and of paragraph 6 of the understanding, and after considering the context of the provisions, determined that the provisions do not apply to the allocation of TRQ shares *among* supplying countries.⁷⁸

Legal Effect of Certification Procedures

China further claimed that because the EU modifications had not yet been incorporated into the EU goods schedule through the certification

procedure set forth in the 1980 Procedures, the modifications had no legal effect and did not replace the bound duties listed in the EU goods schedule. As a result, said China, by applying the new concessions rather than the tariff rates listed in its goods schedule, the European Union had acted inconsistently with article II:1 of the GATT 1994, which prohibits members from according to the commerce of other members treatment less favourable than that provided for in the member's goods schedule.⁷⁹

The European Union opposed China's view, arguing that certification under the procedures is not a legal prerequisite for giving effect to modifications agreed in article XXVIII negotiations.⁸⁰ The European Union indicated that the changes agreed with Brazil and Thailand had been communicated to members and that it had submitted for certification a first batch of modifications to its schedule on March 24, 2014, but that certification had not yet occurred.⁸¹ (The modifications negotiated with Brazil and Thailand were included in the modifications package negotiated in connection with the expansion of the European Union to 25 members.) The European Union explained that it had not yet submitted for certification the remainder of the modifications negotiated with Brazil and Thailand, but that it planned to do so when submitting the modification package associated with the expansion of the European Union to 27 members.⁸²

The panel was thus required to determine whether certification is a legal prerequisite that must be completed before a WTO member modifying its concessions can proceed to implement the changes agreed upon in the article XXVIII negotiations at the national level without acting inconsistently with article II:1 of the GATT 1994. The panel ruled that certification is not required before implementing the negotiated changes.

The panel relied on the Appellate Body ruling in *EC-Bananas III (article 21.5-Ecuador II, article 21.5-US)* that modification of schedules does not require

⁷⁷ *Ibid* at para 283.

⁷⁸ *Ibid* at paras 7.287–7.302.

⁷⁹ *Ibid* at para 7.496.

⁸⁰ *Ibid*.

⁸¹ Certification occurred on December 14, 2016, which was after the panel report was issued to the disputing parties, but before circulation to all WTO members. See *Schedules of Tariff Concessions to the General Agreement on Tariffs and Trade 1994* (2016) WTO Doc WT/Let/1220.

⁸² *EU-Poultry Meat (China)*, *supra* note 62 at paras 7.501–7.502.

an amendment under article X of the Marrakesh Agreement, but “is enacted through a special procedure set out in Article XXVIII.” The panel emphasized the Appellate Body’s reference to the “special procedure” through which the modification “is enacted,” which language suggested to the panel that the Appellate Body considered that article XXVIII provided the legal basis for modifying a schedule. The panel also found support for its view in the language of article XXVIII:3(a), which states that modifying members “shall be free” to modify the concessions if agreement between the relevant members cannot be reached, and in article XXVIII(b), which allows negotiating members to withdraw substantially equivalent concessions once the modifying member has taken such action in the face of the lack of agreement.⁸³ The panel reasoned that “insofar as the terms of Article XXVIII:3 imply that Members concerned are ‘free’ to withdraw or modify concessions prior to certification of changes to the Schedule in those situations, then we consider that such a right must exist *a fortiori* where, as in the present case, the modification has been agreed by the [relevant] Members.”⁸⁴

The panel also analyzed the provisions of the Procedures for Negotiations under Article XXVIII (which are different from the 1980 Procedures relied upon by China in this case), pointing out that paragraph 7 thereof provides that members “will be free to give effect to the changes agreed upon in the negotiations...*as from the date on which the conclusion of all the negotiations has been notified*” to the WTO and not as from the date of certification. The panel also called attention to the different terminology used in paragraph 8, which stipulates that “*Formal effect* will be given to the changes in the schedules by means of Certifications.”⁸⁵

Having analyzed the Procedures for Negotiations under article XXVIII, the panel also analyzed the provisions of the 1980 Procedures, noting that they address *how* changes in authentic text of a schedule are to be made. For the panel, these procedures “clarify that certification is the legal prerequisite to altering the authoritative text of a Schedule,”⁸⁶ but do not speak to whether certification is a

legal prerequisite to giving effect to concessions agreed upon in article XXVIII negotiations.

The panel took care to underline that its finding that certification is not a legal prerequisite to implementing changes negotiated to a goods schedule under article XXVIII does not suggest that the process for certification is meaningless. Indeed, the panel pointed to situations where the introduction of changes to the text of a goods schedule is a legal prerequisite for effecting a change in members’ substantive rights and obligations. The panel referred to a proposed rectification to correct an error in a goods schedule (which change would not be effected through an article XXVIII process). The panel made clear that such change would have no legal effect until the proposed rectification was certified via the 1980 Procedures.⁸⁷ The panel also suggested that an agreement to reduce tariffs may not be enforceable through WTO dispute settlement procedures until the changes have been introduced through certification. The panel summed up its view, stating that the “legal consequence of certification varies in different situations, and therefore must be analysed in relation to the particular situation at hand.”⁸⁸

The panel drew two important implications from its interpretation of the 1980 Procedures that could inform the United Kingdom’s approach to negotiating and/or implementing its goods schedule. First, the panel observed that paragraph 3 of the 1980 Procedures permits members to object within three months to a proposed certification on the ground that it “does not correctly reflect the modifications” resulting from article XXVIII negotiations. For the panel, this implies that “the certification process does not confer a ‘veto’ right upon those Members which did not participate in the negotiations and who may not be satisfied with the compensation agreed.” Second, the panel said that absence of an objection under paragraph 3 “cannot be construed as a Member ‘acquiescing’ or ‘accepting’ that the changes introduced into the authentic text

83 *Ibid* at paras 7.514–7.515, 7.517.

84 *Ibid* at para 7.518.

85 *Ibid* at paras 7.523–7.524, 7.530 [emphasis added].

86 *Ibid* at para 7.538.

87 The panel referred, in note 730 of its report, to paragraph 7.54 of the panel report in *Russia–Tariff Treatment* (WT/DS485), noting that the relevant schedule for purposes of that dispute was the original Russian schedule because the European Union and Japan had objected to a rectification proposed by Russia, resulting in the proposed change not being certified.

88 *Supra* note 62 at para 7.536.

of the Member's Schedule are consistent with the Member's obligations under the GATT."⁸⁹

In light of these various conclusions reached by the panel, it rejected China's claim that the European Union had acted inconsistently with article II:1 of the GATT 1994 by giving effect to the changes agreed with Brazil and Thailand prior to certification of the modifications.⁹⁰

Conclusion

As the director-general pointed out in his speech to the World Trade Symposium in June 2016, the United Kingdom is a member of the WTO and this will not change following the country's departure from the European Union. However, the United Kingdom will find itself in a unique situation post-Brexit, given that it is currently covered by the EU goods and services schedules and presumably will need to secure WTO members' agreement to UK-specific schedules (be they simply the adjusted EU schedules or newly negotiated ones) once it leaves the European Union.

There are no existing procedures in the WTO that precisely govern the situation in which the United Kingdom will find itself post-Brexit. The United Kingdom's future trading relationship with the European Union, the contours of which are still very much unknown, will of course inform the future UK-WTO trading relationship in any event. But in terms of securing agreed UK-specific schedules, the United Kingdom and other WTO members might need to look for additional guidance and inspiration to existing WTO procedures governing the modification of goods and services schedules found primarily in article XXVIII of the GATT 1994 and article XXI of the GATS. Nevertheless, even if members choose to rely on these provisions to address the UK schedules situation post-Brexit, they are unlikely to provide answers to many of the questions that will arise as the process unfolds.

Another complication in securing agreed post-Brexit UK-specific schedules is that there is a paucity of WTO case law to guide any such

process, whatever it turns out to be. However, the recent findings in the panel report in *EU-Poultry Meat (China)*, which was not appealed, provide some guidance upon which the United Kingdom and other members may seek to rely.

Under the circumstances, the words of the director-general spoken to the World Trade Symposium in June 2016 remain apt: "I don't have a crystal ball to assess the outcome of these various different negotiations — and nor does anybody else."⁹¹

Indeed.

Depending on your perspective, we are either fortunate or cursed to live in interesting times.

⁸⁹ *Ibid* at para 7.541.

⁹⁰ *Ibid* at para 8.1.

⁹¹ Azevêdo, *supra* note 2.

About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

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BIICL is a leading independent research centre in the fields of international and comparative law. For more than 50 years, its aims and purposes have been to advance the understanding of international and comparative law; to promote the rule of law in international affairs; and to promote their application through research, publications and events.

BIICL has significant expertise both in conducting complex legal research, and in communicating it to a wider audience. Its research is grounded in strong conceptual foundations with an applied focus, which seeks to provide practical solutions, examples of good practice and recommendations for future policy changes and legal actions. Much of the research crosses over into other disciplines and areas of policy, which requires it to be accessible to non-lawyers. This includes, for example, drafting concise and user-friendly briefing papers and reports for target audiences with varying levels of experience of the law.

