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BREXIT AND THE UK FUTURE TRADE REGIME WITH THE EU AND THE WORLD: OPTIONS AND CONSTRAINS

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Abstract

The UK Government has indicated that it intends to maintain after Brexit the existing "deeply integrated trade and economic relationship between the UK and the EU", while at the same time not seeking to remain part of the EU single market, or to establish a custom union with the EU. The EU Guidelines for Brexit negotiations under Art. 50 of the TEU, on the other hand, have made clear that a non-member of the Union cannot enjoy the same benefits as a member. Establishing a trade regime "as frictionless as possible" as aimed at by the UK appears therefore problematic, short of the UK remaining in the single market or establishing a custom union with the EU, both options having been rejected by the UK at the opening of the Art. 50 negotiations on 19 June2017 notwithstanding the results of the 8 June elections.

The paper discusses then the features of a possible EU-UK post-Brexit Free Trade Agreement, and of trade relations in the light of WTO rules, should an FTA not be concluded. The Frontier Traffic exception of GATT could be a basis for avoiding reestablishing a hard border between the Republic of Ireland and Northern Ireland. As to future UK trade relations with third countries, the conclusion is that the UK could not maintain its membership in the EU's current bilateral agreements, even if it so wished.

As to UK's relations with other WTO members, it is submitted that the UK will retain its status as a full "original" member of the WTO and that its schedule of concessions will be initially that of the EU in place at the date of Brexit, thus preventing third countries from asking for renegotiation of the UK schedules. A delicate issue will be represented however by the apportionment between the EU and the UK of EU tariff-rate quotas for agricultural products, which will imply negotiations with third countries beneficiaries by both the EU and the UK. Finally, the UK will be able after

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Brexit to freely negotiate FTAs with any WTO member, notably with the US, in accordance with GATT rules on regional agreements.

Keywords: Brexit, Trade, UK, EU, World, WTO

1. Introduction

The UK Government has indicated that it intends to maintain after Brexit the existing "deeply integrated trade and economic relationship between the UK and the EU", while at the same time not seeking to remain part of the EU single market, or to establish a custom union with the EU. The EU Guidelines for Brexit negotiations under Art. 50 of the TEU, on the other hand, have made clear that, as to substance, a non-member of the Union cannot enjoy the same benefits as a member, nor participate to the single market based on a sector-by sector approach. As to timing, the position of the EU is that while work on an agreement on trade relations can be initiated pending the Art. 50 TEU negotiations it can be finalized only "once the UK is no longer a Member of the EU". As a consequence, establishing a trade regime "as frictionless as possible" as aimed at by the UK appears problematic.

Against this uncertain outlook, this chapter highlights what type of post-Brexit trade agreement might be envisaged between the EU and the UK, considering the rules of the WTO notably as to Free Trade Agreements (FTAs). The Frontier Traffic exception in GATT could be a basis for avoiding, as both parties desire, reestablishing a hard border between the Republic of Ireland and Northern Ireland. As to future UK trade relations with third countries, the chapter looks first at those with the many countries with which the EU has bilateral agreements in place to which the UK is part as member of the EU. Based on several legal and political reasons the conclusion is that the UK could not maintain its membership in them, even if it so wished, except for agreeing some kind of transitory regime with the non-EU partners.

As to the future trade relations between the UK and other WTO members, the paper considers that the UK will retain its status as a full "original" member of the WTO and that its schedule of concessions (mainly custom duties) will be initially that of the EU in place at the date of Brexit. A delicate issue will be represented however by the apportionment between the EU and the UK of EU tariff-rate quotas for some agricultural products, which will imply negotiations by both the EU and the UK with third countries which currently benefit from them. Finally, the UK will be able after Brexit to freely negotiate FTAs with any WTO member, notably with the US. Until the EU-UK post-Brexit trade regime is not defined it will be however difficult for the UK to finalize any such

deal both for legal reasons and because the terms of the UK-EU agreement will impact the conditions of competition on the UK market for goods and services originating from other WTO members. This will make it difficult for them to figure out beforehand the exact commercial benefits of a FTA with the UK.

2. UK-EU post-Brexit possible trade regime

2.1. UK objectives vs the EU's Guidelines for Brexit Negotiations.

The Brexit White Paper of 2 February 2017 has clarified the aims that the UK Government pursues as to the trade (and other) relationship it wishes to establish with the EU at 27 following its withdrawal from the EU. This has been further clarified by the official letter of 29 March 2017 by which the UK has notified the European Council its decision to leave the EU, in conformity with Article 50 TEU. Within a few days the European Council's guidelines to the Commission for negotiating with the UK, as provided in Art. 50, have been issued thus allowing a clearer picture of the flexibilities and also limits that the UK will encounter in trying to accomplish its objectives.

In her speech of 17 January 2017 the UK Prime Minister had set 12 principles that will guide the UK Government "in fulfilling the democratic will of the people of the UK". The objects of Principle 8 "Ensuring free trade with Europe" are spelled out as follows: *"We will forge a new strategic partnership with the EU, including a wide reaching, bold and ambitious free trade agreement and will seek a mutually beneficial new customs agreement with the EU."*[1] The objects of Principle 9 "Securing new trade agreements with other countries" are: *"We will forge ambitious free trade relationships across the world."*

Since it takes two to tango, the nature of the relationship to be established with the EU depends of course from the EU response and objectives and from the outcome of a complex negotiation that include several other issues. The European Council has made clear that the EU has three paramount objectives in the Article 50 negotiations: ensuring the rights of EU citizens presently residing in the UK and those of UK citizens living in the EU, settling the financial obligations of the UK, and ensuring that no hard border will be reestablished between the Republic of Ireland and Northern Ireland. Procedurally, the Council Decision authorizing the Commission to open negotiations with the UK foresees that negotiations on the framework for the future relationship should be identified

[1] To realize the importance of this objective let's not forget that 45% of UK exports are towards the rest of the EU. By contrast the share of exports to the UK on the total varies for major EU countries between 14% (Ireland) and less than 6% for Italy, with Germany around 8%. 16% of UK exports (goods and services) are directed to the US and less than 4% to China (2014, UK White Book, Table 9.2)

in a second phase of the negotiations under Article 50, once the Brexit negotiations have advanced substantially.

The EU Guidelines do not make it easy for the UK to pursue its trade objectives to have an open flow of goods while being out of the EU single market or the custom union, although *"The European Council welcomes and shares the United Kingdom's desire to establish a close partnership between the Union and the United Kingdom after its departure."*[2] The Guidelines acknowledge that the *"British government has indicated that it will not seek to remain in the single market, but would like to pursue an ambitious free trade agreement with the European Union. Based on the Union's interests, the European Council stands ready to initiate work towards such an agreement, to be finalised and concluded once the United Kingdom is no longer a Member State."*[3]

The post- 8 June 2017 elections UK government has not changed its position not to seek to remain a member of the single market, not to aim at establishing a custom union with the EU.

The EU Guidelines "reiterate" in non-ambiguous terms in Core Principle 1 that *"any agreement with the United Kingdom will have to be based on a balance of rights and obligations, and ensure a level-playing field. Preserving the integrity of the Single Market excludes participation based on a sector-by sector approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member*."[4] The European Parliament on April 5 approved these negotiating objectives for the pending talks. Thus both the European Parliament and European Council objectives state that the UK will not have similar or better benefits as a third country as it had as a member of the EU.

2.2. What features for "an ambitious and comprehensive Free Trade Agreement and a new customs agreement" aimed by the UK Government?

It is therefore difficult at the moment to highlight what type of relations will be established post Brexit. While the UK has not specified the legal features of the new trade framework it seeks with the EU, stressing rather its aims to maintain the existing "deeply integrated trade and economic relationship between the UK and the EU", it has made clear that it does not intend to remain part of the single market. This would entail accepting the four basic freedoms of the single market, free movement of goods, services, capitals and persons, as the EEA countries (Norway, Iceland, Liechtenstein have accepted), the UK objecting especially to the last one. The UK has also ruled out

[2] European Council guidelines par. 18
[3] *Ibid*, par 19.
[4] Guidelines, par.1.

becoming part of a custom union with the EU, as is the case for Turkey, because such a scheme would curtail the UK's ability to freely establish its trade relations with the word within the existing World Trade Organization (WTO) system and oblige the UK to accept fully the EU custom regime.[5]

In her letter triggering the Art. 50 process the UK Prime Minister has written that *"The UK wants to agree with the European Union a deep and special partnership that takes in both economic and security cooperation…If however, we leave the European Union without an agreement the default position is that we would have to trade on World Trade Organization terms."* As to the future relationship with EU, the White Paper under Principle 8 explains: *"The Government will prioritise securing the freest and most frictionless trade possible in goods and services between the UK and the EU. We will not be seeking membership of the Single Market, but will pursue instead a new strategic partnership with the EU, including an ambitious and comprehensive Free Trade Agreement and a new customs agreement."*

As to the positive features of the new agreement the White Paper is vague, and probably it could not be otherwise: *"This should include a new customs agreement with the EU, which will help to support our aim of trade with the EU that is as frictionless as possible…That agreement may take in elements of current Single Market arrangements in certain areas as it makes no sense to start again from scratch when the UK and the remaining Member States have adhered to the same rules for so many years. Such an arrangement would be on a fully reciprocal basis and in our mutual interests."*[6]

As mentioned above, the EU is however not willing to allow the UK to cherry pick those parts of the single market regime, such as "financial passporting" which best suits the UK interests, rejecting other elements. The EU Guidelines specify that *"Any free trade agreement should be balanced, ambitious and wide-ranging. It cannot, however, amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning. It must ensure a level playing field, notably in terms of competition and state aid, and in this regard*

[5] See generally, Jennifer Hillman and Gary Horlick (eds.), *Legal Aspects of Brexit—Implications of the United Kingdom's Decision to Withdraw from the European Union* (2017), available at http://iielaw.org. For a fresh evaluation of the UK options after the 8 June 2017 elections which have reinvigorated the supporters of a "soft Brexit", see Michael Emerson, *What's next after Theresa May's spectacular own goal?*, CEPS paper, 12 June 2017, www.ceps.eu/publications.

[6] White Paper, at par. 8.2 and 8.3

encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices".[7]

Some more detailed indications as to the UK's aims are found in the specific sub-section of the UK White Paper "A mutually beneficial new customs arrangement" where on the one hand the benefits of the "deep model" represented by the current EU Custom Union are highlighted, on the other it is stressed that the UK does not want a system whereby due to a common external tariff members are prevented from entering FTAs with third countries.

It is not clear however how the UK can maintain the advantages of the internal free movement of goods and services, including the uniform regulation which "underpin the provision and high standards of goods and services" while abandoning completely all the membership groupings included or associated with the EU. The single market is based on common regulation and standards (effected through unification, harmonization or mutual recognition of equivalence), and single supervision by EU regulatory authorities to make the abolition of internal barriers both possible and effective. By being out the single market, the EU would either face barriers to its non-conforming export or have to accept those standards with little to say on their adoption and updating, as is the case for the EEA members and Switzerland.

The White Paper restates that: *"In leaving the EU, the UK will seek a new customs arrangement with the EU, which enables us to make the most of the opportunities from trade with others and for trade between the UK and the EU to continue to be as frictionless as possible. There are a number of options for any new customs arrangement, including a completely new agreement, or for the UK to remain a signatory to some of the elements of the existing arrangements."*[8]

It is thus easier to say what this envisaged "Cross-Channel Trade and Investment Partnership" will not resemble to, than what it will look like, once that existing models associating Norway, Switzerland or Turkey to the EU have been ruled out.[9]Also the arrangements between Switzerland and the EU have been excluded as a model. By means of a bunch of specific agreements - more than 120 – Switzerland participates *de facto* like Norway to the benefits of the single market in

[7] EU Guidelines, par. 20.
[8] White Paper, par. 8.45
[9] See Michael Emerson, *After the UK's Brexit White Paper – What's the next move towards a CFTA?*, CEPS Policy insights, no. 2017/07, February 2017, www.ceps.eu.

goods, and partly in services, without being able however to influence effectively its rule-making.[10] Switzerland is able however to negotiate within EFTA trade agreements with third countries.

What comes therefore into play is only the looser Free Trade Agreement model of the WTO. According to Article XXIV GATT, under this scheme internal barriers must be eliminated "on substantially all the trade between the constituent territories" but only "in products originating in such territories."[11] This precludes the possibility of entering trade agreements applicable only to selected sectors, even if the EU were to accept such pick-and-choose arrangements.[12] More liberalization can of course be agreed and the agreement may cover also other matters, such as mutual recognition of certifications, regulatory cooperation in the enactment of new standards, enhanced protection for intellectual property, investments and dispute settling.[13] This is the model of the CETA, the "Comprehensive Economic and Trade Agreement" between the EU and Canada of 2016, which is proposed by some as a model for future UK – EU relations.[14] The fact that 99% of the tariffs will be abolished between the EU and Canada in due time does not make however CETA an instrument comparable to a custom union or participation to the single market in ensuring a "frictionless" trade regime.[15] For instance the imposition of anti-dumping duties is not automatically excluded within a FTA.

It must thus be clear that any "custom arrangement" with the EU, short of a custom union, will entail new barriers as to the reciprocal flow of goods even if no tariffs were established between the EU and the UK. Custom controls will be unavoidable due to the cessation of common rules as to the standards of products and rules of origin. Products imported from third countries into the UK could not as is currently the case be transferred further into the EU without control and possibly imposition of EU import duties. To sum-up such an FTA will be a second best as compared with the current regime and business will face an unavoidable uncertainty for some time to come as to freedom of trade between the UK and the EU after Brexit.[16]

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[10] Switzerland has been able to somehow unilaterally control the freedom of access of EU workers to its market and retains the freedom to conclude free trade agreements (FTAs) with third countries as a member of EFTA. Both Norway and Switzerland moreover contribute to the EU budget, specifically to the "cohesion funds".

[11] Article XXIV. 8 (b) GATT

[12] For an analysis of the various models of trade agreements see Friends of Europe, *How to (Br)exit: A Guide for Decisions-Makers. The Key to an agreement between the EU and the UK*, March 2017, available at www.politico.eu.

[13] Preferential trade in services is allowed under liberalization agreements among some WTO members only by Art. Y of GATS.

[14] See M. Emerson, *After the UK's Brexit White Paper – What's the next move towards a CFTA?*, CEPS Insights, n. 2017/07, February 2017, available at www.ceps.eu.

[15] See Elaine Fahey, *CETA and Global Governance Law: What Kind of Model Agreement is it Really in Law*, European Papers, 9 February 2017, www.europeanpapers.eu.

[16] Custom checks will be the first and most obvious hurdle, see *Brexit and the borders. The custom crunch*, The Economist, April 8, 2017, p.26. See also there *Descending Mount Brexit*, at p. 25:"Mrs May now calls for a "deep and

2.3. What UK – EU trade relations if no agreements is reached? Reciprocal trading under WTO rules

As the official letter of 29 March 2017 spells out, *"If however, we leave the European Union without an agreement the default position is that we would have to trade on World Trade Organization terms"*. The WTO regime that would govern in this case the UK-EU trade relations is the same as the one that will be generally applicable between the UK and the rest of the world post-Brexit

As between the UK and the EU the WTO multilateral rules are currently inapplicable since the EU member States are part of the custom union governed by EU law. In respect of the EU, the UK situation would be similar to that of a newly admitted member of the WTO which has no trade agreement in place with the EU. The EU custom tariff, according to the list of commitments ("schedule") of the EU filed with the WTO would apply to UK exports to the EU, a tariff which is estimated to be 4% *ad valorem* on average, but presents high peaks on selected "sensitive" products.[17] This is the Most-Favored-Nation (MFN) tariff applicable to exports into the EU from any member of the WTO with which the EU has no comprehensive trade agreement, such is the case in respect of Japan, Australia or the USA.

The UK would not benefit from any special advantage, such as tariff-rate quotas, currently granted by the EU either, assuming that the UK would be an exporter of products covered, since these quotas, essentially covering agricultural products, are addressed to specific beneficiary countries. All other WTO disciplines, such as the WTO agreements on Anti-Dumping, on Technical Barriers to trade (TBT) and the one on Sanitary and Phytosanitary Measures (SPS), would apply reciprocally between the UK and the EU. The EU would be able to levy anti-dumping and anti-subsidy duties against UK exports sold at less than their "normal" value applying the rules and procedures of its Antidumping Regulation. The UK could do the same once it has established an anti-dumping authority able to perform anti-dumping investigations in compliance with WTO rules.

Matters are more complicate as to imports into the UK, since currently the UK has no separate custom tariff or regime. Based on the principles of the Great Repeal Bill, unveiled by the UK Government at the end of March 2017, current EU directly applicable regulations (such as the

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special partnership" with the EU. That implies a trade relationship that extends beyond goods to the services Britain likes to export, particularly the financial sort, and a means to ensuring its standards and rules do not deviate from Europe's. The deeper the trade deal, therefore, the more Britain must play by the EU's rulebook and, perhaps, accept the de facto supervision of its courts."

[17] See *From Farm to Pharma*, The Economist, April 8th, 2017, at p. 64: "Half of Ireland's exports go to Britain and some would face tariffs of almost 60% in the event of a cliff-edge" Brexit, in which trade reverts to the WTO rules.

Common Custom Tariff and the Union Custom Code[18]) will become part of the domestic law of the UK after withdrawal, subject to the necessary adaptations since reference to EU law, EU authorities and the European Court of Justice (ECJ) will become inapposite and will have to be replaced as appropriate.

In the absence of a FTA, the trade regime between the UK and the EU would hardly represent that "freest and most frictionless trade possible in goods and services" that the UK Government intends to prioritise in the negotiations, or that "close partnership between the Union and the United Kingdom after its departure" that the European Council welcomes in its Guidelines.[19]

2.4. A special solution for the Irish question: keeping free trade between the Rpublic of Ireland and Northern Ireland under the "frontier traffic excetion" of article XXXIV.3 GATT

One of the objectives set by the UK government in its White Paper is that "When the UK leaves the EU we aim to have as seamless and frictionless a border as possible between Northern Ireland and Ireland, so that we can continue to see the trade and everyday movements we have seen up to now."[20] Also the EU has emphasized that one of its core objectives is, for evident political reasons, that the all EU member States share with the Republic of Ireland, is avoiding a hard border between the latter and Northern Ireland.[21]

A little explored provision of GATT makes this possible as to trade relations also in respect of other WTO members. Article XXIV.3 states that the GATT *"shall not be construed to prevent: (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic."* In practice this means that any such facilitation would not be subject to most-favored-nation (MFN) obligations, so that if reciprocal trade between the two territories would be exempted from custom control and other restrictions of trade, other WTO members could not complain that their goods would be subject instead to custom duties when exported to the same territories.

[18] The Union Customs Code (UCC) was adopted on 9 October 2013 as Regulation (EU) No 952/2013 of the European Parliament and of the Council. It entered into force on 30.10.2013 although most of its substantive provisions apply from 1 May 2016.

[19] Some of the dispute settlement clauses (mostly weak and sometime squarely ineffective) of existing FTAs of similar agreements of the EU have been annexed to the White Book as possible models for dispute settlement clause of a future trade agreement between the UK and the EU. Let's not forget however that these procedures are all purely inter-governmental, of an administrative or arbitral nature. They invariably deny access to their procedures to private parties, such as importers and exporters who are mostly affected by breaches, differently from the EU judicial protection system by the member States' judges and the European Court of Justice Some of the dispute settlement clauses (mostly weak and sometime squarely ineffective) of existing FTAs have been even annexed to the White Book as possible models for dispute settlement clause of a future trade agreement between the UK and the EU . Let's not forget however that they are all purely inter-governmental, of an administrative or arbitral nature. They invariably deny access to their procedures to private parties, such as importers and exporters who are mostly affected by breaches, differently from the EU judicial protection afforded by the member States' judges and the European Court of Justice.

[20] See White Paper par. 4.4.

[21] See John Bruton, *Reflections on Brexit and its Implications for Ireland*, CEPS Paper, 2 May 2017, www.ceps.eu/publications/. John Bruton is a former Prime Minister of Ireland.

There is no definition of "frontier traffic" in the GATT so that it can be assumed that a regime covering an area as large as the whole of Ireland could be admissible, although extending well beyond a traditional concept of local commerce adjacent to a border. A bigger issue would be how to avoid circumvention, that is both further shipment of goods benefiting from this regime for final destination beyond the chosen area, such as in the rest of the UK, and, on the other hand, further shipment of Northern Ireland goods from the Republic of Ireland to the continental part of the EU.[22]

3. The UK and trade with countries associated with the EU

3.1. What destiny for the UK participation in the EU agreements with third countries post-Brexit?

As is well known, besides the EEA, the agreements with Switzerland and the custom union with Turkey, the EU has negotiated a number of trade agreements with most countries all over the world based on Articles 37 TEU and 216 and 217 TFEU.[23] These basically bilateral agreements[24] are difficult to systematize due to their variety in scope and content, although the EU has tried to frame them according to different models. Some are closely linked with the EU opening to progressive enlargement and the objective to establish a *European Neighborhood Policy* under Article 8 TEU to stabilize and reinforce the rule of law countries falling within this policy.[25] Other agreements are predominantly trade only, such as the FTAs with Korea, Mexico and various countries in South and Central America.[26]

After the entry into force in 2009 of the Lisbon Treaty, by which the EU has acquired exclusive competence, as part of an expanded common commercial policy including the commercial aspects of intellectual property and direct foreign investments (Article 207 TFEU), the "new generation"

[22] See also John Doyle & Eileen Connolly, in this volume, who point to the even more liberal model in place in Cyprus that rests on the Protocol of Accession and the so-called "Green Line Regulation": Goods produced in Northern Cyprus are considered of EU origin; they can enter the Republic of Cyprus without custom duties and automatically circulate within the whole of the EU single market. A related issue is how to ensure free movement of agrifood products should the UK no longer apply the EU's high phytosanitary standards.

[23] www.ec.europa.eu/neighbourhoodenlargement/instruments/overview

[24] There are cases of agreements between the EU and several other parties when the latter are part of an economic union, as is the case of the Economic Partnership Agreement between the EU and the CARIFORUM States of the Caribbean of 2008 (or the proposed agreement with the MERCOSUR countries). Also these agreements are however framed as bilateral agreements between the EU and its members on the one side and the other entity and its members on the other.

[25] Besides pre-accession agreements, we can recall the stabilization and association agreement with countries in the Balkans, the Euro-Mediterranean association agreements with countries on the eastern and southern shore of the Mediterranean, the Partnership and Cooperation Agreements with countries which were part of the Soviet Union and the three Deep and Comprehensive Free Trade Agreements concluded with Ukraine, Moldova and Georgia. Most of them provide, directly or indirectly, for technical and financial assistance by the EU to the partner country.

[26] The possibility for the UK "to take over" these existing EU agreements, that we exclude for the reasons stated in the text, has been mentioned also in respect of autonomous (unilateral) preferential regimes adopted by the EU, and thus currently including the UK, such as the Generalized System of Preferences and the elimination of tariffs and quotas on imports from least developed countries under the "Everything but Arms" initiative of 2001.

FTAs also include an investment chapter, as is the case of the FTA with Viet Nam (2016), CETA (2016) and that negotiated with Singapore.

There are also other international agreements entered into by the EU and its member States which concern economic relations, notably the U.S.-EU Air Transport Agreement of 2007 ("Open Sky Treaty"), but which are outside of the realm of the WTO.[27]

Another relevant distinction is that between agreements which are within the exclusive competence of the EU and "mixed agreements" whose purview extends to matters which are shared between the EU and its member states. While the first type are negotiated and concluded only by the EU, but "are binding on the institutions of the Union and on its Member States" under Article 216(2) TFEU, mixed agreements are concluded by the EU and its member States and require the ratification also of all member States according to their constitutional provisions (which may entail, in some of them, also the approval of sub-national entities) to enter into force.

This distinction is often not clear at the outset and the matter has been the object of a number of disputes before the ECJ between member States and the Commission.[28] Once a mixed agreement has been concluded, distinguishing between provisions which fall within the competence of the EU and those which pertain to the competence of the member States is difficult. It is also a fruitless exercise because the agreement is indivisible and the EU and its member States are just "one party", as these agreements almost invariably define them jointly.

It seems that the UK does not count much on the maintenance of these agreements. The UK government White Paper advocates an independent trade policy for the UK also through trade deals: *"Our approach to trade policy will include a variety of levers including: bilateral FTAs and dialogues with third countries, participation in multilateral and plurilateral negotiations, market access and dispute resolution through the WTO, trade remedies, import and export controls, unilateral liberalisation, trade preferences and trade for development. Without the need to reflect the positions of the EU27, an independent trade policy gives us the opportunity to strike deals better*

[27] To note, as a possible precedent for the UK, that Iceland and Norway joined subsequently the Agreement through a distinct agreement in 2011 becoming parties "as though they were party to the EU".

[28] See Art. 218(11) TFEU empowers member States, the European Parliament, the Council or the Commission to obtain the opinion of the ECJ as to whether an agreement envisaged is compatible with the Treaties, with the effect that if the opinion of the ECJ is adverse the agreement envisaged may not enter into force unless it is amended. In its Opinion n.2/15 of 16 May 2017 the ECJ has considered, that the proposed EU-Singapore FTA is a mixed agreement in view of the provisions on portfolio investment and investment dispute settlement which exceed the EU's exclusive competence.

suited to the UK and to make quicker progress with new partners, as well as those where EU negotiations have stalled."[29]

The exit of the UK from agreements in force will in any case be an issue also for the EU since the territorial application of any such agreement will be reduced, requiring at a minimum a notice to the other party. The dropping out of the UK may in some case impact the scope of their application from an economic and trade point of view, affecting the balance of mutual benefits and possibly leading to a request of renegotiation by the non-EU party.

As to the participation of the UK to these agreements after Brexit, even if the UK might be interested in maintaining its participation in some of them, the answer cannot but be generally negative, both for reasons of substance and legal. The EU Guidelines have taken the same position although they show some temporal flexibility on the part of the EU.[30] This conclusion is legally inevitable for agreements entered into only by the EU within its exclusive competence which bind also the member States as a consequence of them being members of the Union.[31] After Brexit the UK would cease to be bound by them while the EU would be incapable of performing the agreement in respect of the territory of the UK.

Even as to mixed agreements, the participation of member States is inextricably connected with them being members of the EU, bound by its provisions and obliged to assist in the performance of the EU obligations in accordance with the principle of sincere cooperation of Article 4(3) TEU. These agreements provide moreover for their application to the territory of the EU and that would rule out automatically their application to the UK. Finally, in respect of all the treaties which have a strong political objective of tying the non-EU party to the EU economy, principles, policies, such as those falling within the EU Neighbourhood Policy, a further participation of the UK would run contrary to their object and purpose.

[29] White Paper par. 9.6-7

[30] See Guidelines par. 13:" *Following the withdrawal, the United Kingdom will no longer be covered by agreements concluded by the Union or by Member States acting on its behalf or by the Union and its Member States acting jointly. The Union will continue to have its rights and obligations in relation to international agreements. In this respect, the European Council expects the United Kingdom to honour its share of all international commitments contracted in the context of its EU membership. In such instances, a constructive dialogue with the United Kingdom on a possible common approach towards third country partners, international organisations and conventions concerned should be engaged."*

[31] Art. 216.2 TFEU.

3.2. State Succession principles and Fundamental Change of Circumstances as an obstacle to EU treaties remaining in force in the UK

A formal argument is decisive: all these agreements are bilateral, between the EU on one side and the other contracting country on the other. They are bilateral not multilateral treaties. They normally define who the (two) parties are, and to which territory they apply.[32] For the EU it is the territory where the relevant EU treaties are applicable. They moreover provide for bilateral joint or mixed organs, such as Commissions or Committees, and bilateral mechanisms of dispute settlement.[33] The participation of the UK as an additional separate member would turn them into trilateral, that is multilateral agreements,[34] a change that would be incompatible with the operating of such treaties.

This conclusion finds support in international treaty law, specifically in the UN Vienna Convention on Succession of States in respect of Treaties of 1978. Although it is in force (since 1996) only between few countries (including six members of the EU) we can assume that it reflects customary law.[35] *Mutata mutandis*, the UK might be considered as a State which separates itself form a larger State, considering the EU like a State since its members have devolved to it part of their sovereign prerogatives.[36] Separation, dissolution, dismembering of States as well as transfer of territories are all covered under the heading of "State succession" but it is not easy to select the applicable regime in the peculiar case of Brexit.

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[32] See e.g. Art 1 (Definitions) of the EU-US Air Transport Agreement of 2007:" 6. "Party" means either the United States or the European Community and its Member States"; 9. Territory means (…) "for the European Community and its Member States, the land areas (mainland and islands), internal waters and territorial sea in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and any successor instrument.". Art.1.2 of the EU (and its member States) FTA with Korea (2011) provides at Art. 1.2 (General Definitions): "Throughout this Agreement, references to: the Parties mean, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Korea".

[33] See e.g..Article 15.1 of the EU – Korea FTA establishes a Trade Committee "comprising representatives of the EU party and representatives of Korea". As to territorial application the FTA provides at Art. 15.15 "This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties, and, on the other hand, to the Territory of Korea."

[34] I recall that under the Vienna Convention on the Law of treaties (1969) which reflects customary international law the regime of multilateral treaties is different in several respects from that of bilateral treaties, notably as to Amendments (Part IV of the VCLT, Art.40),Extinction (Part V, Art.55, 58)

[35] On this Convention see generally Andrea Zimmermann, *State Succession in Treaties*, Max Planck Enc. Public Int'l Law on line, http://opil.ouplaw.com . The Art.15 approach has been followed when the German Democratic Republic acceded to the Federal Republic of Germany in 1990, the territory of the European Communities being thereby extended, a process contrary to the one resulting from Brexit, see also R. Mullerson, *The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia*, ICLQ 42, 1993, 473.

[36] This approach is supported by the well-known constant jurisprudence of the ECJ as to the innovative nature of the European Communities, since the seminal decisions *Van Gend & Loos*, case 26/62, and *Costa v. ENEL*, case 6/64. This configuration is especially warranted as to agreements in the sphere of the common commercial policy where the EU has exclusive competence (Cf. the participation of the EU as an original member to the WTO under Art. XI.1 of the Agreement establishing the WTO)

There are two different, even opposite regimes, in such a case. According to the one of Art. 15 of the Convention, EU treaties would cease to be applicable to the UK.[37] According to the regime of Art.34 instead, EU treaties would remain in operation also for the UK.

Applying the first paragraph of Art.15, which is referred to as the "mobility of borders as to treaty application" or "the moving frontiers" principle, EU treaties shall cease to apply to the territory of the UK since the UK will replace the EU as the territorial sovereign also in the matters previously pertaining to the EU competence.
According to Article 34 on *"Succession of States in cases of separation of parts of a State"* EU treaties would remain in force also for the UK except if *(a) the States concerned otherwise agree; or (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.*

The application of this provision would imply not only the continuity of the applications of the EU treaties in the EU-27[38] but also in and by the UK. This result appears however to be prevented by the caveat of the last sentence, when such application by the successor State to a part of the territory where a treaty was applicable *"would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."*

This conclusion is warranted in the light of the structure, object and purpose of FTAs. These EU agreements are essentially bilateral and are premised, as to EU party, on the exercise by the EU of its prerogatives under the EU Treaties, according to their rules which are applicable only in the EU territory. As a result, it is rather the regime of Article 15 of the UN Convention that appears more in conformity with the peculiarities of these treaties.[39] The issue is not moot but could be relevant in relation to certain multilateral treaties not of the FTA model, such as some environmental treaties,

[37] According to Article 15 ("Succession in respect of part of territory"): *"When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State: (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and(b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise stablished that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."*

[38] This would result also from Article 35, which affirms in principle the continuity of application in the predecessor State (here the EU) if it continues to exist after separation of part of its territory.

[39] "State concerned" would include not only the EU and the other party to the treaty but also the UK. Maintaining the substance of a specific EU FTA might be considered by the UK not to be in its interest on a bilateral basis, so that Article 15 (but not Article 34) of the UN Convention of 1978 would provide an (additional) basis for considering such a treaty not in force anymore for the UK upon Brexit.

the Energy Charter Treaty or the Government Procurement Agreement, a "plurilateral" agreement which is not part of the WTO "single undertaking". Nothing would prevent these treaties remaining in force for the UK in accordance with the rule of Art. 34.

In addition to the Convention on State Succession also Article 62 of the Vienna Convention on the Law of Treaties of 1969 (VCLT) on "Fundamental Change of Circumstances", the well-known *rebus sic stantibus* clause, may come into play.[40]

This exceptional ground for terminating a treaty[41] could be invoked both by the EU and the other party, but not by the UK that would not be a party ("anymore") of the treaty. Giving for granted that Brexit may involve in some instances "a fundamental change of circumstances", for sure "unforeseen by the parties", invoking Article 62 VCLT by either party would require showing that the UK market being part of the EU single market was (a) "an essential basis of the consent" to the treaty by the party invoking Article 62, and (b) that a strong imbalance of rights and obligations would ensue due to the exit of the UK from the EU, such as to "radically to transform the extent of obligations still to be performed under the treaty" by the party invoking Article 62. This is unlikely but not impossible.[42] In any case it might be an argument for renegotiation from the side of the non-EU party. In fact an agreement between "the parties concerned" to resolve any issue, as stated in Article 34 of the 1978 Convention will be the most likely development. This could take the form of a provisional agreement for a transitory period.[43] The UK might be interested to go on applying a given EU FTA, say with Korea, on a bilateral basis with the other party, thus going on reciprocally to enjoy the previous liberalization regime applicable while a new FTA is being negotiated.[44]

[40] See the text of Article 62 1: *A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."*

[41] The ICJ has stated in the *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) judgment of 25 September 1987, that "the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional circumstances"

[42] In order to anticipate instances of such a move one would need to know the economic balance underlying the conclusions of relevant treaty. It has been mentioned that a substantive consideration for Peru concluding the FTA with the EU was the large consumption of its quinoa mainly be UK consumers. If this is so, Peru might be able to claim if not termination at least renegotiation of the FTA. One could envisage that without the UK the Open Sky Treaty between the US and the EU might show substantial imbalances, the US losing its rights in respect of the UK airports.

[43] This is what is advocated by G. van der Loo and S. Blockmans, *The Impact of Brexit on the EU's International Agreements*, CEPS, 21 July 2016, available at www.ceps.eu/publications/impact-brexit-eu.

[44] It has been pointed out that the EU-Korea FTA liberalizes also many services, such as financial services and telecommunications providing to the parties a much more advantageous access to selected service sectors of the other

4. The UK position in the WTO after Brexit: operating as an "independent" WTO member

4.1. The UK as an original member of the WTO may go on keeping the EU schedules

First of all the EU will have to notify to the WTO that one of its members, the UK, is not "represented" any more by the EU since that member and its territory have ceased to be part of the EU. Such notification seems not to be problematic at the WTO.[45]

Discussions are ongoing among trade law experts whether the EU's WTO tariff schedule can be automatically assumed as its own by the UK, possibly through a simple notification to the WTO, once the UK will cease to be a EU member, just declaring or notifying to the WTO that this tariff goes on being the one of the UK as an "independent" member.[46]

I do not see why this should not be so. The UK, which was an original contracting party of the GATT in 1947, is also an original member of the WTO by virtue of both the WTO Agreement and EU law. The WTO Agreement, comprising the agreement establishing the WTO and the various multilateral and plurilateral agreements annexed to it have been concluded and ratified as "mixed agreements", that is also by all the individual members of the EU.

There is thus no issue of State succession, nor any need of admission of the UK as spin-off part of an existing member of an international organization. The UK was, is and remains a member of the WTO so that the EU schedule, which is also the UK's schedule currently, remains its schedule.

The UK Government White Paper takes substantially this position:

establish our schedules in a way that replicates as far as possible our current position as an EU Member State, thus creating a mutually beneficial, simple and inclusive outcome, so that the interests of the UK and other WTO members are protected." If at least initially the UK will adopt the current schedules applicable to it as a member of the EU, other members of the WTO could not object to having the EU (EU-28) split between the EU-27 and the UK since, in principle, this would

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party than under the GATS, see UK Trade Policy Observatory, *The WTO: A Safety Net for a Post-Brexit UK Trade Policy?*, Briefing Paper 1 – July 2016, available at https://blogs.sussex.ac.uk/uktpo/

[45] The breaking up of Czechoslovakia into the Czech Republic and Slovakia was the object of a simple notification by them to the GATT Secretariat in 1993. No other contracting party raised objections or asked for any renegotiation. The "transformation" of the European Communities into the European Union was also the object of a simple communication in 2009.

[46] Some "technical" changes will be most probably requires, such as converting in British pounds the EU tariffs expressed currently in Euros. Determining the "official" EU schedules for each product at the WTO is not a simple matter. EU schedules had to be amended and renegotiated after each expansion of the EU, by which new EU members adopted the EU common tariff, thereby causing losses or resulting in advantages to other WTO members. Currently the EU tariffs "certified" by the WTO at the end of this process (only as recently as December 2016) are still those following the enlargement of the EU from 15 to 25 members in 2004.See *"12 years on, EU's certified WTO goods commitments now up to date to 2014*, https://tradeblog.worldpress.com/2017/02/04/, accessed 10.4.2017.

not affect negatively the original, previous balance of benefits and obligations.[47] Establishing a new WTO schedule would entail instead a painstaking process of negotiations[48], which does not necessarily lead to replicating the EU schedule especially if the UK would aim at obtaining more concessions from other Members than those reflected in their schedule in force (and vice-versa).[49]

Although some WTO member might be tempted to ask for renegotiation,[50] this position is unsupported by WTO law.[51]

Also the argument that other members will be prejudiced because their exporters will lose the benefits of shipping their goods freely from and to the UK to and from the rest of the EU is a non sequitur.[52] The territorial extension of a WTO member can change and is not a relevant element of a concession. In any case it is not clear how other WTO members would be able to challenge effectively the UK retaining the EU schedule, except through bringing a case against the UK within the WTO dispute settlement system: a cumbersome and lengthy process leading to an uncertain outcome while in the meantime the UK would be entitled to maintain its announced unchanged tariff regime.[53]

In the future, it is to be assumed that the UK will want to adjust or modify its schedules and the WTO grants the necessary flexibility also outside multilateral negotiating rounds. In any case this cannot be done unilaterally since schedules and other commitments are part of multilateral

[47] As submitted by L. Bartels, *Understanding the UK's position in the WTO after Brexit*, part I and II, www.ictsd.org/opinion of 26 September 2016 and paper of 23 December 2016 *The UK's status in the WTO after Brexit.*

[48] E. McGovern, What would be the UK's WTO schedules following Brexit, www.globefield.com/updates.htlm, accessed 3 April 2017.

[49] The constraints of the process of renegotiating schedules under Article XXVIII GATT ("Modification of Schedules") have been highlighted in the recent WTO Panel Report of 28 March 2017 *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products* (DS492), adopted without appeal on 19 April 2017, concerning China's objections to a modification by the European Union of tariff concessions (TRQs) on certain poultry products pursuant to negotiations held under Article XXVIII concerning in particular the granting of TRQ by the EU.

[50] The reason therefor is possibly the one exposed by Jim Bacchus, the first US member of the WTO Appellate Body, in his Commentary "*Making Room for Britain at the WTO"* in The Wall Street Journal of 7 February 2017. According to him, the legal argument that the UK could just cut and paste its current obligations from the EU list "is more likely to persuade other legal scholars than canny trade negotiators seeking greater access to the UK market".

[51] If the status of the UK as an original member of the WTO would not to be applicable to the GPA, then the principles of state succession of Article 34 of the 1978 Convention would result in the UK going on participating to it as a successor of the EU. For a contrary (unconvincing) view see UK Trade Policy Observatory, *The WTO: A Safety Net for a Post-Brexit UK Trade Policy?*, Briefing Paper 1 – July 2016, available at https://blogs.sussex.ac.uk/uktpo/ .

[52] See McGovern op.loc. cit. This issue does not affect concessions under GATS which are in the form of allowing service providers of other WTO members to access in the various forms envisaged the market of another member, since the EU GATS schedules are mostly limited to individual EU member states and vary from one to the other. A specific UK GATS schedule can thus already be identified, see Bartels, *The UK's schedule after Brexit*, cit., p. 12.

[53] According to Jim Bacchus instead, op.cit *supra* note 35, should the UK refuse to renegotiate "other members may retaliate by refusing to continue their current trade commitments to the UK, which have been made in exchange for the commitments made by the EU as a whole as listed in the EU schedule." Since the same schedule will remain in place for the EU-27, undermines such a position by another member. In such a case, it would be however for the UK to start dispute settlement proceeding to challenge such refusal to recognize the validity of the UK schedule.

obligations of each member. Articles XXVIII of GATT and XXI of GATS on Modification of Schedules provide the framework for such negotiations, allowing them to be conducted only with those other members who "have a principal supplying interest".

4.2 Apportioning the EU tariff-rate quotas (TRQ) between the UK and the EU

The most complicated issue is according to most observers that of the TRQ and similar restrictions, as far as allowed, that have been granted by the EU as a whole to third countries and would need to be apportioned between the EU-27 and the UK (except in the unlikely event that the UK would liberalize its agricultural imports allowing them without limits at the tariff rate currently limited to the quota). In this respect, even if the EU and the UK would find an agreement inter se, they would not be able to oblige third parties to accept their decision. It is to be expected that negotiations under Article XXVIII would follow both with the EU and with the UK.[54] The EU has many tariff-rate quotas on imports of agricultural products, which includes a specific quantitative amount to be imported at a given tariff, while beyond the quota the rate is much higher. A similar problem of apportioning exists as to the cap on expenditure on trade-distorting agricultural subsidies that the EU negotiated in the Uruguay Round, the so-called "blue box". In both cases, one could envisage that the EU-27 will want to reduce its commitments to take into account the loss of the UK market for exporters from outside the EU 28, while the UK may want to accept as few TRQ as possible. The matter is further complicated by the fact that WTO members who benefit of a given TRQ may

have a different interest towards the EU-27 or the UK markets depending upon their established trade flows and commercial relations.[55]As to trade in services, most commitments of the EU under the GATS are limited to individual EU member countries (since the regime for non-EU nationals providing services is in great part still governed by national, not European, legislation) making the transition somehow simpler.[56] Liberalization of services under the GATS is modest; FTAs covering

[54] See the case *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products* referred to in note 49 above.

[55] To give an example and an idea of what can be expected, the EU has a tariff quota for high quality, hormone-free beef, commonly named the "Hilton quota". It was introduced initially pursuant to a 2009 Memorandum of Understanding (MOA) with the USA to compensate the US for the EU not having implemented the outcome in 1998 of the Hormones dispute and maintaining the prohibition of imports of hormone-treated beef (The US recently submitted that the EU is not respecting the MOA threatening additional duties on selected EU exports to the US as a countermeasure). The EU's current official commitment is 37,800 ton charged 20% import duty. Outside the quota, the duty is much higher: €2,700–€4,700 per ton. Since it is unlikely that the UK renounce to the quota (or admit hormone-treated beef) applying the 20% tariff to all imports, the quota would have to be renegotiated by both the EU and the UK with the major exporters of the product to the EU and the UK (such as the US, Argentina, Uruguay), which may have different interests of accessing these two markets. For a detailed analysis, *The Hilton beef quota: a taste of what post-Brexit UK faces in the WTO* by Peter Ungphakorn, https://tradebetablog.wordpress.com/2016/08/10/hilton-beef-quota, posted August 10, 2016, updated November 25, 2016

[56] Thus, while rules on establishment and freedom of services for banks and insurance including non-EU based - have been harmonized across the EU, this is not so for the services and establishment of non EU lawyers. The EU and the US

also services are therefore crucial in order to obtain reciprocal access for service with relevant markets.

4.3. The UK negotiating and concluding new FTAs

This is clearly fundamental for the UK post-Brexit in order to replace the EU existing network from which it will be cut-out. The UK has signalled its intent to "strike free trade agreements with countries around the world" to use the expression of Objective 12 of the White Book "Securing new trade deals with other countries", notably with the US and members of the Commonwealth. Transitory agreements with the countries currently linked to the EU by FTA and similar agreements are essential, since until the Art. 50 agreement has not been finalized the UK will not be able to formally negotiate and conclude international treaties with non-EU countries.

The UK will have full capacity and ability to frame such agreements by negotiation with the other parties, since the WTO gives almost complete freedom to members as to their content and structure, provided they respect the principles of Art. XXIV GATT and Art. V GATS: elimination of duties and other restrictive regulations in respect of substantially all trade in goods between the partners (custom unions) or in respect of products originating from them (FTAs); no increase of the incidence of the members duties in respect of third parties; elimination of duties in a reasonable period not exceeding ten years if a staged decrease of duties is provided for. The UK will have many models from which to take inspiration.[57] The quantity and variety of existing such agreements (bilateral and regional), including those currently binding the EU and therefore the UK (such as the FTA with Korea), or negotiated by the EU but not fully in force (CETA) and others which have been extensively negotiated (such as the TTIP) or even concluded (TTP), but that will not result in binding treaties under the current US Administration, is well-known.[58] They offer many solutions also as to "WTO+" clauses in sectors covered or not covered by the WTO agreements. If the UK would "break away from the EU" and adopt positions more similar to those of the US on sensitive issues such as financial services regulatory cooperation, standard setting and the precautionary principle (thus allowing hormone-treated meat or opening its market to GMO products at large), as

have recently (end of 2016) concluded an agreement on the mutual recognition of qualifications for insurance companies, which is not yet in force. Post Brexit, the UK will have to negotiate its own agreement.

[57] The policy options available to the UK and the unavoidable constraints that negotiating trade agreements based on reciprocity of mutual concessions are highlighted by S. Dhingra, G. Ottaviano, T. Sampson, *A hitch-hiker's guide to post-Brexit trade negotiations: option and principles*, Oxford Rev. of Economic Policy, 33, 2017, 22-30.

[58] For some reflections see James Bacchus, *Balanced Approach needed to UK-US trade agreement*, www.gtlaw.com, March 2017

has been advocated by some US commentators, it might be able to strike a better deal for its exports to the US, but at the cost of putting their access to EU market at risk.[59]

5. Conclusion

It will be an uphill challenge for the UK to succeed in negotiating with the EU a trade agreement capable of ensuring reciprocal trade flows freedom as unimpeded as currently under the single market, without accepting a custom union with the EU either. Any UK-EU Free Trade Agreement will offer a second-best solution, the price that the UK will have to pay to be able to freely negotiate trade relations across the world. The principles of the WTO, of which the UK is and will remain an original member, allows the UK to maintain the current custom regime of the EU as its own without having to renegotiate with third countries, except in respect of EU tariff-rate quotas in place for certain agricultural products. Trade agreements with other WTO countries, including with those which have such agreements with the EU, from which the UK will be cut out, may be negotiated by the UK based on its future trade policy choices in accordance with WTO rules but only once the Brexit negotiations with the EU have been concluded.

[59] See Inside US Trade, *Brexit could lead UK to avoid snags in trade talks with the US,* www.InsideTrade.com, April 21, 2017.