

No Deal is Better Than a Bad Deal?
The Fallacy of the WTO Fall-Back Option as a post-Brexit Safety Net

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Abstract

The terms and conditions of the WTO fall-back option and the extent to which the WTO could act as a safety net for the UK's future economic relations depend, to a great extent, on successful negotiations with all other WTO Members. There are significant differences between EU and WTO Membership, in terms of the applicable trade rules and their economic impact, as well as compliance and dispute settlement procedures. Imposing new regulations and processes will inevitably entail additional costs and delays, regardless of any mitigation agreements. Finally, the EU-UK relationship covers much more than trade so the WTO fall-back option will in any case leave major legal vacuums. Thus, the mantra 'no deal is better than a bad deal' is misleading; the WTO fall-back option falls far short of providing an adequate safety net, even for trade matters.

1. Introduction

On 23 June 2016, 51.89 % of turnout voters in the United Kingdom (UK) and Gibraltar answered 'Leave' to the referendum question: 'should the United Kingdom remain a member of the European Union or leave the European Union?'. Already during the campaign running up to the referendum, politicians supporting 'Leave' put forward the idea that no economic catastrophe was to be feared in case the UK left the European Union (EU) because, even if Britain failed to reach a trade deal with the EU, it could fall back on the so-called World Trade Organization (WTO) option. To support the statement that 'it would be better to have no deal with the EU, rather than a bad deal', members of the UK government – and others – have consistently claimed that the WTO fall-back option will allow the UK to seamlessly continue participating in the global economic market post-Brexit.

On 8 December 2017, Brexit negotiations reached the first breakthrough since the UK activated Article 50 of the Treaty on European Union (TEU)² as the UK and the EU agreed

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² Consolidated version of the Treaty on European Union, *OJ C 326* (26.10.2012) p. 13 [hereafter 'TEU'].

on the status of Union citizens in the UK and UK citizens in the Union, a framework addressing the circumstances in Northern Ireland, and the UK's financial settlement.³ Reaching a deal on these crucial aspects of the withdrawal agreement made it possible to formally move Brexit talks into the second phase of negotiations starting in March 2018. During this second phase, the discussions address possible transitional arrangements and the establishment of an overall framework for the future relationship between the UK and the EU, including trading relations.⁴ However, these negotiations are not formal trade talks, as any trade agreement can only be concluded *after* the UK has left the EU and has become a third country.⁵ Hence, any withdrawal agreement will, at most, include an understanding for the future relationship between the UK and the EU.

On 19 March 2018, the UK and the EU reached agreement concerning a non-extendable transition period (until December 2020), upon condition that a withdrawal agreement can be concluded.⁶ Pending these negotiations, all alternatives regarding the UK's future trade relationship with the EU remain possible, in theory at least. At this stage, it is not even certain that any deal will be adopted, as the European Parliament could veto the final withdrawal agreement, if is not satisfied with its terms.⁷ This leaves open the possibility that the UK may quit the EU on 29 March 2019 without any withdrawal agreement and without any transitional arrangements, *i.e.*, 'a hard Brexit' necessitating a fall-back on the WTO option.

Meanwhile, various reports have surfaced, indicating the estimated economic impact of Brexit, including the UK government's own impact assessment, the EU Exit Analysis,⁸ the findings of which are in line with most other reports on the matter.⁹ The EU Exit Analysis looks at three Brexit scenarios: continued single-market access through membership of the

³ TF50 (2017) 19, Commission to the EU 27: Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 Dec. 2017) – at https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf .

⁴ EUCO XT 20011/17, European Council (Art. 50) Guidelines for Brexit negotiations (15 Dec. 2017) – at www.consilium.europa.eu/media/32236/15-euco-art50-guidelines-en.pdf .

⁵ EUCO XT 20001/18, European Council (Art. 50) Guidelines on the framework for the future EU-UK relationship (23 Mar. 2018) – at <http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf> .

⁶ TF50 (2018) 35, Commission to EU27: Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018 (19 Mar. 2018) – at https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf . Other conditions included that Northern Ireland and the Irish Republic will stay in regulatory alignment unless a hard border can be avoided either by a future trade deal or new technology and the UK has to meet its long-term financial obligations to the EU, with annual payments possibly continuing until 2064. Moreover, during the transition period, the UK has to comply with the rulings of the Court of Justice of the EU; allow EU vessels continued access to UK fisheries; and, permit free movement for EU citizens while it cannot implement any trade deals negotiated with third countries.

⁷ It is unclear at this point whether the UK Parliament will be able to vote on the withdrawal agreement.

⁸ Department for Exiting the European Union (DExEU), *EU Exit Analysis – Cross Whitehall Briefing* (Jan. 2018) – at <https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Cross-Whitehall-briefing/EU-Exit-Analysis-Cross-Whitehall-Briefing.pdf> [hereafter 'EU Exit Analysis (2018)'] .

⁹ See e.g., the Brexit Impact Studies, commissioned by the European Parliament – at <http://www.europarl.europa.eu/unitedkingdom/en/ukevents/brexitstudies.html> .

European Economic Area (EEA), a comprehensive free trade agreement (FTA) with the EU and the no-deal option in which the UK would fall back on the WTO terms of trading. The EU Exit Analysis concludes that the UK will be economically worse off outside the EU in every one of these three scenarios but particularly reverting to WTO rules is estimated to reduce economic growth by 8% over the next 15 years, compared to current forecasts.¹⁰ This estimate does not consider any short-term hits to the economy, such as the cost of adjusting the economy to new customs arrangements, and it assumes that the UK will be able to conclude a trade deal with the US, take over many of the EU's current trade agreements and relax existing regulations involving environmental protection standards, among other.

Furthermore, every UK region would undergo an economically negative impact, with particular severity in the North East, the West Midlands and Northern Ireland (not taking into account the effects of a potential hard border with Ireland). Almost every sector of the UK's economy would be adversely affected, in particular the chemical, food and drink, cars and retail, clothes and manufacturing industries. The only exception to this downward trend would be the agricultural sector. Finally, London's status as an international financial centre is very likely to suffer.

This article addresses the legal consequences of the 'WTO fall-back option' for the UK in its relationship *vis-à-vis* the EU as well as other WTO Members.¹¹ It outlines the main features of the future EU-UK trading relationship if no trade agreement between them enters into force after Brexit, and the UK's relationship with other WTO Members. In other words, in case of a 'hard Brexit', can the WTO provide a safety net for the UK? After setting out the legal basis of the WTO fall-back option, the article examines the problems surrounding the determination of the EU's current commitments in the WTO, the UK's and EU's commitments on goods, services and other matters after Brexit. After analysing the specific repercussions for the settlement of trade disputes and the options of redress for private parties, some general conclusions are offered.

2. Legal basis of the WTO Fall-back Option

This section examines the legal position of the UK as a WTO Member, before addressing the terms of the UK's WTO membership after a hard Brexit.

2.1 Legal position of the UK as a WTO Member

¹⁰ EU Exit Analysis (2018), p. 16.

¹¹ For a broader analysis of the consequences of Brexit for the UK to negotiate and conclude new international agreements as well as the impact of the UK's withdrawal on existing international agreements concluded by the EU and its Member States with third countries (beyond the WTO), please see R.A. Wessel, 'Consequences of Brexit for International Agreements concluded by the EU and its Member States' [REFERENCE TO ARTICLE BY RAMSES WESSEL IN THIS ISSUE]

In principle, EU treaties will cease to apply to the UK from the date of the entry into force of the withdrawal agreement or, if earlier, two years after the UK's withdrawal notice to the European Council.¹² This period can only be extended by unanimous agreement of all EU Member States. In case no withdrawal agreement can be agreed upon, the UK's relationship with the EU will be subject to general rules of international law and the international treaties in force between them, including the WTO Covered Agreements. Moreover, even if the EU and the UK manage to agree on trade arrangements after Brexit, WTO law will still be relevant, as its rules will apply alongside and in addition to any EU-UK trade agreement. Also, the WTO Dispute Settlement Mechanism will be an option for resolving trade disputes between the EU and the UK after Brexit. Between EU Member States, WTO rules are not applied as they have been superseded by the EU treaties so their disputes fall under the exclusive jurisdiction of the Court of Justice of the EU (CJEU).¹³ In other words, exiting the EU elicits a revival of WTO rules and dispute settlement procedures for the UK as regards its relations with the EU and its Member States.

The legal basis for the UK's WTO Member status can be found in Article XI.1 of the WTO Marrakesh Agreement:¹⁴

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.

The UK was a Contracting Party to the General Agreement on Tariffs and Trade (GATT)¹⁵ 1947 so it is an original Member of the WTO. The European Union (until 30 November 2009, known officially in the WTO as 'the European Communities' (EC)) has also been an original WTO Member since 1 January 1995.¹⁶ The EU itself and its 28 Member States are full WTO Members in their own right so all rights and obligations under the WTO Covered Agreements apply equally to all of them. In practice, based on its exclusive competences under the common commercial policy,¹⁷ the European Commission represents the EU as well as its Members in almost all WTO meetings, negotiations and

¹² Article 50(3) TEU. Note, however, that a transitional agreement would most probably require the UK to comply with all EU rules and regulations for the duration of the transition period.

¹³ Case 10/61, *Commission of the European Economic Community v Italian Republic* (27 Feb. 1962) Judgment of the Court, *ECR* (1962) p. 1; Article 292 TEU.

¹⁴ Marrakesh Agreement Establishing the World Trade Organization (1995) 1867 UNTS 155 [hereafter 'WTO Marrakesh Agreement'].

¹⁵ General Agreement on Tariffs and Trade (1947) 55 UNTS 194; (1994) 1867 UNTS 190 [hereafter 'GATT'].

¹⁶ WTO, *The European Union and the WTO* – at https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm.

¹⁷ Article 3 Consolidated version of the Treaty on the Functioning of the European Union (TFEU) *OJ C* 326 (26.10.2012) p. 47.

dispute settlement procedures.¹⁸ The EU also exercises the right to vote of its Members, having a number of votes equal to the number of EU Member States.¹⁹

The conduct of EU Member States can be considered as conduct acknowledged and adopted by the EU as its own, in case any dispute arises. For example, in the oral pleading before a WTO panel in the case *EC – Customs Classification of Certain Computer Equipment*, the EC declared that it was: ‘ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States’.²⁰ The EU has also accepted the existence of a special rule on attribution, to the effect that, in the case of EU acts that are binding upon Member States, State authorities would be considered as acting as organs of the Community.²¹ This approach has been recognized by, for example, the WTO panel in *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, which:

accepted the European Communities’ explanation of what amounts to its sui generis domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, ‘act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general.’²²

Once the UK is no longer part of the EU, its conduct is no longer covered by the EU, but as it remains a WTO Member, it becomes solely responsible for its own potentially WTO-inconsistent measures, unless it also decides to exit the WTO,²³ or unless its membership is terminated by the WTO Ministerial Conference.²⁴ Neither option is currently on the table,

¹⁸ This is not the case, for example, for matters relating to the WTO budget. See P. Van den Bossche and W. Zdouc, ‘The Law and Policy of the World Trade Organization’ (CUP 2017, 4th ed.) p. 116 [hereafter ‘Van den Bossche and Zdouc (2017)’].

¹⁹ Article IX.1 WTO Marrakesh Agreement.

²⁰ International Law Commission (ILC) Articles on the Responsibility of International Organizations, with Commentaries (2011) A/66/10, *ILC Yearbook* (2011) vol. II, Part Two [hereafter ‘ILC ARIO’], Article 9, Commentary para. 3. The ILC further discussed the potential confusion as to whether the conduct or the responsibility itself is to be attributed. For the purpose of the present article, this distinction is not relevant.

²¹ ILC ARIO, Article 64, Commentary para. 4.

²² WTO Panel Report, *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Complaint by the United States (EC – Trademarks and Geographical Indications (US))* WT/DS174/R (20 Apr. 2005) para. 7.725. See also: WTO Panel Report, *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R (29 Sept. 2006) para. 7.101 [hereafter ‘*EC – Biotech* (2006)’].

²³ In order to withdraw from the WTO Marrakesh Agreement and the Multilateral Trade Agreements, the UK would have to send a notice to the WTO Director-General. The withdrawal would take effect after six months (Article XV.1 WTO Marrakesh Agreement). Withdrawal from plurilateral trade agreements would be subject to the provisions of those agreements (Article XV.2 WTO Marrakesh Agreement).

²⁴ The WTO Ministerial Conference can decide that some amendments to the WTO Covered Agreements are of such character that any member which has not accepted it within a certain period is free to withdraw from the WTO, lacking which, it can only remain a member with the consent of the Ministerial Conference (Article X.3 and Article X.5 WTO Marrakesh Agreement).

as confirmed by the WTO Director-General Roberto Azevêdo who stated that ‘the UK, as an individual country, would of course remain a WTO member’.²⁵

2.2 Terms of the UK’s WTO Membership Post-Brexit

The terms of the UK’s WTO membership after a hard Brexit are predictable insofar as rights and obligations *erga omnes partes* are concerned, *i.e.*, rights and obligations, deriving from multilateral treaties or customary international law, that protect a collective interest of a group of States.²⁶ Quantifiable rights and obligations remain to be determined through probably lengthy negotiations – a situation which may, according to some, give rise to a non-violation claim, or even a situation claim. A final issue relates to the question of the format in which effect will be given to the new schedules: renegotiation or rectification?

2.2.1 Rights and obligations: *erga omnes partes* or quantifiable?

After the UK leaves the EU, it will be confronted with a set of complex and technical trade rules under the WTO, in particular as some rights and obligations will be more difficult to determine than others. Arguably, the rights and obligations that apply on an *erga omnes partes* basis – such as those contained under the WTO Marrakesh Agreement, the GATT (except for Article II: Schedules of Concessions), the General Agreement on Trade in Services (GATS) (except for Article XX: Schedules of Specific Commitments), the Agreement on Trade-Related Intellectual Property Rights (TRIPS) and the Dispute Settlement Understanding (DSU)²⁷ – would not be problematic to transpose to the UK after Brexit.²⁸ If so, these rights and obligations will be fully applicable to the UK as from the date the withdrawal from the EU takes effect.

Two examples of such *erga omnes partes* rights and obligations are the most favoured nation (MFN) treatment and national treatment standards. Under the rubric of MFN treatment, any advantage, favour, privilege or immunity granted by any WTO Member to products or services originating in or destined for any other country must be accorded immediately and unconditionally to the like product or service suppliers originating in or

²⁵ Azevêdo addresses World Trade Symposium in London on the state of global trade, World Trade Organization News (7 June 2016) – at https://www.wto.org/english/news_e/spra_e/spra126_e.htm [hereafter ‘Azevêdo Keynote Address (2016)’].

²⁶ ILC ARIO, Article 48, Commentary para. 6.

²⁷ General Agreement on Trade in Services (1994) 1869 UNTS 183 [hereafter ‘GATS’]; General Agreement on Trade-Related Aspects of Intellectual Property (1994) 1869 UNTS 299 [hereafter ‘TRIPS’]; Understanding on the Rules and Procedures Governing the Settlement of Disputes (1994) 1869 UNTS 401 [hereafter ‘DSU’].

²⁸ L. Bartels, ‘The UK’s Status in the WTO after Brexit’ (23 Sept. 2016) p. 7 – at <http://dx.doi.org/10.2139/ssrn.2841747> [hereafter ‘Bartels (2016)’].

destined for the territories of all other contracting parties.²⁹ Under national treatment, any product, right, service or service supplier must be treated like its domestic equivalent.³⁰

On the other hand, it will be far more difficult to determine the UK's quantifiable rights and obligations after Brexit, as these are bundled with those of the EU. This is the problem WTO Director-General Azevêdo was referring to, when he stated that the UK

*would not have defined terms in the WTO for its trade in goods and services [as it] only had these commitments as an EU member. Key aspects of the EU's terms of trade could not simply be cut and pasted for the UK. Therefore, important elements would need to be negotiated.*³¹

This statement refers to the fact that all WTO Members must submit a list of concessions and commitments in the form of schedules when joining the WTO.³² There are different schedules for goods and services; each WTO Member has a 'Goods Schedule' and a 'Services Schedule'. In the case of trade in goods, concessions usually consist of maximum tariff levels (bound tariffs or bindings),³³ but on agricultural products, they also deal with tariff rate quotas, limits on export subsidies, or domestic support. In relation to trade in services, commitments consist of market access and national treatment commitments on a sector-by-sector basis and according to the four GATS modes of supply (cross-border trade, consumption abroad, commercial presence, and presence of natural persons).³⁴ With regard to the EU's services schedules, commitments may apply to all Member States or be differentiated between them. These are referred to as *quantifiable* rights and obligations, and are likely to become the most challenging matter to settle from a WTO law perspective.

²⁹ Article I GATT; Article II GATS. Note, however, that regarding services, the GATS allows WTO Members to exempt measures from the MFN treatment obligation by listing them in the Annex on Article II Exemptions. This was a once-only opportunity offered to WTO Members when the GATS entered into force. For instance, the EU's MFN exemptions (found in the *Final List of Article II (MFN) Exemptions*, GATS/EL/31, 15 April 1994) include '[m]easures granting the benefit of any support programmes [...] to audiovisual works, and suppliers of such works, meeting certain European origin criteria' (GATS/EL/31, p. 4). Thus, with regard to these measures, the EU does not have to ensure MFN treatment. Although the MFN exemptions were in principle meant to expire after 10 years, many Members continue to apply them, due to the absence of any annulment negotiation. Therefore, the EU would be able to discriminate against the UK after Brexit with respect to the measures that are enumerated in its list of MFN exemptions. Also, the question remains open as to whether the UK would have a right to continue exempting the measures on the EU list of MFN exemptions.

³⁰ Article III GATT; Article XVII GATS.

³¹ Azevêdo Keynote Address (2016).

³² All WTO members have a schedule which is either annexed to the Marrakesh Protocol to the GATT 1994 or to a Protocol of Accession in the case of goods, and to the GATS in the case of services. A schedule's content can change over time to take account of different modifications. See WTO, Members' Commitments – at https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm for goods, and https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm for services.

³³ Article II.1(a) GATT.

³⁴ Article I:2 GATS.

As stated above, the EU submits schedules on behalf of all its Members.³⁵ Once the UK is no longer part of the EU, the latter's specific WTO commitments will no longer automatically apply to the former. That is, the UK will be a WTO Member without special commitments,³⁶ so it will have to negotiate them, bearing in mind that commitments have to be granted on a non-discriminatory basis to all WTO Members in compliance with the MFN and national treatment provisions.³⁷ Other rules that will govern the trade relationship between the UK and all WTO Members (including the EU and its Member States) include limitations on tariffs,³⁸ prohibition on quantitative restrictions,³⁹ anti-dumping,⁴⁰ subsidies and countervailing measures,⁴¹ and safeguards.⁴²

Such negotiations could easily take years and in the meantime, it is not clear which schedules, if any, would apply to the UK. While some suggest the UK could start by replicating the current EU schedules,⁴³ others more convincingly state that this would not be possible⁴⁴ – as can be explained with the following example. Goods can be subject to tariff rate quotas (TRQs), which allow a specific quantitative amount of a good to be imported duty-free or at a certain lower rate of duty. Around one hundred products are subject to these quotas in the EU, including high-quality beef. The EU's current quota is about 40,000 tonnes (the so-called Hilton Quota),⁴⁵ so the UK and the EU will need to divide those 40,000 tonnes. The EU opened beef quotas after lengthy negotiations with Argentina, Australia, Brazil, Canada, New Zealand, Paraguay, Uruguay and the US. Distinguishing the UK's share of these beef quotas from the EU's would require negotiations with all of these countries, plus possibly other suppliers.⁴⁶ The EU might want the UK to take a large share, in order to appease European beef producers. Exporting countries will probably also press for the UK's quota gates to be opened wider, while UK

³⁵ Article XI WTO Marrakesh Agreement. See European Commission, *How the EU Works with the WTO* – at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150988.pdf

³⁶ Azevêdo Keynote Address (2016).

³⁷ The process for withdrawing from the European Union, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty (15 Feb. 2016) – at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No_2_Accessible.pdf [hereafter 'UK Government, Withdrawal Process (2016)'].

³⁸ Article II GATT.

³⁹ Article XI.1 GATT.

⁴⁰ Agreement on Implementation of Article VI GATT (1994) 1868 UNTS 201 [hereafter 'Anti-Dumping Agreement'].

⁴¹ Agreement on Subsidies and Countervailing Measures (1994) 1869 UNTS 436 [hereafter 'SCM Agreement'].

⁴² Agreement on Safeguards (1994) 1869 UNTS 154 [hereafter 'Safeguards Agreement'].

⁴³ Statement of Liam Fox, Secretary of State for International Trade and President of the Board of Trade in the House of Lords (HLWS313) (5 Dec. 2016) – at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-12-05/HCWS316/>.

⁴⁴ Azevêdo Keynote Address (2016).

⁴⁵ This example is discussed more in detail in: P Ungphakorn, 'The Hilton beef quota: a taste of what post-Brexit UK faces in the WTO' (10 Aug. 2016) - at <https://tradebetablog.wordpress.com/2016/08/10/hilton-beef-quota/#disclaimer>.

⁴⁶ P Ungphakorn, 'Nothing simple about UK regaining WTO status post-Brexit', International Centre for Trade and Sustainable Development (ICTSD) (27 June 2016) <https://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit> [hereafter 'Ungphakorn (2016)'].

farmers will most likely be pushing in the opposite direction in order to protect the local beef market.

Despite the difficulty in determining the specific share of quantifiable EU commitments that should be transferred to the UK, this concerns existing legal rights and obligations of the UK, in its capacity as a full Member of the WTO. For its part, the UK government has expressed its anxiety that, as long as the UK schedules are not regularised, it could be denied the right to access other WTO Members' markets and the possibility to enforce those rights.⁴⁷ However, this concern could well be unfounded as, arguably, such a denial would not have any legal grounding under WTO rules, because 'nothing in the WTO Agreements provides that the exercise of WTO rights by an existing Member depends on the Member having finalised individual schedules'.⁴⁸ Hence, the UK might be able to enforce its WTO rights even if its own schedules are not regularised.

2.2.2 The potential for non-violation or situation complaints

The idea of a WTO Member without agreed schedules is virtually uncharted territory: it seems to never have been contemplated during the course of establishing the WTO or previously, during the GATT negotiations. Arguably, unless and until the UK has renegotiated its schedules and made bound commitments, there will be a lack of reciprocity with other WTO members, which some fear could give rise to a non-violation claim under Article XXIII:1(b) GATT or Article XXIII:3 GATS,⁴⁹ or even a situation claim under Article XXIII:1(c) GATT.⁵⁰

Under Article XXIII:1(b) GATT,

[i]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- a. [...]
- b. *the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or*
- c. *the existence of any other situation,*

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.

⁴⁷ UK Government, *Withdrawal Process* (2016) p. 3.

⁴⁸ Bar Council Brexit Working Group, *The Brexit Papers: WTO*, 3rd ed., Paper 21 (June 2017) at www.barcouncil.org.uk/media/575749/brexit_paper_21_-_wto.pdf. [hereafter 'Bar Council (2017)']

⁴⁹ M Gehring, 'Brexit and EU-UK trade relations with third states' (6 Mar. 2016) at <http://eulawanalysis.blogspot.nl/2016/03/brexit-and-eu-uk-trade-relations-with.html>.

⁵⁰ Pursuant to Article XXIII:3 GATS, situation complaints cannot be raised in disputes arising under GATS and pursuant to Article 64.2-3 TRIPS, neither non-violation complaints nor situation complaints can currently be brought in disputes arising under TRIPS.

The possibility to bring non-violation and situation complaints broadens the scope of the WTO dispute settlement provisions beyond what is available in other international adjudicatory systems (where a violation needs to be proven); yet the requirement that the complainant demonstrate the nullification or impairment of a benefit, or the impediment of an objective's achievement, limits said scope again. This particularity is thought to reflect the Members' intention to maintain and enhance the balance of mutual trade commitments (concessions and benefits) which can be distorted even by WTO-consistent measures.

With regard to the first type of non-violation claims, the complainant must establish three elements: '(1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.'⁵¹ The first element requires that the measure is attributable to the government or that the government actively supports or encourages certain private actions.⁵² The second element refers to a legitimate expectation of improved market access opportunities resulting from the relevant tariff concessions which the complainants have been able to rely on in the past.⁵³ The third element implies that 'the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being *upset by* ("nullified or impaired ... as the result of") the application of a measure not reasonably anticipated.'⁵⁴ No presumption applies in non-violation cases as regards nullification or impairment.

Alternatively, a second type of non-violation claim requires the complainant to prove (1) the application of a measure (2) which impedes the attainment of an objective. In addition, the DSU requires the complainant to 'present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement.'⁵⁵ Only about fourteen non-violation complaints have ever been brought as it is 'an exceptional remedy',⁵⁶ because 'Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules'.⁵⁷ None of the non-violation complaints to date have been successful.

It would seem unlikely that a non-violation claim against the UK because of the absence of negotiated schedules and bound commitments could be successful, unless it adopts new measures that would specifically limit market access opportunities under existing tariff concessions. In such case, the UK measures must have been 'reasonably unexpected' at the

⁵¹ WTO Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (31 Mar. 1998) para. 10.41 *et seq.* [hereafter 'WTO Panel Report, *Japan – Film* (1998)']; WTO Panel Report, *Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (18 Sept. 2000) para. 8.283 [hereafter 'WTO Panel Report, *EC—Asbestos* (2000)'].

⁵² WTO Panel Report, *Japan—Film* (1998) para. 10.52-56. See also Article 11.3 Agreement on Safeguards.

⁵³ WTO Panel Report, *Japan—Film* (1998) para. 10.61-81.

⁵⁴ WTO Panel Report, *Japan—Film* (1998) para. 10.82.

⁵⁵ Article 26.1 DSU.

⁵⁶ WTO Appellate Body Report, *Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (12 Mar. 2001) para. 186 [hereafter 'WTO Appellate Body Report, *EC—Asbestos* (2001)'].

⁵⁷ WTO Panel Report, *Japan—Film* (1998) para. 10.36; see also WTO Appellate Body Report, *EC—Asbestos* (2001) para. 186.

time the TRQ was agreed (*e.g.*, between 6 August 1974, the date of circulation of the first EU schedule including the UK, and 23 June 2016, the date of the Brexit referendum, when WTO Members realised the UK became likely to leave the EU). If such claim were successful, the complainant would be entitled to a ‘mutually satisfactory adjustment’ from the UK, such as ‘an increase in the UK tariff rate quota to include imports from the EU-27 imports (or, perhaps, only from those EU Members who were Members at the time that the tariff rate quota was agreed)’.⁵⁸

Arguably, dispute settlement proceedings could also be brought against the EU because a hard Brexit may be seen as affecting the EU’s commitments or otherwise nullifying or impairing expected benefits.⁵⁹ The EU could consider expanding the TRQs pre-emptively and unilaterally, although the better solution would probably be to renegotiate its position with all other WTO Members. The mere occurrence of a hard Brexit, however, does not nullify or impair benefits without any further proof being required: quota shares, for example, fluctuate regularly so they cannot as such create legitimate expectations. As a result, the competitive position of imported products will probably remain the same for the foreseeable future. For the same reason, would the success rate of bringing a non-violation claim based on the non-attainment of an objective not seem to be realistic.

Situation complaints may cover any situation resulting in ‘nullification or impairment’. The negotiating history shows that this provision was intended to cover situations of macroeconomic emergency (*e.g.*, general depressions, high unemployment, collapse of the price of a commodity, balance-of-payment difficulties).⁶⁰ Pursuant to Article 26.2 DSU positive (as opposed to reversed) consensus is needed to adopt situation complaints, because the GATT dispute settlement rules and procedures contained in the Decision of 12 April 1989 continue to apply concerning adoption, surveillance and implementation of recommendations and rulings, including the authorization of the suspension of obligations in the event of a failure to implement.⁶¹ In other words, any WTO Member, including the ‘losing’ party, can veto the panel recommendations in the Dispute Settlement Body.

Under GATT 1947 practice, Members brought situation complaints about withdrawn concessions, failed re-negotiations of tariff concessions and non-realized expectations on trade flows.⁶² None of these complaints ever resulted in a panel report. Under the WTO, no situation complaint has ever been raised, so the criteria for a successful complaint remain rather unclear. Arguably, situation complaints would be more suitable to address the post-Brexit situation as major re-negotiations of tariff concessions might indeed be difficult and,

⁵⁸ Bartels (2016) p. 11.

⁵⁹ P Krishnamurthy, ‘The European Union’s WTO Rights and Obligations Post-Brexit: Negotiation and Enforcement’ in J Hillman and G Horlick (eds) *Legal Aspects of Brexit: Implications of the United Kingdom’s Decision to Withdraw from the European Union* (Institute of International Economic Law, 2017) p. 245 and 249.

⁶⁰ Analytical Index of the GATT (pre-1995), Article XXIII, p. 668-669.

⁶¹ BISD 36S/61, *Decision on improvements to the GATT dispute settlement rules and procedures* (12 Apr. 1989).

⁶² Analytical Index of the GATT (pre-1995), Article XXIII, p. 669-671.

in some cases, (temporarily) fail. Nevertheless, as no such claim has ever been successful and any report would need the agreement of the UK to be adopted, the chances of a situation claim being successful, would seem negligible.

2.2.3 Giving effect to new schedules: renegotiation or rectification?

One often-discussed issue regarding Brexit concerns the applicable procedure for the UK to obtain its own independent goods and services schedules. Although this is relevant for EU-UK relations post-Brexit, it seems sometimes overlooked that major negotiations will also need to take place with third countries in order to establish the UK's position *vis-à-vis* non-EU WTO Members. Two possible procedures are usually referred to: (i) making a 'rectification' under the *Procedures for Modification and Rectification of Schedules of Tariff Concessions* for goods, and the equivalent procedures for services,⁶³ or (ii) engaging in a 'renegotiation' under Article XXVIII GATT for goods and Article XXI GATS for services.

On the one hand, the renegotiation option could be more advantageous to the UK, because 'renegotiation can proceed over the objections of relevant WTO Members'.⁶⁴ This is expressly provided for under Article XXVIII:3(a) GATT, which states that '[i]f agreement between the contracting parties primarily concerned cannot be reached [...] the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so'. However, the same article allows affected WTO Members to make retaliatory adjustments to their own schedules. Within the context of trade in services, if an arbitration takes place to settle objections against the intended modifications, the WTO Member making the modification is permitted to ignore the findings of the arbitral panel.⁶⁵ But again, in such circumstances, the affected WTO Members can make retaliatory adjustments to their own schedules. The main drawback of these procedures is that they would most probably require lengthy rounds of negotiations, mainly over tariffs and TRQs. Hence, this approach is seen by some as too cumbersome for the UK.⁶⁶

On the other hand, a rectification would be easier to implement, as it would involve only 'changes that do not alter the scope of a concession' as well as 'rectifications of purely formal character'.⁶⁷ Arguably, making a rectification would not infringe any WTO rule and

⁶³ WTO Doc. L/4962, GATT Contracting Parties, *Procedures for Modification and Rectification of Schedules of Tariff Concessions* (Decision of 26 Mar. 1980) para. 2 [hereafter 'Decision on Procedures for Modification and Rectification of Goods Schedules (1980)']; WTO Doc. S/L/84, Council for Trade in Services, *Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments* (18 Apr. 2000) [hereafter 'Decision on Procedures for Rectification or Improvements to Services Schedules (2000)'].

⁶⁴ Bar Council (2017) p. 5.

⁶⁵ WTO Doc. S/L/80, Council for Trade in Services, *Procedures for the Implementation of Article XXI of The General Agreement on Trade in Services (GATS)* (29 Oct. 1999) para. 16.

⁶⁶ Bartels (2016) p. 12–18.

⁶⁷ *Decision on Procedures for Modification and Rectification of Goods Schedules* (1980) para. 2; *Decision on Procedures for Rectification or Improvements to Services Schedules* (2000) para. 1.

would not represent any major technical difficulty.⁶⁸ In the case of the new Goods Schedule of the UK, ‘the rectification involves replacing ‘EU’ with ‘UK’ at the top of the tariff schedule’.⁶⁹ As regards the UK’s new Services Schedule, the rectification would straightforwardly transpose the EU Schedule commitments to the new UK Schedule, eliminating all references to other EU Members’ specific limitations. As submitted above, however, even though replacing ‘EU’ with ‘UK’ might work for *erga omnes partes* obligations, it does not provide a solution for the allocation of quantifiable commitments. Neither would it provide an answer to the objection other WTO Members may put forward that they only accepted the EU’s Schedule because it was put forward for the entire EU internal market, whereas they would not have agreed to such Schedule if it had only been proposed by the UK.

Most probably, the UK will have to renegotiate many aspects of its WTO rights and obligations, and particularly, its schedules of concessions under GATT Article II and specific commitments under GATS Article XX, placing it in a position similar to that of a State seeking to join the WTO for the first time.⁷⁰ The schedules of concessions and commitments on market access, as well as the list of exemptions from the MFN treatment obligation will have to be reset and resubmitted.⁷¹ The new schedules and lists will have to be accepted by consensus by the other WTO parties, who could also decide to veto the UK’s proposals.⁷² What is generally expected, is that certain tariff commitments will be transposed from the EU Schedule into the UK’s new schedule through the rectification process but that complications might arise where the UK’s rights correspond to (part of) a right or obligation, determined on a quantified basis, which is currently set out in the EU’s schedules.⁷³

It is uncertain whether, and if so, how, tariff import quotas would have to be divided between the EU and the UK (a particularly contentious issue in the context of agricultural goods).⁷⁴ Equally, the UK may not have a right to demand that tariff quotas on exports, allocated by other WTO Members to the EU, be divided. In that case, the UK would have to negotiate preferential access all over again, by itself. In practice, such problems could be

⁶⁸ *Corrected oral evidence: Brexit: future trade between the UK and the EU*, The Select Committee on the European Union, House of Lords (13 Oct. 2016) – at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/41317.html>.

⁶⁹ P. Holmes, J. Rollo and L.A. Winters, ‘Negotiating the UK’s Post-Brexit Trade Arrangements’, 238 *National Institute Economic Review* 1 (2016) p. 8 [hereafter ‘Holmes, et al. (2016)’].

⁷⁰ E Lagerlof, ‘Would the UK be able to rely upon the WTO agreement if it were to leave the EU?’, June 2016 at <https://www.matrixlaw.co.uk/wp-content/uploads/2016/06/Article-9-Dr-Erik-Lagerlof.pdf> ; P Eeckhout, ‘Brexit and trade: the view over the hill’ (16 Jun. 2016) – at <https://londonbrussels.wordpress.com/2016/06/16/brexit-and-trade-the-view-over-the-hill/> .

⁷¹ P Koutrakos, ‘What does Brexit mean for the UK in WTO?’ (12 Jul. 2016) – at www.monckton.com/brexit-mean-uk-wto/ .

⁷² Ungphakorn (2016).

⁷³ Bartels (2016) p. 21.

⁷⁴ R Eglin and P Eeckhout, *Uncorrected Oral Evidence, Brexit: future trade between the UK and the EU, Select Committee on the European Union – External Affairs and Internal Market Sub-Committees* (8 Sept. 2016) p. 3 at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.pdf> .

resolved if the EU and the UK would agree to continue to divide the allocation in proportion to their respective historical import/export shares. However, such agreement could in turn raise new questions as to whether historical shares accurately correspond to future expectations in light of the changed economic situation post-Brexit. Also, several WTO Members, such as Argentina, Brazil, Canada, New Zealand, Thailand, Uruguay and the US, have already expressed their view that ‘splitting Tariff Rate Quotas (TRQs) based on historical averages [...] would not be consistent with the principle of leaving other World Trade Organization Members no worse off, nor fully honour the existing TRQ access commitments.’⁷⁵ All other WTO Members would need to be at least consulted, if not formally asked for approval, before such agreement could be concluded; otherwise the UK and the EU may find themselves jointly targeted in WTO dispute settlement proceedings. To ease the concerns of other WTO Members, the EU and the UK wrote a joint letter to the WTO Membership in October 2017, stating that ‘[i]n communicating its own separate schedules before it leaves the EU in March 2019, [the UK] intends to replicate as far as possible its obligations under the current commitments of the EU’ in order to ‘minimise disruption to trade’.⁷⁶ However, as is clear from the repeated reference to ‘intentions’ and ‘proposals’ throughout the letter, the EU and UK recognise that the extent to which these plans will be able to materialise, depends largely on the WTO Members’ cooperation.

A different point of view is that the UK rights and obligations under the WTO are complete, although they might be undetermined in some cases.⁷⁷ As a result, it would not be complicated to identify the UK’s rights and obligations, particularly those applicable *erga omnes partes*, as discussed above. Arguably, the UK’s right to access the country-specific EU TRQs bound by other WTO Members under the GATT would be included in this group of clearly identifiable rights but this does not offer a solution for the problem of determining the UK’s TRQ commitments and the right to subsidise agricultural production. From this perspective, the UK’s scheduled commitments in services under the joint GATS schedule of the EU and its Members would continue to apply to the UK, and any problems derived from a territorial limitation in the schedule could be disregarded, based on the customary international rule of ‘moving treaty-frontiers’.⁷⁸ If so, the UK could submit a new schedule by requesting a change (instead of engaging in an entire renegotiation) while other WTO Members would not be able exercise any veto.⁷⁹ For example, the UK would

⁷⁵ Letter by Argentina, Brazil, Canada, New Zealand, Thailand, Uruguay and the US, to the UK and the EU (26 Sept. 2017) – at <http://im.ft-static.com/content/images/ec0a64b2-a95f-11e7-ab55-27219df83c97.pdf>.

⁷⁶ Joint Letter by the EU and UK, to the WTO Membership (11 Oct. 2017) p. 1 – at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/651033/Letter_from_EU_and_UK_Permanent_Representatives.pdf [hereafter ‘EU-UK Joint Letter to the WTO (2017)’].

⁷⁷ Bartels (2016) p. 6.

⁷⁸ ‘Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.’ (Article 29 Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331) As a result: as the territory of a treaty party expands (*e.g.*, accession of new Member States to the EU) or shrinks (*e.g.*, Brexit), the territorial scope of application of the treaty changes correspondingly.

⁷⁹ Bartels (2016) p. 22.

also have the option to accede (some even argue it has a ‘right to succeed’)⁸⁰ to the revised WTO Government Procurement Agreement,⁸¹ a plurilateral agreement executed among 19 parties, entered into by the EU (on behalf of its 28 Members) but not separately by the UK.

However, no matter the procedure finally chosen, other WTO Members are likely to object. Despite this, some argue that ‘[t]he right of WTO Members to modify or withdraw their commitments is ‘absolute’ and stems from the relevant provisions of the GATT and GATS, not from secondary instruments on certification’.⁸² As of yet, this argument is untested and it remains to be seen, if any dispute arises as to whether a certain UK measure post-Brexit violates a scheduled commitment, how the scope of such commitment will be interpreted by a WTO panel and the Appellate Body.

3. The UK’s and the EU’s commitments after Brexit

As explained in the previous section, there is uncertainty as to how easy or difficult it will be for the UK to extract its own commitments currently bundled with those of the EU. Not all EU commitments can be easily transposed to the UK after Brexit without affecting other WTO Members’ legitimate expectations. Moreover, there are also legal hurdles that will have to be overcome – as discussed in the subsections below. Overcoming these hurdles is, however, of crucial importance to the economies of both the UK and the EU. In 2016, the UK recorded a trade deficit with the EU of GBP 82 billion.⁸³ Specifically, the UK had a trade deficit with 18 of the 27 other EU Member States; a surplus with 4 Members; and a broad balance with the remaining 5 Members. The UK’s largest EU trade surplus was with Ireland and the largest deficit with Germany.⁸⁴

In case of a hard Brexit, the trade of goods and services from and to the UK will be subject to the WTO terms of trading, which allow for several tariff and non-tariff barriers. These include tariffs ranging from 0% to more than 100%, as well as TRQs; third-country treatment for imports and exports to and from the EU (without streamlined procedures); extensive regulatory checks on both sides of the border (particularly expensive and time-consuming for heavily-regulated industries such as pharmaceuticals, chemicals and foodstuffs); and supplementary administration and infrastructure investments.

⁸⁰ *Ibid.*, p. 21; I Willemyns and M Koekoek, ‘The legal consequences of Brexit from an international economic perspective’, *Leuven Centre for Global Governance Studies – Working Paper No. 188* (June 2017) p. 20-21.

⁸¹ Agreement on Government Procurement (1994) 1869 UNTS 194; Revised Agreement on Government Procurement (2012) – at https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.

⁸² Bartels (2016) p. 18.

⁸³ A surplus of GBP 14 billion in services was offset by a deficit in goods of GBP 96 billion. See Office for National Statistics (2012), *UK Balance of Payments, The Pink Book* (2017) – at <https://backup.ons.gov.uk/wp-content/uploads/sites/3/2017/10/UK-Balance-of-Payments-The-Pink-Book-2017.pdf> [hereafter ‘Office for National Statistics, *UK Balance of Payments* (2017)’].

⁸⁴ M Ward, ‘UK trade: a deficit in goods but a surplus in services’, *Second reading: the House of Commons Library Blog* (9 Nov. 2017) – at <https://secondreading.uk/economy/uk-trade-a-deficit-in-goods-but-a-surplus-in-services/> [hereafter ‘Ward (2017)’].

In turn, these might necessitate far-reaching reforms of the UK's domestic customs, administrative, tax, corporate and finance law and practice – possibly also requiring changes to EU law, unless the EU would agree to add the UK as a third country to its list of existing MFN treatment countries. In order to illustrate concretely what this would mean, the tariff and non-tariff barriers in the goods and services sectors that are most important to the UK's and EU's economies are examined below, with special focus on areas in which particular difficulties might arise. Subsequently, the potential effects on commitments beyond goods and services are explored, but first, the problem of determining the EU's current commitments in the WTO is analysed.

3.1 Determining the EU's current WTO commitments

The main problem with allocating part of the EU's commitments to the UK is that there is confusion and uncertainty regarding the EU's current WTO commitments themselves. Thus, the 'UK would be negotiating a share of key quantities that are unknown'.⁸⁵ As regards trade in services, for example, 'there have been a number of modifications and rectifications of the [EU's] schedules since they were originally agreed, which makes the identification of the correct document a somewhat complicated task'.⁸⁶ The original EU's schedule of commitments was established at the conclusion of the Uruguay Round of Negotiations in 1994.⁸⁷ However, at that time the EU only had 12 Members. Therefore, EU enlargements since 1995 have necessitated further modifications of its Schedule,⁸⁸ but the legal status of these modifications remains unclear. The most recent EU-25 consolidated schedule was certified in 2006,⁸⁹ but its entry into force is still pending, awaiting ratification by all EU Member States involved. Nevertheless, the 2006 certified schedule is, for practical purposes, probably the best starting point for future trade negotiations, at least with respect to the EU-25.⁹⁰

As regards the EU's goods schedule, the same problem applies. The current certified EU-15 schedule dates from 2012,⁹¹ while an EU-25 schedule was submitted for certification in 2014.⁹² For instance, the EU's limit for its (pre-2004) 15 Members was EUR 67.2 billion. However, when notifying its current level of subsidies to the WTO, the EU established the

⁸⁵ Ungphakorn (2016).

⁸⁶ A Lang, 'The 'default option'? The WTO and Cross-Border Financial Services Trade after Brexit', in: Alexander, K., Barnard, C., Ferran, E., Lang, A., and Moloney, N., *Brexit and Financial Services – Law and Policy* (Hart Publishing 2018) p. 175 [hereafter 'Lang (2018)'].

⁸⁷ WTO Doc. GATS/SC/31, EC and their Member States, *Schedule of Specific Commitments* (15 Apr. 1994).

⁸⁸ This is often seen as a relevant precedent for schedule adjustments. See G Sheffer 'Brexit: Is the UK set for WTO limbo?', *New Law Journal* (9 May 2017) – at <https://www.newlawjournal.co.uk/content/brexit-uk-set-wto-limbo> [hereafter 'Sheffer (2017)'].

⁸⁹ WTO Doc. S/L/286 (18 Dec. 2006): this schedule does not include Bulgaria, Romania and Croatia whose current WTO position is represented in their country-specific schedules.

⁹⁰ Lang (2018) p. 177.

⁹¹ WTO Doc. WT/Let/868, Schedules of Tariff Concessions to the GATT 1994, *Certification of Modifications and Rectifications to Schedule CXL - European Communities* (30 Oct. 2012, effective as of 27 Oct. 2012) [hereafter 'WTO Doc. WT/Let/868 (2012)'].

⁹² WTO Doc. G/MA/TAR/RS/357, Committee on Market Access – Rectification and Modification of Schedules – Schedule CLXXI – European Union (25 Apr. 2014)

limit at EUR 72.4 billion.⁹³ In practice, however, these problems may be overcome by skilful negotiation as ‘the WTO is a very pragmatic organisation, which does not generally trip over legal niceties’.⁹⁴ Hence, for both the EU and the UK, a smooth post-Brexit transition on WTO matters will depend on ‘rapid and active diplomacy with partners in the WTO and in the EU’.⁹⁵ In other words, the extent to which the WTO could act as a safety net for the UK’s future relation with the EU, and vice versa, is co-dependent on successful negotiations with all other WTO Members.

3.2 Goods Schedule of Concessions under GATT

In this section, the abstract idea of ‘falling back on WTO trading terms’ is made concrete by illustrating which tariffs would apply if the UK were to be treated as any third country importing goods into the EU. Subsequently, three specific problem areas are examined: tariff-rate quotas, EU-wide value chains and agricultural subsidies.

3.2.1 Falling back on WTO trading terms: implications for the UK’s most important goods sectors

In accordance with GATT Article II:1(a),

[e]ach contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

Goods schedules usually consist of maximum tariff levels, often referred to as ‘bound tariffs’ or ‘tariff bindings’. Most WTO tariff rates are *ad valorem* tariffs (whereby the amount is calculated based on the value of the good) while others are *non-ad valorem* tariffs (based on a unit of quantity, such as weight, length, area, volume or numbers of that good). A compound tariff combines the two methods, as in the case of the EU tariff on fresh or chilled boneless bovine meat which is 12.8% of the value of the product plus EUR 303 per 100 kg.⁹⁶ The WTO also allows Members to register minimum and maximum ranges of both these tariff types. It is estimated that ‘of the 5,000 individual products that are listed with the WTO, the tariffs applied by the EU on non-members without a specific

⁹³ WTO Doc. G/AG/N/EU/42, Committee on Agriculture – Notification – European Union – Domestic Support (15 Feb. 2018).

⁹⁴ Holmes, et al. (2016) p. 9.

⁹⁵ *Ibid.*

⁹⁶ Statistics from the WTO Tariff Download Facility – at <http://tariffdata.wto.org>. This database contains comprehensive information on MFN applied and bound tariffs at the standard codes of the Harmonized System (HS) for all WTO Members. When available, it also provides data at the HS subheading level on non-MFN applied tariff regimes which a country grants to its export partners. This information is sourced from submissions made to the WTO Integrated Data Base (IDB) for applied tariffs and imports and from the Consolidated Tariff Schedules (CTS) database for the bound duties of all WTO Members.

trade deal range from 0% to over 80%.⁹⁷ As a result of a hard Brexit, the UK will leave the EU's Common Customs Territory (CCT) and the associated common schedule of tariffs, so products exported to/from the UK and the EU will be subjected to tariffs, where applied. The UK Government indicated in December 2016 that it was considering to continue the CCT rates which it currently applies as an EU Member State,⁹⁸ but it could also set tariffs at some other levels determined according to its priorities. Because of the MFN obligation, however, in the absence of an FTA, neither the EU nor the UK will be able to unilaterally lower their tariffs solely for each other's benefit, without simultaneously also doing so *vis-à-vis* all other WTO Members.

Currently, goods represent the largest share of UK trade, accounting for 55% of all trade in 2016.⁹⁹ The EU is the UK's largest trading partner. In 2016, the EU accounted for 43% of UK exports of goods and services, and 54% of UK imports.¹⁰⁰ The most important commodities and manufactured products exported by the UK to the EU are (1) motor vehicles, trailers and semi-trailers; (2) pharmaceutical products; and (3) computer, electronic and optical products (see [Annex I](#)). These very same sectors are also the most important ones for export by the EU to the UK (see [Annex II](#)). Should the UK exit the EU without any agreement, the tariff and non-tariff barriers currently applied by the EU to third country products would become applicable to UK products as well.¹⁰¹ To illustrate what 'falling back' on the WTO trading terms would mean concretely, the next paragraph examines which tariffs would apply to those three most important sectors of goods imported by the UK into the EU under the existing schedules. (At present, it is unclear which barriers the UK would impose for EU goods imported into the UK.)

The cost of cars made in the UK, for example, would be negatively affected as the tariffs applicable to motor vehicles under Chapter 87 are up to 13% for average MFN *ad valorem* duties applied (HS17) and up to 12,7% for MFN bound tariffs (HS02). The equivalent for pharmaceutical products under Chapter 30 is only 0,0% and 0,2%, respectively but here significant problems will arise with regard to the registration and patenting of new drugs. With regard to the third top trade sector for the EU and the UK, tariffs on optical products under Chapter 90 are up to 5,7% and 5,9%, respectively. In general, the level of tariffs on industrial goods applied by major developed economies is on average around 3%, with many goods, in particular components and raw materials, being entirely tariff-free. Other products in the CCT, however, such as vehicles and textiles are subject to sizeable tariff rates of 10% or above, which would have a direct impact on UK/EU-27 trade. Tariffs or equivalent charges on certain agriculture and food products are significantly higher than

⁹⁷ M Lawless and EL Morgenroth, 'The Product and Sector Level Impact of a Hard Brexit across the EU', *ESRI Working Paper No. 550* (Nov. 2016) p. 8.

⁹⁸ M Johnson, 'Unpicking the 'no deal is better than a bad deal' mantra: what does 'no deal' look like?' (9 Jun. 2017) – at <http://blogs.lse.ac.uk/brexit/2017/06/09/unpicking-the-no-deal-is-better-than-a-bad-deal-mantra-what-does-no-deal-look-like/> [hereafter 'Johnson (9 Jun. 2017)'].

⁹⁹ In 2016, trade in goods reached a total of 302,067 million GBP, compared to 245,406 million GBP for trade in services (Office for National Statistics, *UK Balance of Payments* (2017)).

¹⁰⁰ Ward (2017).

¹⁰¹ Statistics from the WTO Tariff Download Facility – at <http://tariffdata.wto.org>.

those on industrial goods (particularly in light of the limited profit margins and the high price elasticity) which is likely to exert considerable influence on end-user prices.

The adoption by the UK of these bound tariffs after Brexit does not represent major legal problems and could in principle be easily transposed to the UK's new schedule, as this does not require any determination of quotas in cooperation with all other WTO Members. The question is whether this would be desirable from a consumer perspective. The quantifiable rights and obligations on the other hand will raise the significant difficulties already referred to in determining the scope of the UK's rights and obligations after Brexit. More specifically, goods schedules contain TRQs, the cost of which will be increased through EU-wide value chains. Another issue of concern relates to the allocation of agricultural subsidy rights between the EU and the UK.

3.2.2 Tariff-rate quotas

A TRQ is *not* a quota or quantitative restriction, but a 'quantity, which can be imported at a certain duty', commonly used with regard to agricultural products.¹⁰² An example of a TRQ is the in-quota tariff rate for bananas in the EU's Schedule:¹⁰³

Description of product	Tariff item number(s)	Initial quota quantity and in-quota tariff rate
Fresh bananas, other than plantains	0803 00 12	2.200.000 t 75 EUR /t

Once the quota – 2.200.000 tons – is completed, a higher tariff applies for the importation of bananas. After Brexit, it is not clear what the UK's share of other WTO Members' TRQs, as well as the UK's share of the EU's import TRQs, will be.

It would appear that the UK will have the right to access other WTO Members' TRQs when these are allocated on a non-discriminatory basis.¹⁰⁴ Problems might emerge if the WTO Member concerned makes use of the option to reach an agreement on the allocation of quotas with WTO Members having a 'substantial interest' in supplying the product concerned.¹⁰⁵ The UK's volumes of exports, unbundled from those of the EU, may not be large enough to amount to a 'substantial interest', so it may therefore lose participation in another WTO Member's allocation of TRQs. This is, as such, not a legal problem, but it may have significant business implications.

¹⁰² Van den Bossche and Zdouc (2017) p. 480.

¹⁰³ WTO Doc. WT/Let/868 (2012).

¹⁰⁴ Article XIII:2(a) GATT.

¹⁰⁵ Article XIII:2(d) GATT.

Regarding the UK's share of the EU's TRQs, in their joint letter referred to above, the UK and the EU stated that they will seek to 'maintain the existing levels of market access available to other WTO Members'.¹⁰⁶ To this end, they intend that:

*the future EU's (excluding the UK) and the UK's (outside the EU) quantitative commitments in the form of tariff-rate quotas be obtained through an apportionment of the EU's existing commitments, based on trade flows under each tariff-rate quota.*¹⁰⁷

This option seems to follow the direction of established Article XIII GATT practice of extrapolating quota shares from a representative period of three years' import data.¹⁰⁸ However, beyond the issue of the formula applied for apportioning the EU's current TRQs, the problem is that a TRQ divided 'into binding limits in two markets is less valuable [than] the same TRQ with the flexibility to switch exports between two markets'.¹⁰⁹ Hence, there is 'no guarantee that combined EU-27 TRQs and UK TRQs that quantitatively replicate current EU-28 concessions necessarily adhere to the 'no less favourable treatment' provisions of Article II:1'.¹¹⁰ So, if the WTO members believe that the UK and the EU's concessions have diminished in value after Brexit (which is contingent on their trade relations), they may seek to contend that the EU and the UK have to offer greater concessions to them to compensate for the negative effect.¹¹¹ If such request is refused, other WTO Members may decide to initiate WTO dispute settlement procedures. Finding an equitable solution will therefore depend largely on other WTO Members' political goodwill.

3.2.3 EU-wide value chains

A hard Brexit might create specific problems for EU-wide value chains, 'where manufacturing processes, for example for vehicles, are coordinated between plants in different countries and components may cross national borders several times at different stages of manufacture'.¹¹² In principle, after Brexit, components shipped repeatedly between the UK and EU27 could be subject to tariff charges upon each border crossing, which would amount to significant cumulative costs, even if the rates were kept modest. The EU Customs Code has procedures in place to mitigate such accumulation of costs: for

¹⁰⁶ EU-UK Joint Letter to the WTO (2017) p. 2.

¹⁰⁷ *Ibid.*

¹⁰⁸ See e.g., GATT Panel report, *EEC – Restrictions on Imports of Apples from Chile*, BISD 27S/98 (10 Nov. 1980) para. 4.8; WTO Panel Reports, *EC – Regime for the Importation, Sale and Distribution of Bananas (Bananas III)* WT/DS27/R (22 May 1997) para. 7.68.

¹⁰⁹ A Matthews, 'WTO dimensions of a UK 'Brexit' and agricultural trade' (5 Jan. 2016) – at <http://capreform.eu/wto-dimensions-of-a-uk-brexit-and-agricultural-trade/>.

¹¹⁰ C. Downes, 'The Post-Brexit Management of EU Agricultural Tariff Rate Quotas', 51 *Journal of World Trade* 4 (2017) p. 747-748.

¹¹¹ Sheffer (2017).

¹¹² Johnson (9 Jun. 2017). This problem is exacerbated once the effect of global value chains is taken into account: B Hoekman, 'Trade Agreements and International Regulatory Cooperation in a Supply Chain World', *EUI Working Paper RSCAS* (2015/04).

example, it lays down rules concerning goods in temporary storage or placed under the external transit procedure, storage procedure, temporary admission procedure and inward processing procedure.¹¹³ All of these, however, require exporters to gather extensive data on their activities, in order to compile and submit the reports required by the customs authorities. Even when such applications are successful, customs duties may still need to be paid, with refunds only issued months later.

EU-wide value chains will also exacerbate the new procedural obligations affecting both UK and EU27 traders as '[c]onsignments of dutiable goods in both directions would be subject to Customs inspection in order to determine the correct tariff classification for the purpose of assessment for duty'.¹¹⁴ While international agreements are in place to expedite this process through electronic data submission,¹¹⁵ "one-stop shops" or "single windows" (combining in one place the different checks to which goods may be subject), the grant of privileged "trusted trader" status and/or post-hoc checking, traders in both directions would still have to submit data and undergo procedures that are not currently required in intra-EU trade'.¹¹⁶ Additional time will be required to check and assess complicated or hybrid consignments, quickly amounting to significant overall delays. For example, adding a mere 2 minutes to the checking procedure of each lorry crossing the channel would reportedly result in queues of over 20 miles at Dover, Calais and Dunkirk, causing an extensive burden on these cities.¹¹⁷

¹¹³ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, *OJ L 269* (10.10.2013) p. 1. For a comparative study at the international level, see World Bank, *Duty and Tax Relief and Suspension Schemes - Improving Export Competitiveness* (2009) – at http://siteresources.worldbank.org/INTEXPCOMNET/Resources/duty_and_tax_toolkit_pub_screen_2009.pdf.

¹¹⁴ Johnson (9 Jun. 2017).

¹¹⁵ E.g., International Convention on the simplification and harmonization of Customs procedures (Kyoto Convention) as amended (2006) 2370 UNTS 27.

¹¹⁶ Johnson (9 Jun. 2017).

¹¹⁷ J Rankin, 'Belgian ports batten down the hatches for Brexit trade shock', *The Guardian* (7 Oct. 2017) – at <https://www.theguardian.com/politics/2017/oct/07/zebrugge-brexit-braced-for-tariffs-trade-loss>; L O'Carroll, 'Dover could suffer '20-mile permanent traffic jam' after Brexit', *The Guardian* (14 Feb. 2018) – at <https://www.theguardian.com/politics/2018/feb/14/dover-could-suffer-20-mile-permanent-traffic-jam-after-brexit>. For more general studies demonstrating the (practical) benefits of the single market, see Cecchini Report, *The Cost of Non-Europe* (1988) SEC(88)524; H Badinger, 'Growth Effects of Economic Integration: Evidence from the EU Member States', 141 *Review of World Economics* 1 (2005) p. 50 – 78; F Ilzkovitz, A Dierx, V Kovacs and N Sousa, 'Steps towards a deeper economic integration: the Internal Market in the 21st century A contribution to the Single Market Review', *Economic Papers Series*, Paper N° 271 (European Commission, Directorate-General for Economic and Financial Affairs, Jan. 2007); *Twenty Years On: The UK and the Future of the Single Market* (Department for Business, Innovation and Skills (BIS), HM Government and Centre for Economic Policy Research (CEPR) 2012) – at <https://www.gov.uk/government/publications/twenty-years-on-the-uk-and-the-future-of-the-single-market>; Policy Brief #2014/02, *20 Jahre Binnenmarkt - Wachstumseffekte der zunehmenden europäischen Integration* (Bertelsmann Stiftung 2014) – at <https://www.bertelsmann-stiftung.de/de/publikationen/publikation/did/20-jahre-binnenmarkt-wachstumseffekte-der-zunehmenden-eu-integration/>; N Crafts, 'The Growth Effects of EU Membership for the UK: Review of the evidence', *Global Perspectives Series: Paper 7* (SMF/CAGE Apr. 2016) – at <http://www.smf.co.uk/publications/the-growth-effects-of-eu-membership-for-the-uk-a-review-of-the-evidence/>.

3.2.4 Agricultural subsidies

The two main types of agricultural subsidisation are export subsidies and domestic support. Export subsidies are unlikely to be problematic in the Brexit context, as the EU has abolished these following the 2015 WTO Nairobi Ministerial Decision on Export Competition.¹¹⁸ Commitments on domestic support will have to be allocated between the EU and the UK. In the joint letter referred to above, the EU and the UK have stated that they ‘intend that the EU’s current annual and final bound commitment level specified for domestic agricultural support be apportioned between the future EU and the UK on the basis of an objective methodology [...] in accordance with appropriate WTO rules and procedures’.¹¹⁹ However, there are no WTO rules determining the apportionment of agricultural subsidy commitments, so again, this may become a contested issue.

Against this backdrop, the UK’s subsidisation rights could be determined on the UK:EU payments ratio over a representative period of three years applied to the EU’s total subsidy commitments¹²⁰ – but this would need to be agreed between both parties. In any case, the current EU’s domestic subsidies are only 9% of its scheduled commitments,¹²¹ leaving a broad margin to the UK to obtain a share of these commitments.

3.3 Services Schedule of Specific Commitments under GATS

In this section, the abstract idea of ‘falling back on WTO trading terms’ is made concrete through illustrating which non-tariff barriers would apply if the UK were to be treated as any third country importing services into the EU. This is followed by an investigation into one specific problem relating to the UK’s position as a WTO Member post-Brexit: the references to territorial limitation and non-Community status in the EU’s Services Schedule.

3.3.1 Falling back on WTO trading terms: implications for the UK’s most important services sectors

The services schedules under GATS consist of market access and national treatment commitments, as Article XVI:1 GATS states:

[w]ith respect to market access through the modes of supply identified in Article I [cross border supply, consumption abroad, commercial presence and presence of natural persons] each Member shall accord services and service suppliers of any

¹¹⁸ WTO Doc.WT/MIN(15)/DEC, Nairobi Ministerial Declaration (19 Dec. 2015) – at https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm.

¹¹⁹ EU-UK Joint Letter to the WTO (2017) p. 2.

¹²⁰ Bartels (2016) p. 12.

¹²¹ In the marketing year 2014/15, domestic support was €6.642bn of a possible €72.378bn: WTO Doc. G/AG/N/EU/43, Committee on Agriculture, Notification – European Union (5 Mar. 2018).

other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. (emphasis added)

Regarding national treatment, Article XVII:1 GATS states:

[i]n the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. (emphasis added)

Thus, national treatment and market access obligations depend on whether, and if so to what extent, a WTO Member has made market access and national treatment commitments in its Services Schedule with regard to the services sectors concerned.¹²² In principle, the commitments contained in the EU's Services Schedule could be easily transposed to a new exclusive UK GATS Schedule, as these commitments are not of a quantifiable character. Moreover, the EU's Services Schedule is generic, allowing for EU Member States to introduce their own limitations, which makes it easier for the UK to use the EU Schedule as a basis to design its own Schedule.

Overall, the pressure to find a solution for the services schedules is even more urgent than in the case of goods, as services account for 80% of the UK economy.¹²³ The most important services exported by the UK to the EU are (1) financial services; (2) business services (especially management consulting); and (3) tourism and travel related services (see Annex I). The equivalent list for services exported by the EU to the UK is slightly different – but still very similar: (1) tourism and travel related services; (2) business services (especially management consulting); and (3) transport services (see Annex II). The last ranks as fourth important export market for the UK, while financial services is listed as the fifth most important for the EU.

Any limitations to market access affecting these sectors would hence negatively impact upon the services that are most important to the UK and the EU. When a WTO Member undertakes a commitment in a sector or subsector, it must indicate for each mode of supply what limitations, if any, it maintains on market access.¹²⁴ Where a Member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment, the Member has entered in the

¹²² Van den Bossche and Zdouc (2017) p. 413 (national treatment) and p. 542 (market access).

¹²³ In 2016, services accounted for a total of 1,382,050 million GBP over a total of 1,744,435 million GBP of Gross Value Added at current prices (Office for National Statistics, *UK GDP(O) low level aggregates*, (23 Nov. 2017) – at <https://www.ons.gov.uk/economy/grossdomesticproductgdp/datasets/ukgdpolowlevelaggregates>).

¹²⁴ Article XVI:2 GATS lists six categories of restrictions which may not be adopted or maintained unless they are specified in the schedule. All limitations in schedules therefore fall into one of these categories. They comprise four types of quantitative restrictions plus limitations on legal entity types and foreign equity participation. Beyond these specific limitations, limitations are included in the EU's schedule under 'Horizontal commitments', applicable to all sectors (WTO Doc. S/DCS/W/EEC (22 Apr. 2003) p. 5-18).

appropriate space the term ‘unbound’. Where there are no limitations on market access or national treatment in a given sector and mode of supply, the entry reads ‘none’. Tariff barriers are currently not applicable to services,¹²⁵ but should the UK exit the EU without any agreement, the non-tariff barriers applied by the EU to third country services would become applicable to UK services as well.¹²⁶ To illustrate what ‘falling back’ on the WTO trading terms would mean concretely, the next paragraphs examine which non-tariff barriers would apply to three most important UK services imported into the EU under the existing schedules. (At present, it is unclear which barriers the UK would impose for EU services imported into the UK.)

The limited level of commitments would severely affect UK services. Firstly, in the case of banking and other financial services (excluding insurance),¹²⁷ numerous restrictions depending on the type of transaction or activity and the EU member.¹²⁸ Cross-border supply is affected as Belgium and Ireland require incorporation and authorization, while Italy has chosen to remain unbound as to financial salesmen. For consumption abroad, Denmark and Greece impose incorporation requirements, while all EU members have the same requirements with regard to the commercial presence of specialized management companies and for depositories of investment funds assets. Furthermore, several EU Member States have adopted requirements relating to incorporation/partnership, place of residence and others. Moreover, they have opted to stay generally unbound concerning the presence of natural persons active in this sector.

Secondly, regarding business services (especially management consulting),¹²⁹ there are no limitations on market access with regard to cross-border supply, consumption abroad and commercial presence, but the presence of natural persons remains generally unbound with some exceptions.¹³⁰ Thirdly, for tourism and travel-related services, and in particular for the cross-border supply of hotels and restaurants, almost all Member States remain unbound.¹³¹ There are no market access limitations for consumption abroad, but in Spain, Greece, Portugal and Italy authorization of commercial presence can be denied in order to protect areas of particular historic and artistic interest.¹³² The presence of natural persons is

¹²⁵ Although tariff barriers on services currently do not exist, they could be introduced in the future; see for example, the discussion concerning the ‘bit tax’ which could theoretically be imposed on electronic communications containing services outputs, and ‘digital products’. Thus far, WTO Members have agreed not to impose customs duties on electronic transmissions (WTO Doc. WT/MIN(15)42 – WT/L/977) Ministerial Conference (Decision of 19 Dec. 2015) *Work Programme on Electronic Commerce* (21 Dec. 2015).

¹²⁶ Statistics from the WTO Tariff Download Facility – at <http://tariffdata.wto.org>.

¹²⁷ WTO Doc. S/DCS/W/EEC (22 Apr. 2003) p. 5-18 and 92.

¹²⁸ WTO, Reports – Commitments – (RTAs) 7.B. *Banking and Other Financial Services* – at http://i-tip.wto.org/services/DetailView.aspx/?cid=C899§or_path=0000700044&rta_path=Please%20select&IsRta=1&IsGats=0&rgm_id= .

¹²⁹ WTO Doc. S/DCS/W/EEC (22 Apr. 2003) p. 54.

¹³⁰ Belgium, Germany, Denmark, Italy and Sweden require a university degree and three years of professional experience for managers and senior consultants. Italy requires an economic needs test.

¹³¹ For catering, all Member States have no limitations to market access, except Austria and Finland.

¹³² In Italy, there is a local economic needs test on opening of new bars, cafés and restaurants.

generally unbound – in France, for example, there is a nationality condition for those seeking to open cafés and bars.

Aside from the trade barriers which may apply to the UK-EU relationship, changes may be limited (at least at first) regarding UK services imported into other WTO Members: the UK government has indicated that it aims to adhere to the commitments on services access to the UK market which it undertook as an EU Member State – presumably hoping other WTO Members will return the favour.¹³³

3.3.2 Territorial limitation and non-Community status

The EU's Services Schedule (replicated in the 2006 consolidation) includes the following introductory note:

*[t]he specific commitments in this schedule apply only to the territories in which the Treaties establishing the European Communities are applied and under the conditions laid down in these Treaties. These commitments apply only to the relations between the Communities and their Member States on the one hand, and non-Community countries on the other. They do not affect the rights and obligations of Member States arising from Community law.*¹³⁴

This note raises two questions: first, whether the territorial limitation in the first sentence excludes the Schedule's applicability to the UK territory, leaving it *de facto* without a schedule; and second, whether the second sentence has the effect of excluding the application of the EU's commitments in relations between the EU and the UK, given that the UK was not a non-Community country at the time the text was written.

Regarding the first question, once the UK leaves the EU, this territorial application clause should arguably be ignored entirely, based on the rules of customary international law concerning 'moving treaty-frontiers' – as explained above. Following this approach, the UK could simply make a rectification to the schedule, making the territorial clause irrelevant. As to the second question, the reference to non-Community countries would not exclude the application of the EU's commitments in the relationship between the EU and the UK, since the meaning of the term 'non-Community members' was always expected to evolve with the growing membership of the EU. Moreover, excluding the UK from the EU's Schedule would constitute a clear violation of the MFN principle enshrined in Article I GATS.¹³⁵

¹³³ EU-UK Joint Letter to the WTO (2017) p. 1.

¹³⁴ WTO Doc. S/C/W/273 and S/C/W/273/Suppl.1, Communication from the European Communities and its Member States – *Certification, Draft Consolidated GATS Schedule* (9 Oct. 2006) (emphasis added).

¹³⁵ Lang (2018) p. 179.

3.4 Commitments beyond GATT and GATS

WTO Members also have commitments beyond the Schedules of Commitments under GATT and GATS – two of which form the focus of the present section. Firstly, a problem will be the increasing divergence between UK and EU standards with regard to services as well as goods, with ensuing enforcement issues. A second concern relates to trade remedies.

3.4.1 Regulatory standards: divergence and enforcement

On repeated occasions, the UK Government indicated its intent to leave not just the EU customs union, but also the broader Single Market,¹³⁶ which, *inter alia*, promotes EU-wide regulatory standardization and harmonisation so as to further economic integration. Such standards are voluntary technical specifications that apply to various products, materials, services and processes, and are aimed at reducing costs, improving safety, protecting the environment and human health, enhancing competition and facilitating innovation.¹³⁷ The European Commission also introduced the CE mark to indicate that a product meets high safety, health and environmental protection requirements and can be sold throughout the EEA.¹³⁸ In the so-called Great Repeal Bill, the UK Government has announced it will incorporate existing EU legislation into domestic UK law to avoid creating a legal vacuum post-Brexit.¹³⁹ The UK Government would subsequently be able to amend, repeal and improve individual rules as it sees fit. This is probably the only practicable course but it entails at least two significant risks.

Firstly, the UK will have to balance exercising its regained flexibility to conclude its own trade deals with maintaining the high level of safety standards the British public has become accustomed to and which is needed in order to allow for ‘frictionless trading’ with the EU. UK producers, be it of technical products (a broad category which may include any product from electronic and medical equipment to cosmetics and toys) or of agricultural and food products, are currently subject to the same regulations and monitoring procedures as other producers in EU Member States, minimizing the need for any technical or plant and animal health checks. The WTO does not provide an alternative regulatory system in this regard: the Technical Barriers to Trade (TBT) Agreement and the

¹³⁶ K MacLellan and W James, ‘Britain to leave EU market as May sets 'hard Brexit' course’ (16 Jan. 2017) – at <https://www.reuters.com/article/us-britain-eu-may-priorities/britain-to-leave-eu-market-as-may-sets-hard-brexite-course-idUSKBN1502H2> ; B Martin, ‘Chancellor confirms UK will leave EU customs union and single market’ (19 Jun. 2017) – at <https://www.telegraph.co.uk/business/2017/06/18/chancellor-confirms-uk-will-leave-eu-customs-union-single-market/>; A Asthana, D Boffey and A Perkins, ‘Theresa May says Brexit will reduce UK access to single market’ (2 Mar. 2018) – at <https://www.theguardian.com/politics/2018/mar/02/theresa-may-says-brexite-will-reduce-uk-access-to-single-market> .

¹³⁷ See https://ec.europa.eu/growth/single-market/european-standards_en.

¹³⁸ See https://ec.europa.eu/growth/single-market/ce-marking_en.

¹³⁹ European Union (Withdrawal) Bill 2017-19 – at <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>; G Peretz, ‘The Great Repeal Bill: a giant Henry VIII clause?’ (3 Oct. 2016) – at <https://www.monckton.com/the-great-repeal-bill-a-giant-henry-viii-clause/>.

Sanitary and Phytosanitary Measures (SPS) Agreement mainly serve to ensure that the Members' regulations, standards and procedures are non-discriminatory and do not create unnecessary impediments to trade while recognizing their right to adopt measures to accomplish legitimate policy objectives.¹⁴⁰ In other words, Members are free to implement regulations at the national level that diverge in stringency, as long as these are not inconsistent with the WTO standards. The EU has made extensive use of this option to adopt rigorous regulations in areas such as food safety, environment and animal welfare, with which every third country that wishes to export its products to the EU market has to comply.¹⁴¹

The UK could decide to voluntarily continue to follow the EU standards in this regard. However, in light of calls to 'cut the Brussels red tape' and 'get rid of burdensome health and safety regulations imposed by the EU', combined with indications that the US' willingness to sign a UK-US FTA will depend on relaxing stringent environmental and labour rules (for example, regarding chlorinated chicken),¹⁴² such voluntary alignment would seem increasingly uncertain. Moreover, the UK would have to adjust its legislation in case of future changes in EU regulations, without having had the opportunity to influence such developments, or benefit from advances in EU internal regulations, which may adversely affect the prospects for UK manufacturers and service suppliers exporting to the EU. The impact will be felt particularly heavily by financial services undertakings operating in the UK, which explains why some major players are already making contingency plans to move at least a proportion of their operations out of Britain.¹⁴³ This

¹⁴⁰ Agreement on the Application of Sanitary and Phytosanitary Measures (1994) 1867 UNTS 493; Agreement on Technical Barriers to Trade (1994) 1868 UNTS 120.

¹⁴¹ The EU also conducts extensive studies examining the technical and (phyto)sanitary standards of other countries (see, e.g., European Parliament, Directorate-General for Internal Policies, Policy Department B: Structural and Cohesion Policies – Agriculture and Rural Development, *Comparative Analysis of EU Standards in Food Safety, Environment, Animal Welfare and Other Non-Trade Concerns with Some Selected Countries* (2012) [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/474542/IPOL-AGRI_ET\(2012\)474542_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/474542/IPOL-AGRI_ET(2012)474542_EN.pdf)); occasionally its measures have been found to be WTO-inconsistent: see e.g., WTO Panel Report (18 Aug. 1997); WTO Appellate Body Report (16 Jan. 1998) *EC—Measures Concerning Meat and Meat Products*, WT/DS26/R and WT/DS48/R; WTO Panel Report, *EC – Biotech* (2006).

¹⁴² G Rayner and C Hope, 'Cut the EU red tape choking Britain after Brexit to set the country free from the shackles of Brussels' (28 Mar. 2017) – at <https://www.telegraph.co.uk/news/2017/03/27/cut-eu-red-tape-choking-britain-brexit-set-country-free-shackles/>; S Lowe, 'What Chlorinated Chicken tells us about Brexit' (20 Sept. 2017) – at <https://uktradeforum.net/2017/09/20/what-chlorinated-chicken-tells-us-about-brexit/>; J Elgot, 'Fox says public won't accept lower food standards in chlorinated chicken row' (7 Nov. 2017) – at <https://www.theguardian.com/politics/2017/nov/07/fox-says-public-wont-accept-lower-food-standards-in-chlorinated-chicken-row>.

¹⁴³ Bank of England, *Letter to banks, insurers and designated investment firms that undertake UK/EU cross-border activities* (7 Apr. 2017) – at <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/letter/2017/contingency-planning-for-the-uk-withdrawal-from-the-eu.pdf?la=en&hash=86E380D94B9FEBD49999ACE2AB3FD9B799C3A76C>; Bank of England, *Letter to banks, insurers and designated investment firms that undertake UK/EU cross-border activities* (20 Dec. 2017) – at <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/letter/2017/firms-preparations-for-uk-withdrawal-from-the-eu.pdf>; Shearman & Sterling, *Brexit Contingency Planning in Financial Services: Have All the Angles Been Considered?* (16 Mar. 2018) – at <https://www.shearman.com/-/media/Files/Perspectives/2018/03/Brexit-Contingency-Planning-in-Financial-Services-Have-All-The-Angles-Been-Considered-FIAFR-03162018.pdf?la=en&hash=95E2E2C69AE80253EA13AD20312443FBBB36C0FE>.

is, of course not solely a problem of diverging regulation but also of passporting rights which will no longer apply once the UK has left the Single Market. Financial services providers will at least need to have an authorised subsidiary in the EU to benefit from passporting.¹⁴⁴

Secondly, once the UK is outside the Single Market, EU enforcement authorities will need to verify UK regulatory compliance with EU standards, which is likely to take the form of checking and authorisation procedures regarding goods and services to be imported into the EU. A consequence of a probable failure to ensure voluntary alignment is that these procedures risk to become more burdensome over time as EU and UK regulations evolve and diverge. As a result, both parties will need to cooperate intensively if they wish to limit the administrative burden imposed by the EU to ensure compliance with its regulatory standards. This is not impossible: even in the absence of an EU-UK FTA, both parties could agree upon so-called conformity assessment procedures.¹⁴⁵

3.4.2 Trade remedies

Under the WTO rules, Members can justifiably use trade measures ('trade remedies') to restrict imports in the form of anti-dumping duties (*i.e.*, import duties imposed in response to pricing practices of private firms that are deemed to be 'unfair' and that cause or threaten 'material injury' to an industry in the importing State), countervailing duties (*i.e.*, import duties imposed in response to certain subsidies provided to exporters by their governments that cause or threaten 'material injury' to industries in the importing State) and safeguards (*i.e.*, import measures, usually tariffs or quotas, imposed in response to a surge in imports that causes or threatens 'serious injury' to a domestic industry).¹⁴⁶

Within the EU, such trade measures are taken at the EU level, but after a hard Brexit, they would no longer apply to the UK – they could potentially even be used against the UK. A more likely scenario, however, would be one in which damaging flows of goods that form the object of EU trade remedies, would be diverted to the UK market instead. This would require the UK to conduct its own investigations, unless it would adopt a practice of mirroring the EU remedies, without any investigation of its own. Such mirroring could, however, potentially be considered a violation of WTO rules in and of itself. Depending on when the mirroring act takes place, three scenarios could be envisaged.

First, trade remedies that are already in place when the UK leaves the EU could probably be maintained as the EU investigation, on the basis of which such remedies were adopted, included an assessment of the UK market. Second, trade remedies that are taken post-Brexit, but based on a pre-Brexit EU investigation, could arguably also be implemented in

¹⁴⁴ [REFERENCE TO THE ARTICLE BY NIAMH MOLONEY IN THIS ISSUE]

¹⁴⁵ Commission Notice, The 'Blue Guide' on the implementation of EU products rules 2016, *OJ C 272* (26.07.2016) Section 5 (Conformity assessment) p. 65 – 86; Article 5 TBT Agreement; Article 4 SPS Agreement.

¹⁴⁶ Anti-Dumping Agreement; SCM Agreement; Safeguards Agreement.

the UK, as the EU will – up to March 2019 – take the UK market into account in its investigations. Whether this has actually been the case (in particular for investigations that started before but ended after Brexit) would have to be examined on a case-by-case basis, meaning that the legality of the UK’s mirroring practice could vary accordingly. It could be the case, for example, that if the investigation into damages or prices would have been limited to the UK market, the resulting findings would have been different than those resulting from the EU-28 averages on which the Commission has based its determination of appropriate remedies. Third, from March 2019 onwards, the EU-27 investigations will not examine practices and potential damages relating to the UK market. As a result, remedies on the basis of investigations that were only initiated after the UK has left the EU could not be mirrored by the UK. From that point onwards, whether the UK market is negatively affected, ought to be investigated by the UK itself, in order to avoid that its measures are later found to be WTO-inconsistent. The UK government seems to realize this as it is currently hiring staff for its to-be-established Trade Remedies Organisation.¹⁴⁷

4. Dispute settlement

After the UK has left the Single Market, trade with EU Member States will no longer be governed by internal EU law and procedures, including provisions for redress in case disputes arise. The European Commission will no longer investigate trade practices that are allegedly unfair to the UK or its traders and the route to the CJEU will no longer be open to them. As with other trade disputes involving third States, and assuming no EU-UK trade agreement is agreed upon that provides otherwise, redress would only be possible within the framework of the WTO dispute settlement mechanism. This mechanism has, compared to the EU adjudicatory system, at least two significant disadvantages: first, it does not provide compensation for damage caused, and second, it does not allow for private standing.

4.1 Compensation for damage caused

If a WTO Member initiates proceedings at WTO level and a violation of the trade rules is found, the WTO dispute settlement system does not automatically offer compensation:

In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure

¹⁴⁷ H Mance, ‘Job advert reveals surprise plans for new trade authority’ (2 Aug. 2017) – at <https://www.ft.com/content/78201a5e-77a2-11e7-a3e8-60495fe6ca71>; R Wearmouth, ‘UK Trade Experts Face Bing Outgunned As Liam Fox Hires Just 25 Staff For Post-Brexit Body’ (7 Feb. 2018) – at https://www.huffingtonpost.co.uk/entry/fox-trade-disputes_uk_5a79d5d8e4b07af4e81e0d6e.

*pending the withdrawal of the measure which is inconsistent with a covered agreement.*¹⁴⁸

In other words, after a measure has been found to be WTO-inconsistent, the respondent Member merely has to withdraw this measure within ‘a reasonable period of time’ – the length of which may vary on a case-by-case basis.¹⁴⁹ Should it fail to do so, compensation is an option but this is entirely voluntary on the part of the offending Member – and therefore quite exceptional.¹⁵⁰ More often, the complainant has to initiate arbitration proceedings in order to establish its right to suspend concessions and benefits¹⁵¹ – the exercise of which could, but not necessarily does, benefit the affected industries. The entire procedure from initiation of consultations to the end of the reasonable period of time to implement the WTO report (or beyond, in cases of non-implementation) may take several years during which the violation continues to cause economic damage. As a result, the WTO dispute settlement system is a far cry from the effective means and methods of redress available under the EU system.

4.2 Private standing

The WTO system, however, does not offer standing to private parties, so individuals and companies that are negatively affected by violations of WTO rules have no access to any court. They cannot initiate proceedings before the WTO Dispute Settlement Body as this is open only to WTO Members and they cannot bring a claim on this basis before a domestic court as WTO law does not have direct effect in the national legal system.¹⁵²

¹⁴⁸ Article 3.7 and 21.1 DSU [emphasis added]. The absence of an obligation to repair the damage caused before the end of the ‘reasonable period to implement’, and the limited effectiveness of a ‘suspension of concessions and benefits’, may result in the perverse incentive to temporarily violate WTO law with impunity; see M Bronckers and F Baetens, ‘Reconsidering financial remedies in WTO dispute settlement’, 16 *JIEL* 2 (2013) 281.

¹⁴⁹ Article 21.3 DSU, see e.g., Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS114/13 (18 Aug. 2000) para. 45-47; Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13 (29 May 1998) para. 26; Award of the Arbitrator, *Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (7 Dec. 1998) para. 22; Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS75/16, WT/DS84/14 (4 Jun. 1999) para. 37; Award of the Arbitrator, *United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU*, WT/DS136/11, WT/DS162/14, (28 Feb. 2001) para. 3.

¹⁵⁰ Article 22.1-2 DSU. Compensation does not mean monetary payment; rather, the respondent is supposed to offer a benefit, for example a tariff reduction, equivalent to the benefit which the respondent has nullified or impaired by applying its measure.

¹⁵¹ Article 3.7 DSU: ‘The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.’; Article 22.2 DSU.

¹⁵² Case 21/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219, para. 21; Case C-280/93, *Germany v. Council* (the *Bananas* case), [1994] ECR I-4973, para. 105. For scholarly analysis, see: C Dordi [Ed.], *The absence of direct effect of WTO in the EC and in other countries* (Giappicchelli 2010); A Tancredi, ‘On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order’ in: E Cannizzaro, P Palchetti and R Wessel

Any future trade agreement between the UK and the EU would need to establish its own dispute settlement procedures, to adjudicate issues that go above and beyond what can be resolved through the WTO dispute settlement mechanism. Most existing EU FTAs contain arbitration clauses, while the European Free Trade Association (EFTA) has its own court.¹⁵³ Private parties (natural and legal persons) can bring direct actions before the EFTA Court against the EFTA Surveillance Authority, if the latter has not (appropriately) acted on complaints about EFTA State conduct.¹⁵⁴ None of the FTAs currently in force provides such option.¹⁵⁵ As a result, should the UK and the EU wish to maintain a form of redress for private individuals and businesses, akin to their current rights within the EU, they would need to conclude an agreement establishing a special court or arbitration mechanism allowing for private standing *vis-à-vis* all Contracting Parties. Such provisions could, however, meet with opposition within the EU, not least from the CJEU itself which may regard this as infringing upon the autonomy of the EU legal order and its own exclusive jurisdiction to interpret EU law.¹⁵⁶

Should the UK request, and be granted, a privileged agreement equivalent to Single Market membership where Single Market law would effectively be applied in the UK, however, the EU might require that such procedures were regulated and conducted according to the procedures of the CJEU. A precedent for such arrangement can be found in the Agreement

[Eds.], *International Law as Law of the European Union* (Nijhoff 2012) p. 249; H Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?', 25 *EJIL* 1 (2014) 151. For a comparative analysis from the Swiss perspective between the (dis)advantages of bilateral agreements and the WTO system with regard to direct effect, see *Bericht des Bundesrates in Beantwortung des Postulats Keller-Sutter [13.4022] „Freihandelsabkommen mit der EU statt bilaterale Abkommen“* (Jun. 2015) p. 50 *et seq.* – at https://www.eda.admin.ch/dam/dea/de/documents/berichte_botschaften/BR-Bericht-150605_de.pdf

¹⁵³ For a list of EU FTAs: <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>; Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement) *OJ L* 344 (31.1.1994) p. 3.

¹⁵⁴ Articles 36 and 37 Surveillance and Court Agreement. Individuals can only bring damages actions against a State before the EFTA Court. This possibility cannot be identified on the basis of the legal texts, as it was 'invented' (following the CJEU example) by the EFTA Court in E-09/97, *Erla María Sveinbjörnsdóttir v Iceland* (10 Dec. 1998) Advisory Opinion – at http://www.eftacourt.int/uploads/tx_nvcases/9_97_Advisory_Opinion_EN_01.pdf.

¹⁵⁵ The EU-Canada Comprehensive Economic and Trade Agreement (CETA – at <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>) provides for a limited form of private standing (only for investors concerning specific protection granted to them under Chapter Eight) but this Chapter is not covered by the provisional application period which started on 21 Sept. 2017 (http://europa.eu/rapid/press-release_IP-17-3121_en.htm). A Belgian request for an opinion regarding the compatibility of this Chapter with EU law is currently pending before the CJEU (https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf). Other EU FTAs which provide for similar standing for investors, such as the Singapore-EU FTA (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>) and the Vietnam-EU FTA (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>) are currently awaiting formal approval by the European Commission after which they will be sent to the Council of Ministers for agreement and the European Parliament for ratification.

¹⁵⁶ Similar considerations have led the CJEU to decide that the agreement on the EU's accession to the European Convention for the Protection of Human Rights is not compatible with EU law (*Opinion 2/13* (18 Dec. 2014) ECLI:EU:C:2014:2454) and are currently being argued before the CJEU in the context of the Belgian request for an opinion regarding the compatibility of the proposed Investment Court System with EU law.

on a European Common Aviation Area.¹⁵⁷ Also, if the longer-term agreement provided rights for EU citizens in the UK and reciprocal rights for UK citizens in the EU, the EU might equally insist on CJEU jurisdiction.

5. Conclusions

The legal position of the UK within the WTO is not in doubt. The UK has always been a full Member of the WTO and will remain so post-Brexit; the problem lies in determining the exact terms and conditions of its membership. Insofar as rights and obligations *erga omnes partes* are concerned, no major problems are likely to arise as the UK could continue to adhere to the commitments it undertook as an EU Member State (transposing the EU Schedule commitments straight into to the new UK Schedule) – and hope that other WTO Members will return the favour. It will be far more difficult to determine the UK's quantifiable rights and obligations after Brexit, as these are bundled with those of the EU. The potential for non-violation or situation complaints to be successful because of the lack of reciprocity, unless and until the UK has renegotiated its schedules and made bound commitments, seems remote. In order to give effect to the UK's new schedules, it is likely that rectification will only be possible for the *erga omnes partes* rules, while other rights and obligations will need to be renegotiated through what may be a lengthy process.

The main problem with allocating part of the EU's commitments to the UK is that there is confusion and uncertainty regarding the EU's current WTO commitments themselves due to the changes in its membership in the last two decades. 'Falling back on WTO trading terms' will have significant repercussions for manufacturers, service suppliers and consumers, as illustrated with regard to the most important goods and services exported from the UK to the EU. Furthermore, three specific problem areas with regard to goods need to be highlighted: tariff-rate quotas, EU-wide value chains and agricultural subsidies. The UK will probably have the right to access other WTO Members' TRQs when these are allocated on a non-discriminatory basis. Regarding the UK's share of the EU's TRQs, the UK and the EU have said that they will seek to 'maintain the existing levels of market access available to other WTO Members';¹⁵⁸ this seems to follow the direction of established Article XIII GATT practice of extrapolating quota shares from a representative period of three years' import data. If the WTO members believe, however, that the UK's and the EU's concessions have diminished in value after Brexit, they may seek to contend that the EU and the UK have to offer greater concessions to compensate for the negative effect. A hard Brexit might also create specific problems for EU-wide value chains. Even though mechanisms could be put in place to mitigate the accumulation of costs, as already exist under the EU Customs Code, these are likely to be seen as rather cumbersome by

¹⁵⁷ Articles 15 and 16 Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area, *OJ L* 285 (16.10.2006) p. 3.

¹⁵⁸ EU-UK Joint Letter to the WTO (2017) p. 2.

exporters. There are no WTO rules determining the apportionment of agricultural subsidy commitments, so this may become a contested issue. The UK's subsidisation rights could be determined on the UK:EU payments ratio over a representative period of three years applied to the EU's total subsidy commitments – but this would need to be agreed between both parties.

Once the UK leaves the EU, the territorial application clause in the introductory note of the EU's Services Schedule should arguably be ignored entirely, based on the rule of customary international law concerning 'moving treaty-frontiers'. The reference to non-Community countries would not exclude the application of the EU's commitments in the EU-UK relationship, since the meaning of the term 'non-Community members' was always expected to evolve with the growing EU membership and excluding the UK from the EU's Schedule would violate the MFN principle.

Beyond the Schedules of Commitments under GATT and GATS, at least two areas of concern can be identified: the increasing divergence between UK and EU standards, with ensuing enforcement issues, and the implementation of trade remedies. The UK will have to balance exercising its regained flexibility to conclude its own trade deals with maintaining the high level of safety standards the British public has become accustomed to and which is needed in order to allow for 'frictionless trading' with the EU. The WTO does not provide an alternative regulatory system as it mainly serves to ensure that the Members' regulations, standards and procedures are non-discriminatory and do not create unnecessary impediments to trade, while recognizing their right to adopt measures to accomplish legitimate policy objectives. Both the UK and the EU will need to cooperate intensively if the goal is to limit the administrative burden imposed to ensure compliance with EU regulatory standards. Under the WTO rules, Members can justifiably use trade remedies to restrict imports in the form of anti-dumping duties, countervailing duties and safeguards. In order to employ these, the UK will have to conduct its own market investigations, unless it adopts a practice of mirroring the EU remedies without any investigation of its own. Such mirroring could, however, potentially be considered a violation of WTO rules, depending on when the mirroring act takes place.

After the UK has left the Single Market, trade with EU Member States will no longer be governed by internal EU law and procedures, including provisions for redress in case disputes arise. As with other trade disputes involving third States, and assuming no EU-UK trade agreement is agreed upon that provides otherwise, redress would only be possible within the framework of the WTO dispute settlement mechanism. This mechanism has, compared to the EU adjudicatory system, at least two significant disadvantages: first, it does not provide compensation for damage caused, and second, it does not allow for private standing.

Finally, this article has concentrated mainly on the legal consequences of using WTO rules as a default position in case of 'no deal'. But the effect of leaving the EU without a comprehensive cooperation agreement would have repercussions far beyond matters

addressed within the WTO, such as human rights and environmental protection, law enforcement, policing and security, research and development, data protection, science and technology, etc.

In sum, the terms and conditions of the WTO fall-back option and the extent to which the WTO could act as a safety net for the UK's future economic relations depend, to a great extent, on successful negotiations with all other WTO Members. This situation would be further complicated if negotiations with the EU were to break down, since the EU's cooperation is crucial. There are significant differences between EU and WTO Membership, in terms of the applicable trade rules and their economic impact, as well as compliance and dispute settlement procedures. Imposing new regulations and processes will inevitably entail additional costs and delays, regardless of any mitigation agreements. Economic impacts depend not only on trade barriers and procedural changes, but also on the effect on bilateral trade flows, economic growth rates and prospects, currency adjustments, and the fact that UK exporters will be competing in the EU market with established players from third States, such as China, Japan and the USA. Finally, the EU-UK relationship covers much more than trade so the WTO fall-back option will in any case leave major legal vacuums. Thus, the mantra 'no deal is better than a bad deal' is misleading; the WTO fall-back option falls far short of providing an adequate safety net, even for trade matters.

Annex I - Most Important Trade Sectors for the UK

Most exported commodities and manufactured products by the UK to the EU¹⁵⁹

Rank	Product Description	GBP millions 2016
1	Motor vehicles, Trailers & Semi-Trailers	18,257
2	Pharmaceutical Products	12,077
3	Computer, Electronic & Optical Products	11,586
4	Machinery & Equipment	11,451
5	Crude Petroleum & Natural Gas	9,133
6	Air & Spacecraft & Related Machinery	8,958
7	Food Products	7,908
8	Petrochemicals	5,595
9	Refined Petroleum Products	5,380
10	Basic Metals	5,209

Most exported services by the UK to the EU¹⁶⁰

Rank	Sector/subsector ¹⁶¹	GBP millions 2015
1	Financial Services Sector	24,262
2	Business Services (Specially Management Consulting)	22,192
3	Tourism and Travel Related Services	12,675
4	Transport Services	11,534
5	Insurance and Pension	8,965
6	Telecommunications, Computer and Information Services	7,644
7	Intellectual Property	4,387
8	Construction	715
9	Personal, Cultural and Recreational Services	667

¹⁵⁹ Office for National Statistics, *UK Trade in goods, CPA (08)* (13 Sept. 2017) – at <https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/datasets/publicationtablesuktrade CPA08> for data from 1999–2017 (not classified by HS chapters). The latest data available for goods (broken down per geographical region) relate to the year 2016 [hereafter ‘Office for National Statistics, *UK Trade in Goods* (2017)’].

¹⁶⁰ Office for National Statistics, *Statistical bulletin: International trade in services, UK: 2015* (31 Jan. 2017) – at <https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/adhocs/006656balanceofpaymentsannualgeographicaldatatables>. The latest data available for services (broken down per geographical region) relate to the year 2015 [hereafter ‘Office for National Statistics, *International Trade in Services* (2017)’].

¹⁶¹ This list includes all the services exported.

10	Government	581
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Annex II – Most Important Trade Sectors for the EU

Most exported commodities and manufactured by the EU to the UK¹⁶²

Rank	Product Description	GBP millions 2016
1	Motor vehicles, Trailers & Semi-Trailers	47,744
2	Pharmaceutical Products	21,719
3	Computer, Electronic & Optical Products	21,300
4	Food Products	20,908
5	Machinery & Equipment	18,540
6	Electrical Equipment	9,396
7	Petrochemicals	8,153
8	Basic Metals	7,973
9	Refined Petroleum Products	7,069
10	Rubber Products	6,755

Most exported services by the EU to the UK¹⁶³

Rank	Sector/subsector ¹⁶⁴	GBP millions 2015
1	Tourism and Travel related services	24,098
2	Business Services (Specially Management Consulting)	16,880
3	Transport Services	11,734
4	Telecommunications, Computer and Information Services	5,859
5	Financial Services Sector	3,494
6	Intellectual Property	2,181
7	Government	1,254
8	Construction	605
9	Personal, Cultural and Recreational Services	417
10	Insurance and Pension	0

¹⁶² Office for National Statistics, *UK Trade in Goods* (2017).

¹⁶³ Office for National Statistics, *International Trade in Services* (2017).

¹⁶⁴ This list includes all the services exported.