

THE UK, BREXIT, AND THE WTO

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Reflections on a new old Member's new
multilateral responsibilities

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REFLECTIONS ON A NEW OLD MEMBER'S NEW MULTILATERAL RESPONSIBILITIES

INTRODUCTION

The World Trade Organization (WTO) and the treaty instruments that establish it and govern trading relations between its Members have – strangely – figured prominently in the run-up to the Brexit negotiations and since.

For some, if the rest of the world functions well with the WTO and assorted regional or liberalising trade agreements, there would be no need for the UK to tether its trade policy – at a minimum – to that of the European Union (EU). For others, the WTO represents something of a defeat – after the deep economic integration into a vast market, WTO rules serve as nothing more than a baseline, providing hardly any protection for UK business and trade interests.

There was even briefly – and comically, for at least some of us who have been in this game long enough – a suggestion that

- 1) after Brexit, the UK would have to apply to join the WTO, or, at the other extreme,
- 2) upon regaining its “sovereignty” in trade policy matters, the UK would somehow lead the rest of the Membership of the WTO in resolving problems (the Appellate Body, negotiations) that have proven intractable over the past twenty years.

What is the *real* impact of Brexit on the UK and the WTO?

As with much else in life, with law, trade, and commercial relations – but perhaps not theoretical economics – the answer is a robust and unequivocal “it depends”.

In this paper I will try to demystify the WTO and discuss its relevance to a post-Brexit UK, in particular in relation to the food and beverage sector. As would befit an international organization with roots reaching back to the post-World War II global reconstruction era and established by a 560-page treaty following seven years of multilateral negotiations, this brief exposition will of necessity be no more than a thumbnail sketch; considerable simplification is unavoidable, and this paper does not set out a comprehensive and precise

legal analysis of WTO rules. My hope here is to provide enough context and background to cast enough illumination on a complex topic to give the reader a better sense of at least the outlines and the texture of the WTO's inevitable and emergent role in the UK's post-Brexit trade and economic relations.

WHAT IS THE WTO?

A system of rules

The WTO is an international organization established by a multilateral treaty that entered into effect on 1 January 1995.

The underlying treaty, commonly referred as the WTO Agreement, creates a comprehensive system of rights and obligations that governs measures of a Member affecting trade in all goods, some services, and certain investments. It sets out disciplines governing, among others, tariffs, customs formalities, health and safety measures, technical regulations (including labeling), subsidies, measures against unfair trade, services, and intellectual property rights.

The most basic obligations of a Member of the WTO are related to non-discrimination: between Members (most favored nation, or MFN) and between domestic and imported like goods or services (national treatment). The most basic rights are to maintain negotiated tariffs; liberalise only those services sectors that a Member wishes to make commitments on; impose measures for the protection of public order, health, and the environment; and impose measures it considers necessary for its security interests.

Of note, because each Member of the WTO retains the right to maintain multilaterally negotiated tariffs, the WTO Agreement is not a “free trade agreement”. As well, nothing in the WTO Agreement provides that it was intended to have “direct effect” in Members: it is up to each Member to decide how it wishes to implement its obligations under the treaty.

A multilateral organization

The WTO is not part of the United Nations' system of international organizations. Members of the WTO refer to it as a “Member-driven” organization because, unlike some others, it does not develop policies and proposals separately from the Membership.

Crucially, decisions related to the functioning of the organization – for example, which topics should be part of negotiations – are made on the basis of “consensus”.

The current crisis of the dispute settlement mechanism of the WTO has dominated the headlines – at least some specialized headlines. In the previous paragraph I referred to negotiations. Perhaps it would be useful to underline all three functions of the organization:

- First, the WTO’s principal intended function was to serve as a forum for multilateral negotiations on global rules governing trading relations between its Members. Building on the success of negotiating rounds under its predecessor, the General Agreement on Tariffs and Trade (GATT), the WTO was intended to provide a mechanism and a forum for progressively liberalising multilateral negotiations, including through negotiating new rules as need arose. For that purpose, the WTO has a strong network of committees comprising diplomats from Members covering areas of interest to the Members.
- Second, the WTO has a “trade policy review mechanism”. Each Member of the WTO periodically undergoes a comprehensive examination of its trade policy instruments. This permits other Members that have concerns about trade measures to raise those concerns; it also permits a Member being reviewed to have a multilateral conversation about its areas of concerns and how best it could meet its multilateral obligations.
- Finally, multiple avenues and structures for the resolution of trade disputes are provided under the WTO Agreement. Of note – and currently in the news – is the formal dispute settlement mechanism of the WTO; this entailed, in 1995, key innovations such as
 - automatic establishment of adjudicatory panels with mandatory jurisdiction; and
 - appellate recourse.

THE UK, THE EU, AND THE WTO

It’s complicated

Currently, the European Commission has exclusive competence over the Common Commercial Policy. This means that:

- In the WTO, the EU is a Member in its own right and speaks on behalf of its (after Brexit) 27 member States.
- Each member State of the EU remains a Member of the WTO but typically does not intervene directly in most WTO discussions.

- Budget contributions to the WTO are made by each member State of the WTO.

And so, the UK already is a Member of the WTO. In fact, the UK makes financial contributions to the WTO and sits on the Budget Committee of the WTO in its own right. Finally, the UK is also involved in ancillary organizations such as the Advisory Centre on WTO Law, an intergovernmental “legal aid” centre for developing countries.

Following Brexit, it will be ...

Less complicated because the UK will have its own voice as a Member of the WTO, will be able to negotiate for itself in any multilateral negotiations, and will not be bound by the complex interests of other member States.

But also ... more complicated because the UK will need to develop an independent trade policy. Given the reach of WTO rules into national law, the UK will also need to strengthen its expertise in trade law across the entire government. When challenged in dispute settlement by another Member of the WTO, the UK will have to defend itself and, in case of a loss, put in place implementing measures to bring itself into compliance.

POST-BREXIT UK IN THE WORLD

The WTO is an integration baseline

I have already referred to the comprehensiveness and complexity of the WTO Agreement. At the same time, I have also noted that the WTO Agreement does not require the removal of all protectionist barriers to trade: negotiated tariffs and restrictive measures on services not subject to commitments remain part of the trade policy toolbox of all WTO Members. In this sense, key market access rules of the WTO are best described as an “economic integration starter set”. Indeed, all advanced economies have economic integration or trade liberalisation agreements of one sort or another with, at the very least, their biggest trading partner.

To be sure, on a range of topics – for example, health and safety measures, technical barriers to trade, trade remedies, subsidies, services, and intellectual property – the WTO Agreement sets out fairly detailed rules that are referred to or relied on even in deeply liberalising trade agreements. However, these baseline rules – especially in the field of food and health industries – are not an effective replacement for economic integration.

Post-Brexit re/integration

This is because in the modern developed economy, economic integration is no longer about tariffs and other visible protectionist measures. Rather, it is about standards, regulations, environmental and health measures, services requirements, intellectual property rights, and the like. To the extent that the UK wants to minimize the cost of doing business for its exporters – and therefore remain competitive internationally – it must enter into agreements that go beyond the baseline terms of access under the WTO.

The WTO should therefore be seen as, at best, a springboard rather than a destination.

ⁱ **Rambod Behboodi** has over twenty-five years of experience as a trade diplomat, negotiator, and litigator under both the WTO and NAFTA. In postings to Brussels and Geneva as a Canadian diplomat he gained particular insight into multilateral and bilateral trade diplomacy as well as key issues shaping global trading relations (IP, non-tariff barriers, institutional reform, trade and environment, and regulatory cooperation). As General Counsel at Canada's Finance Ministry, he participated in and advised on CETA negotiations. At the Competition Bureau, he established the Competition Promotion Branch and led the Branch's efforts in international cooperation agreements and economic advocacy. He served as Counsellor at the WTO and as international trade Partner at the global firm of King & Spalding before launching GenevaTradeLaw.com. He has taught international trade law in universities in Canada and Europe, and in the past five years has been deeply involved in training and capacity-building, and writing on trade, competition law, and climate change.