



The Consequences of Brexit: Some Complications From International Law

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Britain's international trade obligations seriously complicate the question of Britain's exit from the EU, and significantly expand the range of stakeholders with a say in how the process would be managed.

As the UK approaches the possibility of an in-out referendum on EU membership in 2017, it is important to prepare for a vigorous public debate about what exit from the EU might mean for Britain, politically, socially and economically. One significant issue has to do with the impact of exit on Britain's relationship with the European internal market, as well as its major non-European trading partners. This paper looks at some aspects of the international legal framework relevant to this issue, and argues that existing international trade treaties seriously complicate the question of Britain's exit from the EU. They are, it suggests, likely to make it more difficult for Britain to manage the process smoothly, and on its own terms – primarily because they significantly expand the range of stakeholders with a say in how the process is managed.

It is sometimes said that if the UK were formally to exit the EU, it may be able to negotiate preferential access to the single market, as well as some modified participation rights in EU governance, through an arrangement approximating that of Norway's relationship with the EU. While this is no doubt true, it is important to remember that this may not be a matter solely for negotiation between the UK and its European partners. Granting the UK preferential access to the single market would on its face

be contrary to the most favoured nation obligation under the law of the World Trade Organisation, of which the UK is a member. As a consequence, it would be vulnerable to challenge under the WTO's dispute settlement system by any other WTO member. It is true that most states have on the whole been reluctant formally to challenge regional and bilateral arrangements through WTO dispute settlement, but there is no guarantee that this practice will continue. It is safe to presume at least that the acquiescence of a number of key WTO Members will have to be purchased with further trade concessions, rather than taken for granted.

Should the UK not be able to secure preferential access to the European common market, its commercial relationship with Europe would largely be governed by the rules of the World Trade Organisation itself. While WTO law certainly provides for a significant degree of market access, it does not contain anything comparable in scope to the four freedoms of European law. The potential impacts of the change are hard to describe in general terms. In some sectors – say, for a variety of agricultural exports – access to vital European markets may be severely curtailed. For others – such as financial services – European markets are relatively open in any case, so the direct effects on competition may

be limited. However, even in the latter case, the *indirect* effects may be considerable. The UK (especially London) attracts significant overseas investment from major foreign firms seeking a base from which to enter European markets. If, as a result of Britain's exit from the EU, such firms could no longer be guaranteed the free movement of their personnel between London and other major European cities, they would have a strong incentive to move their European headquarters elsewhere. Membership in the European Union brings access not just to the European common market, but potentially also to other major foreign markets. Since 1997, for example, the European Union has negotiated free trade agreements with Korea, Chile, Mexico and South Africa, with a view to securing preferential access to those markets for European exports. It is not fully clear whether the UK would continue to enjoy the benefit of these treaties if it left the EU: much depends on whether it is a party to them independently in its own right, or solely in its capacity as a member of the EU. The likely outcome is that it would not.

More significantly, exit from the EU would exclude the UK from the benefit of any future agreements into which the EU enters. This is potentially very important: the EU is currently engaged in negotiations for greater access to the US market under the Transatlantic Trade and Investment Partnership, as well as (more or less actively) with Canada, ASEAN, the Gulf Cooperation Council, India, Malaysia, Singapore and others, all of which have the potential incrementally to open lucrative foreign markets for British producers. Exclusion from these agreements – particularly the TTIP and CETA – as a result of exit from

the EU, could hurt UK exporters, as trade and consequently investment is diverted to competitors based in Europe.

It is true that exiting the EU would free Britain to pursue its own free trade agreements with key trading partners. This avenue certainly has some attractions, given the difficulties of the European process – witness for example the obstacles that the German auto industry created for the trade agreement with Korea. But the downside is equally obvious: would the promise of greater access to the UK market alone persuade countries such as the United States, Canada, or India to invest significant the resources and political capital required to conclude a serious free trade agreement with the UK? As the world moves towards larger and bigger regional trading blocs, now appears to be precisely the wrong time to be disassociating from one of the biggest and most powerful of them.

The UK's membership in the World Trade Organisation may significantly complicate the process of Britain's exit from the EU in another way – evento the extent of giving a significant number of other WTO Members a say in how it is done. This is because many of the Britain's market access commitments under WTO law are in fact subsumed under European-wide market access obligations. For example, the EU's scheduled annual quota of frozen bovine meat products is 34,300 tonnes across the entire European market, and this quota is allocated in specific shares to five main exporting countries. If the UK left the EU, this quota would have to be reorganised in a number of ways: the EU quota would have to be changed to reflect

the reduced size of its market as well as historical net trade flows between the UK and the rest of Europe; some of the European quota would have to be allocated to the UK; the UK itself would have to impose its own quota and allocate it between different beef exporting nations. Disentangling the UK's from the EU's commitments in this way would count as a modification of both the EU's and the UK's GATT schedules and therefore, according to GATT Article XXVIII, must be done by negotiation and agreement with certain other WTO members. Failing agreement, any modification is subject to reciprocal withdrawal of market access concessions from affected parties. The result of this process is that a potentially large number of other WTO Members would have the ability to significantly impede the process of the UK's exit from the EU – a powerful concern given the current decision-making dynamics within the WTO.

Finally, there is a perception in some quarters that exit from the EU would relax some of the constraints the UK is currently under as regards European market regulation. In fact, however, the picture is considerably more complex than that. For one thing, considerable pressures would in any case remain to harmonise regulation with European standards, given the importance of maintaining secure market access to European markets. In this respect exit from the EU seems a bad bargain: continued pressure to meet European regulatory standards, but with significantly reduced influence over the processes by which such standards are made. For another thing, while the UK would indeed be free from the regulatory constraints of European law, it would still be

subject to those contained in WTO law. It is difficult to generalise about the relative degree of regulatory constraint imposed by each body of law. On one hand, it is true that WTO law, unlike European law, provides no right of enforcement to private parties, and in some areas (such as the provision of state aid in services sectors) contains considerably more relaxed obligations than EU law. On the other, however, it is also true that withdrawal from the EU would expose the UK to significantly more challenges from its European trading partners in WTO dispute settlement as regards its domestic regulation, and may not in most areas provide a significantly greater degree of regulatory freedom.

There is no doubt much good to be had from a vigorous public debate about Britain's relationship with Europe and the European common market. But it is important that participants in that debate be clear-eyed about the nature of Britain's international trade obligations, and the ways in which they may substantially affect the contours of any attempted renegotiation of the terms of that relationship.

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