

## The UK's status in the WTO after Brexit

Lorand Bartels\*

23 September 2016

### Introduction

It has become conventional wisdom that once the UK leaves the EU it will have to renegotiate core aspects of its WTO rights and obligations, and in particular its concessions under Article II of the GATT 1994 and Article XX of the GATS. A leading exponent of this view is WTO Director-General Azevêdo, who said during the Brexit referendum campaign that '[the UK] will be a member with no country-specific commitments'.<sup>1</sup> For some, rather dramatically, the UK will, at least *de facto*, be in the position of a country seeking to accede to the WTO from scratch,<sup>2</sup> and that it will have to negotiate its terms of membership with all other WTO Members who will hold a veto over the outcome of these negotiations.<sup>3</sup> At a minimum, others have said, the UK will have to negotiate its share of the EU's commitment not to subsidise agricultural production above a certain level as well as its share of current EU preferential tariff rate quotas for certain agricultural products.<sup>4</sup> In addition, doubts have been expressed as to the UK's rights to access the tariff rate quotas that other WTO Members have committed to allocate to the EU,<sup>5</sup> and it is generally taken for granted that the UK would have to accede as a new party to the plurilateral WTO Government

---

\* Faculty of Law, University of Cambridge ([lab53@cam.ac.uk](mailto:lab53@cam.ac.uk)). I am very grateful to Tomer Broude, Bill Davey, Larry Elliot, Alberta Fabbriotti, Michael Fogden, Tom Grant, Christian Häberli, Holger Hestermeyer, Gary Horlick, David Kleimann, Andrew Lang, Petros Mavroidis, Federico Ortino, David Roberts, and Peter Ungphakorn for their help, comments and discussion. All opinions and errors remain mine.

<sup>1</sup> Reported in Larry Elliot, 'WTO chief says post-Brexit trade talks must start from scratch', The Guardian, 7 June 2016, [www.theguardian.com/business/2016/jun/07/wto-chief-brexit-trade-talks-start-scratch-eu-referendum](http://www.theguardian.com/business/2016/jun/07/wto-chief-brexit-trade-talks-start-scratch-eu-referendum).

<sup>2</sup> Eg Piet Eeckhout, 'Brexit and trade: the view over the hill', 16 June 2016, <https://londonbrussels.wordpress.com/2016/06/16/brexit-and-trade-the-view-over-the-hill/> ('withdrawal from the EU is comparable to a full WTO accession, and accession negotiations can easily take years'); Erik Lagerlof, 'Would the UK be able to rely upon the WTO agreement if it were to leave the EU?', June 2016, <https://www.matrixlaw.co.uk/wp-content/uploads/2016/06/Article-9-Dr-Erik-Lagerlof.pdf> ('[i]n the event of a departure from the EU, the UK would accordingly have to start its renewed relationship with the WTO from scratch'); Panos Koutrakos, 'What does Brexit mean for the UK in WTO?', 12 July 2016, [www.monckton.com/brexit-mean-uk-wto/](http://www.monckton.com/brexit-mean-uk-wto/) ('[t]he application ... of WTO law on the UK following Brexit will depend on resetting the terms of the British membership in the Organisation').

<sup>3</sup> Eg Peter Ungphakorn, 'Nothing simple about UK regaining WTO status post-Brexit,' 27 June 2016, <http://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit> ('[i]t would only take one objection to hold up the talks because the WTO operates by consensus, not voting, one reason why WTO negotiations take so long'), Koutrakos, *ibid.*, ('[t]he schedules of concessions and commitments on market access, for instance, as well as the UK's list of exemptions from the MFN treatment obligation would have to be reset and resubmitted. They would also have to be accepted by the other WTO parties').

<sup>4</sup> Richard Eglin, Piet 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 September 2016 (<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.pdf>).

<sup>5</sup> Eglin, Eeckhout, *ibid.*

Procurement Agreement (GPA 2014),<sup>6</sup> to which the EU – but not the UK – is a party, even though this agreement covers UK public bodies.

It is contended here that, in different ways, these views are mistaken. As far as the multilateral WTO agreements are concerned, it is noted that the UK's rights and obligations are not, as some have thought, contingent on its status as an EU Member. In fact, it is argued (section 1) that what will change with Brexit are not the UK's underlying rights and obligations, but rather the EU's exercise of these rights and assumption of responsibility for the performance of these obligations. It follows that the UK's rights and obligations are, as a matter of legal theory, complete, even if, in some cases, they are presently undetermined (section 2). Furthermore, identifying these rights and obligations is not necessarily difficult. In the first place, all WTO rules that apply to WTO Members on an *erga omnes partes* basis also apply to the UK without any further complications, along with all exemptions and exceptions (section 2(a)). Among these ordinary rights is the UK's right to access the country-specific EU tariff rate quotas bound by other WTO Members under the GATT 1994, even though, if the UK is not a substantial supplier, it may in practice lose market access under those quotas (section 2(b)). It is more admittedly more complicated to identify the UK's tariff rate quota commitments, at least in a way that does not lead to the EU-27 accessing these quotas along with traditional third country suppliers. However, the UK can act unilaterally to forestall any complaints, including non-violation complaints, by setting and allocating tariff rate quotas in terms of recent imports from all sources, including the EU-27, as well as the historical expectations of other WTO Members at the time that the quotas were initially agreed (section 2(c)). As for the right to subsidise agricultural production, it is suggested that the UK be allocated a sum calculated by applying the current ratio of UK:EU subsidy payments to the EU's scheduled rights (section 2(d)).

The article next looks at the UK's scheduled commitments in services under the joint GATS schedule of the EU and its Member States' GATS (section 3). This schedule raises no issues concerning the identification of commitments, as such. They apply directly to the UK, which submitted a GATS schedule under Article XX of the GATS. Naturally, any EU or UK-specific limitations on these commitments are also transposed to the UK. However, there is a question about the validity of a territorial limitation in the schedule, according to which commitments only apply to territory to which the EU treaties apply. Strictly speaking, this would leave the UK *de facto* with no schedule, a result that is not impossible, but certainly undesirable. However, it is suggested that this would be a wrong result. Instead, in line with the rule of customary international law concerning 'moving frontiers' in cases of state succession, it is suggested that this provision simply be disregarded as inapplicable when UK territory no longer falls under the EU treaties.

The next section considers the procedural mechanisms that should be used to establish the UK's commitments in new schedules of commitments (section 4). It argues that, following relevant practice in similar situations under the GATT 1947, the proper procedure to be followed is for the UK to submit a new schedule, based on the considerations above, for certification as a 'change' to an existing schedule. Objections to certification by other WTO

---

<sup>6</sup> Eglin, *ibid*, Eeckhout, *ibid*, Michael Bowsher, 'Procurement law after Brexit?', 16 March 2016, <http://publicsectorblog.practicallaw.com/procurement-law-after-brexite/>.

Members should then be limited to questions of accuracy. However, even if there are objections, which are to be expected, this section contends that these are of no legal consequence, as certification is not required for a schedule, or a change in a schedule, to be legally effective. For this reason, there is no basis for the assumption, noted above, that other WTO Members hold anything like a veto over the UK's legal position in the WTO.

The last issue addressed in this article concerns the UK's legal position in relation to the Government Procurement Agreement 2014 (section 5). It is argued that there are rules of customary international law on the succession of states from unions with legal personality, as well as practice under the 1947 GATT, and that according to these rules the state succeeds to any legal rights and obligations contracted by that union that were applicable to that state or its territory. For this reason, it is contended that the UK succeeds to the Government Procurement Agreement in its own name. In addition, however, this section notes that other WTO Members have formally recognized that the EU acts on behalf of its Member States within the context of this agreement, and it argues that, for this reason, other WTO Members would most likely be estopped from denying a UK claim to succession.

In short, this article concludes that, in substance, the position of the UK within the WTO after Brexit can, if the UK wishes, be the same as it is today. There may be certain statistical and political difficulties in setting the legal position of the UK within the WTO. But there do not appear to be any that are legal (section 6).

## **1. The UK's status as an original WTO Member**

On 1 January 1995 the UK became an original WTO Member pursuant to Article XI:1 of the WTO Agreement. This provision states:

The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

This applies to the UK in a straightforward way. The UK was a contracting party to the GATT 1947 and it 'accepted' the WTO Agreement and the multilateral trade agreements, in accordance with Article XIV:1 of the WTO Agreement, by ratification on 30 December 1994.<sup>7</sup> Further, the EU annexed a schedule of concessions to the GATT 1994 'for'<sup>8</sup> the UK,<sup>9</sup> in

---

<sup>7</sup> Note 1 to the Marrakesh Agreement Establishing the World Trade Organization (1995) 1867 UNTS 155, in force 1 January 1995; also WTO, *Status of WTO Legal Instruments* (Geneva: WTO, 2015), at 41.

<sup>8</sup> Paragraph 1 of the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 (the 'Marrakesh Protocol') similarly describes its annexed schedules as 'relating to' WTO Members. Paragraph 1(d) of the 'language incorporating GATT 1947 and other instruments into GATT 1994' makes the Marrakesh Protocol part of the GATT 1994. For its part, paragraph 1 of the Marrakesh Protocol states that '[t]he schedule annexed to this Protocol relating to a Member shall become a Schedule to GATT 1994 relating to that Member'. By these means, a schedule annexed to the Marrakesh Protocol is deemed to be a schedule annexed to the GATT 1994, and thereby meets the descriptions of annexed schedules in Article II of the GATT 1994.

accordance with its practice since the UK joined the EU<sup>10</sup> in 1974.<sup>11</sup> For the GATS the situation is a little different, in that the EU and its Member States, including the UK, jointly submitted a schedule of specific commitments.<sup>12</sup> Accordingly, all of the conditions set out in Article XI:1 have been met for the UK, and the UK will remain a WTO Member unless it withdraws from the WTO Agreement in accordance with Article XV of the WTO Agreement.<sup>13</sup>

Article XI:1 of the WTO Agreement is an unusual provision, although not unique,<sup>14</sup> insofar as it allows for the possibility that original WTO Members will not have autonomy in all matters covered by the WTO agreements, and which contrasts with Article XII of the WTO Agreement, according to which newly acceding WTO Members must have full autonomy in these matters. It is important in this context to note that autonomy is concerned with the power, under domestic or internal law, of a given entity to act on the international plane. Such acts are, in principle, attributable to that entity under international law, although there are also other ways in which acts can be attributable to an entity (such as adoption). But neither the autonomy of an entity, nor the question whether a given act is to be attributed to that entity, have anything to do with its rights and responsibilities under international law.<sup>15</sup> That depends entirely on whether the rules are binding on that entity.

Against this background, the meaning of Article XI:1 can be better understood. It recognised that the EU (probably) and its Member States (certainly) lacked full autonomy, as a matter

---

<sup>9</sup> The EEC-12 schedule attached to the Marrakesh Protocol, *ibid*, was Schedule LXXX. The current certified EU-15 Schedule CXL dates from 27 October 2012 (WT/Let/868, 30 October 2012). An EU-25 schedule was submitted for certification on 25 April 2014 (G/MA/TAR/RS/357, 25 April 2014).

<sup>10</sup> For convenience, this article uses the term 'European Union' (EU), effective both generally and in the WTO (WT/Let/679) from 1 December 2009, also for its predecessors, the European Communities ('EC') (1993-2009), the European Coal and Steel Community ('ECSC') (1952-2002), and the European Economic Community ('EEC') (1958-1992).

<sup>11</sup> The UK's schedule for its metropolitan territory had been Schedule XIX, Section A, Parts I and II. The EEC withdrew the schedules of the EEC-6 and the UK (and Denmark and Ireland) as of 1 August 1974, and a new EEC-9 Schedule LXXII was circulated on 6 August 1974. See GATT, Article XXIV:6 Renegotiations – Entry into Force of Schedules LXXII and LXXII*bis*, L/4067, 6 August 1974.

<sup>12</sup> European Communities and their Member States – Schedule of Specific Commitments, GATS/SC/31, 15 April 1994. An EU-25 schedule (S/C/W/273, 9 October 2006 and S/C/W/273/Suppl.1, 31 October 2006) was certified on 18 December 2006 (S/L/286, 18 December 2006) but its entry into force still depends on ratification by all EU Member States. Article XX:1 of the GATS states that '[e]ach Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement'. This language is personal to each WTO Member, and seemingly does not permit one Member to submit a schedule 'for' another Member, contrary to Article XI:1 of the WTO Agreement. However, Article XVI:3 of the WTO Agreement states that '[i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.'

<sup>13</sup> It is also possible for a WTO Member to be expelled if it refuses to accept certain amendments to the WTO agreements under Article X:3 and Article X:5 of the WTO Agreement.

<sup>14</sup> Article 3 of the UN Charter states that '[t]he original Members of the United Nations shall be the states which ... sign the present Charter and ratify it in accordance with Article 110.' Among the 49 original UN Members were Belarus, Ukraine, India and the Philippines, which were not independent states at that time.

<sup>15</sup> The concepts of attribution and responsibility in this context are typically confused by discussions of the EU being 'responsible' for its Member States. See also Joni Heliskoski, 'EU Declarations of Competence and International Responsibility' in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union* (Oxford: Hart, 2013), at 192-196.

of their domestic and internal law, to have schedules of concessions submitted ‘for’ them, and thus to become original WTO Members.<sup>16</sup> But it has nothing to do with the question whether measures that are formally adopted by EU Member States can be attributed to the EU, and if so, whether this is on a shared or exclusive basis.<sup>17</sup> Nor does it have anything to do with the question whether the EU or a given EU Member State has WTO rights or obligations. That question can only be determined by looking at the rules, and in what respect they are binding on the EU or its Member States.

In principle, when a state or an international organization conclude an agreement they exercise rights and obligations under that agreement subject to any limitations set out in that agreement. In the present case, there are no such limitations. As just explained, Article XI:1 is concerned with autonomy, not responsibility (or attribution).<sup>18</sup> Nor is there any suggestion anywhere in the WTO Agreement, or in any relevant instruments, that the WTO rights and obligations of the EU Member States, or of the EU, are in any way limited to their areas of autonomy.<sup>19</sup> Indeed, there are indications to the contrary. The Marrakesh Final Act states that ‘the WTO Agreement shall be open for acceptance as a whole, by signature or otherwise, by all participants pursuant to Article XIV thereof,’<sup>20</sup> and Article XVI:5 of the WTO Agreement specifies that ‘[n]o reservations may be made in respect of any provision of this

---

<sup>16</sup> It was known that the EU Member States had no autonomy in the area of trade in goods, but it was uncertain whether they also lacked autonomy in the areas of services and intellectual property. On 15 April 1994 the WTO Agreement was signed separately by the EU and the EU Member States: at 16-42. On 15 November 1994 the European Court of Justice decided that, apart from cross-border services, the EU and its Member States possessed a shared competence for GATS and a joint competence for TRIPS: *Opinion 1/94*, paras 98 and 105. On 30 December 1994 the EU and its Member States each accepted the WTO Agreement in accordance with Article XIV:1 of the WTO Agreement: WTO, *Status of WTO Legal Instruments*, above at n 7, at 16-42. Subsequent treaty changes have meant that, at present, except for transport services, all areas covered by the WTO are now within exclusive EU competence. See *Opinion 1/08 (GATS)* EU:C:2009:739 (GATS) and Case C-414/11, *Daiichi Sankyo* EU:C:2013:520 (TRIPS).

<sup>17</sup> For an argument in favour of exclusive attribution, based on the division of competences between the EU and the EU Member States, see Frank Hoffmeister, ‘Litigating against the European Union and Its Member States—Who Responds under the ILC’s Draft Arts on International Responsibility of International Organizations?’ (2010) 21 EJIL 723, at 728 and 734 and Pieter-Jan Kuijper and Esa Paasivirta, ‘EU International Responsibility and its Attribution: From the Inside Looking Out’ in Evans and Koutrakos, above at n 15, at 60-63. For an argument against, see Giorgio Gaja, ILC Special Rapporteur on responsibility of international organizations, Third Report, UN Doc A/CN.4/553, 13 May 2005, para 12 and, expressing a sceptical view, James Flett, ‘The World Trade Organization and the European Union and its Member States in the WTO’ in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge: CUP, 2016) at 896-97. See also WTO Panel Report, *Russia – Tariff Treatment*, WT/DS485/R, circulated 12 August 2016, para 7.46, in which the Panel said that ‘the act of applying the duty rates (i.e. the levying of duties at the time of importation) is directly attributable to Russia’ even though Russia was arguably acting as an organ of the Eurasian Economic Union (EAEU) in so doing.

<sup>18</sup> I would like to thank Tomer Broude for insisting upon this point, and the distinction between autonomy and responsibility more generally.

<sup>19</sup> As to whether the EU or its Member States could claim that their consent to be bound to the WTO Agreement was invalid on the grounds that it was in manifest violation of a constitutional norm of fundamental importance see Eva Steinberger, ‘The WTO Treaty as a Mixed Agreement: Problems with the EC’s and the EC Member States’ Membership of the WTO’ (2006) 14 European Journal of International Law 837, at 856-857.

<sup>20</sup> Paragraph 4 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

Agreement.’ Moreover, the WTO Agreement refers to the votes of the EU Member States, without limiting these to specific areas, when it states that ‘[t]he number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.’<sup>21</sup> The conclusion must be that the WTO rights and obligations of the EU and its Member States are the same as those of any other WTO Member.<sup>22</sup>

This conclusion has also been endorsed in WTO jurisprudence. In *EC/Certain MS – Airbus*, the Panel rejected an EU request to remove five EU Member States (including the UK) as respondent, which would have left the EU as the sole remaining respondent. It said that ‘[e]ach of these five is, in its own right, a Member of the WTO, with all the rights and obligations pertaining to such membership, including the obligation to respond to claims made against it by another WTO Member’. The Panel added that ‘[w]hatever responsibility the European Communities bears for the actions of its member States does not diminish their rights and obligations as WTO Members, but is rather an internal matter concerning the relations between the European Communities and its member States.’<sup>23</sup> The point is clear, and, it is submitted, correct.

It is worth noting that this conclusion does not transpose to all other so-called ‘mixed agreements’ of the EU and the EU Member States. Typically, these treaties seek to limit the obligations of the EU and the EU Member States to their respective areas of autonomy (or, in EU language, ‘competence’). There are several ways by which this is sought to be achieved. One, common in multilateral treaties, is by making a ‘declaration of competences’ in relation to the various subject matters covered by the treaty.<sup>24</sup> Another is to define the ‘parties’ as ‘the EU, or the Member States, or the EU and the Member States, in accordance with their respective powers’.<sup>25</sup> A third, more recent, innovation is to permit the EU to determine the proper respondent in any arbitral proceedings.<sup>26</sup> There is much that can be said about these techniques, but what is presently important is that, in the absence of a statement, effective in international law, that limits the respective responsibilities of the EU and its Member States under a given treaty, they will each be fully responsible for

---

<sup>21</sup> Footnote 2 of Article IX:1 of the WTO Agreement.

<sup>22</sup> Piet Eeckhout, ‘The EU and its Member States in the WTO – Issues of Responsibility’ in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford: OUP, 2006) at 451.

<sup>23</sup> WTO Panel Report, *EC and Certain Member States – Large Civil Aircraft (Airbus)*, WT/DS316/R, adopted 1 June 2011, paras 7.174-7.175.

<sup>24</sup> See, eg, Heliskoski, above at n 15.

<sup>25</sup> There has been virtually no academic commentary on these provisions. Hoffmeister considers that they determine responsibility according to whether a treaty provision specifies that it relates to an EU or Member State competence, and that in cases of shared responsibility or silence both the EU and its Member States (or State) might be responsible. See Frank Hoffmeister, ‘The Contribution of EU Practice to International Law’ in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford: OUP, 2008), at 65.

<sup>26</sup> Article 8.21 of the Comprehensive Economic and Trade Agreement (CETA) between the Canada and the EU and its Member States (initialled 26 September 2016; revised version published 29 February 2016; not yet signed ([http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)))

performing that treaty.<sup>27</sup> At most, one might argue that their liability would be joint in terms of quantum, an issue which is of little relevance to WTO law.<sup>28</sup>

## 2. Identifying the UK's separate rights and obligations

### (a) Introduction

If the UK already possesses all of the rights and obligations of an original WTO Member, it will continue to possess all of these rights and obligations once it leaves the EU. What will change is the EU's role in exercising these rights and assuming responsibility for the performance of these obligations, a role which will be henceforth be exercised solely by the UK. What remains is to identify the UK's rights and obligations. This is relatively unproblematic in relation to WTO rights and obligations that apply on an *erga omnes partes* basis with respect to all WTO Members, or to WTO Members within an established category, such as developing countries, or when the UK is specifically named.<sup>29</sup> No more, therefore, needs to be said about the UK's rights and obligations under the WTO Agreement, the GATT 1994 (except for Article II), the GATS (except for Article XX), TRIPS, or the DSU.

This said, questions arise in relation to rights and obligations concerning the UK's commitments under Article II of the GATT 1994 and Article XX of the GATS, in particular when these commitments give the EU, by name, rights or obligations that are quantified, for example, in the form of quotas and money (such as the right to subsidise agricultural production up to a certain amount). In these areas, it would undoubtedly be practical to arrive at an interpretation of the UK's rights and obligations, extracted from the EU's rights and obligations, by negotiation. However, this practical solution should not obscure the fact that what is at issue is the proper identification of existing legal rights and obligations, even if this is a difficult task. In the absence of agreement, there will be no alternative but for disaffected WTO Members to enforce their rights in WTO dispute settlement proceedings, if they consider that the UK is not respecting these rights, or has otherwise nullified or impaired benefits accruing under the GATT 1994 or the GATS.

---

<sup>27</sup> Eeckhout, above at n 22, at 457.

<sup>28</sup> At present, financial compensation is not awarded in WTO law, although it can form part of a settlement. The question of quantum might also however be relevant for determining 'appropriate countermeasures' under the SCM Agreement in terms of the amount of a prohibited subsidy rather than by the injury caused. This approach was adopted by the Arbitrator in *Brazil – Aircraft (Article 22.6 – Canada)*, WT/DS46/ARB, 12 December 2000, para 3.60. But it has not been followed, however, inter alia because of the difficulties that would arise in the case of multiple complainants. See eg Arbitrator, *US – FSC (Article 22.6 – US)*, WT/DS108/ARB, 30 August 2002, para 6.27. On joint and joint and several liability between the EU and its Member States in the WTO, see Flett, above at n 17.

<sup>29</sup> This includes special safeguard measures in the form of increased customs duties as permitted under Article 5 of the WTO Safeguards Agreement. The latest available figures are for the marketing year 2012/2014, showing the activation of price-based (but not volume-based) special safeguard mechanisms for poultry and sugar products: see WTO Committee on Agriculture, Notification – European Union (special safeguard measures), G/AG/N/EU/19, 4 May 2014.

## (b) The UK's share of tariff rate quotas of other WTO Members

The first question concerns the identification of the UK's share of tariff rate quotas offered by other WTO Members to the EU on a country-specific basis, such as the US tariff rate quota for cheese. Article XIII:2 of the GATT 1994, which applies to tariff rate quotas,<sup>30</sup> permits an importing WTO Member to allocate quotas, in the first instance on a non-discriminatory basis.<sup>31</sup> However, Article XIII:2(d) also offers an importing WTO Member the option of reaching an 'agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned' or to allocate a quota to such parties based on their share of total imports<sup>32</sup> during a previous representative period,<sup>33</sup> 'due account being taken of any special factors which may have affected or may be affecting the trade in the product.'<sup>34</sup> As between these two options, there is a clear incentive for WTO Members with a substantial interest in supplying a given product to reach an agreement on the allocation of a quota, because such an agreement does not need to take any account of imports from WTO Members without a substantial interest or from non-WTO Members.<sup>35</sup> This is because, in the absence of such an agreement, an importing WTO Member is permitted to allocate those shares both to WTO Members without a substantial interest<sup>36</sup> and to non-WTO Members,<sup>37</sup> provided that it does so on a non-discriminatory basis vis-à-vis the 'other' WTO Members without a substantial interest.<sup>38</sup>

For present purposes, the important point is that the UK has a right to access another WTO Member's tariff rate quota when it has a substantial interest in those exports. It also has a right to access a quota, on a non-discriminatory basis, when that WTO Member has allocated part of that quota to any WTO Member without a substantial interest or to non-WTO Members. Of course, this may not lead to a perfect result. It could be that, unbundled from the EU's exports as a whole the UK's exports will be sufficiently low that the UK will not have a substantial interest guaranteeing it a share of the quota. But that is a commercial, not a legal problem.

---

<sup>30</sup> Article XIII:5 of the GATT 1994.

<sup>31</sup> Article XIII:2(a) of the GATT 1994. Article XIII:2 aims to 'mimic' the comparative advantages of all WTO Members producing like products which might participate under a quota: WTO Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II/US)*, WT/DS27/AB/RW2/ECU, adopted 22 December 2008, para 338.

<sup>32</sup> WTO Appellate Body Report, *EC – Poultry*, WT/DS69/AB/R, adopted 23 July 1998, para 106.

<sup>33</sup> The representative period is undefined, but is usually the previous three years: WTO Panel Report, *EC – Bananas III*, adopted 25 September 1997, para 7.94. There may however be special circumstances, such as market distortions, in which case other periods may be used: WTO Arbitrator, *EC – Bananas III*, WT/DS27/ARB/US, 9 April 1999, paras 5.29-5.33.

<sup>34</sup> Article XIII:2(d) has been called a *lex specialis* to Article XIII:1 of the GATT 1994. See WTO Panel Report, *EC – Bananas III*, WT/DS27/R, *ibid*, para 7.75.

<sup>35</sup> Such agreements are only ever provisional, and are subject to revision in the event that any WTO Member, new or otherwise, acquires or increases its substantial interest in supplying the products concerned. See WTO Panel Report, *EC – Bananas III*, above at n 33, para 7.92.

<sup>36</sup> WTO Panel Report, *EC – Bananas III*, *ibid*, para 7.75.

<sup>37</sup> WTO Panel Report, *EC – Poultry*, WT/DS69/R, adopted 23 July 1998, para 230, n 140.

<sup>38</sup> WTO Panel Report, *EC – Bananas III*, above at n 33, para 7.75. It remains unclear whether it is possible to leave the 'other' shares unallocated, or whether they must be allocated to WTO Members with a substantial interest, or to those without a substantial interest.

### (c) The UK's share of EU's import tariff rate quotas

A more complicated question concerns the identification of the UK's commitment to provide certain country-specific tariff rate quotas as listed in the EU's existing schedule.<sup>39</sup> There are two practical solutions. One would be for the UK to bind a commitment to cover all products currently the subject of an EU tariff rate quota at the duty rate of that quota; the other would be for the UK to reach an agreement with all suppliers, or all suppliers with a substantial interest, which would then be protected under the first sentence of Article XIII:2(d) of the GATT 1994. It is more difficult to determine the UK's legal obligations in the absence of either of these practical solutions.

This said, it is important to note that the UK has existing legal obligations in respect of its share of the tariff rate quotas set out in the EU schedule. Fundamentally, then, as the EU schedule is part of the GATT 1994,<sup>40</sup> this is a question of treaty interpretation, which means that the task of identifying the UK's tariff rate quota obligations is to determine the common understanding of all WTO Members at the time the EU tariff rate quotas were last incorporated as an integral part of the GATT 1994.<sup>41</sup> The key question is whether it was agreed, or, more likely, assumed that EU Member States would not have access to those quotas. If this is the case, which is almost certain, the UK's commitments in respect of the EU's tariff rate quota can be read to exclude EU-27 imports. However, this does not dispose of the issue, because schedules cannot override other WTO obligations, including Article XIII:2(d) of the GATT 1994.<sup>42</sup> This means that, provided that there is no other basis on which the EU-27 exports those products to the UK, such as a free trade agreement or a waiver,<sup>43</sup> that, as an ordinary WTO Member, the EU-27 would have a right to access any UK tariff rate quota for any product for which it has a substantial exporting interest. That, of course, reduces the value of any tariff rate quota for other suppliers.

---

<sup>39</sup> See above at n 9 for the EU's schedules. Existing tariff rate quotas are notified in WTO Committee on Agriculture, Notification – European Union (tariff rate quotas: imports), G/AG/N/EU/30, 2 September 2016 and WTO Committee on Agriculture, Notification – European Union (tariff rate quotas: administration), G/AG/N/EU/31, 2 September 2016. Quotas were filled above 70% for the following products, not all of which are produced in the UK: beef, lamb, chicken, turkey, garlic, millet, sugar, cheddar, potatoes, carrots and turnips, sweet peppers, dried onions, grapes, apples, pears, almonds, maize, rice, manioc starch, pasta, chocolate, cereals, preserved fruit, fruit juices, wine, corn gluten, dog, cat and certain animal feed: WTO doc G/AG/N/EU/30, *ibid*.

<sup>40</sup> Article II:7 of the GATT 1994.

<sup>41</sup> This would be in accordance with the introductory language of the GATT 1994 or, later, in accordance with Article II:7 of the GATT directly. It should be noted that, as it amounts to a treaty revision, the critical date for interpreting a schedule is the date of its certification or, failing that, its latest legal revision (on which see below at text to n 87), not the earlier date that the quota was first agreed, which is relevant for a non-violation complaint: WTO Appellate Body Report, *EC – Computer Equipment*, WT/DS62/AB/R, adopted 22 June 1998, para 150.

<sup>42</sup> In WTO Appellate Body Report, *EC – Poultry*, above at n 32, paras 96 (and also 96-102), the Appellate Body stated that a tariff rate quota resulting from a renegotiation of a concession under Article XXVIII was still subject to the non-discrimination rule in Article XIII.

<sup>43</sup> GATT 1947 Panel Report, *EEC – Newsprint*, L/5680, adopted 20 November 1984, para 55; WTO Arbitrator, *EC – Bananas III*, above at n 33, para 5.8.

There are various options which could counteract such a result. One would be to conclude a free trade agreement with the EU providing for duty free access to the products at issue. Another would be to treat the UK's withdrawal from the EU as a 'special factor' that, according to Article XIII:2(d), can justify adjustments to the allocation of shares based on global trade patterns. Such an interpretation would allow the EU to be excluded from the allocation of the quota. However, the Note to Article XI, which is applicable to Article XIII:2(d),<sup>44</sup> indicates that 'special factors' relate to changes in productive capacity, not changes of a legal nature. Second, and related to this, the result of such an interpretation would be to nullify the rights, under Article XIII:2(d), of any WTO Member leaving a customs union to access a tariff rate quota agreed when that WTO Member was a member of that customs union. This would be a result with significant systemic implications.

Another possibility is to ignore the question of the UK's legal obligations, and focus rather on the reasonable expectations of the traditional importers under a tariff rate quota. This can be done by means of a non-violation complaint against the UK under Article XXIII:1(b) of the GATT 1994, based on a claim that the UK has nullified or impaired benefits accruing to that complainant under the GATT 1994 by a measure, regardless of whether or not it violated a WTO rule that was not reasonably expected at the time that the tariff rate quota was negotiated.

Such a claim would have to satisfy several conditions. It would need to be established that the UK's leaving the EU, and its consequent new schedule, nullified benefits accruing to that WTO Member under Article XIII of the GATT 1994. As quota shares under Article XIII:2 are subject to fluctuation, a disaffected WTO Member could not have had any reasonable expectation of exporting any given quantities under the tariff rate quota. However, it may be that it was not expected at the time the tariff rate quota was agreed that non-UK EU imports would be allocated shares of that quota.<sup>45</sup> Second, the measure at issue must have been reasonably unexpected at the time the tariff rate quota was agreed. This would be the case for any tariff rate quota agreed at most between 6 August 1974, the date of circulation of the first EU schedule including the UK,<sup>46</sup> and the date when that WTO Member can be said to have been aware of the possibility that the UK might leave the EU.<sup>47</sup> Any such expectations would also have to be limited to imports into the UK from EU Member States at the time the relevant tariff rate quota was agreed. If these conditions are made out, then a complaining WTO Member would be entitled to a mutually satisfactory adjustment, which may include compensation.<sup>48</sup> If successful, that complainant would then be entitled to a

---

<sup>44</sup> The Note Ad Article XIII:4 of the GATT 1994 makes a cross reference to the Note Ad Article XI, which states that '[t]he term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement'.

<sup>45</sup> WTO Panel Report, *EC – Poultry*, above at n 37, para 293, noting that Brazil had not made such a claim, suggesting implicitly that it might have made such a claim.

<sup>46</sup> WTO Panel Report, *Japan – Film*, WT/DS44/R, adopted 22 April 1998, paras 10.64-10.70.

<sup>47</sup> That date might be, at the earliest, 1 December 2009, the date of entry into force of the Treaty on European Union, Article 50 of which provides for the possibility of an EU Member State leaving the EU, or 25 April 2013. It might also be somewhat later, on 23 June 2016, when the UK voted to leave the EU, but arguably no later than that date.

<sup>48</sup> Article 26(1)(b) and (d) of the WTO Dispute Settlement Understanding.

‘mutually satisfactory adjustment’ from the UK, which would most likely be achieved by 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).

Based on this analysis, it would be prudent for the UK to bind, unilaterally, tariff rate quotas on products covered by existing EU tariff rate quotas based on imports from all sources, including the EU-27, over a representative period of three years.<sup>49</sup>

#### **(d) The UK’s share of the EU agricultural subsidy commitments**

A next question concerns the UK’s share of the EU’s commitment not to subsidise agricultural production beyond a given annual quantum, or, to describe this from the other direction, the UK’s share of the EU’s liberty to subsidise up to that quantum. In reality, this question is unlikely to be very controversial,<sup>50</sup> as the EU’s actual domestic subsidies are only 7% of its scheduled amount<sup>51</sup> and the EU has already abolished export subsidies,<sup>52</sup> in line with the 2015 WTO Nairobi Ministerial Decision on Export Competition.<sup>53</sup> Nonetheless, the theoretical question remains.

Once again, WTO law supplies no direct rules or principles for determining the UK’s share of a shared liberty to subsidise agricultural production. One might wonder whether the origins of the UK’s and EU’s respective subsidy commitments would be a suitable basis for this calculation. As with tariff rate quotas, this might be relevant with respect to a non-violation complaint. Given the reduction in commitments over time, however, it is unlikely that any WTO Member would make such a claim. A more realistic option would be based on the UK’s existing shares of the EU’s subsidisation policy, either in terms of its (higher) contributions or its (lower) receipts.<sup>54</sup> As between these two options, given that the purpose of the commitments is to reduce distortions in the domestic marketplace, it is suggested that the stronger basis for determining the UK’s right to subsidise would be the UK’s receipts from the EU’s Common Agricultural Policy (CAP), rather than its contributions to that policy,

---

<sup>49</sup> See above at n 33. An interesting question, raised by David Roberts, concerns the appropriate date for determining a currency conversion should the UK wish to convert specific duties from euros/quantity to sterling/quantity.

<sup>50</sup> Alan Matthews, ‘WTO dimensions of a UK “Brexit” and agricultural trade’, <http://capreform.eu/wto-dimensions-of-a-uk-brexite-and-agricultural-trade/>, 5 January 2016. Statistical issues resulting from transit of products to the UK via other EU ports (the ‘Rotterdam issue’) may add a certain practical difficulty. See Yorkshire Agricultural Society, *The Implications of ‘Brexit’ for UK Agriculture*, 2016, [http://yas.co.uk/uploads/files/YAS\\_FSN\\_Brexit\\_-\\_Full\\_Report.pdf](http://yas.co.uk/uploads/files/YAS_FSN_Brexit_-_Full_Report.pdf), at 29.

<sup>51</sup> In the marketing year 2012/13, domestic support was €5.9bn of a possible €72.3bn: WTO Committee on Agriculture, Notification – European Union, WT/G/AG/N/EU/26, 2 November 2015.

<sup>52</sup> In the marketing year 2014/2015, export subsidy commitments were zero out of a possible €8bn, WTO Committee on Agriculture, Notification – European Union, G/AG/N/EU/29, 20 May 2016.

<sup>53</sup> WTO Ministerial Conference, Decision on Export Competition, 19 December 2015, WT/MIN(15)/45, para 6. For discussion of the legal value of this decision see Lorand Bartels, ‘The Relationship between the WTO Agreement on Agriculture and the SCM Agreement: An Analysis of Hierarchy Rules in the WTO Legal System’ (2016) 50 *Journal of World Trade* 7, at 17-19.

<sup>54</sup> Lars Brink, ‘UK Brexit and WTO farm support limits’, 13 July 2016, <http://capreform.eu/uk-brexit-and-wto-farm-support-limits/>.

which are based on the UK's share of EU gross national income.<sup>55</sup> It is therefore suggested that the UK's subsidy commitment be calculated as the ratio of UK:EU CAP payments (over a representative period of three years) applied to the EU's total subsidy commitments.<sup>56</sup>

### 3. The UK's GATS schedules

A next question concerns the UK's commitments under Article XX of the GATS.<sup>57</sup> These are generic, subject to limitations on an EU Member State basis. These can easily be transposed to a new exclusive UK GATS schedule.

There is however a slightly niche issue concerning the territorial limitation to the schedule annexed by the EU and the UK to the GATS, according to which '[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'.<sup>58</sup> Read strictly, this clause would have the effect that, after leaving the EU, the UK would have no real commitments, as its commitments would apply to a territory in respect of which it has no jurisdiction. This would lead to the situation that the UK would possess all rights and *erga omnes partes* obligations, but it would have no obligations in relation to specific commitments under the GATS. This is not impossible. It appears to be assumed that the WTO agreements apply to territories of WTO Members that are not subject to a schedule (such as the Faroe Islands, a dependency of Denmark).<sup>59</sup> Nonetheless, this might risk a situation of *rebus sic stantibus*, and in any case a different outcome seems more likely.

This outcome is based on the principle of customary international law that a treaty only binds a state in respect of its territory 'unless a different intention appears from the treaty or is otherwise established'.<sup>60</sup> It might be arguable that the territorial application clause represents just such a different intention.<sup>61</sup> However, it is readily apparent that this clause was predicated upon the EU Member States continuing as such. It is therefore suggested that, once the UK leaves the EU, that clause be read either as applying to UK territory

---

<sup>55</sup> If one were prepared to draw an analogy between a right to subsidise agricultural production and movable property related to territory, this would also accord with the rule in the Vienna Convention on Succession of States in Respect of State Property providing that 'movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State'. Art 14(2)(b) and Art 15(1)(d) of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (done 8 April 1983, not yet in force).

<sup>56</sup> In 2015, the UK's share of Common Agricultural Policy receipts was 6.7%. See spreadsheet attached to Alan Matthews, 'Impact of Brexit on CAP budget net balances for remaining Member States', 5 August 2016, <http://capreform.eu/impact-of-brexit-on-cap-budget-net-balances-for-remaining-member-states/> at [https://drive.google.com/file/d/0B6KoZ\\_bJBQHYbzQ0cFNsMG5VTGc/view?usp=sharing](https://drive.google.com/file/d/0B6KoZ_bJBQHYbzQ0cFNsMG5VTGc/view?usp=sharing).

<sup>57</sup> European Communities and their Member States – Schedule of Specific Commitments, GATS/SC/31, above at n 12.

<sup>58</sup> *ibid.*

<sup>59</sup> Matthew Kennedy, 'Overseas Territories in the WTO' (2016) 65 *International and Comparative Law Quarterly* 741, at 745.

<sup>60</sup> Article 29 of the Vienna Convention on the Law of Treaties, (opened for signature 23 May 1969; entered into force on 27 January 1980) (1980) 1155 UNTS 331.

<sup>61</sup> Schedules of concessions are an integral part of the GATT 1994, according to Article II:7 of this agreement.

described in that clause, or else ignored entirely, with the result that the UK's commitments would extend to all UK territory unless expressly limited.

This is not as radical a suggestion as might be thought. According to the 'moving frontiers' principle, a rule of customary international law,<sup>62</sup> when territory passes from one state to another, the treaties of the former state cease to apply to that territory and the treaties of the latter state commence applying to that territory. Importantly, this rule includes limitations on treaties, such as reservations,<sup>63</sup> and there is no reason why this rule would not likewise apply to territorial limitations. The result, which accords with common sense, would be that the territorial application clause in the current EU schedule would simply cease to be relevant to the UK once it leaves the EU, and this could be reflected by means of a rectification to that schedule.

In any case, one might doubt whether, in practice, this territorial application is likely to cause much controversy. As a rule, WTO Members are unlikely to complain that a schedule covers too much, rather than too little. For example, when the UK notified the WTO that its commitments now covered the Isle of Man, it made no exception for services<sup>64</sup> notwithstanding the fact that the EU treaties do not apply to the Isle of Man in respect of services,<sup>65</sup> and this passed without any objections by any other WTO Members.

#### **4. Procedures for rectifying and modifying schedules of concessions**

These considerations inform the procedure applicable to the UK in annexing new schedules to the GATT 1994 and the GATS.

The current procedure for making changes to a GATT 1994 schedule is set out in the 1980 Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions,<sup>66</sup> which is binding as part of the GATT 1994.<sup>67</sup> This Decision distinguishes between modifications, on the one hand, and 'other changes,' on the other. Paragraph 1 describes modifications, relevantly, as follows:

---

<sup>62</sup> The 'moving frontiers' rule is codified in Article 15 of the 1978 Vienna Convention on the Succession of States in Respect of Treaties (1978) 1946 UNTS 3, in force 6 November 1996. In 1990 Germany notified the GATT 1947 contracting parties that it was now applying the GATT 1947 to the territory of the former German Democratic Republic and East Berlin, which it had absorbed. See GATT Doc L/6759, 31 October 1990. There were no objections.

<sup>63</sup> First report on succession of States in respect of treaties, by Sir Francis Vallat, Special Rapporteur, International Law Commission, Commentary to Article 14 [later 15], UN Doc A/CN.4/278 (1974) II(1) Yearbook of the International Law Commission 1, at 210, para 11.

<sup>64</sup> Confirmed by email communication with the UK Foreign and Commonwealth Office.

<sup>65</sup> Article 355(5)(c) of the Treaty on the Functioning of the European Union, discussed in Fiona Murray, *The European Union and Member State Territories* (The Hague: TMC Asser, 2012), at 152.

<sup>66</sup> GATT Contracting Parties, Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of 26 March 1980, L/4962.

<sup>67</sup> Introductory language to the GATT 1994, para 1(b)(iv).

Changes in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII shall be certified by means of Certifications.

It is notable that each of the provisions listed in this paragraph is concerned with negotiations following a desire of a WTO Member to increase duties or other barriers to trade. Article II:5 grants an affected WTO Member a right to consult another WTO Member if the first Member considers that a product is not receiving the expected treatment contemplated by a concession; Article XVIII grants developing country WTO Members a right to raise trade barriers for the purposes of infant industry production, subject to compensation; Article XXIV:6 refers to the procedure in Article XVIII for WTO Members wishing to increase as a result of forming a regional trade agreement; Article XXVII grants WTO members the right to withdrawing or withholding concessions initially negotiated with a party that never became or ceased to become a WTO Member; and Article XXVIII establishes a right for a WTO member wishing to modify or withdraw a concession, and a mechanism for consulting and negotiating compensation with certain other affected WTO Members. Consequently, in fact, subsidy commitments cannot be 'modified', because they cannot be increased.<sup>68</sup>

By contrast, paragraph 2 of the 1980 Decision describes other 'changes' as follows:

Changes in the authentic texts of Schedules shall be made when amendments or rearrangements which do not alter the scope of a concession are introduced in national customs tariffs in respect of bound items. Such changes and other rectifications of a purely formal character shall be made by means of Certifications.

It is a little noticed fact that paragraph 2 describes not only formal rectifications, which are concerned with accuracy, but also 'other amendments and rearrangements which do not alter the scope of a concession'. Given that paragraph 1 is concerned with modifications that negatively affect concessions, it is submitted that this phrase must refer not both to changes that are neutral, and to those that lead to improvements to bound concessions. Support for this proposition may be found in the parallel GATS Council Decision, which distinguishes between ordinary modifications under Article XXI of the GATS,<sup>69</sup> on the one hand, and 'modifications ... which consist of new commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of the existing commitments'.<sup>70</sup> Objections to ordinary modifications, if not withdrawn, lead to arbitration to determine appropriate compensation,<sup>71</sup> while objections to modifications that do not alter schedules, at least initially, lead to revised versions of

---

<sup>68</sup> Bernard Hoekman and Petros Mavroidis, 'MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS', EUI Working Paper RSCAS 2016/6, at 8 n 24.

<sup>69</sup> WTO Council for Trade in Services, Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules), 19 July 1999.

<sup>70</sup> WTO Council for Trade in Services, Decision on Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, adopted 14 April 2000, S/L/83, 18 April 2000. The Procedures are set out in S/L/84, 18 April 2000.

<sup>71</sup> Article XXI:3(a) of the GATS.

non-altering modifications,<sup>72</sup> although, if objections persist, modifications submitted as non-altering are treated as ordinary modifications,<sup>73</sup> and therefore also result in arbitration.

There is, admittedly, a difficulty with this proposition, which lies in the fact that, at least in the context of the GATT 1994, it has been flatly contradicted by the Appellate Body. In *EC – Bananas III (Art 21.5 – Ecuador II/US)*, the Appellate Body said:

The ordinary meaning of the term ‘modify’ appears to include both the situation in which the scope of a concession is reduced (for example, a tariff increase) and when the scope is expanded (for example, a tariff reduction).<sup>74</sup>

It is submitted, however, that the Appellate Body is wrong. This is because it fails to respect the basic fact that renegotiations of concessions are intended to maintain the expected benefits of those concessions overall, even if new concessions are made in different sectors as a result.<sup>75</sup> It therefore makes no sense to say that changes to a schedule are to be seen as ‘modifications’ when those benefits are not in question, still less when they are being improved. Indeed, the Appellate Body itself seems to recognise this, implicitly, in the sentence following that just quoted. It said ‘whether the proposed modification actually constitutes a reduction or an expansion of the concession may only become clear in the course of the renegotiations’.<sup>76</sup> While seemingly supportive, this sentence actually undermines its approach because as it is based on the assumption that the proposed reduction of a concession triggers the need for renegotiations. But the only damage caused by a lowered tariff is in the context of preference erosion, which is not a benefit protected by the WTO.<sup>77</sup> At most, and sensibly, this sentence recognises that there can be disagreement about whether a proposed change does, in fact, reduce the scope of a concession. But this is an argument about ambiguity; it is not an argument that any change counts as a ‘modification’.<sup>78</sup>

Even if the Appellate Body ruling is sound, it is suggested that there should be a carve out for new schedules scheduled by newly autonomous WTO Members, based on practice

---

<sup>72</sup> WTO CTS, S/L/84, above at n 70, para 3.

<sup>73</sup> *Ibid*, para 3.

<sup>74</sup> WTO Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II/US)*, above at n 31, para 450.

<sup>75</sup> Petros Mavroidis, *The Regulation of International Trade*, Vol 1, The GATT (Cambridge, MA: MIT, 2015) at 374.

<sup>76</sup> WTO Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II/US)*, above at n 31, para 450.

<sup>77</sup> The GATT 1947 Panel Report, *Germany – Sardines*, G/26, circulated 31 October 1952, not adopted, found in favour of a nonviolation complaint due to preference erosion on sardines due to the lowering duties on herring and sprats. The reason for the report, however, was specifically that Germany had assured the complainant, Norway, that this would not occur.

<sup>78</sup> Perhaps this statement can be explained by the unusual way in which the point arose. Ecuador had argued that because the EU had twice commenced renegotiation procedures under Article XXVIII of the GATT, a particular EU quota, the validity of which was at issue in the proceedings, could not have expired. The Appellate Body objected, as explained, to reach the conclusion that ‘the fact that the European Communities initiated twice Article XXVIII negotiations to modify its concessions is not conclusive as to whether the tariff quota concession did not expire on 31 December 2002’. *Ibid*, para 452. It would have been sufficient for the Appellate Body to say that the views of the EU on the matter were irrelevant; there was no need to draw precisely the opposite conclusion.

under the GATT 1947, which should, in the first instance, be treated as ‘changes’ in a schedule not amounting to a modification within the meaning of paragraph 1 of the 1980 Decision. This practice is found in paragraph 5 of the 1980 Decision, which states:

The procedure of Certification under this Decision may be applied for the establishment of consolidated Schedules or of new Schedules under paragraph 5(c) of Article XXVI, wherein all changes are modifications or rectifications referred to in paragraphs 1 or 2.

Some background is necessary. Article XXVI:5(c) of the GATT 1947 permitted newly autonomous customs territories, which in practice was mainly decolonized independent states, to which the GATT 1947 had been made applicable, to succeed to GATT contracting party status,<sup>79</sup> upon request and with the sponsorship of the responsible (or formerly responsible) GATT contracting party.<sup>80</sup> Upon succession, the newly autonomous territory inherited all of the rights and obligations that were previously applicable to its territory, including scheduled commitments (and qualifications)<sup>81</sup> which the formerly responsible contracting party had made effective in respect of its territory.<sup>82</sup> Sometimes, this meant that

---

<sup>79</sup> Alberta Fabbriotti, ‘Article XXVI’ in Rüdiger Wolfrum, Peter-Tobias Stoll and Holger Hestermeyer (eds), *WTO – Trade in Goods*, Max Planck Commentaries on World Trade Law, Vol 5 (Leiden: Brill, 2011). The right of succession – to be deemed a contracting party – was automatic, on request, provided that the request was sponsored by the responsible (or formerly responsible) contracting party. See GATT Council, Minutes of Meeting 25 April to 1 May 1963, GATT Doc C/M/15, 15 May 1962, at 7. The automaticity of this procedure is reflected in the more accurate use, at least after 1963, of the terminology of ‘succession’: Tatsuro Kunigi, ‘State Succession in the Framework of GATT’ (1965) 59 *American Journal of International Law* 268, at 272 and 275. Going beyond the usual rules in some respect, newly autonomous territories were also permitted a grace period prior to deciding whether to apply for succession (during which, to a limited extent, they were treated as *de facto* GATT contracting parties): GATT Contracting Parties, Application of the Provisions of Article XXVI:5(c), Recommendation adopted by the Contracting Parties on 1 November 1957, GATT Doc L/748, 21 November 1957. This reflection period was later extended indefinitely, until the WTO required that all Members submit schedules. See para 1(a) of the WTO Ministerial Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization, and, extending the period, WTO General Council, *Decision on the Finalization of Negotiations on Schedules on Goods and Services*, 31 January 1995, WT/L/30, 7 February 1995. Craig VanGrasstek, *The History and Future of the World Trade Organization* (Geneva: WTO, 2013), at 125, notes that ‘[s]everal of the countries that were still negotiating by the time the WTO came into being might well have regretted not taking advantage of this option.’

<sup>80</sup> The criterion of sponsorship was solely evidentiary. It was to clarify for other GATT 1947 contracting parties that the territory at issue was, in fact, autonomous in matters covered by the GATT 1947.

<sup>81</sup> As the 1961 Working Party on the application of Article XXXV to Japan said ‘there could be no doubt that a government becoming a contracting party under Article XXVI:5(c) does so on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question.’ See GATT Contracting Parties, Report of the Working Party on Article XXXV Review, GATT Doc L/1545, 6 September 1961, para 19. See also below, at text to n 98, for an example of a state leaving a customs union GATT contracting party and assuming its commitments. This is in accordance with the rule stated in Article 20(1) of the 1978 Convention, above at n 62.

<sup>82</sup> Contrary to earlier practice, the GATT Panel Report, *Jamaica – Margins of Preference*, GATT Doc L/3485, adopted 2 February 1971, para 13, para 13, determined that the date for determining the application of GATT obligations (in casu, preference margins under Article I:4 of the GATT 1947) was the date on which the original obligations were undertaken (in casu, 1947), not the date on which autonomy was acquired (in casu, 1962). The assumption of previously applicable commitments contrasts with Article 20(2) of the 1978 Convention, above at n 62, according to which newly independent states were permitted to formulate new reservations upon their notification of succession to a multilateral treaty.

succeeding contracting parties preferred not to inherit these rights and obligations, and rather accede to the GATT 1947 as a new contracting party.<sup>83</sup> Importantly, and relevantly to the present situation, the submission of new GATT 1947 schedules in this context were treated as other 'changes', except when the schedule required an increase in duties beyond the bound rate.<sup>84</sup>

It is submitted that the UK's departure from the EU is the same as the situation described by Article XXVI:5(c) of the GATT 1947, insofar as both concern the acquisition by a customs territory of full autonomy in matters covered by the GATT 1947, or WTO. It is true that the purpose of Article XXVI:5(c) was to establish a right of succession to contracting party status, whereas the UK is already a full WTO Member. However, both the UK and such new independent states share the same need to adopt, in their own name, the schedule of concessions that formerly applied to their territories by virtue of a GATT contracting party (or WTO Member) with autonomy and responsibility in matters covered by the GATT 1947 and WTO respectively. It is submitted that for this reason, practice under Article XXVI:5(c) of the GATT 1947 in relation to the identification of the commitments of the newly autonomous customs territories should 'guide' the WTO, even though technically this practice only applies to cases falling under Article XXVI:5(c), which is no longer operative. Still, this is another reason why the UK is entitled to submit a new schedule to the GATT 1994 as a 'change' not amounting to a modification, so as to enable the UK to avoid having to go through the procedures for modification.

The significance of submitting new UK GATT 1994 and GATS schedule for certification as 'changes' and rectifications within the meaning of the respective procedures is that other WTO Members have limited grounds on which they may object. Paragraph 3 of the 1980 Decision states as follows:

The draft containing the changes described in paragraphs 1 and 2 shall be communicated by the Director-General to all the contracting parties and shall become a Certification provided that no objection has been raised by a contracting party within three months on the ground that, in the case of changes described in paragraph 1, the draft does not correctly reflect the modifications or, in the case of changes described in paragraph 2, the proposed rectification is not within the terms of that paragraph.

The 2000 GATS Decision does not expressly restrict the grounds on which objections may be made, but it does specify that '[a] Member making an objection should to the extent possible identify the specific elements of the modifications which gave rise to that objection.'<sup>85</sup> By implication, the same grounds should be relevant here, or else there would

---

<sup>83</sup> An example was Cambodia, which preferred not to commit to the high scheduled commitments that had been applied to its territory (as part of the Indo-China customs union) under France's schedule of concessions. See GATT Contracting Parties, Accession of Cambodia: Statement by Cambodia, GATT Doc L/900, 1 November 1958. It was similar for Tunisia, as discussed by Kunigi, above at n 79, at 279.

<sup>84</sup> For example, Cameroon accepted that it would have been required to renegotiate its schedule under Article XXIV:6 of the GATT 1947 if it had to increase its tariff bindings due to its membership of a customs union. See GATT, Accession by Newly-Independent African States to the GATT, INT(62)142, 3 November 1962, para 18.

<sup>85</sup> *ibid*, para 2.

be no need to distinguish between modifications and other changes. On the other hand, there is no practice of rejecting an improperly grounded objection, even if the WTO Director-General by implication has this power, in order to administer these procedures.

This means that, regardless of the UK's proposed schedules, and even if they represent, on a proper analysis, other 'changes' and rectifications and not modifications, it is likely that other WTO Members will object in any case. Given this, it is important to note that the legal effect of certification is evidentiary. The right of WTO Members to modify or withdraw their commitments is 'absolute'<sup>86</sup> and stems from the relevant provisions of the GATT 1994 and GATS,<sup>87</sup> not from secondary instruments on certification. In the event of an objection to certification, as a matter of practice it will either be the last certified schedule is applicable or, should this be contested, the schedule that, legally, reflects the commitments made by a WTO Member in accordance with proper procedures.<sup>88</sup> In the present case, it matters little if WTO Members refuse to certify the UK's new schedule. What counts is that it UK accurately reflects its existing commitments, as they are currently expressed in the EU GATT 1994 and the EU and UK GATS schedules. Ultimately, if there is any dispute as to whether a UK measure violates a scheduled commitment, the matter, including the definition of that commitment, will fall to be interpreted in WTO dispute settlement proceedings.

## 5. Government Procurement Agreement 2014

A final question concerns the UK's status under the revised WTO Government Procurement Agreement (GPA 2014), a plurilateral WTO agreement. Article XXII:1 states that:

This Agreement shall enter into force on 1 January 1996 for those governments<sup>1</sup> whose agreed coverage is contained in the Annexes of Appendix I of this Agreement, and which have, by signature, accepted the Agreement on 15 April 1994, or have, by that date, signed the Agreement subject to ratification and have subsequently ratified the Agreement before 1 January 1996.

<sup>1</sup> For the purpose of this Agreement, the term 'government' is deemed to include the competent authorities of the European Union.

It is the EU alone, and not the UK, that is the relevant party to this agreement.<sup>89</sup> Accordingly, it is at present the EU that is solely responsible for its obligations under the agreement, including in respect of the actions of government authorities that are organs of its Member States. It is submitted that on leaving the EU, the UK will succeed to the GPA in

---

<sup>86</sup> Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO* (Cambridge: CUP, 2001), at 15.

<sup>87</sup> Cf John Jackson, *World Trade and the Law of GATT* (Cambridge, MA: The MIT Press, 1997), at 75.

<sup>88</sup> See, eg, WTO Panel Report, *Russia – Tariff Treatment*, WT/DS485/R, circulated 12 August 2016, para 7.54; GATT Panel Report, *Jamaica – Margins of Preference*, above at n 82, para 13; WTO Council for Trade in Services, *ibid*, S/L/84, para 4 (by implication).

<sup>89</sup> Agreement on Government Procurement (1996) 1915 UNTS 103, n 2. Four EU Member States, but not the UK, ratified the GPA 1995: *ibid*. The revised 2014 Agreement on Government Procurement was however only accepted by the EU, not by these Member States: WTO, *Status of WTO Legal Instruments*, above at n 7, at 128-29.

its own right, in accordance with rules of customary international law on the succession of states to treaties, and practice under the GATT 1947, which 'guides' the WTO.<sup>90</sup>

There are two preliminary points. First, whether states succeed to treaties is independent of whether they succeed to the membership of international organizations, where practice is mixed.<sup>91</sup> Second, while it is true that the 1978 Convention on Succession of States in respect of Treaties is, strictly speaking, inapplicable to predecessors which are international organizations and not states, there is practice concerning the succession of states from unions and federations formed by them with other states. This practice is virtually uniform: in almost all cases the state resuming its autonomy succeeded to the rights and obligations in treaties entered into by that federation or union.<sup>92</sup> This includes, in particular, trade agreements. A 1971 study by the UN Secretariat, having reviewed state practice, concluded that 'in general the members of a union remain bound by the trade agreements of the union following its dissolution, at least if there is a clear continuity of the entity involved.'<sup>93</sup> This accords with the basic rule in the 1978 Convention, which is that states succeed to treaties concluded by the predecessor state that apply to them or, where relevant, their territory.<sup>94</sup>

There is also GATT 1947 practice to the same effect. This concerned the Federation of Rhodesia and Nyasaland (also called the Central African Federation), which was formed by

---

<sup>90</sup> Article XVI:1 of the WTO Agreement.

<sup>91</sup> Konrad Bühler, *State Succession and Membership in International Organizations* (The Hague: Kluwer, 2001), at 309-12, concludes his book with the proposition that international organizations that are functionally limited, particularly in relation to political issues, recognize the succession of membership, while others, such as the United Nations, do not. Practice under the GATT 1947, a functionally specific quasi-organisation, is open to interpretation. Most cases of direct succession involve the independence of former colonies, which was specifically regulated under Article XXVI:5(c) of the GATT 1947. Beyond this, there are examples of unions that succeeded to the contracting party status of a constituent entity, such as the Federation of Rhodesia and Nyasaland, but also contrary practice, such as that concerning the Czech and Slovak Republics, which acceded as new GATT contracting parties upon the dissolution of Czechoslovakia, which had been a GATT contracting party. On the other hand, these new contracting parties were permitted to retain Czechoslovakia's rights and obligations without any need for negotiations, so *de facto* this can be considered a case of succession, supporting Bühler's argument, though he does not refer to this example.

<sup>92</sup> DP O'Connell, *State Succession in Municipal Law and International Law*, Vol II: International Relations (Cambridge: CUP, 1967), at 164-178, discussing the dissolutions of the Union of Colombia (1829-31), the German Confederation (1866), the United Arab Republic (1960), the Mali Federation (1960), the Federation of Rhodesia and Nyasaland (1963), and the separation of Singapore from Malaysia (1965). O'Connell is critical of cases in which a succeeding state did not assume the obligation incurred by the federation or union, such as Mali (*ibid*, at 172). He distinguishes these cases from those of secession involving dismemberment, such as the dismemberment of the Austro-Hungarian monarchy (1919) and Rwanda-Burundi (1962), but even here a general principle can be discerned, with anomalies explained on their facts, in favour of the continuity of treaties for the newly emerged states (*ibid*, at 178-182).

<sup>93</sup> UN Secretariat, Succession of States in respect of bilateral treaties: third study prepared by the Secretariat [trade agreements], UN Doc A/CN.4/243/Add.1, 24 March 1971, para 182.

<sup>94</sup> Article 34 of the 1978 Vienna Convention, above at n 62. There is a possible exception for newly independent ex-colonies, and perhaps others in a similar situation (eg Ethiopia-Eritrea Claims Commission, *Prisoners of War – Eritrea's Claim 17*, Partial Award (2003) 26 RIAA 23, para 35), for which succession may not be automatic, but which may rather be at their election: Articles 16 and 17, *ibid* (with some exceptions). This is a controversial rule, but for present purposes this does not matter, as this rule mirrors, and is in part drawn from, the practice under Article XXVI:5(c) of the GATT 1947.

Southern Rhodesia, Northern Rhodesia and Nyasaland in 1953, and which succeeded to the contracting party status of Southern Rhodesia.<sup>95</sup> The United Kingdom, which at the time retained a measure of sovereignty over all of these parties under general international law, certified that the Federation had the requisite autonomy in matters covered by the GATT 1947,<sup>96</sup> but in fact it would seem that this was a case of straightforward succession under international law, not under Article XXVI:5(c) of the GATT 1947. The relevant decision contains a preamble stating that ‘by the said Declarations [of the United Kingdom and Southern Rhodesia], the Government of Southern Rhodesia has notified the CONTRACTING PARTIES that the Federal Government has succeeded to the rights and obligations under the Agreement formerly accepted by Southern Rhodesia’.<sup>97</sup> It is only after this that the contracting parties declared that the Federation was ‘deemed to be a contracting party’. The Federation therefore apparently succeeded as a contracting party on two bases: first, as the successor to Southern Rhodesia, which took effect as of the unilateral declaration by Southern Rhodesia, and second, independently, by declaration of the GATT contracting parties, most likely, although this provision was not cited in relevant respects, under Article XXVI:5(c). For present purposes, of course, it is the first element of this practice that is relevant. It should suffice that the UK declares unilaterally that it succeeds to the EU’s status as a party to the GPA 2014 in respect of itself and its territory.

This precedent also has a second dimension. The Federation dissolved in 1963, at which point Southern Rhodesia notified the GATT contracting parties as follows:

In resuming its former status as a contracting party to the GATT, the Southern Rhodesian Government accepts, in respect of the territory of Southern Rhodesia

- (i) the rights and obligations incurred by the former Federal Government under various protocols, declarations and recommendations, including the disinvocation of Article XXXV in respect of Japan;
- (ii) that Schedule XVI once again becomes Southern Rhodesia's Schedule in the GATT and that the rights and obligations of the former Federal Government in relation to the concessions negotiated with other contracting parties will be applicable to Southern Rhodesia; and
- (iii) the base date provisions of the Decision of 19 November 1960 and the provisions of the further Decision of 19 November 1960 relative

---

<sup>95</sup> GATT, Central African Federation – Joint Statement issued by the United Kingdom and Southern Rhodesian Delegations for the Information of the Contracting Parties, L/132, 22 September 1953, discussed in GATT Contracting Parties, Summary Record of the Thirteenth Meeting, 6 October 1953, SR.8/13, 12 October 1953. See also GATT, Central African Federation – Joint Notification by the Governments of the United Kingdom and Southern Rhodesia, L/172, 6 November 1953 and GATT Contracting Parties, Federation of Rhodesia and Nyasaland – Declaration of 1 November 1954, L/278, 11 November 1954.

<sup>96</sup> GATT Contracting Parties, Federation of Rhodesia and Nyasaland – Declaration, L/278, *ibid.*

<sup>97</sup> *ibid.*

to the Customs Treatment for Products of United Kingdom Dependent Territories.<sup>98</sup>

There was no objection from other GATT 1947 contracting parties, which may be taken as acquiescence in this claim. For present purposes, the relevance of Southern Rhodesia's assumption of the rights and obligations incurred by the Federation is that this occurred by way of right. Again, this supports the proposition that the UK is entitled at its election to succeed to the GPA 2014 in its own name.

Finally, it is relevant that other GPA 2014 parties have, at least to some extent, acknowledged that the EU is a party to the GPA 2014 in part on behalf of its Member States. In a GPA Committee Decision approving the modification by the EU of its Annexes by adding entities of new EU Member States, the GPA Committee '[r]ecogniz[ed] that ... these ten countries will, as member States of the European Communities, form part of the European Communities for the purposes of the Agreement and be bound by the Agreement'.<sup>99</sup> Strictly speaking, this cannot mean that these EU Member States are bound directly by the GPA 2014. It probably refers to the fact that the EU Member States are bound under EU law by the GPA 2014. However, what this also means, it may be suggested, is that other WTO Members have expressly recognized that the EU's status as party to the GPA 2014 is at least in part on behalf of its Member States in respect of their territory. This should be sufficient to estop those other GPA 2014 parties from rejecting a UK claim to succeed to this agreement in its own name.

## 6. Conclusion

To summarise, on the basis of the analysis offered here, the UK already today possesses full WTO rights and obligations under the WTO multilateral trade agreements, even if these are, at present, for the most part, exercised and performed on its behalf by the EU. In many respects it is not complicated to identify these rights and obligations, and this is particularly true of rights and obligations applicable *erga omnes partes* to all WTO Members (or categories of Members). There is a question concerning the territorial limitation in the UK's GATS schedule, according to which the schedule only applies to EU territory, but it is argued, based on the 'moving frontiers' rule, that this limitation can be ignored in the UK's new schedule.

Complications arise where the UK's rights correspond to part of an obligation, determined on a quantified basis, that is currently set out in the EU and EU Member State schedules.

---

<sup>98</sup> GATT, Submission by the Southern Rhodesian Government for the Information of Contracting Parties, GATT Doc L/2167, 4 March 1964. This claim also had a practical incident, insofar as Southern Rhodesia notified the GATT contracting parties shortly after this declaration that it was withdrawing a safeguard measure that had been imposed by the Federation. GATT, Southern Rhodesia – Article XIX – Modification of Restrictions on Certain Textile Piece-Goods, GATT Doc L/2213, 28 April 1964.

<sup>99</sup> WTO Committee on Government Procurement, Decision Pursuant to Article XXIV:6(a) of the Agreement on Government Procurement, 23 April 2004, GPA/78, 4 May 2004 (EU-25), WTO Committee on Government Procurement, Decision Pursuant to Article XXIV:6(a) of the Agreement on Government Procurement, 8 December 2006, GPA/90, 11 December 2006 (EU-27) and WTO Committee on Government Procurement, Decision Pursuant to Article XXIV:6(a) of the Agreement on Government Procurement, 27 June 2013, GPA/118, 27 June 2013 (EU-28).

This is the case for the EU's right to subsidise agricultural production up to a set limit. It was suggested that the UK should adopt a subsidy commitment calculated by applying the UK:EU ratio of payments from the EU's Common Agricultural Policy over the past three years to these commitments. As to the UK's quantified obligations corresponding to the EU's country-specific tariff rate quotas, it is likely that, in practice, quotas are likely to be established with relevant WTO Members by agreement, in accordance with Article XIII:2 of the GATT 1994. However, such agreements should be reached against the background of the fact that the UK currently possesses obligations with respect to these tariff rate quotas; it is just difficult to know what these obligations mean in practice. The real problem, however, is that regardless of how a quota might be determined, the EU-27 would have a right to access this quota under Article XIII:2. This would raise the possibility of a non-violation complaint, on the basis that at the time the quotas were agreed, they would exclude imports from other EU Member States. To forestall such a complaint, it was suggested that the UK could offer tariff rate quotas corresponding to recent imports, including from the EU-27, over a representative most likely three-year period.

As to the procedure to be followed, it was suggested that the UK should submit new schedules under Article II of the GATT 1994 and Article XX of the GATS, as other 'changes' and rectifications to the current EU schedule, in respect of itself and its territory. It is almost certain that other WTO Members will object to these schedules, but, importantly, these objections do not require the UK to enter into renegotiation of the UK's entire schedule, as is sometimes thought to be the case. Other WTO Members hold no veto over the determination of the UK's schedules or over its legal position within the WTO in any other respect. At most, objections might lead to arbitration on the value of a compensatory adjustment following an alleged modification of the UK's services concession (which might be zero) and dispute settlement proceedings in respect of any given measure alleged to violate the UK's commitments or that otherwise nullifies or impairs benefits under the GATT 1994 or the GATS. However, it is also submitted that the UK will be able to forestall any such proceedings by determining its tariff rate quota and subsidy commitments along the lines suggested here.