

'WTO terms': understanding the ongoing Brexit default

*With the EU insisting that it cannot (or will not) do a trade deal with the UK within a year, and Boris Johnson stating that he will not extend the transition period beyond 31 December 2020, it is more important than ever to settle the issue of whether trading with the EU on WTO terms is feasible – and perhaps even desirable if the alternative is a 'bad' trade deal. While Remainers insist that hardly any countries trade on WTO terms alone, **Dr Lee Rotherham** shows that the UK can easily access 'side deals' with the EU.*

In advancing the notion that 'no deal is better than a bad deal', Brexiteers have frequently pointed out that some of the world's largest economies (including the top two, China and the USA) do huge amounts of trade with the EU on WTO terms.

'Ah,' respond gloomy Remainers, 'but hardly any countries trade on WTO terms alone! They have a range of smaller agreements in place that make trading with each other easier.'

It now looks almost certain that the Withdrawal Agreement will be ratified. But with the EU insisting that it cannot (or will not) do a trade deal with the UK within a year, and Boris Johnson stating that he will not extend the transition period beyond 31 December 2020, it is more important than ever to settle the issue of whether trading with the EU on WTO terms is feasible – and perhaps even desirable if the alternative is a 'bad' or 'overly clunky' trade deal. Or to boil it down even further, what do people really mean when they use such expressions?

It is indeed true that the EU and many other countries trade on WTO terms, but also apply a varying number of 'additional

agreements'. These reduce specific areas of trade friction, and – importantly but a detail far less appreciated – legally allow cooperation and funding to happen in fields considered of common worth. So, how extensive are these 'extra agreements'?

To answer this question, it is useful to look at the example of the USA, whose EU trade volume is broadly speaking on a par with the UK's. As TTIP has not been ratified, the EU trades with the United States under WTO terms, modified by such bilateral agreements.

There are in fact 147 agreements listed on the EU Treaties database as being in force between the USA and the EU. For comparison, the EU is listed as having 71 agreements with China, and 97 with Russia – despite there being a form of trade war currently ongoing with the latter.

Of those 147 US agreements, it turns out that 85 of them are in fact international agreements to which both the EU and the US are signatories, but along with many other states. The European Commission is not the guardian of these. This means that **the UK can opt to sign up to these agreements in its own right**. The WTO Agreement on General Procurement (which fits in closely with established UK procurement principles) is one example. [1]

That leaves just 62 agreements, of which a small number are annexes to existing arrangements accommodating some comparatively small change.

Not all of these bilateral agreements concern 'trade' as traditionally understood. For example, there are seven bilaterals on security, policing and defence – an area the EU is keen to see the UK cooperate closely in (too closely, in fact). A further eight bilaterals provide legal bases for mutual cooperation in research and education, and a further three for nuclear cooperation. These are straightforward legal

bases that allow joint activity with budgets. Note that an agreement on nuclear cooperation is somewhat forced on the EU given the shared nuclear reactor is physically sited in the UK.

Furthermore, some of the agreements cover areas where the UK has existing treaty commitments, or might be assumed to retain current ones assumed on its part by the EU. An example here is an accord signed by the EU and US on opening up government procurement to international bids. Through EU membership, the UK is already signed up to the WTO Agreement on General Procurement. Its governing principle fits in closely with established UK procurement policy, and we can assume that both parties will remain covered by such commitments as the UK will not seek to denounce its affiliation.

But the example is particularly striking because the UK (as more culturally inclined to free market public sector bids) is a disproportionately heavy user of the common database for notifications, meaning that continental businesses would be disproportionately affected if the UK was no longer allowed into a common scheme. In this case, the potential impact on EU businesses would run into billions. It is thus in the EU's economic interest to encourage the UK to sign up to the system.

In the event of the EU and UK not agreeing an FTA by the end of this year, realistically it is likely that a number of these agreements will be incorporated into any mitigating 'padded no deal'. The fact that these agreements are set in precedent and largely uncontroversial means for the most part they can be cut and pasted. The principle was already ceded when the Commission started listing a number of areas where it was prepared to carry existing EU agreements across (such as over medical radiological supplies) if the UK were simply willing to reciprocate.

It is a legitimate area for debate as to what proportion of

these 'WTO+' deals will genuinely be subject to negotiating difficulties. It is not credible however to simply rule them out or ignore them. In particular, one argument that has been used is that some of these agreements are 'long' and therefore will take time to negotiate. This is a complete misreading (or lack of reading) of the actual content of most of these texts beyond glancing at the section headings.

Only a couple of these areas appear to genuinely require negotiation from a UK perspective, and then from a starting point of full compliance and mutual recognition of standards and certifiers. (On a motivational point, the UK is also inconveniently sited as an obstacle for the EU's transatlantic flight path if an aviation safety deal is spitefully blocked; and Heathrow slots remain prized.)

We might take the example of the mutual recognition of compliance testing. This is a principle also variously deployed in agreements with Canada, New Zealand, Japan, Australia, and Israel. These allow for testers in the other party to be considered as legitimate authorities to sign off an export as compliant with the market rules of the other. In the case of the US-EU protocol, the six product sectors cover Telecommunications, Electromagnetic Compatibility (EMC), Electrical Safety, Recreational Craft, Medical Devices, and Pharmaceutical Good Manufacturing Practices. A WTO+ deal might include carrying this across for the UK. A WTO++ agreement could extend the list, and in a best case scenario could extend the direct applicability of standards surety provided through more fulsome mutual recognition of standards. Realistically, we anticipate the Commission would not universally agree to this, though there might be individual areas where something approaching this remains deliverable.

Separately, amongst the treaty listings, there are 85 agreements that are not bilateral but multilateral. Only one of these appears to be implementing an EEA-US agreement – the majority are international agreements.

These existing treaties demonstrate that there is precedent for the EU to extend, by means of separate agreements, its relationship with third parties with which it trades on WTO terms. In the absence of an FTA, these could be replicated and possibly developed further without raising the question of the 'sanctity' of the Single Market in the eyes of the Commission.

It is also worth here noting that this does not preclude the UK adopting a policy of unilateral mitigation to ease customs transition at the end of the 'transition period'. It would be possible for the UK to continue to recognise existing administrative mechanisms for products coming in from the Single Market, since (say) an imported ironing board considered safe on 31 December 2020 will still be built to the same previously-recognised standards if it arrives at a UK port from the EU on 1 January 2021. It should, however, be noted that WTO rules preclude this approach from being a permanent set of affairs unless incorporated into a treaty or applied universally to all imports, including those outside the EU.

However, a short term deployment of this principle, associated with a declaration that the UK was heading towards greater free trade principles and was not looking at such as being more than a stopgap under exceptional circumstances, would not generate complaints at the WTO unless it stretched into the medium term – which would in any event be evidence of policy gridlock and an extreme level of negotiating failure by Whitehall – a bigger problem in its own right.

It is probable, though not certain, that what will emerge from 2020 is a set of agreements based on FTAs and gradual divergence (more on the tell-tale pointers here). However, it is also within the grounds of possibility that talks may stall, with fisheries already identified as an area of Commission pig-headedness. It pays to have a back up plan, both as good policy but also as an incentive to the other side to act reasonably. If a default based on WTO terms plus

uncontroversial bilaterals is it, we ought to better understand it.

Of course, the more complex a bilateral agreement is, the more tempting it becomes for the European Commission to become recalcitrant and try to make negotiating capital out of it. However, with respect to this catalogue of agreements, those who idly moot such a threat exists miss two key points. Firstly, that a number of these merely legally enable an agreed multilateral agreement, meaning that the UK can retain its status without being subject to any casual threats. Secondly, that the remainder were so uncontroversial that they were agreed without raising any particular concerns for the Commission, even towards a country such as the United States where there are certain tensions over regulatory approaches.

In short, to suggest that the UK is facing a complete lock out from these simple agreements that bolt onto WTO terms is farcical. Such an extreme outcome would require UK-EU relations to deteriorate into an actual trade war during the course of 2020 – a scenario that is ridiculously remote.

[1] In broad terms, the UK can access these multilaterals without the EU's consent. While technically the EU could go out of its way to object, the key factor is that the Commission is not the arbiter: a third party or panel would adjudicate, taking time.