

# THE STATUS OF THE UNITED KINGDOM UNDER INTERNATIONAL AGREEMENTS AND AT THE WTO DURING THE BREXIT TRANSITION PERIOD AND BEYOND

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Legal Briefings

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The withdrawal of the United Kingdom from the EU creates a number of unprecedented issues for international agreements in which the EU participates, whether by itself, together with its Member States or even where the EU it is not a party but to which its Member States have become parties acting on behalf of the EU. Do the rights and obligations under these agreements continue to apply to the United Kingdom and its territory and if so who enjoys or bears them and under what conditions?

The [Withdrawal Agreement](#) addresses the issue for the purposes of the transition period. In its Article 129(1), it includes these EU agreements within the body of EU law that is to apply “to and in” the United Kingdom during that period. A footnote to that provision goes on to state that “[t]he Union will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements.”

As a matter of international law, the EU and the United Kingdom cannot unilaterally change the rights and obligations of third countries, and it would be a matter for each third country to consider its position in response to the EU/UK notification. However, the solution provided in the Withdrawal Agreement is likely in most cases to be considered convenient and to be tacitly accepted and followed.

Article 129(2) of the Withdrawal Agreement goes on to specify that the United Kingdom shall not participate in the work of any bodies set up under these agreements unless the United Kingdom “participates in its own right” or is invited to do so by the EU. It is not entirely clear if this covers all agreements to which the United Kingdom is formally a party or whether it is supposed to limit United Kingdom participation to matters over which the EU has no competence or does not have exclusive competence. Practice will no doubt clarify matters and in this connection, it is of interest to note that the United Kingdom was appointed as president of the Conference of the Parties to the United Nations Framework Convention of Climate Change (“UNFCCC”) with EU approval. This will involve the United Kingdom “participating in the work” of the entire UNFCCC and the Paris Climate Accord despite the existence of EU legislation and EU competence on the matter and so one would expect the concept of the United Kingdom participating “in its own right” to be given a wide interpretation.

The transition period is currently set to expire at the end of 2020. At that point the transition period solution will cease to apply. It will then fall to the UK and the relevant third party states to define the rights and obligations under these agreements, for example by entering into agreements or declarations to extend or re-define their application in the new circumstances.

To help prepare for this, Article 129(4) of the Withdrawal Agreement grants the United Kingdom a limited derogation to the EU principle of “sincere cooperation” (which it is considered would normally prevent the United Kingdom negotiating on its own behalf), and allows the United Kingdom during the transition period to “negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union.”

Negotiating such agreements within the transition period will be challenging. “Roll-overs” by third countries of existing EU agreements into similar agreements with the United Kingdom is likely in many cases, and a number have indeed already been agreed, but some important trading partners may prefer to hold out in the hope of seeking additional concessions.

One agreement where preparations are well advanced is the WTO Agreement which we consider in more detail.

## The WTO Agreement

The EU has duly made the [notification](#) to the WTO relating to the transition period that it promised to make in the footnote discussed above and has gone further to address the issue of what happens after the end of the transition period stating that “[a]t the end of the transition period, the United Kingdom will no longer be covered by the international agreements [of the EU]. This is without prejudice to the status of the United Kingdom in relation to multilateral agreements to which it is a party in its own right.”

The United Kingdom has also submitted a [communication](#) in which it sets out its view of its status at the WTO in more detail and makes clear its view that it is “an original Member of the WTO, in its own right.” It also makes clear that during the transition period it considers that it is covered by the obligations of the EU and will also continue to be treated as a Member State of the European Union for the purpose of ongoing WTO disputes to which the European Union is a party.

The United Kingdom Communication also recalls the discussions that have been proceeding in the WTO on how to untangle the obligations of the EU and the United Kingdom.

On 19 July 2018 the United Kingdom circulated in the WTO a draft [goods schedule](#) that it proposed should apply to its trade with other WTO Members after withdrawal. This was presented as a “technical rectification” on the basis that it is simply transcribing for the United Kingdom the commitments that already applied to it as a Member State of the EU. Discussions are continuing with certain Members about aspects of that schedule. It cannot be certified and enter into force until these discussions have concluded.

The more complex issues relate to the tariff rate quotas (“TRQs”) that the EU had agreed to for the whole of its territory, without specification of Member State of import, and also the commitments made to limit agricultural subsidies (known as Aggregate Measures of Support or “AMS”) without specifying where the subsidies would be deployed.

In late 2017, the [EU and the United Kingdom jointly proposed](#) to split the TRQs on the basis of historical data (the AMS are not problematic since the level of agricultural subsidies have been much reduced since they were negotiated). That notification is not public but the resulting TRQs can be discerned from the EU’s [internal legislation](#). The EU intends to apply the split of TRQs that it has proposed to the WTO provisionally until there is agreement at the WTO on the new schedules. In its recent Communication, the United Kingdom announces that it has initiated a process under Article XXVIII GATT with respect to the TRQs that it is to apply and negotiations and consultations with relevant Members are continuing.

A number of countries have publicly [objected](#) to the EU/UK methodology on splitting the TRQs both on the basis of the data used and in principle. The right to export a certain quantity of goods at lower duties to anywhere in the EU is worth more than the right to export one part to the United Kingdom only and to export the other part to the remaining EU Member States (the “EU-27”). Accordingly, many countries have requested adjustments or compensation.

As regards the new United Kingdom [GATS schedule](#) the negotiations appear to be more advanced since the United Kingdom reveals in its Communication that there is only one WTO Member that still has concerns.

In its notifications of the draft schedules the United Kingdom stated that it would notify the date of application of its new GATT and GATS schedules at a later date. Presumably it hopes that this will be at the end of the transition period but if the negotiations are not completed by then, it will, in accordance with practice, apply the new schedules in any event.

One WTO agreement in respect of which the arrangements for independent UK participation has been resolved is the WTO Agreement on Government Procurement (“[the GPA](#)”), a plurilateral agreement providing access to government procurement markets on agreed terms in some 19 territories around the world.

On 5 June 2018, the United Kingdom submitted an application for accession in its own right to the GPA. Essentially, it proposed to continue to be bound by the commitments that applied to it already in exchange for continued access to the markets of the other parties. The decision on the accession of the United Kingdom to the GPA (“[the Decision](#)”) sets out the precise terms and specifies how they will enter into force. This Decision provides for the UK to remain bound by the EU’s membership of the GPA until the date on which it leaves the EU or the expiry of the transition period provided for in a withdrawal agreement but that the UK needs to deposit an instrument of accession (containing the obligations set out in the decision on accession, possibly adjusted to take account of recent changes) as provided for under Article XXII:2 of the GPA. If this should be unsuccessful for some reason, the UK would cease to be covered by the GPA until such time as it accedes – although if there is substantive agreement it may be expected that other GPA Members will not cease applying the GPA to the United Kingdom in the interim.

The EU does not appear to have submitted revised schedules omitting the United Kingdom from its commitments.

There are a series of other WTO agreements and arrangements concluded since the creation of the WTO to which the UK is not a party but to which it has announced in its communication that it will continue to be bound during the transition period and of which it will “confirm its continued acceptance” on expiry of the transition period. These are the Trade Facilitation Agreement, the Protocol Amending the TRIPS Agreement, the 2015 Protocol to the Agreement on Trade in Civil Aircraft, the Ministerial Declaration on Trade in Information Technology Products and the Ministerial Declaration on the Expansion of Trade in Information Technology Products.

## Conclusion

There is much scope for discussion and debate as to the future of the rights and obligations relating to the United Kingdom, arising out of international agreements of various kinds entered into while the United Kingdom was a Member State of the EU, following its withdrawal from the EU. Pragmatic solutions are being found, for example as illustrated by the developments at the WTO. However, the extent of the interaction over 40 years of EU membership is such that all may not be resolved by the end of the transition period.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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