




Brexit: WTO Goods Schedules

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Brexit & UK Goods Schedules

- UK must establish its own goods schedules so as to fulfill its WTO Membership obligations
 - UK to **replicate** - 'rectification of schedules'
- UK proposal in G/MA/TAR/RS/570 of 24 July 2018 (communication dated 19 July 2018) - Tariffs, TRQs, AMS, export subsidies
- “Pursuant to paragraph 3 of the Decision of 26 March 1980 (BISD 27S/25), the United Kingdom hereby submits, for certification, the attached draft Schedule XIX-United Kingdom, containing rectifications to its concessions and commitments as a consequence of its exit from the European Union.”
- If no objection is notified to the Secretariat within 3 months, Schedule XIX-United Kingdom will be deemed to be approved and will be formally certified.

Brexit & EU Goods Schedules

- EU proposal to modify schedules – only TRQs
- G/SECRET/42 of 24 July 2018

Situation of EU goods schedules

- EU25 – certified WT/LET/1220 (effective 1 December 2016)
- EU ITA expansion – certified WT/LET/1265 (effective 27 May 2017)
- EU28 proposed G/MA/TAR/RS/506
 - Not yet certified due to objections

EU Goods Schedules: tariffs & AMS

- Tariffs: Economic value of EU tariff concessions will substantially decrease – Members have a valid basis to file a non-violation complaint against the EU under GATT Article XXIII:1(b)
 - A non-violation complaint may be used to challenge any measure applied by another Member, even if it does not conflict with GATT 1994, provided that it results in “nullification or impairment of a benefit”
- AMS: EU has not proposed reduction of AMS

Whether WTO Members are bound by uncertified schedules

- EU-Poultry (China) –panel report DS492
 - China – out of quota duties for several poultry tariff lines were higher than certified bound tariff; violation of Article II:1 GATT
 - Panel – ‘certification is not a legal prerequisite that must be completed before a Member modifying its concessions can proceed to implement the changes agreed upon in Article XXVIII negotiations at the national level’
- In this case, EU had completed Article XXVIII:5 negotiations (with Thailand and Brazil) & notified to all Members, but not yet certified.

Whether WTO Members are bound by uncertified schedules

- DS492 EU-Poultry (China) might have limited application: 1) it is a panel report and most importantly 2) Brexit is a different case – Article XXVIII negotiations have not even opened (UK) or concluded (EU) yet
- Practically, EU28 goods schedule appears marginally different from EU25 (Romania, Bulgaria & Croatia account for 1-2% of EU28 GDP) & in most cases less trade restrictive than EU25 (except in the case of AMS, and perhaps some tariff lines)

Which goods schedule is legally binding

EU

EU is legally bound by EU25 schedule. OK to apply more liberal import policy (uncertified EU28 schedule) or if Art XXVIII negotiations on specific tariff lines have been concluded, were conducted in line with Art XXVIII requirements & notified to all Members (ref DS492)

UK

In principle, no goods schedule means no bound tariffs but it means that UK has zero AMS & can probably not apply country-specific TRQs (violative of MFN). At the same time, the UK unilaterally bound itself to apply the EU28 schedule as its own schedule, so it is probably bound to its proposed goods schedule. Both views are valid

Does UK have a right to succeed to the EU's rights and obligations

- UK may assert that it has a right to succeed to the EU's rights and obligations in accordance with customary international law on state succession
- Vienna Convention on the Succession of States in respect of Treaties, Art 2(1)(b) – «succession of States»
- «the replacement of one State by another in the responsibility for the international relations of territory»
- EU is not a State, but an supranational organisation

Is copy pasting EU schedules by UK WTO-consistent?

- Inconsistent with GATT Article XXVIII:4 read in conjunction with para 2 of the Procedures for Modification and Rectification of Schedules
- Rectification – amendments which are of a purely formal character and which do not alter the scope of the concession
- AMS, SSG, TRQs, INRs – clearly not a rectification
- Footnotes referring to the 'relevant provisions of the UK' instead of EU – goes beyond formal change and alter scope of concessions

Tariffs –SSG

- SSG was available for products that were ‘tariffed’ in the Uruguay Round
 - Whether UK has automatic right to SSG
 - Calculation of tariff equivalent - different for UK than for EC12 as a whole. **In some cases, the UK bound tariff might be lower than the current EU’s bound tariff**
 - 1993 UR modalities – GATT doc MTN.GNG/MA/W/24:
 - The calculation of the tariff equivalents, whether expressed as ad valorem or specific rates, shall be made using the actual difference between internal and external prices in a transparent manner **using data, data sources and definitions as specified in Annex 2**. Data used shall be for the years 1986 to 1988.
 - Calculation of price trigger (included in goods schedule) – different for UK than for EC12 as whole
- Absent these calculations, UK cannot maintain (price-based) SSG for these lines

Tariffs – Initial Negotiating Rights (INR)

- For several tariff lines, Members maintain Initial Negotiating Rights (INR) – 286 in NAMA, most of them held by US & Canada
 - There are references to concession(s) having been "initially negotiated" in Articles II, XVIII, XXVII and XXVIII of GATT 1994. It stems from those references that a WTO Member should be understood to be an INR-holder, for the purposes of the GATT, any time it has originally negotiated with another WTO Member a specific concession. (WTO Sec note ‘Negotiating rights under Art XXVIII of GATT 1994’, JOB(02)/93)
 - The INRs that have been created after UK joined the EC in 1973 do not apply to UK (those created before might remain valid)
- UK in principle cannot be an INR holder for any tariff line in any other WTO Member’s schedule
- In principle, UK should remove the INRs from its own Schedule

Tariffs – INRs in UK schedule

INR holder	Number of tariff lines (in NAMA)
CA	39
CA-US	35
US	33
YU	27
NZ-US(ex Squid)-US(ex Oysters preserved in airtight containers)	19
CA-CL-US	16
JP-US(ex canned)	11
NZ-US	8
JP	7
US (ex for other purposes than use as a power or heating fuel)	6
CA-US-AU(ex Jarrah Wood(Eucalyptus Marginata))-CL(ex Laurel)-CA-US (ex of walnut)	5
IN-PK	5
SR	4
US (ex for other purposes than use as a power or heating fuel)	4

Tariffs – footnotes with reference to ‘relevant provisions of the UK’

- 2. Entry under this subheading is subject to conditions laid down in the relevant provisions of the United Kingdom. (**1006 10 10 Rice for sowing**)
- 3. Entry under this subheading is subject to the production of a certificate issued in accordance with the conditions laid down by relevant provisions of the United Kingdom. (**0202 3050 -Crop, chuck-and-blade and brisket cuts**)
- 4. Only **poultry eggs** which fulfil the conditions laid down in the relevant provisions of the United Kingdom are eligible for entry under this subheading.
- 7. Entry under this subheading of **albumins** to be rendered unfit for human consumption is subject to conditions laid down in the relevant provisions of the United Kingdom.
- 36. "In the case of the varieties: Basmati 370, Basmati 386, Type 3 (Dehradun), Taraori Basmati (HBC-19), Basmati 217, Ranbir Basmati, Pusa Basmati, Super Basmati, and Kernel (Basmati), the duty shall be zero, subject to conditions laid down in the relevant provisions of the United Kingdom." (**10062000 - - Husked (brown) rice**)

Article XXVIII

Three types of renegotiations under Article XXVIII:

- (i) Normal three year renegotiations / 'open season' negotiations (para 1)
- (ii) Renegotiations in 'special circumstances' after authorization by the Ministerial Conference (para 4)**
- (iii) Renegotiations following a reservation made (para 5)

(When) can UK commence negotiations under Article XXVIII?

- UK can only independently engage in trade negotiations only **after** it officially terminates EU Membership (entry into force of Withdrawal Agreement)
- Unless EU grants UK this right
 - Recommendation for a COUNCIL DECISION authorising the opening of negotiations with a view to apportioning the Union's WTO concessions on Tariff Rate Quotas annexed to the General Agreement on Tariffs and Trade 1994 in view of the withdrawal of the United Kingdom from the Union:

"The United Kingdom is hereby authorised to undertake the necessary procedures with a view to setting out its own schedule of concessions and commitments annexed to the GATT 1994 as well as any quantitative limits therein, **including negotiations with other WTO Members on its portion of the tariff rate quotas** currently included in the Union's schedule of concessions and commitments annexed to the GATT 1994." (EC proposal COM 2018.311 of 22 May 2018) – not yet adopted

Article XXVIII:4 negotiations

- UK may freely modify its concessions within a period of 60 days after negotiations have been authorized by the Ministerial Conference, subject to providing compensatory concessions on other products (Article
- If no agreement is reached, affected WTO Members (INR+PSI+substantial interest) have the right to withdraw 'substantially equivalent concessions' (time limits to be respected)

Baseline for negotiations with UK – which schedule?

- EU25 latest certified
- 1980 Procedures for Modification and Rectification of Schedules:
 - 'changes in the authentic texts of Schedules ... shall be certified by means of Certification'
 - 'formal effect will be given to the changes in the schedules by means of Certifications'

Article XXVIII – Principal Supplier Interest and Substantial Interest

- Renegotiations under Article XXVIII of the GATT 1994 – with Members that have INR and principal supplying interest
- PSI
 - Based on import share - Interpretative Note 4 to para 1 of Art XXVIII - “if that Member has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated or would, in the judgement of the CONTRACTING PARTIES, have had such a share in the absence of discriminatory quantitative restrictions maintained by the applicant contracting party.”
 - Based on export share - the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession)
- Consultations with those with ‘substantial interest’ – usually >10% import share
- In practice, often agreement with PSI + SI

PSI and SI - MFN trade

- 3. In the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII) or substantial interest, **only trade in the affected product which has taken place on an MFN basis shall be taken into consideration.**

PSI and SI -

UK imports under EU GSP, GSP+ and DFQF imports might be taken into account for calculation of PSI or substantial interest?

- “However, trade in the affected product which has taken place under noncontractual preferences shall also be taken into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation»

Example 1 – Oranges (HS 080510)

Exporters	Imported value in 2013	Imported value in 2014	Imported value in 2015	Imported value in 2016	Imported value in 2017
World	247314	223741	204813	210716	243169
Spain	89824	79525	78185	72978	82594
South Africa	63307	54936	51006	44127	61214
Egypt	45526	38263	31115	40103	34771
Germany	7586	8792	13123	13630	24789
Netherlands	10177	13352	6663	10623	10643
Peru	3181	1457	1962	5620	9549
Morocco	5865	5555	5780	4701	4743
→ Brazil	2558	2542	2723	1987	3057

Example 2 - T-shirts, singlets and other vests of cotton, knitted or crocheted (HS 610910)

Exporters	Imported value in 2013	Imported value in 2014	Imported value in 2015	Imported value in 2016	Imported value in 2017
World	1705790	1878030	1717261	1564253	1688201
Bangladesh	427074	475269	486798	438103	462930
Turkey	291721	320699	241566	217291	221538
India	175377	205954	178825	167767	168579
China	137396	130968	117386	93359	94947
Netherlands	56563	60564	52260	68077	92564
Italy	47031	51659	52363	60093	78420

Apportionment of TRQs between EU and UK

- Apportionment of TRQs - 'Clear and objective methodology, which was agreed jointly with UK'
- Main rule - UK usage share for each individual TRQ over a representative period (2013-2015) / Entire scheduled TRQ volume for EU28
- $EU28\ TRQ = UK\ TRQ + EU27\ TRQ$

Issues with TRQ 'apportionment'

- 'Apportionment' decreases the value of present access to EU28 market
 - Flexibility
- Data
 - Based on calculations from EU database which logs imports coming through the TRQ - verifiability
 - What is reflected – the country of imports of the country in which the import license is issued or the office where the request for license is filed
 - 2013-2015 – is it representative?
 - Underfill
 - 'Current access opportunities' and 'minimum access opportunities' would need to be calculated by UK
 - E.g. 13. For existing non-automatic import licensing, non-tariff measures maintained through state trading enterprises and like measures, current access opportunities shall be defined as the quantity of product imported during the base period

UK's access to EU27 TRQs and EU's access to UK TRQs

- UK will be 3rd country to EU like any other WTO Member
 - UK would have access to EU27 TRQs that are on 'erga omnes' basis and the 'other' category
 - Also, EU will have access to UK TRQs 'erga omnes' & 'other'
 - Currently, UK/EU does not use EU/UK TRQs, so why should UK/EU have access to revised EU/UK TRQs?
- TRQ should be set to zero for UK in new EU27 schedule
- TRQ should be set to zero for EU in new UK schedule

EU proposes to unilaterally apply its TRQs

- COM(2018) 312 final

‘Given the timeframe in which these negotiations will need to be conducted, it cannot be excluded that some of these negotiations with individual WTO Members under Article XXVIII of the GATT 1994 regarding one or more TRQs will not be concluded by agreement within the necessary time limits before the UKK is no longer covered under the EU’s WTO schedule. It is therefore necessary to ensure that, in the absence of such agreement, the EU can nevertheless proceed with the apportionment of the TRQs by modifying the WTO tariff concessions and that the Commission is given the necessary powers to consequently amend the relevant EU provisions on the opening and implementation of the relevant TRQs’

TRQs under FTAs

- At present, EU does not foresee renegotiation

‘The Commission is aware of the potential implications of the withdrawal of the United Kingdom from the European Union, which will depend on the outcome of future negotiations on the EU-UK relationship and are therefore difficult to predict with certainty. At present it is not envisaged to adapt or re-open existing bilateral agreements.’

AMS

- 'Apportioning' from EU28 entitlement
- EU has not yet proposed to lower AMS.
 - At present EU uses only around 10% of its total EU28 (claimed) entitlement.
- Without certified schedule, UK has no right to apply AMS
- Does UK has a right to AMS? It was a «participant in the Uruguay Round» - Current proposed methodology is not correct
- UK needs to calculate based on UR modalities
- A measure that was above de minimis in EC12 during the base period (1986-1988) could be de minimis in UK – in such case, no AMS entitlement for UK

Goods Schedule - next steps with respect to EU (1)

- EU cannot unilaterally apply more restrictive TRQs than those contained in its currently certified schedule / agreements reached under Article XXVIII
- EU has not committed to lower AMS
 - Makes sense as UK presumably has 0 AMS entitlement
 - Unclear who can furnish the necessary data and statistics for UK's AMS calculations
- Value of EU's tariff concessions decrease – the EU might need to compensate / consultations under the DSU (non-violation complaint) in the absence of UK certified schedule
- Many issues in TRQs - EU to commit to bind itself to not give UK access to its TRQs.

Goods Schedule - next steps with respect to UK (1)

- UK declared its intention to apply its proposed schedule as bound schedule
- Without certified schedule, in principle, UK has no right to AMS and cannot apply country-specific TRQs, i.e. UK would violate WTO rules
- Based on current WTO rules, UK has to commence Article XXVIII negotiations (currently it does not have authority to do so but soon to be approved) which has to be approved by Ministerial Conference/General Council
- Opening up Article XXVIII negotiations for each tariff line start a very lengthy process

Goods Schedule - next steps with respect to UK (2)

- More research is needed of tariff lines for which WTO Members are principal supplier or hold a substantial interest – it might that some Members prefer the long route
- Non-contractual preferences – UK will stop applying EU GSP (+), EU Everything But Arms (EBA), which suggests that trade under MFN as well as GSP(+) and DFQF can be taken into account in the calculation of principal supplier and substantial interest.

Goods Schedule - next steps with respect to UK (3)

- AMS and TRQ are the most contentious issues. Another alternative, UK to submit a tariff only schedule for certification solving the current issues; pending negotiations on TRQs and AMS which can be added later?
 - Calculation of 'tariffed' tariff lines (i.e. those with SSG) and propose the lower tariff as binding for UK tariff schedule
 - Calculation of price trigger for SSG (alternative would be for UK to bind itself not to use price-based SSG)
 - Solution on footnotes 2, 4, 7 and 36
 - Solution on INRs