Brexit and the EU - Canada *Comprehensive Economic and Trade Agreement*: Implications for the European Union, the United Kingdom and Canada

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ABBREVIATIONS AND DEFINITIONS

CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CCP	Common Commercial Policy
CU	Customs Union
EU	European Union
FTA	Free Trade Agreement
GATT 1994	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
MFN	Most Favoured Nation
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

OVERVIEW

[1] This memorandum is a non-confidential summary of a confidential memorandum prepared for a Beneficiary in the International Trade and Investment Law Practicum course taught by Professor Debra P. Steger in the Fall 2016 semester at University of Ottawa, Faculty of Law. Ana Poienaru, Stefanija Savic, and Morgan McCabe were the student team who researched and prepared the original memorandum for the Beneficiary in the course. Ana Poienaru and Stefanija Savic prepared this summary.

[2] This memorandum has been prepared in the context of the United Kingdom (UK) providing notice to withdraw from the European Union (EU), known as Brexit, and the implications of this on the provisional application of the EU – Canada *Comprehensive Economic and Trade Agreement* (CETA)[1], and on the United Kingdom (UK) negotiating and concluding new Free Trade Agreements (FTAs). Most recently, the EU and Canada have signed the CETA and the Parties to the CETA have agreed to provisionally apply parts of the Agreement in the future.

[3] This memorandum therefore examines whether the provisional application of the CETA will continue to apply to the UK after it withdraws from the EU. This memorandum also identifies the constraints on the UK in negotiating and concluding future FTAs with third

[1] *Comprehensive Economic and Trade Agreement,* Canada and European Union, signed on 30 October 2016 (has not yet entered into force). [CETA]; European Commission, "Proposal for a Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part" (5 July 2016) COM/2016/0470 final - 2016/0220 (NLE) online: < http://eur-lex.europa.eu/resource.html?uri=cellar:b922cc35-4357-11e6-9c64-01aa75ed71a1.0001.02/DOC_2&format=PDF> [CETA, Explanatory Memorandum].

countries from an European Union law and Word Trade Organization (WTO) law perspective. We define third country as a country other than an EU Member State.

[4] In the first section of the memorandum, we examine whether the provisional application of the CETA will continue to apply to the UK after it withdraws from the EU. To make this determination, we examine the scope of the provisional application of the CETA in relation to the UK. This means that the term "Parties" in the CETA has to be interpreted in light of the provisional application set out in the CETA. Based on this, we conclude that "Parties" in the context of the provisional application are the EU and Canada, because only matters falling under the EU's exclusive competence are provisionally applied. This means that the provisional application of the CETA will apply to the UK until it withdraws from the EU, for matters falling under EU exclusive competence. The provisional application will, however, not extend to the UK after it withdraws from the EU, because EU law will no longer apply to the UK.

[5] In the second and third sections of this memorandum, we look at the constraints on the UK in negotiating FTAs. In making our analysis, we address the key issues in relation to negotiating and concluding FTAs between the UK and third countries under EU law and WTO law.

[6] Under EU law, the UK must withdraw from the EU before it can negotiate and conclude FTAs with third countries. This is because as a Member of the EU, the UK lacks the competence to negotiate FTAs. Under EU law, the negotiation of FTAs is part of the EU exclusive competence under the common commercial policy (CCP). An examination of Article 50 of the

Treaty of the European Union[2] (TEU) leads to the conclusion that the UK will cease to be a Member of the EU on one of the following three dates: (1) on the date of entry into force of the withdrawal agreement, (2) falling that, two years after the notification to withdraw, or (3) at a later date than (2) if the European Council and the UK both agree to extend the period of negotiation. Based on this analysis, we determine that once the UK withdraws from the EU, it will again have the competence to negotiate and conclude FTAs with third countries, because the EU's exclusive competence in the area of CCP will cease to apply to the UK.

[7] Under WTO law, the UK must be a customs territory in order to conclude FTAs. Though Article I *of the General Agreement on Tariffs and Trade 1994* (GATT 1994) prohibits WTO Members from contravening the Most Favoured Nation (MFN) obligation,[3] Article XXIV of the GATT 1994 provides a justification for Members that would contravene the MFN obligation by concluding a FTA or forming a customs union (CU).[4] However, Article XXIV also sets out that only customs territories are able to conclude FTAs or form CUs under WTO law.[5] Since we determine that the UK is not currently a customs territory, it will not be able to conclude a new FTA until it becomes one. To become a customs territory, the UK will need to submit its own draft schedules to the WTO in accordance with procedures set out in GATT 1994[6] and *General Agreement on Trade in Services* (GATS). This includes an obligation to

[2] European Commission, *Consolidated version of the Treaty of the European Union*, [2010] OJ L 83/13 at Article 50 [TEU].

[3] *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187 at Article 1 (entered into force 1 January 1948) [GATT 1994].

[4] *Ibid* at Article XXIV para 5.

[5] *Ibid* at Article XXIV paras 1 and 5.

[6] GATT 1994, *supra* note 3, at Article XXIV.

negotiate an outcome that will be agreed to by other WTO Members by consensus.[7] Although the length of this process is impossible to predict with certainty, we conclude that the UK will not be able to conclude FTAs with third countries until this process is complete.

[7] *General Agreement on Trade in Services*, 19 April 1994, 1869 UNTS 183 at Article V (entered into force 1 January 1995) [GATS].

FACTUAL BACKGROUND

Referendum on Brexit

[8] On June 23, 2016, the UK voted with a 52% majority to leave the EU[8]. The British Prime Minister, Theresa May indicated that the UK will carry out the will of the people and will notify the European Council of its intention to withdraw from the EU, in accordance with Article 50 of the TEU.[9]

Signature of the CETA

[9] Canada, EU and the 28 EU Member States signed the CETA on October 30, 2016.[10] The CETA was signed as a mixed agreement under EU law. [11]

Provisional application of the CETA

[10] There is an understanding between Canada and the EU that in the near future most of the CETA will be applied provisionally, pursuant to Article 30.7 of the CETA. The Council of

[8] The Electoral Commission, "EU Referendum Results," online: <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>.

[9] See: Jon Henley, "What will happen now timescale for Article 50 has been revealed?", *The Guardian* (2 October 2016), online: <https://www.theguardian.com/politics/2016/oct/02/Article-50-timescale-theresa-may-brexit>.

[10] Office of the Prime Minister, Justin Trudeau, "Canada and EU sign historic trade agreement during EU-Canada Summit," online: <http://pm.gc.ca/eng/news/2016/10/30/canada-and-eu-sign-historic-trade-agreement-during-eu-canada-summit>. See also, Council of the European Union, XVI EU-Canada Summit, "Joint Declaration" (Brussels, 30 October 2016), online: <http://www.consilium.europa.eu/en/press/press-releases/2016/10/30-eu-canada-declaration/>.

[11] Council of the European Union, "EU-Canada trade agreement: Council adopts decision to sign CETA," (28 October 2016) online: <http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/>.

the European Union approved the provisional application of the CETA in October 2016, subject to the following exclusions or inclusions:

> (a) Only the following provisions of the Chapter Eight of the Agreement (Investment) shall be provisionally applied, and only in so far as foreign direct investment is concerned:
> - Articles 8.1 to 8.8
> - Article 8.13;
> - Article 8.15, with the exception of paragraph 3 thereof; and
> - Article 8.16
>
> (b) The following provisions of Chapter Thirteen of the Agreement (Financial Services) shall not be provisionally applied in so as far as they concern portfolio investment, protection of investment or the resolution of investment disputes between investors and States:
> - Paragraphs 3 and 4 of Article 13.2;
> - Article 13.3 and Article 13.4
> - Article 13.9; and
> - Article 13.21
>
> (c) The following provisions of the Agreement shall not be provisionally applied:
> - Article 20.12;
> - Article 27.3 and Article 27.4, to the extent that those Articles apply to administrative proceedings, review and appeal at Member State level;
> - Paragraph 7 of Article 28.7l
>
> (d) The provisional Application of Chapters 22, 23 and 24 of the Agreement shall respect the allocation of competences between the Union and Member States.[12]

[11] It is clear from the text of the EU Council approving the provisional application of the CETA that the Council considers the parts of the CETA approved for provisional application to fall under the competence of the EU.[13] In addition, the parts of the CETA that fall under the competence of the EU Member States have been excluded from provisional application.[14] Thus,

[12] Council of the European Union, "Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part" 2016/0220 (NLE) Brussels, 5 October 2016 (OR. en), online: <http://data.consilium.europa.eu/doc/document/ST-10974-2016-INIT/en/pdf> [EC, Decision on the provisional application of the CETA].

[13] *Ibid.*

[14] CETA, Explanatory Memorandum, *supra* note 1. The Commission wrote as follows at page 4 of its Explanatory Memorandum, of July 5, 2016, by which it transmitted a proposal for a Council Decision on provisional application of the CETA, which was subsequently adopted: "CETA has identical objectives and essentially the same contents as the Free Trade Agreement with Singapore (EUSFTA). Therefore, the

the Council accepted the European Commission's position that the parts of the CETA, which were approved for provisional application, fall under EU exclusive competence[15] or, in the alternative, fall under an area of shared competence in which the EU has adopted the necessary measures to ensure that the treaty-making power rests with the EU.[16]

[12] Pending the release of *Opinion 2/15* of the Court of Justice of the European Union (CJEU) regarding the *European Union-Singapore Free Trade Agreement,*[17] we assume in this memorandum that the European Council correctly concluded that the CETA provisions approved for provisional application fall under the exclusive competence of the EU. In the alternative that the parts of the CETA which are provisionally applied fall under one or more areas of shared

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Union's competence is the same in both cases. In view of the doubts raised with regard to the extent and the nature of the Union's competence to conclude EUSFTA, in July 2015 the Commission requested from the Court of Justice an opinion under Article 218(11) TFEU (case A – 2/15). In case A -2/15 the Commission has expressed the view that the Union has exclusive competence to conclude EUSFTA alone and, in the alternative, that it has at least shared competence in those areas where the Union's competence is not exclusive. Many Member States, however, have expressed a different opinion. In view of this, and in order not to delay the signature of the Agreement, the Commission has decided to propose the signature of the Agreement as a mixed agreement. Pending the completion of the procedures for its conclusion, the agreement should be provisionally applied. Nevertheless, this is without prejudice to the views expressed by the Commission in Case A – 2/15. Once the Court issues its opinion in case A-2/15, it will be necessary to draw the appropriate conclusions."

[15] By virtue of Article 3(1)(e), 3(2) and 207 (in conjunction with Article 215) of the TFEU. See EC, *Consolidated versions of the Treaty on the Functioning of the European Union,* [2010] OJ, L 83/02 [TFEU].

[16] *Ibid.* By virtue of Article 2(2) TFEU, which provides: "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

[17] CJEU, *Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU* (Opinion 2/15) (2015/C 363/22).

competence, we assume that the EU has adopted the necessary measures to deprive the Member States of their treaty-making power.[18]

[13] The starting date of provisional application of the CETA remains to be determined by the process set out in Article 30.7(3) of the CETA.

EU and its Member States in the WTO

[14] Canada, the EU, and all 28 Member States of the EU are Members of the WTO. The EU has only one schedule for trade in goods, one schedule for trade in services, shared tariffs, common MFN exemptions, and common agricultural subsidies. These commitments apply to the EU and all of its Member States.[19]

[18] EC, Decision on the provisional application of the CETA, *supra* note 12. The Council Decision on the provisional application of the CETA refers to the following legal bases in the TFEU: "Having regard to the Treaty on the Functioning of the European Union, and in particular Article 43(2) [common agricultural policy], Article 91 [common transport policy], Article 100(2) [on sea and air transport], Article 153(2) [on social policy], Article 192(1)[on the environment] and the first subparagraph of Article 207(4), in conjunction with Article 218(5), thereof [on the common commercial policy]." While the reference to the common commercial policy is to an area of exclusive competence, the other references are to areas of shared competence.

[19] World Trade Organization, "The European Union and the WTO," online: <https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm>.

QUESTION 1: Provisional application of the CETA to a Member State withdrawing from the EU

[15] This part of the memorandum examines whether the CETA will continue to provisionally apply to the UK after it withdraws from the EU. This requires an examination of whether the UK is a Party to the CETA, and a determination of the implications this has for the provisional application of the CETA.

[16] The analysis below shows that the provisional application of the CETA will likely only affect the UK for a limited period of time. The negotiating history and the CETA text leads to the conclusion that "Parties," in the context of the provisional application of the CETA, are Canada and the EU. This is because the CETA provisions that will be applied provisionally are considered by the Council to fall under the treaty-making competence of the EU and not of the Member States. This means that the provisional application in respect of those matters will continue to apply to the UK until it withdraws from the EU. This provisional application will, however, not extend to the UK after it withdraws, because EU law will no longer apply to the UK.

1. Rules of interpretation of "Parties" in Article 1.1 of the CETA

[17] Article 1.1 of the CETA sets out the definition of "Parties" in this Agreement:

> **Parties** means, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on

> the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Canada.[20]

[18] The term "Parties" does not clearly define "Party," because it refers to multiple parties. An interpretation of the term "Parties" in the CETA in accordance with Articles 31 of the *Vienna Convention of the Law of Treaties* (VCLT) is therefore required.[21] This means that the CETA has to be interpreted "based on the ordinary meaning of terms of the treaty in their context and in the light of its object and purpose."[22] The Appellate Body in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* discussed how to interpret the ordinary meaning of a term:

> In order to identify the ordinary meaning, a Panel may start with the dictionary definitions of the terms to be interpreted. But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue all meanings of words—be those meanings common or rare, universal or specialized.[23]

[19] The "ordinary meaning cannot be arrived at in the abstract, but must be examined in the context of the treaty and in light of its object and purpose."[24] The context of the treaty leads to an examination of the treaty as whole, including the preamble and annexes.[25] The context can also be examined by looking at any subsequent agreements between the Parties, subsequent practice,

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[20] CETA, *supra* note 1 at Article 1.1.

[21] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980 [VCLT].

[22] *Ibid* at Article 31(1).

[23] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p 5663 (and Corr 1, DSR 2006:XII, p 5475) at para 163.

[24] Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed (Cambridge: Cambridge University Press, 2013) at 67.

[25] VCLT, *supra* note 21 at Article 32(2).

or any relevant rule of international law applicable between the Parties.[26] Therefore, we interpret the term "Parties" in the CETA in accordance with the rules set out in Article 31 of the VCLT. The analysis of each relevant term in the CETA follows below.

2. The interpretation of the CETA shows that it is a bilateral Agreement between Canada and the "EU Party"

[20] By way of preliminary observation it should be noted that "Parties" in the CETA is defined as "on the one hand, […] ("hereinafter referred to as the 'EU Party'), and on the other hand, Canada." [27] The expression "on the one hand, on the other hand" is "used to introduce statements that describe two different or opposite ideas, or people."[28] This statement, therefore, introduces a binary definition of "Parties." Although the CETA has the features of a multilateral agreement, because there are multiple parties, the definition of "Parties" in the Agreement makes it clear that in essence this is a bilateral Agreement. This is because the text of the CETA points toward an Agreement between two Parties: "EU Party" and Canada. Parties in the CETA can thus be defined as the "EU Party" on the one hand, and Canada on the other.

[26] VCLT, *supra* note 21 at Article 32(3).

[27] CETA, *supra* note 1 at Article 1.1.

[28] Merriam-Webster, "on the one hand, on the other hand", online <https://www.merriam-webster.com/dictionary/on%20the%20one%20hand,%20on%20the%20other%20hand>.

3. The definition of "EU Party" in the CETA will depend on the area of competence under EU law

[21] To understand the meaning of "Parties" in the CETA, the term "EU Party" has to be defined further. In the CETA, the term "EU Party" is defined in the definition of "Parties:"

> the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union.[29]

[22] This indicates that "EU Party" is: "the European Union **or** its Member States **or** the European Union and its Member States." The conjunction "or" introduces an alternative. Read in the context of the entire definition of "Parties," this phrase means that the "EU Party" can be one of the following: 1) "The European Union" **or** 2) "its Member States" **or** 3) "European Union and its Member States."

[23] To understand the meaning of "EU Party" the following terms and phrases need to be further defined: 1) "European Union," 2) "Member States," 3) "European Union and Member States," and 4) "within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union."

3.1. The interpretation of "European Union"

[24] There is no textual definition of the term "European Union" in the CETA. Therefore, it has to be interpreted in accordance with the ordinary meaning of the term and in light of its

[29] CETA, *supra* note 1 at Article 1.1.

object and purpose. The ordinary meaning of the "European Union" is provided in Article 1(1) of the TEU:

> By this Treaty, the **HIGH CONTRACTING PARTIES** establish among themselves a EUROPEAN UNION, hereinafter called "the Union", on which the Member States confer competences to attain objectives they have in common.[30]

[25] This means that the TEU defines the "European Union" in relation to the High Contracting Parties to the TEU that established the "European Union." Article 1(1) of the TEU indicates that the High Contracting Parties are the Member States. This also leads to the interpretation that once the UK withdraws from the EU, it will no longer be a Member State of the EU, because it will no longer be a High Contracting Party of the TEU. Consequently, the UK will no longer be part of the definition of "European Union" set out in the CETA.

3.2 The interpretation of "Its Member States"

[26] Since there is no textual definition of "its Member States" in the CETA, this term has to be read in the context of the Preamble of the CETA, which says that: "Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union and its Members States**,** […]."[31] There is a comma after "Its Member States**,**" and the CETA enumerates all Members of the EU. Here, it is possible to conclude that "Members" refers to States that are part of the European Union, including the UK.

[30] TEU, *supra* note 2 at Article 1(1).

[31] CETA, *supra* note 1 Preamble.

[27] As discussed above, Article 1(1) of the TEU indicates that the High Contracting Parties to the TEU form the European Union and are the Member States that conferred competence to the EU:

> By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', **on which the Member States confer competences to attain objectives they have in common.** [32]

[28] Thus, the term "its Member States" in the CETA refers to the EU Member States. This wording leads us to posit that once the UK is no longer a Member of the EU, the qualification of "its Member States" in the CETA will no longer apply to the UK, because it will no longer be part of the EU. This also means that even though the UK is listed as a separate entity in the Preamble, it cannot stand on its own as a Party to the CETA after it withdraws from the EU. This is because the UK is only listed as a Party in the Preamble by virtue of its membership in the EU and being one of "Its Member States."

3.4. The CETA indicates that "EU Party" can also be the "European Union and its Member States"

[29] The CETA indicates that the "EU Party" can also be defined as the "European Union and its Member States." The conjunction "and" indicates that two prepositions are "used as a function word to indicate connection or addition especially of items within the same class or type [or] used to join sentence elements of the same grammatical rank or function."[33] This means that under certain circumstances, the "EU Party" is defined as the EU and Member States acting jointly.

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[32] TEU, *supra* note 2 at Article 1(1).

[33] Merriam-Webster, "and", online <https://www.merriam-webster.com/dictionary/and>.

3.5 The CETA indicates that "EU Party" will depend on the areas of competence in EU law

[30] The CETA further says that the "EU Party" is either the EU, Member States or the EU and its Member State will based on: "[…] their respective areas of competence as derived from the *Treaty on European Union* and the *Treaty on the Functioning of the European Union*." This means that the "EU Party" will depend on the areas of competence set out in the TEU and the *Treaty on the Functioning of the European Union* (TFEU).[34]

[31] To summarize, the "Parties" in the CETA can be:

Chart 1: "Parties" in the CETA

Party No. 1: subject to their respective competences as defined in the TFEU and the TEU		Party No. 2
EU Party: European Union	&	Canada
OR		
EU Party: Member States	&	Canada
OR		
EU Party: European Union and Member States	&	Canada

4. The provisional application of the CETA will not extend to the UK after it withdraws from the EU

[32] The history behind the Council Decision, which approved the provisional application of the CETA, allows us to conclude that the EU Member States in the Council agreed that the provisional application of the CETA will extend to areas that fall under the EU's exclusive competence. In the alternative, the provisional application of the CETA will extend to matters that fall under areas of shared competence, in which the EU has adopted the necessary measures

[34] TFEU, *supra* note 15.

to deprive the Member States of treaty-making power. Therefore, it must be concluded that in respect of the provisional application of the CETA, the "EU Party" is the "European Union." Consequently, the "Parties" in the CETA are Canada, on the one hand, and the "European Union" on the other.

[33] This leads to two determinations. First, the CETA will provisionally apply to the UK for matters that fall under the EU's competence. Until the UK withdraws, EU law continues to apply to these matters. Second, the provisional application of the CETA will not extend to the UK after it withdraws from the EU, by virtue of the UK terminating its membership in the EU. This aspect is examined further in the next question.

QUESTION 2: Constraints to negotiating and concluding FTAs under EU law

[34] To determine when the UK will be in a legal position to negotiate and conclude an FTA with third countries, we identify potential constraints under EU law. First, we examine the areas of competence for the negotiation and conclusion of FTAs. As an EU Member State, the UK is subject to EU law, including the EU's exclusive competence to negotiate and conclude FTAs with third countries. Then, we examine Article 50 of the TEU, which indicates that EU law will cease to apply to the UK once it withdraws from the EU. Consequently, the UK will no longer be subject to EU's exclusive competence to negotiate FTAs with third countries.

[35] We also examine Article 50(3) TEU which provides that withdrawal occurs: (1) on the date of entry into force of the withdrawal agreement, or (2) falling that, two years after the notification to withdraw, or (3) at a later date, should the European Council and the UK both agree to extend the period of negotiation. This means that the UK will only be in a position to negotiate an FTA once it has withdrawn from the EU, i.e. after one of the three events mentioned in Article 50 of the TEU have transpired. This question will focus on interpreting events (2) and (3) referred to in the previous paragraph, i.e. two years after the filing of the notification of the intention to withdraw or a decision of the European Council, in agreement with the UK, to extend the period of negotiation.

1. As a Member of the EU, the UK lacks the competence to negotiate and conclude FTAs

[36] Under EU law, the general rule is that a Member of the EU does not have the competence to negotiate and conclude FTAs. This is because the negotiation of an FTA is a competence of the EU under the CCP (exclusive competence) or, in the alternative, falls under one or more areas of shared competence in which the EU has adopted the necessary measures to deprive the Member States of their treaty-making competence. These principles operate through the mechanism of Articles 2(1) and 3(1)(e) of the TFEU, in conjunction with Articles 207 and 218 TFEU examined below.

[37] Article 3(1)(e) of the TFEU provides that: "the Union shall have exclusive competence in the following areas: […](e) common commercial policy." In addition, Article 2(1) of the TFEU provides that when the EU has exclusive competence in a specific area, only the EU may legislate and adopt legally binding acts:

> 1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts of the Union.

[38] This shows that in the area of the CCP, the EU has exclusive competence to legislate and adopt legally binding acts. The CCP is defined in Article 207 of the TFEU as:

> The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

[39] We assess that matters falling under the CETA are likely covered by the CCP, at least to a large extent, including foreign direct investment and trade in services. Although the issue of the CCP scope had been submitted to the CJEU for a (legally binding) opinion in the past,[35] on whether the EU had the exclusive competence to conclude the GATT 1994, the GATS and the TRIPS,[36] the issue whether there are limits on the EU's competence to negotiate FTAs has been submitted again to the CJEU for interpretation.[37] In the context of the *EU-Singapore Free Trade Agreement*,[38] the CJEU has been asked to rule on which provisions of that Agreement fall within the EU's exclusive competence, the EU's shared competence, and EU Members' exclusive competence. This decision will likely have a significant impact on the scope of the CCP and the EU's exclusive competence. It will also affect how the limits of the EU's competence to negotiate and conclude FTAs, especially in matters relating to FDI, are defined.[39] Ultimately, it will have an impact on the UK' competence to negotiate and conclude FTAs with third countries while it is still a Member of the EU.

[40] In addition, Article 218 in paragraphs (1) and (2) of the TFEU, in conjunction with Article 207 TFEU, further show that the UK, as a Member of the EU, does not have the competence to negotiate and conclude an FTA with third countries on matters covered by the CCP while it is a Member State of the EU:

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[35] TFEU, *supra* note 15 at Article 218(11).

[36] CJEU, *Opinion of the Court of 15 November 1994.-Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, [1994] ECR I-5267 This Opinion was rendered pursuant to Article 228(6) of the EC Treaty (which is now Article 218(11) TFEU).

[37] *Opinion 2/15*, *supra* note 17.

[38] *European Union-Singapore Free Trade Agreement*, 17 October 2014 (has not yet entered into force) [EU-Singapore FTA].

[39] European Union Advocate General, *Opinion Advocate General Sharpston to the Court of Justice in respect of Opinion 2/15*, (December 22, 2016).

> 1.Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organizations **shall be negotiated and concluded in accordance with the following procedure.**
>
> 2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

[41] Thus, Articles 2(1) and 3(1)(e) of the TFEU, in conjunction with Articles 207 and 218 TFEU, stipulate that the EU has the exclusive competence to negotiate and conclude FTAs in the area covered by the CCP. In this context, the UK does not have the competence to negotiate an FTA with third countries, since this is part of the EU's exclusive competence. This is because the UK has not yet withdrawn from the EU, and therefore EU law still applies. Consequently, the UK is still bound by the law of the EU and cannot negotiate or conclude an FTA with third countries.

2. The EU exclusive competence to negotiate FTAs "will cease to apply" to the UK once it withdraws from the EU

[42] As a general rule, EU law, including the EU's exclusive competence to negotiate FTAs with third countries, will no longer apply to the UK once it withdraws from the EU. This is because Article 50(3) of the TEU provides that "the **Treaties shall cease to apply** to the State in question from […]".

[43] Since the phrase "shall cease to apply" is not defined in the TEU, it has to be interpreted in accordance to the interpretation rules set out in Article 31(1) of the VCLT. The Oxford Dictionary defines "cease" as "come or bring to an end."[40] It further defines "apply" as "to be

[40] Oxford Dictionaries, "cease", online <https://en.oxforddictionaries.com/definition/cease>.

applicable or relevant."[41] Therefore, this means that the Treaties' relevance will come to an end at some point in time. In addition, the term "shall cease to apply" has to be read in the context of Article 50 as a whole. Article 50 sets out the rules for the withdrawal mechanism of a Member State. Article 50(2) of the TEU further indicates that the withdrawal process shall set out the relationship between that State and the EU. This discussion, therefore, demonstrates that there is a point in time when "Treaties" of the EU will come to an end *vis-à-vis* the UK.

[44] Article 1(3) of the TEU defines "Treaties:"

> The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

[45] This shows that both the TEU and TFEU apply to an EU Member State. Thus, once the TFEU and the TEU cease to apply to the UK, the obligations set out in these Agreements will also cease to apply to the UK. This includes the EU exclusive competence to negotiate and conclude FTAs in the area of the CCP. Therefore, once the UK withdraws, EU law, including the prohibition against EU Member States negotiating and concluding their own FTAs, will cease to apply to the UK.

3. Withdrawal procedure

[46] Article 50(3) of the TEU provides that the UK will regain its competence to negotiate FTAs two years after the notification to withdraw is given, if no withdrawal agreement has entered into force. However, this rule would not apply if the European Council, in agreement

[41] Oxford Dictionaries, "apply", online <https://en.oxforddictionaries.com/definition/apply>.

with the UK, decides to extend the period of negotiation. This is outlined in Article 50(3) of the TEU:

> The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, **two years after the notification referred to in paragraph 2**, unless **the European Council, in agreement with the Member State concerned, unanimously decides to extend this period**.

[47] The following text provides a more detailed analysis of the meaning of "two years after the notification" and "unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

3.1 Article 50(3) provides that the Treaties will cease to apply to the UK, two years after the notification is given

[48] TEU Article 50(3) provides that "the Treaties shall cease to apply to the State in question […], failing that, **two years after the notification referred to in paragraph 2**." This means that if no withdrawal agreement has entered into force, then the UK will have withdrawn from the EU two years after notification was given.

[49] The ordinary meaning of "notification" is defined as "the act or an instance of notifying" or "a written or printed matter that gives notice."[42] In addition, Articles 50(1) and 50(2) of the TEU indicate what notification means:

> Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> A Member State which decides to withdraw shall notify the European Council of its intention […]

[42] Merriam-Webster, "notification", online <http://www.merriam-webster.com/dictionary/notification>

[50] This demonstrates that the notification is the act of giving notice to the European Council of its intention to withdraw. The TEU is, however, silent on how notification should be given. Article 67(1) of the VCLT fills this gap by providing that the instrument for the withdrawal from a treaty shall be made in writing. Here, it is assumed that the notification to withdraw will be given in writing by the UK to the European Council. The two-year notification period will thus start to count once notification to withdraw is given in writing to the EU.

[51] This means that if no withdrawal agreement has entered into force, and absent an extension by the European Council and the UK, it will be deemed that the UK has withdrawn from the EU. This also means that EU law will cease to apply to the UK on the second anniversary after notification was given, and at that point, the UK will have regained its competence to negotiate and conclude FTAs.

[52] TEU Article 50(3) also raises the issue of whether the Treaties of the EU will automatically cease to apply to the UK at the expiration of the two years. Since Article 50 of the TEU is silent on this issue, we examine Article 70 of the VCLT, which provides that:

> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
> (a) Releases the parties from any obligation further to perform the treaty.

[53] Article 70 of the VCLT further demonstrates that the termination of a treaty releases the parties from any obligation to further perform under the treaty. Here, this means that once two years have transpired after notification was given, the Treaties of the EU will no longer apply to the UK and the UK will have competence to negotiate and conclude FTAs.

3.2 Article 50(3) of the TEU provides that the EU Treaties could cease to apply at a later date should the UK and the European Council decide to extend the negotiation period

[54] Article 50(3) also sets out that the negotiation period could be extended, thereby also extending the application of EU law to the withdrawing Member State:

> The **Treaties shall cease to apply** to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, **unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.**

[55] This part of Article 50(3) TEU indicates that the European Council, in agreement with the UK, could unanimously decide to extend "this period." This means that the Treaties of the EU could "cease to apply" at a date later than the two years after notification. The reading of "this period" in relation with "two **years after the notification** referred to in paragraph 2," indicates that the European Council, in agreement with the UK, could extend the period between notification and a withdrawal agreement, i.e. the negotiation period leading to a withdrawal agreement. Therefore, this means that if the negotiation period is extended, the UK will regain the competence to negotiate an FTA at a later date.

4. Conclusion

[56] This memorandum demonstrates that as a Member of the EU, the UK lacks competence to negotiate and conclude FTAs. It will, however, regain this competence when one of the following events occur: 1) on the date of entry into force of the withdrawal agreement with the UK; (2) failing that, two years after the notification to withdraw was given; or (3) at a date later than (2), should the European Council and the UK both agree to extend the period of negotiation.

After one of these events, the UK will have the competence to negotiate and conclude FTAs on its own behalf.

QUESTION 3: Constraints to negotiating and concluding FTAs under WTO law

[57] This part of the memorandum provides an examination of the obstacles the UK will have to overcome before it can negotiate an FTA with third countries under WTO law. Under Article XXIV of the GATT 1994, only customs territories may conclude FTAs.[43] The UK is, therefore, required to be a customs territory in order to fall within the ambit of Article XXIV and be able to conclude an FTA with a third country. Since the UK is not a customs territory, this section also examines the steps the UK will have to take in order to become one. This includes submitting draft schedules to the WTO in order to replace the schedules that it currently shares with the EU as its Member State, and negotiating an outcome that is acceptable to all other WTO Members by consensus.

[58] The negotiation and conclusion of an FTA between the UK and a third country is governed by the applicable rules under the *Marrakesh Agreement Establishing the World Trade Organization* (the WTO Agreement). These rules stipulate that the UK is required to be a customs territory, within the meaning of paragraph 2 of Article XXIV of the GATT 1994[44] in order to be able to conclude a future FTA.

[59] Article XXIV of GATT 1994 and Article V of the GATS allow an exception from the MFN principle for WTO Members that wish to conclude an FTA or form a CU, provided that

[43] GATT 1994, *supra* note 3 at Article XXIV para 2 and para 5.

[44] *Ibid* at Article XXIV.

certain requirements are met.[45] Under paragraph 1 of Article XXIV of the GATT 1994, only customs territories are able to conclude FTAs and form CUs.[46]

[60] Therefore, in the following text, we first set out how Article I of GATT 1994 and Article II of the GATS prohibit violations of the MFN principle. We then examine Article XXIV of GATT 1994 and Article V of GATS, which provide a justification for acts that would otherwise violate the MFN obligation when FTAs or CUs are formed.

[61] Since Article XXIV of GATT 1994 only applies to customs territories, the next part of this section examines why the UK is not a customs territory right now. In addition, this section also analyses the effect of the fact that the UK is not a customs territory on its ability to conclude a future FTA. Consequently, we then examine what steps the UK will be required to take in order to become a customs territory, and difficulties associated with this process are outlined.

1. Article I of GATT 1994 prohibits violations of the MFN obligation

[62] MFN treatment is a key obligation in the WTO. Article I of GATT 1994 states that any "advantage, favour, privilege or immunity" granted to one trading partner to any product must be applied immediately and unconditionally to all other trading partners:

> 1. **With respect to customs duties and charges of any kind** imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* **any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product**

[45] GATT 1994, *supra* note 3 at Article XXIV; GATS, *supra* note 7 at Article V.

[46] GATT 1994, *supra* note 3 at Article XXIV.

> **originating in or destined for the territories of all other contracting parties**.

[63] Violations of the MFN obligation, therefore, are prohibited under WTO law.

2. Article XXIV of the GATT 1994 and Article V of the GATS provide an exception for FTAs and CUs

[64] Article XXIV of the GATT 1994 allows for derogation from the MFN principle with respect to trade in goods for the conclusion of an FTA or forming a CU.[47] It does not provide any positive obligations for WTO Members; instead it allows a defence for WTO-inconsistent behaviour.[48] Similarly, Article V of GATS provides a defence for MFN-inconsistent behaviour relating to trade in services.[49]

[65] Therefore, to conclude a future FTA, the UK has to rely on these two Articles. The effects of these two Articles on the conclusion of FTAs, or interim agreements which in turn can lead to the conclusion of FTAs, are discussed below.

2.1 Paragraph 5, Article XXIV of GATT 1994

[66] Article XXIV of GATT 1994, paragraph 5, allows WTO Members to negotiate new FTAs. This provision states:

> Accordingly, the **provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement**

[47] GATT 1994, *supra* note 3 at Article XXIV para 5.

[48] Appellate Body Report, *Turkey-Restriction on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted on 19 November 1999 at para 45.

[49] GATS, *supra* note 7 at Article V para 1.

> **necessary for the formation of a customs union or of a free-trade area**; Provided that:
>
> (a) […]
> (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be;[50]

[67] Therefore, WTO Members are permitted to conclude agreements leading to the formation of an FTA, as long as the resulting trade measures and policies are not more trade restrictive overall than the constituent territories' previous trade policies.

[68] However, this Article is an "exception and defense, not a right or an obligation."[51] In other words, it allows Members to enter into agreements that would otherwise violate certain WTO rules, such as the MFN obligation.

2.2. Paragraph 1, Article V of GATS

[69] Article V of GATS allows for WTO Members to enter into FTAs and liberalize trade with respect to services. This provision states:

> This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:
> (a) has substantial sectoral coverage, and
> (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

[50] GATT 1994, *supra* note 3 at Article XXIV para 5.

[51] Mikaella Hurley and Marina Murina, 'Designing a WTO-Consistent Customs Union: Select WTO Obligations in the Context of GATT Art. XXIV', The Graduate Institute of International and Development Studies, Trade and Investment Law Clinic, Geneva (Spring Semester 2011), at p 11.

> (i) elimination of existing discriminatory measures, and/or
> (ii) prohibition of new or more discriminatory measures,
> either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.[52]

[70] This Article, therefore, permits a WTO Member to enter into an agreement to further liberalize trade in services with other WTO Members, provided that the agreement has "substantial sectoral coverage," eliminates measures that discriminate against service suppliers of other countries in the group, and prohibits new or more discriminatory measures.

3. Only customs territories can negotiate FTAs and CUs (or interim agreements leading to FTAs) under Article XXIV of the GATT 1994

[71] The derogation from the MFN principle in Article XXIV of GATT 1994 is available on a conditional basis—the exception only applies to "customs territories."[53]

[72] Paragraph 1 of Article XXIV of the GATT 1994 states that "[t]he provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties."[54] This means that only those WTO Member States that are also customs territories are entitled to conclude FTAs and form CUs under Article XXIV of the GATT 1994.

[73] Therefore, if the UK is not a customs territory, it does not fall within the ambit of this Article. Consequently, it would not be entitled to the exclusion contained in Article XXIV which

[52] GATS, *supra* note 7 at Article V para 1.

[53] GATT 1994, *supra* note 3 at Article XXIV para 5.

[54] *Ibid* at para 1.

allows for the formation of CUs and more importantly in this case, the conclusion of new FTAs.[55]

3.1 Definition of customs territory in Article XXIV

[74] Paragraph 2 of Article XXIV of GATT 1994 provides the definition of a customs territory. This provision states:

> For the purposes of this Agreement a **customs territory** shall be understood to mean any territory **with respect to which separate tariffs or other regulations of commerce are maintained** for a substantial part of the trade of such territory with other territories.

[75] This definition shows that a customs territory could be any territory, whether it is a union of territories or a sovereign nation, which maintains separate tariffs or other regulations of commerce.

[76] Article XXIV, paragraph 2, should be read in conjunction with Article XXIV, paragraph 8(a), which states: "a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories."[56] Furthermore, this provision states that a CU includes the removal of duties and other restrictive regulation of commerce "with respect to substantially all the trade between the constituent territories of the union," [57] and that "substantially the same duties and other regulations of commerce" should be applied by every member of the CU to trade with states not included in the CU.[58]

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[55] Since Article V of GATS does not contain a similar condition, this text which follows will only examine the applicability of Article XXIV of GATT 1994 to the UK.

[56] GATT 1994, *supra* note 3, at Article XXIV para 8(a).

[57] *Ibid* at Article XXIV para 8(a)(i).

[58] *Ibid* at Article XXIV para 8(a)(ii).

[77] Article XXIV paragraph 2, and Article XXIV paragraph 8(a) of the GATT 1994 should be read in conjunction with each other. This suggests that once a union of customs territories has achieved a high level of integration and synchronization of tariffs and regulations, the CU becomes its own customs territory.[59]

3.2 The UK is a Member of the WTO but not a customs territory

[78] The UK, like the rest of EU Member States, is a member of the WTO in its own right. In fact, the UK has been a WTO Member since January 1, 1995, and a Member of GATT since January 1, 1948.[60] However, in order for the UK to rely on Article XXIV of GATT 1994 in order to conclude an FTA, it must be a customs territory.

[79] Article XXIV paragraph 2, and Article XXIV paragraph 8(a) of the GATT 1994 suggest that once a union of customs territories has achieved sufficient integration and harmonization of tariffs and regulations, the CU becomes its own customs territory.[61] This means that as a Member State of the EU, the UK is not a customs territory on its own, but rather a part of the EU customs territory. In order to demonstrate this point, an examination of whether the UK is a territory with respect to which separate tariffs and other regulations of commerce are maintained as a substantial part of its trade with other territories is required.

[80] With respect to trade with third parties, many of the terms of the UK's WTO Membership are bundled with those of the EU. These include a common tariff, common

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[59] Hurley and Murina, *supra* note 51 at 11-12.

[60] World Trade Organization, "Member Information—United Kingdom and the WTO," <https://www.wto.org/english/thewto_e/countries_e/united_kingdom_e.htm>.

[61] Hurley and Murina, *supra* note 51 at 11-12.

schedules for trade in goods, trade in services, MFN exemptions, and agricultural subsidies.[62] The UK does not have an external tariff that is separate from that of the EU, nor does it have a separate commercial regulatory system. Instead, the common tariff and other regulations of commerce are maintained and applied on an EU-wide basis by Community Institutions.

[81] Therefore, as an EU Member State, the UK is not a customs territory right now, but rather part of the EU customs territory.

4. In order to become a customs territory, the UK will have to negotiate certain schedules of its own in the WTO

[82] According to Article XXIV, paragraph 2, of GATT 1994, a customs territory is any territory that maintains separate tariffs or other regulations of commerce.[63] However, the UK, as an EU Member State, is currently part of the EU customs territory. It does not have its own tariffs and other regulations of commerce, but rather shares them with other EU Member States. Therefore, the UK must have its own regulations of commerce that are separate from that of the EU in order to become a customs territory.

4.1 The UK must maintain separate tariffs and other regulations of commerce

[83] In order to become a customs territory, the UK is required to maintain its own tariffs and other "regulations of commerce."[64] Since there will be no schedules in the WTO that would

[62] These include common goods and services schedules, tariffs, and MFN exemptions. See: World Trade Organization, "Member Information—The European Union and the WTO," <https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm>.

[63] GATT 1994, *supra* note 3 at Article XXIV para 2.

[64] *Ibid*.

extend to the UK once it is no longer part of the EU customs territory, the UK will be required to submit its own schedules to the WTO. This process is unpredictable because the UK will have to design its own schedules and certify them in accordance to certain procedures, and all other WTO Members will have to accept the schedules by consensus.[65]

[84] There are specific schedules of concessions and commitments that require submission to the WTO. The UK will be required to submit a schedule for trade in goods that will include, inter alia, tariff bindings and commitments as well as agricultural export subsidy and domestic subsidy commitments.[66] In addition to this, the UK will have to submit a schedule under the GATS which will contain its specific commitments on market access, national treatment and other concessions.[67] The UK may include the same or similar concessions and commitments in its schedules as those contained in the current EU schedule, or it may make different concessions and commitments after negotiations with other WTO Members. These matters cannot be determined until after the UK and EU have conducted their own internal negotiations with respect to trade in goods and services first.

[85] In addition to the above, the UK must submit its schedule of exemptions from the MFN treatment obligations under Article II, paragraph 1, of the GATS.[68] Currently, the most common type of MFN exemptions applied by WTO Members pertain to access to communication and transport services. The EU, for example, permits more favourable treatment of specific kinds of audio-visual services from Finland, Norway, Sweden and Iceland under its Article II MFN

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[65] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) at Article IX para 1 [Marrakesh Agreement].

[66] GATT 1994, *supra* note 3 at Article II.

[67] GATS, *supra* note 7 at Article XX.

[68] *Ibid* at Article II para 1.

exemptions.[69] Again, these specific EU exemptions would no longer apply to the UK in the event that it does not reach an agreement with the EU. Consequently the UK would have to re-submit its own schedules of MFN exemptions that either replicate those of the EU or set new exemptions.

[86] Finally, the UK will need to ensure that the schedules are accepted by all other WTO Members,[70] and certified, before they may enter into force. Only then will the UK be able to form new FTAs under WTO law. This process, as well as the associated economic implications, will be discussed in the following section.

4.2 The modification of UK's schedules under GATS and GATT 1994

[87] The most significant consideration that must be addressed before the UK is be able to negotiate a new FTAs is the need for its WTO schedules to become legally binding. This means that the schedules will need to be accepted by WTO Members, certified, and annexed to the GATT 1994[71] and the GATS.[72] In other words, the schedules that the UK submits will have to be accepted by other WTO Members by consensus, as well as certified. This is likely going to be a lengthy and complicated process since there is uncertainty regarding what procedures the UK will follow in order to modify and submit its schedules, as well as the fact that these schedules will require approved by other WTO Members once submitted.

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[69] World Trade Organisation "European Communities and their Member States. Final List of Article II (MFN) Exemptions," GATS/EL31 (15 April 1994), online: <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=14703,98576&CurrentCatalogueIdIndex=1&FullTextSearch=.>.

[70] Marrakesh Agreement, *supra* note 65 at Article IX para 1.

[71] GATT 1994, *supra* note 3 at Article II para 1.

[72] GATS, *supra* note 7 at Article IV para 1.

[88] At the outset it is important to note that regardless of the process by which the UK submits its new and independent schedules, WTO Members would have to agree to these changes. Article IX, paragraph 1, of the WTO Agreement states that "the WTO shall continue the practice of decision-making by consensus followed under GATT 1947."[73] This means that before the UK's schedules are certified, they have to be accepted by a consensus of WTO Members.

[89] The process by which WTO Members' schedules may be modified is found in Article XXVIII of the GATT 1994, and in Article XXI of the GATS. Article XXVIII states that a Member may, "by negotiation and agreement […] modify or withdraw a concession."[74] Article XXI of GATS states that the notification of an intention to modify schedules must be given "no later than three months before the intended date of implementation of the modification or withdrawal."[75]

[90] After notification is given by the Member that wishes to modify its schedules, Article XXVIII of GATT 1994 states that the concerned parties must maintain "reciprocal and mutually advantageous concessions" that are at least as favourable as those provided for prior to the negotiations, and this must continue until agreement is reached.[76] Article XXI of GATS contains a similar provision.[77]

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[73] Marrakesh Agreement, *supra* note 65.

[74] GATT 1994, *supra* note 3 at Article XXVIII para 1.

[75] GATS, *supra* note 7 at para 1(b).

[76] *Ibid* at para 2.

[77] *Ibid* at para 2(a).

[91] A modification of schedules under these provisions may give rise to the need for compensation of any WTO Members that are affected by the modified schedules.[78] In addition, Article XXVIII of GATT 1994, paragraph 5 states that once a Member has given notification that it wishes to modify any schedules, other Members will have the right "to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party."[79] All of this could have an impact on how long the negotiation process lasts.

[92] In addition, Article IX, paragraph 3, of the Marrakesh Agreement sets out the waiver procedure that should apply to "any new exemption applied for after the date of entry into force of the WTO Agreement."[80] This procedure requires that all WTO Members consent to the grant of a waiver, so that a state may submit a new list of Article II exemptions. Therefore, although it is possible that this procedure would apply to the UK's submission of its new MFN exemptions, all WTO Members would have to consent in order for the waiver to be granted.

[93] Finally, it should also be pointed out that the UK will not be in a position to conduct any of the abovementioned negotiations in the WTO until it has concluded the necessary negotiations with the EU.[81] This could, indeed, be a lengthy and complex process for the UK.

5. Conclusion

[94] Since only customs territories are entitled to conclude FTAs or customs unions under Article XXIV of the GATT 1994,[82] the UK must become a customs territory before it is able to

[78] GATT 1994, *supra* note 3 at Article XXVIII para 2; GATS, *supra* note 7 at Article XXI at para 2.

[79] *Ibid* at para 5.

[80] GATS, *supra* note 7 at para 2 of Annex on Article II Exemptions.

[81] UK, House of Lords, "Brexit: financial services", HL Paper 81 in 9th Report of Session 206-17 (15 December 2016).

conclude or form a new FTA. To become a separate customs territory, the UK will be required to submit its own draft schedules to the WTO.

[95] Currently the UK shares common goods, services, and tariff schedules, as well as common MFN exemptions and agricultural subsidies with the EU and its Member States. The process by which the UK will disentangle its schedules and fill this gap is likely going to be a complex one, and will require the country to negotiate with other WTO Members in order to obtain consensus for the proposed changes.

[82] GATT 1994, *supra* note 3 at Article XXIV para 5.

CONCLUSION

[96] This memorandum has examined the impact of the expected withdrawal of the UK from the EU. In particular, we analysed the impact of the provisional application of the CETA on the UK after it withdraws from the EU. We also analysed the constraints on the UK in negotiating and concluding new FTAs.

[97] In the first section, we examined whether the provisional application of the CETA will continue to apply to the UK after it withdraws from the EU. We concluded that in the context of provisional application, the term "Parties" in the CETA refers to the EU and Canada. The provisional application of the CETA concerns matters that are within the EU's exclusive competence (or, in the alternative, that fall under a shared competence in respect of which the EU has adopted the necessary internal legislation, so as to deprive the Member States of treaty-making power). This means that until the UK withdraws from the EU, the provisional application of the CETA will apply to the UK for these matters. However, the provisional application of the CETA will not continue after the withdrawal of the UK from the EU. This is because EU law will cease to apply to the UK after it withdraws from the EU.

[98] In answering the second question of the memorandum, we examined the legal constraints on the UK under EU law in order to determine when the UK will be in a position to negotiate and conclude FTAs with third countries. We concluded that under EU law, the UK can negotiate an FTA only after it has withdrawn from the EU, since the negotiation and conclusion of FTAs is part of the EU exclusive competence through the CCP.

[99] Finally, in the third section of this memorandum, we examined the obstacles the UK will have to overcome under WTO law in order to conclude new FTAs. We determined that under WTO law, it will be necessary for the UK to become a customs territory before it can enter into FTAs with third countries. This will likely be a complex process, and as a result it is impossible to predict with confidence how long it will take.

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