BREXIT: TREATIES, TRADE AGREEMENTS, “ACQUIRED RIGHTS” AND OTHER PRACTICAL IMPACTS UNDER INTERNATIONAL LAW

As the Brexit debate intensifies, campaigners on both sides have said very little about the relevance of international law to a possible exit vote. The very fabric of the UK’s relationship with the EU is underpinned, through the EU treaties, by international law. And should the UK vote in favour of leaving the EU in June, there could be a very significant impact on the UK’s rights and obligations under EU treaties with third countries, and on other international rights and commitments.

Most of the debate in recent months has focused on the UK’s relationship with the EU and whether and how that relationship could be unpicked and then re-packaged. Yet the implications for the UK in terms of its relations with third countries under international law may be no less complex. The EU is party to a great many international agreements and other commitments. Should the UK vote to leave, its status under those agreements may not be clear, and yet could be a matter of considerable practical significance. International law will therefore play a significant part in determining where the UK will stand following the referendum whether the vote is to remain or leave. It will impact on the UK’s relations with third states, as well as between the UK and EU Member States.
Structuring the UK’s Post-Brexit relationship with the EU

There are a number of possible structural options for the UK’s ongoing relationship with the EU. These are discussed in more detail in our webinar of 9 July 2015, available in our webinar archive.

Each of these options has the potential to have different implications from an international law perspective.

1. WORLD TRADE ORGANISATION (“WTO”)

The current position: the UK is a member of the WTO in its own right, as are all of the current Member States of the EU. The EU is also a member of the WTO and, in practical terms, the EU speaks for all EU Member States in WTO negotiations. Many of the UK’s commitments and obligations in the WTO are heavily tied up with those of the EU.

In the event that the UK votes to stay in the EU: the UK would continue to interact and negotiate with the WTO as part of the EU. That brings with it both advantages and, potentially, disadvantages, in that it is more difficult to pursue a “UK-specific” agenda.

If the UK votes to leave the EU: the UK would take on direct membership of the WTO and speak for itself in any negotiations or dealings. This is the “default” option for the UK which would apply even in the absence of any specific UK-EU trade deal – to rely on the global multilateral trading system available through the UK’s direct membership of the WTO to pursue its own external trade agenda, potentially focusing away from Europe to other markets.

Potential complexities: the UK’s market access rights and obligations are derived from the EU-wide rights and obligations. As part of the UK’s negotiation of its exit from the EU, the UK and the EU would have to consider and agree how the EU’s commitments (such as on import access) and concessions (such as on export sales) under the WTO should be apportioned between the UK and the EU.

Example – tariff rate quotas: If the EU has dedicated export rights with pre-allocated quantities in a bilateral tariff rate quota (“TRQ”), to change or reallocate aspects of that to the UK will require the consent of the importing country. That may be difficult to achieve, and could mean that the UK loses its market access under that TRQ. The quota may simply remain with the EU. Even if allocation could be agreed, other members of the WTO would have to agree to that apportionment. Potentially the other members may be concerned about the impact on their own position and seek improvements or changes as a result.

Other WTO-related considerations include:
• If the UK was to leave the EU without trying to negotiate any form of trade agreement (the “go it alone, WTO” option), the tariff applied by the EU to its “most-favoured nation” outside the EU block would then be applicable to any goods exported by the UK to the EU.

• Trade in services between the UK and the EU would also be governed under a WTO framework (the General Agreement on Trade in Services – the “GATS”).

• Any specific trade deal agreed between the UK and the EU would need to respect WTO principles of non-discrimination.

2. INTERNATIONAL TRADE AGREEMENTS WITH THIRD STATES NEGOTIATED THROUGH THE EU

There are a large number of trade treaties with third countries that involve the EU. These are in various stages of negotiation, signature and ratification. Some of these treaties are already in force and give significant benefits for UK companies doing business in those third countries, including many Commonwealth members.

A potential UK exit from the EU would give rise to potentially complex questions about the UK’s status under treaties to which the EU is a party.

The EU’s treaty-making power: the EU may negotiate and conclude a treaty where it has exclusive competence over the subject-matter of the treaty (or competence that is shared with the Member States and the Member States agree that it may do so). EU Member States are bound by such treaties through their membership of the EU, but the Member States do not become party in their own right (e.g. the EU’s pure trade agreements). Wherever the subject matter of the treaty also includes an area which falls within Member State competence, then the treaty becomes what is called a “mixed agreement”, i.e. an agreement that the EU and the Member States individually all sign. So that the third State knows who is responsible for which obligations, whether the EU or the individual Member States, the delineation of competence between the EU and the Member States will often be set out in a so-called Declaration of competence, which is lodged with the depository of the treaty (e.g. the UN Convention on the Law of the Sea).

There are a number of so-called “bilateral” agreements between the EU and its Member States, on the one part, and a third state on the other part, which are “mixed agreements”. This is the case with many of the EU’s free trade agreements (“FTAs”) with key trading partners (for example the EU’s FTA with South Korea – see text box EU-South Korea FTA). Such a treaty only enters into force once all 28 of the Member States, and the third country, have ratified it in accordance with their constitutional procedures.

The implications of Brexit: these will largely depend on the terms of the specific agreement in question.

Mixed agreements: in principle, if a State were to decide to leave the EU, in circumstances where it had already ratified the agreement in its own right, it could make a formal declaration, stating that it intended to assume all of the obligations under the agreement in its own right. However, in a number of such agreements, territorial application is defined by reference to the territory of the third State, and the territories “in which the Treaty of the European Union and the Treaty on the Functioning of the European Union are applied”. Once the UK had left the EU, it would of course no longer be covered by this definition. This could have implications for the UK’s ability to remain party to a large number of treaties. The UK would need to negotiate some other arrangement, but this may require an amendment to the territorial scope of the treaty. Under international law rules this would require an amending treaty, which itself would need, in the case of a mixed agreement, the unanimous consent of all the Member States and the third party, and thereafter a ratification process. However, with goodwill from other States, mitigating ad hoc provisions could be agreed, for example some form of effective provisional application.

Example: EU-South Korea FTA - a “mixed agreement”

According to the UK Government, the EU-Korea FTA is estimated to be worth over £500 million to UK business each year. It contains a provision for accession of new countries to the EU, but there is no provision for any party leaving the EU to remain able to benefit from the treaty and the territorial scope is defined by reference to the EU treaties. In due course, the UK may be able to negotiate its own bilateral arrangement with Korea but there are, of course, questions as to timing, both in terms of how long it would take but also in relation to when the UK could start these negotiations. Similar principles will apply to many other EU trade agreements in place, as well as to the recently concluded agreements for FTAs with Canada and Singapore, which are yet to come into force.

Ongoing negotiation of FTAs: should the UK give notice to leave the EU, this would initiate an exit period. During this period, the negotiation of the Transatlantic Trade and Investment Partnership (or “TTIP”) between the EU and the USA and other FTAs would continue as part of the usual business of the EU. The UK’s ongoing role in and under this agreement would need to be negotiated, within the EU as part of the two-year exit negotiation, as well as with the USA. It is possible that the UK could
continue to participate in the negotiating process through the EU, or become more directly involved in the negotiation in its own right, with a view to ensuring the UK’s participation in the TTIP or FTAs with other countries once its exit from the EU had become legally effective.

**Some pros and cons:** concluding trade deals as a single country may be more straightforward than the co-operation and compromise which comes with negotiating as a 28 country bloc, and the UK would be able to prioritise deals with countries not at the top of the EU’s list. But whether other states will consider it as important to conclude such a treaty with the UK alone, without the other 27 EU Member States, remains an open question. The UK will also need to build up the national capacity to conduct these negotiations – the European Commission has been the party negotiating the UK’s trade deals for many years now.

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3. ACQUIRED RIGHTS

This is a very complex area of law which may be relevant to a wide number of rights created by EU law which are currently directly enforceable in national courts, both vertically and horizontally.

**Acquired rights under EU Law?** There is some suggestion based on the decision of the European Court of Justice (now called the CJEU), in *van Gend en Loos*, that a right may be "acquired", in the sense that it was acquired and vested under the EU Treaties during the period when the UK was part of the EU. Following this argument, the acquired or vested right is not automatically lost or does not otherwise cease to vest once the EU Treaties no longer apply.

The European Court of Justice in *van Gend en Loos*...

…the Community constitutes “a new legal order of international law for the benefit of which the states have limited their sovereign rights…” confirming that “[i]ndependently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage…”.

It is not clear how acquired rights would be asserted. Further, the outcome of any attempt to rely on acquired or vested EU rights would be inextricably linked to the position which the UK negotiates with the EU after an exit vote. In the unlikely event that there were to be no transitional arrangements agreed, the outcome of any attempt by an individual to rely on vested EU rights – either in the English court, or as a UK citizen in another Member State court – would be highly uncertain.

**Acquired rights under international law?** The doctrine of acquired rights is a generally recognised principle of international law - rights are acquired or vested if they are relied on during the period in which the treaty or legal system from which they are derived is in force and not removed or otherwise dealt with when the source of the rights ends. Nothing in the founding treaties of the EU provides any guarantee of enduring rights.

The international law doctrine is reflected, in respect of rights and obligations derived from treaties, in Article 70(1)(b) of the Vienna Convention on the Law of Treaties 1969 (the “Vienna Convention”). This provides that unless the relevant treaty otherwise provides or the parties to the treaty otherwise agree, the termination of a treaty under its provisions or in accordance with the Vienna Convention does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

The uncertainty as to whether rights acquired and vested in individuals and businesses from other Member States before exit would exist as a matter of international law, and continue to exist independently of the rights granted by the EU treaties, will be relevant to the negotiation of the UK’s exit. When Greenland left the EU, the EU Commission made it clear that it considered established enterprises and workers exercising their “free movement” rights, held acquired rights. The EU Commission recommended that transitional measures should be implemented to deal with the issue of acquired rights. These were then dealt with in the Greenland Treaty. Greenland may not set a precedent, especially given that Greenland was not itself a Member State but part of Denmark. Acquired rights are nonetheless likely to feature in an agreement on transitional arrangements between the UK and the remaining Member States of the EU.

The protection of rights under human rights law is beyond the scope of this bulletin but human rights law – for example, the right to respect for private and established family life in Article 8 of the European Convention on Human Rights (the “ECHR”) - is also relevant to potential withdrawal of free movement rights on which EU citizens have already relied. The ECHR is a separate treaty pre-dating and independent of the EU Treaties and the UK will remain bound by the ECHR even if it leaves the EU.

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4. THE UK’S BILATERAL INVESTMENT TREATIES

The UK has over 100 bilateral investment treaties (“BITs”) entered into by the UK with other countries. These grant to investors from the other party to the treaty certain rights with regard to the protection of their investments in the UK and reciprocal rights to UK investors in the other party. An investor can bring a claim under the treaty directly against the UK for breach of these rights. These treaties themselves will be unaffected by Brexit and remain in force. It is possible that claims may be brought in relation to Brexit.

Amongst the substantive protections is the right to fair and equitable treatment. It is widely recognised that this right may be infringed by a State failing to provide a stable regulatory environment or to meet the legitimate expectations held by investors when they made their investment. Whether an investor could establish that it held legitimate expectations would very much depend on the particular circumstances of the claim. Further, a claim may also depend on the regulatory landscape after Brexit, which in turn will depend on whether the UK departs from the regulatory position which is imposed by virtue of its membership of the EU. While it would be highly unlikely for the UK suddenly to impose dramatically more stringent regulatory requirements than are currently imposed, if it were to do so there may be potential for foreign investors to look to treaty protections under the UK’s BITs.

5. FISHERIES AND THE UN CONVENTION ON THE LAW OF THE SEA (“UNCLOS”)

The Treaty of Lisbon established a common fisheries policy. Conservation of “marine biological resources” (such as fish) falls within exclusive EU competence (although other aspects of fisheries remain a shared competence (see Article 4.2(d) of the Treaty on the Functioning of European Union – “TFEU”)), so only the EU can legislate in this area. In particular, following the 2015 Advisory Opinion issued by the International Tribunal for the Law of the Sea (“ITLOS”) requested by the Subregional Fisheries Commission, it was held that the EU has exclusive competence in fishing matters under the UNCLOS such that obligations of flag states who are member States of the EU are now obligations of the EU. As such, it is the EU that is liable for breach of fishing access agreements and violation of fisheries laws in the Exclusive Economic Zone of third states.

Upon leaving the EU: the UK will leave the common fisheries policy. The UK will be able to take its own decisions regarding all aspects of management of fisheries and will no longer be bound by the quotas imposed by the EU. Upon Brexit, the UK may no longer enjoy rights under EU fisheries access agreements and would therefore need to negotiate its own fisheries access agreements with third states; it is likely to be doing so in competition with the EU. Moreover, it would be the UK that would have to police the due observance of local fisheries laws and which would be held responsible as the flag state for violations by UK flag vessels.

The UK’s other international law obligations: these include obligations under UNCLOS to ensure that its fish stocks are appropriately utilised whilst not being over-exploited. The UK will also have to cooperate with its European neighbours to ensure that suitable measures are in place to conserve stocks that straddle the maritime zones of other states. Accordingly, the EU will be a key partner in that discussion.

6. THE COMMON FOREIGN AND SECURITY POLICY (“CFSP”) AND SANCTIONS

The implications of a UK exit from the CFSP have not been particularly widely debated to date, but they could be significant for companies operating on a global stage. One aspect of the CFSP that concerns businesses closely are sanctions imposed against third countries, individuals and entities.

Current position: the UK is bound by sanctions that derive from the UN (through Security Council resolutions) and the EU (under the CFSP). The EU implements UN sanctions and its own autonomous regimes through directly applicable Regulations, and the UK imposes penalties for breach at domestic law level.

If the UK were to leave the EU: the sanctions agreed at the UN Security Council are ones which all UN states are required to adopt and the position would be unchanged. However, the UK would no longer be bound to comply with EU sanctions, and would not participate in shaping the EU’s own sanctions regimes. The UK could choose which of the EU’s sanctions regimes it wished to adopt, and do so under domestic law (in the same way as Switzerland and Norway), with any adjustments or amendments that it saw fit to impose. Any such additional layer of regulation at UK level, however, could risk lessening the impact of sanctions from a foreign policy perspective, and could also add to the administrative burden for companies working in both the UK and the EU in terms of understanding and applying the relevant sanctions legislation.
Given the significance of the UK’s role as an international financial centre, other states will wish to ensure the consistent application of sanctions in the UK in order to preserve their effectiveness. Accordingly, all parties may be motivated to work closely together to ensure continued cooperation.

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7. ENVIRONMENT

Most modern environmental treaties are signed as ‘mixed agreements’ (see text box, The EU’s Treaty-Making Power). If the UK is a party in its own right, it may be able to declare that going forwards it is exclusively responsible for all obligations of a party under the treaty in question. However, similar complexities may arise as identified in relation to the EU’s trade agreements.

In terms of implementation of environmental law within the EU, the EU may have chosen to implement through a Regulation (which is directly applicable in Member States without the need, in most cases, for domestic laws) or alternatively as a Directive (to be implemented through domestic law). Depending on the alternative structure of the UK’s relationship with the EU, EU environmental Regulations may no longer be applicable, meaning that the UK will need to implement its international obligations in domestic law.

Environmental Regulation and Trade: the UK is bound by its WTO obligations and those under the General Agreement on Tariffs and Trade (the “GATT”) not to impose barriers to trade with other WTO members. Environmental standards imposed in relation to goods to be imported to the UK or the provision of services to the UK could fall foul of GATT rules if they are not imposed for genuine reasons of environmental protection, or if in practice they discriminate in favour of UK suppliers. The UK might find itself under attack from EU exporters if it were to impose stricter environmental standards than the EU in some aspects – even though that is usually currently permissible under the UK’s membership of the EU. Or the UK might avail itself of the WTO disputes procedure against EU standards that UK goods exports must meet in order to gain entry to the EU market, which that it believes are not justified.

In practice, the EU’s existing product environmental standards are extensive, with the result that even if no longer bound by EU law, UK manufacturers and distributors will be forced to comply with EU environmental product standards in order to gain access to the EU market.

Example: registration of chemicals manufactured in or imported to the EU. Without registration, substances cannot be marketed within the EU. Registrations held by UK manufacturers would cease to be valid, resulting in disrupted supply chains. However, agreement may be reached upon UK exit to continue to recognise them. If not, the EU-based buyer will need to register its import. This makes forward planning difficult. There is no certainty that the EU authorities will continue to recognise existing registrations held by UK based manufacturers. If not, either an EU-based buyer will need to register its import, or the UK manufacturer would need to appoint an “only representative” based within the EU. Delays occurring whilst this is achieved could result in disrupted supply chains. Until it is known how this will be handled, forward planning will be difficult.

Any preferential “passporting” of the UK’s compliance with EU environmental standards for UK exports to EU buyers would have to be WTO-compliant.

Climate change and the new Paris Agreement: the EU has so far chosen to sign up to its Kyoto emissions reduction commitments and has made its Paris commitments as a bloc. For Kyoto, the EU then reallocate its commitment amongst the Member States through the EU “effort sharing agreement” which may also be the method used to reallocate Paris reduction commitments amongst the member States. Post Brexit, however, the UK would need to resubmit its own national Paris reduction commitment and implement that nationally with perhaps more freedom to align that to binding national targets under UK legislation.

Secondly, under the EU’s emissions trading regime, UK participants are allocated emissions allowances held in an account at a central European registry, which have a value and are tradeable in the scheme. It is not clear what would happen to the UK’s allowances upon Brexit if the corresponding EU obligations to surrender them in respect of UK emissions no longer exist. If such allowances continue to be tradeable assets on the doctrine of acquired rights discussed above, then a surplus of allowances over surrender obligations may arise once again - an issue that the EU has struggled with, that has led to the value of such allowances dropping significantly and a consequent loss in the EU scheme’s effectiveness. The UK might re-establish a domestic carbon trading scheme and seek to link it to the EU’s scheme, possibly helping to abate the disruption to the latter whilst making use of existing EU allowances issued to UK emitters before Brexit.

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For further information on the implications of Brexit, including sector analysis, please visit our Brexit hub.
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