Brexit Essentials: The World Trade Organization

1. Executive Summary

1.1 The World Trade Organization (“WTO”) provides a global multilateral agreement on the trade in goods and certain services between member countries based on two foundational principles: “national treatment” and “most favoured nation” treatment (see Glossary for further details), as well as a number of safeguards against certain trading practices.

1.2 There are two primary WTO agreements: the General Agreement on Tariffs and Trade (“GATT”) and the General Agreement on Trade in Services (“GATS”). Under both agreements there are certain common principles: each WTO member is obliged to accord most favoured nation treatment in respect of trade in goods and services supplied by each member of the WTO. In other words, it is generally prohibited from charging a lower tariff on goods originating in one WTO member than is applied to goods originating in another WTO member. There is an exception under the GATT for customs unions and free trade agreements, and under the GATS for economic integration agreements. These exceptions cover preferential trade arrangements such as the European Union (“EU”) and North American Free Trade Agreement (“NAFTA”) as well as bilateral free trade agreements.

1.3 Under the GATT each member must accord national treatment to other members. This means that members must treat goods coming from overseas, once the goods have paid any relevant tariffs, in the same manner as goods originating domestically. For the GATS the situation is more restrictive as there is only an obligation to accord national treatment if the particular WTO member has agreed to do so. In practice, developed countries have made more far reaching commitments in respect of national treatment than developing ones, but the level of commitments for trade in services is much narrower than is the case for trade in goods.

1.4 There are exceptions to the two main disciplines referred to above. Moreover, under the GATT it may be possible for WTO members to apply sanctions to protect their domestic industry against unfair trade and, exceptionally, economic safeguard measures to protect a domestic industry where fair trade is impacting it adversely.

1.5 The WTO has a dispute settlement mechanism under which states (but not corporates or individuals) may submit allegations of breaches of WTO rules. This provides scope for negotiation between states, although if the parties cannot agree then the matter will be resolved by judicial process. The WTO agreements do not create private rights that can be enforced in national courts.

1.6 When the United Kingdom leaves the EU it will not have any schedules of tariffs or list of services that it permits to be supplied in the United Kingdom. New schedules will therefore need to be negotiated with the EU and other WTO members by consensus. The requirement for consensus potentially gives any of the 164 other WTO members a veto right over the new commitments to be entered into by the United Kingdom.
### Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Description</th>
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<tbody>
<tr>
<td>Doha Development Round</td>
<td>The multilateral trade negotiations launched in Doha in November 2001 which are still ongoing</td>
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<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>Horizontal schedule of commitments</td>
<td>General commitments made under the GATS. This will additionally set out general limitations on national treatment and market access in respect of modes of supply of the services</td>
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<tr>
<td>Market access</td>
<td>Providing access to the domestic market subject to compliance with national regulatory requirements</td>
</tr>
<tr>
<td>Modes of supply</td>
<td>The four different ways in which a service can be supplied under the GATS</td>
</tr>
<tr>
<td>Most favoured nation basis/treatment</td>
<td>The obligation not to discriminate between goods or services based on their origin</td>
</tr>
<tr>
<td>National treatment</td>
<td>The obligation to accord the same treatment to foreign goods/services as the member accords to its own goods/services</td>
</tr>
<tr>
<td>Sector specific commitments</td>
<td>Commitments to provide national treatment or market access in specific service sectors including any limitations in respect of modes of supply of the service</td>
</tr>
<tr>
<td>Unbound</td>
<td>No commitments have been made in respect of national treatment and/or market access</td>
</tr>
</tbody>
</table>
2. Introduction

2.1 Article 50(3) of the Treaty on European Union ("TEU") states that the EU Treaties will cease to apply to the United Kingdom from the date of the entry into force of the withdrawal agreement or, if earlier, two years after the notification to the European Council of the United Kingdom’s intention to withdraw from the EU. This period can only be extended by unanimous agreement of all Member States. Trade deals between the EU and non-EU states have taken between four and nine years to conclude on average, and the previous Government has warned that negotiation of an ambitious trade deal with the EU could take several years.

2.2 The WTO provides a global multilateral agreement on the trade in goods and certain services between member countries based on two foundational principles: national treatment and most favoured nation treatment, as well as a number of safeguards against certain trading practices. In this briefing we will summarise the basic principles of WTO law as they would apply to trade between the United Kingdom and the EU Member States following the United Kingdom’s departure from the EU. WTO law is also relevant to trade between the United Kingdom and other countries with which the United Kingdom has no preferential trade agreement ("PTA"), and so would apply to such trade until and unless PTAs were negotiated with such countries. It is important to note that the United Kingdom cannot bring into effect PTAs with other countries until it has completed its withdrawal process from the EU. Other countries may wish to understand the future arrangements that may be negotiated with the EU before agreeing to negotiate a PTA with the United Kingdom. Any such PTAs would need to comply with WTO rules (see sections 4.7 and 5.4 for the requirements in the GATT and GATS respectively).

2.3 In looking at WTO rules we are assuming that the United Kingdom will be outside the EU customs union. It follows that EU tariffs and border checks will apply to trade between the United Kingdom and EU Member States. The United Kingdom will therefore be in the same position vis-à-vis the EU as major trading nations such as Australia, Canada, China, India, Japan, New Zealand, Russia and the United States.

2.4 To assist readers there is a Glossary of terms on page 2.

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1 These agreements did not cover the situation of an EU member state leaving the EU.
3 The EU has negotiated the Comprehensive Economic and Trade Agreement with Canada. This has yet to come into force.
3. **Law and Institutions of the WTO**

3.1 The WTO exists to facilitate the implementation, administration and operation, as well as to further the objectives, of the WTO agreements. Beyond this, the WTO has four tasks:

- to provide a forum for negotiations amongst members;
- to administer a system of dispute settlement;
- to administer the Trade Policy Review Mechanism (which is a mechanism for reviewing all members’ trade policies to ensure continuing adherence to WTO rules); and
- to co-operate with the International Monetary Fund and the World Bank.

3.2 The WTO currently has 164 members. The WTO is an international organization with two governing bodies: the Ministerial Conference and the General Council. The Ministerial Conference is the supreme decision-making body for the WTO and meets every two years. It is composed of representatives of all WTO members. The General Council meets “as appropriate” and is charged with decision-making between meetings of the Ministerial Conference. It is also composed of representatives of all WTO members.

The WTO
3.3 Decisions by the Ministerial Conference and the General Council are, in practice, taken by consensus. The WTO has a Director-General and a secretariat based in Geneva, as well as a large number of subsidiary bodies tasked with specific responsibilities, including the Committee on Trade in Goods and the Committee on Trade in Services. Members of the WTO are expected to engage in periodic trade rounds under which they agree to reduce tariffs and extend their commitments in respect of services. The current round of trade negotiations is the Doha Development Round which was launched in 2001 and has yet to be completed.

3.4 The United Kingdom is a member of the WTO partly in its own right and partly as a member of the EU. This is because the WTO agreements were classified as “mixed agreements” under EU law where competence is partly vested in the EU and partly shared with the EU Member States. Roberto Azevêdo, the Director-General of the WTO, has said that there is no precedent for a WTO member to extricate itself from an economic union whilst inside the WTO. On 7 June 2016 he said that “Britain is a member of the WTO and will continue to be a member of the WTO. But it will be a member with no country-specific commitments.” He has also observed that “It is very likely that both the EU and the UK will have to negotiate with all WTO members.” Currently, as a customs union, the EU has a single set of tariffs applicable to trade with other members of the WTO as well as a set of commitments in respect of trade in services. The United Kingdom would need to determine what set of tariffs and commitments it wishes to apply to WTO members following EU exit. These are referred to as “schedules of commitments” in the goods and services sectors and would need to be agreed with the EU and other WTO members by consensus.

3.5 One possibility would be for the United Kingdom to seek to replicate the existing set of EU tariffs and commitments. However, this would need the consent of other WTO members acting by consensus. Any alterations in the level of tariffs resulting in an increase would need to be negotiated following a specific procedure set out in the GATT. More difficult to deal with would be “tariff-quotas” which allow a certain amount of goods to enter the EU at a lower tariff. The United Kingdom might wish to take over a portion of the EU’s tariff-quotas, but this would need to be agreed with the EU as well as other WTO members and could be blocked by either. Exporter countries might seek to use these negotiations to obtain concessions in favour of their own goods and services as a condition of agreeing to the changes sought by the United Kingdom. The timeframe for such negotiations is unclear as it will depend on the attitude of other WTO members but it is generally supposed that negotiations may take years, depending on their complexity. It took five years to integrate Bulgaria and Romania into the EU WTO schedule of commitments in respect of services after they joined the EU. It should be noted that this process of “regularising” the United Kingdom’s position within the WTO as an independent member will be necessary under any of the models proposed for the United Kingdom’s future relationship with the EU other than remaining within the EU customs union (like Turkey).

3.6 The WTO administers several agreements of which the most important are:

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4 Since the Treaty of Lisbon the EU has had exclusive competence in matters covered by the WTO agreements.

5 The Guardian, Tuesday 7th June 2016.


7 A tariff-quotas is an arrangement under which a specific quantity of a good may be imported at a fixed tariff with a higher tariff applying to imports above that level. A tariff-quotas may be combined with an ad valorem duty.
• the General Agreement on Tariffs and Trade ("GATT");

• the General Agreement on Trade in Services ("GATS"); and

• the Agreement on Dispute Settlement.

We examine these below.

4. The GATT

4.1 The GATT 1994 is the successor to the GATT 1947 that governed most global trade in goods from its inception until the conclusion of the Uruguay Round of trade negotiations that led to the establishment of the WTO in 1994. The GATT does not cover services.

4.2 The basic principles of GATT law may be described as:

• national treatment;

• most favoured nation treatment;

• limitations on tariffs; and

• prohibition on quantitative restrictions.

There are detailed exceptions to these principles.

National Treatment

4.3 Under the first rule a foreign person, product or right must be treated like its domestic equivalent. Article III of the GATT prohibits any law, regulation or taxation pattern that modifies the conditions of competition between like imported and national goods. The GATT prohibits de facto as well as de jure discrimination, and both actual and potential, directly or indirectly discriminatory measures are caught. WTO case law has established that Article III is apt to catch all state measures that have an effect on the conditions of competition between domestic and foreign goods.

4.4 Article III:2 of the GATT catches internal taxes or other internal charges that are in excess of those applied, directly or indirectly, to like or directly competitive or substitutable products. In the case of “like” goods, even the slightest distinction in treatment will result in a breach of Article III. Goods are “like” if they are in “an intense competitive relationship” with each other. In the case of directly competitive or substitutable goods (i.e. where there is a lesser level of similarity), the difference in treatment must be so as to afford protection to domestic production.

4.5 Article III:4 applies to laws, regulations and requirements that affect the internal sale, offering for sale, purchase, transportation or use of goods. It is sufficient to come within the scope of Article III:4 that the measure modifies the conditions of competition. What
is prohibited is the according of less favourable treatment to “like” foreign products. The concept of likeness is therefore broader under Article III.4 than under Article III.2.

**Most Favoured Nation Basis**

4.6 Article I of the GATT requires that “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 originating in or destined for the territories of all other contracting parties”. In other words, discrimination between members of the WTO is prohibited. This is referred to as according treatment on a “most favoured nation” basis or “most favoured nation treatment”. The scope of the article is broad, covering both measures imposed at the border (e.g. customs duties) as well as measures that apply once a product has crossed the border (e.g. taxation, licensing provisions). An example of measures prohibited by Article I is the imposition of differential tariffs depending on the origin of the goods concerned. Determining whether the imported products are “like” depends on a number of factors including the end-use, consumers’ tastes and habits, the products’ properties and tariff classification. No distinction is drawn between *de facto* or *de jure* discrimination.

4.7 An important exception to the most favoured nation basis requirement is that accorded to customs unions and free trade agreements. Parties to a customs union (such as the Member States of the EU) need not accord the same treatment to themselves as they apply to WTO members that are not parties to the customs union. Similarly, parties to a free trade agreement (such as the European Economic Area (“EEA”)) may apply a more beneficial regime among themselves than they apply to other WTO members.

**Limitations on Tariffs**

4.8 The purpose of the GATT 1947, and its successor, the GATT 1994, is progressively to reduce tariffs on imported goods. This is done through trade “rounds” of which the most recent is the uncompleted Doha Development Round. The effect of successive rounds of tariff negotiations has been to reduce tariffs on most manufactured goods to very low levels, while tariffs remain higher on agricultural goods. In the case of the EU, the common commercial policy establishes a set of tariffs for all goods entering the EU. Tariffs are set out in schedules of commitments setting the maximum tariff applicable to imported goods (Article II GATT). WTO members may in practice apply a lower tariff than their committed level, but must do so on a most favoured nation basis.

4.9 If the United Kingdom were to rely on its WTO membership to trade with the Member States of the EU, exports to the EU would be subject to the EU’s schedule of tariffs. By way of example, the tariff on imports of automobiles is 10% and the tariff on oil is either 0% or 1.7% (depending on the customs classification of the oil product). Tariffs on agricultural goods are generally higher (on average, 46%). As seen above, the United Kingdom could seek to retain the existing level of tariffs on imports from the EU, lower them, or seek to increase tariffs. However, reducing tariffs unilaterally would not alter the tariffs payable on United Kingdom exports to the EU.
Prohibition on Quantitative Restrictions

4.10 Article XI:1 of the GATT states that “[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party”. Quantitative restrictions on exports and imports are generally prohibited regardless of whether they take the form of quotas, import or export licences or any other measures that distort trade (other than customs duties and similar charges). Exceptions do, however, exist.

4.11 Article XI of the GATT does not distinguish between de facto and de jure measures that restrict trade.

Protective Measures under the GATT

4.12 The GATT includes a number of specific protections against unfair trade, as well as safeguards which may restrict fair trade in certain circumstances. The former include protections against dumping and subsidies while the latter include the WTO agreement on safeguards (see below). There are also general exceptions.

Dumping

4.13 Dumping occurs where a WTO member brings products onto the market of another WTO member at a price less than the “normal value” of the product. Dumping is not illegal, and the GATT does not regulate dumping per se. However, WTO members are able to impose anti-dumping measures if: (1) there is dumping; (2) the domestic industry producing the “like” product in the importing country is suffering material injury (or a threat of material injury); and (3) there is a causal link between the dumping and the injury. Generally, the normal value of a product is its market price in the country from where the imports originate. However, where sales are made below cost, or there are too few or no sales of the dumped product on the domestic market, or if the domestic price is distorted (for example because the exporter is not a market economy), alternative values may be used.

4.14 A “major proportion” of the domestic industry must suffer harm from the dumped products, although this need not be over 50%. If, following an investigation, dumping is found to have occurred, a member of the WTO may impose anti-dumping measures. The extra tariffs imposed cannot exceed the margin of dumping i.e. the difference between the normal price and the dumped price of the product concerned, and may only be imposed as long as necessary. Anti-dumping measures must end five years after having been imposed unless a further investigation finds that continuation of the measures is necessary to prevent the continuation or recurrence of dumping and injury.
Subsidies and Countervailing Measures

4.15 The second form of unfair trade regulated under the GATT is the provision of subsidies. Subsidies are either prohibited or actionable under WTO rules if certain conditions are met. Members are also required to notify the WTO of subsidies that they provide. Subsidies are defined broadly as a financial contribution by the government or public sector that confers a benefit. The WTO agreements, however, only regulate specific subsidies as opposed to subsidies available generally throughout the community (e.g. free roads). Where, however, specific enterprises benefit, the subsidy will be treated as specific. WTO rules prohibit export subsidies (i.e. subsidies contingent on export performance) and import substitution subsidies (i.e. subsidies contingent on using domestic products). WTO members are under a duty to withdraw prohibited subsidies. Subsidies to firms that are export-oriented may be actionable but are not prohibited.

4.16 Other subsidies may be actionable if: (1) they cause material injury to the domestic industry of a WTO member; or (2) they seriously prejudice, or threaten serious prejudice to the interests of a WTO member. Prohibited or actionable subsidies may be challenged under the WTO dispute settlement system. In addition, where there is injury to the domestic industry of a member importing the subsidised goods, that member may impose a countervailing measure unilaterally. As with anti-dumping duties, the WTO member imposing countervailing measures must follow an investigatory procedure and the countervailing measures must be terminated after five years unless a new investigation shows that there is likely to be a continuation or repetition of subsidisation and injury to the domestic industry. The WTO Agreement on Agriculture provides special rules for agricultural subsidies. Under the Agreement on Agriculture, the United Kingdom would need to agree to take over a portion of the EU’s Aggregate Measure of Support (i.e. permitted level of agricultural support) if it wished to continue to subsidise agriculture as well as taking over a portion of the EU’s quotas on exports. Delays incurred in concluding the negotiations could extend the period for which the UK’s position in the WTO is unclear.

Safeguards

4.17 The third protection under the GATT is the Agreement on Safeguards which seeks to provide limited protection to a domestic industry from fair trade. It operates as an economic emergency rule which may be invoked where: (1) there are increased imports; (2) there is serious injury to the domestic industry (or threat thereof); and (3) there is a causal link between the increased imports and the injury. There must be a sudden, sharp and significant increase of imports for safeguards to be imposed. Serious injury will occur if there is a significant impairment in the position of the relevant domestic industry. Safeguards are concerned with protecting industries and not consumers (who may benefit from the increase of imports). Essentially, the purpose of the agreement is to give the domestic industry a chance to recover without providing indefinite protection (which may potentially occur in the cases of ongoing dumping or subsidisation).

4.18 Only serious injury caused by the increased imports may be addressed, although the increased imports may not be the sole cause of the injury. There are procedural requirements necessitating an investigation which may lead to the imposition of temporary safeguard measures. Such measures typically take the form of higher than permitted customs duties and therefore constitute an exception to Articles II and XI of the GATT. Safeguard measures may
not generally exceed four years (or eight years if the measures continue to be necessary and there is evidence that the domestic industry is adapting). Moreover, once safeguard measures have expired with respect to a particular product, it may not be subject to safeguard measures for a time period equal to the previous safeguards (i.e. four or eight years). There is also an obligation to offer “compensation” to the states having a substantial interest in exporting the product subject to the safeguards. This can take the form of lower tariffs on other goods. In the absence of agreement, the affected states can increase their tariffs on the WTO member imposing safeguards, or otherwise restrict importation, to a “substantially equivalent” level.

Other Security Exceptions

4.19 Article XX of the GATT provides protection for societal values other than trade liberalisation. It provides exceptions for measures that:

- are necessary for the protection of public morals;
- are necessary for the protection of the life or health of humans, animals or plants;
- are necessary to secure compliance with national law which is itself not inconsistent with the GATT (e.g. consumer protection laws, national financial services regulation); or
- relate to the conservation of exhaustible natural resources. This can refer to living resources (e.g. animals, plants) as well as expendable raw materials.

4.20 In addition, the measures must not constitute a means of arbitrary or unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on trade. In practice, it has proved difficult for national measures adopted under Article XX to pass this test.

5. The GATS

5.1 The GATS is much more limited than the GATT in terms of the liberalisation of trade in services. Basically, it is up to each WTO member to determine the extent of interpenetration of its services markets that it is willing to concede. Like tariffs, these are set out in schedules of commitments and are published on the WTO website. The lower level of liberalisation is driven by important national policy objectives (to protect consumers of services), as well as more overtly protectionist motives. The major disciplines imposed under the GATS are most favoured nation basis, national treatment and market access. Only most favoured nation treatment is unconditional, with national treatment and market access being dependent on a WTO member having entered a national treatment or market access commitment in its schedule of commitments. There is some overlap between the GATT and GATS, in that the same transaction may involve the supply of goods as well as a service. For example, the sale of a complex piece of machinery may be followed by a long-term servicing agreement for the machinery.

5.2 The concept of services is not defined in the GATS, although the WTO secretariat has prepared a Services Sectoral Classification List which is used when constructing members’ schedules of commitments. Services may be supplied in one of four modes, which are important when interpreting WTO members’ schedules. These are set out below.
**Mode 1**

Cross-border supply, where the service supplier and the service recipient remain in their own respective countries, but the service crosses the border.

Example: Legal advice delivered by phone from a lawyer in London to a client in Paris.

**Mode 2**

Consumption abroad, where the service recipient travels to the country of the service provider to receive the service.

Example: An employee of a Chinese company travelling to London to receive financial advice on an investment in the United Kingdom.

**Mode 3**

Commercial presence, where the service supplier sets up a commercial presence in another country to provide a service.

Example: The establishment of a branch of an English insurance broker in Germany to provide insurance mediation services.

**Mode 4**

Presence of individuals, where the service supplier temporarily moves to the country of the service recipient to provide the service.

Example: An English banker flying to India to advise on a corporate finance matter.

**Most Favoured Nation Basis**

5.3 Article II:1 of the GATS provides that each WTO member shall accord immediately and unconditionally to services and service suppliers of any other member most favoured nation treatment - that is treatment no less favourable than it accords to like services and service suppliers of any other member. Like with the GATT, this embeds the general prohibition on discrimination amongst WTO members. Article II:2 enables members, when they join the GATS, to enter a reservation in respect of certain measures inconsistent with Article II:1. The EU has taken advantage of this concession. The full list of measures is set out on the WTO website.

Examples from the EU list include audiovisual services, foreign participation in companies in Italy exceeding 49% of the capital and voting rights and, in the case of the United Kingdom, the waiver of a requirement for a work permit for citizens of Commonwealth countries with a grandparent born in the United Kingdom.

5.4 In other cases, to determine consistency with the requirement as to most favoured nation basis it is necessary to ask: (1) are the measures covered by Article II:1; (2) are the relevant services or service suppliers “like”; and (3) are the services or service suppliers of WTO members immediately and unconditionally accorded treatment no less favourable than the “like” services or service suppliers of another country? For example, if the EU allows branches of US banks to establish a commercial presence to sell retail mortgages then like treatment must be accorded to branches of United Kingdom banks once the United Kingdom has left the EU. There is an exception from the most favoured nation basis under Article V of GATS for economic integration agreements that have substantial sectoral coverage and provide for the absence or elimination of substantially all discrimination. The EU itself is one such arrangement. A third exception from most favoured nation treatment is mutual recognition agreements (e.g. in relation to professional qualifications) between WTO members (Article VII) i.e. a WTO member only has to recognise qualifications from states which recognise its own qualifications.
National Treatment

5.5 Article XVII of the GATS contains the national treatment obligation concerning services. It is very different from the rules in Article III of the GATT as national treatment only applies if a WTO member (Country X) has made a relevant commitment to offer national treatment in its schedule of commitments. Whether a WTO member makes a commitment in any particular service sector is a matter for negotiation. Where a WTO member has made commitments in relation to services, its behaviour will be considered by assessing (1) whether a particular measure is a measure affecting trade in services; (2) whether the services and service suppliers are “like”; and (3) whether the foreign services or service suppliers are granted “treatment no less favourable” compared with Country X’s services and service suppliers. Article XVII therefore prohibits all discrimination only to the extent that commitments have been undertaken.

5.6 For example, the EU places limitations across all service sectors on establishing a commercial presence. The detail of the restrictions varies across Member States. By way of example, nationals of non-EU countries may not acquire an interest in Irish land without first obtaining the written consent of the Irish Land Commission. The EU has entered an unbound commitment (i.e. excluded national treatment) for the presence of individuals (mode 4) across all sectors except for the entry into, and temporary stay within an EU Member State of specific categories of persons. These are known as “horizontal commitments”. All requirements of EU and Member States’ laws and regulations regarding entry, stay, work and social security measures shall continue to apply to such persons. Examples are requirements set out in EU directives and regulations imposing prudential requirements and conduct of business rules on financial services providers. In addition, members may impose restrictions over and above those set out in their sector-specific commitments.

5.7 For legal advice (excluding EU law) cross-border supply (mode 1) is unbound in France and Portugal (i.e. no commitments have been made). For consumption abroad (mode 2) there are no restrictions. Presence of individuals (mode 4) is unbound except as indicated above (see paragraph 5.6) and is subject to specific additional requirements in Denmark.
This is an hypothetical GATS schedule.

Excerpt of the Services Schedule of Country X

I Horizontal commitments

<table>
<thead>
<tr>
<th>Sector or subsector</th>
<th>Limitations on national treatment</th>
<th>Limitations on market access</th>
</tr>
</thead>
<tbody>
<tr>
<td>All sectors included in this Schedule</td>
<td>Mode (3) Authorization is required for the acquisition of land by foreigners</td>
<td>Mode (4) Unbound except for temporary presence of specialists, being natural persons with essential technical skills not currently satisfied in Country X</td>
</tr>
</tbody>
</table>

II Sector-specific commitments

<table>
<thead>
<tr>
<th>Sector or subsector</th>
<th>Limitations on national treatment</th>
<th>Limitations on market access</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal services</td>
<td>Mode (1) Unbound</td>
<td>Mode (1) Unbound</td>
</tr>
<tr>
<td></td>
<td>Mode (2) None</td>
<td>Mode (2) None</td>
</tr>
<tr>
<td></td>
<td>Mode (3) Three years of professional experience in the law of Country X</td>
<td>Mode (3) Subject to a maximum of 150 foreign legal firms</td>
</tr>
<tr>
<td></td>
<td>Mode (4) Unbound</td>
<td>Mode (4) Unbound, except as indicated in the horizontal section</td>
</tr>
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Market Access

5.8 Rules on market access are laid down in Article XVI of the GATS. This sets out a list of what are considered barriers to access. These are limitations on (i) the number of service suppliers, (ii) the total value of service transactions, (iii) the total number of service operations, (iv) the number of individuals that may be employed and (v) the participation of foreign capital. WTO members wishing to retain such restrictions on market access must therefore schedule them. Other market access barriers are not covered by Article XVI. Market access barriers differ from national treatment as they may apply equally to domestic and foreign service suppliers. As is the case with national treatments under the GATS, the GATS does not prohibit market access barriers per se. Rather, it is for WTO members to set out in their horizontal and sector-specific commitments the extent to which they will accord market access to other members. However, when a member makes a market access commitment it is obliged to accord such access to all WTO members on a non-discriminatory basis (see most favoured nation basis discussed above).

Domestic Regulation

5.9 Article VI:4 calls on the Council for Trade in Services (which is a WTO body charged with administering the GATS) to establish disciplines aimed at ensuring that qualification requirements, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. Such requirements should be: (1) based on objective criteria such
as competence; (2) no more burdensome than is necessary to ensure the quality of the service; and (3) in the case of licensing procedures, not in themselves constitute a restriction on the supply of the service. Pending the adoption of such a regime, WTO members must not, in sectors in which that member has established specific commitments, apply licensing and qualification requirements and technical standards that nullify or impair specific commitments which breach the criteria in (1) to (3) above and which could not reasonably have been expected of that member at the time the specific commitments in those sectors were made (Article VI:5).

5.10 The GATS Article III:3 requires WTO members to inform the Committee on Trade in Services of all new laws, regulations or administrative guidelines which significantly affect trade in services covered by their respective specific commitments under the GATS.

Safeguards

5.11 The GATS does not seek to regulate dumping, subsidies and emergency increases in imports the way the GATT does. Members were supposed to negotiate a safeguards regime under Article X but this has not happened. The granting of subsidies may trigger “consultations” which are to be accorded sympathetic consideration, but no legal remedies exist for distortive subsidies. Nor are there equivalent provisions to address dumping. However, Article XIV provides general exceptions that are very similar to those in Article XX of the GATT. In addition to protecting public morals, public policy, human, animal or plant life or health, and securing compliance with laws and regulations that are not inconsistent with the GATS, there are also two specific exemptions in respect of direct taxation and double taxation treaties. Like Article XX of the GATT, the measure must not constitute arbitrary or unjustified discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.

5.12 The following table summarises the position under the GATT and the GATS.

<table>
<thead>
<tr>
<th>At a Glance Comparison of the GATT and the GATS</th>
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<tbody>
<tr>
<td><strong>GATT</strong></td>
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<tr>
<td>National Treatment</td>
</tr>
<tr>
<td>Most Favoured Nation Treatment</td>
</tr>
<tr>
<td>Market Access</td>
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6. **WTO Dispute Settlement**

6.1 WTO dispute settlement is about disputes between states. Private individuals or companies cannot bring a case against a WTO member acting in breach of its obligations. This limits the effectiveness of protection. Moreover, the Court of Justice of the EU has held that the WTO agreements do not have direct effect in the EU legal order (i.e. cannot be directly invoked by natural or legal persons in the ordinary courts). The same is likely to be the case in the United Kingdom when it leaves the EU. It follows that a corporate whose rights are being violated under the WTO agreement has no right to bring a claim directly before the WTO dispute settlement bodies or to sue in its national court. The most the company, or a wider industry, can do is to lobby the United Kingdom Government to take up its case. Currently, alleged breaches of WTO rules are considered by the EU Commission which has the sole right to initiate the dispute settlement mechanism on behalf of EU Member States.

6.2 Disputes are heard by panels established by the Dispute Settlement Body (which represents all WTO members). The relevant panel is required to adjudicate on the specific complaints alleged by the complainant state. Panel decisions may be appealed on point of law to the Appellate Body. Non-appealed panel decisions, and decisions of the Appellate Body, will become binding unless the Dispute Settlement Body decides, by consensus, not to approve the report. In practice, this does not happen as it requires the consent of the winning party not to enforce an award in its favour.

6.3 Two sanctions are specified for the failure to comply with an award within a reasonable period of time: compensation or retaliation. What is a reasonable period of time is usually agreed between the parties, although if agreement cannot be reached the period can be determined by arbitration with a guideline of 15 months as a maximum. Compensation involves the losing party offering additional trade concessions, usually in related areas, as a substitute for maintaining the trade barriers in dispute. This is a voluntary process. However, where compensation cannot be agreed, the winning party in the trade dispute may request permission from the Dispute Settlement Body to engage in retaliation. The level of retaliation must be commensurate with the nullification or impairment of the trade concessions involved. Generally, retaliation involves the withdrawal of trade concessions in the same economic sector, although if this is not practicable then retaliation may be authorised in a different sector or under a different WTO agreement. If the losing party objects to the level of retaliation the dispute will be referred to arbitration. There is no appeal from the decision of the arbitrators.

6.4 WTO panels and the Appellate Body are creatures of public international law, so the law they apply in resolving disputes is not the national law of any country but international law. Over the years, panels and the Appellate Body have built up a rich tapestry of jurisprudence, especially on the GATT.

7. **Conclusion**

7.1 As a model the WTO option presents certain difficulties. However, it offers a default option if a satisfactory preferential trade agreement or other relationship cannot be negotiated between the United Kingdom and the EU (although the United Kingdom will still need to negotiate its WTO schedules with the EU). It will also be relevant to the United Kingdom’s trade with other countries in the world with which the United Kingdom does not have PTAs. In terms of trade in goods, the United Kingdom would be subject to the EU common external tariff in the absence...
of agreement. More significantly, given that tariffs are generally quite low, the United Kingdom will be subject to non-tariff barriers, such as EU product standard requirements, as well as customs checks on the importation of goods into the EU. However, the dependence of the United Kingdom's economy on services is an area of greater exposure because the level of liberalisation of services under the GATS is far more limited.

7.2 It is to be hoped that future rounds of trade negotiations will result in greater openness of the services sector to international trade. However, given the deadlocked state of the Doha Development Round, the United Kingdom may find it easier to pursue liberalisation in services trade through bilateral agreements with the EU and its other trading partners. The United Kingdom will also need to regularise its position as an independent state within the WTO, negotiating schedules of tariffs and commitments in services with other WTO members by consensus. The position of the agricultural sector may be particularly sensitive in such negotiations as certain countries are likely to wish the United Kingdom to liberalise trade in that sector further. There is of course also a risk of consensus not being reached for political or other non-trade related reasons.