

Negotiating Brexit Free Trade Agreements

JONATHAN MUKWIRI*



On 23 June 2016 the UK voted by 52% to 48% to leave the EU. The formal Brexit process would start after the UK triggers Article 50 of the Treaty on the European Union (TEU), which the UK Government may trigger by the end of March 2017 (*The Guardian*, 2 October 2016). In the meantime, and as long as the UK remains an EU Member State, it is bound by the EU trade rules under

the Common Commercial Policy (CCP). Free trade relations with non-EU countries fall under the competence of the EU through the CCP. Two questions arise.

First, to what extent can pre-Brexit UK negotiate and sign Free Trade Agreements (FTAs) with non-EU countries? After the Brexit vote, the UK Government created the Department of International Trade (DIT), with responsibilities including one of 'developing and negotiating free trade agreements and market access deals with non-EU countries' (as stated on the DIT website). After the DIT started informal talks with non-EU countries, it was reported that the UK 'Cabinet aims to have trade deals in place before Brexit' and that 'the deals would be ready up to "the point of signing" given that Britain is not meant to formally negotiate trade deals while it is still a member of the EU' (*Financial Times*, 17 July 2016). The UK would be in breach of the CCP to sign trade deals with non-EU countries before Brexit. But it was reported that 'leaked papers show Brussels could impose fines for simply talking to other countries which are already in talks with the EU' (*The Sunday Times*, 18 September 2016).

It is here suggested that the spirit of Article 50 TEU, once triggered, should allow for the UK to have trade talks with non-EU countries and sign trade agreements that would not come into force until after Brexit. The letter of Article 50(2) TEU explicitly provides that a Member State that notifies its intention to leave the EU may negotiate with the EU while it is still a Member State, 'setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union'. Parallel UK negotiations with non-EU countries, setting out the arrangements for their future relationship outside the EU, should be read into the

spirit of Article 50 TEU. Once the UK has triggered Article 50 TEU, it should, from that time, be implied that the EU cannot competently negotiate future trade deals with non-EU countries that will bind the UK after Brexit. It should then follow that the UK should be deemed to have exclusive competence and allowed to negotiate trade deals with non-EU countries and sign trade agreements to come into force after Brexit. As formal negotiations between the UK and EU cannot commence until Article 50 TEU is triggered, so should be for formal negotiations between the UK and non-EU countries in areas falling under the CCP.

It is further suggested that once Article 50 TEU is triggered, to preclude the UK from talking to non-EU countries and signing trade agreements that would come into force after Brexit, would be in breach of the spirit of Article 8 TEU. The letter of Article 8(1) TEU provides that the EU 'shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation'. This should be read to extend the 'area of prosperity' beyond the EU to 'neighbouring countries' such as the UK after Brexit. Once Article 50 TEU is triggered, the spirit of Article 8 TEU should be read as requiring the EU to cooperate with the UK to 'establish' 'good neighbourliness' in allowing the UK to negotiate its future prosperity with non-EU countries to come into force after Brexit.

Second, will the UK retain the rights and obligations of pre-Brexit FTAs with non-EU countries post-Brexit? Opinions are divided. Alan Dashwood QC, referring to the EU-Korea FTA, said that he did not 'believe that the UK could retain the rights and obligations that apply to it under the agreement. We would have to renegotiate'.¹ Iain Mansfield said that, as 'signatory of the EU's FTAs in its own right, the UK will continue to be bound by these obligations and should expect other countries to reciprocate; the UK signs and ratifies EU trade agreements in its own right, even though all negotiation is done by the Commission'.² It is suggested that the UK may require the consent of both the EU and the non-EU party to retain the rights and obligations under those FTAs. But depending on the terms of those FTAs, the interests of the UK outside the EU may best be served by renegotiating FTAs.

* Senior Lecturer in Commercial Law, Durham Law School, Durham University, United Kingdom. E-mail: jonathan.mukwiri@durham.ac.uk.

¹ Foreign Affairs Committee, *Costs and Benefits of EU Membership for the UK's Role in the World* (HC 545, Q217 8 Dec. 2015).

² Iain Mansfield, *A Blueprint for Britain: Openness not Isolation* 14 (Institute of Economic Affairs 2014), fn. 16.