Professor Joseph McMahon (ABR0039)

You suggested that the EU's existing free trade agreements with non-EU countries are 'mixed agreements.' Are all the EU's free trade agreements mixed agreements and if they are not, what are examples of mixed agreements?

All agreements concluded by the EU that also had to be approved by the UK Parliament are mixed agreements – you can check this by using the parliamentary database of agreements. It is only relatively recently that the EU Commission has been arguing that agreements with third countries should be concluded solely by the EU. This matter is currently before the European Court as the Commission referred the EU-Singapore agreement to the Court and the Advocate General's opinion was delivered in December so a ruling from the Court is imminent.

· *In the session, you noted that "There is also another great fallacy at work here, which is that the WTO approves your Schedule." What is the difference between the WTO approving, rather than certifying, a WTO Schedule of Commitments?*

Approving the Schedule would suggest, in my opinion, that all Members would have to consider the Schedule to be acceptable whereas certification requires only that receipt of the Schedule is acknowledged by the Director General. As indicated, if a Member has a problem with the Schedule as a result of an increase in tariffs and/or more restrictive tariff quotas, that Member may decide to invoke Article XXVIII GATT – the modification of concessions provision leading to consultations in the hope of finding a mutually agreed solution.

· *You suggested it was "advisable" for the UK to deposit its WTO Schedule of Commitments before entering into trade negotiations with non-EU countries and with the EU. Why is that? Is it a legal requirement or politically desirable?*

Trade negotiations are about a range of issues, for example, trade concessions on tariffs, tariff quotas, the use of export subsidies and regulatory issues. Negotiations on trade concessions are conducted with respect to a Schedule, so logically this would suggest that a proposed Schedule should be in place before the negotiations begin. Legally, I would suggest that the Schedule cannot exist until the UK ceases to a member of the EU. Politically, this does not mean that the contours of the Schedule cannot be put in place before the UK formally leaves.

· *In the session, you said that "The EU has a number of tariff rate quotas arising out of the Agreement on Agriculture. There is some*

argument, shall we say, as to whether those tariff rate quotas can be split between a departing Member State and the remaining EU." To clarify, would all tariff rate quotas (TRQs) have to be divided between the EU and the UK following Brexit, including those negotiated as a result of the recent accessions to the EU, or is it only those TRQs that result from the 'tariffication' under the Agreement on Agriculture?

The Preamble to the Agreement on Agriculture provides that its long-term objective "is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines." The market access commitments are expressed in Article 4 which provides that the Schedule will include tariffs and tariff quotas – and the footnote indicates that what is to be tariffied are "quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement." So, all existing tariff quotas have their origins in the implementation of Article 4. Those who have joined the EU since 1995 were members of the WTO and thus subject to Article 4 before joining the EU. For example, the latest acceding Member State, Croatia, became a member of the WTO in 2000 and on its accession to the EU, it became subject to the EU Schedule. So what is being "divided" is the EU Schedule as it stands in 2019 (assuming that this is the date of the UK's exit).

A detailed examination should be undertaken of the existing tariff quotas in the EU Schedule to determine if the UK is the major/principal beneficiary of those quotas. If so, there is an argument that the tariff quota in the UK Schedule should match the traditional pattern of trade for a particular product with a consequent reduction in the EU Schedule for that product.

· *You argued that "there is no precautionary principle in international trade". Could you elaborate on that distinction between a precautionary approach and the precautionary principle for the purposes of the SPS Agreement? To what extent will this be relevant post-Brexit?*

As previously stated, the EU tried to argue in *EC – Hormones* that Article 5.7 SPS incorporated the precautionary principle into the Agreement but this was rejected by the Appellate Body who noted that it is reflected in

that provision and others such as the Preamble and Article 3.3. However, it concluded that the principle did not override Articles 5.1 and 5.2 SPS. This was repeated by the Panel in *EC – Biotech*. The wording paragraph 7 (and each of the four requirements that it sets out) has been the subject of considerable jurisprudence, most notably by the Appellate Body in *US/Canada – Continued Suspension*, when it noted that the "four conditions set out in Article 5.7, however, must be interpreted keeping in mind that the precautionary principle finds reflection in this provision."

I would suggest that the jurisprudence to date indicates that the precautionary principle can be used in the interpretation of Articles 5.1 and 5.2 SPS. However, that requires the principle to have the status of customary international law and both the Appellate Body and the Panel have denied this status to the principle. Even if it did have that status the jurisprudence suggests that it would not override Articles 5.1 and 5.2, so I think it is more correct to say that SPS Agreement adopts a precautionary approach in those instances in which scientific evidence is uncertain. After Brexit the above will be of relevance if the UK (or any of its devolved administrations) adopt precautionary measures in areas where the scientific evidence of the safety of a food product is uncertain e.g. genetically modified food.

· *You suggested that some imports of food products currently restricted under the Novel Foods Directive could be removed by the UK post-Brexit. Could you give us examples of such food products?*

Novel food is defined as a food that has not been consumed to any significant degree in the EU before May 1997 when the first novel food legislation entered into force. This includes for example food traditionally eaten outside the EU (chia seeds) or food produced using new technologies (high pressure fruit juice). The new Regulation, which will enter into force later in 2017, introduces a different assessment procedure for traditional food i.e. if the food can historically be demonstrated as being safe and there are no safety concerns raised by EU Member States or EFSA, it can be placed on the market on the basis of a notification from a food business operator.

WTO members have continued to raise specific trade concerns about the Regulation. For example, in 2011 Peru suggested that the Regulation was blocking the export of Camu camu, a traditional Amazonian product, which is an effective antioxidant for human health and is rich in Vitamin C (containing 56 times more than the lemon) and is exported to Japan and the US. (G/SPS/GEN/1087). More recently, it has noted that exports of kaniwa (a supergrain) had increased by more than 317% in 2013 and about 206% in 2014, going to markets such as Australia, Canada and the US, "the marketing of this food in the European market was restricted and its real potential was therefore reduced." (G/SPS/GEN/1383)

· *In the evidence session you also stated that trade negotiations could start at the same time as the Article 50 notification is made. However others, including the EU, have argued that this cannot happen because the Commission does not have the competence to negotiate trade deals with existing EU Member States; and that the UK cannot negotiate with third countries until the withdrawal process is complete, because that competence sits with the Commission. Would you be able to elaborate on your views on this issue?*

The evidence I gave suggested that the Article 50 negotiations were about disentangling the UK from the EU including such matters as dealing with UK citizens resident in the EU and EU citizens resident in the UK. Article 50 provides, however, that such negotiations must take account of "the framework for its [UK's] future relationship with the Union." There is room for various interpretations around this additional phrase.

It seems clear that the future relationship could be based on Article 8(1) TEU which provides: "The Union 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." Under paragraph 2 the specific agreements "may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly." The other possibilities are an association agreement under Article 217 or a free trade agreement under Article 207 – the latter seems to be suggested by the White Paper.

This suggests that at some time during the two-year negotiations on the withdrawal agreement, discussions will have to begin on the future relationship. It is unrealistic to expect the negotiations on the future relationship to be concluded within the two-year period mentioned in Article 50 and there is no legal obligation to meet that timetable as it applies only to the withdrawal agreement. However, within this two-year period it would be possible to have the outlines agreed for a transitional arrangement to avoid a legal vacuum as EU trade agreements take between four and seven years to negotiate. Such agreements are usually concluded as mixed agreements, requiring approval by the EU institutions and national parliaments.

The same argument can apply to UK agreements with third countries. Once it is certain that the UK is withdrawing from the EU, informal negotiations can begin with third countries. Such negotiations cannot be officially concluded until the UK has withdrawn from the EU.

1 March 2017