

In the Brexit divorce, who gets custody of the EU's FTAs?

Blog post by Partner Stephen Adams, 12 October 2016

Like many divorces, Brexit is going to be a custody battle of sorts. UK Secretary of State for International Trade Liam Fox has warned (via his preferred UK newspapers) his EU counterparts that attempts to prevent the UK inheriting a large number of FTAs signed on the UK's behalf by the EU could be met with retaliation by those EU trading partners. This is, in essence, the question of who gets custody of the EU's FTAs after Brexit.

In the generally garbled coverage in British media, it has been translated into the suggestion that the EU could be subject to demands for compensation from states like Korea and Mexico that currently have FTAs with the UK, via the EU common commercial policy, if the EU does not give the UK a "fair" deal. Central here is the vexed question of how to transition the EU's existing FTAs onto both the UK and the 'EU without the UK'.

In both cases, EU trading partners may potentially feel that the concessions they previously granted the two combined markets should not apply to either market in isolation. This is a much more acute problem for the UK, as it is much smaller (even if a hefty share of EU markets). But it is an EU problem too, and could in theory give rise to demands for compensation (in additional market access concessions, not cash) from some EU partners. Even the simple question of dividing up preferential EU import quotas between the EU and the UK markets, while a niche issue, is intensely sensitive for some trading partners, with and without FTAs.

Solutions for this unprecedented problem are starting to be explored even in the lock-down, 'don't mention the Brexit' environment of Brussels. Potentially, the UK could join the existing stock of EU FTAs as a third party, which has some advantages for the treatment of supply chains across the three markets involved - but this may be unattractive to London if it thinks it could get a better bilateral deal. It would take a large measure of political goodwill all round, which may be in short supply. Not many takers in Brussels for this one at this point.

Alternatively, the UK (and the EU) can accept the need to review, and probably renegotiate to a greater or lesser degree, the existing stock of agreements. This would be a significant undertaking. To the extent that the UK would be establishing new deals (whereas the EU will arguably be reviewing existing ones), the UK and its counterparties would potentially rely on the forbearance of other WTO members - perhaps in the form of an agreed waiver - if it wanted to keep any kind of preferential trading terms in place while replacement deals were confirmed.

This would be materially easier - and could even largely remove the WTO issue - if the EU granted the UK a waiver from its own EU obligations to negotiate bilaterally in order to have new FTAs ready at the point of departure. Needless to say, this would be a major political gesture from the EU and the UK would have to earn such a concession with a constructive approach of its own.

Suffice to say, the issue is much more complicated than British media suggest, or than Dr Fox's comments imply.