

UK Trade Negotiations: *Preparing the Ground*

Sir Daniel Bethlehem QC

The point has been made in recent weeks that the UK does not have a seasoned pool of experienced trade negotiators, lawyers and technical advisers. This is probably accurate, at least in terms of a sufficiency of numbers who have sat in or led trade negotiations and know their way around tariff schedules and the nomenclature of international trade. In practical terms, the task facing the UK on this agenda is significant. It is likely to be complicated by an enlarged departmental division of competence across government on such matters.

The only way in which this agenda is likely to be manageable will be for HMG to quickly take a number of practical steps to prepare the ground and prioritise the tasks to be addressed. The following steps suggest themselves.

Policy and advisory coordination

It will be important to avoid the entrenchment of departmental fiefdoms of policy and technical expertise. While the formulation of international trade policy will be a matter for Ministers and senior officials, practical steps should be taken quickly to establish a trade law and policy advisory service that sits between the various departments. There is an insufficient pool of expertise to populate each department with its own cadre of specialists. The creation of an inter-departmental advisory service, drawing on expertise from across government is likely to be the only practical way of ensuring that necessary expertise is coordinated, developed and made available across HMG.

Training

Growing the pool of technical expertise will be essential. It is unlikely that HMG will simply be able to go on a recruiting drive and, even if so, this would be costly. While there are many who have been quick to hold themselves out as having such expertise, this is unlikely to be accurate. Proven familiarity with trade negotiations, and with the intricacy of tariff and non-tariff nomenclature and documentation is likely to be small. Immediate steps therefore need to be taken to develop a home-grown pool of expertise through high intensity training programmes that draw on instructors with real-world experience, including through participation by WTO and similar officials.

Prioritising the trade policy agenda

The trade policy agenda facing HMG is large. It will not be possible to address everything in tandem. Prioritising the agenda will be essential.

Effective prioritisation will need to go beyond defining HMG's trade policy, setting an order of negotiations and determining a negotiating strategy. The agenda is too broad for such an approach. There is also a risk that uncertainty in back-order items will give rise to volatility. Prioritising the agenda should therefore include the early formulation of a number of high-level policy statements that will establish a stable framework under which HMG will address core issues systematically and sequentially in a manner designed to settle uncertainty going forward. Elements of such an approach include multilateralism, succession to and continuity of existing commitments, and the most-favoured-nation principle.

Multilateralism

While the UK is a Member of the WTO, the UK Mission in Geneva has not historically had the expertise, the numbers or the inclination to follow developments in the WTO closely. This ought to change immediately. At a practical level, a number of trade policy and legal posts should be created in Geneva with the remit of developing expertise in the day-to-day working of the WTO.

In parallel, HMG should give careful consideration to whether and what synergies of effort and leverage may be achieved by working through and in the margins of the WTO. Effective use of this forum would enable the UK to maximise its engagement in the near-to-medium term, while personnel capacity is developed at home.

Succession to and continuity of existing commitments

By virtue of its EU membership, the UK is bound by an array of treaties addressing issues of international trade. The EU common commercial policy and WTO tariff schedule and other commitments also bind the UK. This is the legal and customs framework for the UK's import and export of goods and services beyond the EU.

As a first order priority, HMG should give urgent consideration to whether and in what terms it might be sensible to signal that it intends to adopt and maintain the EU WTO tariff schedule and other commitments, whether in general terms or for specified sectors, and whether for a defined period or indefinitely. Such an approach is likely to have a calming effect and reassure commercial operators that there will be no precipitous change in the arrangements relating to access to the UK market. It may also be expected to

encourage reciprocal arrangements that would benefit UK exporters as well as encourage inward investment.

As regards EU trade and other agreements by which the UK is currently bound, HMG should similarly give urgent consideration to the approach that might sensibly be taken, for example, by signalling succession to such agreements (or certain of them), non-succession to such agreements (or certain of them), or an intermediate position of succession for a defined period of time after which UK participation should either be presumed to continue or to lapse. There are well-established principles of international law relevant to such matters. With appropriate adaptation, such principles might serve the UK well in the current circumstances.

The most-favoured-nation principle

MFN clauses are a common feature of international trade and investment agreements. They operate to give to the recipient all the benefits that are accorded to the most favoured nation. The MFN principle is a core feature of the WTO as well as other treaties. Within the framework of the WTO, MFN operates subject to an exception in the case of customs unions and free trade areas.

In the present circumstances, the MFN principle both poses challenges and opens opportunities. It poses challenges as, once outside the EU, the UK may no longer have the cover that allows it to give preference to trade from EU Member States without the obligation to afford this to other States with which there are operative MFN clauses. Absent appropriate arrangements, therefore, the UK may find that arrangements agreed with the EU will be subject to MFN vis-à-vis WTO Members or other States with which there are operative MFN clauses.

Conversely, reliance on MFN opens opportunities in the current circumstances as doing so may enable HMG to focus attention on the negotiation of a key bilateral trade agreement on the basis that subsequent agreements and arrangements will, by operation of MFN, follow quickly. Whatever the case, the automaticity of the multilateralising effect of MFN clauses will need to be carefully considered if unintended consequences are to be avoided as the UK embarks on its international trade policy agenda.

Sir Daniel Bethlehem QC is a barrister specialising in public international law practising from chambers at 20 Essex Street, London and a visiting professor at King's College London. He was the principal Legal Adviser of the Foreign & Commonwealth Office from May 2006 to May 2011.