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The fundamentals of trade deals

Public Law analysis: As the UK draws up its 'to do' list for its future trade agreements, Greg Spak, head of White & Case's international trade group, and Brendan McGivern, executive partner of the firm's Geneva office, caution that if the UK wants speedy deals, it will likely have to pay for it with trade concessions to its partners.

What are the fundamental considerations when negotiating trade deals between states?

The negotiation of free trade agreements (FTAs) is invariably driven primarily by national economic interests, market dynamics, and a measure of domestic policy and politics. In other words:

- Which sectors are priorities for the negotiating country?
- Where are the market opportunities? and
- How does the country balance its offensive and defensive priorities?

The UK would want trade agreements with countries where it has and wants to preserve a substantial share of the market, either generally or in key sectors of interest to the UK industry.

FTAs are built on the existing rules of the World Trade Organization (WTO). But in an FTA, like-minded countries can go further and faster than the WTO, both in terms of market access and in the scope of the rules that apply to trade. These are often called 'WTO Plus' agreements, and they have been a major force in driving the world trading system.

Another important consideration when negotiating trade deals between states is a commitment by the other country to a rules-based system. Trade rules essentially impose 'disciplines', or restraints on each side, in the conduct of their trading relationship. Both countries must agree to abide by agreed rules, enforceable through dispute settlement if need be. Exporters need as much legal certainty as possible, and a shared rulebook goes a long way to providing that.

Trade negotiations also relate to protection of the domestic market. Just as the UK has its lists of what it wants from foreign markets, other countries will have their wish lists for the UK market. The balance and trade-off between these offensive and defensive interests is what makes for a robust trade policy and an interesting negotiation.

If the UK now has to look to the world for trade deals, on what basis should it prioritise negotiations (eg size of market, influence, sector)?

Economic interests and market dynamics should drive the UK's priorities for FTAs. The UK will have a long 'to do' list. It will of course need to negotiate some kind of preferential access agreement with the EU itself. It will also want to replicate the FTAs that the EU has negotiated with a wide range of important third countries outside of Europe, such as South Korea and Mexico. It will also want to include emerging markets where there are new opportunities for UK industry to expand exports.

Then there are the so-called 'mega regional' FTAs, most importantly the Transatlantic Trade and Investment Partnership (TTIP). The importance of this agreement cannot be overstated. The combined GDP of the US and the EU is nearly half of the GDP of the entire world, and the US is the largest non-European export market for the EU. Securing preferential access to the US will clearly have to be one of the very highest priorities for the UK.

How long do trade deals take to complete?

There is no set period. It really depends on the size of the country and the difficulty of the issues being negotiated. But this is not a fast process. To take one example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) took five years to negotiate, plus a further two years of talks on investment protection and dispute resolution, and there were a couple of years of study on EU-Canada trade before the negotiations were launched. And this agreement is still not in force—it has to be ratified by the European Parliament, the Canadian Parliament, and the legislatures of all EU Member States. All that will take time.

It seems unlikely that the UK will be able to construct a system of trade agreements quickly. There is one clear reason for this—it may not be in the interest of the UK's trading partners. Any negotiation involves an assessment of relative strengths and weaknesses. A perceived 'weakness' for the UK will be time, the lack of a strategic trading regime is a detriment, and trading partners will understand the sense of urgency inherent in the UK's approach to the process. If the UK wants speed, it will likely have to pay for it with trade concessions to its partners.

Are there such things as 'speedy' trade deals or interim agreements prior to full deals being completed?

Those are really two separate questions. Let's start with 'speedy' trade deals.

While some FTAs are more complex than others, there is really no such thing as a 'speedy' trade deal. Even if there are no major differences on what rules to apply, the differing commercial interests of the parties can often lead to protracted negotiations. Moreover, in modern democracies such as the UK there is a need for extensive consultations back at home, including with industry and civil society. Indeed, a major challenge for any government is to reconcile the competing or divergent domestic interests in order to come up with a unified

position to present to the other side. This process is likely to be more acute given that the UK stakeholders will have to find their way through this new process. Moreover, once the deal is done, it has to be ratified by the different Parliaments. There is nothing 'speedy' about this.

As for interim agreements, some FTAs provide for so-called 'provisional application'. In practice, that can be politically very difficult. Governments will want to avoid the accusation that they are applying an important trade agreement before Parliament has had it say.

For example, the EU Trade Commissioner, Cecilia Malmström, advised the European Parliament at the time of her appointment that she agreed 'not to provisionally apply politically important trade agreements before the European Parliament has had the opportunity to give its consent', other than in cases of urgency or 'very technical measures'. So it will be difficult to fast track an FTA with the EU through provisional application.

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