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Tackling post-Brexit uncertainty about international agreements in force (case study: United States)

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Executive summary

- A source of uncertainty in ensuring continuity of the application of trade (and other) agreements exists already at a fundamental level: The EU’s and other databases do not match up as regards treaties currently in force.
- This uncertainty means that it is not clear by which set of agreements the UK may cease to be covered post-Brexit, both in the bilateral and multilateral sphere.
- The present author’s research in the case of transatlantic treaty relations (EU-U.S.) may contribute to a general methodology on explaining and eliminating discrepancies regarding the extent of the currently existing treaty relations that are likely to affect the UK.
- As per recommendations, legal teams from the UK and its most important trading partners should systematically compare their respective databases/compendia and establish “joint lists of items of concern,” which include legal instruments which at least one side deems binding, and establish generally applicable “continuity road maps”.

Introduction

1. The present submission uses the economically and politically important treaty relationship between the European Union (EU) and the United States as an example to demonstrate that a fundamental problem in ensuring continuity of trade and other agreements post-Brexit exists already at a fundamental level, i.e., establishing the extent of legal relations based on the treaties currently in force.¹ It should be stressed

¹ This submission draws on research conducted for the author’s Fulbright-Schuman project “Forms of Foreign Policy Cooperation in the Unraveled Transatlantic Space”, in particular his forthcoming article entitled “The New Transatlantic Trigonometry: ‘Brexit’ and Europe’s Treaty Relations with the United States”, as well as a preview of some of the project’s findings in Joris Larik, Brexit and the Transatlantic Trouble of Counting Treaties, EJIL: Talk! (Dec. 6, 2017), https://www.ejiltalk.org/brexit-and-the-transatlantic-trouble-of-counting-treaties/.
in this context that the quest for continuity not only concerns comprehensive bilateral trade agreements (such as EU-Korea or CETA), but also many related agreements, e.g., on mutual recognition, technical standards, or on particularly sensitive issues, often addressed in “softer” instruments such exchanges of letters. The submission provides a number of explanations for mismatching numbers, which might also apply to relations with other trading partners, and recommends to the UK Department of International Trade to urgently review databases with its most important trading partners and establish general “continuity road maps”.

Uncertainty about agreements in force: Mismatching databases

2. As pointed out by the Financial Times (FT), the UK’s withdrawal from the EU will require the renegotiation of more than 700 international agreements from which the UK currently benefits by virtue of its EU membership. Given the political and economic importance of transatlantic relations for both the UK and EU, the United States is arguably a good place to start when it comes to gaining a deeper understanding of the challenge at hand. As this submission stresses, before even reaching the substantive questions surrounding continuity and concluding new agreements, determining the number of treaties that may need to be “rolled over” or replaced is shown not to be a straightforward task.

3. In anticipation of the many legal and political questions that these negotiations will raise, a preliminary—seemingly simple—matter would be to establish what the actual treaty relations between the U.S. and EU are, as well as with other key trading partners of the UK. Three comprehensive and authoritative sources can be drawn upon in this case study: The EU’s Treaty Office Database, the U.S. State Department’s Treaties in Force 2017, and the FT’s Brexit treaty renegotiation checklist. However, these three sources do not match up. This reveals that establishing the extent and content of legal relations affected by Brexit amounts in the first place to an empirical challenge.

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2 Paul McClean, *After Brexit: the UK will need to renegotiate at least 759 treaties*, Fin. Times (May 30, 2017), https://www.ft.com/content/f1435a8e-372b-11e7-bce4-9023f8c0fd2e.


4. In an effort to better understand this challenge, this submission will first explain the reasons for (most of) these discrepancies in the bilateral sphere, and subsequently add a further explanation pertaining to multilateral treaties. Before doing so, it should be stressed that this analysis focusses on treaties in force, thus excluding treaties pending ratification or those which are being provisionally applied (such as the 2007 Open Skies Agreement or CETA). As a second caveat, this submission does not delve into any of the many administrative agreements concluded directly between U.S. and EU agencies.\(^6\) What the submission seeks to show is that even the extent of single treaty relationship is challenging enough to grasp.

**Bilateral treaties**

5. According to the U.S. State Department, there are 31 bilateral treaties in force between the EU and U.S., according to the EU’s Treaty Office Database, the number is 52, and according to the FT, it is 37. The divergence of the numbers of treaties is due to three main methodological differences: **Timing**, consolidation (counting of extensions and amendments), and the treatment of “soft” instruments.

6. In terms of timing, the difference between the U.S. State Department and the EU Treaty Office is the following: *Treaties in Force* lists all treaties the U.S. considers to be in force at a particular point in time. In the current edition, this is January 1, 2017. Moreover, it includes only those treaties that “had not expired by their own terms, been denounced by the parties, replaced or superseded by other agreements, or otherwise definitely terminated” by the critical date.\(^7\) By contrast, the EU Treaty Office provides a qualifier in the “advanced search” mode to show only treaties that have “entered into force”.\(^8\) This has two consequences. On the one hand, the U.S. list will not show agreements that have entered into force after January 1, 2017. Hence, the Agreement between the U.S. and EU on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences, which entered into force on February 1, 2017, is absent from *Treaties in Force 2017*. On the other hand, the EU Treaty Office lists all agreements that entered into force at some point in the past, including those that are no longer in force. This concerns at least six agreements of the 52 listed by the EU, including the 2004

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\(^6\) See for a useful overview of these the table provided in Peter Chase & Jacques Pelkmans, *This time it’s different: Turbo-charging regulatory cooperation*, in *Rule-Makers or Rule-Takers: Exploring the Transatlantic Trade and Investment Partnership* (Daniel Hamilton & Jacques Pelkmans ed., 2015), at 55–60.

\(^7\) U.S. Department of State, *Treaties in Force*, at i.

Agreement on the processing and transfer of PNR data by air carriers, which was denounced and later replaced by an agreement from 2011.

7. In terms of **consolidation**, which refers here to the counting of extensions and amendments of pre-existing agreements, the State Department opts for a more compact approach. It lists the main agreement, and mentions amendments and extensions as additional information for the same entry. The EU Treaty Office, by contrast, counts amendments and extensions as separate agreements. For example, the EU-U.S. Agreement for scientific and technological cooperation from 1997, which was extended and amended in 2009, is counted as one by the Americans and as two by the Europeans. From the point of view of the international law of treaties, the latter approach is technically correct. However, it terms of drawing up lists for post-Brexit continuity/renegotiation purposes, the U.S. approach of counting “consolidated” versions of agreements in force as they currently stand makes more practical sense.

8. Thirdly, the most important difference in terms of numbers relates to counting **“softer” agreements**, such as exchanges of letters and memoranda of understanding. However, this cannot be explained by a more generous versus a more restrictive interpretation of what counts as a treaty. *Treaties in Force* notes that it “uses the term ‘treaty’ in the generic sense as defined in the Vienna Convention on the Law of Treaties”, rather than “as a matter of U.S. constitutional law”. Hence, executive and executive-congressional agreements are not excluded. Beyond that, it is not clear which criteria are applied. For instance, the EU lists a 2005 Exchange of letters relating to the method of calculation of applied duties for husked rice, while the U.S. does not. By contrast, the U.S. includes a 2009 Memorandum of understanding regarding the importation of beef from animals not treated with certain growth-promoting hormones, while the EU does not. Each side includes about half a dozen of such “soft” agreements in its list that the other does not, with no legal reason readily apparent.

9. Regarding the FT’s database and its listing of 37 U.S.-EU bilateral agreements, in addition to the issues mentioned above, additional factors are at play. While excluding...

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9 Note also that the 2003 Agreement in the form of an exchange of letters on the amendments to the Annexes to the Agreement between the European Community and the United States of America on sanitary measures to protect public and animal health in trade in live animals and animal products is not included in Treaties in Force, but only the original agreement from 1999.


11 U.S. Department of State, *Treaties in Force*, at i.
expired and superseded treaties, it also excludes those that the FT considers of “little or no relevance to the UK after Brexit”, but includes ten EU implementing decisions/regulations. The authors justify this by noting that these are “EU ‘equivalence’ decisions on financial services, which provide access rights to third countries” and that “[t]rade partners would likely take them as a starting point in financial services discussions with the UK after Brexit.” While they are right in pointing out their relevance, such EU decisions and regulations are definitely not international agreements based on consent with third countries and hence should not be counted as such.

10. What, then, is the correct member of treaties currently in force between the EU and U.S.? Looking at the above issues, it would be hubris to even pretend here to have the undisputable number. But it can be better approximated. Taking into account only bilateral agreements in their “consolidated” versions, which are currently in force, and which despite their sometimes “soft” format at least one side deems “hard” enough to include in its list, this yields a number of around 50. But to be clear: This does not mean the EU list was “more correct” because 50 is closer to its 52. The result of 50 reached here excludes a number of agreements no longer in force, and includes a number of “soft” agreements listed by the U.S.

Multilateral treaties

11. A discrepancy exists also when it comes to multilateral treaties. The EU Treaty Office Database lists 80 treaties that have entered into force for the EU and which the U.S. has at least signed, if not ratified. The State Department’s Treaties in Force does not allow for a full two-way comparison, as it simply lists all multilateral treaties in force for the U.S. as of January 1, 2017, ordered according to subject matter but without specifying treaty parties.

12. Of the EU Database’s 80 treaties, only 51 are individually listed in the State Department’s Treaties in Force. In addition to the reasons for discrepancy mentioned in the bilateral context above, another factor is at play here is that the EU Database considers the signatories to multilateral treaties rather than those countries that have ratified. This means that the EU’s list contains treaties which the U.S. has signed but not ratified. These include, for instance, the 1998 Rotterdam Convention on the

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12 Paul McClean, Alex Barker, Chris Campbell & Martin Stabe, The Brexit treaty renegotiation checklist.
13 Ibid.
prior informed consent procedure for certain hazardous chemicals and pesticides in international trade and the 2003 WHO Framework Convention on Tobacco Control. The U.S. is not a party to these agreements, and hence not bound to their provisions.

13. The *Financial Times* only lists seven multilateral treaties to be renegotiated with the U.S., noting that in cases such as the WTO or UN, “the UK should be able to ‘plug in’ to these agreements with ease.” This is again a political assessment and not a legal one, and in the case of the WTO may have shown to be too optimistic given the tough negotiating stance of other WTO members, including the U.S., on the post-Brexit redistribution of tariff-rate quotas. The UK will remain a member of the WTO and other multilateral fora where it is a party, but the terms of its membership may require adjustments to which other members need to lend their consent.

**Conclusion and recommendations**

14. In sum, there is already a significant degree of uncertainty regarding the scope of the international treaty law in force between the EU and U.S. in the lead-up to the UK’s withdrawal from the EU. This entails, furthermore, significant uncertainty as to the extent of what is in need of being “rolled over” or renegotiated post-Brexit, before even getting to the legal and political dimension of this challenge. Prominent comprehensive trade deals (such as with South Korea or Canada) are of course known to negotiators, but in the case of the U.S. and other countries no such comprehensive agreements are in place (yet). Instead, with each of the EU’s and UK’s major trading partners, there exists a bundle of often inter-related international treaties and “softer” instruments (e.g., exchanges of letters), many with a trade-relevant dimension. Certainty as regards these agreements is promptly needed if the UK wishes to avoid any gaps in coverage or other unexpected barriers to its future trading relationships.

15. From the point of view of institutional capacities, it should be stressed that while the U.S., only needs to go through this Brexit-continuity/renegotiation exercise once, the UK will have to do it with each country that has treaties with the EU—168 according to the *Financial Times*. Moreover, the U.S. and EU have comparatively good resources to help clarify what the status and extent of their treaty relations is. However, this might not be the case with other countries.

16. This submission has offered a number of explanations regarding different methodologies in counting treaties with regard to the U.S. It is likely that

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16 Paul McClean, Alex Barker, Chris Campbell & Martin Stabe, *The Brexit treaty renegotiation checklist*.

17 Shawn Donnan & Jim Brundsen, *Trump rejects May’s post-Brexit agriculture deal with EU* (Oct. 5, 2017), [https://www.ft.com/content/92bb5636-a95b-11e7-ab55-27219dfb3e97](https://www.ft.com/content/92bb5636-a95b-11e7-ab55-27219dfb3e97).
discrepancies with other countries may—at least partially—be explained by these factors as well. Moving forward, and in order to optimize its resources, reduce legal uncertainty, and minimize economic damage, this submission recommends that the UK government, in particular the Department for International Trade, should **urgently compare databases and compendia of treaties with its most important trading partners.** Based on the comparison, “**joint lists of items of concern**” should be drawn up for discussion with counterparts in third countries, consisting of those treaties and other instruments which at least one side deems binding. Lastly, generally applicable “**continuity road maps**” should be established to streamline the process of rolling over similar kinds of treaties that the UK maintains with various countries. These should allow negotiators for a swift assessment of the legal situation, in particular the requirement for third-country—and in some situations the EU’s—consent (see the Annex for a visualization of some core questions in this regard), in their quest to ensure legal certainty economic continuity.