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Future of the EU and UK trade relations in light of the EU-UK Trade and Cooperation Agreement: contextualizing Brexit and trade

Abstract: This paper aims to contextualize Brexit from the perspective of international trade law. It first discusses the history of Brexit from a general and trade perspective. This is followed by an overview of the negotiations also from an international trade perspective. It then proceeds to examine the general context and content of the EU-UK Trade and Cooperation Agreement and evaluate it in comparison to the pre-Brexit trade situation. In the conclusion the author briefly discusses existing trade disputes between the EU and the UK, before attempting to conjecture on the future of the trade relationship.

Keywords: Brexit, international trade law, trade, European Single Market

1. Introduction

In the wake of Brexit, years of uncertainty followed on multiple fronts. One of these was the question of trade relations and how they would unfold, given the UK's decision to leave the EU, which above all was an economic union. There were multiple different approaches and ideas on both sides during the negotiations regarding how this could be handled, some realistic, others less so. In the end, an agreement was reached, the EU-UK Trade and Cooperation Agreement, which largely handled the international trade issues surrounding Brexit.

This paper does not aim to merely produce a simple textual analysis of the Agreement. Instead, its principal aim is to provide an in-depth contextual analysis surrounding the origins of the Agreement and provide the reader with an overview of

Brexit from an international trade perspective. It accomplishes this in the following structure: First, we discuss the political background of Brexit, followed by a brief analysis of the UK's trading regime within the context of the EU system. This is in turn followed by an in-depth play-by-play of the chaotic and prolonged negotiations surrounding the UK's exit from the EU, and the adoption of the Agreement. The final segment of the discourse is a brief overview of the final contents of the Agreement. In the concluding part, we aim to show how this Agreement has worked out so far in actual practice and attempt to establish theories regarding the future trajectory of the trade relationship between the UK and the EU.

2. Political background of the Brexit

The relationship between the UK and the rest of the EU has always been contentious. In this section, we briefly explore the political background and reasons behind Brexit, focusing on the perspective of both the UK citizenry, and that of its politicians. Anti-EU sentiments were nothing new in the UK. Even at the time it joined the EU's predecessor, the European Communities (EC), there was significant (but not major enough to meaningfully counteract the joining) opposition within both the country's political class (not to mention the EC's political class, as shown by French president Charles de Gaulle's veto on the UK joining the European Economic Community)¹ and residents.² There were concerns about sacrificing sovereignty, and tying the UK too closely to continental affairs both politically and economically, which ran contrary to the tried-and-true tradition of British disengagement from continental

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¹ *See*: de Gaulle (1963).

² *See in general*: Davis (2017).

affairs outside of maintaining a balance of powers.³ However, the promise of economic advancement through cooperation was found to be too powerful of a factor to be ignored.

This economy-centric promotion of the European Communities (a not unreasonable position at the time, as the EC was still chiefly about economic integration and cooperation) would ultimately prove to be a double-bladed sword for the pro-EC(EU) parts of the British political establishment. In essence, joining the EC was sold to the British public as an almost purely economic affair. Hence, it became commonplace in the later development of the European project for the United Kingdom to oppose political integration measures, and to secure various exemptions from different harmonization efforts. This represented a carefully balanced tightrope walk between securing as much benefit as possible from this cooperation with the continentals, while ensuring that the British retained the ability to control their affairs with as much freedom as it was possible.⁴

The “problem” of immigration into the UK from the rest of Europe was another issue.⁵ It also became commonplace to associate this immigration with the EU, given the free movement of laborers and people between Member States being a fundamental pillar of the whole EU.⁶ Adding to the woes related to immigration concerns was the Lisbon Treaty in 2007 (2009), which significantly expanded the scope of the European Union’s power and competency. Notably, the British Prime Minister (PM) of the time, Gordon Brown, opted out of publicly signing the treaty, and instead signed it later.⁷

³ Davis (2017) 3-4.

⁴ Campos and Coricelli (2015).

⁵ The Migration Observatory (2020).

⁶ EC (2022c).

⁷ Virunurm (2020).

Finally, we can't fail to mention the effect of the 2008 global economic crisis.⁸ Even though the economy had recovered, negative feelings towards the EU were aroused and not easily silenced. This was reflected by the rising popularity of the United Kingdom Independence Party (UKIP), a political party solely dedicated to the goal of removing the United Kingdom from the European Union.⁹

All these slowly boiling political factors led to a political gambit. David Cameron, the next PM of the UK after Gordon Brown, decided to announce a renegotiation of the EU-UK relationship and a referendum on the EU membership if the Conservative Party won the general election of 2015.¹⁰ His reasons for this announcement were complex. In general, there was an internal pressure on the Tories to decisively address the growing problem of the EU attempting to hasten political integration of its Member States, something that was still deeply controversial in British society. Secondly, the rise of the UKIP threatened some traditional Conservative voter bases. If the Tories seemed to falter, to appear weak against the EU, they would risk losing the more concerned Conservative voters to the UKIP. Thus, Cameron's decision was to attempt to build political capital and cordon off UKIP's growth with his promise of renegotiation and a public referendum on EU membership, if said renegotiations would fail.¹¹

Bolstered by these promises, the Conservative Party managed to eke out a victory, and set off to fulfil the promises made to their electorate by first attempting to renegotiate the UK's

⁸ Crafts (2019).

⁹ Hunt (2014).

¹⁰ BBC (2013).

¹¹ *See in general:* Tournier-Sol (2015).

relationship with the EU.¹² Suffice to say, this attempt ended up not fulfilling all of the expectations, though it resulted in a potential deal, leading Cameron to announce public referendum on the membership.¹³

As a result, British society divided into two camps: Leave and Remain. In the end, the situation culminated in a narrow win for the Leave faction on June 23, 2016,¹⁴ which set the stage for Brexit proper, and was followed shortly by the resignation of David Cameron, paving the way for a new era in UK-EU trade relations.

3. Trading regime within the EU

In order to properly appreciate the changes brought by Brexit in relation to international trade law, first of all it is necessary to examine succinctly the so-called European Single Market. Furthermore, it is also necessary to give a short general exposé on the trading system the EU employs with third countries, and in which the UK also participated.

The foundation of the original internal trade relationship lay in the so-called four freedoms, that together comprise the main principles of the European Single Market: the free movement of goods, capital, services and labour.¹⁵ From an international trade law perspective, the existence of this European Single Market affords a unique opportunity to its Member States to trade among each other in a completely free manner. Rather than being purely a result of a single legal act, this European Single Market developed over the course of decades, alongside the European Communities and later the European Union. The

¹² BBC (2015).

¹³ BBC (2016b).

¹⁴ BBC (2016a).

¹⁵ Eu3doms (2017) 3.

fundamentals of this single market were already laid by the European Economic Community. It then properly took shape after the second half of the 1980s and the first two years of the 1990s were spent by the EEC negotiating this single market.¹⁶ The rest of the 1990s produced further developments, as the Amsterdam Treaty of 1997 abolished physical barriers through adopting the concept of the Schengen Area, though the UK was not a part of it. In general, each of the four freedoms underwent evolution and expansion during this period of EU legislation.¹⁷

From our perspective, the most important aspect of the European Single Market is the customs union, closely tied to the freedom of movement of goods. As evidenced by its name, we are talking here about a customs union, a more advanced form of economic integration than a simple free trade area. While in a free trade area, Member States abolish tariffs and other barriers to trade among themselves, they still retain control over tariffs towards third countries. Not so in a customs union. Member States of a customs union go beyond simply abolishing tariffs and non-tariff barriers to trade, and apply single tariffs to goods from third countries.¹⁸

We can see that this European Single Market thus largely erased trade barriers. All this allowed the creation of a vigorous and active internal market within the EU, where goods (services, capital and labour) could flow freely without restraint. While this increased competition faced by British goods, it also provided them with a more accessible market on the continent. Not to mention, that from a consumer perspective this state of affairs was highly beneficial.¹⁹

¹⁶ Gerbet (2016) 2.

¹⁷ Gerbet (2016) 3.

¹⁸ EC (2020).

¹⁹ Berlingieri, Breinlich, Dhingra (2018).

Regarding third countries, there were two main aspects that ought to be discussed. First, we have to briefly explain the World Trade organization (WTO) system. The WTO's primary aim was to reduce tariffs and non-tariff barriers to trade and facilitate free trade between its signatory members.²⁰ The EU as a whole dealt with third countries on the basis of the principles laid down in the WTO system, which while advantageous, were nowhere near to the freedom of trade found within the internal market of the Union. Beyond the WTO system, as part of the shared trade policy, the EU also negotiated a large number of free trade agreements with different countries (most recently, Canada and Japan both signed notable free trade agreements with the EU), that offered a more liberalized trade regime compared to the WTO rules. Of course, these free trade agreements had different degrees of comprehensiveness: some only covered goods or services, or only particular sectors in each area. This was dependent on the negotiation of the parties, and their willingness to compromise on various trade matters. Naturally, as part of the EU, the UK also benefited from these agreements.

Furthermore, it is prudent to highlight a particular array of goods that face greatly increased difficulties if arriving from third countries, outside the European Union. Here we mean the rigorousness of EU procedures when it comes to food products and livestock coming to the EU from third countries. These products face increased scrutiny and can be subjected to examinations on a sectoral basis, which delays their arrival to the market. And with perishable goods, even a delay of a day or two could easily serve to drive up costs and reduce profits.²¹ In particular, live animals, products of animal origin, plants and plant products coming from third countries are channelled in a mandatory fashion to border control entities and subjected to

²⁰ WTO (2020).

²¹ *See in general as an example:* Beestermöller, Disdier, Fontagné (2016).

checks. These checks are designed to ensure that all imports fulfil the same (rather high) standards of food safety and quality as similar goods from the EU's own single, internal market would.²² The high requirements the EU places on food safety is thus reflected in an international trade law context as well, and this in fact has been a source of various trade disputes with third countries.²³ The already mentioned high food safety standards were also an issue the parties had great trouble working out when negotiating the ultimately failed TTIP (Transatlantic Trade and Investment Partnership) free trade agreement between the EU and the US.²⁴

4. Negotiating trade: from chaos to chaos

Trade negotiations over Brexit had been a long process for both parties. However, from our perspective, the most important facets occurred during the final year of negotiations, amidst the pressing deadlines following the formal withdrawal of the UK from the European Union. However, the preceding period should be also discussed to some extent, mostly in relation to the so-called Theresa May deal that ultimately failed.

In the immediate aftermath of the Brexit referendum, it became clear that it was fundamentally necessary to resolve issues related to the UK's continued access to the European Single Market. However, much of 2016 was spent resolving the domestic political situation with PM David Cameron resigning

²² EC (2022b).

²³ A good example of this was the EC - Hormones (European Communities (2022b)) WTO case, where the EU (then the European Communities) found issue with the usage of growth hormones in livestock by USA producers. In a similar fashion, the EU also came into "trouble" over GMO food products in the EC – Biotech (European Communities (2022a)) where the USA found issue with the EC's slow approval process and eventual moratorium on the approval of GMO products.

²⁴ Inman (2015).

and Theresa May coming into power in July 2016.²⁵ At this juncture, the discussion still focused on whether there would be a “soft Brexit” (the UK retains close ties to the European Union from a trade perspective) or a “hard Brexit” (the UK separates from the European Union in most ways, and from a trade perspective a free trade agreement is the likeliest solution). “Soft Brexit” was seen as more advantageous from a purely economic perspective, as it would have caused the least damage and impact economically, while “hard Brexit” was considered more favourable from a sovereignty perspective.²⁶ A fundamental issue here was that the Brexit referendum did not specify how Brexit should be handled, and thus, there was vigorous debate over which approach to Brexit would better represent the people’s mandate to leave the European Union that was given to the United Kingdom’s government. However, by the end of 2016, it seemed that “hard Brexit” was slowly emerging as the more viable option politically, partially due to sovereignty-prioritization being seen as more in the spirit of the voters’ will.²⁷ This latter policy would calcify by January 2017, when Theresa May officially announced in a speech that her government would aim for a “hard Brexit”, and on the front of trade will attempt to negotiate a free trade agreement with the European Union on a sector-to-sector basis. During this time, she also set the free trade agreement’s negotiation period to be two years, a very ambitious scheduling, as free trade agreements frequently take several years to negotiate.²⁸ At this stage, the UK government was clear in its intention to leave both the European Single Market and the customs union as well.

Over the course of January and February 2017 further preparations were made by the United Kingdom to prepare for

²⁵ McKenzie, McLaughlin (2016).

²⁶ The Economist (2018).

²⁷ Springford (2016) 1-2.

²⁸ Grant (2017e) 1-2.

the newly set goal of a “hard Brexit”.²⁹ Then, at the end of March 2017, art. 50 was triggered, and the United Kingdom began the formal process of withdrawing from the European Union.³⁰ Shortly afterwards, there was a snap election in the UK. Though the election was not solely about how to handle Brexit, there was an implication that the results would either empower the sitting government to pursue its course of “hard Brexit” or it would do the opposite.³¹ The results were not rosy for the reigning Conservative Party, and Theresa May lost her majority in the Parliament³² (which later forced her to form a coalition with the North Irish DUP party in order to retain control)³³. This created an expectation that perhaps a somewhat softer Brexit was still a possibility.³⁴ Amidst these circumstances did the formal exit negotiations begin in June 2017. During this period, much of the negotiations centred around resolving the Irish border question, a very thorny issue for both Ireland and the United Kingdom, and one that would be potentially jeopardized by Brexit.³⁵ By February 2018, an early Withdrawal Agreement draft was completed.³⁶ Further negotiations took place over the course of 2018, with the final version being published in November 2018, and it was shortly endorsed by the EU.³⁷ However, this agreement could not be agreed to by the UK, after Theresa May called for a vote on the agreement, which failed in January 2019, and then ended in a second failed vote in March.³⁸ This caused a complicated situation and severe political fallout, which ended up in the

²⁹ Grant (2017d) 2-18.

³⁰ BBC (2017a).

³¹ Mackintosh (2017).

³² BBC (2017b).

³³ Hunt (2017).

³⁴ Grant (2017c) *See also*: Grant (2017b) 1-5.

³⁵ Jenkins (2017).

³⁶ EC (2022d).

³⁷ Department for Exiting the European Union (2019).

³⁸ BBC (2019).

downfall of the May government and the ascension of Boris Johnson as the new Prime Minister in July 2019.³⁹

By this point, the situation increasingly shifted towards the parties planning for a no-deal exit, as it seemed likely that the UK and the EU couldn't agree on trade issues on time, though it was not necessarily an inevitable outcome at this time.⁴⁰ Ultimately, Boris Johnson and the EU managed to reach a new Withdrawal Agreement by the end of 2019. This allowed the UK to complete Brexit and leave the EU.⁴¹ However, this Withdrawal Agreement didn't cover trade issues, which were instead deferred to be resolved in the transitional period from January 2020 to December 2020, during which the UK remained in the European Single Market and in the customs union.⁴²

At this point, it became clear that the “softer” trade deal was off the table, and it became a serious question if any deal at all could be negotiated at all between the parties. During this period, the so-called “Canada plus” emerged as the most desirable option for the UK, a version of CETA that was expanded to cover services as well.⁴³ However, achieving this goal seemed difficult given the year of mostly unsuccessful trade negotiations, which were further hampered by the COVID-19 pandemic.⁴⁴

In general, negotiations about the EU-UK trade deal were mostly stuck on three different questions: fishing, level playing field, and governance/dispute resolution.⁴⁵ The first issue,

³⁹ Lyall, Castle (2019).

⁴⁰ Grant (2017a) 1-5.

⁴¹ Department for Exiting the European Union (2019).

⁴² Edington (2020).

⁴³ Jackson (2020).

⁴⁴ Casert, Lawless (2020).

⁴⁵ Brunsdon, Foster (2020).

despite the comparatively small size of the fishing industry in relation to total UK GDP⁴⁶, was thorny and problematic for the UK, as one of the primary arguments of the Leave campaign was retrieving control over the British fishing industry.⁴⁷ As fish don't respect Exclusive Economic Zones (EEZs), it was necessary for EU Member States to collaborate with each other on fishing matters through the use of quotas and other measures. This system allows proportionate access to relevant fish stock for all affected Member States, and ensures that problems, such as one Member State deliberately overfishing, don't happen. However, this system can only work if all involved parties agree on it.⁴⁸ Moreover, if the UK would leave in a "no deal" scenario, the sea regions would suddenly find themselves in a relative state of chaos, as the local fishing industries would enter an uncertain situation. Hence, the necessity of figuring this out for both parties. Especially as the UK desired to regain control over its own fishing waters, while the EU was keen on EU fisheries retaining access to UK waters under the old system.⁴⁹

The second issue that hampered negotiations was the question of level playing field. This essentially entailed both parties agreeing to follow a similar set of competition law, ensuring that they don't undercut each other's businesses by degrading environmental regulations or by utilizing excessive subsidies. This is considered an important facet of any free trade agreement, as such undercutting measures could easily result in unfair outcomes. However, the UK and the EU remained divided over the issue, as the latter would have preferred the UK to follow the EU's existing competition law standards and regulations, while from the United Kingdom's perspective, doing so would undermine one of the major positive aspects of

⁴⁶ Morris (2020).

⁴⁷ Morris (2020).

⁴⁸ Corbett (2020).

⁴⁹ Morris (2020).

Brexit (regaining control over competition law and business subsidization).⁵⁰

The final major issue that the parties had trouble agreeing on was governance or dispute resolution. While a signed free trade agreement is well and good, there was the question of what happens if one side breaches it. This is another field where there seemed to be severe difference in opinion between the negotiating partners. In particular, the EU seemed to be focusing on establishing that the Commission should be able to unilaterally determine that the UK had breached the agreement and restrict single market access through retaliatory measures as most appropriate in the situation.⁵¹

In the end, a final agreement was reached at the end of December 2020 and was signed on December 30 of the same year.⁵² This would be the EU-UK Trade and Cooperation Agreement.

5. The EU-UK Trade and Cooperation Agreement

Having examined the context surrounding its creation, we can now briefly summarize the contents of the Agreement. Naturally, it is not within the scope of this paper to provide a thorough overview of every single detail. Instead, we focus on two approaches. First, we discuss the general structure of the Agreement, as well as its scope. Second, we summarize the most important provisions and their overall “result” from an international trade perspective.

⁵⁰ Brunsdon, Foster (2020).

⁵¹ Morris (2020).

⁵² Pub Affairs Bruxelles (2021).

First of all, the EU-UK Trade and Cooperation Agreement's structure can be divided into seven parts.⁵³ The first part concerns common and institutional provisions, the second includes trade, transport, fisheries and other arrangements, the third is about law enforcement and judicial cooperation in criminal matters, the fourth deals with thematic cooperation (on health and cyber security), the fifth handles the issues of participation in union programmes, sound financial management and financial provisions, the sixth consists of dispute settlement and horizontal provisions, and the seventh part covers final provisions. This is further accompanied by dozens of annexes. For the purposes of this paper, we only discuss the second part in detail.

This second part is further subdivided into six headings: trade, aviation, road transport, social security coordination and visas for short-term visits, fisheries, and other provisions. The trade heading is the most important for us here. This heading is also subdivided into titles: trade in goods, services and investment, digital trade, intellectual property, public procurement, small and medium-sized enterprises, energy, transparency, good regulatory practices and regulatory cooperation, level playing field for open and fair competition and sustainable development and exceptions. The titles themselves are further subdivided into chapters and sections, but we do not cover these in too much detail here. We can already ascertain from the discussed information that the free trade agreement, as part of the EU-UK Trade and Cooperation Agreement, is quite extensive in its scope. There are specific rules in place for all the major categories of trade and trade-related questions. The trade in goods title engages with the common international trade questions of national treatment, market access, rules of origin, technical barriers, customs, sanitary and phytosanitary

⁵³ The Trade and Cooperation Agreement (2021).

measures, etc. Likewise, the trade in services and investment title is also rather broad in scope. It dedicates separate portions of the Agreement to investment liberalization and cross-border trade in services, as well as including specific sections for delivery, telecommunications, financial and legal services, among others. The title concerning digital trade is fortuitous, evidencing the modernity of the Agreement in general. And for the other titles, we can perhaps highlight intellectual property, energy and the level playing field title for being particularly extensive. In all of these, the Agreement seems to cover all notable topics without fail, including topics such as patents, electricity and gas and environmental standards, just to name a few. In conclusion, we can state that the scope of the Agreement is rather extensive from an international trade perspective.

We have seen the structure and scope of the agreement, at least in relation to trade. So, the question arises, what did this new Agreement exactly accomplish in this field? The previous parts of this paper detailed the nuances of international trade with relation to Brexit, and what sort of severe issues the UK's exit from the EU caused. Does this Agreement address those issues (or at least the trade-related ones)? The answer to that seems to be at least partially yes. The Agreement does establish zero tariffs and zero quotas on goods (that comply with appropriate rules of origin), and this notably includes even traditionally contentious categories of goods (when it comes to free trade negotiations), such as farming goods. However, we must also note that this does not imply that the free trade agreement essentially allows for the same degree of free trade between the UK and the EU as it was before the Brexit. The rules of origin provisions of the agreement are extremely detailed (especially if one also considers the annexes), and while we can notice some leeway in certain aspects (such as the wide range of goods, as previously noted), some sectors still face much stricter rules than previously. These can include rules regarding a minimum

percent of added value that is either British or European, or mandating that certain materials or components of the good must be EU or British in origin, before a tariff exemption can be granted.⁵⁴ In case of goods that went through a complicated value chain, complying with the Agreement's rules could naturally pose severe issues for British enterprises, especially smaller ones.

By contrast, the services part of the agreement likewise appears somewhat limited, even considering the broad range of questions covered by the agreement that we previously mentioned. While they do provide a degree of liberalization, they arguably seem to provide less freedom compared to the pre-Brexit status of UK service providers.⁵⁵

Given the issues surrounding the question of fishing, perhaps it would be also prudent to briefly dwell on the question of fisheries, which as previously noted, was also covered by the Agreement, though in a separate heading from trade proper. In this case, it seems the final resolution agreed upon by the UK and the EU was annual consultations, determining exact fishing opportunities and water access on a yearly basis.⁵⁶ This could be considered a compromise solution between the two extremes mentioned earlier.

As for the other two “hot topics” we mentioned in the previous part, level playing field seemed to have been worked out in the Agreement as a sort of bilateral procedure to assess any potential divergence from EU norms, with the possibility of arbitration if no agreement is forthcoming.⁵⁷ As for dispute resolution, the Agreement came to contain a general dispute resolution

⁵⁴ The Trade and Cooperation Agreement (2021) Annex 3.

⁵⁵ The Trade and Cooperation Agreement (2021) Heading One, Title II.

⁵⁶ The Trade and Cooperation Agreement (2021) art. 498, art. 500.

⁵⁷ The Trade and Cooperation Agreement (2021) Heading One, Title XI.

mechanism, with the potential for binding external arbitration if the parties can't come to terms.⁵⁸

In conclusion, we can assess the Agreement as having averted the worst potential outcomes of Brexit. However, it still cannot be truly called as having been without economic cost, and the business conditions are noticeably less favourable under the Agreement than they were while the UK was still part of the EU.

6. Conclusions

As we had seen from the findings of this paper, the Agreement was a definite step down from the earlier state of affairs from an international trade perspective. However, we can also confidently state that it was a superior solution to return to just utilizing WTO rules on trade.

Since the Agreement was signed and became applicable more than a year has passed. The question arises whether it has fulfilled its promises or not. So far, it seems that the Agreement has somewhat stabilized the trading between the UK and the EU, however, it still caused a decline in certain sectors (which was perhaps unavoidable)⁵⁹, and it failed to prevent a number of trade disputes between the UK and the EU that had arisen since the signing of the Agreement. This includes the WTO dispute over the UK's Contracts for Difference (CfD) scheme, which erupted in March 2022. This scheme was the UK's main mechanism for supporting low-carbon electricity generation.⁶⁰ Another example is the dispute over the Northern Ireland Protocol deal, which allowed for Northern Ireland to stay part of the EU single market in practice, as opposed to the rest of the

⁵⁸ The Trade and Cooperation Agreement (2021) Part Six.

⁵⁹ O'Carroll (2022).

⁶⁰ EC (2022a).

UK. The dispute was caused by the UK attempting to introduce a new bill that would unilaterally alter the Protocol, by allowing goods to enter Northern Ireland under either UK or EU rules.⁶¹

These examples show that the Agreement and related deals are far from perfect, and the complex relationship the UK had with the EU before Brexit was not easily untangled by the UK's exit and the Agreement. As previously stated, it can still be considered an adequate solution to Brexit, but it is far from perfect. In our opinion there will be further debates and disputes in the future, as both sides, especially the UK, will likely push for more favourable terms than what currently exists. Furthermore, we can state that some more time is needed before we can evaluate conclusively the long-term effect of the Agreement.

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