

LEAVE ALLIANCE

Brexit Monograph 7

Trade agreements

17 August 2016
(revised and corrected)

Introduction

The 1973 agreement between the EEC and Norway, comprising 113 pages including schedules, is a free trade agreement.¹ So is the 2010 EU-Republic of Korea agreement, but that runs to 1,432 pages.² Furthermore, this agreement does not stand on its own. It runs in parallel with a framework agreement that runs to a further 64 pages.³

On the other hand the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, which has yet to come into force, takes 1,598 pages.⁴ But the EU-Chile Agreement, which came into force in 2005, is only 112 pages.⁵ The 1995 EU-Turkey Agreement, on forming a customs union – the so-called Ankara Agreement - is a mere 55 pages.⁶

Even when agreements are roughly the same length, there are substantial differences in content, as to sectors which are covered and the various exclusions, rendering each a unique property.

Complicating the matter even further, there are a myriad of agreements which are dedicated to, and have the effect of, freeing up trade, which are not termed free trade agreements. To facilitate trade, some nations rely not on a single, comprehensive treaty, but a multiplicity of agreements, some of which do not even have the status of treaties. Often these are interwoven with multilateral treaties, the effects gained reflecting the interaction between the entire group.

¹ <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=480>

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=en>

³ https://eeas.europa.eu/korea_south/docs/framework_agreement_final_en.pdf

⁴ http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

⁵ http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111620.pdf

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1996:035:FULL&from=EN>

Yet, in the post-referendum discourse, it is commonly asserted that the UK's trading relations with the EU can be settled by negotiating a "free trade agreement", without advocates in any way specifying what they mean by the term.⁷ This is unhelpful. They are using a portmanteau expression, its meaning generic rather than descriptive. It does not define sufficiently, if at all, the relationship we need with the EU.

If the debate on these matters is to progress, we need a great deal more precision and clarity as to the terms used. In this Monograph, therefore, we look at the different arrangements that are entered into by disparate nations, how they apply and how, separately and in concert, they achieve their effects.

The Free Trade Area (FTA) and other groupings

A free-trade area is defined by Article XXIV of the General Agreement on Tariffs and Trade 1994. It is understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (subject to certain exception, mainly relating to quotas and currency movements) are eliminated on substantially all the trade between the countries, in products originating in their territories.⁸

Customs Unions (CUs) are bracketed with free trade areas, even though there is a substantive difference. These are groups of nations which agree to free trade within their collective customs areas but which also agree a common external tariff (CET), applicable to all non-members (unless separate trade agreements are made). Because of this, Customs Union members are not able to conclude separate free trade agreements with non-members.⁹

On formation, both free trade areas and customs unions must be formally notified to the WTO.¹⁰ Details are held on a dedicated WTO database.¹¹ As of 1 July 2016, some 635 notifications (counting goods, services and accessions separately) had been received by the GATT/WTO. Of these, 423 were in force. These WTO figures correspond to 460 physical RTAs, of which 267 are currently in force.¹² Of the WTO membership, only Mongolia, Djibouti, the Democratic Republic of Congo and Madagascar are not participants in at least one preferential trade agreement.¹³

A crucial distinction, held in common with customs unions, is that they embody reciprocity. That distinguishes them from the Preferential Trade Arrangement (PTA) These include Generalised Systems of Preference (GSPs), non-reciprocal

⁷ See for instance: <http://www.telegraph.co.uk/business/2016/08/13/a-bright-industrial-future-beckons-but-not-as-part-of-the-single/>

⁸ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm#article24A7

⁹ <https://stats.oecd.org/glossary/detail.asp?ID=3130>

¹⁰ *Ibid.*

¹¹ <http://rtais.wto.org/UI/PublicAllRTAList.aspx>

¹² https://www.wto.org/english/tratop_e/region_e/region_e.htm

¹³ Gutner, Tamar L (2016) *International Organizations in World Politics*, CQ Press, p.185.

preferential schemes for products from Less Developed Countries (LDCs) only, as well as other non-reciprocal preferential schemes that have been granted a waiver by the WTO.¹⁴ There are currently 29, listed on a separate database.¹⁵

Nomenclature, however, is not always used uniformly and there plenty of room for confusion. In the WTO, the term regional trade agreement (RTA) – as distinct from arrangement - is often used as a generic, or a synonym for reciprocal trade agreements and customs unions.¹⁶ This sometimes include Regional Integration Areas (RIAs) - agreements which have gone beyond trade issues and include varying degrees of economic and political integration.

Since such agreements do not necessarily involve contiguous nations, and groupings can be geographically dispersed, a preference is sometimes expressed for the term Preferential Trade Agreement as a generic.¹⁷

Then, between the EU and other states, there are "association agreements", which rely on Article 217 Treaty of the Functioning of the European Union (TFEU). As well as dealing with trade, often including services, they create "special, privileged links with non-member countries which must, at least to a certain extent, take part in the Community system".

The first Association agreement was between European Economic Community and Turkey, signed in Ankara on 12th September 1963. As its aim was to prepare Turkey to the EEC accession, it created (in three steps) the customs union with between Turkey and the EU, which come into effect in 1995.¹⁸

Reviewing the definition of the free trade area (and customs union), one can also take into account what it does not include. Clearly, any trade agreement between countries that does not involve the substantial reduction or elimination of duties (tariffs) and quotas across a wide range of goods, does not qualify as a free trade area.

By this measure is excluded the Partial Scope Agreement (PSA). This is a type of agreement which has become popular in South America, driving much of the growth in south/south trade. It is a reciprocal agreement, but unlike a qualifying FTA, it only covers a small range of goods. It may not require the elimination or even the substantial reduction of the tariffs affected, and the concessions may have quantitative limits.¹⁹

An example is the Belize-Guatemala PSA, which covers only 150 specified tradable products. It allows for tariff reductions between 50 and 100 percent

¹⁴ https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm

¹⁵ <http://ptadb.wto.org/ptaList.aspx>

¹⁶ https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm

¹⁷ https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr11-2a_e.pdf

¹⁸ <http://www.etsg.org/ETSG2013/Papers/236.pdf>

¹⁹ <http://www.guardian.co.tt/business-guardian/2012-05-09/what-partial-scope-agreement>

and, on some goods, the reductions are limited to agreed tonnages and are thereby impose quantitative restrictions.

PSAs have the particular advantage of being easier to negotiate and faster to conclude. In the Belize-Guatemala example, despite an outstanding territorial dispute, negotiations were launched on 22 November 2004. Belize (which has a trade deficit with Guatemala) signed the Agreement by 26 June 2006, although the Guatemalan President did not issue a decree to give effect to the agreement until 4 April 2010.

Although most PSAs are reciprocal, this is not always the case. In October 1992 the Caricom trade bloc agreed the Caricom-Venezuela Trade and Investment Agreement, which became effective on 1 January 1993.^{20,21} The agreement was a non-reciprocal partial scope agreement, a preferential accord designed to encourage Venezuela to open its markets to Caricom exports.²²

Whatever their specific characters, the PSA are not notified to the WTO and recorded. They thus remain a relatively little-known and largely unacknowledged form of agreement.

Comprehensive Trade Agreements

Because they are primary intended to deal with tariffs (and quantitative restrictions to trade), the free trade agreement does not as a matter of course address the issue of non-tariff barriers which have grown up to replace them. As a result, between advanced economies where tariffs are already low, the value of the FTA is being diminished.

To deal with wider issues, we are seeing the emergence of "second generation" agreements, or the Comprehensive Trade Agreement (CTA). Generally, they include services and other behind-the-border issues, such as investment, competition policy, intellectual property and government procurement, plus the so-called "deep provisions" of harmonisation or mutual recognition of product and process standards.²³ Sixty percent of modern RTAs include dedicated chapters and committees to co-operate on the movement of business persons, both for goods and services, including visa facilitation measures.²⁴

Examples include the EU-Republic of Korea agreement, the EU-Canada trade agreement (CETA) and the EU-US agreement (TTIP). Almost two thirds (57 percent) of RTAs signed since the beginning 2001 display "deep" coverage, as opposed to only ten percent prior to 1994. Some agreements have changed over

²⁰ <http://wits.worldbank.org/GPTAD/PDF/archive/CARICOM-Venezuela.pdf>

²¹ <http://www.belize.org/tiz/belize-guatemala-partial-scope-agreement>

²² http://ctrc.sice.oas.org/trc/Articles/INTAL_Caricom.pdf

²³ https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf

²⁴ <http://www.oecd-ilibrary.org/docserver/download/5jxvgn4bjf0.pdf?expires=1471196669&id=id&accname=guest&checksum=AC3D9F71670B56C9570B26D365A5F0B4>

time. The Chile-Mexico agreement was agreed in 1991 as a relatively shallow agreement, then revised in 1999.²⁵

Comprehensive Trade Agreement are not recognised in the WTO agreements as a specific form of trade agreement and nor is there any single definition. They are notified to WTO only if they include (as they usually do) commitments to reduce or eliminate tariffs, even if these are only residual.

Multilateralism and plurilateralism

Technically, a multilateral agreement takes in three or more countries (or entities: an agreement between the EU, invoking its legal personality, and one other country is regarded as a bilateral agreement).

That aside, multilateralism - or the term "multilateral trading system" - is used to describe the GATT/WTO agreements, encompassing most of the countries in the world. The WTO has about 160 members, accounting for about 95 percent of world trade. Around 25 others are negotiating membership.²⁶

The GATT/WTO agreements do not themselves form a sufficient basis on which any developed nations can rely for market access – especially into developed markets such as the EU. But they do provide a platform, or baseline, on which agreements of wider scope depend. Most trade agreements, therefore – whether full FTAs or other types of agreements – can be regarded as WTO-plus, or sometime WTO-beyond.²⁷

Within the literature, there is also reference to "regionalising multilateralism", where multilateral recommendations issued by WTO Committees become the basis for regional obligations. This was the case in government procurement: most WTO-plus templates followed in RTAs are modelled after the 2012 revised Government Procurement Act of the WTO, which builds on and expands the WTO Agreement on Government Procurement.²⁸

The agreement on government procurement itself is one of two "plurilateral agreements" currently in force, the other dealing with trade in civil aircraft. These agreements, concluded within the WTO framework, do not apply to all members but are confined to a small minority of the membership.²⁹

Such agreements are used as a means of circumventing the "single undertaking principle" which guides WTO agreements. Every item of the negotiation is considered to be part of a whole and indivisible package and cannot be agreed separately, all on the basis of: "Nothing is agreed until everything is agreed".³⁰ They can also pave the way for future multilateral rule-making and, as such, are

²⁵ *Ibid.*

²⁶ https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm

³⁰ https://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm

regarded by some as a powerful tool for trade opening and a building block for a more open international trade regime.³¹

Unilateralism

As opposed to any form of activity, unilateralism – as its name implies – defines action taken by a nation on its own behalf without requiring assent from (or even the involvement of) another party. It is much favoured by the political right, in pursuit of a long-term free-trade agenda.^{32,33} As an option which does not ostensibly depend on reciprocity, it is sometimes styled as unilateral tariff reduction (UTR). Some advocates argue that it is an alternative to the customs union and even conventional free trade agreements.³⁴

In the late 1980s when tariffs were still a significant impediment to trade, UTR was seen as a way of forcing trade liberalisation. The World Bank estimates that developing nations unilaterally lowered their average tariffs by something like 14 percentage points between 1983 and 2003 independently of GATT rounds and RTAs. One driver may have been the internationalisation of the supply chain the growth of global supply chains, and a phenomenon known variously as fragmentation, production unbundling or vertical specialisation.^{35,36}

Despite the apparent absence of reciprocity, UTR can manifest as "soft unilateralism" in which apparently unilateral actions are taken in the expectation of non-obvious reciprocity.³⁷ One also sees reference to "coordinated unilateralism".³⁸ On the face of it, this is a contradiction in terms, but is seen when two parties announce separately trade liberalisation measures of mutual benefit – not necessarily tariff reductions - without being tied to a formal agreement.

This is probably the dynamic behind the multi-level trade agreements between the EU and China. In order to conclude formal agreements, the EU is under pressure to demand conditionality, especially in terms of human rights commitments.³⁹ But, to keep "face", the Chinese government cannot concede to these demands and therefore responds by making unilateral concessions as part of what is in fact a negotiated agreement. Certainly, in pursuing WTO accession, China was an enthusiastic unilateralist.⁴⁰

³¹ <http://www.asiapathways-adbi.org/2015/02/plurilateral-trade-agreements-an-overlooked-but-powerful-force-for-international-trade-opening-for-asia/>

³² <http://www.iea.org.uk/in-the-media/media-coverage/unilateral-free-trade-is-the-key-to-prosperity>

³³ <http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2000/1/cj19n3-3.pdf>

³⁴ <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1612&context=economicsresrpt>

³⁵ http://www.econ.hit-u.ac.jp/~cces/COE2010_HP_20101006/paper/richard_baldwin.pdf

³⁶ <http://www.economist.com/node/8559758>

³⁷ <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.4&rep=rep1&type=pdf>

³⁸ <http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2000/1/cj19n3-3.pdf>

³⁹ <https://www.euractiv.com/section/trade-society/opinion/trade-and-human-rights-in-china-the-eu-must-take-action/>

⁴⁰ http://www.frbsf.org/economic-research/files/paper-kar-yiu_wong.pdf

International Regulatory Cooperation (IRC)

As the importance of tariffs and related barriers (such as quotas) has receded, their place has been taken by a range of non-tariff barriers (NTBs), also known as technical barriers to trade (TBTs) or non-tariff measures (NTMs).

Since most (but by no means all) TBTs are regulatory barriers, often in the form of regulations, or differences between regulations which require international traders to conform to multiple regimes, many different mechanisms and structures have emerged to deal with this particular problem. The OECD lists nine types of organisation (in addition to RTAs) and mechanism which have been set up or employed to address the TBT issues.⁴¹

One of the more important is the "trans-governmental network", loosely-structured, non-treaty organisations often without any specific legal base. They exist to develop (usually) global regulatory standards which are adopted by supporting states (or trading blocs such as the EU) ostensibly on a voluntary basis but heavily reinforced by peer-to-peer pressure. Most often, they work through direct interaction between officials with minimal supervision by foreign ministries and very little political input.⁴²

One example is the Basel Committee on Banking Supervision.⁴³ This in 2011 published the "Basel III" package, a comprehensive set of reform measures, developed to strengthen the regulation, supervision and risk management of the banking sector.⁴⁴ The package has been adopted by the EU as the CRD IV package on capital adequacy, by the United States and by many other countries including Hong Kong SAR, India, Japan, Saudi Arabia, Mexico, Russia, Singapore, South Africa.⁴⁵

This extensive network is coordinated by the G20, the OECD and the Financial Stability Board.⁴⁶ Collectively, these organisations, alongside the International Organization of Securities Commissions and the International Association of Insurance Supervisors. Are responsible for generating most of the regulatory standards pertaining to the financial sector.⁴⁷

Another form of non-treaty cooperation is the "regulatory partnership", where different countries – usually neighbours - agree jointly to produce better quality regulation and minimise unnecessary regulatory divergences. An examples is the US-Canada Regulatory Cooperation Council, formed by a joint declaration from President Obama and Prime Minister Harper in February 2011.⁴⁸ Another

⁴¹ <http://www.oecd.org/gov/regulatory-policy/irc-toolkit.htm>

⁴² *Ibid.*

⁴³ www.bis.org/bcbs

⁴⁴ <http://www.bis.org/bcbs/basel3.htm>

⁴⁵ <http://www.bis.org/bcbs/publ/d366.pdf>

⁴⁶ <https://www.oecd.org/g20/topics/financial-sector-reform/>

⁴⁷ OECD, *op cit.*

⁴⁸ <https://www.whitehouse.gov/the-press-office/2011/02/04/joint-statement-president-obama-and-prime-minister-harper-canada-regul-0>

example is the Transatlantic Economic Partnership (TEP) between the EU and the US.⁴⁹

Yet another player is the UNECE Working Party on Regulatory Cooperation and Standardisation Policies (WP.6).⁵⁰ It facilitates the production of international regulation via its Common Regulatory Objective (CRO) system.⁵¹ Effectively, through this system, UNECE is able to broker sector-specific common regulatory frameworks, without having to resort to the international treaty system. An example is the Common Regulatory Framework for Equipment Used in Environments with an Explosive Atmosphere.⁵²

Basic cooperation agreements can be given "teeth" when individual governments incorporate IRC in their own domestic legislation. Described by the OECD as: "formal requirements to consider IRC when developing regulations", this again by-passes the treaty-making process. Nevertheless, it can have like effect, especially when linked to non-binding regulatory partnerships. Such requirements can also have multilateral dimensions. In Australia, for instance, there is a cross-sectoral requirement to consider "consistency with Australia's international obligations and relevant international accepted standards and practices".⁵³

There can be further linkage (and sometimes overlap) through "recognition of international standards". This has individual nations building into their legislative codes their mandatory recognition, permitting global harmonisation of technical standards can be achieved, without specific treaties. This process has been boosted by the 1994 WTO agreement on Technical Barriers to Trade, and the parallel SPS Agreement.^{54,55} In Europe, there are also the Vienna and Dresden agreements which give primacy to international standards.⁵⁶ A key role is taken by the International Standards Organisation (ISO), itself described as a Transnational Private Regulator (TPR).⁵⁷

A further building block in the OECD's list is the "mutual recognition agreement" (MRAs), specifically on conformity assessment, whereby states recognise and uphold legal decisions taken by competent authorities in another

⁴⁹ http://trade.ec.europa.eu/doclib/docs/2003/october/tradoc_111712.pdf

⁵⁰ <http://www.unece.org/trade/wp6/aboutus.html>

⁵¹

<http://www.unece.org/fileadmin/DAM/trade/wp6/AreasOfWork/RegulatoryCooperation/RegulatoryCooperation-Brochure.pdf>

⁵²

http://www.iec.ch/about/brochures/pdf/conformity_assessment/A_Common_Regulatory_Framework_for_Equipment_Used_in_Environments_with_an_Explosive_Atmosphere.pdf

⁵³ Council of Australian Governments (COAG), Best Practice Regulations:

https://www.coag.gov.au/sites/default/files/coag_documents/coag_best_practice_guide_2007.pdf

⁵⁴ https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm

⁵⁵ https://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf

⁵⁶ <http://www.cencenelec.eu/intcoop/StandardizationOrg/Pages/default.aspx>

⁵⁷ For a discussion of this concept, see: http://aei.pitt.edu/36811/1/ceps_1.pdf and http://sna.gov.it/fileadmin/files/ricerca_progetti/Ricerca_1_Cafaggi_Pistor.pdf

member state. By this means, conformity assessments (of qualifications, product...) carried out in one country are recognised in another country. These are formal treaties but in some instances are sole formal instruments which lock in a raft of informal agreements and political declarations.

This was the mechanism adopted by the Australian government to secure a trade agreement with the European Union. This comprised a joint declaration on EU-Australian relations in 1997 and, two years later, a Mutual Recognition Agreement on conformity assessment.^{58,59} Completing the suite of measures was the COAG Best Practice Regulations.⁶⁰

Next of the OECD categories is what it calls: "Dialogue/informal exchange of information". This comprises conferences, forums and similar settings where regulators and various stakeholders from different jurisdictions meet on regulatory issues. The process can be formalised, as in the Transatlantic Business Dialogues and Transatlantic Consumer Dialogues, held under the aegis of the TEP. These are effectively a manifestation of "soft law", a portmanteau term which describes instruments that are not legally binding, or whose binding force is somewhat "weaker" than that of traditional law, such as codes of conduct, guidelines, roadmaps, peer reviews.

Further developments in trade relations include direct agreements between non-state actors, comprising inter-institutional agreements. The typical instrument is the Memorandum of Understanding (MoU), one example being the MoU between the International Maritime Organisation, the International Labour Organisation and UNECE, on the Code of Practice for Packing of Cargo Transport Units.^{61,62} Of extremely narrow, technical application, this type of agreement nevertheless represents a significant evolution in the way in which progress is being achieved.

Trade Facilitation

The United Nations Conference on Trade and Development (UNCTAD) estimates that the average customs transaction involves 20–30 different parties, 40 documents, 200 data elements (30 of which are repeated at least 30 times) and the re-keying of 60-70 percent of all data at least once. With the lowering of tariffs across the globe, the cost of complying with customs formalities has been reported to exceed in many instances the cost of duties paid.⁶³

Measures which deal with these "at-the-border" issues such as customs cooperation and simplification of administrative procedures, are grouped under

⁵⁸ http://eeas.europa.eu/delegations/australia/documents/more_info/timeline.pdf and http://eeas.europa.eu/australia/docs/australia_joint_declaration_en.pdf, accessed 26 June 2015.

⁵⁹ <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=771>, accessed 26 June 2015.

⁶⁰ *Op cit.*

⁶¹ http://www.unece.org/oes/mou/mou_toc.html

⁶² https://www.unece.org/fileadmin/DAM/trans/doc/2014/wp24/CTU_Code_January_2014.pdf

⁶³ https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_tradfa_e.htm

the generic heading of "trade facilitation". Definitions vary considerably but can also include behind-the-border measures.⁶⁴ Initiatives are now focused on the WTO Trade Facilitation Agreement, agreed as part of the wider "Bali Package" in December 2013.⁶⁵

Conclusions

There was once the simple free trade agreement. But these are not simple instruments. They encompass a huge range of possibilities, so varied that the description itself is empty of meaning without further qualification. At one extreme, it can be a limited agreement on the mutual reduction of tariffs while, at the other, it can cover almost unlimited economic integration.

Over time, however, traditional agreements have been more and more difficult to secure, often taking many years before parties are ready to sign – with added problem of getting them ratified. Furthermore, as tariffs cease to exert significant impact on trade, to be replaced with non-tariff barriers, this type of agreement is becoming less relevant.

Overlaying these developments is the ongoing tension between the RTA movement and multilateralism, where competing agendas and the inevitable stresses involved in international relations, are inhibiting progress through conventional means.

What is thus emerging, largely in response to these problems, is a wider – even bewildering – array of additional options. Under the generic heading of: "international regulatory cooperation", most of them circumvent classic treaty structures. Primarily addressing non-tariff barriers, they work in concert, delivering the same outcomes as formal treaties, without actually being full-blown treaties.

To a very great extent, these arrangements are "under the radar", barely recognised for what they are, especially by commentators whose vision does not extend beyond a simplistic view of free trade agreements. But, without these arrangements, globalisation could not proceed. That they are less than visible does not make them any less real.

ends.

⁶⁴ https://www.wto.org/english/res_e/booksp_e/world_trade_report15_e.pdf

⁶⁵ https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm