

The New Trade Agenda, Mutual Recognition and BREXIT

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International trade policy is changing rapidly. Trade flows of goods are now dominated by global supply chains of commodities and manufactures, sustained by growing services trade. As a consequence, individual economies are becoming more integrated.

The GATT trade negotiations concluded in the early 1990s with the creation of the WTO and brought import tariffs on manufactures down to an average of 3-4% in OECD countries. Since then, behind the border non-tariff barriers (NTBs) became the major restrictions on trade flows in manufactures, services and to some extent foodstuffs.

Frictions over agriculture support policy no longer dominate trade relations between Australia and the EU. The EU is now Australia's largest two-way trading partner in services. Australia and the EU are set to negotiate a Free Trade Agreement (FTA) that aims to be comprehensive, covering all sectors of trade. These are key themes of a book published by ANU Press in 2017, [*Australia, the European Union and the New Trade Agenda* \(Elijah et al. 2017\)](#)

Now that import tariffs no longer dictate trade flows, it is imperative that the world embraces a 'New Trade Agenda' that reduces the trade-reducing effects of diverging domestic policies. These include national regulatory requirements such as product standards on goods, certification, licensing procedures on goods and services and professional qualifications on traded services.

Such requirements frequently differ from country to country and often act as trade restrictions, whether intended or not. The New Trade Agenda also encompasses other domestic policies impacting on trade, notably; investment, public procurement and competition policies. An important aim of trade negotiations increasingly is to remove the NTB effect of these domestic policies to the greatest extent possible and expand trade opportunities.

One problem, however, is that the rules of the WTO have not kept pace with the capacity of regulatory NTBs to restrict trade. The negotiations that created the WTO made efforts to bring NTBs into the multilateral trade rules.

The General Agreement on Trade in Services (GATS) intended to mirror the GATT rules on goods trade in force from the 1940s, recognised the current importance of services in world trade. The Technical Barriers to Trade agreement (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS) also came into force with the WTO. They were similarly important in recognising the growing impact of NTBs over tariffs in limiting trade flows.



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Nevertheless, the 'Domestic Regulation' provisions of these agreements exhort WTO members to ensure only that technical regulations not 'constitute unnecessary barriers to trade' or 'be more restrictive than necessary'. Each of these agreements also encourages members to seek equivalence or mutual recognition (MR) solutions to regulatory NTB problems, but they do little more. WTO rules disciplining NTBs have not been updated since the 1990s and need strengthening.

In the concluding chapter of *Australia and the EU: Partners in the New Trade Agenda*, Kenyon and Van der Eng (2017) argue for an MR approach to liberalising the trade-restrictive effect of regulatory divergences in the forthcoming Australia-EU FTA negotiations. This would be in the context of bilateral tariffs between Australia and the EU (apart from agriculture) being reduced to zero, as they have in other FTAs negotiated by the EU.

Both the EU and Australia have considerable experience with MR in dealing with the trade restrictions of regulatory divergences. MR works in circumstances where there may be regulatory differences, but where there is also a high level of equivalence of regulatory intent and where there is a high level of trust in regulatory integrity. In effect, MR achieves acknowledgement that goods made to the standards, or marketed to the certification or licensing provisions of country A, may be freely traded in country B, and *vice versa*. By granting recognition to the technically divergent regulations of another jurisdiction, the certifying state effectively acknowledges that the regulations reach acceptable standards.

This has been a principle important for the EU in constructing its Single Market in the early 1990s, by building on the earlier "cassis de Dijon" judgment of the European Court of Justice that goods lawfully produced in one member state cannot be banned from sale in another member state. Australia applied the same principle across the differing product standards then applying in the six states of Australia in the Mutual Recognition Agreement of 1993. It extended the principle to New Zealand in 1997 with the Trans-Tasman Mutual Recognition Agreement (TTMRA), which also included an MR of professional qualifications. The TTMRA was the first to apply MR internationally. As we indicate below, there is every reason why there should be others.

When it came to bringing services fully into the Single Market in the 2000s, the EU had become a bloc of 28 countries. In this larger EU, there was not the same trust in regulatory integrity across all member states. It became clear that an MR approach to the creation of a single market in the EU for services could not just simply be applied across the larger bloc without further confidence building.

Nevertheless, MR remained the basis for the solution reached in the EU's Services Directive of 2006 in the form of 'managed MR'. In effect, the directive establishes a prior step to MR, known in the EU as 'Mutual Evaluation'. This is a process of transparency and peer review between member states aimed at increasing equivalence and confidence as a stepping stone to MR. McNaughton and Lo (2017) discuss the steps taken in the 2006 directive to bring traded services fully into the Single Market.

The extensive experiences both Australia and the EU have with MR in liberalising the trade restricting impact of regulatory divergences both internally (between Australian states and between EU member states) and internationally (between Australia and NZ in the TTMRA) place Australia and the EU in a strong position to pursue MR solutions to regulatory NTBs on goods and services in the forthcoming FTA negotiations.

Both Australia and the EU have well-developed regulatory standards, enjoy high equivalence of regulatory intent, and share a high level of trust in each other's regulatory capacities. The latter is evidenced by 'conformity assessment' agreements currently in force to test for each other's standards. To the extent that any of the above elements may need reinforcing, the transparency/peer review process contained in the 2006 Services Directive could provide a stepping stone to MR solutions.

In June 2016, the UK decided by referendum to leave the EU and triggered the article 50 withdrawal provision of the Treaty on European Union on 29 March 2017. The UK subsequently clarified it will leave both the Single Market and the Customs Union of the EU. The latter in order to re-establish an independent external tariff and to be free to make separate trade agreements with other countries. More recently, the British Prime Minister spoke about the future relations with the EU on 2 March 2018 (UK 2018). She specified that the UK must avoid:

1. damage to the "integrated supply chains" that are now essential to trade in manufactures between the UK and the rest of Europe,
2. re-establishment of "customs and regulatory checks" between the UK and Europe, and
3. creation of a "hard border" between Northern Ireland and the Republic of Ireland.

She concluded that the only way to realise these aims would be through a "comprehensive system of Mutual Recognition" between the UK and the EU. The logic of this conclusion appears incontestable. After BREXIT, import tariffs between the UK and the EU will remain reduced to zero under a bilateral FTA, maybe except agriculture. But without an MR approach, regulatory NTBs could arise again between the UK and the EU.

Against all the points above, a post-BREXIT trade relationship that deals with regulatory barriers through MR will be consistent with the objectives of the TTMRA to eliminate regulatory trade barriers between close trading partners. This should be the aim of all trading partners who share high regulatory standards, capacity and equivalence of intent as they move towards greater trade liberalisation in a manner that will reinforce disciplines on regulatory NTBs adopted with the establishment of the WTO.

In her speech, Britain's PM made a number of other specific points to demonstrate why MR is the preferred route for dealing with regulatory NTBs. She noted that the UK's "regulatory standards will remain as high as the EU's" and will "remain substantially similar". This is not a commitment to harmonisation, but to equivalence. In any case, the UK would be starting from a situation of full regulatory integration with the EU. An explicit commitment to MR would make it unlikely to stray far in regulatory differences.

Also, the PM's speech indicated an expectation that "regulators on both sides" would be involved in monitoring any post-BREXIT modifications. This transparency, together with use of the peer review mutual evaluation process now available from the EU Services Directive, should provide sufficient confidence that close equivalence of regulatory intent will remain between UK and EU.

Britain's PM also noted that a post-BREXIT trade arrangement, which includes MR on regulatory provisions, will permit cooperation "deeper than in any other existing trade agreement" the EU has. This is important, as it is true that without liberalisation of regulatory trade barriers, the value of any FTA in liberalising trade between partners will always be severely curtailed. This is increasingly the case as behind-the-border NTBs become more important than more traditional trade restrictions such as tariffs and quotas. As noted above, regulatory NTBs emerged as the main restriction on global trade. The liberalisation of NTBs is central to continued economic integration and prosperity.

In conclusion, the UK rightly points to an MR solution to avoid the re-emergence of regulatory NTBs on trade with the EU following BREXIT. MR is the most ‘trade friendly’ solution. It will foster deeper UK-EU economic integration than possible in a trade arrangement focussed primarily on tariff elimination. The EU’s 2006 “Global Europe” communication on trade policy stated that the EU was committed to future FTAs that build on the GATT rules “by going further and faster in promoting openness and integration” (EU 2016). Future FTAs, it said “must be comprehensive in scope, provide for liberalisation of substantially all trade and go beyond WTO disciplines. The EU’s priority will be to ensure that new FTAs ... serve as a stepping stone not a stumbling block for multilateral liberalisation”.

A post-BREXIT UK-EU trade arrangement that includes MR on regulatory barriers will achieve that aim. An appropriately designed surveillance and arbitration mechanism within the overall arrangement could monitor its application. Possibly through recourse to arrangements modelled on the transparency and peer review procedures in the EU Services Directive. An FTA between Australia and the EU that also encompasses MR of regulatory divergences on conditions similar to those that can be worked out for the UK could be equally liberalising and also play a positive role in realising the aims of “Global Europe”. Such an approach might also be of value in future bilateral and multilateral approaches involving APEC countries.

References

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