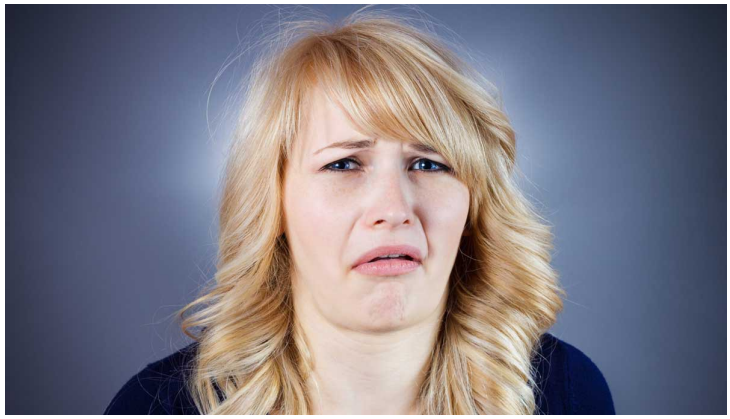
Brexit Monograph 6: Post-Brexit regulation

Prominent elements of the Brexit debate in the run-up to the EU referendum were discussions about the cost of EU regulations and the potential for massive deregulation, with the prospect of a vast "bonfire of regulation" offered by the leave campaign, effectively as a reward for voting to leave the EU.

The role of regulation.



1. Taking one example of business costs, in the ***hygiene*** laws applicable to commercial food premises, there are statutory obligations relating to the cleanliness of toilets. These are, currently, EU regulations but, not even the wildest anti-EU zealot would argue that the repeal of the relevant EU law would result in proprietors no longer spending money on toilet cleaning.

   In the food sector, many operators go far beyond the minimum regulatory standards, some using high standards as a marketing tool. In practice, therefore, regulation becomes a means of penalising the very few non-conforming businesses.

2. Another aim of regulation is to prevent or reduce the likelihood of ***catastrophic failure***. Such an objective would apply to aviation safety, where the preservation of life is the primary objective to which all others are subordinate. Cost is not an issue. The cost of the world financial crisis in 2008-9 was estimated by the IMF to be $11.9 trillion (US) and while some have argued that poor regulation was in part responsible, the current round of regulation is most definitely aimed at preventing a repetition.

3. Defining specific codes of behaviour or procedure to prevent ***fraud*** or other malpractice. This is easier to do when common standards are in place.
   For instance, we are seeing increasingly rigorous regulation governing aspects of the VAT system. Estimated at 12 percent of total VAT revenue, EU-wide.fraud may have cost €90-113bn a year in the period 2000-2006 and more than €100bn in 2012, accounting for over €1 trillion in just over a decade. As long as the system is in place, there must be regulation to protect it.

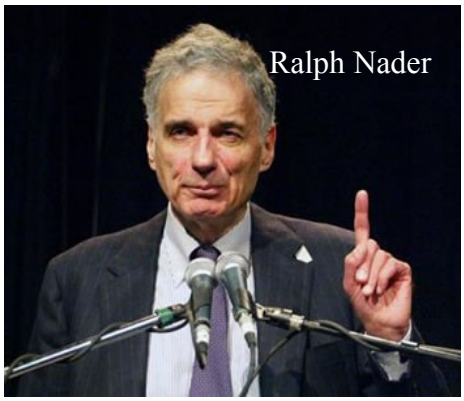
4. ***In terms of international trade,*** regulation is often not so much proscriptive as permissive, ***facilitating the movement of goods***. Conformity with an agreed international standard, where it exists, prohibits importing countries imposing their own arbitrary (or even just higher or different) standards which can (and are often intended) to act as barriers to trade.

   A classic example of this is the Globally Harmonised System of Classification and Labelling of Chemicals (GHS), manifest at EU level in the Classification, Labelling and Packaging (CLP) Regulation.[9] The global standardisation of hazardous material markings means that goods bearing the correct markings cannot be excluded by importing countries on the grounds of non-conformity with local codes. Labelling is a normal cost of doing business. Harmonising regulations are entirely beneficial.

The relevance of regulatory costs.

Impact assessments attempt (often unsuccessfully) to reduce the costs of these regulations. But they also allow campaigners to argue that high costs are a valid reason for reducing or eliminating regulation.

The fallacy of this view is evident when one looks at the ***rise of consumerism.*** Despite the expense of safety regulation, it is hardly imaginable that buyers in developed countries would be willing to purchase vehicles that had not been extensively tested. The cost of regulatory compliance is again a cost of doing business.


Ralph Nader

Turning to ***the food scares*** of late 1980 through to the late '90s, from Salmonella in eggs to BSE, producers were often prepared to accept a degree of regulation more rigorous than strictly necessary to ensure public safety, simply to restore consumer confidence. Without the controls, there was no business. In the meat industry, where no inspection was carried out, serious embarrassment to honest traders was caused, owing to the absence of any check on unscrupulous traders.

Modern businesses often welcome regulation. In the UK, the DIY store B&Q had a long-standing policy of selling only "sustainable" timber to its customers. Before the adoption of the EU timber regulations, the business was put at a disadvantage with its European competitors. EU timber regulation ensured that the company was not put at a commercial disadvantage for "doing the right thing".

At a different level, ***manufacturers*** find the absence of specific product regulation can render them prey to different contract standards applied by their powerful customers. Individual supermarket buyers have been known to demand their own specific standards simply to lock in their suppliers.

The Open Europe Survey:

At the centre of the debate on the cost of regulation has been the think tank **Open Europe**, with its study of October 2013, asserting that the top "100 EU laws" cost the UK economy £27.4 billion a year.[14] In a further study published in 2015, this became £33.3 billion. The higher figure of £33.3 billion was translated by the Vote Leave campaign into a weekly cost of £600 billion, implying that this amount could be saved if we left the EU. As to benefits, these were estimated at £58.6 billion a year. However, not only were benefits under-stated, there was an obvious selection bias.

The banana directive was mocked. And to focus on the "top 100" most costly regulations is in itself a distortion. **The Single Market *acquis* comes as a package. Its costs need to be assessed as a package or not at all**.

Regulation has been attacked in **the Climate change Act (CCA)**. One can compare its situation to that of a victim in a horror movie, trapped alive in a coffin. Having broken through the lid in a bid to escape, he finds to his consternation that there is another lid. This "double lid" is, on the one hand, **the EU treaty obligations** and, on the other, t**he UNFCCC Kyoto Protocol**. Breaking through the EU legislative layer simply reveals the second "lid" of the Kyoto Protocol.

Working Time Regulations, based on Directive 2003/88/EC, are attributed entirely to the EU. This ignores the fact that the core requirements are based on I**nternational Labour Organisation (ILO)** standards.

Conclusion: Prospects for Deregulation:

An extraordinary amount of emphasis has been given to the cash-saving potential of Brexit. The opportunity for a bonfire of regulations on a Churchillian scale gave the leave campaign the opportunity to argue that, of the Open Europe "top 100", 66 were attributable to EU Single Market legislation, at an annual cost of £22.6 billion.

What we can conclude is that t**he focus on the economic costs of regulation, in the expectation of making large-scale savings, has in the main proved illusory.**

A better approach might be to consider the time-consuming aggravation of **"red tape"**, seeking to reduce demands on businesses and allowing proprietors to concentrate on revenue-making activities. In our investigations, we found that poor or over-zealous enforcement was often as significant as the regulation itself. both at EU and national levels a change in emphasis from high profile deregulation policies to a more nuanced strategy of seeking "better regulation" at national and EU levels.

The perception that other nations are better at **lobbying** and influencing new legislation than the UK. might be a function of the way trade bodies are organised in this country. Germany has compulsory trade guilds, for example.

The EU commission itself can be very inflexible when it comes to removing the *acquis*.The more important issue would appear to be not regulation, per se, but who makes the regulations, and the degree of control the UK is able to exert over its adoption and, crucially, its **ability to secure change**.

But, where law is increasingly framed at international level, there is particular advantage in being outside the EU and regaining voting rights and independence in global (and regional) standards-making bodies. Through this, we regain the right of initiative and, once more, have a direct hand in shaping the legislative agenda.

Regulation is the tool and the consequence of policy. Over-emphasis on regulation is akin to mopping up the water from an overflowing bath without first turning off the tap. **If policy is well-founded, outcomes will reflect the quality of the inputs. Policy needs to be the target. The rest will follow.**

Brexit Monograph 7: Trade agreements

Introduction:

It is commonly asserted that the UK's trading relations with the EU can be settled by negotiating a "free trade agreement". This is unhelpful. 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. We need to get into detail.

Before we begin, we are dealing with extraordinarily long documentation. Just to take one example: the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, which has yet to come into force, takes 1,598 pages. We are dealing therefore with very long negotiations.

The Free Trade Area (FTA) and other groupings

According to the GATT agreement of 1994, a **FTA** is 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.

Customs Unions (**CU**s) 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. Because of this, Customs Union members are **not able to conclude separate free trade agreements with non-members.**

Both of these must be **notified to the WTO**. There are 462 such agreements in force and nearly every country in the world has at least one such arrangement.[1]

There is an a**lphabet soup of acronyms** which are often used indiscriminately too. Preferential Trade Arrangement (PTA); Generalised Systems of Preference (GSPs); non-reciprocal preferential schemes for Less Developed Countries (LDCs); Regional Trade Agreement (RTA) Regional Integration Areas (RIAs). All have slightly different meanings, yet are often used confusingly.

Such agreements do not necessarily involve contiguous nations. Groupings can be geographically dispersed, so a preference is sometimes expressed for the term **Preferential Trade Agreement** as a generic.

Then, between the EU and other states, there are "**association agreements"**, which rely on Article 217 Treaty of the Functioning of the European Union[2] (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.

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. For example the **Partial Scope Agreement** used in South America only covers a small

1 Just for fun: the exceptions are Mongolia, Djibouti, the Democratic Republic of Congo and Madagascar.

2 Aka the Lisbon Treaty

amount of trade. An example is the Belize-Guatemala PSA, which covers only 150 specified tradable products.

PSAs have the particular advantage of being easier to negotiate and faster to conclude. For example the Belize-Guatemala PSA took just 18 months[3]. the PSA are not notified to the WTO and recorded. They thus remain a relatively little-known and largely unacknowledged form of agreement.

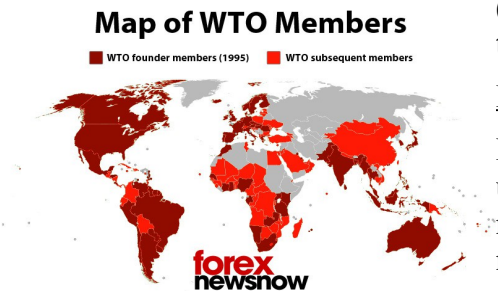
Comprehensive Trade Agreements

As Tariffs become less important in the world, the FTA and its associates are becoming more comprehensive in scope.

The **Comprehensive Trade Agreement (CTA)** includes 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.

Sixty percent of modern **Regional Trade Agreements (RTAs)** include dedicated chapters and committees to co-operate on the movement of business persons, both for goods and services, including visa facilitation measures. Examples include the EU-Republic of Korea agreement, the EU-Canada trade agreement (CETA) and the EU-US agreement (TTIP).

Comprehensive Trade Agreement are not recognised in **the WTO** agreements unless they include (as they usually do) commitments to reduce of eliminate tariffs.



Multilateralism and plurilateralism

Multilateralism - or the term "multilateral trading system" - is used to describe the GATT/WTO agreements, encompassing most of the countries[4] in the world. The WTO has about 160 members, accounting for about 95 percent of world trade. Around 25 others are negotiating membership.

But 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. More is needed, which can be regarded as WTO- plus, or sometime WTO-beyond.

WTO Committees have produced guidelines for regional trade agreements, which affect, for example, government procurement and trade in civil aircraft. They do not affect all members, but only a selected few of the members of the RTA. This goes against the WTO principle of "Nothing is agreed until everything is agreed". So they can also pave the way for future multilateral rule-making and, as such, are regarded by some as a powerful tool for trade opening and a building block for a more open international trade regime.

Unilateralism

Unilateralism(unilateral tariff reduction [UTR]) 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.

In the late 1980s when tariffs were still a significant impediment to trade, UTR was seen as a way of forcing trade liberalisation. Since then, for one reason or another, tariffs have fallen considerably.

"Soft unilateralism" means apparently unilateral actions which are taken in the expectation of non-obvious reciprocity. The EU-China talks may well be a case in point.

3 The Guatemalan President signed it off after six years in 2010.
4 Legally the EU counts as a country.

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).

Many different mechanisms and structures have emerged to deal with this shift. The OECD lists nine types of organisation (in addition to RTAs) which have been set up to address the technical barriers to trade.

One of the more important is the **"trans-governmental network"**, which work ostensibly on a voluntary basis but they are 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. One example is the Basel Committee on Banking Supervision, which published the "Basel III" package in 2011, a comprehensive set of reform measures, developed to strengthen the regulation, supervision and risk management of the banking sector. 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. This extensive network is coordinated by the G20, the OECD and the Financial Stability Board. 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.

The "**regulatory partnership**" is where different countries – usually neighbours - agree jointly to produce better quality regulation and minimise unnecessary regulatory divergences. The US-Canada Regulatory Cooperation Council, was formed by a joint declaration from President Obama and Prime Minister Harper in February 2011. Another example is the Transatlantic Economic Partnership (TEP) between the EU and the US.

The **UNECE Working Party on Regulatory Cooperation and Standardisation Policies (WP.6)** facilitates the production of international regulation via its Common Regulatory Objective (CRO) system, through which UNECE is able to broker sector-specific agreements, 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.

Basic cooperation agreements can be given "teeth" when **individual governments** incorporate international regulatory cooperation into their own domestic legislation, which again by-passes the treaty-making process[5].

On 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 member state. Conformity assessments (of qualifications, product...) can be carried out in one country and recognised in another country.

Next of the OECD categories is what it calls: "**Dialogue/informal exchange of information**". Conferences, forums and similar settings are held, where regulators and various stakeholders from

5 This process has been boosted by the 1994 WTO agreement on Technical Barriers to Trade, and the parallel SPS Agreement. In Europe, there are also the Vienna and Dresden agreements which give primacy to international standards. A key role is taken by the International Standards Organisation (ISO), itself described as a Transnational Private Regulator (TPR).

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 Technology Enhancement Programme.

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. 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.

International trade hads become very complicated. 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. These impede trade much more effectively than customs dues.

Conclusion:

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. As tariffs cease to exert significant impact on trade, to be replaced with non-tariff barriers, this type of agreement is becoming less relevant.

Then there is is the ongoing tension between **the Regional Trade Agreement** movement and multilateralism, where competing agendas and the inevitable stresses involved in international relations, are inhibiting progress through conventional means.

What it emerging, is a wider – even bewildering - array of additional options. Under the generic heading of: "**international regulatory cooperation**", most of them by-pass the classic treaty structures. Primarily addressing non-tariff barriers, they work in concert, offering 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. In addressing the costs of regulation – irrespective of its origin – it is necessary to question whether costs, per se, are a meaningful measure of their utility or otherwise.

Arguably, and especially in administrative law affecting businesses, they are an unavoidable cost of doing business, or of achieving a desired policy outcome.

The actual cost (given efficient regulation and sensible enforcement) is not necessarily an issue.