

The Implementation of the EU Strategy for Free Trade Through the Conclusion of Bilateral Agreements with its Major Partners the Latest Developments

Odysseas G. Spiliopoulos¹ and Dimitrios Petropoulos²

Abstract

The need to achieve greater opening of international markets in more areas of economic activity has prompted the EU since the mid-2000s, specifically from 2006 onwards, to launch a process of negotiating new bilateral economic agreements. The purpose was not to conclude agreements that would be limited to regulating the traditional aspects of trade with its economic partners, but agreements whose scope would include all economic relations between the contracting parties. The key element of these new generation agreements is their global content given that, regardless of their title, their object is to regulate both trade in goods and services and trade-related areas such as investment status, public procurement, competition issues, protection of intellectual property rights. Their basic aim is to liberalize and facilitate trade in goods and services between the parties. The present study seeks to examine the objectives as well as the fundamental rules set out in these EU agreements.

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¹ University of the Peloponnese, 24100 Kalamata, Greece.

² University of the Peloponnese, 24100 Kalamata, Greece.

1. Introduction

The need to achieve greater market opening in more and more economic sectors has prompted the EU since 2006, to launch a process of negotiating new bilateral agreements with its major economic partners (Commission 2006). The purpose was to conclude agreements covering all economic relations between the parties. They have a global content as they regulate both trade in goods and services and trade-related sectors such as investment status, public procurement, competition issues, and the protection of intellectual property rights (Rigod 2012).

It should be stressed that a key element of these agreements is their multidimensional nature in the sense that they do not concern one sector in one dimension but provide for commitments in several sectors (Commission 2015). All commitments, regardless of the covered area is oriented to the promotion of liberalization of trade and investment. Over the last decade, the EU has concluded comprehensive economic agreements with South Korea (Horng, 2012)³, Canada (White 2017)⁴, Japan (Katakami 2016)⁵, Singapore⁶, Vietnam (Fruscione, 2021)⁷, Central America⁸, Peru-Colombia-Ecuador⁹. Negotiations are ongoing with Australia, New Zealand, the Mercosur and Mexico.

2. The Scope and Key Objectives of EU Global Agreements

It is clear from the Agreements Preamble that it is important for the parties to strengthen their economic relations and to promote bilateral trade and investment in accordance with multilateral WTO Rules. The process to achieve the above objectives must combine the environmental, social and business dimensions in the sense that the need to protect the environment and workers' rights will be taken into account as well as the promotion of the interests of the businesses on a mutual basis. The complementarity that characterizes their economies should contribute to further promoting the development of trade and investment between the parties, exploiting their respective economic advantages through bilateral trade and investment activities.

It is crucial to establish a clear and secure legal framework for trade and investment between them, in order to strengthen the competitiveness of the parties' economies and to create a predictable trading environment for further expansion of the above activities.

The main object of the agreements is to create a legal framework ensuring the establishment of a free trade area covering goods, services and investment between the EU on the one hand and each third country on the other (Hannonen, 2017). Their

³ EU-Korea FTA.

⁴ Comprehensive Economic and Trade Agreement (CETA).

⁵ EU-Japan Economic Partnership Agreement (EUJEPA).

⁶ EU-Singapore Free Trade Agreement (EUSFTA).

⁷ EU-Vietnam FTA.

⁸ EU-Central America Association Agreement including a Trade Component.

⁹ EU-Perou/Colombia/Ecuador Trade Agreement.

first objective is to liberalize and facilitate trade in goods between the Contracting Parties. The second one is to establish a legal framework promoting the liberalization of services supply between them.

In terms of their regulatory scope, it covers globally all aspects of bilateral economic relations. In particular, they parties undertake commitments on:

- a) *Trade in Goods* and in particular on market access regime and national treatment concession, (on) rules of origin and trade facilitation and customs, (on) sanitary and phytosanitary measures, (on) technical barriers to trade and trade remedies.
- b) The reciprocal and progressive liberalization of investments (establishment), cross-border services supply, entry and temporary stay in the territory of natural persons for the exercise of business activities, national regulations affecting establishment, cross-border services supply and the provision of services through the presence of natural persons of one Party in the territory of the other as well as the strengthening of cooperation in the field of e-commerce.
- c) Capital movements and payments liberalization
- d) *Opening* up their public procurement market
- e) Protecting fair and free competition;
- f) Establishing a legal framework for the protection of intellectual property rights.

It is important to highlight two critical parameters:

- a) The EU Global economic Agreements exceeds the commitments arising from the WTO agreements in many areas, such as services, public procurement, non-tariff barriers, protection of intellectual property rights, including geographical indications (GIs). In all these areas, the contracting parties have made new commitments to complement their obligations under the WTO Agreements going beyond them.
- b) These Agreements meet the criteria of Article XXIV of the GATT relating to regional economic agreements in respect of goods (elimination of customs duties and other restrictive measures for the substantial trade between the Parties) and Article V of the GATS which provides a similar criterion for services.

3. The Market Access Regime

3.1 The liberalization of trade in goods

With regard to the liberalization of trade in goods, the outcome of the negotiations is considered particularly important for the EU as it facilitates exports to third countries by removing both tariff and quantitative restrictions and non-tariff barriers.

3.1.1 The removal of tariff barriers and quantitative restrictions

The EU Agreements objective is to facilitate and progressively liberalize bilateral trade and, for its implementation, the parties undertake the following obligations: Each party is obliged to reduce or eliminate customs duties on products originating

in the other. This commitment will be implemented according to a timetable set out in the Annex to each agreement.

In addition, it may not impose or maintain duties, charges or other charges of any kind imposed on goods exported to the other Contracting Party or other internal taxes or charges on goods exported to the other Party in excess of those imposed on similar goods intended for domestic consumption.

It shall be prohibited for the authorities of one Party to impose or maintain quantitative restrictions on imports of goods from the other Party or on exports to the customs territory of the other Party, except as provided in Article XI of GATT 1994.

The Agreements establish a standstill clause under which one Party undertakes not to increase customs duties on goods originating in the other beyond the rate applicable in accordance with the aforementioned annex.

Finally, the global economic Agreements provide provisions enabling the parties to adopt measures that impose restrictions on trade, for reasons related to the protection of their financial interests and subject to specific circumstances and conditions. These measures include anti-dumping, countervailing and safeguard measures.

3.1.2 The removal of non-tariff barriers

The term non-tariff barriers, in the context of the EU Agreements application, includes all obstacles, except tariff barriers and quantitative restrictions, which hinder the export of products from the territory of one Party to the territory of another Party (Krstic, 2012). More specifically, this term covers the regulatory and technical barriers and, in more detail, the regulations adopted by the authorities and relating to the goods, the application of complex technical standards, the enforcement of procedures for the approval of imported products, the conduct of inspections to ensure that imported products comply with national standards and regulations.

It is necessary to clarify that, in the case of non-tariff barriers, their restrictive effect is not produced by the measure itself, by which a State may, after all, pursue legitimate objectives such as protection of the health or safety of persons as well as protection of the environment. Their restrictive effect is mainly due to the fact that these measures impose standards, regulations and requirements that differ from or are inconsistent with the standards and regulations applied by the exporting country. Given these discrepancies and incompatibilities, companies are required to comply with the regulations in force in the importing country, which entails costs for them. The situation may be aggravated by the uncertainty exacerbated by the interpretation of the regulations by the authorities of the importing State in an unpredictable manner.

Specifically for EU-Japan trade, the different Japanese regulations and technical standards mainly affect the automotive, food, pharmaceutical and medical technology EU industries. To address this unfavorable situation, which has made it more difficult for EU imports into these critical sectors, the EU has sought to include

in the agreement texts a commitment by Japan to adopt more international standards, similar to those used by EU itself. It also proposed the establishment of a joint regulatory cooperation committee to ensure that the regulations in place are more effective, simpler and less costly for businesses. Japan is committed to removing technical and regulatory barriers to trade in goods, such as retesting, mainly by promoting the use of EU technical and regulatory standards in the fields of motor vehicles, electronics, pharmaceuticals and medical devices, as well as green technologies¹⁰.

In the field of the automotive industry, it is pointed out that the EU applies to international standards set by the United Nations Economic Commission for Europe (UN-ECE) for cars and car parts, as well as for other vehicles. Japan has agreed to align its standards fully with those international standards. Japan's obligation to harmonize its car standards with the same international standards used by the EU will make it easier for EU carmakers to sell their vehicles on the Japanese market. To ensure compliance with the aforementioned Japanese commitments, reliable procedures should be adopted. A safeguard clause included in an annex related to motor vehicles allows the EU to re-impose tariffs in the event that Japan ceases to apply UN-ECE regulations or reinstates (or imposes new) non-tariff measures.

With regard to the pharmaceutical industry, Japan has agreed to refer to the International Council for the Harmonization of Technical Requirements and the registration of medicinal products for human use (ICH) as the international standard-setting body and to implement its guidelines as the basis for its legislation. In the textile sector, the EU's request for Japan to reform its system of labeling with textile care directives and bring it in line with the ISO standard used by the EU industry has been granted. But in other industries as well, Japan has committed itself to adopting the international standards applied by the EU.

Similar commitments have been made by other countries with which the EU has concluded bilateral economic agreements. The overall result will be an increase in EU exports of agricultural foodstuffs, electrical machines and appliances, pharmaceuticals, medical devices, motor vehicles, transport equipment, textiles and clothing, and forestry products. It is noteworthy that the increase in exports of EU processed food to the Japanese market can reach 180%. An increase of this order is translated into additional sales of 10 billion Euro.

3.2 The improvement of market access for parties' investors

The EU agreements contain provisions on the freedom of establishment of investors (companies) of one Party in the territory of the other for the purpose of carrying an economic activity there. The establishment consists in the creation or acquisition of

¹⁰ It should be noted that according to art. 7.3 par. 2 of the EU-Japan agreement, a big part of the provisions of the Agreement on Technical Barriers to Trade (TBT) of the WTO is an integral part of the EU-Japan Economic Partnership Agreement. The objective of the TBT Agreement is to create a legal framework according to which technical regulations, standards and procedures for establishing the conformity of imported products with domestic products will not create obstacles to the international trade of goods., See Bredimas A., Gourgourinis A., *The WTO Law*, Nomiki Bibliothiki, 2018, pp. 98-108, Glavinis P., *International Economic Law*, Sakkoulas, 2009, pp. 259-260.

a legal person, in particular through equity participation or creation of branch or representative office in a party, for the purpose of establishing or maintaining lasting economic links.

The beneficiary of the right of establishment, according to the above, is every entrepreneur of a party, i.e., every natural or legal person of one party, who wishes to create or acquire or creates or acquires or has created or acquired a business in the territory of the other pursuing the above purpose. The term "business" covers legal entities, branches and representative offices.

The scope of the liberalization of investments includes any measure that meets specific conditions.

Firstly, this measure must be taken by a contracting party. In particular, the above provisions shall apply to measures adopted not only by the central government authorities of the Parties but also by regional or local governments or authorities as well as non-governmental organizations in the exercise of the powers conferred on them by central, regional or local authorities.

Secondly, the measure taken, in accordance with the above, must regulate the establishment or operation of economic activities by:

- a) The entrepreneurs of the other party.
- b) The companies which are established or acquired in the territory of a party, directly or indirectly, by an investor of the other Party.

The term *operation* includes the management, maintenance, use, exploitation and sale or other form of transfer of a business, while the concept of economic activity includes any service or activity of an industrial, commercial or professional nature as well as the activities of craftsmen, with the exception of services supplied or the activities carried out in the exercise of governmental authority.

In order to facilitate access to each other's markets, the Parties undertake commitments similar to those under the General Agreement on Trade in Services (GATS).

Specifically, it is prohibited for a party to maintain or adopt, with regard to market access through the establishment or operation by a business or enterprise of the other party, measures that impose restrictions or impose specific conditions.

In particular, no restrictions may be imposed on the number of companies of the other Party which may exercise the above right. This prohibition concerns the restrictions that take one of the restrictively mentioned forms such as, exclusive rights, monopolies, numerical quotas, requirement for consideration of economic needs. Thus, a third country may not limit the number of EU companies which will be permitted to establish in its territory by establishing a monopoly status in certain sectors or depending on how many EU companies will be granted

It is also not allowed to impose a restriction on:

- a) The total value of transactions or assets, in the form of numerical quotas or the requirement to consider economic needs.

- b) The total number of operations or the total quantity produced, expressed in specific numerical units, in the form of quotas or a requirement to examine economic needs.

Measures imposing restrictions on the participation of foreign capital in undertakings operating in the territory of the host Party shall be prohibited. A party may not set a maximum percentage of shares that foreigners may hold, nor impose a limit on the total value of foreign investments that may be made.

A party may not impose restrictions on the total number of natural persons who may be employed in a particular sector or which a company may employ and which are necessary for the conduct of an economic activity and directly engaged in it, in the form of quotas or the requirement to consider economic needs. Finally, the prohibition also applies to measures that restrict or provide for specific types of legal entities or consortia through which an entrepreneur of the other party can engage in economic activity.

For the purposes of the liberalization of investments, the Agreements expressly oblige the parties to allow, as regards the capital account and the financial account of the balance of payments, the free movement of capital. However, either party may apply its own laws or regulations relating to bankruptcy, insolvency or the protection of creditors' rights, if appropriate, to assist law enforcement or financial regulatory authorities in dealing with crimes or misleading or fraudulent practices. However, the above-mentioned laws and regulations may not be applied unfairly, arbitrarily or in a discriminatory manner or otherwise constitute a disguised restriction on the movement of capital or payments.

The Parties have the possibility to adopt and implement measures of safeguard of temporary duration, but only if specific, defined circumstances and conditions are met.

First, in exceptional cases of serious difficulty or threat of major difficulties in the functioning of the EU Economic and Monetary Union, it may introduce or maintain safeguard measures in respect of capital movements or payments for a period not exceeding six months.

In addition, a Contracting Party may introduce or maintain restrictive measures in respect of capital movements or payments:

- a) In the event of serious difficulties or threats of serious difficulties relating to the balance of payments or its external financial situation, or
- b) If, in exceptional cases, capital movements or payments cause or threaten to cause serious macroeconomic difficulties related to monetary and exchange rate policies.

In any case, the above measures need to meet specific criteria. In detail, they must be in accordance with the Statute of the International Monetary Fund, they must not exceed the limits necessary for the restoration of the above situations, they must be temporary and phased out as the above problematic situation improves, they must not cause unnecessary damage to the commercial, economic and financial interests

of the other Party and not introduce discriminations against third countries in similar situations.

3.3 The cross-border services supply legal framework

The scope of the provisions on cross-border provision of services includes any measure taken by one party and having an impact on the above provision by the other party service providers (VanDuzer, 2012). The object of these measures are, for example:

- a) The production, distribution, marketing, sale or delivery of a service.
- b) The purchase, use or payment of a service.
- c) Access and recourse to services offered to the general public.

With regard to market access status, Parties are prohibited from adopting or maintaining measures imposing restrictions on the number of service providers, either in the form of numerical quotas, monopolies, exclusive providers, or the requirement to consider economic needs.

This prohibition also concerns the imposition of restrictions on:

- a) The total value of transactions or service-related assets, in the form of numerical quotas or the requirement to examine financial needs, or
- b) The total number of transactions in services or the total quantity of services produced, expressed in specified numerical quantities in the form of quotas or the requirement to examine economic needs.

It is not allowed to introduce or maintain measures imposing only specific types of legal entities or consortia through which a person can supply a service.

The above arrangements are expected to facilitate the provision of services by EU companies in particular in the areas of business services, financial services (mainly insurance), telecommunications, transport, postal services and courier services.

In the field of postal and courier services, the Agreement includes provisions on universal service obligations, border procedures, licensing and the independence of regulators while ensuring a level playing field between EU postal and courier services providers and their competitors of third countries¹¹.

In the telecommunications sector, there are provisions focusing on a level playing field for telecommunications service providers and on issues such as universal service obligations, number portability, and mobile roaming and communications confidentiality¹².

With regard to international maritime transport, the Parties have obligations to ensure open and non-discriminatory access to international maritime services (transport and related services), as well as to ports and port services¹³.

With regard to financial services, the agreement contains specific definitions, exceptions and rules for new financial services, self-regulatory bodies, payment and

¹¹ See articles 8.36 – 8.40 of EU-Japan Economic Partnership Agreement (EUJEP A).

¹² See articles 8.41 – 8.57 of EUJEP A.

¹³ See articles 8.68 – 8.69 of EUJEP A.

clearing systems and transparency, as well as rules for insurance services provided by postal operators¹⁴. Many of these arrangements are based on rules established within the World Trade Organization, while addressing the specificities of this service sector.

With regard to the entry and temporary residence of business staff, the agreement contains the most advanced provisions on the movement of natural persons for business purposes (the fourth way of providing services according to GATS), which have been negotiated by the EU so far. These provisions cover all traditional categories of staff, such as in-house transferees, business visitors for investment purposes, freelancers, and newer categories, such as short-term business guests and investors¹⁵.

3.4 Improving access to the public procurement market

It should be emphasized that the EU has one of the largest public procurement markets in the world. In a developed economy like the EU, the supply of goods and services to the state and the wider public sector accounts for more than 15% of the total economy.

First, EU Agreements incorporate the Public Procurement Agreement (GPA) as an integral part of it. In addition to the GPA rules, the EPA shall lay down provisions on the conditions for participation in a tendering procedure, the evaluation of suppliers, the technical specifications, the treatment of tenders submitted and the award of contracts, and internal control procedures, the means of appeal available to the tendering companies that have submitted tenders if they consider that they have been treated unfairly.

A contracting authority of a Party shall not exclude a supplier established in the other Party from participating in a bidding process under a legal requirement that the Supplier must be:

- a) A natural person, or
- b) A legal person.

While this authority of a Contracting Party may, in determining the conditions for participation, require relevant prior experience, when it is really necessary to meet the requirements of the contract, it cannot be assumed that this prior experience must have been acquired in the territory of that Party.

With regard to supplier evaluation, if a party maintains a supplier registration system under which interested suppliers are required to register and provide certain information, such suppliers may request their registration at any time. The contracting authority must inform these suppliers within a reasonably short time of their registration. Where, in accordance with paragraphs 4 and 5 of Article IX of the GPA, a contracting authority limits the number of suppliers for a particular supply, the number of suppliers authorized to submit tenders must be sufficient to ensure

¹⁴ See articles 8.58 – 8.67 of EUJEP.A.

¹⁵ See articles 8.20 – 8.28 of EUJEP.A.

competition without affect the operational efficiency of the procurement system. If a supply entity implements environmentally friendly technical specifications as laid down for environmental labels or as defined in the relevant laws and regulations in force in either Party, each Contracting Party shall ensure that those specifications are:

- a) Appropriate for the determination of the characteristics of the products or services covered by the contract.
- b) Based on objectively verifiable and non-discriminatory criteria.
- c) Accessible to all interested suppliers.

Where a non-discriminatory administrative authority is designated by a Contracting Party pursuant to Article XVIII (4) of the GPA, that Contracting Party shall ensure that the members of the designated authority:

- a) Are independent, impartial and free from external influence during their term of office.
- b) Not be dismissed against their will in the performance of their duties, unless their dismissal is required by the provisions of the designated authority.

All of the above provisions that go beyond the WTO Agreement on Public Procurement provide a legal framework that ensures impartial and fair assessments of the technical capacity and experience of EU tenderers in third countries and makes access to information on public tenders easier. The result is an improvement of the conditions for EU companies to access the other parties' public procurement market at both central and regional and local government levels.

A particular reference should be made to Japan's commitments under the relevant EUJEPA provisions.

With regard to contracts for which tenders are announced by the central government, greater access to the Japanese market for railway equipment and infrastructure is ensured. Particularly important is the removal by Japan of the operational safety clause which, despite the fact that its alleged purpose was to ensure the safety of rail transport in Japan affected by natural disasters, nevertheless in practice served as a mechanism exclusion of foreign suppliers from tendering for train supply contracts and other railway equipment. Japan has also undertaken to grant improved access to EU companies to tenders announced by hospitals and academic institutions (87 entities) as well as by electricity distributors (29 entities). At regional and local government level, Japan grants non-discriminatory access for EU suppliers to the public procurement markets of 48 cities with a population of around 300,000. In total they correspond to about 15% of the Japanese population¹⁶. For its part, the EU has committed to partially opening up the market for public transport equipment in small and large cities, such as trains and signaling for metro systems and land-rail installations.

¹⁶ See https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155719.pdf. (30-7-2019).

4. The foreign products, services and investment treatment regime

The regime to facilitate market access is complemented by rules for the treatment (post entry) of the products, services, or businesses of one Party in the territory of the other.

Regarding trade in goods, there is an obligation on the part of one party to grant national treatment to products derived from the other party¹⁷, i.e., treatment no less favorable than the treatment applied to its own similar products in accordance with the provisions of Article III of the GATT 1994 which is an integral part of the EU agreements.

In the field of investment, each party undertakes to grant to the other party 's entrepreneurs and companies:

- a) First, treatment no less favorable than that which it accords in similar circumstances to its own operators and undertakings, as regards both their establishment and their operation on its territory, under the principle of national treatment¹⁸.
- b) Secondly, treatment no less favorable than that accorded in similar circumstances to third-country operators and their undertakings, both in terms of their establishment and operation in its territory, under the principle of the principle of most-favored nation treatment¹⁹.

Each Contracting Party shall therefore extend to the companies of the other Party any advantage arising from an agreement entered into with any third country as regards the establishment and operation of a business of that third country.

In the area of cross-border services, the principle of national treatment requires each party to grant services to the other party's services and providers no less favorable than that accorded to its own similar services and suppliers. Compliance with this rule is ensured when one party grants to the other party's services and providers either a treatment formally the same as the treatment accorded to its own similar services and its own similar providers or a treatment formally different. A formally identical treatment or a formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or suppliers of certain services of one party compared to similar services or similar service suppliers of the other one. The parties are not obliged to compensate for the inherent competitive disadvantages arising from the foreign nature of the services or service providers concerned.

The principle of national treatment is complemented by the principle of the most-favored-nation treatment, which obliges each Contracting Party to provide services and suppliers of the other party treatment no less favorable than the treatment accorded to similar services and suppliers of a third country.

¹⁷ Art. 2.7 EUJEPa,

¹⁸ Art. 8.8 para. 1 and 2 EUJEPa.

¹⁹ Art. 8.9 para. 1 and 2 EUJEPa.

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