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INTERNATIONAL TRADE AND SUSTAINABLE DEVELOPMENT: ON LEVEL PLAYING FIELD, CROSS-LINKAGES AND CHERRY-PICKING

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Legal Briefings

There was time when trade negotiations were just about reducing tariffs and quotas. That was the purpose of GATT negotiating rounds and any tariff concession obtained by one contracting party had to be applied to all countries without discrimination. There were exceptions, in particular for customs unions and free trade areas, but these were subject to conditions and needed to cover substantially all trade in the region so that they did not cause too much trade distortion. There were a few other wrinkles such as rules against dumping and injurious subsidies but otherwise the world of trade was relatively straightforward.

Times have changed. Over the years many other subjects have shoe-horned their way into trade negotiations.

First, it was rules against unreasonable technical regulations including sanitary and phytosanitary standards. It was clear that these could be used to provide unwarranted protection to national production. However, the GATT always opposed attempts to restrict trade that were based on the way products were made. Discrimination was prohibited if the product as it arrived at the border was “like” another national or imported product, no matter how it was produced. When Belgium, for example, imposed compensatory levies on imports from countries that did not provide for an acceptable level of family allowances to the workers producing the goods that was ruled unacceptable.

The WTO Agreement modernised the GATT in many respects and developed more complex and nuanced rules for trade. In particular, it brought services under its system of rules and required Members to respect certain minimum standards for the enforcement of intellectual property rights (which, of course restrict rather than liberalise free trade).

One consequence of the broadening agenda is that it has become extremely difficult to achieve trade liberalisation at the level of the WTO because everything is being linked to everything else. For example, the WTO failed at the 11th Ministerial Conference in 2017 to adopt rules prohibiting subsidies being paid for illegal fishing not so much because anyone objected to the laboriously negotiated rules but because certain countries insisted that they could not agree to this reform without agreements on other matters under negotiation.

Faced with the ossification of the WTO, major economies have turned to the negotiation of free trade agreements to further liberalise trade. These are also becoming difficult to agree, not so much because of opposition to the reduction of tariffs and quotas but because of the introduction of other subjects into the negotiations, such as the protection of the environment, labour standards, investment protection, direct taxation and many others. Of course, developing rules and cooperation in all these areas is entirely desirable. The problem is that many more actors and interests are brought into play that need to be reconciled.

There is another complication arising out of these developments that is acting to impede rather than promote trade and this is the concept of the level playing field; it is argued that free trade cannot be allowed if the foreigner has an unfair advantage – like playing football on a sloping pitch. The concept appears to have first been used in the United States in relation to the NAFTA. That agreement could only be concluded by the US once provisions had been agreed (in the form of side agreements to the NAFTA) to address concerns about labour issues and the impact of trade liberalisation on the environment (in particular by incentivising a "race to the bottom"). The concept was taken to another level in the successor agreement, the USMCA, including the introduction of minimum wage conditions in the definition of what automobile parts can be considered of North American origin and thus qualify for the benefits of the tariff reductions of the agreement.

The concept of the level playing field has been enthusiastically adopted by the EU, most notably in its negotiations with the UK on a future relationship. It is argued that the proximity of the UK to the EU and the closeness of the existing integration is such that the EU can only accept not to introduce tariffs and quotas on trade with the UK if there is a level playing field, meaning rules relating to State aids, competition policy, state-owned enterprises, taxation, labour and social protection, environmental protection, the fight against climate change and sustainable development. Since the current rules of both parties are those of the EU, the standards that need to be respected are those of the EU. The innovation of the EU is to provide, in some areas at least, for *dynamic alignment* meaning that when the EU changes its rules, the UK must follow.

The desire to make free trade conditional on other objectives is also evident in the recent Franco-Dutch "non-paper" calling on the EU to "increase its ambition regarding the nexus between trade and sustainable development in all its dimensions". It specifically mentions the need to incorporate future EU trade agreements commitments from the post-2020 framework of the Convention on Biological Diversity and under the Paris Climate Accord – indeed that the latter should become an "essential element" of such agreements in the same way as human rights clauses are. Although existing agreements often refer to commitments under other conventions, such as the International Labour Organisation, the non-paper complains that these are often ignored in practice. Cross-linking of the kind apparently proposed by the non-paper allows non-binding and non-easily enforceable obligations to be enforced through trade sanctions.

This is the reason why the EU insists so much that its future relationship with the UK must be constitute a single coherent framework covering trade, fisheries, a level playing field, security cooperation and much more. It is also the reason why the UK is resisting the single framework.

It is worth reflecting on the consequences of the broadening of the scope of other trade negotiations proposed in the Franco-Dutch non-paper. First, it may scupper the potential trade agreement with the US and the negotiated free trade agreement with Mercosur if these partners are not prepared to accept the proposed cross-linking. Second, if such obligations are incorporated into a trade agreement, then a breach would entitle the EU to retaliate by imposing trade sanctions. The EU would be entitled to impose duties on a product of its choice from the offending party. It could follow trade law theory and impose sanctions that hurt the other party sufficiently to induce compliance. Or it could cherry-pick a product that satisfies the complainants, for example, biofuels from Mercosur or steel from the US. Such compensatory countermeasures would of course reduce trade but may not induce compliance. The danger is that the deviations from agreed obligations become permanent.

A similar desire to enforce one objective through another instrument is also evident in recent demands within the EU that COVID-19 State aid should be conditional on climate action. For example, France recently made the State aid to Air France-KLM conditional on Air France ceasing certain flights to domestic destinations that can be served in a more climate-friendly manner by rail. It may be questioned whether the Commission would have competence to impose such requirements that are not directly competition and trade-related as a matter of EU State aid law (similar issues are currently before the EU Court of Justice in Austria's appeal of the Hinkley Point C State aid). In its most recent revision of the Temporary Framework for COVID-19 State aid, the Commission resisted pressure to impose environmental obligations as conditions for State recapitalisations, settling instead on related reporting requirements, while encouraging Member States to impose such obligations of their own accord (see here).

The cross-linking of objectives and imposition of conditionality in international agreements appears to be a growing trend. On the one hand it promotes coherence and increases international cooperation. On the other hand, it does make the conclusion of international agreements more complex and time-consuming.

More on Brexit

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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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