

## **Report on the UK Trade Policy Observatory Conference**

*'New Dimensions in International Trade Law'*

6 November 2019

This report summarises the UK Trade Policy Observatory's one day conference, organised by Drs Kamala Dawar and Emily Lydgate, on New Dimensions in International Trade Law at Chatham House on 6<sup>th</sup> November 2019. The conference brought together distinguished international trade law experts to share insights and discuss contemporary trade law topics and tensions. Six sessions were held covering blockchain; China's role in international trade; official export support; strategic litigation in international economic law; development, labour and sustainability standards in free trade agreements; and retaining versus reforming EU food safety legislation. A roundtable on current international trade tensions concluded the conference.

### Welcome and Introduction

Professor Jim Rollo, Deputy Director of UKTPO and Associate Fellow of Chatham House, opened the conference with brief reflections on the themes of the conference.

### Session 1: Blockchain: Creating and eliminating trade in services

The first session on the implications of blockchain for trade in services was presented by Weiwei Zhang of Sidney Austin LLP with discussant Gabriel Gari, Reader in International Economic Law, Queen Mary, University of London, responding.

In her presentation, Dr Zhang provided an introduction to blockchain, set out how blockchain may change trade in services and discussed the relevance of GATS to this new technology. Blockchain is a digital peer-to-peer network that allows for the creation and transfer of assets or information. In contrast to traditional centralised models, blockchain does this through distributed ledger technology. Dr Zhang suggested that blockchain may change trade in services in three ways, namely by replacing, eliminating or creating services. Firstly, service providers may change when services provided by centralised authorities are provided instead by participants in the network. Secondly, certain auxiliary services may become unnecessary and will be eliminated. Thirdly, services may expand or new services may be created as previously marginalised individuals and groups are able to participate. Dr Zhang considered how GATS may apply to blockchain and concluded that GATS could be an effective instrument for liberalising blockchain-based services and expanding trade in services, subject to the wishes of WTO members.

In response, Dr Gari identified a number of areas for further consideration, such as the technical neutrality of GATS and relatively low level of commitments in regard to modes of supply as well as blockchain's reliance on the free flow of data and divergence across jurisdictions in this regard. He suggested a discussion of regulatory reform outside the market and litigation environments was needed. Questions and comments from the floor focused on how customs arrangements and

regional agreements might impact the new technology as well as the high energy consumption of some blockchain applications and the potential of blockchain in the environment sector.

## Session 2: China's role in international trade: Case study of China's accession to WTO on Government Procurement

In Session 2, Ping Wang, Assistant Professor, School of Law, University of Nottingham, looked at the negotiation process of China's accession to the plurilateral and legally binding Agreement on Government Procurement (GPA) with discussant Femi Amao, Reader in Law, Sussex Law School, University of Sussex.

Dr Wang has been an adviser to Chinese ministers on China's accession to the WTO's GPA for 13 years. Dr Wang commented on the striking resemblance of the old Chinese 'silk roads' to the current 'one belt one road initiative' relating to China's trade with Europe. In contrast with the historical routes, state involvement has been widely expanded. China's joining of the WTO obviated the need for negotiation of most favoured nation (MFN) treatment every year. It also now benefits from WTO tariffs. China is the world's largest exporter and second largest importer (2017 figures) with a surplus of 2.33 trillion RMB and ranked 31 by the World Bank in their 'ease of doing business' ranking. Dr Wang outlined President Xi Jinping's embracing the theory of 'comparative advantage' and avoidance of protectionism referring to a Chinese Government white paper (June 2018) which asserted that China had fulfilled its WTO accession commitments, firmly supports multilateral trading and has made a significant contribution to world trade since joining in 2001. Negotiations relating to the GPA have been ongoing since 2001. A sixth revised offer to join the GPA was tabled on 21st October 2019. The presentation dealt with the main coverage requirements and technical issues relating to accession. Dr Wang argued that China needs the GPA as it cannot afford to ignore the government procurement market. Public private partnerships (PPP) have grown enormously in China but are now being 'cooled down'. Chinese PPP contracts are currently dominated by six major state-owned construction companies, so the private sector is encountering difficulties. To conclude, Dr Wang assessed China's approach to GPA accession as proactive and believes that China is ready to take a leading role in the multilateral trading system.

The discussant, Dr Amao commended Dr Wang's report and explored the proposition that China could be the saviour of the multilateral trading system. Dr Amao identified a key challenge to China's accession to the GPA to be the treatment of China's State Owned Enterprises (SOEs). The exclusion of SOEs significantly reduces the market for China, therefore a careful and nuanced approach is required relating to these. Developing country status is an issue needing to be considered: if China benefitted from such status, it would benefit from offsets and other member states may not agree to this. Questions addressed included: why China may be delaying joining the GPA when it would be likely to be competitive in most sectors, when papers may be released on the discussions on investment in China, and China's positions regarding the Appellate Body.

## Session 3: Official Export Support – compliance and competition concerns

Kamala Dawar, Senior Lecturer in Law, University of Sussex and fellow of the UKTPO, presented her paper examining competition and compliance issues related to official export credit support. The discussant, Lauge Poulsen, is an Associate Professor and Director of Graduate Studies at the Department of Political Science, University College London.

This paper relates to work by Dr Dawar for the Horizon 2020 project on the export credit market and the competition and compliance issues this has raised for the EU. Export credit agencies are usually public bodies, but can be private undertakings under a trust mandate, and aim to support domestic businesses when exporting. Normally as lenders of last resort, these agencies provide loans,

guarantees and assurances. Until the recent financial crisis, private banking was seen as sufficient. Following that crisis, export credit agencies provided a new role in industrial strategies and have continued to grow. There are now 110 such organisations worldwide, all supporting their own domestic markets, however they risk over-subsidising, giving rise to subsidy and countervailing measure issues. Two major international organisations monitor this: the OECD which set out 'Arrangement and Common Approaches' in respect of terms and conditions, interest rates and sustainability requirements; and the WTO which operates as a multilateral framework. Problematically, non-members of the OECD, such as China and India, are now challenging the effectiveness of the arrangement. Whereas the EU have adopted the OECD arrangements as hard law, there remains also a transparency issue. Compliance is self-reported by Member States and there is very little monitoring. Compliance reporting was the subject of an ECAWatch complaint in 2016 to the European Ombudsman. Recently, export credit agencies have been trying to calibrate their support to fall outside the OECD arrangement, avoiding the need for the due diligence tests and other requirements. There are further concerns relating to environmental sustainability under the WTO Agreement on Subsidies and Countervailing Measures in regard to due diligence and compliance. Concluding, Dr Dawar argued that the shifts create a problem for governments: they have the choice of completing on the current basis of subsidies which distorts the market or deciding to try to avoid the current position and lobby for change.

Dr Poulsen commented that this is an area which is almost entirely unassessed, commending Dr Dawar for bringing it to the fore. One of the reasons there is so little focus is that it is governed outside the traditional treaty infrastructure. The soft law arrangements since 1978 worked quite well until they have recently started to break down. Dr Poulson continued the discussion by asking how this problem might be resolved and inviting comments from the chair and audience.

#### Session 4: Strategic litigation in international economic law: The plain packaging dispute in context

Fiona Smith, Professor of International Economic Law at the University of Leeds, presented on the implications of strategic litigation for international trade law, with Federico Ortino, Reader in International Economic Law, King's College London, responding.

Professor Smith began by identifying that current debates in international economic law lack a focus on the role of strategic litigation by multinational corporations and provided a case study of litigation by Philip Morris to exemplify how trade disputes relate to non-economic issues and are influenced by corporate strategy. After outlining the health impacts of smoking and the leading companies in the sector, Professor Smith gave an account of the WTO disputes brought or funded by Philip Morris in respect of cigarette packaging regulation. Philip Morris was unsuccessful in these cases and Professor Smith described how these actions could be interpreted as motivated by the strategic aim of capturing debates on development and consumer safety, thereby repositioning Philip Morris on the market and providing justification to its shareholders of the need to move to smokeless tobacco. Professor Smith concluded that companies use litigation to fulfil their corporate strategy revealing weaknesses in the dispute settlement mechanism and the need for reform.

Dr Ortino responded by highlighting the complexity of strategic litigation and the need for further case studies. He drew attention to positive cases of strategic litigation in the field of human rights as well as the challenges of identifying litigants and their motivations in a trade context. Questions and comments from the floor continued the discussion on how corporations might utilise the trade

dispute mechanism to further strategic objectives, for example in buying time for their products or providing funding to states.

### Session 5: Development, labour standards and sustainability in trade agreements

Clair Gammage, Senior Lecturer in Law, University of Bristol, presented her paper examining current developments on labour standards and sustainability in free trade agreements (FTAs). Lorand Bartels, Reader in International Law and Fellow of Trinity Hall, University of Cambridge, acted as discussant.

Dr Gammage's paper examined new innovations in FTAs relating to labour and environment chapters, as well as more recent gender chapters, and the challenges in implementing such provisions. Since 2015, the UN 2030 Agenda for Development with Sustainable Development Goals (SDGs) are being embedded in global FTAs. The labour and development goals in the 2030 Agenda are not new but there are 17 new goals and 169 targets with associated indicators. Although there are some convergencies, global FTAs typically address the economic, social and environmental dimensions heterogeneously. In the environmental dimension, there is a shift away from generalised clauses to more specific priority areas to be protected by trading partners. Labour provisions typically map onto labour standards of the International Labour Organisation (ILO). Incorporation of labour clauses has been rejected at the multilateral level but such clauses have emerged in FTAs. There are four main ILO commitments adopted: freedom of association and collective bargaining; elimination of forced or compulsory labour; abolition of child labour; and non-discrimination in the workplace. Monitoring provisions are through cooperative dialogue by civil society mechanisms and domestic advisory groups. Dr Gammage identified the need to check whether there is a lowering of labour standards on implementation. In EU-Peru and EU-Vietnam FTAs the labour standards around health and safety were lower under the FTAs than previously. Gender provisions have flourished since SDG 5, but Dr Gammage suggested these provisions are weak, explicitly framed as cooperative and have huge divergencies between the FTAs. Dr Gammage concluded by arguing that many of the provisions have limited enforceability. The US approach is sanction-based and EU enforcement takes place through cooperative mechanisms. There is a huge lack of transparency and the reporting mechanisms are not fit for purpose although the EU is currently trying to remedy this.

As discussant, Dr Bartels further developed the themes of how values connect with trade and how evolving obligations are interpreted from a trade perspective. He further commented that although dispute settlement mechanisms exist relating to EU obligations, there are no sanctions for non-compliance.

### Session 6: Retaining versus reforming EU food safety legislation: Selected issues for a US-UK trade negotiation

This session on food safety legislation in the context of Brexit and future trade negotiations was presented by Emily Lydgate, Senior Lecturer in Law at the University of Sussex, with Tom West, Law and Policy Advisor at ClientEarth, as discussant.

Dr Lydgate began by outlining the key legislative instrument of Brexit, the EU Withdrawal Act 2018, which incorporates EU law into UK law on 'exit day' and gives ministers powers to amend that 'retained EU law' by secondary legislation. This power to amend retained EU law was understood by the Government of the day to be necessary for the effective operation of the domestic legal system post-Brexit and is limited to 'technical changes.' There is a commitment to introducing primary legislation for policy changes or new legal frameworks. Leaving the EU necessitates far-reaching

legislative reform and Dr Lydgate highlighted that changes to regulatory processes may impact the level of protection provided for in food safety regimes. Her presentation compared current EU law with the secondary legislation made under the Withdrawal Act in key areas of food safety legislation: pesticides, GMOs, food additives and microbiological food safety. She found that regulatory frameworks have been amended in respect of requirements for obtaining scientific assessment, and monitoring. Further, broader powers to make future secondary legislation are given to ministers than currently exist in EU regulatory procedure. In addition to the potential for regression in standards with minimal democratic oversight, the potential for divergence between UK countries exists under the Brexit legislation. The EU framework allows for divergence in certain cases in the context of the regulatory baseline that ensures the functioning of the single market. While the need for 'common frameworks' post-Brexit is recognised in the UK, progress has stalled between the devolved nations with potentially significant implications for international trade. Dr Lydgate identified food safety as a key area in UK-US trade deal negotiations giving rise to tensions for future internal and external UK trade.

Responding to Dr Lydgate's presentation, Dr West focused on how food safety legislation is an example of the previous Government's approach to the repatriation of powers and functions to the UK, as well as the potential for negative impacts on environmental protection. He acknowledged UK withdrawal from the EU was a complicated task and suggested appropriate levels of transparency and democratic oversight are needed. Questions and comments from the floor focused on the future of the precautionary principle in UK law, the current role of Parliament in trade negotiations and how the UK might learn from federal countries.

### Roundtable: Current trade tensions

The closing session took the form of a roundtable on current trade tensions with Lorand Bartels, Reader in Law, University of Cambridge; Laura Bannister, Senior Advisor on EU-UK Trade, Trade Justice Movement; Peter Holmes, Reader in Economics, University of Sussex; and Andrew Hood, Fieldfisher LLP. Anna Jerzewska, independent customs and trade consultant, chaired the discussion.

Dr Jerzewska initiated the discussion by identifying two key issues: the tension between new technologies and existing trade arrangements, for example blockchain, e-commerce and data; and current challenges to trust in the international trade framework, for example by unilateral actions. In respect of new technologies, the panel discussed the issues of regulation in the public interest and challenging traditional assumptions of international trade. The potential for the use of new technology at borders was raised including implications for product safety. On the issue of trust, Dr Jerzewska commented that the whole of the international trade framework is somewhat based on trust. It was agreed that many international themes focus around both trust and self-interest. The question of trust in several contexts was discussed, for example in regard to post-Brexit border arrangements, anti-dumping and anti-subsidy measures. Further comments on the changing nature of international trade and politics were given and the development of the GATT systems and WTO regimes.

Professor Rollo closed the conference with warm appreciation for the conference organisers, speakers and guests.