Volume 21 Number 2 2020/pp.53-67 www.usask.ca/esteyjournal

The Estey Journal of International Law and Trade Policy

Are the Benefits of Trade No Longer Sufficient?

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Abstract

Trade policy has two roles: (1) to deal with issues in international commerce and; (2) to alter the behaviour of foreign parties through the ability to apply economic sanctions. In the international institutional architecture established at the end of the Second World War the two roles were separated with the first function housed in the GATT while the second function was the purview of the UN Security Council. The GATT/WTO provided substantial *gains from trade* and these benefits were sufficient to largely inhibit the use of trade sanctions outside of the Security Council. Recently, however, groups in civil society have been advocating the use of trade sanctions to achieve other foreign policy goals such as foreign recognition of geographical indications, enforcement of labour standards and protection of marine mammals. Environmental tariffs are being given serious consideration by the EU and the Trump administration is using trade measures to sanction Chinese commercial and government activities it considers *cheating*. The Trump administration is also actively working to remove WTO constraints on the use of economic sanctions. More than the *gains from trade* are now expected from trade policy in major economic powers. In the process, however, the benefits of trade are at risk.

Keywords: behavioural change, gains from trade, preferential trade agreements, trade sanctions, WTO

Introduction

> The case in which it may sometimes be a matter of deliberation how far it is proper to continue the free importation of certain foreign goods is, when some foreign nation restrains by high duties or prohibitions the importation of some of our manufactures into their country. Revenge in this case naturally dictates retaliation, and that we should impose the like duties and prohibitions upon the importation of some or all of their manufactures into ours. Nations, accordingly, seldom fail to retaliate in this manner. …
>
> There may be good policy in retaliations of this kind, when there is a probability that they will procure the repeal of the high duties or prohibitions complained of. The recovery of a great foreign market will generally more than compensate the transitory inconveniency of paying dearer during a short time for some sorts of goods.
>
> Adam Smith, *The Wealth of Nations*, 1776

> The United States was prepared to declare economic war on Japan as a means of deterring – or at least delaying – a Japanese advance into South East Asia and that is exactly what the Roosevelt administration did in July 1941. Roosevelt did not envision an abrupt shut down of all U.S. trade with Japan when he signed the order freezing Japanese assets in the United States on July 26. As Roosevelt told Secretary of the Interior Harold Ickles, he intended to use the order's requirement that the Japanese obtain export licenses to release frozen dollars for purchase of any U.S. products as a "noose around Japan's neck" which he would "give it a jerk now and then."
>
> Jeffrey Record, 2009, p. 14

> Donald Trump is not a protectionist. If he imposes tariffs on China or any other country that cheats, all he wants to do is defend America against unfair trade practices.
>
> Peter Navarro, 2020

Trade policy has long had two prongs. The first relates solely to the conduct of international commerce. That may be in providing protection from international competitors for domestic firms or, in cooperation among countries to make rules to govern the use of trade distorting measures with an eye to reducing risks for firms wishing to engage in international commerce. The second relates to the use of trade measures to coerce or otherwise induce a change of behaviour in trading partners or their firms. This is the sanctioning role of trade policy, which lies along a continuum from moral suasion-to-economic sanctions-to-war as means to bring about a desired behavioural change in a foreign party. Since the end of the Second World War when the multilateral rules-based system for international trade was agreed and put in place, the emphasis has been on the former with the economic benefits from a long process of trade liberalization and strong rules of trade being top of mind (Kerr, 2010a). The

benefits from the *gains from trade* were, for the most part, perceived as a sufficient return from trade policy efforts. More recently, however, countries have begun to demand more from their trade policy exertions leading to a willingness to engage in economic sanctioning to achieve changes in the behaviour of trading partners. While the most obvious example of this change in expectations regarding what trade policy initiatives can be used to achieve is the approach to international trade taken by the administration of US President Donald Trump, but other examples exist among the major economic powers. The increased interest in the sanctioning facet of trade policy can lead to a direct conflict with the international commerce enhancing existing rules of trade. The result is not *gains from trade plus* but rather a portion of the *gains from trade* being traded off against gains arising from sanctioning. As with Adam Smith, those who are proponents of sanctioning think that the long run benefits arising from changing the behaviour of trading partners will outweigh any short run reductions in the *gains from trade*. This is an untested hypothesis, however, and sanctioning has, at best, a mixed history of success (Kerr and Gaisford, 1994).

Sanctions in the International Institutional Architecture

At the end of the Second World War the victors, primarily the United States as the emerging hegemon and the much experienced United Kingdom, set about to remove/reduce the sources of international conflict. They perceived that the source of two world wars in the first half of the twentieth century was an absence of international institutions. They set about to establish such institutions to deal with what they perceived as the four major sources of international conflict: (1) political conflict to be handled through the United Nations (UN); (2) strategic devaluations (in the era of fixed exchange rates) to be handled by the International Monetary Fund (IMF); differences in levels of economic development to be handled by the World Bank (IBRD) and; trade conflicts to be handled by the International Trade Organization (ITO) (Kerr, 2000). The UN was the successor to the League of Nations, which had failed to defuse political conflicts in the 1930s. The IMF and IBRD arose out of the post-war Bretton Woods conference. The ITO was negotiated in Havana resulting in the Havana Charter in 1948. The ITO, however, never came into force as the US Congress perceived that it would be too constraining on the use of US trade policy. As an alternative, the separately negotiated General Agreement on Tariffs and Trade (GATT) was ratified by the US Congress and became the *de facto* multilateral trade organization.

In this new international institutional architecture the authorization of the use of economic sanctions internationally was housed in the United Nations and specifically its Security Council, and not the GATT. Hence, economic sanctioning was recognized as a coercive tool to deal with international political problems. The use of sanctions was thus confined to major international concerns as befitting the Security Council of the United Nations. According to Charnovitz (2001, p. 800):

> The authors of the GATT recognized the potential conflict between the United Nations-directed trade sanctions and GATT rules, and therefore provided a GATT exception for trade measures taken in pursuance of obligations under the UN Charter regarding the maintenance of peace and security.

In the GATT, and subsequently the WTO, the use of retaliatory trade measures is entirely reactive rather than pro-active. Only if a Member State is found to be in breach of its obligations is any form of retaliation allowed. The degree to which such retaliation is allowed is to offset the economic harm a Member State suffers from another Member State failing to live up to its obligations. WTO disputes panels determine the limits to the retaliation that may be authorized. Charnoviz (2001) argues that, unlike the GATT, whose objective was to *rebalance* so that the harm was offset, the WTO objective of sanctions is to bring Member States into compliance. It is not clear, however, that there is a direct relationship between the economic harm suffered from a breach of obligations and the economic incentive required to induce compliance.

In the cases where retaliation is routine – dumping and countervailing *unfair* subsidies – the remedy is to offset the harm suffered. In the case of anti-dumping, the duties imposed are to offset the below *normal* price (Kerr and Loppacher, 2004; Kerr, 2006a; Viju and Kerr, 2014). Countervailing duties are meant to offset the negative impact on price arising from the export of subsidised goods (Baylis, 2007). Of course, there are methodological issues with how anti-dumping and countervailing duties are calculated (Kerr and Loppacher, 2004) but under WTO rules they cannot be increased substantially to threaten offending firms into compliance.

Over its lifetime the GATT/WTO has been successfully ring-fenced from governments using trade sanctions to achieve other aims of commercial or foreign policy. As governments were generally supportive of allowing the trade institutions to operate to facilitate acquisition of the *gains from trade*, they accepted the disciplines on attempts to use the threat of trade sanctions to achieve non-commercial policy objectives. There were, of course, exceptions such as the US blockade of Cuba and sanctions against apartheid era South Africa that fell outside both the ambit of the UN Security Council and the GATT/WTO, but they were exceptions. Of course, there were many examples of threats of trade actions being taken but little in the way of effective follow through (Gordon et al., 2001).

The Shift to Wanting More from Trade Policy

For a considerable period the obvious *gains from trade* arising from the GATT/WTO rules were considered as providing sufficient returns from trade policy. Over time, however, some countries, primarily major economic powers, felt increasingly that they

were forced to try and achieve their commercial and foreign policy goals *with one arm tied behind their back* – the continuum of behavior changing coercive measures moving from moral suasion (diplomacy) through economic sanctions to war was missing its intermediate step. Some civil society groups also felt that coercive economic options were being overlooked when they lobbied governments to act to assist in achieving their particular objective.

The WTO is relatively unique among international organizations in that it does have the ability to authorise the use of trade measures in the case of breaches of Member State's obligations. This power has not been given to other international organization such as multilateral environmental agreements (Kerr and Hall, 2004). The WTO is also unique in that it was endowed with a binding dispute settlement mechanism (Kerr, 2018a). This made it an inviting quarry for capture by those who wished to use trade sanctions.

One example of successful capture of the multilateral trade system took place during the Uruguay Round when the GATT was re-formulated into the WTO. The proportion of the value of goods comprised of intellectual property had been climbing steadily for a considerable period. Most of the world's intellectual property was, and is, produced in a few developed countries but markets are increasingly global. Protection of intellectual property in developing countries was weak (Gaisford and Richardson, 2000). The international institution that dealt with intellectual property, the World Intellectual Property Organization (WIPO), had no sanctioning power for countries that did not live up to their commitments and had no binding dispute settlement mechanism. Most developing countries did not even belong. Those with a vested interests in the development of intellectual property and their governments, who saw the knowledge economy as the future source of prosperity, needed an alternative institutional mechanism to the WIPO. They settled on enlisting the GATT with its sanctioning power. The new WTO was purposely constituted to administer three sets of internationally agreed rules: (1) the updated GATT-1994; (2) a new General Agreement on Trade in Services (GATS) and; (3) a new Agreement on Trade Related Aspects of Intellectual Property (TRIPS). Despite "Trade Related" in its name the TRIPS was, at best, only tangentially related to trade. Its central focus was protection of intellectual property in foreign countries. The new WTO was also endowed with a new binding disputes mechanism. It was also cleverly designed so that the dispute settlement mechanism covered all three agreements and made specific provision for *cross-agreement retaliation* whereby a failure to live up to TRIPS commitments could be punished through trade sanctions under GATT. In theory, this provided the threat of trade sanction that was missing in the WIPO. Previous GATT members and future WTO acceding

members had to sign up to all three agreements if they wished to receive the *gains from trade* that the GATT provided. Hence, the number of countries agreeing to protect foreign intellectual property was greatly expanded relative to the previous WIPO membership. It was a masterful capture of an international trade institution by those with a vested interest in intellectual property.

Despite the *best laid plans* to use the threat of the sanctioning power of the GATT to provide the incentive to protect foreign intellectual property, the TRIPS did not perform as intended. Developed countries resented the TRIPS and, while most put intellectual property protection legislation in place, enforcement has been problematic (Gaisford and Richardson, 2000). In addition, the size of the retaliatory threat – constrained by GATT rules to the size of the trade loss – was not sufficiently large to deter foreign governments from failing to protect the intellectual property of foreigners (Yampoin and Kerr, 1998; Gaisford et al., 2002). This became obvious fairly rapidly and few disputes were initiated (Kerr, 2003). Latterly, the United States has attempted to strengthen foreign protection of intellectual property in its preferential trade agreements.

The United States attempted to use trade sanctions to achieve goals related to the protection of marine mammals (Gordon et al., 2001). Pushed by environmental lobbies the United States imposed trade penalties on countries that failed to mirror US standards for tuna fishing methods that it considered dolphin friendly and, subsequently, shrimp fishing methods that it considered sea turtle friendly – neither of which were trade issues. Countries whose trade was negatively impacted by the US trade measures brought cases to the WTO arguing the measures represented overreach and contravened GATT/WTO commitments. In both cases the dispute panels ruled against the United States (Isaac et al., 2002). These rulings led to a view by many environmentalists that the WTO was anti-environment and the common feature of protesters dressed and dolphins or turtles at WTO meetings (Belcher et al., 2003).

The United States was not the only economic power that wanted its trade policy to achieve more. The European Union began to use its preferential trade agreements to achieve a wider range of policy goals (Kerr and Viju-Miljusevic, 2019). Frustrated with lack of progress on what are known as *Singapore Issues* – investment, competition law, government procurement and trade facilitation (Kerr, 2018a), which are central parts of the EU's single market structure and pressure from civil society to extend *European Values* beyond the region led to attempts to have wider objectives included as part of preferential trade agreements. Reasons that would explain the successful attempts of the EU at externalizing its internal policies and regulatory measures through preferential trade agreements have been suggested. Among those are the relative size of the EU

market in the global economy as it affects the material incentives of foreign governments when choosing their regulatory measures; the institutional features of the EU as expressed through regulatory expertise and coherence (Bach and Newman, 2007) and; the relative influence of various interests groups (Vogel, 1995). Meunier and Nicolaïdis (2006) have defined the EU as a *power through trade* and a *power in trade*, meaning that access to its large market is used as a bargaining chip for influencing the domestic policies of its partners – in other words altering their behaviour in ways that achieve EU non-trade objectives. It represents the use of trade policy as a *carrot* rather than a *stick* to achieve broader commercial and foreign policy ends.

In 2006 the EU adopted a new official policy that included embracing globalization by maintaining a dominant voice in world politics, taking a leadership role in securing and expounding its values and improving its competitive position relative to other states (Dür and Zimmerman, 2007; Young, 2007). The *Global Europe: Competing in the World* initiative adopted by the Council of the EU in June 2007 is the foundation of the new approach (Antoniades, 2008). This assertive European trade strategy resulted from the lack of success in the Doha Round of multilateral trade negotiations and from a shift in perception about how the EU needed to react to globalization (Bartels, 2007a; Heydon and Woolcock, 2009). The active pursuit of preferential trade agreements reinforces the EU's position as a global power by fostering it becoming a *power through trade* and to impose a *European model of society* on those seeking improved access to the large EU market (Meunier and Nicolaïdis, 2006; Akman (2010). In the wake of the 2008 financial crisis, the *Europe 2020* trade strategy of 2010 has expanded this approach. As a result of wider public engagement on global issues and globalization in the EU, with rising concerns about trade policy and regulatory protection, job losses and lack of transparency, the Commission published a new framework for trade and investment, *Trade for All*, in 2015 (European Commission, 2015). Additionally, the Commission's *Reflection Paper on Harnessing Globalisation* (European Commission, 2017a) and its communication titled *A Balanced and Progressive Trade Policy to Harness Globalisation* (European Commission, 2017b) represent continuations of the *Trade for All* trade strategy in which the concerns raised by the European citizens are addressed. The EU's strategy for the use of trade power was also outlined by the President of the European Commission in the *State of the Union – 2018* (European Commission, 2018), with the use of power explained by the trade agreements that the EU signed with 70 countries, which cover 40 percent of the world's GDP. President Junker mentions that "these agreements – so often contested but so unjustly – help us export Europe's high standards for food safety, workers' rights, the environment and consumer rights far beyond our borders" (European Commission, 2018, p. 3).

One area of EU domestic policy that the EU wishes to extend through trade agreements is the recognition of its geographical indications (GIs). Geographical indication status gives intellectual property rights to groups such as farmers or artisans that produce the designated goods (e.g. Stilton cheese; Port) (Giovannucci et al., 2009). This gives the holders of these intellectual property rights a government recognized monopoly on the sale of the product (Yeung and Kerr, 2011). It is hoped that having monopoly rights will increase returns for the producers of GI designated products. As a results of reforms to the EU's Common Agricultural Policy (CAP) that could reduce returns to farmers, the increased use and promotion of GIs has become an important part of EU agricultural and rural development policy (Josling, 2006).

One way to increase returns for a monopoly is to increase the size of the market where it is recognized. To accomplish this the EU has been pushing to have trading partners recognize its GI products. It has attempted to do this at the WTO through both the TRIPS Council and the Doha agricultural negotiations but with no success. In its negotiation of preferential trade agreements, however, it has been aggressively pursuing foreign recognition (Kerr, 2006b). It achieved considerable success in recognition of GIs through its preferential trade agreement with Southern Africa, whereby for example, South Africa recognized EU GIs such as Port and ceased marketing its fortified red wine as Port (Yeung and Kerr, 2011). The issue of Canadian recognition of EU GIs was a very contentious issue in the negotiation of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada (Viju and Kerr, 2011; Viju et al., 2011). There were also concerns in Canada that the GI provisions in the CETA would contravene existing NAFTA commitments (Viju et al., 2013). In the agreement eventually reached, Canada agreed to recognize a number of EU GIs but the EU made some compromises which allowed existing Canadian producers of what were to become EU GIs recognized by Canada to be grandfathered. No new Canadian producers of those products, however, are allowed (Kerr and Hobbs, 2015). Recognition of EU GIs was included in the preferential agreement with South Korea and are a contentious issue in any discussions surrounding a trade agreement with the United States.

The EU's use of trade policy to achieve non-trade aims extends beyond preferential trade agreements. The EU heavily regulates trade access to its biofuels market (Williams and Kerr, 2016). Developing countries, which are significant sources of biofuel consumed within the EU, must have ratified and implemented the Cartagena Protocol on Biosafety (BSP), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and eight Conventions of the International Labour Organization (Directive 2009/28/EC Article 17, 7) – Conventions 29, 87, 98, 100, 105, 111, 138 and 182 (Schuenemann and Kerr, 2019). To induce developing

countries to ratify such international agreements and conventions the EU began to make membership a condition for receiving preferred access to the EU market (Kerr, 2019a). For example, to be eligible for the tariff reductions encompassed by the EU's commitments under the General System of Preferences (GSP), GSP+ or the Anything But Arms (ABA) initiative, countries must have ratified the BSP (EUR-Lex 2012; Bartels 2007b; Khorana et al. 2012).

The EU's insistence on ratification of the BSP is an interesting example of garnering other policy objectives through the offering of trade benefits. The EU's trade policy toward genetically modified organisms (GMOs) is a contentious, and for the EU a problematic, issue at the WTO (Pavleska and Kerr, 2019; Viju et al., 2012; Viju et al., 2014). As part of its strategy for dealing with trade issues surrounding biotechnology the EU has been attempting to remove the regulation of trade in the products of agricultural biotechnology out of the WTO and into an alternative set of multilateral environment agreement rules for trade – those of the BSP (Holtby et al., 2007).

Once a country has acceded to the BSP it means that they have given up their rights to access the WTO's Disputes Mechanism for issues covered by the BSP – such as the EU's import regime for biotechnology. This is because, under international law (i.e. The Vienna Convention on the Law of Treaties (United Nations, 1969)), if both parties belong to two international treaties covering the same subject in international law and there is a conflict between the commitments, then it is the more recent treaty that takes precedence (Kerr et al. 2014). The 2003 BSP is newer than the 1995 WTO.

As the BSP has no disputes resolution system this means that the EU does not have to face a challenge at the WTO from trading partners regarding its barriers to imports of GMOs. It means that it has successfully *ring fenced* its regulatory regime for GMO imports from what could be contentious, and embarrassing, international rulings (Isaac and Kerr, 2007). The more countries that accede to the BSP the more potential allies the EU has in its attempt to move the international regulation of trade in the products of biotechnology out of the WTO.

Recently the EU has been floating the idea of using environmental tariffs to induce other countries into living up to their commitments to the *Paris Accord* on climate change. This represents a major initiative in using trade measures to achieve non trade, in this case environmental, goals. Despite the inherent difficulties with environmental tariffs (Kerr, 2010b), if the EU decides to pursue the implementation of environmental tariffs, it will represent a serious threat to the WTO.

It has been the trade policy of US President Trump's administration that has been the most aggressive proponent of using the threat of trade sanctions to achieve non-trade goals. Many of the issues his administration is concerned about (e.g. some Chinese

commercial practices, support of state owned enterprises in China, global excess capacity in the steel industry, foreign taxation of US-based technology firms) under WTO rules are not open to the use of trade sanctions (Kerr, 2020). Since the election of President Trump the United States has been systematically attempting to remove the constraints on the use of trade sanctions that have been agreed at the WTO (Kerr, 2018). The most important of these constraints is the disputes system. The United States, by refusing to cooperate in the appointment of new fixed term members of the WTO's Appellate body, has reduced the number of judges required to hear an appeal to below the specified minimum, meaning that the dispute settlement mechanism can no longer function (Kerr, 2019b). This has been the case since the end of 2019.

The United States has also been purposely violating WTO commitments by imposing tariffs and other trade measures unilaterally and without justifications that would satisfy the WTO. It is hoping that the tariffs will bring about a change in behaviour before a WTO complaint can work its way through the disputes system. If the strategy is correct, there will be a change in behaviour and the complaint withdrawn prior to any ruling from a WTO Panel. The main target of this activity has been China where there has been some success as a *first stage* agreement was reached – but it fell far short of the behavioural changes the Trump administration announced it was seeking. For historical reasons, the strategy may not work in the case of China (Kerr, 2019c). In any case, with the Appellate system no longer able to function, the Trump administration no longer needs to worry about binding negative judgements from the disputes system.

The Trump administration has also been exploiting *loopholes* in the GATT by claiming that tariffs it has imposed on steel and aluminum are justified on the grounds of national security. If a country uses a national security justification, it is unlikely that a challenge by trading partners will be successful (Jackson, 1989). While the imposition of tariffs in this case may look like standard economic protection measures the underlying cause is the inability of the international community to come to an agreement on how to deal with global excess capacity in steel production – and may be interpreted as an attempt to induce a change in this non-cooperative international behaviour. In any case, it is a further example of the United States attempt to ignore constraints imposed by the WTO on its ability to sanction those it feels are trading unfairly.

Conclusions

Trade measures have dual role in international relations: (1) to provide economic protection and; (2) to induce changes in the behaviour of foreign firms or governments

that the imposing country finds unacceptable. Limiting the use of trade measures to provide economic protection has been the basis of multilateral efforts to secure the *gains from trade* economic theory predicts. This has been the central focus of the *ruling paradigm* of trade policy since the Second World War (Kerr and Viju- Miljusevic, 2019). The substantial *gains from trade* that arose from this predictability in the GATT/WTO system were sufficient to inhibit, to a considerable degree, the use of trade measures for sanctioning.

The sanctioning role of trade measures lies along a continuum of measures from moral suasion-to-trade sanctions-to war that can be used to alter the behaviour of foreign firms and governments. The GATT/WTO rules make no provision for the sanctioning role of trade measures and are constructed to constrain their use as part of providing the surety and predictability that is key to enabling the *gains from trade* being achieved. Provision for the use of trade sanctions is made in the international institutional architecture through the Security Council of the United Nations.

Some civil society groups and governments are increasingly frustrated by trade sanctions being *off the table* as policy measures that can be used in attempts to force foreign firms and governments to alter their behaviour (e.g. tuna fishing methods, child labour, environmental standards, recognition of geographical indications, forced sharing of advanced technology) and have been pressuring their governments into being willing to use trade sanctions to achieve broad foreign policy objectives. Preferential trade agreements have been one avenue where such non-trade concerns have been included. The improved access to large markets such as the European Union and the United States may simply be denied – no trade agreement being reached - unless trading partners agree to the inclusion of such non-trade provisions (e.g. recognition of geographical indications, ratification of ILO conventions). The administration of President Trump has been a particular advocate of the use of trade sanctions and has been actively working to remove WTO constraints on their use.

The *gains from trade*, however, are at risk.

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