

UK - India

Beyond Trade: Power Democracy

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Abstract:

The UK aims at redefining a “modern” relation with India. But what is a modern partnership? One that builds upon a long and special relationship marked by the legacy of colonialism as much as the missed opportunities and new challenges of globalisation. One also, which entails a rupture with this very precise violent colonial history to better engage, on an equal footing, in a trade relation going far beyond simple commercial exchanges. One that furthers democracy while supporting trade.

Against this backdrop for a redefinition of a modern partnership of equals, this article addresses the issue of Non-Trade Concerns (NTC) (as a broad category including Non-Investment Concerns) in selected International and Indian Trade and Investment Treaties (I) ; reviews UK post-Brexit trade treaties attempts to later draw a series of observations on the possible way forward to trade yet also power democracy (II).

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Introduction: Redefining a Special Relationship

The UK aims at redefining a “modern” relation with India². But what is a modern partnership³? One that builds upon a long and special relationship marked by the legacy of colonialism as much as the missed opportunities and new challenges of globalisation. One also, which entails a rupture with this very precise violent colonial history to better engage, on an equal footing, in a trade relation going far beyond simple commercial exchanges. Today’s trade involves all aspects of human life and challenges States sovereignty as much as it offers opportunities for growth and development. India, as well as the UK, is a fervent supporter of multilateralism and a rules-based international trade system. Yet what rules? While there is more to trade than trade, the socio-economic and human aspects of trade have long been undermined by trade treaties negotiators in favour of a purely positivist legal approach focusing on tariffs or complex, if not obscure, non-tariffs barriers to trade taking the form of hyper technical norms. As if technique in isolation was the guarantee of prosperity. As if legal fragmentation was also a shield against interference. Developing countries are indeed mistaking the need for rights protection with protectionism and the pursuit of neo-colonial objectives in disguise. While there is certainly some truth in the later, a rather cynical perspective on the virtues, but also the aims of trade, has resulted in the complete decoupling between norms and human realities. It has fuelled the fragmentation of international law and deceived a civil society now rather opposed to global trade.

To address these pressing challenges and indeed reconcile trade objectives with other imperatives of States policies, recent treaties have adopted a language of rights if not yet binding norms. The trend started in the US and Canada in the late 1980s with, for example, the inclusion of labour issues in the American General System of Preferences (GSP) and the adoption of the North American Agreement on Labour Cooperation (NAALC), the side agreement to the 1994 North American Free Trade Agreement (NAFTA). For the past 10 years or so, labour, gender, the environment, corporate social responsibility, and to a lesser extend human rights defined *per se*, are quite universally incorporated in the new generation of trade treaties be it in their preambles or in more precise special provisions⁴. So much so that the EU, for instance, prides itself for the development of what it defines as a “Human Rights Clause”, which often covers democratic principles and the rule of law envisaged as a way to engage in

² See House of Commons Foreign Affairs Committee, “Building Bridges: Reawakening UK-India Ties”, Eighteenth Report of Session 2017–19, 11 June 2019, available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmfaaff/2633/263302.htm> and in particular the opening remark: “*The Government is failing to make the most of this country’s extensive ties with India: the bilateral relationship is strong, but falls short of its huge potential. The Government cannot afford to be complacent or rely on historical connections to deliver a modern partnership. The UK needs to adjust its strategy to India’s enhanced influence and power: we should do more to respond to India’s priorities, and should communicate our own objectives more clearly.*”, p.6.

³ On the idea of modernity in India see, Leïla Choukroune and Parul Bhandari (eds.), *Exploring Indian Modernities: Ideas and Practices* (eds.), Springer, 2018.

⁴ For an interesting historical perspective on the incorporation of labour in trade treaties, see for example, International Labour Organisation (ILO), Franz Christian Ebert and Anne Posthuma, *Labour Provisions, in Trade Arrangements: Current Trends and Perspectives*, 2011, available at: https://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/inst/documents/publication/wcms_192807.pdf. See as well, US Congressional Research Service, *Labour Enforcement Issues in US FTAs*, 23rd August 2019, available at: <https://fas.org/sgp/crs/row/IF10972.pdf>

a constructive dialogue with trade partners, but also to enable the taking of specific measures in response to serious treaty breaches that is the suspension of trade preferences⁵. This is yet to be seen. The integration of a “Human Rights Clause” has as much to do with a response to European civil society’s quest for States accountability than it has with a genuine defence of rights.

In a WTO context, these provisions are quite strangely referred to as “Non-Trade Concerns” (NTC). As if, for example, the issue of labour in the global supply chain was not “concerned” with trade and *vice versa*. The term itself is problematic. Why is the environment or gender equality a “concern” and not simply a reality or, even better, an opportunity? These “concerns” appeared in relation to the interpretation of the WTO Agreement on Agriculture (AoA), which is said to be flexible enough to provide for the protection of food security, rural development and poverty alleviation, and the environment.⁶ In this context, the “multi-functionality” of agriculture already addressed by the Organisation for Economic Cooperation and Development (OECD) in its March 1998 Communiqué was stressed by the WTO itself on the basis of the Agreement on Agriculture Preamble⁷:

“Noting that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing countries;”

This apparently simple reasoning has nevertheless generated numerous heated debates from the early years of the WTO.⁸ The absence of a clear definition of what could be a Non-Trade Concern participated to the confusion as well as developing countries’ fears to see their trade policies impeded by externally imposed “Western” values and standards. In addition, recent cases such as the “seal dispute” have reactivated the debate on the basis of the interpretation of the GATT 94 Article XX (General Exceptions) and the protection of public moral (Article XX (a)) and indigenous communities (Inuit) rights in particular.⁹ Yet no consensus could be achieved in treaty drafting or case law on the very coverage of NTC.

⁵ See European Parliament Research Service, *Human Rights in EU Trade Agreements, The Human Rights Clause and Its Application*, July 2019, available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2019\)637975](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2019)637975)

⁶ See WTO, ‘Non-trade’ concerns: agriculture can serve many purposes, available at https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd17_agri_e.htm.

⁷ See OECD, *Ministerial communiqués related to agricultural policies*, available at <http://www.oecd.org/tad/agricultural-policies/ministerialcommuniquésrelatedtoagriculturalpolicies.htm#mar98>

⁸ These include academic debates on NTC as reminded by Laurence Boisson de Chazournes in a recent article honouring the scholarship of Professor Jackson: “*WTO and Non-Trade Issues: Inside-Out*”, J, INT’L ECON. L., 2016, 19, 379–381; See also, for an investment related perspective on environmental aspects: Laurence Boisson de Chazournes, *Environmental Protection and Investment Arbitration: Yin and Yang?*, COLUM. J. INT’L L., forthcoming, 2016.

⁹ See Appellate Body Report., *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (May 22, 2014) available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm. In this case, the Appellate Body upheld the Panel’s finding that the EU Seal Regime is “necessary to protect public morals” within the meaning of Article XX(a) of the GATT 1994, but that the European Union had not justified the EU Seal Regime under Article XX of the GATT 1994 and in fact applied its exception in a discriminatory manner inconsistent with the GATT and the Agreement on Technical Barriers to Trade (TBT). For a synthetic perspective on the dispute, see: <http://www.ictsd.org/bridges-news/biores/news/the-litmus-test-non-trade-interests-and-wto-law-after-seals>; on interpreting the WTO agreements and developments in interpretation of the Article XX, see Joel Trachtman *The WTO Seal Products Case: Doctrinal and Normative Confusion*, AM. J. INT’L L. Unbound available at: <https://www.asil.org/blogs/wto-seal-products-case-doctrinal-and-normative-confusion>.

Having this in mind, one can also expand the same sort of definition – or rather non-definition – to analyse the greater inclusion of Non-Investment Concerns (NIC) in international investment treaties and today’s megaregional deals, which encompass a broad vision of trade. The following elements could be considered as falling under the banner of NIC: the right to regulate – despite its many and problematic meanings – human rights, development, labour, corporate social responsibility (CSR), the environment and anti-corruption. While certainly subjective, this list is based on today’s most recurring treaty practices responding, even timidly, to pressing “societal” challenges treaty drafters and adjudicators do not yet dare to formulate in a rights and precisely human rights language. No matter their definition or absence of the same, NTC/NIC are not generally accepted.

In reaction to the problematic increase of global trade disputes, India recently expressed its reluctance to see certain (NTC), including labour and the environment, introduced in the World Trade Organisation’s purview. According to India’s Commerce Secretary indeed, developing nations are facing a double challenge when dealing with the WTO dispute settlement system: a lack of internal capacity to tackle complex technical issues such as trade remedies, and the progressive inclusion of labour and environment related decisions, settled in other forums, in the reasoning of the WTO’s adjudicators.^{10,11} This perspective is unfortunately not uncommon as it echoes other developing countries approaches to international trade law and, at the same time, contributes to the artificial fragmentation of international law, which has characterized the past 20 years.¹² While developing and, to a lesser extent, emerging economies have traditionally associated their global attractiveness to a rather loose normative framework of protection for labour and the environment hence creating a comparative advantage in trade, these disastrous views for a sound and sustainable development have only but been reinforced by the technicalization and strategic division of international law in many sub-disciplines eventually read in isolation to meet short term policy objectives. *Lex specialis* (specialized law), “self-contained” regimes, and regionalism have indeed been advanced as many explanations of the current international law complication while, at the same time, *jus cogens*, “systemic integration” and repeated incantations to refer to the article 31 (3) (c) of the Vienna Convention of the Law of Treaties¹³ (VCLT) are supposed to provide drafters and judges with solutions in favour of a pluralistic and integrative vision of international law as well as integration of non-trade concerns in trade law.¹⁴

¹⁰ On India’s willingness and challenges to build up trade capacity, see James J. Nedumpara, “WTO, State, and Legal Capacity Building: An Indian Narrative”, in Leïla Choukroune, *JUDGING THE STATE IN INTERNATIONAL TRADE AND INVESTMENT LAW* (Springer 2016).

¹¹ See *Non trade Issues at the WTO: Lack of Capacity Worries India*, THE HINDU, 3rd May, 2016, available at <http://www.thehindu.com/business/Economy/nontrade-issues-at-wto-lack-of-legal-experts-worry-india/article8548230.ece>

¹² On fragmentation, see International Law Commission, A/CN.4/L.682, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 2006 as well as Ernst Ulrich Petersmann, *Methodological Pluralism and Its Critics in International Economic Law Research*, 15(4) J. INT’L ECON. L. 921–970 (2013); See as well, “Human Rights in International Investment Disputes: Global Litigation as International Law Re-Unifier”, in Leïla Choukroune (ed.), *Judging the State in International Trade and Investment Law*, Springer, 2016.

¹³ Vienna Convention on the Law of Treaties, art. 31(2), May 23, 1969, 1155 U.N.T.S. 331

¹⁴ *Id.*, . The article 31 of the VCLT reads as follows:

GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

India is often perceived as a difficult treaty negotiator. It is indeed assertive and very particular about what it wants and does not want. Indian trade negotiators are also very well versed in the many technicalities of trade law for they have gained great direct expertise and exposure in the World Trade Organisation (WTO) as well as the more recent mega-regional negotiations such as the ongoing discussions for the creation of the Regional Economic Comprehensive Partnership (RCEP) between the 10 ASEAN countries, India, China, Japan, South Korea, Australia and New Zealand. UK trade negotiators are lying far behind. Trade is negotiated at the EU level and there is paradoxically a great effort of trade capacity building to be made in the UK to enable a true dialogue of equals.

Against this backdrop for a redefinition of a modern partnership of equals, this article addresses the issue of Non-Trade Concerns (as a broad category including Non-Investment Concerns) in selected International and Indian Trade and Investment Treaties (I), and reviews UK current trade treaty attempts to later draw a series of observations on the possible way forward to trade yet also power democracy (II).

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument, which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

1. Non-Trade Concerns in Selected International and Indian Trade and Investment Treaties

1.1. Selected International Approaches

NTC can be incorporated in treaty texts as the now more popular “human rights clause or embraced in a more fluid manner through the adoption of policy documents informing the research and practice of a given organisation such as the WTO.

1.1.1. EU

In quite systematically integrating a “Human Rights Clause” in its trade deals, the EU, very much inspired by American and Canadian previous treaty practices, has recently responded to the pressure of a civil society greatly disenchanted by the consensual discourse on the benefits of trade and largely opposing Mega trade deals perceived – rightly or not – as harmful to the environment, labour or indeed, human rights. In 2009, a common approach on the use of political clauses was agreed upon in the name of EU values defence¹⁵:

“The inclusion of political clauses in agreements with third countries aims at promoting the EU's values and political principles which constitute the basis for its external relations as well as at promoting the EU's security interests. Moreover, political clauses constitute a specific tool which the EU can use to implement some of its most important external policy objectives, e.g. respect for human rights, democracy and the rule of law and non-proliferation.

The EU's approach towards the inclusion of political clauses in agreements with third states aims at:

- asserting the EU's fundamental values and political principles;
- enhancing the effectiveness of the EU policies of which the clauses constitute a tool;

- ensuring coherence vis-à-vis third countries; - strengthening the EU's negotiating stance.”

The clause is not necessarily very new if taken in the perspective of development policy and the relationships of the EU with a number of its Members former colonies. The first reference to human rights was indeed found in the Article 5 of the Fourth Lomé Convention, concluded in December 1989. The analogy with a conditionality is easy to make. Yet, this type of clause assuming the possibility of withdrawal of benefits or sanctions if indeed a human right violation was found, was actually not very operational. A clear reference to international and European norm is only found in recent EU treaty and could allow a legally binding approach if not yet obligations to be put in place. These objectives do not either preclude the EU Members to enter into trade treaty negotiations, they can at best delay them as in the recent case of Vietnam. There is in fact an implicit hierarchy between trade and human rights to the benefit of the former. It is assumed that opening up trade will *de facto* impact on the opening up of a given country to the rule of law and democracy as, for instance in the case of China's accession to the WTO. Unfortunately, China has not demonstrated any logical progression from trade to indeed the implementation of human rights for its own people¹⁶.

¹⁵ See the Council of Europe partially declassified document at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010491%202009%20REV%201%20EXT%202>

¹⁶ On the hopes of a rule of law by internationalisation in the Chinese case, see Leïla Choukroune, “China's accession and participation to the WTO”, in *China and the Law*, Mireille Delmas-Marty and Pierre-Etienne Will (eds.), Brill, 2011, pp.649-704 and “The Language of Rights and the Politics of Law: Perspectives on China's

Interestingly the EU is now not only integrating NTC and Human Rights clauses in its trade treaties with the developing world, but also with its developed trade partners such as Singapore or Canada. In the Comprehensive Economic and Trade Agreement (CETA), a grave violation of human rights could even lead to the termination of the treaty. What could seem surprising between two developed trade bloc with rules-based systems and strong democratic counter-powers, can most likely be explained by the precise values shared by the negotiating parties as well as the pressure they faced from civil society. However, as disappointing as it is, there is no direct legal effect of these human right clauses that is that an aggrieved individual cannot invoke the trade treaty clause before the EU courts or those of an EU member State¹⁷. The road to implementation is still paved with uncertainties and, as we will see below, it is ample time for the EU (and its Member States) to adopt a genuine human rights-based approach in trade treaty drafting, which include clear enforcement mechanisms.

1.1.2. WTO

In the context of the limited progresses achieved in recent negotiation history, the WTO is adopting a different approach. Beyond its GATT article XX (General Exceptions) it is building up a discourse and to some extent a plan of action on certain NTC. The issue of gender is quite revealing in this regard. Building up on the UN Sustainable Development Goals (SDGs) and the goal 5 (gender equality) as well as the work performed by the UNCTAD, the 11th Ministerial Conference of the WTO adopted the “*Joint Declaration on Trade and Women’s Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017*”. On the basis of this declaration, the Members agreed to:

(...) “to collaborate on making our trade and development policies more gender- responsive, including by:

1. Sharing our respective experiences relating to policies and programs to encourage women’s participation in national and international economies through World Trade Organization (WTO) information exchanges, as appropriate, and voluntary reporting during the WTO trade policy review process;
2. Sharing best practices for conducting gender-based analysis of trade policies and for the monitoring of their effects;
3. Sharing methods and procedures for the collection of gender-disaggregated data, the use of indicators, monitoring and evaluation methodologies, and the analysis of gender-focused statistics related to trade;
4. Working together in the WTO to remove barriers for women’s economic empowerment and increase their participation in trade; and

Last Legal Ditch Struggle”, *International Journal for the Semiotic of Law*, 2015, pp.1-25.

¹⁷ See generally, Katharina L. Meissner & Lachlan McKenzie (2019) The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes, *Journal of European Public Policy*, 26:9, 1273-1291, DOI: [10.1080/13501763.2018.1526203](https://doi.org/10.1080/13501763.2018.1526203)

5. Ensuring that Aid for Trade supports tools and know-how for analysing, designing and implementing more gender-responsive trade policies.¹⁸

This soft law approach is now translating in a number of initiatives, not so much at the WTO level, but at the Members levels and furthers as well as translates into regional trade agreements¹⁹.

Two approaches are hence clearly perceptible at the international level, a treaty based language (generally non-binding) or a soft law/soft power path aiming at influencing treaty negotiations.

1.2. An Indian Perspective?

Is there an Indian perspective on the integration of NTC in international treaties drafting? On the contrary to what the WTO viewpoint might reveal, India is not necessarily reluctant to the inclusion of NTC. There is indeed an Indian practice already. This practice is found in international investment treaties rather than in trade. One of the reasons of this apparent dichotomy between trade and investment is that India has been a fervent supporter of trade multilateralism and the WTO and has had few occasions to engage in mega-deals negotiations as the currently discussed RCEP. The below developments present a brief overview of recent Indian NIC inclusions in treaties.

1.2.1. India's BITs Models and Practices

As far as NIC are concerned, the 2003 and 2015 Bilateral Investment Treaties (BITs) models offer a very contrasted approach. Short and investment friendly, the 2003 model visibly aimed at economic efficacy: how to attract foreign direct investment (FDI) in an area of liberalization. There was no genuine provision one could relate to NIC²⁰.

On the other hand, and as a reaction, the 2015 model treaty offers a number of NIC related provisions, which counterbalance the criticism often formulated since its adoption.²¹ A curious instrument indeed, at the intersection of various approaches of investment law (liberal and statist), the 2015 model BIT somehow contradicts other political ambitions of the current government and the "make in India" campaign to start with. The model BIT does not always provide a protective and so attractive environment for FDI while, at the same time, it does not necessarily protect the interests of the State and its population. The debateable new provisions include: the stricter definition of investment, the complete exclusion of taxation, the absence of an MFN provision and the very curiously drafted dispute settlement provisions, which require the exhaustion of local remedies by the investment before it could proceed to international arbitration, i.e. a quite challenging task in a country where the number of pending cases is infamous. These provisions also have to be taken into consideration for Indian

¹⁸ See Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017 available at: https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf

¹⁹ See WTO, José Antonio Montero, Gender Related Provisions in Regional Trade Agreements, December 2018, available at: https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf

²⁰ India 2003 BIT model is available at <http://www.italaw.com/investment-treaties>

²¹ For well-argued and constructive criticism, see the Indian Law Commission Report: *Report 260 of the Law Commission of India* available at <http://lawcommissionofindia.nic.in/reports/Report260.pdf>

investors “going global” as they will offer them less protection than in the past²². However, as briefly alluded to above, the NIC related provisions deserve particular attention. They are identifiable in the following sections: Preamble (Sustainable development and right to regulate), Article 9 (Entry and Sojourn of Personnel), Article 10 (Transparency), Article 11 (Compliance with Law), Article 12 (Corporate Social Responsibility including labour, human rights, environment and anti-corruption standards), Article 32 (General Exceptions) and Article 33 (Security Exceptions and Annexe 1 related).

The preamble sets the tone in reaffirming the “*Right of Parties to regulate investments in their territory in accordance with their law and policy objectives*”.²³ Directly related to individual rights protection, the Article 9 (Entry and Sojourn of Personnel) and Article 10 (Transparency), to be read in relation to today’s evolution of trade and investment and increasing expectations in terms of freedom of movement and access to information although the latest is well framed by certain other imperatives (Article 10.4):

“Nothing in this Treaty shall require a Party to furnish or allow access to confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular juridical persons, public or private.”

The articles 11 (Compliance with Law) and 12 (Corporate Social Responsibility including labour, human rights, environment and anti-corruption standards) can be read together as far as anti-corruption measures are concerned. Here again, they correspond to cotemporary evolutions and the greater public demand in favour of political and economic accountability. Article 12 is however of particular interest knowing India’s recent moves in favour of the implementation of sound corporate social responsibility policies and the 2014 change in company law which requires businesses with annual revenues of more than 10bn Rupees must give away 2% of their net profit to charity, putting India at the forefront of CSR:

“Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.”

The direct references to human rights is of particular importance although a language of rights of the mention of precise binding instrument is still absent.

In addition, the exceptions related articles provide for an interesting development: Article 32 (General Exceptions) and Article 33 (Security Exceptions and Annexe 1 related). Largely modelled on WTO exceptions articles, they could prove useful in dispute settlement and help

²² See generally, Leïla Choukroune and Rahul Donde, (eds.) *International Commercial and Investment Disputes in and with India*, Transnational Management Dispute (TDM), India Special Issue, Vol. 2, 2018, Available at: <https://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=77> and Leïla Choukroune and Rahul Donde (eds.), *Adjudicating Global Business in and with India: International Commercial and Investment Disputes Settlement*, Routledge, forthcoming, 2020.

²³ The 2015 and previously discussed draft are available at http://www.bilaterals.org/IMG/pdf/modelbit_annex.pdf

contribute to a certain de-fragmentation of international law. The sceptics would, of course, argue that their implementation could be complicated in an investment context.

1.1.2. Indian Treaties with Investment Provisions (TIPs)

As if anticipating this new trend, previous TIPs had paved the way for further NIC measures being integrated. Amongst them a few deserve special attention. The 2005 India-Singapore Comprehensive Economic Cooperation Agreement set the tone of the developments to come. Its Preamble reaffirms the “*right to pursue economic philosophies suited to development goals and right to regulate activities to realize () national policy objectives*” and recognizes that “*economic and trade liberalization should allow for the optimal use of natural resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment*”. In addition, the chapter 6 (investment) comprises public interest related measures (right to regulate, article 6.10) as well as WTO type “general exceptions” (article 6.11).

The 2010 India-Korea CEPA follows the same path and interestingly integrates an original article 10.16 on “health, safety and environmental measures”:

“1. Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Agreement that is in the public interest, such as measures to meet health, safety or environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.”

The 2011 CECA with Malaysia contains an article (10.20) on measures in Public interest and an article (99) on “environmental measures”:

“Each Party recognizes that it is inappropriate to encourage investment activities in its Area of investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investment.”

Lastly, the recently negotiated (2014) India-ASEAN Investment Agreement contains a large number of NIC measures. For example, it includes: Preamble (Special and differential treatment (SDT) and Development), Article 3 and 4 and 5 (Reservation List on National Treatment and Review of the same), Article 16 (SDT for newer members), Article 21 (General Exceptions), Article 22 (Security Exceptions and Annexes 1 and 2 related).

While engaging in multilateral negotiations including trade and investment issues with developed and developing countries, India will certainly benefit from a larger and more comprehensive inclusion of NIC measures in its current BITs and other IIAs and eventually the adoption of a (human) rights-based approach (see below).

1.1.3. The Case of CSR

From the early 2000s onwards, a vast body of literature has been published in international economic law on the merits, limitations and possible linkages of CSR with general international law and trade and investment in particular. Scholars were eager to interrogate the possibly binding nature of these apparently voluntary guidelines if read in conjunction with international law norms and principles hence complementing the existing discourse in economics, management or political sciences. International organisations and other influential think tanks came up with policy guidelines and recommendations to integrate CSR in treaty drafting and progressively “legalize” their content. As a matter of fact, and in direct relation with international investment law, the United Nations Conference on Trade and Development (UNCTAD) first published some recommendations, in 2004, on how to integrate CSR in international investment agreements²⁴. Including CSR provisions in IIAs was rather unprecedented and three options were put forward: voluntary principles, no lowering of other standards, binding obligations.

In April 2016, the International Labour Organisation (ILO) published a landmark research paper on CSR in international trade and investment agreements and the implications for States, businesses and workers. Following the classic tripartite approach of the Organisation, the ILO interrogated the progressive “legalization” of CRS in government policies yet, at the same time, the vagueness of CSR treaty related provisions, which *de facto* limit the effectiveness of their implementation. After all, CSR provisions are directly related to labour and the ability of international agreements to participate equitably to the development of countries and regions of the world where the capacity or willingness of governments to protect human rights and so labour rights are often challenged by the imbalances of power between multinational corporations and weaker States with limited if not absent regulatory power. So, the ILO formulated the following hypothesis: “*one way to address these concerns and to assure that trade and investment go hand-in-hand with decent work is through the promotion of Corporate Social Responsibility (CSR)*”²⁵. In line with the United Nations Conference on Trade and Development (UNCTAD) analysis and its recent investment policy reform papers, the ILO is of the opinion that: “CSR would be better placed addressing only investors’ behaviour in Bilateral Investment Treaties (BITs) as a means to rebalance the investors’ rights conferred in these treaties (for example, access to investor-state dispute settlement) with the rights of states to regulate in the public interest, and to ensure the promotion of responsible investments”. When analysing these provisions, one is immediately struck by their vague character, which appears sometimes in contrast with more stringent and legally binding legal requirements adopted by the same State(s) domestically.

In this context, the idea of “Legalization” refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation. *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behaviour thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they

²⁴ See UNCTAD, *International Investment Agreements - Key issues*, Volume II, 2004, pp. 129-151.

²⁵ See ILO, Research Paper N°13, *Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Businesses and Workers*, April 2016, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf.

require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules. Each of these dimensions is a matter of degree and gradation, not a rigid dichotomy, and each can vary independently. Consequently, the concept of legalization encompasses a multidimensional continuum, ranging from the “ideal type” of legalization where all three properties are maximized; to “hard” legalization, where all three (or at least obligation and delegation) are high; through multiple forms of partial or “soft” legalization involving different combinations of attributes; and finally to the complete absence of legalization, another ideal type. None of these dimensions far less the full spectrum of legalization—can be fully operationalize.²⁶”

To a large extent this approach has been adopted by India. In 2013, India globally pioneered a novel social experiment: the legalization of precise CSR targets in domestic law. Although not immediately welcomed nor supported by the private sector, this reform did not come as a complete surprise for the astute observer of Indian business life. India is deeply influenced by ethical and societal values, which find their roots in a long history of syncretism. Be it the Muslim *Zakaat* (donation to the poor), the Hindu principle of *Dhramada* (benefaction) or *Daashant* (the tenth part or contributing one tenth of resources) found in Sikhism, the idea of “giving back to the community” as one would express in a modern CSR manner was present throughout Indian business history. India had clearly illustrated itself from the early days of modern capitalism by some fascinating and unique philanthropic practices lead by major industrialists’ families such as the Tatas or Birlas^{30,31,32}. In addition, another reform had preceded the 2013 Company Act amendments: in 2010 indeed, the Indian Government had made CSR mandatory for more than 200 Public Sector Undertakings (PSU), asking them to spend 0.5% to 5% (on an average, 2%) of their net profit on Corporate social responsibility. These “Guidelines on Corporate Social Responsibility for Central Public Sector Enterprises” were seen as a continuation of the earlier CSR voluntary guidelines, making CSR expenditure mandatory. The concept was simple: “*Public corporations have legal responsibility to maximize shareholders profits; but a shift in corporate mindset led by social expectations and pressure is causing business leaders to rethink their responsibilities with corporate performance measured in terms of economic impact, social impact and environmental impact, commonly called the Triple Bottom Line*”. It revealed efficient too as public sector companies had spent 66.7% of what they were required to spend (against 82% for private companies) in the first year of mandatory CSR. In about a century, the Indian way to CSR had so gone from Tata’s Patchwork philanthropy to a legal obligation supported by the State and public and private enterprises equally.

As far as NIC are concerned, India also incorporated a CSR provision in its 2015 BIT model Article 12, which reads as follows²⁷:

²⁶ On the concept of legalization, see Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalisation”, *International Organization* 54, 3, Summer 2000, pp. 401–419, available at: <https://www.princeton.edu/~amoravcs/library/concept.pdf>.

²⁷ The model text is available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download>

“Corporate Social Responsibility

Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.”

While voluntarism is still the norm, a form of legalisation is provided by the inclusion on the provision in the core of the treaty text as well as by the correspondence or echo with domestic legislation.

2. Post-Brexit: What New UK Model?

2.1. *Current attempts*

What could then be the situation post-Brexit for a UK non-Member of the EU yet very much Member of the WTO? What are the current negotiations and recently concluded UK trade negotiations suggesting? From this basis could we expect a partnership of equals as needed now in the context of the trade negotiations between the UK and India.

The European Union (EU) has about 40 free trade deals, covering more than 70 countries and worth about 11% of total UK trade while the EU accounted for 46% of UK exports and the US for 19%. In the event of a no-deal Brexit, the UK would lose tariff-free access to these markets and it would have to trade under World Trade Organization (WTO) rules.

In the preparation for this scenario, the UK has engaged in a series of trade negotiations. These did not reveal as easy as first expected. The objective is indeed to negotiate better trade deals than that the WTO regime could offer. As demonstrated in this Special issue, the WTO is very much back into play if ever there is a no-deal between the EU and the UK and, in any case, as a logical basis for trade. The UK started with easy deals. India will have to wait as the issues at stake are complex but also because India is a well experienced trade negotiator. The trade agreements that have been already signed by the UK are listed below:

- Andean countries
- CARIFORUM trade bloc
- Central America
- Chile
- Eastern and Southern Africa (ESA) trade bloc
- Faroe Islands
- Iceland and Norway
- Israel
- Lebanon
- Liechtenstein
- Pacific states
- Palestinian Authority
- South Korea
- Switzerland

In addition, another trade agreement with the Southern Africa Customs Union and Mozambique (SACU+M) trade bloc has been agreed in principle and shall be signed shortly. Lastly, according to the UK government, as in September 2019, the below trade agreements are still in discussion:

UK Trade Agreements in Discussions:

Country or bloc	Nature of agreement	Status of discussions	Percentage of total UK trade, 2018
Albania (Western Balkans)	Association agreement	Engagement ongoing	0.00%
Algeria	Association agreement	Engagement ongoing (agreement unlikely before exit day)	0.21%
Andorra	Customs union	Will not be signed for exit day	0.03%
San Marino	Customs union	Will not be signed for exit day	0.00%
Bosnia & Herzegovina (Western Balkans)	Association agreement	Engagement ongoing	0.01%
Cameroon (Central Africa)	Economic partnership agreement	Engagement ongoing	0.01%
Canada	Free trade agreement	Engagement ongoing	1.41%
Côte d'Ivoire	Economic partnership agreement	Engagement ongoing	0.03%
Egypt	Association agreement	Engagement ongoing	0.23%
Georgia	Association agreement	Engagement ongoing	0.01%
Ghana (Western Africa)	Economic partnership agreement	Engagement ongoing	0.09%
Japan	Free trade agreement	Engagement ongoing (agreement will not be transitioned before exit day)	2.27%

Country or bloc	Nature of agreement	Status of discussions	Percentage of total UK trade, 2018
Jordan	Association agreement	Engagement ongoing	0.03%
Kenya (EAC)	Economic partnership agreement	Engagement ongoing	0.10%
Kosovo	Association agreement	Engagement ongoing	0.00%
Mexico	Free trade agreement	Engagement ongoing	0.34%
Moldova	Association agreement	Engagement ongoing	0.05%
Montenegro (Western Balkans)	Stabilisation and association agreement	Engagement ongoing	0.01%
Morocco	Association agreement	Engagement ongoing	0.17%
North Macedonia (Western Balkans)	Association agreement	Engagement ongoing	0.16%
Serbia (Western Balkans)	Association agreement	Engagement ongoing	0.04%
Southern Africa Customs Union and Mozambique (Botswana, Eswatini (Swaziland), Lesotho, Mozambique, Namibia, South Africa)	Economic partnership agreement	Expected to be in place for exit day (agreement in principle)	0.75%
Tunisia	Association agreement	Engagement ongoing	0.03%
Turkey	Customs union	Will not be signed for exit day	1.37%
Ukraine	Association agreement	Engagement ongoing	0.10%

Source: <https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries-in-a-no-deal-brexite>

Lastly, on another plan, Mutual recognition agreements have been signed with Australia, New Zealand, the United States and discussions are ongoing with Japan. These provide a form of recognition of conformity assessments that is a close trade link on relatively similar technical grounds.

As far as NTC are concerned, there is not much, if anything, in the newly signed UK trade deals. The UK-Korea treaty signed in August 2019 nevertheless provides some interesting provisions if not real Innovations. Its Preamble acknowledges a series of important human rights commitments including a right to regulate/general exceptions like paragraph and the protection of labour and environmental rights²⁸:

(...) “REAFFIRMING their commitment to the *Charter of the United Nations* signed in San Francisco on 26 June 1945 and the *Universal Declaration of Human Rights* adopted by the General Assembly of the United Nations on 10 December 1948;

REAFFIRMING their commitment to sustainable development and convinced of the contribution of international trade to sustainable development in its economic, social and environmental dimensions, including economic development, poverty reduction, full and productive employment and decent work for all as well as the protection and preservation of the environment and natural resources;

RECOGNISING the right of the Parties to take measures necessary to achieve legitimate public policy objectives on the basis of the level of protection that they deem appropriate, provided that such measures do not constitute a means of unjustifiable discrimination or a disguised restriction on international trade, as reflected in this Agreement;

RESOLVED to promote transparency as regards all relevant interested parties, including the private sector and civil society organisations;

DESIRING to raise living standards, promote economic growth and stability, create new employment opportunities and improve the general welfare by liberalising and expanding mutual trade and investment”

SEEKING to establish clear and mutually advantageous rules governing their trade and investment and to reduce or eliminate the barriers to mutual trade and investment;

RESOLVED to contribute to the harmonious development and expansion of world trade by removing obstacles to trade through this Agreement and to avoid creating new barriers to trade or investment between their territories that could reduce the benefits of this Agreement;

DESIRING to strengthen the development and enforcement of labour and environmental laws and policies, promote basic workers' rights and sustainable development and implement this Agreement in a manner consistent with these objectives; and

BUILDING on their respective rights and obligations under the *Marrakesh Agreement Establishing the World Trade Organization*, done on 15 April 1994 (hereinafter referred to as the "WTO Agreement") and other multilateral, regional and bilateral agreements and arrangements to which they are party;”

There is as well a general exceptions provisions (Article 2.15) modelled on that of the GATT Article 20 and referring to it. As simple as it is compared to currently negotiated complex FTA by the EU, Canada or even a number of developing it is by far the best treaty in terms of NTC. What does this say? That negotiations are complex and uncertain and that it is easier to negotiate as a trade bloc. But also that the UK has tried to negotiate easy deals first at the

²⁸ See the treaty text available at : <https://www.gov.uk/guidance/summary-of-uk-south-korea-trade-agreement>

detriment maybe of its general human rights protection ambitions. Liam Fox, the international Trade Secretary, was recently alluded to the fact that the UK had received some requests to lower down its human rights expectations²⁹. The government claims that it is not willing to do so, and the House of Lords has prepared a report supporting the country' human rights commitments³⁰. Yet the reality of trade and the legal text concluded as of now seem to show the opposite. It will not be easy for the UK to trade as equal.

2.2. *A Partnership of Equal*

It might well be counter-intuitive, but it is likely that India is now in control of the trade play with the UK. Its experts are much better experienced than UK negotiators, its economy, at least on absolute terms is as important and its potential, despite the many social challenges immense. In addition, it has proven internally more innovative than a number of developed countries in adopting a legalised CSR approach. How could a possible trade deal be then approached from a NTC perspective. It seems that only a partnership of equals could pave the way for a long-term beneficial cooperation. It's not up to the UK to propose/impose NTC modelled on previous EU experiences, but rather to the two partners to come up with a mutually agreed solution on the basis of universally accepted principles, which could reveal much more operational than existing NTC incorporated in international treaties. In this regard, a Human Rights-Based Approach could reveal of great value. Beyond consensual rhetoric, the United Nations has listed a number of criteria be met to define a HRBA³¹:

- **Universality and inalienability:** Human rights are universal and inalienable: As stated in the article 1 of the Universal Declaration of Human Rights, "All human beings are born free and equal in dignity and rights."
- **Indivisibility:** Human rights are indivisible. Whether civil, cultural, economic, political or social, they are all inherent to the dignity of every person. There is no hierarchy of rights.
- **Interdependence and interrelatedness:** The realization of one right often depends on the realization of others. Rights are not separable.
- **Equality and non-discrimination:** All human beings are equal. Discrimination on the basis of sex, religion, ethnicity (etc.) cannot be tolerated.
- **Participation and inclusion:** Human beings are entitled individually and collectively to active, free and meaningful participation in, contribution to and enjoyment of civil, economic, social, cultural and political development.
- **Empowerment:** Human beings are empowered to claim their rights.
- **Accountability and respect for the rule of law:** There is a need to identify 'rights holders' and corresponding 'duty bearers'. These include both positive obligations to

²⁹ See The Guardian at: <https://www.theguardian.com/politics/2019/feb/13/post-brex-it-trade-partners-ask-uk-to-lower-human-rights-standards>

³⁰ See Human Rights and Trade Deals, 26th September 2019, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2019-0117#fullreport>

³¹ See UNESCO Strategy on Human Rights, *The Human Rights-Based Approach to the United Nations System*, 2006, and UNICEF, a *Human Rights Based Approach to Education for All*, 2007.

protect, promote and fulfil human rights, as well as negative obligations to abstain from rights violations. A HRBA requires the development of laws, administrative procedures, and practices and mechanisms to ensure the fulfilment of entitlements, as well as opportunities to address denials and violations. It is local and global and yet again glocal in that international norms and standards are integrated at the local level.

In doing so, novel treaty drafting would echo recent arbitral decisions, which seem to timidly move towards the direction of a greater appreciation of CSR, if not entirely human rights as international law obligations, as illustrated in the Urbaser case (as concessionaire, Urbaser supplied water and sewerage services in the Province of Buenos Aires replacing in the context of water privatisation):

“1195. The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation’s specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual”³².

A HRBA not only encompass essential human rights principles, but it also proves an effective tool to international law reunification and coherent application from treaty drafting to dispute resolution. As applied to trade, an HRBA puts the discussion in another perspective, that of legal entitlements, rights holders can claim against the State and other non-State actors. Hence, for example, the provision of water and sanitation services to the most vulnerable and marginalized communities as in the Urbaser case and many more to come including in India is no longer a charitable act but a State’s obligation to be fulfilled. Of course, one of the dangers of an HRBA could be the multiplication of rights deprived of concrete substance (the right to development as an example) and so possible application as hardly justiciable. This normative hyper activity would prove counterproductive and so leads to the dilution of rights rather than to their fostering. However, an HRBA is not necessarily equivalent to rights inflation and eventually dilution. While HRBA re-politicizes international issues in calling for justice and equity, it can also be extremely concrete as based on a clear set of identified norms. This HRBA makes rights justiciable. They can be invoked before domestic courts. There is a direct legal effect of trade treaties and a reconciliation of trade law with international law. Hence one departs from a mere superficial incorporation of poorly defined NTC to build trade around human rights. Priorities are reversed.

Such a dramatic change in perspective will require an immense political will and long negotiations, but if the objective of the Brexit is indeed to do better than the existing EU system, there is a large margin for improvement for trade and beyond trade. The latest reports of the

³² See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, para. 1195.

UK parliament suggest an appetite for this approach³³. The UK's National Action Plan on Business and Human Rights, last updated in 2016, contains for instance, a commitment to 'consider the possible human rights impacts of free trade agreements. The UK Modern slavery fight also supports this vision on the basis of the 2015 Modern Slavery Act and its furthering in the trade supply chain.

³³ See House of Commons and House of Lords, *Human Rights Protection in International Agreements*, Seventeenth Report of Session 2017-19, 12 March 2019.

Conclusion

In a recently released book, the popular historian and the travel book writer, William Dalrymple, narrates the controversial and hardly researched history of the East India Company, the first private multinational company, which has relentlessly looted India for 200 years from the early 17th century³⁴. The history of UK-India trade is not a peaceful one. The modern relationship the UK wishes to establish with 21st century India needs to take this past into account while provoking a rupture for a new partnership of equals to develop. In doing so NTC should be taken into consideration on a realistic case by case basis taking into consideration the subtle realities of each partners economy and social challenges. In doing so, trade is furthered and democracy, what the UK and India truly have as a common heritage, is powered.

³⁴ See William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company*, William Dalrymple, Bloomsbury, 2019.