A Matter of Faith

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> "Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us."

The above statement, from the revered judge, Lord Denning, in 1971, reflects the classic position in the United Kingdom concerning the relationship between international law and domestic law. It explicitly provides that any decisions concerning the effect of international agreements on British territory shall be made by Parliament, regardless of the terms of such agreements, and their effects in international law. The UK's accession to what became the EU in 1973 was to change this picture radically, with the normative force of supremacy and direct effect being described by Denning three years later as "like an incoming tide…[flowing] into the estuaries and up the rivers. It cannot be held back."

The purpose of Brexit, we have been told, *ad nauseam*, is to "take back control". It should hardly come as a surprise therefore that this involves the reassertion by Parliament of its prerogative to determine the domestic effects (if any) of international agreements within the UK legal system. Wresting this power away from Brussels goes to the very root of Brexit's *raison d'être*. Moreover, why have this power if you're not going to use it? What good, old boy, is that?

It is in this context that the furore concerning the Internal Market Bill, presented last Wednesday by the Johnson government, should be viewed. Clause 42 thereof allows the UK Government to disapply, via statutory instruments (secondary legislation) export declarations and other exit procedures required by the Protocol on Ireland/Northern Ireland for goods transiting between Northern Ireland and the rest of the UK after the end of the transition period. Clause 43 empowers Ministers to disapply or modify the effect of the "level playing field" provisions of the Protocol, which precludes more generous state aid to UK firms. Clause 45 explicitly provides that regulations made under Clauses 42 and 43 shall "have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent".

The language of Clause 45, in particular, is rather brazen and provocative. Its import was underlined by the admission by the Secretary of State for Northern Ireland that the bill "does break international law in a very specific and limited way." In particular, the bill, if passed, has the potential to breach the Protocol attached to the UK's Withdrawal Agreement concerning Northern Ireland.

Prime Minister Johnson has defended the bill – and indeed the breach of international law – arguing it was necessary "to uphold the integrity of the UK, but also to protect the Northern Irish peace process and the Good Friday

agreement."Whether this dubious (political) claim holds water has been discussed elsewhere. However, the legal question as to whether, and how, the Internal Market Bill in fact breaches international law perhaps warrants further examination.

The Minister doth protest too much?

It is worth noting that the question as to the legality of the Internal Market Bill was raised in the House of Commons: MP Sir Bob Neill asked the Secretary of State for Northern Ireland for the assurance that "nothing that is proposed in this legislation does, or potentially might, breach international legal obligations…that we have entered into." The Secretary's admission that "yes, this does break international law…" was rather less equivocal than it might have been. On the face of it, the controversial Clauses 42, 43 and 45 of the draft bill, might, if employed – *i.e.* if Ministers, via secondary legislation, were to act under these provisions – serve to place the UK in breach of obligations entered into under the Protocol to the Withdrawal Agreement. However, until such time as they *are* employed, the breach would seem potential, rather than factual.

The UK to the contrary has, even during its membership of the EU, seen itself as disposing of the power to override obligations arising from international and EU law, even in the face of the *sui generis* nature of the latter. By 1979, Lord Denning remarked that "Parliament, whenever it passes legislation, intends to fulfil its obligations under the [Rome] Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty (…) and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament". This view received the support of Lord Laws, and 30 years later was revived in submissions to the European Union Bill. Thus, from the UK's perspective, it has always disposed of the means to breach its obligations under EU and international law, notwithstanding supremacy and direct effect. The effect of the Internal Market Bill, seems, therefore, to be little more than passing this *potential* power, in limited circumstances, from Parliament itself to the relevant Minister.

As such, one might well conclude that the Secretary of State conceded more than was strictly necessary. Passing the Internal Market Bill into law will not, in and of itself, contravene the UK's international legal obligations under the Withdrawal Agreement, merely passing the power to do so from the Parliament to the administration. From an international – and indeed EU – law perspective, it matters little which organ of state breaches a state's international obligations; the state is, in any event, responsible for the act. However, a more subtle breach of international law may well have occurred, albeit one to which the Secretary of State and Prime Minister appear oblivious.

Article 184 of the Withdrawal Agreement provides that:

> "The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the

> necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the Political Declaration of 17 October 2019 and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period."

This Article should be read in the context of the broader purpose of the Withdrawal Agreement, enshrined in its Preamble, namely to facilitate an orderly withdrawal of the UK from the EU, and to ensure the successful negotiation and implementation of an agreement providing for a fruitful subsequent trading relationship, while respecting the need to ensure continued peace in Northern Ireland.

The reference to good faith is revealing. A general principle of international law, it applies, even in the absence of explicit enumeration, to any international agreement, requiring parties thereto to exercise their obligations honestly, and to respect bargains entered into. The principle was repeatedly cited by the ICJ, including in the 1984 *Gulf of Maine Case*, where it held that parties who have agreed to engage in future negotiations were not only under a duty to negotiate but also "to do so in good faith, with a genuine intention to achieve a positive result".

It is entirely conceivable that the negotiations between the EU and the UK might fail to reach a comprehensive trade agreement by the end of the transition period. Neither party is required to make compromises that are intolerable to its interests. In such circumstances, it is perfectly natural that a certain degree of brinksmanship may occur. International law to a large extent is a consensualist discipline, where states are bound by rules of their own creation, entering into agreements freely. In such circumstances, occasionally hostile rhetoric, divergent interpretations of proposals, and periodic breakdowns of talks are to be expected.

However, in the present negotiations, the EU and the UK do not dispose of entirely unfettered freedom. Articles 184-5 of the Withdrawal Agreement provide (i) that both sides must make a genuine attempt to reach a deal, and (ii) that the Northern Ireland Protocol shall have effect, whether or not a deal is in fact reached. The tabling of the Internal Market Bill before the House of Commons raises significant doubts as to whether the UK is serious about achieving either. The bill's provisions allow for any agreement reached, to be set aside at the whim of a government minister, thereby frustrating the object and purpose of the agreement itself, which is to provide for an orderly withdrawal, and ultimately, to facilitate a stable and predictable future trading environment between the UK and the EU. The spectre of this legislation is likely to impede, rather than aide, the conclusion of such a deal, and to complicate the withdrawal itself. Moreover, the bill has the potential to drive a coach and horses through the delicate arrangement provided for in the Northern Ireland Protocol, and will hang like the perennial Sword of Damocles over its implementation, undermining the reciprocal trust upon which such arrangements are based.

Nearly a century ago, commenting on the interpretation of the good faith principle in international law, Justice Ehrlich explained that the *ex re sed non ex nomine* principle constituted a core component of good faith. This maxim states that the law will look to the real state of affairs and not merely the legal form underlying

it to determine responsibility, and whether the law has been breached. While the substance of the Internal Market Bill before Parliament does not, in and of itself, breach the specific provisions of the Northern Ireland Protocol, or indeed the Withdrawal Agreement, the act of introducing it before Parliament – and particularly, its imminent enactment – is likely to do so, as it has serious potential to jeopardise the ongoing negotiations, to imperil peace in Northern Ireland, and therefore falls foul of the UK's stated obligation to engage with the EU in good faith.

As such, while the Secretary of State for Northern Ireland's contention that the Internal Market bill "break[s] international law" is based upon a false understanding of the effect of the former and the nature of the latter, it is, nonetheless, true. However, the breach, is not, in fact, "specific and limited". It pertains to a general principle, upon which all international obligations are based. Breaching this principle, in such an egregious manner, on a matter of such importance, should raise serious questions for any other actors considering trade deals with the UK in the immediate future, as well as for the EU in whether it can trust its interlocutor. It also raises serious questions concerning the UK's commitment to the international rule of law. Lord Denning noted that it was "elementary" that the courts should take no notice of treaties as such; the UK Government is now inviting its Parliament to follow suit.