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“Mercantilist Bilateralism or Rules-Based Multilateralism? Are Developed Countries Revisiting a Key International Trade Debate?”

Sean P. Stacy*

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* World Trade Institute – University of Bern, Switzerland

1. INTRODUCTION

While trade has continually stirred debate among policy-makers and their domestic constituencies, for the wealthier, so-called ‘developed’ nations, a consistent and shared policy orientation has generally prevailed over the last three quarters of a century. This consensus has manifested itself in two significant policy choices. First, inspired by core arguments made in economic theory (e.g. the Ricardian theory of comparative advantage) and certain aspects of international relations theory (e.g. the notion that there exists a correlative relationship between peace and economic integration), the removal of trade barriers (be they tariff and/or non-tariff barriers) has been pursued by affluent nations as a common development prescription for developed and developing countries alike. Second, and reflective of the postulations made by Institutional Economics scholars (e.g. Douglas North and Daron Acemoglu) that societal frameworks are largely responsible for development, developed countries have generally been committed to the idea that rules-based multilateralism offers the best path for bringing the aforementioned economic and political benefits into their fullest expression. Guided by these shared principles, rich countries have, heretofore, joined in a common refrain on multilateral integration, creating, *inter alia*, an expansive set of rules which facilitate freer trade, an international organization to administer the rules (the World Trade Organization (WTO)) and a dispute settlement system within the WTO to interpret and enforce those rules.

While most wealthy countries desire a continuation of this symphonic tune, discordant notes have recently been struck by some of the developed country community’s most important players. Particularly notable in this respect are the United Kingdom’s (UK’s) ‘Brexit’ decision and the United States’ (US’) increasingly antagonistic stance toward WTO dispute settlement. These actions lead one to question whether a reorientation toward mercantilism – and away from rules-based multilateralism – is taking place in these two countries. To the extent that it is, one wonders about the nature and the cause(s) of this alteration, as well as what it portends for the future of developed country trade policy. This paper aims at exploring, and to the extent possible, addressing these queries.

In the course of the discussion conducted herein, four principle conclusions are drawn. First, trade-related wealthy state ‘development policy’ is not a stand-alone topic for rich nations, as it often is for their developing country counterparts. Rather, the orientation of such a strategy must be inferred from policy positions and the debates that give rise to said orientations strategies. We will further see that these policy programs are themselves hard fought compromises born from persistently present, and often conflicting, ideological positions relating to the proper role of economic and state activity on the international stage. Second, despite the enduring nature of these debates, a shared orientation toward freer trade facilitated by a state-centric, rules-based legal system, has prevailed for the better part of a century. Third, the presence of populist movements – which are hallmarked by their loose connection to a particular policy agenda – have distorted the domestic debates in the UK and US and are largely responsible for the divergence in trade policy that exists between these two countries and other developed nations. Forth, and finally, because populist movements lack firm ideological commitments, and are neither *necessary* outgrowths of

globalization, nor likely to be durable, the changes currently taking place are apt to be regretted by those tasked with rebuilding that which is currently being dismantled.

The structure of this paper will be as follows. **Section 2** will discuss the concept of wealthy state development and will highlight the lines of argumentation that have typically contributed to crafting a country’s trade policy. **Section 3** will survey the last seventy-five years of international trade development; evidencing the shared orientation toward rules-based multilateralism in trade among developed countries. Presaging the turn made by the US and UK, **Section 4** will digress to summarize the theoretical literature related to populism and its relationship with globalization. **Section 5** will examine the UK’s and US’ recent approach to trade and will compare and contrast these approaches with those other developed countries. **Section 6** will discuss whether populism accounts for the changes in the UK and US approach to trade and, to the extent that it does, will consider what this portends for the future of rules-based multilateralism. **Section 7** concludes.

2. WEALTHY STATE ‘DEVELOPMENT’

2.1. CONCEPTIONS OF DEVELOPING COUNTRY DEVELOPMENT

Whether advancing a development agenda that privileges GDP per capita or adopting a more expansive notion that explicitly includes additional development variables (e.g. social factors, such as literacy, infant mortality, levels of inequality, etc.),¹ the development methodologies proselytized by wealthy countries for their less wealthy brethren have generally been a reflection of the development orthodoxy that prevailed in a given era. In the past, such prescriptions have included: encouraging domestic savings in the post-war (WWII) era (pursuant to the Keynesian-rooted Harrod-Domarr theory and Rostow’s modernization theory);² concentrating on separating developing countries from colonial domination (under dependency theory in the 1970s); and aiming to advance the privatization of industry and the free movement of capital through advanced contracts and property rights schemes under the Washington Consensus in the 1990s and early 2000s.

Currently, the prevailing wisdom, while not necessarily ridding itself of the elements of previous eras,³ is dominated by the notion that ‘institutions rule’. That is, development economics tends to look at the problem of coordination as *the* principle issue to be addressed. One of the most important and influential progenitors of this line of thinking is Douglas North, who founded what has come to be known as the New Institutional Economics (NIE). Without belaboring the discussion, NIE, as set forth by North, views institutions as fundamental to the creation of economic growth. Institutions, which North refers to as the “rules of the game,” are integral to a state’s functioning. For North, these rules, be they formal or informal, are comprised of the procedures and moral, ethical, and psychological norms, which constrain an individual’s behavior.⁴

¹ See, for example, the Human Development Index, at <http://hdr.undp.org/en/content/human-development-index-hdi>.

² Rostow, Walt. *The Stages of Economic Growth: A Non-Communist Manifesto*. 3rd ed. Cambridge, 1961.

³ Todaro and Smith contend that the present orientation toward development is “an eclectic approach” that “draws on all of these classic theories.” Todaro, Michael P., and Stephen C. Smith. *Economic Development*. 11th ed. Addison-Wesley, 2012.

⁴ North, Douglas C. *Institutions, Institutional Change, and Economic Performance*. Cambridge University Press, 1990. Institutional frameworks can be seen as a potpourri of constitutional rules, operating rules, and normative behavioral codes, which are generated (intentionally or not) by humans. That is, NIE theorists view the state and the institutions that comprise it as

NIE has garnered a devoted following in both academia and policy.⁵ To the extent that good ‘institutions’ are growth’s catalyst, facilitator or both, there is an implied edict that all countries must allow them to flourish if they are to pass from developing to developed and if they are to stave off regressing once there. Ultimately, there can be little doubt that NIE has been an influencer in the varied efforts to foster good governance, and other ‘optimal’ systemic traits, such as ‘freedom’, ‘democracy’, and ‘rule of law’, to name but a few.

Given that NIE is the prevailing ideational driver in development, might we assume that it is the measuring stick against which wealthy countries gauge their own development progress? It is to this question that we now turn.

2.2. WEALTHY STATE DEVELOPMENT: SELF-CONCEPTIONS

While one might reasonably infer that developed countries view their own development through the same lens used to assess developing country advancement, this would be a less than accurate perception. Certainly, wealthy countries revere GDP per capita and are motivated to exhibit steady growth. Similarly, one could easily imagine the shame that might inure to a developed country experiencing a plummet in ‘institutional’ or ‘governance’ indicators (e.g. those measuring ‘freedom’, ‘democracy’, ‘rule of law’, etc.); a reaction that illustrates an acceptance NIE’s fundamental tenets. Nevertheless, with the exception of occasional nods to the applicability of ‘sustainable development’ concepts, developed countries do not generally frame policy debates in terms of their own ‘development’. The simple reason for this is that wealthy-country discourse relating to development is binary (developed vs. developing).⁶ Stated differently, wealthy countries believe that (a) there is a terminus for the development marathon, and (b) that they (and other developed countries) have already broken the tape at the finish line. As such, there are reputational and psychological reasons to eschew a discussion of their further ‘development’. To engage in such a dialogue would be to potentially mar a closely guarded image of success; one that is projected to both the citizenry and the world.

Thus, one cannot expect to arrive at an understanding of development policy of a developed country through an appeal to the explicit discourse of said topic, as one could with developing nations. Rather, wealthy country development policy, such as it is, must be inferred from the debates and discussions that are had in related areas. For wealthy countries, these ‘related areas’ almost always include not only their economic situation but their geo-political ‘place’ in the world as well.

endogenous to the development process, and perceive the design and functioning of institutions as critical determinants of countries’ development prospects.

⁵ This is perhaps not surprising as the nebulous theory provides an implicit (and sometimes explicit) call for well-meaning professionals to ply their trade in the noble pursuit of development. This is true in law as well, where arguments made by development economists like Acemoglu and Robinson stress the import of promoting ‘inclusive’ rather than ‘extractive’ systems and others like Hernando de Soto give explicit credit to the sophisticated legal structures of the West (e.g. secured transactions) to impact development.

⁶ This might appear odd as wealthy countries generally accept the premise that there is a spectrum of development. Closer examination of that spectrum, however, reveals an acknowledgement that extends only to the less wealthy end of said spectrum (e.g. the categorization of least developed countries, developing countries and countries in transition). Contemplation of a range of possibilities beyond ‘developed’ is much less imaginative.

By extension, drawing conclusions about how developed countries view trade (e.g. as a mercantilist enterprise, as something to pursue as its own end, or some hybrid thereof) as an instrument of development, and how they execute on those views (e.g. through multilateral rule-making and enforcement, bilateral trade agreements or autarky), must be inferred from debates and discussions generally unfettered by explicit appeals to their own development. Instead, as we shall see in the following subsection, developed country trade debates and policies derive from direct appeals to economic and international relations (IR) theory. It is to a discussion of those debates to which we now turn.

2.3. THE PURPOSE OF TRADE AND TRADE GOVERNANCE: MERCANTILISM VS. MARKETS

This sub-section draws on constructivist IR theory in making the claim that there are ideational catalysts for developed country debates relating to their proper development course(s).⁷ The concepts are - depending upon one’s supposition about their underlying correctness - either inspired by, or reflective of: economic thought (including NIE) and IR theories (in particular, realism and liberalism). These schools of thought supply sometimes conflicting, sometimes complementary, theories about what constitutes human flourishing and the role(s) the State and/or international relationships can and/or should play in advancing that flourishing. More specific to trade, neoclassical economics tends to argue for advancing freer trade, with the notion that it maximizes opportunities for individuals and nations, while realist and liberalist approaches yield conflicting senses as to whether the economic ends are the correct motivators and, to the extent they are, the effectiveness of international cooperation in facilitating those ends.

Realism is one of the principle theories that dominate international relations discussions. One central thematic of this tradition is found in Morgenthau’s 1948 opus, *Politics Among Nations: The Struggle for Power and Peace*.⁸ Specifically, the author argues that international politics (and all politics, for that matter) is, at its root, about the struggle for power among States. While domestic and international politics share power seeking as an attribute, realists posit that a difference in ‘structure’ accounts for distinct behaviors that serve to direct the behavior of the actors on each of the international and domestic level. In particular, Waltz argues that the basic structure of international politics is one of *anarchy*.⁹ This anarchical setting is assumed to be the natural state of things because each nation state considers itself to be its own highest authority, answerable to no other. This stands in stark relief, says Waltz, to the domestic sphere in which a series of hierarchical relationships are established.

Differences emerge among realists in the appropriate response of states to the anarchy existent in the international sphere and their respective attempts to ‘survive’ in this atmosphere. Some realists

⁷ Armstrong et al. attempts to summarize constructivism, as follows:

This rapidly growing literature examines how the world, and what goes on in it, is socially constructed – i.e., constructed by the very ideas that actors share with themselves and others about the world they live in, and (given these ‘things’) what they can and should do.

Armstrong, David, et al. *International Law and International Relations*. 2nd ed., Cambridge University Press, 2012.

⁸ Morgenthau, Hans J. *Politics Among Nations: The Struggle for Power and Peace*. 2d ed., rev. and enl. New York: Knopf, 1954.

⁹ Waltz, Kenneth N. *Theory of International Politics*. Reading, Mass: Addison-Wesley Pub. Co, 1979.

believe that states are inherently power maximizers, actively and wantonly searching out opportunities to climb the ladder of power and influence by exploiting weaknesses in others in a zero-sum game of geopolitical chess.¹⁰ Others, however, see a more defensive posture as the primary motivational force. Waltz, for example, while still believing that states attempt to acquire power, ultimately aim for ‘security’. Thus, for Waltz, there is an ‘appropriate’ amount of power which would stand to make a state confident in its own position.¹¹

While realists may not agree on each and every aspect of IR theory, certain themes are clear and consistent, among them: (i) statism (that the state is the pre-eminent actor on the world stage); (ii) that the primary objective of the state is survival and (iii) no other state, organization or entity can be relied upon to ensure that survival, hence leaving a state to rely only on itself for its own survival (this is often referred to as the concept of ‘self-help’).¹² To put a fine point on the subject, the operational first principles of the State in a realist concept are not to economic efficiency, but to the survival of the State. This engenders more than a suspicion of yielding ‘sovereignty’ in the form of firm, enforceable commitments. Moreover, it makes an adherent to this school potentially sensitive to arguments that freer trade should be pursued as an end in itself.

Liberalism has generally acted as the intellectual counterweight to realism. Early liberal thought, often derisively referred to as ‘idealism’, trusted in the benefits of interdependence of constitutional states to bring about and sustain peace.¹³ Modern liberalism (often referred to as ‘neo-liberalism’) bears some of the optimism of Enlightenment incarnations, but has been chastened by two World Wars, a Cold War and the fallout from the attacks on September 11, 2001, and now generally concedes the anarchic international ‘structure’ and the centrality of states in this setting.

While these are significant similarities, one should not assume that the two theories are now fused. On the contrary, two differences in particular dictate alternate orientations to international relations. The first difference lay in the interpretation of anarchy’s ramifications. For the neo-realist, there is pessimism in the extreme toward the notion of durable arrangements of cooperation. For neo-liberalists, the creation of an international regime, including, importantly, rule-governed organizations, facilitate cooperation by, *inter alia*, providing greater degrees of transparency in statecraft and a less costly route to applying sanctions for rule/norm breaking. Dunne notes a second, and arguably more important, difference. Specifically, neo-liberals contend that international actors will enter into cooperative agreements if the gains are equally shared. Neo-realists, while conceding that entry into such agreements is obviously possible, require

¹⁰ Mearsheimer, J. *The Tragedy of Great Power Politics*. W.W. Norton, 2001.

¹¹ Notably, modern realists also differ with respect to the degree of influence that domestic structures and actors ultimately have on state behavior on the international stage. While ‘structuralists’, such as Waltz, and more classical realists such as Morgenthau and Carr have downplayed the role of individuals, some ‘neoclassical’ realists think that, at a minimum, the perceptions of leaders (e.g. heads of state and diplomats) may play a role in explaining/predicting state behavior.

¹² See, Dunne, Tim, and Brian Schmidt. “Realism.” *The Globalization of World Politics*, edited by John Baylis et al., 6th ed., Oxford University Press.

¹³ Classical liberalism has roots in Immanuel Kant’s notion that in order to produce perpetual peace on the international stage, a conscientious effort to form a constitutional republic of the countries of the world, wherein countries would agree to abolish war. Kant, Immanuel. “Perpetual Peace: A Philosophical Sketch.” *Kant: Political Writings*, edited by H.S. Reiss, translated by Nisbet, 2nd ed., Cambridge University Press, pp. 93–130.

something more than the prospect of mutual gain to enter into an accord. What stands as the required inducement is a *relative* gain.¹⁴ That is, a neo-realist state will engage in a cooperative enterprise if it stands to gain more than a rival (or rivals) do(es).

And what role is played by economics in these debates? For many areas of international law (e.g. Human rights law), economics enters only as a secondary or tertiary factor in the discussion. As such, the debate is dominated by the aforementioned State-centric views. Perhaps what distinguishes international trade debates from other areas of international law (and international relations) is the insistent presence of economic thought. While there are countless in politics and academia who have penned paeans to the perceived complementarity of capitalism and the interests of the nation-state, one should not simply overlook the incongruities between the two. At its essence, economics is an atomistic discipline, focused on the individual and aimed, like all utilitarian notions, at maximizing the benefit of the population. When looked at through the lens of the population of the world, economics becomes discordant with notions of realism and liberalism insofar as it is not preoccupied with the focus of the state. Even Ricardian notions of ‘comparative advantage’, which are certainly framed in a more state-centric way, ultimately envision the state as a facilitative tool for market operations, and not vice versa.

Taken collectively, we begin to see how complicated - and even schizophrenic - a state’s trade strategy can become, given that these conflicting motivators are simultaneously influential in the making of policy.¹⁵ Moreover, and importantly for the Section 4 discussion, there is ample opportunity for political movements that are relatively agnostic in their policy prescriptions, toglom onto elements that fit their idiosyncratic narrative, and do so with an air of legitimacy, because of the inherent complexity of trade policy and governance.

2.4. THE DOMESTIC DEBATE CONCERNING RULES-BASED MULTILATERALISM IN TRADE

The disparate foundational theories that make up a significant portion of the debate on trade in general, and rules-based multilateralism, in particular, can lead to a spectrum of policy orientations. A state with more realist leanings might be quite receptive, for example, to a mercantilist approach to trade and would be apt to search for ways to maximize its power on the international stage. While a realist orientation would not foreclose the possibility that a state would enter into a multilateral organization, it would shape how they perceived the organization’s desired functions. By contrast, a strong foundation in liberalism might see the forming of the organization as an end in itself, facilitating peace and prosperity through dialogue and cooperative rule-creation and enforcement. Meanwhile, economics-driven arguments might be relatively agnostic on the presence or absence of one form of international governance or another, so long as such governing apparatus did not impede the free movement of capital and labor.

We can see the influence of these schools of thought more clearly by examining the specific arguments that are employed to defend or decry freer trade relationships and rules-based multilateral frameworks. I summarize these arguments below.

¹⁴ Dunne and Schmidt, “Realism”, 110.

¹⁵ As most developed nations are democracies, it is unsurprising that there is representation of such views at the highest levels.

2.4.1. ADVANTAGES OF FREER TRADE AND RULES-BASED MULTILATERALISM TO SUPPORT IT.

2.4.1.1. REAPING THE BENEFITS OF COMPARATIVE ADVANTAGE

While Adam Smith’s notion of absolute advantage provides countries a justification to participate in trade under certain scenarios, it was David Ricardo’s concept of comparative advantage that offered a rationale for *every* country to participate in trade. In his 1817 book, *The Principles of Political Economy and Taxation*, Ricardo hypothesized that, despite the fact that one country possessed an absolute advantage in production of a given good (i.e. a country can produce a good more efficiently than others), it would be beneficial to foster specialization in areas where a country had a relative (or ‘comparative’) advantage. Doing so, would decrease the cost of production among trading partners for the goods that were to be traded, and increase the quantity of these goods available to the citizenry.

The natural extension of this argument is a call for the reduction or elimination of market distorting measures aimed at protecting local/national industries from foreign competition. Looked at through an economic lens, these market distorting mechanisms range from the less-offensive (transparent subsidies), to the somewhat distortive (transparent tariffs) to the most negatively impactful (opaque non-tariff barriers) form of protective measures. The counterintuitive nature of some of the aspects of the Ricardian argument aside, it is difficult to overestimate the impact that Ricardo’s concepts have had in justifying the lowering of trade barriers.¹⁶

While more politically-motivated approaches may advise a circumspect (or even adverse) tack toward trade, there can be little doubt that the economic theory would advocate, on efficiency grounds, for something close to a universalization of the rules, as the gains made through transparency and uniformity would maximize efficiency.

2.4.1.2. PEACE

One need not look only to economic theory to justify lowering tariff barriers and creating a uniform trading system across countries. Tenets of liberalism have also been supportive of this approach. For centuries, there have been those who have posited that greater depths of commercial integration among two or more nations beget friendlier relations between them. This concept has had a recurrent place in 20th century American diplomacy, particularly among American leaders who have felt the scourge of war. Consider, for example, the third of Wilson’s 14 points, which prioritized:

The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the

¹⁶ It is worth noting that these ideas are so firmly entrenched in the policy orientation of some developed countries that they show up in domestic policies as well. For example, in US law, interpretations of the so-called ‘dormant commerce clause’ (sometimes referred to as the ‘negative’ commerce clause) are highly reflective of the national treatment obligations that one Member of the WTO owes to another with respect to goods under Article III of GATT.

nations consenting to the peace and associating themselves for its maintenance.¹⁷

We see a similar statement made by Sumner Welles, a chief diplomat to Franklin Roosevelt during WWII, who stated,

Nations have more often than not undertaken economic discriminations and raised up trade barriers with complete disregard for the damaging effects on the trade and livelihood of other peoples, and, ironically enough, with similar disregard for the harmful resultant effects upon their own export trade. The resultant misery, bewilderment, and resentment, together with other equally pernicious contributing causes, paved the way for the rise of those very dictatorships which have plunged almost the entire world into war.¹⁸

More recently, these sentiments were on the minds of those who helped form the WTO. Consider the remarks of Peter Sutherland, former GATT and WTO Director-General, in 1997

[T]he greatest economic challenge facing the world is the need to create an international system that not only maximizes global growth but also achieves a greater measure of equity, a system that both integrates emerging powers and assists currently marginalized countries in their efforts to participate in worldwide economic expansion ... The most important means available to *secure peace and prosperity* into the future is to develop effective multilateral approaches and institutions.¹⁹

As discussed earlier in the section, liberalism also offers a robust defense of the fitness of international organizations to serve as a venue for administering negotiations and the adjudicating the rules that result from those discussions. This segues into another possible benefit of a rules-based multilateralism in trade from a developed country perspective (though from a slightly more realist perspective): the influence a country can have on shaping rules and norms.

2.4.1.3. INFLUENCING RULES AND NORMS

Another line of argumentation for rules-based multilateralism in trade is the ability to shape rules and, by extension, behavior. This notion has appeal to realists and liberals, though potentially for different reasons. By serving as the principle drafter (or major influencer) of rules, one can craft a legal structure to fit one’s ends. In the trade realm, this could certainly mean fashioning a

¹⁷ Wilson, Woodrow. Message to Congress, January 8, 1918; Records of the United States Senate; Record Group 46; Records of the United States Senate; National Archives.

¹⁸ Welles, Sumner. 1941 speech [].

¹⁹ Sutherland, Peter. “Beyond the Market, a Different Kind of Equity”, *International Herald Tribune*, 20 February 1997.

structure that facilitates greater flow of people and capital, but it need not. And this is the appeal to a realist. A powerful state could wield this tool (i.e. law) in order to achieve any number of desired ends, either narrow in scope (e.g. promoting or protecting a certain domestic industry) or more expansive (e.g. attempting to use the rules to compel an adversary to behave as one would like). This has clearly been a motivating force behind the willingness of many developed countries to participate in rules-based multilateralism in trade.

A related rationale, arguably more befitting the development concepts offered by NIE, is the notion that international legal institutions may have the potential to operate in ways that promote ideals, such as democratic principles and the ‘rule of law’. The impact of such a feat is not only that it provides order among the nations (to the extent rules are deemed binding) bound by the dictates of the legal regime, but that it also serves as an exemplar to participant countries whose domestic systems are relatively less reflective of those ideals.²⁰

2.4.2. ARGUMENTS AGAINST FREE TRADE AND RULES-BASED MULTILATERALISM

2.4.2.1. CORPORATE FLIGHT AND DISPLACED WORKERS

While there are arguments for restricting trade and limiting multilateral rule-making that are common across all countries, some such contentions are potentially more resonant with developed nations. With respect to economics-based arguments, concerns about the flight of domestic industry to places where labor and/or capital is less expensive weighs heavily on the minds of developed country policy makers. More specifically, the impact that such movement has on workers in the outgoing industry is a cause of significant angst.

This concern is not without evidence. Take, for example, a study conducted by the Peterson Institute for International Economics which found that 156,250 US jobs were lost on net each year between 2001 and 2016 from expanded trade in manufactured goods.²¹ The short-term employment challenges that are faced by displaced workers are self-evident. If programs aimed at retraining or reintegrating impacted people into the workforce are either unavailable or inefficient, this short-term issue becomes chronic one.

To some extent, these results should not be surprising. Rodrik notes that the theory has been warning about the downsides of trade for developed countries for quite some time.

One of the most remarkable theorems in economics is the Stolper–Samuelson theorem (1941), which generates very sharp distributional implications from opening up to trade. Specifically, in a model with two goods and two factors of production, with full intersectoral mobility of the factors, owners of one of the two factors are made *necessarily* worse off with the opening to trade. The factor

²⁰ See, for example, Finnemore, Martha and Sikkink, Kathryn. “International norm dynamics and political change,” *International Organization* 52 (1998), 887–917.

²¹ Hufbauer, G. and Lu, Z. *The Payoff to America from Globalization: A Fresh Look with a Focus on Costs to Workers*, Policy Brief (Peterson Institute for International Economics, 2017), 13, at <https://www.piie.com/system/files/documents/pb17-16.pdf>. While seemingly a damning figure, it should be noted that this represents less than 1 per cent of the workers laid off in a typical year.

which is used intensively in the importable good must experience a decline in its real earnings.²²

Ultimately, labor displacement is one of the principle reasons why organized labor groups in developed countries have been a consistent source of resistance for new and larger trade deals. It is to another, closely related argument against such deals, that we now turn.

2.4.2.1.1. THE RACE TO THE BOTTOM

In concert with the arguments that decry ‘offshoring’ of jobs on economic grounds, are contentions that the basis upon which developing countries obtain their competitive ‘advantage’ are anathema to the ethics of the developed country. For example, a company may move some or all of its manufacturing operations to a less developed country *because* the latter is offering a less regulated marketplace where labor or environmental standards are concerned. The domestic constituencies of developed countries who oppose freer trade on these grounds, generally appeal to a deontological argument that holds fast to the concept that laborers, the environment, or both, are owed certain baseline protections.

Obviously, there are counterarguments, generally utilitarian in root, which note both the hypocrisy of developed country complaints in this regard – most developed countries went through periods in which workers and/or the environment had little protection from those states – and the sincere belief that these countries cannot reasonably be expected to confront some of these issues until labor demand puts an upward pressure on wages, and the economy expands as a result. These rebuttals notwithstanding, the concerns expressed by those in developed countries are sincere, and therefore, a factor in the political choices that emanate from those countries.

2.4.2.1.2. INFANT INDUSTRY AND STRATEGIC TRADE

There are, of course, arguments for curtailing trade and/or multilateral rule-making that are more universally applicable to both developed and developing countries alike. Take, for example, protections for so-called *infant industries*. The argument made in connection with such protections contends that restrictions on trade can be a force for good when a country wishes to provide a domestic industry a chance to grow and expand. This argument has been compelling for many developing countries, including post-colonial America, where Alexander Hamilton championed restrictions aimed at protecting fledgling manufacturers.

A concept closely related to the infant industry argument is that of ‘trade strategy’ or ‘strategic planning’. Essentially, this is an allowance for government assistance, through trade restrictive or other market distorting measures, made in order to augment a domestic industry’s global market share. While obviously not in accordance with classical economic thought, these are attractive options for those who view trade through a more mercantilist lens.

2.4.2.2. LOSS OF CONTROL: SOVEREIGNTY (AND RELATED) CONCERNS

²² Rodrik, Dani. “Populism and the Economics of Globalization.” *Journal of International Business Policy*, no. 1, 2018, pp. 12–33.

Arguments expressing apprehension at trade generally, and multilateral rule-making and enforcement more particularly, are primarily borne of a realist impulse to protect sovereignty and policy control. Indeed, the most typical argument against deepening ties with an international organization (or other form of multilateral arrangement) is that doing so unnecessarily risks a ceding of state sovereignty and, by extension, the citizenry’s capacity to steer the policy of the state. This can become particularly prickly where the public sees foreign judges opining on their country’s cases. The state could have signed a treaty, the treaty could be ratified domestically, and yet the attenuation between the individual citizen of a given developed country and the judicial body of an international organization is such that the legitimacy of the latter is constantly under question by the former.

A related argument posits that an overreliance on trade and multilateralism potentially leaves states vulnerable in times of crisis (i.e. where ‘national security’ is deemed to be at stake). For example, if a large developed country has effectively stopped producing certain manufactured or agricultural products because they now acquire those goods from abroad, there may be concern that a catastrophe (natural or man-made) could sever that supply in times of peril. This, in turn, could lead to an era of tremendous hardship while the effected country attempts to recreate its capacity to produce in that area or to find a less expensive option elsewhere. These arguments, it should be noted, have become a topic of much discussion in the era of COVID-19.

Another developed country fear is that a rules-based system simply cannot provide the desired amount of political leverage for powerful developed countries when an organization has become too large and unwieldy. Attempting to arrive at a consistent poetical thematic is difficult, after all, if one country thinks a saga is being created and another a haiku. As the number of voices and opinions are increased, it decreases the possibility of controlling the narrative in a way that would be palatable or profitable for a political realist.

2.4.2.3. SOCIO-POLITICAL DYNAMICS

A final argument against deeper integration in trade is socio-political in nature. The relevant hypothesis argues that globalization and integration naturally precipitate domestic conditions in developed countries (e.g. through increases in immigration and exacerbated inequality) that allow the toxic seeds of nativist and populist feelings/rhetoric to bloom and grow. As we will see below, the impact of populism on the current change in the stance of the US and UK is perhaps quite significant. Whether populism is sired by globalization or whether the latter is one of many contributing factors in the rise of this type of movement will be addressed more fully below. Given what has transpired, it is certainly a worthy topic for those nations favoring greater integration.

3. DEVELOPED COUNTRY TRADE POLICY IN THE MODERN ERA

The debates above, inspired by, *inter alia*, realist, liberalist and economic theories, have been a fixture in the discourse of developed countries over many decades. Unsurprisingly, the concerns expressed by each of the positions are represented in the resultant system that has taken hold. This fact shall be seen in the discussion of trade law’s history. What will also be seen is a trajectory that has consistently favored freer trade, further integration and further legalization. For the better

part of three quarters of a century, a one-way ratchet on globalization and integration, spearheaded by trade and multilateral rule-making and enforcement, has reigned.

3.1. 1947-2016 - THE GROWING CONSENSUS

While flirtations with freer trade dotted the international relations landscape during the earlier part of the 20th century, protectionist schemes generally prevailed. For example, the US, in response to volatile agricultural markets and the onset of the great depression, enacted the Hawley-Smoot tariff act, which substantially increased tariffs on agricultural products.²³ Countries in Europe took similar paths. Germany, for example, allowed for ‘managed trade’ in which clearing agreements (i.e. the balance of trade had to be zero or better for Germany to go through with the deal) were the preferred trade tool.

In recognition of the economic benefits of freer trade and the possible deleterious effect that acrimonious trade relationships may have had on pre-war relationships, a call for a more integrated international commercial sector began to take shape. This originated with the proposal to create a triumvirate of institutions aimed at addressing financial and trade issues: The World Bank, the International Monetary Fund (IMF) and a trade body to be known as the International Trade Organization (ITO). Ultimately, American cold feet - an illustration of the fact that fears of eroding national sovereignty have been a perpetual force among developed countries - refused to ratify the ITO charter. This in spite of consistent support from the President at that time, Harry Truman.²⁴ Truman, fearing the Charter would be officially rejected in the US Senate, declined to submit it to that body for ratification.

This was not the end of the story, however. In connection with the creation of the ITO, a set of ‘temporary’ rules were fashioned to guide trading relationships as countries awaited the launch of the ITO. These rules were set forth in the *General Agreement on Tariffs and Trade* (GATT). Rather than abandoning the GATT when it became apparent that the ITO would not come to fruition, states, including the US, signed on to the rules contained therein. The GATT would provide the framework for international trade in goods for half a century.

During the GATT era, a series of trade rounds dramatically lowered tariffs. As tariffs began to be replaced by more surreptitious non-tariff barriers, these too began to be addressed, with negotiations relating to such topics as technical barriers to trade, dumping and subsidies becoming as prominent as the tariff talks themselves. There were even nascent recognitions of special and differential treatment for developing countries.²⁵

The potpourri of rules that emanated from these discussions (e.g. the Subsidies Code that was created during the Tokyo Round and which had no more than 25 adherents), coupled with the

²³ While the Hawley-Smoot Tariff Act is arguably the most famous of the US protectionist measures, the Fordney McCumber Act, which was passed in more economically felicitous times, shows the predilection for protectionism in that era. The latter Act raised tariffs on average by 40%, and caused a European backlash.

²⁴ See, for example, Leviero, A. *Truman and Aides Hail ITO Charter*, New York Times, March 25, 1948. Online at: <https://www.nytimes.com/1948/03/25/archives/truman-and-aides-hail-ito-charter-president-harriman-anderson-say.html>

²⁵ The most prominent development initiative was the ‘Enabling Clause’ which, among other things, allowed developed countries the ability to waive their most-favored nation requirements on goods coming from developing countries through ‘generalized system of preferences’ programs (GSPs).

GATT Contracting Parties’ ability to rebuff legal challenges at will, served to frustrate and motivate those favoring a more rules-based trade regime. Those ambitions were fulfilled by the Uruguay Round’s prolific output of agreements, which included an updated GATT (GATT 1994), an agreement dealing with trade in services (GATS) as well as agreements covering technical barriers to trade,²⁶ sanitary and phytosanitary measures,²⁷ intellectual property,²⁸ and many other areas.

Also included alongside this bevy of agreements were two supremely important accords. The first was the Marrakech Agreement, which established the World Trade Organization (WTO) - a successor in form to the ITO - as a body empowered to facilitate further negotiations, review and monitor trade policies of its Members and oversee disputes. This latter role provides a segue to the other important agreement, known as the *Dispute Settlement Understanding* (DSU). The DSU evidences the increased desire to ‘legalize’ the rules in a way that never truly happened under GATT. Most notably, the DSU did away with the GATT-era practice of blocking the establishment of a panel by an uncooperative respondent, and formed a two-tiered system of judicial review made up of a panel stage and an appellate stage, with the latter overseen by a standing body (i.e. the Appellate Body) of jurists.

This new establishment – i.e. the WTO and its dispute settlement system - became the center of the trade universe. The success and import of the judicial branch of the WTO structure is evident in a look at the statistics. In a twenty-five-year span 596 challenges have been commenced, 199 panel reports have been issued and 121 Appellate Body reports have been adopted.²⁹ These numbers are remarkable when juxtaposed to the much more modest caseload heard by other international tribunals. The prolific figures speak to the legitimacy of the rules and the judicial system. Furthermore, since the creation of the WTO, there has been, in addition to a robust legal apparatus, norms of adherence that speak to a respect for the institution and a recognition of the reputational damage that can or would accrue to those who cavalierly sullied it. This speaks to something larger than the existence of rules. It hints that ‘rule of law’ exists for the Members.

This is not to say that we should conflate a trajectory of integration and legalization of trade with a unanimous march unfettered by dissent. On the contrary, along the way significant questions have been voiced concerning sovereignty and the availability of ‘policy space’,³⁰ among other

²⁶ *Agreement on Technical Barriers to Trade (TBT)*

²⁷ *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*

²⁸ *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*

²⁹ The listed number of panel and Appellate Body reports does not include reports issued with respect to compliance hearings (known by the section of the DSU which addresses issues of compliance (Article. 21.5)), for which there are an additional 36 and 25 reports, respectively. Nor do the numbers include the 24 Arbitration decisions made pursuant to Article 22.6 of the DSU. Data found at worldtradelaw.net.

³⁰ Consider, for example, the summary of US sovereignty concerns that the late trade law maestro, John Jackson, mentions with respect to the US ratification of the WTO agreements. Those debates included a proposal – never officially adopted – to establish a commission to review WTO panel decisions. Pursuant to that proposal, the continued support of the Congress for the WTO (that is, the US would have withdrawn from the WTO, in the absence of that support) would have dependent upon a WTO dispute settlement system that: A) operates in a fair and impartial manner; B) does not add to the obligations of or diminish the rights of the United States under the Uruguay Round agreements; and C) does not exceed its authority, scope, or established standard of review. See, Jackson, John. “The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results.” *Columbia Journal of Transnational Law*, vol. 36., at 19. available at: <http://www.worldtradelaw.net/articles/jacksonsovereignty.pdf>

important concerns. As a result, the law itself resembles something of a palimpsest. One can almost imagine the devotee of free markets writing a line, only to have a mercantilist write over it and vice versa. Side by side in the WTO agreements are strong representations of a free markets commingling with state-centric mercantilism. Similar treatment for like products and services is fostered, while at the same time, a negotiating structure that consistently yields a group of lawyers and economists aiming to protect their country’s dying industries, is likewise present. A relatively strong judiciary is established, but one that still lacks the power to punish past wrongs and has a seemingly interminable process to further accentuate that lack of power.

Ultimately, when one takes a cleared-eyed view of the situation, the conclusion is this: There has been an unquestionable trajectory toward further integration in trade with rules-based multilateralism as its framework, however, the domestic concerns relating to sovereignty and economic losses have made their presence felt. We now begin to inquire whether these dissents have moved to the majority.

4. ENTER POPULISM

4.1. A KEY SIMILARITY IN THE US AND UK

One cannot deny the optic parallels between the US and UK experiences of the recent past. There is no greater illustration of this than the singular ‘moment’ that each nation experienced – in the British case the Brexit referendum and in the United States, the election of Donald Trump – leaving unsuspecting domestic constituencies and the broader world community stunned and/or bemused.

When one considers the possible causes or facilitators of these jarring US and UK actions, there is a motivator – or perhaps more accurately, a vehicle – that has arguably played a significant role: populism. While there are certainly differing definitions of this concept, there is strong degree of centripetal momentum around a notion set forth by Cas Mudde.

I define populism as an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite’, and which argues that politics should be an expression of the *volonté générale* (general will) of the people.³¹

When conceived of in this way, there is a formidable argument that the powerful forces that brought Donald Trump to the White House and supported a successful withdrawal from the European Union in the UK, have right-wing populist origins. Both countries possessed an agitated group or groups within its population who were sensitive to, *inter alia*, increasing domestic heterogeneity and rising inequality. These conditions serve as megaphone, magnifying resonance of ‘in-group’, ‘out-group’ tribalist rhetoric so typically offered by populist leaders.³² Given the relative wealth of both nations and the impact that globalization seems to have played in creating

³¹ Mudde, Cas. “The Populist Zeitgeist.” *Government and Opposition*, 2004, pp. 541–63.

³² This is/was, in no small part due to the media landscape, in which ratings (or clicks) increase when viewers are agitated or aggravated by something. Ergo, media outlets have financial incentive to focus on conflict and even to manufacture such angst little (or none) exists in reality.

these movements, it is worth pondering whether this is not simply *fait accompli* for all developed nations. We now turn to a brief discussion of that matter.

4.2. POPULISM’S FUTURE

One might query the extent to which populism is simply a natural occurrence for developed countries and, similarly, whether it becomes a fixture of the political landscape once present. There are a couple of ways in which this question has been addressed in the literature. The first, addressed by Mudde, looks at whether populism is a natural outgrowth of liberal democracies. The other lens through which one might possibly view the question is an economic one. Specifically, we might ask whether globalization and greater integration naturally tend to produce a populist rise?

With respect to liberal democracy’s propensity to produce populist reign, Mudde delivers good news and bad. On the positive side, he draws on Taggart’s line of reasoning to assert that there is no reason why liberal democracies would yield to a perpetual populist rule.³³

So, are politics in liberal democracies destined to stay populist forever? Hardly! True, there are some structural tensions within liberal democracy upon which populists can feed. But populism is also episodic; not just the individual movements, but the whole dynamic. When explicitly populist outsider groups gain prominence, parts of the establishment will react by a combined strategy of exclusion and inclusion; while trying to exclude the populist actor(s) from political power, they will include populist themes and rhetoric to try and fight off the challenge.³⁴

While not fatalist about the long-term outcome of populism, a sobering prognostication made by Mudde is that, while no particular populist incarnation is ‘made to last’, its presence leaves an imprint that arguably opens the door for future populists. Specifically, the rise of populism tends to erode legitimacy (or ‘demystifies’ law, says Mudde), the political process, and even the law. This has a consequence, says Mudde, and that outcome is an increase in the episodic frequency of populism’s appearance on the national stage.

However, because of the structural changes, and the consequent move away from legal authority and toward charismatic authority, as well as the demystification of politics in Western liberal democracies, populism will be a more regular feature of future democratic politics, erupting whenever significant sections of ‘the silent majority’ feels that ‘the elite’ no longer represents them.³⁵

And what of globalization’s impact on developed country politics? Specifically, does it have a role in populism’s rise? While Mudde mentions globalization and ‘post-industrialism’ as broad

³³ Taggart, Paul. *Populism*. Open University Press, 2000.

³⁴ Mudde, Cas. 2004, 563.

³⁵ *Ibid.*

trends that might help the populist cause, he seems to see other issues (e.g. a more educated elite, influence of media, etc.) as being more primary in fomenting populism. Others see a more direct connection with globalization. Dani Rodrik, for example, submits that international economic shocks are greatly influential in sowing the seeds of populism. Writing in 2018, Rodrik noted,

It may seem like populism has come out of nowhere. But the populist backlash has been on the rise for a while, for at least a decade or more. More importantly, the backlash was perfectly predictable.³⁶

In essence, Rodrik sees the developed country domestic policy community as having been entranced by the benefits of globalization, while ignoring the negative impacts that can and do accrue to many in the country. As the connections made through globalization deepen and widen - and particularly when they do so with an increased velocity- the irritants of trade are felt by a subset of the domestic population in a more acute way. These aggravations are further exacerbated by a number of factors, including the absence of a functioning safety net (e.g. a trade adjustment assistance program) and by fears associated with increased immigration (e.g. loss of jobs and an angst about national identity)

Ultimately, Rodrik is not entirely sanguine on the potential outcomes.

One conclusion from the preceding discussion is that the simple economics of globalization is not particularly auspicious with respect to its political sustainability. This is especially true of the advanced phases of globalization – what I have called elsewhere “hyperglobalization” – in which the ratio of political/distributive costs to net economic gains is particularly unfavorable.³⁷

It should be noted that in neither Rodrik’s nor Mudde’s telling, is populism’s rise necessary nor is its tenure assured to be lasting. However, once present on a significant scale, it’s impact can be substantial as we shall now discuss.

4.3. IMPACT ON DISCOURSE, DEBATE AND POLICY

When one contemplates populism’s likely impact on US and UK approaches to international trade law and policy, one cannot help but surmise that less solicitous orientations would be forthcoming.³⁸ Stated differently, we might expect populist leaders to *naturally* be devotees of a

³⁶ Rodrik, Dani. (2018), 10.

³⁷ *Ibid.*, 27.

³⁸ Some scholars resist this generalization. For example, Verbeek and Zaslove contend that international policy need not be anathema to populism. Moreover, say the authors, there are types of populism (e.g. a ‘market liberal’ populism) that appeals that see international relationship, particularly market-based relationships as being *the* appropriate means by which to ‘rescue’ the ‘folk’ from a corrupted domestic elite. See, Verbeek, Bertjan, and Andrej Zaslove. “Populism and Foreign Policy.” *The Oxford Handbook of Populism*, edited by Cristóbal Rovira Kaltwasser et al., Oxford, 2017.

mercantilist approach to international trade relationships as this orientation would be in accordance with a perceived fidelity to the tenets of realism discussed earlier.³⁹

But this need not be the case. Returning to Mudde’s definition of populism, we might highlight that it possesses the benefit of being flexible enough to subsume the differing policy programs that might issue from left and right varieties of populism.⁴⁰ As it happens, this is not only a practical benefit of the definition, but one which captures something about the nature of populism itself: its relative absence of a concrete policy program. Mudde states,

Populism is only a ‘thin-centred ideology’, exhibiting ‘a restricted core attached to a narrower range of political concepts’ ... As a thin-centred ideology, populism can be easily combined with very different (thin and full) other ideologies, including communism, ecologism, nationalism or socialism.⁴¹

This ‘thin-ideological’ aspect of populism creates a difficulty (or opportunity, depending on one’s vantage) for those attempting to accurately predict and/or frame a given country’s policy position. While a reorientation of policy might be expected to represent an authentic shift in ideology (e.g. policy makers, the public or both become convinced of the benefits of realist mercantilism relative to free-market multilateralism and therefore pursue a more mercantilist tack), a populist-induced policy change might represent a much more elastic commitment to underlying ideological arguments. This elasticity, coupled with Mudde’s notion that populism is not apt to continue *ad infinitum*, may be valuable considerations for those conducting business with a populist government (be those counterparties other nations or domestic figures). As such, identifying whether a country is being motivated on ideological grounds or by a populist movement (no easy task since parties do not generally label themselves as ‘populist’) could be a potentially significant determination. This should be kept in mind as we examine the actual changes that have taken place in the US and UK.

5. UK AND US TRADE POLICY: WHAT HAS CHANGED? WHAT HAS NOT?

Starting with the financial crisis in 2007, the volume of dissent in many developed countries has moved from low- decibel murmur to full-throated shout. Nowhere is this more evident than in the US and UK. Certainly, a *stylized* look at Brexit and Trumpism would tell us that both countries have entirely new outlooks with respect to trade and rules-based multilateralism. The reality is far more complex. While the UK’s jarring withdrawal from the EU evidences a public backlash to that institution, those sentiments have not curtailed its approach to freer trade, nor even to rules-

³⁹ There is some credence to this. Mudde notes that, ‘populism is inherently hostile to the idea and institutions of liberal democracy or constitutional democracy.’ Mudde, Cas (2004), at 56.

⁴⁰ In the US case, this receptivity arguably produced left and right populist movements in the years leading up to Trump’s election. Consider, on the left, the “Occupy Wall Street” movement. There was very little cohesiveness or coherence with respect to policy prescriptions but an overwhelming fixation on the division between the 1% and the 99%. Similarly, the so-called ‘Tea-Party’ of the right had a policy orientation that was eclectic, to put it kindly. At once professed libertarians, this group also sported fervently nationalistic responses to invocations of the military (the largest governmental entity in the US) and to other nationalist symbols.

⁴¹ Mudde, Cas (2004). at 544.

based multilateralism. The US, by contrast, has become decidedly more mercantilist in its orientation, most starkly evidenced by its open antagonism to the WTO’s dispute settlement forum.

5.1. APPROACH TO FREER TRADE

We begin with a look at recent American and British approaches to trade generally. While there has been a sustained drumbeat of criticism with respect to trade policy over the past decade in these countries, much of the policy orientation in the US and the UK remains familiar. Suffice to say, neither country, even the US and its ‘America First’ outlook, is heading toward autarky.⁴²

The official line of the US trade representative, for example, looks quite familiar to any recent administration. The USTR website, citing the benefits of trade, states that exports in trade help “strengthen America’s economic growth rate.” More redolent of pro-trade policies, is its statement with respect to imports. There, the USTR notes,

Moreover, imports increase consumer choice, and help keep prices low raising the purchasing power for consumers. Imports also provide high quality inputs for American businesses helping companies and their U.S. employees become or remain highly competitive in both domestic and foreign markets.⁴³

The sincerity of this view is arguably confirmed by the fact the US has continued to negotiate with trade partners, completing a free trade deal to supplant NAFTA (the United States-Mexico-Canada Agreement (USMCA)) and working to find common ground with others (e.g. Japan) on a bilateral basis.⁴⁴

The UK has also pursued freer trade since initiating its exit from the EU. In fact, if anything, the UK has been in relentless pursuit of trade deals out of a very real fear of the economic consequences that await them. No doubt, some of this aggressive posture has been an attempt to garner leverage in their EU negotiations. Nevertheless, one cannot overlook what appears to be a sincere pro-trade stance. Consider, for example, the proposed ‘global tariff’ regime that would ostensibly replace the temporary tariff schedule currently in place in Britain. This new tariff schedule, which would apply to countries that have *not*, heretofore, agreed to a trade deal with Britain, eliminates tariffs for an estimated 62 billion pounds (\$76bn) of imports.⁴⁵

Moreover, the UK aspires to expand the amount of trade it has covered under free trade agreements, “with the aim of having 80 percent of total UK external trade covered by free trade

⁴² Instead, in the US, there seems to be a vision of trade that is more mercantilist in its orientation, with a relative fixation on balance of trade issues. The Trump administration seemingly attempts to ‘divide and conquer’ trade partners. The only exception here is the USMCA, a trilateral agreement put in place to supplant NAFTA.

⁴³ USTR, found at: <https://ustr.gov/issue-areas/economy-trade>.

⁴⁴ This is not to suggest that the current era is the acme of free-trade sentiment in the US. In fact, for the first time in decades, the U.S. enters an election year in which neither of the nominees of the country’s two largest political parties offers a platform that might be seen to vocally and unequivocally advocate for free trade.

⁴⁵ “UK Publishes Vision of Post-Brexit European and Global Trade.” Aljazeera, 20 May 2020. Online at: <https://www.aljazeera.com/economy/2020/05/20/uk-publishes-vision-of-post-brexit-european-and-global-trade/?gb=true>.

agreements by 2022.”⁴⁶ This intent has been illustrated in a recently completed bilateral deal with Japan.

5.2. MULTILATERALISM VS. MERCANTILISM

As noted above, a stylized take on the US and UK fidelity to trade ideals would lead one to believe that both countries have adopted a decidedly new direction. Having looked at their current orientations toward free trade, however, we see a relatively similar orientation – albeit with a more mercantilist tinge in the US case – to that which prevailed in the past. A look at their current loyalties to multilateral rule-making and enforcement, however, produces a murkier picture. As was previously addressed, domestic constituencies in both countries experienced a rise in populism (itself born, in part, from nativist and/or nationalist sentiments) which acted as an unsettling force on typical policy discussions. Interestingly, this shared domestic disruptor has not produced similar policy tendencies when it comes multilateralism in trade. The UK’s break from the EU, while unquestionably a negative commentary on some Brits’ feelings toward *deep* integration, obscures what ultimately remains a largely favorable opinion of multilateral rule-making and enforcement in the realm of trade. The US, by contrast, has become ambivalent at best, and antagonistic at worst, toward rules-based multilateralism in the trade arena. Let us begin our analysis with US.

5.2.1. THE US CASE

The US offers a host of individual actions that evidence a change in posture away from rules-based multilateralism and toward mercantilist bilateralism. Rhetorical attacks on the WTO, including a proposal that the U.S. withdraw from the WTO, courtesy of a Republican Senator from Missouri,⁴⁷ and a threat to do the same from the president of the United States, represent but the tip of the iceberg in this regard. More evidentiary of a tectonic shift is the actual treatment of the WTO’s rules and norms.

While one might rightly assert that the Obama administration broke with some of the norms of engagement at the WTO,⁴⁸ the Trump administration is in a league of its own. This has been done in a variety of ways. First, they have brazenly flouted the existent rules, with Mr. Trump making edicts by tweet with apparent indifference to the fact that the United States has legally bound itself. Tweets in the early part of his term, in which he threatened double-digit tariff increases on certain goods from Mexico, would have constituted violations under both WTO law and NAFTA, for example. Likewise, his unilateral decision to increase tariffs with China, created a trade war.⁴⁹

⁴⁶ “Liz Truss kick-starts UK-US trade talks” Department of International Trade of the United Kingdom, March 1, 2020. Online at: <https://www.gov.uk/government/news/liz-truss-kick-starts-uk-us-trade-talks>

⁴⁷ Hawley, Josh. “The W.T.O. Should Be Abolished.” New York Times, 5 May 2020. Online at: <https://www.nytimes.com/2020/05/05/opinion/hawley-abolish-wto-china.html?smid=tw-share>.

⁴⁸ Indeed, it was the Obama administration, and not his successor, that first began to see reappointment of Appellate Body members as an institutional pressure point to be squeezed. This included the blockage of one of their own nationals for what many have seen as a failure to ‘waive the flag’ sufficiently enough in her rulings.

⁴⁹ [Somewhat bizarrely, Trump’s tariffs not only targeted China, but also the European Union. Though it is outside the bounds of this paper, it is worth noting that there was likely a receptive audience for a joint (EU and US) approach toward China, that would have been substantially more efficacious than the go-it-alone approach applied by the administration. Not one for alliances, that tack was not taken by the Trump administration.]

As much as transgressions of the law are indicative of a new sensibility with respect to the US’ obligations, they may not be as destructive to the legitimacy of the WTO legal system as the (sometimes purposeful) erosion of long-held norms. Two actions are particularly notable in this regard: (i) the U.S. invocation of the General Agreement on Tariffs and Trade (GATT) Article XXI security exception in defense of a steep increase in steel and aluminum tariffs and (ii) its active refusal to fill vacated Appellate Body member seats. Each action unto itself is a broad-side attack capable of rendering the current dispute settlement scheme obsolete.⁵⁰

Consider the first action. When the U.S. imposed its steel and aluminum tariffs it could have ostensibly chosen more traditional avenues for defending its measure. These may not have proven successful, but they would have allowed time to create the kind of political pressure the U.S. wanted to foster. Rather than go this route, however, the US purposefully targeted a weak point in the legal *system* of the WTO: Article XXI of GATT’s ‘national security’ exceptions. Practitioners and trade academics have always known that the broad discretion granted to Members under Article XXI could be something of a detonator button. If pushed under a discrete set of circumstance, little collateral damage would accrue. Pushed indiscriminately, however, and the legal system would suffer massive injury. The U.S. arguably went further than a ‘frequent pushing’ of the button, however, by asserting that a panel had no right to establish the validity of a ‘national security’ invocation. Had the U.S. tack been successful, it would have done two things. First, it would have allowed would-be respondents to simply opt of any panel proceeding that made it uncomfortable. Second, as this precedent would have been established by one of the most influential and important trading countries on the planet, it would have legitimized the behavior for others. Ultimately, the panel decision(s) in Russia-Transit and [Saudi Arabia] have dulled the impact of the U.S. position. Nevertheless, the willingness to risk ‘neutering’ the WTO’s dispute settlement system, reveals not just a cavalier attitude toward the rules, but a desire to eliminate their efficacy.⁵¹

The norm-breaking nature of its Article XXI invocation is not the only U.S. action noteworthy for its potential to inflict maximum damage on the WTO dispute settlement system. A second tack, the U.S.’s refusal to seriously consider the nomination of new Appellate Body members (or the renewal of existing judges) has already damaged the institution. The U.S. ‘strategy’, nominally meant to effectuate dispute settlement reform, began with the Obama administration. One can only guess at how doggedly the Obama administration would have pursued this strategy. We do know, however, that the Trump Administration, and U.S. Trade Representative, Robert Lighthizer, have leveraged this perceived vulnerability in the extreme.

When one briefly considers what this tactic entails, the propensity for harm becomes immediately evident. The Appellate Body, the highest court of the WTO, is a standing body meant to consist of seven Members at any given time, with three Members presiding over each particular appeal. Each Appellate Body member can serve up to two, four-year, terms. At both the initial nominating

⁵⁰ Stacy, Sean P. “WTO Dispute Settlement: ‘Will of the Strongest’ or ‘Rule of Law’?: Attempting to view recent U.S. actions through the proper lens”, *International Economic Dispute Settlement: Demise or Transformation?*, Cambridge University Press (forthcoming), 2020.

⁵¹ This was the verb used by Senator Charles Grassley of Iowa in describing the US approach to the Appellate Body. Quoted in: <https://insidetrade.com/daily-news/grassley-wto-appellate-body-shutdown-only-way-achieve-reform>

stage and when up for a second term, any WTO Member can essentially block – through an objection – the seating of a given nominee to the Appellate Body. Through this mechanism, the US has gutted the WTO’s highest court, leaving it with only one judge. As this is below the minimum number of Appellate Body members needed to hear a case, there currently exists an untenable situation: a treaty-established mechanism for judicial review that cannot be utilized by WTO Members.

These actions clearly show a deviation in US policy, as does its movement away from large multilateral trade deals like *Transatlantic Trade and Investment Partnership* (TTIP) and the Trans Pacific Partnership (TPP).⁵² Where once a reverence for law and institutions would have fostered, at the very least, a Hippocratic (i.e. do no harm) approach to rules-based multilateralism, there now exists a sentiment that those rules obstruct, rather than promote, American flourishing.

5.2.2. THE UK CASE

Ultimately, the single greatest piece of evidence to suggest a British move away from rules-based multilateralism is Brexit itself. After having been one of, if not *the*, significant leader of deepening integration of the EU countries for many years, the population determined that the time had come to separate; an unwinding that they ostensibly knew would be accomplished only with great political and economic cost.

These facts would allow one to reasonably infer a British unease with rules-based multilateralism. However, unlike the U.S., which has taken a sharp turn away from trade multilateralism in the Trump era (removing itself as a possible signatory to TTIP and the TPP and undermining the WTO dispute settlement process at every turn), the UK exhibits a relatively strong commitment to trade-multilateralism. Consider, for example, that the UK has made overtures to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – the successor to the TPP.⁵³ While this attempt to accede to the CPTPP is arguably a self-evident affirmation of multilateral rule-making in the realm of trade, the UK’s position paper on the issue makes an argument that would have fit in nicely with the approaches of American Presidents of the recent past.⁵⁴

[Joining the CPTPP] would consolidate growing relationships with partners and help us play a more meaningful role in strengthening and shaping the rules-based international system.⁵⁵

⁵² Though not directly related to trade, a similar US hostility to multilateralism is shown in: the withdraw from the Paris Climate Agreement, its consistently antagonistic stance toward NATO and, in the time of the Covid-19 pandemic, its blame shifting to the World Health Organization.

⁵³ This was in no small part an overture by the UK toward Japan. The two agreed in principle to a bilateral free trade agreement, Britain’s first such agreement since leaving the EU. See, <https://www.gov.uk/government/news/uk-and-japan-agree-historic-free-trade-agreement>

⁵⁴ The USTR under Obama had placed a premium on multilateral rule-making for realist, geo-political reasons as much or more than for any perceived economic benefits. This may have been the rationale for the US’s attempt to be a substantial driver of the Trans-Pacific Partnership (TPP). Specifically, through executing this partnership, the US would be essentially surrounding China with geographic neighbors that were adhering to rules that the U.S. had a substantial hand in drafting. A secondary goal would almost certainly include influencing China to behave in a way that U.S. had been unable to achieve within the rules of the WTO.

⁵⁵ UK Department of International Trade. *An Update on the UK’s Position on Accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*. 17 June 2020. Online at: <https://www.gov.uk/government/publications/uk->

But this faith in multilateralism in the realm of trade also extends to the WTO itself. Consider the US stance on seating Appellate Body Members and the open disregard for the system that it demonstrates. Then ruminates on the UK’s recent statement on the matter:

We continue to be concerned that the WTO Membership has not been able to launch the selection processes for new Appellate Body members and we are now seeing the concrete impairment of rights arising from this situation. While we do not underestimate the challenge of reaching agreement on the necessary reforms, we continue to view a two-stage dispute settlement system with the support of all Members as a central pillar of the broader multilateral trading system.

Indeed, at the time of this writing, not only is the UK distancing itself from the US position, Prime Minister Boris Johnson is openly campaigning for Liam Fox, the UK’s former international trade secretary, to become the next Director General of the WTO.⁵⁶ All of this speaks to a position on rules-based multilateralism in trade that is entirely in keeping with the developed country orthodoxy over the last several decades.

5.2.3. OTHER DEVELOPED NATIONS

Before moving on, it is important to note that the changes made by both the UK and the US have generally been decried by their developed country brethren. Among the European Union, the UK’s Brexit decision was panned and, at various points, the remaining EU countries have expressed a sentiment wishing to make an example of the UK for what they believe to be a foolhardy decision. The US’ actions similarly been met with bemusement and ridicule. Within the WTO, there have been frequent calls for the US to relent in its tactics with respect to the blocking of Appellate Body judges and the invocation of the national security exception. In short, there is a desire for rules-based multilateralism to continue among many developed countries.

6. DEALING WITH AN UNPREDICTABLE GIANT

The foregoing suggests that both the US and UK are, to some extent, experiencing a populist-led political movement. As populism is a ‘thin-centred’ ideology focused on domestic relationships (elite vs. folk), this can engender a common rhetorical sensibility without necessarily leading to a similar policy orientation. This arguably helps to explain why the US has become significantly antagonistic toward rules-based multilateralism while the UK is still relatively tethered to it.

As was also discussed, most developed countries desire a continued orientation toward rules-based multilateralism in trade. Indeed, at this juncture, there is nothing in the response of blocs like the EU or countries like Canada, Australia or Japan that indicates an abandoning of commitment to the rules-based system currently offered through the WTO. This is largely true even in the face of the profound market shock that has been brought on by COVID-19.

approach-to-joining-the-cptpp-trade-agreement/an-update-on-the-uks-position-on-accession-to-the-comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp.

⁵⁶ <https://www.thetimes.co.uk/article/boris-johnson-backs-liam-fox-to-lead-world-trade-organisation-66chvwq9m>

Given this, we might ask what is next for developed countries? Similarly, how might we expect these nations to be impacted by, or react to, the US situation? One possibility, of course, is that these countries will eventually meet a similar fate, irrespective of their approach to the US. Certainly, the same forces that unleashed populism in the US and UK could arrive in other developed countries. This is particularly true if, as Rodrik suggests, economic shocks that can be reasonably traced to globalization (or which are exacerbated by same), act as the fertilizer for populist growth.⁵⁷ Then again, populism is not without precedent in developed countries, and those in which it has appeared may be more apt to recognize, and less inclined to pursue, its siren song. Moreover, even absent this disinclination, there is nothing in the literature to suggest that populism *must* gain a foothold.

If populism is not an irresistible force, how might developed countries perceive of, and react to, a country that is currently impacted by a populist regime, as the US seems to be? They may choose to view the current trade policies of the US as being reflective of a sincere ideological change that is likely to persist. In that situation, a substantially weakened WTO and a more mercantilist trading position for these developed countries is the likely outcome. This is because a withdrawal by the US, either *de jure* or *de facto*, erodes the underlying rules and norms created through the WTO. A reversion to a ‘will to power’ orientation that was available, if not always acted upon, during the GATT era would presumably take its place.

Developed countries that believe the populist influence in the US is transitory could choose a ‘wait and see’ approach, shoring up areas that are within their zone of influence in the meantime. This would be a rational stance, as we would expect some of the populist ardor to abate, making room for a reemergence of typical policy discourse and decision-making. Many developed countries seem to have adopted just such a strategy. For example, the EU and 22 other Members of the WTO have agreed to agree to participate in a multi-party interim appeal arrangement (MPIA), wherein the participating Members will employ the Dispute Settlement Understanding’s (DSU) Article 25 arbitration option to essentially form a stop-gap appellate system until ‘the WTO’s Appellate Body is once again able to function.’

Ultimately, while one might rightly wonder about the strength of the tether between the US policy beliefs, on the one hand, and the actions taken, on the other, it simply may not matter. Because of the importance of US power and stature on the global stage generally, and in trade in particular, the methods of executing on their current policy prescriptions – which seem to be a misguided attempt to find an ‘optimal’ level of multilateralism – are poised to rend the current system asunder. Another four years spent blocking appellate body judges and attempting to undermine existent norms by such a powerful actor, will almost certainly leave the WTO a desiccated husk compared to its former self.

Such a scenario is frustrating to contemplate as the role currently played by the WTO must inevitably be performed in the future. Indeed, every data point and every lived experience of the present suggests a world that will continue to grow more connected, not less. Moreover, if and

⁵⁷ Consider that there is recent evidence to suggest that even Singapore, long the darling of indicators measuring economic freedom, rule of law, etc., is now experiencing its own backlash to globalization. [link to article]

when a reconstitution of a trade body would take place, a return to efficacy -- particularly in the realm of dispute settlement -- would be a difficult standard to attain. This is because law is not legitimate unless it shapes activity. And it cannot shape activity if there is no confidence in a commitment to the rule of law.

7. CONCLUSION

The complexity of trade policy necessitates a robust debate composed of conflicting ideologies and influences. Such requirements might suggest a corrosive discourse without much hope of compromise. However, in spite of these impediments, developed countries have, jointly and severally, arrived at policies that have privileged freer trade facilitated by an ever-integrating rules-based multilateralism.

Recently, this common project has faced recalcitrance from one of its most important members, leading to concerns about the presence of a new (or resurrection of an old) approach to trade policy for developed country members. A significant cause of this change in perspective seems to be the presence of an empowered populist movement, a fact which potentially exacerbates worries about an inevitable domino-like tumbling of developed country commitments to multilateralism in trade. However, amidst the fears of globalization begetting more populist movements, there is also an argument for patience and calm. As populism is an ideology long on tribalist rhetoric and short on policy prescription, the authenticity (i.e. the sincere fidelity to policies on ideological grounds) and longevity of the strategies now being pursued by the Trump administration, are appropriately brought into question. One wonders if the flouting of rules and norms may soon be coming to an end, and if so, whether there may be just enough time to save the current WTO system.