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Editorial

Re-Embedding Trade in the Shadow of Populism

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Abstract

In the last 75 years of international economic cooperation, we have witnessed tremendous changes. The global trade and investment regime is under pressure and undergoing a significant transformation. Supply chains are being restructured, new trade blocks are forming based on strategic and political considerations, support for trade among citizens is weak and inconsistent, and populist opposition to the global economic and political order is ascendant. In this time of uncertainty about the future of the world order, the articles for this thematic issue address how and if the global trade and investment regime can be re-embedded into society.

Keywords

embedded liberalism; labor rights; populism; trade; trade adjustment

Issue

This editorial is part of the issue “Re-Embedding Trade in the Shadow of Populism” edited by Kevin Kolben (Rutgers Business School) and Michèle Rioux (Université du Québec à Montréal).

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1. Introduction

Nearly 40 years ago, John Ruggie published “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order” in which he argued that the postwar economic order was forged on a compromise (Ruggie, 1982). A liberal multilateral economic regime of rule-based free trade was established that was buffered by a state-based regulatory space to achieve non-protectionist social objectives and pursue full employment (Ruggie, 1982). This international economic order provided a governance framework that preserved the state’s ability to stabilize its national economy without the destructive consequences that plagued the interwar period. National states retained regulatory space to protect national economic stability and implement agreed-upon exceptions to the free trade regime. This domestic regulatory autonomy ensured that the multilateral economic order would maintain its legitimacy and retain domestic political support. The international order, which had been founded to protect regula-

tory space for states, is under stress as political leaders, technocrats, and WTO adjudicators have arguably abandoned the principles of embedded liberalism in favor of free trade and open markets as ends in themselves.

The WTO Dispute Settlement Body, for example, has been criticized for interpreting WTO agreements in ways that prioritize free trade principles over the freedom of states to regulate for the public interest—although the Appellate Body has arguably taken a somewhat balanced approach to that issue (Howse, 2016). Labor and environmental protections remain excluded from WTO agreements and negotiations. Concurrently, the entry of China into the WTO and the transition to supply chain models of production led to significant social and economic disruption in developed economies while social support and trade adjustment assistance have been under attack (Acemoglu et al., 2016). The access to vaccines during the Covid-19 pandemic made painfully clear the inequalities that exist between wealthy and poor countries. This confluence of events has allowed populist politicians to stir up opposition to trade and foster a national retreat

from the global economic order in the name of economic protection, nativism, anti-elitism, and anti-globalism. Yet, there are multiple indications that while perhaps ambivalent about free trade and global economic integration, a necessary condition for citizens and consumers is that trade be embedded in society and domestic social values. Consumers, for example, increasingly seek assurances that the goods they buy are manufactured under socially acceptable working conditions (Kolben, 2019); and bilateral and regional trade agreements increasingly include labor and environmental provisions, in part to boost support for trade in the developed world (Bastiaens & Postnikov, 2020).

2. Exploring Embedded Liberalism

Contributors to this thematic issue examine from a variety of perspectives how the global liberal economic order is foundering because the embedded liberal compromise has been—one might say—*compromised*. They explore embedded liberalism from several perspectives and subject areas. Fundamentally, they describe how trade and the liberal economic order have become disembedded from society and how they might become re-embedded. While their views are hardly monolithic, they argue the global economic system is and should be undergoing a reorganization and process of re-embedding. The contributors have been asked to go beyond purely descriptive accounts to also propose policy solutions or approaches to resolving the tensions they describe.

Jones (2023) and Bachand (2023) address the embedded liberalism compromise from contrasting points of view. The former argues for a strong version of Ruggie's original framework and draws on the sociological concept of constructivism to understand the foundation of global trade institutions. He describes an erosion of state adherence to global trade rule exacerbated by populist movements, due to political pressures arising from trade-related displacement and inequality, and highlights Trumpian populism and its success in (a) linking trade openness with elite interests and (b) wielding American power to undermine global trading rules. He proposes several "fixes," including improving trade adjustment policies in domestic trade policy, revisiting the consensus rule at the WTO, providing for more domestic policy space, and finally stronger leadership on trade. In contrast, Bachand (2023) identifies the changes related to the transformations of the world economy and questions international institutions and their capacity to provide a new deal that would be adapted to globalization. This is key to understanding the linkage between embedded liberalism and the underlying labor-capital relationship that was at the basis of tripartism. Can this social compromise be reconstructed in the new global context? A Polanyian double movement is certainly at play, but the national political and legal space is perhaps no longer matching the economic space with the rise of transnational capitalism. Bachand (2023) suggests that

there needs to be a focus on greater democratic participation in the enterprise and the economy generally.

Santos (2023) turns our attention to ISDS institutions. He explains why they have fallen into disfavor from both developed and developing country governments. Rather than re-domestication of international dispute settlement, which could harm developing economies, he argues for embedding ISDS institutions internationally and for their restructuration to ensure participation rights to a range of affected stakeholders.

Political space and new economic models might not only favor development objectives but also foster new approaches to the linkage of trade/investment and environmental regimes. Dufour (2023) questions whether the current liberalized trade and investment regime is consistent with the possibility of an ecological transition, and explores ways in which it could be subordinated to ecological and social concerns and contribute to, rather than hinder, an ecological transition. As global capitalism is conducive to an intensification of resource extraction and commodity production, it begs the question of what the necessary adjustments are to achieve sustainable growth and development.

Ehrlich and Gahagan (2023) help clarify the types of opposition to free trade that have emerged in the USA and focus on how populist opposition to trade should be understood. In contrast to Jones (2023), they are less sanguine about the ability of compensation—a key policy tool of embedded liberalism—to address populist opposition to trade, which is rooted in nativism. Their analysis can help inform policies that address popular opposition to trade.

Finbow (2023) focuses on populist opposition to free trade and rejection of the embedded liberal international order by examining the paradoxical contrast between Canadian and American populists. According to Finbow (2023), in contrast to American populists, Canadian populists are generally not opposed to free trade. He highlights the importance of trade to Canada's economy, as well as the electoral success of pro-trade policies to explain why political parties have not utilized anti-trade rhetoric as a populist mobilizer. On the other hand, American populists and conservative leaders have pointed to the concentrated and identifiable harms of trade dislocation to American workers and have combined that with nativist rhetoric to mobilize anti-trade populist movements. According to Finbow (2023, p. 243), "economic asymmetry and political opportunity structures" were key to understanding the different populist rhetoric around trade in the two countries.

One way in which trade has been re-embedded in social values and objectives is through labor and environmental provisions. The inclusion of such provisions is often described as ensuring fair trade over free trade. The USMCA includes stronger labor provisions than its predecessor and is perhaps stronger than any other trade agreement to date. But Velut (2023) asks a different question about embedding fairness into trade

agreements: Why have some domains of trade been disembedded from social objectives such as labor protections? He uses the case of digital trade to ask what caused digital trade to be embedded in a social objective of data privacy but disembedded from the social goal of labor protections. Velut (2023) identifies discursive, institutional, inter-scalar, and countermobilizing dynamics that can help explain “non-decision making,” or the decision to dis-embed some trade issues areas from specific social objectives.

The final two essays turn to the essential social goal of public health—the importance and fragility of which have become amplified during the time of the pandemic. Arguing that this public good was supposed to be protected from unfettered liberalization, Paquin and Plouffe-Malette (2023) examine what they describe as the different responses and capacities of developed and developing countries to provide the vaccines, diagnostic tools, and treatments to their populations. The WTO’s TRIPS agreement facilitated the monopolization of those goods by wealthy countries, but a subsequent agreement was reached by WTO members to provide a temporary waiver to certain aspects of TRIPS. The threat and challenges to public health are viewed with a domestic lens by Dalingwater (2023). Like Bachand (2023), she emphasizes the move away from embedded trade and globalization to a neoliberal form of transnational capitalism. Defending the NHS became the organizing theme of anti-globalization populists on both left and right, helping lead to Brexit, and general skepticism of global economic and political integration.

3. Conclusion

These articles provide insights into the economic and political multidimensional crisis that the world is currently facing. If the global economic order is to be preserved, then its goals and objectives need to be re-embedded into social goals and domestic objectives. If not, the world might be sleepwalking into a new era of conflict and economic upheaval that increases the risk of falling into the same disruptions and crises that embedded liberalism was intended to avoid.

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Conflict of Interests

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Article

Populism, Globalization, and the Prospects for Restoring the WTO

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Abstract

This article sets out to identify a constructionist framework for a new and expanded “embedded liberalism” and WTO reforms in the global trading system. Globalization and populism led the Trump administration to attack the WTO system by introducing unilateral protectionist measures and undermining its rules and norms. US populist trade policies have persisted under President Biden. Necessary steps to restore the WTO system include (a) domestic reforms by WTO members to improve economic adjustment, labor mobility, and social safety nets; (b) WTO reforms to allow for additional domestic policy space, new negotiated rules to address contentious issues, and a relaxation of the consensus rule; and (c) US restoration of its commitment to multilateral trade rules. Renewed global leadership will be required to pursue these steps. If the current WTO agreement proves to be incapable of resolving these issues, countries will turn increasingly to the alternative of regional trade agreements, which may be able to re-create the conditions for a return to a rules-based global trading system. Yet populism, anti-globalization pressures, and geopolitical tensions present the danger of a continued unwillingness to cooperate among major countries.

Keywords

embedded liberalism; global institutions; globalization; populism; trade policy; WTO

Issue

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1. Introduction

A global wave of populism brought Donald Trump to power as US President in 2016 and increased the influence of populist parties around the world. It has also disrupted global trade policy, primarily through Trump’s defiance of the norms and rules of the WTO beginning in 2018, and this impact has persisted beyond his defeat in the 2020 presidential election. The disruptions of globalization had already led to skepticism in many countries regarding the benefits of open trade, particularly since the global financial crisis of 2008 (Hays, 2009). The populist challenge to the global trading system, in other words, arose at a time when support for the post-World War II global system of trade was already being questioned, challenged, and attacked from other quarters. Yet populism has played a special and particularly corrosive role in the disruption of trade and trade relations since it sparked overt efforts to undermine the very institutions of trade and eroded the trust among WTO mem-

bers in the rules necessary to sustain the entire trading system. In addition, populist strategies of domestic polarization severely undermined the ability of some countries, and in particular the US, to achieve a workable domestic pro-trade coalition. The creation of a new and revived global trade regime will require measures to address both anti-globalist and populist challenges to the WTO as an international institution.

This article sets out to explain the erosion of the system of global trade rules, and how this damage might be repaired. It will draw primarily on a constructivist model of global institutions as the basis for analysis. While US populist trade policy was a major contributor to this problem, anti-globalization anxieties played a key role in promoting it, as it had already begun to create major trade adjustment problems in large countries, particularly after China joined the world economy in the 1990s. Structural changes in global capital flows, along with accelerating technological change and the expansion of global supply chains, exacerbated anti-globalization

sentiment. These factors undermined the constructivist underpinnings of the WTO that had been established in the postwar period, especially regarding political support for the rules and trade liberalization in general. Remedies to fix this problem will require new mechanisms to rejuvenate support through new domestic policies, a broader engagement with domestic pro-trade constituencies, reforms of WTO rules, new models of trade leadership and, if necessary, the use of regional trade liberalization to move countries back to a multilateral rules-based trading system.

The article is organized as follows: A beginning section presents the basic constructivist model and the framework it provided for the initial the General Agreement on Tariffs and Trade (GATT)–WTO system. There follows a discussion of populist trade policies and other disruptions to the system in terms of eroding political support for WTO rules and institutional norms. The analysis of possible remedies then sets out to identify policy changes, WTO reforms, and other strategies to improve the situation. A concluding section assesses the prospects and requirements for making progress in improving the political environment for a stable global trading system.

2. The GATT–WTO System as a Constructivist Institution

The GATT–WTO system that emerged from the aftermath of World War II was an innovative institution that established for the first time a multilateral agreement of trade regulation and negotiation based on reciprocity, non-discrimination, and the principle of peaceful third-party dispute resolution. The constructivist element of the system consisted of a collective intentionality among its participants to gain the benefits from international trade, subject to each member's ability to retain sovereign policy space to manage domestic economic stabilization (see Jones, 2015; Lang, 2006; Ruggie, 2008; Searle, 2005). Leadership by major trading countries, especially the US, in conjunction with European and other OECD countries, was necessary to ensure the legitimacy, stability, and viability of the universal rules-based system. Accession to the system involved a negotiated balance of benefits (the output of welfare-improving trade agreements) and obligations (reciprocal market opening, subject to rules and exceptions). A dispute settlement system provided the benefit of third-party review (and later adjudication) of bilateral trade conflicts, with the understanding that participants would forgo unilateral actions in favor of peaceful and negotiated resolutions. The underlying economic justification of the system was its ability to reduce transaction costs, secure gains from exchange for all participants, motivate a mutually welfare-enhancing negotiating framework based on reciprocity, instill adherence to the rules, and thereby provide a domestic "anchor" for stable liberal domestic trade policies. Figure 1 illustrates the three pillars of the

constructivist institution—collective intentionality, constitutive rules, and institutional output—and their institutional components.

An important element of a country's participation in the collective intentionality of the WTO is the domestic mechanism for achieving political support for trade openness within the participating countries, particularly the leading countries that provide the institution's stability. This is a political process that requires the domestic government to provide assurances to key constituencies in the population that government policies will provide safety net protection from disruptive external trade forces. Ruggie (1982) identified embedded liberalism as the domestic political compact that made possible trade liberalization among participants in the postwar GATT–WTO system. Its features included progressive tax and fiscal policies, domestic welfare measures to offset wage losses, and adjustment policies to facilitate labor flexibility and mobility in response to trade-related job displacement. In addition, the GATT–WTO system itself allowed for participating countries to use temporary "safety valve" trade restrictions in case of defined "unfair" trade practices and unexpected trade disruptions, including anti-dumping and countervailing duties and safeguards measures. GATT–WTO rules on domestic subsidies were also designed to allow domestic transfers to stabilize the economy without compromising trade-opening measures negotiated under the agreements. The goal behind the designation of domestic policy space and negotiated exceptions was to maintain the domestic political balance necessary to sustain support among sovereign countries for the "pooled sovereignty" of a cooperative system of reciprocal market opening, dispute settlement, and trade negotiations.

Over the years, this balance has often been precarious, especially with regard to politically sensitive traded items. Throughout the entire history of the GATT–WTO system, many countries have persisted in their efforts to impose subsidies, tariffs, and other forms of intervention favoring domestic output, an issue that continues to vex trade relations to this day. Some measures, such as import quotas and voluntary export restraints (VERs) violated the GATT non-discrimination rule. Subsequent WTO negotiations eliminated the use of VER-type restrictions, but trade conflict over sectoral issues has continued. In addition to trade conflicts among the richer countries over manufactured products, the growing number of developing country members in the WTO, and their growing influence in the negotiations, reflects an increasing divergence in sectoral trade interests within the organization. In particular, the participation of China in the world trading system has disrupted many industrial markets around the world, and its system of subsidies and treatment of intellectual property have been at odds with WTO rules.

Achieving a workable system of domestic political support for trade among an expanded membership, now at 164 countries, across a wide range of development

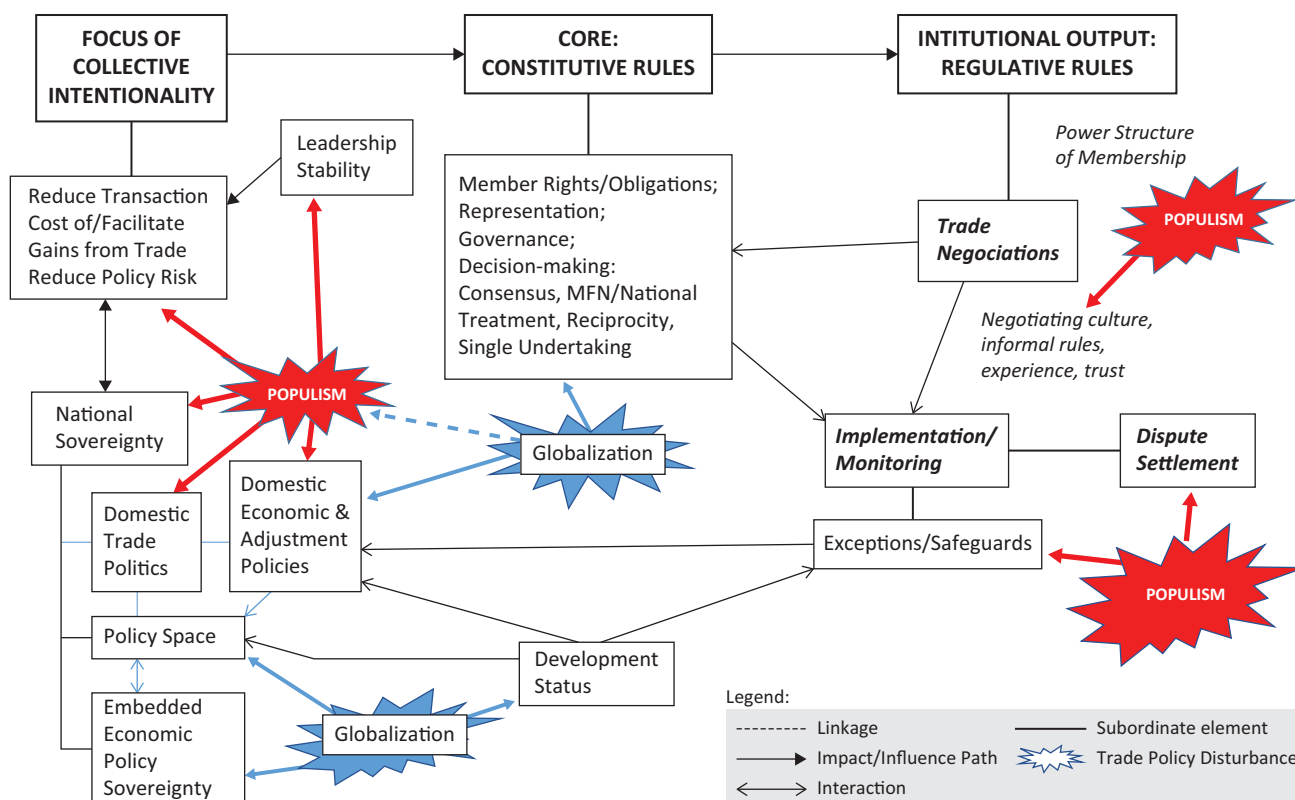


Figure 1. Institutional sketch of the GATT–WTO system and populist/globalization disruptions. Notes: Concept based on Searle (2005) and Jones (2015); MFN refers to the GATT/WTO Most-Favored Nation Clause.

status and governmental ability to stabilize domestic economies, has made the WTO consensus rule on comprehensive negotiations nearly impossible to maintain. Zelicovich (2022) notes that multilateralism in the WTO appears to be possible only to the extent that the membership shares a core of principles and values that supports collective intentionality, which becomes problematic when members' developmental and trade concerns diverge. In the early postwar years of the GATT, the consensus rule had benefitted from the more informal diplomacy that came with a small group of leading countries whose trade diplomats had similar educational backgrounds and perspectives. Trade negotiations were never quick, but the consensus ethos of the time made agreements easier to reach. The transition to the WTO introduced the "single understanding" (total package) requirement in multilateral trade negotiations, and more formal legalization, especially in the Dispute Settlement Understanding and its reverse consensus rule. These changes, along with the membership growth, displaced trade diplomacy in favor of legal precision in anticipation of possible disputes and made trade negotiations less conducive to consensus building. The collapse of the Doha Round in 2009 signaled the end of the era of postwar multilateral trade liberalization, and accelerating globalization compounded the growing divergence of trade interests among its members, increasing the likelihood of trade conflict. Figure 1 illustrates the globalization flashpoints that tend to disrupt the policy space

equilibrium. Rapid changes in comparative advantage have heavily burdened adjustment policies in countries experiencing job displacing imports, threatening domestic political support for trade openness. These problems are familiar features of the GATT–WTO system, but the complexity of increasing interdependence presents a particularly difficult challenge to the WTO as an institution, and a remedy to the problem will require improved domestic adjustment policies, as well as WTO reforms.

The populist trade policies of US President Donald Trump have presented an analytically distinct challenge to the global trading system. It is important in this regard to acknowledge that populism itself, a phenomenon that begins specifically in democratic electoral systems (see Eichengreen, 2018), is not linked inherently with protectionist trade policy. Mudde (2017, p. 29) defines populism as an "ideology that considers society to be ultimately separated into two homogenous and antagonistic groups: 'the pure people' and 'the corrupt elite,' and argues that politics should be an expression of the...general will of the people." Populism can take different forms along the political spectrum, but regarding trade, right-wing, culturally centered populism is the most consequential. Its operating principle is to stoke division in the domestic population between "the people" and the "elite" through a political strategy of affective polarization in the case of Trump's presidential campaign (Gidron et al., 2019). Trade, in this context, is most likely to become a populist issue to the extent

that populist leaders can link it to other grievances to mobilize the people's outrage against the elite. Trump succeeded in associating trade institutions with global elitism and import competition with immigration and cultural issues. Sociotropic voting behavior motivated many of his supporters not impacted directly by trade to connect job displacement through imports with larger social grievances and support for protectionism (see Colantone & Stanig, 2018). At his campaign rallies, Trump criticized US trade policy as a reflection of US immigration policy, comparing Chinese imports with the surge of Mexican immigrants he claimed were threatening US security and culture. In this connection, Hinojosa Ojeda and Telles (2021) present evidence that the surge of import competition from China, which had joined the WTO in 2001, caused a broader political shift towards populism reinforced by fears of cultural displacement by immigrants. Trump also exploited popular anxieties about globalization itself, framing national economic security in terms of a competition between the US and its trading partners over trade balances, with the US losing the battle (see Mutz, 2021). Trade thereby became a vector of populist anger.

3. The Populist Damage to the Trading System and US Economic Welfare

Even so, only a large and influential country such as the US is capable, on its own, of attacking the core institutional principles of the WTO system itself. In Figure 1, Trump's populist disruptions sought not only to contravene WTO open trade principles but to undermine their legitimacy, by substituting unilateral protectionist actions for adherence to the core rules of non-discrimination and tariff binding and the principle of multilateralism (Jones, 2021). Trump's populist trade policies began in earnest in 2018 as he invoked the National Security Clause of US trade law (corresponding to GATT article 21) to apply universal tariffs of 10% on imported aluminum and 25% on imported steel. This policy was designed by Trump's Trade Representative Robert Lighthizer, a prominent trade lawyer who was aware of the hitherto untested vulnerabilities of the WTO to unilateral assertions of US power. The original intention of GATT article 21 was to allow such tariffs only in wartime and cases of national security emergencies, but Trump declared "unemployment in the industry" (US Department of Commerce, 2018, p. 17) as the national security argument for it. The new US interpretation flew in the face of all previous applications of this measure, opening the door to protectionist trade actions by other WTO members for any self-declared "security" reason. It also implied that the GATT–WTO tariff binding principle could be negated unilaterally, potentially undoing all previously negotiated trade liberalization measures and the entire system of rules-based multilateral trade.

The second major populist blow to the WTO was the Trump-initiated trade war with China. The GATT had

been founded in large part to avoid the trade wars that contributed to the collapse of the world economy in the 1930s. The WTO agreement, therefore, committed its members to submit trade disputes on matters negotiated under WTO agreements to a dispute settlement procedure, thus preventing tit-for-tat tariff escalation. The US, in this regard, had agreed in principle to forgo its use of unilateral measures under US section 301 as a method of dealing with trade disputes. China, for its part, had been the subject of several legitimate complaints regarding intellectual property violations, as well as non-transparent subsidies, which would have justified WTO dispute settlement proceedings. Trump, on the other hand, seemed less interested in these specific rule violations and focused instead on the US trade deficit with China, which he regarded as the more important problem. He embarked on a policy of unilateral tariffs across a wide range of Chinese products, leading predictably to Chinese retaliation in kind, and then US counter-retaliation. These actions directly violated the tariff-binding rule, the GATT–WTO non-discrimination clause, and dispute settlement procedures. The 2020 Phase One Agreement, which established a truce in the trade war, also violated these provisions, locking both countries into trade quota agreements in further violation of WTO rules. The recrudescence of trade war policies, compounded by discriminatory managed trade agreements, further weakened the world trading system.

Economic welfare cost estimates of the national security tariffs and the US–China trade war on the US include the traditional negative static welfare effects but also the enhanced effects associated with their violation of WTO rules. Bown and Russ (2021) estimate that small increases in steel and aluminum industry employment were overwhelmed by job losses among industries that use these metals as inputs, with a net decrease in manufacturing employment of 75,000. Amiti et al. (2019) estimate the consumer welfare cost of all new tariffs under the Trump administration for 2018 alone to be \$23.8 billion, compounded by the fact that all China-US trade war tariffs and the protective effect of many of the steel and aluminum tariffs continued into the Biden administration. In addition, the degree of foreign retaliation against the national security tariffs was unusually high because most countries regarded them as an open violation of WTO rules (see Table 1). Foreign counter-measures beginning in 2018 disrupted US export and import trade by \$183 billion on an annual basis (Amiti et al., 2019). US diplomatic relations with major trading partners and military allies also suffered, as these tariffs treated them as national security risks. Amiti et al. (2021) update economic cost estimates of the US–China trade war by considering its broader macroeconomic and productivity effects, concluding that it has reduced US economic welfare by 4.9%, a much larger impact than all other estimates of the trade war tariffs based on static market effects alone. The systemic cost of the trade war

Table 1. Trump administration trade restrictions and foreign retaliation, 2018–2020.

Date	Initiated by	Against	Action	Products **
Jan. 22, 2018	US	Korea China	Section 201 (Safeguard)	Washing machines Solar Panels
Mar. 23	US	Most countries Most countries	Section 232 (Nat'l Security tariffs)	Steel Aluminum
Mar. 28	US	Korea	Section 232 VERs	Steel
Apr. 2	China	US	Retaliation	Steel/Aluminum tariffs
June 1	US	EU, Canada, Mexico	Extend Section 232	Steel/Aluminum
June 22	EU	US	Retaliation	Food, consumer goods
June 5–July 1	Canada, Mexico	US	Retaliation	Steel/Aluminum, Food, consumer goods
July 8	US China	China US	Section 301 trade war tariffs I Trade war tariffs I	Various goods Various goods, food
Aug. 10	US	Turkey	Doubled tariffs (for currency manipulation)	Steel/Aluminum
Aug. 6	Russia	US	Retaliation	Steel/Aluminum
Aug. 14	Turkey	US	Retaliation	Cars, alcohol, tobacco
Aug. 23	US	China	Trade war tariffs II	Various
Aug. 23	China	US	Trade war tariffs II	Various
Sept. 24	US	China	Trade war tariffs III	Various
Sept. 24	China	US	Trade war tariffs III	Various
Aug. 27	US	Mexico, Canada	* USMCA, VERs, wage provisions	Autos
May 10, 2019	US	China	Raise tariff III rates	Various
May 30	US	Mexico	Contingent tariff threat	Immigration policy
June 1	China	US	Retaliation: higher tariff III rates	Various
June 5	US	India	Withdraw GSP benefits	All Indian exports
June 15	India	US	Retaliation	Steel/Aluminum
Jan. 15, 2020	US, China		Phase One trade war truce	Various trade quotas
Jan. 24	US	Several countries	Section 232 extension	Steel/Aluminum derived products

Notes: * USMCA stands for United States-Mexico-Canada Agreement, successor to the North American Free Trade Agreement (NAFTA); ** steel/aluminum tariffs against Canada and Mexico were terminated in 2018, and tariffs against other countries were converted into tariff-rate quotas in 2021 by the Biden administration; China tariffs continue, as of late 2022. Source: Jones (2021).

must also include the US–China Phase One violation of the MFN clause, along with the fact that the negotiated targets for Chinese purchases of US goods had not been realized as of mid-2022 (Bown, 2022).

Trump's third blow to the WTO was his veto on the appointment of any new WTO Appellate Body judges, thereby blocking the completion of appeals to dispute panel decisions. This action threw the entire dispute settlement system into disarray, one of the three major functions of the organization. The Trump administra-

tion's view was that the US was under no obligation to comply with WTO rules or dispute panel decisions unless they served US goals. His trade policy sought to replace the WTO system with unilateral measures unrestrained by international agreements. White House aides reportedly deterred him from withdrawing completely from the WTO on more than one occasion (Woodward, 2018). Other examples of this defiance of the WTO included Trump's resurrection of VERs as a trade policy tool, a measure explicitly banned in the WTO Safeguards Agreement,

and his threat to impose unilateral tariffs on Mexico unless it changed its immigration policy to satisfy US demands. The systemic damage to the global economy from the totality of these disruptions was reflected in the resulting global uncertainty of trade policy, previously secured by the long-standing acceptance of WTO rules. One way to quantify the economic impact of this phenomenon is to observe related changes in economic activity, especially reduced new trade-related investments and initiatives. Caldara et al. (2019) estimate that the impact of trade-related uncertainty shocks during this period reduced global GDP by about 1%, as uncertainty spikes were linked specifically with key Trump tariff announcements (see Figure 2). Beyond these immediate disruptions, one must also consider how much the populist policies may have crippled global trade cooperation and liberalization in the long run, not only through trade policy actions but also through the broader diplomatic conflict they created among erstwhile friendly countries and allies. Table 2 summarizes the major disruptions of Trump's trade policy regarding WTO norms and rules.

4. Fixing the Populist Damage

Moving from a point of institutional disequilibrium in the global trading system to one of stability and renewed functionality will involve many challenges, not least because the current dysfunction has roots in several factors. Some of them have been familiar to WTO observers for several years, such as the lack of adequate and effective adjustment policies to deal with trade disruptions, thereby diminishing public support for trade liberalization. Other problems that need to be addressed include the increasing diversity of the WTO membership and the corresponding ineffectiveness of the consensus rule

and "single undertaking" strategies in multilateral trade negotiations. A related problem is the lack of flexibility in concluding smaller-scale WTO plurilateral agreements among willing WTO partners. Updated WTO rules and "safety-valve" provisions will also be required to forestall major protectionist actions. Finally, the "trust deficit" that has arisen from the populist fever and other polarizing global events needs to be addressed, a monumental task that will require new sources of global leadership. Progress in returning to rules-based trade will depend on progress in solving many of these constituent problems simultaneously.

4.1. Domestic Adjustment and Safeguards

The problem of adjusting to trade disruptions is not new but has become more difficult and complicated to manage. Early postwar Keynesian fiscal policies seemed adequate to handle most adjustment problems in the context of production, trade, and labor mobility patterns in the early decades of the GATT–WTO system. However, the speed of technological change, the increased mobility of capital, and the evolution of international supply chains have increased the pace of global change in comparative advantage and trade patterns, creating adjustment pressures and often stoking protectionist policy responses. Either directly or indirectly, these pressures have supported populist movements as well. If the embedded liberalism model can be renewed at all, it will take new and broader thinking to address the underlying impediments to trade adjustment. A comprehensive plan for overcoming populist influences on trade policy, along with the structural changes and challenges facing the global economy, must therefore include effective efforts by domestic governments to improve their

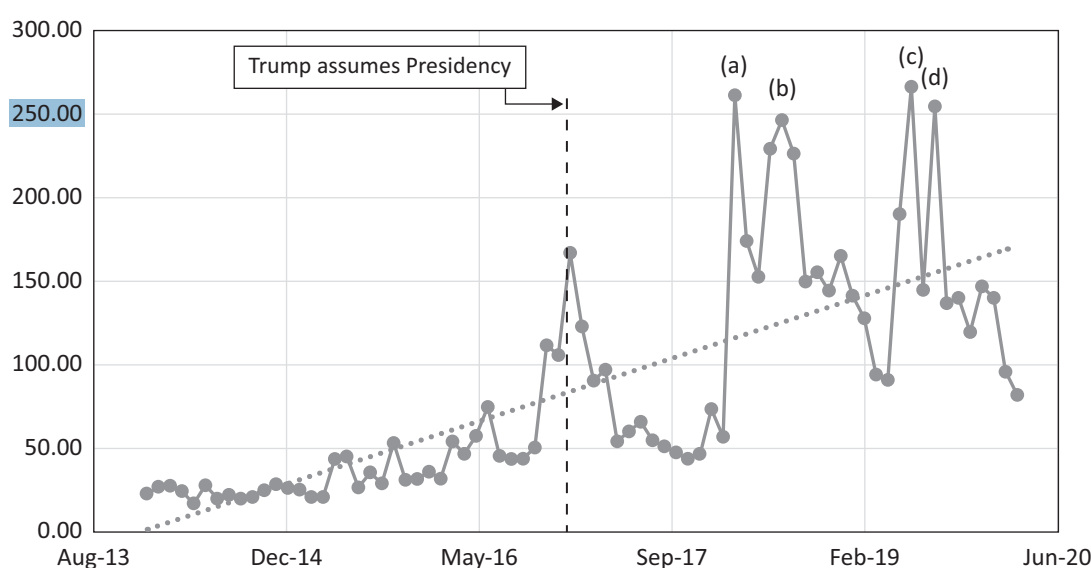


Figure 2. Trade policy uncertainty index, January 2014–March 2020. Notes: (a) US imposes section 232 global steel and aluminum tariffs, (b) US imposes first China tariffs, (c) US raises China tariff levels, (d) US expands China tariff coverage. Source: Caldara et al. (2019).

Table 2. Populist erosion of trade institutions under the Trump administration.

Date	Trade Provisions	Application	Institutional Impact
April 2018	US Sec. 232/GATT art. XXI (national security)	Universal steel (25%) aluminum (10%), and tariffs	Ambiguous GATT wording allowed US to introduce new criteria for potentially unlimited national security-based trade restrictions
March 2018 (ongoing trade war)	US Sec. 301; GATT arts. XXI, I.1 (MFN *), II.1(a), and (b) (tariff binding); DSU art. 23; DSU ** case DS-152	Unilateral retaliation against China trade practices. Retaliation and tariff escalation	US refusal to honor previous agreement restraining use of Sec. 301, opens door to trade war
2017–2020	WTO DSU ** (Annex 2), art. 17.2. AB *** Appointments	US blocks AB *** judge appointments	US action progressively limits the ability of AB *** to function and encourage countries to file WTO disputes. Quorum dissolves Dec. 11, 2019
April 2018	WTO Agreement on Safeguards, art. 11(b)	VER (steel from Rep. Korea, Brazil, Argentina)	US negotiations with Korea, Argentina, and Brazil on steel quotas defy WTO ban on voluntary restraint agreements
May 2019	US International Emergency Economic Powers Act of 1977 (applicability disputed)	Threat of unilateral discriminatory tariffs to coerce changes in Mexican immigration policy	Coercive protectionism. WTO: nullification and impairment of negotiated trade benefits; MFN * violation; NAFTA/USMCA violation
January 2020	GATT art. I, WTO DSU **	US–China Phase One Agreement: discriminatory quantitative import requirements	Trade quota agreement between the US and China contravening MFN *, dispute settlement rules

Notes: * MFN-Most-Favored Nation Clause, ** DSU-Dispute Settlement Understanding, *** AB-Appellate Body. Source: Jones (2021).

capacity to adjust to changing patterns of production and trade.

Effective trade adjustment policies comprise government actions that increase the efficiency of market adjustment, allowing workers displaced by trade to find stable new employment in other firms and industries. This proposition, to be sure, has become subject to increasingly critical skepticism. Kolben (2021) suggests that the traditional concept of compensation in trade policy may no longer be politically viable. Such policies need to identify channels of adjustment to facilitate the movement of labor, capital, and other resources from firms and industries where jobs are being displaced to those where economic activity can provide new jobs. In many cases, domestic economies have become too rigid to accomplish this goal in the face of ongoing and accelerating adjustment pressures. Factor mobility appears in many countries to be too low to absorb trade shocks (Akman et al., 2018). In addition, many workers disparage the notion of direct compensation as “hand-outs,” and reject long waits and re-training for new and unfamiliar

jobs in distant locations (Kolben, 2021). Government programs such as the US Trade Adjustment Assistance program have notably failed to fill the need for effective retraining and re-employment of trade-displaced workers (Kim & Pelc, 2021), and structural problems with taxation and program financing have allegedly starved governments of resources to tackle the problem (Hays, 2009). These problems often present policy-makers with political motivations to rely on protectionist measures rather than market adjustment mechanisms to respond to trade-driven job displacement.

These problems must be taken seriously, but it is important to consider the alternative. Protectionism tends to create new conflicts that offset the gains of avoiding adjustment. For example, a steel tariff that helps avoid layoffs for basic steel workers often results in other (and often more) layoffs in steel-using industries because of tariff-induced higher input prices, as noted earlier (Bown & Russ, 2021). A full consideration of this issue will require an empirical study of the net costs of specific protectionist policies compared to the

net costs of alternative market adjustment policies that support trade openness over time. Adjustment policies have indeed come up short, but trade restrictions may become politically entrenched and difficult to reverse. In this regard, WTO safeguard policies remain an instrument of adjustment that has not fulfilled its intended purpose: to provide temporary protection for industries subject to unexpected trade disruption to allow adjustment to take place. The problem in recent years has been that WTO safeguard rules have led to dispute challenges by exporting countries that typically have discouraged their use, an issue that will require negotiations on WTO reform.

Regarding domestic adjustment policies, there is plenty of room for improvement, including more responsive and flexible skill re-training and education, measures to increase labor mobility, and regulatory reforms to encourage entrepreneurship and new business development, such as antitrust measures (see Clausing, 2019). Broader policies can also help this process, including general market adjustment that provides incentives and assistance for workers displaced by both trade and non-trade disturbances (especially technology) to make the transition to new jobs (Kolben, 2021). Progressive tax policy can also contribute to trade adjustment and more equitable income distribution (Clausing, 2019). “Compensation,” in this regard, may be only one part of a new set of complementary policies that unclog market barriers to adjustment. Renewing the embedded liberalism model is not just a way to provide political support for trade liberalization, but also a necessary component of managing market upheavals in a modern economy. Adjustment policies will also need to be adapted to developing countries as they confront trade market disruptions.

4.2. WTO Reforms

Since the WTO became a battleground for conflict over populism and other sources of division, it will be necessary to pursue corrective institutional reforms. One stream of thought on this question focuses on fundamental structural changes to global economic governance. Building on a critical historical analysis of global institutional evolution, Mazower (2012) traces the evolution of modern global organizations such as the GATT and WTO, which in his analysis have tended to favor the interests of western countries. Organized on the principle of nation-state sovereignty, these institutions allowed global trade increasingly to serve corporate and financial interests, sacrificing broader global goals of development, macroeconomic stability, human rights, and environmental sustainability. Trade institutions, according to this view, became focused on trade liberalization to the exclusion of all other concerns. Addressing these shortcomings, Gallagher and Kozul-Wright (2022, pp. 95–102) propose a “new” Bretton Woods that would re-set the goals of the WTO, in conjunction with complementary

reforms in the IMF and World Bank, to serve equitable growth, development, and sustainability across the world. While individual countries would have to implement supporting and parallel reforms, the transformation of global economic institutions would proceed on the basis of multilateral negotiations.

The emphasis on multilateralism is shared by others seeking global institutional reforms favoring social and developmental goals (see Narlikar, 2019; Wilkinson, 2019). Such fundamental global institutional change would need to overcome economic nationalism inspired by right-wing populism, not to mention geopolitical and North-South divisions. The drawback to new institution building along the lines of Bretton Woods is that the opportunities for such major international summitry are rare. Mazower (2012) indicates in his historical overview that the birth of new international institutions typically occurs after major wars, whereby victorious countries can find common ground on establishing significant new relations beneficial to themselves. Given the possibility of future cataclysmic events such as major wars and deadlier pandemics than the Coronavirus, the world may yet encounter another such a moment, in which conflicts among major powers could be set aside to solve catastrophic global problems. In the meantime, Stephen and Parizek (2021) identify a process of deadlock, drift, and fragmentation in global trade governance, based on diverging preferences among new and existing trading powers. Zelicovich (2022) similarly identifies a divergence in values within the diverse WTO membership that diminishes the scope of multilateral cooperation. If the foundations for multilateral cooperation are weak, the likelihood of successful negotiations on large new multilateral institutions is slim.

An alternative, although generally less ambitious, stream of thought regarding WTO reform is to work within the existing WTO structure to achieve incremental reforms. This approach applies especially to technical issues and rule changes (Appleton & Macrory, 2022). The threshold for cooperation on smaller reforms would be easier to reach, although it may also be easier to negotiate difficult larger issues internally than as part of separate treaties. Many observers believe that the WTO needs an updated rulebook to guide dispute settlement, including a resolution of long-standing conflicts over pricing methodology in anti-dumping cases and the trade impact of non-transparent government subsidies (Wouters & Hegde, 2022). It also needs a way to modify the consensus rule, a problem made particularly difficult by the fact that any changes in this rule also require consensus. As suggested by the discussion of domestic adjustment measures, it will be necessary to re-strike the balance between policy space and trade liberalization. Thus, WTO safeguards methods, as noted in the context of domestic adjustment, may need to be modified, along with rules for government intervention regarding subsidies in regulation. There is also growing pressure for the WTO to accommodate environmental

initiatives in a manner that is consistent with rules-based open trade.

One promising provision in the existing WTO agreement is the possibility of new “critical mass” trade liberalization, which allows a smaller number of countries representing a sufficiently large amount of trade in a product category to agree to MFN trade liberalizing measures for the entire WTO membership without new obligations for non-signatory WTO members. Another, more complicated, possibility is Annex 4 plurilateral agreements among smaller numbers of WTO members on a conditional MFN basis. Members of a specific Annex 4 “club” would have both the benefits and obligations of the agreement, with no additional costs or benefits for non-signatories. The increased flexibility of negotiating smaller agreements regarding trade liberalization among like-minded countries would also allow subsequent accession of other countries. Annex 4 would allow smaller coalitions of countries to avoid populist confrontations or conflict with other WTO members and reach an agreement. Annex 4 would be particularly useful in pursuing agreements on new topics that do not meet the threshold of consensus support, such as electronic commerce, investment facilitation in developing countries, services regulation, environmental sustainability, and plastics pollution (see WTO, 2017). One Annex 4 proposal would establish WTO measures to help small firms overcome barriers to entering global trade markets and would also help to build a broader base of political support for the WTO and trade liberalization (Hoekman & Sabel, 2021). Unfortunately, the Annex 4 issue is yet another prisoner of the consensus rule, which allows any WTO member country to veto any such agreement, even as a non-signatory (Hoekman & Sabel, 2019).

4.3. Renouncing Populist Trade Policies

To restore confidence in any system of global trade cooperation, the specific measures taken by the Trump administration will need to give way to policies consistent with WTO rules and norms to repair the damage they caused (see Goldstein, 2021). A sort of protectionist inertia propelled these measures into the Biden administration, partly the result of a reluctance of the new US president to give up inherited bargaining chips in trade relations. Yet President Biden has clung to the domestic political advantages of the new protectionist tools of his predecessor and has been slow to show a full return to rules-based trade. When it comes to major WTO trade negotiations, the “trust deficit” that inhibits major trade liberalization will persist until these measures are renounced. At the same time, there are signs that the WTO may be recovering at least part of its negotiating function. The Twelfth Ministerial Conference, long delayed by the Covid-19 pandemic, was finally convened in June 2022 and led to a modest, but welcome, agreement on fisheries subsidies, along with new measures increasing access to pandemic-related intellectual

property, and a pointed statement endorsing the WTO rules-based system and continued commitments to a broad set of ongoing programs (WTO, 2022). These developments provided evidence that the populist disruption of the WTO negotiating function was not complete, and that WTO members could still find a way to pursue the collective intentionality of rules-based trade liberalization, at least on more narrowly defined issues that facilitate productive bargaining.

For broader and more consequential agreements, the path forward for establishing a post-populist trading system will require newly energized leadership in the global trading system. The US, as the erstwhile champion of rules-based trade, will need to serve as an essential and committed player, but in addition, there must be a renewed coalition of pro-trade countries that agree to negotiate new WTO rules and reforms. The EU and other OECD countries will be essential in this effort, but the developing countries must also play a role if the WTO is to continue to be global in scope. China, which has a major stake in an open trading system, will need to participate in a new bargain to re-establish the WTO as a repository of rules and a forum for multilateral trade liberalization.

4.4. A Possible Alternative

The foregoing set of conditions for establishing a post-populist and revitalized system of trade liberalization is based on the modernization of embedded liberalism and the repair of anti-globalization and populist damage done to existing GATT–WTO institutions. The problem with pursuing this solution lies in the fact that major reforms within existing global institutions must overcome internal barriers to change that had previously served to lock in commitments and create stability, such as the consensus rule. Because the underlying conditions that facilitated the original institutional agreement change—the pattern of country leadership, the scope of negotiating issues, and technological and geopolitical conditions—the commitment among its participants to the original terms of collective intentionality may no longer be sufficient to make the needed repairs. Specifically, such a weakened institution may have difficulty in mustering the needed domestic political support among countries that would need to play a leadership role in the process. For this reason, the plan to revitalize the WTO with incremental reforms will be contingent on the political support and global leadership that can be brought to bear on the project.

Notwithstanding predictions of fragmentation in trade governance into regional parallel institutions (Stephen & Parizek, 2021), such regional trade agreements may provide a pathway back to Geneva and a rejuvenated WTO. WTO member countries have already moved their diplomatic resources increasingly into regional trade agreements as the main channel for trade liberalization, having become impatient with

the WTO's inability to conclude major new multilateral agreements. Returning to a multilateral outcome will depend on the same sort of leadership needed to renew embedded liberalism and WTO reforms, but within the framework of regional trade agreements. Larger countries can be expected to favor regional trade agreements because their economic leverage allows them to negotiate them relatively quickly, with agendas customized for their economic interests. Wei and Frankel (1996) develop an economic model in which countries initially fearful of a global trade agreement will tend to be more favorable to an intermediate stage of regional agreements. This strategy allows political support to grow for openness to global trade and would also support domestic reforms for a new embedded liberalism. This "stepping-stone" approach holds that exporting lobbies in general will benefit from regional trade, subsequently generating broader export lobby support for a global agreement, while diminishing the influence of import-competing protectionism. In addition, regional negotiating dynamics may allow new issues to be concluded among smaller groups of like-minded countries. If open to new member accession, expanded acceptance could grow incrementally rather than being reliant on the risk of not achieving immediate global consensus. It may therefore be easier for countries to overcome the "trust deficit" in trade relations through regional trade agreements than through long and contentious WTO negotiations. Yet success in this approach will require a general restoration of confidence in cooperative, good-faith negotiations.

Regional agreements are still inferior economically to global agreements in that they limit the gains from trade itself, as well as the transaction cost savings of a single set of global rules. The greatest danger of this approach is that it could lead to a balkanization of trade into insular trading blocs dominated by competing large countries with hub-and-spoke networks. Unabated populism and geopolitical tensions would make this outcome more likely. The regional pathway to multilateralism will therefore have to navigate the "steppingstones" carefully. The pattern of openness to new members, along with leadership among large trading countries, will be crucial in this regard. For example, whereas the USMCA (formerly NAFTA), is currently closed to new members and the EU's door is open only to neighboring countries in the region, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and Regional Comprehensive Economic Partnership (RCEP) appear to be open to new membership on a much wider geographical basis. The process will also depend on a sort of jealousy that comes from competitive trade liberalization, based on the desire of trading countries not to be left out of new market access agreements. The momentum of expanding or merged agreements may then lead to the adoption of common rules, thereby "multilateralizing regionalism" (see Baldwin & Low, 2008; Capling & Ravenhill, 2011). At the same time, the joint negotiating power of its members will grow, making the acces-

sion of large trading partners—such as China, the US, and the EU—more compelling. A check on this process is that many smaller economies, including developing and emerging market countries, will need to accede based on mutually compatible rules, but they, too, would also have a strong incentive to join an expanding trade network. At the same time, broader negotiations would have to adjust to the diverse interests of larger memberships and new trade issues. Yet existing WTO rules and dispute settlement procedures could act as the foundation for new global trade rules created by this incremental process.

5. Conclusion

Donald Trump's trade policies represented an unprecedented challenge to the WTO by its largest and most influential member: A defiant rebuke of its core principle (non-discrimination), rules (on tariff binding, negotiated quotas), and practices (multilateralism, dispute resolution). While the underlying problems of the WTO can be traced to globalization and other forces, the systemic damage due to these policies exposes the need to address the accumulated problems of a weakened institution. Overcoming the current institutional rupture in the global trading system will require a host of measures to restore the conditions for negotiating global trade liberalization. Building domestic components of a new embedded liberalism in key countries, especially the US, will require new government programs and public support in the face of domestic skepticism about trade. Getting WTO member countries to come to a consensus on updating their rulebook and making their decision-making more flexible and adaptive appears to be equally challenging. Finally, global leadership will be needed to motivate the world to re-embrace some version of the system's traditional model of rules-based governance and trust-based goodwill. Working within the framework of existing global institutions to make progress on these changes appears to be the best strategy for reform. In the absence of progress at the WTO in Geneva, the alternative of a "back-door" return to multilateralism through the "steppingstones" of regional trade agreements offers the possibility of a more gradual process that could avoid the pitfalls of an unwieldy WTO negotiation. However, even within the regional framework, leadership and commitment to broader multilateralism will eventually be necessary, building trust, cooperation, and trade expansion incrementally, while reducing the severity of national sovereignty concerns. In the meantime, domestic policies that promote economic growth and reduce political and social tensions, combined with global reductions in geopolitical tensions, may be necessary intermediate steps to restore a diplomatic environment for international trade cooperation.

A hopeful sign is that, throughout these disruptions, the WTO has continued to function, having completed its Ministerial Conference in June 2022 and announcing

a fisheries agreement and a number of other decisions and declarations (WTO, 2022). Even without a fully functioning dispute settlement mechanism and with no major multilateral negotiations in progress, member countries' delegations and staff maintain the WTO rules and day-to-day work on the committees in preparation for future negotiations and agreements.

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Conflict of Interests

The author declares no conflict of interests.

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Article

Class Struggle and International Economic Institutions: The Origins of the GATT and “Embedded Liberalism”

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Abstract

If one wants to get a grasp on the international institutional arrangement of what J. G. Ruggie called “embedded liberalism,” which included the General Agreement on Tariffs and Trade (GATT), one must first carefully examine the conditions that made the regime of accumulation called Fordism possible. More precisely, it is essential to grasp how the particular evolution of class struggle in the US strongly influenced the organization of capitalism in this country, and subsequently the international institutions at the core of the embedded liberalism. Simply put, the thesis defended in this article is that the evolution of class struggle in the US in the 1930s and the following decades has been the main influence in the shaping of Fordism and an undervalued factor in the creation of the GATT. The GATT, in other words, is an agreement that strongly corresponds to the necessity of the management of the class struggle associated with Fordism.

Keywords

class struggle; Fordism; GATT; regime of accumulation

Issue

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1. Theoretical Premises

The main theoretical premise of this article is that international economic institutions must be conceived as an important part of the “mode of regulation” of the “regime of accumulation” that the dominant social class of the dominant state wants to defend at the national level and reproduce at the international level (for a fuller description see Bachand, 2021). More specifically, in the capitalist mode of production, their main function is to help the dominant social class achieve rates of profit high enough to ensure such accumulation. Let us develop these arguments a bit more.

First, a capitalist mode of production can give rise to many specific kinds of social configurations that organize the accumulation of capital. Here, I will call these configurations a “regime of accumulation,” even if I define this concept slightly differently than the *école de la régulation* does (Aglietta, 1997; Boyer, 2002, 2015). Different regimes of accumulation distinguish themselves by the way they organize the relations between

capital and labor in the process of production, how they divide wealth between them, how competition is organized nationally and internationally, by the relative importance of industrial and financial capital, and the relations between them, and so on. Yet, some coherence remains necessary between a regime of accumulation and the different formal and informal institutions of society (its “mode of regulation”). In this relation, the institutions have to secure the functioning and the reproduction of the regime of accumulation, or, in other words, help it to overcome its inherent contradictions. This is true for national institutions, but also international ones. Consequently, when one wants to understand a particular set of national or international economic institutions, an accurate understanding of the national regime of accumulation becomes a necessary starting point.

International institutional arrangements do not come to life in an environment where countries can participate on an equal footing. Rather, they are the result of the work of the dominant state(s) that strongly exercise its/their influence to promote its/their interests.

Since these institutions' function is to contribute to the smooth working of a regime of accumulation, it is the regime of accumulation that is proper to the dominant state(s) that will serve as a model for the institutional arrangement (Cox, 1983, 1987; Gill, 2002; Gill & Cutler, 2015).

Saying that international institutions must contribute to the smooth work of the regime of accumulation of the dominant state(s) essentially means that they must help maintain rates of profit high enough to allow the continuity of the accumulation of capital. Accordingly, as long as rates of profit are high enough to sustain an acceptable rate of accumulation of capital, the mode of regulation and the institutional arrangement (including the international economic institutions) are fulfilling their role. Otherwise, the regime of accumulation enters into crisis, bringing the mode of regulation with it in its fall. In other words, the primary explanation for the crisis of an institutional arrangement should be found in the bad functioning of the regime of accumulation sustained by the arrangement (Bachand, 2020).

This explanation leads us to the historical framework that supports this article. A specific regime of accumulation was progressively put in place in the US by the middle of the 1930s with the New Deal and was consolidated in the two decades following the war. A central aspect that influenced the establishment and the development of that regime of accumulation is the state and the evolution of the class struggle between capital and labor. For lack of a better term to qualify this particular form of capitalism, despite different definitions given to that concept and debates surrounding its characteristics (Watson, 2019) and while I recognize its imperfections, I will call this regime of accumulation "Fordism," in direct line with the early works of Michel Aglietta, among others (Aglietta, 1997; Panitch & Gindin, 2012, pp. 82–87). As will become clearer in Section 2, this concept is a singular regime of accumulation that pushed further the logic of fragmentation of work implicit to Taylorism, allowed a greater share of wealth between capital and labor, and counted for a larger part on internal consumption for the accumulation of capital (Boyer & Saillard, 2002, pp. 561–562).

At the national level, Fordism needed some legal support like the Wagner Act (officially the National Labor Relations Act), adopted in 1935. It also needed some international institutions, the most important being the IMF and the World Bank, both created in 1944, and the General Agreement on Tariffs and Trade (GATT), which was created in 1947 and entered into force in 1948, the latter will be the focus of this article. This institutional arrangement is at the basis of what J. G. Ruggie characterizes as "embedded liberalism" (Ruggie, 1982). If one wants to get a grasp on this international institutional arrangement that sought to re-embed economy in society, one must first carefully examine the conditions that made Fordism possible. More precisely, it is essential to grasp how the particular evolution of class struggle in

the US strongly influenced the organization of capitalism in this country or, in other words, how it heavily contributed to shape this new regime of accumulation. Since regimes of accumulation also need, as we have stated, some institutions to secure their good functioning and that some of these institutions be of an international nature, one can consequently presume that class struggle also affects the constitution of these international institutions. The thesis defended in this article is in direct line with this idea. Simply put, the evolution of class struggle in the US in the 1930s and the following decades has been the main influence in the shaping of Fordism and an undervalued factor in the creation of the GATT. The GATT, in other words, is an agreement that strongly corresponds to the necessity of the management of the class struggle associated with Fordism.

2. The Fordist Regime of Accumulation

The Fordist regime of accumulation was a response to two characteristics of the 1930s US political and economic environment. First, it was an attempt to pacify the harsh conflict between capital and labor (Section 2.1). Second, it also contributed to the creation of an (internal) market for US production (Section 2.2). For capitalists, if we only consider the rate of profit they could reap, the results were extremely positive (Section 2.3), as these rates were by far higher than in any other period following World War II.

2.1. Fordism and Class Struggle

The establishment of social peace between capital and labor was at the core of New Dealers' concerns. On one hand, poor working conditions and miserable wages provoked an intensification and a radicalization of the labor struggles following the end of World War I. On the other, harsh repression hit the labor movement and other social movements (Zinn, 2010, Chapters 14–15). This repression came with the implementation of Taylorism as a model of economic organization that established an extreme segmentation of labor. The crash of 1929 worsened the situation as unemployment strongly contributed to the capital's capacity to force the workers to accept even worse wages and working conditions.

These conditions strongly influenced the claims of the workers and specifically the rank-and-file activists that were generally more radical than the unions' elected leaders. Even if wages and union recognition took a large place in these claims, workers also wanted to have a voice in the organization of the production per se. Indeed, "in a majority of cases the fundamental grievance was the petty despotism of the workplace incarnated in capricious power of the foremen and the inhuman pressures of mechanized production lines" (Davis, 1986, p. 55). Other important claims concerned arbitrary procedures for promotion, hiring, and firing, and the implementation of a seniority system became a common

claim. In other words, the organization of the production, or what employers called their “management right,” became an important point of dispute between workers and employers. Finally, a substantial rise in the number of strikes, including sit-down, wildcat, and solidarity strikes, some of them successful, enhanced the prestige of unions, favoring their membership (Gordon et al., 1982, pp. 176–180).

The New Deal launched in 1933 by President Roosevelt inaugurated some changes. According to Zinn (2010, p. 392), Roosevelt’s program had two goals, that is to help capitalism overcome the crisis and appease the anger of different social movements that were emerging all around the country. One of the first legal instruments adopted was the Wagner Act of 1935 which would become central to achieving these goals. The Wagner Act provided some protection to labor unions and helped them attack anti-union practices. It also established the National Labor Relations Board to rule on labor disputes (Walker, 2020, p. 17).

The Wagner Act and the creation of a new and more radical labor union organization—the Congress of Industrial Organizations (CIO; Schlesinger, 1958, pp. 407–419)—improved for a while the balance of power in favor of the workers. Union recognition was central to the workers’ grievance, but once again, control of the factories took a huge place in the struggle. The concept of “industrial democracy” was regularly invoked and while referring to a wide range of claims, some radical uses of this concept referred to the idea of the self-determination of the workers in their working lives and, more specifically, their participation in the decisions of the company (Brandeis, 1934, p. 7; Derber, 1970; Rupert, 1995, p. 139).

This context allowed a significant improvement in working conditions for a time (Gordon et al., 1982, pp. 172–177; Montgomery, 1979, pp. 131–134), but the pendulum began to swing back when the Japanese attacked Pearl Harbor in December 1941. This new context pushed the labor organizations’ elected leaders to agree to a no-strike pledge with the Roosevelt administration, an agreement that was nevertheless regularly violated by the rank-and-file and that widened the separation between the latter and their elected officials that had already begun to appear by 1938–1939 (Davis, 1986, pp. 183–184).

The situation was worsened by the creation of the National War Labor Board (Atleson, 1995, pp. 46–48) which was mandated with arbitrating all labor conflicts and ensuring that labor-capital disputes would not slow down the war economy. The Board was given a very circumscribed field of jurisdiction (essentially limited to issues related to collective labor contracts and “day-to-day” concerns of workers) and refused to rule on anything that was more or less related to the management of factories (Atleson, 1995, pp. 48–58). The result was a certain “de-radicalization” of the labor demands or, at least, of those coming from the top leaders of

the organizations that were more and more inclined to frame their position around claims that were within the Board’s jurisdiction.

When the Republicans took control of Congress in 1946, this anti-labor reaction continued with the employers wanting to reestablish the “management right” that they had partially lost to a dynamic rank-and-file syndicalism. Indeed, many base activists, politically more radical than their elected leaders, were using what could be called guerilla tactics (that included solidarity and “wildcat” strikes, secondary boycott as well as sabotage against installations) to slow down, up to a certain point, the dictatorial management of factories (Gordon et al., 1982, pp. 176–180). For capitalists, it was then becoming more and more important to de-radicalize this movement. Their strategy was to ensure the collaboration, if not the compromise, of the union officials; and to make sure that the latter would become not only the “official,” but also the “genuine” leaders of the labor movement in place of the rank-and-file activists. They chose, in other words, to exterminate rank-and-file radicalism.

By this time, the Wagner Act had already begun to weaken it in a certain sense (Klare, 1977). Indeed, the National Labor Relations Board had contributed to the “formalization” and the “policing” of the capital-labor conflict. The Taft-Hartley Act was another important piece that confirmed the tendency to undermine rank-and-file syndicalism. This legislation, adopted in 1947:

Banned mass picketing, secondary boycotts, and sympathy strikes, all associated with tactics of the social movement of industrial unionism identified with the CIO. Elected union officials were required to sign affidavits that they were not members of the Communist Party or lose the use of the National Labor Relations Board. Unions were made legally liable for any strikes by their members in violation of written contracts and the president was given the right to seek injunctions against strikes he deemed against national interests. (Milton, 1982, p. 159; see also Davis, 1986)

From then on, labor union officials not only began to adhere to anti-communist rhetoric but also became, up to a point, the “managers” of collective labor agreements with the role of ensuring workers’ discipline and preventing illegal strikes. They became, in Rupert’s words, the workers’ “brokers of consent” (Rupert, 1995, p. 87).

Another aspect that proved to be central to Fordism consisted in a relatively substantial improvement of the conditions of the workers (or, at least, of some of them: the unionized ones). That change can be illustrated by the famous Treaty of Detroit. Concluded in 1950 between United Auto Workers and General Motors and quickly reproduced with Ford and Chrysler (and then other industrial sectors), this collective labor agreement allowed relatively generous wages to the workers (and an advantageous “cost-of-living adjustment”), but also other economic advantages like the participation of

the enterprises to wealth insurances and the retirement pensions of the employees (Davis, 1986, pp. 111–112; Lichtenstein, 1989, pp. 141–142). That kind of labor agreement enhanced the consent of the majority of the workers and diverted their attention from radical demands—notably those that challenged the capital’s right of management and their property right per se. In other words, it gave the majority of the workers the impression that capitalism could work well for them.

The Wagner Act, the Taft-Hartley Act, as well as the labor agreement scheme exemplified by the Treaty of Detroit, became central to the specific configuration of capital-labor relations under Fordism that was based on two ideas. First, a legal—and ideological—arrangement that ensured the formalization of labor relations and favored a certain de-radicalization of the labor organizations. This arrangement subsequently rendered socialist claims or any political argument based on class struggles extremely difficult, if not impossible to formulate (Bowles & Gintis, 1982, pp. 65–66). Second, a significant improvement in the workers’ wages and general conditions helped to legitimize capitalism and, consequently, marginalize radical claims. Both of these aspects participated in a change of perspective on the role that labor unions should play. They contributed to isolate rank-and-file militants and de-radicalize labor unions, pushing them towards “explicit cooperation with corporate labor-management strategies” (Gordon et al., 1982, p. 188) and into a corporatist and mostly economic logic (Lichtenstein, 2003). Labor unions were not there to contest capitalism in itself anymore, but rather to defend the rights embedded in the collective labor contracts. Obviously, they were legally recognized and enterprises then had to deal with them and workers continued to strike. Nevertheless, unions were under the absolute obligation to “respect the property rights of their employers, uphold the sanctity of contracts into which they enter, and assume the corresponding responsibility for controlling their memberships and enforcing compliance with contractual commitments” (Rupert, 1995, p. 92). In other words, from the capitalist point of view, this consideration, even though it came with some financial costs notably associated with raised wages, ensured that the workers would not constitute a threat to the capital accumulation logic (Pizzolato, 2013).

2.2. US Workers as Consumers

During the war, the US industry became the first producer of military as well as civil products in the world. When the conflict ended, US capitalists had accumulated a colossal amount of capital that they could use to make gigantic new investments that helped make an important boost in productivity. Obviously, this came with the need of finding (or creating) new markets. At the international level, the negative effects of the war doubled with the protectionist spirit of the time (more on this later), making the exportation of the surplus of commodities pro-

duced in the US difficult. According to Panitch and Gindin, “American reconstruction in the postwar years was therefore bound to be heavily dependent on private consumer spending. Rising working-class incomes were the main mechanism through which this demand could materialize” (Panitch & Gindin, 2012, p. 82). Talking about the role of workers’ consumption in the new regime of accumulation, Aglietta explains that Fordism constituted “a new stage of regulation of capitalism, the intensive regime of accumulation.” One of the main characteristics of this kind of regime (in opposition to the extensive regime of accumulation) is that production relations are intrinsically linked to consumption relations. Fordism, in other words, was based on the principle of “an articulation of the process of production and of the mode of consumption” (Aglietta, 1997, pp. 137–138). The increase of wages not only contributed to putting in place relatively manageable relations between capital and labor (or, at least, to a less aggressive struggle between them than would have been the case otherwise): it also created an important market for US production and then became essential for the reproduction of capitalism in the country.

That is not to say that exports had no importance. For instance, Irwin estimates that they were responsible for 1.33 and 1.97 million out of a total of 58 million jobs in 1946 and 1947 (Irwin, 2017a, p. 493). Now, a historic comparison shows that between 1950–1966, the yearly part of exported goods and services in the US GNP was always between 3.9%–5.1%, and generally below 4.5%. After that period, it rose substantially to reach 9.8% in 1980 and has almost always been over 10% since 1995—the four-year span between 2001–2004 being the only exception. According to data from the Federal Reserve Bank of St-Louis (2022), it has been regularly around 12 or 13% since 2010. That is three times the proportion of the 1945–1966 period.

In short, what characterized this period is that “the organized American working class would now become the backbone of a high-wage and high-consumption proletariat, but its unions were no longer prepared to challenge capital’s right to manage production, let alone question the ‘capitalist system’ ” (Panitch & Gindin, 2012, p. 84). This particular configuration of the class struggle between capital and labor became, as will be seen, a core element at the origin of the GATT.

2.3. Economic Results of Fordism

The results, in terms of rates of profit, were exceptional (see Table 1). Not only did this period produce results that have been unbeaten since the end of World War II, but even its down years (1958–1961) gave profits that were higher than any period since that time. Actually, during those two decades, only three years gave a rate of profit below 10% (1958, 1960, and 1961). In comparison, since 1970, no more than three years produced a rate (and only slightly) higher than 10% (1978 with a 10.03%, 2006 with a 10.49%, and 2021 with a 10.31% rate of profit).

Table 1. Rate of profit, before tax, non-financial corporate business.

1945	13.91%
1946	14.29%
1947	15.67%
1948	15.66%
1949	12.06%
1950	16.46%
1951	15.46%
1952	12.79%
1953	12.66%
1954	11.32%
1955	13.36%
1956	12.11%
1957	10.75%
1958	9.02%
1959	10.94%
1960	9.93%
1961	9.68%
1962	10.38%
1963	11.16%
1964	11.85%
1965	13.16%
1966	13.14%
Average 1967–1982	8.99%
Average 1983–1997	5.93%
Average 1998–2013	7.26%
Average 2014–2020	7.64%

Source: Bureau of Economic Analysis (2022).

This performance largely—but not only—rested on the consumption power of the working class that relied on wages and other economic advantages conceded by the capitalist class. Now, two things must be underlined. First, only exceptional productivity allowed the capitalists to grant such wages to their employees and still make profits. This productivity, as we have seen, was due to the large investments made after the war. Second, this consumption power was not enough to contribute to the success of Fordism. Indeed, this power had to be used to buy US and not imported products. In most economic sectors, US enterprises' productivity was sufficient to guarantee the competitiveness needed to ensure this condition. Still, some sectoral or temporary cyclical exceptions would still require protectionist interventions. In other words, Fordism counted on three conditions: high productivity, significant consumption power by the working class, and relative protection of national markets against foreign products (Davis, 1986, p. 118). These conditions were an important part of the context of the creation of the GATT, as will be seen in Section 5.

3. International Economic Context

The international context undeniably played a huge role in the background of the GATT and some factors must be underlined here. First, shortly after the 1929 crash,

Congress adopted the Smoot-Hawley Act that entered into force in 1930 and increased tariffs on imports from 40% in 1929 to some 53% in 1932 (Irwin, 2017b, pp. 107–108). This increase had a significant impact on imports on US territory but it also convinced other countries to adopt the same kind of strategy, having consequently detrimental effects on US exports. Notably, it pushed the UK to adopt the imperial preference system that gave preferential treatment to products traded between Commonwealth countries (Irwin, 2017b, pp. 176–182), the results being a decrease of 74,4% and 66% of US exports to Canada and the UK between 1929–1932 (Eckes, 1995, p. 126).

Roosevelt and his secretary of state, Cordell Hull, nevertheless tried to reverse the situation. They convinced Congress to adopt, in 1934, the Reciprocal Trade Agreement Act (RTAA) that gave the president authority, for a period of three years, to conclude trade agreements and to decrease tariffs up to 50% (Letiche, 1948). Having been renewed multiple times in the following years, it ended up constituting the legal justification for 33 agreements with 29 countries between 1934–1948 (United States Tariff Commission, 1959, pp. 13–16).

Now, the objective of the US executive was not to enforce “free trade” as much as to establish “freer trade.” Concretely, it was first to transform non-tariff barriers into tariffs, and then to lower these tariffs, but only insofar as the national economy was not injured by trade liberalization. More important, these tariffs were to be applied on a non-discriminatory basis, that is to say, to subordinate them to the most-favored-nation treatment (Kock, 1969, p. 7). For example, the president could only negotiate under the condition that the negotiations to lower tariffs were to be organized on a “product-by-product” basis where it is easier to protect products and producers susceptible to being hurt by foreign imports. Congress also insisted on an “escape clause” being added to the agreements so that specific national producers be protected if economic agreements injured them. Globally, the agreements failed to have a substantial effect on foreign access to the US market and global trade in general as the US tariffs were still, in 1939, only slightly lower than they were before the adoption of the Smoot-Hawley Act (Irwin, 2017a, pp. 433–443).

4. Fordism and the GATT

In this section, I will argue that the contextual elements underlined in Sections 2 and 3 formed the background that made possible the debates surrounding the redaction of the GATT, and that made acceptable some provisions promoted by other countries and against the initial will of the US negotiators. The argument is that the GATT represented the kind of trade agreement needed for the reproduction of Fordism in the US and its expansion at the international level. Since the struggle between capital and labor is probably the core aspect at the origin of the GATT, this amounts to saying that the state and the

evolution of the class struggle in the US was a central element in the creation of the General Agreement.

4.1. The Main Goals of the US Administration

The negotiation of the postwar economic order has been marked by conflictual positions between the two main participants, that is the US and the UK. First, the British were putting full employment at the top of their priorities, and keeping the possibility to intervene on the market was seen as a priority. Even some British industrials, skeptical about their capacity to compete with their American counterparts, were opposed to the liberalization proposed by the US (Gardner, 1956, pp. 30–31). They were also strongly opposed to the elimination of the imperial preference system, which was one of the main goals of the US delegation (Curzon & Curzon, 1976, p. 144).

On the US side, strong internal consumption was not considered enough to absorb the national production and it was felt necessary to export part of it and to ensure, at least, a positive trade balance (Kock, 1969, p. 13). It was also necessary to guarantee that the high wages would continue to be used to buy the US and not foreign production. Consequently, the objective was only to provoke a certain drop in tariffs on a non-discriminatory basis (Curzon, 1966, p. 7; Gardner, 1956, p. 13). Quoting an interim report of the Special Committee on Relaxation of Trade Barriers produced in 1943 that expressed “the prevailing view among American officials,” Douglas Irwin summarizes the concrete objectives during the negotiating process:

[The report] proposed “a substantial reduction of protective tariffs in all countries”; the abolition of import quotas, which “are among the devices most destructive of international trade and least conformable to a system of private enterprise”; “elimination of all forms of discriminatory treatment in international trade,” particularly Imperial preferences; the establishment of principles for state trading; the elimination of export subsidies; and the creation of an international commercial policy organization as “essential to the successful operation of the proposed convention”. (Irwin, 2017a, p. 462)

Hence, the US wanted to establish a sort of level playing field, accepting the legitimacy of the protection of internal markets, but mainly in the form of tariffs founded on a non-discriminatory basis. It was also to eliminate “unfair trade” (dumping, subsidies, anticompetitive, state trading, etc.). In other words, even if the US and the UK disagreed on specific aspects of the postwar economic order (notably the elimination of the Imperial preference system), both “shared a common view of the legitimacy of state intervention to secure domestic stability” (Lang, 2011, p. 195). This shared mindset concretized itself in many ways, two of them being the lowering of

tariffs (Section 4.2) and the insertion of different exception clauses in the GATT (Section 4.3).

4.2. Tariffs Negotiations

As seen before, the mandate of the US negotiators was determined by the RTAA, which had been extended for three years in 1945. This renewed RTAA gave the authority to the State Department to reduce tariffs by up to 50% from their 1945 level on a product-by-product basis (Irwin, 2017a, pp. 463–471). Yet, the result of the negotiations, if we only consider the US tariffs, was not extraordinary. Bown and Irwin, for instance, calculated that the average duty on dutiable products (that is, excluding those entering free of duty) was still at 20,1% at the end of the negotiations (Bown & Irwin, 2015, p. 8). Moreover, Irwin opines that the fall of the tariffs was more a result of the rise of the price of imported products than the negotiations—a substantial amount of tariffs was not ad valorem but specific (Irwin, 2017a, pp. 484–485). If we now put in the balance that “it is generally acknowledged that the United States made the deepest tariffs cuts” among the contracting parties (Irwin et al., 2009, pp. 118–119), we understand that the contracting parties of the GATT, including the US, kept important latitude to protect internal markets through import duties.

Furthermore, the goal of bringing down the imperial preference system was far from being achieved during the negotiations since all the US negotiators could achieve was a promise from their British counterparts not to widen the margin between the preference and the bound tariffs (Gardner, 1956, pp. 348–361).

4.3. The Escape Clause and Other Exceptions

The GATT also included different provisions that allowed the contracting parties to impose different duties, notwithstanding the engagements they took to bind tariffs. The first one was the escape clause that allowed contracting parties to take some temporary actions such as the withdrawal or modification of concessions (that is, bounded tariffs) in certain circumstances (GATT, 1947, art. XIX). This provision “provid[ed] a means by which governments [could] literally ‘escape’ GATT tariff concessions and thereby protect their interests from imports that [were] likely to injure domestic industries” (Derrick, 1998, p. 348; on the escape clause in general, see Eckes, 1995, pp. 219–256). This escape clause and this is important, was *not* a compromise accepted by the US. Rather, it was under their insistence that it was inserted into the GATT (Jackson, 1969, p. 553).

Once again, and “largely at the insistence of the United States” (Stewart et al., 1994, p. 23), protections against “unfair trade” (notably subsidies and dumping) were also included in the GATT. These protections, in the opinion of Alfred Eckes, had the effect of “emasculat[ing] other trade statutes” (Eckes, 1995, p. 257). For instance, protection against “dumped” products was

taken seriously by the US negotiators that were “the main proponent of including AD procedures in Article VI of the GATT in 1947. Indeed the [US antidumping] legislation formed the textual basis for Article VI” (Irwin, 2005, p. 654).

A general exceptions clause (art. XX) was also inserted to ensure that contracting parties could continue to adopt and enforce measures otherwise contrary to the obligations of the agreement, but that were, for instance, “necessary to protect public morality,” “necessary to protect human, animal or plant life or health,” or “relating to the conservation of exhaustible natural relation,” etc. (GATT, 1947, art XX). Once again, this article was not a concession made by the US but almost replicated the exact wording of a similar article that appeared in the Proposals for Expansion of World Trade and Employment developed by the American Department of State in preparation of the negotiations for the International Trade Organization and, subsequently, for the GATT (United States Department of State, 1945, Section G).

One of the main realizations of the GATT was to obtain the elimination of quantitative restrictions (or quotas) on trade. Now, this provision came with exceptions that allowed contracting parties to continue to apply quantitative restrictions in many situations. Curzon actually noted that countries other than the US:

Felt that they were sufficiently safeguarded by the number of exceptions written into the agreement, and sufficiently assured of the permanency of these exceptions, to be able safely to accept the general principle of freer multilateral trade without direct controls. (Curzon, 1966, p. 130)

The two main exceptions to quantitative restrictions were the one for agriculture and fisheries products—once again inserted at the insistence of the US (Curzon, 1966, p. 131)—and the one for balance-payment or development reasons that came as a compromise on the part of the Americans. The latter exception was so written that according to Curzon, “besides the United States and Switzerland, there were practically no countries in the world which in 1947 could not claim exception to the rule of freer trade for one of these two reasons” (Curzon, 1966, pp. 131–132).

Article XXV.5 also provided that, “in exceptional circumstances not elsewhere provided for in this Agreement, the contracting parties may waive an obligation imposed upon a contracting party by this Agreement” (GATT, 1947, art. XXV.5). Even with a wording referring to “exceptional circumstances,” this article had, in 1967, been used from 40 to 50 times according to John Jackson, the most important one probably being the waiver granted to the US to protect their agricultural sector (Jackson, 1967, pp. 152–153).

Another aspect that undermined the liberalizing objectives of the GATT is what came to be known as

“grandfather rights,” which allowed pre-1948 legislation that was contrary to the requirement of the GATT to continue to be enforced by the contracting parties (Kock, 1969, p. 65) for various reasons that space limitations prevent me from elaborating. Some of these legislations actually persisted until the creation of the WTO in 1995.

In summary, the GATT was not an agreement in which free trade was the aim. The very content of the rules and the large number of exceptions it contained left a wide range of possibilities for the US to continue to intervene in their economy in a way that promoted other values than commercial and economic ones. In other words, it was an agreement that perfectly corresponded to the needs of a country with a Fordist regime of accumulation—like the US—that wished to increase its exports, but without losing the possibility of intervening in the market to protect its industries and its workers. This necessity, as seen before, was directly linked to the relation between capital and labor where the latter was accorded relatively satisfactory wages—that helped give some legitimacy to capitalism—that needed to be used essentially to buy domestic production.

5. The Fall of Fordism; the Rise of Neoliberalism

From 1967, American enterprises’ profits began a long downturn. Even if not all of the factors at the origin of this situation were intrinsic to the regime of accumulation, the result was that Fordism went into crisis. Unsurprisingly, the regime of accumulation crisis had similar effects on its national and international institutions. First, the US abandoned the “Bretton Woods monetary system” between 1971–1973 (Block, 1978, pp. 198–199; Brenner, 2003, pp. 27–28; Panitch & Gindin, 2012, pp. 122–131). Second, Washington began to adopt protectionist actions (Brenner, 2003, p. 29; Irwin, 2017a, pp. 524–525), particularly against Japan (Arrighi, 2010, p. 316), that were increasingly incompatible with the idea of a free(r) trade commercial order. The result was a break in the consensus underlying the agreement (Hudec, 1970, p. 214).

Protectionist strategies did not work, however, and it was only when Neoliberalism replaced Fordism that the rate of profit stopped its tendential fall. Ironically, the average rate of profit was lower than that of the preceding period but its tendency to grow added to some other factors (such as the fall of the Berlin Wall), brought optimism to the capitalist side. A fundamental distinction between Fordism and neoliberalism is that the former is an intensive regime of accumulation while the latter is an extensive one, the difference being the way that both manage the contradiction between capital and labor. In Fordism, wages and other economic advantages contributed to buying a relative social peace and constitute an internal market for national production. In an extensive regime of accumulation, the national market is not as important since the search for consumers had turned towards the international market. The importance of this

move is enormous for workers for at least two reasons. First, they lose their importance in the eyes of the capitalists because foreign consumers (at least partly) replace them in terms of needed markets. Second, now that the new coveted market is international, it means that the competition increasingly comes from foreign firms that employ workers with potentially lower working conditions and wages. Wages then become significant constraints in competing against these new international competitors. In Neoliberalism, restraining wages and other costly worker advantages becomes a necessity.

Estimating that Fordism was not viable anymore, the US capital, helped in by an administration that was closer and closer to its interests (especially after Reagan's election), undertook a violent attack against workers and their unions. First, the Volker shock drastically raised the interest rate in 1979 (Arrighi, 2010, pp. 326–330), and pushed multiple enterprises into bankruptcy, provoking a large wave of unemployment that strongly and negatively affected wages (Brenner, 2003, pp. 51–79; McNally, 2013, p. 75). A virulent animosity against union labor also arose from the government. This new context quickly affected workers' confidence and the resistance of the unions (Pizzolato, 2013, p. 41).

With their workers more "competitive" but also less able to constitute a sustainable market, the aggressive search for new consumers was the next priority for the US capital and it quickly appeared that a new set of international institutions was needed. These rules and organizations appeared when free trade agreements were concluded, first with Israel (1985), then with Canada (1989), and finally the most important, NAFTA, with Canada and Mexico (1994). Then, the Marrakech agreements created the WTO, which entered in function in 1995. In parallel, a large web of treaties to protect foreign investments was created to afford some protection to the enterprises that thought that profits could be more easily made abroad than at home (Bonnitcha et al., 2017, pp. 1–31).

Globally, these institutions and treaties put an end to the Fordist's intensive regime of accumulation and to what Ruggie called "embedded liberalism." The result, if we follow Slobodian, was the protection, through international law and institutions, of the invisible hand against the "disruptive capacity of democracy" and "its legitimization of demands for redistribution" (Slobodian, 2018, p. 272).

6. Why Re-Embeddedness Must Be Thought on New Bases

As argued elsewhere (Bachand, 2020), the current institutional crisis that the WTO faces is directly linked to the crisis of its regime of accumulation. Indeed, an analysis of the rates of profit of American non-financial enterprises since 1997 shows that the only periods when good rates of profit were obtained are characterized by financial bubbles or by the enlargement of credit and that both characteristics have led the US and world economy

towards crisis (the Asian crisis, the Dotcom crisis, the Subprime crisis, etc.). This conjuncture leads us to the perspective of the structural crisis of Neoliberalism and its replacement by another regime of accumulation—or of decumulation.

Implicitly, this thematic issue presumes that the future regime of accumulation should be inspired by the "embedded liberalism" that characterized the Fordist era. My position is rather that a return to the 1945–1966 economic organization is both impossible and unadvisable. Impossible because the high productivity of the US economy that was necessary to the Fordist success is not there anymore, and its return in a near future is highly doubtful (Posen & Zettelmeyer, 2019). It is also unadvisable (from a left-wing point of view) because it was based on a labor-capital institutional framework that tended to de-radicalize the labor movement with the effect that it was too weak and not mobilized enough to attack neoliberal reforms put in place by the end of the 1970s. Lessons to be learned from the period is that a new embedded regime of accumulation should rather be inspired by a different, and probably more radical agenda from the part of the labor and the social movements, an agenda that should probably include broader participation in the economy and the enterprises' decision-making process (Ferrerias, 2017; Ferrerias et al., 2022; Piketty, 2019, pp. 1111–1190).

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Conflict of Interests

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Article

International Investment Law in the Shadow of Populism: Between Redomestication and Liberalism Re-Embedded

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Abstract

The international investment regime is in crisis, nowhere more so than in regard to the investor–state dispute settlement system. While several developing countries have been critical of the system for some time, rich countries like the US and EU states—once the principal promoters of this regime—are now acknowledging problems and advancing reforms. This change of position has been fueled by the mobilization of civil society and the emergence of domestic populist movements on both the right and the left, reflecting widespread discontent with the past three decades of neoliberal globalization and its effects on job losses, lower wages, and increasing inequality. This article argues that this shift has opened up a unique opportunity for developing countries that want reform, as there is less pressure (real or imagined) from rich countries to continue with an old model that no longer serves. Two paths present a possible way forward: (a) Participating countries can disengage from investor–state dispute settlement and opt for the redomestication of international investment law, rekindling the Calvo doctrine, or (b) they can follow John G. Ruggie’s “embedded liberalism” to re-embed the international investment regime with values and social objectives that are now deemed politically indispensable. This article explores each of these paths, with a particular focus on Latin America. It argues that although populism creates pressures to change or abandon the regime, in developing countries it also generates constraints that may prolong the status quo.

Keywords

Calvo doctrine; embedded liberalism; foreign direct investment; ISDS reform; international investment law; Latin America; neoliberalism; populism; redomestication

Issue

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1. Introduction

The international investment law regime is in crisis. Once held out as a promising innovation for attracting foreign direct investment (FDI) and a bastion for the rule of law, today it faces criticism from scholars, practitioners, governments, and civil society groups alike. Concerns focus not only on the regime itself, but also on the investor–state dispute settlement (ISDS) mechanisms found in hundreds of international investment agreements (IIAs). Critics note *inter alia* that as investors’ interests are afforded prominence, states’ regulatory powers have declined, staggering awards can damage a country’s fiscal budget, and inconsistent awards negatively impact trust and predictability.

Countries that once enthusiastically embraced the system of ISDS are now leaving or reducing their engagement. Rich countries are increasingly wary of infringements on their regulatory autonomy, given the unanticipated use of IIAs to challenge domestic regulation and the effects of prioritizing investor rights on their democratic processes (Pelc, 2017). As countries in the Global North become significant recipients of capital, and not just capital exporters, they face mounting arbitration and the potential constraints and budgetary risks of ISDS. As a result, these countries—once principal promoters of this regime—have started acknowledging problems and advancing reforms at an ever-increasing pace.

This change of position has been fueled by the emergence of domestic populist movements in rich,

democratic countries on both the right and the left, reflecting widespread discontent with the past three decades of liberal globalization and its effects on job losses, lower wages, and increasing inequality (see, e.g., Milanovic, 2013; Roberts & Lamp, 2021; Rodrik, 2018b). This article argues that this shift has opened a unique opportunity for developing countries that want reform, as there is less pressure (real or imagined) from rich countries to continue with an old model that no longer serves. Two paths present a possible way forward: Participating countries can (a) opt for redomestication by disengaging with ISDS and bringing investment disputes under home-state jurisdiction, in line with the historical tenets of the Calvo doctrine, or (b) they can try to re-embed the investment regime with updated values, establishing a new “embedded liberalism” compromise like the one John G. Ruggie analyzed and substantially transforming it with a social purpose that is now deemed necessary. This article explores each of these paths, with a particular focus on Latin America. It argues that although populism creates pressures to change or abandon the regime, in developing countries it also generates constraints that may prolong the status quo.

2. The Populist Challenge to Neoliberal Globalization and Reform of Investor–State Dispute Settlement

The backlash against globalization in rich countries has led to important policy changes, which have sought to disengage from, substantially alter, or challenge the legal and institutional setup wrought by neoliberal globalization. The US siege of the World Trade Organization’s Appellate Body, the North American Free Trade Agreement renegotiation (the United States–Mexico–Canada Agreement [USMCA]), the withdrawal from the Trans-Pacific Partnership (TPP), and the tariff war with China are all examples of the US challenging the agreements and principles for which it once proudly stood. In Europe, Brexit, opposition to the Transatlantic Trade and Investment Partnership, and growing nationalistic movements that oppose the EU illustrate creeping doubt about the liberal economic principles of free trade, underscored by concern about its distributional consequences.

“Populism” describes political movements that claim to represent “the people” in some capacity, against “the establishment.” Its roots go back to the 19th century in the US, but it has been present in many parts of the world (Rodrik, 2018b). Rodrik (2018b) argues that economic history and economic theory indicate that advanced phases of globalization would produce a populist backlash, given concerns about distribution, inequality, and fairness. Whether the movement takes a left-wing or a right-wing form in each state depends on how the globalization shock has manifested there (in demand) and what social cleavage the political leaders choose to emphasize (supply).

In the left-wing variant, the shock is related to job losses due to trade competition, economic and finan-

cial crises, International Monetary Fund programs, conflict with multinational corporations’ investments in sensitive sectors, and economic mismanagement. Such populist leaders mobilize the majority against the economic elite and its foreign capital/institutional allies, identifying them as the source of the peoples’ economic woes. Left-wing populist narratives center on an income and social class cleavage (Rodrik, 2018b). The left-wing populist narrative critiques neoliberal globalization because it rarely compensated losers, the rules of the game were rigged in favor of the elite, and because of the selective nature of economic integration, which hurt the working class (Roberts & Lamp, 2021).

In the right-wing variant, the shock is focused on immigration and refugees, who are seen as displacing the “native” workforce, draining fiscal budgets, and changing the cultural mores of society. The majority turns against minorities (national, ethnic, racial, religious) and other countries, identifying *them* as the source of the problem. Politicians in right-wing populist movements emphasize an ethno-national/cultural cleavage (Rodrik, 2018b). The right-wing narrative also has an anti-trade trade protectionist element, combined with anti-immigration and nationalism. Proponents of this variant may use these elements jointly or separately, but they share the belief in an external threat from which they need to protect the people (Roberts & Lamp, 2021). In Latin American countries, left-wing populism has been dominant and long active, whereas in Europe the right-wing variant is prevalent and has emerged more recently. In the US, both variants are currently present and strong (Rodrik, 2018b).

Furthermore, populism can be economic or political (Rodrik, 2018a). Economic populism rejects constraints on economic policy whether imposed by autonomous agencies, independent central banks, or international economic agreements. Political populism, often led by a charismatic autocrat, rejects checks on power and political competition. It undermines separation of powers, an independent judiciary, free media, and free and fair elections. A populist regime may, but need not, have both components.

Are we witnessing the dawn of a new era? Is the neoliberal economic regime giving way to something else? And if so, what are the underlying principles of this new regime? What are its aims? The dust may still be too thick in the air to see what will come; whether countries will opt to re-define the values underpinning the international investment law regime, or to withdraw from the system entirely. We grasp for historical examples of regime change or theories that can shed light on the present shift. In recent years, scholars have begun to chart potential changes to the international investment law regime and to devise frameworks for assessing alternatives (Duarte Gomez et al., 2021; Puig & Shaffer, 2018; Roberts, 2018a, 2018b). The potential changes range from modicum corrections to a paradigm shift. These frameworks are designed to help reformers think about possible institutional setups, given their country’s

context. Crucially, what institutional configuration a country may choose—and what level of integration or decoupling with the international investment system it entails—would depend on that country’s goals, economic outlook, geopolitical situation, and institutional capacity. In what follows, I describe redomestication and embedded liberalism as two general approaches that can help conceptualize countries’ efforts to disengage or reform the international investment regime and the general direction they may pursue.

2.1. Redomestication

In the last decade, several countries (including many in Latin America) have been affected by the frequency of ISDS claims against them and the staggering monetary awards they have been ordered to pay (Center for the Advancement of the Rule of Law in the Americas, 2022). Some countries have become so upset with the constraints imposed by ISDS on their ability to pursue social and economic regulatory agendas that they have decided to exit the system altogether. They have thus sought to disengage from ISDS systems and bring back to their domestic arena any disputes concerning investment law. I refer to this approach as “redomestication,” evoking the double meaning of “domestication.” On one hand, domestication means bringing to the national, domestic level all matters of investment law, making national law the governing standard and national courts the relevant fora for dispute resolution. Domestication also alludes to the act of taming or disciplining something, usually a wild animal, to be beneficial as opposed to dangerous (Domestication, n.d.) Redomestication may increase in appeal as an alternative to ISDS reform if reform proposals do not respond to the most powerful critiques of the system or address the needs of countries most at risk from a currently undomesticated and perilous regime.

Redomestication is an approach that embraces the Calvo doctrine, a nationalist legal doctrine developed by Argentinean jurist Carlos Calvo in the 19th century, which stands for the proposition that foreign investors

should be treated as nationals of the host state (Shan, 2007a; Shea, 1955). Under the Calvo doctrine, foreign investors renounce the protection of their home governments and accept to resolve their disputes in the national courts of the host state, according to domestic law. This doctrine was adopted by most Latin American countries and spread to other parts of the world (Shan, 2007b, p. 632). It was influential in the proposed New International Economic Order and the Charter of Economic Rights and Duties of States, advanced by countries of the non-aligned movement in the 1970s (Shan, 2007b).

Redomestication means movement on two fronts: a shift of the applicable substantive standard to national law and the attribution of jurisdiction for investment disputes to national courts (See Table 1). In the current context, redomestication can be better understood as a continuum, and a country may move in that direction even if it does not fully disengage from the international investment regime. For instance, a country may exit ISDS but still preserve state-to-state dispute settlement and applicable international law stemming from its investment agreements.

3. Re-Embedding Investment Law in an International Regime

3.1. Embedded Liberalism

In these uncertain times, Ruggie’s (1982) work in international relations and his analysis of the “embedded liberalism” compromise in the regime of international economic law has gained new relevance. Writing in the early 1980s, Ruggie argued that the international trade regime established after the Second World War was not one of laissez-faire or unfettered market liberalization, as many claimed. Rather, he suggested that it was an international regime whose founders set out to interact with states’ own social and economic institutions, making room for national compromises regarding economic competition and social protection. It was a liberal regime, but it was “embedded” with states’ own values.

Table 1. From the Calvo doctrine to ISDS in a spectrum.

Domestic			International	
Standard of treatment	National treatment		More favorable treatment to foreign investors	
Applicable law	Governed by domestic law exclusively	Governed by domestic law primarily, complemented by international law	Governed by investment treaty	Governed by international customary law
Dispute settlement venue	Exclusive jurisdiction of national courts	Exhaustion of local remedies	Diplomatic protection: State to state	Investor–state arbitration

Ruggie's work helped to cast doubt on the characterization of the international trade regime as inherently neoliberal. The trade measures undertaken by the US in the 1980s to protect its industry against the rise of Japan were decried by trade scholars and policymakers as protectionist and anti-trade. By calling attention to the "embedded liberal" compromise of the international trade regime, Ruggie's work sought to dispel the notion that those actions were a departure from the values enshrined in the General Agreement on Tariffs and Trade, which allowed states plenty of space to modulate trade liberalization according to their own domestic choices and needs.

From this standpoint, the liberalization agenda that took hold more decisively in the 1990s with the formation of the World Trade Organization—not always in its agreements but in their interpretation and in the predominant normative discourse—was a departure from the embedded liberalism of the post-Second World War era (see Grewal, 2018). At its peak, and then during the long, gradual decline of neoliberalism, scholars have returned to Ruggie's work for inspiration on the possibility, desirability, or impossibility of re-embedding the liberal regime with new, socially relevant values (Dunoff, 1998; Howse, 2002; Lang, 2006; Rolland & Trubek, 2019). At present, in the face of the populist challenge to liberalism and nationalist attacks on the international liberal regime, "embedded liberalism" seems a promising port in which to dock the drifting ship.

Ruggie's work can be useful in several ways. First, it makes clear that social purpose is a central element of a regime's existence and of its continuation or eventual decline. Second, beyond the institutional and legal frameworks, it can help describe how the regime is constituted by a "generative grammar," which is to say a shared understanding of the assumptions on which the regime rests and which the relevant actors deploy and develop.

3.2. *The Investment Regime's Social Purpose and Its Fading Legitimacy*

A line of inquiry in Ruggie's work, less explored by international economic law scholars, analyzes the conditions that make a regime coalesce or lead it to unravel. Ruggie argued that, just as important as hegemonic power supporting a regime is the legitimacy of that regime's social purpose (Ruggie, 1982). So, even if the power configuration between regime participants changed (or a hegemon declined), the regime could endure so long as the social purpose held. Conversely, one could argue that even when a regime maintained the support of powerful countries, that regime could unravel despite hegemonic support if social legitimacy began to wane. What we are seeing today seems both a significant challenge to the social purpose of the international investment law regime and a withdrawal of support by its most powerful actors—hitherto its biggest proponents.

Changes in the US and European position, as well as that of many emerging countries who have been vocal critics of the regime, manifest a challenge to the regime's assumed social purpose and consequently a weakening of its legitimacy. This fracture could lead to the eventual demise and transformation of the international investment law regime. It is not clear what China's position will be regarding the international investment law regime and ISDS in the future. For now, China maintains a somewhat flexible, uncommitted position, participating in discussions about the regime's reform but not advocating for any big change (Du, 2022). Other emerging countries like India have been strong critics of the regime and have clearly departed from it. Brazil was an early critic and has developed its own model of investment agreement, which excludes ISDS.

So, what is the purported social purpose of the international investment law regime? How did those who designed and promoted it justify it? What expectations gave the regime such allure? Of the various objectives that scholars have identified, two seem central. First, that IIAs with ISDS would help attract much-needed FDI to developing countries that needed capital but could not source it nationally (Howse, 2017). In addition, it was often assumed that FDI would naturally lead to growth and development, improving society's overall welfare.

Second, it was argued that IIAs would help improve the rule of law in the host state or act as a substitute when it was weak (Howse, 2017, p. 34). Rule of law is a notoriously vague concept. I am referring here to a formal and instrumental conception of the rule of law, which assumes that there must be clear, general rules and that those rules must be capable of being followed so that individuals can plan accordingly (Santos, 2006). ISDS would help discipline the government to avoid defaulting on its promises or acting arbitrarily, hence providing certainty and predictability to foreign investors. The state would be disciplined given the real threat of an unfavorable arbitral award rendered by an independent tribunal. This newfound restraint of the host state would have spillover effects for all economic actors in society, hence improving the rule of law in the country. If the host state's rule of law remained weak and unreliable, ISDS would fill that gap, providing a necessary enclave to guarantee certainty to investors (Howse, 2017).

After three decades of the regime's boom and the beginning of a potential bust, both objectives have clearly fallen short. On the attraction of FDI, results of empirical research show that there is no clear causal connection between the existence of an IIA and FDI (Brada et al., 2021). States that did not sign on to ISDS, like Brazil, continue to attract significant FDI. States that have withdrawn from the ISDS system, like South Africa, have seen no decline in FDI. Investors consider many factors when deciding where to invest and the existence of an IIA does not seem to be high on the list. Moreover, investors have effective alternatives to ISDS in the case of conflict, such as political risk insurance. Investors can also seek

to include arbitration clauses in their contracts with governments. But even if ISDS somehow helped attract FDI, the connection between FDI and growth is not automatic, much less the connection to economic development that was the ultimate aspiration of developing countries in adopting ISDS.

On the rule of law question, it also seems clear by now that there is no direct connection between ISDS and rule of law improvement in a host state (Bonnitcha et al., 2021). First, many state policies that have led to ISDS action and hefty awards have little to do with (a lack of) rule of law, for example, having to respond to economic crises, regulating in the public interest in areas of health or the environment, or complying with other international obligations like climate change mitigation or human rights that conflict with investment obligations. In addition, several of these cases involve the US, Canada, and EU countries, with traditionally robust legal systems, underscoring that the regime is disciplining the regulatory autonomy of countries, not strengthening their rule of law.

Second, ISDS does not seem to have changed the institutional incentives to prevent the state from acting arbitrarily or unpredictably in other instances (Sattorova, 2018). The potential risk of an adverse arbitral award from an administrative or regulatory action does not seem to have been internalized or socialized domestically to the requisite extent to produce this change. Finally, the many extant critiques of the investment law regime and ISDS should put to rest any lingering notion that the system could be a good substitute for rule of law when one is lacking in the host state. These critiques include, inter alia, the inconsistency of arbitral awards, the practice of double hatting by arbitrators and the potential conflicts of interest this may entail, the delay of proceedings, the flaws of evidentiary rules, the methodological problems with how damages are calculated, and the resulting exorbitant amounts of the awards (Kahale, 2018). In short, there are serious problems with the predictability, transparency, and certainty of the investment law norms and their application, the very problems that a rule of law system was supposed to resolve.

It is in this context that the ongoing discussions about the potential reform of the system are taking place. As Alvarez (2021) has recently noted, however, if the central critiques of the legitimacy of the system are ignored, this will likely become an opportunity wasted. This calls for an honest engagement with how the social purpose of the regime has failed, and for a new purpose to be explicitly rearticulated. Otherwise, it would be unclear what the reforms of the regime are for or what ultimate purpose they ultimately seek to achieve.

3.3. The “Generative Grammar” of International Investment Law

One of the most interesting aspects of Ruggie’s (1982, pp. 380–382) analysis of a regime is his idea of generative

grammar (see also Lang, 2006, pp. 102–105). Regimes cannot be understood simply by looking at their institutions and norms, or at the “descriptive inventory of their concrete elements, but by their generative grammar, the underlying principles of order and meaning that shape the manner of their formation and transformation” (Ruggie, 1982, p. 380).

What a regime is and what it does is construed by what the actors in the system think it is and does. The most important policy questions will not be determined by the rules or institutions but by a “common sense,” a normal baseline construed and shared by the actors through which those rules will be interpreted to assess specific actions. In international trade law, this normal baseline delimits, for instance, what constitutes a legitimate regulation and what is a “protectionist” measure or trade barrier. It delimits what a subsidy is and what is a market-based transaction (Tarullo, 1987, p. 546). There is no objective or “natural” normative baseline upon which to make these decisions. They are policy choices informed by the common assumptions shared by the regime’s actors which ultimately mark the limits of what is appropriate state action or inaction.

These underlying assumptions can change over time as a result of new phenomena and of contestation. In the trade regime, the debate about trade’s linkage to other domains, such as the environment and public health, seems to have challenged some of the regime’s established assumptions. The World Trade Organization’s Appellate Body seemed to have worked to broaden and rearticulate those assumptions. For some actors and observers, it did not go far enough. For others, it went too far and overstepped its limits. What is clear is that the “generative grammar” that prevailed for much of the last three decades in the trade regime has changed dramatically in recent years, and we speak differently now.

In international investment law, this generative grammar is undergoing changes too. That states have had to advance an agenda to reclaim their “right to regulate,” an essential state function, says much about what came to be the regime’s underlying assumptions regarding the role of the state in the economy and society. There are proposals to introduce obligations of investors to comply with national laws or international standards regarding labor, the environment, and human rights, conditioning investors’ standing in arbitration, or their ability to collect damages to compliance with these obligations. There are proposals to grant rights to third parties—local communities or workers—to bring claims against investors in an ongoing arbitral process or in the investor’s home state (Perrone, 2021).

When then-US Trade Representative Robert Lighthizer criticized ISDS as a system promoting outsourcing and unduly rewarding US companies with insurance to create jobs abroad, it was clear that the long-held assumptions of the regime had begun to crack. The significant reduction of investor rights in the USMCA, including the elimination of indirect expropriation and fair and

equitable treatment for all but five sectors, the requirement of exhaustion of local remedies, and the elimination of ISDS altogether between the US and Canada show a significant shift in the US actors' assumptions about the desirability of the regime.

3.4. *The Limits of Embedded Liberalism*

Ruggie's analysis of the way the embedded liberalism compromise of the post-Second World War era enabled a type of globalization that left considerable space for states' social and economic choices, and for the pace of their liberalization, holds much attraction today. In the face of frontal attacks on globalization, it is useful to challenge the inevitability of "hyperglobalization" (Rodrik, 2011) and remember that a different institutional architecture, with a different social purpose, was and is possible. It is useful to remember that assumptions that held sway for decades—such as the limited role of the state in the economy, the need to discipline its actions, and the privileges that foreign capital required to be attracted—have lost their grip.

However, there is also a risk of idealizing the embedded liberalism compromise or holding it as the main compass of reform efforts. That compromise, particularly in the trade regime, represented a particular vision of globalization forged by North Atlantic countries in the post-Second World War settlement. It left out proposals from the South that advocated a different international economic law regime, more attuned to their needs and developmental aspirations. Those who forged the compromise looked at the developing countries' proposals with skepticism and disdain (Lang, 2006, p. 100).

Moreover, it was a state-focused compromise, which allowed states to pursue their development goals with more flexibility. However, the developmental state could also sacrifice the livelihoods of indigenous and local communities as it carried out development projects in the name of national welfare. It often operated under authoritarian forms of governance, with serious gender and racial biases, and a blind spot for environmental impact and climate sustainability. Thus, returning to embedded liberalism seems unappealing from the perspective of those groups and perspectives it excluded. It can, nonetheless, help us be mindful of those critiques and think about alternatives to the neoliberal settlement in international investment law.

3.5. *Investor–State Dispute Settlement Reform in the North*

Populist opposition to new trade and investment agreements in the US, and to some extent in Europe, further illustrates how wealthy countries have become more aware of ISDS-related threats. Opposition to the Trans-Pacific Partnership in the US from academia, civil society, and politicians focused prominently on ISDS. Opponents criticized the potential encroachment on government

regulatory autonomy, the unwarranted protection of US investors abroad and the resulting stimulation of outsourcing, and a better standard of treatment for foreign investors than to nationals by US law. In Europe, significant opposition by civil society to new trade agreements with the US (Transatlantic Trade and Investment Partnership) and Canada (EU–Canada Comprehensive Economic and Trade Agreement [CETA]) focused on ISDS. Responding to the opposition, Canada and Europe transformed CETA's investment dispute settlement system, including by establishing a permanent investment tribunal with an Appellate Body, a code of conduct and qualification requirements for arbitrators, and deliberately expanding the state's regulatory space (see Tietje & Crow, 2017).

Against the backdrop of the ISDS backlash, many countries are actively participating in the multilateral reform discussions hosted by the United Nations Commission for International Trade Law Working Group III. In this context, the EU has proposed a multilateral investment court, with an Appellate Body, following the model it has established in its recent bilateral trade agreements (Roberts, 2018a).

The most significant change in the US position is reflected in the new USMCA. The agreement significantly reduces the rights of investors (except for investors with government contracts in five sectors) and limits their protection to direct expropriation and non-discrimination. It eliminates the rights of indirect expropriation, fair and equitable treatment, and full protection and security, which are the basis for most claims. Moreover, the USMCA requires the exhaustion of local remedies before investors can bring a claim against one of the parties. Furthermore, ISDS is only operative between the US and Mexico. Significantly and in an example of redomestication, the US and Canada decided to eliminate ISDS as to claims between them and foreign investors from the other state in the USMCA. Any claims their respective investors may have against the other government must instead be adjudicated in the host countries' courts. Canada and Mexico have no ISDS agreement between them in the USMCA, but both are parties to Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and its ISDS mechanism (Santos, 2019).

Other rich countries have recently changed their position too. Australia and New Zealand decided to opt out of ISDS in the CPTPP (New Zealand Government, 2018). In addition, New Zealand signed side letters with Brunei, Malaysia, Peru, and Vietnam to exclude compulsory jurisdiction in ISDS, with the result that each country must consent to ISDS arbitration on a case-by-case basis (New Zealand Government, 2018). New Zealand's Minister for Trade and Export Growth also expressed that ISDS had been one of their main concerns in negotiating CPTPP and that they "will oppose including ISDS in any future free trade agreements involving New Zealand" (New Zealand Government, 2018).

This comes on the heels of the last two decades during which rich countries have changed their model bilateral investment treaties (BITs) to address criticisms and clarify that investor protection should not undermine legitimate state objectives, like protecting public health, labor rights, or the environment (Shan, 2007b). Also, as rich countries increasingly became recipients of foreign investment, the worries of developing countries hit home—see, e.g., *Vattenfall AB and Others v. Federal Republic of Germany* (2012), wherein Swedish energy company Vattenfall filed a request for arbitration against Germany following a democratic decision to phase out nuclear energy.

In Europe, in addition to social mobilization, a significant driver of the ongoing changes in ISDS is the competence struggles between European institutions and member states since the 2009 Lisbon Treaty transferred competence over foreign investment policy from member states to the EU (Basedow, 2021). The decision by the Court of Justice of the European Union in the *Achmea* judgement (*Slovak Republic v. Achmea BV*, 2018), holding that the arbitration clause of the Netherlands–Slovakia BIT was incompatible with EU law, led to the Agreement on the Termination of all Intra-EU BITs, signed by most EU members, which is now in force. The process of BIT termination is advancing as members ratify the agreement, which also terminates the BITs’ sunset clauses, leaving them without effect. The goal is to end all intra-EU investment arbitration. The Court of Justice of the European Union made a similar ruling in *Republic of Moldova v. Komstroy* (2021), holding that the ISDS mechanism in the Energy Charter Treaty was incompatible with EU law and thus not applicable to intra-EU disputes. While there are still open questions and ongoing litigation on the Energy Charter matter, this is a significant example of redomestication at the EU level.

4. Investor–State Dispute Settlement Reform in the South: The Latin American Experience

The experience of Latin America effectively demonstrates the rise and fall of the appeal of international investment law, and particularly of ISDS, and its changing social purpose. One-third of all ISDS cases globally involve a country in the region (Center for the Advancement of the Rule of Law in the Americas, 2022). Latin American states have together faced claims for US\$1.5 trillion and have been ordered to pay US\$32.2 billion in awards and settlements (Center for the Advancement of the Rule of Law in the Americas, 2022). The frequency of claims and the steep increase in the value of the awards have led some countries to rethink their participation in the system. Latin America is of interest for another reason amidst the conversation on ISDS reform: The region was the birthplace of the Calvo doctrine, named after Argentinian jurist Carlos Calvo. Conceived in the late 19th century as a defense against rich states’ interventions in developing countries,

the Calvo doctrine was widely adopted by many Latin American countries. The doctrine became enshrined in a clause—often referred to as the “Calvo clause”—in many countries’ constitutions and foreign investment laws. This was a significant feat in a region that had experienced military interventions and diplomatic pressure from foreign governments looking to defend the interests of their investors. Looking at how Latin American countries have responded to the concerns with ISDS can be instructive, particularly at a time when populism is gaining force.

It is important to underscore that there is no monolithic “Latin American position” on ISDS. Countries in the region have differed in their approach to resolving its problems, based on factors including their political and economic history, the respective states’ economic performance at any point in time, and the popularity of their governments (Calvert, 2018; Droubi & Elizondo, 2022)

4.1. The Rise and Fall of Investor–State Dispute Settlements

Starting in the 1990s, most Latin American countries embraced the neoliberal economic model, pursuing domestic reforms of privatization and deregulation, and integrating their economies into the global market through international trade agreements. They also became avid participants in IIAs with ISDS, hoping to attract much-needed FDI that could lead to growth. Argentina, for instance, signed its first BIT (with Italy) in 1990. By 2001, it had signed 58 BITs (Pérez-Aznar, 2016). This new international investment regime soon started to produce investment disputes, in frequency and amounts that were hardly anticipated. Argentina experienced a wave of investment claims based on measures to address its 2001 economic crisis. In 2003 alone, it received 20 claims. By 2008, there were 45 cases against Argentina stemming from measures related to the crisis.

By 2010, the increasing number of investor claims and the fiscal risk they represented led some countries to change their mind about the desirability of ISDS. A number of commentators began discussing a “Calvo revival” in Latin America (e.g., García-Bolívar, 2009; Shan, 2007a, 2007b). Ecuador, Bolivia, Venezuela, and Argentina denounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and withdrew their consent from a number of IIAs (Feng & Shen, 2020). The 2008 Ecuadorian constitution proscribed the celebration of international agreements in which non-state parties could sue the state before international arbitration tribunals. By 2018, Ecuador had denounced all its IIAs, though several are still in effect given the length of the sunset clauses. By 2019, it had received 29 claims, losing 13 disputes for a total of US\$1.3 billion. Similarly, the 2009 Bolivian constitution introduced a Calvo clause for foreign companies operating in the hydrocarbon sector.

Between 2008 and 2018, Bolivia denounced all its IIAs. These were all efforts of redomestication, led by left-wing populist governments. After a change in government in Ecuador in 2021, the country re-signed and ratified the ICSID Convention (International Centre for Settlement of Investment Disputes, 2021).

An additional player beyond a country's executive government are its courts, which can rule on the constitutionality of IIAs. In 2019, the Constitutional Court of Colombia issued two judgments conditioning the ratification of IIAs with France and Israel on the treaties not providing more favorable treatment to foreign investors over national ones (Constitutional Court of Colombia, 2019a, 2019b). We may begin to see further action by courts asserting national control and imposing conditions on IIAs to make them conform to the country's constitutional principles.

Changing course or terminating IIAs has not been an exclusively Latin American phenomenon. Among developing countries, South Africa denounced 20 of its IIAs (2010; Davis, 2019), Indonesia announced it would end all of its 67 IIAs (2014), and India denounced its network of 58 IIAs (2016). These developments show that redomestication is an increasingly appealing option to dissatisfied developing countries across the Global South. Further, the case of India, governed by a right-wing populist government under Modi, also shows that this option appeals to both sides of the populist political spectrum (Agarwal, 2019, p. 11). These developments have caused concern among advocates of international investment arbitration, who argued openly against the "re-statification" of dispute settlement in investment law (Brower & Blanchard, 2014).

4.2. The Paradox of Populism and Reform in Developing Countries

Given the crisis of the international investment law system and the policy space opened by the shift in rich countries' positions, one would expect a greater move towards redomestication or reform by new populist governments in developing countries. Paradoxically, the advent of populist governments may make it harder for these countries to advance reforms. First, developing countries' governments will have to overcome their own fears of reputational risk from exiting or significantly reforming their engagement with ISDS. They may be reluctant to reform for fear that it will signal they are hostile to FDI (Salacuse, 2017). This fear emerges from their insecure geopolitical situation, where being part of international investment and trade agreements is often regarded as desirable (Poulsen, 2015). Left-wing governments often feel pressured to reassure international investors, financial markets, and rich country governments that they will stay the course, even promising not to alter their international obligations. At least initially, they often seek to downplay their divergence from the neoliberal economic model in rhetoric and practice.

Second, when these populist governments (whatever their political valence) are not only economic but political populists and advance domestic policies that undermine the country's democratic institutional framework, such as the independence of the judiciary, other parties and civil society groups in the country may be less supportive of changing international agreements, raising the political cost of reform. In a context of authoritarian rise, these international agreements are often perceived, even if mistakenly, as providing a basic backstop for rule of law and an important protection against the potential arbitrary abuse of the government.

While Ecuador, Bolivia, and Venezuela pursued the path of redomestication, other countries like Mexico and Chile have significantly reformed their agreements with the US and Europe. These changes drastically reduce investor rights and require the exhaustion of local remedies in the case of USMCA or create a two-tier arbitral tribunal with an Appellate Body in the case of the EU. But the initiative and pressure have come from the US and Europe. There has not yet been an endogenous effort in the region by countries to significantly transform their international agreements and re-embed them with the social values these countries now espouse.

5. Concluding Remarks

The rise of populism in rich and developing countries and its opposition to ISDS has made evident that the original social purpose of the international investment regime has lost its legitimacy. Populist governments of left- and right-wing varieties are disengaging or advancing changes. There are two broad options. The first option is redomestication, leaving the existing international investment regime and at the very least opting out of ISDS. A country willing to go this way would need to both fully withdraw from international commitments and adjust its domestic law appropriately. For developing countries concerned about signaling, it would be important to consider which guarantees it would still offer to foreign investors, particularly during the transition, and how it equalizes that treatment to national investors. The experience of South Africa stands out as a successful example of this strategy. The hero figure of this strategy is Calvo.

The second option is re-embedding international investment law, making it compatible with the social and economic values of states. This is an overhaul strategy that would need to reorient the regime's social goals and then redesign its norms and institutions accordingly. This path would forge a new international compromise, leaving sufficient room for states to pursue their own domestic economic and public welfare strategies. The hero figure for this strategy is Ruggie.

An important question is whether embedding international investment law can be done in a way that brings together the overarching interests of both developing and developed countries' agendas. As noted, several

developing countries have been critical of the regime for a long time, but it is opposition in rich countries' societies and the recent shift in their governments' position that has galvanized attention and created a credible space for change.

Rich countries are concerned about their regulatory autonomy in essential public welfare areas but also in light of a more active role of the state in the economy. They want to be free to advance other international commitments such as climate change mitigation or national security goals. They are concerned about the potential offshoring incentives of ISDS and are increasingly reluctant to provide what they see as free political risk insurance to their national companies. These countries are going in the opposite direction, advancing economic policies of homeshoring, or nearshoring that seek to bring production home.

Developing countries are extremely worried about the fiscal hole that ISDS claims can make to their budget and their capacity and costs to manage the increasing number of claims. They worry about their regulatory space too, as a great many claims involve challenges to regulatory policy. A top concern continues to be their ability to attract FDI and not scare it away with reforms that could send the wrong signal to current or potential investors, despite evidence that ISDS does not have a causal connection with FDI. An increasing awareness that FDI does not necessarily translate into growth, or development, has led some countries to pay more attention to the effects of investments, particularly when they have significant detrimental effects on the environment or the local communities in which they operate. The ability to screen investors, ensure that they comply with domestic law obligations during operations, and to maximize the chance that investments will have a positive effect in the economy is increasingly prized.

One of the main demands for an embedded regime would be to include rights for third parties, namely those stakeholders involved in or affected by the investment such as workers and local communities. There are already a variety of proposals to that effect, which include procedural requirements and substantive obligations for investors to comply with. This possibility is a clear advantage of embedding the investment law internationally in contrast to redomestication, as it adds a layer of protection to these stakeholders that they would not necessarily have in a purely domestic regime.

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Conflict of Interests

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Article

Trade Policy and Ecological Transition

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Abstract

While the global pandemic has taken the front stage since the spring of 2020, environmental issues remain as pressing as ever. In this article, I question whether the current liberalized trade and investment regime is consistent with the possibility of an ecological transition and argue that it is not. The organization of a large part of economic activity on a world scale by multinational corporations, with profitability imperatives and relatively short planning horizons, is inherently conducive to an intensification of resource extraction and commodity production. A liberal trade and investment regime gives free rein to these dynamics, which should instead be curtailed in order to achieve the necessary adjustments to sustainable living. As such, this article will explore ways in which the trade and investment regime could be subordinated to ecological and social concerns and contribute to, rather than hinder, an ecological transition.

Keywords

ecological transition; environment; financial liberalization; trade policy

Issue

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1. Introduction

Environmental issues have been mounting over the last decades. As accelerating climate change is putting increasing pressure on ecosystems and communities (Intergovernmental Panel on Climate Change, 2022) and many resources are getting depleted (International Resource Panel, 2019), the unsustainability of current economic practices is made manifest. Still, the pace of transition towards more ecologically sustainable practices is slow (International Resource Panel, 2019), putting in question the adequacy of current institutions and policies to reach such a transition. In this article, I focus on the international trade and investment regime and analyse whether or not and in what ways it fosters sustainable economic practices.

While environmental issues are global, coordination at that level is difficult. In the end, national governments have limited control over what other national governments do, leaving national or local initiatives as their main policy focus. At the same time, the world economy is increasingly integrated, with value chains span-

ning the globe. This reduces the scope of what governments can do nationally to reorient economic practices. Governments have some control over trade and investment flows through the rules and restrictions they put in place, but the level of intervention has generally decreased in recent decades, leaving it to private entities to decide on the scope and direction of these flows.

There is some debate regarding the effect of trade and investment liberalization on the environment. Some argue that it could help global sustainability, notably by ensuring that economic activity at different stages, such as recycling, takes place where it is most efficient (Yamaguchi, 2018). Others note that liberalization could have detrimental effects, say, for example, by leading to a race to the bottom in environmental standards (Sheldon, 2006). I assess some of the terms of that debate in the next section and conclude that it is unlikely that trade and investment liberalization contributes positively to ecological sustainability.

Section 3 reviews different strategies currently employed in existing trade and investment agreements to favor good environmental practices. These

agreements are found lacking, in part because the environment is often a secondary consideration, subordinated to economic growth and commerce. Section 4 explores ways in which trade and investment policy could be framed to give more importance to environmental outcomes and thus foster an ecological transition. Finally, I offer some concluding remarks in Section 5.

2. Trade and Investment Liberalization and the Environment

Economic analysis of international trade typically regards countries as trading partners (Krugman et al., 2018) and investigates how countries will specialize if trade is liberalized. These analyses highlight factors such as the level of technology, the existence of certain resources, or the availability of various productive inputs. They typically conclude that liberalization usually brings an improvement in efficiency and overall welfare, at least in the short run, since production is allocated to the countries where it can be done relatively more efficiently. This is true even if some countries are less efficient than others at everything since they can always specialize in what they are relatively less inefficient in producing. There are various wrinkles to this basic narrative, such as the way welfare gains get distributed amongst the population of each country and how potential losers are to be compensated, but that there should be productive gains overall is seldom under dispute.

In that framework, trade can impact the environment through two important channels (Copeland & Taylor, 2004). First, if it leads to economic growth, the increase in production can lead to an increase in pollution. However, increasing income could also lead to changes, such as technological improvements or a shift in people's priorities towards a cleaner environment, thus inducing more stringent policies which could be positive for the environment. One hypothesis that has been put forward is that the relationship between growth and environmental degradation could follow an inverted U, with increasing levels of degradation as income increases up to a turning point, after which further growth leads to an improvement in environmental outcomes. Second, pollution could shift between countries, either because some environmental costs are included in production costs and are thus part of the overall calculation of relative costs or simply because some production lines imply more pollution than others, so that specialization implies a concentration of pollution in certain countries. One possibility is that there is a "pollution haven" effect, with some countries specializing in polluting production based partly on relatively laxer environmental regulations.

Further environmental impacts are entailed by the usual contention that liberalization will imply a gain in efficiency as countries specialize in "what they do best." In essence, if there are no barriers to trade or capital flows and industries locate where it is most efficient for

them to operate, one could imagine a circular economy on a world scale which minimizes costs of production and optimizes resource use. This would include trade in second-hand products so as to optimize usage and recycling done where it is most efficient to extract the raw material and make it available for the next round of production. Yamaguchi (2018) outlines such a possibility, noting that any attempt to raise barriers would distort financial and commodity flows and prevent potential gains in efficiency.

Empirical evidence for an inverted U relationship between growth and environmental degradation is mixed at best (Shahbaz & Sinha, 2019; Stern, 2017). Essentially, two tendencies seem to compete: economic growth in itself appears to increase emissions, but there often are also concomitant efforts at reducing pollution. In cases where growth is relatively slow, such as in many high-income countries, pollution-reduction efforts may sometimes dominate the negative effect coming from economic growth (Stern, 2017). Meanwhile, in rapidly growing middle-income countries, the negative impact of growth clearly dominates (Stern, 2017). As such, to the extent that international trade could improve growth prospects, it is unclear that this would favour the environment at this stage. As for pollution shifting, there is indeed some evidence for the existence of a "pollution-haven" effect (Copeland & Taylor, 2004; Kolcava et al., 2019).

These last results are not surprising given that it is not countries which trade, but firms and individuals. Firms will locate their production according to particular local conditions and the ease with which it can be moved along the value chain all the way to consumers. As such, the liberalization of capital and commercial flows are complementary in that the first will ease the allocation of capital on a world scale, and the second will facilitate the separation of loci of production and use. Trade and financial liberalization will thus facilitate the segmentation of production lines and the relocation of parts of them abroad. In fact, about a third of all trade occurs between subsidiaries of the same firms (Dunn, 2015). Accordingly, while some concentration of specific types of production is to be expected, countries do not specialize per se, and certainly not in a way that would be driven by overarching efficiency considerations. Rather, it is firms that decide to expand, cut, or relocate their production, and they will do so based on a narrow profitability frame.

This last point is worth emphasizing. The vision of a worldwide circular organization of the economy (Yamaguchi, 2018) that would optimize resource use, reduce waste, and minimize pollution relies on a level of planning that goes well beyond what individual firms and agents do. Large multinational corporations do plan extensively, making an assessment of resource availability, production possibilities, consumption needs, etc., on a global scale (Whyte, 2020). Consequently, the argument is less between planning and markets than about

the modalities of planning. For a capitalist enterprise, environmental efficiency is not a criterion in and of itself, only one of the dimensions that impact its profitability and sustainability. A classic example is that of externalities: If firms can transfer the costs of pollution or poor working conditions to third parties, they will not take them into account in their own calculations. Beyond externalities, there is no particular reason why a given firm should promote the sustainability of a specific resource or supply source unless it imperatively needs it to continue functioning. Capital is mobile and fungible, all the more so if financial flows are liberalized, and if some ways of making money dry up, other business ventures can be started. Competitive pressures and the profit imperative will thus incite firms to exploit resources as they become available without necessarily planning long-term for any of them. In fact, under some circumstances, it can be profitable to deplete a given resource relatively fast to maximize short-run return and reorient the proceeds elsewhere.

While there is often no particular incentive for sustainable practices from the production side, help is unlikely to come from consumers (Dufour, 2022). Theoretically, if ecological production practices were of paramount importance for consumers, market signals could entice firms to abide by certain standards in order to be able to sell their products. In practice, however, the amount of information required to make an enlightened decision for every consumption product in an era of globalized supply chains is prohibitive. This part could be facilitated by eco-labels, but there are hundreds in existence, each with its own set of standards, and being certified is not always a guarantee of good environmental practices (Brad & Lenikus, 2018). Moreover, even with the relevant information, buying products with good environmental standards is likely to be relatively expensive. Some consumers may simply lack the necessary resources to make that choice, while others could be tempted to free ride and buy the cheaper product if their consumption decision has little global consequence and the price difference is significant.

In short, there is no mechanism within capitalism to align resource use and extraction, as well as production, with environmental efficiency. Trade and financial liberalization will exacerbate the issue by decoupling even more economic processes from specific locations, reducing the dependency of firms on specific sources of labor or resources. Regulation thus has to come from the outside, for example, via sets of governmental policies to impose product norms or regulate firms directly, but these can be hard to put in place in some contexts.

Criteria used by firms in making decisions about the location of production will vary, but costs and ease of management or investment will probably play a role. To the extent that environmental regulation can be costly or create difficulties for a given firm, it will likely act as a disincentive for investment, especially for industries that are more polluting, thus encouraging relocation where

policies are laxer. This holds even for businesses in the environmental sector, such as recycling, for which there will be an incentive to operate where regulations are less stringent. The same will be true for labor costs and regulation. To the extent that investment is desired by a given national government, there is thus a structural temptation to lower regulatory standards. This will be exacerbated by trade and financial liberalization since the increasing mobility of capital and commodities pushes governments to make their country attractive as loci of production. Many factors can contribute to making a specific location of interest for firms, such as education levels and political stability, so the level of environmental standards may not always be a dominant factor in every context. However, since lower standards are typically more attractive than high ones, there could be a scope for coordination between governments to prevent a race to the bottom.

One way for governments to coordinate could be to attempt an upward multilateral harmonization of regulations or product norms. For example, if governments agree to set environmental standards at the same level as the jurisdiction where they are the strictest, this could put a floor that would prevent downward pressure. Alternatively, rules could be set at a supranational level, such as in the EU for all member countries. Unfortunately, this is often easier said than done. Kinderman (2020, p. 675) documents how difficult it was to pass the European Union non-financial disclosure Directive 2014/95/EU in 2014, which mandates companies to “report on their social, environmental, and human rights impacts.” These initiatives faced substantial resistance despite the fact that the directive only mandates reporting, which is much less stringent than regulation, and the subprime crisis and disasters such as the BP oil spill in the Gulf of Mexico in 2010 or the Rana Plaza factory collapse in Bangladesh in 2013 created demand for political action. The initial proposal was watered down during the negotiations, notably in response to preoccupations about adjustment costs in the private sector. Consequently, while clearly not impossible, an agreement on meaningful upward multilateral harmonization of environmental regulations or product norms is hard to achieve.

When environmental provisions are not incorporated into trade and financial liberalization, these agreements could favor a harmonization of standards and practices downwards. For example, Vesilind (2015) documents how the North American Free Trade Agreement (NAFTA) led to the displacement of family and commercial hog and poultry farms by high intensity livestock operations, largely geared towards foreign markets, with deleterious environmental impacts. Similarly, the agreement may have led to a greater prevalence of genetically modified organisms (GMOs) in Mexico (Beyranevand, 2015). NAFTA’s agricultural provisions were seen by many as favoring the US over Mexico, as the latter’s economically sensitive products were not properly

protected (Beyranevand, 2015). Given the prevalence of GMOs in the US, increased exports to Mexico, and labeling rules that did not require disclosing the presence of GMOs in bulk commodity shipments if it was below 5% of content (which is the same percentage as in the US, but much higher than the EU's 0.9%) may have led to an increase in GMOs in Mexico (Beyranevand, 2015). In both cases, competitive pressures without sufficient countervailing regulatory oversight led to a convergence towards practices in place in the US and Canada while largely preserving the status quo in those two countries.

Besides a harmonization of standards, another way for governments to coordinate around environmental issues would be to directly include environmental provisions in trade agreements. While this has been the practice in recent times, are they efficacious in containing possible environmental downsides associated with liberalization?

3. Environmental Provisions in Trade Agreements

There are four types of environmental clauses in recent trade agreements (Castellarin, 2018; Dufour, 2021; Lattanzio & Casey, 2022; Morin & Gauthier Nadeau, 2017).

First, some clauses seek to maintain existing environmental standards. The broad principle is to prevent a downward regulatory spiral by prohibiting a lowering of standards aimed at gaining a competitive edge. By having states agree that they will not compete with each other to attract investment or favor domestic firms based on low environmental standards, this would seem to address the coordination issue mentioned above. This is reinforced in recent agreements by reiterating states' "right to legislate," in particular on environmental matters. In practice, however, these clauses are more statements of principles than actual safeguards (Castellarin, 2018), notably because it is very hard to show that any given regulatory change was done specifically to give a competitive advantage to domestic firms.

Direct and active regulatory cooperation is encouraged in a second category of clauses. These clauses range from simple commitments to foster dialogue around best practices (without any commitment to harmonize rules across jurisdictions) to setting up actual institutions to foster direct government collaboration. These clauses may include indications of how policies ought to be designed and implemented. This second category of clauses seems somewhat more efficacious, at least when states really do collaborate (Castellarin, 2018). Despite this, the link between trade and capital flows is somewhat tenuous. It is certainly a good idea that governments discuss and coordinate environmental policies when possible, but this should be standard practice, not something done specifically as part of trade agreements.

Thirdly, "environmental goods and services," i.e., commodities which contribute to environmental protec-

tion (Castellarin, 2018), are sometimes given favourable treatment. For example, tariff barriers on such commodities were completely lifted in a recent agreement between Taiwan and New Zealand (Morin & Gauthier Nadeau, 2017). Of course, such clauses are only pertinent if barriers are maintained on other commodities, so their relevance decreases as trade is liberalized.

A final category of clauses, largely based on Article XX in the 1994 General Accord on Tariffs and Trade (World Trade Organization, 1994), allows states to unilaterally limit trade for environmental reasons. As long as they do not constitute "an arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade," measures can be adopted to "protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" (World Trade Organization, 1994). Modern agreements either simply reiterate this or specify what is covered. However, just as with the first category of measures, it is difficult to target specific commodities without appearing discriminatory (Castellarin, 2018), and the track record of appeals filed under Article XX is not great (Wu & Salzman, 2014). Usually, the appellate body has maintained the original judgement when a country has tried to defend against a negative ruling by the World Trade Organization about one of its policy measures by claiming it should be exempted on environmental grounds under Article XX. Trade considerations thus seem stronger than environmental concerns in that forum, although it has been mentioned by the appellate body that the rulings should not be interpreted as being against the environment or environmental measures per se. Be that as it may, this can easily lead to what is termed "regulatory chill," i.e., a reluctance to even try to implement such measures out of a fear of being accused of using the environment as a pretext to restrict commerce.

There is still debate regarding the actual impact of environmental clauses in trade agreements, but there is some evidence that their presence does not reduce the ecological footprint of traded commodities (Kolcava et al., 2019). From a logical standpoint, it seems improbable that these clauses would have much positive impact on environmental outcomes. The ability to maintain existing regulations implies a bias towards the status quo while favoring environmental commodities has little importance if the trade regime is otherwise liberalized. Regulatory coordination could be effective, but the various rounds of negotiations around emissions are typically followed by missed targets, thus demonstrating that collaboration on such issues remains difficult even when that is the stated intent. Finally, to the extent unilateral measures could be used, it may have been discouraged by the relatively bad track record of exemption clauses. Consequently, one could expect that the environmental provisions of trade and financial

liberalization agreements are unlikely to effectively mitigate the impact coming from that liberalization.

Is this borne out in practice? NAFTA offers an interesting case study, as environmental preoccupations voiced during its negotiation led to an environmental side agreement, the North American Agreement on Environmental Cooperation (Gladstone et al., 2021). In evaluating the agreement's overall impact after 25 years on the environment at the US–Mexico border, Gladstone et al. (2021) find mixed results. There was some institutional collaboration on environmental issues, notably through three institutions established as part of the agreement: the Commission for Environmental Cooperation whose purview was the whole NAFTA region, and the Border Environment Cooperation Commission and the North American Development Bank, both of which targeted the US–Mexico border and merged in 2017. The Commission for Environmental Cooperation's responsibilities included conducting research studies and reviewing complaints from citizens, the Border Environment Cooperation Commission's intent was to build capacity and certify environmentally sustainable projects, while North American Development Bank was put in place to finance environmental infrastructure projects (Gladstone et al., 2021). Gladstone et al.'s (2021) results suggest that these institutions did favor projects and practices that had positive impacts at the border, notably in areas like wastewater management, and a general improvement in institutional commitments to environmental issues and increased civil society mobilization, especially in the early years. In terms of environmental outcomes, they observe improvements in urban air quality, potable water access, and access to sanitation (Gladstone et al., 2021). However, they state that “there is little evidence of any concrete impact of the NAFTA environmental governance institutions other than the projects to improve potable water and waste management infrastructure along the border, and these with diminished funding over the years” (Gladstone et al., 2021, p. 30).

Meanwhile, Gladstone et al. (2021) note that depletion and degradation of groundwater, as well as increased water pollution, can be attributed to an expansion of mining and export agriculture related to NAFTA in the context of relatively weak enforcement of environmental regulations. In fact, they argue that enforcement is especially lax when environmental issues conflict with “powerful economic, political and social interests” (Gladstone et al., 2021, p. 25). This is congruent with Gallagher's (2004) finding of increased pollution in Mexico following trade liberalization in the 1980s and 1990s, which he attributes to increases in the scale of production unmitigated by proper environmental protection. In some ways, it can be argued that this dominance of economic interests was built into NAFTA, notably through Chapter 11, which protected foreign investment. For example, Dufour (2013) shows how in the Ethyl Corporation case, the firm was able to use Chapter 11 to

successfully fight environmental provisions put in place by the Canadian government, showing how that chapter reduced states' ability to enact environmental legislation, especially if that legislation stemmed from a principle of precaution.

In short, while NAFTA's trade and investment liberalization provisions seem to have generally had a negative impact on the environment, the North American Agreement on Environmental Cooperation appears to have indeed contributed to better collaboration on environmental issues on the part of the signatories and favored positive environmental outcomes. Yet these positive impacts did not seem sufficient to mitigate the negative ones in many areas, with economic interests often trumping environmental considerations. This underlines the limits of a trade policy centered on economic outcomes, with the environment as a constraint rather than an explicit objective. In order to foster an ecological transition, it may be useful to look for an altogether different frame for trade policy than the generalised liberalization of recent decades.

4. Principles for a Pro-Environment Trade Policy

The current approach to trade policy is to liberalize subject to a few constraints, including an environmental one. This presupposes that trade liberalization is good in itself, while deleterious environmental side effects are addressed via additional provisions in trade agreements. As the previous sections demonstrate, it should be expected trade and financial liberalization will have harmful impacts on the environment, and these are unlikely to be resolved by existing provisions in trade agreements. If the goal of liberalization supersedes other considerations, this limits the scope and strength of the safeguards that can be put in place. It will likely be necessary to dispose of that framework to effectively foster ecologically sustainable practices. Abbas (2013) calls for a “reglobalization” that would be compatible with the fight against climate change. This would require a trade policy that is subordinated to the project of ecological transition.

One way to effect this would be to re-embed trade policy in a pro-environmental industrial policy. Given the difficulty of coordinating internationally around environmental priorities (Maslin et al., 2022) and the pro-liberalization orientation of the current multilateral regime, a proactive national industrial policy may be the only short-term option for green systemic transformation. In that context, trade policy becomes a sort of interface between that domestic industrial policy and the rest of the world. Instead of prioritizing the elimination of barriers to ensure a level playing field at home and abroad, this approach seeks a precise set of environmental and social norms in order to assess what to import from abroad and what to produce at home. For example, trade could be reserved for cases when domestic production units will not be able to produce a given commodity

with a lower ecological footprint within a relevant time frame, under similar working conditions, and accounting for transport and possible dynamic industrial changes.

Trade policy has a double role within such a framework. First, it helps create a context that favors the emergence of “good practices.” Shielding the domestic economy from the competition of products generated under unsustainable environmental conditions creates a space wherein new ecological processes can emerge without being immediately stifled. The existence of such a space helps innovation outside of what may be directly encouraged by the state’s industrial policy. State policy is important as a general impetus for change (Mazzucato, 2013) but is unlikely to provide solutions for every context. At the same time, to the extent that foreigners want to export to the domestic economy, it also serves as an incentive to improve their production processes. If this logic spreads to a critical mass of countries, it could generate an upward spiral in norms rather than the current incentives to decrease domestic regulation. Second, trade policy serves its classical role of protecting these “good practices” once they are in place so that they can thrive and spread. The difference, in this case, is that protection is not put in place on the basis of the provenance of the commodity but in relation to the conditions in which it is produced.

A trade interface that reflects the domestic definition of good practices could be put in place in order to foster sustainable economic processes, protect those which are present, and let commodities trade when production conditions and practices are actually better abroad. There are three orientations that could be given to this trade interface, depending on the desired level of international involvement.

First, one can imagine a sort of domestic “retreat” whereby the only focus is on domestic production. That is to say, internal regulations are put in place with respect to production, and then agents are free to trade what they wish, subject to trade barriers aligned with internal environmental standards. This would be an improvement from the current state of affairs in that better domestic production practices would be fostered. In particular, it would protect domestic producers from “environmental dumping.”

At present, much of the international effort on environmental regulation relates to processes that are global in scope, such as carbon emissions. Governments are finding it hard to implement efficacious measures in that realm. Even if they were successful in doing so, it would do virtually nothing to improve practices whose impacts are confined to a single country, such as local pollution or unsustainable resource use. For example, policies on climate change will not prevent the production units of a given country from depleting a resource for export purposes if they are allowed to do so domestically. The depletion and degradation of groundwater in Mexico in relation to the agriculture and mining industry (Gladstone et al., 2021) is a good example of a situa-

tion that would not be impacted by climate change agreements. Some cases are mixed, such as the deforestation of the Amazon in Brazil (Amigo, 2020). It is both a case of resource overuse, with wood being cut and exported as land is cleared to make way for beef or sugar cane production, and a factor in climate change (Boulton et al., 2022). That said, international schemes to preserve that forest typically refers to global components, such as biodiversity or its role in the carbon cycle (Leonte, 2019).

From a selfish standpoint, unsustainable resource use is not problematic for firms or consumers who import the products of that country, which is perhaps why there is not that much pressure to address this. Impacts on firms and consumers are not immediate, and they benefit from lower prices. However, it also incites a lowering of environmental regulations to attract capital or support domestic cost competitiveness. Adding barriers in sync with sustainable production processes at home would shield domestic firms from these competitive pressures. This would favor an ecological transition domestically but may be limited in the promotion of such practices abroad. It would likely not prevent the depletion of certain resources over time. Moreover, barriers would likely not apply to commodities that are not produced in the domestic economy, such as tropical fruit in Northern countries, unless there are worries it might harm substitutes.

In order to address these issues, a second option would be for a country to give itself a consumption budget in addition to ecological norms of production. Trade would be allowed if production targets are reached (say in terms of emissions or resource use), but the embedded characteristics of exports and imports would be taken into account in the calculation of domestic consumption levels. This would further prevent pollution havens and mitigate material transfer from poor to rich countries.

These first two options raise two important issues: (a) How are products to be compared through that interface so as to determine what should be let through and what should not? And (b) how are environmental targets to be determined and modulated through the interface?

Comparing products is not really an issue in the current regime. Since all commodities come with a price tag, there is already a single metric to compare them. Relative prices across borders can thus be modified through tariffs, for example. However, from an environmental standpoint, many important dimensions of the production process are incommensurable, such as the rate of depletion or use of certain resources, emissions, the impact on wildlife, etc. (Planning for Entropy, 2022). As such, they cannot be measured on a single, standardized scale and then added up once we have the information on the actual impact of a given production process. The situation becomes even more complex if other things are considered, such as work conditions or social impacts. These different aspects thus need to be measured separately, which could be done within a multidimensional accounting framework encompassing the full life cycle of a given product and the way economic processes

associated with it impact society and the environment in general (Planning for Entropy, 2022).

Once various dimensions have been measured, it will be difficult to relate two different products or even two similar products with substantially different production processes. For example, if a process to grow tomatoes uses more energy but less water than another, which one is to be preferred? Could imputed values be determined to bring everything back to a single monetary scale, which could then be used to adjust possible barriers? Various methods have been devised to give monetary values or prices to ecosystemic services (Lieken et al., 2014), but they typically rely either on subjective assessments or an estimation based on market prices of costs if there is a change in the ecosystem (e.g., calculating the cost of remediation). Relying on individual subjectivity raises the same problem as before regarding what individuals or firms actually take into account while costing methods seem hard to implement if dimensions are truly incommensurable and there is no simple process to reverse the consequences of a given action (for example, if some non-renewable resources are used). Consequently, it is likely illusory to think that a tax could simply be tacked onto the basic market price and represent adequately everything that prices are not accounting for.

Quantitative (and qualitative) targets are obvious alternatives, especially since environmental realities have little to do with pricing. For example, it is the number of tons of carbon emitted that impacts climate outcomes, not the price that was paid for them. As long as firms and consumers can switch their budgets around, modifying the price without fixing strict limits in amounts will not allow precise quantitative targets to be met. Quantitative targets do not provide a single standard with which to compare different products either. This leaves two possibilities. Either one dimension, say carbon, is deemed more essential, or it is taken as a reference point, or several aspects are evaluated, and an arbitrage process between them is put in place. The decision on this front will, in turn, influence the second issue mentioned above, i.e., the determination of targets.

Suppose one overriding dimension is selected—let us take carbon again as an example. In the first option, with a trade interface relating only to domestic production norms, indicators such as carbon emissions per unit of product could be used so that domestic emission efforts are not undermined by foreign practices. For instance, importing a product could be allowed only if its production, transport, etc., entails a lower amount of carbon emissions than a stated maximum—in essence, a product norm in terms of embedded carbon. Alternatively, if society gives itself a quantitative production and consumption “budget” along that dimension, such as in the second option, trade will then have to be done in a way that this society does not exceed its budget. A combination of quantitative targets in domestic production and consumption would make sure that emissions are not simply rendered invisible through import or export.

If production targets are reached, trade could be allowed only to the extent that adding the carbon embedded in net imports to the portion of production retained for domestic consumption does not amount to a level above the domestic consumption target. If there is only one factor, the situation is not too complex since there is once more a single standard with which products can be compared. However, it is unclear whether ecological sustainability can be reduced to a single dimension.

If many dimensions are under consideration, then there can also be internal budget and production norms for each of them separately, but it makes things much more complex on the trade front. With respect to protective barriers for production, a simple option would be to put minimum standards for each dimension and force any trading entity to follow them, there again creating a sort of multidimensional product norm. If this is deemed too difficult, then there arises an issue of arbitrage: What is fair compensation for being below standards for a given dimension? For example, could exemplary water usage compensate for emissions that are slightly above required levels? This would likely have to be determined by policy. Adding consumption targets in the picture further complicates things, notably with respect to its allocation. With carbon quotas, there could, for example, be a market for the quotas so that arbitrage between products can simply be done through market processes. If quotas are set for all sorts of dimensions, individual accounting and decentralised trade will become more complex. An arbitrage could be done ex-ante, say by an institution responsible for the trade interface, but that would require a fair amount of planning with respect to consumption and production and, thus, a systemic transition at the same time as an ecological one.

One way to reorganize the economy to make this possible would be to implement processes of democratic planning, whereby production and consumption are planned collectively by the communities concerned instead of being left to market forces. Several theoretical models have been devised in an attempt to demonstrate that it could be done at the level of a complex economy, all of which would require a trade interface, and there is currently a lively debate in that field (Planning for Entropy, 2022; Tremblay-Pepin, 2022). A careful study of these models is beyond the scope of this article but suffice it to say that the institutional changes required would be relatively comprehensive.

It is certainly technically feasible to put in place a trade policy to support the sustainability of domestic production processes and even to regulate overall consumption. While the first one may not be sufficient for an ecological transition, the implementation of the second one requires a fair amount of institutional and systemic change in the economy once the multidimensionality of ecological sustainability is taken into account. This may be hard to put in place in the short run. In the meantime, a third orientation for trade policy could help foster change in that direction.

Instead of setting barriers to protect production at large or devising production and consumption budgets, the trade interface could be linked to an explicit strategy of eco-substitution, akin to the traditional strategies of industrial substitution but with a specific environmental focus. In this case, the trade interface would be modulated to protect specifically some domestic initiatives, such as sustainable agriculture, and to ward off certain precise foreign practices, such as export-focused farming degrading groundwater resources, both in view of developing shorter value chains and a greener and more resilient domestic economy. If planned properly in a dynamic fashion, this could pave the way for a more comprehensive change in the structure of the economy and perhaps herald a systemic and ecological transition.

5. Conclusion

The need for an ecological transition is ever more present, and efforts must be made on many levels to favor it. This article explores some strategies whereby trade policy could be made to contribute to such a change. While trade and financial liberalization are probably hindrances to a transition and environmental provisions in current agreements seem relatively weak, an active trade policy subordinated to a project of ecological transition could prove to be useful. The implementation of such a policy would require important institutional work, but well designed, it could complement an industrial policy aimed at reorganizing the economy to make it more sustainable.

Many details remain to be worked out. For example, setting targets for production and consumption along many environmental dimensions, or arbitrating between some of these dimensions, would probably require institutions of their own to manage political and expert debates. Reversing the current liberalising trend would not only require different trade agreements in the future, but it would also probably entail a renegotiation of existing ones given the primacy they give to trade. Of course, such a paradigmatic shift will likely be accompanied by a fair amount of political resistance. All in all, the goal may be conceptually relatively simple, but its implementation can be expected to be complex. Nevertheless, given the urgency of the situation, it is better to start working to this end sooner rather than later.

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Conflict of Interests

The author declares no conflict of interests.

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Article

The Multisided Threat to Free Trade: Protectionism and Fair Trade During Increasing Populism

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Abstract

The standard embedded liberalism argument for increasing free trade after World War II is that countries have compensated those hurt by trade and, therefore, have reduced opposition to free trade policies. This argument relies on opposition to trade being motivated by personal economic effects of trade; however, recent work has increasingly found other motivations for protectionism, calling into question the sustainability of embedded liberalism. This article argues that this threat to embedded liberalism will grow worse as populism increases, which leads to both more nationalistic and more economic opposition to trade, which is only partially offset by other non-economic opposition (most notably, fair trade) decreasing. This article offers a conceptual framework for the different types of opposition to trade and how increasing populism influences its composition. The framework is supported by descriptive statistics of public opinion on trade policy in the US over the past two decades, encompassing trade opinions before and during the global financial crisis, as well as during the rise of global populist movements starting around 2016. We conclude the article with policy implications regarding the multi-sided threat to free trade and how policymakers can confront the evolving challenges to embedded liberalism.

Keywords

embedded liberalism; fair trade; free trade; populism; protectionism; trade policy preferences

Issue

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1. Introduction

The standard story about trade policy since World War II is that countries were able to steadily move towards freer trade because they matched the liberalization of trade policy to increased compensation for those hurt by increased imports. This compromise, known as embedded liberalism, reduced opposition to trade by low-skilled workers and import-competing industries, thus preventing a backlash to globalization. Although simplified, this story is largely true, at least until recently when new threats to globalization emerged. Increased concerns about the ethical impact of trade empowered the fair trade movement, which sought to limit trade with countries that had lower labor and environmental standards, concerns that could not be countered

with increased compensation. The fair trade movement was joined by increasing populism in Europe and North America that often expressed nativist concerns about the effects of globalization on domestic society. The compromise of embedded liberalism seemed to be fraying under attacks from both left and right. With Brexit in the UK and Donald Trump’s victory and subsequent protectionist trade policies in the US, populism won important victories while fair trade persisted in a less visible role and free trade took a step back in important global economies.

This article argues that free trade faces multiple threats simultaneously. The fair trade movement remains a threat, but in times of economic insecurity, it becomes less significant as more people focus on the economic effects of international trade. Economic insecurity can breed nativist populism which pushes a more

isolationist foreign and economic policy. As economies improve, protectionist threats to embedded liberalism will recede and fair trade threats will grow. This multi-sided threat presents significant complications for free trade as the policy responses to traditional protectionism, populist protectionism, and fair trade are different. Governments cannot simply enact compensation policies to increase public support for trade to deal with each of these trade threats. To demonstrate this, we proceed as follows. First, we provide reviews of the literature on embedded liberalism and fair trade as well as on trade policy preferences since our focus here is on embedded liberalism's ability to increase public support for trade. Second, we present the article's argument in detail building upon Ehrlich's (2018) multidimensional theory of trade preferences. Specifically, we incorporate populist protectionism into the existing framework discussing how populist protectionism, traditional protectionism, and fair trade differ from each other and how each threatens support for trade in different ways. Additionally, we posit how the different dimensions relate to each other and when we should expect which threat to dominate. Third, although empirical data aimed at specifically identifying populist protectionism is currently non-existent, we present descriptive statistics from multiple surveys in the US that illustrate the relationship between populist and fair trade concerns before, during, and after economic crises and how each poses a unique threat to embedded liberalism. Fourth, we discuss the policy implications of the argument and how embedded liberalism can survive these multiple threats. We conclude by discussing avenues for future research building on this article and a call for improved survey questions to differentiate fair traders, traditional protectionists, and populist protectionists.

2. Embedded Liberalism and Trade Policy Preferences

Prior to the collapse of the international economy in the interwar period, many countries opted for policies that favored international, rather than domestic, economic stability. After World War II, the new international economic order realized that prioritizing international economic stability was fundamentally in contradiction to the needs of a domestically active state (Ruggie, 1982). An important puzzle thus became how states can embrace free trade policies and the benefits that come with them while maintaining domestic stability and citizen support. Standard economic theory shows that trade is beneficial in the aggregate but produces domestic winners and losers. Without state intervention to help those who are hurt, domestic stability and overall support for free trade could be diminished. Therefore, to alleviate domestic opposition to free trade, embedded liberalism argues for a compromise wherein policies are created to help those that have been hurt by trade.

The policies used to increase support for trade vary from country to country (Kolben, 2021). Oftentimes, par-

ticularly in Europe, there are few trade-specific policies. Rather, compensation is provided through general welfare and unemployment policies. In other countries, such as the US, compensation is provided primarily through targeted programs. Although our argument is general, the data we present below is only from the US, so we provide here more detail on how embedded liberalism works in the US. The primary policy compensating workers in the US is the Trade Adjustment Assistance, which was explicitly designed to reduce the negative effects of trade on those hurt by increased imports. This program mostly provides workers who have lost their jobs due to increased imports with extended unemployment services, job training, and relocation services. The Trade Adjustment Assistance's goal is to give workers the time and resources to find new jobs in industries not facing as much foreign competition. As Ehrlich (2010) finds, these compensation policies are very popular among those who believe trade will hurt their jobs, even more than general compensation programs are. Kim and Pelc (2021) also find that counties that received more Trade Adjustment Assistance help were less likely to support protectionist candidates in the future. Both studies and Kolben (2021) provide more detail on the history and practice of Trade Adjustment Assistance.

In addition to the above studies about the popularity and effect of compensation programs in the US, significant amounts of research have found empirical support for the embedded liberalism thesis. Cameron (1978) and Adsera and Boix (2002) found that increased economic openness is associated with larger government size, which often provides compensation to those hurt by trade. Rickard (2015) found that congressional voting in the US followed this compensation logic as well, with legislators who represent those hurt more likely to support trade when there is compensation. Lake and Millimet (2016) showed that members of Congress were more likely to vote in favor of free trade agreements if the expected redistribution put forth by embedded liberalism policies placated their constituents. Additionally, scholars have found that compensation increases public support for trade as shown by Burgoon (2012), Ehrlich and Hearn (2014), Hays et al. (2005), and Walter (2010).

Embedded liberalism only provides policymakers with tools to combat opposition to trade based on traditional economic protectionism. Most researchers do not believe this to be an issue because they usually assume that people exist along a single continuum from complete support of free trade to complete opposition and assume that all opponents to trade are protectionists. Recently, research has begun to question the assumption that trade preferences are generated primarily by economic factors, such as in Mansfield and Mutz (2009) who argued that personal economic concerns do not motivate trade policy preferences at all. They and others have posited that non-economic determinants of trade preferences such as nativism, cosmopolitanism, isolationism, and ethical concerns such as those

embodied in the fair trade movement influence trade policy preferences in addition to or instead of personal economic concerns. In an assessment of the shortcomings of embedded liberalism's compensation policies, Kolben (2021) offered many non-economic determinants for opposition to free trade, such as ideological preferences about who is deserving of welfare and compensation, preferences for protection rather than compensation, voter's inherent desire to work instead of receiving benefits, racial resentment, and individual identity as a consumer.

These studies continue to present a single dimension of trade policy preferences from complete support to complete opposition to trade. Ehrlich (2018) offers an explicitly multidimensional framework that claims individuals are motivated by both fair trade and economic concerns simultaneously and mentions that additional dimensions could also be added, which we do here by adding populist concerns, positing that individuals are motivated by some combination of these three different factors. We do not claim that these are the only factors that matter, nor that everyone is motivated by all three. We merely focus on them because they appear particularly salient and, in the case of populism, overlooked and because Ehrlich's (2018) framework already incorporates fair trade as an additional dimension. Fair trade has had many meanings over time and is currently most frequently associated with product labels denoting that goods were produced meeting certain labor and environmental norms. We follow Ehrlich (2018) in using an expansive definition of fair trade as the desire to restrict trade due to concerns over labor and environmental standards and human rights abuses within the trade partner. These restrictions can include labeling, but they can also be bans on imports made through abusive practices or revocation of free trade agreements with countries with low standards or other policies.

Fair traders do not resemble protectionists except in their shared opposition to free trade. Fair traders' opposition is not based on the effect trade will have on the domestic economy but instead on ethical or altruistic objections about the effect trade will have inside the trading partner on labor and environmental conditions and human rights. Those who support fair trade are different from those who support protection. Because of the jobs that tend to be hurt by trade in rich countries, protectionists tend to have lower incomes, less education, and tend to be on both the right and the left. Fair traders tend to have higher incomes and education levels and are overwhelmingly on the left. They differ on what types of limits to trade they support: Fair traders tend to oppose trade agreements with countries that have poor labor and environmental standards, while protectionists tend to oppose trade agreements with countries with competitive imports. Crucially, fair traders and protectionists differ in what policies can change their opinion on trade: Since fair traders' opposition to trade is not based on the threat to their jobs or the economy over-

all, promises to compensate those harmed by trade are unlikely to sway them (Ehrlich, 2018). Hence, embedded liberalism is unlikely to be effective in building support for trade if the opposition is fair trade.

The story about trade policy preferences becomes more complicated when the economy worsens. As noted by Hainmueller and Hiscox (2006), fears about the distributional effects of trade can cause a backlash against globalization, especially among less educated and blue-collar workers. Margalit (2012) expands upon these anxieties towards globalization and economic integration, showing how cultural threat becomes an important factor for many individuals. In this scenario, less-educated individuals tend to view economic integration negatively not only because of economic loss but because of a perceived broader change in these individuals' cultural identity. He found these anxieties hold across geographical regions as well as levels of economic development in cross-national survey data. During the Great Recession, Mansfield et al. (2019) found a modest yet statistically significant decline in support for free trade among Americans, some of which was caused by a rise in ethnocentrism and isolationist foreign policy preferences.

Related to this research on the state of the economy, several studies have examined whether worsening economic conditions and openness to trade explain increased populism. Milner (2021) found that exposure to trade leads to more support for extreme right and populist parties and, importantly, that embedded liberalism compensation policies seem unable to counter this trend. Similarly, Abou-Chadi and Kurer (2021) showed that economic pressure among households with high-risk individuals increased support for radical-right populist parties in Europe. Colantone and Stanig (2018) found that increased imports, particularly from China, lead to increased support for "economic nationalism" though Margalit (2019) suggests these effects should be short-lived. Norris and Inglehart (2019) also find that economic insecurity increases the amount of populist authoritarianism, although, as discussed below, they mean something different by this concept than we do by populism. Regardless, there is clear evidence economic insecurity increases support for populism, although there are still questions about the size and duration of the effect.

However, even if globalization and economic insecurity contribute to increases in populism, once populist attitudes have been activated, the opposition to trade is no longer about economic insecurity but rather by cultural attitudes, as Norris and Inglehart (2019) focus on. More compensation policies, or more general policies to increase economic growth and reduce economic inequality, may prevent populism from becoming strong in the first place or even reverse populism's growth, but they do not directly address the concerns populists have about trade which are non-economic. We explain this in more detail in the next section.

3. Multidimensional Trade Policy Preferences, Populism, and Fair Trade

Summarizing the discussion above, trade policy preferences are typically viewed as existing along a single dimension, running from complete support for free trade to complete opposition to it. Further, this opposition is usually viewed as being based on economic concerns about the effects of trade. Even those studies, such as Mansfield and Mutz (2009), that argue trade opposition is not generated by personal economic concerns still consider all opposition to trade as similar and preferences falling along a single dimension. Ehrlich (2018) argues that trade policy preferences are multidimensional and add an ethical dimension to the economic one to explain fair trade opposition to trade. We argue that a third dimension can be added based on populist opposition to trade which differs from both traditional economic protectionism and fair trade.

Traditional protectionism is about protecting jobs or domestic companies from imports, while populist protectionism is motivated less by economic concerns and more by political and cultural concerns. Populism is a complicated concept, as described in detail in Mudde (2007) and Norris and Inglehart (2019). One of the main elements of populism is an anti-elitist and anti-establishment view that holds existing elites in government and elsewhere do not have the best interests of “the people” and that power should be returned to “the people.” This part of our definition of populism is akin to Norris and Inglehart’s (2019, p. 66) discussion of how populism is a “rhetorical style of communication” focusing on how authority derives from the people and how existing powerholders are corrupt. We depart from Norris and Inglehart (2019) in two important ways. First, we focus on populist attitudes regardless of any linkage to authoritarian attitudes, whereas they explicitly link them. Second, we focus on a particular brand of populism, or a “second order principle” (Norris & Inglehart, 2019, p. 4): nativism. Populism often has an exclusionary definition of the people where only citizens (or subsets of citizens) are part of the people in a country, and government should focus on benefitting them. As a result, populist movements tend to be isolationist and anti-immigration and are often, though not always, xenophobic and racist. This nativist feature of populism is our focus because it is the singular focus on domestic concerns and domestic interests that often leads populists to become isolationists and protectionists. Isolationism can lead to a desire to avoid international organizations and commitments, like the WTO or trade agreements, or a desire to avoid international economic relationships more broadly. A distaste for foreign influences can lead to a desire not to import goods from abroad. Additionally, a view that “the people” must be protected can lead to support for tariffs and other trade restrictions to protect local jobs against foreign competition. Anti-establishment parties need not be protection-

ist, but nativist parties almost always are. Thus, though it is a simplification, our use of populist protectionism is mostly a synonym for nativist protectionism. The third populist dimension of trade policy preferences we introduce here has nativism at one end of the dimension and cosmopolitanism at the other end. For our definition of cosmopolitanism, we mean something similar to Mansfield and Mutz (2009), specifically that a cosmopolitan viewpoint entails a positive attitude towards out-groups and internationalism.

Although there are elements of economic protection in populist protectionism, there are also key differences between traditional and populist protectionism. For instance, at its extreme, a populist protectionist would oppose imports even if no domestic industries were producing those products, while a traditional protectionist would not view such imports as a threat. Further, those favoring populist protectionism often exhibit concerns entrenched in inter-group competition that result in policy opinions favoring relative gains over out-groups, even if these policies result in less absolute gains for the in-group (Mutz & Kim, 2017).

Xenophobia, inter-group competition, and the perceived loss by those in the US when it comes to trade were found to be extremely prevalent among supporters of Donald Trump, with roughly two-thirds of Trump supporters believing international trade takes away US jobs (Blendon et al., 2017). The rise of Donald Trump’s brand of populist protectionism did attract those who may have held anti-trade tendencies, to begin with, but it also may have caused those who had xenophobic attitudes to connect their grievances to trade. For example, previous work has argued that Trump supporters who feel as if their racial dominance is being threatened or view America’s global dominance as declining sometimes blamed economic openness for this decline, but others only connected this to trade once Trump’s populist rhetoric of America losing to other countries gained a foothold (Essig et al., 2021).

Adding this third populist dimension to Ehrlich’s economic and ethical dimensions would yield an unwieldy eight different trade policy orientations. If we collapse Ehrlich’s (2018) pure protectionists and anti-traders into one category of “protectionists,” as he often does, we still have six possible orientations: cosmopolitan and populist free traders; cosmopolitan and populist fair traders; and cosmopolitan and populist protectionists, with cosmopolitan protectionists essentially being traditional protectionists. However, as opposed to the economic and ethical dimensions of Ehrlich (2018), it seems unlikely that this third dimension is completely independent of the other two. Where you fall on the other two dimensions likely influences where you fall on the third one. For instance, fair traders are, by their very nature, concerned with people in other countries. It would be difficult for them not to be at least somewhat cosmopolitan, so we rule out the category of populist fair traders.

Populist free traders, on the other hand, could exist. One can support free trade because one believes that increased exports and cheaper consumer goods are good for the country's economy and not because of any preference for foreign goods or concerns about the global economy. However, existing research on the determinants of support for free trade shows that cosmopolitanism is one of the more consistent predictors of support for free trade (Hainmueller & Hiscox, 2006). Therefore, although populist free traders might exist, we assume they are too few to be of interest here. As a result, adding this third populist dimension only yields one additional trade policy orientation over the three Ehrlich (2018) usually focuses on by splitting protectionists into the two different orientations of traditional and populist protectionists.

In summary, this multidimensional trade policy preference model predicts four different categories of preferences listed as Table 1 shows. Free traders support expanded trade and oppose any limitations on trade. Traditional protectionists oppose expanding trade when it might hurt domestic jobs and support limits to trade that will benefit domestic workers. Fair traders oppose trade with countries with weak labor and environmental standards and favor restricting trade with such countries. Populist protectionists oppose trade of all sorts and want policies that promote domestic production and domestic interests more broadly. Individuals can have multiple reasons to oppose trade, so there will be overlap in the last three categories, but there will also be individuals who fall into only one of these three categories.

The analysis so far has been static: What are the categories of trade policy preferences at any given point in time? We are also interested in the dynamics of trade policy preferences: How does the size and composition of these categories change over time? When the economy worsens, we would expect material concerns to increase, so traditional protectionism should

certainly increase. But populist protectionism, despite being motivated by non-economic concerns, might also be expected to increase due to poor economic conditions triggering anxieties that could cause increased nativism.

Existing research shows that support for protectionism increases as the economy weakens. This opposition can be mitigated by embedded liberalism policies, so if economic downturns are met with countercyclical policies, this does not pose an existential threat to embedded liberalism. The possibility that economic downturns also lead to increased populist opposition to free trade is more worrisome for embedded liberalism as there is no known policy response to counter populist protectionism.

How might support for fair trade change during economic downturns? Fair trade is a post-materialist attitude and possibly an expression of altruism. When material needs are threatened, some people will curtail or abandon their post-materialist and altruistic beliefs and behaviors. Inglehart (1981) argues that material needs being met are a prerequisite for post-materialist attitudes to increase in a country. Although he focuses on long-term trends, his logic suggests there should be variation as economic conditions change. Additionally, previous studies (Meer et al., 2017) have found charitable giving declined sharply during the Great Recession in 2008 and did not recover until 2014 (Brooks, 2018). Even though there is a greater need for charity during economic downturns, it appears most people respond by looking out for their own concerns. To the extent that fair trade is a form of altruism akin to charity, we would expect fair trade concerns to have similarly declined during this time frame as fair traders worried less about conditions abroad and more about their own personal or national economic conditions.

We expect both traditional and populist protectionism to increase as the economy worsens and for free trade and fair trade support to decrease. Most

Table 1. Attributes and expectations of different trade orientations.

Type	Ideology	Income	Education	Strong Economy	Weak Economy
Free Trader	Conservative	Wealthy	High Education	Expanded Trade: No Limitations	Less Support for Free Trade: Possible Switch to Traditional Protectionism
Fair Trader	Liberal	Wealthy	High Education	Ethical Limitations on Trade	Ethical Concerns Less Important: Possible Switch to Free Trade or Traditional Protectionism
Traditional Protectionist	Either	Less Wealthy	Less Education	Protection for Domestic Workers	Heightened Protection for Domestic Workers
Populist Protectionist	Mostly Conservative	Least Wealthy	Less Education	Oppose all Trade	Oppose all Trade

new populist protectionists were likely previously traditional protectionists (and may remain traditional protectionists in addition to their populism.) We would not expect many fair traders to become populist protectionists because of their opposite worldviews. Some free traders may become populists if they still believe that free trade is good economically but oppose the outside cultural influences of trade. But most free traders and fair traders who switch policy preferences are likely to become traditional protectionists, as they focus more on how imports might be hurting domestic jobs rather than focusing on conditions in other countries or cheaper consumer prices. Lastly, some fair traders might become free traders if they believe that trade is good for the economy and decide that concerns about conditions in other countries are a luxury they can't afford with a weak economy.

As Ehrlich (2018) discussed, fair traders tend to be liberal, wealthy, and educated; free traders tend to be conservative, wealthy, and educated; and protectionists tend to be less wealthy, less educated, and of either ideology. During economic downturns, these tendencies are likely to be reinforced: poorer and less well-educated fair traders and free traders are both likely to switch to protectionism. Among protectionists, we would expect conservatives to be more likely to become populist protectionists, at least in the current populist wave.

During the period of populism's rise in the US and Europe, the economies of the various countries were mostly growing, raising questions about the extent to which populism was a response to an economic crisis. In the US case, there is already literature debating the rise of Trump, with many arguing that it had nothing to do with economic insecurity but rather with racism (Mutz, 2018). We do not dispute this element of Trumpism, but we do note that Trump chose to harness nativism and racism to a populist economic message instead of other possible frames. In Europe, Carreras et al. (2019) find that economic anxiety and nativism worked together to lead to Brexit support. For many, economic concerns remained despite the recovery from the global financial crisis as growth was slow and unevenly distributed. Certainly, there was enough economic anxiety that opportunistic politicians could use it to fuel populism.

Previous research suggests that foreign policy opinions are often generated through both social cues and a top-down process driven by the media and elites (Kertzer & Zeitzoff, 2017). What might matter then is party messaging rather than objective economic conditions. The Trump 2016 campaign and the Brexit campaign were both based on populist messages about the national economy being under threat from foreign influences. Even though the economy may have been doing well at the time, people were confronted with messages that they should be concerned about the state of the economy. Thus, even though the US economy in 2020 was worse than it was in 2016, populist protectionism might be expected to be lower given that the Trump

campaign focused on other issues and trade policy disappeared almost entirely from the debate. The 2020 campaign focused more on Covid, impeachment, charges of socialism against Biden, and Antifa, few of which would likely prime people to take populist positions on trade.

In summary, support for free trade and fair trade should decrease during poor economic times and other crises while support for protectionism of either flavor will increase. When campaigns emphasize populist issues, populist protectionism should increase at the expense of both free trade and traditional protectionist support. People with lower income and education levels are the most likely to become populist protectionists during all these periods.

4. Descriptive Statistics

The descriptive statistics from public opinion data on trade policy preferences bear out these expectations, although we leave it to future work to examine this more rigorously. The biggest problem with testing the arguments put forward here is that no one has measured populist protectionism before since no one has thought of it as distinct from traditional protectionism. There are rarely direct questions about who a populist is, and none we are aware of in a survey with trade policy questions as well, so we cannot directly determine what type of trade policies populists support. The descriptive statistics here are indirect and show instead what happens to support for other trade policy preference types when populism is on the rise or when the economy is weak. These results, we argue, demonstrate the plausibility of the concepts presented here and call for future research on the issue.

As discussed above, existing research demonstrates the effects of economic decline on support for free trade and traditional protectionism. Ehrlich (2018, p. 70) shows similar patterns when including fair trade preferences. He examined surveys from 2006, 2008, and 2012, thus having data on when the economy was strong, during a crisis, and when it had somewhat recovered. In 2006, during good economic times, about 30% of the population supported free trade, and another 30% supported fair trade, with about 40% supporting protectionism. In 2008 free trade support had dropped slightly to 27%, while fair trade support dropped to 20%, with protectionists making up about half of the sample. In 2012, despite the improved economy, support for protectionism increased again by about 2%, drawing from both free trade and fair trade support, suggesting that the economic anxiety caused by the 2008 crisis lingered. The increase in support for protectionism was most pronounced among conservatives with lower levels of education and income (Ehrlich, 2018, p. 78), the population most likely to be populists. This supports our expectation that as the economy worsens, populists who had supported free or fair trade are more likely to become protectionists of some type (and, especially, populist protectionists).

More recent survey data shows what happens during populist periods. We depart from Ehrlich (2018) and substitute party identification for ideology because we are examining opinion during an election context where partisan effects should be especially salient. Trump's 2016 campaign was heavily based on populism, with previous research finding that Trump supporters became increasingly protectionist due to campaign messaging (Essig et al., 2021). Additionally, 2016 saw uneven economic growth throughout the country, with many areas that were especially susceptible to Trump's populist message suffering more than others (Schneider, 2019). We argue above that embedded liberalism's compensation policies, while aimed at alleviating traditional protectionism, lack a sufficient response to populist protectionism. Our results also demonstrate this: Figure 1 shows results from a panel of respondents in the 2016 American National Election Studies (ANES, 2017) survey. Republicans were the least likely to support free trade, with only 33.1% in favor, and the most likely to oppose trade, with 23.6% of respondents in opposition. This offers descriptive evidence that as the Trump campaign highlighted grievances brought on by trade along with perceptions of a weakening economy, attitudes towards trade soured, even among those who had been the traditional stalwarts of free trade policies.

Further, the breakdown of which Republicans were protectionists follows traditional results born out in previous research (Mansfield & Mutz, 2009). More educated Republicans showed more support for free trade, as shown in Figure 2, with only Republicans in the Some College category having more opposition to free trade ($N = 80$) than supporters ($N = 68$). To the extent that the ANES survey question on trade is measuring both traditional and populist protectionism, it is exactly in lower education categories that we would expect to see

the most Republican protectionists. Surprisingly, income played less of a role than previous research would expect, as shown in Figure 3. Rich and poor Republicans were similar on trade attitudes, with middle-income Republicans the most likely to oppose trade.

In line with Trump's populist rhetoric around trade in 2016 and our expectation of policy preferences in times of real or perceived economic crisis, Republicans in the panel who believed that the economy was doing poorly were the most likely to oppose free trade, as shown in Figure 4. These results line up with our theoretical expectations regarding a worsening economy, or the perception of such, and the adoption of populist positions leading to more protectionist attitudes. For Republicans who thought the economy was worse than the previous year, 30.4% opposed free trade, while only 27% supported it. Conversely, Republicans with positive economic perceptions showed 41.8% favorability towards free trade, with only 9.9% opposing trade. In short, Trump's 2016 campaign created a narrative of a worsening economy hurt by international trade, in tandem with uneven economic growth across the country, which resulted in a populist message swaying former free traders into the protectionist camp while also emboldening those with non-economic grievances to oppose trade.

By 2020, the Trump campaign changed its focus to matters other than trade, such as their response to the Covid pandemic. As a result of the change in rhetoric, trade policy preferences for Republicans reverted to pre-Trump patterns, with a drop in opposition to free trade and over a 10% increase in support for trade from the ANES panel respondents. As shown in Figure 5, opposition to trade decreased across party lines, with Republican opposition to trade decreasing from 23.6% in 2016 to 12.9% in 2020, along with only 7.4% of Democrats and 8.4% of Independents opposing trade.

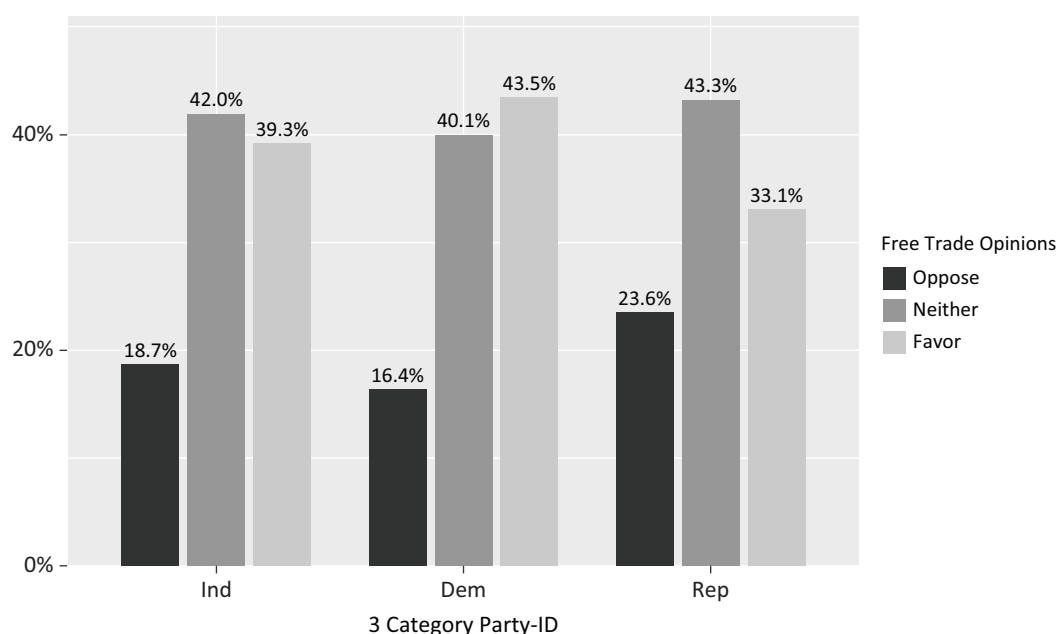


Figure 1. Party ID and support for free trade. Author's own calculations based on ANES (2017).

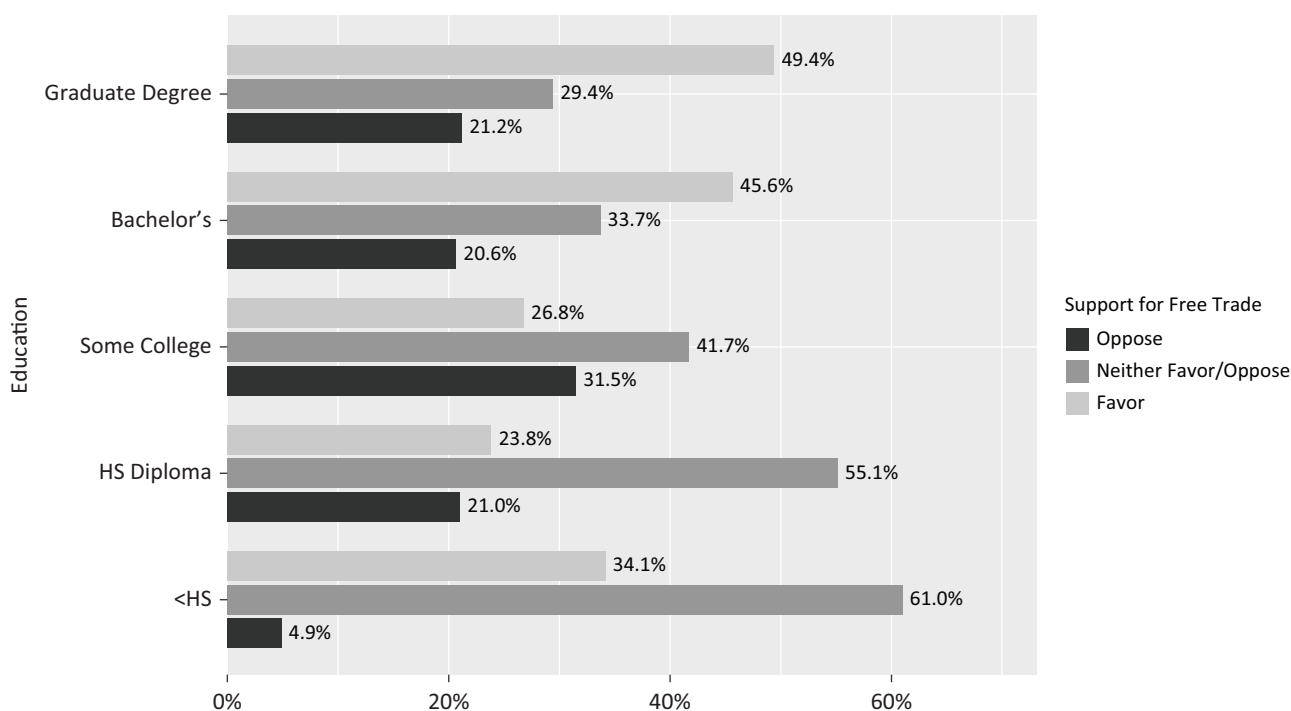


Figure 2. Support for free trade among Republicans by education. Author's own calculations based on ANES (2017).

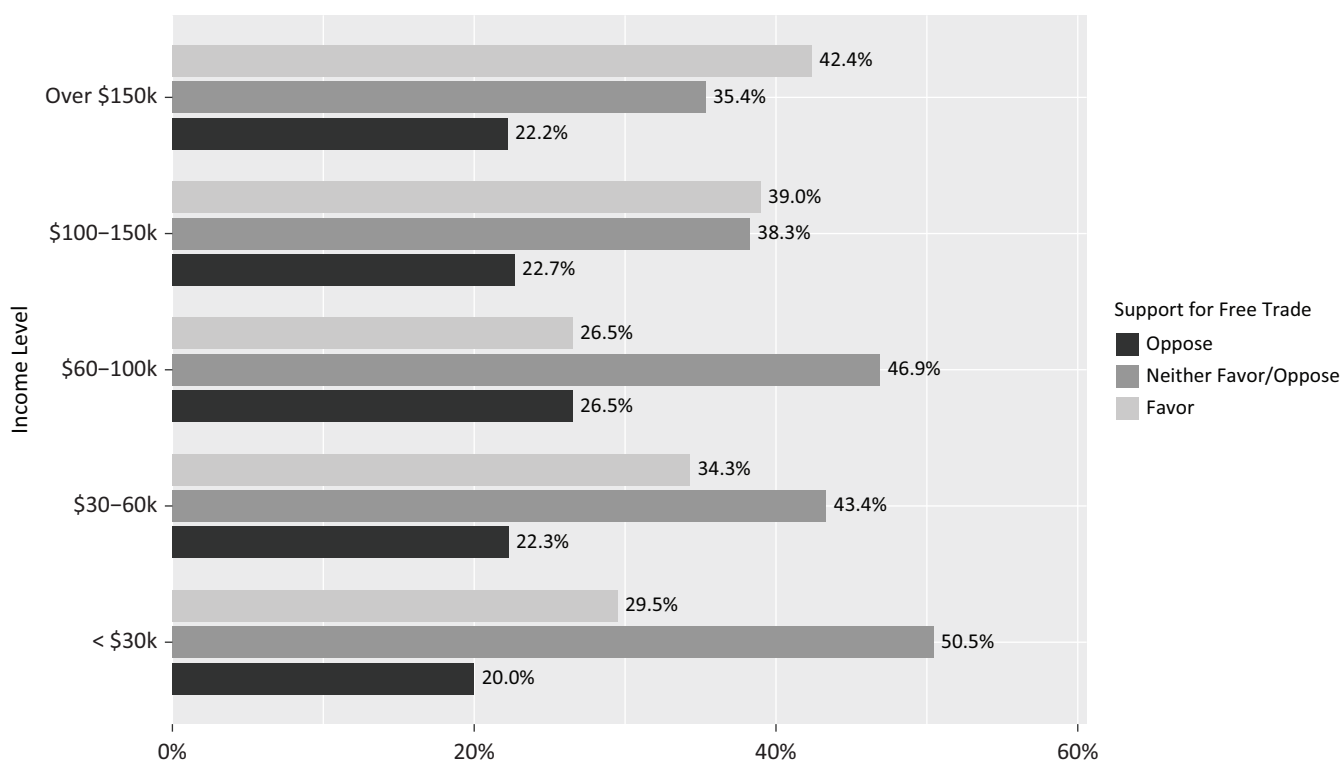


Figure 3. Support for free trade among Republicans by income level. Author's own calculations based on ANES (2017).

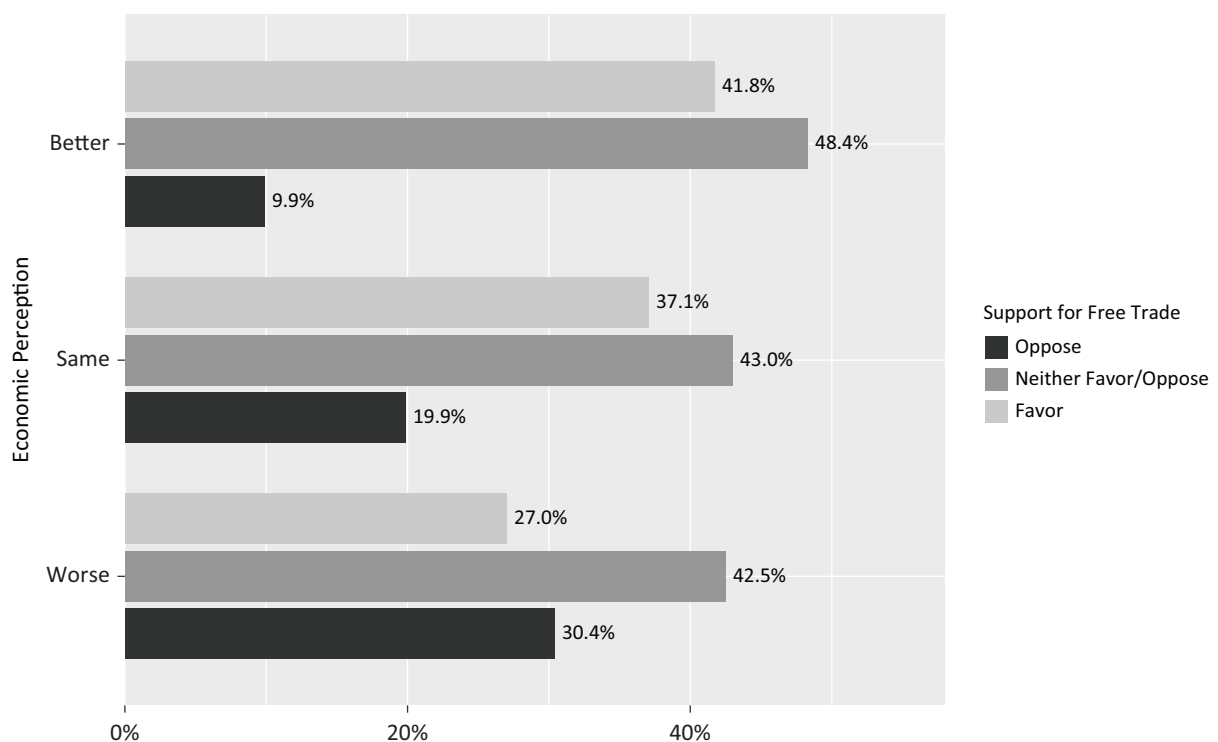


Figure 4. Support for free trade and economic perceptions among Republicans. Author's own calculations based on ANES (2017).

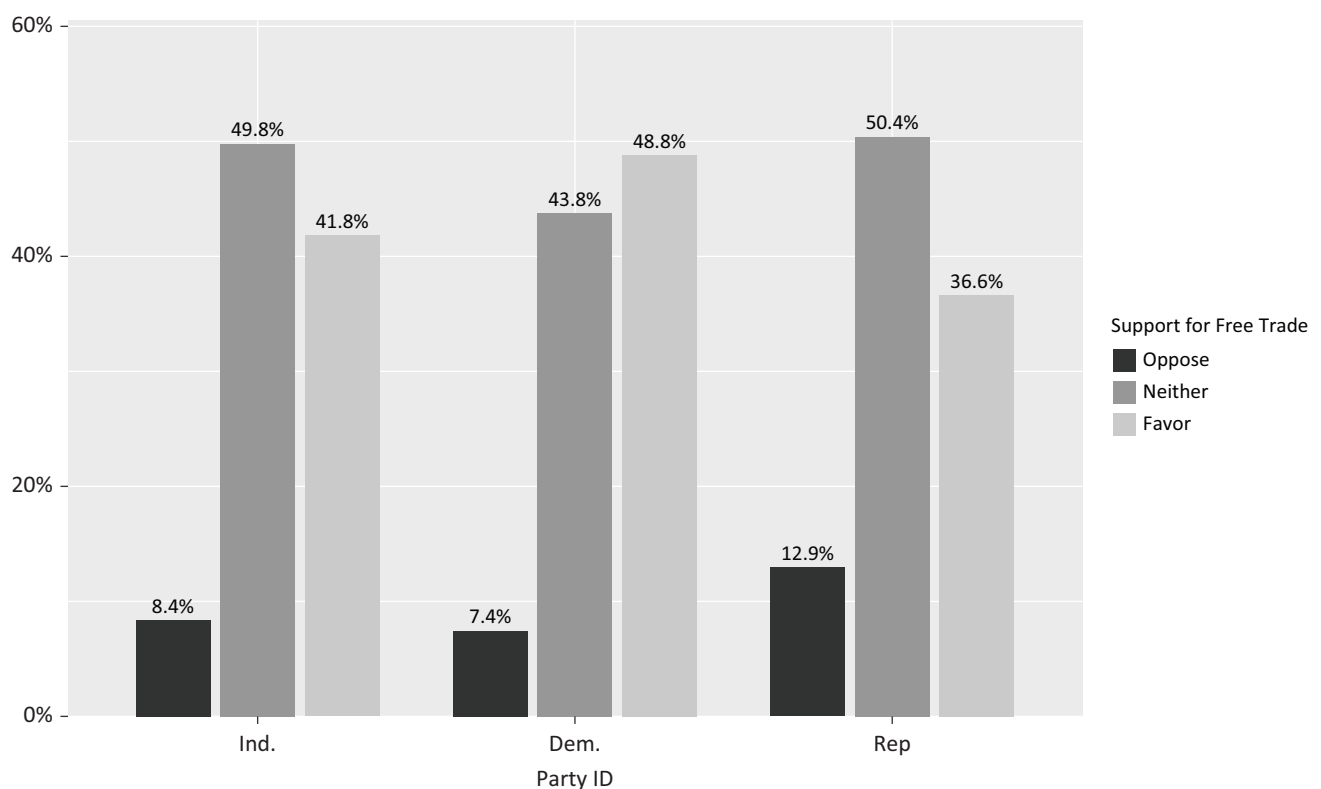


Figure 5. Party ID and support for free trade. Author's own calculations based on ANES (2021).

This return to stronger support for free trade among Republicans falls in line with the literature on traditional trade preferences when the economy improves. However, according to the US Bureau of Economic Analysis (BEA, 2022), many states that Trump won in 2020 suffered worse economic outcomes during the 2019–2020 period when compared to 2018–2019, undoubtedly due to the Covid-19 pandemic. As an example, according to BEA, the US state of Florida’s compound annual growth rate was 5.2% during the period 2012–2016. During the 2016–2020 period this growth rate shrunk to 4% (BEA, 2022), with similar results found in many of the states Trump won in both 2016 and 2020. If economic downturns were the sole cause of increased protectionism, we would expect opposition to trade to increase for the panel respondents in 2020, yet this is not the case. We argue this is because of the decrease in populist rhetoric rather than policy preferences changing based on economic outcomes.

Looking deeper at Republican respondents, we see when examining across education levels opposition to trade decreased in nearly all categories in 2020. As expected from previous literature on trade policy preferences as well as our theory on who is most likely to be a populist protectionist, only Republicans without a high school diploma saw an increase in opposition to trade, although the sample size in this category is small. Interestingly, 2020 Republicans with a bachelor’s degree were less supportive of free trade than those in 2016, garnering 41.6% support in 2020, as shown in Figure 6, compared to 45.6% in 2016, although they were also less likely to openly oppose free trade.

The decrease in opposition to free trade continued across nearly all income brackets for Republicans in 2020, as shown in Figure 7, although this did not always translate to more support for free trade. While support for free trade increased for those making between \$30,000–\$150,000, respondents making over \$150,000 had less support for free trade than those in 2016, with 40.6% of respondents in favor of free trade in 2020 compared to 42.4% in 2016.

The 2016 and 2020 ANES surveys presented here included panel data of 2,595 respondents in the 2016 survey who were questioned again in 2020. We, therefore, have data on how people’s trade preferences changed over these four years. Specifically, we can see the change in those who opposed free trade in 2016 and flipped to supporting free trade in 2020, as shown in Figure 8. Looking at the first set of columns on the left side of the x-axis, we see nearly 31% of those who opposed free trade in 2016 switched to supporting free trade in 2020. Additionally, a majority (50.2%) of respondents who actively opposed free trade in 2016 transitioned to the Neither Favor/Oppose opinion in 2020. As Trump’s re-election campaign focused on other issues, trade took on less salience and therefore garnered less outright opposition even though the economy was experiencing a sharp decline. Specifically, only 19% of respondents who opposed free trade in 2016 still held the same opinion in 2020. Despite a worsening economy, without a populist message from the campaign, opposition to trade decreased. Our arguments suggest this is likely because populist protectionism, and not traditional protectionism, decreased.

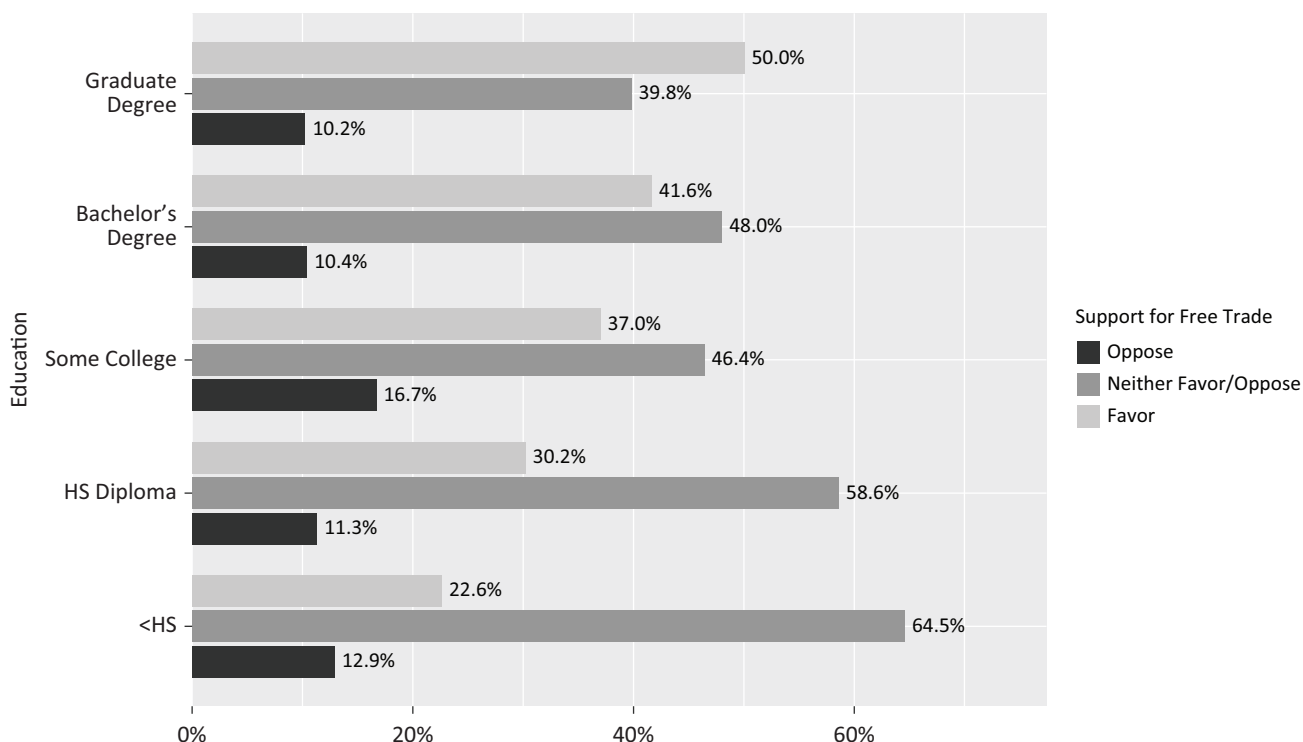


Figure 6. Support for free trade among 2020 Republicans by education. Author’s own calculations based on ANES (2021).

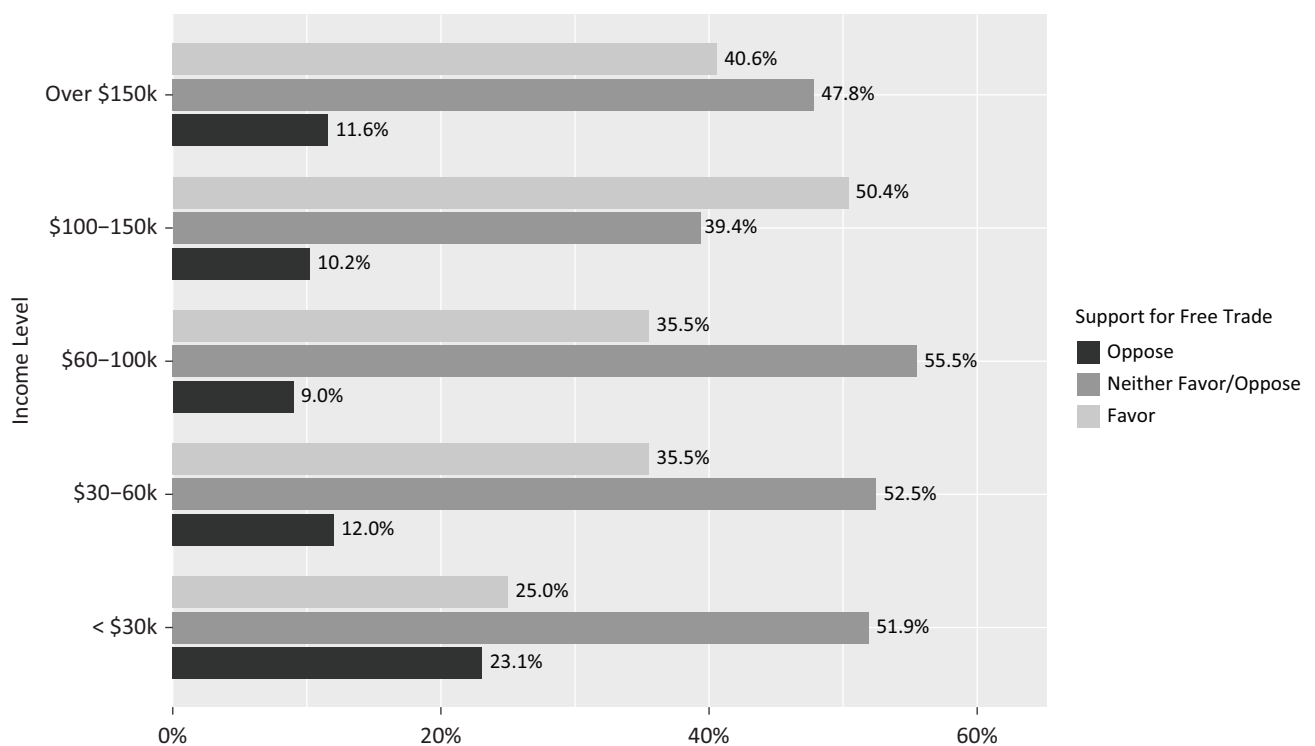


Figure 7. Support for free trade among 2020 Republicans by income level. Author's own calculations based on ANES (2021).

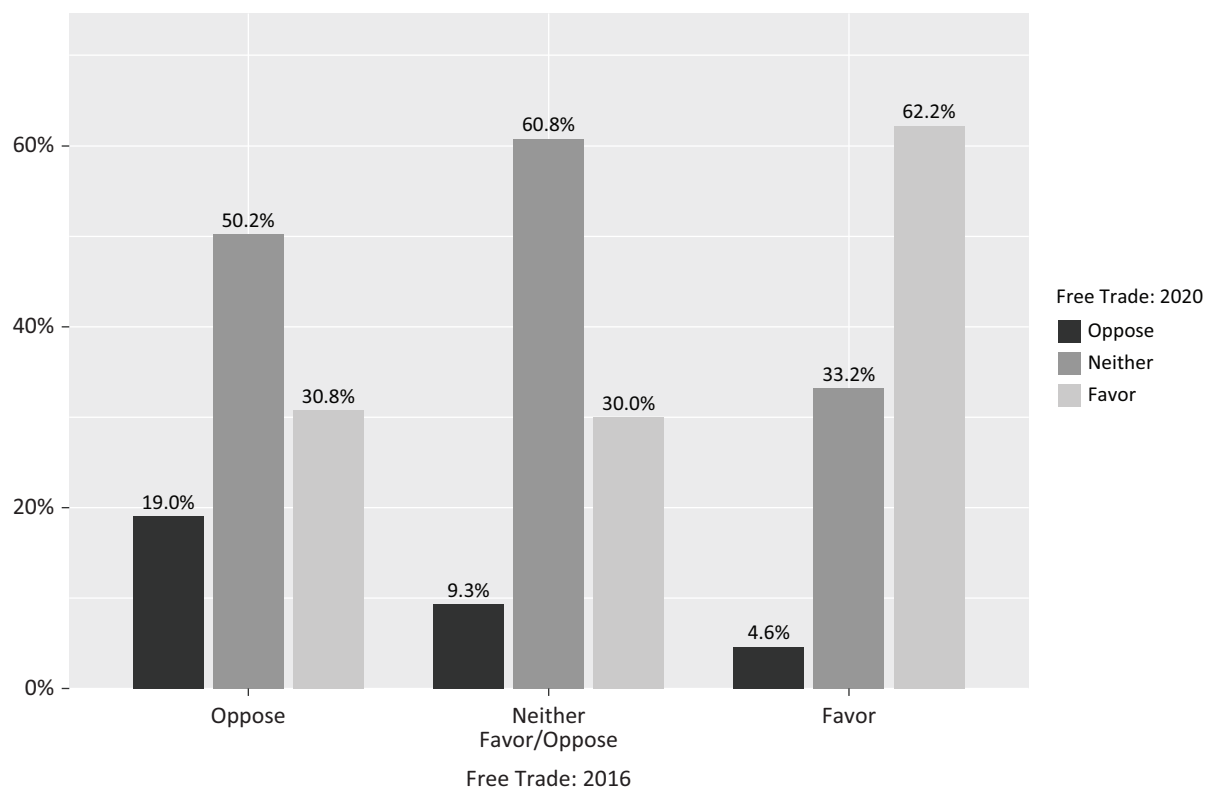


Figure 8. Support for free trade among ANES panel respondents. Author's own calculations based on ANES (2017, 2021).

5. Policy Implications

There is widespread consensus about how to respond to traditional protectionism: compensation as suggested by embedded liberalism. As the economy worsens and traditional protection rises, compensation can increase to offset this. Economic downturns might make it more difficult for countries to provide the budget for this compensation, and countries that adopt a pro-cyclical policy and implement austerity measures might decrease compensation during economic downturns. However, this is a choice, a bet that such austerity policies will improve the economy in the long term and reduce protectionist demands. Thus, even though there is debate about whether to implement compensation programs, it is widely believed that these programs are successful in reducing traditional protectionism.

We have no such consensus on policies that can reduce populist protectionism or fair trade opposition. Ehrlich (2018) provides some suggestions for fair trade opposition. Specifically, he suggests that free trade advocates either focus on expanding trade with countries that have strong labor and environmental standards or include enforceable standards in trade agreements with countries that have low standards. These types of agreements seem to improve standards in poorer countries (Hafner-Burton, 2010), so fair traders should prefer them over banning trade with these countries.

We do not even have this much for populist protectionism. As mentioned above, compensation is unlikely to be effective in reducing nativist-based populist opposition. The concern of these populists is more fundamental than imports competing with domestic products hurt the domestic economy. Rather, they are concerned that foreign influence is corruptive of domestic society and culture. Compensating those materially harmed by trade does not address this cultural harm. Indeed, part of the problem here is that opposition to trade based on nativism does not seem amenable to increasing support for trade. As opposed to traditional protectionism and fair trade, the opposition here is not about the negative effects of trade but foreign trade itself. This is what makes populist protectionism a unique threat to free trade and embedded liberalism. Perhaps focusing on trade agreements with countries that have similar cultures will assuage some populist protectionists, but this is uncertain and limits the scope of potential expanded trade. Likely, the best response is to ignore the direct threat of populist protectionism by focusing on increasing support from other groups. Thus, free traders should double down on the compensation policies inherent to embedded liberalism while also addressing fair traders' concerns. The more people who support trade from these groups, the less of a threat populist protectionism will be.

In addition, free traders could focus on reducing the amount of populism. As a first cut, we highlight here some of Norris and Inglehart's (2019, pp. 461–465) solu-

tions for addressing populist authoritarianism. First, free traders can address the underlying economic issues that can lead to increases in populism, such as improving the overall economy of the country and reducing economic inequality. Second, they can address issues that lead to cultural anxiety, perhaps by limiting immigration. However, while this approach might increase support for trade, it only does so by sacrificing another common element of liberalism, the free movement of people. We, therefore, believe the first approach is the better approach for those pursuing embedded liberalism, especially since robust compensation policies themselves can reduce economic inequality. In sum, though we are not sure populist protectionists can be convinced to support trade, increasing support for trade among traditional protectionists and fair traders and reducing the number of populists by improving the economy and reducing economic inequality might indirectly defang populist protectionism's threat to embedded liberalism.

6. Conclusion

In this article, we argued that populist protectionism and fair trade are both distinct forms of opposition to trade separate from traditional economic protectionism. When the economy worsens or people face economic insecurity, populist protectionism is likely to rise, especially if there are ongoing populist campaigns. Neither fair trade nor populist protectionism can be addressed through compensation, putting the compromise of embedded liberalism at risk. While potential tools may exist to address fair trade opposition, none are available to address populist protection directly.

Our arguments relate to the literature on embedded liberalism, trade policy preferences more broadly, and the rise of populism. With regards to trade policy preferences, we build on the work of Ehrlich (2018) by showing how additional dimensions can be added to his multidimensional trade policy preference theory. We also contribute to the debate about economic vs. non-economic influences on trade policy preferences begun by Mansfield and Mutz (2009), essentially by arguing that both matter but for different people. We also contribute to the literature investigating populism's recent rise, such as Norris and Inglehart (2019), by discussing how populism can influence specific policy preferences and may lead to changing policies and politics even when it does not undermine democracy.

Mostly, though, we hope this article serves as a call to arms, both to policymakers to counter this threat to embedded liberalism and academics to further study the phenomenon of populist protectionism. While populism, xenophobia, and trade policy preferences have been studied before, we always assumed opposition to trade resulting from populism to be the same as economic protectionism. To the extent that it is motivated by xenophobia and nativism, this assumption is incorrect and dangerous if we hope to understand why

people oppose trade and how to address that opposition. We presented descriptive statistics that shows support for fair trade and free trade both reduce during economic crises and populist campaigns, but we could not rigorously test our arguments on the difference between populist protectionism and traditional protectionism because no one has ever conducted surveys that include questions with wording that could distinguish them. Although our data relies solely on US respondents, we do not think this is strictly a US phenomenon. Since 2020, many populist parties have seen increased vote shares in multiple European elections, such as Italy and Sweden (Silver, 2022), with Giorgia Meloni of the far-right Italian populist party Brothers of Italy recently becoming Prime Minister. In addition to entrenched populist leaders such as Hungary's Viktor Orban, or Turkey's Recep Tayyip Erdoğan, populist sentiment appears to be on the rise throughout much of the world. We believe future research is needed to identify who populist protectionists are before additional research on how to address their concerns and what threat they pose to embedded liberalism can be conducted, in addition to testing whether these trends hold outside of the US. Once this is done, we can assess the complete danger to embedded liberalism posed by fair trade, populism, and economic protectionism combined.

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Conflict of Interests

The authors declare no conflicts of interest.

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Article

Populist Backlash and Trade Agreements in North America: The Prospects for Progressive Trade

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Abstract

Populist rejection of the embedded liberal international order is evident in many Western democracies. This is partly attributable to the architects of this system, who over-promised widespread benefits while ignoring warnings from labour and fair-trade advocates about risks to economic security from transnational economic competition. This article contrasts Canadian and American conservative populist positions on free trade. Globalisation and free trade without consideration for fair trade weakened the embedded liberal compromise and undermined the Keynesian welfare state model which sustained it. While regional free trade agreements like the North American Free Trade Agreement have had marginal negative effects, they became convenient scapegoats in a strategy of “othering” adopted by Trump and other populists. Populism arose in part in response to middle- and working-class decline (alongside cultural changes and revitalised nativism), which eroded support for embedded liberalism. The heretofore pro-trade GOP followed Trump to a more protectionist and bilateral model to press for “America first,” tinged by nativist othering towards Mexico and China. This diverged from Canadian right-populist leaders, whose rhetoric generally supports freer trade despite scepticism among some supporters. Asymmetrical circumstances of the US as a global economic hegemon vs. Canada as trade-dependent middle power limits the feasibility of a protectionist, “Canada first” position while particularities of political and electoral systems create more room for nativism in the US. Polling results indicate support for free trade in both nations, with a priority for labour and social protections, which provides the potential for further engagement in progressive trade liberalisation. Hence a significant percentage of the population supports “fair-trade” approaches, not protectionism. However, many conservative politicians eschew fair-trade positions and endorse anti-labour policies. Despite gains such as the labour provisions in the Canada–US–Mexico Agreement, a right-populist alliance with fair-trade advocates and labour unions is unsustainable and would entail compromises like climate denial, anti-immigrant, and anti-equity approaches which hinder the pursuit of progressive multilateral trading regimes.

Keywords

Canada–US–Mexico Agreement; globalisation; North America; populism; protectionism; trade agreements

Issue

This article is part of the issue “Re-Embedding Trade in the Shadow of Populism” edited by Kevin Kolben (Rutgers Business School) and Michèle Rioux (Université du Québec à Montréal).

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1. Introduction

Ruggie (1982, as cited in Helleiner, 2019, p. 1115) argued that with the “re-embedding” of liberalism after 1945 in exchange for global openness, “national authorities were empowered to pursue ‘a set of social objectives to which the industrial world had moved’...namely that governments were ‘assuming much more direct responsibility for domestic social security and economic stability.’”

This set the basis in the Keynesian-welfare era for liberalisation with social safety nets and compensation for those displaced by liberalising initiatives in trade, currency, and finance. Wolfe and Mendelsohn (2005, pp. 45–46) suggest that, over time, support for embedded liberalism became a matter of ideology and values around the popular compromise of liberalising openness balanced with domestic interventionism via the welfare state. Ehrlich (2010, p. 1013) describes the use

of welfare and education policies to compensate those negatively affected and build support for trade liberalisation. Since the 1980s, the rise of neoliberalism, globalisation, and erosion of middle and working-class well-being has challenged support for this compromise as neoliberalism essentially reversed embedded liberalism. Verbeek (2022) notes how “embedded neoliberalism” affected trade agreements, as support for those negatively affected by liberalisation and globalisation decreased, and economic circumstances for many also declined. This contributed to an invigorated protectionist populism appealing to actual or relatively deprived classes.

Commitments by Western governments (such as those of Bill Clinton, Jean Chrétien, and Tony Blair) to embed a meaningful social dimension in trade accords were weakened in the 1990s. Fair-trade arguments, undervalued by supporters of liberalisation, were marginalised in many free trade agreements, including the North American Free Trade Agreement (NAFTA; Finbow, 2006). NAFTA’s labour, environmental, and social dimensions were ineffectively implemented and contributed to dissatisfaction with free trade in these countries. The current rhetoric of right-wing populists on job losses and wage decreases echoes earlier critiques by left-wing labour and fair-trade critics of globalisation and free trade. The weakness of progressive fair-trade measures provided the conditions for populism to flourish. Fair-trade concerns were in part co-opted by populists promoting broader nativist and nationalist, protectionist approaches. The decline in the middle- and working-class communities gave fuel to populists claiming to support these classes and communities despite sponsorship by, or membership in, the wealthiest elites.

As a thin-centred ideology, populism is subject to manipulation by leaders who extol a simple distinction between the “corrupt elite” versus the “pure people” (Mudde & Kaltwasser, 2013, p. 151). Specific populist approaches to trade in various states reflect differential domestic political configurations and variable insertion of states into the global economy. The US primary elections allowed right-wing populists and protectionists to secure control of the Republican Party. As a global economic hegemon, the US could focus on bilateralism and the imposition of its desired positions. This facilitated Trump’s unilateral tariffs and withdrawal from the multilateral Transpacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP). After years of inaction, some fair-trade arguments were made more effectively in coalition with populists via Trump’s agreement with liberal Democrats on labour and investment changes in the Canada–US–Mexico Agreement (CUSMA). In Canada, a smaller trade-dependent player and a taker of trade rules and regimes, most right-populist leaders defend the pursuit of free trade agreements with limited consideration for fair trade.

National particularities affect how populism evolves. Erl (2021, p. 108) illustrates how right populist move-

ments within one country (Canada) can appeal to different constituencies; “thin populism” as an “ideational” construct “can serve as a way for those with elite backgrounds to lead movements seemingly against their own interests.” The emphasis here is on the role of leaders in framing the populist message and enhancing a connection with mobilised followers. Economic distress and cultural nationalism and nativism, plus the context of institutions (especially electoral systems) and the use leaders make of populist, nativist rhetoric, seem pivotal to the different trajectories of populist movements in the two North American states. American populists like Trump have brought together racist, nativist, and marginal outsiders via “scapegoating” in the context of globalisation and economic insecurity and declining prospects (relative deprivation). Canadian populist leaders have evoked some populist cultural messaging but not protectionist economic populism, employing what Budd (2020, 2021) terms “neoliberal populism.”

This article will trace the rise of populist challenges to free trade in the US and Canada and compare the positions of populist leaders and public opinion on trade and fair-trade elements, notably labour. Despite similar backlash based on the failure of embedded liberal approaches, the study will contrast populist messaging to illustrate how political and economic contexts shape engagement with globalisation and trade, confirming Rodrik’s (2021) claim that there are both protectionist and pro-trade populists. The analysis is based on academic studies and qualitative sources such as government documents, legislative proceedings, journalistic and NGO publications, politicians’ statements, and political party discourses. Public opinion surveys by polling firms, university institutes, or government agencies are also used. The article canvasses changes in public opinion towards regional trade agreements in North America. It will reference CUSMA to assess changes induced by the populist critique (especially labour rights protections and the rapid response mechanism). It concludes by discussing the prospects for regional or multilateral trade instruments with a fair-trade component on labour matters.

2. Globalisation, Economic Insecurity, and the Rise of Populism

The post-war liberal order in the General Agreement on Tariffs and Trade focused on tariff elimination and liberalised commerce. The International Labour Organization (ILO) lacked enforcement powers but delimited core worker rights and sought voluntary adoption of its conventions, with consultation and monitoring of improvements. In the 1990s, some Western governments pursued trade agreements such as NAFTA, which promoted liberalisation with enforceable sanctions on trade and investment matters but only consultation and coordination on labour, environment, and social provisions. There was a brief discussion of World Trade Organization (WTO)

reforms to address unfair competition from low wages and poor working conditions but developing world critics argued that lower labour costs were a form of “comparative advantage” for developing states. Such matters were relegated to the consultative ILO (Finbow, 2006, pp. 15–16). In 2001, notwithstanding the Tiananmen tragedy and the absence of independent civil society organisations and labour unions, China was accepted in WTO with no social guarantees.

Faced with these setbacks, civil society groups sought a meaningful social dimension in new trade and investment agreements, with some degree of success. EU, Canadian, and US trade policies contain measures which can lead to loss of trade access, especially for developing states which do not enforce basic labour rights. Bastiaens and Postnikov (2019) suggest that public support for preferential trade agreements was increased by the inclusion of these social standards. In negotiations between developed world partners, such as those with North America for Canada–EU Comprehensive Economic and Trade Agreement (CETA) and TTIP, there were opportunities for input from civil society and stakeholders in business, labour, and social movements. There was optimism that globalisation in the economic realm could potentially be constrained by transnational social movements. There were extensive NGO pressures for enforceable labour rights, but these resulted in only weak consultative complaints processes in NAFTA (Finbow, 2006, p. 53). While governments speak of the progressive character of CETA’s sustainability chapters, some civil society critics demur, and the effectiveness of these provisions remains to be seen (Finbow, 2022, pp. 317–318). For more critical analysts, “neither the US nor EU has so far succeeded in establishing a system of obligations and enforcement robust enough to achieve measurable upward convergence of the labor practices of most trading partners” (Polaski, 2022, p. 216). In the North American cases, free trade agreements “with standards already have a bad reputation with environmental and labour groups” owing to ineffectively enforced provisions of the NAFTA side agreements (Ehrlich, 2018, p. 167).

Warnings of the negative impact of corporate-oriented trade and investment deals from fair-trade advocates in civil society and unions went unheeded while developing world resistance precluded enforceable global social standards. Yet the centrists continued to extol the benefits of the “golden handshake” of globalisation, generating disillusionment for many of the losers of this dramatic transformation with inadequate or impossible compensation measures (Kolben, 2021). Fair traders, who are misleadingly portrayed as protectionists by some analysts (Ehrlich, 2010), attempted to promote alternative trade regimes to cushion the costs of liberalisation to the middle and working classes in both the North and South. The erosion of living standards beginning from the 1970s oil shocks and subsequent decline of Fordism, and the end of the Keynesian consensus gave new urgency to the question of fair

trade and competition. While these concerns originated with progressive NGOs, they eventually gave fuel to populists like Trump, who flailed at the unfair treatment of American workers. Trump sought to adjust the trade regime through pressure on partners using America’s economic might to secure changes, sold to some social segments with nativist messaging. Canadian populists adopted many of Trump’s rhetorical and policy elements (on China’s rise, migration and climate, for instance) but, as a more modest economic player, did not emulate his protectionism; but Canada’s parliamentary electoral system required moderated or disguised nativism for conservatives seeking to win in urbanised areas (Budd, 2021; Kwak, 2020).

Rodrik (2021) notes that gradual cultural change is less likely to explain a recent marked increase in support for populists (including left, but mostly right). The erosion of middle and working classes is extensive and partly explains the weakening of liberal values domestically and transnationally. Evidence from the 1990s to 2010s indicates a middle-class decline of around 4% for Canada and the US, coupled with increases in lower and upper classes as economic polarisation sharpened (Salvatori & Manfredi, 2019, p. 13). The globalisation gamble around embedded liberal institutions contributed to the loss of manufacturing jobs to the developing world, which undercut the incomes of working- and middle-class North Americans without sufficient creation of high-paid technology and service sector employment. This deprived less educated individuals of social mobility (Bonvillian, 2016). Salvatori and Manfredi (2019) connect economic insecurity and decline to job polarisation, especially the decline of middle-skill employment and wage decreases for middle-income jobs. Despite the increased polarisation in both economies, lower-income Canadians may fare slightly better than their American counterparts, given the nature of their welfare state (Lapointe, 2019). Nonetheless, pressures of polarisation, financialisation of housing, and attendant inflation increase a sense of economic insecurity in that country as well (Montgomery, 2018).

While regional trade deals like NAFTA are used as scapegoats for the middle and working-class decline, broader economic changes induced by technological change, financial mobility, and China’s accession to WTO play a bigger role in economic insecurity. Some studies suggest NAFTA’s impact before renegotiation was positive for US exports with “insignificant” impacts from imports (Woldu et al., 2018). But China’s emergence in WTO as a global manufacturing behemoth had negative implications for US employment (Hassan & Nassar, 2018). Therefore, regional trade deals play a small role versus technology and globalisation and China’s WTO accession, which was a major factor in “crashing the NAFTA party” (Dussel Peters & Gallagher, 2013). The slide in middle- and working-class fortunes and the weakening of the compromise of embedded liberalism around Keynesianism and the welfare state

gave fuel to populism, nationalism, and protectionism and prompted questioning of the global liberal order. While the causes of working and middle-class decline are complex, populists like Trump highlighted trade deals like NAFTA and the rise of China to target identifiable “others”; this nativist rhetoric was muted or disguised in most Canadian populist circles (Budd, 2021; Kwak, 2020).

3. Trump, Nativist Populism, and Disrupted Trade

Bisbee et al. (2020) investigate how “disenchantment” with the embedded liberal bargain reduced support for free trade and globalisation sentiments, especially among individuals and localities at “occupational risk” from displacement of employment. Autor et al. (2016, p. 45) have documented how right-wing Republican globalisation and trade sceptics displaced moderates, especially in districts negatively affected by competition from China, not NAFTA. But slow processes of globalisation, technological change, and investment outflow were an amorphous target; “the employment consequences of trade” were “acutely recognizable and therefore politically actionable.” Polling illustrates how Trump effectively used concern about unfair trade to gain support. Public opinion in the US did not turn away from trade overall, with majorities midway through Trump’s term still perceiving economic benefits (Jones, 2019). Nonetheless, variations by levels of education and income were evident, and trade deals like NAFTA, TTIP, and TPP served as convenient scapegoats for the populist targeting of “others.” Negative impacts in sectors like automotive and a decline in specific communities allowed Trump to demonise Mexico and China and move the Republican Party away from support for free trade. This was a key component of his administration’s trade policy. While trade:

Has not been the sole cause of the recent loss of manufacturing jobs or of the attendant societal distress...it cannot be denied that the outsourcing of jobs from high- to low-wage places has devastated communities in the American Rust Belt and elsewhere. (Lighthizer, 2020, p. 7)

The United States Trade Representative (2017, p. 7) stated firmly that:

Americans have been put at an unfair disadvantage in global markets. Under these circumstances, it is time for a new trade policy that defends American sovereignty, enforces US trade laws, uses American leverage to open markets abroad, and negotiates new trade agreements that are fairer and more effective both for the United States and for the world trading system, particularly those countries committed to a market-based economy.

NAFTA was perceived positively by Americans in its first 15 years though in the 2008 financial crisis more people perceived it as negative. The populist frame introduced by Trump took on an ideological tone which mobilised formerly indifferent or sympathetic members of the public to a negative perception of NAFTA and trade. While in the early years of NAFTA’s existence, supporters of the two parties held similar views, after Trump’s targeting of the “unfair” deal, a wide gap of 45% opened up in the parties’ assessments (Saad, 2019). Exit polls indicated that 65% of Trump voters believed free trade eliminated jobs (The Canadian Press, 2017). “Attitudes toward the economy and international trade—combined with Trump’s uniquely (among Republican candidates) critical stance on NAFTA—played a key role in Donald Trump’s electoral victory” (Blendon et al., 2017, p. 239). The partisan character of responses to NAFTA was dramatic. In response to Trump’s attacks, Democrats’ support for the accord soared to historic highs, while Republicans were highly divided among non-Trump members of that party, with 61% favouring the deal, compared to 68% of Trump supporters who deemed NAFTA “bad” (Smeltz & Kafura, 2018).

Trump was able to leverage a general unease with globalisation and its impact on jobs to mobilise a populist nationalist response. As Ehrlich and Gaghan (2023) demonstrate, Trump pulled anti-trade forces together with xenophobes in a successful populist coalition in 2016. Polling data indicates that while Democrats shared a concern that globalisation was bad for jobs, Republican voters were more likely to define the US as an overall loser (Finbow, 2018, p. 198). Republicans signalled a new toughness on trade, and their 2016 election platform previewed this assertive stance. “Republicans understand that you can succeed in a negotiation only if you are willing to walk away from it. A Republican president will insist on parity in trade” and could implement countervailing duties or higher tariffs “if other countries refuse to cooperate” (Republican Platform, 2016, p. 3). From the 2016 campaign on, President Trump asserted that NAFTA was “unacceptable” in its current form and swiftly gave the required notice to commence renegotiation. Improvements were aimed at protecting workers “whose hold on their jobs has been tenuous due to a flawed trade agreement” (United States Trade Representative, 2018, p. 9). Trump framed this policy shift in dramatic terms: “The era of economic surrender is over. From now on, we expect trading relationships to be fair and to be reciprocal” (The White House, 2018). Prominent congressional Republicans like Chick Grassley supported the president’s efforts to correct “injustices” in trade though they worried that retaliatory tariffs as undertaken by the president were only useful as temporary measures (Grassley, 2018).

Polling indicated concern with social elements, especially child labour, human rights, worker health and safety, and, to a lesser extent, environmental impacts (Jones, 2019). Ironically, right populists inaugurated

changes in NAFTA, which matched the long-frustrated demands of labour and left civil society actors. Trade Representative Lighthizer highlighted the impact of lost jobs and declining life changes for too many from a globalisation driven by an emphasis on overall efficiency notwithstanding inequitable distribution (Lighthizer, 2020). Right populist construction of the need to improve trade to prevent unfair treatment by foreign states was a pronounced element of Trumpism (Csehi & Heldt, 2021) which succeeded where fair-trade and labour advocates had failed for decades. Populist targeting of NAFTA did produce innovations in CUSMA, like the rapid response mechanism to permit US action against specific Mexican enterprises which violated freedom of association and collective bargaining laws (Polaski et al., 2022, pp. 148–149). The renegotiated NAFTA contained significant transformations and improvements in obligations, ironically committing Mexico to protections for collective bargaining and freedom of association which exceed “right to work” states in the US. This, plus other aspects of Trump’s “America First” trade emphasis, did have an appreciable effect on reducing American scepticism of trade (Table 1 below) agreements as national interests were perceived as better defended.

CUSMA was born at a unique moment whereby Democratic legislators in Congress held a majority after the 2018 midterm elections. The election of a leftist Mexican president who supported labour law reform protective of independent unions, a long-time request of transnational labour activists, was also essential. Many fair-trade Democrats welcomed Trump’s emulation of longstanding union and NGO concerns about NAFTA’s Chapter 11 investor disputes mechanism and the North American Agreement on Labour Cooperation’s weak labour side agreement. Democrats insisted on stronger provisions on labour and other matters as incorporated in a Protocol of Amendment. Once the revised elements were included, a clear congressional majority voted in favour of the deal, except for a limited number of liberal Democrats in the 116th Congress, and negotiations succeeded. It included an improved labour element, though

America’s own commitment to labour rights remains suspect, as seen in the increase in “right to work” states” limiting union organisation and activity (Fortin et al., 2022). But these changes were only achieved in a problematic and temporary alliance of Trump loyalists and fair traders in Congress with a retrograde populist movement which opposes climate action and undermines democratic accountability and racial and gender equity. These circumstances were exceptional and paved the way for labour law changes that may or may not be sustainable going forward. The revised NAFTA secured support from Americans as well, with the new agreement more popular than NAFTA. It required collaboration between union-supported Democrats in Congress and the Trump administration, which led to gains like the rapid response mechanism, which labour groups in the US and Canada have welcomed. Going forward, the right-populist movement could block serious environmental or climate initiatives while providing superficial assistance to Mexican labour in some sectors (automotive) but sustaining right-to-work and anti-labour litigation domestically (as evidenced in the anti-union character of many judicial appointments).

4. Canada: Neoliberal Populism and Trade in an Open Economy

Studies in Canada from the early 2000s showed deference to governments on free trade agreements and trade liberalisation but scepticism about globalisation, which increased with the erosion of middle-class opportunities (Mendelsohn et al., 2002). In its early years, support for NAFTA fluctuated before a generally pro-free trade consensus emerged (Graves, 2017). Since early free trade scepticism in the 1990s, support for NAFTA grew steadily by 2018, with 63% perceiving NAFTA as positive for the economy, up from 50% in 2011 (Environics Institute for Survey Research, 2018, p. 41). NAFTA and trade agreements, in general, received a boost from concerns over Trump’s protectionist rhetoric. Trade topped Canadians’ list of political issues in 2017, with support for NAFTA increasing (Jenkins, 2017). The consensus

Table 1. US public opinion towards trade: Obama to Trump to Biden.

Date	Opportunity	Threat	Both	Neither	No Opinion
2022, February 1–17	61	35	2	*	2
2021, February 3–18	79	18	3	*	1
2020, February 3–16	79	18	3	*	1
2019, February 1–10	74	21	2	*	2
2018, February 1–10	70	25	3	*	3
2017, February 1–5	72	23	2	*	2
2016, February 3–7	58	34	3	1	3
2015, February 8–11	58	33	5	1	2
2014, February 6–9	54	38	4	*	3
2013, February 7–10	57	35	3	1	3

Note: * = no data. Source: Jones and Saad (2020).

that trade is important for Canada's economy seems clear, with 75% recognising the importance of trade (Environics Institute for Survey Research, 2018, p. 6). Notably, partisans of the three major federal parties all showed support for NAFTA in 2017 polls (Stokes, 2017). Canadians express support for reformed agreements like CUSMA but demonstrate low knowledge of these complex deals (Emmanuel, 2022). Nevertheless, this does indicate potential Canadian support for re-engaging and re-energising trade liberalisation, especially with higher levels of support than in the other North American states (see Figure 1).

Canadian right and populist parties such as the People's Party of Canada, United Conservatives in Alberta and other provincial parties, and an increasing element in the federal Conservative Party have adopted some populist othering rhetoric. They have adjusted positions on immigration and some social and cultural issues. One analyst credits the Harper government with the "mainstreaming of right-populist discourse in Canada" (Kwak, 2020, p. 1180), including engagement with cultural nativism. Budd (2021, p. 170) likewise notes that "the dog whistle politics of the Harper Conservatives, while not overtly xenophobic, racist, or nativist, have helped to provide the ideological and discursive space for subsequent radical right actors in Canada." But for electoral prudence, the Canadian right employed the discourse of "neoliberal populism" which emphasises economic liberalisation and traditional family values (Budd, 2021, p. 156). This can be observed in both the federal and provincial wings of the Conservative Party, notably in Doug Ford's populist-inspired victories in Ontario, where conventional economic liberalism is emphasised alongside anti-elite rhetoric (Budd, 2020; Erl, 2021).

As such, while subtly emphasising "the people" in an exclusionary variant of othering, Canadian populists have not followed a nationalist logic to oppose free trade. This applies even to the more populist Peoples Party, which would "aggressively pursue" free trade, including with significant new partners like China and India (People's Party of Canada, 2019). The Conservative Party of Canada (CPC), which negotiated deals like the Canada–EU CETA, urged that Canada should work with "international organizations and individual nations to reduce protectionist policies to secure free trade agreements" (CPC, 2018, p. 11). They emphasised "the importance of secure access to international markets through a rules-based trading system...to maximize the benefits we have as a free trading nation" (CPC, 2018, p. 17). Trade tensions with the US led the Conservative opposition to question the Trudeau government's signing of CUSMA before Trump withdrew punitive tariffs on steel and aluminium, but this focused on the loss of leverage rather than the content of CUSMA (House of Commons Canada, 2020, pp. 1848–1852). After 2020, some conservative politicians' rhetoric has embraced Trump-inspired populism on cultural, socially conservative, and nativist lines especially motivated by anti-vaccine movement activism during the Covid-19 pandemic (Gillies, 2022, pp. 12–13).

While overall support for trade deals remains evident, many feel that NAFTA benefited the US more than Canada. CUSMA was greeted with scepticism north of the border, with the perception that Trump had "bullied" the country into a new deal (Moore, 2018). Many Canadians were convinced CUSMA was negative for the economy, with a partisan division showing Conservatives as more sceptical as elements of populism creep north (Korzinski, 2018). And Canada is not immune to right populism

Q. Please rate the extent to which you agree or disagree with the following statement: There should be free trade between the U.S., Canada and Mexico

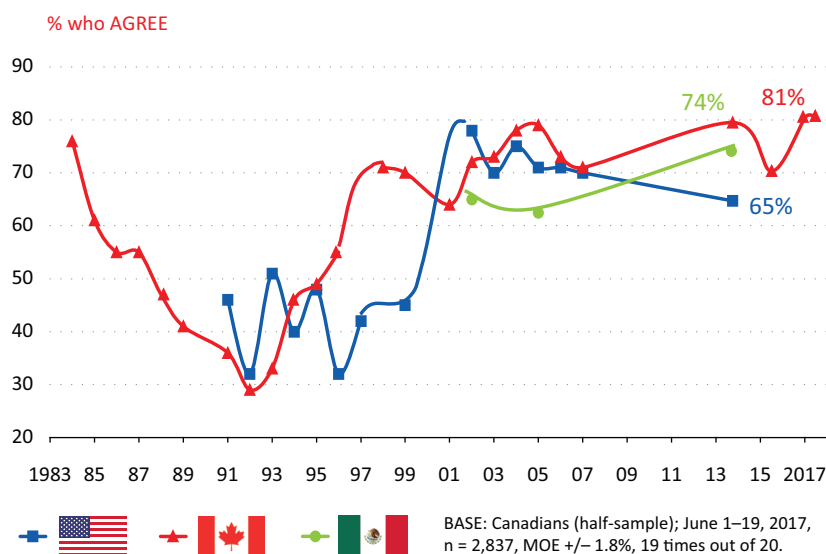


Figure 1. Support for trilateral trade. Source: Graves (2017, p. 17).

driven by “economic stagnation, the growing disparity between the wealthy and the middle and working-classes, a sense that society is headed in the wrong direction and a backlash against the loss of traditional core values” (Graves & Smith, 2020, pp. i–ii). As many as 34% of Canadians ascribed to values akin to Trump and Brexit supporters’ scepticism of established liberal institutions, and these moderately affected views of trade liberalisation as well. Commitment to CUSMA and free trade appears weaker among less educated or wealthy persons (Jenkins, 2018). A “future drift toward populism in Canada cannot be ruled out” (Acquaviva et al., 2018, para. 23), given insecurities about economic futures and unease about multiculturalism. Polling also shows a significant, persistent preference for Trump-style populism among Canadian conservatives (Fournier, 2022).

The evolution of the CPC to populism remains to be evaluated; until recently, the party has avoided the extremes of the GOP and UK and European far-right parties (Gillies, 2022, p. 6). The CPC negotiated the Foreign Investment Promotion and Protection Agreement with China in 2014 despite being a critic of China’s human rights record (Ong, 2020). But the influence of right-populists in the party is evident since the pandemic measures and convoy protests (Gillies, 2022, pp. 7, 12–13). China critics are prominent in the party which spear-headed the revival of Canada–People’s Republic of China Relations Committee to address ongoing concerns (Paul, 2020). It is unclear how trade relations with China would fair under a future CPC government, though a more cautious relationship might emerge, given Canadian public wariness of economic relations with China (Angus Reid Institute, 2022). The neoliberal populist consensus which glued the Conservatives under Harper was undone during the electoral defeat in 2015, caused in part by “xenophobic attacks against illiberal Islamic cultural practices and tone-deaf opposition to refugees” (Budd, 2021, p. 171). There is a chance the CPC will join other mainstream conservative parties and “co-opt” populist extremism as an electoral strategy to energise supporters (Gillies, 2022, p. 13). Despite some nativist targeting in critiques of China’s rights record and rising economic power, Canadian conservatives and populists remain supportive of trade liberalisation overall. But they approach this from a conventional liberalising approach, not a fair-trade one; how seriously they would act to protect labour and other sustainability concerns remains unclear, especially absent similar supportive efforts in the US.

5. Comparing Populisms: Protectionist vs. Pro-Trade Variants

Canada and the US both provide fertile ground for populists challenging the embedded liberal order as economic insecurity proliferates. However, they remain distinguished by differing leadership orientations with similar framing on some elements of populism but differ-

ences in others. In the open, trade-dependent Canadian case, neo-liberal populism has been most prominent. There is a disinclination in this middle power to reject multilateralism or revert to protectionism. Economic asymmetry and political opportunity structures (Budd, 2021) induced variation in rhetoric, with Canadian populists and conservatives (so far) remaining committed to the liberal order embodied in trade regimes. Canadian populists remain pro-free trade, with trade deals with Europe and Asia enjoying public support. In contrast, Trump challenged this order, pushing “America First” alternatives befitting a larger economy with global power status; the US populist movement has espoused more nativism and protectionism, which disrupts agreements like TTIP and TPP and prompted the NAFTA renegotiation. An “America First” conception does not imply entirely turning away from international trade but rather an assertion of power in bargaining to secure concessions on trade matters, for instance, holding Mexico to ILO standards not achieved in “right to work” US states. While CUSMA makes progress in labour rights and fair trade, it may come at a price of legitimising right populism, which still features anti-labour elements and remains anti-equity on race and gender grounds and disregards planetary health and climate change.

Trump also took an aggressive, unilateral position on the use of tariffs as bargaining chips in relationships with traditional allies like Canada and the EU, as well as rivals like China (Tankersley & Bradsher, 2018). Targeted retaliation from trade partners did undermine some of the claimed benefits of this approach, as it ended up costing Americans, especially in Trump-leaning districts (Fetzer & Schwarz, 2021). Trumpism did induce a scepticism of global institutions, such that elements of protectionism became more permanently entrenched (notably withdrawal from TPP and TTIP). While restoring relationships and liberalised tariff levels with most major partners, President Biden kept some measures in place to induce China to increase imports from the US and preserved a more wary self-interested attitude towards that rising power (with some persisting reviews demonstrating ongoing caution). However, support for trade has declined towards pre-Trump levels under Biden (Jones, 2022). Current initiatives on transatlantic trade, such as the EU–US Trade and Technology Council, remain far from the ambitious TTIP that the Obama administration was negotiating (as are Biden’s Pacific rim partnerships). Any future trade deals will certainly follow CUSMA in omitting an investor–state dispute settlement component with developed state partners. Meanwhile, further breakthroughs on the labour and social dimension of trade deals remain possible, though the significant gains on CUSMA were only achieved in a unique alliance of the populist Trump and pro-labour Democrats in Congress (with a boost from a progressive Mexican presidency), conditions which are unlikely to be readily replicated.

But on the trade front, Canada, like post-Brexit Britain, as identified by Rodrik (2021), is an instance

where populists do not embrace protectionism. Leadership orientations seem critical here, as Canadian conservatives and populists prefer a neoliberal vision and remain committed to regional and multilateral trade agreements. An awareness of the importance of trade to electoral success and economic growth in this open economy may explain why Canadian populists have not invoked protectionism. Additionally, political opportunity structures and the need for a majority coalition across diverse provinces in the parliamentary system have moderated (so far) the CPC employment of protectionism and nativist othering at the federal level. This could be affected by the behaviour of American populists, however. Gagnon (2020) notes that even American supporters of Canada embraced economic nationalism and expected Canadian compliance with measures affecting economic relationships with China and others. A provision in CUSMA gave the US the right to preview any deals Canada reached with other states and permitted abrogation of CUSMA if the terms of those deals were deemed unacceptable (Gagnon, 2020, pp. 240, 249). If such hardball tactics are revived, Canada might be forced to a defensive protectionist approach. If faith in the US as a reliable trade partner is shaken and if there is a permanent American change in orientation to unilateralism and disregard for Canadian concerns, diversification of trade connections may be essential. Whether this translates into nationalist or protectionist sentiment still seems unlikely, given Canada's high dependence on trade as a component of gross domestic product. While Canadians are warier about the US relationship after Trump, its overall importance is still understood (Kennedy et al., 2020, p. 27).

6. Conclusion: Whither Progressive Trade?

Policymakers face difficult choices in preserving the international and regional trading order. There has been forward momentum improving on the General System of Preference and NAFTA provisions on labour, based on ILO principles with integral disputes settlement around "an enforceable non-derogation clause, prohibiting signatories from lowering their labour standards." (Velut et al., 2022, p. 131). The ineffective consultative model of the NAFTA side agreement has been replaced by a third-generation model with stronger standards and sanctions (Polaski et al., 2022, p. 150). CUSMA's rapid response mechanism does indicate the potential for populist-driven transformation to assist labour advancement in partner states, though not ending limitations to collective bargaining in subnational federal jurisdictions in the US itself where right-to-work initiatives are, in fact, spreading. Certainly, labour and fair-trade advocates have welcomed the forward momentum in CUSMA for its early success in pressing for independent union representation in Mexico (DiCaro & Macdonald, 2022). While the potential exists for improvements in labour elements of trade agreements, ultimately, "effective use

of all existing trade-labor linkage instruments still ultimately depends upon the political will of governments to use them" (Polaski, 2022, p. 217).

Overall, the ineffective application of the labour and social clauses of trade deals and the side-lining of fair-trade commitments have provided fodder for protectionist populism. To an extent, critics unfairly blame regional trade deals for the decline of working and middle-class opportunities, as globalisation and technological change matter more. Right populism provides only a salve of nostalgia for better times and not actual relief from economic distress. And, leavened with the targeting of others in minority and immigrant communities, it creates a dangerous combination which will not offset the status decline many face in globalisation. In fact, the populist right cornering of this rhetorical space creates substantial challenges:

The limited capacity of governments to effectively attenuate political grievances among those adversely affected by relentless technological progress highlights the strategic disadvantage of responsible center-right or center-left parties in contemporary democracy. It renders post-industrial societies vulnerable to political forces responding to voters on the grounds of less tangible identity politics, which are difficult to counter with mundane, precise, and politically feasible policy reactions. (Kurer, 2020, p. 1826)

In the US context, a future return to GOP dominance in Congress could embolden a populism which is both anti-union and pro-labour "flexibility" (Republican Platform, 2016, p. 5) and is also problematic on issues of racial, gender, and class equity and environmental sustainability—enhancing trends of middle-class decline.

This could further contribute to democratic decline, aggravated by voter suppression and partisanship, which are undermining Democratic competitiveness in many red states and eventually in the Senate and the Electoral College as well. Shifting political landscapes and the rise of right corporate-backed populism may not provide a strong basis for substantial improvements in enforceable labour protections in trade agreements. If the undermining of American democracy, rule by court fiat, and spread of right populism continue, and a populist GOP controls the branches of the US government in the future, the outcomes for progressive adjustments to the global order may become more remote. And the costs of making progress on adjustments to labour rights in some partner states will become quite high, including compromises with unpalatable elements of xenophobic, regressive populism, which could work against social and ecological sustainability goals overall.

In Canada, strong populist governments at the provincial level—some neo-liberal and some motivated by social conservatism—could fragment the polity and weaken commitment to liberal values and institutions, even if populist nativism remains more muted at the federal level.

Canadian populist governments would still face a more bilateral orientation by the Americans as the weaker partner in an asymmetrical trading relationship; this might induce a more defensive, protectionist approach in Canada. Populist trends in the federal Conservative Party and in some provinces suggest this future is not necessarily far away (Graves & Smith, 2020), especially in the wake of the era of “freedom convoys” (Gillies, 2022).

Policymakers may need to eschew conventional free trade agreements and develop regional and global arrangements which provide broader benefits to make fewer people feel insecure and at risk. Kolben (2021) may be correct that governments need to accept a slower pace of negotiating and implementing agreements to address the populist backlash. And economic compensation may not be sufficient as well since the middle-class decline is linked in populist rhetoric to broad social and cultural changes breeding insecurity:

Scholars and policymakers must be informed by an approach to addressing the losers of trade that recognizes that some losses and transitions may not be compensable, that values membership in stable communities, and that acknowledges the political resistance to the cosmopolitan ideals that are dominant among policy elites. (Kolben, 2021, p. 702)

Rodrik (2007, p. 4) has long urged an “alternative approach to globalization...[to] focus on enhancing policy space rather than market access, and on devising the rules of the game to better manage the interface between national regulatory and social regimes.”

Ehrlich and Gaghan (2023) argue for strengthening the sustainability and labour elements of trade deals to diminish progressive, fair-trade opposition. The question remains: Will such adjustments counter right, protectionist populism, which erodes support for transnationalism? Verbeek (2022, p. 116) notes that, because of its “constructed and negotiated nature,” embedded neoliberalism permits the co-optation of fair-trade arguments through adjustments like the EU’s investor court system, which revives “political support and legitimacy for continued transnational market expansion and investment protection.” This weakens progressivism and continues trends of economic decline and insecurity, helping sustain populism going forward. As Rodrik (2018) has warned, the balance between globalisation, democracy, and market capitalism may need to be reset, given the neo-liberal emphasis on the global and capital at the expense of welfare for many in the working and middle classes. A reordering of the global order may be required to recognise nation-states’ primacy in regulatory policy, and measures may be required to deny trade privileges to states engaging in unfair trade through lax labour standards. Changes are essential to prevent the erosion of the legitimacy of the global trading system (Rodrik, 2018, p. 210). Whether progressive, fair-trade adjustments to social elements of trade agreements will

be sufficient to offset populist backlash against liberalisation and globalisation remains to be seen, but fully restoring the nuanced balances of embedded liberalism seems unlikely since, in some countries, protectionist populism seems to be here to stay.

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Article

Trade Linkages or Disconnects? Labor Rights and Data Privacy in US Digital Trade Policy

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Abstract

The ever-expanding regulatory scope of “new generation” trade agreements has created new linkages, and thus, new spheres of political conflicts opposing advocates of trade liberalization and free trade critics seeking to make globalization more socially responsible. Scholars have provided different explanations to understand the determining factors behind attempts to re-embed trade, but little attention has been given to the persistence of “trade disconnects”—as opposed to trade linkages—between economic issues and social or environmental externalities that, at the domestic level, can hardly be dissociated. This article proposes to analyze the dynamics and factors of what might be described as persistent disconnects or enduring “disembeddedness” in US trade policy-making. To do so, it examines US digital trade policy and its mixed social record by comparing two issues: labor rights and data privacy. This article builds upon recent scholarship on deliberative forms of exclusion in trade policy-making to track the hidden dynamics of “non-decision-making.” It demonstrates that discursive, institutional, inter-scalar, and countermobilizing processes have restricted the terms of political participation and perpetuated a disconnect between digital trade and labor rights, by contrast with the growing trade linkages with data privacy.

Keywords

data privacy; digital labor; digital platforms; digital trade policy; gig economy; labor standards; trade linkages; US trade policy; workers’ rights

Issue

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1. Introduction

The idiosyncratic personality of Donald Trump and his disruptive, if not destructive, impact on international politics have obscured a longstanding axiom in US foreign trade relations. Since the end of World War II, the US can legitimately claim to have been trade liberalization’s most vocal advocate and its fiercest detractor. These political conflicts not only epitomize America’s ambivalent relationship with the rest of the world but also capture a dialectics of dis-embedding and re-embedding processes, that Polanyi (1944/2001) famously theorized as the “double movement,” namely social and political forces seeking to reassert control over a fabled self-regulating market. Indeed, from the Tokyo Round’s

focus on non-tariff barriers to the 1990s’ foray into investment protection, procurement, and intellectual property before the mega-regionals’ ambitious regulatory agenda, the expanding scope of the negotiating trade agenda has gradually internationalized and dis-embedded segments of the economy that were once confined to national regulation and domestic politics, thereby undermining the compromise of “embedded liberalism” envisioned in the post-war era (Ruggie, 1982). Yet, just as “laissez-faire was planned,” in Polanyi’s (1944/2001, p. 147) famous words, free trade has always been “managed trade.” Or, to put it differently, free trade agreements (FTAs) are neither free nor just about trade. Like laissez-faire ideology at the end of the 19th century, free trade has been promoted by a powerful

coalition of business interests that has faced diverse opposition from labor unions, environmentalists, consumer advocates, and nationalist voices. This counter-movement, made of strange bedfellows from both progressive and conservative strands, has mobilized during historic clashes over globalization, including the stormy debates over the North American Free Trade Agreement (NAFTA), the Seattle protests of 1999, and Donald Trump's trade wars.

Social mobilization contributed to transforming or re-embedding US trade policy in four notable ways. First, it has played a central role in linking—or reconnecting—trade to labor rights, as well as environmental standards. Second, and in parallel, the growing discontent surrounding trade liberalization has shifted the locus of trade politics from the scope of social and environmental provisions during negotiations or before trade agreements are signed, to their implementation and enforcement *after* ratification. This “enforcement turn” is permeable with, but distinct from Donald Trump's protectionism and preceded his election, as illustrated by the passage of the Trade Facilitation and Trade Enforcement Act in 2015 (Velut, 2022a). Third, trade contestation from progressive forces, with the help of conservative allies like US Trade Representative Robert Lighthizer, challenged the logic of investor-state dispute-settlement established under NAFTA and significantly curtailed its scope in the US–Mexico–Canada Agreement (USMCA). Fourth, opponents of so-called FTAs have made them so unpopular that they have become taboo in both political parties, as witnessed by the reference to partnerships, agreements, or, most recently “frameworks.” The “de-FTA-zation” of trade policy is not only a discursive and framing process designed to obscure the continuity in trade policy-making, but is, in effect, a departure from the cycle of cross-regional trade agreements of the previous decade, and one concretely at work in both the US and the EU, as witnessed by the proliferation of sectoral agreements, sustainability initiatives, autonomous measures (Velut, 2022b), and other kinds of executive agreements or “mini-deals” (Claussen, 2022). Leaving aside Donald Trump's trade wars, these four trends can be interpreted as attempts to rein in the disembedding impulses of free market advocates without jettisoning the principles of embedded liberalism.

One policy sphere that has been largely spared from this dialectic process is digital trade. Digital trade can be defined as the sum of “digitally enabled transactions in trade in goods and services which can be either digitally or physically delivered, involving consumers, firms, and governments” (López González & Jouanjean, 2017, p. 6). This definition, which includes non-commercial data transfers, is to be distinguished from the narrower but overlapping notion of e-commerce, which the WTO defines as the “production, distribution, marketing, sale, or delivery of goods and services by electronic means” (World Trade Organization, n.d.). From the emergence of e-commerce in the second half of the 1990s to Donald

Trump's less visible US–Japan Digital Trade Agreement, Washington's emerging digital trade agenda has been largely immune to the contentious politics of trade and globalization. The digital sector's disconnect from trade politics is perplexing on more than one account. The digitalization of trade in goods and services and the increasing use of artificial intelligence (AI) have opened a Pandora's box of new issue linkages, including data privacy, fair taxation, antitrust, labor rights, and democratic accountability. Yet, US decision-makers' willingness to integrate social dimensions in digital trade policy remains uneven at best.

This article examines the symptoms and factors of what might be described as an enduring form of “disembeddedness” in US digital trade policy-making. To do so, it analyzes the formation of US digital trade policy through the prism of bilateral and plurilateral trade negotiations. The latter tend to be more far-reaching than WTO agreements (Horn et al., 2010) and often serve as policy experiments for trade linkages (Jinnah & Morin, 2020). This article focuses on two regulatory issues that have gained prominence at the domestic level: workers' rights and data privacy. This study builds upon recent scholarship on deliberative forms of exclusion in trade policy-making (Velut et al., 2022) to track the hidden dynamics of what Bachrach and Baratz (1962, p. 949) defined as “non-decision-making.” The next section conceptualizes the notion of “trade disconnects” as an emerging research agenda, while the third section applies this framework to labor rights and data privacy.

2. Conceptualizing Trade Disconnects

One obvious starting point to understand why linkages do not occur is the long-established literature on the formation of American trade policy, whose various contributions have shed light on the importance of three factors. First, structural or systemic approaches in international relations argue that the distribution of power—whether in a period of hegemonic stability or power transition—dictates states' behavior and their proclivity to promote economic openness or restrict trade (Ikenberry & Nexon, 2019; Krasner, 1976). Second, state-centered approaches emphasize the role that the state plays in shaping international competitiveness (Haley & Haley, 2013; Krugman, 1986; Rodrik, 2007; Weiss, 2014) or how institutions shape and constrain policy outcomes (Goldstein, 1986; Haggard, 1988). A third, perhaps more dominant approach to trade policy formation focuses on interest groups mobilization in support of trade liberalization or protective measures, using the factor model (Rogowski, 1989), the sector-specific approach (Baldwin, 1985; Magee & Young, 1987), or a combination of both (Hiscox, 2001). Others have highlighted the heterogeneity of firms within the same sector (Bernard & Jensen, 1995; Melitz, 2003) and/or the notable advantages that large multinationals derive from trade agreements (Autor et al., 2017).

Beyond the usual mechanics of trade policy-making, a subsegment of the literature has sought to explain the emergence of new linkages outside of the usual boundaries of trade negotiations. Aggarwal (2013) distinguishes top-down linkages, which are induced by the executive branch, from bottom-up linkages which result from lobbying by business and nonprofit groups. Trade and security linkages are driven by strategic objectives and therefore more likely to be top-down. In effect, security imperatives can also be instrumentalized by business interests and so may be a combination of both forces. Social and environmental linkages, on the other hand, are more likely to result from bottom-up processes. Indeed, civil society groups have played an important role in re-embedding trade in a broader societal sphere, by pushing for the inclusion of environmental (and labor) standards in trade agreements, whether in the EU (Ahnliid, 2013; Hannah, 2016) or the US (Aaronson, 2001; Aggarwal, 2013; Destler & Balint, 1999; Kay & Evans, 2018). Likewise, the expanding scope of trade negotiations in new regulatory fields has long been traced to the mobilization of individual companies and industry associations, whether this relates to investment, rules of origins, and trade facilitation (e.g., Chase, 2003; Ravenhill, 2017), intellectual property rights (Muzaka, 2009; Sell & Prakash, 2004) or digital trade (Azmeah et al., 2020).

Yet, if the trade policy literature has devoted a lot of attention to understanding the origins, scope, and effects of trade linkages, little attention has been given to the persistence of trade disconnects between economic issues and social externalities that, at the domestic level, can hardly be dissociated. This blind spot in the trade policy literature may be driven by methodological concerns but is hardly justifiable from a theoretical standpoint. Indeed, focusing on the “less apparent face” of power hidden in “non-decision making,” in Bachrach and Baratz’s (1962, p. 949) famous words, can shed light on the embedding and disembedding processes at play in the political economy of trade. As noted by Velut et al. (2022, p. 548), debates on the distributive effects of trade policies—e.g., which workers might be displaced, what sectors might win or lose—have often overshadowed “deliberative forms of inclusion and exclusion that hinge upon the premises, modalities and channels through which trade policy is understood, discussed and ultimately decided.” In practice, distributive and deliberative forms of exclusion have fed on one another to produce the populist backlash. Given the ever-expanding scope of the trade and regulatory agenda, there is a need to understand not only how and why new issues are included and alternative voices are heard (i.e., trade linkages), but also why others remain *excluded* from trade negotiations (i.e., trade disconnects).

Trade disconnects can be defined as persistent deliberative forms of exclusion that explicitly or implicitly marginalize certain political actors and policy issues through a combination of discursive, institutional, inter-scalar, and countermobilizing processes. Far from being

mutually exclusive, these processes are codependent. The first type of trade disconnect is discursive. While the power of ideas has long been established in international relations, the constructivist turn in international political economy is more recent (Abdelal et al., 2010). In the trade policy sphere, constructivist approaches are arguably more prominent among scholars of EU trade policy (e.g., De Ville & Gheyle, 2022; Potjomkina et al., 2022; Siles-Brügge, 2014), often described as “value-based,” than those studying the WTO (Lang, 2011) or US trade policy (Goldstein, 1994), where societal approaches emphasizing interest groups mobilization are more common. In practice, however, ideas do not exist *ex nihilo* and are conveyed and instrumentalized by interests. This is true not only for framing strategies designed to create new trade linkages, as has been established in the trade sphere (Kay & Evans, 2018; Siles-Brügge & Strange, 2020) but also for discursive processes intended to exclude specific stakeholders—e.g., workers, consumers, small-and-medium enterprises (SMEs), indigenous populations—and perpetuate trade disconnects. For instance, the rise of technocratic forms of trade governance relying on complex and seemingly uncontested econometric models and legal arguments long reduced critics of corporate-driven trade policies to “protectionists” (Siles-Brügge, 2019). Unless stakeholders manage to appropriate expert knowledge by translating a trade-related issue into quantitative data, trade disconnects may persist. In other cases, inclusive narratives focusing on SMEs (De Ville & Gheyle, 2022), civil society (Drieghe et al., 2022), or transparency processes (Velut, 2022a) can be repurposed, to the detriment of their targeted stakeholders, thereby acting as exclusionary processes.

Second, institutional trade disconnects are induced by silo effects. As explained earlier, the importance of institutions in trade policy-making is now well established but remains to this day largely dominated by a free trade vs. protectionism dichotomy. This means that institutionalism has not taken stock of recent trends in trade policies, namely the growing importance of (de)regulatory questions (Deblock & Wells, 2017; Velut, 2018; Young, 2017), the enforcement turn, and the digitalization of global trade. Yet, as comparative political economists have shown, if international political economy factors force institutions to adapt, change is also endogenous to each nation’s institutional apparatus (Hall & Thelen, 2009). Thus, there is a need to better understand what allows trade institutions to innovate and effectively take on new issues (trade linkages)—whether this pertains to the creation of governmental agencies, interagency mechanisms, or principles of policy coherence—and what restrains them from doing so (trade disconnects).

The third type of trade disconnects can be described as “inter-scalar” as it relates to the incongruence between scales or levels of government action. This question is determined by the extent to which the

interests of subnational governments like cities, counties, or states, but also those of local actors like SMEs and civil society organizations are represented in the design of trade policies. As the literature on multilevel trade politics has shown, this depends on a host of factors, including institutional mechanisms, state capacities and resources, business mobilization, and trade contestation among local stakeholders (Broschek & Goff, 2020; Freudlsperger, 2020; Lequesne & Paquin, 2017; Schiavon, 2020). In some cases, like procurement, large business actors and state actors have worked hand in hand to internationalize local issues and push for new trade linkages on behalf of US economic interests (Weiss & Thurbond, 2006). In others, like waste trade, business actors and subnational governments may instead favor trade disconnects, preferring that international trade negotiators stay away from their practices.

Fourth, trade disconnects can be maintained by de-mobilizing or countermobilizing forces. As mentioned above, this is a traditional determinant of trade policy that includes both business and civil society mobilization and can be combined with discursive, institutional, and inter-scalar forms of trade disconnects. For instance, US pharmaceutical groups have long mobilized to broaden the scope of patent protection provisions (the so-called “evergreening” of patent protection), while preventing the emergence of linkages between trade and health through both domestic and international channels. The WTO’s long-delayed vaccine patent waiver is only the latest illustration of this trade and health disconnect. The full story behind these protracted negotiations remains to be told but was likely shaped by both business mobilization and discursive processes that silenced public health voices in trade and investment debates (Siles-Brügge, 2020).

These four factors can be assembled in multiple bundles and are also influenced by the forces of the international political economy. Thus, the rise of China, the digitalization of the global economy, or the climate crisis can engender new narratives, initiate innovative institutional behavior, and trigger different forms of social or business mobilization. In sum, trade disconnects are shaped by a combination of discursive, institutional, inter-scalar, and countermobilizing processes that are all structured by the constraints—real or constructed—of the international political economy. Understanding how enduring these adversarial forces can be and whether they can be overcome is crucial to understand the disembedding and re-embedding dynamics of trade policy. The next section applies this conceptual framework to the sphere of digital trade.

3. Digital Trade Disconnects and Linkages

3.1. *The Rise of US Digital Trade Policy*

Through an arsenal of domestic and international policies, including the Defense Advanced Research

Projects Agency’s instrumental support for groundbreaking innovations—computer chips, the Internet, GPS, lithium-ion batteries, and cellular technology—and Washington’s sustained advocacy for a WTO moratorium on taxes on cross-border data flows (renewed in June 2022), the US government has played an underestimated role in the emergence and flourishing of the digital sector. Since the turn of the century, Washington has gradually formalized its digital trade policy through multilateral, regional, and bilateral channels. From the Framework for Global Electronic Commerce (Clinton & Gore, 1997) to the ambitious e-commerce chapter of the aborted TransPacific Partnership (TPP) and its modernized transplant in the USMCA, the executive and legislative branches gradually developed a bipartisan digital trade agenda to assert US technological leadership and promote the free flow of information by limiting both tariff and non-tariff barriers on digital trade in goods and services. The first US FTA to incorporate a self-standing chapter on electronic commerce was the Korea–US (KORUS) FTA (signed in 2007), but the real turning point in the formalization of the US digital trade agenda came under the Obama administration. In 2015, Congress officially expanded its traditional focus on e-commerce to a broader policy framework encompassing “digital trade in goods and services and cross-border data flows,” in effect shifting from a more traditional approach to trade administration to a broader regulatory role in data governance. An expanded list of principal US trade negotiating objectives was designed to ensure (a) that WTO rules and disciplines apply to regional trade agreements, (b) that digital goods and services receive the most liberal trade treatment possible, (c) that governments abstain from hampering digital trade or restrict cross-border data flows, (d) to extend the WTO moratorium on duties on electronic transmissions, and (e) that any legitimate regulation is as least trade restrictive as possible (Bipartisan Congressional Trade Priorities and Accountability Act, 2015, §6). In line with these objectives, the negotiations of TPP marked a shift to a broader digital trade agenda. TPP included a more comprehensive electronic commerce chapter whose provisions were, for the first time, enforceable through dispute settlement (Aaronson, 2018). This template would serve as the basis for the negotiations of the USMCA.

Although they have been broadly framed as US national economic interests, these political priorities can have very different implications for a broad range of policy stakeholders, among which are Internet users, consumers, workers, taxpayers, and SMEs. This means that there is potentially a wide range of digital trade policy linkages to be addressed by policymakers, including data privacy, transparency, labor rights, fair taxation, and antitrust/competition law. While it is beyond the scope of this article to survey all policy linkages in digital trade, it will compare two of these social or “non-economic” issues to understand the dynamics and factors of enduring disembeddedness in US digital trade policy.

The first issue pertains to workers' rights, more specifically the rights of digital labor. As the next section shows, the rise of platform capitalism and the proliferation of digital workers have significant implications for workers' rights both in the US and other countries. Given the prominence of labor standards in US trade policy debates for the past 30 years and the growing importance of digital trade in negotiations, it is remarkable that the two policy agendas have neither converged nor collided. The second issue under study is data privacy, a social question related to digital trade that has received increasing attention at both domestic and international levels, and a test case to assess how and why non-economic issues might be linked to or remain disconnected from US trade policy.

3.2. The Puzzling Absence of Digital Workers' Rights in US Trade Policy

The rise of digital workers has been a significant feature of the digital economy, as illustrated by its dramatic increase over the past decade: Between 2010 and 2020, the number of digital labor platforms has increased fivefold (from 142 to 777). The International Labour Organization (ILO) distinguishes online web-based platforms, which can draw from a global workforce, from local-based platforms, whose services are primarily provided at the local level (ILO, 2021). Aggregate employment figures are more difficult to estimate for several reasons, including definitional issues, limited data (platforms do not disclose the number of workers), and oversupply of workers, but recent estimates of the proportion of digital workers in developed countries range from 0.5% to 12% (ILO, 2021). Whereas the proliferation of digital labor has been shown to offer employment opportunities, it also created a long list of challenges for workers, among which downward pressure on wages, lack of social benefits, long working hours, discrimination and harassment, limited or inexistent access to freedom of association and collective bargaining, and acute work safety risks in some sectors, like delivery (Carelli et al., 2022; ILO, 2021; Vallas, 2019).

At first sight, one may disclaim the question of digital labor rights as irrelevant to US trade policy under the pretext that foreign gig workers are primarily embedded in local labor markets and do not compete with US workers. This premise, however, leaves out a growing segment of platform workers who compete internationally for both low-skilled and high-skilled tasks. In fact, the last decade has witnessed a trend in outsourcing digital services from the Global North to the Global South that is reminiscent of the offshoring of manufacturing jobs in previous decades. This invisible but growing pool of "telemigrants" was already gaining significance before the Covid-19 pandemic and now covers a wide range of services including customer relations, editing, translation services, accounting, medical services, and finance (Baldwin, 2019; ILO, 2021).

The fact that many US digital labor platforms have built their business model on non-standard forms of employment raises important questions concerning the enforcement of fundamental principles and rights at work. As explained previously, the structuring of the American digital trade strategy since the second half of the 1990s took place against the backdrop of fierce debates over the scope and enforceability of labor standards in trade agreements, with the 1998 ILO declaration at the center of the US approach to trade and labor. As the ILO has long noted, applying this policy framework to the digital sphere would require guaranteeing that "crowdwork" performed on online web-based platforms is not performed by child labor, that compensation is not discriminatory, and that workers can organize for better conditions (ILO, 2015). Given how much political capital and financial resources US trade officials have devoted to the enforcement of freedom of association and collective bargaining conventions (ILO Conventions 87 and 98 respectively), most recently under the USMCA's rapid response mechanism, it seems paradoxical that the US has given so little consideration to the role that digital trade and platform capitalism have played in the proliferation of non-unionized jobs and the infringement of workers' rights in the digital sphere. This disconnect goes beyond core labor standards: Digital platforms also raise questions on other essential rights beyond the 1998 declaration such as the minimum wage and working hours, both of which have long been an integral part of labor chapters in US trade agreements.

Yet, the working conditions of so-called gig workers were absent from the negotiating objectives of the 2015 Bipartisan Congressional Trade Priorities and Accountability Act and Obama's assertive digital trade agenda. Within the framework of the TPP, the US Trade Representative (USTR) claimed to have negotiated both "the strongest protections for workers of any trade agreement in history" (Office of the United States Trade Representative, 2015a) and "the most ambitious and visionary Internet trade agreement ever attempted" (Office of the United States Trade Representative, 2015b). Yet, these two separate chapters on labor and electronic commerce had no common language or cross-reference. Likewise, the TPP-inspired USMCA left little room for linkages between digital trade and labor rights. Its "digital trade" chapter, which largely drew from TPP's electronic commerce chapter, did not include any reference to digital workers. And despite the praise it received from labor advocates and House Democrats, the labor chapter did not make any advances in the digital economy.

Recently, the Biden administration has begun to acknowledge the potential effects that the digital economy might have on workers. In a speech on digital trade in November 2021, US Trade Representative Katherine Tai went a long way to re-embed digital trade in its social context, underlining the need to protect both workers and consumers:

I also believe that our approach to digital trade policy must be grounded in how it affects our people and our workers. We must remember that people and workers are wage earners, as well as consumers. They are more than page views, clicks, and subjects of surveillance. They are content creators, gig workers, innovators and inventors, and small business entrepreneurs. This means they have rights that must be protected—both by government policy and through arrangements with other governments. (Office of the United States Trade Representative, 2021a)

Tai's speech marked a departure from the US free market approach to digital trade policy and its agnosticism to labor issues. This discursive shift, however, has yet to be met with policy change. In theory, these questions could emerge in ongoing trade negotiations such as the Indo-Pacific Economic Framework (IPEF), or as part of the transatlantic dialogue under the EU–US Trade and Technology Council (TTC). In the former case, one notable precedent is the reference to “workers in the digital economy” in the discussion of labor rights under the “trade pillar” of IPEF (Office of the United States Trade Representative, 2022). The uncertain scope and legal form of IPEF, and whether it can survive congressional scrutiny as an executive agreement, mean that the rights of digital workers have a long way before becoming enforceable labor provisions. An alternative path for linking digital trade and labor rights could come from the TTC. Indeed, the TTC's inaugural joint statement outlined an intention to “discuss the impact of technology on labor markets, working conditions, and worker rights, including policy issues related to the ‘gig economy’ and to undertake an economic study examining the impact of AI on the future of our workforces” (Office of the United States Trade Representative, 2021b). Yet, while the TTC takes a first step in calling for cooperation on workers' rights in the digital economy, this non-binding regulatory dialogue is far from any harmonized approach to regulating digital workers' rights, let alone any kind of enforceable agreement. In short, US trade agreements are still miles away from linking digital trade to workers' rights in any substantive manner.

3.3. Linking Digital Trade and Data Privacy

The OECD has listed the protection of privacy and consumers as one of three potentially conflicting policy goals in the digital sphere, along with maintaining open access to the Internet and preserving market competition (Koske et al., 2014). The proliferation of digital platforms collecting an endless stream of personal data, and the growing use of machine learning and AI technology (so-called Web 3.0) monitoring online behavior mean that these social concerns will continue to be central in the digital trade sphere in the near future.

While labor rights have been largely left out of the digital trade agenda, the question of data privacy

has been part of the US policy discussions since the early days of the Internet. In its Framework for Global Economic Commerce, the Clinton administration argued that e-commerce would “thrive only if the privacy rights of individuals are balanced with the benefits associated with the free flow of information” (Clinton & Gore, 1997). It dedicated a significant portion of its policy platform to the question of privacy. Although Clinton saw private standards as preferable to government regulation, the US government remained open to reevaluating this policy should the market fail to guarantee effective privacy protection. Unlike digital labor rights, however, data privacy has remained a prominent issue in digital trade policy debates, as evidenced by its progressive codification through two main channels: US FTA policy and its sustained regulatory dialogue with the EU.

Within the framework of US FTAs, the linkage between digital trade and data privacy have taken shape incrementally, over the course of two decades. The first US FTA to incorporate e-commerce provisions was the US–Jordan FTA. While it did not include any chapter on e-commerce or digital trade, it stood out from previous PTAs for its Joint Statement on Electronic Commerce, which featured an article on privacy (unless stated otherwise, all quotations of trade agreements rely on texts available on the archives of the Office of the US Trade Representative). Although non-binding, it put the “effective protection of privacy” on par with “the need to continue the free flow of information.” Here again, the Clinton administration called for “flexible” solutions undertaken by the private sector at the industry level. But the mere reference to privacy, even outside the core text of the US–Jordan FTA set a precedent for future trade agreements. The next step was the inclusion of a chapter on electronic commerce in the KORUS FTA. Fairly concise and non-binding, this set of articles reasserted the dual goals of promoting the free flow of information to facilitate trade and protect personal information. This time, however, it abstained from recommending industry-specific solutions to consumer protection, exhorting instead each party's national consumer protection enforcement agencies to cooperate (Chap. 15, Arts. 15.5 and 15.8).

The US free market approach to privacy protection nonetheless collided with other countries' regulatory proclivities, and as a result, did not include references or commitments to the free flow of information. TPP's e-commerce chapter went beyond the focus on online consumer protection of the KORUS FTA to include an article on “personal information protection” (Art. 14.8) which, first, required that each country ensure the protection of personal information through a legal framework following principles and guidelines of international bodies and, second, called parties to publish information on privacy protection and inform individuals about how to pursue remedies. To preserve the US voluntary approach to privacy, a footnote clarified that the legal framework included “laws that provide for the enforce-

ment of *voluntary* undertakings by enterprises relating to privacy” (chap. 14, Art. 14.8, emphasis added). Of course, the US withdrew from TPP and never implemented these provisions. However, these attempts to link digital trade and privacy came to fruition during the USMCA negotiations. The text of the TPP inspired USMCA negotiators to clarify the said principles of privacy protection, which now include “limitation on collection; choice; data quality; purpose specification; use limitation; security safeguards; transparency; individual participation; and accountability” (Art. 19.8, §3). Another notable addendum was a provision of the Cooperation article exhorting parties to share information and practices on “regulations, policies, enforcement, and compliance relating to digital trade”, including on personal information protection (Art. 19.14, §1). These principles were in direct conflict with the free market objectives that Washington had embraced both internationally, with its initial emphasis on the free flow of information, and domestically, as illustrated by the federal government’s reluctance to legislate on data governance and personal information protection.

Finally, these emerging linkages—and prolonged conflicts—between digital trade and privacy have also been on full display outside of FTAs, through a sustained regulatory dialogue between the US and the EU. Since the late 1990s, the EU and the US have conducted negotiations on digital trade and personal information protection. This transatlantic dialogue has given birth to two agreements, both of which have been invalidated by the European Court of Justice for failing to provide adequate privacy protections for European citizens: the Safe Harbor (2000) overturned in 2015 and the Privacy Shield (2016) struck down in July 2020. In March 2022, the two partners reached a new agreement on a Trans-Atlantic Data Privacy Framework designed to address the shortcomings of the Privacy Shield, namely providing additional protection for European citizens’ data being transferred to the US. Notable provisions include new binding safeguards on US intelligence authorities and the creation of a Data Protection Review Court to resolve potential complaints of Europeans on data transfers (Fahey & Terpan, in press).

While the tensions between free data flows and personal information protection are far from solved, advances through both US FTAs and the transatlantic regulatory dialogue are evidence of incremental linkages between digital trade and privacy. In the words of Burri and Polanco (2020, p. 33): “Privacy and data protection have become a trade topic.” These policy linkages contrast with the lingering disconnect between digital trade and labor rights. The next section discusses these contrasting policy developments.

3.4. Interpreting Trade Disconnects

These two case studies have shown that digital trade policy is not indifferent to all social linkages: While US

decision-makers have largely come short of incorporating labor rights, they have gradually integrated provisions to protect data privacy in the development of US FTA policy. What factors account for these different developments and what can we learn about the nature and dynamics of trade disconnects?

The first type of factor driving trade disconnects is of a discursive nature and requires understanding the framework in which e-commerce emerged. An oft-cited policy framework in the history of e-commerce is Clinton and Gore’s Framework for Global Electronic Commerce, which defined the guiding principles for what would become US digital trade policy. The first of its five key principles stated that “the private sector should lead” (Clinton & Gore, 1997). Clinton and Gore’s (1997) roadmap for e-commerce praised the “decentralized nature and tradition of bottom-up governance” of the Internet and was infused with anti-regulatory rhetoric. Governments were deemed to be too slow to follow the rapid pace of technological innovation and, therefore, “should refrain from imposing new and unnecessary regulations, bureaucratic procedures, or taxes and tariffs on commercial activities.” This “hands-off” approach was not the mere product of a decade dominated by free market economics but also dovetailed with the self-regulatory and multistakeholder demands of the Internet governance community that famously issued a Declaration of the Independence of the Cyberspace (Aaronson, 2018, p. 192; Barlow, 1996).

This mix of techno-libertarianism and free market ideology contributed to disembody the digital sphere, to the detriment of digital workers’ rights, and initially at least, privacy protection. It percolated through Obama’s emerging digital agenda, which primed the free flow of information and dismissed foreign attempts to regulate the tech industry as digital protectionism, including European attempts to regulate privacy:

We have owned the Internet. Our companies have created it, expanded it, perfected it in ways that they can’t compete. And oftentimes what is portrayed as high-minded positions on issues, sometimes is just designed to carve out some of their commercial interests. (Obama, 2015)

Here, the new power structure of the international political economy, with the emergence of China as a rival technological power was an important factor behind the US free market posture. Unlike labor rights, however, data privacy was part of the discussion on e-commerce from the early days of the Internet, including in Clinton and Gore’s (1997) Framework for Global Electronic Commerce. This early connection between the two issues was likely more conducive to future policy linkages.

These discursive processes coalesced with institutional factors to maintain a disconnect between digital trade and labor rights. According to the OECD (2017), the US decentralized and market-driven approach to the

digital sector is quite unique among the other members, that have favored more centralized digital trade strategies. This institutional fragmentation has contributed to policy gaps. Both the USTR and the Department of Commerce work to promote digital trade policies and identify foreign trade barriers in consultation with business stakeholders, but neither institution has a clear mandate to address questions pertaining to platform workers. Meanwhile, the Bureau of International Labor Affairs and its Office of Trade and Labor Affairs primarily focus on the enforcement of workers' rights in developing countries and tend to prioritize the eradication of child labor, forced labor, and human trafficking in the agricultural, mining, or services sector. It has yet to broaden its focus to digital workers.

These silo effects contrast with the greater interaction of US federal agencies on data privacy. During the 1990s, several agencies released reports on the Internet and its policy implications for personal information and consumer protection. These included the Department of Commerce's National Telecommunications and Information Administration, the Federal Trade Commission, and the White House's Information Infrastructure Taskforce, which convened working groups soliciting public commitments about how to implement privacy (Clinton & Gore, 1997). Hence, the cause of data privacy, unlike labor rights, had initial institutional support outside of US trade agencies that gave it greater visibility in policy debates.

Inter-scalar processes have also contributed to the disconnect between digital trade and labor rights. The fragmentation of the US regulatory space is illustrated by the conflicting regulatory approaches that US states have adopted to protect platform workers. California has undoubtedly experienced the fiercest political battle to regulate the rights of platform workers. In 2019, the Californian legislature voted to codify an "ABC" test defining the conditions under which platform workers must be classified as employees to be entitled to labor protections and benefits. In response, digital platforms like Uber and Lyft put Proposition 22, an initiative designed to maintain the status of digital workers as independent contractors, on the ballot for the 2020 elections. After digital platforms won the ballot measure in November 2020, a California judge ruled Proposition 22 to be unconstitutional and unenforceable in August 2021. A month later, the Protect App-Based Drivers & Services Coalition representing platform companies appealed the decision (O'Brien & LeBlanc, 2021).

These fierce political battles contrast with the political inertia of the US federal government and are, in theory, inherent to the internal diversity of the American political economy. These battles might have discouraged US federal agencies from developing a formal negotiating position at the international level. In practice, however, the executive branch has at times promoted policies abroad that were far from consensual at home, whether this pertains to environmental standards, labor rights in

general, and even data privacy. Indeed, in the absence of federal law protecting personal information, several states, including California, Virginia, and Colorado have passed consumer privacy laws (Fahey & Terpan, *in press*). These, however, have been far less contentious than attempts to regulate digital labor, which might partly explain the federal government's reluctance to protect digital workers through federal legislation.

These inter-scalar conflicts are related to another important factor of trade disconnects: business mobilization. Over the past decade, the digital sector has become an increasingly organized political force, including in the trade sphere (Azmeh et al., 2020). This politicization has occurred at local, federal, and international levels. At the local level, companies have mobilized to prevent local authorities from imposing costly regulations. This was the case with the 200-million-dollar campaign for Proposition 22 in California, funded by platform companies including Uber, Lyft, DoorDash and Instacart, and Uber-owned Postmates (Azmeh et al., 2020). While this was arguably the most visible political battle related to digital workers' rights, it was also part of a larger organizing endeavor by app-based platforms.

Figure 1 shows the dramatic increase in the lobbying efforts of digital labor platforms between 2014 and 2020. Lobbying expenditures and the number of lobbyists respectively increased twelve-fold and eight-fold over six years. Admittedly, these numbers must be examined with caution. On the one hand, the dramatic growth in lobbying activities contrasts with aggregate trends: The total number of US registered lobbyists stagnated and even narrowly declined between 2014 and 2020 (from 11,789 to 11,534), while annual expenditures increased from \$3.26 billion to \$3.53 billion. On the other, given that many of these tech companies were founded in the past 10 to 15 years, the increase in political spending appears anything but logical and should not be over-interpreted.

Additional evidence of this form of mobilization includes the large interaction between the Obama administration and the digital sector, as illustrated by the so-called "revolving door" between top government officials and representatives of the tech industry. The most prominent example of this process was Obama's nomination of Business Software Alliance's former CEO Robert Honeywell to the position of deputy USTR in 2014, an important signal that the US government was more concerned with dealing with other countries' attempts to regulate the digital industry—lumped under the notion of digital protectionism—than developing linkages between digital trade and labor rights. Another notable example was Uber's hiring of former Obama adviser David Plouffe as vice president for Policy and Strategy between 2014 and 2017 (Kirchgaessner et al., 2022). While it is notoriously difficult to establish a direct link between lobbying and policy developments (or lack thereof, in the case of labor rights), these lobbying efforts at multiple levels, most prominently in California,

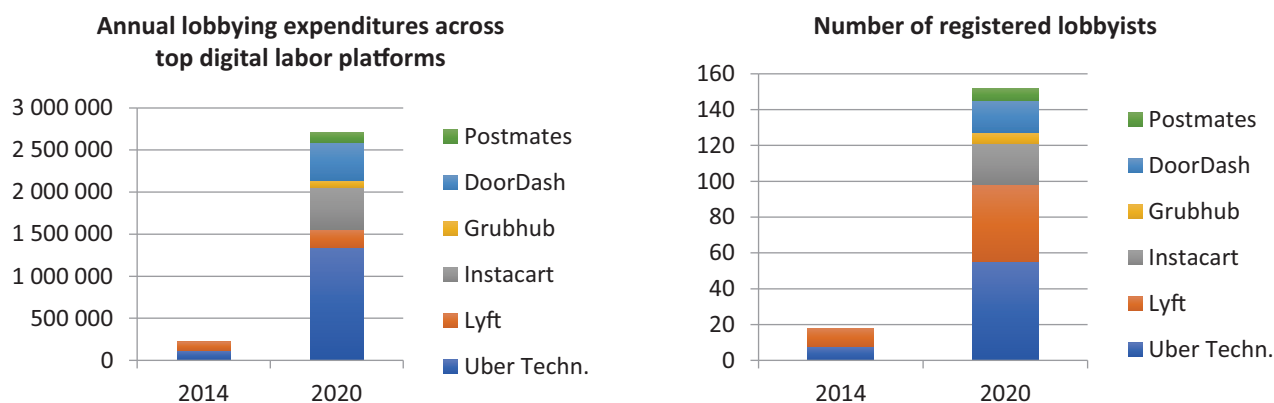


Figure 1. The rising lobbying activities of US digital labor platforms. Note: Since 2020, Postmates is owned by Uber Technologies, which also includes Uber Eats. Source: OpenSecrets (2022).

may have, directly or indirectly, contributed to undermining attempts to link trade policy and digital labor rights at the international level.

A trove of leaked documents called the “Uber files” has recently shown that the digital industry’s lobbying offensive went far beyond domestic activities to include a complex web of high-level diplomacy on different continents. Here again, intensifying competition in the digital sector played an important role in triggering business mobilization against different forms of digital protectionism, thereby reinforcing the predominant antiregulatory narrative of the US digital trade agenda.

Yet, if the rising lobbying activities of tech companies contributed to promoting the US free market approach to digital trade, why did they allow concessions on privacy protection that conflicted with the once-preeminent principle of the free flow of information? Here, part of the answer may be found in the mobilization of digital rights advocates, not simply in the US but also in other TPP countries, which forced US negotiators to reconsider their position on data privacy (Aaronson, 2018). By contrast, the widely-known obstacles to organizing digital workers can also explain the enduring “disembeddedness” of digital trade policy.

4. Conclusion

By comparing the progress made to advance workers’ rights and data privacy in the digital trade policy sphere, this article has shown that the causes of trade disconnects are multiple and complex. The reasons for the enduring disembeddedness of digital trade policy are to be found in four interrelated factors: (a) the strong antiregulatory narrative that has permeated the digital sphere since the origins of the Internet; (b) the policy gaps between different institutions overseeing the development of the digital trade policy on the one hand, and the enforcement of labor rights on the other; (c) the inter-scalar conflicts between different states and the federal government; (d) the increased political mobilization of digital platforms seeking to deter state interven-

tion on behalf of digital workers. As the growing linkages between digital trade and data privacy show, these obstacles are not insurmountable.

From a bottom-up perspective, social mobilization at the local, national, and/or transnational levels could challenge the status quo on digital labor rights. From a top-down approach, the timid steps toward acknowledging the social effects of the digital economy could benefit from stronger interagency and consultation processes giving a voice to workers, consumers, local and state governments, as well as trading partners, to institutionalize digital labor rights in line with the ILO’s fundamental principles and rights at work.

Beyond this attempt to understand the absence of linkages between digital trade and labor rights, this article has reaffirmed the need to study the dynamics of non-decision-making, by offering a new theoretical framework centered around the notion of trade disconnects. This emerging research agenda provides theoretical tools to understand the dynamics of disembedding processes at work in the trade policy sphere and the conditions under which trade linkages may or may not occur in the future, whether this relates to digital labor rights or other neglected social causes.

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Conflict of Interests

The author declares no conflict of interest.

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Article

The WTO and the Covid-19 “Vaccine Apartheid”: Big Pharma and the Minefield of Patents

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Abstract

Unequal access to vaccines for the Covid-19 pandemic, also referred to as “vaccine apartheid,” has marginalized low-income countries again. In October 2020, India and South Africa proposed a temporary waiver from certain provisions of the TRIPS Agreement for the prevention of Covid-19 at the World Trade Organization (WTO). An agreement was later reached in Geneva on June 17, 2022. The objective of this article is to analyze the negotiation and agreement reached at the WTO. This article explores the difficulties of creating international public good in the field of public health within the milieu of powerful actors, namely big pharmaceutical companies with vested interests. The central argument of this article is that this agreement alone will not solve the vaccine access problem for low-income countries. It is too restrictive, does not cover trade secrets and know-how, production capacity, availability of raw materials, and even adds new limitations that did not exist before. The best option to promote the production of quality vaccines in low-income countries is to share technology and know-how on a voluntary basis through production agreements. One way to facilitate the cooperation of large pharmaceutical corporation is to make it easier for low-income countries to use compulsory licenses. Simplifying the use of this mechanism could help encourage pharmaceutical companies to enter into voluntary licensing agreements.

Keywords

Big Pharma; Covid vaccine; TRIPS Agreement; intellectual property rights; waiver of patents; World Trade Organization

Issue

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1. Introduction

In his seminal article on embedded liberalism, John Ruggie argued that the post-war economic order was forged on the basis of a historical compromise (Ruggie, 1982, p. 393). This compromise was to establish a balance between multilateral trade regimes but was to be tempered and governed by national regulation and social objectives including public health. In the field of public health, this balance has never been found for low-income countries and the Covid-19 crisis has completely shattered the last illusions in this regard. Intellectual property and unequal access to vaccines and health supplies needed to respond to the Covid-19

pandemic, also referred to as “vaccine apartheid” by a UN human rights independent expert, and have yet again marginalized low-income countries (Achiume, 2022; Torreele & Amon, 2021). How high-income countries, including the US, Canada, and the European Union maneuvered to monopolize the supply of vaccines from the outset of the crisis had the effect of excluding other countries from the market.

Yet the resolution of the Covid-19 crisis cannot be anticipated until vaccination is truly global because of countries’ interdependence. If high-income countries are vaccinated first, but a large proportion of low-income countries have limited access to the vaccine and health materials, the virus will continue to circulate, likely

mutate, and return in a different form throughout the world. For low-income countries, the current crisis is indicative of the hypocrisy of high-income countries not living up to the promises they made at the time of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) negotiations in 1994 and the 2001 Doha Declaration at the World Trade Organization (WTO). This is the case, particularly, with aspects related to technology transfer and building productive capacity for the poorest countries (Council for Trade-Related Aspects of Intellectual Property Rights, 2021; Deere, 2009, p. 12).

To partially solve the problem of “vaccine apartheid,” India and South Africa proposed a waiver of patents in October 2020 on vaccines and health materials needed to combat Covid-19 at the WTO. An agreement was reached in Geneva on June 17, 2022 (WTO, 2022b). The central argument of this article is that this agreement alone will not solve the “vaccine apartheid” problem for low-income countries. The agreement is too restrictive because it does not cover, for example, testing and treatment of the coronavirus, it is silent on the difficult issue of supply, and adds new limitations that did not exist before. On top of that, the agreement does not cover trade secrets. The best option to promote the production of quality vaccines in low-income countries is to share technology and know-how voluntarily through production agreements. One way to facilitate the cooperation of large pharmaceutical corporations is to make it easier for low-income countries to use compulsory licenses. Simplifying the use of this mechanism could help to encourage pharmaceutical companies to enter into voluntary licensing agreements.

This article thus focuses on the difficulties of creating global public good in the field of public health in the milieu of powerful actors, namely the big pharmaceutical companies with vested interests. This article analyzes the negotiation and the agreement reached at the WTO on the issue of patents for Covid-19 vaccines from primary sources. This includes negotiation documents from the WTO and public statements by key actors, as well as secondary sources, such as analyses by international economic law scholars, focusing on the interests of powerful actors.

2. Theoretical Framework

A global public good is not limited to the idea that the good, like a vaccine, is “good” for the international community. As Samuelson (1954) pointed out in a seminal article on the subject, a public good must meet certain characteristics to be defined as such. It must be both “non-rival” and “non-excludable.” A non-rival public good means that its use by one person does not reduce its availability to others. A non-excludable good means that it must be impossible to prevent an individual from benefiting from it. There are several examples of international global public good in public health, such as open access public health research and data (Moon et al., 2017).

The situation becomes more complex when we look specifically at health products such as drugs (R. D. Smith, 2003). While it is fair to assume that drugs in pill form or even vaccines in a vial are subject to rivalry and exclusivity, the formula from which a pill or vaccine is produced is not in this category (Quigley, 2017, p. 98). In other words, while a vaccine in a vial is a rival and exclusive good, the formula and process for making the vaccine is a non-rival and non-exclusive good. In this case, it is the intellectual property rights or patents held by Big Pharma that transforms the public good into a private good (Stiglitz, 1999; Yamey et al., 2018).

On top of that, while a private good provides a benefit to the person consuming it, at a certain threshold (that of herd immunity) it becomes non-excludable as it produces positive externalities. In a world faced with severe cholera and measles epidemics and now with the Covid-19 pandemic, for example, the need for affordable and accessible vaccines is fundamental. The eradication of a vaccine-preventable disease such as smallpox fulfills the requirements of international public good because everyone benefits from the outcome, whether or not they contributed to the eradication effort.

The importance of this issue explains why in the past scientists have proposed solutions to turn a private good into a public good. Academics and a growing number of research granting agencies, for example, require that research results be open access. Similarly, scientists in the past also decided to make certain technology free for the benefit of all. The inventor of the first synthetic malaria vaccine, for example, gave his patent to the WHO, while the inventor of insulin gave his to the University of Toronto for the nominal sum of \$1 (Quigley, 2017).

Samuelson’s (1954) definition of public good implies that the market is not the best way to produce enough of a public good, since it is impossible to make this investment profitable. It is only when a company can charge a high price for the consumption of the good that the situation becomes profitable for them. In order to do that, the state must thus play a role by, for example, prohibiting the use of the formula to make a drug or vaccine, then exclusivity is created where none existed (Quigley, 2017, p. 98). State intervention is a balancing act because if the state does not intervene enough, the good will not be produced in sufficient quantity. If the state strengthens intellectual property protection too much, it risks harming innovation and also creating a situation where companies can impose monopoly prices (Galasso & Schankerman, 2014). Additionally, in the absence of government intervention, vaccine patent holders have the ability to refuse to transfer their trade secrets, even in the context of a vaccine shortage during a pandemic (Stiglitz, 1999).

This situation explains why American, British, European, and Japanese pharmaceutical companies have mobilized in the past to put pressure on governments to adopt national and international standards. This has happened for example at the WTO, but also in

preferential trade agreements, to strengthen intellectual property protection. The situation is such nowadays that it is even described as “a minefield of patents” by experts (Kianzad & Wested, 2021, p. 74). Indeed, big pharmaceutical companies are multiplying patents to strengthen intellectual property protection measures. With trade secrets on the know-how, these strategies are essential to keeping their profitability high (Flynn, 2011, p. 150; Sell, 2003; Steele, 2021). Since low-income countries cannot keep up with the price of vaccines, it creates a “vaccine apartheid” (Singh Bajaj et al., 2022).

There are, however, several strong arguments for considering vaccines as a global public good. Since public funds have contributed massively to the development of vaccines, the situation is one in which the costs of research and innovation are largely provided by the public sector, but the huge profits are reaped by the big pharmaceutical companies. By 2021, the public sector had invested over \$93 billion in Covid-19 vaccine development (Thambisetty et al., 2021, p. 13). Public funds accounted for 97% to 99% of the research and development funding for the Oxford-AstraZeneca vaccine, for example (Cross et al., 2021, p. 2). In the same year, the US government invested \$1 billion in AstraZeneca, \$1.5 billion in Johnson & Johnson, and \$2.5 billion in Moderna (Bansal, 2021). In addition, global academic research around the Covid-19 issue is largely open access and massively publicly funded. This research was crucial to the development of vaccines.

The call by many countries and non-governmental organizations (NGOs) to make vaccines and health materials available, affordable, and accessible to all—essentially, to make vaccines an international public good—is rooted in the idea of universal health coverage (Moon et al., 2017; Quigley, 2017; R. D. Smith, 2003). Today, as in the days of Nelson Mandela’s struggles on the issue of HIV/AIDS treatment, the opposition is taking place among powerful interests (Paquin, 2022). This conflict emerges between large multinational pharmaceutical companies united under the name Pharmaceutical Research and Manufacturers of America (PhRMA) and several countries, groupings of countries, NGOs such as Médecins sans Frontières, and experts (Bollyky & Bown, 2020).

From the perspective of international political economy (which focuses on the interests of powerful actors) institutions, whether formal or informal, are rules to follow that frame international negotiations on the lifting of patents at the WTO. Institutions help shape how actors perceive and understand their interests. Analyses of international political economy that focus on interests have, as a central assumption, that when a group is negatively affected by a policy proposal, it will mobilize against it (Paquin, 2016). What fundamentally determines the preferences of actors is the importance of an issue to them. If an issue is critical and the effects of a policy measure are highly concentrated, this creates an incentive for stakeholders to act vigorously to defend

their interests. For example, large pharmaceutical companies that invest massively in highly specialized sectors, such as vaccine production, will demand strong protectionist measures such as strengthening intellectual property measures in trade agreements to maximize their profit (Sell, 2003; Milner, 1988). In this context, as Olson (1965) argued in *The Logic of Collective Action*, the most difficult policy measures to pass are those with diffuse benefits but concentrated costs. Those who suffer the costs—in this case, the big pharmaceutical companies when lifting patents on Covid-19—will strongly oppose these changes while those who could benefit from them will not mobilize as effectively.

For pharmaceutical companies, the worst-case scenario is the lifting of patents on all health materials needed to combat Covid-19 and make vaccines an international public good. This option would have a significant impact on their profits, their ability to attract investors in the future, and the value of their shares on the stock markets. This resistance from Big Pharma explains why patent removal at the WTO is so difficult, since it requires a consensus of WTO member countries to adopt the policy or if it goes to a vote, a three-fourths majority in accordance with Article IX of the WTO Agreement. Big Pharma vigorously defends its interests and favors voluntary production agreements (i.e., in negotiation with the owner of the patent) over patent removal. The countries where Big Pharma is located are being intensely lobbied and are divided between protecting the pharmaceutical industry on their territory, and all the well-paying jobs it entails, and working to solve the health crisis.

3. Intellectual Property and Public Health at the WTO

The TRIPS Agreement is the most comprehensive multilateral agreement on intellectual property protection (Council for Trade-Related Aspects of Intellectual Property Rights, 2021; Deere, 2009). It defines the intellectual property regime and regulates trade in knowledge-based products such as vaccine formulas and health materials. With TRIPS, countries commit to granting the same protection to all patents, whether national or international, over a 20-year period, and national patents cannot have the effect of discriminating against a patent from another member country (Flynn, 2011, p. 150). This agreement recognizes the importance of the links between intellectual property protection and international trade.

The 2001 Doha Declaration, which was adopted in the context of the South African government’s mobilization on the issue of HIV/AIDS treatment, is also important in clarifying the scope of the TRIPS Agreement and public health. In the 2001 Doha Declaration, WTO member countries agreed that the TRIPS Agreement should be part of a broader set of national and international actions to address public health problems in developing countries, including the least developed ones. In the declaration, WTO members recognize the sovereign right of

governments to take measures to protect public health (Article 4). Member states agreed on the importance of interpreting the TRIPS Agreement in a manner that supports public health. The Declaration reaffirms the right of governments to take advantage of the “flexibilities” in the Agreement (Article 4). It also states that countries have the right to determine what constitutes a national emergency, and the text even mentions that the HIV/AIDS epidemic constitutes a national emergency, as do tuberculosis and malaria (WTO, 2001, Art. 5).

The flexibilities identified in the Doha Declaration include “the right to grant compulsory licenses” (WTO, 2022a). A compulsory license is issued by a government authority or court to make certain use of a patented invention without the consent of the patent owner. This mechanism is generally present in most patent laws and is recognized as an option or permissible flexibility under TRIPS, and this approach has been used in the past by WTO members.

The 2001 Doha Declaration on the TRIPS Agreement also recognizes that the compulsory licensing system could hamper effective use by countries with insufficient or no manufacturing capacity in the pharmaceutical sector (Steele, 2021). It thus aims to remove this obstacle by creating an additional form of compulsory license that did not previously exist: a compulsory license specifically designed for the export of medicines to countries that lack manufacturing capacity. This mechanism has sometimes been referred to as the “paragraph 6 system,” because of its origin in the Doha Declaration (WTO, 2001). The new Article 31 of the TRIPS Agreement gives full legal effect to this system and allows for the production and export of low-cost generic drugs under a compulsory license exclusively for the purpose of meeting the needs of countries that cannot manufacture these products themselves (Fisher & Rigamonti, 2005, p. 14). For example, Canada was able to produce a generic version of an HIV/AIDS drug for Rwanda under this clause because Rwanda did not have industrial capacity at the time (WTO, 2007).

The options referred to as “flexibilities” in the Declaration were also recognized in the 2015 United Nations Sustainable Development Goals. For public health advocates, the 2001 Doha Declaration represents a remarkable achievement in that it gave primacy to public health, not intellectual property, and clarified the rights of WTO members to use TRIPS safeguards (’t Hoen, 2002). Despite significant progress, the Covid-19 crisis has demonstrated the extent to which the situation remains advantageous to Big Pharma.

4. India and South Africa’s Proposal

The Covid-19 crisis has reignited the debate on intellectual property protection and public health. In October 2020 India and South Africa proposed (and then revised in May 2021) a temporary waiver of Sections 1, 4, 5, and 7 of the second part of the TRIPS Agreement for

at least 3 years (Council for Trade-Related Aspects of Intellectual Property Rights, 2020, 2021). After that time, the WTO General Council would have to determine whether patent removal is still warranted (Berger, 2021). The patent waiver proposal does not focus exclusively on vaccines; it also focuses on other patent-protected subject matter such as health products and technologies, including diagnostics, therapeutics, medical devices, personal protective equipment and their materials or components, as well as methods and means of manufacture for the prevention and treatment of Covid-19. The rationale for this proposal was that, in order to manufacture a vaccine, one must not only lift a patent on a single drug but do it on a wide variety of IP-protected elements also, whether it be an mRNA or an adenovirus, for example (Bostyn, 2021; Hilty et al., 2021, p. 3).

This proposal, which was quickly supported by 100 countries, including China and Russia, is also supported by the WHO and UNAIDS. Hundreds of Nobel Prize winners, Médecins sans Frontières, and the editorial team of the journal *Nature* also support the measure (Nature Editorial Team, 2021). Importantly, the US, historically resistant to such a proposal, has changed its position. Indeed, in keeping with a campaign promise to the left wing of his party, President Biden has supported the temporary lifting of intellectual property rights to promote vaccine production. That said, the US government was not prepared to go quite as far as the Indian and South African proposal requested.

When Joe Biden changed the US position on this issue, pharmaceutical companies quickly mobilized to lobby the US government and elected officials (Bansal, 2021). Several companies, including Pfizer and Johnson & Johnson, supported a public relations campaign initiated by PhRMA. This lobby group sought to undermine Biden’s position on patent relief (Schwartz, 2021). Among the initiatives taken were strategies targeted at members of Congress. The group argued that Biden’s policy will destroy jobs in the US and allow China to benefit from American innovations (Fang, 2021). Several Republican and Democratic elected officials and personalities (Tom Cotton, Thom Tillis, Scott Peters, Ron King, and Howard Dean) have even publicly endorsed the pharmaceutical companies. In a public email sent to consultants working for PhRMA, some arguments were put forward, including national security issues, since the lifting of patents could strengthen the powers of Russia and China. In addition, according to PhRMA, lifting patents could undermine the global response to the pandemic (Diamond et al., 2021; Steele, 2021). A study by the research center Corporate Europe Observatory (2021) found that pharmaceutical companies have also spent at least €36 million lobbying the European Union. The industry employs 290 lobbyists to defend its interests in Brussels, not counting lobbyists hired by consulting firms. Between March 2020 and May 2021, EU commissioners and their staff met members of Big Pharma more than 160 times about the production and

distribution of Covid-19 vaccines but only had one meeting with an NGO in favor of the waiver (Corporate Europe Observatory, 2021).

Several countries clearly opposed the proposal of India and South Africa. This is the case for the UK, Switzerland, Japan, and South Korea for example. As for the European Union countries, some such as Germany, Portugal, and Belgium expressed reservations while France and Italy were in favour (Titievskaja, 2021). On June 4, 2021, the European Commission communicated to the WTO another proposal concerning compulsory licenses that address the issue of export restrictions and increased production rather than the lifting of patents.

Unsurprisingly, pharmaceutical companies put forward the idea that lifting patents would slow down pharmaceutical innovation in the long term and hurt investment (even though vaccines are largely publicly funded; PhRMA et al., 2021). World Bank President David Malpass and European Union President Ursula von der Leyen have also publicly supported the same position (Blenkinsop, 2021). Those who argue against this standpoint note the dangers of setting such a precedent for the next pandemic.

It is in this context that quadrilateral discussions between India and South Africa, as well as the European Union and the US, began in December 2021. On 15 of March, 2022, a first draft of the compromise was leaked to the public. This document provoked strong reactions from various actors. Yet despite this, an agreement was reached in Geneva during the 12th Session of the Ministerial Conference, in the form of a “Ministerial Decision on the TRIPS Agreement,” adopted on the 17 of June 2022 (also simply referred to as the Agreement). In announcing the Ministerial Decision, Katherine Tai, the US trade representative, described it as:

The text-based negotiations with other WTO members that we called for have produced accommodations to the intellectual property rules for Covid-19 vaccines that can facilitate a global health recovery. Through difficult and protracted discussions, members were able to bridge differences and achieve a concrete and meaningful outcome to get more safe and effective vaccines to those who need it most. (Office of the United States Trade Representative, 2022)

The South African government, for its part, said the compromise does not go far enough. In a public statement, it welcomed the compromise on patent removal, but it added that “to scale up the production on the continent, further partnerships will be needed including access to know-how and technologies” (WTO, 2022b). On top of that, the current agreement excludes tests and costly therapeutic treatments against Covid (AFP, 2022).

PhRMA, on the other hand, stated that the WTO Agreement was a “political stunt” since, in their view,

the global context is one of vaccine overproduction and many low-income countries are refusing the doses offered to them due to a lack of demand and vaccination capacity. PhRMA noted that the industry has already produced more than 13 billion doses of Covid vaccine (Dunleavy, 2022).

Several NGOs that have been following the issue were extremely disappointed. According to Max Lawson who is the Head of Inequality Policy at Oxfam:

This is absolutely not the broad intellectual property waiver the world desperately needs to ensure access to vaccines and treatments for everyone, everywhere. The EU, UK, United States, and Switzerland blocked that text. This so-called compromise largely reiterates developing countries’ existing rights to override patents in certain circumstances. And it tries to restrict even that limited right to countries which do not already have the capacity to produce Covid-19 vaccines. (Oxfam International, 2022)

Médecins sans Frontières agrees. In a statement, the NGO writes:

This agreement fails overall to offer an effective and meaningful solution to help increase people’s access to needed medical tools during the pandemic; it does not adequately waive intellectual property on all essential Covid-19 medical tools, and it does not apply to all countries. The measures outlined in the decision will not address pharmaceutical monopolies or ensure affordable access to lifesaving medical tools and will set a negative precedent for future global health crises and pandemics. (Médecins sans Frontières, 2022)

4.1. Ministerial Decision on the TRIPS Agreement, 17 of June, 2022

What does this Ministerial Decision (2022b) on the TRIPS Agreement contain and is it likely to work? The Agreement contains two pages and nine articles. Article 1 states:

Eligible member may limit the rights provided for under Article 28.1 of the TRIPS Agreement...by authorizing the use of the subject matter of a patent required for the production and supply of Covid-19 vaccines without the consent of the right holder to the extent necessary to address the Covid-19 pandemic. (WTO, 2022b, p. 1)

Article 2 states that:

For greater clarity, an eligible member may authorize the use of the subject matter of a patent under Article 31 without the right holder’s consent through any instrument available in the law of the member

such as executive orders, emergency decrees, government use authorizations, and judicial or administrative orders, whether or not a member has a compulsory license regime in place. (WTO, 2022b, p. 1)

In other words, this Ministerial Decision allows the use of a product protected by a patent without having to first seek authorization from the company that owns the patent. The member may also export part of this production to “eligible members,” but the former must make reasonable efforts to prevent the re-export and import of a product under patent. This decision is valid for five years due to the exceptional nature of Covid-19.

The WTO Ministerial Decision clarifies and expands some existing mechanisms for compulsory licensing, under which governments override intellectual property restrictions to allow the manufacture of drugs in emergencies. The Agreement is silent on India’s and South Africa’s requests to exempt all vaccines, treatments, and diagnostics related to Covid, but the decision also requires WTO members to agree within six months on extending these measures to cover “the production and supply of Covid-19 diagnostics and therapeutics” (WTO, 2022b, Art. 8, p. 2). The deadline has now passed (17 of December, 2022) and no agreement has been reached on this issue.

The original proposal from India and South Africa was much more ambitious. This earlier proposal was about lifting patents but would also have allowed countries to manufacture generic vaccines, diagnostics, and treatments without cumbersome procedures, and would have facilitated production by allowing local manufacturers to access manufacturing data. The Agreement does not cover testing and treatment of the Coronavirus, which are also priorities for low-income countries. Treatments such as Molnupiravir or Paxlovid are not part of the Agreement even though they are generally cheaper, more easily administered since they are given orally, and simpler to transport and store.

5. Assessing the Ministerial Declaration

Is this Agreement likely to promote vaccine production in low-income countries? The way the Agreement is written and considering the five-year limit, it would be surprising if it promotes vaccine production in countries that do not yet have production capacity. Overall, there are three basic reasons why this Agreement will probably not have much effect. The first is financial, the second is the five-year limit, and the third is that the Agreement does not include know-how.

The lifting of patents is only applicable for five years as noted above unless extended by the General Council of the WTO. Vaccine production requires significant investment. It is therefore unlikely that a low-income country that does not already have production capacity would develop the necessary infrastructure in this context and time frame. It would be surprising if private

investors and governments were to invest large sums of money to build production capacity when it is simpler and cheaper to obtain vaccines on the international markets because the world is not in a vaccine shortage situation anymore. In effect, therefore, the Agreement comes too late and is far too modest in scope to significantly affect the global vaccine supply (Robbins & Nolen, 2022). The main barriers to immunization rates in low-income countries are more related to distribution and facility set-up issues, not the supply itself.

The third reason, and probably the most important, is related to the fact that patent release does not include know-how. Thus, according to pharmaceutical industry representatives, the main barrier to vaccine production is not the patent, but the production capacity or the know-how (Hilty et al., 2021, p. 1). Pharmaceutical companies are not obliged to share this essential information about vaccine manufacturing. Covid-19 vaccines are complex products and know-how and expertise are scarce. The lifting of patents will not allow for the rapid creation of laboratories capable of working under safe conditions if Big Pharma does not collaborate (Correa et al., 2021). For the moment, their reaction to the Agreement suggests that they will not collaborate. And producing poor-quality vaccines would be detrimental to the global immunization campaign, as the public could lose confidence in vaccines (Kianzad & Wested, 2021, p. 87). Moreover, a company that wanted to manufacture vaccines from a competing firm would not be able to produce a vaccine until 2024–2025, at best. In sum, this is a medium-to-long-term solution.

It is true that Moderna stated in 2020 that it would not sue countries that copy its Covid-19 vaccine during the pandemic (this did not stop Moderna from launching a lawsuit against Pfizer in 2022). That said, Moderna’s position did not include all intellectual property, know-how, and trade secrets, and excluded technology transfer. The company even acknowledged that without the know-how and technology transfer, the difficulties of replicating the vaccine would be extensive (Bansal, 2021).

According to pharmaceutical companies, supply difficulties for essential vaccine components are a more significant problem than patents (Bostyn, 2021, p. 12; Hilty et al., 2021, p. 1). Pfizer-BioNTech’s vaccine, for example, contains 280 different ingredients from 19 countries. Vaccines from Moderna, Johnson & Johnson, and AstraZeneca also rely on components from various countries (Kianzad & Wested, 2021, pp. 87–88). Additionally, the pandemic has had the effect of reinforcing economic nationalism and protectionism in several countries. At the height of the crisis, more than 80 countries had passed more than 137 pieces of legislation banning the export of health materials needed to control the crisis (Bollyky & Bown, 2021). In the US, no vaccine exports were allowed until the US population was sufficiently vaccinated (Bollyky & Bown, 2021). India prohibited the Serum Institute of India (the main producer of vaccines)

to supply the COVAX initiative, which provides free vaccines for low-income countries, from exporting its vaccines during the second wave. This made it more difficult to produce vaccines on a massive scale in the early stages of the pandemic, leading to some calls to negotiate a WTO agreement to liberalize health trade rather than lift patents (Bown & Bollyky, 2021). Even the US has experienced supply difficulties. These aspects are ignored in the Ministerial Declaration on vaccines.

6. The Issue of Compulsory Licenses

The Ministerial Declaration also raises questions about compulsory licensing. In one of the WTO's founding agreements on intellectual property rights (TRIPS), it is stated that in the event of a health emergency, member states may grant a national company a "compulsory license" to copy a foreign drug. This right was reaffirmed by the Doha Declaration of 2001 and, since 2003, has allowed countries whose companies produce generic drugs, such as Canada, India, and Brazil, to sell copies of patented products to countries that do not have the manufacturing capacity themselves in the context of a health emergency.

Compulsory licensing has not been easy in the past. Indeed, the "flexibilities" in the WTO agreements have not had the desired effect, partly because the rules and procedures were too complex and lengthy (Kianzad & Wested, 2021, pp. 82–90). Although the Doha Declaration allowing parallel imports of generic drugs dates from 2001, and the protocol to amend the agreement dates from 2005, this amendment did not take effect until 23 January 2017, i.e., after two thirds of member countries had ratified the amendment, a gap of 16 years (Yu, *in press*, p. 9). In the case of HIV/AIDS, it took eight years before treatment was made available at an affordable price for a country like South Africa. Moreover, parallel importation requires negotiation with another country and the product is limited to a specific quantity and a specific time period (Yu, *in press*, p. 4).

Thus, the compulsory licensing system was difficult to use, particularly because the countries that use it are subject to enormous pressure from pharmaceutical companies and even to sanctions from several Western countries, including the US, the European Union, and the UK. This is the reason why South Africa and India argued that the current situation is unprecedented and that past policies are insufficient. Brazil was one of the first countries to amend its national patent legislation following TRIPS. The Brazilian process was complex and fraught with difficulties, not least of which was because of strong resistance from pharmaceutical companies (Flynn, 2011, p. 164). The US filed a complaint against Brazil's compulsory licensing provisions with the WTO. The dispute was resolved through a negotiated settlement between the parties. Brazil and the US jointly notified the WTO that an agreement had been reached in which Brazil agreed to hold prior discussions with the US government should it find it necessary to apply the provisions in question to

grant compulsory licenses on patents held by US companies (Fisher & Rigamonti, 2005, p. 13).

The best-known case of political pressure and legal action, however, is the crusade of the South African government led by Nelson Mandela. As early as 1997, Mandela took steps to have his country obtain cheaper generic versions of HIV/AIDS drugs from abroad (Quigley, 2017, p. 111). In response to this action, PhRMA sued the South African government from 1998 onwards for violation of patent law and WTO rules (Fisher & Rigamonti, 2005, p. 5). PhRMA has joined forces with many other pharmaceutical companies such as the British SmithKline Beecham and Glaxo, the German Bayer, the Swiss Roche, and the French Rhône-Poulenc. It has retained the services of an expert in the field of drug regulation. It has also hired a consulting firm founded in 1988 by the two Podesta brothers. One of the founders of this firm, heavily involved in the financing of the Democratic Party in the US, was, at the time of the events, the chief of staff of US President Bill Clinton (Robinson, 2016).

For these companies, as in the case of Covid-19 vaccines, the lucrative market was in rich countries, and to avoid having to lower prices in those countries, they set a minimum price. As a result, when adjusted for purchasing power, these drugs were much more expensive in South Africa than in the US, for example. The estimated cost of AIDS therapy was more than \$1,000 per patient per month, while the average annual income in the country at the time was \$2,600 (Fisher & Rigamonti, 2005, p. 3). Recall that in 2000 there were approximately 30 million HIV cases in low-income countries. These cases represented 95% of the world's cases (Chirac et al., 2000, p. 502). South Africa was the most highly affected country in the world at the time with an HIV prevalence rate of nearly 25% among women of childbearing age (Quigley, 2017, p. 154).

The US, under Bill Clinton's administration, as well as several European governments, initially supported pharmaceutical companies in their crusade against South Africa (Quigley, 2017). According to Nathan Robinson, the Clinton administration went to "war" with South Africa's anti-AIDS campaign (Robinson, 2016). Vice President Al Gore, who was preparing his presidential campaign and had benefited greatly from Big Pharma's funding in the US, also supported them (Quigley, 2017, p. 157). He put intense pressure on Mandela and, starting in June 1999, on President Thabo Mbeki to abandon South Africa's plans. At the time, US Trade Representative Charlene Barshefsky even withdrew tariff reductions for South Africa's exports to the US. In April 1998, the US even placed South Africa on the "Section 301 watch-list" (Yu, *in press*). This action is the step prior to trade sanctions and represents a call for a bilateral effort to address a problem that is deemed serious (Fisher & Rigamonti, 2005, p. 7).

This practice is not new to the US. Between 1985 and 1994 (when the agreement on TRIPS was signed in the Final Act of the Uruguay Round), the US government used the "Section 301 watch-list" procedure

on intellectual property issues against Brazil in 1985, 1987, and 1993, India in 1991, Argentina in 1988, South Korea in 1985, Thailand in 1990 and 1991, China in 1991 and 1994, and even against Taiwan in 1992 (Drahos & Brathwaite, 2004, p. 15).

The situation, however, fostered the mobilization of the international and epistemic communities, a mobilization facilitated by Nelson Mandela's charisma and international reputation (Quigley, 2017, pp. 153–170; R. A. Smith & Siplon, 2006). The NGO Médecins Sans Frontières, which won the Nobel Peace Prize in 1999, supported Mandela's initiative and opposed the pharmaceutical companies. The organization highlighted its campaign for access to essential medicines for countries in need (Mbali, 2013, pp. 136–166). Several demonstrations took place, including at the international AIDS conferences in 1999. The pressure was so strong that the US government eventually changed its position (Fisher & Rigamonti, 2005, p. 8). It also withdrew its support for the pharmaceutical companies' lawsuit against the South African government.

7. New Limitations?

From the way the Agreement is written, it puts forward new limitations. Indeed, the Agreement excludes countries such as Brazil, Russia, India, China, and even South Africa from the decision since these countries already have production capacity. A note to the Agreement states:

For the purpose of this Decision, all developing country members are eligible members. *Developing country members with existing capacity to manufacture Covid-19 vaccines are encouraged to make a binding commitment not to avail themselves of this Decision.* (WTO, 2022b, p. 2, emphasis added)

The declaration refers to the right of countries such as Brazil, China, or India, to produce generics for their populations and those of countries unable to afford the originals. To export generics, these countries must instead use the mechanism of voluntary licenses or production agreements in collaboration with the patent holder, in short, with pharmaceutical companies. One of the reasons for the introduction of these measures is that the US wanted to keep China out of the current trade dispute. The US did not want its rival to come away from the negotiations with an advantage.

8. Conclusion

The issue of intellectual protection in trade agreements and the lifting of patents on vaccines and health materials to fight the Covid-19 pandemic profoundly affects the interests of powerful actors, as well as the global society. The big pharmaceutical companies, aided by several governments from high-income countries, have mobilized,

as they have done in the past, to defend their interests against the Indian and South African proposal. It is not surprising, therefore, that the Agreement is ultimately unambitious and it is unlikely to have a significant impact on vaccine production in low-income countries that do not have production capacity.

As we have seen, the Ministerial Decision on the TRIPS Agreement adopted on 17 of June 2022 is too restrictive, silent on the issue of the shortage of raw materials and protectionism, or production capacity problems, and even adds new limitations that did not exist before. The lifting of patents at the WTO will not solve the vaccine apartheid problem in itself (Singh Bajaj et al., 2022).

Most importantly, as mentioned, it does not cover trade secrets and know-how. Producing mRNA vaccines is very complex. To produce them, specific manufacturing processes must be mastered, many aspects of which are not disclosed in a patent. Thus, the lifting of patents will not lead to greater disclosure of information unless the patent holders themselves are willing to cooperate.

One way to facilitate the cooperation of large pharmaceutical companies is to make it easier to use compulsory licenses. Compulsory licenses do not extinguish or suspend patent rights, but rather consist of the government granting licenses to third parties against the will of the patent holder. In a pandemic situation, it is probably easier to use this approach even if it means removing some remaining irritants. Simplifying the use of this mechanism could help to encourage pharmaceutical companies to enter into voluntary licensing agreements. Some precedents in Africa seem to confirm this (Motari et al., 2021).

For Big Pharma, supported by WTO Director-General Ngozi Okonjo-Iweala prior to the Ministerial Declaration, the best option to promote the production of quality vaccines is to share technology and know-how on a voluntary basis through production agreements (Hilty et al., 2021, p. 2). Indeed, there are precedents with emerging economies, such as the agreement between AstraZeneca and the Serum Institute of India, and Fiocruz in Brazil, or the partnership between BioNTech and ironically Fosun Pharmaceuticals in China (Thambisetty et al., 2021, p. 9). According to PhRMA, more than 300 voluntary agreements have been established that include technology and knowledge transfer (PhRMA et al., 2021).

But much more needs to be done. Contrary to their past promises, the countries of the North have not sufficiently strengthened the capacities of the countries of the South in these matters. Simply put, there is a lack of infrastructure, including equipped factories and laboratories, and readily available raw materials to rapidly produce and distribute Covid-19 vaccines as envisioned in the current waiver proposals.

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Conflict of Interests

The authors declare no conflict of interests.

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Article

Embedded Liberalism and Health Populism in the UK in a Post-Truth Era

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Abstract

The National Health Service (NHS), as a symbol of public health protection in the UK, was weaponised in pro-Brexit debates. It was suggested that European integration might inherently have undermined embedded liberalism and notably contributed to what Ruggie described as the “unbundling of sovereignty” (Ruggie, 1993). The manipulation of the NHS by right-wing populists has already been the focus of a number of articles, but calls to protect public health care from global threats have also come from left-wing politicians and activists. This article is particularly interested in socialist populist appeals to protect health care. It aims to show that for socialists the compromise between capital and labour and the protection of welfare systems, which is referred to as embedded liberalism, has not been achieved. In fact, furthering trade and investment is currently seen to be compromising the last remnants of a welfare state, which is embodied by the NHS in the UK. This conceptual article will thus start by presenting the theory of embedded liberalism. It will then establish the link between the breakdown of embedded liberalism in relation to health care systems. It will finally present populist and activist narratives on health and the UK’s national health service from an international perspective. It draws on secondary literature and a corpus of popular press articles and grey literature produced by civil society organisations.

Keywords

embedded liberalism; National Health Service; populism; UK

Issue

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1. Introduction

The literature on embedded liberalism rarely points specifically to questions of health, but it is in fact in the area of public health care where the necessity to achieve a compromise between driving an efficient global market and the protection of citizens’ interests is perhaps the most salient. The National Health Service (NHS), as a symbol of public health protection in the UK, was weaponised in pro-Brexit debates. It was suggested that European integration might inherently have undermined embedded liberalism and notably contributed to what Ruggie described as the “unbundling of sovereignty” (Ruggie, 1993). Since the UK’s departure from the EU, both the Vote Leave campaign and British governments have argued that Brexit has offered the opportunity for the UK not only to regain sovereignty to pursue free trade, but also to enhance the provision of welfare, and

notably protect the NHS. The manipulation of the NHS by right-wing populists has already been the focus of a number of articles, but calls to protect public health care from global threats have also come from left-wing politicians and activists. This article is particularly interested in socialist populist appeals to protect health care. It aims to show that for socialists the compromise between capital and labour and the protection of welfare systems, which is referred to as embedded liberalism, has not been achieved. In fact, furthering trade and investment is currently seen to be compromising the last remnants of a welfare state, which is embodied by the NHS in the UK. This conceptual article will thus start by presenting the theory of embedded liberalism. It will then establish the link between the breakdown of embedded liberalism in relation to health care systems. It will finally present populist and activist narratives on health and the national health service in the UK from an international

perspective. It draws on secondary literature and a corpus of popular press articles and grey literature produced by civil society organisations.

2. From Embedded Liberalism to Neoliberalism

Building on Polanyi's work (1944) Ruggie's seminal article published in 1982 first presented the idea of embedded liberalism as a compromise between driving an efficient global market and serving or protecting the interests of citizens (Ruggie, 1982). Ruggie describes the post-war regime or compromise as a "form of multilateralism that is compatible with the requirements of domestic stability" (Ruggie, 1982, p. 399). Compensation came in the form of welfare systems, particularly in the post-war period, but also Trade Adjustment Assistance programmes, which included unemployment insurance and job training (Rahman, 2017). Wolfe and Mendelsohn (2004) posit that embedded liberalism is by no means a fixed agreement on levels of social spending, protectionism and the like, but a dynamic concept which allows countries to adjust to the multilateral framework. Referring to this notion of embedded liberalism, Rodrik (1997) explains that it involves creating a positive relationship between openness and public spending. Populations rely on the role of expanded government to compensate for greater external risks.

While Ruggie's conception of embedded liberalism was about much more than trade, this article will be looking at the challenges to embedded liberalism within the realm of trade in line with the focus of the thematic issue. Ruggie argues that free trade has flourished since the post-war period thanks to compensation programmes for individuals who might potentially lose out from open borders (Ruggie, 1982). But most historians in the UK do not refer to the notion of embedded liberalism when analysing the situation in this country, they talk about social democracy, which made a very brief appearance in this country between the 1940s–1970s. During the post-war period, this led to the establishment of a comprehensive welfare state including the UK's NHS as a central part of welfare provision, collective bargaining, and generous state spending. Vernon (2016) underlines that this was short-lived because of global conditions and the overriding demands of free market capitalism faced with internationalisation.

Wolfe and Mendelsohn (2004) note that Ruggie's essential conception of embedded liberalism, the implicit bargain between governments and citizens which ensures that governments will protect citizens from the negative impacts of the global economy, was called into question from the 1980s onwards. In fact, the ushering in of neoliberal policies served to undermine the social contract. While it is a somewhat contested theory and paradigm, Harvey (2005) describes neoliberalism as "a theory of political economic practice that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and

skills within an institutional framework characterised by strong private property rights, free markets, and free trade" (p. 2). The early 1980s can be seen as a turning point when neoliberal policies were introduced in the US under Ronald Reagan, and by Margaret Thatcher's new right government in the UK. The policies included the privatisation of many state-owned enterprises and the deregulation of the labour market to promote increased flexibility and a withdrawal of the state. The latter thus became the regulator of free market policies and free trade. In the UK, the Conservative governments of the 1980s promoted global capital mobility and the importance of global market forces, even in areas such as public services where conventional market systems are often considered to be unsuitable. From the 1980s, there was an overhaul of key government sectors, privatisation in some sectors, and marketisation and commodification of others including in public health services.

In his analysis, Harvey (2005) argues that neoliberalism is in sharp contradiction to "embedded liberalism" of the post-war period when Keynesian demand-side policies were applied, state spending increased, and generous welfare protection was provided.

3. The Breakdown of Neoliberalism and the Rise of Populism

However, especially since the financial crisis of 2008, the neoliberal compromise has also started to fall apart owing to what Wolfe and Mendelsohn (2004) call "negative globalisation experiences," which have resulted in anti-globalisation, anti-incumbent attitudes, and support for populist parties and candidates. Higgott (2018) describes populism as a "contested, heterogeneous, imprecise and stylistic discursive concept which can be characterised by political behaviour which seeks to appeal to the past and ensure spontaneous national moral regeneration" (p. 7).

Brubaker (2017) considers populism to arise in response to long-term structural issues and not immediate problems or threats. There has been a rise in populist, essentially right-wing, movements and parties in Europe and the US since the 1980s; and particularly since the Great Recession of 2008, with the rise of the Tea Party and Donald Trump's 2016 presidential victory, but also in the UK, clearly evident during the debate in the lead up to the referendum on the UK leaving the European Union. Populist trends have been interpreted as a reaction to cultural change since the 1970s: changes to lifestyles, religions, and cultures which populist supporters tend to oppose, especially the elderly, white and less educated males. They fear the upheaval or disappearance of their own traditional social values. Populist politics can also be aligned with other ideologies, be it socialist or nationalist, in order to achieve wider political agendas (Speed & Mannion, 2017). Closely connected to populism is the rise in nationalism because, as Inglehart and Norris (2016) observe, populism tends to favour

monoculturalism over multiculturalism. It also supports national interest over international cooperation and open borders. While the focus of most populism is protecting borders from immigration, it can also extend to a rejection of multilateralism and the global economy. Higgott (2018) argues that some of the populist arguments against globalisation are not without foundation. The rise of global economies has indeed placed limits on national democracies and constrained the decisions of sovereign states. Moreover, in the post-Brexit period, it is indeed populist appeals in the realm of public health care which are of interest here.

4. The Demise of the Liberal Compromise and Public Health in the UK

Turning our attention now to the debate on embedded liberalism, populism, and public health in the UK: How does the populist turn and the demise of both the liberal compromise and neoliberalism relate to the health sector? The decline of welfare provision, increased inequalities, and the fear of cultural changes can explain why there has been a rejection of globalisation in the UK.

Embedded liberalism and health care are not debated in the literature, but health care is an area where a compromise between driving an efficient global market and the protection of citizens' interests is surely needed. This compromise has never really been achieved even in the post-war period. International institutions, the European Commission, and national governments claim that the delivery of public health care is protected in international trade agreements and a compromise has been reached in trade deals with carve outs for public services in the General Agreement on Trade in Services and subsequent regional and bilateral trade agreements. However, there is a wealth of literature which has underlined that furthering trade and investment has had a net negative impact on social welfare and population health (Andrews & Chaifetz, 2013; Blouin et al., 2009; Labonté, 2004; Labonté et al., 2009; Shaffer et al., 2005; Smith et al., 2009; Stiglitz, 2006, 2009). Empirical evidence has shown that increased trade and investment agreements have exacerbated unequal access to health services and increased public bads (Baker et al., 2016; Schram et al., 2013, 2015; Smith, 2012; Thow & Gleeson, 2017). This is a result of provisions in trade and investment deals that may limit access to medicines, constrain policy space for health, and limit the scope that governments have to pursue public health goals. Moreover, those public health systems which have significantly liberalised public services through marketization, such as the UK (and especially in England), are those which may be the most under threat. So the UK's public health system, which is epitomised by the NHS, could well be under threat from the development of a two-tier system whereby health care is increasingly provided more efficiently by the private sector at the expense of the public sector. There are examples where this is already the case, such as Israel and of

course the US. The objective of achieving further liberalisation of trade through future trade deals post-Brexit raises further challenges for public health protection in the UK.

Since leaving the EU, the British government has been pursuing an independent trade policy and prioritising free trade agreements, notably with the US, Australia, and New Zealand. It has also requested to join the Comprehensive and Progressive Trans-Pacific Partnership (House of Commons, 2020). This has raised concern about the effects on public health and the NHS following further trade liberalisation of services. The fear generally is that this may reduce the ability of the government and devolved administrations to govern and fund public health services. The debates on the NHS have mainly focused on risks relating to its privatisation as a result of signing trade and investment deals post-Brexit. Opponents have underlined what is at risk for the UK in the trade arena post-Brexit. The fear is that these agreements may well "lock in" the liberalisation of services which could prevent countries from intervening with restrictions or regulating in the national interest. Carve-outs have been introduced to protect public services, but private companies under current NHS legislation can still bid for contracts to provide NHS services in England. Under the Investor State Dispute Settlement (ISDS), provisions in many of the agreements (free trade agreements, bilateral investment treaties) may undermine national legislation in order to give greater power to investors. So the fear is that these future trade deals may well enable foreign investors to challenge national governments in tribunals provided for under ISDS and claim compensation to carry out NHS contracts. Intellectual property rights are another cause for concern because such rights could affect the provision of public services. Future trade agreements may well change medicine pricing and could also allow access to NHS data (House of Commons, 2020). So we might conclude that populist appeals from the left are not without foundation.

5. Populism, Activism, and Save Our NHS Campaigns

Speed and Mannion (2020) underline how political ideology in the realm of health care is central to policy frameworks. Lasco and Curato (2019) have even invented the term medical populism, which implies an appeal to the people about perceived threats to public health and safety. Crisis health care is another popular component of medical populism whereby populists underline that there are threats to collective interests of health care interventions (moral panics). Medical or health populism tends to be stronger in countries which have either completely privatised systems or have undergone significant reforms to introduce a privatised or marketised component into the health care system. This is the case in the UK, wherein new public management reforms led to an introduction of tendering out to the private

sector, a command and control system, and diminished levels of trust. As a result, the populist health discourse post-Brexit has led to welfare chauvinism, limited access to care for immigrants, racism, and mistrust of the other (Lasco & Curato, 2019). Another part of the discourse is also ensuring that existing structures remain intact. Health populist discourses which play on the population's emotions became paramount during and beyond the Brexit campaign.

The NHS is often projected as a symbol of all that is good in the UK, a fantasy of equality and the incarnation of a socially cohesive and equal nation (Hunter, 2017). It could be qualified as the last remnant of the welfare state, so in the context of embedded liberalism the fear is that public health care is in jeopardy given the prospect of further liberalisation. This institution is therefore an ideal target for populists to conjure up ideas from the past and the importance of keeping up past traditions. That is the creation of a universal health system following the post-war settlement. Despite marketisation, this ideal has been upheld but has also been weaponised because it is perceived as being under threat from liberalisation. Fear of privatisation has increased in recent years and particularly since the enactment of the 2012 Health and Social Care Act, which has encouraged further contracting out of public health services to the private sector. Beyond the domestic sphere, the study of this institution in an international context is an excellent example of how emotions can be galvanised by the state and sub-state actors to support a case for the demise of social democracy and especially health democracy. As Wolfe and Mendelsohn (2008) point out "opponents of globalisation are primarily concerned that it will damage cherished symbolic goods" (p. 224). While debates on compensation for the effects of increased liberalism generally focus on labour dislocation, ensuring that health and public health services are protected following increased liberalism is no less important within this compromise.

Attention to the NHS from an international perspective started to gain greater importance in the period leading up to the referendum campaign. Performative appeals were made on the long-term sustainability of the NHS alongside the importance of controlling and resisting access of immigrants to the labour market. The idea that immigrants and EU nationals were profiting from the NHS and that the best way to protect it would be to leave the EU gained traction. Being part of the European Union was therefore presented as a strain on resources which could be used for the NHS. The Vote Leave campaign consisting of prominent conservative politicians (notably Michael Gove and Boris Johnson) travelled the country on a Vote Leave bus claiming that the cost of membership in the EU totalled £350 million a week. They argued that such resources could be used to provide the NHS with much needed funding. The full fact website refuted the claim that the UK sends £350 million a week to the EU. In fact, when the rebate is taken into account, it cal-

culated the fee at £250 million a year (Full Fact, 2017). In addition, it did not take into account the payments which were made to UK farmers and regions. Given the costs of Brexit, even at the outset, it looked very unlikely that there would be financial benefits from withdrawal which could be reinvested in the NHS. Yet the Vote Leave campaign was able to play on the emotions of the British people by suggesting that an institution, much beloved by all, was under threat. Indeed, according to a Mori poll, commissioned by the Health Foundation, protecting the NHS from cuts was considered to be important for the majority of the general public, with 88% stating that the NHS/health care was the main area of public spending that should be protected (The Health Foundation, 2017). Since the British population is aware of the financial strains on the NHS through the press, galvanising fear of losing such a precious institution was a clear objective of the Vote Leave campaign.

The remainder of this article considers how politicians, activists on the left, and the populist left-wing media used similar techniques to those of the right to defend the NHS in future trade deals owing to fear of the demise of the social compromise to protect health from the excesses of globalisation in a post-Brexit era. Further liberalisation post-Brexit has served as an emotional trigger and proxy, scapegoat, or metaphor for the larger concern about the relationship between economic liberalisation and the provision of domestic social welfare programmes. This relates to the compromise whereby economies liberalise but nation-states maintain the ability to regulate domestically and provide social services, in part to blunt the negative effects of free market economies. In practice, this is evident in the popular left-wing press.

6. Social Populism and NHS Protectionism

The opposition party and civil society organisations have engaged in populist rhetoric to save the NHS. Left-wing or social populism has not been given much attention in the literature, with most analyses concentrating on right or extreme-right-wing populism. Social populism can be described as a political ideology which combines left-wing or socialist politics with populist rhetoric. This rhetoric usually consists of anti-establishment, speaking for the common people combined with themes on economic democracy, social justice, and scepticism of globalisation. As Wolfe and Mendelsohn (2008) found, those who are in favour of larger welfare states are also those who are likely to oppose globalisation.

The latter part of this article thus focuses on populist discourses on the NHS relating to further internationalisation of health services and the concern of a demise in the social contract in the face of liberalism. It draws on 24 articles in the popular tabloid press in the UK (*The Sun*, the *Daily Mail*, and *The Mirror*). It also examines discourse from civil society organisations. Indeed, there are at least 14 civil society organisations whose key

purpose is to campaign to maintain the NHS as a publically funded and administered service. Such discourse was paramount in the lead-up to the general election of 2019 when there was a specific focus on this issue in parliamentary debates, which were then reported in newspaper articles, and again in 2020 over a proposed amendment to the trade bill. So the press articles retrieved were those relating to the issue of “trade” and the “NHS” between June 2019–June 2020.

The main emotions that opponents of furthering free trade play on in the popular press, and tracts are negative emotions of fear in very much the same way as mainstream populists did to suggest that the NHS was in financial jeopardy and leaving the EU could save it. However, in the case of post-Brexit trade deals, instead of a distant elite in Brussels, the elite, the government, and big business are now perceived as a threat to a publically funded system and the common interest of the people.

In analysing the keywords in popular press articles and activist tracts, we can note a significant use of words to incite fear: with the repetition of the words “risk,” “threat,” and “unprotected,” and images related to outside forces taking possession of the national institution (or a loss of possession of the institution which provides public health services to the population). Such words as “grab” and “prey” convey this idea. The NHS is described as “a rare jewel” threatened by international forces and unprotected by the state (“Our NHS jewel,” 2019). The promises to protect the NHS are considered as “lies,” or “porkies.” On the other hand, the government and the popular press supporting the Conservative party (*Daily Mail* and *The Sun*) dismiss the claims as “scare stories” or “scaremongering.” Diction relating to protection and security were taken from Boris Johnson’s speech and repeated in the popular right-wing press, claiming that the government offered “a cast iron” guarantee for the NHS. They claimed that the proof that the NHS would be sold in an international market was unreliable or “dodgy” (“Boris gives ‘cast iron guarantee,’” 2019; “Jeremy Corbyn’s dodgy,” 2019).

Jeremy Corbyn, the former leader of the opposition party, also revealed in the period leading up to the 2019 general election that 451 pages of unredacted documents and information showed that the Conservative government was negotiating behind closed doors to “sell off” the NHS. He explained that negotiations had already led to an agreement to lengthen patents for medicines. He implied that the Conservative government was in collusion with big business, which could harm the NHS: “Big pharma has ripped off and imperilled the health of the American people for years. Now these secret reports show they’re looking to do the same to us—if the Conservatives are elected on December 12th” (Labour, 2019, para. 32).

Civil society organisations such as Keep Our NHS Public were also vocal in the run-up to the 2019 general elections on the risks that Conservative policy represented for the NHS. An article written by the organi-

sation entitled “Boris Johnson: An existential threat to our NHS,” reiterates Corbyn’s fears that “all the signs are that Johnson will try to score his big ‘deal’ by offering up the NHS to the predatory vested interests that dominate the catastrophically dysfunctional US health care market” (Leak, 2019, para. 6). It further claims that the anger of the people is evident: “Trump’s recent suggestion that the NHS is ‘on the table’ in trade talks drew a furious reaction from most people in the country, with over 700,000 people in the UK signing a petition against the idea” (Leak, 2019, para. 5). Another militant group, We Own It, contended that “it’s impossible to take the NHS ‘off the table’ without strong new legislation to end privatisation” (We Own It, 2019, para. 2). The popular daily *The Mirror* also reiterated these fears with the headline: “Our NHS is up for sale and Trump has sights on a lot more” (2019).

Yet Boris Johnson dismissed the claims that the NHS is up for sale in trade deals: “Under no circumstances will we agree to any free trade deal that puts the NHS on the table. It is not for sale” (UK Parliament, 2019). Such negation of the perceived risks by opposition groups was also reiterated in the popular right-wing press with the *Daily Mail*’s tabloid headline “Boris Johnson compares Jeremy Corbyn to a UFO conspiracy theorist as he gives Phillip Schofield a ‘cast iron’ guarantee the NHS will NOT be on table in trade deal with US despite Labour ‘scare stories’” (“Boris Johnson compares,” 2019) and ““The NHS is not for sale’: Health Secretary hits back after US...” (““The NHS is not for sale,’” 2019), but also *The Sun* headline “Boris Johnson to tell Donald Trump the NHS is off the table” (“Boris Johnson compares,” 2019).

The Sun also published an article supposedly repeating a speech by trade secretary Liz Truss. In this published speech, she was reported saying: “As Trade Secretary, I know that his claims are utterly baseless and it is disgraceful that he is weaponising such an important issue, scaring vulnerable people to score political points” and “Donald Trump has insisted the NHS would not be on the table in a Brexit trade deal after sparking a massive row” (“Liz Truss: The NHS,” 2019). She also warned them to “ignore the scaremongering from Labour. The price the NHS pays for drugs won’t be on the table” (“Liz Truss: The NHS,” 2019).

The next incident to provoke a reaction and a resurgence of populist discourse was the rejection of an amendment to the trade bill which gave powers to the government to amend retained primary legislation in order to implement trade deals without due scrutiny. However, in December 2020, the House of Lords passed a clause to prevent any agreement which was considered to impede the UK’s ability to secure “a comprehensive publicly funded health service free at the point of delivery” (UK Parliament, 2022). The amendment also included controls on drug pricing and the sale of patient data. However, the bill was voted down in the House of Commons by 357 votes to 266, with Conservative MPs all voting against the protections.

Opponents from the left and especially civil society organisations were very critical of this dismissal of the amendment by the Conservatives:

As Students for Global Health UK, we stand in direct opposition to this decision. The absence of legislative protection of the NHS from international trade deals risks undermining the ability of the NHS to provide 'a comprehensive publicly funded health service free at the point of delivery.' (Students for Global Health, n.d.)

"A service that is not public, free at the point of access and accessible to all is far from our vision of a fair and just world in which equity in health is a reality for all" (Students for Global Health, n.d.).

The Mirror reported a speech from Emily Thornberry, the shadow trade secretary, which expressed her concerns on this issue:

What it means is those same companies winning a greater right to provide services to the NHS through open procurement contracts and thereby gaining access to the vast resource of NHS patient data, which, quite frankly, they have been actively pursuing for years. ("Tory MPs vote," 2021, para. 11)

The same tabloid turned Boris Johnson's "cast iron" image on its head to claim that it was actually Labour who would protect the NHS: "Tory MPs defeated a Labour amendment to include 'cast-iron' guarantees for the health service in the Trade Bill" ("Tory MPs vote," 2020, para. 1). It also reminded the public that "Three quarters of the public want the NHS protected in a trade deal with Trump" ("Tory MPs vote," 2020).

It is clear that in the debate on protecting public health services, populist appeals from both sides of the political spectrum have been important in the rhetoric on overturning the social compromise or upholding protection for the NHS in the international economy. The press debate shows that for socialists, the compromise between capital and labour and the protection of welfare systems, which has been referred to as embedded liberalism, has not been achieved. In fact, furthering trade and investment is actually compromising the last remnants of a welfare state which is embodied by the NHS in the UK.

7. Conclusion

The analysis of the threats to the British NHS in an international economy and populist appeals from the left post-Brexit is very much in line with Lang's observation, which draws on Ruggie's work, that:

The survival of Embedded liberalism depends not only on renegotiating forms of domestic and international social accommodation but also on retaining an

awareness of the need for the trade regime to find a way to accommodate both halves of the grand compromise of embedded liberalism. (Lang, 2006, p. 96)

Health populist discourses have argued that the social contract regarding public health has been called into question. Right-wing rhetoric has moved from protecting the NHS in Europe to promises that furthering trade and investment as part of the "Global Britain" mantra will not compromise public health services. But social populists are intent on calling into question this significant compromise by attempting to galvanise fear and doubt in the population through the weaponisation of the NHS. The fears of social populists are not groundless as significant literature on the risks to public health care, and more general public health, have shown. However, health populism from the left has failed to win over the British electorate despite such appeals regarding the dangers to a publically funded health system.

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