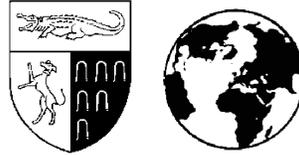


The Yale Journal of International Law Online



Protectionism's Many Faces

By Andrew Lang[†]

I would like to thank the editorial team of the *Yale Journal of International Law* for convening this Symposium and for the invitation to take part. At this time, when the currents of international trade politics are covered almost daily in the mainstream press, it is very helpful for a journal such as this to provide a forum in which to review the current moment within a larger context. In that spirit, I want to offer a few reflections on the broader question of whether we are indeed at an inflection point in the history of the post-war global trading system—and, if so, what are the fundamental challenges that this system will have to address in its transition to a new state?

As many have observed,¹ the contemporary period of international trade politics has a good deal in common with a similar period of turmoil in the 1970s and 1980s, when competitive friction between the United States and Japan gave rise to broadly similar sorts of aggressive unilateralism and many feared for the future of the General Agreement on Tariffs and Trade (GATT). It was more or less in the middle of that period that John Ruggie provided his classic account of the post-war trading system and offered his interpretation of the “new protectionism” of those decades.² It ran contrary to prevailing wisdom and is worth recalling now.

At the time, the resurgence of protectionist measures—in the form of safeguards, negotiated export restraints, dumping duties, unilateral Section 301 actions, and so on—was generally understood to indicate a fundamental departure from a commitment to free trade and the norms and values which had sustained the liberal trading order since the Second World War. But Ruggie, unlike many of his contemporaries, did not take these developments as signals of the disintegration of the post-war trading system. Instead, he argued that this

[†] Chair in International Law and Global Governance, Edinburgh School of Law.

1. See, e.g., Chad P. Bown and Rachel McCulloch, *U.S.-Japan and U.S.-China Trade Conflict: Export Growth, Reciprocity, and the International Trading System*, 20 *J. ASIAN ECON.* 669 (2009); GARY CLYDE HUFBAUER, ET AL., *U.S.-CHINA TRADE DISPUTES: RISING TIDE, RISING STAKES* (2006).

2. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 *INT'L ORG.* 379 (1982).

“new protectionism” was best interpreted as an effort to “slow down structural change and to minimize the domestic cost of adjustment” arising from new patterns of global comparative advantage.³ By and large, he argued, the effects of these measures were modest and targeted at specific sectors. As such, they were consistent with an expansion of international trade in the longer term, albeit more limited and somewhat slower than might otherwise have been the case. Indeed, Ruggie showed that “new protectionism” was consistent with the deeper normative structure of the post-war liberal trading order, which had always seen the expansion of international trade as connected to, and predicated upon, the use of a wide range of instruments to cushion the costs of adjustment that it imposed. It was therefore, for Ruggie, better understood as an indication of the existing order’s adaption to new circumstances as opposed to evidence of fundamental discontinuity.

There is a general lesson and a specific lesson to be drawn from Ruggie’s account. The general lesson, put most simply, is that not all protectionism is the same and that protectionism does not always reflect anti-trade sentiment. The proliferation of protectionist measures *may* signal generalized discontent with free trade and a disintegration of the commitment to an open and liberal global trading system. But this may equally signal a more superficial shift in the instruments and institutions of that order, which may be necessary to maintain the deeper continuity of the system at the level of normative commitment and functional logic. Or, as will be explained shortly, it may signal something else entirely. This may be simple, but it is important given how common it is to reflexively interpret any re-emergence of protectionism negatively: as “against globalization,” “anti-trade,” or a “rejection” of a multilateral rules-based order. This is understandable, but unhelpful. It tends to obscure much more than it clarifies.

The specific lesson has to do with Ruggie’s understanding of “new protectionism” and its applicability to the present. What of today’s protectionisms: the proliferation of unilateral restrictions on dubious national security grounds, the escalating trade war between the United States and China outside the auspices of the World Trade Organization (WTO), the withdrawal of the United States from the Trans-Pacific Partnership (TPP) (and its renegotiation of other agreements), and, finally, the apparent attempts by the United States to radically undermine WTO dispute settlement? Is it helpful to interpret all this as Ruggie interpreted the “new protectionism” of the 1970s and 1980s?

Here there is some reason for caution. It turns out that Ruggie was right to reject the conventional wisdom of his time: as we now know, the turmoil during which he wrote signaled neither the generalized disintegration of the GATT system nor a meaningful turn away from a broad commitment to liberal trade among the key participants in that regime. He was also partially right to see “new protectionism” as an attempt to cushion the social costs of adjustment in the short term while accommodating them over the longer term. But it has since become clear that the most enduring legacy of “new protectionism” was the radical

3. *Id.* at 405, 412.

expansion and transformation of international trade law brought into effect with the negotiation of the WTO agreements and the North American Free Trade Agreement (NAFTA) during the early 1990s.

What “new protectionism” signaled above all, then, was neither the rejection of liberal openness in trade matters (as the orthodoxy of the time feared) nor a gradual accommodation to a new international division of labor (as Ruggie suggested), but rather an attempt by many States to rewrite the rules of global trade to establish a new international division of comparative advantage and secure their preferred places in that order. Thus, the globalizing turn of the 1990s onwards was not a pendulum swing away from the protectionism of the previous decade. To the contrary, it was precisely this protectionism, and the aggressive unilateralism of the United States in particular, which provided the enabling conditions and leverage for a radical renegotiation of the international rules that had undergirded the profound global economic transformations of the previous era. In retrospect, the “new protectionism” is therefore best understood as neither a turn away from free trade nor an instance of “norm-governed” change, but instead as a successful attempt to transform the system from one type of open global trading order to another. In other words, “new protectionism” did not signal the disintegration or rejection of globalization and free trade as such, but rather a transformation of its shape, content, and governing dynamics.

Of these three interpretive frames, which (if any) provides the most useful analytic for the present moment? There are, in fact, some indications in support of each. For one thing, a good deal of the rhetoric around trade—the mercantilist demonization of trade deficits, and even imports, as bad in themselves; references to the repatriation of supply chains; and the use of “globalism” as a critical epithet in certain circles—suggests a broader turn away from the range of ideological positions that have encompassed a commitment to free trade in the past. The emergence and strengthening of nativist and anti-liberal political groupings across the world—evidenced recently by the election of Jair Messias Bolsonaro as Brazilian president—adds weight to a perception of a global trend away from liberal internationalism. So too does the rapid growth of a new security discourse in the United States that sees increased economic integration primarily as a source of insecurity, dependence, and vulnerability, rather than a guarantor of U.S. power.⁴ The approach of the Trump administration to third-party adjudication of trade disputes—witness its treatment of the WTO Appellate Body, its attempts to remove or radically reshape existing NAFTA dispute-settlement mechanisms, its response to the International Court of Justice’s recent indication of provisional measures against it, or its new stance towards the International Criminal Court⁵—may also suggest a decisive turn away from

4. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Dec. 2017), *available at* <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>; *see also* CONNECTIVITY WARS: WHY MIGRATION, FINANCE AND TRADE ARE THE GEO-ECONOMIC BATTLEFIELDS OF THE FUTURE (Mark Leonard ed. 2016).

5. *See* Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Provisional Measures, 2018 I.C.J. __ (Oct. 3); John Bolton, Nat’l Sec. Advisor, Remarks to the Federalist Society: Protecting American Constitutionalism and Sovereignty from International Threats (Sept. 10, 2018), *available at* <https://www.lawfareblog.com/national-security->

international adjudication generally, at least on the part of the United States. In this context, it seems simplest to see the administration's conduct as the hegemon's attempts to free itself of the constraining power of international rules.

It is, however, equally plausible to see renewed protectionism as a response to demands for increased assistance from those who have been hurt by social dislocation caused by globalization. Thus far, most of the changes to global trade rules and new trade-restrictive measures have been relatively modest in their economic impact and targeted at specific sectors. For example, the first round of national security tariffs targeted at the steel and aluminum sectors can be understood as functionally similar to other forms of support and protection offered periodically over the last decades to sectors suffering chronically from intensified international competitive pressures. The renegotiation of NAFTA, and even the United States–Korea Free Trade Agreement, was to a significant extent narrowly focused on aiding a few industries, particularly the U.S. automotive sector. Even the much more broadly-based U.S. sanctions on Chinese imports can be understood as an attempt to address the perceived problem of manufacturing outsourcing and the economic and social costs that this is said to have imposed on blue-collar U.S. workers. And, if we expand our view just a little, it is clear that the huge rise in trade-defense measures imposed by the United States (and many other countries) on Chinese goods since approximately 2005 is probably best understood as a safety-valve mechanism of sorts—one that provides a degree of temporary, targeted protection for those firms and industries most directly impacted by new global competition without undermining a broader commitment to the overall system of open trade.

Nevertheless, in my view it is the third analytical frame—which seems to have attracted the least attention—that is most pertinent. Within this frame, U.S.–China relations are understood to be at the core of the current tension and the present U.S. trade policy is interpreted, not as a wholesale turn away from international openness, but rather as an attempt to rewrite global trade rules to contain the competitive threat posed by China. If this view is right, what we are seeing under President Trump is in fact a continuation of longstanding U.S. strategic trade policy by new and more disruptive means. It may be that alliances are now built less cooperatively and that rules are being promulgated bilaterally rather than multilaterally, but the core dynamics remain roughly the same.

There is some direct evidence of this. Consider the “China-facing” outcomes of the recent NAFTA renegotiation, for example. The new United States–Mexico–Canada Agreement (USMCA) contains several chapters—especially on regulatory cooperation and state-owned enterprises and, to a lesser extent, digital trade—which broadly replicate similar chapters in the TPP.⁶ As is well-known, these chapters were drafted with China in mind and were understood as part of a larger project of gradual multilateralization of such regulation. The USMCA also contains so-called “poison-pill provisions” that

adviser-john-bolton-remarks-federalist-society.

6. United States–Mexico–Canada Agreement, Sept. 30, 2018, OFF. U.S. TRADE REPRESENTATIVE, <http://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico> (ratification pending) (hereinafter USMCA).

seek to isolate China by dissuading Canada and Mexico from striking deals with “non-market” economies.⁷

There is also indirect evidence in support of the third analytic frame. It is striking how quickly and thoroughly concerns about those “left behind” by decades of economic globalization have been recast in public debate not as the result of a lack of social protection but as the consequence of unfair trade between the United States and its partners. Specifically, such concerns have been recast as debates about the Chinese competitive threat—about the ways in which Chinese firms are said to gain unfair advantages (forced technology transfer, support to state-owned enterprises, and inadequate intellectual-property enforcement) under a set of international rules that are no longer fit for purpose.⁸ This indicates how inward-looking political pressure for social protection against international competition is being channeled into outward-looking efforts to rewrite trade rules to place new constraints on emergent competitors. Such a dynamic is powerful because the United States cannot fundamentally change the international economic order on its own: it is clear that a significantly larger global coalition of interests can coalesce around this rhetoric as opposed to a project of pure economic isolationism.

This analytic frame tells us something about the key challenge that is likely to shape the dynamics of international trade governance and rulemaking in the coming years. The elaboration of new international legal restrictions on China’s unfair trade practices (including commercially-oriented cyber-espionage) has been ongoing for some time, including in the negotiation of China’s WTO Accession Protocol, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the USMCA.⁹ But, as has been recognized by many others,¹⁰ these issues reflect a larger problem about the nature of the Chinese economic system as it has evolved over the last decade or so. When China joined the WTO in 2001, the expectation of its most important trading partners was evidently that its economic system would evolve in the direction of marketization, perhaps at an accelerated rate. However, economic reform in China has in fact taken place in an experimental and unexpected manner, with the result that the emergent form of market capitalism appears to Western eyes as an unfamiliar hybrid, often termed “state capitalism.” The question is whether the international trading system should be open to the participation of such heterodox institutional forms—and, if so, how to deal with their potentially profound impacts on global competitive dynamics.

7. *Id.*, ch. 32, art. 32.10.

8. For an example of the Trump administration’s complaints against China, see OFF. U.S. TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE (2018), *available at* <http://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

9. *See, e.g.*, Protocol on the Accession of the People’s Republic of China, WT/L/432 (Nov. 23, 2001), §§ 5, 6, 9, *available at* http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, chs. 14, 17, 18, 25, *available at* <http://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/>; USMCA, chs. 19, 20, 22, 28, *supra* note 6.

10. *See, e.g.*, Mark Wu, *The “China, Inc.” Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 261 (2016). *le at*

This is not a new question for the international trading system. There has always been a diversity of economic systems among the GATT/WTO membership, including wide institutional variation within the capitalist world (broadly defined). This has given rise to an unresolved tension. On one hand, the GATT/WTO system does not formally require adherence to any particular economic system; indeed, it explicitly professes neutrality on such matters. On the other hand, there is no question that the regime has evolved largely as a club of market-oriented economies and has implicitly conditioned the practical benefits of membership on adherence to some form of market capitalism. The messiness of this compromise proved workable during the Cold War, when the frictions caused by intra-capitalist institutional variation were considered perfectly tolerable in the larger scheme of things, and in the first decades afterwards, when the collapse of communism seemed to herald a radical reduction in the degree of institutional diversity in the global economy as States throughout the former “second” and “third” worlds converged on market capitalism.

Nearly three decades after the Cold War’s end, however, the reality has proved more complicated than anticipated. National projects of marketization initiated in transition economies have each evolved according to different dynamics, with the result that over time a variety of new and heterodox market forms have emerged. “Every transition to capitalism,” it has been observed, has “produced a new variety of capitalism.”¹¹ Indeed, the tendency towards institutional variation has intensified as State after State seeks to enhance its position in the global economy in part on the basis of its institutional environment’s quality and supportiveness. As these economies have become more deeply integrated with global markets, the result has been to reopen the fundamental question of the legitimate range of institutional diversity fairly permitted in conditions of global competition. At what point do heterodox market forms cease to constitute legitimate experimentation and become a form of “cheating” on the terms of fair competition in international trade?

This is a meta-institutional question. That is to say, it is not a question of the right rules to define fair and unfair competition in a single market order but of the right rules to govern competition between differently-instituted market orders, each organized around their own conceptions of fair and unfair competition. The key point is that we do not have adequate, or even shared, normative and conceptual language in which to discuss such questions. All the major candidates have serious problems. For example, to try to carve out a space for “sovereignty” or “autonomy” in which States can choose their own economic systems very quickly runs up against the difficulty of externalities: what is truly at stake, of course, is not the extent of sovereign rights but how to resolve disputes in which one State’s exercise of sovereign autonomy seriously affects another’s. Similarly, there are fundamental conceptual difficulties in seeking to distinguish legitimate from illegitimate institutional competition by reference to

11. Neil Fligstein and Jianjun Zhang, *A New Agenda for Research on the Trajectory of Chinese Capitalism*, 7 *MGMT. ORG. REV.* 39, 47 (2011).

the notion of market “distortion.” If the problem is distortion of *domestic* markets, then this begs the question of the distinction between measures which distort markets and those which establish the conditions in which market forces operate. And if the problem is a distortion of global markets, this similarly begs the question of the appropriate institutional foundations of the global market to be used as the yardstick. These are precisely the questions for which we are seeking answers. Finally, what has by now become the most familiar test in international economic law for determining the acceptability of trade-affecting measures—whether it is a bona fide and proportionate measure designed for a legitimate public purpose—is much better suited for the review of domestic regulatory measures, which are amenable to purposive interpretation, than deeper structures establishing fundamental market conditions, which arguably are not.

While it would be naïve to imagine that a single, shared conception of what constitutes “fair” competition is achievable—or perhaps even desirable—it seems to me that developing a common and coherent language in which to debate questions of fair institutional competition between different market orders is one of the key challenges for the international trading order in the years and decades ahead. In the absence of such a framework, the risk is that new rules will tend to impose discipline on market orders which are perceived as heterodox or deviant, or which disrupt existing patterns of comparative advantage without taking into account the systemic importance of a capacity for institutional innovation and experimentation within the global economic order. Ever since the creation of the GATT, it has proved possible, with a series of messy compromises, to defer or avoid this question of the rules which ought to govern the degree, direction, and nature of such institutional innovation. It may be that the present period of instability signals the end of our ability to sustain these compromises in their present form.