

Free Trade, Protectionism, Neoliberalism: Tensions and continuities

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How should we understand the place of trade-plus agreements in European history? Many critics see them as an attempt by first-world states to maintain key neoliberal logics in the world trade regime following the collapse of the Doha Round negotiations within the World Trade Organisation (WTO) in 2008. This had shown that the global south could prevent the north from simply imposing world trade rules. So, in this reading, trade-plus agreements aim to make a neoliberal 'recolonising' of world trade possible. This contention finds support in the hope/fear that their proponents and opponents alike have expressed—that even if these agreements' application is legally restricted to defined regions rather than embracing the whole globe—they would come to set the standards upon which world trade would be organised in the future.¹ This essay proposes that the connections between neoliberalism and trade-plus agreements are more complicated than this.

A second reading of recent developments can start from the observation that the 'explosion' of neoliberal norms in international investment law which took place between 1990 and 2004 created a legitimacy crisis.² More broadly, public manifestations of disenchantment with neoliberalism persuaded some within the WTO that their vision and methods needed to be reviewed if the WTO was to sustain its legitimacy and remain able to determine the future. Lang speaks of the development of a 'post-neoliberal legal imagination',³ whilst Sornarajah notes that key first world states, including the USA, came to

¹ F De Ville and G Siles-Brügge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership* (Polity, 2016) chapter 2. For a very different view, which sees the collapse of the Doha Round as the result of emerging countries insisting that neoliberal principles be adhered to, see K Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford UP, 2016).

² M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge UP, 2015); A Lang, *World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order* (Oxford UP, 2011) chapter 10.

³ Lang (2011) 343.

accept that agreements geared solely towards investment protection would have to give way to more 'balanced treaties'.⁴ From this perspective, far from indicating Europe's capture by neoliberalism, the efforts to negotiate trade-plus agreements could rather be seen as marking a retreat from its excesses.

But there is yet another way of understanding these agreements. It can be argued that, while they embody a free trade logic, they also encompass its apparent opposite, namely, a protectionist impulse. A trade-plus agreement is purportedly a mechanism geared towards facilitating frictionless commercial exchange between the parties. However, it may simultaneously act as a protectionist measure. One of its many aims could be to help the signatory parties achieve mutual protection from those outwith the agreements. In support of this third reading, we note that recent regional agreements have sometimes been presented by their negotiating parties as a way to defend themselves against the economic rise of the BRICS states (Brazil, Russia, India, China and South Africa), especially China. They have been described as a means to 'counter their [signatories'] slide into economic and geopolitical irrelevance'.⁵ In a different guise, in so far as such treaties are 'more balanced' as previously noted, they may serve to protect the states parties against powerful and increasingly independent multinational corporations who would prefer undiluted investment protection in legal provisions that effectively annihilate the jurisdictional reach and regulatory autonomy of states.⁶

These three readings need not be exclusive of each other, they could be imbricated in various ways. Moreover, we would argue that the complicated way in which neoliberalism infuses trade rules in Europe is best perceived when the development of 'free trade' is examined in a longer historical perspective than just the last few years or decades. This has led us to reflect in this essay on the way in which ideas and practices of free trade emerged with colonial expansion and succeeded a mercantilist outlook. It is beyond the scope of this essay to interrogate the relationship between mercantilism and protectionism in any detail.

⁴ Sornarajah (2015) chapter 7.

⁵ De Ville and Siles-Brügge (2016) 39.

⁶ Sornarajah (2015) 406-407.

Suffice it to say here that, in the history of geo-politics, what binds both together with the history of free trade is the assertion of power and the exploitation of asymmetries of power.

In line with this, the emphasis in this essay will be on the power asymmetries that have infused the development of the idea and practice of 'free trade', the construction of the European market, and the ascent and possible decline of neoliberalism. While trade-plus agreements are often presented as pure incarnations of free trade, locating them in an analysis of power will allow us to tell a more complex story.

A. Free trade v. protectionism: The role of power

The starting point of this essay is the observation that free trade never ceases to be in tension with protectionism. At any one time, even if one pole comes to dominate, it nonetheless 'encompasses its contrary', to borrow Louis Dumont's useful insight and formulation.⁷ In other words, the tension between the two poles is ultimately unresolvable; it continuously gets re-settled at various historical moments. Moreover, where it settles at any one time is always shaped by the extant relations and structures of power.

In general terms, the trade policy of modern states wavers between the desire to expand the domestic market by opening up both home and foreign markets whilst also being constantly aware of the need to protect the home market from negative external impacts. The hope is that securing access to external markets will trigger valuable opportunities and economic gains.⁸ The fear is that the creation of a bigger, more open, market might undermine, or even decimate, the local economy and society.⁹

⁷ L Dumont, *Homo Hierarchicus: The Caste System and Its Implications* (Chicago UP, 1970) postface.

⁸ See e.g. the way the European Parliament welcomed the opening of the TTIP negotiations in 2013, referring to the 'untapped potential of a truly integrated transatlantic market, in order to maximise the creation of decent jobs and stimulate a smart, strong, sustainable and balanced growth potential ... particularly timely in the light of [difficult prevailing economic conditions]: European Parliament Resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, 2013/2558 (RSP), recital 2.

⁹ See e.g. David Malone, 'The death of democracy', public talk on the TTIP given on 18 Feb 2015 <https://www.youtube.com/watch?v=6fDCbf4O-0s> (last visited 30 Sept 2017).

At whatever level the market is organised—local, national, regional or global—private traders and public authorities face a set of similar questions. Should external goods be allowed into the market or should they be subjected to a tariff, a quota, or banned altogether? Should this entrepreneur or that investor be welcomed in or kept out? How will 'fair competition' be maintained and who will decide what 'fair competition' requires and/or prohibits? How can 'dumping' be avoided? Will an expansion of the market put the jobs of local workers at risk? Will valued local standards be able to be maintained if the market is 'flooded'? These questions are *perennial*,¹⁰ but they have recently acquired a new level of intensity and complexity with the dramatic expansion of flows of goods and services, global communications and now the rapid development of a digital economy.

That said, because the concerns are basically the same in whatever context they arise, the legal concepts, principles and rules that have been developed to tackle them in the last few decades can appear similar. WTO law for example bears striking resemblances to the law of the European Union regarding the internal market. In both systems, the tension between free trade and protectionist tendencies is immediately recognisable. As these two legal systems illustrate, any system that subscribes to a free trade logic nonetheless accepts the need for some protectionist measures.¹¹ Conversely, any system that appears protectionist is not interested in completely blocking all trade with the 'outside' world.

Exceptions to the declared general ethos/dominant pole can be official or unofficial, or even against the law. What is actually happening at any point in time is typically difficult to read. A purportedly legitimate protectionist measure in a free trade setting (for example, presented as a consumer or environmental safeguard) can disguise a wish to keep a competitor out of the market.¹² The difficulty of identifying motivations and effects inevitably fuels disputes and controversies.

¹⁰ Although the vocabulary changes, the interests at stake are ultimately similar in different historical periods. One might for example think of the organisation of the merchant guilds in the Middle Ages.

¹¹ WTO law recognises a wide ranging set of exceptions to the basic rules designed to facilitate trade liberalisation, whose logic and sometimes even formulation would immediately strike an EU lawyer as familiar.

¹² A classic example is the case informally known as *Cassis de Dijon* in EU law, which concerned a German law providing that any drink sold as 'fruit liquor' needed to contain at least 25% of alcohol. Was this law adopted to protect the German consumer as claimed by the German government or was it a disguised protectionist measure that kept the French Cassis de Dijon away from the German market as its producer complained? The European Court of Justice decided the latter, and declared the German law a 'measure having equivalent

Another key point is that the language of free trade typically implies a level playing field between two or more partners. But, in practice, economic and political equality between partners rarely exists. Asymmetries of power are much more typical. This means that the risks associated with free trade, either for the internal market (e.g. dumping) or for the external partners co-opted into the market (e.g. neo-colonial exploitation) are real. In any analysis of free trade, it is always worth considering whether one or more partners are politically forced into the arrangement, or whether they are persuaded to agree to the deal in awareness of anticipated disadvantages but in the hope of reaping benefits elsewhere. Protectionism is not politically neutral either. Barring access to a market can, for example, convert into a potential denial of prosperity for the would-have-been partner.

In sum, free trade and protectionism both have good and bad sides: free trade promises gain but involves threats; protectionism promises to guard against free trade's excesses but may entail nothing but isolationism and lack of solidarity. Today, many regard free trade positively, for its promise of delivering growth, choice, competition and prosperity. Others decry it for having become a neoliberal tool that wrecks social democracy and deepens inequality. Protectionism similarly attracts contrasting reactions. For some, it can serve to safeguard and maintain basic social standards. For others, it represents a dangerous exclusion of the other, possibly leading to the end of peaceful relations and the onset of war.

Whilst the advantages and disadvantages of each perspective appear easy to identify in the abstract, or are claimed to be so in political rhetoric, they are difficult to ascertain in practice. This is in part because, behind the legal figure of any one 'trading partner', there are always a range of actors representing a variety of collective and individual interests which maybe contradictory and often lacking transparency. The analysis is further complicated by the technical appearance of many issues (e.g. with different goods attracting different tariffs) and the multiplicity of arrangements that are being entered into at any one

effect' to a quantitative restriction: *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* (Case 120/78) [1979] ECR 649.

time (from a limited bilateral agreement targeting specific products to a system of governance aiming at comprehensiveness). In addition, it is hardly possible to grasp the reality, origins and effects of the totality of the multitude of arrangements which are in place at any moment, let alone across time. Consequently, many discussions tend to focus on particular sectors, countries, short historical periods, and so on.

A comprehensive picture of what is happening across the whole world, let alone what has happened across historical periods, is for ever missing. This makes it clear that trying to condense a long complex history into a few paragraphs is full of perils. Despite these difficulties, the next section seeks to identify key moments in the development of free trade.

B. Free trade as a tool of Empire

As an ideology, free trade succeeded mercantilism which had dominated European states' economic policies from the 16th to the 18th centuries. Mercantilism was chiefly interested in the accumulation of national monetary resources through which a state could position itself against its neighbours and rivals. Colonial expansion, which provided trade and commercial opportunities, became one of its tools. It was as support to this expansion that international law was born, with the 'foreigner's right to trade' established at its heart, as Anghie has demonstrated masterfully.¹³

Initially, it was corporations like the British and Dutch East India Companies that largely exercised this right to trade but the mercantilist outlook began to fade in the middle of the nineteenth century when, influenced by critics such as Adam Smith and David Ricardo, Britain unilaterally adopted the principle of 'free trade', arguably to take advantage of its lead in industrialisation, its empire and its naval and merchant fleets. In 1860, the Cobden-Chavalier Treaty, widely regarded as the first modern free trade agreement, was signed by

¹³ A Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge UP, 2005).

Britain and France.¹⁴ A host of bilateral agreements between European powers followed, earning this period the description of having been the 'great phase of European free trade'.¹⁵ Two remarks, in line with what we said above, are in order. First, the purity of this free trade impulse did not last long, as the depression of the 1870s rekindled protectionist sentiments. Second, free trade for some meant rampant exploitation for others.

The Berlin Conference of 1884-85 was convened to try to resolve European rivalries in the so-called 'scramble for Africa'. At this conference, the European imperial powers embraced the idea of 'free trade' *between* their empires, as well as with other dominant states such as the USA. However, *within* the constituted empires, where direct rule and imperial imposition was replacing the earlier corporate form of colonial exploitation, 'free trade' usually meant nothing other than the naked exploitation of raw materials from the colonies and the protection of the domestic market of the imperial power. This 'Age of Empire', as Hobsbawm labels the period 1875-1914, witnessed a period of rapid globalisation underpinned by the assumptions of classical liberal economic theory married to the twin practices of free trade and aggressive imperialism. The result, many argue, was the First World War.¹⁶

At the end of this war, the defeated powers had their colonies taken away from them and put into a mandate system supervised by the League of Nations which, itself, was the first attempt to establish stable institutions at international level. Arguably, due to the rise of the USA as a global power, 'colonialism was [now] seen as both inefficient economically and destabilising politically on account of its inhibition of free-trade',¹⁷ an illustration of our earlier point that what is regarded by some (here, colonial powers) as a free trade arrangement appears to others (here, the USA) to be a protectionist measure. The USA, although not willing to become a mandate power, insisted that an economic open-door policy be implemented in all mandate territories.¹⁸

¹⁴ WTO, *World Trade Report 2007* 36.

¹⁵ Bairock cited in WTO (2011) 49.

¹⁶ E Hobsbawm, *The Age of Empire 1875-1914* (Weidenfeld & Nicolson, 1996).

¹⁷ Anghie (2005) 162.

¹⁸ Anghie (2005) 143.

Deep economic and social crises marked the years after the First World War especially in the developed world.¹⁹ The Wall Street Crash of 1929 was followed by the Great Depression. Countries around the world resorted to aggressive tariff barriers and competitive currency devaluations. The Smoot-Hawley Tariff Act of 1930 put the USA at the forefront of this unabashed protectionism.²⁰ Retaliatory measures in the form of trade barriers brought down the value of world trade considerably—by as much as a third in two years.²¹ The dramatic repercussions of these protectionist actions continued to reverberate and economic recovery was hampered throughout the 1930s. World War II then followed.

At its end, the Bretton Woods system was set up and the International Monetary Fund (IMF) and World Bank were created. Through these institutions, an international trade regime of ‘embedded liberalism’, to use Ruggie's phrase,²² was established between western allies with the aim of ensuring economic and political stability. Due to the US refusal to agree to the establishment of an International Trade Organisation, the core rules for international trade remained inscribed for half a century in the General Agreement on Tariffs and Trades (GATT) of 1948, which had originally been intended as an intermediate measure. GATT favoured trade liberalisation at the international level, whilst recognising the need for domestic state intervention, as per the economic vision then shared by the key countries involved in its negotiations, in particular the United States and the United Kingdom.

For the next two decades, the policy it advocated was largely uncontested as participating countries understood and accepted that GATT was the proprietary instrument of the inner group.²³ As Lang has observed, GATT (and the Bretton Woods system more generally) helped 'create the international conditions necessary for the flourishing of the welfare state domestically'.²⁴ There is often a deafening silence on this point because the argument that national welfare states were built in the west on an international trade regime that

¹⁹ M Blinkhorn, *Fascism and the Right in Europe 1919-1945*, (Longman, Pearson Education, 2000) Ch.3.

²⁰ WTO (2007) 42.

²¹ Lang (2011) 192.

²² J G Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order' 36 *International Regimes* (1982) 379.

²³ Lang (2011) 196.

²⁴ Lang (2011) 16.

continued the historical exploitation of populations in the global south is hard to justify, particularly on the part of European social democratic parties.

Decolonisation saw the initial rise of Bilateral Investment Treaties (BITs) which are now at the core of international investment law. Some 500 BITs were concluded in the 1960s and 70s. Alternatively described as involving ex-colonies and ex-colonial powers, 'developed' and 'developing' countries, or 'capital-exporting' and 'capital-importing' states,²⁵ their primary function was to ensure that former colonial powers could continue to exercise a significant degree of economic control over their former colonies. Sornarajah makes it clear that economic dependence was the price colonies paid for their political independence.²⁶ Adopting a different phrasing, we could say that former colonies were forced to continue to extend 'free trade' to their previous masters.

As their name indicates, BITs are signed between two states. However, it is really the national investors of the state investing in the territory of the other state who stand to gain from BIT provisions. This is achieved through inscribing in the treaties substantive and procedural protections for foreign investors/corporations. On a substantive level, BITs protect against expropriation without compensation—precisely the scenario former colonial powers and their corporations feared most as colonies were demanding independence. This substantive guarantee against expropriation is then made good through a procedural protection. Instead of a dispute regarding a BIT being brought before the judiciary of the state where the dispute has arisen (as could be expected to happen if the agreement was silent on the settlement of disputes) BITs provide that disputes will be brought before an Investor-State Dispute Settlement (ISDS) mechanism which involves independent arbitrators.

One textbook on investment law notes '[i]t is no overstatement to claim that the greatest advantage in international investment law to investors is access to neutral international

²⁵ D Collins, *An Introduction to International Investment Law* (Cambridge UP, 2017) 36.

²⁶ M Sornarajah 'International investment law as development law: the obsolescence of a fraudulent system' in M Bungenberg, C Hermann, M Krajewski & J Terhechte (eds) *European Yearbook of International Economic Law 2016* (Springer, 2016) 209.

dispute settlement'.²⁷ What the author of this remark presents as a 'neutral' mechanism, others would denounce as biased in favour of the foreign investors, whose dispute will be settled by arbitrators steeped in the world of trade and finance.²⁸ What is not controversial, however, is the conclusion that '[t]his procedure offsets one of the most significant risks involved [from the investor's perspective] in investing abroad—ineffective access to justice through the legal system of the host state'.²⁹ Arguably, this is precisely how BITs achieved the feat of ensuring that economic independence would not go hand in hand with political independence for the ex-colonies.

In conclusion, far from signalling freedom for everybody involved, free trade agreements can turn out to be highly exploitative, all the more so to the extent that the signatory parties are economically and politically more unequal. Going further, one might say that free trade often emerges out of a proposition from the rich and powerful, who can afford its risks far more than a weak economic partner can.³⁰ Whatever the historical and geographical context, even when power differences are not as stark as manifested in colonialism, the question 'free trade for whom?' is always worth asking.³¹

C. The nature of the European project

Jumping context, this section continues to reflect upon the nature of the European involvement with free trade, but here 'Europe' no longer means the colonial powers of yesteryear but the European construction which became the European Union (EU) and which, with the coming into force of the Treaty of Lisbon, acquired the explicit power to

²⁷ Collins (2017) 214.

²⁸ For examples of results achieved through the ISDS system illustrating this view, see Schneiderman, this volume, and Gilbert, this volume.

²⁹ Collins (2017) 214. For a critique, Yilmaz-Vastardis, this volume.

³⁰ Interestingly, Ruggie (1982) argues that free/open trade regimes are most likely when there exists a clear global hegemon (Britain in 19th and USA in 20th centuries) and protectionist tendencies most likely in the absence of such a hegemon.

³¹ This question may explain why Europeans were far more vocal in their opposition to the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US than to the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada: P Garcia-Duran and L J Eliasson, 'The Public Debate over Transatlantic Trade and Investment Partnership and Its Underlying Assumptions' *Journal of World Trade* (2017) 23, 32.

negotiate free trade agreements (FTAs).³² FTAs have been presented as the mere 'external complement to the [EU] internal market rules on trade'.³³ By contrast, we wish to stress the difference in essence between the external commercial policy that the EU has recently been developing and the internal market, at least as originally conceived.

The European Economic Community (EEC) started six decades ago as part of political efforts by Europeans to protect themselves against their war-prone selves. Depending on the perspective adopted, it can be seen as a free trade agreement, a protectionist endeavour or a combination of both these and other elements. Clearly, it emerged from a determination to stop thinking and acting as individual nation states and instead to pool resources and decision-making. On the back of the successful initiative in respect of coal and steel, the six founding states agreed they would abolish custom duties and facilitate trade between themselves.³⁴ In this sense, they may be supposed to have been thinking *free trade*. At the same time, they were establishing common custom and commercial policies between their newly created bloc and the external world, arguably in an effort to *protect* themselves against the economic ascendancy of world-leading non-European economies.

Interestingly, free trade has never been part of the vocabulary used by the European project to describe its main aims. Instead what has been spoken about was, initially, the 'common market' and, later, the 'internal market'. 'Free trade' would have conveyed the wrong connotations. First, the project was not exclusively, arguably not even preponderantly, economically driven, given its political and geopolitical intentions. In addition, as we have seen, the free trade impulse has usually been linked to the foreigners' right to trade and the protection of the foreign investor. However, in the European project the aim was not, and never would be, to protect one's partners' foreign investors. On the contrary, what the European project sought was to see distinctions made on grounds of nationality vanish. To phrase this more specifically, the idea was to have every member state treat the economic actors/legal persons of another member state in exactly the same way as its own nationals:

³² A Hervé, L'Union Européenne comme acteur émergent du droit des investissements étrangers: pour le meilleur ou pour le pire? *Cahiers de droit européen* (2015) 177.

³³ B Van Vooren and R A Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge UP, 2014) 277.

³⁴ This was hardly in keeping with either the letter or the spirit of the GATT but no formal objection was raised.

no worse, but also no better. This is embodied in the European cardinal principle of free movement.

EU nationals who exercise free movement are not to be either advantaged or disadvantaged compared to the way host states' nationals are treated. Thus, borrowing from FTAs the idea of referring disputes to ad-hoc arbitrators would have been complete anathema to the European project. Another indication that the European project was not simply a free trade project, is that the resolution of disputes regarding protectionist obstacles allegedly erected against the principle of free movement is put, as everything to do with European law, in the hands of the European Court of Justice (ECJ),³⁵ an institution which is very far apart in conception and in practice from ISDS and which has been driven by a determination to develop a strong jurisprudence in support of the core objectives of the European construction.

While free movement—of goods, persons, services and capital—is cardinal to the European construction, it is not the only aim. The opening of the preamble of the Treaty of Rome made very clear that the objectives of the European construction are multiple:

DETERMINED to establish the foundations of an ever closer union among the European peoples,
DECIDED to ensure the economic and social progress of their countries by common action in eliminating the barriers which divide Europe,
DIRECTING their efforts to the essential purpose of constantly improving the living and working conditions of their peoples ...

As Dinan has said, the aim was 'to end international strife, foster social harmony, and promote economic well-being', all at the same time.³⁶ This is true, but with one proviso, and this is that the European construction started as a largely inward-looking project: for the (participating) Europeans, by the (participating) Europeans. In this sense, it can be seen as a

³⁵ In formal terms, now the Court of Justice of the European Union (CJEU)

³⁶ D Dinan, *Europe Recast: A History of European Union* (Palgrave, 2014) 1.

protectionist endeavour. And at first, benefiting from the context of the post-war 'long boom', 'Europe' appeared successful as a social project for the Europeans: there was virtually no unemployment, inflation was low, the economy was flourishing.³⁷

Worth noting is that, initially, there was little formal engagement with non-European actors. The one exception was member states' colonies, but legally speaking, these were considered part of the common market, as per Part IV of the Treaty of Rome. Needless to say, the inclusion of the colonies in the common market benefited European trade. When the colonies reached independence, the arrangements were thus continued through the Yaoundé Conventions. These spoke of 'reciprocal trade liberalisation'. In fact, they delivered one-way benefits: they safeguarded the monopolists operating in the ex-colonies their trade and profits.³⁸ Importantly, although the colonies were mentioned in the Treaty of Rome, they were not part of the European *social* project.

From its earliest days, trade liberalisation within the internal European market had gone hand in hand with the idea that appropriate protections, social support and regulation of the labour market would be guaranteed—for Europeans—within the jurisdictions of the member states. So this part of the European project was to be achieved by relying on the social projects developed by the member states at national level. As Diamond Ashiagbor puts it 'European economic integration with a minimalist social policy at EU level was in part made possible by strong domestic labour market and social welfare institutions'.³⁹ Free trade and protectionism are imbricated again (though here in a yet different configuration). In other words, within the European project, 'embedded liberalism'—to borrow Ruggie's phrase again—was in large part actualised via national Keynesianism.

However, the disparities in social standards between the member states could not but give rise to tensions, as they created the opposite of the level-playing field implied by the image

³⁷ Dinan (2014) 88.

³⁸ L. Bartels, 'The Trade and Development Policy of the European Union', in M Cremona (ed.), *Developments in EU External Relations Law* (Oxford UP, 2008) 137; J. Odek, 'Lomé IV: Dynamic or Static improvement on the Previous Conventions?' 27 *Comparative and International Law Journal of Southern Africa* (1994) 164.

³⁹ D Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' 19(3) *European Law Journal* (2013) 303.

of the internal market. How to resolve the perennial tension between free trade and protectionism inevitably raised, and continues to raise, its head over and over again. Always controversial, the question suffers no easy answer. Two examples, drawn from different periods and about different trading partners, can serve to illustrate this point.

The first is an academic debate of the 1980s. It was initiated by a scholar in awe of what he saw as the historically, truly exceptional, European success of having achieved an integrated economy whilst providing social democratic guarantees. Hager warned that this success would prove impossible to maintain without the adoption of protectionist measures against external competitors such as the USA and Japan.⁴⁰ Responding, Hindley argued that the key to European prosperity could only be more free trade with external partners.⁴¹ (Neither had any word about developing countries which, by then, were insisting on getting non-reciprocal terms which would take into account their economically weaker position.⁴²)

The second example concerns China's current position in the world. Half the talk from the US and Europe is about the barriers-to-trade China erects and its unacceptable protectionism, including in the field of the digital economy—the one sector which the US is hoping it could still grow on a global scale.⁴³ The other half of the talk is about denouncing China's trading engagements with a host of countries, especially in Latin America and Africa. These are described as 'predatory' and 'reminiscent of European colonialism'.⁴⁴ The US wishes to warn its southern neighbours that 'Investment may look good but comes at a heavy price'⁴⁵—exactly mirroring the concerns expressed by European opponents of TTIP.

⁴⁰ W Hager, 'Protectionism and Autonomy: How to Preserve Free Trade in Europe' 58 *International Affairs* (1982) 413.

⁴¹ B Hindley, 'Protectionism and Autonomy: A Comment on Hager' 59 *International Affairs* (1982-1983) 77.

⁴² Leading ultimately to the so-called Banana wars. See e.g. G. Myers, *Banana Wars—The Price of Free Trade: A Caribbean Perspective* (Zed, 2004).

⁴³ M F Ferracane and H. Lee-Makiyama 'China's technology protectionism and its non-negotiable rationales' (European Centre for International Political Economy), available at <http://ecipe.org/app/uploads/2017/06/China-Tech-Protectionism.pdf> (last visited 5 February 2018); 'Report from the Commission to the European Parliament and the Council on Trade and Investment Barriers 1 January-31 December 2016', pp. 17-18, available at http://trade.ec.europa.eu/doclib/docs/2017/june/tradoc_155642.pdf (last visited 5 February 2018); <https://www.cfr.org/report/rise-digital-protectionism> (last visited 5 February 2018).

⁴⁴ <http://www.scmp.com/news/china/article/2131669/beware-predatory-chinese-investment-america-warns-rex-tillerson> (last visited 5 February 2018).

⁴⁵ *Idem*.

D. The Ascent of Neoliberalism

Having introduced the concepts of free trade and protectionism and examined their relationship to the European project, we now discuss neoliberalism, enabling us then to return to the key point of this essay.

Like Keynesianism, neoliberalism initially developed in the 1930s as a response to the manifest failure of classical economic liberalism during that time. But for much of the post-war period it remained an apparently marginal intellectual current, sustained and nurtured in a few think tanks and intellectual networks.⁴⁶ This was because, following the end of the Second World War, classical liberal economics had been supplanted as the dominant economic orthodoxy by a Keynesian approach to the management of aggregate demand within national economies. At the heart of this Keynesian approach was the idea that the national state should intervene to smooth out the peaks and troughs of the business cycle, for example by stimulating economic activity by public spending at times of economic slow-down and, more generally, by supporting aggregate demand through the welfare state.⁴⁷

Keynes was involved in the talks that led to the Bretton Woods system, but his approach could not easily be internationalized either politically or practically.⁴⁸ That said, Ruggie's description of the international system that emerged as 'embedded liberalism'⁴⁹ makes it clear that there were important links between attempts at national and international economic interventions during the post-war period. According to Rodrik, '[a] delicate compromise animated the new regime: allow enough international discipline and progress

⁴⁶ See Tzouvala, this volume. See more generally W Davies, 'Neoliberalism: A Bibliographic Review', *Theory, Culture and Society* (2014) 31(7/8) 309–317.

⁴⁷ For a very brief summary see <http://www.imf.org/external/pubs/ft/fandd/2014/09/basics.htm> (last visited 5 February 2018).

⁴⁸ R Skidelsky, 'Keynes, Globalisation and the Bretton Woods Institutions in the Light of Changing Ideas about Markets', *World Economics* (2005) 6(1)15-30; B Steil, *The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White and the making of a new world order* (Princeton UP, 2014).

⁴⁹ Ruggie (1982).

toward trade liberalization to ensure vibrant world commerce, but give plenty of space for governments to respond to social and economic needs at home'.⁵⁰

It was when the Keynesian model of economic management began to unravel in the 1970s that the premises of neoliberalism could be advanced as a plausible solution to those dilemmas. Partly because neoliberalism could appeal to the longer historical and cultural roots of classical economic liberalism, especially in the Anglo-American tradition, and partly because no revamped Keynesianism was forthcoming, the 'logics' of neoliberalism took root and flourished. Above all, it is the belief in the social benefits of competitiveness in a marketplace that is the guiding ethos of neoliberalism, so it is argued that non-market institutions should either be marketized (privatized), re-constructed so as to inject competitive market-like behavior into them, or else, like the trades unions, neutralised.⁵¹

Neoliberals typically believe that the liberal democratic states of the west are 'overloaded' by the demands of sectional interests and fall prey to the self-interested behavior of their bureaucrats. Thus, they argue for the shrinking of the size of the state. But, that said, neoliberal institutions also actively seek to create rules and behaviours that accord with their vision of society and therefore seek to strengthen the authority of the state and its enforcement capacities when it serves their interests. It is in this sense that we can talk about neoliberalism as both an ideology and, where it becomes embedded in institutions and organizations, as a regime of governance.

The prime ministerial office of Margaret Thatcher in the UK (1979-1990) and the presidency of Ronald Reagan in the USA (1981-1989) are the symbolic markers of neoliberalism becoming a distinct and systematic regime of governance in the west. With the fall of communism and the Cold War coming to end in 1989, the IMF and the World Bank were ripe for neoliberal 'institutional capture'.⁵² As this happened, countries from the global south ceased their efforts towards exerting sovereign control over foreign investment through the establishment of a New International Economic Order (NIEO), instead breaking

⁵⁰ D Rodrik, *The Globalization Paradox* (Oxford UP, 2011) 69.

⁵¹ Davies (2014).

⁵² Sornarajah (2015) 43.

down earlier solidarities and intensely competing with each other to attract foreign investment.⁵³ By the mid-1990s, neoliberalism both as an ideology, and increasingly as a regime of governance, had become largely hegemonic all around the world. As Lang observes, among trade professionals and lawyers, and for most political elites, it had become the 'common sense' of the age; '[neoliberal] ideas had been adopted—unevenly and partially, but still recognizably—across virtually all areas of the world'.⁵⁴

For Lang, writing at the end of the first decade of the twenty-first century, it was the ideational dimension of the way in which neoliberal thought had transformed the trade regime that remained to be properly grasped. Central to his argument was what he saw as the occlusion of the notion of collective purposes, leading directly to changes in the form and style of the trade regime's legal system. He criticised many 'progressive' critiques of neoliberalism, arguing that both those rooted in the defence of sovereign democratic choice, and those claiming that policy incoherence was generated by an overemphasis on economic criteria, had failed to grasp the depth of the ideational transformation wrought by neoliberalism.

Lang locates the Tokyo round of trade negotiations under the GATT (1973-79) as the beginning of neoliberalism's ascendancy in international trade law. It was, he says, the emphasis by the USA on 'unfair trade practices' that set the ball rolling. The key move, he argues:

was to redefine a barrier to trade primarily in terms of its economic effects, rather than its form or intention. In this approach, a governmental action constituted a barrier to trade if—and to the extent that—it 'distorted' the conditions of competition between foreign and domestic products, as compared to the conditions of competition which would exist in an imagined 'free' market.⁵⁵

⁵³ Anghie (2005) 236.

⁵⁴ Lang (2011) 2.

⁵⁵ Lang (2011) 226.

By subjecting claimed distortions to formalised procedures and technical analysis, such judgements became increasingly separated from the politics of trade diplomacy. This is also a specific example of Lang's broader point that the neoliberal turn 'entrenched and legitimated a separation between the exercise of power in the governance of international trade on the one hand, and on the other hand the pursuit of legitimate public purposes, collectively defined'.⁵⁶ And it was this separation, he argues, that led to a significant legitimacy crisis for the WTO by the end of the twentieth century.

The WTO replaced the GATT in 1995 at the height of neoliberal influence. However, it was nevertheless established on a more representative and democratic basis than its predecessor.⁵⁷ This meant that countries of the global south were able to exercise more power within the WTO than was possible for them either within the GATT or in the IMF and World Bank. This is relevant to our story because, as we mentioned at the outset, this change in organisational structure enabled the resistance of countries from the global south to be consolidated, resulting in the Doha development round reaching an impasse.

E. Neoliberalism and the EU

With this, admittedly brief and sketchy, historical account completed, we are now in a position to address the issue of how to understand the neoliberal character or connotations of free trade agreements in European history. To repeat, some civil society critics see the involvement of the EU in trade-plus agreements as evidence of neoliberalism's thorough capture of the institutions of the EU, whilst for others, this involvement is more a warning of this threat, which has not yet been realised (entirely).

One point which needs to be clarified at the outset is that many believe that, by the beginning of the new millennium, the EU had taken a significant turn towards neoliberalism. For example, Palley locates the origins of Eurozone crisis in a 'toxic neoliberal policy cocktail'

⁵⁶ Lang (2011) 235.

⁵⁷ Hopewell (2016).

dating back to the early 1980s.⁵⁸ The defining moment for him was March 1983 when President Mitterrand turned away from Keynesian policies of reflation and towards neoliberal policies of austerity. Later, according to Palley, it was the economic policy pursued within the Eurozone coupled with the specificities of German national economic policy, and what he calls the flawed neoliberal design of the Euro and European Central Bank, that allowed a long process of 'policy sedimentation' to take place, all of which were rooted in the fundamentals of neoliberal thought. Policymakers stopped seeking to achieve full employment, instead targeting the rate of inflation. A corporate model of globalisation forced workers into international competition with each other via global production networks supported by free trade agreements and capital mobility. The 'small government' agenda attacked the legitimacy of government and pushed persistently for deregulation, while the labour market flexibility agenda attacked trades unions and labour market support. In short, the Keynesian legacy had been supplanted.

Arguably, even the Court of Justice of the European Union started to manifest such tendencies. For a long time, it mostly escaped critique from the left as it was seen (and either applauded or reviled) for participating in the European social project. This changed as the Court was called on to decide cases involving 'posted workers' and other issues which directly pitted the principle of free movement against collective labour rights.⁵⁹ Faced with this choice, the Court favoured free movement over social rights, thus undermining the Keynesian/embedded settlement discussed above. In Ashiagbor's view,

Through its jurisprudence on social rights, in particular collective labour rights and their interaction with economic freedoms, the Court has intensified the impetus towards disembedding, by weakening the 'socials' at the national level. Further, in a line of case-law that, at first sight, offers the prospect of enhancing the social content of EU citizens' rights, the Court's selective conception of the social, and of

⁵⁸ T I Palley, 'Europe's Crisis without End: The consequences of Neoliberalism' 22 *Contributions to Political Economy* (2013) 29.

⁵⁹ S Reynolds, 'Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement Over Fundamental Rights' 53 *Common Market Law Review* 643.

citizenship, has been shown to be potentially destructive of a more community-based conception of solidarity.⁶⁰

Schiek is another commentator who identifies a 'deregulatory thrust' in respect of national social policies which arises as the Court enforces compliance with the rules of the internal market, thereby realising earlier fears that the EU's common social policy would be sacrificed on the altar of the common currency.⁶¹ Without using the term neoliberalism, Schiek nonetheless explains that this has been facilitated by the 'new economic governance', a top-down technocratic approach which has introduced the surveillance of the performance of member states by reference to certain targets relating to: budgetary stability and the containment of government debt; macroeconomic surveillance intended to contain imbalances within the Eurozone and processes that might impact on the stability of national economies; and the coordination of socio-economic policy.⁶²

Neither Ashiagbor nor Schiek approve of the state of affairs they describe, and each therefore envisages how the EU could move away from it. For Ashiagbor, the EU's neoliberal orientation would best be conquered by defending national arenas for social policy, while Schiek proposes to rely on 'the EU's unique socio-economic constitution' in order to work towards a 'constitution of social governance' through a systematic reinterpretation of the EU competence regime in the light of the EU's values and guiding norms as expressed in the founding treaties.⁶³ But an important question to ask in respect of both of these proposals is whether Europe is ready, or able, to reverse its neoliberal orientation.

To recall, the negotiation of comprehensive agreements started only recently: in 2009 in the case of CETA, and in 2013 for TTIP. For their civil society critics, these negotiations indicate that neoliberalism is still very much alive in Europe, despite predictions that the crisis of 2008 would sound its death knell. In campaigning against TTIP, CETA and TiSA, *Global Justice*

⁶⁰ Ashiagbor (2013), 324.

⁶¹ D Schiek, 'A Constitution of Social Governance for the European Union', in N Ferreira and D Kostakopoulou (eds.), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge UP, 2016) 17, 29.

⁶² Schiek (2016) 30.

⁶³ Schiek (2016) 17, 37.

Now, for example, identified key component parts of the neoliberal agenda and how they were linked to the interests of big business ‘nowadays trade deals have little to do with actual trade ... Too often they are about giving huge new powers to big business, affecting every aspect of our society from the NHS to online privacy, from environmental protection to food standards’.⁶⁴ In a similar vein, John Hilary, in describing TTIP as ‘a charter for deregulation an attack on jobs and an end to democracy’, argued that ‘[t]he central objective of TTIP remains the removal of regulatory “barriers” to trade, despite the fact that these regulations represent some of the most important safety standards protecting public health and the environment.’⁶⁵

But how do we reconcile these arguments with the observations, presented at the beginning of this essay, that the hegemony of neoliberalism within the international trade regimes faced a legitimacy crisis by the end of the 1990s. So much so that Lang entitled his 2011 monograph *World Trade Law after Neoliberalism* and Sornarajah could speak of an era of ‘more balanced’ treaties ushered in by this crisis, leading even the United States and the United Kingdom to conclude that potential interference with state regulatory capacity had gone too far. Then, from a different angle, at the time of the Brexit referendum in 2016, significant voices, notably from the UK trades unions, argued for a remain vote on the basis that EU social protections, and more generally the ‘European social model’, would act as a counterweight to the strong neoliberal currents that have continuously flowed through British politics since the election of Mrs Thatcher in 1979.⁶⁶

So, in the context of the EU and the European project, is neoliberalism best described as being alive, dead or somewhere in-between? Crouch’s *The Strange Non-Death of Neoliberalism* examines the continuing influence of neoliberalism after the global economic crisis and presents abundant evidence that the current ‘politics of austerity’ re-instantiates key aspects of the neoliberal agenda.⁶⁷ One commentator who has pushed the idea of ‘non-

⁶⁴ <http://www.globaljustice.org.uk/why-trade-deals-are-threat> (last visited 2 October 2017)

⁶⁵ J Hilary, *The Transatlantic Trade and Investment Partnership*, (War on Want/Rosa Luxemburg-Stiftung, 2015) 11.

⁶⁶ For an analysis of the UK Labour Party’s neoliberal ‘turn’ see R Heffernan, *New Labour and Thatcherism: Political change in Britain* (Palgrave Macmillan, 2001).

⁶⁷ C Crouch, *The Strange Non-Death of Neo-Liberalism* (Polity Press, 2011).

death' a step further is Peck, who employs the colourful descriptor of 'zombie neoliberalism' with its provocatively enjoyable image of the 'living dead'.⁶⁸ Though insightful to some degree, this image strongly implies that the rise, fall and apparent resurgence of neoliberalism is a special, spectral and unworldly, case. It draws our attention away from the possibility that the recent trajectories of neoliberalism need to be understood as being located within the history, and quite normal and routine relationships, of how power works through law and institutions.

One way to explore this is through Gramsci's account of hegemony which, as an historical, ideological and cultural concept, attempts to explain how particular ideas and the practices that flow from them become sufficiently culturally embedded so as to appear 'common sense' in a particular historical period.⁶⁹ During periods of hegemony, key elements of the ideology become imbricated into the legal and institutional fabric of the extant social order and then sedimented into laws, rules, processes and procedures, working assumptions and organisational cultures. Thus, even when a particular hegemony is significantly challenged or begins to break down, all of those sedimented features remain, both helping to sustain the ideology in question and giving continuing effect to the politics and policies derived from that ideology.

So, if the high point of neoliberal hegemony within the international trade regime, investment law, and the EU was attained in the 1990s, we could then understand the legitimacy crisis of the end of the 1990s, then followed by the global economic crisis, as posing a significant challenge to that hegemony. But even if no longer hegemonic, that does not mean that neoliberalism has either been abandoned or is in terminal decline. Indeed,

⁶⁸ J Peck, 'Zombie Neoliberalism and the Ambidextrous State' 14 *Theoretical Criminology* (2010) 104.

⁶⁹ This ideological/cultural conception of hegemony needs to be distinguished from the notion of a 'hegemon' as used in International Relations and by Ruggie (above n 31) and Schneiderman in this volume. For a seminal account of Gramsci's relevance to International Relations see R W Cox, 'Gramsci, Hegemony and International Relations: An essay in method' 12 (2) *Millennium: Journal of International Studies* (1983) 162-175. For a summary account of how Gramsci's conception of hegemony relates to both Marxist understandings of ideology and post-structuralist accounts of the role of discourse, see M Stoddart, 'Ideology, Hegemony, Discourse: A Critical Review of Theories of Knowledge and Power', 28 *Social Thought and Research*, (2007)191-225.

neoliberalism as regime of governance may continue long after it has lost a degree of legitimacy in ideological and cultural terms.

Whether the legitimacy of neoliberalism can be successfully re-asserted or whether it will continue to decline is an open question. All we can safely predict is that the struggle for/against the 'common sense' of neoliberalism will continue for the foreseeable future. This makes the set of distinct warnings offered by the essays in the rest of this volume, extremely timely.