

From the “Closed” to the “Open” Commercial State:

A Very Brief History of International Economic Law

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Abstract

Trade and commerce became “reasons of state” in the eighteenth century. The mercantilist State believes it competes with all other States; and in its attempt to control “its” national market and “its” international trade-balance it develops a range of trade instruments that structure international economic law until today. With the publication of Smith’s “Wealth of Nations”, however, the idea that free international trade was economically beneficial gradually gained prominence. The long nineteenth century indeed saw – bilateral – attempts to implement the new politico-economic philosophy. Yet the two World Wars and the Great Depression in the first part of the twentieth century destroyed almost all trade liberalisation already achieved. Nonetheless: after the Second World War the belief emerged that a peaceful world order could only be founded on a stable economic order; and a number of institutional attempts to liberalise – and harness – the world economy were. This article discusses the evolution from the “closed” commercial State of the eighteenth century to the “open” commercial State of the twentieth century and with it the evolving legal framework of modern international economic law up to the 1947 General Agreement on Tariffs and Trade.

Keywords: Mercantilism, Free Trade, Adam Smith, David Ricardo, Methuen Treaty, Cobden-Chevalier Treaty, United States, League of Nations, International Trade Organization, GATT

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1. Introduction

“Nothing seems so self-evident ... as the classical notion of the *national* market”;¹ and yet, the – national – unification of customs territories is itself relatively recent.² The *internal* unification of national markets had pushed customs duties to the national border.³ But the construction of national markets had required a second – external – element: a national customs border.⁴ For a “national” market could only exist if demarcated from “foreign” trade; and once the modern commercial State had insisted on an external boundary around “its” national market, *global* trade became *international* trade.⁵

The mercantilist State is thereby based on “the unchallenged assumption” that the national government “had the right and responsibility to regulate economic activities in the interest of the common good”.⁶ Under classic international law, States were thus

1 Fernand Braudel, *Civilization and Capitalism: 15th-18th Century – Volume III: The Perspective of the World* (Collins Sons & Co, 1984), 277 (emphasis added).

2 Boris Nolde, *Droit et technique des traités de commerce*, (1924) 3 *Collected Courses of the Hague Academy of International Law*, 291-456 at 329-330: “La souveraineté douanière – expression la plus simple de cette faculté – est une conquête relativement récente de l’évolution historique. Pendant de longs siècles, parfois jusqu’au commencement du xix siècle, les Etats européens vivaient sous l’empire d’un système de morcellement de la souveraineté douanière. »

3 Jean Morini-Comby, *Mercantilisme et Protectionnisme: Essai Sur Les Doctrines Interventionnistes en Politique Commerciale Du XVe au XIXe Siècle* (Paris : Librairie Félix Alcan, 1930), 92.

4 In the words of Richard C. Snyder, *The Most Favoured-Nation Clause* (New York: King’s Crown Press, 1948), 2: “Tariffs have become synonymous with modern economic life because of their close relation to nation-building.”

5 The historical symbiosis between local and global trade that existed prior to the rise of the modern State was thus eliminated in favour of the national market. On this point, see only: Braudel, *Civilization and Capitalism* (supra n.1), Chapters 2 and 3.

6 Joyce O. Appleby, *Economic Thought and Ideology in Seventeenth-Century England* (Princeton: Princeton, 1978), 99.

sovereignly free to become a “closed commercial State”.⁷ This idea of economic coexistence is however gradually replaced by a spirit of economic cooperation in the long nineteenth century. That century is a century of economic bilateralism that is indirectly “multilateralised” by means of most-favoured-nation clauses. The rise of “true” trade multilateralism only emerges after the First World War and only triumphs after the Second World War. This article traces the gradual move from the “closed” commercial State to the “open” commercial State – a move that parallels the changing structure of international law from a law of (economic) co-existence to a law of (economic) cooperation.⁸ It is divided into four parts. Part 1 explores the classic doctrine of mercantilism in the eighteenth century. That doctrine is challenged at the end of that century by the “new” philosophy of free trade discussed in Part 2. Part 3 analyses the various legal attempts during the (long) nineteenth century to implement international cooperation on the European continent – primarily through the rise of the bilateral trade agreements with most-favoured-nations clauses. This rise of free trade comes to a dramatic halt at the beginning of the twentieth century. Part 4 starts with a discussion of the “autarkic” commercial State in the interwar years, and subsequently moves to examine the gradual rise of trade multilateralism in the first half of the twentieth century. The normative foundations laid here are still with us today; yet the article stops with the genesis of the 1947 General Agreement on Tariffs and Trade, which has come to constitute the cornerstone of contemporary world trade law in the second half of the twentieth century.

2. The Eighteenth Century: International Law and the Mercantilist State

How would the modern nation State control its economic borders? Historically, two classic tools were here developed to “regulate” international trade: the (import) ban and the (external) tariff.⁹ Tariffs thereby combined the interests of domestic producers

7 Isaac Nakhimovsky, *The Closed Commercial State: Perpetual Peace and Commercial Society from Rousseau to Fichte* (Princeton: Princeton University Press, 2011).

8 Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens, 1964).

9 Georg Erler, *Grundprobleme des internationalen Wirtschaftsrechts* (Göttingen: Schwartz, 1956), 56: “Mit dem Zollrecht erhielt der junge Staat zum erstenmal das spezifische rechtliche Instrument zur Dursetzung einer zentral geleiteten Außenhandelspolitik.”

in protection from foreign competition with the – great – appetite of the modern State to raise revenue.¹⁰ This alliance between “merchants” and the State has become known as “mercantilism”. Mercantilism simply stands for economic state-building.¹¹ It is a process in which the “commercial” state jealously guards its balance of trade with other nations. For the central tenet of the mercantile system was “to diminish as much as possible the importation of foreign goods for home consumption, and to increase as much as possible the exportation of the produce of domestic industry”.¹²

But could States prohibit trade with other States under international law? Early modern conceptions of international law had remained ambivalent towards the idea of economic “sovereignty”. For Grotius, the “law of nations” had introduced the principle “that the opportunity to engage in trade of which no one can be deprived, *should be free to all men*”.¹³ Yet in the late seventeenth century a conceptual change occurred. Pufendorf already allows each state to restrict trade if it “would lose a considerable profit, or in some indirect way suffer harm”. Imports can therefore be taxed or prohibited “either because the state may suffer some loss from its importation, or that our own citizens may be incited to greater industry, or that our wealth may not pass into the hands of foreigners”.¹⁴ This transformation is completed in the middle of the eighteenth century. Henceforth, the classic justification of the “closed” mercantilist state is found in Vattel’s “Law of Nations”.¹⁵ This famous eighteenth-century textbook clearly

10 For an analysis of the English case, see: John B. Condliffe, *The Commerce of Nations* (New York: Norton, 1950), 87: “By the beginning of the eighteenth century the tariff of duties chargeable on imported goods had come to be both the chief source of revenue and an elaborate instrument of protection to English manufacturing industries. This twofold aspect of tariff development was characteristic of the mercantile age.”

11 Shepard B. Clough, *France: A History of National Economics, 1789-1939* (London: Octagon Books, 1970), 8.

12 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Editor: K. Sutherland), (Oxford: Oxford University Press, 1993), 286. For a classic “English” mercantilist theorist, see only: Thomas Mun, *England’s Treasure by Forraign Trade* (London: Macmillan, 1895 – originally published: 1664) p.7: “The ordinary means therefore to increase our wealth and treasure is by *Forraign Trade*, wherein wee must ever observe this rule; to sell more to strangers yearly than wee consume of theirs in value.”

13 Cf. Hugo Grotius, *The Freedom of the Seas* (Oxford: Oxford University Press, 1916), 61 (emphasis added).

14 Cf. **Samuel von Pufendorf, *De Jure Naturae et Gentium Libri Octo – Volume 2: Translation of the 1688 Edition* (Oxford: Calrendon Press, 1934), 369-370. In the view of Douglas A. Irwin, *Against the Tide: An Intellectual History of Free Trade* (Princeton: Princeton University Press, 1998), 24: “Pufendorf almost completely undermined the law of nations case for free trade. From this point on, the cosmopolitanism of the earlier natural law thinkers was largely abandoned in favour of rules that supported the independent sovereignty oft he nation state in its right to restrict trade.”**

15 Emer de Vattel, *The Law of Nations* (trans: Joseph Chitty) (Philadelphia: Johnson & Co, 1883).

distinguished between “home trade” and “foreign trade”;¹⁶ and the mercantile State was entitled to prohibit the importation of foreign goods:

“§ 90. Prohibition of Foreign Merchandise

Every state has consequently a right to prohibit the entrance of foreign merchandises; and the nations that are affected by such prohibition have no right to complain of it, as if they had been refused an office of humanity. Their complaints would be ridiculous, since their only ground of complaint would be, that a profit is refused to them by that nation who does not choose they should make it at her expense...”¹⁷

Foreign trade was thus a sovereign power left in the hands of each individual State. In the absence of a perfect right under natural law, States could only create “contractual” commercial rights between themselves: “A nation, not having naturally a perfect right to carry on a commerce with another, may procure it by an agreement or treaty”.¹⁸ The mercantilist State would however always need to keep a jealous eye on its balance of trade. To quote Vattel’s famous textbook again:

“§ 98. Balance of trade, and attention of government in this respect

The conductor of a nation ought to take particular care to encourage the commerce that is advantageous to his people, and to suppress or lay restraints upon that which is to their disadvantage. Gold and silver having become the common standard of the value of all the articles of commerce, the trade that brings into the state a greater quantity of these metals than it carries out, is an advantageous trade; and, on the contrary, that is a ruinous one, which causes more gold and silver to be sent abroad, than it brings home. This is what is called the balance of trade. The ability of those who have the direction of it, consists in making that balance turn in favour of the nation.

16 Ibid., 37: “§ 83. Of home and foreign trade: It is commerce that enables individuals and whole nations to procure those commodities which they stand in need of, but cannot find at home. Commerce is divided into home and foreign trade. The former is that carried on in the state between the several inhabitants; the latter is carried on with foreign nations.”

17 Ibid., 38.

18 Ibid. 39 (para.93). The international treaty route was here seen as the only one, because even custom could not create a perfect right to international commerce (ibid., 41 = para.95): “Thus, although two nations have treated together, without interruption, during a century, this long usage does not give any right to either of them; nor is the one obliged on this account to suffer the other to come and sell its merchandises, or to buy others: — they both preserve the double right of prohibiting the entrance of foreign merchandise, and of selling their own wherever people are willing to buy them. Although the English have from time immemorial been accustomed to get wine from Portugal, they are not on that account obliged to continue the trade, and have not lost the liberty of purchasing their wines elsewhere. Although they have, in the same manner, been long accustomed to sell their cloth in that kingdom, they have, nevertheless, a right to transfer that trade to any other country: and the Portuguese, on their part, are not obliged by this long custom, either to sell their wines to the English, or to purchase their cloths. If a nation desires any right of commerce which shall no longer depend on the will of another, she must acquire it by treaty.”

§ 99. Import duties

Of all the measures that a wise government may take with this view, we shall only touch here on import duties. When the conductors of a state, without absolutely forcing trade, are nevertheless desirous of diverting it into other channels, they lay such duties on the merchandises they would discourage as will prevent their consumption. Thus, French wines are charged with very high duties in England, while the duties on Portugal are very moderate, – because England sells few of her productions to France, while she sells large quantities to Portugal. There is nothing in this conduct that is not very wise and extremely just; and France has no reason to complain of it – every nation having an undoubted right to make what conditions she thinks proper, with respect to receiving foreign merchandises, and being even at liberty to refuse taking them at all.”

This classic legitimation of the mercantilist State became the cornerstone of modern international law.¹⁹ Sovereign States were entitled to freely choose their commercial policy vis-à-vis other States. Neither were they obliged to treat foreign goods in the same way as domestic goods; nor would they have to treat all imports on an equal footing. The sovereign State could decide to be an “open” or a “closed” commercial State;²⁰ and even if it were to open its domestic market to foreign products, it could freely discriminate between trade channels by preferring one foreign State to another.

We find an excellent illustration of this mercantilist philosophy in the 1703 “Methuen Treaty”.²¹ Regulating commerce between England and Portugal, the Treaty took its name from the (then) English Ambassador to Portugal. The Treaty thereby allowed the importation and sale of English cloth on the Portuguese market; and, in exchange, it granted Portuguese wines a lower tariff than French wines. The two central provisions here stated:

“Article I

His sacred Royal Majesty of Portugal promises, both in his own name, and that of his successors, to admit, for ever hereafter, into Portugal, the woollen cloths, and the rest of the woollen

19 Cf. Lassa Oppenheim, *International Law: A Treatise – Volume 1: Peace* (London: Longman, Greens and Co, 1912), 178: “In consequence of its internal independence and territorial supremacy, a state can adopt ... any commercial policy it likes[.]”

20 For the philosophically most radical pleading in favour of the closes commercial state, see: Johann G. Fichte, *The Closed Commercial State* (translated by: Anthony C. Adler) (Albany: Suny Press, 2012), esp. 160-163: “In short, this system, where foreign trade is closed incompletely, without precise calculation of what goods ought to be brought into trade given the nation’s needs, not only fails to achieve what it should, but in fact brings about new evils. (...) The state must close itself off entirely to all foreign trade, forming from this point on an isolated commercial body, just as it had already previously formed an isolated juridical and political body.”

21 Among the three Methuen Treaties; only the third – commercial – Treaty has become famous. For an analysis of its negotiations, see: Alan D. Francis, *John Methuen and the Anglo-Portuguese Treaties of 1703*, (1960) 3 *The Historical Journal* 103-124.

manufactures of the [English], as was accustomed, till they were prohibited by the law; nevertheless upon this condition:

Article II

That is to say, that her sacred Royal Majesty of [England] shall, in her own name, and that of her successors, be obliged, for ever hereafter, to admit the wines of the growth of Portugal into [England]: so that at no time, whether there shall be peace or war between the Kingdoms of [England] and France, any thing more shall be demanded for these wines by the name of custom or duty, or by whatsoever other title, directly or indirectly, whether they shall be imported into [England] in pipes or hogsheads, or other casks, than what shall be demanded for the like quantity or measure of French wine, deducting or abating a third part of the custom or duty[.]”²²

The Treaty was consequently designed to eliminate all “quantitative restrictions” of English cloth in exchange for a “preferential” tariff on Portuguese wine. Originally, this connection between English cloth and Portuguese wine was “somewhat accidental”;²³ yet it became a major element of British foreign policy, especially in relation to France. For Britain’s trade relations with France were subject to a long-standing trade deficit; and because of this trade imbalance, Britain had consciously tried to “divert” its wine importations from France to Portugal. France soon attempted to neutralise the preferential treatment of Portuguese wines, but the British Parliament failed to ratify the commercial provisions of the negotiated Treaty of Utrecht.²⁴ David Hume famously commented on this victory of passion over reason as follows:

“Our jealousy and our hatred of France are without bounds; and the former sentiment, at least, must be acknowledged reasonable and well-grounded. These passions have occasioned innumerable barriers and obstructions upon commerce, where we are accused of being commonly the aggressors. But what have we gained by the bargain? We lost the French market for our woollen manufactures, and transferred the commerce of wine to Spain and Portugal, where we buy worse liquor at a higher price... But would we lay aside prejudice, it would not be difficult to prove, that nothing could be more innocent, perhaps advantageous. Each new acre of vineyard planted in France, in order to supply England with wine, would make it requisite for the French to take the produce of an English acre, sown in wheat or barley, in order to subsist themselves; and it is evident, that we should thereby get command of the better commodity.”²⁵

22 The text is taken from A. Smith, *Wealth of Nations*, Book IV – Chapter 6 (<http://www.econlib.org/library/Smith/smWN16.html>). I have replaced Smith’s references to “Great Britain” with “England” because at the time of the Treaty, the union of England and Scotland had not yet taken place.

23 Francis, John Methuen and the Anglo-Portuguese Treaties of 1703 (*supra* n.21), 122.

24 The 1713 Treaty of Utrecht contained a clause similar to a most-favoured-nation clause in its Article 8. The clause would have allowed French wines to be treated like Portuguese wines.

25 David Hume, *Essays, Moral, Political, and Literary* (1742), II.V.16 “Of the Balance of Trade”, available: [http://www.econlib.org/library/LFBooks/Hume/hmMPL28.html#Part II, Essay V, OF THE BALANCE OF TRADE](http://www.econlib.org/library/LFBooks/Hume/hmMPL28.html#Part%20II,%20Essay%20V,%20OF%20THE%20BALANCE%20OF%20TRADE).

This “jealousy of trade” between Great Britain and France caused nearly a century of economic “warfare”. A first attempt to re-establish economic peace was made in the 1786 Eden Treaty.²⁶ The latter was the first material result of a new economic philosophy with regard to the wealth of nations, which we shall discuss in our second section.

3. A (New) Philosophy: International Law and the “Wealth of Nations”

Should States open their domestic frontiers to foreign goods? The question famously received a novel – and swiftly canonical – answer in 1776. Adam Smith’s “Wealth of Nations” revolutionized the theoretical discourse on international trade by extending the principles on political economy from the national to the international sphere.²⁷ His famous critique of the mercantile system can be found in Book IV and reads:

“It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. The tailor does not attempt to make his own shoes, but buys them of the shoemaker. The shoemaker does not attempt to make his own clothes, but employs a tailor. The farmer attempts to make neither the one nor the other, but employs those different artificers. All of them find it for their interest to employ their whole industry in a way in which they have some advantage over their neighbours, and to purchase with a part of its produce, or, what is the same thing, with the price of a part of it, whatever else they have occasion for. *What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.*”²⁸

This was an argument for an international division of labour. For international specialisation promised – just like the division of labour within an industry – a dramatic increase in the overall wealth of nations. If each country exploited its advantages in the production of particular goods, an exchange of these – more cheaply

26 On this point, see: Richard M. Brace, *The Anglo-French Treaty of Commerce of 1786: A Reappraisal*, (1947) 9 *The Historian* 151-162.

27 Smith, *Wealth of Nations* (supra n.12).

28 *Ibid.*, 292-3 (emphasis added).

produced – goods would always be mutually advantageous. The theory of natural (or acquired) advantages was expressed as follows:

“The natural advantages which one country has over another, in producing particular commodities, are sometimes so great, that it is acknowledged by all the world to be in vain to struggle with them. By means of glasses, hot-beds, and hot-walls, very good grapes can be raised in Scotland, and very good wine, too, can be made of them, at about thirty times the expense for which at least equally good can be brought from foreign countries. Would it be a reasonable law to prohibit the importation of all foreign wines, merely to encourage the making of claret and Burgundy in Scotland? But if there would be a manifest absurdity in turning towards any employment thirty times more of the capital and industry of the country than would be necessary to purchase from foreign countries an equal quantity of the commodities wanted, there must be an absurdity, though not altogether so glaring, yet exactly of the same kind, in turning towards any such employment a thirtieth, or even a three hundredth part more of either. Whether the advantages which one country has over another be natural or acquired, is in this respect of no consequence. As long as the one country has those advantages, and the other wants them, it will always be more advantageous for the latter rather to buy of the former than to make.”²⁹

The belief that the balance-of-trade was a zero sum game – the very heart of the mercantilist creed – was consequently wrong.³⁰ A mercantile system did not protect the wealth of the nation; it only protected the wealth of a part of that nation: “In the restraints upon the importation of all foreign commodities which can come into competition with those of our own growth, or manufacture, the interest of the home-consumer is evidently sacrificed to that of the producer. It is altogether for the benefit of the latter, that the former is obliged to pay that enhancement of price which this monopoly almost always occasions.”³¹

This attack on the mercantilist State was refined, a few decades later, in the work of another British author: David Ricardo. In his “Principles of Political Economy and Taxation” (1817), we read:

“It is quite as important to the happiness of mankind that our enjoyments should be increased by the better distribution of labour, by each country producing those commodities for which by its situation, its climate, and its other natural and artificial advantages it is adapted, and by their exchanging them for the commodities of other countries, as that they should be augmented by a rise in the rate of profits. (...) Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole... It is this

29 Ibid., 294-5.

30 Ibid., 308. The existence of a powerful and wealth neighbouring state, while dangerous in war, would be advantageous in trade: “A nation that would enrich itself by foreign trade is certainly most likely to do so when its neighbours are all rich, industrious, and commercial nations”.

31 Smith, *Wealth of Nations* (supra n.12), 377.

principle which determines that wine shall be made in France and Portugal, that corn shall be grown in America and Poland, and that hardware and other goods shall be manufactured in England.³²

The famous fictitious illustration here given was the (not so) fictitious trade agreement between Portugal and England in which Portuguese wine is exchanged for English cloth, and through which Ricardo shows that it could work in both countries favour – even if one of them were to enjoy an absolute advantage in the production of both products!³³ This novel theory of “comparative advantages” would soon become the solid rock on which the philosophy of free international trade was to be built.³⁴

Yet the “British” free trade philosophy was not without critics. One of the early challengers of the idea of free trade between States was a founding father of the young American Republic: Alexander Hamilton. Having produced a “Report on Manufacturers” for the House of Representatives in 1791, Hamilton argued against free trade in some areas so as to protect the nascent American industry, then still in its infancy.³⁵ This “infant industry” argument was, a few decades later, developed by Friedrich List – one

32 David Ricardo, *The Principles of Political Economy and Taxation* (Mineola: Dover Publications, 2004), 80-81.

33 The famous “thought experiment” goes as follows (*ibid.*, 82): “If Portugal had no commercial connexion with other countries, instead of employing a great part of her capital and industry in the production of wines, with which she purchases for her own use the cloth and hardware of other countries, she would be obliged to devote a part of that capital to the manufacture of those commodities, which she would thus obtain probably inferior in quality as well as quantity. The quantity of wine which she shall give in exchange for the cloth of England, is not determined by the respective quantities of labour devoted to the production of each, as it would be, if both commodities were manufactured in England, or both in Portugal. England may be so circumstanced, that to produce the cloth may require the labour of 100 men for one year; and if she attempted to make the wine, it might require the labour of 120 men for the same time. England would therefore find it her interest to import wine, and to purchase it by the exportation of cloth. To produce the wine in Portugal, might require only the labour of 80 men for one year, and to produce the cloth in the same country, might require the labour of 90 men for the same time. It would therefore be advantageous for her to export wine in exchange for cloth. This exchange might even take place, notwithstanding that the commodity imported by Portugal could be produced there with less labour than in England. Though she could make the cloth with the labour of 90 men, she would import it from a country where it required the labour of 100 men to produce it, because it would be advantageous to her rather to employ her capital in the production of wine, for which she would obtain more cloth from England, than she could produce by diverting a portion of her capital from the cultivation of vines to the manufacture of cloth.”

34 Irwin, *Against the Tide* (*supra* n.14), 90.

35 Alexander Hamilton, *Report on the Subject of Manufacturers* (New York: Cosimo Classics, 2007). For a historical analysis of the report and its consequences, see: Douglas A. Irwin, *The Aftermath of Hamilton's "Report on Manufactures"*, (2004) 64 *The Journal of Economic History*, 800-821, 800: “To this day, the report is often heralded as the quintessential American statement against the laissez faire doctrine of free trade and for activist government policies -including protectionist tariffs- to promote industrialization.”

of the founding fathers of German economic unification. List equally felt that a “boundless cosmopolitanism” in international trade would, in the absence of a “universal confederation of nations”, subject less-developed States to the economic power of “predominant manufacturing nations”.³⁶ And since every State would wish to develop from an agricultural to an industrialised State,³⁷ each State was entitled to protect its infant industrial sectors against foreign competition.³⁸ The cosmopolitan doctrine of free trade is thus seen a hegemonic light:

“It is a very common clever device that when anyone has attained the summit of greatness, he kicks away the ladder by which he has climbed up, in order to deprive others of the means of climbing up after him. In this lies the secret of the cosmopolitical doctrine of Adam Smith ... Any nation which by means of protective duties and restrictions on navigation has raised her manufacturing power and her navigation to such a degree of development that no other nation can sustain free competition with her, can do nothing wiser than to throw away these ladders of her greatness, to preach to other nations the benefits of free trade, and to declare in penitent tones that she has hitherto wandered in the paths of error, and has now for the first time succeeded in discovering the truth.”³⁹

The view that free trade entailed the danger of “trade imperialism” was of course directed at Great Britain – the (then) workshop of the world.⁴⁰

36 Friedrich List, *National System of Political Economy – Volume 2: The Theory* (New York: Cosimo Classics, 2005), 77. He explains (*ibid.*, 78): “In proportion, however, as the principle of a universal confederation of nations is reasonable, in just the same degree would a given nation act contrary to reason if, in anticipation of the great advantages to be expected from such a union, and from a state of universal and perpetual peace, it were to regulate the principles of its national policy as though this universal confederation of nations existed already. We ask, would not every sane person consider a government to be insane which, in consideration of the benefits and the reasonableness of a state of universal and perpetual peace, proposed to disband its armies, destroy its fleet, and demolish its fortresses? But such a government would be doing nothing different in principle from what the popular school requires from governments when, because of the advantages which would be derivable from general free trade, it urges that they should abandon the advantages derivable from protection.”

37 *Ibid.*, 80: “As an uncivilised nation, having a barbarous system of agriculture, can make progress only by commerce with civilised manufacturing nations, so after it has attained to a certain degree of culture, in no other way can it reach the highest grade of prosperity, civilisation, and power, than by possessing a manufacturing industry of its own.”

38 *Ibid.*, 86: “If the theory will teach the Germans, that they can further their manufacturing power advantageously only by protective duties previously fixed, and on a gradually increasing scale at first, but afterwards gradually diminishing, and that under all circumstances partial but carefully limited foreign competition is really beneficial to their own manufacturing progress, it will render far better service in the end to the cause of free trade than if it simply helps to strangle German industry.”

39 Friedrich List, *National System of Political Economy – Volume 3: The Systems and The Politics* (New York: Cosimo Classics, 2005), 46.

40 **This view has been shared by later historians: Clough, *France: A History of National Economics* (supra n.11), 15: “At all events, Great Britain did not adopt free trade until she had such technological advantages over her competitors that they were unable to sell in her markets. When she did apply this**

4. The (Long) Nineteenth Century: Free Trade Bilateralism (and Its Limits)

4.1. The European Continent: The Rise of Free Trade Agreements

A first celebrated manifestation of the Smithian free trade philosophy was the 1786 Eden Treaty.⁴¹ Based on three liberal principles, it granted (limited) national treatment to a number of goods and persons;⁴² it, secondly, lowered customs tariffs for certain goods – especially alcoholic beverages;⁴³ and it, thirdly, contained a most-favoured-nations clause.⁴⁴

All three principles announced, at least on the theoretical level, a revolutionary break with the older mercantilist philosophy;⁴⁵ yet, on a practical level, the Treaty proved

doctrine, she endeavoured to convince other nations of the wisdom of pursuing the same policy in the hope that the removal of trade barriers would allow her to sell to them.”; as well as: Paul Bairoch & Susan Burke, ‘European trade policy’, 1815–1914, in: Peter Mathias & Sidney Pollard (eds.), *The Cambridge Economic History of Europe – Volume 8: The Industrial Economies: The Development of Economic and Social Policies* (Cambridge: Cambridge University Press, 1989), 1-160, 14: “At the same time as Britain was becoming aware of its industrial lead and drew the logical conclusions from this by adopting a free trade policy, the rest of Europe was becoming conscious of its backwardness and was seeking in a new form of mercantilism – more defensive than offensive, in short in what was from the 1840s to be called protectionism – a way of catching up.”

41 For a (French) copy of the Treaty, see: Alexandre de Clercq (ed.), *Recueil des Traités de la France – Tome Premier (1713-1802)* (Paris: Pedone-Lauriel, 1880), 147. For an analysis of the Treaty, see: Brace, *The Anglo-French Treaty of Commerce of 1786: A Reappraisal* (supra n.26); as well as: William O. Henderson, *The Anglo-French Commercial Treaty of 1786*, (1957) 10 *The Economic History Review*, 104-112, 104: “The Anglo-French commercial treaty of 1786 was one of the most important trade agreements of the eighteenth century. It marked a break in a commercial system which had long been accepted as the only method of regulating international trade. It marked also a serious attempt to end the traditional rivalry between France and Britain.”

42 Eden Treaty, Articles I, IV and V.

43 Ibid., Article VI, especially paragraph 1: “Les vins de France, importés en droiture de France dans la Grande-Bretagne, ne payeront, dans aucun cas, pas de plus gros droit que ceux que payent présentement les vins de Portugal.”

44 Ibid., Article VII: “Et l’intention des deux Hautes-Parties Contractantes étant que leurs sujets respectifs soient les uns chez les autres sur un pied aussi avantageux que ceux des autres nation Européennes, Elles conviennent que, dans le cas où celles accorderoient dans la suite de nouveaux avantages de navigation et de commerce à quelque autre nation Européenne, elles y feront participer mutuellement leursdits sujet, sans préjudice toutefois des avantages qu’elles se réservent, savoir ; la France en faveur de l’Espagne, en conséquence de l’article 24 du Pacte de famille signé le 5 Août 1761 ; et l’Angleterre, selon ce qu’elle a pratiqué en conformité et en conséquence de la convention de 1703 signée entre l’Angleterre et le Portugal. »

45 This was especially the case with regard to bilateral trade preferences. For an extensive analysis of this point, see: Erler, *Grundprobleme des internationalen Wirtschaftsrechts* (supra n.9), 66.

spectacularly unsuccessful. Inspired by French “physiocratic” principles, the Eden Treaty had scarified the (nascent) French industry at the altar of tariff concessions for French agricultural products;⁴⁶ and in the aftermath of the French revolution, the Treaty was quickly renounced in 1793.⁴⁷ But worse: in the aftermath of the Napoleonic wars, most European States turned again to the use of mercantilist tools so as to protect their national economies against an overpowering British competition.⁴⁸

It would take the better part of the nineteenth century before the idea of free international trade found a second important legal expression: the 1860 Cobden-Chevalier Treaty.⁴⁹ The latter is justly celebrated as the “true” manifestation of a Smithian free trade philosophy.⁵⁰ Britain had here promised, *inter alia*, to drastically reduce its duties on French wines (and spirits);⁵¹ and, in exchange, France would outlaw all import prohibitions and would reduce its customs duties to a maximum of 30% of the value of the imported goods.⁵² Fundamentally, however, the Treaty elevated a new type of clause to centre-stage:

“Each of the two High Contracting Powers engages to confer on the other any favour, privilege, or reduction in the tariff of duties of importation on the articles mentioned in the present Treaty, which the said Power may concede to any third Power. They further engage not to enforce one against the other any prohibition of importation or exportation, which shall not at the same time be applicable to all other nations.”⁵³

46 In the words of Clough the Treaty meant “that England, with her superior industrial equipment and cheaper costs of production in many lines, would be able to rout her French competitors in the home markets” (Clough, *France: A History of National Economics* (supra n.11), 27). On this point see also: Brace, *The Anglo-French Treaty of Commerce of 1786: A Reappraisal* (supra n.26), 158: “Qualitatively superior and cheaply priced manufactured goods from across the Channel soon flooded the French markets. Handicapped by outmoded production methods, monopolies, onerous internal tolls, and the lack of good domestic coal, French industry faced a major crisis by the autumn of 1787.”

47 Clough, *France: A History of National Economics* (supra n.11), 28.

48 Erler, *Grundprobleme des internationalen Wirtschaftsrechts* (supra n.9), 67.

49 Treaty of Commerce between Great Britain and France (Paris, January 23, 1860), in: Lewis Hertslet, *A Complete Collection of the Treaties and Conventions and Reciprocal Regulations at Present Subsisting between Great Britain and Foreign Powers – Volume XI* (London: Her Majesty’s Stationary Office, 1864), 165.

50 For excellent and extended discussions of the Treaty, and its background, see: Arthur L. Dunham, *The Anglo-French Treaty of Commerce of 1860* (Ann Arbor: University of Michigan Press, 1930); and more recently: Assana A. Iliasu, *The Cobden-Chevalier Commercial Treaty of 1860*, (1971) 14 *The Historical Journal* 67-98.

51 Treaty of Commerce between Great Britain and France (supra n.49), Articles VI and VIII.

52 *Ibid.*, Article I.

53 *Ibid.*, Article XIX.

The importance of such *unconditional* most-favoured-nations clauses for the development of (European) international trade law in the second half of the nineteenth century cannot be exaggerated.⁵⁴ It became “the cornerstone of all modern commercial treaties”.⁵⁵

Designed to eliminate bilateral trade preferences, most-favoured-nation clauses prohibited the discriminatory treatment of foreign imports. The name of the clause is therefore a serious misnomer: instead of identifying a “favourite nation”, it achieves the very opposite by establishing the – universal – equality of all foreign States. The 1860 (bilateral) Treaty has thus been beautifully described as a “treaty with the whole world”.⁵⁶ For the inclusion of most-favoured-nation clauses in (bilateral) treaties encouraged third States to join a network of free trade agreements. And in the middle of the nineteenth century, there therefore “came into existence a European network of treaties resting on the combination of independent tariff treaties and most-favored-nation clauses”, which “worked, in an ingenious way, to reduce the general level of tariff duties in the countries concerned, since every reduction of duties granted to one of these states came into force as regards the others also, owing to the independent operation of the most-favored-nation clause”⁵⁷ It was this “universality” of the Cobden-like free trade agreement(s) that marked a new phase of trade liberalization within Europe.⁵⁸

This new phase of free trade, while not without setbacks,⁵⁹ lasted up to the beginning of the First World War and is often identified as the first era of free global trade.⁶⁰

54 In the first half of the nineteenth century, it was the conditional form that had dominated European Treaty practice, see: Endre Ustor, First report on the Most-Favoured-Nation Clause, (1969) 2 Yearbook of the International Law Commission, 157-186. This conditional form became known as the American version – see below.

55 Stanley Hornbeck, The Most-Favored-Nation Clause, (1909) 3 American Journal of International Law, 395-422.

56 Iliasu, The Cobden-Chevalier Commercial Treaty of 1860 (supra n.50), 71.

57 Sydney H. Zebel, Fair Trade: An English Reaction to the Breakdown of the Cobden Treaty System, (1940) 12 The Journal of Modern History 161-185, 162.

58 **Ibid., as well as: Bairoch & Burke, European trade policy, 1815–1914 (supra n.40), 36. For a challenge to this traditional view see: Oliver Accominotti & Marc Flandreau, Bilateral treaties and the most-favored-nation clause: the myth of trade liberalization in the nineteenth century, (2008) 60 World Politics 147-188. For a critical analysis of these critical claims, see: Markus Lampe, Explaining nineteenth-century bilateralism: economic and political determinants of the Cobden–Chevalier network, (2011) 64 Economic History Review 644-668.**

59 For a magisterial account of the rise and fall of free trade in Europe, see: Charles P. Kindleberger, The Rise of Free Trade in Western Europe, 1820-1875, (1975) 35 Journal of Economic History 20-55.

60 In this sense, see: Ulrich Scheuner, (1953) 2 Die völkerrechtlichen Grundlagen der Weltwirtschaft in der Gegenwart, Verhandlungen des 40. Deutschen Juristentags, 19 at 39.

4.2. The Exception to the Rule: US American Protectionism

This first era of free trade was nevertheless confined to the European continent. For the philosophy of free trade hardly managed to penetrate the commercial consciousness of the United States. Economic protectionism had here “coincide[d] with the formation of the Union” and originated in in “the need for revenue to finance the Union”.⁶¹ But this appetite for revenue was not the sole source of American isolationism. Eager to protect its infant industry against cheaper British imports, the young Republic thus dramatically raised its tariff barriers after the Napoleonic Wars. The “Tariff of 1816” was here the first in a long series of protective tariffs that separated the United States from the free trade philosophy on the European continent.⁶² Indeed, and with the benefit of historical hindsight, all nineteenth century American commercial policy was protectionist – even if its protectionism knew a softer and a stricter version.⁶³

Apart from its tariff policy, there was a second – famous – manifestation of American protectionism. For early on, the United States only granted trade concessions on a basis of strict reciprocity. This would become known as the “American” most-favoured nation clause.⁶⁴ Unlike its European “sister”, it made most-favoured nation treatment dependent on reciprocal concessions; and even where an international treaty appeared

61 Condliffe, *The Commerce of Nations* (supra n.10), 242-3.

62 For a famous analysis of the early tariff history, see: Frank W. Taussig, *The Tariff History of the United States* (Boston: Elibron Classics, 2005).

63 Bairoch & Burke, *European trade policy, 1815–1914* (supra n.40), 140: “[I]t is possible to divide nineteenth-century American commercial history into three relatively distinct periods. The first, which can be labelled a protectionist phase, lasted from 1816 to 1846. From 1846 till 1861 came a period which is sometimes said to have been liberal, but should more accurately be described as one of very modest protectionism. The last phase, which lasted from 1861 to the end of our period (and in fact to the end of the Second World War), was one of strict protectionism.”

64 For a general discussion, see: Vernon G. Setser, *Did Americans Originate the Conditional Most-Favored-Nation Clause?*, (1933) 5 *Journal of Modern* 319-323. For an early example of the clause, see Article II of the 1778 Treaty of Amity and Commerce between the United States and France: “The most Christian King, and the United States engage mutually not to grant any particular Favor to other Nations in respect of Commerce and Navigation, which shall not immediately become common to the other Party, who shall enjoy the same Favor freely, if the Concession was freer made, or on allowing the same Compensation, if the Concession was Conditional.” See also Article XXVI in the 1799 Treaty of Amity and Commerce between the US and Prussia: “If either party shall hereafter grant to any other nation any particular favour in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.”

to give unconditional most-favoured nation status, the United States would generically imposed its view as a “rule of construction”.⁶⁵

A good judicial example of this philosophy of reciprocal bilateralism is offered by *Shaw v United States*.⁶⁶ The applicant had imported whisky from the Great Britain into the United States and thereby paid a customs duty of \$2.25 per gallon. This was a higher duty than that paid by French brandies. The lower French duty had been the result of the 1898 Agreement between the United States and France, which set the tariff for such spirits to \$1.75. Pointing to the 1815 Treaty of Commerce and Navigation between the United States and Great Britain, Shaw thus invoked most-favoured-nation treatment, which appeared to be unconditional within that treaty.⁶⁷ But in line with a previous decision by the U.S. Supreme Court,⁶⁸ the Court of Customs Appeals held otherwise:

“The reciprocity treaty with France is one founded upon mutual considerations. This country gave considerations for the considerations given in exchange therefor by France. If, therefore, this country should concede to Great Britain without consideration what it has conceded to France for consideration, it would not be conceding to England a favor it conceded to the other country but it would be conceding to England more than it conceded to the other country, because England in such case gives no consideration for the concession for which France gave a consideration. The extension of the \$1.75 rate upon spirituous liquors in this case to England without any mutual concession therefrom would be conceding not what was conceded France,

65 This rule of construction was apparently suggested by (then) Foreign Secretary John Jay, see: Samuel B. Crandall, *The American Construction of the Most-Favored-Nation Clause*, (1913) 7 *American Journal of International Law*, 708-723. The Supreme Court would eventually back up this construction, cf. *Whitney v Robertson*, 124 US 190 (1888).

66 *United States Court of Customs Appeals Reports – Volume I: Cases Adjudged in the United States Court of Customs Appeals* (Reporter: T.H. Clark, Washington, 1911). For those without access to a US library, the book can be found here: <https://babel.hathitrust.org/cgi/pt?id=uiug.30112059122876;view=1up;seq=7>.

67 Article II of the 1815 Treaty of Commerce and Navigation between the United States and Great Britain states: “No higher or other Duties shall be imposed on the importation into the United States of any articles the growth, produce or Manufacture of His Britannick Majesty's Territories in Europe and no higher or other duties shall be imposed on the importation into the Territories of His Britannick Majesty in Europe of any articles the growth, produce or manufacture of the United States than are or shall be payable on the like articles being the growth, produce or manufacture of any other foreign country nor shall any higher or other duties or charges be imposed in either of the two Countries, on the Exportation of any articles to the United States, or to His Britannick Majesty's Territories in Europe respectively than such as are payable on the Exportation of the like articles to any other foreign Country nor shall any prohibition be imposed on the exportation or importation of any articles the growth, produce or manufacture of the United States or of His Britannick Majesty's territories in Europe to or from the said Territories of His Britannick Majesty in Europe, or to or from the said United States, which shall not equally extend to all other Nations.”

68 **Bartram v. Robertson**, 122 U.S. 116 (1887).

but something more than that which was conceded France, and, therefore, can not be within purview of the most-favored-nation clause of the treaty with His Britannic Majesty without consideration, which has not been given.”⁶⁹

This “American” interpretation of a “neutral” most-favoured-nation clause thus insisted on a reciprocal bilateralism in all trade relations between the United States and foreign nations. Trade concessions given to one State would *not* automatically be extended to a third State. And while the treaty practice of the American Union was not all about protectionism,⁷⁰ its trade philosophy remained predominantly mercantilist throughout the long nineteenth century.

5. The (Early) Twentieth Century: Free Trade Multilateralism (and its Limits)

5.1. The Inter-War Years I: The Emergence of the “Autarkic” Commercial State

By the turn of the twentieth century, the United States had become the greatest economic power of the world.⁷¹ Free trade initiatives would thus have to be endorsed by her. Yet her new status as an economic superpower did not immediately persuade the United States of the advantages of free global trade. On the contrary, it maintained its protectionist philosophy after the outbreak of the First Great War.⁷² But the Great War had also ended the era of free trade within Europe. After the war, all European economics returned to protectionist policies. This *neo*-protectionism was the result of their decision to retain some wartime commercial controls so as to stabilise their national markets.⁷³ The economic consequences of the war (and the Versailles peace)

69 Shaw v United States (supra n.66), 433-434

70 The treaty practice of the young American nation was indeed not all about protectionism. In fact, it gradually cultivated and extended a number of clauses that were to become a staple of modern international trade law. U.S. American treaty practice thus significantly developed the national treatment principle (cf. 1815 Treaty with Britain, and the 1831 Treaty of Amity, Commerce and Navigation between the United States and the United Mexican States), and it also revived the (older) idea of independent arbitration (cf. 1794 Jay Treaty).

71 Bairoch & Burke, European trade policy, 1815–1914 (supra n.40), 137.

72 Ibid., 144-45.

73 For an analysis of this point, see: Nolde, Droit et technique des traités de commerce (supra n.2), 385-6.

would thus leave a strong mark on the national economies on the European continent.⁷⁴

States searching for economic stability soon moved towards economic autarky.⁷⁵ The most-favoured-nation clause would thus “never regain[] its former firm position as the general foundation of commercial treaty policy”.⁷⁶ But worse: in an attempt to “isolate” national markets from the world economic crisis,⁷⁷ many States not only opted for high tariffs, “[i]n an effort to insulate themselves from economic depression, and to capture dwindling markets from competitors, foreign nations applied on a wider scale than ever before the most effective device yet invented to diminish trade – the quantitative restriction on imports”.⁷⁸ The revival of such “neo-mercantilist” devices ushered in a period of “beggar-thy-neighbour” policies that have been – justly or unjustly – identified with the 1930 Smoot-Hawley Tariff. The latter provided a fatal signal during the Great Depression against free trade; and, unsurprisingly, the British response to this American affront was swift. Britain quickly suspended its historical commitment towards free global trade and introduced a general tariff that was complemented by an “Imperial Preference System” for trade within the British Empire.⁷⁹ And with America and Britain having turned away from global free trade by 1932, the achievements of the nineteenth century appeared to have been completely lost.⁸⁰

74 In the words of Clair Wilcox, *A Charter for World Trade* (New York: Macmillan, 1949), 5: “The foundations of economic liberalism were shaken by the First World War. The economy of Europe was disorganized; productive facilities were destroyed; channels of trade were broken; heavy debts were incurred. Nationalism and protectionism were stimulated by the revision of boundaries and the creation of new states.”

75 Scheuner, *Die völkerrechtlichen Grundlagen der Weltwirtschaft in der Gegenwart*, (supra n.60), 40 as well as 45.

76 Ustor, *First report on the Most-Favoured-Nation Clause* (supra n.54), 163.

77 For a beautiful account of 1930s economic dilemmas, see: Douglas A. Irwin, *Trade Policy Disaster: Lessons from the 1930s* (Cambridge: MIT Press, 2011), esp. Chapter 1.

78 S. D. Metzger, *United State Foreign Trade: Past, Present and Future*, (1961) 6 *Villanova Law Review* 503-513, 505.

79 Gilbert R. Winham, *The Evolution of International Trade Agreements* (Toronto: University of Toronto Press, 1993), 30.

80 Yet there were also some positive signs during the interwar period. The United States had – surprisingly – come to embrace the “European” version of the most-favoured-nation clause. This change of policy occurs in the mid-1920 and can be seen reflected in the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany. For an analysis of the changing US practice, see in particular: Jacob Viner, *The Most-Favored-Nation Clause in American Commercial treaties*, (1924) 32 *Journal of Political Economy* 101-129. More importantly still, the 1934 American Reciprocal Trade Agreements Act delegated the power to conclude future (reciprocal) liberalisation agreements to the President. It was this provision that would – again somewhat surprisingly – become the central American platform for trade liberalisation in the future.

5.2. The Inter-War Years II: The Emergence of Economic Multilateralism

The idea of an economic league had, unlike the idea of a military league,⁸¹ still no real intellectual pedigree by the early twentieth century. The much agreed general idea was still that “[e]conomic sovereignty reigns supreme”.⁸² But the idea that economic coordination between States was necessary to stabilise the world economy slowly emerged after the end of the First World War.

One first expression of this changed mood was the League of Nations. While not designed to directly assist in the post-World-War-I economic reconstruction, the League was nonetheless partially tasked to assist in the re-calibration of the world economy.⁸³ The textual foundations of this economic task were remarkably weak. Indeed: tariffs and other commercial regulations continued to be seen as “solely within the domestic jurisdiction” of each State;⁸⁴ and the Covenant modestly asked its Member States, subject to existing and future international conventions, to provide for the “equitable treatment for the commerce of all Members of the League”.⁸⁵ The League nevertheless managed to organise a series of important economic conferences that produced a range of interesting (draft) conventions on central problems of international trade. For example: the 1927 Convention on the Abolition of Import and Export prohibitions and Restrictions, invoking the League of Nations,⁸⁶ here stated:

81 See famously: Charles de Montesquieu *The Spirit of the Laws* (ed: Anne M. Cohler et al.) (Cambridge: Cambridge University Press, 1989), esp. 131

82 Georg Schwarzenberger, *Equality and Discrimination in International Economic Law*, (1971) 25 *Yearbook of World Affairs* 163-181.

83 **Patricia Calvin, *Securing the World Economy: The Reinvention of the League of Nations, 1920-1946* (Oxford University Press, 2013), 1. For an analysis of the economic aspects of the League, see also: Georg Schwarzenberger, *Economic World Order?* (Manchester: Manchester University Press, 1970), esp. Chapter 3.**

84 League of Nations Covenant, Article 15 (8).

85 League of Nations Covenant, Article 23 (e).

86 Preambles 1-5 state: “Having regard to the resolution of the Assembly of the League of Nations dated September 25th [29th], 1924; Being guided by the conclusions of the International Economic Conference held at Geneva in May 1927, and agreeing with the latter that import and export prohibitions, and the arbitrary practices and disguised discriminations to which they give rise, have had deplorable results, without the grave drawbacks of these measures being counterbalanced by the financial advantages or social benefits which were anticipated by the countries which had recourse to them; Being persuaded that it is important for the recovery and future development of world trade that Governments should abandon a policy which is equally injurious to their own and to the general interest; Being convinced that a return to the effective liberty of international commerce is one of the primary conditions of world prosperity; and Considering that this object may best be achieved by resort to simultaneous and concerted action in the form of an international convention”.

“Article 2

Subject to the exceptions provided for in the following articles, the High Contracting Parties undertake to abolish within a period of six months from the date of the coming into force of the present Convention, in so far as the respective territories of each of them are concerned, all import and export prohibitions or restrictions, and not thereafter to impose any such prohibitions or restrictions. (...)

Article 4

The following classes of prohibitions and restrictions are not prohibited by the present Convention, on condition, however, that they are not applied in such a manner as to constitute a means of arbitrary discrimination between foreign countries where the same conditions prevail, or a disguised restriction on international trade:

1. Prohibitions or restrictions relating to public security.
2. Prohibitions or restrictions imposed on moral or humanitarian grounds. (...)
4. Prohibitions or restrictions imposed for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites.
5. Export prohibitions or restrictions issued for the protection of national treasures of artistic, historic or archaeological value. (...)
7. Prohibitions or restrictions designed to extend to foreign products the regime established within the country in respect of the production of, trade in, and transport and consumption of native products of the same kind. (...)

This first attempt to create multilateral economic treaties nevertheless failed. Unable to deal with the fervent economic nationalism unleashed by the Great Depression, the League experiment progressively faded away in the inter-war period. Nonetheless: the idea that something had to radically change in the organisation of the world economy had gained ground and – ultimately – germinated after the Second World War.

5.3. The Modern Economic Order I: The (Failed) International Trade Organisation

The “close connection” between economic disorder and the Second World War had fostered a belief that a peaceful world order could only be founded on a stable *international* economic order.⁸⁷ The view gradually emerged that classic international law was “ill adapted to the present interdependent world” and that “[t]he economic sovereignty of states must be limited by rules of positive law if a more stable and prosperous world order is to be achieved”.⁸⁸ The economic unit of the nation state was

87 Rolf Stödter, *Völkerrecht und Weltwirtschaft*, (1950/51) 13 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67-97, 79.

88 Quincy Wright, *International Law and Commercial Relations*, (1941) 35 *Proceedings of the American Society of International Law* 30-50, at 37.

henceforth considered as “partly too large and partly too small”. It was too large for a “genuinely free and neighbourly communal life”; and too small “for those intellectual, political and economic relations which today can only flourish satisfactorily in an international community”.⁸⁹ The 1945 United Nations Charter consequently dedicated a chapter to “international economic and social cooperation” and here specifically set up the Economic and Social Council.⁹⁰

However: the most elaborate and institutionally courageous manifestation of this new belief in international economic originations was the Havana Charter for an “International Trade Organization”. The idea to establish such an international organisation dated back to the First World War;⁹¹ yet, serious diplomatic efforts would only follow after the end of the Second World War. A draft Charter was completed in 1947,⁹² and the envisaged International Trade Organization was designed to become one of the specialised agencies of the United Nations.⁹³ In light of “the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations”, the central purpose of the ITO was “[t]o promote on a reciprocal and mutually advantageous basis the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce”.⁹⁴ In order to achieve this aim, the Charter contained a “Commercial Policy” Chapter that comprised provisions on “General Most-favoured-nation Treatment”,⁹⁵ “Reduction of Tariffs and Elimination of Preferences”,⁹⁶ “National Treatment on Internal Taxation and Regulation”,⁹⁷ and a provision on “General Elimination of Quantitative Restrictions”.⁹⁸

89 Wilhelm Röpke, *International Order & Economic Integration* (Dordrecht: Reidel Publishing Company 1959), 45.

90 United Nations Charter, Chapters IX and X. For an early discussion of the Economic and Social Council, see: Charles H. Alexandrowicz, *World Economic Agencies: Law and Practice* (London: Stevens & Sons, 1962), Chapter 11

91 Wilcox, *A Charter for World Trade* (supra n.74), 37.

92 **Ibid., 40 et seq. A reproduction of the Charter can be found in *ibid*, 231. On the genesis of GATT, see more generally: Thomas W. Zeiler, *Free Trade, Free World: The Advent of GATT* (Chapel Hill: University of North Carolina Press, 1999), and even more recently: Douglas A. Irwin, Petros C. Mavroidis & Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2009).**

93 C. Wilcox, *A charter for World Trade* (supra n.74), 153.

94 ITO Charter, Article 1.

95 *Ibid.*, Article 16.

96 *Ibid.*, Article 17.

97 *Ibid.*, Article 18.

98 *Ibid.*, Article 20.

With over one hundred articles, the Charter was a “ponderous” document,⁹⁹ which was deliberately designed to become the “Magna Carta” of world trade. The world was however not yet ready for its comprehensive and institutional approach;¹⁰⁰ and a narrower agreement, drafted in parallel with the ITO Charter, therefore gradually moved from the periphery to centre stage: the 1947 General Agreement on Tariffs and Trade (GATT).¹⁰¹

5.4. The Modern Economic Order II: The General Agreement on Tariffs and Trade

In light of the Havana Charter’s uncertain future, the 1947 GATT emerged as a truncated version that would – provisionally – apply until a final agreement on the ITO Charter was reached. Confined to tariffs and trade,¹⁰² it largely reproduced the “Commercial Policy” Chapter of the Havana Charter but had dropped its broader economic and social provisions; and most importantly: it had been drafted without any “institutional” base.¹⁰³ The GATT was thereby perceived “as an interim arrangement, not an organization, until the ITO charter could be formally approved by [the U.S. American] Congress”.¹⁰⁴ (The reason behind this non-institutional approach was to allow its conclusion as an executive agreement by the President of the United States, that is: a conclusion outside the Article II procedure under the Senate must consent.¹⁰⁵)

99 Georg Bronz, *The International Trade Organization Charter*, (1949) 62 *Harvard Law Review* 1089-1125, 1091.

100 The Charter was dead by 1950 when the United States announced that it would not ratify the Charter. The Charter would nonetheless occupy an important place in the post-war discussions on global trade, cf. Georg Schwarzenberger, *The Principles and Standards of International Economic Law*, (1966) 117 *Collected Courses of the Hague Academy of International Law* 1-98, 89: “The Havana Charter of 1948, although it never came into force, is still worth remembering as the high watermark in the post-1945 world of liberal and social democratic thinking in the field of international economic relations.”

101 On the relationship between the ITO and the GATT drafting history, see Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (Salem: Butterworth Legal Publishers, 1990), Chapters 1-6.

102 Georg Bonz, *An International Trade Organization: The Second Attempt*, (1955-56) 69 *Harvard Law Review* 440-482, 441.

103 John H. Jackson, *World Trade and The Law of the GATT* (Indianapolis: Bobbs-Merrill, 1969), 31: “GATT draftsmen contemplated that GATT would depend on the ITO for its ‘organizational’ base. This the General Agreement itself does not mention any organization; indeed, even original references to an „Interim Committee“ were changed to ‘CONTRACTING PARTIES acting jointly.’”

104 Irwin, Mavroidis & Sykes, *The Genesis of the GATT* (supra n.92), 96.

105 The (old) 1947 GATT was never submitted to the Senate, nor to Congress. Instead, it rested on the “Protocol of Provisional Application”, which had been signed and proclaimed by President Truman under powers delegated by the Reciprocal Trade Agreement Act (as amended in 1945). This choice in favour

But as so many things in life, nothing proves more permanent than the transient; and the “provisional” GATT was to become the keystone of post-war international trade coordination.

What type of economic “organisation” was the GATT? The GATT lacked an institutional apparatus for decision-making;¹⁰⁶ and for conceptual purists, it was therefore “an article of faith that the GATT is not an organisation”.¹⁰⁷ Decision-making within the GATT was consequently not allocated to a formal “organ” but to the collectivity of the contracting parties acting jointly. This intergovernmental arrangement also extended to the resolution of inter-state disputes with the GATT having made a conscious choice “to refrain from the adjudicatory approach to dispute settlement”.¹⁰⁸ Unlike the United Nations Charter, there was thus no reference to the International Court of Justice; nor did the GATT establish a special court to adjudicate disputes for its parties.¹⁰⁹ (The institutional non-existence of the GATT would only be remedied half a century later, in 1995, with the foundation of the World Trade Organisation.)¹¹⁰

What substantive legal principles underpin the free trade multilateralism offered by the GATT? The GATT codifies the three classic “free trade” principles that had developed during the nineteenth century: the most-favoured-nation principle, the national treatment principle, and the liberal principle that prohibited import restrictions generally. These three principles are expressly acknowledged as the three

of a “presidential” executive agreement was highly controversial, especially as it seemed designed to circumvent Senate consent for a treaty creating an “International Trade Organization”. Nonetheless, for an excellent apologia of the executive route, see: John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, (1967-68) 66 *Michigan Law Review* 249-332, esp. at 273: “Thus, in answer to the question whether the President had statutory authority to enter GATT, it seems clear that he did. The wording of the statute, legislative history, and the known precedents of prior trade agreements at the time of the 1945 Act combine to show a delegation of authority to enter into all particular provisions of GATT[.]”

106 For an overview of the weak “institutional” elements of the original GATT, see: Kenneth W. Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970), Chapter 19.

107 *Ibid.*, 335.

108 *Ibid.*, 351.

109 The task of “adjudication” was left to ad hoc panels of experts that operated at the behest of the collectivity of the contracting parties. For a wonderful early history of these GATT adjudicatory system, see: Hudec, *The GATT Legal System and World Trade Diplomacy* (supra n.101), Chapters 7-10.

110 The WTO finally offered a “common institutional framework” for a number of multilateral and plurilateral agreements – including the 1947 GATT. The tasks of this WTO were generally defined as follows (WTO Agreement, Article III:1): “The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.”

core principles of modern world trade; yet in doing so, the GATT made a number of specific “systemic” choices.

First, it makes a fundamental distinction between tariff barriers and non-tariff barriers with only the former being seen as a legitimate instrument of protectionism. A State wishing to limit its international trade with the outside world can therefore, in principle, no longer employ quantitative restrictions or discriminatory national laws but it must channel its “protectionist” ambitions into tariffs. Behind the special status of tariffs as the sole legitimate instrument of economic boundary control lie historical as well as pragmatic reasons.¹¹¹ The central provisions on tariffs are thereby found in Articles I and II GATT. Article I here encapsulates the unconditional (European) “most-favoured-nation” principle,¹¹² while Article II engages the contracting States in a process of “binding” tariff reductions.

Second, within the class of non-tariff barriers, the GATT draws an important distinction. It here distinguishes between two types of national measures, namely: “internal” measures and “border” measures. The former are subject to a national treatment principle, which demands that a (host) State must not discriminate against foreign goods.¹¹³ Article III GATT consequently targets *internal* taxes as well as regulatory measures that affect the *internal* sale or use of a foreign good. For border measures, by contrast, Article XI GATT generally considers all non-tariff border measures that constitute quantitative restrictions as illegal.¹¹⁴

111 Dam, *The GATT: Law and International Economic Organization* (supra n.106), 25 et seq.

112 Article I (1) GATT states: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

113 For these “internal” measures Article III:1 GATT generally states: “The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.”

114 The core prohibition on quantitative restrictions is found in Article XI:1 GATT and states: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

Finally, according to a third choice, not all restrictions of international trade are outlawed. The GATT allows for a number of public policy exceptions in Article XXIV GATT; and it – importantly – also recognizes a special exception for regional (economic) unions in Article XXIV. The GATT here showed a remarkable tolerance towards regional economic organisations, like “Customs Unions”.¹¹⁵ This regional exception flew into the face of one of the major purposes of the GATT: the eradication of trading preferences, and in particular the British Commonwealth preferences. Yet when the GATT was drafted, customs unions in particular were seen as beneficial towards the gradual and general liberalisation of international trade.¹¹⁶ For no one could imagine “that post-World War II commercial policy would be dominated by the rise of a multitude of regional arrangements which would challenge the draftsmen’s universalist principles in the most fundamental manner”.¹¹⁷

6. Conclusion

Trade and commerce had become a “reasons of state” in the eighteenth century.¹¹⁸ The mercantilist State competes with all other States; and in its attempt to control its national market and its international trade balance, the modern nation state developed a range of legal instruments that have structured international economic law until today.

The advantages of economic cooperation and trade were however not unknown to eighteenth-century philosophers: “The natural effect of commerce is to lead to peace. Two nations that trade with each other become reciprocally dependent; if one has an interest in buying, the other has an interest in selling, and all unions are founded on

115 Customs Unions are economic leagues in which the free movement of all goods within the customs area is guaranteed; and in order to achieve this aim, all intra-union restrictions are removed while a common external customs tariff is created for goods from outside the customs union.) The idea of a customs union has been said to be a German invention (see: Nolde, *Droit et technique des traités de commerce* (supra n.2), 440). For the great study of the nineteenth century German Customs Union, see: William O. Henderson, *The Zollverein* (London: Cass & Company, 1959).

116 This “romantic” view changed somewhat after 1950 with the publication of Jacob Viner’s “The Customs Union Issue” (London: Stevens, 1950).

117 Dam, *The GATT: Law and International Economic Organization* (supra n.106), 274.

118 This is the famous pronouncement by David Hume, see: Nakhimovsky, *The Closed Commercial State* (supra n.7), 80.

mutual needs.”¹¹⁹ And with the publication of Smith’s “Wealth of Nations”, the idea that free international trade was also economically beneficial gradually gained prominence. The long nineteenth century indeed saw – bilateral – attempts to implement the new economic philosophy; yet two World Wars and a Great Depression destroyed almost all trade liberalisation already achieved, and the neo-mercantilist policies of the 1920s and 1930s indeed seemed to turn the wheels of commerce backwards. The shockwaves of the Second World War had nonetheless strengthened the belief that a peaceful world order could only be founded on a stable economic order; and in its aftermath, a number of institutional attempts to liberalise – and harness – the world economy were made.¹²⁰

The most ambitious attempt here was the (failed) International Trade Organisation, which was subsequently replaced by the narrower 1947 General Agreement on Tariffs and Trade. Nevertheless: the GATT – together with the Bretton Woods arrangements for monetary cooperation – has offered the legal framework for the dramatic rise of international economic cooperation and free trade in the second half of the twentieth century. It has successfully induced the move from the “closed” State to the “open” commercial State and represents one of the prime illustrations of the changing structure of international law from a law of (economic) co-existence to a law of (economic) cooperation.¹²¹ It goes nonetheless to far to identify this international law of cooperation with “international federalism”.¹²² (For although the States commit themselves to binding international rules that limit their external sovereignty, contemporary international economic law continues to principally respects the *internal* sovereignty of the States over their own national market.) Yet federal market structures can increasingly be found in *regional economic unions*, such as the European Union. But this new phase in the transition from the closed to the open commercial state is for another time.¹²³

119 de Montesquieu, *Spirit of the Laws* (supra n.81), 338.

120 For classic post-war studies on economic integration generally, see: Bela Balassa, *The Theory of Economic Integration* (London: Allen & Unwin, 1961); Jan Tinbergen, *International Economic Integration* (Amsterdam: Elsevier Publishing, 1965), Jacob Viner, *Studies in the Theory of International Trade* (New York: Harper and Brothers, 1965); and Fritz Machlup, *A History of Thought on Economic Integration* (London: Macmillan Press, 1977).

121 Friedmann, *The Changing Structure of International Law* (supra n.8).

122 Jackson, *World Trade and the Law of GATT* (supra n.103), 772 speaks of “international federalism”, that is: “the problem of determining to what degree the international regulatory measures should impinge upon domestic social and political decisions”. But see already Röpke, *International Order and Economic Integration* (supra n.88), 46: “international federalism”.

123 But see: Robert Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford: Oxford University Press, 2017).