Free Trade *Revolution*

Beware: Today's "constitutional convention" will shape the global trade landscape for years to come.

BY SIMON LESTER

In the trade world, most of the talk these days revolves around two "mega-regional" trade negotiations, one on each side of the North American continent: the Transatlantic Trade and Investment Partnership (TTIP), and the Trans-Pacific Partnership (TPP). The conversation surrounding these trade talks has focused on issues such as regionalism versus multilateralism, efforts to address regulatory barriers to trade, and the development of new disciplines for state-owned enterprises. What is missing from the debate, however, is recognition of an important conceptual change in the nature and coverage of trade agreements: Countries are no longer negotiating simple free trade agreements; rather, they are negotiating global economic constitutions. That is, they are negotiating the basic principles and laws that govern international economic activity. In effect, through these various negotiations, we are in the midst of a constitutional convention for free trade. The architecture and rules that we choose will shape global economic governance for years to come.

CONSTITUTIONAL VISIONS OF FREE TRADE

In the early days of the free trade debate, free trade as a policy was simply a contrast with protectionism. Protectionists wanted to shield domestic producers from foreign competition; free traders wanted that competition to take place, due in large part to the ben-

Simon Lester is a trade policy analyst at the Cato Institute.

THE INTERNATIONAL ECONOMY
THE MAGAZINE OF INTERNATIONAL ECONOMIC POLICY
220 I Street, N.E.
Suite 200
Washington, D.C. 20002
Phone: 202-861-0791
Fax: 202-861-0790
www.international-economy.com
editor@international-economy.com

efits to consumers. The main instrument of protection at this time was the tariff. Protectionists wanted high tariffs, whereas free traders wanted low or zero tariffs.

Early trade agreements consisted primarily of mutual agreements to reduce tariffs. (They also put limits on the use of an alternative border barrier, import quotas). By the 1930s, however, governments had recognized that domestic laws (such as discriminatory government procurement and discriminatory taxes) could also be used for protectionism. In response to the rise of this new protectionism, governments began to put detailed legal obligations into trade agreements in order to constrain such measures.

We are in the midst of a constitutional convention for free trade.

However, the scope of these new rules was never well defined. Sometimes the discussion centered around the amorphous concept of "trade barriers," the meaning of which is subject to a wide range of interpretations. As a result, there were opportunities to expand the rules far beyond their original scope. Over the years, various interest groups developed many creative arguments to the effect that a particular issue affected trade in some way, and thus acted as a trade barrier which needed trade rules to govern it.

In the abstract, the subtle distinctions may be difficult to perceive, as all of these rules relate to trade in some way. The following examples of areas now covered by trade agreements help illustrate the expanding scope of the rules, and how trade agreements have moved from simple anti-protectionism agreements to a broader concept involving "constitutional" principles.

As noted, lower tariffs, the removal of import quotas, and a general principle of nondiscrimination in relation to foreign goods and services are standard elements of any trade rules. Such measures all affect trade by discriminating against foreign competition. Without obligations that constrain protectionism, there would not be any free trade and thus no real free trade agreement.

More controversially, however, there are various other issues that have been included in trade talks and agreements over the years. These rules are difficult to characterize. They are often discussed as being "trade related," but that does not tell us much. More accurately, many of these rules could be seen as a form of global economic regulation or global administrative law.

One example is intellectual property. To what extent should free trade agreements protect intellectual property rights? There is no question that the level of intellectual property protection affects trade. Stronger protection will increase exports and lower imports for those countries with the most intellectual property; and weaker protection will increase exports and lower imports from countries without much intellectual property. But what is the right level of such protection? There have been some calls in the United States for loosening the domestic protection of patents and copyrights in recent years. At the same time, though, the U.S. government continues to push its trading partners to tighten their own protections.

Another example is the treatment of foreign investors. Some international trade and investment agreements provide that foreign investors must be offered "fair and equitable treatment," and be given a direct right of action to sue host governments in an international tribunal for perceived violations. Do these rules go beyond liberalization, and instead mostly offer up litigation opportunities for big multinational companies? A rule that prohibits "investment protectionism" (discriminating against foreign investors) makes sense, but a broad and vague legal obligation like "fair and equitable treatment" seems to elevate domestic administrative/constitutional law concepts to international status, which goes much further. Some countries, including Australia, have questioned the need for these rules, and there are differences in views among the United States and European Union on the appropriate scope of these rules.

Countries are no longer negotiating simple free trade agreements; rather, they are negotiating global economic constitutions.

Labor and environmental protections have also been covered in recent trade agreements. A number of

groups in developed countries have expressed concerns that weak labor and environmental standards abroad "unfairly" affect trade by giving developing countries an advantage. In recent years, legal obligations in these areas have been included in trade agreements in order to promote the enforcement of domestic laws, and even incorporate legal principles from other international organizations.

Finally, some trade rules go beyond trying to identify protectionist laws and regulations, condemning measures that are simply irrational or are not science-based, even though they are not protectionist. Should international trade rules try to make domestic regulation more effective in this way? Is this an attempt to make the rest of the world regulate "more like us"? It is also possible that these rules are intended to be a proxy for identifying protectionism. If rules are not science-based, they must be protectionist, the theory goes. At the same time, though, it seems clear that such rules are over-inclusive, and that not all laws and regulations which are not science-based are protectionist.

COMPETING CONSTITUTIONS AND AN OPPORTUNITY FOR DEBATE

Currently, the U.S. government is in the process of drafting not one, but two, free trade "constitutions," the TTIP and the TPP. The TTIP is being negotiated with the European Union, although there has been a suggestion that Canada and Mexico might join these talks as well. (Mexico already has a free trade agreement with the European Union, and Canada is far along in its process of negotiating one). The TPP is being negotiated with a number of countries in the Pacific region, with Japan recently having joined in, thereby substantially increasing the economic relevance of this agreement. (And for good measure, there is already a global trade constitution in the form of the World Trade Organization.)

These competing constitutions provide an opportunity to debate the issue of what should be in trade agreements and help shape the future of global trade governance. Over the next several years, as the TTIP and TPP progress, this aspect of trade talks should be just as prominent as the traditional issue of protection for domestic industries.

The debate should not just be pro or con; it should be about what issues trade agreements should cover.

Unfortunately, for the most part, the actual debate has mostly emphasized the yes-or-no question of whether or not to support free trade agreements in the abstract. The question is presented simply as whether one is for or against whatever trade rules are being proposed, with the details often obscured. All of the various legal obligations are lumped together as part of the free trade package. As noted, however, this ignores important differences in the concept of what constitutes free trade. It misses the nuances of the distinctions between the various possible rules. The debate should not just be pro or con; it should be about what issues trade agreements should cover. For example, does intellectual property belong in there? If so, what level of protection should be provided? Negotiations over a "constitution" for free trade cannot simply gloss over these issues.

"Free trade" as practiced in free trade agreements is not a uniform concept.

FREE TRADE CONSTITUTIONAL CONVENTION

As the trade negotiations with the European Union and with the Pacific region progress, remember that "free trade" as practiced in free trade agreements is not a uniform concept. There are a range of opinions on what should be covered and what constitutes free trade. My own view is that free trade rules should focus on the general principle of fighting protectionism. By contrast, broadening the trade regime into a general global governance system goes too far.

But regardless of how one comes out on this issue, there is no need to accept that whatever terms are used in a particular agreement as it is presented for signing are the only options for free trade. In reality, we are in the midst of something like a constitutional convention for free trade. To get a free trade constitution that works, everyone should take advantage of this opportunity to participate and to engage fully in the debate. It is not enough to be for or against free trade. A larger question also should be addressed: What conception of free trade are you for? ◆