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## From Empire to Austerity: The Golden Thread of International Economic Law

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### 1. Introduction: International Economic Law and Neoliberalism in the Post-Colonial Period

Long before the politics and practices of austerity arrived on European shores as the neoliberal response to the series of “crises” beginning in 2008, the imposition of austerity regimes was one of the potent weapons used by the Bretton Woods institutions to discipline states, especially states forming part of the so-called “developing world”.

In this short paper I comment on the way in which the post-colonial life of international economic law has participated in the creation of the conditions for the extension of the neoliberal politics of austerity from the former subjects to the former metropolitan centre(s) of empire. My argument is, essentially, that the post-colonial “development” project, which has been a main concern of international economic law and which has been central to the accumulation of capital in the post-second world war period, has now been rolled out globally in a new version of empire.

In order to make out this argument, the paper is divided into three substantive sections. First, the paper considers the origins and structure of the current system of international economic law, which it argues are central to understanding the way in which the system facilitates capital accumulation and the generation of interstate competition for mobile capital. Secondly, the paper turns from the general question of systemic facilitation of capital accumulation to the more specific question of the way in which international economic law mediates the relationship between development in the post-colonial period and global capital accumulation. In the final section, the paper focuses on the embedding of neoliberal strategies in international economic law and its consequent role in the globalization of austerity.

### 2. Origins and Structure of International Economic Law

The current international legal order, which has emerged since the end of the Second World War, embraces a kind of schism between international economic law and public international law, marking a bifurcation in international law along the lines of the putative division between the

political and the economic.<sup>1</sup> This bifurcation appears to be rooted in the origins of the Westphalia System, with respect to which Arrighi remarks that “[t]his reorganization of political space in the interest of capital accumulation marks the birth not just of the modern inter-state system, but also of capitalism as world system”.<sup>2</sup> Arrighi is far from being the only prominent commentator to have noticed that this division between the political and the economic is critical to the modern system of global capitalism.<sup>3</sup> The same observation is fundamental to Hirschman’s argument that the division between the political and the economic was essential to controlling the power of despotic rulers in the pre-democratic period. The division was a political question in the sense that the power of the economic system was regarded as a constraint on the operation of the political system. In the nineteenth century when Western politics had developed its own forms of democratic restraint, the economic system was liberated from its role in politics. Instead, however, of democratic politics taking up the role of constraining the power of the economic system, the global capitalist system was liberated from much in the way of political restraint and so effectively de-politicized.<sup>4</sup> Nevertheless, as this paper will argue, the neoliberal project has never abandoned its central concern to ensure that capitalism is protected from the incursions of democracy.<sup>5</sup> The split between the political and the economic in the newly re-made post-war international law system was a step in what Slobodian describes as the eventual “encasing” of capitalism through international regulatory structures.<sup>6</sup>

In addition to de-politicizing - or attempting to de-politicize - the international economic law system, the split between the political and the economic in the post-war international legal system also lead to the fragmentation of regulation. The international law principles governing human rights, labour rights and development are particularly affected by the fragmentation of regulation. Arguably different concepts of human rights, for example, operate in the two parts of the system.<sup>7</sup> Maybe even worse, labour rights seem to have completely disappeared from the international economic law system. And specifically in relation to development, the dedicated instrumentalities are all part of the United Nations system, but the real action (or damage) is taking place in the international economic law system. Thus, it can be seen that de-politicization and fragmentation operate in tandem, as part of the neoliberal project of encasement of capitalism to protect it from the sorts of effusions of democratic principles that might be seen to be embedded in things like human rights and labour rights.

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<sup>1</sup> Sundhya Pahuja, “Trading Spaces: Locating Sites for Challenge within International Trade Law” (2000) 14 *Australian Feminist Law Journal* 38; Fiona Macmillan, “International Economic Law and Public International Law: Strangers in the Night” (2004) 6 *International Trade Law and Regulation* 115.

<sup>2</sup> Giovanni Arrighi, *The Long Twentieth Century: Money, Power & the Origins of Our Times* (Verso 2002), 44.

<sup>3</sup> See also, eg, Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (first published 1944, Beacon Press, 2000); Albert O Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (New Jersey, Princeton University Press, 1977, reprinted 1997); Samir Amin, *Capitalism in the Age of Globalization* (London & New York, Zed Books, 1998); John Gray, *False Dawn: The Delusions of Global Capitalism* (New York, New Press, 1998); Ellen Meiksens Wood, *Empire of Capital* (Verso 2003).

<sup>4</sup> Dimitris Milonakis and Ben Fine, *From Political Economy to Economics: Method, the social and the historical in the evolution of economic theory* (Routledge 2009); Fiona Macmillan, “The World Trade Organization and the Turbulent Legacy of International Economic Law-making in the Long Twentieth Century” in Julio Faundez and Celine Tan (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar, 2010); Benjamin Selwyn, *The Global Development Crisis* (Polity 2014), ch 5.

<sup>5</sup> See Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018).

<sup>6</sup> Slobodian, n 5 above.

<sup>7</sup> Pahuja, n 1 above.

This fragmentation and de-politicization has enabled the imposition of conditions attached to lending by the World Bank and the International Monetary Fund (IMF) (the Bretton Woods institutions) in their role as lenders (often of last resort) to states. Structural adjustment using loan conditionality has become one of the famous ways in which these institutions put pressure on developing countries (and other countries in need of emergency finance) to change their laws and institutions.<sup>8</sup> Distressing cases of the damage caused by this type of loan conditionality abound.<sup>9</sup> Not only do these forms of conditionality require the Westernization of the law and institutions of the recipient states, they also reflect the tenets of neoliberalism, especially as expressed in the Washington Consensus. Consequently, they are driven by ideas like reduction of the public sector, low taxation, privatization of public services, limitation – or even elimination – of labour standards, liberalization of inward FDI, and austerity. In other words, conditionality is driven by the needs of global capital.

The use of the concept of the rule of law as a means to facilitate capital accumulation and drive interstate competition for mobile capital has also been achieved through obligations imposed by the third major institution of international economic law, the World Trade Organization (WTO), which require national laws to be brought into conformity with its rules. Here we can see the mutually supportive relationship between homogenisation of markets through “free trade” and homogenisation of law. The arrival of the WTO not only constituted the perfection of the neoliberal encasement strategy, but also demonstrated the importance of law as the technology for implementing this strategy.<sup>10</sup> The effects of the fragmented system of international law and the de-politicization of international economic law are also fundamental in relation to the WTO. While the Bretton Woods institutions have, for example, developed their own concepts of human rights in order to discipline states to which they have given financial accommodation, the WTO appears to embrace the position that things like human rights and labour standards are outside its sphere of operation. Perhaps the honesty is refreshing, but the failure to acknowledge its role in the perpetuation of human misery as a result of downward pressure on labour standards, which are seen as constituting non-tariff barriers to trade, is not appealing.

### 3. Colonialism, Post-colonial Development and Global Capitalism

A critically important process that informs the birth of the international economic law system, and especially its entanglement with development, is the post-war process of decolonization. It was essential to enmesh newly decolonizing states in the remade system of international law in order,

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<sup>8</sup> See, eg, Faundez, n 4 above; Richard Peet, *Unholy Trinity: The IMF, World Bank and the WTO* (Zed Books 2003), ch 4; Celine Tan, *Governance Through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011).

<sup>9</sup> See, eg, Michel Chossudovsky, “India under IMF Rule” (1993) 28 *Economic and Political Weekly* 385; B. Rajagopal, *International Law From Below: Development, Social Movements, and Third World Resistance* Cambridge (CUP 2003), ch 5

<sup>10</sup> Slobodian, n 5 above, esp 7-13, citing as an example of this neoliberal approach one of the legal architects of this new order, Ernst-Ulrich Petersmann, “International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order” Ronald St John Macdonald & Douglas M Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff, 1983).

apart from anything else, to continue to extract resources from them on favourable terms.<sup>11</sup> This question of extraction of resources is a critical theme in international economic law in a number of ways. First, the principle of most favoured nation (MFN) treatment in WTO law operates to protect extraction of primary resources by countries lacking them on favourable terms. Secondly, the doctrine of comparative advantage upon which the idea of free international trade is based has forced many resource rich countries, mostly from the global south, into the position of suppliers of primary resources without having the opportunity to develop manufacturing capacity. Thirdly, extraction of biological and knowledge-based resources seems to be one of the primary drivers behind the international patent system, which was reinforced with the conclusion of the WTO and its Agreement on Trade-Related Aspects of Intellectual Property (the TRIPs Agreement). Fourthly, the internalization of trade within the domains of multinational corporations, which forms part of the post Second World War global economic landscape,<sup>12</sup> has also operated to extract capital and other resources from weaker states. This is because the direct relationship between multinational corporations and states of the global south has mostly taken place through a process of FDI, often on extremely disadvantageous terms.<sup>13</sup>

Access to resources, in other words, has been essential to capitalist expansion. And capital accumulation and state power were, and continue to be, linked. In the colonial period this relationship was expressed through the joint stock corporations, which were state backed trading enterprises, the role of which was to advance both empire and capitalist expansion. Arrighi recognises the role of these corporations in his argument that capitalism is a history of cycles of capitalist accumulation (meaning success in attracting mobile capital) dominated by a leading agency of capital accumulation in the form of a state.<sup>14</sup> In Arrighi's theory each of these cycles of state led capital accumulation follows the same trajectory. That is, when capital can longer be profitably employed by use in the development of new markets that expand the productive capacity of the existing markets, then a switch occurs and excess profits are ploughed into the trade in money. That is, a switch is made from trade to finance.<sup>15</sup> Arrighi argues that interstate competition for mobile capital has been essential to the material expansion of the capitalist world economy and that capitalist power has intensified during each period of capitalist accumulation.<sup>16</sup> To guarantee the conditions for the continued expansion of capital, however, the neoliberal project has focussed on protective regulatory structures at the supranational level. This, obviously, is not a problem for the leading state agency of capital accumulation since it is the same state that leads the making – and un-making - of international law. In short, in the current period of capital accumulation regulation at the international level is part of the deal for the leading capitalist power.

#### 4. Neoliberalism and the Globalization of Austerity

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<sup>11</sup> Gustavo Esteva, "Development" in Wolfgang Sachs (ed.), *The Development Dictionary: A Guide to Knowledge as Power* (Zed Books 2009).

<sup>12</sup> Arrighi, n 2 above, 74.

<sup>13</sup> Eg (directly from the belly of the beast) WTO Working Group on the Relationship between Trade & Investment (2002) *Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe: Investors' and Home Governments' Obligations*, WT/WGTI/W/152, 19/11/2002.

<sup>14</sup> Arrighi, n 2 above.

<sup>15</sup> Arrighi, n 2 above, 215.

<sup>16</sup> Arrighi, n 2 above, 12ff.

### (a) The New International Economic Order and “neoliberalism”

The key historical moments of the current US-dominated cycle of capital accumulation are, first, the end of the Cold War and the *Pax Americana* or Washington Consensus, and secondly, the Uruguay Round of trade negotiations leading to the creation of the WTO in 1994. But the important phenomenon of the entire American period is the modern multinational corporate enterprise, which is very much a creature of the constant intensification of capitalist power identified by Arrighi. The pre-condition of the ascendancy of the multinational enterprise was the twentieth century processes of vertical integration and internalization of international trade within those enterprises. And the dominance of multinational enterprises is crucially linked to interstate competition for investment and its pressure on the “weakest” states to make their legal regimes “welcoming” to the interests of capital.<sup>17</sup>

The so-called developing world did start to re-organize and fight back, agitating for changes in the world system under the banner of a call for the famous, but never appearing, New International Economic Order (NIEO). This campaign was well placed to take advantage of the interruption to the process of corporate-led globalization as a result of the so-called “exogenous shocks” of the 1970s and 1980s, including the collapse of the fixed exchange rate system established under the auspices of the IMF, and the OPEC crisis. As a result of these shocks, many states introduced non-tariff barriers to protect domestic production, which included things like labour rights, environmental protection, limits on the entry of foreign capital and differential taxation systems for foreign multinational corporations. The NIEO, however, never appeared for the very simple reason that a political decision was taken to create the conditions for the re-intensification of corporate-led globalization and expansion of the capitalist system. This is a decision that we commonly call the Washington Consensus, which imposed on states fiscal discipline, tax reform, interest rate liberalization, trade liberalization, liberalization of inward FDI, reduction and redirection of public expenditure, deregulation, privatization and a religious zeal for the security of property rights. In the end, the only new international economic order to emerge was what is now referred to as neoliberalism.

### (b) The Uruguay Round, the WTO and Comparative Advantage

The Washington Consensus coincides historically with the beginning of the Uruguay Round of trade negotiations, which was primarily concerned with three things: first, removal of these “non-tariff barriers”, which had been inhibiting the growth of international trade; secondly, putting in place a global intellectual property regime; and, thirdly, liberalizing trade in services, including financial services. These negotiations culminated in the birth of the WTO, which claims to promote free international trade based on the concept of comparative advantage, a doctrine of classical economics into which the neoliberal spirit has breathed new life.<sup>18</sup>

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<sup>17</sup> See n 13 above.

<sup>18</sup> See further Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round & Globalism – A Critique* (Zed Books 2001); Donatella Alessandrini, “WTO and the Current Trade Debate: An Enquiry into the Intellectual Origins of Free Trade Thought” [2005] *International Trade Law and Regulation* 53; Macmillan, n 4 above.

In order to make some sense of these developments in systemic terms, it is useful to revisit one of Arrighi's insights, which is that every cycle of capitalist accumulation has a signal point when the profits derived from trade become so poor that money switches from trade to investment capital. These signal points and their accompanying switches are autumnal and generally inaugurate a period of economic turbulence. They do not, however, spell the immediate end of the dominant regime of capital accumulation.<sup>19</sup> In the current turbulent stage Arrighi argues that a combination of structural changes in the form of "the withering away of the modern system of territorial states as the primary locus of world power", "the internalisation of world-scale processes of production and exchange within the organizational domains of transnational corporations" and "the resurgence of suprastatal world financial markets" have created a pressure to relocate state authority and counter systemic chaos through a process of world government formation.<sup>20</sup> What has become evident in the current neoliberal period is that for such world government formation to become effective, economic governance has to be encased at the supranational level, while democratic politics remains trapped within the boundaries of national political systems.<sup>21</sup>

Going further and reflecting on the nature and ideology of the WTO, does it also represent an attempt on the part of the US, in its death throes as the dominant agency of capitalist accumulation, to control interstate competition for mobile capital? Certainly, the chronological coincidence between Arrighi's post-switch phase in the US cycle of capital accumulation and the Uruguay Round negotiations is striking, as is the fact that the two new Uruguay Round agreements, the TRIPs Agreement and the GATS, are quite conceivably conceptualised as being essentially concerned with investment.<sup>22</sup>

### (c) Developing countries in the global capitalist system

For developing countries, loan conditionality and structural adjustment requirements imposed by the Bretton Woods institutions, and also by the WTO as a condition of entry into the WTO system, are generally connected to gearing up for comparative advantage. It is the theory of comparative advantage and its concomitant doctrine of free trade that keep developing countries in the same economic position they have always been in: suppliers of primary products or suppliers of manufactured products made on the back of often appalling labour, environmental and human rights conditions. Domestic regulation to improve standards in these areas is not only directly constrained by the legal obligations placed on states through the international economic law system, but also by the need to survive in the international capitalist system by competing for mobile capital through FDI. The dominant state agencies, using the system of international economic law, have rigged the rules to give themselves a vast competitive advantage in the attraction of interstate mobile capital.<sup>23</sup>

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<sup>19</sup> Arrighi, n 2 above.

<sup>20</sup> Arrighi, n 2 above, 331.

<sup>21</sup> Slobodian, n 5 above.

<sup>22</sup> Fiona Macmillan, "Looking Back to Look Forward: Is there a Future for Human Rights in the WTO?" [2005] *International Trade Law and Regulation* 163, 178-80.

<sup>23</sup> See also Amin, n 3 above, 97.

(d) Globalizing development disadvantage

How is it then that these dominant states agencies, or some of them, have fallen foul of the system? I hypothesize that the answer lies in a toxic combination of the following factors: first, the depolicization of the international economic law system has dealt a blow to the link between state sovereignty and the creation and operation of international economic law; secondly, the fractured system of international law means that political and legal protections stemming from the system of public international law (human rights, labour rights) make no real impact on the operation of the international economic law system; thirdly, the US, in the autumnal phase of its reign as the leading state agency of capital accumulation is ready to throw its old “First World” bedfellows to the dogs in the hope of staving off its demise; fourthly, the intensification of capitalist power under the US-lead system has now, in any case, outstripped the ability of even the leading state agency of capital accumulation to control it. The system requires every state in it to participate in the competition for mobile capital. Every state must be a market for investment. Austerity and its accompanying adjustments to the labour market are designed to achieve this end. Only a political decision, expressed through international economic law, can challenge this empire of capital.