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ARTICLE

ADAM SMITH'S *WEALTH OF NATIONS* IS STILL RELEVANT TO UK TRADE POLICYMAKING ON INTERNATIONAL TRADE

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Abstract

This article reviews Adam Smith's clearly articulated views about the desirability of free trade and his equally strong view on the necessity of sound institutions and 'the tolerable administration of justice' as key ingredients of successful economic management. It starts with Smith's views on free trade and shows how pertinent they are to today's high-level trade policy challenges. It then considers a more detailed day-to-day instrument of policy—the Trade Remedies Authority (TRA). Following Brexit, the TRA was created as an arms-length body for investigating cases for granting temporary import restrictions to specific products according to a reasonably well-defined objective process. The article demonstrates how, over the first 2 years of its life, the TRA has been reduced from a useful administrative instrument to a fig leaf for a political process for granting protection to petitioners. Unfortunately, this tendency to displace analytical approaches to policy by purely political ones can now be observed in many activities of UK governance.

Keywords: Adam Smith; free trade; trade policy; institutions; trade remedies

JEL codes: F13; B12; B17

1. Introduction

International trade policy has become an active area of policymaking and debate since the Brexit referendum in June 2016. This article reviews Adam Smith's clearly articulated views about the desirability of free trade and his equally strong view on the necessity of sound institutions and 'the tolerable administration of justice' as key ingredients of successful economic management. It starts with Smith's views on free trade and shows how pertinent they are to today's high-level trade policy challenges. It then switches to governance. This has been a blind spot in recent UK policy-making in general, but trade policy provides a particularly egregious example of those failings—the sad fate of the Trade Remedies Authority (TRA). Following Brexit, the TRA was created as an arms-length body for investigating cases for granting temporary import restrictions to specific products according to a reasonably well-defined and objective process. The article documents how, from its first month of operation, government action has undermined the TRA, turning it from a useful administrative instrument into a fig leaf for a political process for granting protection to petitioners. This may or may not be judged a significant denial of good governance *per se*, but it is far from being an isolated incident and so warrants study as an example of an alarming trend.

This article is being prepared for a Special Issue of the *National Institute Economic Review* in 2023 to celebrate Adam Smith's Tercentenary.

The article does not ask 'What would Adam Smith have felt about Brexit'—the reader can draw his or her own conclusions about that. Rather it seeks to highlight the remarkably direct and insightful light that Adam Smith's economic analysis sheds on current issues of international trade policy both large and small.

2. Adam Smith on trade and trade policy

Adam Smith's views on international trade have proved elusive, and, as Schumacher (2020) observes, have mainly been interpreted for us by later scholars seeking to purchase legitimacy for their own models by claiming lineage from the acclaimed master. Schumacher observes that Smith was focusing on the *mechanical* division of labour, not the *territorial* division of labour, which underpins most of our discussion of international trade; this focus partly explains why we find it so difficult to fit into our modern discourse.

This is not an area of scholarship in which a dilettante in the history of economic thought wishes to get caught, so I will confine myself to two observations which bear on contemporary debate; both are drawn from Schumacher. First, perhaps Smith's best-known contribution is the division of labour—the pin factory. He identified that this gives rise to economies of scale and that this is limited by the extent of the market, which immediately introduces the relevance of international trade. Second, he believed that the volume of trade between countries is 'in proportion to the wealth, population and proximity of the respective countries', a statement which any trade scholar will recognise as the foundation of trade economists' work-horse model, the gravity model. Moreover, Smith saw proximity as substantially a matter of transportation costs, which in modern usage has been generalised to trade costs.

Even if one cannot provide a fully articulated positive theory of international trade, however, one may still be able to contribute to the debate on trade policy in a meaningful way. Two hundred years ago, James Syme (1821) wrote (as quoted in Schumacher, 2020) "Adam Smith knew little or nothing about the nature of trade or commerce, and, being conscious that he could not explain what he did not understand, he very wisely said 'let trade be free'".

But Smith did not just 'say', he argued, and, according to Irwin (1996, p. 75) provided for the first time 'a systematic, coherent framework for thinking about the economics of trade policy'. This section draws heavily on Irwin's excellent book, and in order to avoid any underserved appearance of scholarship I refer the reader to Irwin rather than give original references for quotations below where they come from Irwin.

Adam Smith's objective was to

> 'examine chiefly what are likely to be the effects of [such policies] upon the annual produce of [a country's] industry', because 'according as they tend either to increase or diminish the value of this annual produce, they must evidently tend either to increase or diminish the real wealth and revenue of the country'.

That is, he seeks to assess policy against a national, rather than a sectoral, yardstick, coming very close to defining it in terms of Gross Domestic Product and National Income. Smith later re-enforced the message through an aphorism that should be nailed above every politician's and every undergraduate's desk

> consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.

Smith's next analytical building block was his famous 'invisible hand', whereby individuals trying to maximise the value of their own output, maximised that of society so long as they were free of distortions generated by governments or monopolies.[1]

[1]Smith did not advance this position from one of *laissez faire*; he saw specific useful roles which governments should play—establishing conditions in which the market could operate effectively, providing law and order and certain public goods. However, he did not, he said, see places in which interfering with trade advanced those objectives. As the latter part of this article shows, I would qualify the last statement because governments set the rules for international trade and Smith's analysis of institutions is still highly relevant now.

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We all want to maximise output and revenue, but how? Smith averred that, since a country's stocks of capital and labour are fixed (what trade economists would 150 years later refer to as fixed endowments and full employment), there are necessarily trade-offs between sectors. He conceived these very directly in terms of opportunity costs:

> No regulation of commerce can increase the quantity of industry in any society beyond what its capital can maintain. It can only divert a part of it into a direction into which it might not otherwise have gone; and it is by no means certain that this artificial direction is likely to be more advantageous to the society than that into which it would have gone of its own accord.

and from here he concluded directly on trade policy, that

> 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… It is certainly not employed to the greatest advantage, when it is thus directed towards an object which it can buy cheaper than it can make. …. [If a] commodity could be purchased from foreign countries cheaper than it can be made at home [it] could, therefore, have been purchased with a part only of the commodities … which the industry employed by an equal capital, would have produced at home, had it been left to follow its natural course.

As Irwin notes, relative to the general policy statement in the preceding quotation which states that gain from intervention 'is by no means certain', Smith's statement about trade policy is bold and definitive. It is immediately recognisable as a description of the current textbook general equilibrium analysis of trade restrictions, except for the fact that the latter spells out how intervention distorts prices to bring about the result.

Smith's policy construct is one of resource allocation with a fixed stock of resources and is thus fundamentally static. But he also had dynamic arguments for preferring free trade (Irwin, p. 80): first, by enlarging the market, it permits a finer division of labour and hence increases productivity; second, the same force provides incentives to innovate, and third, and probably most important in Smith's mind, international trade encourages the 'mutual communication of knowledge' about business practices and technologies.

Just as Smith was no '*laissez faire* zealot', so he was also pragmatic about import restrictions. He admitted four exceptions to his general stance on free trade, two of principle and two of a tactical nature.

A. 'When some particular sort of industry is necessary for the defence of the country', which he justifies, after a long discussion of the UK Navigation Acts, on the grounds that 'defence … is of much more importance than opulence'.
B. When domestic producers are subject to taxes, imports should be similarly taxed.
C. In retaliation when a partner impedes our exports, but only if there is a reasonable chance that retaliation will lead to the removal of the original restriction.
D. Where a reduction in an import tariff would cause 'severe dislocation of domestic labour and capital'. Smith's opinion is that this circumstance is much less common than commonly imagined, but if it does pertain, Smith concedes the need for gradual liberalisation.

Trade policy is not just about import restrictions. Smith's views about industrial policy may be inferred from the quote above starting 'No regulation of commerce'—serious doubt—and he is much more acerbic about export subsidies:

> We cannot give our workmen a monopoly in the foreign as we have the domestic market. We cannot force foreigners to buy their goods, as we have done our own countrymen. The next best

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> expedient it has been thought, therefore, is to pay them for buying. …. The effect of bounties …. can only be to force the trade of a country into a channel much less advantageous than that in which it would naturally run of its own accord.

3. UK trade policy through a Smithian lens

Smith was writing for a simpler world, without the advances in economic thinking of the last 250 years. Nonetheless, his framework and analysis provide a clear lens through which to observe several elements of contemporary UK trade policy. For several decades the UK had surrendered the management ('sovereignty' in some tellings) of its trade policy to the European Commission; not very much happened and even less attracted much attention in the UK. That all changed with the Brexit referendum of June 2016, and it is the period since then that I shall discuss.

Brexit was many things, but among the largest, it entailed a massive reconfiguration of UK international trade policy. Brexit threw up significant trade barriers between the UK and its geographically closest, economically largest, culturally most similar and most interconnected trading partner. As it left the EU Customs Union and Single Market, tariffs on goods remained at zero, but became subject to rules of origin and border formalities; UK and EU regulations became independent of each other so that any alignment between UK and EU standards had to be proven not presumed; and the standards enforced by regulations started to drift apart in the case of goods and were abruptly sundered in the case of many services—Ayele *et al.* (2021).

The final result of this separation is arguably yet to be seen, but by late 2022 UK imports of goods from the EU were 28 per cent lower than one might have expected on the basis of trade with non-EU partners; 18 per cent of goods exports to the EU paid tariffs (although aggregate exports had returned to expected levels), and the variety of UK exports to the EU had declined dramatically. Total exports (EU + non-EU) were 13 per cent down and import performance relative to pre-Brexit times was the worst in the G7.[2]

Smith's analysis suggests several arguments against this approach to foreign trade: the distortionary costs of new trade barriers, the loss of imports curtailing consumption, the associated loss of Gross Domestic Product (GDP) (e.g. Springford, 2022), the reduced incentives to innovate through declining integration with firms in Europe, and the reduced extent of the market and hence of economies of scale. One might argue that with the sixth largest economy in the world and with trading links around the world, the UK should not be constrained by economies of scale. But they remain crucial in many service sectors, precisely those sectors in which the UK has most thoroughly detached itself from Europe by breaking regulatory alignment and for which negotiating access to other economies is so difficult. Dingel *et al.* (2023) give a pertinent example of economies of scale in medical services in the USA.

As the Brexit referendum campaign proceeded, and even more strongly as Brexiteers tried to define the benefits they had won for the UK, the ability to strike its own trade agreements took centre stage. The UK Government rolled over nearly all the agreements it was party to through EU membership and has struck new agreements with Australia and New Zealand and has acceded to the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP). It is renegotiating several of the roll-overs and hopes to sign an agreement with India by the end of 2023. The government's own analysis suggests that the economic gains from these agreements are trivial, certainly compared with the losses associated with declining trade with the EU. Smith, as a proponent of gravity in trade, would not be surprised. He identified proximity as a key stimulus to trade, and it still is.

Independent, the UK now has the right to join plurilateral trade agreements on its own account. For example, it considered quite seriously joining the negotiations on the Agreement on Climate Change,

[2]Details of the statistics in this paragraph may be found in Winters (2023).

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Trade and Sustainability (ACCTS) but decided not to do so, because it wanted to keep fossil fuel subsidies and tariffs on some environmentally friendly goods and services back as bargaining chips in future negotiations Langtree (2021). Such 'negotiating tariffs' are similar to Smith's retaliatory tariffs and accordingly subject to Smith's caveat that one needs to be confident that the immediate cost of higher tariffs and subsidies (economic or environmental) will be offset by future negotiating gains.

Trade policy comprises much more than just trade agreements—it involves a whole panoply of measures all of which the UK Government now has to decide on. Many of them are not named by Smith, because, as observed already, he wrote in a simpler era. Nonetheless, they are arguably subject to his general strictures on the role of trade. For example, the pursuit of UK-specific regulations in goods and services both creates additional costs for businesses trying to trade with the UK and tends to re-enforce any tendency towards Smith's greatest bête noire, domestic monopoly. In particular, where regulatory approval, or even registration, is required for importing into the UK, overseas businesses may just not bother to supply the market. It is generally too early to tell whether such effects have come about, but potential concerns include the UK-specific approval and licencing system for medicines, (because meeting these will be a much lower priority for suppliers than gaining US or EU licences) and the need to seek UK-specific conformity assessment for products—the UKCA—which, after two welcome postponements, is due to be introduced in October 2023.

The UK also needs to develop its own rules on trade. These include customs procedures, which are now much more significant given that the half of UK goods imports that are from the EU now face 'regular' customs attention. They also include the rules for so-called trade remedies—temporary import restrictions where trade is deemed to be unfair or too disruptive. As the next sections show, the UK developed a reasonable scheme for this, but then gradually undermined it in an alarming way entirely contrary to Smith's views of the needs of an economy.

A third example is how to integrate climate change and trade policy. The EU and the UK have an emissions trading scheme which charges energy-intensive sectors for the carbon dioxide they emit. The EU has committed to a Carbon Border Adjustment Mechanism (CBAM) which will be introduced from October 2023. It will impose costs—at the same rate—on importers for the emissions embedded in their imports of included goods as domestic producers face on their output of those goods through the EU's Emissions Trading Scheme. This would presumably meet Smith's approval, see exception (B) above:

> It would only hinder any part of what would naturally go to it from being turned away by the tax, into a less natural direction, and would leave the competition between foreign and domestic industry, after the tax, as nearly as possible upon the same footing as before it.

[i.e. the CBAM would only impede those imports which displaced EU production that had been turned into less commercially profitable uses by the internal emissions charge, and hence restore a level playing field between imports and domestic producers.]

The UK is pondering whether to adopt the same policy and then, although it can barely admit to it, deciding whether to align the UK scheme so closely to the EU one that UK-EU trade could be carried out without any of the bureaucracy associated with imposing the CBAM on third party import sources.

The final example I shall mention is the World Trade Organization (WTO) in which the UK can now maintain wholly independent positions where previously it was constrained by the overall EU positions. Of course, Smith conceived of no such thing, but his views on trade touched on several of the issues dealt with under the WTO. First, the WTO, deriving from the General Agreement on Tariffs and Trade (GATT) has always admitted the dominance of national defence over trade policy. Article XXI allows members to break any WTO rule in the name of defence. The requirements for defence are left to the member itself to define and the only thing that has prevented the use of this Article from dissolving the trading system into anarchy has been self-restraint on the part of large players and 'a quiet word in the ear' of smaller players if they thought about exercising it. Self-restraint no longer appeals to Russia (which was accused of misusing the scope of this Article in 2016 by Ukraine whose transit through Russia to third markets had been impeded) or to President Trump's USA (which cited national defence for several

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trade restrictions in 2019.) Neither case excites much sympathy among other members nor is the damage to the integrity of the WTO potentially massive. Nonetheless, I note that the justification of trade restrictions in the name of defence was accepted by Adam Smith.

A second link to Smith concerns retaliation against other countries' trade policies. Smith admitted that this was an efficient economic policy if the retaliation achieved a reversal of policy and its cost did not exceed the original damage done. He opined that these conditions applied less commonly than often supposed, but that nevertheless retaliation is an extremely common response whenever a country is inconvenienced by another's policies. The main sanction the WTO has against rule-breaking is to authorise the members adversely affected by a measure to retaliate against the offending member. The WTO's key contribution is to define tight boundaries for such retaliation in order to prevent it spiralling out of control and to insist on due process before it is introduced. Over 70 years of the GATT and the WTO it has been pretty successful in this respect, but, as with Article XXI, the magic of voluntary adherence to WTO rules appears to be wearing thin now.

In neither of these cases has independence led the UK to take very active stances at the WTO. In a third case, on the other hand, which arises when a trade shock disturbs the local economy, the UK has consciously chosen to violate WTO rules. This, it turns out however, is but one instance of a general tendency of recent UK governments to ignore two other of Adam Smith's dicta about how to properly run an economy—the 'tolerable administration of justice' and the need for sound institutions to provide some constrain on governments' discretion to pursue political rather than economic objectives in determining commercial policy.

4. Institutions and the 'tolerable administration of justice'

The first three books of Adam Smith's *Wealth of Nations* establish his view that the key to a country's economic success lies in 'the productivity of its labour force, which in turn depends on specialisation and the division of labour driven by exchange (trade) and limited by the extent of the market' (Irwin, 2020). Necessary to this desirable outcome, Smith argues, is the security of property rights which incentivises effort and also allows planning and facilitates investment in future economic activity. But what, in turn, delivers the security of property? Irwin (2020) writes:

> In 1755, more than a decade before the publication of the Wealth of Nations, Smith wrote a single sentence that encapsulates much of his thinking about economic development: 'Little else is requisite to carry a state to the highest degree of opulence from the lowest barbarism, but peace, easy taxes, and a tolerable administration of justice; all the rest being brought about by the natural course of things'. Smith believed that a 'tolerable administration of justice' required the establishment of a legal system to protect private property from encroachment and enforce contracts and the repayment of debts.[3]

The operationalisation of these elements of justice requires institutions. While the 'pop-version' of Adam Smith focuses almost entirely on *laissez-faire*, any informed commentary recognises the critical importance that Smith placed on institutions as defining and preserving the rules of the game in which freedom of choice can flourish and which can channel individualist pursuits into the common good—see Nathan Rosenberg's seminal article (1960). Indeed, a substantial share of the *Wealth of Nations* is devoted to the analysis of how institutions may (or often may not) work to enhance the public good.

Smith had little time for politicians ('that insidious and crafty animal, vulgarly called a statesman or politician, whose councils are directed by the momentary fluctuation of affairs' *WN, BkIV, Ch II*), nor officials (whom he saw, in Rosenberg's words, as 'a class of men peculiarly insulated not only from the ordinary pressures of the market but from any other compulsion which engages the pursuit of their

[3]Irwin draws on Stewart (1795), Smith's original having been destroyed.

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selfish interests with the public welfare'—Rosenberg, 1960, p. 565). Hence, Smith saw sound institutions as necessary to guide/manage the behaviour not only of individuals and firms but also of government itself. The twenty-first century has moved on since the eighteenth in terms of a culture that recognises, if not always adheres to, the need for non-self-interested public administration. But institutional constraints have been an essential component of that progress, and one does not have to be a Public Choice zealot to notice that when such constraints are absent or ignored, policymaking can become distorted by the interests of politicians and their supporters.

In this section and the next, I argue that the UK's 'administration of justice' has become less 'tolerable' over the last few years as constraints on the Executive behaviour have been eroded. This is evident both in issues of 'high politics' and in more day-to-day issues of administration: some involve the UK Government explicitly planning to act unlawfully and some are (possibly) unwitting. However, the bulk of the evidence lies in the cavalier way in which the government has undermined other branches of government by, for example, seeking to by-pass Parliament, neglecting to honour commitments to appear in front of Parliamentary Select Committees, ignoring the advice of formal advisory bodies, reducing the scope for the judicial review of government action and, most of all, in passing legislation which appropriates to itself the ability to change regulation by secondary legislation that had previously been determined by primary legislation. After listing a few instances of 'high politics', which are well known, I examine in detail a more day-to-day issue of international trade regulation which illustrates the way in which this erosion of standards of administration has occurred.

Brexit stressed UK politics and institutions nearly to breaking point. Among the symptoms, was the government's growing intolerance of opposition from any quarter and this spilled over into several instances of activity that was unlawful or of highly dubious legality. Prime Minister Teresa May tried to exclude Parliament from key Brexit decisions, and when struck down by the Supreme Court made no effort to challenge a press campaign depicting judges as 'the enemies of the people'. Boris Johnson prorogued Parliament when it would not pass his Brexit legislation and, again, was overruled by the Supreme Court. The government acknowledged that the Internal Market Bill of September 2020 broke international law by violating the Withdrawal Agreement with the EU. The Northern Ireland Protocol Bill of June 2022 was held by most to be unlawful and was dropped only after extensive EU-UK negotiations on a compromise deal on Northern Ireland—the Windsor Framework. Finally, the Home Secretary stated in March 2023 that she was 'unable to make a statement that, in my view, the provisions of the Illegal Migration Bill are compatible with the [European Convention on Human Rights—of which the UK is a signatory]'.

International treaties are a form of contract and so, although he does not discuss the international dimension, the sort of behaviour outlined in the previous paragraph would fall short of Smith's view of 'tolerable administration'. In addition, the threats of unlawful behaviour have undermined the UK's credibility in the community of nations, with clear potential economic costs. For example, Jacinda Ardern's threat to block the UK's access to the CPTPP because it *did not respect 'the rules-based order'*, and the EU's refusal to admit the UK to the huge scientific programme Horizon Europe while it refused to honour the Northern Ireland Protocol. Although these specific issues have been resolved, they clearly weakened the UK's hand in negotiations and it seems inevitable that there will continue to be reservations about the UK's willingness to honour agreements and hence about the wisdom of entering cooperative arrangements with it.

5. The Trade Remedies Authority (TRA)

The UK Government's weakening attachment to the rule of law is also present in less prominent areas of government than the previous examples, and in ways that are less likely to be undone in future. This section documents the breaking of the law and the subsequent *ad hoc* adjustment of the law to undermine an institution of economic governance: the TRA. Such behaviour violates the implicit contract with

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trading partners to behave fairly and also undermines property rights in the sense that investments in developing trading links with the UK might be undone by arbitrary UK action without due process.

Having taken responsibility for its trade policy from the European Commission, the UK Government immediately faced the question of the institutional and legal framework under which it would exercise that responsibility. One aspect concerned how to manage trade remedies—the imposition of temporary restrictions on imports in the face of unfair trade (resulting from dumping or subsidies) or unforeseen shocks which cause injury to UK producers (where governments can introduce temporary trade restrictions known as safeguards). There was effectively no discussion of *whether* to have a trade remedies regime. The EU had one, which had long been pretty active, and nearly all major economies also had such regimes.

To try to ensure that trade remedies responded to real needs rather than just meeting politically convenient requests for protection, WTO rules impose (mild) technical and procedural requirements on their introduction, but the details are determined by national governments and are written into national law. In the main economies of the world, the technical and procedural tests are carried out by arms-length bodies or largely autonomous branches of government, which then make recommendations to the ministries governing trade politically. The recommendations always refer to very precisely defined commodities rather than general issues of trade policy. While most administrations give ministers the right to override trade-remedy recommendations on 'public interest' (political) grounds, this is usually made rather public and inconvenient to discourage it from being done casually. This is the case in the UK.

Economists generally dislike the administrative structures that manage trade remedies. These involve extensive investigation of the case for imposing restrictions on a specific import, and thus inevitably pit the import-competing sector, which would get protection against its customers which would face higher prices. Investigations are almost always initiated in response to requests from the potential beneficiaries of the restrictions and are detailed and costly and thus place small firms and consumers at a disadvantage. Large firms and those that would gain heavily from protection can afford the resources to operate the system in their favour by collecting and presenting evidence and employing smart lawyers. Small firms lack resources and individual consumers lack the incentive to oppose any particular import restriction because it has only a miniscule effect on their budgets. But policies add up over products and there are millions of small firms and consumers, so in terms of aggregate interest, the latter groups are greatly under-represented in trade remedy decisions.

On the other hand, trade remedies are often seen as a necessary political evil, because permitting occasional trade restrictions in the name of fairness or compassion is seen as an important safety net which allows import-competing interests to agree to general trade liberalisation on the grounds that if it gets too uncomfortable, relief is possible—Bhagwati (1988).

A leading critic of trade remedies was Michael Finger—starting from Finger *et al.* (1982). Trade remedies create winners and losers and Finger argued that delegating much of the decision-making analysis to arms-length bodies and making it highly elaborate were designed to offer politicians a partial shield against lobbying and to take the political sting out of granting petitioners the protection they sought (or not). He demonstrated that, as noted above, most systems were heavily biased towards large producer interests. Eventually, however, with his co-authors, Finger concluded that the system does have one virtue—Baracat *et al.* (2015): by codifying and making public the process of making one-off protection decisions, it can help to avoid political *ad hocery* and its eventual descent into favouritism, clientelism and chaos.

It is not clear that a Smithian trade policy would include anti-dumping or anti-subsidy actions: he believed that if foreign producers were more competitive than domestic ones, one should import, and he also abhorred any system that facilitated the 'monopolisation' of trade as anti-dumping duties are often said to do—Messerlin (1990). We can, on the other hand, find a parallel with safeguards in his comments on the occasional need for choosing gradual liberalisation. Independent of such detail, though, Smith's broader comments seem to suggest providing a policy environment that offers predictability, security and robust defences against political interference.

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The UK Government started off along this Smithian line: it consulted widely on trade remedies and eventually came up with a regime that was explicitly WTO-compatible, provided procedural limits on the introduction of import restrictions and established a credible appeals process. It required investigation of a case for introducing a trade remedy against stated criteria, including an Economic Interest Test (EIT) which attempts to balance the benefits to the protected sector against the costs to users/consumers and the wider effects of the remedy—Serwicka *et al.* (2023). The regime was initially embodied in the Trade Remedies Investigations Directorate (TRID) of the Department of International Trade and eventually, from 1 June 2021, in the independent non-departmental public body, the TRA, when the Trade Act was finally passed in 2021. The TRID's and TRA's powers and operating rules were defined by Statutory Instrument 2019/449 (Department for International Trade, 2019) under the Taxation (Cross-border Trade) Act of 2018. The undermining of the TRA began within a month of its formal entry into operation!

5.1. Round 1: Safeguards on certain steel products

In March 2018, President Trump introduced 25 per cent tariffs on US imports of steel and aluminium. The EU introduced safeguards on steel in order to forestall exports excluded from the USA being diverted to the EU. The EU investigated 28 categories of steel (covering over 300 8-digit product codes) and introduced tariff rate quotas (TRQs)[4] on 26 of them definitively on 31 January 2019—European Commission (2019). The UK inherited these TRQs at the end of the transition period on 1 January 2021 and decided to maintain 19 of them until their expiry on 30 June 2021, the remaining ones being deemed to have no UK production to protect, and hence no case for a safeguard.[5]

In October 2020, the TRID was asked to investigate whether the inherited safeguards were appropriate (and implicitly legal) for the UK to extend beyond 30 June 2021.[6] It did so by examining whether the UK had experienced a significant increase in imports during the investigation period used by the EU (2013–2017),[7] whether more recent data suggested that imports would surge if the TRQs were abolished and the extent of injury if they did surge.

The TRA published its analysis, which was seriously done, and its final recommendation on 11 June 2021. Using a slightly altered classification of 19 categories, it recommended the extension of the safeguard on 11 categories for 3 years. Of the remainder, one was deemed to fail the Economic Interest Test, which basically balances the benefits to the producers against the costs for purchasers of the products, and the rest failed to meet the government's criteria for safeguards (i.e. no UK production, or no increase in UK imports, or no significant increase in UK imports, or no likelihood of injury to UK industry).

On the day before the transitioned safeguards were due to expire, 30 June 2021, the Secretary of State rejected part of the TRA's recommendation and implemented her own variant, partly underpinned by a bespoke *Statutory Instrument* (2021/783) made at 5:40 pm and coming into force at 6:00 pm on that day! It extended the 11 TRQs the TRA recommended on the terms it proposed, extended the TRQs on five categories for 1 year, despite the TRA's recommendation to the contrary, and revoked the remaining ones as recommended. In addition, the Government announced a review to see if the TRA was 'fit for purpose'—Truss (2021).

This does not sound like a grievous blow to the trade strategy, but it was to the rule of law. The Secretary of State's 'pick and mix' approach violates TRA Regulation 52: the TRA made just one

[4]TRQs admit a certain volume of imports at a low (possibly zero) tariff and then impose a much higher rate anything beyond that level.

[5]Colleagues close the process warn me of the pitfalls of counting here since at every stage of the UK process some categories were combined or split, so the numbers cited are only approximate.

[6]Now the UK had an independent trade policy, these decisions had to be based on UK data alone.

[7]The EU investigated imports into the EU. It was necessary to go back to the original period because the question was to *extend* the measures, not to introduce new ones.

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recommendation and the article requires that 'Where the TRA makes a recommendation …., the Secretary of State must accept or reject [it]', the latter only if he/she believes the Economic Interest Test is not satisfied or 'is not otherwise in the public interest'. The reasons for rejection must be published and made in a statement to the House of Commons. The 'all or nothing' requirement is designed to try to oblige the Government to recognise the need for balance and to decide matters on principle rather than on the political expediency of favouring some interests over others. And the publication of the reasoning behind a rejection is basically the price for adopting it.

To compound the damage, the extension decisions were also contrary to the WTO Agreement on Safeguards because, as shown by the TRA's investigation, there was no increase in UK imports or credible injury to UK firms. All this occurred on the TRA's first significant decision and within 1 month of its creation as an independent body![8]

5.2. Round 2: Transitioned trade remedies

All new institutions take time to bed down and not all reviews are serious attempts to change things, so it was possible on 1 July 2021 to believe that steel safeguards were just a teething trouble and that the government really did believe in independent advice and WTO compliance. One can no longer plausibly believe that.

On 9 February 2022, the (new) Secretary of State for Trade laid a statutory instrument before the House of Commons, 2022/113 'The Trade Remedies (Review and Reconsideration of Transitioned Trade Remedies) Regulations 2022', which stated that where the TRA has not completed its processes, the Secretary of State will decide matters in relation to a review or a reconsideration of a transitioned trade remedy [i.e. those inherited from the EU].[9] Moreover, s/he 'may do anything that [s/he] considers appropriate for the purposes of making a decision', notably define the timescale for representations to be made on the issue and seek information from whomever s/he wishes. The TRA must analyse the evidence and its views must be 'taken into account' but may be ignored.

On 22 March, the Secretary of State used the new instrument to 'call in' the decision on the five categories of steel that received only a year's relief in 2021, and in doing so redefined the way in which she wished the TRA to reach its (non-binding) advice. The latter reported on 23 June and, rather bravely, stated that while its original mandate would lead it to reject an extension of those TRQs, analysis under the revised instructions suggested that the TRQs could be extended.

On 29 June, the Secretary of State announced to Parliament extensions for 2 years for the five categories. But perhaps more importantly, she added that 'The Government wishes to make it clear to Parliament that the decision to extend the safeguard on the five product categories departs from our international legal obligations under the relevant WTO agreement. ….. However, from time to time, issues may arise where the national interest requires action to be taken which may be in tension with normal rules or procedures.' Moreover, we know she spoke on behalf of the government, because the Prime Minister had asked his ethics advisor to bless the breach of international obligations in advance! (The latter refused and resigned, ostensibly over this issue, although in time it became known that he had several other concerns about Mr Johnson's behaviour.)

In sum, the government used secondary legislation to overrule procedures defined by primary legislation after considerable debate; it altered the rules of analysis to ensure it got the answer it wanted; and it was happy to violate WTO commitments. Baldly stated the Secretary of State was saying that in this small area (transitioned remedies are just one element of the TRA's work and will eventually disappear) decisions will be purely political and pay little regard to rules or institutions. Institutions sometimes need to 'duck and weave' to avoid political hostility in order to stay alive, so maybe the TRA's report was a pragmatic tactical retreat in the face of overwhelming odds.

[8]For more details on this first round of the saga, see Winters (2021).

[9]This has become known in short hand as the Secretary of State's 'call-in' power.

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5.3. Round 3: All trade remedies

Round three commenced on 9 March 2023. The Secretary of State for Business and Trade announced that the review was completed (but not published or debated) and that it had concluded that new regulations for Trade Remedies giving Ministers more power were required—Badenoch (2023). These extend to the whole of the TRA's domain. I quote extensively because there are few UK examples and such an unashamed emasculation of a supposedly independent body:

> The proposals I am announcing today maintain the TRA's expert independent analytical and investigative role, while also giving Ministers greater power to look at wider public interest considerations and flexibility to make decisions that balance the interests of UK producers, importers and consumers.
>
> More specifically, the updated framework will do the following.
>
> 1. Require the TRA to notify Ministers before initiating new investigations.
>
>   *Comment:* It is basically inconceivable that the contrary could happen, so this is just a standard bit of controlling behaviour.
>
> 2. Provide Ministers with the power to request the TRA to reassess a recommendation to apply a trade remedy where there is justification to do so. For example, where there is new evidence which the TRA has not previously considered or to correct an error.
>
>   *Comment:* Having set up an 'expert independent' body, Ministers will use their own insight to identify errors and require the work to be revisited.
>
> 3. Give Ministers the flexibility to apply an alternative remedy to that recommended by the TRA, where there is supporting evidence to do so, and it is in the public interest.
>
>   *Comment:* This removes any assurance that exporters to the UK have of due process, because the body that can independently assess evidence and the public interest will be bypassed.
>
> 4. Give the power to the TRA to provide alternative options within its recommendation to Ministers, where justified.
>
>   *Comment:* This sets the TRA up to validate the decision that will be taken by the Minister in advance—a fig leaf.
>
> 5. Make the TRA's assessment of the economic interest test (EIT) advisory so that the Ministers will still be able to apply measures if the TRA determines that the EIT is not met.
>
>   *Comment:* This is just an assurance that an assessment of aggregate gains/losses will not impede support for politically significant interests.
>
> 6. Give Ministers the power to revoke trade remedy measures without the need for a TRA recommendation if retaining a measure is no longer in the public interest. Ministers may request that the TRA provide advice, support and assistance before deciding to revoke measures.
>
>   *Comment:* This removes any security that the beneficiaries of trade remedy largesse may feel.

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According to the press release, there will be meetings with 'interested stakeholders' to 'explain', but not to consult on, the new regime.

The Secretary of State's statement does not mention the appeals process. In the original legislation, this permits appeals to the Upper Tribunal over decisions by the Secretary of State, but it is unclear what its purpose would be under a politicised system. Moreover, even if it survives, unless there is an obligation for the Secretary to explain her reasoning so that the appellant has something concrete to challenge, the appeals process will become just a location for examining the TRA's analysis, but with little by way of a yardstick against which the Tribunal can judge the matter. This will further muddy the waters for any traders caught up in the process.

One interesting contextual feature of this announcement is that, with the exception of the steel safeguards discussed here, the government has accepted every other recommendation made by the TRA. So, does the announcement reflect the accumulation of unfettered political discretion just in case, that the government plans a change of tack or that the current institutional structure really did constrain it?

The government is now working on the legislation to implement these proposals. It has a majority of around 70 in the House of Commons and so one has to presume that it will pass into law. Politicians rarely give power away, and so until they have got themselves into trouble a few times they will not appreciate the benefits of having a technical and independent cut-out between them and interest groups. For the foreseeable future, UK trade remedies will be a field of political rather than investigatory activity.

Unfettered trade remedies are a setback in the regulation of international trade. But the much larger issue is Adam Smith's concerns about the need for sound institutions and 'the tolerable administration of justice' and the trend of which this example is a part. If a relatively narrow issue like trade remedies can be treated so cavalierly by a British government, with unlawful action knowingly taken, the *ad hoc* modification of laws and the eventual emasculation of an independent institution in favour of naked politics, what message does that send about other issues in which economic agents seek stability and assurance in policy areas that do not suit the political tastes of the day?

One cannot plausibly argue that the UK has entirely lost 'the tolerable administration of justice', but neither can one argue that it has not been diminished. And perhaps the most famous economist ever, Adam Smith, believed that such diminution has economic costs.

What shines out from the matters discussed in this article is the astonishing breadth of Adam Smith's vision. Over 250 years after he wrote them, his words bear on so many of the trade-policy decisions and debates of the 2020s.

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