

## FROM POLITICS TO TECHNOCRACY—AND BACK AGAIN: THE FATE OF THE MULTILATERAL TRADING REGIME

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### I. “TRADE AND . . .” AND THE HISTORICAL FOUNDATIONS OF THE TRADING SYSTEM

As is known to every student of trade law and policy, the modern idea of free trade originates from the theories of absolute and comparative advantage developed by the classical political economists, Adam Smith and David Ricardo.<sup>1</sup> Smith and Ricardo both addressed themselves to a sovereign unilaterally deciding its trade policy. They concluded that, with some qualifications or exceptions, a policy of liberalizing restrictions on imports would maximize the wealth of that sovereign.

This insight did not depend on the policies of *other* countries being similarly liberal. Smith and Ricardo sought to show how the unilateral removal of import barriers would enhance national wealth. Thus, the central insight of Smith and Ricardo did not, as such, lead to bargained free trade or the creation of international trade *law*. The Ricardian theory of comparative advantage dictated the removal of import restrictions in almost all circumstances, regardless of any commitment of one’s trading partners to liberalize *their* imports.

Further, in focusing on aggregate national wealth, Smith and Ricardo were not preoccupied with the internal redistributive effects of import liberalization—who would be made better off and worse off within the polity by such a move, and by how much. Smith and Ricardo were concerned in the first instance to disprove the conventional or established mercantilist view that national *wealth* was reduced by (unilateral) free trade, and while they had many important reflections on the relationship of wealth to morals and justice, the basic logic of the theory of comparative advantage does not depend on any of those insights. A country can gain in wealth from liberalizing its import regime, regardless of any legal commitment by its trading partner to liberalize its own import rules reciprocally, or even not to restrict imports further.

When we turn to the regime of international trade *law*, as it has emerged in the post-Second World War era, we find an intellectual or conceptual foundation that, to be sure, assumes and assimilates the classic insights about the gains to wealth and welfare from free trade but is fundamentally concerned with the *interdependency* of different states’ trade and other economic policies—i.e., managing or constraining the external costs that states impose on other states by virtue of their policies.<sup>2</sup> A paramount goal is the avoidance of a protectionist *summum malum*—the situation where domestic social or economic pressures lead some states to *increase* or *reinstate* barriers to trade, thus triggering a competitive reaction in

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<sup>1</sup> DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* (1996); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE*, ch. 1 (2d ed. 1999).

<sup>2</sup> For an expression of this conceptual foundation in the language of contemporary economics, see KYLE BAGWELL & ROBERT W. STAIGER, *GATT-THINK 16* (Nat’l Bureau of Econ. Research, Discussion Paper No. 8005, 2000).

kind by other states, and eventually a “race to the bottom” that is disastrous for the global economy.<sup>3</sup> This sort of behavior was widely perceived by the founders of the Bretton Woods system to have led eventually to perilous instability in the interstate system and economic catastrophe in the interwar years—which phenomena were seen as having contributed to the climate that made fascism, and the Second World War itself, possible.

The postwar trade and financial order was therefore mainly designed to enable states to manage their domestic economies, in a manner consistent with political and social stability and justice, without the risk of setting off a protectionist race to the bottom. States obligated themselves not to impose quotas or related import restrictions, of the sort strongly associated with the race to the bottom of the interwar years. On the other hand, they were not required to eliminate or reduce their import tariffs. The legal structure of the General Agreement on Tariffs and Trade (GATT) was designed to facilitate such concessions and make them binding, but it did not require them.

At the same time, the GATT contained a variety of exception or emergency provisions, which reflected the recognition that in some cases an individual state might actually need to increase trade protection to manage a crisis in an adequate manner; thus, the challenge of legal design was fundamentally to ensure that even if one or several states had to renege, at least temporarily, on their commitments, this would not trigger a general crisis of confidence in the system, and consequently a reversion to beggar-thy-neighbor protectionism. Adjustment, the management of an internal economic crisis in a manner that would be politically and socially sustainable domestically, but also not threatening to the integrity of the international legal order, was facilitated as well by the other Bretton Woods institutions, the International Monetary Fund (IMF) and the World Bank. A global financial order based upon managed or supervised exchange rates and exchange rate adjustments, and emergency liquidity assistance from the IMF, would provide means of working out macroeconomic instability that would neither threaten liberal trade, nor on the other hand lead to beggar-thy-neighbor macropolicies or currency devaluations.<sup>4</sup>

This is the first and original sense in which the postwar trading order addressed itself in its very conception and structure to “trade and . . .”—the system sought to structure the way domestic pressures would be addressed through trade and nontrade alternative measures. A key assumption or expectation was this: one should be able to protect domestic social and political stability, using means that avoid exporting domestic social economic difficulties and threatening *global* stability—in other words, to avoid destructive forms of *interdependent* behavior. This can be seen not only in how the GATT within the Bretton Woods framework constrained protectionist trade responses to economic pressures and *enabled other, nontrade* responses (managed macroeconomic adjustment), but also in how the system enabled some (carefully circumscribed) *trade* responses (safeguards, etc.), *managing or hedging the risk* that those responses would trigger generalized, competitive recourse to protectionism.

The second sense in which the system was designed or structured to deal with “trade and . . .” goes to the core dilemma or puzzle of rules-based negotiated trade liberalization. Such liberalization entails selecting a set of trade barriers or restrictions and legally prohibiting or disciplining them. However, there will always be a rather huge number of possible nontrade or not explicitly trade-based policies that individual member states can implement, which will undermine the value of the negotiated legal disciplines to their trading partners. These policies can take on the aspect of legitimate regulation for noncommercial public purposes. At the same time, they may have the effect of restricting market access, similarly to the explicit trade barriers that member states have legally bound themselves to constrain

<sup>3</sup> See the seminal article by Jeffrey Dunoff, from which I have learned much, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733 (1999).

<sup>4</sup> See generally, for a careful and balanced account of the evolution of these arrangements, ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER*, chs. 9–10 (2001).

or remove. Let us say I bind myself not to increase tariffs on steel beyond 15 percent ad valorem. What happens now, if by legislation I turn the steel industry into a domestic monopoly? Or if I set a regulatory standard that foreign competitors in the industry are unlikely to be able to meet, or that it will cost them much more than the domestic industry to meet? Or if I subsidize domestic production of steel? Which of these is a legitimate and acceptable domestic policy, and which is “cheating” or renegeing on my trade liberalization commitments in a way that is apt to undermine confidence in the system, if undertaken widely enough?

*There is no natural or self-evident baseline or rule that can solve this basic dilemma.*<sup>5</sup> Individual member states’ perceptions of what policies fall on one side of the line and what on the other are going to vary depending on ideology, regulatory traditions, and so forth, all of which generate intuitions about whether someone’s regulatory behavior looks like “normal” public policy or, rather, like something that might only be done in the circumstances for protectionist reasons.<sup>6</sup> Of course, several simple “bright line” solutions might be possible. One is simply to say: when you sign an agreement that disciplines certain kinds of measures, you take the other public policies of the signatories as you find them and accept the risk that those policies might be changed, charging a premium as it were to bear such risks, the premium being, for example, higher levels of concessions from others. Another perfectly logical solution is to open for negotiation all public policies that might undermine trade concessions, and to enact specific disciplines on those policies so that enough member states are sufficiently confident that they will not end up undermining the disciplines on trade barriers or restrictions. In fact, some see the WTO today as headed exactly in that direction, whether they fear or welcome the implication of the WTO’s becoming a kind of world state *en herbe*.

## II. TOWARD “EMBEDDED LIBERALISM”

The original postwar solution to the dilemma, as reflected in the GATT, did not adopt either of these solutions but, rather, could be described as complex, multifaceted, and messy. Yet within a couple of decades this approach would take a more coherent shape, in the understanding of the principal players of the system, as what John Ruggie calls the “embedded liberalism” bargain.<sup>7</sup> This bargain, or agreed understanding, would allow, for some period of time, the “trade and . . .” challenge, in its full profundity and insolubility, to disappear from view, or largely disappear from view—in other words, the problem became one that appeared *manageable*, mainly by technocrats and experts, *within* the system.

What were the main elements of the messy, multifaceted legal solution that led Keynes to call the lawyers the poets of Bretton Woods?<sup>8</sup>

One of these elements of the postwar solution that would not fall into place, except to some extent in the case of finance, was global governance, the creation of institutions that would determine at the global level the appropriate parameters of domestic regulation, especially in areas that appeared to the founders to be closely linked to trade—exchange rate policy, competition policy, and labor practices. Although, as Anne-Marie Slaughter has pointed out, the architects of these would-be institutions of global governance envisaged them as a kind of projection globally of the U.S. New Deal regulatory state,<sup>9</sup> sovereignty concerns in the

<sup>5</sup> Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 547 (1987); Daniel K. Tarullo, *Logic, Myth and the International Economic Order*, 26 HARV. INT’L L.J. 533 (1985).

<sup>6</sup> See Robert E. Hudec, *GATT Constraints on National Regulation: Requiem for an “Aims and Effects” Test*, 32 INT’L LAW. 623 (1998).

<sup>7</sup> JOHN G. RUGGIE, *Embedded Liberalism and the Postwar Economic Regimes*, in CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION 62 (1998).

<sup>8</sup> See Anne-Marie Slaughter, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in THE WORLD TRADING SYSTEM: CRITICAL PERSPECTIVES ON THE WORLD ECONOMY 50 (Robert Howse ed., 1988), reprinted in JOHN GERARD RUGGIE, MULTILATERALISM MATTERS 125 (1993).

<sup>9</sup> Slaughter, *supra* note 8.

United States itself foiled the most ambitious versions of the enterprise, especially the proposed governance mechanism for trade, the International Trade Organization.

Another dimension of the solution, to be found in the 1947 GATT, was a “non-violation nullification and impairment” clause, which allowed a claim for compensation where, even though it does not violate a specific provision of the GATT, a member state engages in other actions that undermine the value of negotiated concessions under the GATT (Art. XXIII). As drafted, this clause reads like a general right of compensation for policy change, where the value of negotiated concessions is affected. However, it would come to be interpreted much more narrowly than that.

A further dimension was the adoption of a nondiscrimination norm to distinguish acceptable from unacceptable nontrade domestic policies (national treatment). The nondiscrimination norm arguably provided (and indeed still provides) a highly useful default rule, a tentative sorting of domestic policies. The notion of “discrimination” against trading partners seems closely linked to the very idea of protectionism, though in some cases one may discriminate for nonprotectionist reasons, which is why at least as a preliminary sorting or sifting mechanism, the nondiscrimination norm has a certain durability and putative legitimacy. It is consistent with a wide scope for regulatory diversity and allows discipline of “cheating,” while minimizing the need for interference with the substance of domestic regulatory choices.<sup>10</sup>

At the same time, recognizing that the nondiscrimination norm may not in all cases be an adequate dividing line between “legitimate” public policies and “cheating” on trade liberalization commitments, the GATT text provides explicit exceptions for policies that may even entail elements of discrimination, provided that they are justified in terms of certain nonprotectionist goals and that their application does not entail *unjustified* or *arbitrary* discrimination (Art. XX). Conversely, certain other provisions of the GATT reflect a recognition that, without certain additional disciplines, there may be forms of embedded or structural protectionism that elude the straightforward application of the national treatment obligation.

Finally, some kinds of domestic policies received explicit, but ambiguous, treatment under the GATT—subsidies were recognized as potentially (and illegitimately) trade distorting but also as not in principle illegal or illegitimate. In response to this studied ambiguity, the GATT explicitly permitted, under certain constraints, self-help in the form of countervailing duties. Second, the GATT did not require that the member states constrain private restrictive business practices, but “dumping” (an admittedly crude surrogate for some such practices, in particular predatory pricing) was disapproved and the self-help of antidumping duties, again under certain constraints, was made the accepted remedy.

How did such a messy and complex approach to “trade and . . .” prove operable, especially since the global governance elements in the approach never really got off the ground?

This was the miracle of “embedded liberalism”—trade liberalization was embedded within a *political* commitment, broadly shared among the major players in the trading system of that era, to the progressive, interventionist welfare state; in other words, to a *particular* political and social vision, including at the same time respect for diverse ways of implementing this vision—with greater use of microeconomic intervention, such as indicative planning and public enterprise in Europe and Japan, while tax-and-transfer approaches were more typical of North America, and certainly the United States.<sup>11</sup> Following an insight of Kalypso Nicolaidis, one could even say that it was the trust that emerged from this basically shared vision that produced acceptance of the differences in approach to the mixed economy and welfare state as between the United States, Europe, and Japan. The success or at least viability of the

<sup>10</sup> Hudec, *supra* note 6; John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000).

<sup>11</sup> See Dunoff, *supra* note 3; Ruggie, *supra* note 7.

embedded liberalism bargain is reflected in the fact that high social spending and openness to trade have traditionally been positively correlated.<sup>12</sup>

### III. FORGETFULNESS OF THE POLITICAL AND PROFESSIONALIZATION OF TRADE LAW AND POLICY

The very success of the embedded liberalism bargain, along with other phenomena, led to forgetfulness or amnesia concerning the political foundation of the postwar trading regime, its character as a specific and contingent bargain about the interaction between freer trade and the welfare state. As the high politics of international relations increasingly focused, with the Cold War, on matters of international security and the East-West conflict, the administration and incremental development of the trade system was increasingly entrusted to a specialized policy elite insulated from, and not particularly interested in, the larger political and social conflicts of the age. This group included some officials employed in the GATT/WTO Secretariat (of whom there were very few in comparison to any other international organization of comparable stature); but more important, the larger group of “experts”: former or current governmental trade officials; GATT-friendly academics who often sat on GATT/WTO dispute settlement panels and were invited to various conferences and meetings of the GATT/WTO; international civil servants in other organizations (particularly the World Bank, the Organisation for Economic Co-operation and Development, and the IMF) preoccupied with trade matters; and a few private attorneys, consultants, and former politicians.<sup>13</sup>

This new trade policy elite developed professional working procedures and norms within the GATT, organized the agenda for negotiations, and—with very little to go on from the treaty text itself—created and sustained an effective arbitral mechanism for dispute settlement. As persons with the bent of managers and technical specialists, they tended to understand the trade system in terms of the policy science of economics, not a grand normative political vision. A sense of pride developed that an international regime was being evolved that stood above the “madhouse” of politics (if one can borrow Pascal’s image), a regime grounded in the insights of economic “science,” and not vulnerable to the open-ended normative controversies and conflicts that plagued most international institutions and regimes, most notably, for instance, the United Nations.<sup>14</sup> This is all well described by Joseph Weiler:

<sup>12</sup> Dani Rodrik, *Globalisation and Labour, or: If Globalisation is a Bowl of Cherries, Why Are There So Many Glum Faces at the Table?* in MARKET INTEGRATION, REGIONALISM AND THE GLOBAL ECONOMY 117, 141–43 (Richard E. Baldwin et al. eds., 1999).

<sup>13</sup> Obviously, the description of the insider network is stylized—it abstracts from real differences of national interest or personal outlook among the members—and one should not overestimate the homogeneity of this group (indeed, later on in this essay, I shall discuss some of the quite divergent responses of different elements within the insider network to the legitimacy challenges facing the WTO). It must especially be stressed that there is only limited overlap between the insider network and the officials within the WTO Secretariat; many of the latter are not real “insiders,” while, as noted, many of the “insiders” have never held any official position in the GATT or the WTO. Nor am I suggesting something like a conspiracy. What I am describing here and in the rest of this essay could be thought of, in terms of international relations theory, as an “epistemic community.” Thus, John Ruggie suggests:

Institutionalization [of international organization] involves not only the organizational grids through which behavior is acted out, but also the *epistemes* through which political relationships are visualized. I have borrowed this term from Michel Foucault . . . to refer to a dominant way of looking at social reality, a set of shared symbols and references, mutual expectations and a mutual predictability of intention. Epistemic communities, then, may be said to consist of interrelated roles that grow up around an *episteme*: they delimit, for their members, the “proper” construction of social reality.

JOHN GERARD RUGGIE, *The New Institutionalism in International Relations*, in CONSTRUCTING THE WORLD POLITY, *supra* note 7, at 45, 55; see also Emanuel Adler & Peter M. Haas, *Conclusion: Epistemic Communities, World Order and the Creation of a Reflective Research Program*, 46 INT’L ORG. 367 (1992); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT’L ECON. L. 1014 (1996).

<sup>14</sup> On the relationship of technocratic governance in international economics to the fate of politics in an era of globalization more generally, see David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT’L L. 9, 119 (1999).

A dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms. The GATT successfully managed a relative insulation from the “outside” world of international relations and established among its practitioners a closely knit environment revolving round a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term first-name contacts and friendly personal relationships. GATT operatives became a classical “network” . . . Within this ethos there was an institutional goal to prevent trade disputes from spilling over or, indeed, spilling out into the wider circles of international relations: a trade dispute was an “internal” affair which had, as far as possible, to be resolved (“settled”) as quickly and smoothly as possible within the organization.<sup>15</sup>

At the hands of this trade policy elite, “embedded liberalism” came to be recast as *economics, and economics became ideology, the ideology of free trade*.<sup>16</sup> The central notion that governed the conception of the relationship of trade policy to domestic policy generally was that wherever trade barriers such as tariffs had direct price-distorting effects in the market of the importing country, removal of those barriers enhanced aggregate domestic welfare in that the total gains to consumers could be shown always to exceed the total losses to producers/workers.<sup>17</sup> Put in this crude way, the case for trade liberalization appeared to be totally indifferent to any notion of a just distribution of benefits and burdens from the removal of trade restrictions. But from the perspective of a liberal democratic understanding of *justice*, of course, there may be good reasons of principle and/or policy to place a higher value on the avoidance of catastrophic losses to a small vulnerable group (for example, textile workers in Quebec) than on gains dispersed among millions of consumers (slightly lower prices for shirts and blouses).

How then, was the insider network able to turn a blind eye to these issues of distributive justice? Above all, through the notion that gains to the winners should allow us to fully compensate the losers from removal of trade restrictions, while still netting an aggregate welfare gain. According to this conception, based on what is known in the economics and related literatures as Kaldor-Hicks efficiency, in the end no one need be worse off as a result of trade liberalization. What was presumed, or taken for granted here, was the existence of a regulatory and social welfare state to take care of the interests of the losers (however legitimate) through the use of nontrade policy instruments (worker retraining, etc.) that are less costly to domestic welfare than trade restrictions.

If we can thus imagine that many will benefit, and no one has to lose (assuming appropriate “compensation”), from a policy move, then the question of its effect on just deserts or a just allocation of goods might seem to disappear. Who could fairly complain about having been made better off? The belief that the removal of trade restrictions is Kaldor-Hicks efficient cannot be reduced to *just* blind ideological faith—in many situations the empirical evidence suggests that one could and should replace trade restrictions with other policy instruments, and make everyone better off. Thus, in earlier work, my coauthors and I, estimating from various empirical studies the cost to consumers per job saved from trade protection, argued that far lower cost policy instruments than trade protection could be deployed to address the effects on workers of loss of comparative advantage in certain

<sup>15</sup> Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement*, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 334, 336–37 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian, & Americo Beviglia Zampetti eds., 2001) (citation omitted).

<sup>16</sup> On the ideology of free trade as it evolved in the GATT regime, see the very insightful article by David Driesen, *What Is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate*, 41 *VA. J. INT'L L.* 279 (2001).

<sup>17</sup> This is because a tariff will always price some consumers out of the market altogether.

industries.<sup>18</sup> However, as we discussed in that study, these kinds of conclusions depend upon certain assumptions about the nature of welfare losses from employment dislocation. One assumption is that the loss of old jobs can be adequately (or more than adequately) compensated by new jobs, or by cash. Nevertheless, alternative, non-trade-restricting policies may allow workers to find jobs elsewhere in the economy but would not compensate for the welfare losses from having to leave the community in which one has lived and worked for much of one's life. Early retirement, even at full salary, might be less costly than continued trade protection but would not compensate workers for losing the sense of value and dignity, and perhaps solidarity and community, that comes from productive labor.

Finally, even if we believe that, with appropriate policy shifts, no one is worse off in absolute terms, the *relative* gains and losses that different groups in society experience may be relevant to social legitimacy: if the gap between rich and poor widens, even if the poor are no worse off in absolute terms of wealth, the mere presence of this greater inequality may offend relevant social values, as well as carry quite concrete implications—for instance, eroding the social solidarity between classes necessary to sustain certain redistributive policies.<sup>19</sup>

Thus, the notion that a more effective policy instrument than trade protection is always available to achieve *any* legitimate public end vastly oversimplifies the problem of politics. This notion tended to convert the *political* vision of embedded liberalism—dependent upon a *particular* value-laden idea of the liberal democratic, progressive, redistributive social welfare state—into an apparently timeless truth or dogma, valid across regimes, and more or less valid regardless of changed or changing economic and social circumstances, or changing public values.<sup>20</sup> One simply *assumed* a certain toolbox of effective nontrade policy instruments, and the stability and viability of the social bargains within states as well, or at least the stability of institutions that construct and reconstruct such social bargains. Keynes had known better—for him, the prescription of free or freer trade was contingent and contextual, and might well have to yield to the demands of justice in given social and economic circumstances.<sup>21</sup> That is, there could be circumstances where trade liberalization would have the unavoidable effect of making some group, or some range of individuals, worse off in a manner significant from the perspective of justice.

In its confidence in the prescription of free trade as a timeless truth, the network identified special interest groups as the evil force that explained all, or almost all, deviations from the clearly rational policy prescription to use nontrade instruments for achieving public policy goals. How fortunate, then, that there was an enlightened elite, operating largely above politics, through secretive or low-profile processes of diplomacy and elite bargaining, to counteract the influence of the special interests. Indeed, the “public choice” explanation of protec-

<sup>18</sup> MICHAEL J. TREBILCOCK, MARSHA A. CHANDLER, & ROBERT HOWSE, *TRADE AND TRANSITIONS: A COMPARATIVE ANALYSIS OF ADJUSTMENT POLICIES* (1990).

<sup>19</sup> See ROBERT B. REICH, *THE WORK OF NATIONS*, ch. 25 (1991).

<sup>20</sup> This is, of course, yet another example of the way the insider network, in professionalizing or technocratizing trade policy and politics, was ultimately dependent on a particular political bargain, that of embedded liberalism, a dependency masked from the network or many of its members by their innate tendency to translate that understanding, or assumptions flowing from it, into universalizing discourse of the kind innately congenial to “scientific” specialists. The phenomenon in question is well characterized by Sol Picciotto, albeit in speaking generally about international economic governance:

[T]he growth of international regulatory or governance networks does not constitute a reduction of the scope of interstate politics, but its pursuit by other means. Certainly, this may entail an attempt to “depoliticize” issues, by deploying scientific, managerial, or professional techniques and basing their solution on universalizing discourses. However, such techniques are neither neutral in themselves, nor in the processes of their development and application.

Sol Picciotto, *North Atlantic Cooperation and Democratizing Globalism*, in *TRANSLATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 495, 505 (George A. Bermann, Matthias Herdegen, & Peter L. Lindseth eds., 2000) (citation omitted).

<sup>21</sup> See IRWIN, *supra* note 1; JOHN MAYNARD KEYNES, *Mitigation by Tariff*, in *ESSAYS IN PERSUASION* 271 (1991).

tion purported to show why trade liberalization required a bargain that further masked or concealed the essential nature of the real postwar bargain. A bargain, a legally binding deal, would allow one to enlist against the evil protectionist interest groups other (export-oriented) interest groups that benefit from the reciprocal market access granted by other countries; it would also allow politicians, in the manner of Ulysses, to tie themselves to the mast, and avoid the calls of the protectionist Sirens. Thus, reciprocal, negotiated trade rules were not about the grand normative political vision of “embedded liberalism” but, rather, about the management, or containment, of vulgar (domestic) interest group politics.

#### IV. THE RETURN OF THE POLITICAL (WITH A VENGEANCE)

It was not until the 1970s that the embedded liberalism bargain came under sustained stress. The collapse of the gold standard and with it the structure for managed macroeconomic adjustment foreseen by the Bretton Woods system, combined with the recession of the 1970s and the mounting intellectual and practical (stagflation) challenges to the Keynesian consensus, led to increasing emphasis on microeconomic interventions of various sorts for adjustment purposes, as well as to new kinds of trade restrictions—“voluntary” export restraints negotiated under threat of unilateral action—of dubious legality under the GATT.<sup>22</sup> For various reasons, the safety valves for adjustment written explicitly into the GATT did not prove to have the appropriate kind of flexibility to deal with the political economy of adjustment in the 1970s.<sup>23</sup>

As for the domestic microeconomic interventions, especially subsidies but other forms of industrial policy as well, these challenged the stability of the nondiscrimination norm as a means of distinguishing “normal” legitimate domestic policies from “cheating” on the trade liberalization bargain. Differences in approach to the mixed economy were to be tolerated under the embedded liberalism bargain, but under the economic pressures of the 1970s it was easy to view activist industrial policies as a beggar-thy-neighbor approach to declining industries or declining demand (steel, for instance); that is, as protectionist cheating on the basic bargain. Domestic technical regulations gave rise to claims that even facially neutral regulatory requirements constituted disguised protectionism, with regulations creating obstacles to trade by forcing foreign producers to adapt to distinctive requirements of the importing country not obviously justified by nonprotectionist regulatory objectives. By the end of the 1970s, it thus became evident that the postwar multilateral trade liberalization needed some fine-tuning so as to sustain the embedded liberalism bargain under changed economic and political circumstances. Then came the economic conservative revolution (exemplified by Thatcher and Reagan at the level of political leadership), and with it a radically different outlook on the problems that ailed the multilateral trading system, and their solution.

The problem was, at least for the United States, no longer framed in terms of the adequacy of the scope for adjustment under the existing rules of the game. In fact, the normative basis for interventionist adjustment policies was put in question by the moral laissez-faire outlook of the ascendant economic neo-Right, aided and abetted by public choice accounts of interventionism as the payment of rents to concentrated, entrenched constituencies. It was natural, then, in defining the U.S. interest in rewriting the rules of the game for multilateral trade, to focus on interventionist or otherwise “inappropriate” domestic policies in other countries as barriers to market access for the United States in areas in which it had a competitive disadvantage.

The multilateral rules of the game had enabled Germany and Japan, America’s wartime enemies, to compete successfully in the U.S. market for industrial products; they had also enabled the newly industrializing developing countries to compete successfully in highly labor-

<sup>22</sup> JAGDISH BHAGWATI, *PROTECTIONISM* (1988).

<sup>23</sup> TREBILCOCK, CHANDLER, & HOWSE, *supra* note 18.

intensive industries such as textiles. On the other hand, many barriers worldwide hampered America in exploiting its apparent contemporary comparative advantage in knowledge-intensive industries and services. In some, intellectual property was largely unprotected; in most, competition in network services, such as in telecommunications and finance, was severely restricted or limited, while many others still imposed byzantine and archaic regulatory requirements on products, both imported and domestic. In many cases, a business presence in the other country was necessary for the full exploitation of comparative advantage, and here American firms faced severe foreign investment restrictions.

This new agenda, of course, was to become the core of the Uruguay Round agreements, which established the World Trade Organization. Eventually, it would prove to be the greatest threat so far to the sustainability of embedded liberalism. In contrast to the traditional GATT rules constraining tariffs, quotas, and discriminatory domestic regulations, the new WTO rules, while clearly enhancing market access, had much more ambiguous welfare effects, both domestic and global. These rules could not be justified through the idea of Kaldor-Hicks efficiency—there is no particular reason to believe on the basis of economics that increasing intellectual property protection will increase aggregate domestic welfare. Some countries gain from increased patent protection and some lose; aggregate welfare may increase or decrease.<sup>24</sup> And the issue of who gains and who loses *within* a given society rears its head and cannot be avoided or suppressed by any idea tractable to technocratic management of the trading system.

At the same time, as the framework for management of the system by insiders was being challenged, as it were, from the economic Right, it was also being challenged by the Left. One of these challenges came near the end of the GATT era, at the beginning of the 1990s, from the need for the dispute settlement authorities to examine, against the nondiscrimination norm crucial to embedded liberalism, certain kinds of measures that did not fit within the normal postwar model of domestic policy interventionism, yet did not clearly resemble old-style protectionism, either. Thus, in the *Tuna/Dolphin* dispute, two GATT panels were faced with deciding the legality under the GATT of a U.S. trade embargo against tuna fished in a manner that killed dolphins at high rates.<sup>25</sup> On the one hand, because they extended a domestic scheme to imports, the measures in question arguably did not constitute discrimination against imports; also, there was no textual basis in Article XX, the exceptions provision of the GATT, that provided a territorial or jurisdictional limitation on the policies or rationales for intervention that could be justified under the individual heads of that article, such as conservation of exhaustible natural resources. On the other hand, the scope for domestic policy intervention that attached to the postwar embedded liberalism model did not necessarily, on the available evidence, either explicitly exclude or encompass actions of this nature, aimed at influencing behavior, or at least addressing various noncommercial consequences of behavior, outside the boundaries of the intervening state.

In fact, sorting out how to deal with such measures within the existing framework, while preserving the centrality and coherence of the nondiscrimination norm, is not an insuperable intellectual challenge, as became evident with the *Shrimp/Turtle* case.<sup>26</sup> There, the WTO Appellate Body accepted the view that such measures could be justified under Article XX of the GATT, subject to the conditions of the chapeau of Article XX, in particular that they not be applied in such a way as to constitute arbitrary or unjustified discrimination. But the GATT panels were not up to it, and instead read into the GATT various kinds of limitations

<sup>24</sup> See Alan V. Deardorff, *Should Patent Protection Be Extended to All Developing Countries?* in 4 THE WORLD TRADING SYSTEM: CRITICAL PERSPECTIVES ON THE WORLD ECONOMY 37 (Robert Howse ed., 1998).

<sup>25</sup> United States—Restrictions on Imports of Tuna, 30 ILM 1594 (1991) (unadopted panel report, Aug. 16, 1991); United States—Restrictions on Imports of Tuna, 33 ILM 839 (1994) (unadopted panel report, June 16, 1994).

<sup>26</sup> United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle* case].

on such measures that would exclude them entirely from the legitimate scope for domestic policy intervention. The panels might have thought that they were merely preserving as best they could the implicit parameters of the postwar embedded liberalism bargain. But because of the lack of textual foundation for the rulings, and the apparent flouting of the explicit hierarchy of norms in Article XX (which allows even explicitly discriminatory policies for conservation purposes), the panels were understood to be making a choice that trade liberalization should trump environmental values. To many people around the world, the panels had blown up exactly what they had been trying to preserve—the notion of trade liberalization as consistent with deep regulatory diversity, accommodating a full range of noneconomic public values.

A further set of developments was simultaneously putting pressure on the embedded liberalism bargain. In the wake of the debt crisis, a range of developing countries ended up removing or modifying restrictions on foreign investment and various other domestic policies that were disincentives to the attraction of foreign capital, either because they were encouraged to do so by the IMF (the “Washington consensus”) or because, with access to debt markets now limited, equity investment from abroad seemed to be the only plausible remaining means of financing economic growth. This led to fears of “social dumping” in the developed world that would eventually cause a race to the bottom: developed countries would not be able to sustain high environmental and labor standards, or rates of taxation needed to finance the redistributive policies of the welfare state, if they had to compete with these poorer countries for the location of capital investment. However contested its empirical foundations might be, the race to the bottom gave a new, nonprotectionist normative foundation to traditional “level playing field” concerns about “fair trade,” and, indeed, one consistent with the normative basis of the embedded liberalism bargain itself: first of all, because it put in question the sustainability of the very sort of legitimate policy interventionism that was the “domestic” side of the embedded liberalism bargain; and second, because the “race to the bottom” conjured up images of the kind of beggar-thy-neighbor competition that the “international” side of the embedded liberalism bargain was aimed at constraining. After all, as noted above, trade law in its original postwar form was not about comparative advantage as such, but about constraining destructive interdependence—of which a race to the bottom is one form.

Just as the insider network could not easily justify or explain *including* intellectual property standards within the multilateral trading regime, or even disciplines on nondiscriminatory food safety and technical regulations, on the basis of the simple conception of Kaldor-Hicks efficiency, they could not easily justify, on the basis of this economic vision, *excluding* in principle or a priori, as it were, trade measures to protect the global environment or to address labor rights abuses. Howard Chang, in the case of the environment,<sup>27</sup> and Michael Trebilcock and I, in the case of both environmental and labor rights,<sup>28</sup> demonstrated how nondiscriminatory trade measures for these purposes have ambiguous welfare effects, which might well be positive in some scenarios. Chang showed how sticks might be more effective than carrots in leading to an optimal internalization of transboundary environmental spillovers or externalities. For one thing, as Chang argued, carrots might induce higher levels of the offending activity (or threat thereof) as a rational response to the prospect of being compensated for not engaging in the activity. Trebilcock and I attempted to categorize possible gains and losses to different interests from both environmental and labor rights-based trade measures. Once one accepts that welfare gains may result from inducing higher levels of environmental and labor rights performance in a range of circumstances, there is no way

<sup>27</sup> Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995).

<sup>28</sup> Robert Howse & Michael J. Trebilcock, *The Free Trade–Fair Trade Debate: Trade, Labor and the Environment*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW* 186 (Alan O. Sykes & Jagdeep S. Bhandari eds., 1995).

of determining in the abstract, i.e., by conceptual economic analysis, whether the welfare losses from trade action are likely to outweigh the gains. It is a matter for case-by-case judgment. Significantly, while the work of Chang and mine with Trebilcock was widely read and cited, no insider trade economist ever publicly challenged its basic conclusions that no robust economic welfare case can be made against trade measures for environmental or labor rights purposes.

The case of the insiders started to appear to come down to the intuition that, since their own ideas about normal government regulation excluded the notion of protecting dolphins or foreign workers, what must be driving such policies was protectionism, more or less hidden. That is, what ultimately backed their position was not, as it turned out, state-of-the-art economics, but highly contingent and contestable social and political notions. Finally, the insiders had resort to arguments about cultural imperialism, “unfair” distributive effects on developing countries, and fear mongering that if one refused to stick to *their* intuitive understanding of what was inside and outside the system, it might collapse in a cornucopia of protectionist measures on environmental or moral pretexts—“après nous le déluge.”

By resorting to such arguments, the insiders, the network, all but threw away, as it were, their own crown and scepter; for these are the kind of arguments that belong to political debate and struggle, not technocratic management; no longer could one plausibly apply expressions like “system friction” and “interface” to the issues in question, whose imaging suggested that what was required were technical, engineering solutions. And as for the claim about the danger of system collapse, it constituted an *admission* that the system rests on an essentially contingent, and in some measure arbitrary, dividing line between what is acceptable and unacceptable in the way of domestic regulation—arbitrary and artificial, that is, when detached from a relevant, legitimate conception of politics such as embedded liberalism had provided. Thus, those with a different intuition about the dividing line could simply say: *we* want the line drawn *here*, not there, to which the insiders could summon no good response based upon the authority of expertise, having admitted that the dividing line is preeminently a judgment call about where a sustainable, legitimate dividing line might be drawn.

Some insiders tried to avoid this predicament by “re-embedding” their normative ideal of free trade within the Washington consensus. In other words, they moved from free trade as an economic ideology to free trade as embedded in a broader liberal economic ideology. Trade liberalization became part of a general set of prescriptions for growth and prosperity, at odds to a large extent with the progressive welfare state vision of the embedded liberalism bargain. On the basis of the Washington consensus, bringing intellectual property into the WTO and keeping labor and the environment out (meaning not only not dealing with these claims but making unilateral responses to them illegal) could be explained. For this is a vision that links protection of property rights to growth and innovation, and views environmental and human rights as luxury goods, a kind of gratification to be postponed until unrestrained industrial or postindustrial capitalism produces high real incomes.<sup>29</sup> But, even before the Asian crisis, the Washington consensus became visible as merely an *ideology*, imposed on developing countries by the IMF and bitterly contested in political struggle everywhere, whose individual prescriptions often failed on their own narrow terms to produce success, and were, in short order, fundamentally challenged by responsible mainstream economists.<sup>30</sup> Dani Rodrik makes the essential point: “There is no single mapping between a well-functioning market and the *form* of non-market institutions required to sustain it. This finds reflection in the wide variety of regulatory, stabilizing, and legitimizing institutions that we observe in today’s advanced industrial societies.”<sup>31</sup> In the case of developing countries, prior to the Asian

<sup>29</sup> And see the powerful critique of this view by AMARTYA KUMAR SEN, *DEVELOPMENT AS FREEDOM* (1999).

<sup>30</sup> Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered*, paper prepared for the United Nations Development Programme (Apr. 2001) (on file with author).

<sup>31</sup> *Id.* at 12.

crisis at least, the insider network constructed a story of “export-led growth”—the remarkable economic success of the Asian tigers could be attributed to openness in trade policy, as opposed to the traditional “import-substitution”-based *dirigiste* development policies. However, it turned out that a range of interventionist government policy instruments may well have been crucial to the success of at least some of the Asian tigers, including, among others, targeted subsidies and incentives not really compatible with the insider vision of “undistorted” liberal trade.<sup>32</sup>

Another route taken by some insiders was to recast the trading system as “constitutional” in nature—as higher *law*, not simply dependent on economic science but on juridical and even moral *grundnormen*. The strongest proponent of this approach is Ernst-Ulrich Petersmann, who astutely perceived the limits of economic policy science in legitimating the trading system long before others were forced to open their eyes. Petersmann sought to justify free trade in terms of a Kantian notion of autonomy, as part of the core of liberty, or human rights.<sup>33</sup> With the juridification of dispute settlement in the creation of the WTO—now panel reports were adopted with automaticity, the positive consensus rule having been replaced by a negative consensus rule, and there was an appeals tribunal as well—this view seemed intuitively plausible. Also, one could be inspired by the trajectory of the European Union, where the European Court of Justice apparently had a crucial role in transforming a bargain or contract about economic mobility into a constitutional arrangement for economic (and to some extent political) integration. A more modest, or more cagey, version of the constitutional thesis was propounded by those such as Thomas Cottier, who had little use for Kantian arguments about autonomy but were very attracted to the notion that, having lost the crown and scepter of policy science, the insiders might now don the even more majestic robes of *Hütter der Verfassung*. The idea here was that the WTO was inevitably becoming the kind of institution that required a balancing of trade and nontrade values, especially in adjudication. This could be undertaken with legitimacy because *within* the constitutional order of the WTO there were certain “fundamental principles,” developed to be sure by the insiders with their expert sense of what the system as a juridical system required, that permitted such balancing in individual cases.

With Nicolaidis, I have responded at length elsewhere to the constitutionalist view of the WTO.<sup>34</sup> Here, it suffices to make two points as to why this approach is inadequate to counter the return to the political and to maintain the WTO as a “system” above politics. First, if free trade is recast in terms of “rights,” it must obviously be integrated or balanced somehow with other human rights, explicitly entrenched in international legal instruments (something that Petersmann has willingly and explicitly admitted). Yet since these other rights are not substantively focused on trade, it is very unclear why the trading system itself or, more specifically, its juridical organs have the legitimacy to strike the balance (as opposed to the UN organs primarily seized of human rights questions), or indeed why it should not in the first instance be struck by democratic decision making within each polity. Thus, a line of argument that seeks to prevent the collapse of the trading system into politics really ends up collapsing it into the complexly, but unmistakably political realm of human rights discourse. There may be a constitutional element, but it is largely external to the trading system, i.e., it is to be found in the hierarchy of norms in international human rights law generally, as evolved in the jurisprudence and practice of the UN committees and other organs, or in the domestic constitutional arrangements of liberal democracies.

Second, with respect to the non-human-rights-based constitutionalist position, it faces a similar set of difficulties—if there is a conflict of values, what makes it legitimate to resolve

<sup>32</sup> See GILPIN, *supra* note 4, ch. 12.

<sup>33</sup> Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT’L ECON. L. 19 (2000).

<sup>34</sup> Robert Howse & Kalyso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, in EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 15, at 227.

these *within* the trading system, according to *its* fundamental principles? In recent work, Cottier has shrewdly attempted to finesse this problem, through linking the “fundamental principles” of the trading system with more general principles of public international law, but he cannot disguise the basic move here, which is to convert such notions as “good faith” to principles that privilege the internal values of the trading system as understood by the insider network; for instance, an idea of legitimate expectations that favors interpretations of trade treaties made in light of expectations of liberalization, as if “good faith” would not equally apply to the expectations of those seeking to rely on treaty provisions delimiting, or providing bounded exceptions, to liberalization commitments.<sup>35</sup>

Finally, and with significant consequences, some of the insider network had resort to legal positivism as a strategy for at least defending the current rules and institutions against their critics. The WTO has no power independent of the rules agreed to by consensus of the member states; that agreement is based on domestic political procedures that have the legitimacy prescribed by domestic constitutional arrangements. The implication of this approach is that, *of course*, trade is political—but the political dimension or phase is exhausted within each polity according to its own internal political system. To quote an expression much favored by John Jackson, “All politics is local.” Once the result is a set of rules approved by each member according to its internal political system, the problem of legitimacy largely disappears, or its political dimension disappears—the insiders are then authorized to take the rules and, on the basis of their expertise, apply them to the “management” of the trading regime. This is not to say that new rules may not be required in the future, which will then be subject to the full process of politics within each member country.

By cabining off the political to the local or domestic, the insider network might aim to avoid attempts by new social movements to gain participatory rights at the level of the WTO itself, as well as their attempts to discredit existing rules as “antidemocratic.” In other words, it is not just that such matters as labor and the environment belong somewhere else—*politics* belongs somewhere else. Yet the positivistic move is profoundly self-defeating. By focusing attention on the actual political processes by which WTO rules have been debated and accepted at the level of domestic political institutions, the positivistic move has served to highlight the gap between formal and actual consent, a gap that has historically almost always proved to have fateful consequences for the legitimating power of established, traditional democratic procedures.

Thus, as I have developed at length elsewhere,<sup>36</sup> there are significant agency costs problems in the use of representative institutions to determine the consent of the principals, the people, to bargains negotiated by their agents (diplomats, expert negotiators, etc.) with agents of other peoples. Agency costs are generated whenever agents themselves have interests that diverge from those of the principals on whose behalf they are acting. Some of the problems in terms of international treaty negotiations are well described by Eyal Benvenisti: a process such as parliamentary ratification

permits very little public scrutiny of the negotiators’ acts and omissions because ratification does not allow for amendments; thus many alternatives necessarily remain unexplored. Even the domestic debate on ratification often remains clouded because the access of the public and legislators to information concerning international negotiations is invariably limited. Little is known about the options offered and discussed, as negotiators have little incentive to provide accurate information on their performance to the general public.<sup>37</sup>

<sup>35</sup> See Thomas Cottier & Krista Nadakavukaren Schefer, *Good Faith and the Protection of Legitimate Expectations in the WTO*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 47 (Marco Bronckers & Reinhard Quick eds., 2000).

<sup>36</sup> Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, in *TRANSATLANTIC REGULATORY COOPERATION*, *supra* note 20, at 469.

<sup>37</sup> Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 *MICH. L. REV.* 167, 200 (1999) (citation omitted).

Now some of the obvious answers to these agency costs problems are transparency with respect to negotiating proposals; access of nongovernmental organizations (NGOs) to the negotiating room at least as observers, so as to monitor agent behavior; and abstention from negotiating WTO rules in grandiose rounds where many issues and provisions are linked and a take-it-or-leave-it package presented to domestic polities. Thus, the effect of raising domestic democratic procedures as the basis for the legitimacy of the existing rules is to invite consideration of defects in domestic democratic processes that may be remediable, at least in part, only by the very kinds of changes concerning transparency and participation at the WTO level that the insider network might be seeking to avoid by cabining off the political to the domestic level.

But even deeper difficulties are posed by the positivistic move as a response to the collapse of the trading regime into politics. Most democratic processes within WTO member states assume that the greatest part of the rules they generate will be reversible, at manageable cost, in response to a change in democratic will within that particular polity. Where a greater degree of irreversibility is desired, as with constitutional change in many systems, higher degrees of democratic consent than mere parliamentary approval are often demanded. Now consider the WTO: to be excused from or modify a WTO rule that the people of a particular polity may no longer view as legitimate, that polity will have to obtain the consent of much, if not all, of the membership of the WTO or pay the enormous price of withdrawal from the organization. In effect, this result can amount to a higher degree of irreversibility than even for constitutional amendments. Those with a libertarian orientation, such as Petersmann, welcome such hands tying, pointing out that in a sense the WTO outdoes domestic constitutionalism in the hands-tying department. After all, protections of property and contractual rights, to the extent embodied in WTO rules, cannot be reversed, except by a radical and potentially catastrophic move by that particular polity, i.e., without agreement by others. One way that some have fudged this situation is by presenting WTO law as requiring that only a modest price, acceptance of trade retaliation of limited commercial effect, be paid for non-obedience to WTO rules.<sup>38</sup> But as Jackson and Marco Bronckers, among others, have pointed out, such an understanding supposes a departure from the basic conception of state responsibility in the law of treaties, a departure not explicitly endorsed in any WTO treaty text.

The problem is not only that democracy implies the ability of a polity to change its heart without catastrophic consequences—at least on most matters. There is also the difficulty of limited knowledge *ex ante* of the effects in practice of a given set of rules. This difficulty goes to the quality of the original consent itself. Many WTO rules are stated in quite general terms, even inviting their characterization by some commentators as “standards” rather than rules.<sup>39</sup> How these rules are interpreted and applied *ex post* may differ very substantially from anything predicted in democratic deliberation *ex ante*, even if one assumes that negotiators or other government officials made no effort to disguise or sweeten the real story about the kind of impact the rules might have.<sup>40</sup> While this is not a new occurrence for ordinary domestic legislation, in that case addressing the gap between *ex ante* expectations and *ex post* effects by legislative amendment or even by detailed rule making is quite feasible. Again, in the WTO context the only adjustment mechanism possible entails the consent of much, if not all, of the membership of the organization.

<sup>38</sup> See Alan O. Sykes, *The Remedy for Breach of Obligations Under the WTO Dispute Settlement Understanding: Damages or Specific Performance?* in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW*, *supra* note 35, at 347.

<sup>39</sup> See Kalypto Nicolaidis & Joel P. Trachtman, *From Policed Regulation to Managed Recognition: Mapping the Boundary in GATS*, in *GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION* 241 (Pierre Sauvé & Robert M. Stern eds., 2000).

<sup>40</sup> See MARCO C. E. J. BRONCKERS, *A CROSS-SECTION OF WTO LAW*, ch. 9 (2000) (“Better Rules for a New Millennium: A Warning Against Undemocratic Developments at the WTO”).

In invoking a positivistic notion of legal rules, the insider network may have been underestimating the significance of a change between the old GATT system and the WTO legal order presupposed in the above analysis. Under the old GATT system, as noted earlier in the discussion on constitutionalism, dispute panel reports had legal effect only if adopted by the membership and were essentially the product of the insider network itself, operating through the drafting work of the legal secretariat (the “independent” panelists themselves rarely conceptualized and drafted rulings). Thus, the insider understanding of the agreed meaning of treaty provisions, as refracted in the first place through the secretariat and then through the delegates of member states, provided a hedge against the democratic problem posed by sharply divergent *ex ante* and *ex post* understandings of treaty provisions. Indeed, one of the crucial functions of the insider network was to maintain continuity of meaning—with subtle adjustments as times changed—with respect to treaty interpretations. This effort shines through in the old GATT panel decisions in their tremendous emphasis on negotiating history and their supposed understanding of what the drafters “really” had in mind.

Moreover, in the pre-Uruguay Round GATT system, through the process of adopting panel reports by positive consensus, there was a diplomatic control on interpretation as well. If the losing party found that the ruling was sharply at odds with a domestic understanding of the nature of a treaty commitment, it could block adoption (consider how much more damage would have been done to system legitimacy had the *Tuna/Dolphin* rulings not remained unadopted). The automaticity of adoption in the WTO system makes *ex post* diplomatic adjustment of interpretations by dispute settlement organs much more difficult—in practice, it requires a consensus of the membership *in favor* of an interpretation at odds with the ruling of the panel and/or Appellate Body.<sup>41</sup>

In depicting the inability of the insider network to generate an adequate response to the various pressures on embedded liberalism from the 1970s on, I mean neither to criticize it in this regard, nor to depict it as the *cause* of the apparent difficulties of the system today. Many factors—e.g., that the United States is a declining hegemon increasingly concerned with relative gains within the trading system and shifting ideas and ideologies (the rise and fall of the economic conservative Reagan/Thatcher revolution and the Washington consensus)—came into play. I mean only to point out that, in presenting challenges to the embedded liberalism bargain itself, these pressures simply could not be addressed coherently or plausibly within the constitutive horizon of the insider network. Diplomatic and technocratic management could not by themselves perform an adequate mediating function as between domestic politics and interstate bargaining on trade liberalization, i.e., the kind of role they had appeared to play when protected by the relative stability of the embedded liberalism bargain and the relative insulation of the trade institutions from global Grossepolitik in the Cold War era. I only wonder whether the various modes of resistance to the collapse of the trading regime into politics put up by the insider network may in the short term have made the evolution of new mediating mechanisms, structures, and ideas more difficult, by reinforcing the divide between insiders and outsiders, and teaching the outsiders the habits of extremism and negativism that people learn when they get habituated to being (illegitimately) excluded.

#### V. HOW WE LIVE NOW—ALL TRADE IS “TRADE AND . . .”

If, then, we have arrived at the point where one can no longer hide the absence of an apparently natural or “scientifically” defensible demarcation between what is inside the trading system, what can legitimately be affected by it, and what not, and what should be

<sup>41</sup> I am grateful to Sara Dillon for reminding me to stress this point.

disciplined by it and what not, is this predicament not the very abyss that the insider network has long feared and yet apparently not proved able to forestall?

The answer, most assuredly, is no. First of all, the original goal of the Bretton Woods system remains widely shared. Perhaps apart from some anarchist fringe groups, no one believes that it would be desirable to unleash a protectionist race to the bottom. Constraining generalized recourse to protectionism in the presence of economic tension or crisis, whether regional or global, remains a widely desired outcome. It is shared by Pascal Lamy, Ralph Nader and Laurie Wallach (who want to roll back the WTO to the original GATT but *no further*), Jagdish Bhagwati, almost all the political leaders in the world and, for what it's worth, me. One can remain true to this goal without having to believe in noble lies that trade is *always* advantageous and benign.<sup>42</sup> And one can embrace the goal while at the same time acknowledging that the specific rules in the system are contingent and a matter for political bargaining and adjustment, determined neither by economics as policy science nor by some kind of "higher law" or *grundnorm*.

Second, the Appellate Body of the WTO has shown that one can craft interpretations of existing rules, in cases where a conflict or potential conflict of values is evident, that have a legitimacy that crosses the divide between the "protrade" insiders and the external constituencies they have (unsuccessfully) attempted to marginalize. In cases like *Shrimp/Turtle*, *Beef Hormones*, and most recently *Asbestos*,<sup>43</sup> the Appellate Body has rejected the approach of the insider network evidenced in the panel decisions in these cases and used a variety of jurisprudential techniques to do justice to the delicate interrelationship of values and interests in such cases, some internal and some external to the trading "system."<sup>44</sup> Thus, while the Appellate Body has contributed to the destruction of the myth of "trade and . . ."—that there is a trading system with a secure sense of self-identity facing "critics" who want to get in the door on the basis of some concern of dubious or complex relevance or relation to the system—it has at the same time shown how one could craft legal judgments in complex cases that rise above such a simplifying bifurcation.<sup>45</sup> For instance, in the *Hormones* case, it questioned the panel's interpretation of a requirement that members (in this case the European Union) not take trade-restrictive sanitary or phytosanitary measures unless they are "based on" international standards. The panel said those measures must conform with such standards, assuming that the stricter meaning was intended by virtue of the purported purpose of the treaty to eliminate trade-restrictive effects of regulatory diversity through harmonization. In reversing this finding, the Appellate Body noted one of the main reasons why attention to the details of the text is important to legitimacy when competing values are being adjudicated: the detail of the text itself may reflect a "delicate and carefully negotiated bal-

<sup>42</sup> See Driesen, *supra* note 16.

<sup>43</sup> *Shrimp/Turtle* case, *supra* note 26; European Communities—Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AB/R (Jan. 16, 1998) [hereinafter *Hormones* case]; European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos Products, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *Asbestos* case].

<sup>44</sup> Some of these techniques are discussed in extenso in Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in *THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* 35 (J. H. H. Weiler ed., 2000). See also Robert Howse & Elisabeth Tuerck, *The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 283 (Gráinne de Búrca & Joanne Scott eds., 2001) (commenting on *Asbestos* case, *supra* note 43).

<sup>45</sup> There are many who still have not got the point, admittedly. Thus, in a recent article Gregory Shaffer pegs or labels me as a "critic" of the "system"—as if the system any longer existed when an official organ of the WTO, the Appellate Body itself, if not rejects, even more tellingly, simply bypasses the insider view of the requirements or fundamentals of the system (*Tuna/Dolphin*). If I am a critic of the "system," then a fortiori so is the court of last instance of the "system." Gregory Shaffer, *WTO-Blue Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 *FORDHAM INT'L L.J.* 608, 619–23 (2000).

ance . . . between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.”<sup>46</sup> Here, the Appellate Body opposed the tendency of the panels, dominated by the insider network, to *assume* a certain purpose prior to careful textual interpretation, thereby taking a shortcut to the establishment of treaty meaning that bypasses the exact text. This approach prevents interpreters from having to “test” their view of purpose against the exact words used in the treaty, a necessary safeguard against the importation of a single purpose into a legal text crafted to balance diverse, and possibly competing values. In some sense, the very decision to follow these general interpretive norms of public international law enhances the legitimacy of the dispute settlement organs in adjudicating competing values, because these norms are common to international law generally, including to regimes that give priority to very different values, and are not specific to a regime that has traditionally privileged a single value, that of free trade.

Another interpretive issue in the *Hormones* case illustrates this. A traditional GATT-specific canon of interpretation was that where a provision of the treaty allows an exception to a trade-liberalizing obligation, the burden of proof falls on the party invoking the exception—an approach that clearly privileges free trade over other, competing values and assumes that the latter, embodied in the exception, cannot easily dislodge the former, regardless of the nature of the matter in dispute. In *Hormones*, the panel applied this traditional GATT-specific approach to a provision of the Agreement on the Application of Sanitary and Phytosanitary Measures, but the Appellate Body reversed its finding on burden of proof, instead emphasizing that “merely characterizing a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of the provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty’s object and purpose.”<sup>47</sup>

Article 31 (3) (c) of the Vienna Convention on the Law of Treaties provides that “any relevant rules of international law applicable in the relations between the parties” shall be brought to bear on the interpretation of a treaty.<sup>48</sup> This provision mandates the consideration of *non*-WTO international legal rules in the interpretation of WTO treaties—rules that may reflect other values and interests than those of trade liberalization. In the *Shrimp/Turtle* case, the Appellate Body referred to international environmental law and policy in interpreting the provisions of Article XX of the GATT as it related to the possibility of justifying otherwise GATT-inconsistent trade measures aimed at protecting endangered species; in this case, the Appellate Body relied upon the explicit invocation of sustainable development in the preamble to the WTO Agreement, as well as an evolutionary conception of the interpretation of treaty terms. Perhaps more important, in assessing the implications of the unilateral nature of the U.S. measures for the consistency of their application with the “chapeau” of Article XX—which requires that application not result in “unjust” or “arbitrary” discrimination or a “disguised restriction on international trade”—the Appellate Body, unlike the *Tuna/Dolphin* panels, did not simply invent its own limitation on unilateralism as a means of protecting the environmental commons; instead, it referred to a baseline in actual international environmental law that was contained in the Rio Declaration on Environment and Development.<sup>49</sup> Thus, since Principle 12 of the Rio Declaration, among other international legal instruments, called for the avoidance of unilateral measures and resort to a solution based

<sup>46</sup> *Hormones* case, *supra* note 43, para. 177.

<sup>47</sup> *Id.*, para. 104.

<sup>48</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 31 (3) (c), 1155 UNTS 331.

<sup>49</sup> Rio Declaration on Environment and Development, June 14, 1992, 31 ILM 874 (1992).

on consensus whenever possible, the Appellate Body could find that, against this baseline, the failure of the United States to negotiate seriously with the complainants toward a consensus-based solution, while having already negotiated successfully with other members, constituted “unjustified” discrimination.<sup>50</sup>

In *Shrimp/Turtle*, without so much as a citation to the unadopted *Tuna/Dolphin* panels, the Appellate Body came to the conclusion that the conservation exception in Article XX(g) of the GATT could, in principle, provide a legal basis for unilateral trade measures to protect the global environment, in this case endangered species of sea turtles, even where directed against other countries’ policies. It opined:

It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.<sup>51</sup>

The Appellate Body went on to find that the U.S. embargo on turtle-unfriendly shrimp was a bona fide conservation measure that fell within the ambit of Article XX(g); but it also found that the way it was applied violated the conditions in the chapeau, or general preambular paragraph of Article XX, which stipulate that measures to be justified under that article shall not be applied with “arbitrary” or “unjustified” discrimination. In particular, the United States had failed to make a serious effort to reach a negotiated agreement with the complainants, though it had done just that with some other WTO members; the scheme was applied in an inflexible manner to different countries where different conditions prevail; and its enforcement at the border lacked due process and transparency.

In essence, the Appellate Body threw out the window the conventional insider wisdom that one could not bring such measures within the purview of the trading system without threatening its coherence or integrity. The fact that the United States lost the case, or apparently did, was actually more damaging to the insider outlook than if the United States had simply won—for what the Appellate Body showed is that one could in fact control the problematic or potentially problematic aspects of these kinds of measures (e.g., knee-jerk unilateralism, indifference to the specific situations of other countries, hidden protectionism) *within* the legal framework of the WTO system. With this ruling, the Appellate Body enfranchised the previously “external” constituencies, who had been marginalized as “critics,” as “trade and . . .” people. As with any newly enfranchised group, there is some distance between the initial act of enfranchisement and significant empowerment. But the initial stage is crucial—those who simply stood “outside” are now stakeholders “inside.” Or, more precisely, the categories of “inside” and “outside” have been destabilized in important respects. Ironically, perhaps, many of those now enfranchised did not realize what had happened. Looking largely at the result (the United States still lost the case, albeit only on the details of how it had applied its scheme), many groups did not immediately understand *Shrimp/Turtle* to differ that much from the *Tuna/Dolphin* outcomes (an interpretation doubtless influenced by the “spin” that insiders generally put on *Shrimp/Turtle*, minimizing its departure from insider dogma, or attributing the departure to considerations of “politics,” i.e., pressure from the United States, as opposed to a sea shift in interpreting the trade and environment issue doctrinally). Now, however, a panel charged with examining whether the actions the United States took to implement the *Shrimp/Turtle* ruling were adequate has made it crystal clear that there has indeed been a sea shift—the United States was found to be imposing

<sup>50</sup> *Shrimp/Turtle* case, *supra* note 26, paras. 168–72.

<sup>51</sup> *Id.*, para. 121.

a unilateral trade measure to protect the environment altogether consistently with the requirements of the GATT. Many insiders never thought they would see the day.<sup>52</sup>

The insider network will not, of course, easily give up the kind of power that it exercises. The Bourbon monarchy held on for quite a time after the divine right of kings was largely discredited among the politically significant classes. The insider network retains a wealth of technical knowledge, functioning personal relationships, competent professional practices and habits, and (unlike the Bourbon monarchs) a justly earned reputation for integrity, incorruptibility, and dedication to (its own ideal of) public service. It is still largely essential to making the system run on a day-to-day basis, oiling its wheels. What it can no longer succeed in doing is to translate these credentials into privileged authority with respect to interpreting and evolving the fundamental norms of the trading regime, and above all divining what is “inside” and what must remain in some sense or other “outside” the WTO. It must compete in the marketplace of ideas and the *political* marketplace, with alternative conceptions of what the trading regime should be like and its relationship to the goals of politics.

Arguably, the Appellate Body’s interpretation of the existing rules can go only so far in stabilizing the system from its fall into politics. How, then, can new rules ever be negotiated and the system be evolved politically, if economics or insider expertise or insider-evolved *grundnormen* cannot lead toward a consensus about what is inside and what is outside? Given the tensions between different constituencies, and between developed and developing countries, and the intense contestability of the relation of domestic policies and institutions to the goals of the trading system, are we not condemned to impasse?

Applying insights developed in the context of a major project on comparative federalism that we have spearheaded,<sup>53</sup> Nicolaidis and I have developed a notion of global subsidiarity<sup>54</sup> that reflects the proposition that, in all multilevel governance systems, attempts to legitimately define and police jurisdictional boundaries (competences or powers) have failed. Rather than attempt once again to decide what is “in” or “out of” the WTO, we should try to mold the rules and their interpretation to structure the *interaction* of the trading regime with other powers and authorities, both domestic and international, in a legitimate manner.<sup>55</sup> Thus, we must recognize in the first instance that the trading regime should interfere with substantive regulatory choices made by institutions and actors with greater democratic legitimacy only to the extent needed to maintain a bargain that can avoid reversion into beggar-thy-neighbor protectionism (this should not be understood as old-fashioned deference to domestic sovereignty; the actors or institutions could be international or transnational, such as an international environmental regime or an accord on health matters). In this respect, a good starting point, but only a starting point, is the original national treatment nondiscrimination norm—significantly, an idea that is accepted by many of those who are described or self-described as critics of the system. Where additional or different disciplines are needed to preserve a legitimate bargain or extend rules on protectionist measures, the challenge is not to try to limit these to certain areas and not others (telecommunications, yes; environment, no, for example), but to be creative with instruments that allow the appropriate *droit de regard*, without unduly disturbing domestic democratic choices or the legitimate choices of other institutions. The focus as regards technical regulations should

<sup>52</sup> The panel’s finding that the U.S. measures, as adapted, are consistent with WTO law was recently upheld on appeal by Malaysia to the Appellate Body. In rejecting the appeal by Malaysia, the Appellate Body reemphasized the importance of its finding in the original appellate ruling that unilateral trade measures directed at other countries’ policies are not, in principle, excluded from justifiability under Article XX. It stressed that this finding was not dicta and in fact was intended in part to give guidance to future panels. Shrimp/Turtle case, *supra* note 26, Recourse to Article 21.5 of the DSU by Malaysia, WTO Doc. WT/DS58/AB/RW, paras. 107, 137–38 (Oct. 22, 2001).

<sup>53</sup> THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypto Nicolaidis & Robert Howse eds., 2001).

<sup>54</sup> Howse & Nicolaidis, *supra* note 34. Much of what follows is derived from that essay.

<sup>55</sup> On this point, see also Marco C. E. J. Bronckers, *More Power to the WTO?* 4 J. INT’L ECON. L. 41 (2001).

be on process-related disciplines (transparency, public justificatory processes, fairness and nondiscrimination in application) or managed mutual recognition, and as regards labor and the environment, on minimum standards to prevent a race to the bottom, with continuing permission for recourse to unilateralism à la *Shrimp/Turtle*, where countries unreasonably hold out from being part of a negotiated framework.

In terms of the legal architecture appropriate to this notion of global subsidiarity, it is worthwhile to consider the contrast between the original GATT regime and the WTO treaty system as embodied in the Uruguay Round Final Act. Early in this essay, I described the GATT approach to the relationship between trade and “domestic” policies as “messy.” Drafted at a time when the market revolution was at its zenith, the WTO approach could be described as much more purist. Opt-out and phase-in provisions (except for sectors such as textiles and agriculture, where traditional protectionist interests had to be appeased) were strictly limited and circumscribed; states were placed under an obligation to adhere to almost all the treaties to take advantage of the others (unlike the GATT Codes on Subsidies, for example); and very few soft law mechanisms were created, it being assumed that binding dispute settlement, with the possibility of authorized countermeasures in the case of non-compliance, was the logical route to implementation. The new agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights and the General Agreement on Trade in Services, contained minimal safeguards arrangements; nor were there many provisions allowing individual states to reverse commitments or rebalance concessions at a reasonable cost. Looking at this legal architecture, one can easily see how Petersmann, for example, could discern an incipient system of *rights* emerging from the messy bargain “à la carte” that was the GATT regime.

If, today, we want to preserve and enhance a basic multilateral bargain to contain generalized recourse to protectionism, but under conditions in which the trade regime has collapsed into politics, and there is no transpolitical orthodoxy that can universally validate any particular relationship between domestic policies and trade liberalization, then we may want to reopen the kind of tool kit that was used by the original GATT drafters, and revisit and perhaps dismantle some of the more rigid architecture that was produced in the 1990s. If the Washington consensus has been discredited and we cannot return to the Keynesian welfare state accepted by embedded liberalism as an assumed normative benchmark, then it is important to cast new trade rules and the institutional framework for their implementation, in a manner that allows democratic experimentalism at the domestic level with new economic and social institutions, and mechanisms for development.<sup>56</sup> In the services area, for instance, should not commitments that members make to market access be adjustable, as they experiment with forms of delivery of public goods that reflect neither traditional welfare-state orthodoxies about state monopolies nor 1980s orthodoxies about privatization? Similarly, in the case of biodiversity, developing countries, in particular, are engaged in many experiments with respect to the appropriate legal instruments and institutions to protect and compensate indigenous knowledge, and to safeguard plant genetic resources: should the WTO rules not be crafted to facilitate such experiments, ensuring that they cannot be undermined by developed countries or multinational corporations, while avoiding the rigidity of boilerplate intellectual property *rights*?<sup>57</sup> In the case of competition law and policy, domestic policy interventions can interact to create potentially destructive interdependencies in a range of situations. There is no reason to hold the line against a role for the WTO, but the role may not be rules-based dispute settlement. Rather, independent analysis of the situations in question, from a perspective different from that of domestic regulators, is called for, an analysis that focuses precisely on trade effects and potentially

<sup>56</sup> See Rodrik, *supra* note 30. See also, on the promise of democratic experimentalism, ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* (1998).

<sup>57</sup> See VANDANA SHIVA, *TOMORROW'S BIODIVERSITY*, ch. 5 (2000).

destructive or negative interdependencies, and that regulators are required to consider before finalizing their decisions. Thus, regulatory cooperation and broadening of domestic regulatory perspectives should be facilitated without the imposition of an ideal policy model or paradigm. Moreover, it may make no sense whatever to require all WTO members to adhere to such norms, since many WTO member countries have no competition laws or policies. Hence plurilateralism, but of the open kind that allows all members to join the future on equal terms and conditions. For example, much of the debate on labor and environmental standards has been cast in terms of the possibility of codes, adherence to which would be a condition of WTO membership, and enjoyment of the benefits of the other agreements, including the original GATT. However, one could easily imagine a plurilateral approach, with developed countries and perhaps the most advanced developing country economies taking the lead in accepting disciplines on beggar-thy-neighbor regulatory competition in these areas. Of course, many environmentalists and labor rights advocates might find such an approach too weak; yet, as long as the *Shrimp/Turtle* ruling is good law, a WTO member that consistently rejects cooperative approaches to genuinely international environmental or labor concerns (those recognized in international environmental and labor law) may have to reckon with WTO-legal unilateral action.

A second dimension of the appropriate response to the recognition of the collapse of trade law into politics is inclusiveness. Classic embedded liberalism was predicated on the assumption that democracy happened inside, while bargains happened outside between national representatives who were the sole representation of these domestic processes. Deciding how and to what end state-society relations were to be conducted was the sole prerogative of the sovereign state. This view mirrored the sharp distinction between inside and outside and the role of the border in the territorially based conceptions of trade law. While the economic and to some extent legal reality has moved on, with the interpenetration of domestic systems of production, laws, and regulation, indirect representation still constitutes the basis of the politics of the WTO and its claim to legitimacy. It is time to unbundle traditional concepts of territoriality, as Ruggie has called for.

As Robert Keohane and Joseph Nye put it, international regimes, like the trade regime, were conceived as decomposable hierarchies governing specific issue areas and were designed to keep out the public, as well as officials from other branches.<sup>58</sup> The undoing of the embedded liberalism bargain demonstrates in part that this club paradigm needs to be adapted: if what is happening within the organization is not simply the application of technical competence to specific issues within a predetermined political framework, but itself entails the balancing and arbitrage of competing values and interests, without authoritative guidance from economic "science" and/or ideology, then a closed process seems sinister, not sensible.

Today, inclusiveness needs to be more broadly and more subtly defined. First, at the *national* level the WTO can encourage greater inclusiveness in trade policymaking. After all, to the extent that democratic principles can be maintained beyond the nation-state, indirect accountability remains the foremost means to deal with the problem of a democratic deficit at the global level. National citizens, groups, or parliaments can more truly and meaningfully participate in trade policy decision making under obligations of domestic consultation. This conclusion logically follows from the analysis of agency costs in international negotiations discussed earlier in this essay.

More important, at the *supranational* level it has become much harder to pretend that governments adequately represent all relevant interests in a given trade issue. There are epistemic communities, transnational issue networks, and global advocacy NGOs that do not find any adequate point of entry at the domestic level. The irony of the Seattle Ministerial Conference is that it revealed the beginnings of a *global* civil society with regard to trade matters,

<sup>58</sup> Robert O. Keohane & Joseph S. Nye, *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 15, at 264.

as both a product of and a reaction against globalization. Thus, providing participatory opportunities for NGOs is not *simply* a matter of addressing the problem of agency costs of representative democracy—it is also a question of seizing on the potential for *deliberative* democracy at the transnational level. Embedded liberalism assumed the state was the only really legitimate or effective institution for mediating different collective interests and values. Yet many of the most interesting and perhaps promising experiments today in transnational social and economic governance do not involve the state in a leadership or regulatory role; the codes of conduct for multinational corporations are an obvious example. On the one hand, social theorists such as Charles Sabel have arguably very much overestimated the possibility of such arrangements to replace or displace the state;<sup>59</sup> on the other hand, ceaseless repetition by the WTO insider network of the slogan that the WTO is a “Member-driven” organization—however flattering to the vanity of diplomats and potentates—cannot suppress the reality that economic and social institutions are being shaped and reshaped by nonstate actors, and indeed by bargains between different nonstate actors. Why is it that (independent) northern and southern NGOs can speak to each other respectfully and make progress toward common positions on, for instance, the trade and environment issue (which they are doing), whereas refracted through the statist institution of the WTO, this whole issue gets cast as northern NGOs versus the South?<sup>60</sup> Why is it that, despite huge differences in outlook and perspective, Nike, local Mexican human rights organizations, U.S.-based antisweatshop groups, and even the University of Michigan could work cooperatively toward an end to worker intimidation at a Mexican plant (the Kukdong incident),<sup>61</sup> whereas the WTO maintains a gag order even on any meaningful *deliberation* there on the relationship of trade and labor rights? Left to their own devices, the state representatives at the WTO seem incapable of working effectively toward mutual understanding of the real issues that must be reckoned with, and cannot be avoided, after the removal of the embedded liberalism safety blanket; they merely assume that whatever might replace embedded liberalism will necessarily have to be bargained for nationally, and perhaps to some extent between states, with the state thus retaining a monopoly over the readjustment of the social contract. The least dangerous possibility is that they will simply render themselves irrelevant to what is really happening; the most dangerous is that they will still have sufficient power over the discourse and the agenda to strangle, at least in the short term, some of the new possibilities that are arising.

At the same time, it must be said that, in the judicial and political spheres, some limited progress has already been made toward inclusiveness for nonstate actors. The Appellate Body has made clear that amicus curiae briefs by nongovernmental actors may be considered in WTO dispute settlement cases. A process of consultation regarding trade and the environment has been in train for the last five years. In the recent services negotiations, proposals by individual delegations have been posted to the WTO Web site, allowing for informed and very active NGO involvement in the debate. A conference that the WTO held in Geneva on the future of the trading system in July 2001 seems to have been well structured to allow deliberation about fundamental issues that crosses the insider-outsider divide. But these steps are not enough. Greater inclusiveness must be underpinned by amending the dispute settlement rules, which currently provide for secrecy in WTO dispute settlement proceedings themselves, in both the written pleadings and the oral argument. It is also important to explore ways of giving greater voice to nongovernmental actors during political negotiations. Here, inclusiveness—more inclusive public participation in shaping the system—should be contrasted with the constitutional idea of private litigants’ rights in the

<sup>59</sup> See the debate about codes of conduct in Archon Fung, Dara O’Rourke, & Charles Sabel, *New Democracy Forum: Stepping up Labor Standards*, BOSTON REV., Feb./Mar. 2001, at 4.

<sup>60</sup> A characterization even bought hook, line, and sinker by some academics; see Shaffer, *supra* note 45.

<sup>61</sup> Ginger Thompson, *Mexican Labor Protest Gets Results*, N.Y. TIMES, Oct. 8, 2001, at A3.

WTO that would enable private parties to sue under WTO treaty provisions on the understanding that these provisions create “rights.” Understood in terms of inclusiveness (e.g., amicus type intervention, the right to attend hearings), such opportunities need not and should not be viewed as the first step toward private rights of action. Similarly, participatory opportunities in political debates need not be understood as rights of representation, leading to formal decision-making roles for NGOs.

Finally, under embedded liberalism, especially as practiced after the collapse of the gold standard and with it the Bretton Woods blueprint for financial governance, the function of assuring that trade liberalization commitments worked with, not against, the needs of the domestic polity was understood as in the first instance domestic; as discussed earlier in this essay, the law of trade was essentially designed to be *permissive* toward the domestic polity performing those functions (safeguards, etc.). Particularly with respect to developing countries, this idea of permissiveness or mere tolerance may need to be rethought. When the WTO envisages potential obligations with real financial consequences, it needs to support state efforts to adjust to these obligations. The role of financial assistance here should not be viewed as based on conditionality, the imposition of a governance model on the countries concerned, or as premised on a global conception of distributive justice but, rather, in terms of the logic of adjustment as sustaining and underpinning the political economy of a mutually self-interested interstate bargaining. If we can no longer believe the ideological premise that all countries necessarily win from liberalization, and the trade liberalization bargain needs to be revamped in response to the insistent demands of a subset of countries, a genuine, mutually self-interested bargain may still be possible, provided that one can assure the kind of capacity for adjustment to the would-be “loser” countries that would allow them to become “winners.” The proposal for a joint WTO–World Bank–IMF–International Labour Organization commission on the social impact of globalization should be seen in this context.

## VI. CONCLUSION

The existence of the possibilities for change discussed above does not, of course, guarantee that new political bargains will actually be achieved; there is no science to this, only the art of politics and the “poetry” of legal method, as Keynes would have it. A major reason for skepticism, in the short term (despite the apparent success in launching a new round in Doha, Qatar), is that once again governments will still depend largely on the insider network to develop the agenda and the negotiating proposals while the “external” constituencies look in from the “outside”; this, in fact, is the real “democratic deficit,” the management of the process by agents who have distinctive interests of their own, which tend to exclude or marginalize those that are important to democratic “principals.” After the failure of the draft Multilateral Agreement on Investment and Seattle, the “external” constituencies have been enfranchised in the negotiating process in an important sense, just as they were enfranchised by the Appellate Body in *Shrimp/Turtle* in the process of applying and interpreting existing norms. It is recognized that these groups may have the power, if wielded properly, to impede a successful negotiation, which does not mean that the protesters stopped the Seattle proceedings or anything that crude, but it does mean that once they have reached a compromise, the insiders may still face the real possibility of its unraveling, with all fault lines exposed, as it were, in the presence of scrutiny and critique from the “outside.”

Thus, in the decisive sense they are no longer simply outsiders, and governments, at least in the liberal democratic states, treat them as such at their peril. But despite this apparent negative, or veto, power, the constituencies in question will still not be permitted into the negotiating room as members of delegations, or even as observer/advisers with whom draft proposals are shared for reaction, and so forth. To some groups, this is a very comfortable place to be, since their sense of identity and solidarity has been forged in opposition and

dissent. Such groups make common cause as it were with the insiders, who seek to maintain control of the negotiating room and the delegates' lounges, the last citadels that have yet to be stormed. They would rather be heroic rebels or mischievous party spoilers than one stakeholder representative among many with a place at the table.

In fact, however, there are other international negotiations that show the constructive role that stakeholder representatives/NGOs can play in a negotiating process, when they are able to share power and influence with expert governmental/diplomatic elites; for example, preparation of the Biosafety Protocol. As a critical mass of noninsiders develops with a high level of technical expertise about trade law and policy, and as the WTO continues to bend to irresistible pressures to make at least the basic negotiating proposals public (as is already done with the current "built-in" negotiations on services), some governments will feel able to loosen the control of insiders over the agenda and the negotiations: the manner in which the declaration on TRIPS and access to medicines came about in Doha, and the way in which NGOs are intervening in the ongoing services negotiations are indications that the WTO *is* evolving toward greater openness, despite the continued mantra of its being a "Member-driven" organization that has no place for global civil society. And just as the outsiders are no longer completely outsiders, the impermeability and homogeneity of the *insider* network are beginning to be compromised—the WTO Secretariat today is sprinkled with young people who see the real issues, who are engaged in a subtle, but courageous (still often covert) dialogue with global civil society, and, although marginalized in overt sites of power such as the director general's office, these younger people are beginning to make a difference. Significantly, these new "insiders" (and a few souls from the older generation who protect them) may have backgrounds in public international law or environmentalism or development studies that facilitate their seeing beyond the narrow economic outlook that traditionally unified the insider network as an epistemic community.

As the various constituencies confront each other directly, new ideas will percolate, and we will witness the beginnings of a genuine transnational democratic deliberation—not above, or autonomous from, deliberation within domestic polities, but deeply intertwined with the domestic and the local.<sup>62</sup> Because in the end it is all politics—in this case a new, legitimate transnational politics—no one can say in advance what the result will actually look like.

<sup>62</sup> But as Lord Dahrendorf has recently observed, this will be a messy, rather chaotic process, until new institutional structures are evolved:

For some time to come, we shall live with a confused and rather uncomfortable mix of highly imperfect attempts to democratize global decision-making. . . .

. . . If we cannot have world or even European democracy, at least we can have democrats: people who are conscious of their rights as citizens, and take seriously the responsibility actively to defend them. Citizens do not just let things happen. They speak up, and even if they are not always heard, their voices still matter. They use all non-violent means to check the untrammelled exercise of power. They support visible initiatives such as the counter-World Forum at Porto Alegre earlier this year. . . . Democrats without democracy offer a more hopeful prospect than the reverse. Perhaps this was the secret of postwar Germany: there were democrats . . . who were prepared to practice what they believed, and thus created a working democracy. For all we know, something of this kind may one day be achieved beyond the nation-state.

Ralf Dahrendorf, *Can Democracy Survive Globalization?* NAT'L INTEREST, Fall 2001, at 17, 22 (citation omitted); see also SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY*, ch. 12 (2000); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AJIL 489 (2001).