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ARTICLE

Special Issue: The Resurgence of the State as an Economic Actor–International Trade Law and State Intervention in the Economy in the Covid Era

How to Think About the Battle for the State at the WTO

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Abstract
International trade law has long been the site of a battle over who or what the state can represent. Today, that battle is taking a new form. While for decades the WTO was considered a centerpiece of the international economic order, the policy landscape is now awash with claims that the US should abandon WTO disciplines, critiques of the WTO as the vehicle for a coherent neoliberalism, and concerns about the implications of trade law for domestic industry, democratic participation, climate action, and national security. While I am a long-standing critic of trade law's excesses, I don't see that sudden shift as a cause for celebration. In order to understand why, I argue that it is necessary to pay careful attention to the different forms the battle for the state at the WTO has taken. This article explores the conditions and stakes of three key moments in that battle – the negotiation of the GATT and the era of decolonization, the end of the Cold War and the creation of the WTO, and the recent transformations caused by the decline of US power, the rise of China, and the systemic shock of climate change. I conclude that we cannot automatically apply critiques developed in earlier eras to the current situation.

Keywords: WTO; international trade law; neoliberalism; geopolitics; climate change

A. Introduction

Since at least the eighteenth century, debates about free trade have been concerned as much with the battle over who and what the state can represent as with questions of tariffs and quotas.[1] Today, that battle for the state is taking a new form. For decades the World Trade Organization (WTO) and the agreements it oversaw were considered to be the centerpiece of the international economic order. But suddenly, the policy landscape is awash with claims that states are justified in abandoning WTO disciplines when faced with "unfair" trading partners, critiques of the WTO as the vehicle for an outmoded neoliberalism, and new-found concerns about the implications of international economic law for domestic industries and democratic participation. As controversy continues to shadow the effect of trade agreements within and beyond the WTO, the political vision of the role of the state and its relationship to the social that has been embedded in those agreements is now coming under increasing challenge. Perhaps most importantly for the future of the trade regime, critiques about the effects of trade agreements developed

[1]Anne Orford, *Theorizing Free Trade, in* The Oxford Handbook of the Theory of International Law 701 (Anne Orford & Florian Hoffmann eds., 2016).

in the Global South since the creation of the WTO have begun to be taken up by mainstream commentators in the North Atlantic heartland of economic liberalization.

Unlike many of the contributors to this special issue, I am a generalist international lawyer rather than a specialist in WTO law. However, I have argued for decades that generalist international lawyers need to pay attention to international economic law and that the social and ecological crises that have accompanied the intensification of economic liberalization point to problems with the state form that has been normalized through the free trade project.[2] It might then seem strange that, as a long-standing critic of the excesses of international economic law, I don't necessarily see the sudden mainstream discovery of the significance of international economic law to the battle for the state as a cause for celebration. But in any engagement with law, it is essential to clarify the situation within which an intervention is being made and the standpoint that the intervention assumes or adopts.[3] For this reason, as Bernard Harcourt has argued, legal critique should come with "a GPS-, a time-, and a date-stamp".[4] Scandalized narratives about the evils of foreign globalists at the WTO or of international economic law can be used in support of many different ends, depending in part on the situation in which they are taken up.

In this article, I argue that it is necessary to take notice of the relation between this moment of rapid change in geopolitics and the varied causes that attacks on international economic law are serving.[5] In order to make sense of this shifting politics, its conditions, and its stakes, the article sketches three key moments in the battle for the state at the WTO. Following this introduction, Part B suggests that the negotiation of the General Agreement on Tariffs and Trade (GATT) was a significant development in the struggle over the limits of government intervention in the market. In the era of liberal triumphalism that accompanied the end of the Cold War, the idea gained ground that the GATT had always been oriented towards a neoliberal understanding of the proper limits to the regulatory state.[6] That vision of the origins of the GATT is now being amplified, both by critical voices who present the GATT/WTO system as a coherent program for locking in a neoliberal agenda for the world, and by those international lawyers who see the current moment as the tragic end of an era in which trade and the politics of national security were kept separate. As Part B shows, however, the argument that GATT members were all committed to a shared liberal understanding of the state or that the GATT was designed to separate economics from geopolitics and security is unsustainable. It ignores the situation in which the GATT was negotiated and functioned and the connection between trade and ideology in the era of decolonization and the conditions of the Cold War.[7] There was always a struggle between GATT parties over what counted as "normal" forms of states and markets and of whether any particular vision of state/market relations should shape the interpretation and implementation of GATT disciplines.[8] Even within dominant players like the US, "neoliberal" resistance to economic regulation had to reckon with other geopolitical agendas.

[2]*See id*.; *See also* Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 Harv. Int'l L. J. 443 (1997); Anne Orford, *Food Security, Free Trade, and the Battle for the State*, 11 J. Int'l L. & Int'l Relations 1 (2015); Anne Orford, International Law and the Social Question (2020).

[3]*See* William Twining, *RG Collingwood's Autobiography: One Reader's Response*, 25 J. L. & Society 603, 614–15 (1998) (Finding that, "In studying law the commonest form of stupidity consists in forgetting who one is pretending to be . . . .Self-conscious clarification of standpoint" is a "first step in any intellectual procedure concerned with law.").

[4]Bernard E Harcourt, Critique and Praxis 48 (2020).

[5]*See generally* Anne Orford, *Regional Orders, Geopolitics, and the Future of International Law*, 74 Current Legal Probs. 149 (2021) (arguing more broadly about the relation between shifting geopolitics and the transformation of international law, including international economic law).

[6]*See* Andrew Lang, World Trade Law after Neoliberalism: Re-imagining the Global Economic Order 235 (2011).

[7]*See* Francine McKenzie, GATT and Global Order in the Postwar Era 63 (2020).

[8]*See* Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 Harv. L. Rev. 546 (1987).

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Part C explores how the project of remaking the state significantly accelerated in the 1990s following the end of the Cold War and the break-up of the Soviet Union. As the sole remaining superpower, the US attempted to entrench its model of state regulation as the norm through processes of transnational economic integration. In many ways, it succeeded. In an interdependent world, "one country's regulatory "autonomy" is another country's external regulatory constraint."[9] Given that almost any form of state action could potentially be characterized as an "unfair" barrier to trade or as a potential distortion to an ideal "free" market, deciding which measures will be treated as barriers to trade requires differentiating illegitimate state actions from a presumed "normal" level of intervention in the market.[10] During the Uruguay Round negotiations, the US was able to take advantage of the post-Cold War geopolitical situation to project a mode of differentiation that gave it a comparative advantage. The US-led negotiation of ambitious new multilateral agreements was central to that process, and the creation of the new WTO in 1995 one of its most significant achievements. The WTO agreements operated to make a particular vision of relations between state and market appear normal. International economic law became a key site for transmitting the economic doctrines, vocabularies, concepts, and practices through which industrial and post-industrial society explained (to itself and to others) why some forms of market relations should be preferred to other forms and thus, why some people were entitled to an oversized shared of the world's resources and others were not.[11]

Part D focuses on a third moment in the battle for the state through international economic law. In retrospect, a key turning point was China's accession to the WTO in 2001 and the gradual realization that its rise would pose a significant challenge to US economic dominance. As numerous commentators have noted, the resulting "weaponization" of international trade by a number of states—a process accelerated in response to the Russian invasion of Ukraine—appears set to restructure the global economic system.[12] In that context, US officials and commentators have begun to offer new languages and frameworks for envisioning the future international economic regime, arguing that the traditional approach of multilateralism, liberalization, and tariff elimination associated with the WTO should be replaced by a new paradigm of industry protection and what US Treasury Secretary Janet Yellen has called "friend-shoring."[13] As Gregory Shaffer has argued, it is primarily the US that "now calls into question the trade law system it created, while emerging economies that long criticized that system for its bias in favor of US interests defend it."[14]

In Part E, I conclude by asking how international lawyers should think about the battle for the state in that context. Overall, the message is a simple one: Scholars engaging with international

[9]Lang, *supra* note 6, at 344.

[10]*Id.* at 117.

[11]*See* Orford, *Theorizing Free Trade*, *supra* note 1, at 701.

[12]*See*, *e.g.*, Tania Voon, *The Security Exception In WTO Law: Entering a New Era*, 113 AJIL Unbound 45, 45 (2019); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 Yale L. J. 79 (2019); Yong-Shik Lee, *Weaponizing International Trade in Political Disputes: Issues under International Economic Law and Systemic Risks*, 56 J. World Trade 405 (2022); Mona Paulsen, *Let's Agree to Disagree: A Strategy for Trade-Security*, 25 J. Int'l Eco. L. (2022).

[13]*See*, *e.g.*, Atlantic Council, *Transcript: US Treasury Secretary Janet Yellen on the Next Steps for Russia Sanctions and 'Friend-Shoring' Supply Chains,* Atlantic Council (Apr. 13, 2022), https://www.atlanticcouncil.org/news/transcripts/transcript-us-treasury-secretary-janet-yellen-on-the-next-steps-for-russia-sanctions-and-friend-shoring-supply-chains/ ; Robert Kuttner, *After Hyper-Globalization*, The American Prospect (May 31, 2022), https://prospect.org/economy/after-hyper-globalization/; Dani Rodrik, *The New Productivism Paradigm?*, Project Syndicate (July 5, 2022), https://www.project-syndicate.org/commentary/new-productivism-economic-policy-paradigm-by-dani-rodrik-2022-07; Stephen Olson, *Forget about Free Trade Agreements*, Hinrich Foundation (Aug. 23, 2022), https://www.hinrichfoundation.com/research/article/ftas/free-trade-agreements-us/; *Remarks by Ambassador Katherine Tai on the Biden Administration's Commitment to Multilateral Engagement at the Washington Foreign Law Society's 2022 Annual Gala*, Office of the United States Trade Representative (Sept. 28, 2022), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2022/september/remarks-ambassador-katherine-tai-biden-administrations-commitment-multilateral-engagement-washington.

[14]Gregory Shaffer, Emerging Powers and the World Trading System: The Past and Future of International Economic Law 13 (2021).

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economic law need to pay attention to the new form that the battle for the state is taking rather than assume that inherited critiques from earlier eras can mechanically be applied in the current situation. The conditions for the current moment of change in international economic law include the shifting politics resulting from the decline of the US empire, the rise of rival economic and security powers, particularly China, and the major systemic shock of climate change. In that dynamic context, it is vital to be as clear as possible about how we know what we think we know about the relation between international economic law and the state, what we take "international economic law" and the "state" to mean in any such accounts, why particular issues are appearing on the global public agenda at this moment, and how big ideological claims and detailed technical reforms are being related, by whom, and to what ends.

B. The Struggle for the Meaning of the General Agreement on Tariffs and Trade

In order to trace the shifting nature of the battle for the state through international economic law, it is useful to begin by revisiting the situation in which the GATT was negotiated and functioned until the creation of the WTO. International economic lawyers and historians have recently begun to look to the "origins" of the GATT in the context of arguments about what the WTO is really for.[15] Whether or not the GATT embeds a shared understanding of the proper role for the state in relation to the market has become a live question. The renewed interest in the history of the WTO has developed in the context of the unfolding "trade war" between the US and China and is strongly shaped by the positions taken by states and scholars in relation to that situation.

In their contribution to that debate, Petros Mavroidis and André Sapir have argued that the dominant role played by the UK and the US in negotiations means that there is an "implicit liberal understanding" underpinning the GATT.[16] By "liberal understanding," they mean that the GATT "implicitly assumes" that in all GATT members, contract and property rights will be enforced, the state will not undo "contractual promises regarding trade liberalization through favoritism," and "investment will be liberalized."[17] The GATT regime was not "designed to fit every country."[18] Rather, it was only designed for countries that "represent an economic system, where (economic) decisions and the ensuing pricing of goods and services are, for all practical purposes, determined by the interaction of private individuals, citizens, and businesses alike."[19] The core aim of the GATT was "protecting the equality of competitive conditions."[20] While Mavroidis and Sapir admit that "[n]one of this was ever translated into legal language in the GATT/WTO agreements," they argue it nonetheless "formed the essential background against which the multilateral trading system has been operating since its inception in 1948".[21] In this account, the GATT didn't need to wear its ideology on its sleeve because its members were a small and like-minded group. They shared an unwritten commitment to the "(invisible) content of the liberal understanding" and the "spirit of the GATT."[22] The historical narrative offered by Mavroidis and Sapir forms the basis for their claim that China is "'violating' the 'spirit of the GATT.'"[23]

[15] *See* Anne Orford, International Law and the Politics of History 265-83, 296–99 (2021) (providing critical evaluation of some of that literature).

[16] *See generally* Petros C. Mavroidis & André Sapir, China and the WTO: Why Multilateralism Still Matters (2021).

[17] *Id.* at 5.

[18] *Id.* at 11.

[19] *Id.* at 5.

[20] *Id.* at 164.

[21] *Id.* at 5.

[22] *Id.* at 166, 172.

[23] *Id.* at 172; *See also* Jennifer Hillman, *The Best Way to Address China's Unfair Policies and Practices is Through a Big, Bold Multilateral Case at the WTO*, US-China Economic and Security Review Commission (Jun. 8, 2018), https://www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf (describing a related argument from a former US Appellate Body member).

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As this example illustrates, and as I have argued in much greater detail elsewhere, appeals to the history of the GATT and the WTO are increasingly used to justify claims about what international economic law is really for, what the underlying object and purpose of particular trade agreements really are, and which ideologies have been programmed into the design of the WTO.[24] Both proponents and critics of the WTO appeal to history as the objective foundation for their arguments about the regime's role, legitimacy, and future and as the basis for revealing the ideological distortions of their opponents' views on those questions, often by selecting a small number of states or even negotiators as representing the views of GATT parties or the WTO membership as a whole. The effect is to make ideological visions of the trade regime appear far more clear-cut and influential than careful attention to practical influence and institutional embeddedness would suggest. While some of the players involved in negotiating and implementing the GATT in its early years were certainly driven by the urge to create a mechanism for "protecting the equality of competitive conditions" or sought to embed a "liberal understanding" to inform future interpretations of the GATT, many were not.

For example, the negotiations that led to the adoption of the General Agreement on Tariffs and Trade (GATT) in 1947 were largely driven by the US and, to a lesser degree, the UK, and individuals involved in the US and UK delegations did seek to shape a new liberal economic order. Cordell Hull, who was US Secretary of State from 1933 to 1944, had already played a central role in repositioning US foreign policy toward trade liberalization during the 1930s and in shaping planning for post-war reconstruction during the 1940s. Under Hull's leadership, the US negotiated friendship, commerce, and navigation agreements with twenty-two countries during the 1930s, many of them in Latin America.[25] While the recognition of sovereign equality and non-intervention had been forced on the US by Latin American states,[26] it proved very productive for US relations in the region. The formal adoption of the right of non-intervention paved the way for a decade of hemispheric legal cooperation, which bound the Americas together through a web of treaties, multilateral institutions, and arbitral bodies.[27] The commercial provisions of those agreements formed the basis for much of the GATT.[28]

During World War II, the US conditioned its assistance to the UK on negotiations towards the reduction of Britain's imperial preferences and an agreement on principles for a liberal international commercial policy and free trade regime.[29] A small number of "internationally minded civil servants and economists" had "enormous influence" over the subsequent initial Anglo-American negotiations. They were able to overcome the opposition to trade liberalization from the US Departments of Agriculture, Labor, and Commerce, and the British Treasury, the Ministry of Supply, the Ministry of Agriculture, the Ministry of Food, and the Board of Trade.[30] Amongst those negotiators were the liberal economists Harry Hawkins and Clair Wilcox from the US State Department and James Meade and Lionel Robbins from the Economic Section of the British War Cabinet Secretariat.[31]

Robbins, who had been appointed to a chair at the LSE in 1929, was part of a broader inter-war milieu of liberal internationalists who shared the sense that the disintegration of the international

[24] *See* Orford, International Law and the Politics of History, *supra* note 15, at 265–84, 294–96.

[25] *See* Douglas A. Irwin et al., The Genesis of the GATT 12 (2008).

[26] *See* Jorge L Esquirol, *Latin America*, *in* The Oxford Handbook of the History of International Law 553, 566–70 (Bardo Fassbender & Anne Peters eds., 2012).

[27] *See* Greg Grandin, Empire's Workshop: Latin America, the United States, and the Rise of the New Imperialism 34 (2006).

[28] *See* Robert E Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. World Trade L. 615, 616 (1970); Irwin et al., *supra* note 25, at 12.

[29] *See* Irwin et al., *supra* note 25, at 12–43.

[30] *See* Susan Howson, Lionel Robbins 424–461 (2011).

[31] *See* Irwin et al., *supra* note 25, at 23–27.

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system was a real problem, that it coincided with the end of European liberalism and empire, and that it meant the weakening of international law. As my earlier work on the genealogy of economic integration has shown,[32] Robbins was a close collaborator of Friedrich Hayek and part of an affiliation of liberal lawyers, economists, sociologists, corporate leaders, publishers, and policy-makers who had begun to express concerns about the collectivism and optimistic approaches to state planning that had begun gaining support during the 1930s.[33] Through events such as the Colloque Walter Lippmann held in Paris in 1938, the creation of think tanks such as the Mont Pèlerin Society in 1947 (for which Robbins drafted the statement of aims), and the academic networks associated with Freiburg University, the LSE, and the Chicago School of Economics, they developed new proposals for constraining collectivism and sought to develop the foundations of a new liberalism, in part through approaching the question of how to create a competitive market economy as one of international law and order.[34] For these liberal thinkers, liberalism and parliamentary democracy were not necessarily compatible. They believed that democratic states too easily become the prey of organized special interests and unable to act for the collective good. Robbins was an influential contributor to those interwar debates about the future of international order. He considered that the causes of war could be found in the emergence of "planning," which had become "the grand panacea of our age."[35] Robbins argued for rejecting state planning in favor of a liberal model of economic order premised on "the free market and the institution of private property" and restrained within suitable limits by a framework of institutions.[36] Robbins and his colleagues saw international economic integration through law as one means of freeing the market from special interests, limiting state planning, and enabling competition. The negotiation of the GATT fitted well with this vision of the architecture needed to constitute a new liberal international economic order.

With the successful completion of the Anglo-American negotiations in 1945, the State Department moved to sponsor an international conference to establish an international trade organization. The GATT was negotiated during a series of meetings of the Preparatory Committee set up by the UN Economic and Social Council to draft the Charter for that proposed International Trade Organization (ITO). It was never meant to exist as a stand-alone agreement but rather was envisaged as an interim arrangement that would eventually take the form of a protocol to the more encompassing Havana Charter establishing the ITO.

While the text of the GATT was primarily shaped by the negotiations between the UK and the US, representatives from the Global South played a significant role at the Havana Conference in ensuring that the proposed ITO Charter prioritized achieving full employment, promoting industrialization, and addressing economic inequality over trade liberalization. Eight hundred amendments were proposed to the draft Charter, most of them by states from Latin America and Central Europe, Scandinavia, and Asia.[37] The final version involved wide-ranging concessions in order to gain the support of all fifty-six participating nations and included detailed provisions addressing issues such as employment, international commodity agreements, economic development, and organizational structure. Indeed, the resulting Charter contained almost all the major elements that would later be included in the historic UN resolutions proposing a New International Economic Order.[38] In the end, however, the GATT was the only outcome of the negotiations

[32]*See, e.g.*, Orford, *Food Security*, *supra* note 2, at 51, 56; Orford, *Theorizing Free Trade*, *supra* note 1, at 728.

[33]*See, e.g.*, Howson, *supra* note 30, at 163–66, 196–241; Hagen Schulz-Forberg, *Laying the Groundwork: The Semantics of Neoliberalism in the 1930s*, *in* Re-Inventing Western Civilisation: Transnational Reconstructions of Liberalism in Europe in the Twentieth Century 13, 28 (Hagen Schulz-Forberg & Niklas Olsen eds., 2014).

[34]*See, e.g.*, The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective 68, 87 (Philip Mirowski & Dieter Plehwe eds., 2009); Serge Audier, Le Colloque Lippmann: Aux Origines du 'Néo-libéralisme' (2012).

[35]Lionel Robbins, Economic Planning and International Order 3 (1937).

[36]*Id.* at 6, 222, 227.

[37]*See* McKenzie, *supra* note 7, at 179.

[38]*See* Robert E. Hudec, Developing Countries in the GATT/WTO Legal System 30 (2010).

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leading up to that conference.[39] The ITO never eventuated due in large part to a lack of domestic political support within the US. US business leaders lobbied Congress to reject the charter, characterizing it as a "threat to the foundations of capitalism" and "a slide down the slippery slope of regulation, regimentation, and statism."[40]

Yet despite the central role played by US and UK liberal economists in the drafting of the GATT, their "intentions" cannot offer us the key to the meaning of the GATT. To begin with, the idea that attending to the "context" in which the GATT was drafted will somehow give privileged access to the verifiable intentions of its members and thus to the true "spirit of the GATT" is not borne out in practice.[41] Given the process of inter-governmental negotiation through which treaties are negotiated, it is "difficult to say, after the event, how and why and when the language emerged and took on its independent existence."[42] Determining the purpose of a treaty and when that purpose governs interpretations of key terms is part of the game of treaty interpretation,[43] played in an adversarial context and "as an *act of power*."[44] A dispute can turn on whether a particular treaty term should be read as evolutive or static, whether and when the object and purpose of a treaty governs interpretations of key terms, how far, if at all, the interpretation of treaties should be informed by their preambles, and so on. As the legal realists taught us, divining the "will" or "intention" of the parties to an agreement "is not the object of the interpretative process, but its product."[45]

Even if we were to take the "intentions" of those involved in GATT negotiations as determinative of the GATT's meaning, the "intentions" of Anglo-American liberal economists cannot be considered in isolation, despite their central role. Other delegates had very different motivations and visions of the future international economic order. To take just one example, Alexandre Kojève was a key figure at meetings of the Committee that negotiated the GATT,[46] as well as playing a more intangible but nonetheless influential role in European economic integration.[47] Kojève was a Franco-Russian philosopher, whose seminar on Hegel taught at the *École Pratique des Hautes Études* during the 1930s inspired a generation of Parisian intellectuals including Raymond Aron, Jacques Lacan, Georges Bataille, and Maurice Merleau-Ponty.[48] Kojève's Hegelian vision of the "end of history" would find a new audience sixty years later when it was taken up by Francis Fukuyama.[49] Kojève was a member of the French resistance during

[39]*See* Irwin et al., *supra* note 25, at 101 (stating that the negotiations for the GATT were concluded before the Havana Conference began, and the GATT entered into force for its original 23 members during the Conference. The original members were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, Republic of China, Cuba, Czechoslovak Republic, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States).

[40]Thomas W. Zeiler, Free Trade, Free World: The Advent of GATT 150–51 (1999).

[41]Orford, International Law and the Politics of History, *supra* note 15, at 226-35 (discussing the problems with treating the intentions of specific drafters as determining the meaning of a treaty).

[42]Philip Allott, *Interpretation: An Exact Art*, *in* Interpretation in International Law 373, 377 (Andrea Bianchi, Daniel Peat, & Matthew Windsor eds., 2015).

[43]*See* Dino Kritsiotis, *The Object and Purpose of a Treaty's Object and Purpose*, *in* Conceptual and Contextual Perspectives on the Modern Law of Treaties 237 (Michael Bowman & Dino Kritsiotis eds., 2018).

[44]Allott, *supra* note 42, at 377.

[45]Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 Int'l Relations 3, 17 (2012).

[46]*See*, *e.g.*, Irwin et al., *supra* note 25, at 110; Robert Howse, *Alexandre Kojève, a Neglected Figure in the History of International Law*, Opinio Juris (Nov. 19, 2014), http://opiniojuris.org/2014/11/19/alexandre-kojeve-neglected-figure-history-international-law/.

[47]*See* Christoph Kletzer, *Alexandre Kojève's Hegelianism and the Formation of Europe*, 8 Cambridge Y.B. of Eur. Legal Stud. 133 (2006).

[48]James H. Nichols Jr., Alexandre Kojève: Wisdom at the End of History 21–45 (2007); *See also* Slavoj Žižek, Interrogating the Real 354 (2006) (According to Slavoj Žižek, Lacan referred to Kojève as his *maître* until the end of his life).

[49]*See generally* Francis Fukuyama, The End of History and the Last Man (1992).

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World War II, and when the war ended, joined the *Direction des relations économiques extérieures* of the French Ministry of Finance. He described his work there as "administering the end of history."[50]

Kojève was "at the forefront of efforts to provide a special regime for developing countries", including through designing proposals for a global commodities facility and "switching around the terms of trade between developing countries and the former imperial powers."[51] His argument for a "Latin Empire" encompassing Southern European and North African states as a response to the coming "epoch of Empires" has been the focus of recent attention, in part due to the debate provoked by Giorgio Agamben's polemic published in *La Repubblica* reviving the idea of a Latin Empire as a challenge to German Europe.[52] Kojève later participated in the Kennedy Round of GATT negotiations,[53] at which the European Economic Community realized at least part of his vision by becoming a trading power in its own right.[54] As Robert Howse has argued, attending to Kojève's participation in the GATT negotiations is a reminder that there were influential alternatives to the dominant liberal views about the international trading system at the negotiating table during those early years. That pluralism was subsequently replaced by the "increasingly closed 'epistemic community'" that produced the WTO.[55]

In addition, even if all the original GATT members states were to be characterized as accepting a "liberal understanding"—a big call given the very different economic interests and philosophies of states like Australia, Brazil, Chile, China, Cuba, India, Lebanon, Pakistan, Syria, and South Africa when compared to the US position at the time—any idea of the GATT as a club was quickly unsettled as new members joined. The transition of Czechoslovakia, an initial member of GATT, to the Soviet bloc represented an early challenge to the idea of GATT members being committed to a liberal economic model, as did the accessions of Yugoslavia (1966), Poland (1967), Romania (1971), and Hungary (1973). Japan's accession in 1955, strongly supported by the US for geopolitical reasons, was initially resisted by other members, in part due to the perception of "heavy state involvement in the economy."[56] More broadly, Robert Hudec has shown that the positions taken by newly independent states at the GATT were not based on "moral" ideas about the virtues of either liberal internationalism or preferential treatment. Rather, those states were putting into play the strategic lesson they had learned from their colonizers—that "economic benefit was maximized by controlling trade and suppressing competition from alternative suppliers."[57] All states simply "sought to model GATT norms to their economic and political advantage," and did so "in highly pragmatic, as opposed to highly principled, ways."[58]

The trading relations established through the GATT were part of the broader field of struggles over affiliations and loyalties that shaped the era of decolonization in the context of the Cold War. Security issues played a central role in the GATT's formation and operation. The GATT took

[50]Nichols, *supra* note 48, at 136.

[51]Howse, *supra* note 46.

[52]For Kojève's position on a Latin Empire, see Erik De Vries, *Alexandre Kojève, "Colonialism from a European Perspective"*, 29 Interpretation 91 (2001 (discussing Kojève's position on a Latin Empire). For discussions of Kojève's Latin Empire in the post-Cold War context, see Robert Howse, *Kojève's Latin Empire: From the "End of History" to the "Epoch of Empires"*, Hoover Inst. (Aug. 1, 2004), https://www.hoover.org/research/kojeves-latin-empire (discussing Kojève's Latin Empire in the post-Cold War context). *See also* Robert Howse, *Europe and the New World Order: Lessons from Alexandre Kojève's Engagement with Schmitt's 'Nomos der Erde'*, 19 Leiden J. Int'l L. 93 (2006); Thomas Meaney, *Fancies and Fears of a Latin Europe*, 107 New Left Rev. 117 (2017).

[53]McKenzie, *supra* note 7, at 133–34.

[54]*See generally* Lucia Coppolaro, The Making of a World Trade Power: The European Economic Community (EEC) in the GATT Kennedy Round Negotiations (1963-1967) (2013).

[55]Howse, *supra* note 46.

[56]Mavroidis and Sapir, *supra* note 16, at 135.

[57]Hudec, *supra* note 38, at 30.

[58]Jeffrey L. Dunoff, *The Political Geography of Distributive Justice*, *in* Global Justice and International Economic Law: Opportunities and Prospects 153, 167 (Chios Carmody, Frank J. Garcia & John Linarelli eds., 2012).

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effect at the same time as other Cold War projects, such as the Marshall Plan and the North Atlantic Treaty Organization, and GATT diplomacy functioned within that broader geopolitical context. Security issues motivated questions of participation and accession throughout the early decades of the GATT. US negotiators extended concessions to other states during the Havana negotiations because "national security advisors were holding the pen during the last stages of the GATT negotiation."[59] US negotiators feared that "some of the "weaker" countries participating in the GATT negotiation would turn away from the liberal understanding," and were "prepared, to a certain degree, to promote the unity of the 'Western world' over their own economic interests."[60] The Cold War competition for the loyalty of newly independent countries continued to play out throughout the following decades, with the Soviet Union supporting the creation of the United Nations Conference on Trade and Development (UNCTAD) as an alternative to the GATT within the United Nations.[61] The US subsequently supported the accession of communist states such as Hungary and Poland, seeing the GATT as a vehicle for undoing Soviet alliances and preventing newly independent states from migrating to the Soviet bloc.

And even if we accepted that the GATT was designed to reflect a coherent "liberal understanding" of limited state intervention in the market, any such commitment tended to fade away when dominant GATT parties were themselves faced with competition or "market disruption." Although the US and "like-minded" states preached the gospel of non-intervention and market distortions, "from the very beginning their own conduct belied this message."[62] Successive waves of discussion about the "threats" to the multilateral trading system emerged whenever rising powers appeared set to challenge the economic dominance of the US and Europe.[63]

This was particularly clear when it came to competition from newly independent states in the sectors of agriculture and textiles. By 1970, there were seventy-seven Contracting Parties to the GATT, twenty-five of which were industrialized countries and fifty-two referred to as "developing" countries.[64] The supposed commitment of like-minded states to protecting the equality of competitive conditions dissipated when faced with the competition posed by those new parties to that GATT. The sustainability of the GATT during its first decades depended in part on the marginalization of the interests of those states, particularly through effectively excluding agriculture and textiles from GATT commitments.[65] Emboldened by a growing "theology of 'pragmatism'", industrialized states imposed an increasing number of discriminatory new quantitative import restrictions on competition from other emerging exporters.[66]

For example, when Japan acceded to the GATT in 1955, fourteen of the existing thirty-four Contracting Parties invoked Article XXXV, which allowed them not to apply the GATT in relation to Japan, particularly in relation to textiles.[67] The US also employed a broad range of unilateral and defensive trade measures to protect its manufacturers against competition from other Japanese products including steel, cars, and semiconductors.[68] Textiles were effectively exempted from the GATT during the 1960s following the negotiation of the Long-Term Arrangement on International Trade in Cotton Textiles (LTA), which allowed governments to introduce restrictions against cotton textiles if imports threatened to cause market disruption in the importing country.[69] The risk that textile imports from the Global South would lead to "market disruption"

[59]Mavroidis and Sapir, *supra* note 16, at 170.
[60]*Id.*
[61]*See* Hudec, *supra* note 38, at 51.
[62]*Id.*, at 34.
[63]*See generally* Rorden Wilkinson, What's Wrong with the WTO and How to Fix It (2014).
[64]*See* Hudec, *supra* note 38, at 40.
[65]*See* Lang, *supra* note 6, at 196.
[66]Hudec, *supra* note 38, at 71.
[67]*See* Mavroidis and Sapir, *supra* note 16, at 128–30.
[68]*See id.* at 133–39.
[69]*See* McKenzie, *supra* note 7, at 196–98.

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would eventually be used to justify the Multi-Fiber Arrangement, which authorized a "virtually permanent regime of quantitative trade controls" in the textiles sector.[70] Similarly, the liberalizing of agricultural trade with the Global South was effectively excluded from the GATT by the US and the European Community, through a combination of reliance on exceptions allowing for quantitative import restrictions (under Article XI) and waivers (under Article XXV).[71]

Even when the GATT took up questions of competition between North and South, it did so in ways that furthered a particular vision of state/market relations. To take one example, the Haberler report is often seen as the moment when "development" entered the GATT trade agenda.[72] The report was produced by a panel set up to address concerns about agricultural protectionism in the industrialized world. The chair of the panel, Gottfried Haberler, was an Austrian economist and one of the most active members of the Mont Pèlerin society, closely connected to Ludwig von Mises and Hayek.[73] The resulting report was part of a major attempt to reconfigure relations between the state, finance, and labor played out through debates about development economics and the place of free trade in development. The Haberler report reflected the position developed by influential liberal economists who were concerned that the problems facing Third World countries, combined with the tendency to look to state planning in response, would lead to another Keynesian revolution.[74] The vision of development through trade liberalization was presented in the Haberler report and other Mont Pèlerin influenced literature in conscious opposition to those redistributive approaches. The neoliberal developmental strategy reflected in the report was premised on building export-oriented mining and industrial agriculture rather than manufacturing industries in developing states, with a focus on attracting funding from foreign investors.[75] The report reflected the outcome of intense strategizing in neoliberal circles about the form that the postcolonial state should take.[76]

In addition to making use of GATT exceptions when it faced strong competition from imports, the US also sought to rewrite the rules of the game when it feared it was threatened with losing its "comfortable margin of competitive superiority" globally.[77] Beginning in the 1970s, US trade lawyers explored ways of addressing what John Jackson described as "the pressures put upon importing economies by a myriad of subtle (and sometimes not so subtle) government aids to exports,"[78] or in other words, to find ways to counter the policies of states that provided support to industry and agriculture. To take one example, while most states viewed support for industry and agriculture as a "fact of modern economic life,"[79] American policy-makers sought to characterize such support as illegitimate and unfair. Disputes during negotiations over what counts as a subsidy, and whether and when subsidies should be disciplined, reflect deep divisions over the proper role of the state in relation to the market. US trade lawyers, however, argued that the GATT needed to move away from its ambiguous legal basis and flexible approach to dispute settlement towards a more institutionalized and rule oriented model, with detailed codes developed to address issues such as the use of subsidies. In the words of trade lawyer John Jackson, while consumers in importing countries may benefit from the cheaper prices of commodities produced with the

[70]Hudec, *supra* note 38, at 54.

[71]*See* Joseph McMahon, The WTO Agreement on Agriculture: A commentary 1–10 (2006).

[72]GATT, Trends in International Trade: A Report by a Panel of Experts (1958) [the Haberler report].

[73]*See* Jennifer Bair, *Taking Aim at the New International Economic Order*, *in* The Road from Mont Pèrlin 347, 357–59 (Philip Mirowski & Dieter Plehwe eds., 2015).

[74]*See* Dieter Plehwe, *The Origins of the Neoliberal Economic Development Discourse*, *in* The Road from Mont Pèrlin 238 (Philip Mirowski & Dieter Plehwe eds., 2015).

[75]*See* Raewyn Connell & Nour Dados, *Where in the World Does Neoliberalism Come From? The Market Agenda in Southern Perspective*, 43 Theory and Soc'y 117, 122 (2014).

[76]*See* Orford, *Locating the International*, *supra* note 2, at 730–31.

[77]Hudec, *supra* note 38, at 76.

[78]John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. World Trade L. 93, 95 (1978).

[79]Richard R. Rivers & John D. Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences* 11 L. & Pol'y Int'l Bus. 1447, 1452 (1979).

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support of foreign governments, "the domestic producer feels outraged that while playing by the free enterprise rules he is losing the game to producers not abiding by such rules."[80] As two US trade negotiators remarked in reflecting on the Tokyo Round, deciding on the rules that should govern the use of subsidies necessarily raised "fundamental questions concerning the nature and degree of government involvement in commercial affairs and the right of other governments to inquire into that involvement."[81]

As this example shows, given that almost any form of state action could potentially be characterized as a potential distortion to an ideal "free" market, deciding which measures will be treated as barriers to trade requires differentiating illegitimate state actions from a "normal" level of intervention in the market.[82] During the 1980s, US trade officials and lawyers increasingly began to make visible and characterize "institutional and regulatory *differences* between foreign markets and the domestic US market" as trade barriers, unfair practices, or market distortions.[83] This brought such practices within the operation of Section 301 of the US Trade Act of 1974.[84] That section gives the Office of the US Trade Representative (USTR) the authority and responsibility to investigate and respond to "unfair," "unjustifiable," or "unreasonable" foreign trade practices. While "unjustifiable" restrictions against US commerce are defined as measures that violate international law or obligations under trade agreements, "unreasonable" or "unfair" practices need not violate or be inconsistent with international legal rights of the US. During the Uruguay Round negotiations of the GATT, Congress expanded the authority to respond under Section 301 to unfair trading practices in services, investment, and intellectual property rights. In the lead up to and during the Uruguay Round, the US made aggressive use of those provisions to enforce its vision of "fair trade," particularly in the areas of services and intellectual property.[85] Even resistance to US negotiating objectives could trigger states being added to the Special 301 watchlist.[86] This was the environment in which the US was able to reshape the meaning of normal state/market relations during the Uruguay Round.

C. The WTO as a Project of Statecraft

The Uruguay Round radically altered the landscape of international trade law. In addition to creating the WTO, it significantly expanded the range of activities encompassed by the trade regime to include issues such as the protection of intellectual property, liberalization of services provision, and regulatory standardization (largely leading to deregulation) of measures to safeguard human and animal health and safety. It also established much more sophisticated mechanisms for ensuring compliance with the new WTO covered agreements, including through establishing a compulsory dispute settlement mechanism. The overall effect was to make it increasingly costly in terms of time and resources for governments to introduce regulations that did not comply with a particular US vision of economic governance in two broad respects.

First, new agreements like the Agreement on Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade limited the capacity of states to regulate to protect human, animal, or plant health and safety, or to require specific forms of labelling or other technical issues in order for products to be sold in their markets. Those agreements added further disciplines to the exceptions provided for in GATT Article XX, providing that states could

[80]Jackson, *supra* note 78, at 96.

[81]Rivers & Greenwald, *supra* note 79, at 1448.

[82]Tarullo, *supra* note 8.

[83]LANG, *supra* note 6, at 227.

[84]For an overview, see Andres B. Schwarzenberg, *Section 301 of the Trade Act of 1974: Origin, Evolution, and Use*, CONGRESSIONAL RESEARCH SERVICE REPORT, R46604 (Dec. 14, 2020) https://crsreports.congress.gov/product/pdf/R/R46604.

[85]*See, e.g.*, Fred Lazar, *Services and the GATT: US Motives and a Blueprint for Negotiations*, 24 J. WORLD TRADE 135 (1990); Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13 PROMETHEUS 6 (1995).

[86]*See id.* at 11.

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only introduce "trade-distorting" measures directed to public goods such as protecting public health, animal welfare, or the environment where certain conditions were met. The new WTO agreements had a significant chilling effect on regulation, through the combination of requirements that states could only adopt measures aimed at protecting public goods such as health and safety once they had proved through expensive risk assessments that products were *not* safe, the obligation that any proposed new regulatory measures be communicated and thus subjected to detailed scrutiny by relevant WTO committees, and the threat of disputes to challenge such regulations. Many aspects of once conventional areas of government control and policy were, in the aftermath of the Uruguay Round, now characterizable as illegitimate non-tariff barriers to trade. The overall effect was to create a system of review that would not be out of place in a libertarian manual on how to deconstruct the regulatory state.

Second, the WTO agreements also imposed on states what could be called a duty to regulate in relation to intellectual property or the style of regulation envisaged in relation to services. These two areas were central to establishing the legal infrastructure for the new high-tech global economy which the US would (at least initially) dominate. A coalition of US, European and Japanese firms involving agrochemical, pharmaceutical and tech companies redefined intellectual property as a trade issue.[87] The new Agreements on TradeRelated Aspects of Intellectual Property and General Agreement on Trade in Services played a central role in consolidating a new global division of labor organized around the relation between trade within global value chains enabled through services liberalization and intellectual property protection. The resulting forms of international economic law that gained ground through the WTO mandated state action in the form of protecting and assembling particular property rights, economic relations, and corporate forms. The result was that the WTO became a key site for political decisions over how to structure property regimes and balance property rights with competing public goods.[88] As Donald McRae recognized in 2000, the expansion of the trade liberalization project to include such issues as liberalization of trade in services and investment "calls into question notions about traditional state functions, and hence calls into question some of the traditional assumptions on which international law is predicated."[89] For McRae, in the aftermath of the Uruguay Round international lawyers needed to "move beyond the easy assumption that the WTO is no more than the continuation of a tradition."[90] The deals made during the Uruguay Round had little to do with familiar ideas of removing explicit "barriers to trade" in the sense of quotas or import tariffs. Instead, the WTO Agreements required most member states to change their rules and regulations in order to secure the comparative advantage of self-interested US and European banks, pharmaceutical companies, and the tech industry.[91]

Other states were persuaded to sign on to such a far-ranging set of new obligations in part because the WTO agreements were treated as a "single undertaking."[92] In brief, this meant that states had to sign on to all the covered agreements if they wanted to join the WTO and obtain other benefits negotiated as part of the Uruguay Round of trade negotiations. The phrase "single undertaking" was initially used in the Punta del Este declaration launching the Uruguay Round. By the end of the Round, the insistence on the resulting agreements as a single undertaking was used to close the negotiations and secure the overall bargain. The Final Act of the Uruguay Round

[87]*See generally* Peter Drahos & John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? (2002); Susan K. Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights (2003).

[88]See Anne Orford, *Why It's Time to Terminate the TRIPS Agreement*, Austl. Year Book of Int'l L. (2023, forthcoming) [hereinafter AJIL]. A recording of that lecture is available at https://www.youtube.com/watch?v=jQGQe5_-j1M.

[89]Donald M. McRae, *The WTO in International Law: Tradition Continued or New Frontier?* (2000) 3 J. Int'l Econ. L. 27, 40 (2000).

[90]*Id.* at 41.

[91]*See* Dani Rodrik, *What Do Trade Agreements Really Do?*, 32 J. Econ. Perspectives 73 (2018).

[92]Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12 J. Int'l Econ. L. 835 (2009).

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states that "the *WTO Agreement* shall be open for acceptance as a whole," and Article XIV(1) provides that ratification applies to the seventeen Uruguay Round agreements included in the annexes. The wide-ranging agenda of the Uruguay Round negotiations meant that a loss in one area could be turned into a win in another.

The new dispute settlement system established as part of the WTO played an important role in that story. The capacity of any specific state to entrench their vision of economic relations through law had until then been limited by lack of any formal institution overseeing the GATT. The fact that the ITO never came into existence left a reasonably adequate statement of trading rules for member states in the form of the GATT, but no agreement on organizational and institutional provisions. GATT was seen as a mechanism for peacefully resolving trade disputes rather than creating a liberal trade constitution for the world. While it made no provision for a formal dispute settlement procedure, GATT Articles XXII and XXIII provided for diplomatic methods of dispute settlement through consultation and consensus. In the absence of a mutually satisfactory solution, a dispute could be referred to the contracting parties for investigation and recommendations. The aim was to resolve trade disputes efficiently through agreement rather than identifying violations. The emphasis on a voluntary process of non-binding dispute settlement ensured that no ideology or form of expert knowledge could get out ahead of states and their sense of what they had committed to in their national interest.

The creation of a new dispute settlement body, and in particular of a standing Appellate Body that would hear appeals from first instance Panels, was heralded as the moment in which the GATT ethos of diplomats was replaced by the rule of law.[93] For many states, an important aspect of that single undertaking was the commitment of the US to cease its aggressive unilateralism in relation to trade practices.[94] Under Article 23 of the Dispute Settlement Understanding (DSU), headed "strengthening the multilateral system," Member states undertook to abide by the multilateral dispute settlement process when seeking redress of a violation of obligations or other nullification or impairment of benefits, rather than resort to unilateral measures. The willingness of the US to agree to this exclusive dispute resolution clause rather than continue its heavy-handed use of unilateral sanctions, anti-dumping duties, and countervailing practices as retaliation was a significant factor in the decision of many states to sign on to the WTO agreements.[95]

For legal scholars writing at the time, "the importance of the mere existence of the Appellate Body to a shift in organizational legal culture" could not be overestimated.[96] It was referred to as the "jewel in the crown" of the organization.[97] The WTO system was lauded as an approach to mandatory dispute settlement that "surpasses" in "effectiveness and sophistication" anything "achieved by other international tribunals, such as the International Court of Justice."[98] For those who saw international law as contributing to the creation of a liberal international order, "WTO admission and participation would set up a kind of tutorial in rule-of-law values" and might provide the means to push a state "not only to change its trade and trade-related practices, but also to reform its domestic government, liberalize its political system, expand the rights

[93]Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. World Trade 191 (2001).

[94]C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 Vand. J. Trans'l L. 209 (1997).

[95]*See* Robert Hudec, *International Economic Law: The Political Theatre Dimension*, 17 U. Pa. J. Int'l L. 9, 13 (1996) (arguing that while US trade negotiators were aware of the meaning of Article 23 and how other countries viewed it, all parties also knew that the US Congress would insist on continuing to use Section 301).

[96]Weiler, *supra* note 93.

[97]Cosette D. Creamer, *Can International Trade Law Recover? From the WTO's Crown Jewel to its Crown of Thorns*, 113 AJIL Unbound 51 (2019).

[98]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 (Joseph H.H. Weiler ed., 2000).

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and opportunities of women and other disadvantaged groups, and so on."[99] In short, it represented "the most ambitious attempt in history at promoting welfare-increasing policies through international guarantees of freedom, nondiscrimination and rule of law."[100]

The Appellate Body gained increasing autonomy and independence over time, due to a combination of the compulsory nature of WTO dispute settlement, the limited institutional capacity for state control over the Appellate Body in practice, the existence of a standing Secretariat that provided support to Panelists and Appellate Body members, and the constraining effect that a commitment to consensus had on decision-making amongst the WTO Members.[101] That steady expansion of adjudicative authority and activism was welcomed by those scholars who saw the WTO as a key vehicle for realizing a particular vision of global economic integration.

While legal scholars had celebrated the move at the WTO from a flexible diplomatic culture to a more formal legal one, Members States had not been so sure. In the euphoria amongst international trade lawyers that greeted the creation of the WTO and the successful conclusion of the Uruguay Round more generally, less attention was paid to the shots that had already been fired across the bow of a more assertive or activist "self-understanding" on the part of Appellate Body members by member states. The attempt to constrain judicial activism was indicated in provisions of the DSU that sought to preserve political control over the interpretation of the complex bargain that had been made by WTO members by stressing that the dispute settlement body must to defer to negotiated rights and obligations.[102] In addition, the DSU stresses the subordinate role of panels and the Appellate Body in relation to political organs, describing their role as the provision of findings to assist the governing Dispute Settlement Body, describing the Appellate Body as a "body" with "members" rather than a "court" with "judges", and reserving to Members "the exclusive authority to adopt interpretations" of the obligations contained in the agreements."[103]

Writing in 1996 in response to criticisms of the WTO system by US "economic nationalists," Judith Hippler Bello offered a modest account of the potential effect of the DSU.[104] For Bello, a former Deputy General Counsel in the Office of the US Trade Representative, WTO rules could not be understood as "binding" in any straightforward sense. If a dispute settlement ruling was adverse to a member, "there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement."[105] The WTO "did not alter the fundamental nature of the negotiated bargain among sovereign member states" that underpinned the old GATT regime. A state found not to be in compliance with WTO agreements could choose to bring its law or measure into compliance, maintain the offending measure or omission but provide benefits to restore the balance of negotiated concessions, or decline to make any changes or compensation and open itself up to retaliation. The only "sacred WTO imperative" was "to maintain that balance so as to maintain political support for the WTO Agreement among members."[106]

[99]Lori F. Damrosch, *Human Rights, Terrorism and Trade*, 96 PROCEEDINGS OF THE ASIL ANNUAL MEETING 128, 130 (2002).

[100]Ernst-Ulrich Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 EUR. J. INT'L L. 161 (1995).

[101]*See*, *e.g.*, Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9 (2016); Andrew Lang, *The Judicial Sensibility of the WTO Appellate Body*, 27 EUR. J. INT'L L. 1095 (2017).

[102]Understanding on rules and procedures governing the settlement of disputes, art 3.2 (noting that the WTO dispute settlement system "serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements' and 'cannot add to or diminish the rights and obligations provided in the covered agreements."); Understanding on rules and procedures governing the settlement of disputes, art 19.2 ("The panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.").

[103]WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, art IX.2, Apr. 15, 1994, 1867 U.N.T.S. 154.

[104]*See* Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416 (1996).

[105]*Id.* at 417.

[106]*Id.*

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Nonetheless, with the shift to formal adjudication at the WTO, a new corps of international lawyers specializing in international trade law began to develop. This separate area of specialization assumed a fundamental differentiation between the field of international trade law and other areas of international law and politics. The field of international trade law was one of the first areas in which rational choice analysis was applied, with international trade lawyers and trade economists developing a detailed literature on international trade norms and their economic rationale to inform decision-makers.[107] For many in that community, it made sense for the Appellate Body to understand itself as "an independent, semi-autonomous judicial branch of the WTO system,"[108] just as it made sense to treat trade agreements as incomplete contracts that may require "completion" through dispute settlement or as having a constitutional character.[109] Rather than seeing this as a form of "judicial power unleashed," international lawyers celebrated the capacity of the Appellate Body to declare its independence from Member States and the political institutions of the WTO.[110]

In contrast, from early on a growing body of activists and critical scholars began to express concern about the scope and consequences of the new WTO agreements, particularly given the unprecedented extent of the mandatory dispute settlement mechanisms that underpinned their influence. The transformation of economic law by the WTO Agreements "came under sustained criticism almost as soon as it took recognizable shape."[111] One area of focus was the effect on democracy of the move to technocratic management of such a broad range of issues. The argument about the threat posed to democracy by the WTO was well developed in much activist literature, including the influential book by Lori Wallach and Michelle Sforza, entitled *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy*.[112] The book was published by the NGO Public Citizen, just before the ill-fated Seattle Ministerial Meeting of the WTO in 1999. As I argued, the creation of the WTO was accelerating "the development of a culture in which political decisions that would once have been at least theoretically within the realm of parliamentary decision-making, popular sovereignty, or democratic government" were "made by experts in economics."[113] A growing body of literature also pointed to the potential for new agreements governing trade in intellectual property, services, and investment to increase the inequality between North and South, enabling a form of "recolonization."[114]

[107]*See* Anne van Aaken, *Rational Choice Theory*, *in* Oxford Bibliographies Online: International Law (Anthony Carty ed., 2012).

[108]Howse, *supra* note 101, at 25.

[109]For introductions to a broad literature, see Joel P. Trachtman, *The Constitutions of the WTO*, 17 Eur. J. Int'l L. 623 (2006); Alexander Keck & Simon Schropp, *Indisputably Essential: the Economics of Dispute Settlement Institutions in Trade Agreements*, World Trade Organization: Economic Research and Statistics Division (Sept. 2007), https://www.wto.org/english/res_e/reser_e/ersd200702_e.pdf.; Henrik Horn, Giovanni Maggi & Robert W. Staiger, *Trade Agreements as Endogenously Incomplete Contracts*, 100 Am. Econ. Rev. 394 (2010); Simon AB Schropp, Trade Policy Flexibility and Enforcement in the WTO: A Law and Economics Analysis (2009); Ernst-Ulrich Petersmann, International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods (2012); John H. Jackson, *Constitutional Treaties: Institutional Necessity and Challenge to International Law Fundamentals*, *in* Reflections on the Constitutionalisation of International Economic Law 193 (Marise Cremona, Peter Hilpold, Nikolaos Lavranos, Stefan Staiger Schneider & Andreas Ziegler eds., 2014).

[110]*See*, *e.g.*, Howse, *supra* note 101; Hélène Ruiz Fabri, *The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story*, 27 Eur. J. Int'l L. 1075 (2017).

[111]Lang, *supra* note 6, at 313.

[112]Lori Wallach & Michelle Sforza, Whose Trade Organization? Corporate Globalization and the Erosion of Democracy (1999). *See further* the discussion in Anne Orford, *Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice*, 18 Leiden J. Int'l L. 179, 183 (2005).

[113]Orford, *Locating the International*, *supra* note 2, at 476.

[114]*See generally* Chakravarthi Raghavan, Recolonization: GATT, the Uruguay Round and the Third World (1990).

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More broadly, the WTO became a focus for the growing discontent over the Washington Consensus and the influence of neoliberal ideology, to which many policy elites at the time were in thrall. Already in the first years of the WTO's operation, legal scholars were critiquing the "perceived elite commitment to internationalism at whatever cost, that would leave marginalized and unrepresented groups to make the sacrifices deemed necessary for global competitiveness."[115] The "Battle at Seattle" that took place at the 1999 WTO Ministerial Meeting made clear that labor, human rights, environmental, and indigenous activists were deeply concerned about the dystopian vision of relations that the agreements prefigured.

In response, trade lawyers argued either that entering into the WTO agreements was *itself* an exercise of sovereignty and of democratic choice, or alternatively, building on public choice arguments, insisted that the WTO agreements in fact served to *protect* democracy from falling prey to vested protectionist interests. The battle for the state during this period turned as much on the meaning of the WTO agreements as on the meaning of democracy.[116] Trade lawyers argued that scholarly critiques and the growing phenomenon of antiglobalization protests were best met with bigger doses of liberal rationality and better design proposals. The literature worried about how best to "micromanage divergent public orders,"[117] and engaged in endless attempts to allocate tasks to different global actors according to a functional logic—"what institutions, if any, with the authority to manage linkage—that is, to enable states effectively to negotiate and agree on linkage—will best allow us to achieve our goals."[118]

In addition, the sense that international economic law had somehow constitutionalized or "locked in" particular constraints on state action also served to make critical engagement with international economic law seem somehow passé.[119] As one European professor advised me from the audience when I first began presenting work on these issues in the early days of the WTO —"we already had these debates, and your side lost." It was presented as a matter of legal necessity that certain property rights and economic relations were privileged over other rights, relations, values, and interests. That regime had been "locked in" through an international economic constitution that could no longer be revisited.

D. Great Powers and Competitive Statecraft

A third major turning point in the battle for the state that has played out through international economic law was China's accession to the WTO and its subsequent economic rise. China acceded to the WTO in November 2001, after fifteen years of negotiations. In order to do so, it had engaged in dozens of bilateral and multilateral meetings, leading to a detailed accession protocol.[120] The US was the last state to approve China's accession, requiring additional concessions from the Chinese government before doing so.[121] The resulting accession protocol contained hundreds of pages of China-specific commitments, granting greater rights to WTO members against China than under general WTO agreements ("WTO-plus" obligations) and granting fewer rights to China against

[115]Orford, *Locating the International*, *supra* note 2, at 484.

[116]*Id.* at 462–64.

[117]Kyle W. Bagwell, Robert W. Staiger & Petros Mavroidis, *It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 75 (2002).

[118]Joel P Trachtman, *Institutional Linkage: Transcending "Trade and . . . "*, 96 AM. J. INT'L L. 77, 88 (2002).

[119]*See* ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 15, at 265–83, 296–99 (2021) (commenting on the problems created by presenting WTO agreements or indeed any form of international law as somehow "locking in" particular ideological positions).

[120]Protocol on the Accession of the People's Republic of China, WTO Document WT/L/432 (Nov 23., 2001); Report of the Working Party on the Accession of China, WTO Document WT/ACC/CHN/49 (Oct. 1, 2001) (incorporating report in the Accession Protocol through para 1.2).

[121]Scott Lincicome, *Testing the "China Shock": Was Normalizing Trade with China a Mistake?*, CATO INSTITUTE (July 8, 2020), https://www.cato.org/policy-analysis/testing-china-shock-was-normalizing-trade-china-mistake.

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other WTO members than under standard WTO rules ("WTO-minus" obligations).[122] In order to implement its commitments, China made changes to more than 3,000 domestic laws and regulations, in what Gregory Shaffer and Henry Gao have described as "arguably the largest condensed exercise of law-making and law revision in China's (and perhaps the world's) history."[123]

China's accession was seen as a first step towards transforming China into a market economy and celebrated (by some) as a significant achievement of the Chinese economic reformists who supported neoliberal transformation.[124] China was the world's most populous country with "huge unmet domestic demand" and little local competition for international brands,[125] and it seemed to offer opportunities for manufacturing capital to profit from relaxed labor laws and big tax incentives for foreign investors. The downside for Western firms was perceived to be that China lacked strong intellectual property protection laws, and turned a blind eye to the manufacture of counterfeit versions of popular brands.[126] Nonetheless, many international corporations chose to manage that risk by investing in manufacturing and assembling products in China in order "to benefit from cheap labor, subsidized land and other factors of production," while they undertook "design, marketing and R&D ... in countries that offered tough IP-protection and enforcement."[127]

China's consequent economic success, however, unsettled assumptions that the international order would continue to be shaped in the image of the US. China spent its first years at the WTO building the legal capacity of government officials and private actors to participate in WTO negotiations, committee processes, and dispute settlement.[128] By 2009, in the wake of the global financial crisis and prolonged US military engagement in an open-ended war on terror, China had become the world's second largest economy and a major player in development aid. In the first decade after accession, China's share of world manufacturing exports increased from just under 5% in 2000 to over 15% in 2010. Under Xi Jinping's leadership, China began a more ambitious phase of engagement with international law and institutions, forming negotiating blocs at the WTO, becoming an active participant in WTO dispute settlement proceedings, engaging in institutional entrepreneurialism through the creation of the Asian Infrastructure Investment Bank, and playing a more significant role in shaping regional orders including through the Belt and Road initiative introduced in 2013 and the successful negotiation of the Regional Comprehensive Economic Partnership, the world's largest trading bloc, in 2020.[129]

The response from the US was an avalanche of studies and reports exploring the political, security, and economic implications of the "China Shock," particularly focusing on US job losses, the

[122]*See, e.g.*, Julia Ya Qin, "*WTO-Plus*" *Obligations and their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol*, 37 J. World Trade 483 (2003); Nannan Gao & Fangying Zheng, *The WTO-Plus Obligations: Dual Class or a Strengthened System?*, *in* Trade Multilateralism in the Twenty-First Century: Building the Upper Floors of the Trading System Through WTO Accessions 357 (Alexei Kireyev & Chiedu Osakwe eds., 2017).

[123]Gregory Shaffer & Henry Gao, *China's Rise: How it Took on the US at the WTO*, 2018 U. Ill. L. Rev. 115, 131 (2018).

[124]For analyses of the implications of China's accession to the WTO, see *id.*; China and Global Trade Governance: China's First Decade in the World Trade Organization (Ka Zeng & Wei Liang eds., 2013); Mark Wu, *The WTO and China's Unique Economic Structure*, *in* Regulating the Visible Hand? The Institutional Implications of Chinese State Capitalism 313 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2016); Mark Wu, *The "China, Inc" Challenge to Global Trade Governance*, 57 Harv. Int'l L. J. 261 (2016); Congyan Cai, The Rise of China and International Law: Taking Chinese Exceptionalism Seriously (2019); Mavroidis & Sapir, *supra* note 16; For reflections on the broader process of deregulation and marketization in China over that period, see Wang Hui, The End of the Revolution: China and the Limits of Modernity (2011); Justin Yifu Lin, Mingxing Lu & Ran Tao, *Deregulation, Decentralization, and China's Growth in Transition*, *in* Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century 467 (David Kennedy & Joseph Stiglitz eds., 2013); Julian Gewirtz, Unlikely Partners: Chinese Reformers, Western Economists, and the Making of Global China (2017).

[125]*See* Kalpana Tyagi, *China's Pursuit of Industrial Policy Objectives: Does the WTO (Really) Have an Answer*? 54 J. World Trade 615, 623 (2020).

[126]*Id.*

[127]*Id.* at 624.

[128]*See* Shaffer & Gao, *supra* note 123, at 126–42; Cai, *supra* note 124, at 288-92; Shaffer, *supra* note 14, at 182–95.

[129]*See* Orford, *Regional Orders, Geopolitics, and the Future of International Law, supra* note 5.

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shifting of US manufacturing facilities offshore, the effect of cheap imports on US competitors, and the capacity of Chinese companies to "force" technology transfer from foreign investors.[130] US commentators argued that China's accession had caused harm to US workers because "cheap" Chinese labor beat skilled US labor, and argued that while it may benefit US firms to outsource production to low-wage countries, US workers were faced with disappearing jobs. While numerous US and Chinese trade officials and academics offered counterarguments to explain both the reasons for the decline in US manufacturing jobs and for China's economic success, the political decision to blame China was effective.[131]

Just as it had when faced with competition from emerging economies that acceded to the GATT in early decades, the US responded aggressively to the threat China posed to its economic dominance, both within and outside the WTO. From the time of China's accession until late 2022, the US initiated 23 dispute settlement proceedings against China at the WTO and succeeded in the 20 resolved to date.[132] The US also made widespread use of unilateral measures involving the imposition of countervailing and antidumping duties and of tariffs on Chinese goods, claiming that in doing so it was relying upon policy flexibilities provided for in the WTO Agreements.

When the WTO dispute settlement system held that some of those measures did not fall within the scope of allowable trade remedies or GATT exceptions, the US administration blocked the reappointment of Appellate Body members who had upheld challenges by China and more broadly attacked the operation of the dispute settlement system.[133] Successive US administrations expressed concerns about the approach taken by WTO adjudicators to the interpretation of the WTO agreements.[134] US officials insisted that WTO agreements should be strictly interpreted as contracts rather than as multilateral, law-making treaties, that Panel and Appellate Body rulings only apply to specific disputes and have no precedential value, that the Appellate Body was wrong to consider itself as something akin to a court, and that it was insufficiently accountable to WTO members. The US took dramatic steps to restore the balance of rights and obligations to which it

[130]*See generally* PETER NAVARRO & GREG AUTRY, DEATH BY CHINA: CONFRONTING THE DRAGON (2011); David H. Autor, David Doran & Gordon Hanon, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121 (2013); David H Autor, David Dorn & Gordon Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205 (2016); U.S. TRADE REPRESENTATIVE, 2017 USTR REPORT ON CHINA'S WTO COMPLIANCE, January 2018; Reihan Salam, *Normalizing Trade Relations with China Was a Mistake*, THE ATLANTIC (Jun. 8, 2018), https://www.theatlantic.com/ideas/archive/2018/06/normalizing-trade-relations-with-china-was-a-mistake/562403/; Dani Rodrik, *What's Driving Populism?*, PROJECT SYNDICATE (July 9, 2019), https://www.project-syndicate.org/commentary/economic-and-cultural-explanations-of-right-wing-populism-by-dani-rodrik-2019-07?barrier=accesspaylog.

[131]*See, e.g.*, DOUGLAS A IRWIN., CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY 666–72 (2017); Scott Lincicome, *Testing the "China Shock": Was Normalizing Trade with China a Mistake?*, CATO INSTITUTE (July 8, 2020), https://www.cato.org/policy-analysis/testing-china-shock-was-normalizing-trade-china-mistake# (discussing counterarguments about the causes of decline in US manufacturing jobs); *see* WANG HUI, CHINA'S NEW ORDER: SOCIETY, POLITICS AND ECONOMY IN TRANSITION (Rebecca E. Karl trans., 2003) (discussing the reasons for China's economic success, including that China successfully competed with the United States, at least in part, by providing a different economic order and a better educated and skilled workforce rather than simply a cheaper workforce); Hui, supra note 124; LI MING, FIVE PRINCIPLES OF PEACEFUL COEXISTENCE: CONTINUITY AND CHALLENGES 117–18 (2017); THE BEIJING CONSENSUS: HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT (Weitseng Chen ed., 2017).

[132]See *Disputes by Members*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (stating that eleven disputes were decided in favor of the US, nine resolved through settlement, and three are pending or withdrawn); See also the analysis in Jeffrey J. Schott & Euijin Jung, *In US-China Trade Disputes, the WTO Usually Sides with the United States*, PIIE (Mar. 12, 2019), https://www.piie.com/blogs/trade-and-investment-policy-watch/us-china-trade-disputes-wto-usually-sides-united-states.

[133]Steve Charnovitz, *The Obama Administration's Attack on Appellate Body Independence Shows the Need for Reforms*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (Sept 22, 2016), https://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html.

[134]Robert McDougall, *Crisis in the WTO: Restoring the WTO Dispute Settlement Function*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION, (Oct. 2018), https://www.cigionline.org/static/documents/documents/Paper%20no.194.pdf.

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understood itself to have agreed in joining the WTO, when it began to take steps aimed at restraining the autonomy of the Appellate Body. Under the Obama administration, the US blocked a series of appointments and reappointments to the Appellate Body because the candidates were not considered to share the interpretative approach preferred by the US.[135]

Those simmering disagreements with and challenges to the Appellate Body were intensified after the election of President Trump. Opposition to the global economic order and to existing trade deals had been central to President Trump's worldview for decades.[136] During his campaigning and after his election, he continued to declare his opposition to the WTO, telling journalists that it was "set up for the benefit of everybody but us," that membership had been "a disaster for this country," and that the agreement establishing the WTO "was the single worst trade deal ever made."[137] The concerns of the Trump administration were subsequently set out in the US 2018 Trade Policy Agenda, which criticized specific decisions of the WTO adjudicative bodies, the interpretative approach taken by the Appellate Body, and procedural actions taken by the Appellate Body.[138] In his address at the opening of the UN General Assembly meeting in 2019, President Trump used the dubious term "globalists" to deride US participation in the WTO,[139] declaring that "globalism" had "exerted a religious pull over past leaders, causing them to ignore their own interests."[140] But, he added, "those days are over." "The future does not belong to globalists. The future belongs to patriots."[141] The Trump administration continued to block the appointment of any new Appellate Body members at the WTO, leading to a situation in which the Appellate Body ceased to be able to function after December 2019.[142]

In another move familiar from earlier periods in GATT history, the US also argued that it was entitled to take measures against "unfair" trade practices of China. The US considered that existing

[135]*See, e.g.*, Gregory Shaffer, *Will the US Undermine the World Trade Organization?*, HUFFINGTON POST (May 23, 2016), https://www.huffpost.com/entry/will-the-us-undermine-the_b_10108970; Jennifer Hillman, *Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma?*, 111 AJIL UNBOUND 364, 367 (2017).

[136]CHARLIE LADERMAN & BRENDAN SIMMS, DONALD TRUMP: THE MAKING OF A WORLD VIEW 104–08 (2017).

[137]Ian Schwartz, *Full Lou Dobbs Interview: Trump Asks What Could Be More Fake Than CBS, NBC, ABC and CNN?*, REALCLEAR POLITICS (Oct. 25, 2017), https://www.realclearpolitics.com/video/2017/10/25/full_lou_dobbs_interview_trump_asks_what_could_be_more_fake_than_cbs_nbc_abc_and_cnn.html;ChrisIsidore, *White House Lauded US Record with WTO, Which Trump Now Calls a "Disaster"*, CNN MONEY (Mar. 2, 2018), https://money.cnn.com/2018/03/02/news/economy/trump-wto-white-house-economic-report/index.html; John Micklethwait, Margaret Talev & Jennifer Jacobs, *Trump Threatens to Pull US Out of WTO if it Doesn't "Shape Up"*, BNN BLOOMBERG (Aug. 30, 2018), https://www.bnnbloomberg.ca/trump-threatens-to-pull-u-s-out-of-wto-if-it-doesn-t-shape-up-1.1131248; Chad P. Brown & Douglas A. Irwin, *What Might a Trump Withdrawal from the World Trade Organization Mean for US Tariffs?*, PIIE (Nov. 2018), https://www.piie.com/publications/policy-briefs/what-might-trump-withdrawal-world-trade-organization-mean-us-tariffs.

[138]*2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program,* OFFICE OF THE USTR (2018), https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF.

[139]*See* Andrew Prokop, *The White House Power Struggle Between Steve Bannon and the "Globalists" Explained*, VOX (Apr. 14, 2017), https://www.vox.com/policy-and-politics/2017/4/14/15209072/steve-bannon-trump-kushner-globalists (discussing the anti-Semitic and white supremacist traditions on which Trump's advisor Steve Bannon had drawn when he brought the term 'globalist' into mainstream debate); Ben Zimmer, *The Origins of the "Globalist" Slur*, THE ATLANTIC (Mar. 14, 2018), https://www.theatlantic.com/politics/archive/2018/03/the-origins-of-the-globalist-slur/555479/; Nicole Goodkind, *Donald Trump Keeps Calling Adversaries "Globalists", Despite Warnings It's Anti-Semitic*, NEWSWEEK (Aug. 1, 2018), https://www.newsweek.com/donald-trump-anti-semitic-globalist-koch-1052375; *See* Nathaniel Berman, *Economic Consequences, Nationalist Passions: Keynes, Crisis, Culture, and Policy*, 10 AM. U. INT'L L. REV. 619 (1995) (analyzing the historical association between racist right-wing attacks on transnational capital and antisemitism).

[140]President Donald Trump, *Address by Mr. Donald Trump*, President of the United States of America (Sept. 24, 2019), *in* UN Doc A/74/PV.3 11.

[141]*Id.*

[142]*See* Gregory Shaffer, *The Slow Killing of the World Trade Organization*, HUFFINGTON POST (Nov. 11, 2017), https://www.huffpost.com/entry/the-slow-killing-of-the-world-trade-organization_b_5a0ccd1de4b03fe7403f82df; Chad P. Brown & Soumaya Keynes, *Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0*, PIIE, (Mar. 2020), https://www.piie.com/publications/working-papers/why-trump-shot-sheriffs-end-wto-dispute-settlement-10.

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WTO disciplines were not adequate to address issues such as China's subsidies to domestic industries or the trade-distorting effects of state-owned enterprises.[143] In addition, the US took issue with the transfer of technology that Chinese companies were negotiating with foreign partners. In the language of US officials, that technology transfer is "forced."[144] This claim was detailed in the USTR Section 301 report of 2018,[145] alleging that the Chinese government uses foreign ownership restrictions to pressure technology transfer from US to Chinese entities, directs or facilitates investment in and acquisition of US companies and assets by Chinese companies to generate technology transfer, and conducts and supports unauthorized access to intellectual property and trade secrets. That report was used to justify the imposition of tariffs worth over USD 250 billion, to which China announced it would retaliate with tariffs of the same size.[146] In response to a dispute initiated by China at the WTO regarding the Section 301 tariffs,[147] a Panel found that the US measures were inconsistent with US obligations under the GATT, and rejected the US defense that they were justified under the "public morals" exception in GATT Art XX(a).[148] The US announced its decision to appeal the Panel decision in October 2020, but given that the Appellate Body has lost its quorum due to the US blocking of appointments, the dispute is in a state of limbo.[149]

Both the US and China have also begun to appeal to national security grounds as a basis for imposing restrictions on economic activities with specific foreign firms, as well as import and export controls on goods, services, and technologies. For example, in addition to imposing tariffs on steel and aluminum products from all countries on the basis of national security and protecting critical infrastructure,[150] the Trump administration transformed its regime of export controls with an expanded philosophy of the controls required for "national security." Under the Export Control Reform Act 2018, agencies were mandated to identify emerging and foundational technologies that are key to US national security, rather than only focus on items modified or intended for military application. In 2019, Huawei was added to an Entity List of actors against whom the US Department of Commerce was authorized to impose sanctions, on the basis that it posed a

[143] *See* Wu, *supra* note 124 (discussing an influential argument on the inability of the WTO disciplines to address Chinese state-owned enterprises); *See also* Leonardo Borlini, *When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements*, 33 LEIDEN J. INT'L L. 313 (2020) (stating a critical reflection on that debate).

[144] *See Findings of the Investigation into China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Mar. 22, 2018), https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF; *Update Concerning China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Nov. 20, 2018), https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Report%20Update.pdf; *United States Strategic Approach to the People's Republic of China*, TRUMP WHITE HOUSE (May 26, 2020), https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.24v1.pdf; *See also* Julia Ya Qin, *Forced Technology Transfer and the US-China-Trade War: Implications for International Economic Law*, 22 J. INT'L ECON. L. 743 (2019); Weihuan Zhou, Huiqin Jiang & Qingang Kong, *Technology Transfer Under China's Foreign Investment Regime: Does the WTO Provide a Solution?*, 54 J. WORLD TRADE 455 (2020).

[145] *See Section 301 Report 2018*, *supra* note 144; *See also* Dispute Settlement, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, Request for Consultations by the United States WT/DS542/1 (Mar. 26, 2018) https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm.

[146] *See* Tyagi, *supra* note 125.

[147] *See* Request for Consultations by China, *United States – Tariff Measures on Certain Goods from China*, WT/ DS543/1 (5 Apr. 5, 2018); For discussions, see Zhou et al., *supra,* note 144; CAI *supra* note 124.

[148] *See* Panel Report, *United States – Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (adopted Sept. 15, 2020) https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds543_e.htm.

[149] *See* Lee, *supra* note 12, at 412 (arguing that this may breach the legal obligation of good faith).

[150] *See* Proclamation 9704, 83 C.F.R 45019 (2018); Proclamation 9705, 83 C.F.R 11625 (2018); United States – *Certain Measures on Steel and Aluminium Products*, *Communication from the United States,* WT/DS550/10 (settled Jan. 20, 2022), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds548_e.htm.

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significant threat to US technological leadership and national security. In 2022, the Bureau of Industry and Security introduced new export control regulations aimed at reshaping the global semiconductor industry, designed to "restrict the PRC's ability to obtain advanced computing chips, develop and maintain supercomputers, and manufacture advanced semiconductors."[151] The US National Security Advisor, Jake Sullivan, explained that the policy was driven by the belief that leadership in computing technologies, biotechnologies and clean energy technologies was a "national security imperative."[152] According to Sullivan, the new export controls were aimed at "redesigning the field on which future technology competition would play out" because "we are facing a competitor that is determined to overtake US technological leadership." China in turn has used trade measures in the context of security-related issues, including imposing export controls and trade measures against the US, Australia, South Korea, and Lithuania.[153]

US officials and commentators have begun to offer new frameworks for envisioning the future international trade regime. The US Trade Representative under the Trump administration, Robert Lighthizer, attacked the WTO and demonstrated an enthusiasm for trade wars,[154] while Peter Navarro, head of the National Trade Council under President Trump, critiqued the WTO's "abject failure to address emerging problems caused by unfair practices from countries like China," which "put the US at a great disadvantage."[155] Under the Biden administration, the US Treasury Secretary Janet Yellen proposed "friend-shoring" rather than off-shoring as the future of world trade,[156] announcing that the US would encourage its firms to source critical resources and relocate manufacturing plants in "trusted countries" to prevent other states from "unfairly" leveraging their market position to "disrupt" the US economy.[157] Numerous op-eds and think pieces quickly took up the idea that the WTO regime should be abandoned and replaced with a new policy of "friend-shoring" and trade blocs.[158] And US Trade Representative Katherine Tai announced that in the face of challenges such as pandemics, security threats, and climate change, the time had come to abandon "the traditional approach to trade" involving "aggressive liberalization and tariff elimination",[159] and adopt new approaches to "crafting our competitiveness in this new world."[160]

Where once anyone who questioned the legitimacy of the WTO or the timelessness of neoliberal tenets was dismissed as irrelevant, now the US policy and intellectual landscape is dominated by people busily rediscovering that every rule has an exception, that the economy is not in

[151]Bureau of Industry and Security, *Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC)*, U.S. Embassy & Consulates in China (Oct. 7, 2022), https://china.usembassy-china.org.cn/commerce-implements-new-export-controls-on-advanced-computing-and-semiconductor-manufacturing-items-to-the-peoples-republic-of-china-prc/.

[152]Jake Sullivan, *Remarks by National Security Advisor Jake Sullivan at the Special Competitive Studies Project Global Emerging Technologies Summit*, White House (Sept. 16, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/16/remarks-by-national-security-advisor-jake-sullivan-at-the-special-competitive-studies-project-global-emerging-technologies-summit/ (transcript available in the White House Briefing Room Speeches).

[153]*See* Weihuan Zhou, Huiqin Jiang & Zhe Chen, *Trade vs Security: Recent Developments of Global Trade Rules and China's Policy and Regulatory Responses from Defensive to Proactive*, World Trade Rev.: First View 1 (2022).

[154]Robert E. Lighthizer, *How to Set World Trade Straight*, Wall Street J. (Aug. 20, 2020), https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341; *See also* Matt Peterson, *The Making of a Trade Warrior*, Atlantic (Dec. 29, 2018) (discussing how Robert Lighthizer's career as a lobbyist for the steel industry shaped his approach to the WTO).

[155]Jacob M. Schlesinger, *How China Swallowed the WTO*, Wall Street J. (Nov. 1, 2017), https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308.

[156]*Transcript: US Treasury Secretary Janet Yellen on the Next Steps for Russia Sanctions and 'Friend-Shoring' Supply Chains,* New Atlanticist (Apr. 13, 2022), https://www.atlanticcouncil.org/news/transcripts/transcript-us-treasury-secretary-janet-yellen-on-the-next-steps-for-russia-sanctions-and-friend-shoring-supply-chains/.

[157]*Id.*

[158]*See* Kuttner, *supra* note 13; Rodrik, *supra* note 13; Olson, *supra* note 13.

[159]*Remarks by Ambassador Katherine Tai*, *supra* note 13.

[160]Office of the US Trade Representative, *Remarks by Ambassador Katherine Tai at the Roosevelt Institute's Progressive Industrial Policy Conference* (Oct. 7, 2022), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2022/october/remarks-ambassador-katherine-tai-roosevelt-institutes-progressive-industrial-policy-conference.

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fact separate from politics and security, and that perhaps the world was complex all along. In the final section, I turn to ask how international lawyers should think about the battle for the state in that context.

E. International Economic Law Between Technique and Ideology

The struggle for what counts as the normal relation between state and market has been at the heart of trade disputes and negotiations for at least the past century. The negotiation of the GATT and later of the WTO Agreements was intimately connected with that struggle. The international economic law system functioned to embed and transmit ideas about the proper relation between state and market so as to "generate the experience of necessity."[161] The argument that international trade law turns neoliberal tenets into constitutions that are then "enforceable" worked precisely because it largely reproduced the familiar moves of dogmatic legal argumentation,[162] in that case by making particular contested interpretations of what WTO agreements mean appear necessary and inevitable.[163] The attempt to present the WTO Agreements as locking in a coherent neoliberal model of normal economic relations served US interests and its comparative advantage at a particular moment in history. That moment has passed.

In the aftermath of the financial crisis, under both Democrat and Republican administrations, the US has steadily moved away from a commitment to economic and political liberalization in its foreign policy. US trade policy has long since ceased focusing on promoting trade liberalization broadly conceived. In practice, US trade policy has been organized around a tension between neoliberal premises and interventionist practices, including the unilateral imposition of trade remedies for supposed unfair trade practices, engagement in trade wars conducted in the name of security, and the pursuit of traditional forms of industrial policy domestically.

The US has been strikingly effective at destroying the sense of inevitability and necessity that for decades underpinned the operation of the WTO. The official justifications for US actions over the past decade have expressly made clear that the US is not normatively committed to the WTO system if it does not benefit its interests in very concrete ways. The sense that there is no alternative to the WTO has been destroyed by the state that appeared to have the greatest investment in that way of ordering the world. As a result, the sense that there is a deeper rationality or morality underpinning the WTO system should also have disappeared. What remains is a much more transactional or pragmatic sense of why countries sign on to such agreements, and why they might walk away from them if it is not in the interests of the country or its people to remain.

Now we have entered a new period, in which there is no clear policy or ideological framework to replace neoliberalism. It has become worthwhile for those who imagine themselves advising rulers to spend time and energy on proposing new authoritative frameworks as the foundation for international economic law and practice. For example, with the rise of China and the arrival of the Trump administration, the language of geoeconomics began to reappear in the US policy world, usually in the context of claiming that there was something novel about the current rivalry between the US and China conducted through battles over trade and investment and by using corporations as proxies for great power competition. In these accounts, the halcyon decades of harmonious integration following the end of the Cold War are presented as a period in which a clean line had been drawn between the politics of security policy on one hand and the technicalities of economic policy on the other.[164] The growing rivalry between the US and China is

[161]Duncan Kennedy, *A Semiotics of Legal Argument*, *in* THE PROTECTION OF HUMAN RIGHTS IN EUROPE 309, 319 (Academy of European Law ed., 1994).

[162]*See* Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613, 626 (2005).

[163]ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 15, at 280–83.

[164]*See* Orford, *Locating the International, supra* note 2 (arguing that the illusion of a clear separation in international law between security and economics in the post-Cold War era and more generally is an effect of liberal ideology); ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW

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portrayed as a new entangling of economics and security. The argument that there is a new and different quality to the regional ordering undertaken by China is performative, making the adoption of geoeconomic strategies by the US in response appear necessary and desirable.[165]

In turn, a growing number of US scholars have joined in the project of "historicizing" international economic law from a critical perspective. To take one example, in 2018, some years into the US-led project of wrecking the aspects of the WTO that were getting in its way, the historian Quinn Slobodian published what he characterized as an account of "the animating ideas" behind the WTO and a "field guide" to the "transnational legal instruments" regulating the global economy.[166] Slobodian chose to use the dubious term "Globalists," then in vogue amongst Trumpians due to the influence of Steve Bannon, to brand his book.[167] In the book's acknowledgements, Slobodian explained his regret that he did not join friends and acquaintances at the Seattle protests to the WTO in 1999, but situated his book published twenty years later as a delayed "apology for not being there" and an attempt to put into words what "they went there to fight."[168] The book represented aspects of legal critiques developed as interventions during earlier moments of international economic integration, but transformed those critiques that stressed the contingency and contestability of neoliberal interpretations into an account that presented a neoliberal program as the true goal and meaning of WTO agreements. Slobodian portrayed the WTO as a project of foreign globalists—the "Geneva school"—who were able to realize a coherent ideological program of neoliberalism through international law. According to Slobodian, neoliberalism is "one body of thought and one mode of governance," which the Geneva school was able to turn into a set of "rules, enforced through internationally enforceable constitutional laws."[169] The creation of the WTO was "the crowning moment in the twentieth century for the Geneva school," which was able to use it to "lock in liberal trade rules."[170] While *Globalists* has received short shrift from trade lawyers,[171] it has been widely cited by critics of the WTO both within and outside international law in the terms Slobodian claimed for it, as an authoritative "field guide" to the determinative nature of current international economic law and to the purposes of the WTO.[172] The book was published not when the project of international economic integration was being championed by US elites, but rather when they had abandoned it. It appeared in the US market at the moment when claims about international economic law as "globalist" were being used both to shore up a reactionary political agenda and as the basis for an assault on aspects of the WTO that no longer preserved the comparative advantage of the US against its competitors.

(2003); Orford, *Food Security*, *supra* note 2, at 19–24; *See* Mark Beeson, *Geoeconomics Isn't Back - It Never Went Away*, Lowy Institute (Aug. 22, 2018), https://www.lowyinstitute.org/the-interpreter/geoeconomics-isnt-back-never-went-away (critiquing of the geoeconomics literature); Adam Tooze, *Whose Century?*, London Review of Books (July 30, 2020), https://lrb.co.uk/the-paper/v42/n15/adam-tooze/whose-century.

[165]*See* Sören Scholvin & Mikael Wigell, *Power Politics by Economic Means: Geoeconomics as an Analytical Approach and Foreign Policy Practice*, Taylor & Francis Online (Feb. 16, 2018), https://www.tandfonline.com/doi/abs/10.1080/01495933.2018.1419729?journalCode=ucst20.

[166]*See*, *e.g.*, Quinn Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism 257 (2018); Quinn Slobodian, *Making Sense of Neoliberalism*, Harv. U. Press Blog (Mar. 15, 2018), https://harvardpress.typepad.com/hup_publicity/2018/03/making-sense-of-neoliberalism-quinn-slobodian.html.

[167]*See supra* note 135 (discussing the dubious nature of the term globalists).

[168]Slobodian, Globalists: The End of Empire, *supra* note 162, at 363.

[169]*Id.* at 3, 18.

[170]*Id.* at 273, 281.

[171]*See* Ernst-Ulrich Petersmann, *Book Review*, 19 J. Int'l Eco. L. 915 (2018); Frieder Roessler, *Democracy, Redistribution and the WTO: A Comment on Quinn Slobodian's Book Globalists: The End of Empire and the Birth of Neoliberalism*, 18 World Trade Rev. 353, 359 (2019) (quoting Slobodian, "He engages in an evaluation of the impact and problems of an institution without, however, examining the law, the jurisprudence, the methods of operation, or the powers of that institution.").

[172]*See* Orford, International Law and the Politics of History, *supra* note 15, at 296–99 (discussing early examples of that reception).

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To be clear, I too want to change those aspects of our situation that certain officials, lawyers, and economists have sought to present as somehow legally locked in through treaties portrayed as having a constitutional effect. However, I would be both dishonest and defeatist if I taught my students that law, even "constitutional" forms of law, was able to lock in anything or that they should accept that a particular interpretation of a legal provision was locked in. As I have argued in detail elsewhere, the visions of even the most confident ideologues cannot be translated directly into concrete institutional practice.[173] The sense that they can be is part of the problem, in that it gives these institutional practices greater coherence (this is all mapped out), inevitability (the constitution is determining, it makes things happen), legitimacy (it was all there in the treaty, we had no choice but to apply it), and power (the WTO will enforce its laws). How the routine work of international lawyers makes certain interpretations or arguments appear incontestable is part of what has to be understood rather than reinforced.

As that example illustrates, critique in general, and critique of international law in particular, must attend carefully to its own conditions of possibility. As William Davies has argued, "[i]t is no good simply criticizing without also understanding the role of critique within capitalist society and its capacity to be adopted by dominant powers.[174] In the case of international law, we are often invited to take up narratives, concepts, or ways of framing a situation that have been developed within the palace wars of government officials or between states. By doing so unthinkingly, we risk translating into "great debates" the struggles for position within policy circles.[175] It is important to have some idea about why these ideas have suddenly become fashionable, and whose side one is on in taking them up and turning them into grand debates.[176] More specifically, we need to "subject the language of the times to its own critical pressure" and not "take the abstract nouns of the ruling ideology ... as a given."[177]

Histories of "globalism" and "neoliberal" internationalism are now pouring out of East Coast US universities. The ease and speed with which US scholars are now publishing histories of and op eds about international economic law and governance is a sign that (neo)liberal internationalism is indeed history in the US. Critiques of trade law as "neoliberal" are now acceptable and able to dominate the public sphere because the US has changed course. While for three decades the "liberal international order"—of free markets, free trade, free movement of capital, and the promotion of carefully selected human rights—was made to appear unchallengeable, today it is being discarded. It should give us pause for thought that the sudden mainstreaming of challenges to the WTO is occurring at the same moment when the US political establishment has become disenchanted with the world that multilateral trade agreements have wrought. In my reading, this disenchantment has not been caused primarily by concerns about global inequality or about the material limits to the energy-intensive economic model upon which the US way of life has depended. Rather, the shift in the mainstream US position advocated by trade officials and in public commentary has been driven by the effects that economic liberalization is thought to have had on US competitiveness, US workers, and US firms.

The decoupling of capitalism from liberalism has "opened up space for nascent political movements to challenge capitalism, from within the 'liberal spirit' of critique.'"[178] Arguments that the WTO is unfair to the US, or that domestic officials should not have to answer to foreign elites, or

[173]*See id.* at 282–83.

[174]*See* William Davies, The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition 13 (2015).

[175]*See* Didier Bigo, *Afterword: War and Crime, Military and Police: The Assemblage of Violence by Security?*, *in* War, Police, and Assemblages of Intervention 204 (Jan Bachmann, Colleen Bell, & Caroline Holmqvist eds., 2015).

[176]*See* Luc Boltanski, On Critique: A Sociology of Emancipation (2011) (discussing the need for a pragmatic sociology of critique).

[177]McKenzie Wark, Capital is Dead: Is This Something Worse? 81 (2019).

[178]Davies, *supra* note 174, at 193.

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that powerful states in Europe or North America should be able to take unilateral action in response to challenges posed by climate change or security threats, can readily work to reinforce existing power relations by offering new narratives to justify them. This is "how neoliberalism could in principle rebuild itself in an authoritative fashion," with the values mobilized to challenge past economic regimes being placed in the service of further accumulation.[179]

It is here that international lawyers can offer crucial insights. To be clear, I do not make this point to suggest that somehow international lawyers are all radicals—as we all know well, many lawyers who work in the fields of international trade and investment law are as far from radical as can be imagined. However, international lawyers who teach in law schools or engage with professional practice need to be aware of current developments in their fields. Through that engagement with the shifting materials of international law, we work with a site or archive that allows us to study how states and elites are attempting to (re)structure economic affairs at any given moment. As a result, international legal scholarship, even very conservative legal scholarship, is likely to offer powerful insights into how economic relations are being assembled, structured, and shaped at any given period. In addition, the materials of international law also offer an insight into the forms of resistance being developed by those attempting to challenge the legal transformation proposed by dominant powers and corporations. As with many aspects of international law, the devil is in the detail—or more specifically, in the move between technical legal details and grand ideological claims.

The US has always sought to justify its foreign policy through the premise that the general interests of the international community and the particular interest of US supremacy (represented as leadership) are aligned. Now the race is on to find an ideological framework that will justify the new legal architecture that the US and other major powers are seeking to constitute. Powerful states and their consiglieres are seeking to establish the credibility of new visions for a planned global economy through the twinned languages of securitization and climatization. The US in particular is seeking to persuade its allies that "friend-shoring" offers a better way forward than multilateralism, and that US leadership can stave off the coming apocalypse. However, the reconciliation of American hegemony and global public good may no longer be self-evident or possible. There are too many other powerful actors, too much uncertainty caused by the vagaries of US politics, and too many obvious ways in which US national interests do not equate with those of the rest of the world, particularly given the proportion of global resources needed to maintain the American way of life and the role played by the US military in securing that way of life.

How then to think about the battle for the state at the WTO? It is important to be clear-eyed about the transformation that is taking place and the relation of ideology to technical legal work in that process. For decades, most states, particularly US allies, have engaged with the WTO in the normative terms proposed by the US itself. The form of economic integration enabled by the WTO Agreements was presented as a rational and cooperative activity, directed to achieving shared economic benefits and maximizing global welfare, even if it required sacrifices from specific sectors in the short term. But as that system began to create successful economic competitors, the US discarded the veil of normativity cloaking the very transactional nature of its approach to the WTO. There was never a commitment to a coherent ideology of minimal government intervention, self-regulating markets and a clinical separation of state and enterprise. The US has always adopted a statist approach to advancing the interests of its industries, just as its competitors did. But unlike many of its competitors, the US was able to use its political, economic, cultural, and military power to ensure that the rules of the WTO mandated a regulatory regime that promoted its comparative advantage and to create the illusion that the US approach made sense according to an overarching rational and principled neoliberal vision.

[179] *Id.*

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In contrast, US trade officials are now overtly adopting a pragmatic approach to international economic law. Establishment figures across the political spectrum agree that something called neoliberalism existed and was bad, that it was associated with the WTO, and that it is time for the US and its allies to move beyond that ideology and the multilateral trade regimes it engendered.[180] We need to recognize the stakes of the rapid transformation that has taken place away from the (neo)liberal internationalist narrative. The current story is that we have entered a world that is newly complex, newly dangerous, and in which security and social issues have entered a field from which they once had been excluded. We are told that we should trust in the US, perhaps with a little help from its friends, to protect us from looming threats and risks. US officials are overtly presenting the task ahead as distinguishing between friends and enemies—identifying the actors in the international economic system who can be trusted as allies and defeating those who threaten US dominance.[181] At the same time, the US continues to frame its objectives in the language of common goods—responding to climate change, defending against rogue actors, managing disasters, promoting democracy.

In turn, academics have been quick to take up the invitation to develop a policy or ideological framework that can justify the new balance of protection and liberalization preferred by the US and offer a new "normal" to differentiate legitimate from illegitimate interventions in the market. Rather than rushing to provide such a framework, we could instead see the transactional approach now being taken by US officials as providing the opportunity to approach international trade law in the same spirit of pragmatism. If the US is serious about making space for regulatory autonomy, respecting democratic control of economic matters, and rethinking the utility of trade agreements, it should welcome other states and actors taking the same approach. To date, however, it is only powerful players that are being invited to rewrite the rules of the global trading regime, as demonstrated by the approach taken to negotiating a temporary waiver of provisions of the TRIPS Agreement in the context of the COVID pandemic,[182] the growing use of "climate clubs" as a means of addressing the decarbonization of the economy,[183] and the turn to plurilateral negotiations at the WTO as a way for more powerful members to move forward on issues such as services and investment liberalization.[184] In contrast, states from the Global South have not yet been able to reclaim the "critical policy space they yielded in joining the WTO."[185]

It is not useful to make broad claims arguing that the WTO once locked in neoliberalism, globalism, or any other allegedly coherent ideology, or that it should now lock in a new vision that resonates with current tendencies in US statecraft. Instead, we need to pay attention to the way that powerful states seek to remake international law in their own image at particular moments, map the links their advisors make between grand narratives and technical details, and resist the idea that any account of international law designed to justify the preferred policies of hegemonic states is necessary and inevitable. International economic law is a site for a renewed battle over who or what the state can represent, now playing out in the languages of security and

[180] *See* Jennifer Hillman, *China's Entry into the WTO – A Mistake by the United States?, in* CHINA AND THE WTO: 20 YEARS ON (Henry Gao & Damien Raess eds., forthcoming) (arguing that US policymakers on both sides of the aisle have become skeptical of continued engagement with the WTO, as China has "moved up the global value-chain," and that both major parties "have endorsed and continue to explore industrial policies that would once have been taboo").

[181] *See* Remarks by Ambassador Katherine Tai, *supra note* 13; Office of the US Trade Representative, *supra note* 160; Transcript, US Secretary Janet Yellen, *supra note* 156.

[182] *See* Orford, *Why It's Time to Terminate the TRIPS Agreement*, *supra* note 88 (furthering the discussion).

[183] *See* William Nordhaus, *Climate Clubs: Overcoming Freeriding in International Climate Policy*, 105 AM. ECON. REV. 1339 (2015) (claiming that climate clubs are necessary); *see also* Guilia Claudia Leonelli, *Carbon Border Measures, Environmental Effectiveness and WTO Law Compatibility: Is There a Way Forward for the Steel and Aluminum Climate Club?*, 21 WORLD TRADE REV. 619 (2022) (discussing climate clubs in the context of the WTO).

[184] *See* Jane Kelsey, *The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO*, 25 J. INT'L ECON. L. 2 (2022).

[185] Walden Bello, *The Global South in the WTO: Time to Move from the Defensive to the Offensive, in* ENVISIONING A BETTER WORLD WITHOUT THE WTO 7, 12 (2022).

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environmentalism once considered "external" to the trade regime. This reflects the broader securitization and climatization of international law as a whole. By using our training and resources to make visible and intelligible the ongoing struggles over legal transformation that are underway, international legal scholars are in a position to articulate, make visible, and challenge the ways that new visions of international economic law are being imagined in the present to shore up particular property and power asymmetries into the future.

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