

TOWARD A GLOBAL ETHICS OF TRADE GOVERNANCE: SUBSIDIARITY WRIT LARGE

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I

INTRODUCTION

When it comes to the governance of human affairs, people love to build grand theories, only to find out that they do not work in practice.¹ But what of ideas—or call them intuitions—that make perfect sense in practice but for which it seems impossible to develop a theory? This, we believe, is the problem with the appealing idea that when humans come to govern themselves at various scales of aggregation, from the village to the global, they should always attempt to remain at the lowest scale possible—that self-government is at its best on a smaller scale. And yet, people must solve their problems together, across borders and across levels of governance. And so, in practice we adjudicate between these two imperatives. But how do we make sense of the balancing act in theory? This symposium issue does so through systematic exploration of the analytical and normative dimensions of the principle of subsidiarity across time and issue areas. The introduction acknowledges that subsidiarity comes in many shapes and forms: it is at best a political reminder against excessive centralization, what the editors call “a rebuttable presumption for the local”²—rebuttable if good reasons exist for shifting authority upward.

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1. Some of the ideas discussed in this article were developed in the context of the Programme on Global Trade Ethics, University of Oxford, co-directed by Emily Jones and Kalypso Nicolaïdis. An early version of the ideas expressed in this article is provided by Robert Howse & Kalypso Nicolaïdis, *Towards a Global Trade Ethics: Preliminary Building Blocks*, in BUILDING BLOCKS TOWARDS A GLOBAL TRADE ETHICS: A COMPENDIUM OF THE OXFORD PROGRAMME ON GLOBAL TRADE ETHICS 6, 6–14 (Matthew Eagleton-Pierce, Emily Jones & Kalypso Nicolaïdis eds., 2009) [hereinafter Howse & Nicolaïdis, *Towards a Global Trade Ethics*]; see also Robert Howse & Kalypso Nicolaïdis, *Democracy without Sovereignty: The Global Vocation of Political Ethics*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 163, 163–91 (Tomer Broude & Yuval Shany eds., 2008) [hereinafter Howse & Nicolaïdis, *Democracy without Sovereignty*].

2. Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 1, 6.

So if we are to theorize from practice, we must ask both what these “good reasons” are and when the centralizing rationale should trump the presumption for the local.

In this article, we explain our move from subsidiarity to what we call “global trade ethics,” how it relates to a more general political ethics for the global, and how it can be better anchored in the spirit of global subsidiarity. “Global trade ethics” refers to a set of ethical, rather than legal, principles that ought to inspire the various actors involved in addressing conflicts in the realm of trade. In effect, this terminology seeks to shift the debate over subsidiarity from a negative constraint to a positive ethos.

We begin with the widely shared diagnosis of the crisis of multilateral trade governance and the challenge posed by those who argue that in today’s world, power is too diffused, among too many actors, and with too many divergent agendas to make multilateral economic governance workable.³ Even short of predicting its demise, questions abound over what matters should still be negotiated at the World Trade Organization (WTO), how to negotiate them, and what kind of outcomes would be acceptable.⁴ Further questions arise about the wider context in which global trade governance is nested: the possible displacement of regional over multilateral approaches, the links between trade and finance, the role of the Global South in the new balance of power, and the impact of technological change, including the Internet. We therefore need to ask anew what it means for a quasi-universal organization like the WTO to search for sufficient common ground for addressing this range of questions.

Our aim here is to offer a blueprint for meeting this challenge, through the idea of devising a sort of code of conduct under the heading of “global trade ethics.” We do not seek to establish nor defend a hierarchical structure of values.⁵ Nor do we provide a foundation for liberal democratic theory beyond the state or suggest that any of the elements drawn upon are somehow beyond contestation.⁶ Moreover, we do not argue that our ethics can *determine* or *fully justify* any particular set of substantive trade rules or policies. Rather, on the theoretical front, we proceed through a kind of “inductive normative” approach whereby we seek to relate actual and emerging normative practices in the multilateral trading system to conceptions of legitimate governance that are

3. See John S. Odell, *How Should the WTO Launch and Negotiate a Future Round?* (European University Institute Robert Schuman Centre for Advanced Studies Global Governance Programme, Working Paper No. 110, 2014); see also Peter Drahos, *When the Weak Bargain with the Strong: Negotiations in the World Trade Organization*, 8 INT’L NEGOTIATION 79, 79–109 (2003); Thomas W. Hertel, Bernard M. Hoekman & Will Martin, *Developing Countries and a New Round of WTO Negotiations*, 17 WORLD BANK RES. OBSERVER 113, 113–40 (2002).

4. See generally CHRIS BRUMMER, *MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT* (2014).

5. See AMARTYA SEN, *THE IDEA OF JUSTICE* 5–6 (2009).

6. See generally CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* (2013); Kalypso Nicolaïdis, *Democratic Theory and Europe’s Institutional Architecture*, in *THE EUROPEAN UNION: DEMOCRATIC PRINCIPLES AND INSTITUTIONAL ARCHITECTURES IN TIMES OF CRISIS* (Simona Piattoni ed., 2015).

widely shared in liberal democratic theory.⁷ And in practice, we imagine our ethics as contributing to shape the deliberative space in which alternative rules and policies are debated and negotiated.

This article proceeds, in part II, by discussing some of the material and ideational contexts relevant to our discussion. Part III suggests eight principles, which together can provide the building blocks of a global trade ethics faithful to the spirit of global subsidiarity. Part IV concludes.

II

WHY? THE NEED FOR A GLOBAL ETHICS OF TRADE GOVERNANCE

A. From Subsidiarity to Global Ethics

To start, it may be useful to explain why we have chosen to engage with the subsidiarity puzzle under the heading of “global trade ethics.” The question brings us back to the mid-1990s, when we found fascinating the ways in which both the European Union (EU) and the United States struggled with the contested nature of allocation decisions between different levels of governance. Struck by the lack of bridges between these parallel political debates, we brought them together in a volume pairing scholars of both polities.⁸ In the end, our initially narrow focus on “comparative subsidiarity” gave way to what we called *The Federal Vision*, a vision freed from the specific variant of federal statehood, proceeding instead from the notion that multiple levels of governance have been and remain a normal and ideal mode of governing human affairs across time and space.⁹ In short, federal unions do not necessarily require the kind of centralizing of core powers that we find in federal states. And even in federal states these are often shared to some extent between the national government and the sub-units.¹⁰

Like the editors of this issue, the comparative enquiry led us to draw lessons from the federal to the global level of governance. In the 1990s, the WTO was the object of a type of subsidiarity debate under the guise of increasingly strong calls for its constitutionalization—a move aimed at exempting global trade rules from the rough and tumble of interstate politics.¹¹ We sought to counter these arguments by drawing inspiration from the EU experience while stressing its

7. See Kalypso Nicolaïdis, *European Democracy and Its Crisis*, 51 J. COMMON MKT. STUD. 351, 351–69 (2013).

8. See generally KALYPSO NICOLAÏDIS & ROBERT HOWSE, *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* (2001).

9. *Id.*

10. *Id.*

11. See Robert Howse & Kalypso Nicolaïdis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 GOVERNANCE (SPECIAL ISSUE) 73, 86 (2003); see also Robert Howse & Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why a Constitution for the WTO is a Step Too Far?*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227, 227–52 (Roger Porter et al. eds., 2001).

idiosyncratic features, calling for a kind global subsidiarity from which the EU had largely exempted itself.¹²

One might consider the WTO a hard case for voicing concerns about subsidiarity breaches. It is inclusive in terms of membership and its decisions are based on consensus, constituting a prima facie safeguard against centralization by stealth. But this simply implies that the scope of subsidiarity will depend heavily on the terms under which power has been delegated upward and on what constrains the exercise of this power.¹³ And within this scope, we heed the introductory article's assertion that subsidiarity should apply especially firmly in areas such as trade, in which one cannot identify weighty, justice-based reasons for scaling up decisionmaking.¹⁴

Yet as we continued to pursue our twin interrogation regarding the federal (or regional) and the global over the last decade, we became increasingly frustrated with the dominant institutional focus implied by both the term and conceptual apparatus of subsidiarity and grew convinced of the need to free the principle from its narrow, mainstream meaning of allocation of power. This led us to suggest foundations for what we called a global ethics for trade governance—or in short, a “global trade ethics”¹⁵—meant to inform decision making across the judicial, political, economic and civic realms of decisionmaking.

The starting point for a global trade ethics lies to a great extent in the practice itself. A lack of agreement today about formulas for economic governance and the diversity of interests for pursuing them either competitively or cooperatively is not in and of itself fatal to multilateral trade governance. Instead, we can find a kind of common ground emerging more clearly than ever before in WTO politics through the refinement of actual or emerging normative practices, observed at the WTO's Ninth Ministerial Conference in Bali, and elsewhere.¹⁶ This ethos—akin to the ethos of democratic pluralism that allows people with deep divergences of interest and value to govern themselves in a legitimate fashion within a liberal democratic polity—must be forged at the global level, where the divergences in question are greater.¹⁷ If it is not to be a renewed project of hegemony, this ethos must be more open-ended and respectful of political autonomy than the grandiose forms of constitutionalism that some scholars have sought to project onto multilateral trade governance, especially during times of greater optimism about its prospects.

12. *Id.*

13. See Jachtenfuchs & Krish, *supra* note 2, at 25.

14. *Id.* at 16.

15. Howse & Nicolaidis, *Towards a Global Trade Ethics*, *supra* note 1.

16. World Trade Organization, Ministerial Declaration of 3–6 December 2013, WTO Doc. WT/MIN(13)/DEC (2013).

17. See Howse & Nicolaidis, *Democracy without Sovereignty*, *supra* note 1, at 185.

B. The Rise and Contestation of Disembedded Liberalism

A starting point for optimism about the possibility of common ground in the form of global trade ethics is that, despite of the global financial and economic crisis, there has been no dramatic or durable resurgence of protectionism and “beggar thy neighbor” spirals (although exchange-rate battles can be seen as a more subdued modern equivalent), nor a wholesale tendency to abandon the rules or lose confidence in them. Indeed, the WTO’s dispute settlement system is relatively strong and many of its existing rules enjoy substantial legitimacy, providing a basic framework for nondiscriminatory most-favored-nation (MFN) trading relations.¹⁸ Thus, we do not share the pessimistic assessment that the partial and protracted failure of the Doha Round undermines the important *acquis* of the WTO, which, in many respects, is built on the “embedded liberalism” of the post-war General Agreement on Tariffs and Trade (GATT).¹⁹

Nevertheless, this failure has revealed a considerable dissensus over the future of the WTO and the kind of reform needed to sustain the global trade system whose roots need to be revisited. In an earlier period, the GATT and later the WTO operated according to a self-contained logic, as a relatively closed regime based on a “horse trading” or reciprocal model of trade negotiations. Most important was finding bargains that could leave all states relatively better off, based upon their revealed preferences or domestic political economy. In a world where trade negotiations were mostly about reducing tariffs and similar border measures, such an approach seemed logical. But even in this earlier era, some understanding was needed regarding the legitimate parameters and content of WTO rulemaking. It was embedded liberalism that, shared among the small group of countries leading WTO negotiations, or rather, their “enlightened” political elites, provided this understanding: multilateral trade liberalization was to be premised on the maximum domestic policy space compatible with the principle of nondiscriminatory market access. When determinations regarding such liberalization were difficult, unemployment or consumer protection trumped openness.

This consensus withered away in the era of “disembedded liberalism” of the last two decades. The Uruguay Round in the early 1990s and its aftermath undermined the consensus in a number of important ways.²⁰ In a negotiation among an increasingly large and diverse group of states, some insisted on bringing rules into the WTO that were premised in part on neoliberal views of

18. Chad P. Bown, *Trade Policy under the GATT/WTO: Empirical Evidence of the Equal Treatment Rule*, 37 CANADIAN J. ECON. 678, 679 (2004).

19. General Agreement on Tariffs and Trade, Oct. 7, 1957, 278 U.N.T.S. 170 [hereinafter GATT]; see John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379, 398 (1982). See generally MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, *THE REGULATION OF INTERNATIONAL TRADE* (4th ed. 2013) (addressing developments in the jurisprudence of the Appellate Body of the WTO).

20. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14 (1994) [hereinafter Final Act].

proper economic governance rules;²¹ for example, on subsidies, intellectual property, and services.²² The struggles were intense between these states and others—often, developing nations—which regarded this departure from embedded liberalism as illegitimate. The resulting “deal” did not represent a resolution of these disagreements, but rather represented a resignation in the case of some developing states, who viewed neoliberalism as being imposed on them nonetheless, through the World Bank and the International Monetary Fund; and in the case of other states, an acceptance that even if the rules in question were illegitimate, the gains or advantages in other areas outweighed these considerations.²³ These constrained deals were clearly very fragile substitutes for legitimacy because the compensating gains turned out to be fewer and more transitory than what was expected or promised, whereas the new, constraining rules were set in stone.

The two failed attempts to launch a new trade round on economic governance rules at Seattle and Cancún reflected the resurgence of disagreement about both ends and means within the WTO, with the critique of the Uruguay Round’s result given new resonance by emerging doubts about neoliberal globalization. The Doha Declaration,²⁴ which was meant to launch a new multilateral trade round committed to development through trade, was little more than an agreement to disagree on the underlying issues, manufactured through post-9/11 anxiety about the future of global (dis)order.

Faced with the prospect of a definitive death of the Doha Development Agenda, negotiators at the 2013 WTO Bali Conference managed to put together an interim, or transitional, agreement on a handful of issues.²⁵ This represented sufficient progress to allow for a continuation of the Doha Round. For some, the modest or tentative nature of this deal, along with its near unravelling due to India’s concerns over the adequacy of the interim food-security arrangement, reflected the marginal relevance of the WTO as a site of global economic governance, especially when contrasted with the ambition and scope of the megaregional negotiations. Not surprisingly, Roberto Azevedo, the WTO’s Director-General, put a more positive spin on matters, announcing the WTO was back in business.²⁶ But what can “business as usual” mean for the multilateral trade regime today, given that it is underpinned neither by embedded liberalism—the political philosophy that enlightened post-war

21. *Id.*

22. See generally William Drake & Kalypso Nicolaïdis, *Ideas, Interests and Institutionalization: Trade in Services” and the Uruguay Round*, 46 INT’L ORG. 37 (1992).

23. See Silvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Trade Negotiations*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 285, 285–300 (Daniel L. M. Kennedy & James D. Southwick eds., 2002).

24. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2001) [hereinafter Doha Declaration].

25. See generally Sofia Alicia Baliño, *Bali and the Future of Multilateral Trade*, 8 BIORRES 1 (2014) (providing background information on the Conference).

26. Roberto Azevedo, Director-General, World Trade Org., Remarks at the Meeting of the General Council (Nov. 27, 2011).

political elites used in creating the GATT—nor by neoliberalism—embodied in the Washington Consensus–based normative outlook that propelled the WTO into existence in the early 1990s?

C. From Institutions to Ethics

The challenge facing a global trading system in search of legitimacy is to reembed liberalism within domestic circumstances while doing so in an era of much greater interdependence and demands for transnational justice than after WWII. In today's era, increasing heterogeneity and intrusiveness of global trade rules raise concerns from the local not simply because of parochial self-interest in protectionism but because these rules can challenge norms viewed by citizens as reflecting paramount concerns ranging from health to privacy to financial soundness. If embedded liberalism was an early expression of subsidiarity, the constitutionalization of neoliberalism became its denial. What then would it mean to seek the reembedding of trade governance within the variety of circumstances present at the national and local levels? These circumstances include justice or injustice that pertain to non-Western actors who perceive not only a Western bias in the existing rules of the game,²⁷ but also an antiregulatory bias, still incipient in many countries around the world, that might threaten a state's certain core functions.²⁸ Thus, to again infuse subsidiarity into the WTO, it is necessary to consider the problems raised not only by disruptive import competition, but also by the various kinds of indirect harm that may occur through the establishment of an economic structure with benefits for some and severe costs for others.

Much thinking on how to reform the global trading system centers on questions of formal institutional architecture—about the ways in which the different decisional bodies can be adapted to better reflect economic power shifts in the international system, while still mitigating power asymmetries. Reform must be about finding ways for state and non-state actors to be better represented in order to more effectively impact rulemaking. Indeed, institutions and institutional rules play a crucial role in international cooperation. In subsidiarity terms, it matters who decides how to formally allocate authority to global institutions.

But institutions cannot be changed so radically as to truly address the difficult challenges faced by the WTO. In this sense, formal institutional tinkering cannot help much in dealing with the spillage of globalization. If multilateral, regional, or bilateral trade relations are to evolve through governance that touches on a wide range of policy areas and human interests, it is not enough to believe that the rules of the game can simply be jurisdictionally

27. See Elwyn Grainger-Jones & Carlos A. Primo Braga, *The Multilateral Trading System: Mid-Flight Turbulence or Systems Failure?*, in *TRADE, DOHA, AND DEVELOPMENT: A WINDOW INTO THE ISSUES* 27, 27–37 (Richard Newfarmer ed., 2006).

28. DANI RODRIK, *THE GLOBALIZATION PARADOX* 77 (1997).

circumscribed, contained, or designed and policed by some institution in an *ex ante* manner. Institutional rules are certainly critical, but they are not the whole picture. Absent a broader vision, it is difficult to see how WTO members would agree on precisely which institutional changes are desirable in the first place.

In this context, legitimacy is likely to come as much from behavior as from structure. This insight may appear counterintuitive given the frequent association of democracy with formal structures of representation. But as illiberal and even liberal democracies demonstrate, the legitimating function of representation, when closely examined, depends on the adhesion of its agents to certain normative commitments. Such adhesion seems even more central when considered in relation to governance beyond the state, where legitimacy lacks the prop of direct representation. Legitimacy, then, partly depends on the extent to which the agents of governance conduct themselves—and are seen to conduct themselves—in accordance with a political ethics of global governance informed by norms such as inclusiveness, mutual respect, transparency, value pluralism, procedural justice, rational deliberation, and respect for a role for passionate commitments in global politics.

A strong version of global subsidiarity means that the transnational management of social conflict is more likely to be legitimate if addressed by the appropriate people, in the appropriate space of governance, in the appropriate ways. In turn, this implies the need to ensure respect for local circumstances, values, and preferences while at the same time stressing the limits of such respect when local circumstances fail to demonstrate the basic ingredients of the kind of compatibility necessary for engaging in common governance.

This argument fits with a statist or pluralist version of cosmopolitanism, which seeks to identify political structures that may serve global norms of political and distributive justice and argues that mere reliance on inclusive membership of international institutions to serve these norms is insufficient.²⁹ It is impossible to consider which institutions are appropriate without considering which rights or *right processes* these institutions must serve. Indeed, “Institutions on their own are not guaranteed to produce benign policies . . . what is needed are certain political cultures and certain character traits as well.”³⁰

Political structures are critical, but they nevertheless can be conceptualized as shells, generally conducive to such democratic ethos.³¹ The spirit of global subsidiarity, at least as understood in its broadest sense, should not only serve as a guiding principle regarding appropriate allocations of competencies, but

29. See generally NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010); KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006). See also SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* 148–88 (2005).

30. CANEY, *supra* note 29, at 172.

31. See DAVID CAMPBELL, *NATIONAL DECONSTRUCTION: VIOLENCE, IDENTITY, AND JUSTICE IN BOSNIA* 196–200 (1998).

also appropriate respective roles, behaviors, and relationships in complex multicentric political systems.

Trade rules develop, according to different logics and involving different actors, in three spheres: insider network “governance,” in which legitimacy is based on the assumption of technical expertise and instrumental rationality with a fixed “telos” of trade liberalization; formal adjudication, in which legitimacy is based on transnational rule of law and the assumed impartiality of judges; and democratized governance, for which legitimacy is based on the assumed representativeness of government bargains.³² If trade rules increasingly involve the balancing of values and the interests of various interstate and intrastate constituencies, legitimacy will not fully come from the kind of technical judicial expertise that has hitherto dominated the field. Technical expertise does not confer legitimacy in adjudicating between values, and it often makes biased assumptions that power ought to be delegated up simply because it is somehow deemed efficient to do so.³³ The transformation of insider network “governance” by political ethics is unlikely to be rapid or easy. Eventually, the network must either open itself up to this political ethics or simply continue to lose out to other mechanisms of governance in the competition for legitimacy. And while this political ethics is already visible to some extent in formal adjudication, it is more often exemplified in the breach.

It is perhaps hardest to assess the forces that affect the third sphere of democratized governance. Under what conditions will enough politicians consider that, in spite of efficiency gains and the benefits of free trade, there are good reasons to privilege lower levels of decision? These reasons may be framed in terms of individual liberty, justice, democracy, self-determination, political accountability, or respect for social and cultural diversity. It might be the case, as the introduction suggests, that states with disproportionate power, and thus a greater stake in a regime they have shaped, will resist demands for subsidiarity. But should one not consider more systematically the many variations that exist around these issues: the ways in which countries are divided over the need to resist centralization, the clashing positions of their governments and legislatures, or the potential variance in national positions over time? Due to these variations, actors might make calculations that encompass considerations beyond the expected difficulty of change itself, erring against centralizing because of expectations that it would be difficult to scale down should circumstances change.

As the introduction suggests, however, focusing on democratic *processes* alone is not sufficient.³⁴ Rather, it is critical to ask whether *democratized* governance can mitigate the effect of asymmetries of power in the system without denying the constraints of power distribution or the progressive

32. See Howse & Nicolaidis, *Democracy without Sovereignty*, *supra* note 1, at 174.

33. See Robert Howse, *From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System*, 96 AM. J. INT'L L. 94, 94–117 (2002).

34. Jachtenfuchs & Krisch, *supra* note 2, at 25–26.

potentials associated with ethical uses of power. In this equation, internal democratic checks on the use of asymmetric trade power can be harnessed in addition to external institutional safeguards.³⁵ Moreover, questions remain about the *scope* of the democratic polity and whether democracies that cooperate, bounded by subsidiarity concerns, are equipped to internalize externalities that may be borne by noncitizens or future generations. A political ethics beyond the state cannot simply pit democratic peoples against other democratic peoples.

One way to think about this kind of political ethics is to hope for more *democrats*, if not democracy, beyond the state. Legitimacy is not grounded in people's beliefs in the abstract, nor in permanent referenda and "global opinion polls," but in the degree to which power relations can be *justified in terms of* people's beliefs, values, and expectations. The justifications for these power relations are grounded in the behavior of the relevant actors and in the beliefs, values, and expectations that inspire them—as well as in the congruence with other levels of governance. As a result, we must focus less on the setting and more on the performances of the actors and their ethos, or political culture. This involves a series of connected shifts of emphasis: from institutions to outcomes, from structure to behavior, from substantive constraints on states to those of process, from specific rules to general norms, and perhaps from architectural to biological metaphors.

The need to imagine a global ethic for the modern age leads back to democracy and the unavoidable need to think beyond *majoritarianism* at the global level, while eschewing pure unanimity logics. In subsidiarity terms, questions arise about the trade-off between the transfer of competence and the exercise of voice at the global level, not only in terms of institutional rules but also in terms of legitimacy. The functional equivalent to such a middle ground is found by investigating political philosophy. At least since Rousseau, the essence of democratic self-determination has been the notion that only laws of a nation's own making can legitimately coerce citizens.³⁶ This follows from the core democratic idea of political equality: the reflection in politics of each individual's equal moral value. Democracy requires moving beyond consensus, or at least formal consensus in the shadow of power asymmetries (an institutional constraint). So what makes it legitimate for those who disagree—the dissenting minority, the losers with respect to a particular outcome—to nevertheless be subject to the outcome and to even be legitimately coerced by the laws and policies in question? What kinds of norms and practices permit persons who disagree with or lose from particular outcomes nevertheless to view the outcomes in question as consistent with the political ideal of self-legislation or nonsubordination? And—to the extent that perceived benefits

35. Kalypso Nicolaïdis, *Trusting the Poles? Mark 2: Towards a Regulatory Peace Theory*, in REGULATING TRADE IN SERVICES IN THE EU AND THE WTO: TRUST, DISTRUST AND ECONOMIC INTEGRATION 263, 263–64 (Ioannis Lianos & Okeoghene Odudu eds., 2012).

36. See generally JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762).

change over time—what kinds of norms and practices are most likely to sustain the commitment of those who decide to implement and enforce them even while they may come to benefit others, including non-nationals, more?

Understanding the spirit of this undertaking requires both caveats and explanations. First, the objective is not to derive prescriptions for multilateral trade governance from abstract propositions or principles of moral or political philosophy, in the manner of, for instance, Thomas Pogge.³⁷ The ethos is already visible in many of its elements in what one might call the ideal self-understandings of actors in the system. It can be seen in deliberations about global economic governance that occur at many levels, from town hall debates to national parliaments, and even to global sites of deliberation and contestation, including Davos and alternate locations.³⁸ Nevertheless, although a serious commitment to global trade ethics does not involve a wholesale delegitimization or rejection of existing institutions as fundamentally unethical, this ethics does have long-term transformative implications and is far from an attempt to put the best face on the status quo or to adorn it with a high-minded moralism.

When applying a global ethics to trade governance, it is crucial that the ethics enables outcomes to be seen as legitimate even where disagreement persists so that some actors see themselves as losers regarding a specific outcome. Many debates about the direction of the WTO are paralyzed by zero-sum views of the relationship between internal and external legitimacy,³⁹ but multilateral trade governance depends on both the allegiance of the actors that make it work on a daily basis and the broader constituencies or stakeholders whose lives and livelihoods are at stake. The “experts” in the rooms and the protestors in the streets seek equilibrium between internal and external legitimacy—an equilibrium which is inherently dynamic. Recall Machiavelli’s sketch of what is required for a healthy republic in his *Discourses*: a balance between the demands or requirements of the “great” on the one hand and the “people” on the other.⁴⁰

III

HOW? OPERATIONALIZING A GLOBAL TRADE ETHICS

How then can policymakers operationalize the concerns stated above and concretely address the questions of legitimate coercion and sustainable

37. See, e.g., THOMAS POGGE, *REALIZING RAWLS* (1989); see also Robert Howse & Ruti Teitel, *Global Justice, Poverty, and the International Economic Order*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 437, 437–39 (Samantha Besson & John Tasioulas, eds., 2010).

38. The WTO has scored some successes at global forums, such as judicial dispute settlement or the tentative accords at Bali.

39. Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflection on WTO Dispute Settlement*, in *EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM* 334, 341 (Roger Porter et al. eds., 2001).

40. See generally NICCOLÒ MACHIAVELLI, *THE DISCOURSES ON LIVY: LIBERTY AND CONFLICT* (Julia Conaway Bondella and Pete Bondanella trans., 2003) (1517).

governance in the WTO context? A starting point is to facilitate self-consciousness of the ethical underpinnings of a range of specific practices among multilateral trading system actors. This could generate conversation that inspires an unwritten, or perhaps even explicit, code of conduct for the system. This code might be analogous in its guiding and common ground-building role to the earlier ethos of embedded liberalism previously discussed. The following eight principles provide a basis for such a catalyzing conversation. They pertain in effect to the two sides of subsidiarity: on one hand, autonomy—the rebuttable presumption for the local—and on the other hand, the forms and boundary that characterize this presumption at the global level. As stated above, these principles are not intended to build a hierarchical structure and, furthermore, there might well be tensions or trade-offs among them. The same is true among constitutional values in liberal democratic states. Finally, the principles are not exhaustive: they are meant as the beginning point of a conversation, not an end.

A. Inclusiveness: Participation and Internalization⁴¹

Outcomes that result from the exclusion per se of the interests and values of individuals or groups from the decision-making process are likely to be inconsistent with the democratic ideal of political equality.⁴² In the WTO context, such exclusion has often been justified by a formal conception of the allocation of authority between the WTO and other international organizations, or between the WTO and domestic polities.⁴³ In the former case, interests and values affected, or even jeopardized, by trade liberalization have often been excluded by the “insider” community on the grounds that some other international organization is responsible for those concerns.⁴⁴ At the same time, it has often been argued that social interests affected by trade liberalization should seek voice through their own domestic government.⁴⁵ This article has indicated why domestic politics may not be an adequate guarantee of inclusiveness.

Inclusiveness need not, however, entail the challenge of participation of every relevant group or its representatives in the various kinds of decisionmaking made at the WTO. In a number of WTO Appellate Body (AB) decisions, such as the EC–Hormones⁴⁶ and EC–Hormones Suspension⁴⁷ cases,

41. For previous discussion on this topic, from which much of this article’s substance is drawn, see Howse & Nicolaïdis, *Towards a Global Trade Ethics*, *supra* note 1.

42. Howse & Nicolaïdis, *Democracy without Sovereignty*, *supra* note 1, at 186.

43. *Id.*

44. *Id.*

45. *Id.*

46. Appellate Body Report, European Communities—Measures Concerning Meat and Meat Products (Hormones), WTO Docs. WT/DS26/AB/R; WT/DS48/AB/R (adopted Jan. 16, 1998).

47. Appellate Body Report, Canada—Continued Obligations in the EC—Hormones Dispute, WTO Doc. WT/DS321/AB/R (adopted Oct. 16, 2008).

and more recently, the U.S. Shrimp–Turtle⁴⁸ and EC–Asbestos cases,⁴⁹ the AB has displayed this spirit of inclusiveness by showing awareness of the range, balance, and importance of the human values at stake beyond trade liberalization.⁵⁰ The most recent example is the EU–Seal Products case,⁵¹ where the AB accepted that moral beliefs about the treatment of animals could be an acceptable justification for restricting trade. Although the AB has displayed a concern for inclusiveness as participation by permitting submission of amicus briefs by nongovernmental actors, thereby broadening the voices heard well beyond the insider community, these decisions show that inclusiveness need not always depend on participation, provided decisionmakers have an ethic of inclusiveness in the way they are conscious of the full range of values and interests at stake in a given matter. Under an ethic consistent with the ideal of political equality, agents—be they judges, politicians, or even activists—do not need to privilege those values and interests most characteristic of their own epistemic community.

Without formal mechanisms of participation, or minimal ones (for example, the possibility of observer status at WTO Ministerial Conferences), groups speaking for a range of values have recently gained the attention of WTO delegates and negotiators;⁵² this has been notable in the case of trade-related aspects of intellectual property rights (TRIPs)⁵³ and the creation of the recent WTO instruments protecting access to affordable medicines.⁵⁴ In the case of services, civil society groups have sensitized delegates and negotiators as to how particular commitments under the General Agreement on Trade in Services might affect the ability to ensure essential public services.⁵⁵ This has been all the more remarkable because the delegations in question have often been from developing countries, whose governments have been hostile to the direct involvement of civil society in the WTO.⁵⁶ More generally, the creation of the Non-Agricultural Market Access-11 and G-20 groups of developing countries and their push to be included in all big decisions is slowly changing the face of WTO negotiations in part by increasing these countries' confidence and therefore their acceptance of other actors.⁵⁷

Increasing transparency of processes within the WTO has furthered inclusiveness, not only by the opening up of Panel and AB hearings, which now

48. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter U.S. Shrimp–Turtle].

49. Appellate Body Report, European Communities—Measures Affecting Asbestos and Products Containing Asbestos, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

50. Howse & Nicolaïdis, *Democracy without Sovereignty*, *supra* note 1, at 186.

51. *Id.*

52. *Id.* at 187.

53. *Id.*

54. *Id.*

55. General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183 (1994) [hereinafter GATS]; *see also id.*

56. *Id.*

57. *Id.*

happens routinely when frequent litigants like the United States, the EU, and Canada are parties to the dispute, but also through the publication of negotiating drafts of texts as a norm, for example, throughout the Doha Round. Even during the Bali Ministerial, it was possible to follow and comment on the development of proposals through timely publication of material on the WTO website. This stands in sharp contrast to the megaregional negotiations—the Transatlantic Trade and Investment Partnership, Transpacific Partnership, and the Trade in Services Agreement—where drafts of legal texts have generally been kept secret and where public participation has been seriously constrained.⁵⁸ However, once these agreements are finalized, they may still encounter significant difficulties regarding their legitimacy when they face ex post legislative scrutiny. The global trend toward democratization, combined with generational change, may be influencing the values of those involved in the day-to-day governance processes of the WTO. Faizel Ishmael, the South African ambassador to the WTO, is exemplary in this regard (but certainly alone, as his roots are in the progressive politics of the trade-union movement in South Africa).⁵⁹ In contrast, former Director-General of the WTO Supachai Panitchpakdi appointed a task force of elderly “wise” gentlemen—the Sutherland Committee—tasked with consulting with no one in their deliberations as to the future of the organization.⁶⁰ The appointment of the Sutherland Committee reflects the older elite-authoritarian values of an earlier generation of developing country policy elites.

Inclusiveness also relates to the principle of antifactionalism, which is well established in liberal democratic theory. The risk always exists that, in practice, democratic institutions will be dominated by a particular faction that commandeers policy for its own interests rather than on behalf of all.⁶¹ Antifactionalism entails a very high level of scrutiny of negotiating proposals in the WTO that are essentially responsive to the agendas or interests of subsets of powerful states, and which cannot properly be conceived of or defended in terms of the common good of the global community. Such proposals must not dominate, or be seen to dominate, the negotiation agenda at any particular time. This does not involve some abstract notion of substantive equality, such as that all benefit equally or that the least advantaged benefit disproportionately. It simply means that the proposal advances a good capable of being recognized as that of the *entire* community, not simply of a *faction* within the community. In all liberal democracies, there are legitimate policies responsive to the demands of particular constituencies; avoiding factionalism is therefore a matter of degree.

58. Sofia Plagakis, *Transparency and Trade Agreements: If the Public Wouldn't Like it, Don't Sign It*, CENTER FOR EFFECTIVE GOVERNMENT (2014), <http://www.foreffectivegov.org/transparency-and-trade-agreements-if-public-would-not-like-it-do-not-sign-it>.

59. *Id.*

60. *Id.*

61. See THE FEDERALIST NO. 10 (James Madison); see also Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1, 6–7 (2009).

In the process that led to the outcome at Bali, the norm of inclusiveness was clearly at play to a greater extent than in earlier negotiations. This was most dramatically illustrated by resistance to the effort of some players to isolate India, which was insisting on policy flexibilities for food security under the Agreement on Agriculture.⁶² Through repeated efforts, the WTO Director-General and key supporters managed to get those most opposed to the flexibilities to directly face India's concerns, rather than threaten India that if it did not capitulate, the country would be seen as the destroyer of the Doha Round.⁶³ Similarly in the case of trade facilitation, rather than resorting to strong-arm tactics, bullying, or the notorious "Green Room" of informal top-level negotiations, the approach was to continue working even with the concerns of the Least-Developed Countries until an approach addressed the imperative that commitments be matched to capacities and technical assistance to build such capacities where lacking.⁶⁴ Even more than traditional multilateral negotiations, the negotiation over new regional agreements such as the Transatlantic Trade and Investment Partnership and the Transpacific Partnership, tend to be characterized by both secrecy and interest groups' selective access to the negotiators. One must ask whether such shortfalls in inclusiveness are at least partially remedied by the more-inclusive parliamentary and other public consultation processes in some states.

B. Reversibility: Review and Revision

In contrast to the Schmittian politics of friend and enemy,⁶⁵ which gains its intensity from the possibility that one side will permanently suppress or annihilate the other in political struggle, a democratic political ethic will place a high value on opportunities to revisit and revise particular outcomes. This is not simply about inclusiveness in its connection to political equality. The possibility of review and revision allows "losers" to have confidence that the fact that a particular outcome unfavorable to their values or interests does not indicate exclusion from or subordination in political life—they live to fight another day.⁶⁶ Perhaps this is where the tension between political ethics and the constitutionalist vision of the WTO is most visible, as the latter regards the *acquis* of each negotiating round as an irreversible "progression" toward a global economic constitution.⁶⁷

62. Jayati Ghosh, *India Faces Criticism for Blocking a Global Trade Deal, But Is It Justified?*, THE GUARDIAN (Aug. 22, 2014), <http://www.theguardian.com/global-development/poverty-matters/2014/aug/22/india-criticism-blocking-global-trade-deal>.

63. See generally KENT JONES, RECONSTRUCTING THE WORLD TRADE ORGANIZATION FOR THE 21ST CENTURY: AN INSTITUTIONAL APPROACH (2015).

64. See Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization*, 14 WORLD TRADE REV. 643, 643 (2015).

65. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26–27 (1927).

66. Howse & Nicolaidis, *Democracy without Sovereignty*, *supra* note 1, at 187.

67. *Id.* at 188.

This mind-set has been seen in the attitude of a number of very significant developed countries to the meaning of the Doha Round.⁶⁸ For many developing countries, calling the Round a “development round” provides an opportunity to revisit and rebalance the Uruguay Round outcome, which is widely regarded as unfair to developing countries.⁶⁹ For the developed countries in question, new, pro-development concessions are possible (based more or less on reciprocity, although there is some openness to special and differential treatment),⁷⁰ but many countries resist the “open[ing] up” of the Uruguay Round’s main treaties.⁷¹ Notably, even where review was built into the WTO treaties, such as for services liberalization, nonactionable subsidies, and the need for safeguards with respect of service, the review processes have been long delayed or blocked.⁷² But such review processes were put into the agreements in part to assure “losers” that the matter would be reconsidered at a future point in time, in light of experience and changing perceptions.⁷³ The trials and tribulations of the Doha Round, and its conclusion on a minimalist and disappointing note, is largely due to the betrayal of this spirit of reversibility or at least of revisiting agreements in light of changing cost-benefit assessments.

Here political ethics point to an anti-architecture architecture: a consideration of political and legal mechanisms and devices that allow the membership collectively but also individually to revisit and rebalance their rights and obligations.⁷⁴ There is trade-off, however, with the value of the WTO system as a “rules-based” system; pre-commitment always involves tying someone else’s hands, and thus it is problematic from the point of view of democratic political equality and political ethics.⁷⁵

The WTO Facilitation Agreement⁷⁶ that resulted from the Bali Ministerial Conference charts new territory in the architectural embodiment of reversibility. Developing countries in particular are able to set deadlines for implementation of obligations that are revisable, without compensation or rebalancing concessions, in light of nations’ actual capacities to implement. For instance, the interim settlement on food security envisages a comprehensive accord and opens up the possibility of revisiting the adequacy of the policy space provided by the Agreement on Agriculture. The taboo against revisiting the Uruguay Round settlement was broken once again, as it had been the

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. See generally JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000) (discussing the feasibility and desirability of pre-commitment).

76. Preparatory Committee on Trade Facilitation, *Agreement on Trade Facilitation*, WTO Doc. WT/L/931 (adopted Jan. 15, 2014).

access-to-medicines amendments to the Agreement on Trade-Related Aspects of Intellectual Property Rights that were made at the beginning of the Ministerial Conference.

C. Control: Checks and Balances

The political ethics of democracy draw not only on the ideal of participation and self-determination *qua* Rousseau, but also the ideas of classical liberalism *qua* Montesquieu and Madison including the notions of checks and balances and separation of powers. Here, eighteenth-century political theorists understood a functional separation of powers to depend not just on the actual architecture allocating competences, but for every estate of its (limited) authority and legitimacy, on each institution's independent but nonhegemonic spirit. Because democracy can degenerate into governance by majority faction, checks and balances offset any single institution or faction hegemonizing decisionmaking to the exclusion or subordination of other interests and values.

Recently, the UN human rights institutions have begun to raise issues about decisionmaking in the WTO on behalf of constituencies and values traditionally excluded or marginalized there.⁷⁷ This entails a certain spirit of contestation between institutions. Often, international lawyers regard tensions between institutions and regimes in international law as something negative—"fragmentation" or "cacophony"—and many architectural proposals seek "coherence."⁷⁸ "Coherence" reflects checks-and-balance values when it means that outcomes should reflect in a balanced way the full range of values and interests at stake.⁷⁹ But often, coherence is understood in the manner discussed above, as an attempt at enforcing a kind of "watertight compartments" view of competences (for example, the WTO is a trade organization, not a human rights organization, which has no business meddling in trade—it should instead stick to its own work).⁸⁰ Under the constitutionalization school, such coherence would be enforced, once and for all, through a system of rules brought outside of the political arena.

Attempts at cooperation, when undertaken without the appropriate spirit of independence and contestation reflected in democratic political ethics, can result in co-optation, as happened when the WTO Secretariat and the World Health Organization co-wrote a study on trade and health.⁸¹ The WTO point of view, quite narrow in terms of giving play to the value of human health in limiting trade liberalization commitments, was more or less simply accepted by the World Health Organization, which did not see its own expertise and

77. Howse & Nicolaïdis, *Democracy without Sovereignty*, *supra* note 1, at 189.

78. *Id.*

79. *Id.*

80. *Id.*

81. See *WTO Agreements & Public Health: A Joint Study by the WHO and the WTO Secretariat*, WHO & WTO DOC. VII-2002-6 (2002), https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf.

distinctive constituencies as a basis for questioning or challenging the way that WTO law was interpreted and applied in health-related matters. If the Bali Ministerial leads to robust legal norms and effective results, the WTO's relationships with the major development agencies (including the World Bank) and with the World Customs Organization will be crucial in the case of trade facilitation, for much of the substance of trade facilitation is more within their institutional competences than the current competences of the WTO. The same can be said of the UN Food and Agriculture Organization, in the case of food security. The outlook of the traditional trade-policy elite has been opposed to any notion of a real separation of powers, or spirit of contestation between branches of governance within the WTO.⁸² The notion of a member-driven organization has been used to attempt to suppress independence of spirit in the executive and judicial branches of the WTO, the Secretariat, and the AB respectively. In the former case, delegates have pressed for rebuke of secretariat officials making progressive-oriented comments on crucial issues of trade, human rights, and the environment. In the latter case, delegates attempted to intimidate the AB into reversing its decision to allow amicus submissions from nongovernmental actors.⁸³

D. Flexibility: Compromise and Compensation

Often, in democratic politics, the losers from particular decisions are nevertheless able to accept the outcomes as legitimate and consistent with a sense of their equal moral value as human beings because this value is acknowledged through specific elements of compromise or some form of compensation, or both.⁸⁴ The more WTO negotiation outcomes are characterized as “constitutional”—that is, the “right” rules—the less does the spirit of compromise and compensation, very typical of the “embedded liberalism” of the original GATT, enter into the picture.⁸⁵ For some developing countries, the promise of gains in other areas became a basis, at least ostensibly, for accepting rules they did not see as legitimate. By contrast, an approach based on compromise and compensation would make the rules themselves more legitimate, or at least their costs more bearable.

Appropriate adjustment to trade liberalization, once a central theme or preoccupation, has become peripheral to WTO negotiations.⁸⁶ Apart from

82. Howse & Nicolaidis, *Democracy without Sovereignty*, *supra* note 1, at 189; Frieder Roessler, *Are the Judicial Organs of the World Trade Organization Overburdened?*, in EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM 308, 308–28 (Roger B. Porter et al., 2001).

83. Howse & Nicolaidis, *Democracy without Sovereignty*, *supra* note 1, at 190; Robert Howse, *Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy*, 9 EUR. L.J. 496, 497 (2003).

84. Howse & Nicolaidis, *Democracy without Sovereignty*, *supra* note 1, at 190. *See generally* MICHAEL J. TREBILCOCK, *DEALING WITH LOSERS: THE POLITICAL ECONOMY OF POLICY TRANSITIONS* (2014).

85. Howse & Nicolaidis, *Democracy without Sovereignty*, *supra* note 1, at 190.

86. Howse & Nicolaidis, *Democracy without Sovereignty*, *supra* note 1, at 190; *J. Michael Finger*,

longer phase-in periods for developing countries in the case of some agreements and the very generous “safeguards” that developed countries managed to maintain in textiles and agriculture for those concentrated interests, the negotiation outcomes of the Uruguay Round displayed little sensitivity to the need for mitigation and compensation.⁸⁷ For example, in the case of intellectual property, where the rules were seen by many developing countries as illegitimate, there was no effort at compensation or mitigation through covering the considerable cost for many developing countries of implementing these rules through domestic reforms—the creation of effective domestic enforcement mechanisms of intellectual property rights, for example. Concepts such as “aid for trade” have acquired some prominence in the current negotiations and promise to revive a spirit of compromise and compensation, but these ideas are all too easily blocked or watered down by free-trade purists who balk at the notion of the WTO becoming an “aid agency.”⁸⁸ Moreover, aid for trade itself can become an instrument simply to enforce, rather than to compensate for, outcomes of trade liberalization.⁸⁹

But here Bali may mark a new beginning. The structure of the agreement on trade facilitation allows for the calibration of developing countries’ responsibilities for hard-law obligations to the provision of capacity-building assistance; further, the putting in place of such assistance is conceived as an integral element in the finalization of the trade facilitation deal, not an afterthought.⁹⁰ The contrast with, for example, TRIPs in the Uruguay Round, is evident.⁹¹

Flexibility entails envisaging the multilateral trading system as not only a site of fully multilateral bargains to which all members must adhere, but also for negotiating open MFN-based plurilateral arrangements among subsets of WTO members. This reflects a modification of the rigid constitutionalism toward which the system seemed to be veering with the Uruguay Round Single Act and the pressure of developing countries on services and TRIPs that led to it. The Information Technology Agreement is an early example of such post-Uruguay Round flexibility, but the WTO has been slow to take ownership of the plurilateral negotiations on green goods that are taking place essentially within the institution. Such flexibility, however, desirable as it may be, is in tension with the first principle of inclusiveness. The two need to be adjudicated in an ad hoc, case-by-case manner through enhanced transparency. And transparency is not currently present to say the least, in the Trade in Services Agreement, which has been negotiated outside formal WTO procedures almost secretly by

Implementing the Uruguay Round Agreements: Problems for Developing Countries, 24 *WORLD ECON.* 1097, 1107 (2001).

87. Howse & Nicolaidis, *Democracy without Sovereignty*, *supra* note 1, at 190.

88. *Id.*

89. *Id.*

90. See Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization*, 14 *WORLD TRADE REV.* 643, 659–62, 669–70 (2015).

91. Final Act, *supra* note 20.

twenty-four WTO members to supplement the General Agreement on Trade in Services, which is integral to the WTO.⁹²

E. Empowerment: Adjustment and Reverse Conditionality

A permissive interpretation of embedded liberalism must be supplemented by a proactive interpretation that lays some responsibility to help states fulfill the functions that the original bargain was meant to protect on the global community. Clearly, globalization has made it more complicated for some states to deliver the goods that citizens have come to expect, or at least for many states to recast or redesign the domestic social bargain in order to respond effectively to the new pressures and opportunities of globalization.⁹³ Because the greatest buffer in cushioning the effects of globalization is at the state level, the more open countries are most often the biggest welfare states.⁹⁴

In this regard, the spirit of subsidiarity might mean opening the black box of states that participate in global governance, a move that might initially seem to increase infringement on autonomy. But when framed as empowerment, such an opening can be understood as seeking to enhance the life of individuals or groups within borders, which in turn reflects the imperative of political equality. There is, of course, a fine line between global rules or policies geared at empowerment and global rules that dictate the contours of social contracts at the national level. Here again, the WTO can borrow from debates surrounding the EU experience, even though the EU itself has a long way to go in this regard. Of course, as especially highlighted by the Eurocrisis, this is a highly economically integrated economic space where the need for domestic adjustment to external economic pressures is especially sharp. This is why the EU has indeed been involved in empowerment-type actions, especially in the context of the Open Method of Cooperation, implementing the recommendations of the Lisbon strategy with regard to growth and competitiveness. But here, higher-level intervention has been a double-edged sword, empowering certain actors but also disempowering others in the name of competition imperatives. In this context, proposals have surfaced to implement a European law of unfair regulatory competition.⁹⁵ Would such an approach be appropriate on the global level to curb extreme instances of social or environmental dumping or of tax competition?

More broadly, why not introduce differentiated applicability of such a law

92. GATS, *supra* note 55.

93. See PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE* (2d ed. 1999) (arguing that globalization does not necessarily diminish the regulatory and redistributive capacities of the state but that it does put pressure on the traditional social bargains defining how those capacities are exercised).

94. See generally ROBERT HOWSE, *THE WTO SYSTEM: LAW, POLITICS, AND LEGITIMACY* (2007). See also DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* (1997).

95. FRITZ W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 187 (1999).

depending on the level of development or the type of actor? Differentiated applicability and opt-outs for very poor or underdeveloped countries will ensure that such a regime does not amount to a surreptitious harmonization of domestic policies or an imposition of a paradigm of global distributive equity, both of which require, to be legitimate, federal democratic governance.

In other words, the “embedded liberalism” model, whose major function is to provide constraints against beggar-thy-neighbor interstate competition, can address the “race to the bottom” concern. Some of the poorest countries in the world may not accept being so constrained—perhaps quite justifiably—but there is little empirical evidence that the importance of such countries in global markets is their inducing downward movement of regulatory standards elsewhere. On the other hand, a major player in the global marketplace that refused to be so constrained would bear a heavy burden of proof that it was not simply a free rider.

Thus, we could envisage a plurilateral code at the WTO on environmental and social dumping. Adherence to the code would not be a requirement of membership in the WTO. And existing benefits under the WTO system would not be conditioned on joining the code. But at least it would provide a benchmark for commendable behavior that would dovetail well for instance with the new “naming and shaming” approach on the environment agreed to at COP 21 in Paris. Such a code could also link to and balance with the notion of a “right to trade,”⁹⁶ which would give developing countries a right to challenge a wide range of domestic policies in developed countries that create obstacles to market access, an enhanced version of the GATT idea of “non-violation nullification or impairment.”⁹⁷ When the WTO envisages obligations with real financial consequences, it should support state efforts to adjust to those obligations. In this respect, as already discussed, the structure of the Bali trade facilitation accord is groundbreaking. There is a genuine reverse conditionality: developing countries are able to condition their opting in to hard-law obligations on obtaining the necessary assistance. This is a promising model for new agreements in other areas. For example, if the WTO were to move, as it should, to an agreement curbing dirty fuel subsidies, the opting in of poor countries could be conditioned on receiving the kind of assistance necessary to maintain low-income populations’ access to energy, without giving perverse

96. JOSEPH E. STIGLITZ & ANDREW CHARLTON, *THE RIGHT TO TRADE: A REPORT FOR THE COMMONWEALTH SECRETARIAT ON AID FOR TRADE* 16 (2012) (“Developing countries should be able to bring an action against any advanced country where three conditions are satisfied: A specific group of poor people within a developing country (or the country or group of countries as a whole) can be identified as being significantly and directly affected by a specific trade or trade-relate[d] policy (or policies) of an advanced country[; t]he effect of the policy acts to materially impede the economic development of those poor people (or the country or group of countries as a whole); [and] the impediment operates by restricting the ability of the people (or the country or group of countries as a whole) to trade, or gain the benefits of trade.”).

97. GATT art. XXIII ¶ 1(b); *see also* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001) (discussing art. XXIII ¶ 1(b) in the context of previous jurisprudence).

incentives for the consumption of energy with high carbon externalities.

The role of financial assistance should not be viewed as based on conditionality—the imposition of a model of governance on the country concerned—but rather, it should be viewed as underpinning the political economy of a world trading system still based, for the foreseeable future, on mutually beneficial interstate bargains.

F. Pluralism: Global Deals, Horizontality, and Discretion

A genuine commitment to the ideal and praxis of pluralism at the global level must grapple with the extraordinary diversity prevalent in the WTO's political communities, and in particular, the ways in which common trade rules can accommodate divergent moral and religious priorities.⁹⁸ If pluralism is central to mainstream liberal democratic theory à la Ronald Dworkin, its import for global governance has been strikingly under-theorized. Under a pluralist imperative, “global subsidiarity” requires not only respect for policy space to experiment with different approaches to economic governance, but also a sensitivity to the fact that some policy instruments may be appropriate or inappropriate given particular cultural contexts or commitments.

Thus, there needs to be a margin of appreciation based not only on the ability of WTO members to pursue through their domestic policies certain legitimate ends or goals, but also to use means that do not always accord with “secular” concepts of instrumental rationality. This relates in significant measure to how the general exception provisions of the WTO agreements are interpreted, particularly those that relate to “public morals.” The WTO must be open to protecting the environment, as well as animal and human health, through approaches that are sound under utilitarian policymaking, and are shaped by noninstrumental ethical and religious conceptions of what is right. Recently, in the EU–Seal Products case,⁹⁹ the AB gave expression to an important degree to the ethos of global pluralism in this sense, accepting that the EU ban on seal products could be justified not only in terms of moral concern for the suffering of seals, but also as expressing disapprobation of complicity with the infliction of such suffering by consumers who purchase the products.¹⁰⁰ Of course, there are limits to acceptable pluralism in domestic democratic communities, set in part by commitments to certain universal rights often embedded in constitutions. Analogously, in the global community the universalist dimension of human rights, under customary international law, for

98. See Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 *YALE J. INT'L L.* 367, 427–31 (2012).

99. Appellate Body Report, *European Communities—Measures Prohibiting Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R (adopted June 18, 2014) [hereinafter *EC–Seal Products*].

100. *Id.*

example, also limits global pluralism. But this is generally not a matter for the WTO to adjudicate.

G. Contestation: Embracing Agonistic Politics

Democratic governance operates not only through rational discourse of justification, important to legitimacy, but also through passionate contestation of values and interests. Traditionally, the trade-policy elite has had a considerable distaste for such passionate contestation and has sought to achieve governance through technocratic, instrumental conceptions, relying on “science” or “fact” or artificial boundary-policing devices such as the Product–Process Distinction that aim to fend off open-ended normative controversy. Wisely, the AB has pushed back against this avoidance of normative controversy, allowing WTO members to use trade restrictions to pursue their own passionately held values in areas of considerable controversy and contestation, such as conservation and animal welfare policies—for example, Shrimp–Turtle, Tuna–Dolphin II, and Seal Products, all of which are premised on rejection of the traditional policing function of the Product–Process Distinction.¹⁰¹

At the level of political and diplomatic institutions, the rejection of agonistic politics may be connected (in addition to the general technocratic orientation of the insider community) to the fear that passionate controversy will degenerate into anarchy and unrest of the kind witnessed in the 1999 Seattle Ministerial Conference. Today’s civil society actors are, however, both passionate and informed. The identification of passionate agonistic politics with political street theater is a crude stereotype. Precisely because the WTO is a close to universal institution, with an enormous diversity in its membership, it is an appropriate site for passionate contestation of the terms of globalization—much more so than regional regimes that are, institutionally, almost invisible, and whose insider elites are largely unidentifiable and thus all the more unaccountable and unsusceptible to ongoing public scrutiny (although the EU may be the exception in this regard). A frequent response when one questions why some important topics, such as energy and climate change, are not subject to open and extensive discussion in the WTO institutions is that they are “sensitive.” The same insiders who give this rationale lament the apparent waning salience of the WTO as an institution of global governance. But an institution incapable of opening up discussion and negotiation on truly controversial matters will eventually and necessarily be marginalized as a norm-creating institution, but nonetheless continue to competently manage noncontroversial matters.

H. Regionalism: Allocation of Power to Intermediaries

The ethos of subsidiarity has salience not only in its application to the

101. See generally Appellate Body Report, *U.S. Shrimp–Turtle*; Appellate Body Report, United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012); Appellate Body Report, *EC–Seal Products*.

appropriate relationship between the WTO, the levels of governance represented by WTO members, and the other international institutions with overlapping competences (food, health, environment, human rights), but also to regional trade regimes. The traditional insider trade-policy elite has often had a schizophrenic attitude toward regionalism. Many have attacked regional arrangements and assumed they constitute a zero-sum competition with the WTO.¹⁰² Often this point of view is criticized as unrealistic and unpragmatic, given the great difficulty of negotiating new norms multilaterally. The current WTO architecture only addresses whether and under what conditions non-WTO trade regimes are permissible, not the norms that govern their evolving interaction with the WTO.¹⁰³ Here, for example, there is room for considerable innovation.¹⁰⁴ There is no point in lamenting the “spaghetti bowl” of regional agreements. Instead, regional deals must not exploit asymmetries of power vis-à-vis the rest of the world, as the EU tends to do when imposing its standards of integration (as opposed to, say, consumer protection, which is legitimate) as a condition for access to its market.

IV

CONCLUSION: THE LEGITIMACY OF THE WTO CANNOT BE WON BY ARCHITECTURAL REFORM BUT INSTEAD DEMANDS A TRANSNATIONAL ETHICS OF SUBSIDIARITY

As we have previously urged, “A genuine spirit of subsidiarity and democratic self-determination at the global level calls for the fine-tuning of a transnational political ethics for our age of globalization. Such ethics must start by speaking to the relationship between the universal and the local, the global and the regional.”¹⁰⁵ It must and can incorporate other, including minority, considerations into decisionmaking and decisionshaping, including agents and values from outside one’s circle; committing to returning to past outcomes on grounds not only of external change but also internal fallibility; incorporating checks and balances in the global management of economic exchange; taking seriously the need to empower, or at least to compensate, those who for one reason or another are consistent losers in the globalized world; applying the principle of mutual recognition to the greatest extent possible when dealing with cooperation problems; and finally, translating the demands of pluralism into WTO guidelines for adjudication.

Ultimately, the kind of operational ethics sketched out here could be seen as part of a broader philosophy of cosmopolitan pluralism bent on better combining the two tenets of responsible interdependence on one hand and

102. See generally JAGISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* (2008).

103. See GATT art. XXVI.

104. See generally, e.g., BERNARD HOEKMAN, *SUPPLY CHAINS, MEGA-REGIONALS AND MULTILATERALISM: A ROADMAP FOR THE WTO* (2014).

105. See Howse & Nicolaidis, *Towards a Global Trade Ethics*, *supra* note 1, at 13.

respect for first order differences on the other, including between both cultural worlds and socioeconomic bargains.

Our intent is both normative and strategic. We challenge elements of the hegemonic consensus about trade governance while also recognizing that some of these norms are already applied—we are not inventing them as *deus ex machina*; they already affect much behavior and many opinions in the trade world. We offer a way to think through the need to adapt the changing global order to the claims of emerging powers and the rest of the developing world. Although we resist moves from bargaining to constitutionalized rules, we nevertheless propose underlying benchmarks for bargaining: mitigate power asymmetries and decrease transaction costs. In sum, our vision is not to recommend a new legal order but rather to provide a kind of interactive virtual code of conduct for all actors in the global trade game. In the spirit of subsidiarity, operationalizing such an agenda would be up to those actors willing to take part.