

# Northwestern Journal of International Law & Business

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Volume 17

Issue 1 *Winter*

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Winter 1997

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### Recommended Citation

Jeffrey L. Dunoff, "Trade and": Recent Developments in Trade Policy and Scholarship - And Their Surprising Political Implications, 17 *Nw. J. Int'l L. & Bus.* 759 (1996-1997)

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# **“Trade and”: Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications**

*Jeffrey L. Dunoff\**

Lately, I've been thinking about the richly suggestive phrase “trade and.” What does it mean? Is it shorthand for new topics on the expanded trade agenda, such as “trade and environment” or “trade and intellectual property”? Does it describe new movements in legal scholarship on trade issues? How is it similar to, or different from, “law and”?

Until fairly recently, most scholarship about international trade law fell within a relatively well-defined domain. The substantive focus of this traditional scholarship<sup>1</sup> typically has been on a series of traditional, core “trade” issues: tariffs, quotas, most-favored-nation treatment, nondiscrimination, permissible safeguards and adjustment actions, and the like.<sup>2</sup> Most of the traditional scholarship shares a

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\* Associate Professor of Law, Temple University School of Law. This article is a revised version of a presentation at the Conference on Institutions for International Economic Integration sponsored by the American Society of International Law's International Economic Law Interest Group in May, 1996. Scott Burris, Theresa Glennon, Rick Greenstein and Laura Little provided helpful comments on earlier versions of this paper. Special thanks to Jane Baron, who graciously reviewed multiple drafts with good humor and numerous insights. Kyle Danish provided invaluable help in preparing this article for publication, and Roy Barber provided helpful research assistance. Finally, I am indebted to Joel Trachtman for inviting me to participate in this conference. Work on this article was supported by a summer grant from the Temple University School of Law.

<sup>1</sup> Throughout this paper, I will generalize about “traditional,” “critical” and “interdisciplinary” trade scholarship. In so doing, I do not mean to suggest that the scholarship within any of these “schools” is monolithic, or that I have described every aspect of each of the “schools.” For present purposes, I seek only to portray accurately a range of commitments or positions that can fairly be ascribed to each of these three “schools.”

<sup>2</sup> The seminal texts include JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969) and JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNA-*

common set of assumptions rooted in classic liberal economics: that liberalized international trade permits nations and firms to exploit comparative advantages, that voluntary exchanges through trade are mutually beneficial, and that liberalized trade enhances global welfare. Traditional scholarship also assumes, either explicitly or implicitly, the autonomy of international markets. This scholarship typically urges the reduction—or elimination—of government “interference,” either domestically or internationally, with “normal” commercial activity. While much trade scholarship still addresses these issues, today this form of scholarship no longer dominates the field. Indeed, trade scholars today are by necessity “trade and” scholars. That is, those who write about trade policy can hardly escape study of relationships among trade and numerous topics traditionally considered outside the trade realm, whether they be regulatory heterogeneity, environmental regulation, labor standards or competition law. These and other “trade and” topics are among the most interesting—and difficult—issues on the trade agenda.

For this reason, I want to identify three different ways that we might understand the phrase “trade and.” First, this term might refer to new issues on the trade agenda, like “trade and intellectual property,” or “trade and environment.” By addressing “behind-the-border” trade barriers, this new agenda is often hailed by traditional scholars as an opportunity to further discipline the ability of governments to interfere with global trade. But, in the “trade and” universe, things are not always as they appear. By focusing on the institutional competence of trade bodies—and the political understandings supporting the trade regime—I want to sound a cautionary note. While the conventional wisdom among traditional scholars celebrates the trade regime’s expansion into new substantive areas, I will argue that this expansion may threaten the continued political viability of the trade regime.

Second, the term “trade and” might refer not directly to the new “trade and” issues themselves but rather to *legal scholarship* addressing the “trade and” issues. Much of this “trade and” scholarship—including most prominently much of the “trade and environment” and “trade and labor” literature—purports to be critical of the trade regime. In response, many traditional trade scholars have resisted the

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TIONAL ECONOMIC RELATIONS (1989). For a provocative analysis of Professor Jackson’s role in creating the academic field of international economic law, see David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 671 (1995).

arguments advanced in the “critical” scholarship, arguing that they provide justifications for increased government intervention in the marketplace. From the traditionalists’ perspective, the “critical” scholarship thus appears to conflict with the aims of liberalized trade regimes, such as the WTO or NAFTA. But, again, things are not always what they seem. I will argue that the “critical” writings are less an attack on liberalized trade than a reaffirmation of core trade and market premises. Thus, while the “critical” scholarship may appear to challenge traditionalist assumptions and hence critique the status quo, it is actually rather conservative in its assumptions and reform proposals.

Third, the phrase “trade and” might identify a narrower body of writings on the new trade issues, those that use interdisciplinary approaches. The analogy here is to the various domestic “law and” movements, like law and economics, or law and society. In this sense “interdisciplinary trade and” scholarship might be an umbrella term encompassing the trade and economic analysis that Joel Trachtman often uses,<sup>3</sup> the trade and public choice analysis that Alan Sykes often employs<sup>4</sup> or the eclectic mix of postmodern and other insights found in Jeffery Atik’s work.<sup>5</sup> As the papers in this Symposium illustrate, much of the “interdisciplinary” scholarship adopts economic assumptions and methodology. It is often written by scholars with deep roots in the trade community and is typically considered supportive of liberalized trade. Once again, however, things may not be as they appear. I will try to demonstrate that at least some of this interdisciplinary scholarship may warrant increased, rather than decreased, government intervention in markets. Thus, my third claim is that interdisciplinary trade and scholarship often looks rather conservative, but may actually be quite radical in its implications.

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<sup>3</sup> See Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 Nw. J. INT’L L. & BUS. 470 (1997) (applying insights of new institutional economics and industrial organization to international economic organizations); Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiary* (unpublished manuscript on file with author) (applying comparative institutional cost-benefit analysis in “trade and” context).

<sup>4</sup> See Alan O. Sykes, *The (Limited) Role of Regulatory Harmonization in the International System* (unpublished manuscript on file with author); Warren F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 INT’L REV. OF L. & ECON. 27 (1996).

<sup>5</sup> See Jeffery Atik, *Scientific Determinations with WTO and NAFTA Dispute Resolution as Forms of Regional Legislation*, 17 Nw. J. INT’L L. & BUS. 736 (1997).

I. SHOULD TRADITIONALISTS CELEBRATE THE TRADE REGIME'S  
EXPANSION INTO NEW SUBSTANTIVE AREAS?

There can be little doubt that "trade and" issues now dominate trade policy, as the agenda of the upcoming WTO Singapore Ministerial Conference illustrates. The first Ministerial level meeting since the WTO's formation will largely focus on trade and intellectual property, trade and investment, trade and environment, trade and competition and, perhaps, trade and labor standards.<sup>6</sup> In addition, the U.S. seeks to add trade and corruption to the agenda.<sup>7</sup>

Why this expansion into all of these "trade and" areas? Why have these issues come to the fore now? The conventional answer starts by noting the GATT's success at addressing tariffs and other traditional trade barriers.<sup>8</sup> As the significance of these "border barriers" has decreased, there has been an increase in the relative significance of behind the border barriers—such as differences in competition or intellectual property law.<sup>9</sup> And this regulatory heterogeneity<sup>10</sup>—in combination with greatly increased trade—gives rise to the "trade and" agenda. These topics have achieved prominence now because, while not all of them are novel,<sup>11</sup> "what is new is the extent and intensity of international transactions and their capacity to influ-

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<sup>6</sup> See, e.g., *Efforts to Hammer Out Agenda for December WTO Meeting in Singapore*, BNA INT'L TRADE DAILY, Sept. 17, 1996 (WTO Director General urges progress on environment, labor, competition and investment issues in Singapore).

<sup>7</sup> These, and similar issues are likewise central to discussions and negotiations at other multilateral trade fora. See, e.g., *Link Between Labor Rights, Trade Gaining Acceptance, DOL's Otero Says*, BNA INT'L TRADE DAILY, Aug. 6, 1996 (identifying various fora where "trade and labor" issues raised); *U.S. Official Says Trade and Labor Ministers Should Discuss FTAA Project*, BNA INT'L TRADE DAILY, May 10, 1996; *FTAA Declaration Puts Off Issue of Trade and Environment Til 1997*, BNA INT'L TRADE DAILY, Mar. 25, 1996.

<sup>8</sup> Thus, even before the Uruguay Round agreements, leading scholars declared that "tariffs today are so low as no longer to constitute a significant barrier to international trade." John Gerard Ruggie, *Embedded Liberalism Revisited: Institutions and Progress in International Economic Relations*, in *PROGRESS IN POSTWAR INTERNATIONAL RELATIONS* 201, 217 (Emanuel Adler & Beverly Crawford eds., 1991) [hereinafter Ruggie, *Embedded Liberalism Revisited*].

<sup>9</sup> See, e.g., John Gerard Ruggie, *At Home Abroad, Abroad at Home: International Liberalization and Domestic Stability in the New World Economy*, 24 J. INT'L STUDIES 507, 509 (1994).

<sup>10</sup> I borrow this phrase from Alan O. Sykes. See Sykes, *supra* note 4.

<sup>11</sup> The link between labor and trade issues has long been considered in the ILO context. See, e.g., Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE 61, 63 (1986). The implications of cartels on international trade was an issue in the 1920s, and the draft charter of the International Trade Organization included a chapter on anticompetitive conduct. See *Havana Charter for an International Trade Organization*, U.N. Doc. E/Conf 2/78 (1948), reprinted in U.N. Doc. ICITO/1/4 (1948).

ence matters that were traditionally addressed wholly within the confines of the nation state.”<sup>12</sup>

For traditional trade scholars, the expansion of trade law into new substantive areas holds great promise. New WTO disciplines can further restrict the ability of domestic governments to interfere with international markets, and hence appear to further advance the cause of liberalized trade. But, in this area, things are not always as they appear. Pursuit of the “trade and” agenda poses significant risks to the trade regime. I believe it is possible to identify at least two causes for concern.

First, the GATT/WTO’s expansion into new substantive areas raises serious questions about institutional competence and expertise. These arise because trade bodies—like firms, governments, law schools and all other institutions—have certain areas of proficiency. They are well-equipped to address certain issues, and ill-equipped to address others. Indeed, there is little to suggest that the WTO possesses the requisite expertise to address sensibly many of the “trade and” issues. Environmental advocates have repeatedly and persuasively detailed the GATT’s shortcomings with respect to “trade and environment” issues,<sup>13</sup> even a GATT report candidly conceded that “[t]he GATT is not equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environment.”<sup>14</sup> Similarly, even traditional trade scholarship recognizes that “[t]rade bureaucrats are not the best officials to address the complexities of fair labor standards or other social issues, nor are trade agreements necessarily the best instruments for addressing them.”<sup>15</sup> In short, if we applied the theory of comparative advantage to institutions, we might conclude that trade bodies are not terribly well positioned, by virtue of

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<sup>12</sup> Michael Hart, *Coercion or Cooperation: Social Policy and Future Trade Negotiations*, 20 CAN. - U.S. L. J. 351, 354 (1994).

<sup>13</sup> See, e.g., DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE* (1994) [hereinafter ESTY, GREENING]; C. FORD RUNGE, *FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS* (1994); Steve Charnovitz, *Environmental Harmonization and Trade Policy*, in *TRADE AND ENVIRONMENT: LAW, ECONOMICS AND POLICY* (Durwood Zaelke et al. eds., 1993). I have addressed the institutional issues in Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes*, 15 MICH. J. INT’L L. 1042 (1994) [hereinafter Dunoff, *Institutional Misfits*]; Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 CORNELL INT’L L. J. 607 (1994).

<sup>14</sup> Report by Ambassador H. Ukawa, Chairman, Group on Environmental Measures and International Trade, 49th Session of the Contracting Parties 3 (Jan. 25, 1994).

<sup>15</sup> Hart, *supra* note 12, at 380.

mission, experience or expertise, to deal with at least some of the most contentious "trade and" issues.<sup>16</sup>

Second, and perhaps more importantly, the expansion into new substantive areas threatens to undermine international and domestic political support for the trade regime. The argument here focuses more on the political foundations of the GATT than its economic justifications. The GATT's drafters sought to create a multilateral, non-discriminatory trade system. However, they were far from doctrinaire free traders.<sup>17</sup> Rather, they recognized the widespread public rejection of 19th Century laissez-faire capitalism, and the corresponding demand for state intervention in domestic economies to protect against many of the harms and risks associated with a market economy.<sup>18</sup> Their difficult diplomatic task, then, was to design an international structure that "would safeguard and even aid the quest for domestic stability without, at the same time, triggering the mutually destructive external consequences that had plagued the interwar period."<sup>19</sup>

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<sup>16</sup> While it is often the "critics" that raise the "institutional competence" argument, this issue should concern the "traditionalists" as well. The difficulties associated with "trade and" issues are part of a larger problem the GATT/WTO system has in addressing challenges to trade measures imposed for political reasons outside the realm of trade policies, including GATT disputes arising out of US-Nicaragua relations, the suspension of Poland's most favored nation status following suppression of Solidarity, and embargoes imposed in the context of the Falklands/Malvinas War.

<sup>17</sup> As a former State Department trade policy analyst stated: "No one was committed to 'free trade'; no one expected anything like it; the term does not appear in the GATT, which simply calls for a process of liberalization with no stated objective." William Diebold, Jr., *From the ITO to GATT—And Back?*, in THE BRETTON WOODS—GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS 152, 158 (Orin Kirshner, ed. 1996). See also Jacob Viner, *Conflicts of Principle in Drafting a Trade Charter*, 25 FOR. AFF. 612, 613 (1947) ("There are few free traders in the present-day world, no one pays any attention to their views, and no person in authority anywhere advocated free trade.").

<sup>18</sup> As the lead U.S. negotiator at the time stated: "There is no hope that a multilateral trading system can be maintained in the face of widespread and protracted unemployment. Where the objectives of domestic stability and international freedom come into conflict, the former will be given priority. . . . It would be futile to insist that stability must always give way to freedom. The best that can be hoped for is a workable compromise." CLAIRE WILCOX, A CHARTER FOR WORLD TRADE 131 (1949).

While this political reality is often overlooked in current trade scholarship, it was forcefully articulated in two of the leading contemporaneous accounts of the inter-war years. See E.H. CARR, THE TWENTY YEARS' CRISES, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS (1939); KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944). Dean Ruggie, in his 1994 Jean Monnet Lecture, pointed out this similarity in what are otherwise two dramatically different accounts of that historical era. See Ruggie, *Embedded Liberalism Revisited*, *supra* note 8.

<sup>19</sup> John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 393 (1982) [hereinafter, Ruggie, *Embedded Liberalism*].

To achieve these varied ends, the GATT negotiators reached a complex compromise: “the principles of multilateralism and tariff reductions were affirmed, but so were safeguards, exemptions, exceptions, and restrictions — all designed to protect the balance of payments and a variety of domestic social policies.”<sup>20</sup> Thus, the GATT was structured in a way that both sought gains from trade, but simultaneously “promised to minimize socially disruptive adjustment costs as well as any national economic and political vulnerabilities that might accrue from international functional differentiation.”<sup>21</sup> Dean Ruggie has called this compromise structure “embedded liberalism”: a form of economic liberalism embedded in a larger commitment to the ability of domestic governments to mitigate the negative effects of liberalized trade.<sup>22</sup>

Might the WTO’s expansion into “trade and” areas threaten the “embedded liberalism” compromise? I think that at least two related elements of this compromise—one at the international level and one at the domestic level—are at risk. First, at the interstate level, the “embedded liberalism” compromise afforded each government wide latitude over domestic policies, free of interference by other nations. But, the emergence of the “trade and” issues reflects, in part, the blurring of the line between “domestic” and “international” economic policy; increasingly, the “international” includes any policy which has an important impact on international transaction flows.<sup>23</sup> This explains the pressures for WTO disciplines in new areas; however, any such efforts in the areas of intellectual property, labor, environment and competition unavoidably constrain the regulatory options available to governments in what have previously been jealously guarded areas of “domestic” social policy. In this way, the “trade and” agenda fundamentally challenges the policy tolerance central to the “embedded liberalism” compromise.

The international political frictions generated by “trade and” issues are well illustrated by the numerous diplomatic flare-ups prior to the Singapore Ministerial Conference.<sup>24</sup> There can be little doubt

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<sup>20</sup> *Id.* at 396.

<sup>21</sup> *Id.* at 399.

<sup>22</sup> *Id.* at 393.

<sup>23</sup> See, e.g., Renato Ruggiero, *The Road Ahead: International Trade Policy in the Era of the WTO*, *Sylvia Ostry Lecture* (May 28, 1996) <<http://www.wto.org>> (speech by WTO Director-General discussing the “increasingly facile and irrelevant” distinctions between international and domestic policy, and the political tensions generated by trade policy’s expanded domain).

<sup>24</sup> See, e.g., *U.S. Tells WTO that Trade, Labor Issues Can Be Linked, Other Countries Disagree*, *BNA INT’L TRADE DAILY*, Apr. 16, 1996; *ASEAN Unites in Objection to Proposed WTO Social Initiatives*, *BNA INT’L TRADE DAILY*, Apr. 30, 1996 (Southeastern Asian nations take



that, as negotiations move from relatively simple issues like tariffs to relatively more difficult issues like regulatory norms, it becomes significantly harder to reach multilateral agreement. The continuing acrimony over trade and environment, and trade and labor issues, in particular, well illustrates the very real tensions and stresses that "trade and" issues bring to trade regimes.<sup>25</sup>

On the domestic level, the "embedded liberalism" model suggests that the "extraordinary success of post-war international liberalization has hinged on a domestic social compact between state and society."<sup>26</sup> Under this arrangement, as we have seen, governments had wide latitude to intervene in domestic economies to mitigate the dislocations caused by liberalized trade. But GATT's expansion into new areas of domestic policy threatens governments' ability to deliver on their end of this "social compact." The expanded trade regime restricts the regulatory and policy vehicles that governments can use in their efforts to mitigate the dislocations caused by an increasingly globalized economy.<sup>27</sup> To mention just one example: over time, the social compact in poverty-stricken India has included the provision of inexpensive pharmaceuticals. But, under the Uruguay Round Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement),<sup>28</sup> the Indian government will be obliged to provide patent protection to pharmaceuticals, which threatens to significantly increase the cost of medicines, and hence the government's ability to deal with India's crushing poverty.<sup>29</sup> As GATT disciplines continue to expand

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unified stand against WTO discussions of "trade and investment," "trade and corruption," and "trade and labor" issues.); *US Encountering Stiff Opposition to Discussing Trade, Labor in WTO*, BNA INT'L TRADE DAILY, Mar. 14, 1996.

<sup>25</sup> See, e.g., *United States Will Keep Up Pressure for Talks on Trade, Labor at WTO*, USTR Says, BNA INT'L TRADE DAILY, Oct. 11, 1996 (pressures generated by mere attempt to raise the issue of labor standards at WTO); *Ruggiero Hoping to Avoid Controversy At WTO Meeting; Sources Call That Unlikely*, BNA INT'L TRADE DAILY, Mar. 18, 1996.

Of course, the tensions raised by these issues would exist whether or not they are considered in the GATT/WTO context. My point is more limited: bringing the tensions associated with these issues into the trade system risks a spillover effect that can hamper progress on other issues.

<sup>26</sup> Ruggie, *supra* note 9, at 523.

<sup>27</sup> There are, of course, numerous reasons why nations are failing to meet their end of the social compact. Persistent budget deficits and tax-averse publics also make it difficult for governments to expand — or even maintain — the web of social policies that has characterized welfare capitalism since World War II. *Id.* at 524.

<sup>28</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results Of The Uruguay Round Vol. 31, 33 I.L.M. 1197 at Annex 1C (1994).

<sup>29</sup> See, e.g., *Patents: The U.S. Turns on the Heat; India: U.S. Complains to World Trade Organization that Country Fails to Give Patent Protection for Pharmaceutical and Agricultural*

into new substantive areas, governments may discover with increasing frequency that they have inadvertently subverted their ability to manage the domestic consequences of liberalized trade in goods, services and capital.

Moreover, these limits on domestic regulatory options in “trade and” areas threatens to provoke a negative reaction from the public. Public reactions to the GATT’s “tuna-dolphin” panel reports<sup>30</sup> and to the labor issues raised by the NAFTA, indicate that public concern over “trade and” issues will not be limited to a particular panel report or recommendation but can turn into hostility toward trade regimes more generally.<sup>31</sup> Ross Perot’s 1992 Presidential efforts—and, more recently, Pat Buchanan’s campaign rhetoric—illustrate how politicians can exploit these concerns in ways that threaten to undermine multi-lateral trade initiatives. This is why the perception that trade bodies have overstepped their appropriate limits can easily escalate into a

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*Chemicals*, BUS. WORLD, Aug. 28, 1996. The Indian example has even led a prominent advocate of liberalized trade to acknowledge that WTO expansion into “trade and” areas threatens to overreach, and hence prompt a public backlash. See *Overview of U.S. Policy Toward South Asia: Hearings Before the Subcomm. on Near E. and S. Asian Affairs of the Comm. on Foreign Relations U.S. Senate*, 104th Cong. 67-73 (1995) (statement of Jagdish Bhagwati, Professor of Political Science, Columbia University).

<sup>30</sup> United States - Restrictions on Imports of Tuna, GATT Doc. No. DS29/R (June 1994), reprinted in 33 I.L.M. 842 (1994); United States - Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155 (1993), reprinted in 30 I.L.M. 1594 (1991).

<sup>31</sup> Significantly, this backlash cuts across the domestic political spectrum. For example, following a WTO Appellate Body decision upholding a finding that provisions of the U.S. Clean Air Act were GATT-inconsistent, Senator Bob Dole declared: “We should decide what our environmental laws should be. We should decide what kinds of regulations are necessary to protect our environment. We should decide that our children deserve cleaner air and purer water, not some bureaucrat in Geneva.” *Dole Calls for Bill to Set Up WTO Review Commission*, BNA INT’L TRADE DAILY, May 3, 1996. The Senator reiterated his calls for passage of a WTO review commission to prevent U.S. rights from being “trampled” in Geneva. The commission would respond to concerns that the WTO might “begin to operate out of control” and exceed its authority. *Id.*

Environmental activists sounded similar themes. “In its outcome, tone, and reasoning, the ruling of the World Trade Organization’s appellate body against U.S. clean air act rules provides a real life example of the WTO’s threat to environmental and health protections, democratic policy making and national sovereignty . . . . Of course, it is the World Trade Organization, not U.S. policy, which needs to be changed. The Clinton Administration and the Republican Congress must not cave-in to the World Trade Organization . . . . As a policy matter, the U.S. must draw a line: international trade law cannot be made by secretive panels on an ad hoc basis.” *Press Statement by Lori Wallach, Director of Public Citizen’s Global Trade Watch*, (April 29, 1996) <<http://iatp-info@igc.apc.org>>.

larger legitimacy critique<sup>32</sup> that undermines public support for trade regimes.<sup>33</sup>

So, my first claim is that the trade regime risks being a victim of its own success; that by expanding to new, more intrusive areas, trade bodies risk (1) extending themselves into areas outside their substantive expertise, and (2) undermining the political support that makes their existence possible in the first place.

## II. HOW CRITICAL IS CRITICAL "TRADE AND" SCHOLARSHIP?

As "trade and" issues have moved from the periphery to the center of the political agenda, a "critical" body of "trade and" scholarship has emerged. Much of this scholarship purports to critique the ways in which the trade regime has approached "trade and" issues. This critique has prompted a spirited defense of the trade regime by traditional scholars, who, in turn, criticize the arguments advanced by the critics. "Trade and environment" is, perhaps, the most contentious of the "trade and" issues, and thus provides an important illustration of this dynamic.

Environmentalists have highlighted a number of concerns associated with liberalized trade. First, they argue that liberalized trade may cause environmental harm by promoting economic growth that can result in unsustainable consumption of natural resources and increased waste production.<sup>34</sup> Second, trade liberalization agreements contain market access provisions that can be used to override environmental regulations.<sup>35</sup> Third, nations with lax environmental regulations are said to enjoy a competitive advantage in a global marketplace; this creates political pressure in nations with high environmental standards to reduce their level of environmental protec-

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<sup>32</sup> See Paul B. Stephan III, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 Nw. J. INT'L L. & Bus. 681 (1997).

<sup>33</sup> All of this suggests that expansion into "trade and" areas threatens to become the trade world's version of "mission creep." This term is, of course, associated with the tremendous public backlash following the ambush in Somalia when 16 Marines were killed. Significantly, the backlash was not limited to peacekeeping operations that substantially enlarge their original mission, but at peacekeeping operations more generally. In the same way, public dissatisfaction with the treatment of "trade and" issues by trade bodies threatens to become public dissatisfaction with trade bodies more generally.

<sup>34</sup> ESTY, *supra* note 13, at 2.

<sup>35</sup> *Id.* The tuna-dolphin dispute illustrates this point.

tion.<sup>36</sup> Finally, environmentalists seek the ability to use trade measures as tools in global environmental protection efforts.<sup>37</sup>

Many traditional trade scholars have strongly resisted arguments raised in much of the new agenda scholarship, insisting that the critics' positions threaten to undermine the liberalized trade regime.<sup>38</sup> "Critical" scholarship has been attacked for urging a greater freedom for national governments to regulate in trade restrictive ways. From this perspective, the critics' arguments sharply challenge the trade regime's *raison d'être*, which is to discipline the ability of national governments to interfere with trade. A related objection is that the critics' arguments for imposing duties on, or banning trade in, products produced in environmentally harmful ways challenge the doctrine of comparative advantage, the engine driving the international marketplace.<sup>39</sup>

A shift in perspective, however, might suggest that the hostility of traditional scholars to much of the "critical" scholarship should be tempered. First, the fact that even the environmental and labor critics of trade regimes define the problems as "trade and" topics already presupposes a certain perspective on the issues. "Critical" scholarship is largely devoted to discussions of how environment or labor issues can be harmonized with the existing (or slightly modified) body of

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<sup>36</sup> *Id.* at 3. Empirical support for the competitiveness claim appears to be scant. See, e.g., Richard Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L. J. 2039 (1993). For an insightful approach to the competitiveness debate see Ileana M. Porras, *The Puzzling Relationship between Trade and Environment: NAFTA, Competitiveness, and the Pursuit of Environmental Welfare Objectives*, 3 IND. J. GLOBAL LEGAL STUD. 65 (1995).

<sup>37</sup> ESTY, *supra* note 13, at 2. For prominent examples, see Montreal Protocol on Substances That Deplete the Ozone Layer, opened for signature Sept. 16, 1987, 27 U.S.T. 1087, and the Convention on International Trade in Endangered Species, opened for signature Mar. 6, 1973, 993 U.N.T.S. 243.

<sup>38</sup> "Many trade scholars—both lawyers and economists—view the increasing preoccupation with 'fair trade' [associated with environmental and labor standards] as the most fundamental challenge or threat to the liberal trading order that has arisen in recent decades." Robert Howse and Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor and the Environment*, 16 INT'L. REV. OF L. & ECON. 61 (1996) (citations omitted). A representative sampling of traditional scholarship can be found in FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (Jagdish Bhagwati and Robert E. Hudec, eds., 1996). Similar sentiments are voiced by the corporate community. At a recent American Society of International Law Conference, an IBM spokesperson declared: "Frankly, I don't view trade and environment as the biggest threat to trade. I view the whole panoply of trade and issues as the threat to trade." Khristine Hall, *Trade and the Environment: The Business Point of View*, 1994 AM SOC. INT'L. L. PROC. 495.

<sup>39</sup> See, e.g., Piritta Sorsa, *GATT and the Environment*, 15 WORLD ECONOMY 123 (1992) (arguing that such trade measures would "work against the realization of comparative advantage . . . undermine the rule based nature of the GATT and reduce the opportunities for gains from specialization through trade").

international trade law. Thus, discussions of coercive labor practices or abysmal environmental laws are often transformed into discussions of implicit subsidies or competitive advantage.<sup>40</sup> Similarly, "critical" scholarship devotes substantial attention to perceived shortcomings in the GATT/WTO dispute resolution procedures, and suggests a number of reforms in these processes. But, by assuming the priority of trade law—and by assuming that "trade and" issues will be resolved pursuant to trade body procedures—the critics implicitly assure the privileging of trade values over labor or environmental values.<sup>41</sup> In this sense, the "critical" scholarship lacks significant bite.

A similar conclusion results when we focus on the *structure*, rather than the *details*, of the critics' argument. When critics argue that disparate regulations distort trade flows, and that governments should intervene to correct these distortions, they presuppose the existence of "undistorted" or "normal" trade flows.<sup>42</sup> In other words, they presuppose the priority and autonomy of international markets in goods.<sup>43</sup> In this way, critics from outside the trade community tend to reinscribe the most fundamental assumptions of trade regimes.

So, my second claim is that "critical" "trade and" scholarship may appear quite radical, but tends to be rather conservative. The key assumptions and the structure of the argument in much "critical" scholarship tends to reinforce key traditionalist assumptions about the priority of the trade regime and the autonomy of international markets.

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<sup>40</sup> For a recent example in the labor area see, e.g., Daniel S. Ehrenburg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361 (1995) (asserting that forced and child labor violates customary international law and should be considered state subsidies under the WTO).

<sup>41</sup> See Dunoff, *Institutional Misfits*, *supra* note 13 (detailing how GATT subordinates environmental values to trade values). For a broader critique of the use of economic institutions and economic rhetoric in a variety of contexts, see Jane B. Baron and Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431 (1996).

<sup>42</sup> Porras, *supra* note 36, at 79 n.20

<sup>43</sup> For insightful critiques of the idea of autonomous international markets, see Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29 (1995); Daniel Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987).

III. INTERDISCIPLINARY "TRADE AND" SCHOLARSHIP: DO  
"CONSERVATIVE" ARGUMENTS HAVE  
RADICAL IMPLICATIONS?

Finally, there is a third way we might understand the term "trade and." "Trade and" could refer to scholarship identified less by subject matter than by its use of interdisciplinary approaches. Here, the term "trade and" suggests a loose analogy with the various "law and" branches of domestic legal scholarship, such as law and economics, law and literature, law and society, law and feminism, and the like. In this sense, interdisciplinary "trade and" might be a shorthand for the "new movements in international economic law" that Joel Paul surveyed at a previous Interest Group Conference.<sup>44</sup>

Much of the interdisciplinary "trade and" scholarship is informed by economic theory; and perhaps the most influential body of this subset of "trade and" scholarship is what I would call "trade and political economy," or "trade and public choice."<sup>45</sup> It appears that much of this literature is written by scholars who are strongly supportive of liberalized trade, and that this scholarship has been well received by traditional trade scholars. However, I want to suggest that trade and public choice scholarship may present a more serious challenge to liberalized trade regimes than other "trade and" scholarship.

As I understand this theory, public choice applies insights from the study of private economic behavior to politics. It assumes that political actors advance their self-interests in ways similar to market actors. It also views regulation—including national and multilateral trade policies—as a commodity, subject to supply and demand like

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<sup>44</sup> Joel R. Paul, *The New Movements in International Economic Law*, 10 AM. U. J. OF INT'L L. & POL. 607 (1995). Among the most promising of these new movements is a trade and international relations movement. See, e.g., Anne-Marie Slaughter, *Public Choice and International Relations Theory*, 10 AM. U. J. INT'L & POL. 717 (1995); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995). For more on the relationship between international relations and international law generally, see John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

<sup>45</sup> See, e.g., Stephan, *supra* note 32; Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L & POL. 745 (1995) and sources cited *supra* note 4. See also Roland Vaubel, *A Public Choice View of International Organization*, in THE POLITICAL ECONOMY OF INTERNATIONAL ORGANIZATIONS 33 (Roland Vaubel & Thomas D. Willett eds., 1991).

other commodities. Governments supply regulatory results to the highest bidders.<sup>46</sup>

Applying insights developed in collective action literature, public choice theory explains why nations enact tariffs and other protectionist measures, even when such measures are sub-optimal, or reduce overall welfare. The benefits of liberalized trade are widely diffused among a large and unorganized group—consumers. However, each consumer accrues only small benefits from liberalized trade in any particular product, and thus has only a small stake in opposing any particular protectionist policy. Moreover, consumer lobbying efforts face huge organizational burdens and “free rider” problems. In contrast, the costs of liberalized trade tend to be concentrated on particular industries. These producers thus have much to gain from protectionist policies, and sufficient incentive to lobby for such policies. These firms will typically have lower mobilization and lobbying costs, and a greater ability to avoid “free rider” problems than will more widely dispersed consumers. For these reasons, well-organized and well-financed interest groups, such as producers, will tend to have greater political influence on trade policy than poorly organized or financed groups, such as consumers.<sup>47</sup> As a result, the political system will be more responsive to producer interests than consumer interests and will produce legislation and regulations that, although economically irrational from the standpoint of aggregate welfare, respond to the rent-seeking pressures of producer interests.<sup>48</sup>

Thus, public choice theory has provided a powerful explanation of suboptimal governmental regulations. But—though this implication has not always been recognized—public choice arguments also suggest that *deregulation*—or *government inaction*—can likewise re-

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<sup>46</sup> The literature on public choice is voluminous. See, e.g., MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (forthcoming); DANIEL A. FARBER AND PHILIP B. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

<sup>47</sup> The public choice explanation of tariffs has been set forth on numerous occasions. See, e.g., THE POLITICAL ECONOMY OF INTERNATIONAL TRADE (Ronald Jones & Anne Kruger eds., 1990); JAGDISH BHAGWATI, POLITICAL ECONOMY AND INTERNATIONAL ECONOMICS (1991); Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255, 275-76 (1991). An important historical antecedent of the public choice explanation is the pluralist account set out in E. E. Schnattschneider’s famous study of the Smoot-Hawley Act. ELMER E. SCHNATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF (1935).

<sup>48</sup> For these purposes, I am more interested in the political implications than the accuracy of the public choice account. For an analysis skeptical of the accuracy of the public choice explanation for domestic and international trade politics, see Jeffrey L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 HARV. ENV’T L. REV. 241 (1995).

fect self-interested agendas and imperfections in the political process. In other words, the decision not to enact legislation or regulations, or to remove existing governmental programs, might be influenced by the same rent-seeking forces that public choice scholars identify as the engine of government action.<sup>49</sup> Ongoing political battles over the non-regulation of cigarettes may be a good current example.<sup>50</sup>

In other words, public choice theory can explain both regulation and deregulation as well as governmental acts that restrict or that open markets. This theory seems to highlight the primacy of politics—and the thoroughly constructed nature of markets, whether international or domestic. It suggests that, at both the domestic and international levels, we might expect trade policies that maximize the political welfare of certain narrow interests, rather than the economic welfare of all interests.<sup>51</sup>

Public choice theory further suggests that when trade bodies discipline government action in certain areas, this result is not a return to some natural state or neutrality. Deregulation is not simply a process of getting out of the way that lets markets operate “on their own,” but is actually the shaping—or creation—of markets in the first place. Under this understanding, we would not view markets as natural, but rather as socially constructed institutions—just like the many other institutions we understand to be the product of social choices.

But, of course, arguments like these are familiar. They are similar to the legal realist critique of the naturalness or primacy of the market. The realists attacked the claim that the market was neutral and natural, and the claim that law ought to merely passively reflect or

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<sup>49</sup> Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280 (1990).

<sup>50</sup> For a history of these efforts see RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR* (1996). Other current examples abound. See, e.g., Marian Burros, *Congress Moving to Revamp on Food Safety Law*, N.Y. TIMES, July 3, 1995, at A1, 2; John Cushman Jr., *Lobbyists Helped Revise Laws on Water*, N.Y. TIMES, Mar. 22, 1995, at A16; Timothy Egan, *Industries Affected by Endangered Species Act Help a Senator Rewrite its Provisions*, N.Y. TIMES, Apr. 13, 1995. For an interesting example of a domestic industry first vigorously pushing an international agreement that would limit government action, and then reversing its position and helping to defeat implementation of the same agreement, see David E. Sanger, *Suddenly, as the Election Nears, Ship Subsidies Don't Seem So Bad*, N.Y. TIMES, Oct. 3, 1996 at A1.

<sup>51</sup> Indeed, a public choice analysis of the WTO might suggest that this regime is itself a reflection of rent-seeking private interests that have advocated trade policies that enrich a small number of powerful interests at the expense of the broader public. See *GATT Implementing Legislation: Hearings Before the Comm. on Commerce, Science, and Transp. U.S. Senate*, 103rd Cong. 357-68 (1994) (prepared statement of Ralph Nader) (opposing Uruguay Round Agreements).



facilitate neutral market outcomes.<sup>52</sup> I want to suggest that, although starting from quite different premises, public choice theory might bring us to a similar position regarding the autonomy of the market.

The legal realist challenge to the primacy and autonomy of the market, of course, suggested that "the market is defined by legal rules chosen and enforced by governments, that other market structures are possible; and that the kind of market we create should be a function of considerations of policy and justice."<sup>53</sup> In part, the realist attack laid the groundwork for the era of government interventionism and activism known as the New Deal.

Public choice arguments have typically been used to show that regulation can reflect special interest capture. They have thus been powerful arguments for deregulation. Paradoxically, the arguments also run in the other direction. In other words, public choice theory can explain nonregulation or deregulation as a suboptimal outcome that advances rent-seeking interests at the expense of the larger public interest. It thus has the capability of providing a powerful argument for increased government intervention. So, my third claim is that public choice analysis of trade regimes looks rather conservative, but actually contains the seed of a quite radical critique of the trade system.

#### CONCLUSION

In the last several years, "trade and" issues have moved from the periphery to the center of the trade policy world. In turn, a diverse body of "trade and" scholarship has addressed the difficult legal, institutional, policy and conceptual problems raised by these issues. In this short article, I have attempted to identify a useful way of categorizing this body of scholarship, and to suggest some of its surprising political implications.

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<sup>52</sup> See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* at 197 (1992). See also Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 *MOD. L. REV.* 421 (1990).

<sup>53</sup> Joseph Singer, *Legal Realism Now*, 76 *CALIF. L. REV.* 465, 535 (1988).