

THE TRANSFORMATION OF WORLD TRADE

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INTRODUCTION

Conventional wisdom holds that the world trade system evolved from a power-based to a rules-based regime. “To a large degree,” one of the pioneers of the academic study of international trade notes, “the history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented approach.”¹ In a steady, unidirectional process of legalization, the argument goes, trade *law* has gradually replaced trade *politics*.² In particular, the creation ten years ago of the World Trade Organization (“WTO”)³ is commonly portrayed as a constitutional moment when the stability of the rule of law finally eclipsed the caprices of politics and diplomacy. In support of this theory, proponents invariably point to the WTO’s new dispute settlement mechanism,⁴ which, unlike that of its predecessor, the General Agreement on Tariffs and Trade (“GATT”),⁵ is compulsory and fully automatic.⁶ Com-

1. John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 99 (1978). This quotation also appears in, inter alia, JOHN JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 110 (2d ed. 1997). See also R. E. Hudec, Review Article, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 1 WORLD TRADE REV. 211, 219–20 (2002) (“The conventional history of GATT/WTO dispute settlement (for which I may be partly responsible) teaches that GATT dispute settlement evolved from a ‘diplomatic’ instrument into a ‘judicial’ instrument.”).

2. See, e.g., Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385, 389 (1982) (referring to a victory for trade “legalists” over trade “pragmatists”); Miquel Montaña i Mora, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT’L L. 103 (1993); Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 Nw. J. INT’L L. & BUS. 775, 777 (1996–97).

3. Marrakesh Agreement establishing the World Trade Organization, Apr. 15, 1994, 108 Stat. 4809, 1867 U.N.T.S. 14 [hereinafter WTO Agreement].

4. WTO Agreement, *supra* note 3, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex II, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55. U.N.T.S. 194 [hereinafter GATT].

6. Pursuant to the DSU, a defendant can no longer block the establishment of a panel or the adoption of panel or Appellate Body reports by the WTO’s Dispute Settlement Body (“DSB”). DSU, *supra* note 4, arts. 6.1, 16.4, 17.14.

bined with the WTO's expansion into a host of new regulatory areas, such as health and safety standards, services, trade, and intellectual property protection;⁷ and its single package approach (all but two of the more than thirty WTO agreements are binding on all 148 member countries);⁸ the conclusion that the WTO possesses a *thickened* legal-normative structure is, indeed, inescapable. The common perception is, therefore, that at the expense of member countries' sovereignty (less politics), the authority of the WTO gradually expanded (more law).⁹

Within this prevailing school of thought (from-politics-to-law) it is a prominent theme that for trade liberalization to occur the process *must be* unlinked from the horse-trading and instabilities of domestic politics and representative democracy.¹⁰ For utilitarian proponents of this idea, much the way we rely on experts to cure diseases, or as most countries have a politically independent central bank to ensure price stability, so does the world need a trade regime that is sealed off from the excesses of domestic and international politics.¹¹ In the absence of an insulated regime, the argument goes, concentrated special interest groups commanding disproportionate leverage, in particular owners and workers in industries that are habitually injured by free trade, would overshadow more diffuse majority concerns that favor free trade, such as consumers paying less for imports. Since the resulting protectionism would inherently harm the majority, and in that sense not be democratic, WTO agreements tying the hands of domestic politicians to the mast of free trade "act to restrain protectionist interest groups, thereby promoting both free trade and democracy."¹² In other words, the argument concludes that, rather than a

7. WTO Agreement, *supra* note 3, Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, Annex 1A [hereinafter SPS]; WTO Agreement, *supra* note 3, Agreement on Technical Barriers to Trade, Apr. 15, 1994, Annex 1A [hereinafter TBT]; WTO Agreement, *supra* note 3, General Agreement on Trade in Services, Apr. 15, 1994, Annex 1B [hereinafter GATS]; WTO Agreement, *supra* note 3, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Annex 1C [hereinafter TRIPS].

8. The plurilateral trade agreements listed in Annex 4 are binding only on members that have accepted them separately. WTO Agreement, *supra* note 3, art. 2. The listing of those agreements in Annex 4 does not bind all WTO signatories. *Id.*

9. See *Lori's War*, FOREIGN POL'Y, Spring 2000, at 29, 34–40 (interviewing Lori Wallach regarding perceived role of WTO); Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 CHI. J. INT'L L. 417, 420–21 (2001); John Ragosta et al., *WTO Dispute Settlement: The System is Flawed and Must Be Fixed*, 37 INT'L LAW. 697, 698–99 (2003); see also David E. Sanger, *A Blink From the Bush Administration*, N.Y. TIMES, Dec. 5, 2003, at A28 (touting the August 30, 2002 WTO ruling in the United States' foreign sales corporations matter, and its subsequent implementation by the Bush administration, as the international law "equivalent of *Marbury v. Madison*").

10. John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 515–16 (2000).

11. The need to restrict discretionary powers of governments in furtherance of the common good is explained with reference to the so-called time consistency problem; that is, the inability of political institutions to bind themselves for future periods given their exposure to strategic behavior of private agents. See Finn E. Kydland & Edward C. Prescott, *Rules Rather Than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473, 481 (1977).

12. McGinnis & Movsesian, *supra* note 10, at 515.

threat to sovereignty and representative government, the WTO is a fundamental and inherent guarantor of democracy.¹³ Others base a similar approach not on utilitarian, welfare-maximization calculations, but on constitutional theory. Just as most countries have human rights and constitutional guarantees to protect against political dictatorship by the majority, so does the world require economic freedoms of a constitutional nature to protect citizens against economic abuse or failure of representative government.¹⁴ From both this utilitarian and from the constitutional perspective, the commonly perceived trajectory of world trade from politics to law is, therefore, not simply a historical observation. It is a prescriptive, normative goal.

This Article contests the traditional view of the evolution of the world trade system. Rather than a unidirectional process of legalization focused exclusively on the system's normative structure, Part I of the Article, "The Explosion of the GATT Club," recounts the transformation from GATT to WTO as a bidirectional interaction *between* law and politics; in particular, *between* the system's legal-normative structure and its political, decision-making branch. Legal change in the world trade system has, indeed, been profound. Yet, it could only happen and is best understood in its interaction with the system's political process. My claim is that this law-and-politics narrative, as opposed to the conventional from-politics-to-law story, better explains the evolution of the world trade system. It better explains, in particular, how countries could ever agree to decisionmaking by simple majority in the original GATT, what reassured them to surrender their veto right in the WTO dispute process, and why today WTO members so vehemently defend the consensus rule for political decisions.

To tell this alternative story the Article borrows from the theoretical framework of exit and voice, introduced in 1970 by the economist Albert Hirschman¹⁵ and later brilliantly applied by Joseph Weiler to the transformation of the European Community ("E.C.").¹⁶ Crudely put, following Hirschman's insight, there is an inverse, bidirectional relation between exit and voice. In the context of this Article, slightly bending and extending

13. *Id.*; see also Robert E. Hudec, "Circumventing" Democracy: *The Political Morality of Trade Negotiations*, 25 N.Y.U. J. INT'L L. & POL. 311 (1993). Rather than focusing on domestic consumers, however, Hudec highlights the major benefits of trade from the viewpoint of domestic exporters and foreign producers. *Id.* at 314.

14. ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 387-92 (1991).

15. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970). In Hirschman's opinion, when faced with dysfunctional behavior by or in an organization (be it a firm, tribe, government, or international organization), that is, a deterioration in the organization's performance, two endogenous forces of recovery are possible. Firstly, the client of the firm or member of the institution can leave the organization (e.g., buy her goods elsewhere), which ought to put pressure on the organization to improve (*the exit option*). *Id.* at 21. Secondly, the client of the firm or member of the institution can protest or complain to the management of the organization pushing it to improve its goods or services (*the voice option*). *Id.* at 30.

16. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2410-12 (1991), reprinted and updated in J.H.H. WEILER, THE CONSTITUTION OF EUROPE (1999), 10-101.

Hirschman's concepts, "exit" is characterized by the lack of law or discipline or the thickness of a system's legal-normative structure, which offers easy options to defect from the cooperative regime. Similarly, "voice" is characterized by the broader notions of politics, participation, or levels of contestation in the political decisionmaking process, such as offering abundant opportunities for expressing preferences for cooperative decisions. Closure of exit options (more law or discipline) leads to higher demands for voice (more politics or participation). Conversely, higher levels of voice (more politics) are an absolute requirement for enabling and sustaining the closure of exit (more law).

Through this lens, my claim is that the world trade system evolved from a combination of high exit and low voice in the text of GATT 1947 to a combination of low exit and high voice in the WTO. That is, it evolved from *low* discipline or law, with many escape clauses and weak enforcement, and *low* participation or politics, with a highly technical and technocratic operation run by simple majority vote, to *high* discipline or law (stricter rules and automatic enforcement) and relatively *high* participation or politics, a globally contested organization strictly run by consensus. One major consequence of this claim is that increased legalization or discipline such as more supervision by the WTO and less exit, must *not* come at the expense of less politics in the form of less voice from member countries and their constituencies. Rather, more discipline and harder law (less exit) *lead to and require* more politics and higher levels of participation (more voice). Hence, both the WTO and its member states were strengthened. Most importantly, the WTO holds a stronger enforcement mechanism and the states retain a veto in the political process. Another crucial insight of this claim is that the often referred-to "institutional paradox" between the WTO's consensus-based, inefficient rulemaking procedures and its highly efficient, automatic dispute settlement system is readily explained.¹⁷ Rather than a paradox or puzzle, the juxtaposition of a strong, automatic dispute settlement system (high discipline, low exit) and a tedious, consensus-based rulemaking process (high voice/participation) is a logical—although not necessarily optimal—phenomenon. High levels of legalization and discipline, such as a strong enforcement mechanism, entail limited exit options and naturally *require and lead to* high demands for voice via participation and political input, such as consensus decisionmaking.

Moving from the descriptive and analytical to the normative, Part II of this Article, "The Threat of a WTO Fortress," challenges the view that a

17. I. Garcia Bercero, *Functioning of the WTO System: Elements for Possible Institutional Reform*, 6 INT'L TRADE L. & REG. 103, 105 (2000); see also CLAUDE BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* 1 (2001); Claus-Dieter Ehlermann, *Tensions between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO*, 1 WORLD TRADE REV. 301, 305 (2002); John H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited*, 4 J. INT'L ECON. L. 67, 77 (2001); Frieder Roessler, *The Institutional Balance between the Judicial and the Political Organs of the WTO*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON*, 325, 338 (Marco Bronckers & Reinhard Quick eds., 2000).

choice must be made between politics and law or, put differently, between, on the one hand, democratic representation, participation, contestation, and the inherent flexibility that comes with it and, on the other hand, discipline, precommitment, and some degree of government by experts or export-driven interests shielded from capture and popular ignorance. On the contrary, my claim is that a legitimate and efficient trading system requires *both* politics and law, or more particularly, appropriate balances between participation and discipline, flexibility and precommitment, accountability and insulation, popular support and expertise, and input and output legitimacy.

At the time of writing, however, the world trade system is out of balance. Over the years it gradually moved beyond the technicalities of import duties to cover more politically sensitive areas such as health regulation and intellectual property. Now that it matters, in that it affects not just traders but everyone in society, and its disciplines and law have become real because WTO rules became stricter and more strictly enforced, the WTO has been unable to meet the correspondingly high demands for participation, accountability, and contestation. In large part because of its foundational mechanics (overcoming protectionism by insulating export-interests from domestic politics) the world trade system remains too technocratic and too isolated from popular support and has, in places, become too rigid or legalized to respond to valid flexibility demands of representative politics. In sum, there is not enough participation or politics to sustain the high levels of discipline or law. Put differently, the WTO suffers from a lack of popular support, loyalty, and input legitimacy to continue its highly disciplined and legalized operation.

Yet, at the same time, unlike the early years of GATT, this lack of input legitimacy is no longer offset by progress in actual trade liberalization or output legitimacy. The increase in participation or politics that *did* take place since GATT's creation, in particular the insistence by countries on a political veto and decisionmaking by consensus, is currently stifling further welfare-enhancing liberalization and preventing much needed reforms to make the system more equitable for developing countries and more open and supported by civil society. As a result, the WTO now lives in what one could call the worst of both worlds: it misses the benefits of popular support or politics (lack of input legitimacy) *and* must do without the benefits of further trade liberalization and a rule of law perceived as fair and equitable for everyone (lack of output legitimacy).

The most common proposals to reform the WTO, including the January 2005 Sutherland Report on the future of the WTO,¹⁸ do not take account of this delicate interaction and balance between law and politics. They focus rather on just one side of the spectrum without weighing the countervailing

18. PETER SUTHERLAND ET AL., REPORT BY THE CONSULTATIVE BOARD TO THE DIRECTOR-GENERAL SUPACHAI PANITCHPAKDI, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM (2004) [hereinafter SUTHERLAND REPORT].

effects on the other.¹⁹ This Article examines in particular the following three proposals: (1) further legalize or depoliticize the WTO with, for example, legal standing for private parties and fewer escape clauses;²⁰ (2) facilitate decisionmaking in the WTO political process through, for example, majority voting or executive bodies;²¹ and (3) reintroduce politics into the WTO judicial branch with, for example, political vetoes against dispute rulings.²²

Knowing that the present combination is one of high discipline that *led to* and *requires* high levels of participation, my claim is that, when implemented in isolation, all three proposals are counterintuitive. First, further legalization, without the necessary political support, would put even more pressure on the voice mechanism and demand even higher levels of participation in an organization where such levels are already too low. It would only worsen the deadlock in the political branch and risk being counterproductive by putting pressure on some members, particularly the most powerful ones, to leave the organization. Second, although majority voting could facilitate the decisionmaking process and thus, like further legalization, boost the WTO's short-term output legitimacy, the limitation in voice and participation that it would engender through members losing their veto over new rules risks undermining the support for, and legitimacy of, both the strong dispute process and, in the long run, the trade system as a whole. In the absence of a high enough level of "loyalty," Hirschman's third notion besides exit and voice,²³ or support for the WTO, more—not less—voice or participation from individual WTO members and their constituencies is needed. Third, reverting to GATT, diplomatic-style dispute settlement, re-injecting politics into the dispute process itself, may entangle decisionmaking deadlocks. Less discipline would, indeed, require less participation. Yet, this proposal neglects almost 100 years of trade history. If the inter-war period and GATT have taught us one lesson it is that for actual trade liberalization to occur, trade commitments must have legal value and be backed by a strong, independent dispute mechanism. This is all the more necessary today, when most trade restrictions take the form of covert nontariff barriers, often going to the heart of state sovereignty, for which countries would be hard-pressed to exercise a veto if they had one.

19. For notable exceptions, see ROBERT HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed. 1990) [hereinafter HUDEC, *DIPLOMACY*], and more recently, Armin von Bogdandy, *Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship*, in 5 MAX PLANCK YEARBOOK OF UNITED NATIONS L. 609 (Jochen A. Frowein & Rüdiger Wolfrum eds., 2001), and Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004).

20. See, e.g., PETERSMANN, *supra* note 14, at 459–62; John A. Ragosta, *Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?*, 31 L. & POL'Y INT'L BUS. 739, 741 (2000).

21. See, e.g., Thomas Cottier & Satoko Takenoshita, *The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response*, 58 AUSSENWIRTSCHAFT 171, 184–86 (2003).

22. BARFIELD, *supra* note 17, at 7.

23. See HIRSCHMAN, *supra* note 15, at 76–105

Rather than portraying constitutionalization or detachment from politics as the system's normative goal as the utilitarian and constitutional schools described earlier,²⁴ this Article stresses the usefulness and need for politics, participation, flexibility, and occasional crisis. Equally, instead of advocating a wholesale reintroduction of representative politics in the world trade system as both conservative sovereigntists²⁵ and left-leaning cosmopolitans tend to do,²⁶ this Article accepts the need for precommitment and discipline to tame the protectionist excesses of representative democracy. Without such hand-tying, the WTO would soon be ineffective and fail to fulfill its crucially important mandate of welfare-enhancing trade liberalization. Hence, as much as law needs politics, so politics needs law. The difference between these two, in my view, flawed extremes, focused, respectively, on "just more law" or "just more politics" is, however, that discipline or legalization without sufficient politics or accountability risks an unsupported and unsustainable system that in the meantime imposes its whim on the people in the name of economic efficiency: *efficiency without loyalty*. In contrast, politics, participation, and flexibility without sufficient discipline or precommitment would lead to an inefficient, even inactive, trade regime in which important gains from trade are foregone: *loyalty without efficiency*.

As an alternative to such reform proposals, focusing exclusively on either law or politics, discipline or participation, this Article pleads for a more comprehensive reform package that takes account of *both* the law *and* politics poles. On the law or discipline side, my claim is that rather than embracing ever more legalization, the WTO *needs* to maintain a certain level of flexibility or exit options, especially those fine-tuned to consumer welfare and democratic politics. In particular, it must move away from the single-package orthodoxy and permit differentiation through a multiple-speed WTO. In addition, the system must continue to provide for broad substantive exceptions, meaningful safeguard mechanisms, waivers, tariff and other re-negotiations, temporary compensation or suspension in the event of noncompliance, and the scope to settle disputes—and regulate trade-related questions in other international fora—in deviation from WTO rules for as long as third-party rights are left untouched. Rather than being birth defects that need to be cured through gradual legalization, these flexibility and exit options, including the application of WTO law in the wider context of international law, must be clarified and maintained.

On the politics or participation side, the Article rejects the relatively easy way out of decisionmaking by executive bodies or qualified majorities. Instead, at this point in time, the WTO *needs* the high levels of voice, participation, and contestation linked to the consensus principle. Although the WTO's decisionmaking practice is messy, takes time, and can be made more

24. See McGinnis & Movsesian, *supra* note 10; PETERSMANN, *supra* note 14.

25. See, e.g., BARFIELD, *supra* note 17.

26. See *id.*; Lori's War, *supra* note 9; see also Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002).

inclusive, the benefits linked to consensus—not to be confused with unanimity—outweigh its costs. More importantly, if the WTO is to survive as a legitimate institution that effectively liberalizes trade it will need the participation, loyalty, and support, not just of governmental trade elites and technocrats but also of consumers and citizens at large. In addition, it must engage in the muddy process of coordination and contestation with, and among, other international treaty regimes set up to correct market failures or accompany free trade with social and other noneconomic safety nets. Besides procedural reforms that enhance the transparency of, and access to, the WTO, such loyalty and support through participation and contestation requires a substantive shift in the trade system's paradigm, mechanics, and rules and exceptions, away from the proxy of export-driven, producer interests with allegedly only majority concerns in mind, and more directly aligned with consumer and citizen interests in both poor and rich countries for whose benefit the world trade system was set up in the first place.

I do realize that the combination of maintaining politically responsive flexibility or exit options *and* increasing levels of voice or participation by both governments and their peoples, including that required for new agreements, implies that global economic integration may not always be optimal. It will make progress toward further liberalization messy, slow, and difficult to achieve and will face the occasional political deadlock. My claim is, however, that this lethargy—or, to use a term common in European law, *lourdeur*—is the price to pay for the long-term survival and legitimacy of the world trade system. Moreover, the subtle combination of more participation and limited but clearly defined exit options in the background ought to facilitate political agreement. Given the ex post flexibility, countries will be less nervous to engage in new rules. In turn, when rules are agreed to with higher levels of participation and support, they are more likely to be complied with and resort to the exit options enshrined in the system ought to be exceptional. As a result, limited exit options may actually reinforce rather than undermine the system's credibility.

I. THE EXPLOSION OF THE GATT CLUB

Part I of this Article tells the alternative story of the transformation of the world trade system as a bidirectional interaction between law and politics in lieu of the conventional from-politics-to-law narrative focused exclusively on the trade system's dispute settlement branch. It describes three distinct periods: (i) the original creation of GATT in 1947 (“The Politics of a Gentlemen's Club”), (ii) the GATT in operation between 1947 and 1994 (“GATT's Quiet Mutation”), and (iii) the creation of the WTO and its first ten years of operation (“The WTO Eruption”).

A. GATT 1947: The Politics of a Gentlemen's Club

1. Why Was a World Trade Regime Needed in the First Place?

“If economists ruled the world,” Paul Krugman notes, “there would be no need for a World Trade Organization.”²⁷ Following standard economics, free trade maximizes national welfare. Therefore, rational governments ought to liberalize trade *unilaterally*, without the need for an international regime. The reality, of course, is different. Governments face both economic and political incentives to restrict trade, and international coordination was needed to effect its liberalization.

One school of thought, the terms-of-trade school, focuses on economic incentives.²⁸ In economic terms, they argue, large countries—that is, those big enough to influence world prices—are tempted to increase their terms of trade (i.e., reduce import prices) and thereby enhance national welfare through the imposition of a so-called optimal tariff rate. Doing so harms foreign exporters. However, since foreigners do not vote, governments are unlikely to factor in those externalities. At the same time, if all nations impose such an optimal tariff—be it unilaterally or to retaliate against the tariff of another nation—most gains of trade are neutralized and all countries are likely to be worse off compared to a situation without tariffs.²⁹ This puts countries in something like a large-scale prisoner's dilemma. For the terms-of-trade school, the creation of GATT is explained as a way out of this dilemma. Through the exchange of reciprocal “concessions” of market access—originally tariff reductions—countries steered away from so-called beggar-thy-neighbor policies making everyone worse off. Instead, reciprocal commitments to liberalize trade, backed up by the threat of retaliation in the event of defection, forces countries to take account of the harm they cause to others. As a result, GATT ensures a win-win situation for all sides.

A second school of thought focuses on political incentives to restrict trade.³⁰ It relies on public choice and constitutional theories to explain the

27. Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LITERATURE 113, 113 (1997).

28. See KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* (2002); Harry G. Johnson, *Optimum Tariffs and Retaliation*, 21 REV. ECON. STUD. 142 (1954); Raymond Riezman, *Tariff Retaliation from a Strategic Viewpoint*, 48 S. ECON. J. 583 (1982) (modeling the tariff game as a prisoner's dilemma); Edward Tower, *The Optimum Quota and Retaliation*, 42 REV. ECON. STUD. 623 (1975) (analyzing quota instead of tariff retaliation).

29. A large country could be better off by imposing a tariff even in the case of foreign retaliation as long as its price elasticity of import demand is larger than the corresponding elasticity of its trading partners. Johnson, *supra* note 28, at 144.

30. GENE M. GROSSMAN & ELHANAN HELPMAN, *INTEREST GROUPS AND TRADE POLICY* 111 (2002); J. Michael Finger, *Protectionist Rules and Internationalist Discretion in the Making of National Trade Policy*, in *NEW INSTITUTIONAL ARRANGEMENTS FOR THE WORLD ECONOMY* 310 (Hans-Jürgen Vosgerau ed., 1989); WILFRED J. ETHIER, *POLITICAL EXTERNALITIES, NONDISCRIMINATION, AND A MULTILATERAL WORLD* 4 (Penn Institute for Economic Research, Working Paper No. 02-030, 2002), available at <http://ssrn.com/abstract=333006>; WILFRED J. ETHIER, *TRADE*

creation of GATT. The benefits of free trade are long-term, diffuse, and fragmented across consumers, while its costs, although mostly smaller, are felt immediately and directly in layers of society that are best organized, such as import-competing industries and organized labor. Because of collective action problems, the supporters of free trade, such as consumers, have less incentive to incur the cost of lobbying. Those suffering from liberalization, in contrast, are geographically concentrated. Their contributions to the industry's cause are more readily mobilized and monitored. As a result, protectionist groups wield more political clout. Consequently, governments face pressures to restrict trade that, more often than not, outweigh those in support of free trade. International coordination, that is, the exchange of reciprocal "concessions" of market access, is then explained as adding the weight of exporters to the less-organized domestic free-trade camp of consumers in order to overcome the disproportionate impact of protectionist groups (import-competing industries and labor).³¹ For the constitutional branch of this school of thought, trade agreements fulfill a true constitutional function, namely the protection of economic liberties and majority interests against government interference and abuse by special-interest groups.³²

A third perspective focuses on the discriminatory nature of pre-GATT trade relations largely determined by colonial preferences and overlapping bilateral trade agreements.³³ Rather than pursuing the internalization of cross-border externalities (the terms-of-trade school) or the maximization of national, consumer welfare against abuse by protectionist minorities (public choice and constitutional schools), in this third view the GATT emerged to deal with "the mess of the existing bilateral and discriminatory trade policies."³⁴ In support of this approach, it is pointed out that, to this date, the

AGREEMENTS BASED ON POLITICAL EXTERNALITIES 7 (Penn Institute for Economic Research, Working Paper 03-035, 2002), available at <http://ssrn.com/abstract=474562>.

31. See McGinnis & Movsesian, *supra* note 10, at 526–30.

32. PETERSMANN, *supra* note 14, at 132–33; Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem*, 41 *AUSENFWIRTSCHAFT* 405 (1986); Jan Tumliar, *Conceptions of the International Economic and Legal Order*, 8 *WORLD ECON.* 85, 87 (1985) (reviewing JOHN H. JACKSON ET AL., *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* (1984)); Jan Tumliar, *International Economic Order and Democratic Constitutionalism*, 34 *ORDO* 71, 82–83 (1983).

33. Between 1934 and 1945 the United States, for example, negotiated and accepted thirty-two so-called reciprocal trade agreements. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 37 (1969). Especially for the United States, the GATT was more efficient than endless bilateral agreements—in addition, GATT was the United States' only institutional option under which to achieve its trade objectives given that the United States, unlike other major trading nations (France, Britain, etc.), had no regional alternative and could not count on existing imperial or regional trade ties. John Odell & Barry Eichengreen, *The United States, the ITO, and the WTO: Exit Options, Agent Slack, and Presidential Leadership*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 181, 183 (Anne O. Krueger ed., 1998).

34. Patrick A. Messerlin, *Non-discrimination, Welfare Balances and WTO Rules: An Historical Perspective*, in *PREPARING THE DOHA DEVELOPMENT ROUND: CHALLENGES TO THE LEGITIMACY AND EFFICIENCY OF THE WORLD TRADING SYSTEM* 154, 156 (Ernst-Ulrich Petersmann

world trade system remains focused on non-discrimination as opposed to economic efficiency and the protection of producer as opposed to consumer welfare.³⁵ From this perspective, the system neither avoids harmful cross-border externalities nor does it inherently protect domestic consumers. Instead of inherently protecting the majority, the trade system, thereby, risks elevating special (producer) interests above consumer concerns and beyond the control of domestic politics.³⁶

2. *The Original GATT Bargain: It's All Politics*

Whatever the underlying theory of why a multilateral trade system was, and remains, needed, the immediate context of GATT's creation in 1947 was the jolt of the Great Depression and World War II.³⁷ The conclusion of GATT constituted a major departure from previous forms of trade cooperation. Ever since the creation of the League of Nations after World War I, international conferences had been convened to address deteriorating trade conditions,³⁸ but the world needed the wake-up call of another world war to move beyond the lofty rhetoric of hortatory declarations and agree to more specific commitments that would be supported by a normative structure.

Whilst GATT did inaugurate the creation of a legal-normative regime for world trade, at its core it remained a profoundly political bargain. Although GATT negotiators realized that some degree of normative pull was needed, if only to avoid the mistakes of the past, they also voiced a strong distrust of lawyers and the rigid legal method, which, in their minds, would not enable flexible responses to real trade problems.³⁹ As a result, what kept GATT to-

ed., 2003), available at http://www.iue.it/RSCAS/e-texts/200405_e-WTO-Petersmann.pdf. Interestingly, as Messerlin points out, when GATT was created in 1947 the notions of producer and consumer welfare remained underdeveloped. It is, therefore, hard to conclude that the GATT was based on economic analysis. *Id.* at 155 ("If the key economic concepts were largely discovered by the late 1800s and formalized by the 1930s, their operational form, that is, their capacity to answer questions raised by decision makers in a straight forward and computable manner, was non-existent." (citation omitted)).

35. See Henrik Horn & Petros C. Mavroidis, *Economic and Legal Aspects of the Most-Favored Nation Clause*, 17 EUR. J. POL. ECON. 233, 234–36 (2001); Petros C. Mavroidis, *Come Together? Producer Welfare, Consumer Welfare and WTO Rules*, in PREPARING THE DOHA DEVELOPMENT ROUND: CHALLENGES TO THE LEGITIMACY AND EFFICIENCY OF THE WORLD TRADING FORM, *supra* note 34, at 137.

36. Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999).

37. World War I shook the very foundations of economic liberalism and destroyed the economy of Europe. See CLAIR WILCOX, A CHARTER FOR WORLD TRADE 5–9 (1949). In the interwar period (the Great Depression), a major wave of protectionism swept across the globe. One after the other, in a cascade of retaliatory action, countries imposed quantitative restrictions and prohibitively high tariffs on imports and manipulated their exchange rates. These "beggar-thy-neighbor" policies, rather than achieving their purpose of increased competitiveness and lower unemployment rates, caused economic chaos and, according to many observers, were responsible to some degree for World War II itself. See RICHARD N. GARDNER, STERLING-DOLLAR DIPLOMACY 1–4 (1956).

38. HUDEC, DIPLOMACY, *supra* note 19, at 5–9.

39. See *id.* at 25–26 (quoting from a 1932 report of the League of Nations' Economic Committee, calling for a nonjudicial procedure to resolve economic disputes); *id.* at 29 (quoting a U.K.

gether was not so much an abstract respect for legal rules, but rather the political and economic need to keep intact a negotiated balance of tariff concessions, originally exchanged in 1947 and subsequently expanded in further rounds of trade negotiations. Reciprocal tariff reductions through Part I of GATT were at the apex of this GATT bargain. This tariff deal was, in turn, supported by the standard trade policy rules set out in Part II, such as national treatment and prohibitions on quantitative restrictions. Part II was crucial to ensure that commercial opportunities offered by tariff reductions would not be nullified by trade policy instruments other than tariffs. No strong enforcement mechanism to keep this balance afloat was needed. After all, the balance was struck because of reciprocal gains reaped from exchanging tariff reductions. This balance was, in turn, kept because of the threat of reciprocal withdrawals of concessions in case a country would not meet its end of the bargain. This was the secret of the GATT's early success.

The original GATT was, therefore, more like a gentlemen's club than a legal regime. Its objective was to settle trade problems, not to create or clarify trade law. Flexibility to adapt to economic and political realities prevailed over the predictability of the rule of law. The GATT club was inspired and run by what became known as "embedded liberalism," that is, a common belief amongst the technocratic elites of the original twenty-three GATT contracting parties—after all, a limited set of like-minded, capitalist countries—that trade liberalization increases welfare and requires international coordination and discipline, albeit with sufficient room left for domestic politics to redistribute income and sustain the safety-nets of the welfare state at home.⁴⁰

In this clublike context, it should come as no surprise that in the text of GATT the equilibrium reached between law and politics, discipline and participation, exit and voice, was one of relatively *low* levels of politics or participation combined with equally *low* levels of law or discipline.

a. Low Levels of Discipline and Law. The original GATT maintained multiple escape routes and safeguard mechanisms for countries seeking to avoid GATT basic principles. First, the GATT included broadly defined substantive exceptions: Article XII permitted trade restrictions to safeguard a country's balance of payments, Article XVIII allowed for governmental assistance to economic development, and Articles XX and XXI provided for a broad range of general exceptions ranging from public morals and health to the protection of national security, historic treasures, and natural exhaustible resources. Second, and more importantly, GATT also permitted trade restrictions without the need to base them on specific non-protectionist concerns as is required under most substantive exceptions. Article XIX introduced so-called safeguard measures that permit the reinstatement of trade restrictions

memorandum submitted to the London drafting session of the ITO Charter in 1946, insisting on the importance of economic judgment).

40. Howse, *supra* note 26, at 96–98; John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 393–98 (1982).

when countries are faced with a sudden influx of imports causing serious injury to their domestic industry. Article VI permitted extra tariffs to offset so-called dumping, that is, exports sold at less than the normal value of the products concerned. Article XXVIII set out different procedures for parties to renegotiate tariff concessions, for whatever reason, on condition that they offer equivalent liberalization in other products or suffer reciprocal suspensions by other parties. In addition, under Article XXV:5, GATT parties acting jointly and by two-thirds of votes cast could, in exceptional circumstances, grant a waiver from any GATT obligation. Finally, the so-called “existing legislation clause” in the GATT’s Protocol of Provisional Application, in force until the creation of the WTO in 1995, grandfathered pre-1947 legislation under Part II of GATT.⁴¹

In the same vein, GATT’s enforcement mechanism (Article XXIII) was a diplomatic procedure set up to maintain a balance of concessions in the face of future uncertainties,⁴² not an independent judicial system to ensure the impartial enforcement of GATT rules.⁴³ As a result, instead of tackling breaches of international law obligations, the GATT dispute process focused on the “nullification or impairment” of GATT benefits. By the same token, the GATT’s remedy of last resort was to “suspend concessions or other obligations.”⁴⁴ The resulting enforcement regime was therefore distinctly un-legal and, somewhat paradoxically, both lenient and strict. On the one hand, the system was lenient: the customary consequences linked to a breach of an international law obligation—in legal terms, cessation and reparation, and in political terms, the reputational costs of breaking the law—were avoided. On the other hand, however, the system was uniquely strict: parties were held “responsible” not only for breaches of GATT obligations, but also for “nullification or impairment” caused by conduct that did *not* conflict with any specific GATT provision under so-called non-violation or situation complaints.⁴⁵ Finally, confirming the relatively low levels of discipline or

41. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 2051, 55 U.N.T.S. 308, para. 1(b).

42. As one draftsman put it: “We shall achieve . . . if our negotiations are successful, a careful balance of the interests of the contracting parties. This balance rests upon certain assumptions as to the character of the underlying situation in the years to come. And it involves a mutuality of obligations and benefits. If, with the passage of time, the underlying situation should change or the benefits accorded any Member should be impaired, the balance would be destroyed. It is the purpose of [GATT] Article XXIII to restore this balance.” Note by the Secretariat, *Non-Violation Complaints under GATT Article XXIII:2*, at 6, U.N. Doc. MTN.GNG/NG13/W/31 (Jul. 14, 1989), available at <http://www.worldtradelaw.net/history/urdsu/w31.pdf>, quoting U.N. Doc. E/PC/T/A/PV/6, at 5 (1947).

43. Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT’L L. 335, 339–40 (2000).

44. GATT, *supra* note 5, art. XXIII:2.

45. *Id.* art. XXIII:1(b), (c). Since it was realized that domestic measures, such as subsidies or product safety standards, that did not directly relate to trade policy could affect the benefits from tariff reductions *and* it would be impossible to catalogue all such possibilities (as well as politically unfeasible for countries to severely circumscribe their domestic powers in this respect in a mere

constraint, withdrawal from GATT was easy. It sufficed to give sixty days notice.⁴⁶

b. Low Levels of Participation and Politics. If the original GATT reflected low levels of discipline and law, on the politics or voice axis it built upon equally low levels of participation and approval. GATT was, and was seen as, a highly technical, tariff-focused operation driven and inspired by an expert-consensus on embedded liberalism. Far from being the result of democratic politics, one of the GATT's core objectives was to curtail the excesses of representative democracy and the logrolling and protectionism that came with it. Confirming the distance between Geneva-based negotiators and the people they represented, the U.S. Congress, like many other parliaments, never even ratified the GATT agreement. Technically speaking, it was only provisionally applied and never formally entered into force until the creation of the WTO forty-seven years later.⁴⁷

In addition, when it came to making new rules or amendments, equally low levels of approval and participation were seen as adequate. Pursuant to GATT Article XXV, broad competences were delegated to GATT contracting parties acting jointly, including to meet and decide "with a view to facilitating the operation and furthering the objectives of [GATT]."⁴⁸ Even more surprising, unless explicitly provided otherwise, these competences could be exercised by a *simple majority of the votes cast*,⁴⁹ with each contracting party entitled to only one vote and no GATT party entitled to veto power.⁵⁰ Joint action under GATT Article XXV, albeit taken by the

tariff agreement), the remedy of nonviolation and situation complaints was added as a final check to uphold the GATT bargain. See HUDEC, *DIPLOMACY*, *supra* note 19, at 23–24.

46. GATT art. XXXI refers to six months. Paragraph 5 of the Protocol of Provisional Application (which made and kept GATT operational for forty-seven years until the WTO was created), however, reduced this period to sixty days. Hence, as Jackson noted, "if a nation objected strenuously enough to a decision of the CONTRACTING PARTIES, it could simply withdraw if it felt the balance of the advantages obtained through GATT were not sufficient to offset the disadvantages of the particular decision." JACKSON, *supra* note 33, at 127.

47. As is well documented, the 1948 Havana Charter, which was supposed to establish a new International Trade Organization ("ITO")—as well as its 1955 spin-off, the Organization for Trade Cooperation ("OTC")—never came about. See GARDNER, *supra* note 37. On several occasions the United States Congress refused ratification. As a result, the GATT was provisionally applied (never actually entering into force) for forty-seven years until, finally, in 1995 the WTO saw the light of day.

48. GATT, *supra* note 5, art. XXV. As Frieder Roessler, former GATT legal advisor, noted: "The *Contracting Parties* were given the right to meet with a view to furthering the objectives of the General Agreement to enable them to respond to future, possibly unforeseen, changes. . . . What is decisive is whether in the current circumstances the discussions of the subject-matter furthers the objectives of the General Agreement." Frieder Roessler, *The Competence of GATT*, *J. WORLD TRADE L.*, June 1987, at 73, 76 (1987). In similar fashion, article 235 grants broad powers to the Community, in particular the Council, to take "action . . . necessary to attain . . . one of the objectives of the Community." Treaty Establishing the European Economic Community, Jan. 22, 1972, art. 235, 1377 U.N.T.S. 12 [hereinafter EEC Treaty].

49. GATT, *supra* note 5, art. XXV:4.

50. GATT, *supra* note 5, art. XXV:3. Since the rules of procedure set the quorum for valid decisionmaking at a simple majority of contracting parties, *Rules of Procedure for Sessions of the Contracting Parties*, GATT. B.I.S.D. (12th Supp.) at 9, 13 (1964), in theory, joint action under

slightest majority, was binding on all parties, even those who voted against the particular decision.⁵¹ Crucially, in the original GATT, the enforcement mechanism also was subject to the decisionmaking rule of Article XXV. The mechanism was set up as a diplomatic process to be run jointly by all GATT parties, not by independent dispute panels. Complaints, investigations, and eventual recommendations were, therefore, to be initiated, conducted, and adopted by simple majority of the votes cast. Based on Article XXV, a single defendant could not block the dispute process.

Finally, GATT amendment procedures permitted equally low levels of participation. Most GATT rules could be changed by a two-thirds majority of the parties. Although any amendment bound only those GATT parties that accepted it, GATT parties could thus be outvoted on an amendment. Whilst in line with the general principle of state consent, this did permit normative differentiation between countries or a multiple-speed GATT.⁵²

3. *GATT 1947 as a Bidirectional Interaction Between Law and Politics*

The previous Section demonstrates that the original GATT bargain combined relatively low levels of discipline or precommitment, e.g. multiple escape clauses and a largely political enforcement procedure, with relatively low levels of politics or participation, e.g. lack of formal ratification and joint action by majority vote. One way to explain this early balance is self-referential, pointing to the internal history or logic of either the law or politics pole. For example, as hinted at earlier, GATT law was probably soft because of a general aversion amongst negotiators of strict legalism, the clublike atmosphere of the early GATT days, and the prevailing idea of embedded liberalism that permitted flexibility and room for domestic maneuvering. That GATT decisionmaking, in turn, required relatively low levels of politics or participation such as that required by a simple majority could also be explained internally within the politics or voice pole. Tariff negotiations, the central part of the GATT, are a highly technical, low politics exercise more easily left to experts. Those experts, in turn, were quite content to operate in a businesslike fashion, estranged from politics and amenable to rapid reactions in changed circumstances. As a result, they were

Article XXV could be taken by one-fourth of the membership (that is, even if only half of the membership is present, half of those present and casting a vote can still adopt decisions).

51. Cf. EEC Treaty, *supra* note 48, art. 235 (requiring unanimity). As John Jackson noted in 1969: “[L]ooking at the language of [GATT Article XXV] . . . without considering preparatory history, practice, or circumstances, one might conclude that sweeping obligations concerning trade could be entered into by a majority of the contracting parties and be made binding upon other members, even those not voting for the proposal.” JACKSON, *supra* note 33, at 127.

52. Note, however, that Article XXX:2 puts a potential break on the possibility for countries to opt out of GATT amendments: “The CONTRACTING PARTIES may decide that any amendment . . . is of such a nature that any contracting party which has not accepted it within a period specified . . . shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES.” GATT, *supra* note 5, art. XXX:2.

able to agree to majority voting. Yet, in my view, a crucial factor explaining the equilibrium found in the original GATT text is not internal or self-referential to either the law or politics axis. Rather, it relates to the bidirectional interaction *between* the two poles.

First, how did GATT manage so successfully to reduce tariff levels and how could negotiators possibly agree to simple majority voting rules, that is, such *low* levels of participation or voice? In the E.C., for example, it took decades to shift to majority voting and even then only for limited fields and pursuant to some super majority, not a simple majority.⁵³ In my view, it is the GATT's weak legal-normative structure, i.e., its low level of discipline and many exit options, that *explains* GATT's early success and majority voting rules. Is it not logical that when countries know that if worst comes to worst exit from obligations is possible, they will more easily make commitments? And that they will, moreover, not bother too much about how new rules are created nor even mind that their voice, protest, or veto may get lost in a majority voting procedure? In other words, when levels of discipline or precommitment are low and obligations are not rigidly enforced, is it not normal that countries make broader and deeper commitments and more easily agree to future decisionmaking by majority vote?⁵⁴ Any new rule that would emerge against their will can, in any event, still be exited from thanks to the thinness of the legal-normative structure. A similar balance was struck in the United Nations ("U.N.") Charter.⁵⁵

Second, how can one explain the low levels of discipline, many escape clauses, weak remedies, and essentially political enforcement mechanism of GATT 1947, all of which deviate from general international law?⁵⁶ Conversely, and here is the bidirectional or even circular force of the law-and-politics narrative, the GATT's low levels of politics and participation, e.g. lack of formal ratification and majority-voting rules, *explain* the low levels of discipline and multiple exit options under the original GATT, e.g. the existing legislation clause and weak dispute process. Indeed, when faced with low levels of politics, participation, and contestation, including a system of easy, majority-based decisionmaking, is it not normal that countries insisted on escape clauses and a hard law enforcement mechanism was seen as undesirable? Given the inherent risk of being outvoted in the creation of new

53. PAUL CRAIG & GRÁINNE DE BÚRCA, *E.U. LAW: TEXT, CASES, AND MATERIALS* 153–55 (3d ed. 2003).

54. As Jackson pointed out, "nations often can simply violate the [GATT] obligations or CONTRACTING PARTY decisions without the fear of much penalty Since Article XXV is so loosely and broadly drafted, it may be that a very important escape valve and check upon the CONTRACTING PARTIES' power is the practical ability of most states to refuse to obey GATT." JACKSON, *supra* note 33, at 127–28.

55. *Compare* U.N. Charter art. 18 (stating that U.N. General Assembly resolutions are not legally binding, hence countries could agree to their adoption by majority vote), *with* U.N. Charter art. 27 (stating that U.N. Security Council resolutions are legally binding, hence countries, at least the most powerful ones, required a veto).

56. *See* Pauwelyn, *supra* note 43 (stating that standard international law imposes cessation of breach and reparation).

rules and the uncertainties of the future, such as shifts in supply and demand, technological advances, election cycles, changes in political majorities, and domestic social preferences, could it not be expected that negotiators would be averse to strong rule-enforcement, and want to keep certain exit options open?⁵⁷

In sum, because of low levels of law or discipline in the form of escape clauses and weak dispute settlement, the low levels of politics or participation, such as majority voting, became digestible and could be sustained. At the same time, because of low levels of participation or politics, only relatively low levels of discipline or law could be agreed to and only such low levels were manageable.

B. *GATT's Quiet Mutation (1947–1994)*

Departing from an early balance between low discipline and low participation, as soon as GATT became operational, the original equilibrium gradually shifted toward more discipline and harder law, including less exit, and more participation or politics, including more demands for voice. This occurred piecemeal and over time, hence the reference to GATT's quiet mutation. It demonstrates the living, dynamic interaction between law and politics, exit and voice. A change on one side of the spectrum, however small, necessarily affects the other.

1. *More Law: From a Political Enforcement Process to Gradual Legalization*

That GATT's legal-normative structure gradually thickened is well documented. As pointed out earlier, most discussions of the evolution of the world trade system focus on just that.⁵⁸ On substance, seven rounds of tariff negotiations dramatically reduced import duties on industrial goods and in 1979 the Tokyo Round Codes expanded GATT discipline to include the far more sensitive field of nontariff barriers as well.⁵⁹ Moreover, whilst in the text of GATT, the enforcement mechanism was part and parcel of the political structure, over time GATT's dispute process was detached from mainstream decisionmaking. At an early stage GATT parties, rather than making rulings themselves within the diplomatic process, referred Article XXIII complaints to a so-called Working Party. This was a smaller group of

57. See GEORGE W. DOWNS & DAVID M. ROCKE, *OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS* 100 (1995); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 *Nw. U. L. Rev.* 854 (1978); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 *U. Chi. L. Rev.* 255 (1991).

58. See *supra* notes 1–2 and accompanying text.

59. The Tokyo Round Codes dealt with government procurement, technical standards, customs valuation, aircraft, import licensing procedures, anti-dumping, and subsidies.

countries, generally including the principal actors in the dispute as well as a number of interested parties and so-called “neutrals.” The countries in the Working Party discussed, negotiated, and eventually voted on the questions before them and, when successful in reaching some agreement (albeit one imposed by majority vote), recommended a way forward to the GATT membership, which, in turn, adopted or declined to adopt the recommendation under the Article XXV majority voting rule.⁶⁰ Soon the number of neutrals exceeded the number of interested parties and the Working Party process transformed from a purely diplomatic exercise to a modified form of third-party adjudication.⁶¹ The next step was to replace the Working Party with a so-called “panel” made up exclusively of neutral countries before which the disputing parties would plead their case,⁶² and later composed of individuals acting in their own, individual capacity.⁶³ With the establishment of “panels”—a word derived from the term “panel of experts,” evoking notions of technical expertise and impartiality—the role and input of the GATT Secretariat increased. Highlighting the increased focus on an objective application of the rules, rather than an evaluation of the political sensitivities at stake, in 1981 the GATT, for the first time in its history, established a legal office.⁶⁴

After the conclusion of the Tokyo Round in 1979, GATT parties further streamlined and legalized the dispute process. In 1980, they adopted the Agreed Description of Customary Practice and an Understanding on Dispute Settlement.⁶⁵ In 1982, a Ministerial Declaration issued recommendations on how to make GATT adjudication more effective to include expediting the process, strengthening the role of the GATT Secretariat, calling for clearer decisions and recommendations, and clarifying the implementation stage.⁶⁶ In a 1984 decision, important improvements were made in the procedures

60. HUDEC, *DIPLOMACY*, *supra* note 19, at 75–78.

61. The Australian Subsidy case (complaint by Chile) was a trendsetter in this respect. *See Report Adopted by the CONTRACTING PARTIES, Australia—Subsidy on Ammonium Sulphate* (Apr. 3, 1950), GATT B.I.S.D. (2d Supp.) at 188 (1952) [hereinafter the Australian Subsidy case].

62. The first such panel was created at the Seventh Session of GATT contracting parties, in 1952. Interestingly, it was set up to deal with all complaints raised during that session, not just one particular dispute. *Summary Record of the Fifth Meeting*, GATT Doc. SR.7/5, at 6 (Oct. 13, 1952) (recommending establishment of panel); *Summary Record of the Seventh Meeting*, GATT Doc. SR.7/7, at 7–9 (Oct. 18, 1952) (determining composition of panel).

63. *See Summary Record of the Seventh Meeting*, GATT Doc. SR.9/7 at 6 (Nov. 5, 1954); HUDEC, *DIPLOMACY*, *supra* note 19 at 90.

64. ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 70–71 (1993) [hereinafter HUDEC, *EVOLUTION*].

65. *Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance* (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 210–19 (1980); *see also* Robert E. Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 *CORNELL INT’L L.J.* 145 (1980).

66. *Ministerial Declaration*, L/5424 (Nov. 29, 1982), GATT B.I.S.D. (29th Supp.) at 9, 10 (1983).

for panel selection.⁶⁷ In a 1988 midterm agreement in the context of the new Uruguay Round, further procedural rules were set out.⁶⁸

2. *More Politics: From Majority Voting to a Consensus Practice*

As described earlier, the actual text of GATT opened the door for surprisingly low levels of participation or politics; in particular, joint GATT action by simple majority and relatively flexible amendment rules. In 1948, for example, Part II of the GATT was amended with less than unanimity.⁶⁹ In 1959 GATT parties adopted a recommendation on freedom of contract in transport insurance by majority decision.⁷⁰ When granting waivers and deciding on the accession of new countries, GATT parties traditionally voted, each decision requiring just two-thirds of the votes cast.⁷¹ Equally, most results of the various GATT trade negotiation rounds were accepted by only a fraction of GATT parties. They were implemented through tariff protocols amending the GATT under the two-thirds majority rule, or separate side agreements such as the Tokyo Round Codes on nontariff issues.⁷² In this multiple-speed GATT, most developing countries steered away from additional obligations, in particular the Tokyo Round Codes, and even obtained exemptions from existing GATT provisions.⁷³

67. *Dispute Settlement Procedures*, L/5752, GATT B.I.S.D. (31st Supp.) at 9, 9–10 (1985). A roster of nongovernmental individuals for use on panels was set up and the Director General was given the power to appoint panel members in case the parties disagreed.

68. *Improvements to the GATT Dispute Settlement Rules and Procedures*, L/6489 (Apr. 12, 1989), GATT B.I.S.D. (36th Supp.) at 61–67 (1990).

69. *Summary Record of Thirteenth Meeting*, GATT Doc. GATT/1/SR.13, at 5 (Mar. 23, 1948) (discussing two-thirds requirement for amendment).

70. *Freedom of Contract in Transport Insurance* (May 27, 1959), GATT B.I.S.D. (8th Supp.) at 26 (1960); *Summary Record of the Ninth Meeting*, GATT Doc. SR.14/9, at 15 (Jun. 9, 1959) (providing details of vote).

71. GATT, *supra* note 5, arts. XXV:5, XXXIII; see JACKSON, *supra* note 33, at 122.

72. See Roessler, *supra* note 48, at 79.

73. In 1964, Part IV on Trade and Development was added to GATT. *Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development*, GATT B.I.S.D. (13th Supp.) at 2 (1965). The crucial element in Part IV was the abandonment of the basic GATT principle of reciprocity or balance of concessions as it applies to the relation between developed and developing countries. Furthermore, first through a 1971 waiver, *Generalized System of Preferences*, L/3545 (June 25, 1971), GATT B.I.S.D. (18th Supp.) at 24 (1972), and then permanently in 1979 (the so-called Enabling Clause, *Differential and More Favorable Treatment: Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) [hereinafter *Differential and More Favorable Treatment*]), developing countries obtained approval for major deviations from another cornerstone of the GATT system: the principle of non-discrimination. Most importantly, developed countries were now permitted to grant tariff preferences to developing countries without having to extend them to the developed world.

At the same time, voting soon became the exception⁷⁴ and consensus decisionmaking the rule. In 1955, for example, GATT parties adopted, by consensus, resolutions on investment for economic development,⁷⁵ the disposal of surplus products,⁷⁶ and the liquidation of strategic stocks.⁷⁷ In 1979, a number of the Tokyo Round results were implemented by decisionmaking under Article XXV—including the so-called Enabling Clause in favor of developing countries—each time by consensus.⁷⁸ In the majority of cases, prior to formal meetings an agreement was worked out. Only subsequently was a decision taken and this mostly by consensus as interpreted by the Chairman, that is, in the absence of a formal objection from any contracting party present on the floor (to be distinguished from unanimity of all parties).⁷⁹ This consensus practice guaranteed higher levels of participation and voice than the majority-voting rule on the books. Each GATT party could make its voice heard, a voice that was, at least on paper, the same for each party pursuant to the one-member-one-vote rule. Moreover, under the consensus rule, each GATT party could threaten a veto, a risk that increased debate, contestation, and participation and, in short, amplified the level of politics in the decisionmaking process.⁸⁰

Although gradually legalized and extracted from the political process, crucial decisions in GATT dispute settlement—such as panel establishment and the adoption of panel rulings—followed this general trend. Like other decisions under Article XXV, they gradually required consensus, instead of simple majority. In theory, this granted each GATT party the right to veto or block progress in the dispute process.⁸¹ Unlike the impression sometimes

74. For exceptions, see the vote in 1985 in favor of holding a special GATT session to launch the Uruguay Round of trade negotiations and the vote in 1990 on a waiver for the German Democratic Republic's trade preferences to the former Soviet Bloc countries, both reported in Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, 8 J. INT'L ECON. L. 51, 61 (2005).

75. See *International Investment for Economic Development* (Mar. 4, 1955), GATT B.I.S.D. (3d Supp.) at 49 (1955).

76. See *Disposal of Surpluses* (Mar. 4, 1955), GATT B.I.S.D. (3d Supp.) at 50 (1955).

77. See *Liquidation of Strategic Stocks* (Mar. 4, 1955), GATT B.I.S.D. (3d Supp.) at 51 (1955).

78. *Differential and More Favorable Treatment*, *supra* note 73, at 203.

79. As a former legal adviser to GATT concluded, "[t]here is no instance in the history of the GATT in which the *Contracting Parties* have used their powers under Article XXV:1 to impose new policy obligations [to be distinguished from non-binding recommendations] on contracting parties unwilling to accept them." Roessler, *supra* note 48, at 79.

80. The informal nature of the consensus practice also permitted giving a voice to countries that were only provisional or de facto GATT parties. Those countries were also actively participating in the decisionmaking process without much regard for their formal lack of a vote. JACKSON, *supra* note 33, at 123.

81. A 1982 Ministerial Declaration, *Ministerial Declaration*, GATT B.I.S.D. (29th Supp.) at 9, 10 (1983), explicitly confirmed, for the very first time, the consensus principle for *any* decision by GATT parties in dispute settlement. The subsequent 1988 midterm agreement, in somewhat ambiguous terms, took away the veto for the establishment of panels but confirmed the veto for the

created by WTO commentators, however, in most GATT disputes such blocking did not materialize,⁸² and the adoption of Working Party and panel reports occurred by consensus, often with little discussion.⁸³ It was only in the late 1980s and especially the early 1990s that the possibility of vetoing progress in the GATT dispute mechanism led to serious foot-dragging, blocking, refusals to conform to panel rulings, and non-authorized retaliations.⁸⁴ In other words, over time, GATT dispute settlement was not uniformly legalized, as witnessed by neutral panels and an increased role for the Secretariat, and some aspects of it actually became more and more political, in particular panel establishment and adoption.

3. *GATT's Quiet Mutation as a Bidirectional Interaction Between Law and Politics*

Like the low levels of discipline and participation in the text of GATT 1947, the gradual thickening of the GATT's normative structure toward more discipline or law and the increased politicization in its decisionmaking toward more participation and contestation, including a move to a consensus practice, can be explained on the basis of self-referential factors, internal to either the law or politics pole. On the law or discipline side, for example, the legalization of dispute settlement could be explained by a mounting belief in the rule of law amongst GATT parties and GATT panelists alike and the resulting conviction that third-party adjudication is the best and fairest method for dispute resolution. In addition, the stricter enforcement of GATT can be explained as a necessary feature to maintain support for trade liberalization. With tariffs gradually reduced, GATT had to tackle nontariff barriers such as environmental or health standards, antidumping duties, and subsidies, which

adoption of panel rulings and authorizations to suspend concessions. *Improvements to the GATT Dispute Settlement Rules and Procedures*, L/6489 (Apr. 12 1989), GATT B.I.S.D. (36th Supp.) at 61, 63 ¶¶ F(a), G(3).

82. The very first time in GATT history that a defendant blocked the *establishment* of a panel occurred only in 1972 in the U.S.-E.C. *Compensatory Taxes on Imports* case. HUDEC, *EVOLUTION*, *supra* note 64, at 54. Even then, the reason was not some systemic objection to GATT deciding the dispute, but rather that the tax in question would be abolished the same year, a promise that the E.C. eventually kept. *Id.* at 453-54. The *adoption* of panel reports had only been vetoed once in GATT history up to 1986, namely in the very contentious 1976 *DISC* case between the U.S. and the E.C. *See id.* at 46. Even there the report was eventually adopted, albeit only five years later. *United States Tax Legislation*, L/4422 (Nov. 2, 1976), GATT B.I.S.D. (23d Supp.) at 98-114 (1977) (describing the report); HUDEC, *EVOLUTION*, *supra* note 64, at 456 (detailing its later adoption).

83. HUDEC, *DIPLOMACY*, *supra* note 19, at 80 (discussing the Australian Subsidy case, *supra* note 61); *id.* at 89 (remarking that the substance of reports of the Seventh Session Panel were not even debated).

84. In the politically charged report *United States—Imports of Sugar from Nicaragua*, L/5607 (Mar. 13, 1984), GATT B.I.S.D. (31st Supp.) at 67-74 (1985), the U.S. refused to defend the complaint in GATT, but did not block the process. Once adopted, however, the U.S. announced that it had no intention of complying with the panel ruling. HUDEC, *EVOLUTION*, *supra* note 64, at 176, 513. Both the *Pasta* and *Citrus* panel rulings were blocked by the E.C. The U.S. then retaliated in the *Citrus* case by increasing tariffs on E.C. pasta imports, thereby linking the two cases. The E.C. counter-retaliated with higher tariffs on U.S. lemon and walnut imports. The year after, the parties reached a settlement in both cases. *Id.* at 493, 502.

were increasingly used to circumvent tariff commitments. This exercise proved far more contentious, stirring the attention of democratic politics, and required more open-ended rules. To obtain a minimum of compliance with the new disciplines, which were much harder to monitor and enforce, a stronger enforcement mechanism was needed.

Equally, the consensus practice and general increase in the levels of politics and contestation in GATT affairs has explanations self-contained within the politics pole. The 1960s marked the beginning of a gradual erosion of the clublike GATT, centered on an expert consensus on how to improve postwar trade relations.⁸⁵ Deep substantive disagreements came into the open due to a stream of new and extremely diverse GATT members—in particular, the E.C., Japan, and newly independent, developing countries⁸⁶—and the emergence of novel trade problems for which the original GATT did not provide a blueprint—in particular, nontariff barriers.⁸⁷ In this new context, levels of contestation and politics rose naturally and consensus decisionmaking became a necessity if everyone was to be kept on board.

Although the above internal explanations elucidate much of the GATT's quiet mutation, in my view, they miss a key factor. This key factor resides not on either side of the law-politics spectrum but in the *interaction between* the two poles. In the same way that low discipline and low participation mutually supported each other in the original GATT text, during the GATT's forty-seven years of operation, gradually increasing levels of politics, participation, and contestation enabled, *and* were the consequence of, progressive levels of discipline or law. More politics enabled more law. In turn, more law required more politics.

On the one hand—and perhaps most importantly—the higher levels of contestation and politics in the decisionmaking process—in particular, the

85. See HUDEC, *DIPLOMACY*, *supra* note 19, at 67.

86. The E.C. replaced six key GATT parties with one new economic superpower whose goals and commercial policies were not part of the ITO/GATT heritage. *Id.* at 209. The E.C. was, according to many, concerned more with creating its own internal market than with liberalizing world trade. Japan's rapid economic growth led to GATT membership in 1955, introducing another key player that was not part of the early ITO/GATT consensus and had yet another perspective on trade matters. Finally, thanks to decolonization, a steady stream of developing countries joined the GATT, most of them through simple sponsorship by their former colonial master. From its original twenty-three signatories, the GATT expanded to 100 participants in 1973, the increase made up almost entirely of developing countries. *See id.*

87. New topics emerged on GATT's agenda, both because of the new membership and because of the replacement of the early postwar problems, which had gradually been resolved, with new questions of world trade around which no easy consensus emerged, namely: the creation of the E.C. (and the discrimination and new trade restrictions that came with it), the worsening trade position of the developing countries (and the call for special economic development exceptions), the radical effects of postwar agricultural programs, and the emerging industrial competition from the non-Western world, especially in the field of textiles. HUDEC, *DIPLOMACY*, *supra* note 19, at 209. More generally, whilst six rounds of tariff negotiations had reduced the average level of customs duties between the major developed countries to levels approaching commercial insignificance (under ten percent), *id.* at 214–15, new protectionism emerged in the form of so-called nontariff barriers (ranging from quotas and import licenses to technical standards and antidumping restrictions). To define and reduce protectionist nontariff barriers proved much more difficult than making tariff reductions.

consensus rule and effective veto power for each GATT party—*enabled* the thickening of the GATT’s legal-normative structure, including the legalization of its enforcement regime. Indeed, if GATT parties have full control, including veto power, over the creation of GATT rules as well as the adoption of GATT panel rulings, why would they fear the legalization of the GATT system? In this sense, higher levels of politics as seen in the consensus practice *explain* GATT’s increase in law through the legalization of the dispute process. It was the consensus practice that made GATT legalization acceptable and digestible to GATT parties. On the other hand—and here again is the bidirectional or even circular interaction between law and politics—GATT legalization *called for* and *cemented* the need for more politics, participation, and contestation, including the GATT consensus practice. Faced with the gradual legalization of GATT dispute settlement, is it not normal that GATT parties became more aware of and sensitive to how GATT rules were made and how GATT rulings were adopted?⁸⁸ In particular, is it not logical that when rules are enforced and become more real, countries make sure that no rule passes the political process without their consent, hence the consensus practice?

C. *The WTO Eruption (1994–2004)*

In the previous Section, I referred to the changes that took place in the world trade system from 1947 to 1994 as a silent mutation. In this Section, I put the creation of the WTO in perspective, calling it an eruption rather than a big bang that in one instant transformed the trade system. My view, in other words, is that often the transformation that took place in the forty-seven-year operation of GATT is underestimated, while that of the creation of the WTO is somewhat overblown. In the previous Section, I elaborated on the incremental, but overall crucial changes that occurred in the world trade system from 1947 to 1994. The creation of the WTO can only be understood, and was only made possible, in the context of those multiple but less visible mutations. It is to the changes that occurred with the creation of the WTO that I now turn.

1. *Drastic Increase in Discipline and Law*

The WTO treaty significantly thickened the trade system’s legal-normative structure. To begin with, almost fifty years after the failed ITO, a true international organization emerged with legal personality and an almost

88. As Weiler put it in the context of the E.C.’s evolution:

The “harder” the law in terms of its binding effect both on and within states, the less willing states are to give up their prerogative to control the emergence of such law or the law’s “opposability” to them. When the international law is “real,” when it is “hard” in the sense of being binding not only on but also in states, and when there are effective legal remedies to enforce it, decisionmaking suddenly becomes important, indeed crucial.

WEILER, *supra* note 16, at 34.

universal membership of close to 150 countries. A host of new substantive agreements, GATS, TRIPS, SPS, and TBT, were adopted and became binding on all WTO members pursuant to the single-package approach. With few exceptions, the multiple-speed GATT came to a halt and was transposed into a uniform WTO. Also, dispute settlement was streamlined. Most importantly, the right to veto the establishment of panels or the adoption of dispute rulings was taken away. To block the process, a so-called negative consensus of all members is now needed, making the process virtually automatic.⁸⁹ In addition, the creation of a new, standing Appellate Body to hear appeals against panel rulings added significant weight to the independence and further legalization of the enforcement branch. Unlike GATT Article XXIII, which focused on maintaining a mere balance of concessions, the DSU for the first time, albeit implicitly, imposes a legally binding obligation to comply with WTO rules and WTO dispute rulings.⁹⁰ Crucially, the DSU not only increased the level of discipline imposed on reluctant *defendants* (read: the E.C., which had blocked the GATT process in a number of cases brought by the United States). It also limited the exit options of what could be called aggressive *complainants* (read: the United States, which previously pursued certain GATT rights unilaterally under § 301 of the 1974 Trade Act). Article 23 of the DSU obliges all WTO members to submit their WTO complaints to the WTO and not to pursue them unilaterally. In other words, complainants unhappy with the progress or result in WTO dispute settlement can no longer exit the WTO system and revert to self-help.

The strengthening of the trade system's normative structure was confirmed in the first ten years of the WTO's operation. Close to 350 dispute proceedings were started⁹¹ and in all cases in which a panel was requested, it was established, notwithstanding the objections of defendants in certain cases.⁹² Similarly, in all cases in which a panel or Appellate Body ruling was circulated, it was adopted, even if the losers had major problems with the

89. See *supra* note 6.

90. Trade compensation and reciprocal suspensions of concessions are explicitly defined as temporary solutions only. DSU, *supra* note 4, art. 22.1. The ultimate objective of the DSU is, thereby, either settlement or compliance. Paying compensation or suffering trade retaliation can no longer end a dispute. See John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?*, 98 AM. J. INT'L L. 109 (2004); John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60 (1997); Pauwelyn, *supra* note 43. But see Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416 (1996); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179 (2002).

91. See World Trade Organization, Dispute Settlement, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited July 27, 2005).

92. See, in particular, the Cuban Liberty and Solidarity Act dispute, in which the U.S. threatened not to attend panel meetings. Chairman of the Board, *United States—The Cuban Liberty and Solidarity Act*, U.N. Doc. WT/DS38/5 (Apr. 25, 1997) (communication from the Chairman of the Panel), available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996. The case was subsequently settled.

results.⁹³ Illustrating the closure of exit for aggressive complainants, a crucial WTO panel ruled that core aspects of § 301 of the U.S. Trade Act were not in violation of DSU requirements, albeit, only because the United States solemnly promised not to seek redress of its WTO rights inconsistently with the multilateral track imposed by the DSU.⁹⁴ Apart from a few borderline situations, the United States has, indeed, no longer reverted to the unilateral enforcement of its WTO rights.⁹⁵ From the perspective of other WTO members, especially the weaker ones, this is a remarkable achievement. The new Appellate Body, in turn, streamlined panel case law and, like more conventional judicial bodies, has opted for a rigorous, impartial, and strictly legal approach to analyzing trade complaints.⁹⁶ It also placed WTO rules squarely within the broader field of public international law, thereby confirming their legally binding nature.⁹⁷

2. Modest but Important Increase in Participation and Politics

Along with the creation of the WTO, crucial although less visible and noted changes also were implemented on the politics or participation pole. Importantly, for the first time ever, the WTO Agreement explicitly confirmed that “[t]he WTO shall continue the practice of decisionmaking by consensus followed under GATT 1947.”⁹⁸ This confirmation—in deviation from the simple-majority voting rule in GATT Article XXV—offers stricter guarantees of participation and voice than a mere consensus practice developed over time. It cements the veto right of each and every WTO member. At the same time, the old majority-voting rule of GATT Article XXV was not entirely taken off the books; if, but only if, a decision cannot be arrived

93. See, for example, the controversial ruling in Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, U.N. Doc. WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *E.C.—Asbestos*], or the decision to grant a retroactive remedy in the *Australia—Leather* dispute against the request of the complainant (U.S.) itself. Report of the Panel, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, U.N. Doc. WT/DS126/RW (Jan. 21, 2000). Both rulings were adopted.

94. Report of the Panel, *United States—Sections 301–310 of the Trade Act of 1974*, U.N. Doc. WT/DS152/R (Jan. 27, 2000).

95. See, for example, the *E.C.—Bananas* case, in which the U.S. imposed sanctions even before it had obtained WTO authorization. Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, U.N. Doc. WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *E.C.—Bananas*]. This ruling was condemned in the *U.S.—Certain Products* case. Report of the Appellate Body, *United States—Countervailing Measures Concerning Certain Products from the European Communities*, U.N. Doc. WT/DS212/AB/R (Dec. 9, 2002).

96. See ROBERT HOWSE, *GLOBAL GOVERNANCE BY JUDICIARY: THE WTO EXPERIMENT WITH APPELLATE REVIEW* (forthcoming Nov. 2005).

97. See Pauwelyn, *supra* note 43; Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001).

98. WTO Agreement, *supra* note 3, art. IX:1. A consensus is defined as a situation in which “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.” *Id.* art. IX:1 n.1. Article XVI:1 confirms the importance of GATT practice: “Except as otherwise provided . . . the WTO shall be guided by the decisions, procedures and customary practice followed by the CONTRACTING PARTIES to GATT 1947.” *Id.* art. XVI:1.

at by consensus, the matter can be decided by voting.⁹⁹ The WTO Agreement did, however, introduce higher majority rules—ensuring higher levels of participation or voice—for specific decisions (to be resorted to, however, only if no consensus can be reached). A waiver now requires a three-fourths majority of all WTO members or in some cases even consensus,¹⁰⁰ in contrast to GATT 1947 which merely required a two-thirds majority of votes actually cast.¹⁰¹ The adoption of an authoritative interpretation of WTO rules now requires a three-fourths majority of all WTO members,¹⁰² in contrast to the GATT 1947 practice of adoption by simple majority of votes cast pursuant to Article XXV.¹⁰³

Besides embracing stricter decisionmaking rules, the WTO Agreement also reined in the scope of joint action by WTO members. Whilst under GATT Article XXV contracting parties had the power to meet and decide “with a view to facilitating the operation and furthering the objectives of [GATT],”¹⁰⁴ Article IX of the WTO Agreement on decisionmaking does not confer any powers to WTO organs beyond those explicitly granted elsewhere in the treaty, such as Article XII on accessions or the DSU on dispute settlement. As a result, WTO organs, such as the Ministerial Conference or General Council, no longer have the broad-ranging competence of deciding matters to facilitate the operation or further the objectives of the WTO treaty. Although the broad powers in GATT Article XXV were only occasionally exercised, this change represents an important cutback on the powers of the GATT/WTO.

Finally, the rules to amend the WTO treaty were tightened, thereby ensuring, once again, higher levels of participation. Instead of the two-thirds majority required for most amendments under GATT 1947, the WTO Agreement explicitly confirms the consensus practice.¹⁰⁵ Although the fallback rule of a two-thirds majority continues to apply in many cases when no consensus can be reached,¹⁰⁶ an increased number of amendments require

99. *Id.* art. IX:1.

100. *Id.* art. IX:1 n.4 (stating that waivers of obligations subject to a transition period or a period for staged implementation “shall be taken only by consensus”).

101. *Id.* art. IX:3; GATT, *supra* note 5, art. XXV:5.

102. WTO Agreement, *supra* note 3, art. IX:2.

103. *See* JACKSON, *supra* note 33, at 132–37.

104. GATT, *supra* note 5, art. XXV:1.

105. WTO Agreement, *supra* note 3, art. X:1.

106. *Id.* arts. X:1, :3, :5. WTO members *not* accepting the two-thirds majority amendment remain unbound by the amendment unless the amendment is “of a nature that would not alter the rights and obligations of the Members” (in which case the amendment is binding on all WTO members), *id.* art. X:4, or three-fourths of WTO members decide that either a member must accept the amendment or it “shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference,” WTO Agreement, *supra* note 3, arts. X:3, :5; *see also* GATT, *supra* note 5, art. XXX:2.

unanimity or consensus *without* fallback majority voting.¹⁰⁷ In particular, amendments to the DSU¹⁰⁸ and the addition of new plurilateral agreements to the WTO treaty¹⁰⁹ require consensus of all WTO members. The latter ensures the consent of all WTO members before the WTO adds a new agreement to its mandate even if such new agreement is eventually not binding on all WTO members. Put differently, a multiple-speed WTO is thereby possible only with the consent of all WTO members.

Whilst the rules on the books might still leave some doubt as to the importance of consensus (in particular given the remaining fallback of simple majority voting), the actual practice of WTO decisionmaking in its first ten years of operation eradicates all doubts. WTO members have zealously protected the consensus rule, and are clearly determined to defend their veto right and high levels of participation or voice.¹¹⁰ Apart from one decision on the accession of Ecuador¹¹¹ and a few close calls where some countries pushed for a vote,¹¹² in the first ten years of the WTO, no voting has taken place, not even on waivers or the appointment of director-generals. All decisions were taken by consensus. Hence, notwithstanding the relatively light fallback voting rules on the books—three-fourths for waivers and interpretations, simple majority for most other decisions—all WTO activity occurred with the, albeit sometimes tacit, agreement of all WTO members. Although developing countries make up three-fourths of the WTO membership, they vehemently defended the consensus rule as well. As Lorand Bartels points out, “[S]o anxious are developing countries about their position in the WTO that both the Singapore and Doha Ministerial Declarations state expressly that any decision to negotiate on new issues . . . must be taken on the basis of *explicit* consensus. Mere silence [or a consensus decision not explicitly objected to] is no longer sufficient.”¹¹³

107. See GATS, *supra* note 7, art. II:1; TRIPS, *supra* note 7, art. 4; WTO Agreement, *supra* note 3, art. X:2 (referring to WTO Agreement arts. IX and X); GATT, *supra* note 5, arts. I, II.

108. WTO Agreement, *supra* note 3, art. X:8.

109. WTO Agreement, *supra* note 3, art. X:9.

110. See, for example, the WTO Secretariat legal opinion that even the appointment of a facilitator to assist in the resolution of the Brazil-U.S. cotton dispute under the WTO Subsidies Agreement requires an “affirmative consensus.” Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 15 April 2003*, ¶¶ 68–72, U.N. Doc. WT/DSB/M/147 (July 1, 2003), *criticized in* Ehlermann & Ehling, *supra* note 74, at 8.

111. General Council Decision, *Accession of Ecuador—Decision of 16 August 1995*, n.1, U.N. Doc. WT/ACC/ECU/5 (Aug. 22, 1995) (“This Decision was adopted by the General Council by a two-thirds majority.”).

112. See *E.C.—Bananas*, *supra* note 95 (noting that the E.C. pushed for a vote against a U.S. request for sanctions authorization). This was also reported in Ehlermann & Ehling, *supra* note 74, at 64 nn.32–33. The contentious 1999 selection process for a new Director-General eventually led to a split appointment of two individuals each for three years. General Council, *Appointment of the Next Director-General—Introductory Statement by Ambassador Ali Mchumo, Chairman of the General Council*, U.N. Doc. WT/GC/26 (July 23, 1999).

113. Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT’L & COMP. L.Q. 861, 865 (2004).

3. *The WTO as a Bidirectional Interaction Between Law and Politics*

As was the case for the other two periods—the text of GATT 1947 and the forty-seven years operation of GATT—the changes that took place with the creation of the WTO can be explained in a self-referential manner, limited to either the law or the politics pole. For example, the monumental closure of exit in the DSU is, one hopes, at least partially due to the high-spirited belief in the rule of law cherished by many Uruguay Round negotiators. In particular, developing countries had long been supporters of legalization as they hoped that a rules-based system, without political vetoes, would put them on a level playing field with more economically powerful parties.¹¹⁴ Another, probably more important, internal reason that explains the DSU revolution is of a blunter, *realpolitik* nature, namely a deal between the United States, on the one hand, and most other countries (in particular the E.C. and Japan), on the other. In exchange for automaticity in the dispute process (that is, the E.C. and Japan relinquishing their veto rights), the United States agreed to stop unilateral enforcement through § 301.¹¹⁵ Finally, the forty-seven years of GATT experience, in particular the increasing difficulty of implementing trade agreements on nontariff measures such as the Tokyo Round codes, had taught a lesson: if the ambitious Uruguay Round agreements were to be worth the paper they were written on, they had to be backed up by a credible and effective dispute settlement mechanism. Previous experience had shown that this had to include, eventually, the surrender of the veto right. For the GATT/WTO to be a way out of the prisoner's dilemma of trade policy, a credible enforcement mechanism had to be in place to dissuade defectors. To outweigh the opposition to freer trade, the supporters of the WTO had to be reassured that this time the concessions obtained would stick.

As with the other two periods, my claim is, however, that these internal explanations miss a key factor. That key factor is encapsulated in the bidirectional interaction *between* law and politics. One of the main objectives of this Article is to demonstrate that legal change occurs gradually, in tandem with developments in the political process. The surrender of the veto right in the new DSU was not a big bang that emerged out of the blue. Like the magical date of 1992 in the E.C.'s transformation,¹¹⁶ the concessions in the

114. Julio Lacarte-Muró & Petina Gappah, *Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench*, 3 J. INT'L ECON. L. 395 (2000).

115. HUDEC, *EVOLUTION*, *supra* note 64, at 222–31, 237 (“Governments who preferred a more cautious, more voluntary adjudication system had apparently persuaded themselves that the risk of unchecked U.S. legal aggression was a greater danger than an excessively demanding GATT legal system.”). For reasons why the European Community could conclude the DSU, see Theofanis Christoforou, *The World Trade Organization, Its Dispute Settlement System and the European Union: A Preliminary Assessment of Nearly Ten Years of Application*, in L'INTÉGRATION EUROPÉENNE AU XXI^e SIÈCLE: EN HOMMAGE À JACQUES BOURRINET 257 (2004).

116. *See infra* text accompanying note 141.

DSU that still mystify international lawyers were indeed a landslide, but one having its roots in a long history of smaller and bigger earthshocks. The veto right was not written in the GATT itself. GATT provided, on the contrary, for simple majority voting and the veto came about only gradually, first invoked as late as 1972,¹¹⁷ through subtle interactions between law and politics. The surrender of the veto occurred through a similar incremental process, closing off a major exit route, while injecting new levels of voice.

As expected under the law-and-politics paradigm, the closure of exit, imposition of harder law, and general increase in discipline as found in automatic DSU procedures, as well as an obligation to follow the multilateral DSU track, called for equally important inputs of politics or voice including harder lawmaking. As squeezing a balloon on one side will automatically inflate the other, squeezing exit options inflated the need for voice or participation. As a result, the WTO's further legalization led quite naturally to higher demands for voice or participation, including veto rights in the political decisionmaking process, higher fallback majority rules, and tougher amendment provisions. Because WTO norms can now be enforced through an automatic dispute process with limited exit options, control of the norm itself, that is, at the time it is created, is the only possible solution for individual WTO members. This also explains why, to this date, WTO members continue to defend zealously the consensus rule and carefully preserve their veto right over any changes to the WTO bargain. As noted earlier, with one exception, no WTO decision was taken by vote and all passed pursuant to the consensus rule.¹¹⁸

Crucially, this pressure for voice or participation at the state-party level emerged with equal force for nonstate actors outside the WTO. The former (state pressure) strengthened the system's internal legitimacy; the latter (nonstate actor pressure) questioned its external legitimacy. Because trade obligations gradually moved from the dry, technical field of tariffs to the hardcore political controversies of, for example, health and environmental standards, the world trade system affected and drew the attention, protest, and voice not just of governmental trade elites and businesses, but also of NGOs, consumers, and citizens at large. As Keohane and Nye argued in the broader context of international economic institutions:

[T]hese pressures on international institutions are, ironically, reflections of their success. If international institutions were unimportant . . . no one would care about their legitimacy. But it is now recognized that the policies of the IMF, the World Bank, and the WTO make a difference. Hence they are judged not only on the quality of the results that these policies

117. See *supra* note 82.

118. See *supra* text accompanying note 111.

yield, but also on the procedures through which the policies are developed.¹¹⁹

Put differently, because the WTO matters—in the words of the Appellate Body, it is about “the real world where people live and work and die”—and its rules are real in that exit options are reduced, questions of international governance and legitimacy arise. This was not the case in respect of GATT 1947, which focused on tariffs, with multiple options to exit. Nor are legitimacy and democratic deficit hot topics at institutions that the public continues to perceive as largely technical, such as the International Telecommunications Union (“ITU”) or the World Meteorological Organization (“WMO”). The same applies for organizations that, like GATT 1947, have a weak enforcement mechanism, even if they deal with high political topics and decide by majority vote. Such an institution is the U.N. General Assembly, whose resolutions are not legally binding and hence do not attract the same levels of contestation and voice.¹²⁰

Conversely—and here again is the bidirectional (even circular) force of the law-and-politics narrative—it was not only the increase in discipline or law that enhanced the need for politics or participation. The reverse was also true: countries could only accept the dramatic increase in legalization and digest the automatic and compulsory enforcement of WTO obligations under the new DSU once they were reassured that, in the political process, no new obligations could arise without their consent.¹²¹ It is this enhanced voice, or participation in the political process, that gave WTO members the confidence to engage in the revolutionary transformation of the dispute process and to accept it with relative equanimity.¹²²

119. Robert O. Keohane & Joseph E. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 272 (Roger B. Porter et al. eds., 2001).

120. See *supra* note 55. Eric Stein, after reviewing four intergovernmental organizations “confirms the correlation between the level of integration (normative-institutional and empirical-social), on the one hand, and the intensity of the discourse on the democracy-legitimacy deficit, on the other.” Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489, 530 (2001).

121. As Weiler explains in the Community context:

Instead of a simple (legal) cause and (political) effect, this subtler process was a circular one. On this reading, the deterioration of the political supranational decisional procedures [in the WTO, the consensus-based, inefficient rulemaking procedures] . . . constituted the political conditions that allowed the Member States to digest and accept the process of constitutionalization. Had no veto power existed, had intergovernmentalism not become the order of the day, it is not clear to my mind that the Member States would have accepted with such equanimity what the European Court was doing. They could accept the constitutionalization because they took real control of the decisionmaking process, thus minimizing its threatening features.

Weiler, *supra* note 16, at 36.

122. It is, indeed, those increases in voice or participation (consensus decisionmaking and the creation of a new Appellate Body that permits countries to voice their concern about panel rulings) that John Jackson pointed to in his 1994 Congressional testimony when trying to convince the U.S. Congress that the new WTO, and particularly the DSU, would not infringe U.S. sovereignty. John Jackson, *Testimony Prepared for the US Senate Committee on Foreign Relations*, June 14, 1994, in

In sum, higher levels of participation or politics at the WTO were not only a *consequence* of further legalization; they were, at the same time, an *absolute precondition* without which further legalization could not have taken place. Put differently, as much as higher levels of law and discipline increased the need for participation, voice, and politics, stronger outlets for voice and more politics enabled and supported further legalization. The consensus rule in the political process, prevailing under this balance, unmistakably led to a *lourdeur* in WTO decisionmaking. Viewed through the law-and-politics paradigm, however, it was and remains the crucial factor: the price to be paid for an automatic and compulsory DSU. Without the consensus rule and other reinforcements of politics, WTO members could not have accepted and digested the dramatically more legalized WTO.

In this light, the WTO's hard *law* combined with its hard *lawmaking* process or, as most put it these days, the combination of a highly efficient dispute process and a consensus-based, inefficient rulemaking procedure, should no longer strike us as an "institutional paradox."¹²³ To the contrary, this asymmetry can now be explained as a perfectly logical—although not necessarily optimal—balance between high discipline or law and high participation or politics.¹²⁴ In addition, contrary to common perception, the thicker normative structure of the trade system, although undoubtedly strengthening the WTO, did not come at the expense of individual members. On the contrary, through the consensus rule and related veto, the power of individual members was strengthened. Legalization only materialized because of more—not less—politics (including consensus decisionmaking).

GOVERNMENT PRINTING OFFICE, HEARINGS ON THE WTO AND U.S. SOVEREIGNTY, *reprinted in THE WTO AS AN INTERNATIONAL ORGANIZATION* 176 (Anne O. Krueger ed., 1998).

123. See sources cited *supra* note 17.

124. From this perspective, the period of the creation and early years of the WTO is not unlike what Joseph Weiler described as the "foundational period" of the European Community (from 1958, the creation of the E.C., to the middle of the 1970s). Analyzing this early period, Weiler discovered an apparent paradox similar to the now fashionable complaint heard in WTO circles about the imbalance between the WTO judiciary (fully automatic and compulsory) and the WTO political branch (deadlocked by the consensus rule). He describes the paradox as follows:

[F]rom a legal-normative point of view, the Community developed in that first phase with an inexorable dynamism of enhanced supranationalism. European legal integration moved powerfully ahead [especially with the adoption by the European Court of Justice ("ECJ") of core Community doctrines, such as direct effect of Community law before domestic courts and supremacy of Community law over domestic law]. From a political-decisional-procedural point of view, the very same period was characterized by a counter-development towards intergovernmentalism and away from European integration.

WEILER, *supra* note 16, at 16. Under the law-and-politics paradigm, the successful legal-normative activity in this foundational period of the E.C. (spurred, in particular, by the ECJ) meant higher levels of discipline or law, that is, "Community obligations, Community law, and Community policies were 'for real.'" *Id.* at 30. More discipline and closure of exit from the Community system had to increase the need for voice and participation. And so it happened. As Weiler recalls: "In what may almost be termed a ruthless process, Member States took control over Community decisionmaking." *Id.* The best example of this "revenge by the Member States" was the legally dubious Luxembourg Compromise whereby de facto each and every Member State could veto Community-proposed legislation, notwithstanding the majority voting rules in the treaty itself.

Similarly, further legalization required and could only be maintained with more—not less—politics.

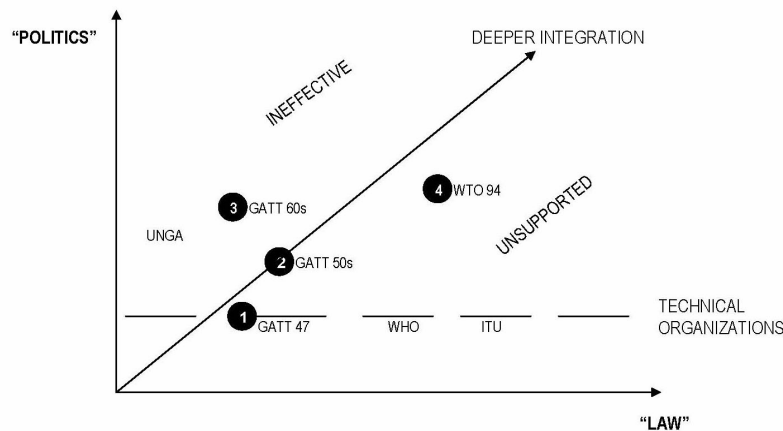
D. The Law-and-Politics Curve of the World Trade System

The law-and-politics narrative of the transformation from GATT to WTO can now be summarized in Chart 1 below. The vertical axis (“politics”) represents levels of participation and contestation, and the flexibility, accountability and input legitimacy that come with it. The horizontal axis (“law”) depicts levels of discipline, precommitment, and legalization, and the rule of law and welfare-enhancing trade liberalization that flow from it (both providing output legitimacy). The diagonal curve depicts the trajectory of international organizations addressing subject matters that are politically sensitive and contestable. At those “politically sensitive” organizations, deeper integration requires more law *and* more politics. More discipline or law leads to more participation or politics. As countries know that the rules are real, they want a greater voice in their creation. Conversely, more participation or politics is what permits and sustains the imposition of higher levels of discipline or law. Without participation, contestation, and accountability, high levels of discipline or legalization in politically sensitive areas would not be digestible and could not be sustained. The horizontal curve, in contrast, depicts the trajectory of technical institutions such as the ITU or the WMO addressing low politics questions that the public gladly leaves to expert decisions. This curve is horizontal, at a constant low level of politics or contestation. No matter how strictly imposed or disciplined the organization’s rules, the level of politics or participation remains the same (government by experts rather than government by representative politics). Depending on the technical or political nature of the subject matters covered, the curve of an organization may be steeper (more politically sensitive) or flatter (more technical) and, as happened with the GATT, can change over time. Crucially, deviations to the left of the diagonal curve, representing too much politics and/or not enough discipline, risk an ineffective organization such as the U.N. General Assembly (UNGA) or GATT in the 1960s. Deviations to the right of the diagonal curve, representing too much law or discipline and/or not enough politics or participation, risk an unsupported organization such as the current WTO. Put differently, deviations to the left may engender loyalty or input legitimacy but lack efficiency or output legitimacy (*loyalty without efficiency*). Deviations to the right, in contrast, threaten a situation of *efficiency without loyalty*.

The text of GATT 1947 is best situated on the horizontal, “technical organizations” curve, somewhere to the right of the diagonal, “politically sensitive organizations” curve (*Point 1: “GATT 47”*). As discussed earlier, the original GATT was framed as a technical, expert-driven organization dealing with low politics issues—tariffs—in a clublike, low-discipline fashion with a lack of formal ratification, majority decisionmaking, many escape clauses, and weak enforcement. In its early years of operation, however, the GATT quickly shifted to higher levels of participation and politics, including

decisionmaking by consensus, and somewhat higher levels of discipline, such as relatively effective dispute settlement (*Point 2: "GATT 50s"*). Spurred by the increasingly contested nature of its activities, including nontariff barriers, and a steady flow of new and diverse members, the GATT gradually changed tracks from the horizontal to the diagonal curve, from a technical to a more politically sensitive organization. In the 1960s and early 1970s, the increased levels of contestation and politics even brought the GATT to a temporary standstill and a virtually dormant dispute process¹²⁵ (*Point 3: "GATT 60s"*). Thereafter, the organization, with renewed political impetus, continued its gradual process of legalization and expansion of trade disciplines to arrive, with the creation of the WTO, at a balance between relatively high levels of politics and participation, as reflected in the consensus rule and global contestation of the organization, and dramatically increased levels of law and discipline, illustrated by a single-package deal of over thirty agreements and a compulsory dispute process (*Point 4: "WTO 94"*). As elaborated below, the current situation after ten years of WTO is, however, one of too much discipline or law for the prevailing levels of participation and politics. As a deviation to the right of the diagonal curve, the trade system thereby risks efficiency without loyalty.

CHART I:
LAW AND POLITICS FROM GATT TO WTO



125. See HUDEC, *DIPLOMACY*, *supra* note 19, at 209–10 (“In one situation after another the rules could not be enforced and were put aside. Formal renegotiation was attempted in a few areas, but for the most part the old rules were simply allowed to lapse while parties searched for whatever ad hoc settlement could be found.”).

II. THE THREAT OF A WTO FORTRESS

Part I of this Article told and explained the story of the transformation of world trade using the alternative law-*and*-politics narrative instead of the conventional *from*-politics-*to*-law approach. Through this lens three distinct periods were discerned: the creation of the text of GATT 1947, the operation of GATT (1947–1994) and the WTO (1994–2004). My central claim was that for all three periods a crucial explanatory factor was the bidirectional, even circular, interaction *between* law and politics, discipline, and participation. Contrary to conventional wisdom, the system did not evolve from trade politics to trade law. Rather, both the level of law and the level of politics gradually increased. More politics *enabled* more law. More law *required* more politics. While both trends were continually present and reinforcing each other, the former was particularly strong during the GATT's operation, the latter especially prevalent since the creation of the WTO.

Part II of this Article shifts gears to savor the prescriptive force of the law-*and*-politics approach. Let there be no mistake: things are far from perfect in the world of trade. Gone are the days of a cozy GATT-club. Instead, the threat of a WTO fortress is looming, both for those outside and those inside the system. Many countries and people, in particular the poor and vulnerable, feel left behind or locked *outside* the WTO. For most developing countries, participation in the system remains elusive.¹²⁶ Ordinary citizens in both poor and rich countries perceive the WTO as a fortress hard to penetrate, a system that operates, behind closed doors, in the interest of powerful producers and exporters, but is oblivious of the rural poor, and the plight of workers or the environment.¹²⁷ In this sense, the WTO suffers, first and foremost, from a lack of popular support, loyalty, or input legitimacy. Yet, at the same time, unlike the early years of GATT, this lack of input legitimacy is no longer offset by progress in actual trade liberalization or output legitimacy. The increase in participation or politics that *did* take place over the years, in particular the insistence by WTO members on a political veto in decisionmaking, is currently stifling further welfare-enhancing liberalization and preventing much-needed reforms to make the system more equitable for developing countries and more open and supported by civil society. The deadlock in the political branch, combined with an automatic dispute process, also risks giving too much power to what many see as un-elected, faceless bureaucrats on the judicial branch.¹²⁸ As a result, the WTO is perceived as a fortress even by those *inside*, that is, governments and domestic polities, tied up in the straightjacket of the WTO single package, with no

126. See, e.g., OXFAM, RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALISATION, AND THE FIGHT AGAINST POVERTY 5 (2002), at http://www.maketrade-fair.com/assets/English/report_english.pdf ("The problem is not that international trade is inherently opposed to the needs and interests of the poor, but that the rules that govern it are rigged in favour of the rich.")

127. See *Lori's War*, *supra* note 9; GLOBALIZE THIS! THE BATTLE AGAINST THE WORLD TRADE ORGANIZATION AND CORPORATE RULE (Kevin Danaher & Roger Burbach eds., 2000).

128. BARFIELD, *supra* note 17, at 1.

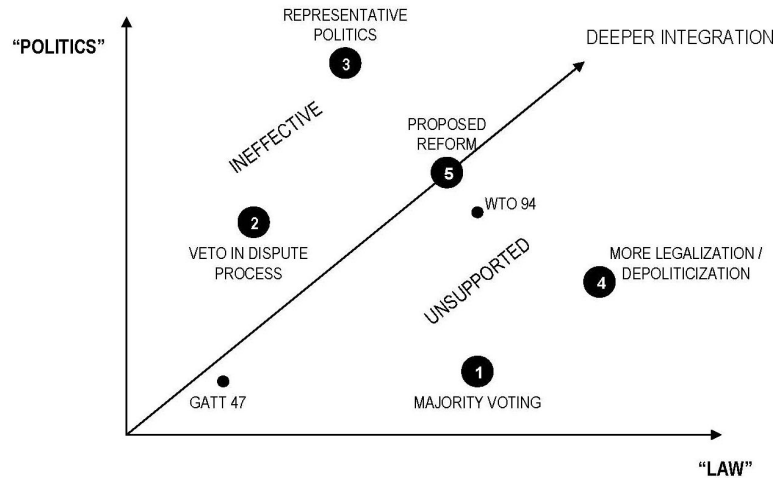
way out or forward, either because of economic necessity or because of the consensus rule and an ever-stricter enforcement mechanism. In sum, the WTO now lives in what one could call the worst of both worlds: it has a lack of input legitimacy in that it misses the benefits of popular support or politics *and* has a lack of output legitimacy because it must do without the benefits of further trade liberalization and a rule of law perceived as fair and equitable for everyone.

In Part II of this Article, I first analyze the conventional proposals for WTO reform and explain why, in isolation, they are counter-productive. As an alternative to those proposals, focused exclusively on one side of the law-politics spectrum, I then suggest a more comprehensive reform package that takes account of both the law and politics poles. My central claim is that such a balanced package, although less spectacular than other proposals, is more likely to make the trading system both more legitimate and more efficient.

A. How Not to Reform the WTO

Knowing that the trade system currently reflects a combination of high discipline or law and high politics or participation (albeit focused on participation by member states)—if you wish, a combination of a highly efficient dispute process and a consensus-based rulemaking system—three major proposals for reform have most commonly been suggested: (1) soften the WTO's decisionmaking rules so as to unlock the recurring political stalemates, or in the words of this Article reduce politics or participation by means of, for example, majority-based decisionmaking; (2) revert to a more political dispute process with more control by individual members over the results in specific trade disputes, or, in other words, reduce discipline by, for example, granting members the right to block the adoption of dispute rulings; and (3) further legalize and/or depoliticize the WTO's normative structure to better resist political pressures obstructing trade liberalization (in other words, further increase discipline through, for example, legal standing for private parties under the DSU or scrapping the system's escape clauses). Each of these proposals is depicted in Chart 2 below. I shall now address them in turn.

CHART 2:
LAW AND POLITICS OF WTO REFORM PROPOSALS



1. Facilitate Decisionmaking in the Political Process

A first group of commentators suggests that we leave the WTO enforcement mechanism intact but facilitate its rulemaking process, in particular, by dropping the consensus requirement. Pascal Lamy, the former E.C. trade commissioner (and now WTO Director-General), for example, has called the WTO's decisionmaking process "medieval."¹²⁹ Those commentators would, in other words, *maintain* the high levels of discipline in the form of a strong DSU but *reduce* the strictures of high voice and participation through softer lawmaking procedures such as weighted or majority voting. This proposal is depicted in Chart 2 above, at *Point 1* ("Majority Voting"). Debra Steger, for example, argues that the remedy lies in a smoother and more efficient rulemaking system. She explains her position thus:

If the system is working very well in one aspect [dispute settlement] and poorly in another aspect [decisionmaking], should the effective part be changed to make it less effective, or should the ineffective part be improved to make it stronger and more effective? Simple logic dictates that Members should fix the part that does not work, and leave the well-functioning part alone.¹³⁰

Along the same lines, Claus-Dieter Ehlermann, a former Appellate Body member, argues that the "ideal solution is, of course, to facilitate and thus

129. Charlotte Denny et al., *Europe urges shakeup of 'medieval' WTO*, THE GUARDIAN, Sept. 16, 2003, at 15.

130. Debra P. Steger, Book Review, 5 J. INT'L ECON. L. 565, 567 (2002) (reviewing BARFIELD, *supra* note 17).

unblock the political decisionmaking process.”¹³¹ In the same breath, he adds that he is also “opposed to all suggestions that tend to turn the wheel of history back, in reintroducing elements of the original ‘diplomatic’ model of dispute settlement.”¹³² Robert Keohane is of a similar view:

The institutions are a mess: too much judicialization, too little legislation If this is the problem, why not strengthen the legislative elements of the WTO? . . . [T]his change should correct the overweening influence of the Appellate Body, as Qualified Majority Voting in the E.U. has limited the ability of the European Court of Justice to make new law.¹³³

Other authors make more specific suggestions for the facilitation of WTO decisionmaking. Amrita Narlikar, for example, refers to the establishment of an “executive board” similar to that in the IMF and the World Bank.¹³⁴ Thomas Cottier and Satoko Takenoshita have proposed the introduction of a system of weighted voting, based on each WTO member’s trading power.¹³⁵ Less drastic, the Sutherland report on the future of the WTO proposes the creation of a consultative body with membership restricted to a maximum of thirty countries.¹³⁶

This first solution may be called the softer *lawmaking* or symmetry solution, favored mainly by insider institutionalists, for it would introduce a degree of symmetry between the powers and efficiency of the judicial and the political branch of the WTO. Notwithstanding its apparent logic and symmetrical feel-good factor, considering the law-and-politics curve above, the symmetry solution is not a solution at all. Indeed, quite the reverse. If, as I explained earlier, the *lourdeur* in the political WTO process is a natural *response* to higher levels of law and discipline, in particular a stricter dispute process, and this *lourdeur* is, moreover, a political condition or *sine qua non* for WTO members to establish the DSU as well as to digest and accept the WTO’s increased levels of discipline, taking away the safety-valve of consensus and veto would *undermine* the support for a strong WTO dispute mechanism. It could eventually threaten WTO disciplines more broadly in that WTO members, faced with weaker outlets for voice and the prospect of being outvoted, would more frequently seek to exit. This, in turn, would reestablish the expected equilibrium, but at the bottom of the

131. Ehlermann, *supra* note 17, at 305; *see also* Ehlermann & Ehring, *supra* note 74, at 51 (“Consensus . . . inherently favours the status quo and . . . does not provide for equality. . . . [I]t is questionable whether it is also more democratic than the majority rule.”).

132. Ehlermann, *supra* note 17, at 307.

133. BARFIELD, *supra* note 17, at 223 n.52 (quoting email from Robert Keohane to Claude Barfield (June 11, 2001)).

134. Amrita Narlikar, *The Politics of Participation: Decision-Making Processes and Developing Countries in the World Trade Organization*, 364 ROUND TABLE 171, 178–80 (2002).

135. Cottier & Takenoshita, *supra* note 21, at 184–86. The authors define trading power in terms of share of trade, gross domestic product, market openness (defined as proportion of imports to GDP), and population. *Id.*; *see also* Dmitri V. Verenyov, Comment, *Vote or Lose: An Analysis of Decision-Making Alternatives for the World Trade Organization*, 51 BUFF. L. REV. 427, 433 (2003).

136. *See* SUTHERLAND REPORT, *supra* note 18, at 70–71.

diagonal curve, close to GATT 1947: less politics or participation, brought about by the “more efficient” rulemaking system, would lead to more pressure on the exit side, such as a weaker DSU and more problems with noncompliance, or even total exit as in withdrawal from the WTO altogether. In the end, rather than resolving the problem, the symmetry solution risks undermining the entire WTO regime. Hence the situation of the proposal at *Point 1* (“Majority Voting”) in Chart 2 above, which deviates to the *right* of the law-and-politics curve with the risk of an “unsupported” regime or *efficiency without loyalty*. Consensus decisionmaking is arduous, messy, and time-consuming. This is the price to pay, however, for a broadly supported and legitimate world trade system. Political deadlocks are unavoidable, and serious crises and threats of exit from the system part of the game. They should not be overblown¹³⁷ since in the past they have proven to be crucial triggers for further progress.

a. The Lessons from European Integration. The history of European integration offers useful lessons in support of maintaining high levels of voice or participation for each WTO member, at least in the foreseeable future. According to Joseph Weiler, the Community’s foundational period from 1958 to the mid-1970s witnessed a dramatic increase in discipline or law in the form of constitutionalization mainly through the European Court of Justice, coupled with a surge in the need for member state voice or participation epitomized by a veto for each member state under the Luxembourg Compromise.¹³⁸ In some way, this is where the WTO stands today, toward the end of *its* foundational period, with an equilibrium between high discipline in the DSU and high participation through consensus decisionmaking. Determining what happened after this foundational period in Europe may prove illustrative of what is in store for the WTO. Although consensus politics, in the shadow of the veto in the Luxembourg Compromise, was needed to establish an equilibrium in the first, foundational period *and* to digest the expansion of Community powers in what Weiler discerns as a second crucial period,¹³⁹ the costs of such consensus politics became apparent toward the end of the 1980s:

[T]he Community became increasingly unable to respond to new challenges, that called for real policy choices. Thus, while consensus politics (the manifestation of enhanced Voice) explains the relative equanimity with which the jurisdictional limits of the Community broke down in the 1970s, this very consensus model also explains why, within the

137. See, e.g., Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT’L ECON. L. 219 (2004); SUTHERLAND REPORT, *supra* note 18 (exaggerating the prospect of regionalism, a form of exit from the WTO, as a major threat to multilateralism although it has in the past proven to be a catalyst for multilateral agreement).

138. See WEILER, *supra* note 16, at 36.

139. Weiler discerns a second crucial period, which he calls a period of *mutation*, during which Community competences were drastically expanded and became virtually limitless (1973 to the early 1980s). *Id.* at 42–43.

Community's expanded jurisdiction, it was unable to realize its most traditional and fundamental objectives, such as establishing a single market in the four factors of production.¹⁴⁰

This political deadlock—not unlike the one we now witness at the WTO—led to what Weiler distinguishes as the third period in the transformation of Europe: the modern era of 1992, i.e., the enactment of the Single European Act (“SEA”), and beyond. Key to the SEA's success was an agreement among E.C. member states to shift to (qualified) majority voting, at least for those decisions required to complete the single European market. The exit-voice, law-politics equilibrium, however, was thereby out of balance: majority voting meant reduced voice. So what was required in response? Indeed, a counterbalancing decrease in discipline or law, in other words, a number of cracks appeared in the constitutional structure of the Community: among other things, a national safeguard mechanism¹⁴¹ and the official acknowledgement of a multiple-speed Europe.¹⁴² At the same time, Weiler argues that further challenges to the Community's legal-normative foundation may have been prevented by the member states' sense of loyalty toward the European project:

[A]cceptance of Community discipline may have become the constitutional reflex of the Member States and their organs. A Loyalty to the institution may have developed that breaks out of the need for constant equilibrium. The two decades of enhanced Voice thus constitute a learning and adaptation process resulting in socialization; at the end of this period decisional changes affecting Voice will not cause a corresponding adjustment to Exit.¹⁴³

Yet, loyalty in the Community sphere, Weiler explains, “is precarious because there is a legitimacy dissonance between the constitutional claims of the polity and its social reality.”¹⁴⁴ Challenges of democracy and legiti-

140. *Id.* at 66.

141. *See* Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3, art. 95(4) [hereinafter E.C. Treaty] (permitting member states, subsequent to a harmonization measure at the Community level, to enact national measures as long as they are proven to be necessary, taken on legitimate grounds, and non-discriminatory); WEILER, *supra* note 16, at 69.

142. *See* Consolidated Version of the Treaty on European Union, Nov. 10, 1997, 1997 O.J. (C 340) 2, arts. 11(2), 40, 43(g) (enabling closer or enhanced cooperation between a limited number of member states with the option for other member states to stay out); WEILER, *supra* note 16, at 73, 99–101. Along the same lines, note that the new European Constitution, for the very first time, explicitly includes a provision permitting members to leave the E.U. altogether. Treaty Establishing the Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1, art. I-60 [hereinafter European Constitution]. This explicit option for total exit can be seen as another response to lower levels of voice. Although it may never be resorted to, the possibility provides an important, symbolical safety valve.

143. WEILER, *supra* note 16, at 77.

144. *Id.* at 99.

macy, especially *social* legitimacy, that is, “societal acceptance of the system,”¹⁴⁵ remain:

People accept the majoritarian principle of democracy within a polity to which they see themselves as belonging.

. . . .

. . . The current shift to majority voting might therefore exacerbate legitimacy problems. Even an enhanced European Parliament, which would operate on a co-decision principle, will not necessarily solve the legitimacy problem. The legitimacy crisis does not derive principally from the accountability issue at the European level, but from the very redefinition of the European polity.¹⁴⁶

In other words, for Weiler, at the European level, as at any other level of governance, there can be no democracy without *demos*.

What lesson can the world trade system learn from this European story? In my view, it is this: if even at the more integrated European level the need for voice or participation of individual member states was so strongly felt in response to increases in law or discipline, and an equally strong pressure to reduce law or discipline emerged when faced, for example, with majority voting, then *a fortiori* these interacting needs for participation and discipline, voice and exit, must play a role at the more loosely integrated and wildly more diverse WTO. At the WTO level, individual members insist all the more on their sovereignty and the member-driven nature of the organization.¹⁴⁷ As a result, executive or majority-based voting at that level is likely to put even more pressure on the exit side. In addition, in Europe, decades of strong voice, participation, and vetoes gradually nurtured a sense of loyalty toward the European project, through “decades of enhanced Voice [and] . . . a learning and adaptation process resulting in socialization.”¹⁴⁸ At the WTO, in contrast, the process of socialization has hardly begun. On the contrary, to the extent WTO legalization is equated with depoliticization, or keeping the trade game removed as far as possible from domestic politics, nontrade concerns, and social contestation, the *raison d’être* of the WTO is to skirt engagement with the broader society. Indeed, it would not be unfair to say that at this moment most layers of society have serious doubts as to the WTO project, be it because they feel left behind, as developing countries feel, or because they perceive the WTO as a front for big business and dehumanizing capitalist values. As a result, not enough loyalty exists in the WTO today either to replace voice *or* to keep exit at bay. In this context, without drastically reducing current levels of discipline or law and thereby weakening the system’s normative structure and effectiveness, it is hard to

145. *Id.* at 80.

146. *Id.* at 83–85 (citation omitted).

147. SUTHERLAND REPORT, *supra* note 18, at 69; Jackson, *supra* note 17, at 72.

148. WEILER, *supra* note 16, at 77.

imagine that any WTO member could accept being outvoted based on some majority-voting rule,¹⁴⁹ be it a majority of WTO *members* (which would give disproportionate power to countries like Luxembourg and Trinidad and Tobago) or, even less so, a majority of the *people* living in WTO members (which, of course, would hugely favor countries like China and India). If the emergence of a European *demos* is questionable, the feasibility of a worldwide, WTO *demos* is even more elusive. Whatever other forms may exist to legitimize international governance,¹⁵⁰ in the WTO none are currently strong enough to support the revolutionary shift from consensus to majority-based decisionmaking without seriously undermining the trade system's effectiveness, including its strong dispute process. The European story—and its ongoing quest for legitimacy notwithstanding the existence of a European Parliament (witness the 2005 referenda rejecting a proposed Constitution for Europe)—ought to warn the world trade community to be patient and to build on incremental changes and improvements.

b. The Lessons from the Failed New International Economic Order (“NIEO”). The difficulty of setting up an effective and legitimate system based on majority voting at the world level is further illustrated by the failure of the NIEO. Strengthened by growing numbers and their power in the world economy, in particular because of the oil crises, in the 1960s and 1970s developing countries became increasingly frustrated with the strictures of the GATT system and the need for consensus to change it. As a result, they turned their attention to the U.N. and, through the much softer lawmaking process prevalent there, requiring only simple and two-thirds majorities,¹⁵¹ created “their own” United Nations Conference on Trade and Development (UNCTAD).¹⁵² Through a series of hotly contested U.N. General Assembly Resolutions, all adopted without the support of the developed world,¹⁵³ they unilaterally declared the existence of a New International Economic Order, excusing themselves from any meaningful reforms and trade liberalization efforts, which should, after all, be beneficial to develop-

149. Crudely put, the big WTO players, such as the United States and the E.C., zealously defend the consensus rule so as not to be constantly outvoted by the large majority of WTO members, three-fourths of which are developing nations. Equally, developing countries strongly defend the consensus rule because it protects them against the whim of the most powerful and gives them the security (or at least the illusion) of a veto for all WTO decisions. Recall in this respect that developing nations do not always form a homogeneous group and often have contradictory interests. Hence, for them as well there is a risk inherent in majority voting even in an organization that consists of three-fourths developing countries.

150. See Daniel Bodansky, *The Legitimacy of International Governance*, 93 AM. J. INT'L L. 596 (1999); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005) (calling on commentators to think outside the democratic box and laying out a series of accountability models based on participation and delegation); Keohane & Nye, *supra* note 119.

151. See U.N. Charter, art. 18, ¶¶ 2, 3.

152. G.A. Res. 1995, U.N. GAOR, 19th Sess., Supp. No. 15, U.N. Doc. 1/5815 (Dec. 30, 1964).

153. See F.V. GARCIA-AMADOR, *THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT* 171 (1990).

ing countries themselves, whilst imposing strict obligations on the developed world and its economic operators active in developing countries. Hence, instead of working out a consensus at GATT, developing countries created the NIEO through the U.N. *without* the support of the developed world. Without any voice or support from those who, in economic and political terms, mattered most, they created a new regime hoping it would change the landscape of world trade.

Viewed through the lens of the law-and-politics paradigm, the effort was doomed to fail: low or no voice at all cannot possibly keep exit at bay. As a result, the NIEO never had any real impact, especially not on developed countries, and ultimately ended in utter failure.¹⁵⁴ With the benefit of hindsight, the consensus requirement in GATT that blocked the most extreme developing country demands may, therefore, have been the GATT's savior as well as the secret of its further success when compared to the stagnation, ineffectiveness, and political infighting often seen in those days at, for example, the U.N. General Assembly or, in the 1960s, UNCTAD. The harder *lawmaking* entailed by the consensus requirement was, indeed, a necessary feeding ground for the corresponding hardening of the GATT normative regime and the reduction in trade barriers and increase in welfare that came with it. In contrast, had developing countries been able to push ahead their NIEO demands within the GATT, without the support or voice of the major trading nations, the GATT would most likely have met the same fate as the NIEO: commercial irrelevance.

c. Hidden Benefits of the WTO Consensus Rule. Let it be clear, finally, what the WTO consensus rule stands for.¹⁵⁵ Consensus does not require the positive vote of each and every WTO member. In this sense, it differs from unanimity. A consensus decision implies a proposal that was not explicitly objected to by any WTO member present at the particular meeting.¹⁵⁶ It is much easier to reach than unanimity, if only because there is no need to get the explicit vote of all 150 members. Countries not affected by, or not interested in, the issue at hand can remain silent. Given the shadow of the future, members have an incentive to use their veto sparingly, that is, only for decisions vital to them. This makes consensus decisionmaking not completely

154. See Thomas Franck, *Lessons of the Failure of NIEO*, in CANADIAN COUNCIL ON INTERNATIONAL LAW, INTERNATIONAL LAW AND DEVELOPMENT: PROCEEDINGS OF THE FIFTEENTH ANNUAL CONFERENCE 82 (Brian Etherington et al. eds., 1986); Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566, 608 (1980) ("An international economic organization that does not reflect actual economic forces, in its operations as well as in its decision-making processes . . . has little promise as an active, effective agency."). The NIEO was a failure not the least because it meant that for decades many developing countries missed the opportunity to reform their political and economic systems, thereby depriving themselves of participation in the world economy.

155. See Mary E. Footer, *The Role of Consensus in GATT/WTO Decision-Making*, 17 NW J. INT'L L. & BUS. 653 (1996); Richard H. Steinberg, *In the Shadow of Law or Power: Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

156. See HOWSE, *supra* note 96.

unlike decisionmaking by an executive committee.¹⁵⁷ Crucially, the consensus rule also resembles weighted voting in that it gives more weight to politically and economically powerful players.¹⁵⁸ A consensus rule does not mean that every player has equal power.¹⁵⁹ It thereby has the positive attribute of weighted voting in that it reflects power realities and does not give disproportionate weight to small or non-affected countries.¹⁶⁰ This should go a long way in countering the criticism that consensus decisionmaking at the WTO gives too much power to *developing nations* who represent a small share in world trade but a three-fourths majority of the WTO membership. The criticism remains that under the consensus rule the *big players* have too much power. This risk is real but can be mitigated by repeat play and the shadow of the future. Evidence shows, for example, that recent developing-country participation in WTO General Council meetings has increased dramatically as compared to the early years of the WTO.¹⁶¹ Moreover, when it comes to actual decisionmaking, even a coalition of the most powerful WTO players can eventually be blocked by the veto of a single developing country. Although small countries will not be able to use their veto often, for those questions that are crucial to them the veto remains a viable option.

Finally, it must be recalled that the WTO treaty maintained a relic of decisionmaking from GATT 1947, namely the rule that if no consensus can be reached on an issue, the fallback is, unless otherwise provided, majority voting. Although this option has not been exercised in the first ten years of the WTO's existence, it may still play a role in the future. It would be sufficient for the *threat* of majority voting to become real. If so, consensus decisionmaking would operate in the shadow of a vote. This would facilitate consensus building and may strengthen the voice of weaker countries. It may be appropriate, in this respect, to distinguish between different types of

157. It avoids, however, the politically sensitive decision as to which countries sit on the committee, and has the benefit of having the flexibility of different "committees" depending on the issue.

158. See HIRSCHMAN, *supra* note 15, at 40 ("[V]oice is . . . conditioned on the influence and bargaining power customers and members can bring to bear [on] . . . the organizations to which they belong."); JACKSON, *supra* note 33, at 128.

159. See Steinberg, *supra* note 155, at 365 ("The GATT/WTO decision-making rules have allowed adherence to both the instrumental reality of asymmetrical power and the logic of appropriateness of sovereign equality.").

160. See Zamora, *supra* note 154. At the same time, the consensus rule avoids some of the major drawbacks of weighted voting: there is no need to agree *ex ante* on a list of votes by country, nor on the criteria that will be used to divide the votes. Within the informal structure of consensus decisionmaking, the major stakeholders, as well as their weight, can differ depending on the question and interests at hand.

161. To give an indication, when comparing country participation during the first nine General Council meetings (Jan. 1995–Dec. 1995) to that during nine more recent General Council meetings (Dec. 2002–Feb. 2004), both in terms of intervention frequency and number of words, developing-country participation has boomed. During the former period (1995), the first developing country in terms of intervention frequency was only ranked sixth (Argentina, 3.6%, compared to the E.C., ranked first, with 10.8%). During the latter period (2002–2004), interventions were spread far more equally, with the U.S. ranked first at 5.4%, E.C. and India second with 3.6% each, and Kenya sixth with 2.8%. (Data and statistics are on file with the author.)

WTO decisions. So-called housekeeping or internal WTO decisions—such as the appointment of a new WTO Director-General¹⁶²—could at times be taken by majority voting or at least in the shadow of majority voting. The same could be done for decisions that do not alter WTO rights and obligations, in particular authoritative interpretations which, on paper, need only a three-fourths majority. Such authoritative interpretations, even if taken only in the shadow of a vote, could facilitate legislative correction of unpalatable dispute rulings, i.e., offer an insurance policy for voice in the event dispute settlement goes wrong. This, in turn, could rectify one of the most important drawbacks of the current balance between high law or discipline and its efficient dispute process and high politics or participation with its requirement for consensus in the political process.¹⁶³

2. *Revert to a GATT-like, Diplomatic Dispute Settlement Process*

Instead of *strengthening* the political branch, for example through majority voting, a logical alternative to cure the current asymmetry between the WTO judicial and political branches is to *weaken* the judicial arm; in particular, to lower discipline or law under the DSU. The most vocal proponent of this solution is Claude Barfield of the American Enterprise Institute, a conservative think tank. When it comes to the asymmetry problem, Barfield's focus is not so much on the inefficient rulemaking process, but rather on the new, judicialized WTO dispute system. He sees the DSU as "politically unsustainable . . . because the imbalance between ineffective rule-making procedures and highly efficient judicial mechanisms will increasingly pressure the panels and the [Appellate Board] to 'create' law, raising intractable questions of democratic legitimacy."¹⁶⁴ To correct the asymmetry, which Barfield considers to be both an imbalance and a "constitutional flaw" (although earlier, I explained why it is rather a logical—although not necessarily optimal—equilibrium), he recommends alternatives that would reintroduce some of the former elements of "diplomatic" flexibility that characterized the earlier GATT regime. In Barfield's view, conciliation, mediation, and voluntary arbitration need to be added as real alternatives; in addition, if a substantial minority of WTO members clearly opposes a decision, a blocking mechanism should be used to set aside that decision until further negotiations produce a consensus.

By reintroducing the possibility for defendants, assisted by a minority of WTO members, to block the adoption of panel and Appellate Body reports,

162. See General Council, *Procedures for the Appointment of Directors-General* ¶ 20, U.N. Doc. WT/L/509 (Dec. 10, 2000) (stating that in the event no consensus can be reached by the deadline, "[m]embers should consider the possibility of recourse to a vote as a last resort by a procedure to be determined at that time").

163. See Ehlermann & Ehring, *supra* note 74, at 13. See generally, Eric J. Pan, *Authoritative Interpretations of Agreements: Developing More Responsive International Administrative Regimes*, 38 HARV. INT'L L. J. 503 (1997).

164. BARFIELD, *supra* note 17, at 7.

Barfield would obviously *increase* the options for WTO members to exit from their WTO obligations. Hence the situation of his proposal at *Point 2* in Chart 2 above (“*Veto in Dispute Process*”). Moreover, through the lens of the law-and-politics curve, less law or discipline (reintroduction of vetoes in the dispute process) would, indeed, *reduce* the need for politics and voice and ought to lead to a more efficient rulemaking process; once WTO Members experience that the law they create is softer, they are more likely to agree to the creation of new law. Hence, the political process of rulemaking is likely to become more efficient: softer law leads to softer law-making; less discipline requires less participation.

Granted, therefore, that less discipline or law may lead to a smoother decisionmaking process and facilitate legislative correction of the Appellate Body—Barfield’s main objective—the reform has one major flaw: it overlooks almost 100 years of trade history. This history, as recounted in Part I, tells us that through a process of trial and error, it was discovered that for the world trade system to be effective, in particular once it started addressing more elusive nontariff barriers, it had to be coupled with an independent and automatic enforcement mechanism. Softer forms of mediation or consultations alone would not do. In other words, for the political consensus to stick and, in particular, for trade liberalization to materialize in the face of domestic pressures for protectionism, the rules of the game had to be backed up by a strong legal-normative system. Similar to proposals for a wholesale reintroduction of representative politics in the world trade system¹⁶⁵ (depicted at *Point 3* in Chart 2 above, “*Representative Politics*”), reintroducing vetoes in the dispute process overlooks the need for precommitment and discipline to tame the protectionist excesses of representative politics.¹⁶⁶ Without such hand-tying, the WTO would soon be ineffective and fail to fulfill its crucially important mandate of welfare-enhancing trade liberalization.¹⁶⁷ Hence the situation, in Chart 2 above, of both the proposal for a veto in the dispute process (*Point 2*) and a wholesale reintroduction of representative politics (*Point 3*) to the *left* of the law-and-politics curve with the risk of an “ineffective” regime or *loyalty without efficiency*. Over time, both *Points 2* and *3* would be drawn back to the equilibrium of the diagonal curve, yet, at the bottom of that curve, slightly above GATT 47, as a political veto in the dispute process would inevitably lead to lower levels of actual integration.

The experience of the Great Depression and World War II prompted GATT negotiators to go beyond the lofty rhetoric of political declarations and to agree to more specific, legally binding commitments in 1947. The

165. See sources cited *supra* note 127 and, to a lesser degree, Howse, *supra* note 26.

166. See *supra* note 11.

167. See George W. Downs et al., *Is the Good News about Compliance Good News About Cooperation?*, 50 INT’L ORG. 379, 395–97 (noting that “deeper” international cooperation that requires more extensive changes to domestic laws and practices requires a strong monitoring and enforcement mechanism).

forty-seven years of operation of GATT have one recurring theme: the gradual independence of the dispute resolution mechanism spurred by the realization that without strong normative pull trade liberalization will not materialize. This was painfully experienced, in particular, in the 1960s and 1970s, when many GATT rules were simply put aside and the entire trade system almost collapsed. The need for a strong enforcement mechanism was again felt in the years leading to the Uruguay Round, when a combination of exit pressures—ranging from the blocking of panel reports to the conclusion of regional trade deals and U.S. unilateralism—seriously undermined the world trade system.¹⁶⁸ Indeed, it was exactly the type of mechanism that Barfield now proposes—the possibility for countries to block dispute settlement—that triggered U.S. unilateralism and necessitated the DSU reforms, including the setting aside of vetoes. Without those DSU reforms, the United States, in particular, would not have signed off on the WTO treaty.¹⁶⁹

Whilst reintroducing political vetoes in the dispute process would, therefore, be “a regression towards some of the very important problems in the GATT era”¹⁷⁰ and risk an ineffective world trade regime, a better solution to alleviate Barfield-type fears—fears that the WTO judiciary acts *ultra vires*—consists of two steps. First, we must value the need for, and legitimizing

168. Although the GATT dispute process *with vetoes* worked reasonably well (according to Robert Hudec, for example, eighty percent of all GATT cases were resolved in a satisfactory manner, see HUDEC, *EVOLUTION*, *supra* note 64; Robert Hudec et al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948–1989*, 2 MINN. J. GLOBAL TRADE 1, 32–34 (1993)), this success is relative and not guaranteed in the context of the WTO. First, it is relative because the GATT figures do not include those disputes that members never bothered to raise formally because they knew that the process would be blocked. Second, and more importantly, the relative success of the GATT system with vetoes is unlikely to transpose to the much broader and deeper commitments made in the new WTO treaty. WTO commitments go well beyond tariff questions and impose disciplines in far more sensitive areas (such as health, safety, services trade, and intellectual property protection). When faced with complaints in those fields, WTO members would be much more inclined to use their vetoes, thereby risking the paralysis of the entire process. This was apparent already in the late 1980s and early 1990s when, according to Hudec’s own statistics, forty percent of disputes were blocked, especially those involving nontariff barriers (such as the Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, U.N. Doc. WT/DS26/AB/R (Jan. 16, 1998)), reaching the point of undermining the entire dispute process. Hence, in the context of the WTO, a system with vetoes is most likely to be far less successful than it has been under GATT. In 2002, Hudec himself rejected Barfield’s proposal to allow a substantial minority to block any legal ruling: “I feel certain that governments would never be able to employ such a blocking power objectively. It would become a political filter for all legal rulings, pure and simple. . . . [I]t would probably leave the WTO legal system in the unflattering position of the spider’s web that catches only middle-sized flies.” Hudec, *supra* note 1, at 222.

169. It is, therefore, no small irony that it is exactly the United States that recently espoused Barfield-type reforms. Faced with a number of losses in WTO dispute settlement, the United States proposed to permit the *partial* adoption of dispute rulings by the DSB, in case the parties disagree with a particular finding. See *Negotiations on Improvements and Clarifications of the DSU on Improving Flexibility and Member Control in WTO Dispute Settlement, Contribution by Chile and the United States*, U.N. Doc. TN/DSW/28 (Dec. 23 2002). In the process, much like Barfield himself, the United States seems to have forgotten about the original reasons why it pushed so hard for DSU automaticity in the first place: foot-dragging and blocking by the E.C. and other GATT parties, threatening support for trade liberalization at home.

170. SUTHERLAND REPORT, *supra* note 18, at 56.

factor of, a rigorous, rules-based judiciary at the international level as much as we do domestically, and forget the illusion that decisionmaking by representative democracy is inherently and always better than by judiciary.¹⁷¹ That is what separation of powers or checks and balances is all about. The judiciary needs political control as much as politics needs judicial implementation and oversight. Or do we want, or even trust, for example, the U.S. Congress to decide each and every civil dispute or murder trial?¹⁷²

Second, we need to think creatively about legislative checks and balances on the WTO judiciary other than the nuclear option of vetoes in the dispute process.¹⁷³ The DSU itself includes a powerful warning against judicial activism: It explicitly prohibits panels and the Appellate Body to “add to or diminish the rights and obligations” of WTO members.¹⁷⁴ Another form of political checks and balances is the control, or at least the sense of control, given to disputing parties over who will serve on a panel and the Appellate Body.¹⁷⁵ In most cases, panel members are appointed with the agreement of both parties.¹⁷⁶ Appellate Body members, in turn, can only be appointed, and after four years need to be reappointed, by consensus of all WTO Members.¹⁷⁷ This control must be maintained.¹⁷⁸ Also during

171. See *supra* note 11 (discussing the need to restrict discretionary powers of governments because of the so-called time consistency problem).

172. Equally, the possibility of (a minority of) individual WTO members blocking the dispute process would seriously taint the objectivity and legal quality of dispute rulings. As happened in the GATT days, when panels operated in the shadow of a veto, WTO panels would again have to take up a political role and craft their decisions in such a way that they would pass muster with the required majority of WTO members. The adoption process, as well, would inevitably lead to power games and nasty political infighting, bargaining, and trade-offs (of the sort, “I support blocking your ruling if you support blocking mine”). This combination of factors would bring into question the foundations of the WTO normative structure (“why should I comply with a ruling if you refuse to do so?”) and with it the effectiveness and legitimacy of the world trade regime itself.

173. See Tom Ginsburg, Abstract, INTERNATIONAL JUDICIAL LAWMAKING, (Illinois Law and Economics, Working Paper No. LE05-006, 2005), available at <http://ssrn.com/abstract=693861> (“While formal mechanisms to over-rule international judges are relatively difficult to exercise, states have at their disposal various informal mechanisms to communicate their views to judges.”).

174. DSU, *supra* note 4, art. 3.2, 19.2.

175. The importance of this control is confirmed, for example, in Andy Stoler, *The WTO Dispute Settlement Process: Did We Get What Negotiators Wanted?* (May 2003) (unpublished manuscript, presented at the Dartmouth-Tuck Forum on International Trade and Business, *Managing Global Trade: The WTO—Trade Remedies and Dispute Settlement*), available at http://mba.tuck.dartmouth.edu/cib/news/df_2003_pdf/Stoler.pdf (last visited Aug. 2, 2005).

176. DSU, *supra* note 4, art. 8.9 provides, however, that in the absence of agreement between the parties who will serve on a panel, either party can request the WTO Director-General to appoint the panelists.

177. See *id.* arts. 2.4, 17.2.

178. Equally important as a political check are the de facto reservation of U.S., E.C., and Japanese seats on the Appellate Body with the other four seats rotating on a geographical basis and the practice that even nationals of a disputing party can sit on an Appellate Body division. For a controversial defense of what is somewhat misleadingly referred to as “dependent” judiciaries over “independent” ones (dependency being defined “in the sense that the judges are appointed by the state parties for the purpose of resolving a particular dispute”), see Eric A. Posner & John C. Yoo, *A Theory of International Adjudication*, 93 CAL. L. REV. 1, 3 (2005).

dispute proceedings, common judicial techniques can accommodate and respond to political sensitivities such as open hearings and increased transparency, deference, judicial minimalism, putting the burden of proving an obligation on the complainant, and even declaring a *non liquet*.¹⁷⁹ In addition, the political control that the DSB currently exercises over dispute settlement ought not be underestimated. As the umbilical cord between the political and judicial branch, it is a crucial interface and forum of contestation or voice to which both panels and the Appellate Body are most receptive. The outcry in the DSB against the Appellate Body's acceptance of amicus curiae briefs in the *E.C.—Asbestos* dispute offers a good example.¹⁸⁰ Ever since, the Appellate Body has not drawn information from such briefs even if they were formally accepted, and a number of panels even refused outright to accept amicus briefs.¹⁸¹ This confirms a broader avenue for political control, or at least political responsiveness, in that courts, including in particular the WTO Appellate Body, have clear incentives to act with restraint, cognizant of their political context and perceived legitimacy. To garnish legitimacy and ensure implementation of their rulings—after all, the ultimate test of their power—Appellate Body members are “eager to avoid adverse political responses by WTO member states.”¹⁸² More than formal controls, it is those considerations of legitimacy and effectiveness that over time will keep the WTO judiciary in check with the WTO political branch.

Finally, as pointed out earlier, authoritative interpretations correcting dispute rulings remain a possibility for formal legislative correction and, at least on the books, require a mere three-fourths majority. As elaborated below, resisting the temptation of ever more legalization, including the temptation of judicial activism and a strict rule of precedent, and maintaining crucial exit options such as meaningful escape clauses and relatively weak remedies would take some steam off the judicial branch. This, in turn, should facilitate political consensus building and legislative correction, and could even make three-fourths majority interpretations digestible. Equally, more participation and contestation in WTO affairs as suggested below, that

179. See Bartels, *supra* note 113; William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 J. INT'L ECON. L. 79 (2001); Jeffrey Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 756 (1999); J. Patrick Kelly, *Judicial Activism at the WTO: Developing Principles of Self-Restraint*, 22 NW. J. INT'L L. & BUS. 353 (2002); see also Hudec, *supra* note 1, at 215, 219 (“Courts do have legal tools that permit them to deflect pressures to legislate . . . [T]he best option at the present time would be to continue dealing with the problem cases as they come, under the present DSU rules, subject to whatever technical improvements governments may agree to.”). See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

180. General Council, *Minutes of Meeting*, U.N. Doc. WT/GC/60 (Nov. 22, 2000).

181. See, e.g., Panel Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, at 71 n.75, U.N. Doc. WT/DS257/R (Feb. 17, 2004); Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, at 88 n.75, U.N. Doc. WT/DS277/R (Apr. 26 2005).

182. James McCall Smith, *WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings*, 2 WORLD TRADE REV. 64, 75 (2003); see also Steinberg, *supra* note 19.

is more politics, should help avoid overreaching by the Appellate Body and lay a broader basis of support for its rulings.

3. Further Legalize/Depoliticize the WTO

A third group of commentators focuses its attention on further improving the legal-normative branch of the WTO (see Chart 2 above, *Point 4: "More Legalization/Depoliticization"*). Ernst-Ulrich Petersmann, for example, is a strong advocate of further constitutionalization of the WTO. He construes WTO rights and obligations as individual human rights and at the domestic level would give direct effect to those rights before domestic courts.¹⁸³ In various ways and degrees, Cottier (direct effect of WTO rules before domestic courts),¹⁸⁴ Weiler (ending the diplomatic remnants of dispute settlement in favor of a more openly legalized approach),¹⁸⁵ Ragosta (standing for private parties under the DSU),¹⁸⁶ Bhala (calling for a *de jure* rule of precedent),¹⁸⁷ and Horlick and Mavroidis (tougher remedies)¹⁸⁸ have also advocated a further thickening of the WTO legal system. Authors expressing support for judicial activism or constitutionalization through Appellate Body rulings fall under the same category.¹⁸⁹ In a more sweeping theory, McGinnis and Movsesian endorse WTO adjudicative power but warn against any attempt to draw the WTO into the politics of nontrade concerns.¹⁹⁰ In their view, depoliticization or separation of trade law from domestic and international politics is not so much a problem. Rather it is the very purpose of the WTO and a prerequisite to economic liberalization.

a. The Risks and Illusions of Further Legalization. How would this harder law approach—if implemented in isolation—play out under the law-

183. See, e.g., PETERSMANN, *supra* note 14; Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002).

184. Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. 83 (1998).

185. J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191 (2001).

186. Ragosta, *supra* note 20.

187. Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873 (2001).

188. Gary N. Horlick, *Problems With the Compliance Structure of the WTO Dispute Resolution Process*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 636 (Daniel Kennedy & James Southwick eds., 2002); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763 (2000).

189. See Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39 (2001); Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 EUR. J. INT'L L. 307 (2004) (calling for the Appellate Body to review the validity of international standards enacted by other organizations to stimulate much-needed reform in those organizations).

190. McGinnis & Movsesian, *supra* note 10.

and-politics curve? To begin with, further legalization would only worsen the current asymmetry between the judicial and the political branch. Judicial activism by the Appellate Body, in particular, risks lawmaking with almost no voice, participation, or guidance from WTO members. Under the law-and-politics curve, in a politically sensitive organization like the WTO, such activism, although it may trigger short-term liberalization and predictability gains, would not be sustainable: more discipline or law requires more, not less, participation and politics.¹⁹¹ Indeed, if a choice had to be made between judicial lawmaking and voting by qualified majority—the softer lawmaking proposal discussed earlier—the latter may well be the least of two evils. This was exactly one of the reasons used to sell majority voting in the E.C., in the wake of judicial activism by the ECJ.¹⁹² Conversely, knowing that legalization or increased discipline unequivocally calls for more politics and expression of voice or participation, the harder law solution would only worsen, not resolve, the current deadlock in the political, rulemaking process: countries would insist even more on their veto rights. Moreover, since harder law or more discipline cannot be sustained without more political support or more politics, it is highly questionable, as things stand today, that sufficient political support—be it at the state or broader societal level—is available to make such further legalization digestible.¹⁹³ In this context, further legalizing the WTO is, in the medium to long term, unlikely to offer tangible gains in trade liberalization.¹⁹⁴ It risks rather serious pressure on the exit side: even under increased legalization, WTO members, especially the most powerful ones, could walk away from their obligations. This, in turn, may undermine, rather than strengthen, the legitimacy and effectiveness of the trade regime. Hence the situation of this proposal in Chart 2 above at *Point 4* (“*More Legalization/Depoliticization*”), deviating to the *right* of the law-and-politics curve with the risk of an “unsupported” regime or *efficiency without loyalty*. As with the other reform proposals, the expected

191. Given the consensus rule, and the need to keep it for the time being, the WTO judiciary cannot afford to be as activist as, for example, the ECJ. The ECJ could, for instance, extend the list of Article 30 E.C. Treaty exceptions (similar to GATT Article XX) as well as more easily strike down member state measures since it knew that E.C. member states acting jointly could respond and enact secondary legislation such as an E.C.-wide environmental regulation that no longer restricts intra-Community trade but takes account of the concern originally expressed in the condemned member state measure. The WTO does not have similar legislative powers.

192. See Koen Lenaerts, *Some Thoughts about the Interaction Between Judges and Politicians*, 1992 U. CHI. LEGAL F. 93, 111 (1992); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 633 (1999).

193. See Goldstein et al., *supra* note 2, at 391 (referring to “misguided attempts to construct a stable order on the basis of fragile norms rather than realities of power politics”); see also Laurence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

194. See Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 603 (2000); Joost Pauwelyn, *The Limits of Litigation: Americanization and Negotiation in the Settlement of WTO Disputes*, 19 OHIO ST. J. ON DISP. RESOL. 121 (2003); Amelia Porges, *Settling WTO Disputes: What Do Litigation Models Tell Us?* 19 OHIO ST. J. ON DISP. RESOL. 141 (2003).

equilibrium would soon be reestablished, yet, at a much lower level of integration along the diagonal curve, somewhere between GATT 47 and WTO 94.

In each stage of the transformation of the world trade system, the maintenance of, or even selective increase in, exit options was an absolute precondition for reaching consensus and concluding new agreements. As pointed out, without broad exceptions and multiple escape clauses such as safeguards, tariff renegotiations, waivers, and weak remedies, the original GATT could not have been concluded. Equally, the Tokyo Round agreements would not have been finalized but for certain exit options; in particular, the *à la carte* nature of the Tokyo Round Codes on nontariff barriers and the exclusion of GATT developing countries from both new and existing GATT disciplines through, for example, the Enabling Clause.¹⁹⁵ The successful conclusion of the Uruguay Round, as well, required the confirmation of certain exit options. Notwithstanding the general thickening of the WTO legal structure, GATT's original safety valves were maintained, some were even expanded,¹⁹⁶ and most of them were also transposed to new WTO agreements on trade in goods, GATS, and TRIPS.¹⁹⁷ Moreover, the remedies to counter violations under the streamlined DSU remained as weak as those in GATT Article XXIII: no reparation for past damage is awarded, compensation for ongoing harm is still subject to agreement between the parties, and a reciprocal suspension of concessions—which, after all, is just another form of exit—remains the measure of last resort. On the contrary, in at least one respect, WTO remedies were actually *weakened*: the DSU reduced the scope for retaliation from suspension as determined “to be appropriate in the circumstances”¹⁹⁸ to suspension “equivalent to the level of the nullification or impairment” caused by the original violation.¹⁹⁹

195. See *supra* note 73.

196. Reservations to renegotiate tariff concessions pursuant to GATT Article XXVIII:5 (i.e., outside the three year interval and without authorization) *increased* as GATT evolved into the WTO. For the period between 1994 and 1996, more such reservations (thirty-seven in total) were made than in any other period (compare to four in the period 1958–1960). See ANWARUL HODA, TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO: PROCEDURES AND PRACTICES 89 (2001).

197. See the broad substantive exceptions in, for example, GATS, *supra* note 7, art. XIV, TRIPS, *supra* note 7, art. 13, and TBT, *supra* note 7, art. 2.2. Based on GATT art. XXVIII (tariff renegotiations), GATS permits members to renegotiate GATS specific commitments. GATS, *supra* note 7, art. XXI. GATS also calls for the consideration of a safeguards mechanism for trade in services, GATS, *supra* note 7, art. X, but none has been introduced yet. As it stands, however, GATS already includes a series of built-in safeguards (e.g. unlike GATT art. III, there is no general obligation under GATS to provide national treatment; according to GATS art. XVII, this obligation is only triggered to the extent a member has made a specific commitment). Finally, waivers under art. IX of the WTO Charter apply across all WTO agreements including GATS and TRIPS.

198. GATT, *supra* note 5, art. XXIII:2.

199. DSU, *supra* note 4, art. 22.4. While the old GATT rule left open, at least in theory, the possibility for punitive sanctions, the new DSU provision limits suspension to equivalence to the harm caused. See also WTO Agreement, *supra* note 3, Prohibited Subsidies, art. 4.10 n.9, 1869 U.N.T.S. 17 (permitting “appropriate countermeasures” but clarifying that “[t]his expression is not

Given the uncertainties of the future, both political and economic, negotiators *needed* these exit options as safety valves.²⁰⁰ Rather than birth defects that must be cured as soon as possible through ever more legalization, my claim is that those exit options were, and remain, crucial preconditions for trade deals to stick. Without them, the breadth and depth of substantive WTO commitments would not have materialized. Similarly, weak remedies were a crucial precondition for the otherwise strengthened WTO dispute process. Knowing that they could no longer block dispute rulings, WTO members were eager to limit the remedies or sanctions that would follow any WTO condemnation.²⁰¹ To drastically reduce or eliminate those exit options, that is, to further legalize the WTO—*without* countervailing increases in participation, loyalty, and support for the WTO project—risks undermining the substantive commitment both to the WTO and to the DSU in particular.

b. The Risks and Illusions of Depoliticization. Like further legalization, calls to transform WTO rules into immutable human rights or, more generally, to keep WTO affairs extracted from politics and nontrade concerns, would increase levels of discipline and precommitment. In addition, such calls would also move the system away from, rather than closer to, participation, democratic accountability, and contestation. Hence their depiction in Chart 2 above at *Point 4*. McGinnis and Mosvesian,²⁰² for example, argue that the WTO must limit itself to antidiscrimination principles and avoid dealing with nontrade concerns such as health or environmental protection, human rights or poverty. In their view, liberal trade, and hence the WTO, is inherently in the interest of the majority; it reinforces democracy by neutralizing protectionist interest groups at home. International efforts to address nontrade concerns, in contrast, must be avoided. They are necessarily captured by special interest groups aimed at skewing a decision in their favor, against majority welfare.²⁰³

meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited”).

200. See sources cited *supra* note 57; see also RICHARD B. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* 219–221 (1981) (referring to exit options in treaties as “Risk-Management Techniques”); B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 *INT’L ORG.* 829, 831 (2001).

201. Along the same lines, the United States, for the first time since the creation of GATT in 1947, made it explicit that WTO rules could not have direct effect before domestic U.S. courts. See Uruguay Round Agreements Act, 19 U.S.C. § 3512 (1994). A similar provision is provided in E.C. implementing legislation. See Case C-149/96, *Portuguese Republic v. Council*, 1999 E.C.R. I-8395. Before 1995, the question of the effect of GATT in domestic U.S. law remained unresolved. See Ronald Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 *STAN. J. INT’L L.* 479, 507 (1990).

202. See McGinnis & Movsesian, *supra* note 10.

203. *Id.* at 557 (rejecting international regulation other than the WTO’s antidiscrimination model since “concentrated interest groups . . . will be able to exercise substantial influence to bring about policies that serve their interests, rather than the public interest”); John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 *HARV. INT’L L.J.* 353, 355 (2004) (arguing that such “[r]egulatory bargains . . . are not as likely to be efficient in terms of nations’ true

This theory obscures that the WTO is as much about protectionism as it is about free trade. As one commentator observed, “[g]lobal economic rules are not written by Platonic rulers, or their present-day pretenders, academic economists. If WTO agreements were truly about ‘free trade,’ as their opponents like to point out, a single sentence would suffice: ‘There shall be free trade.’”²⁰⁴ The reality is that there is as much politics at the WTO, with special interest groups clamoring for favors, as there is in domestic parliaments. Protectionist agreements such as those concerning agriculture, textiles, or antidumping, and agreements that favor one group of countries over another, such as TRIPS,²⁰⁵ illustrate that the WTO does not necessarily lead to free trade in favor of the majority, but represents a political deal brokered in the context of power and special interests. There is nothing inherently wrong about this, and even if so, little we can do about it. Nevertheless, to limit this political bargaining game at the WTO to producer/exporter interest groups, as McGinnis and Mosvesian suggest, on the ground that they are a proxy of majority welfare is effectively elevating one set of special interests above all others.²⁰⁶ Equally, to isolate the WTO from nontrade concerns—which, in any event, is necessarily a fiction²⁰⁷—puts one societal concern above all others.

To this date, the world trade system remains focused primarily on non-discrimination as opposed to economic efficiency and the protection of producer as opposed to consumer welfare.²⁰⁸ No matter how inefficient a regulation or trade policy is, or thus irrespective of consumer welfare, GATT permits it as long as it is (inefficiently) applied across the board to everyone, including foreign traders. From this perspective, the system neither avoids harmful cross-border externalities nor does it inherently protect domestic consumers. Both in the rules and exceptions that it sets up, such as equal competitive opportunities rather than efficient regulation, and major carve-outs for textiles and agriculture, as well as the escape clauses it provides for, which are triggered each time by injury to domestic producers (not harm to

preferences [They] are more likely to represent ‘amoral’ wealth transfers among different groups of citizens.”)

204. Dani Rodrik, *Feasible Globalizations* 19 (Nat'l Bureau of Econ. Research, Working Paper No. 9129, 2002), available at <http://papers.nber.org/papers/w9129.pdf>.

205. See Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 320–24 (2004) (explaining differential effect of TRIPS on superpowers versus developing countries).

206. See, e.g., Benvenisti, *supra* note 36; Keohane & Nye, *supra* note 119; Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 HARV. J. ON LEGIS. 1, 8 (2004).

207. To exclude nontrade concerns from the WTO debate is a fiction. Even antidiscrimination principles require decisions on nontrade questions (e.g., to decide whether two products are alike or whether a discrimination can be justified, for example, by health concerns). See Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401, 404–07 (2000). In the end, therefore, McGinnis and Mosvesian's theory will either lead to very minimal liberalization (since it would discipline only discrimination that does not involve nontrade concerns) or lead to lopsided outcomes where trade always trumps other preferences.

208. See sources cited *supra* note 35.

consumers), the system was created and continues to operate at the behest of producers. It is wed as much to liberal trade as protecting existing producers. Instead of inherently protecting the majority, the trade system, thereby, risks elevating special, that is, producer, interests above consumer concerns and beyond the control of domestic politics.²⁰⁹ It imposes a double standard to arbitrarily bind governments to any WTO rule because it is supposed to increase economic welfare, which in many cases is not true, and to reject international law in nontrade fields because it must be tainted by special interests. Both processes are intensely political and both need more, rather than less, participation, accountability, and contestation. Equally, both need safeguards against abuse by special interest groups and to ensure fair treatment of weaker countries.

The risk of exploitation by special interests at the WTO is further increased by a general lack of domestic control, especially by national parliaments, over a country's trade policy.²¹⁰ Moreover, once member-states conclude a WTO agreement—unlike domestic law, including domestic constitutions—any one particular WTO member cannot change the agreement, even by special or supermajority of its population. This immutability of treaties is, of course, all the more worrying in the context of an international regime, like the WTO, where its rules and decisions matter and have real consequences.²¹¹ As a result, rather than increasing discipline and precommitment, giving us more law, or depoliticizing the WTO, giving us less politics, the trade regime requires certain exit options such as escape clauses and flexible remedies and needs more, not less, space for politics, participation, and contestation. This includes more control by domestic politics, democratic safety valves, and counterweight of international agreements on nontrade concerns. If the WTO is to survive as a legitimate institution that effectively liberalizes trade it will need the direct support of consumers and citizens. Until now, export-driven, producer interests with allegedly only majority interests in mind have dominated the agenda at the WTO, effectively

209. See Benvenisti, *supra* note 36.

210. See Ernst-Ulrich Petersmann, *Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO*, 7 J. INT'L ECON. L. 585, 589 (2004); Thomas, *supra* note 206, at 25.

211. Robert Howse, *How to Begin to Think About the 'Democratic Deficit' at the WTO*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS 79, 94 (Stefan Griller ed., Eur. Cmty. Stud. Assoc. Aus. Publ'n Series Vol. 5, 2003) ("[T]hese costs of and constraints on reversibility, combined with the impact of new era trade rules in freezing or limiting regulatory choices in many policy areas . . . constitute the most troubling aspect of the WTO's 'democratic deficit'."). This combination of factors led Weiler and Motoc to the following conclusion: "You take the obedience claim of International Law and couple it with the conflation of government and State which International Law posits and you get nothing more than a monstrous empowerment of the executive branch at the expense of other political estates." J.H.H. Weiler & Iulia Motoc, *Taking Democracy Seriously: The Normative Challenges to the International Legal System*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS 47, 67 (Stefan Griller ed., Eur. Cmty. Stud. Assoc. Aus. Publ'n Series Vol. 5, 2003); see also Armin von Bogdandy, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of Its Proceduralization*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS 103, 107 (Stefan Griller ed., Eur. Cmty. Stud. Assoc. Aus. Publ'n Series Vol. 5, 2003).

isolating the issues from a broader political debate; this will no longer suffice.

B. A Better Framework for Reform

The core message of the previous Section is that current proposals for WTO reform are focused exclusively on either the politics pole, such as getting rid of the consensus rule, or the law pole, such as reverting to old GATT practices or, in contrast, further legalization/depoliticization. Conventional suggestions for reform do not take sufficient account of the interaction *between* law and politics: in particular, the fact that any change on one side calls for a reaction on the other. This law-and-politics, exit-and-voice balance is in constant flux and under constant threat. A minute alteration on one side can change the balance the way pulling out one brick at one end of a building can cause major cracks on the other end, and even the demise of the entire construction. A better framework for reform realizes the fluid equilibrium between law and politics, discipline and participation, and the bidirectional relationship that brings it about. Although my line of reasoning could stop here, and a variety of equilibria between the two poles are possible,²¹² the final Section of this Article does venture into a particular set of reforms that would, in my view, improve the legitimacy and effectiveness of the world trade system.

To remedy the WTO's problems—lack of input *and* output legitimacy—my claim is that the WTO needs more, not less, politics and participation of individual members and nonstate actors; and more, not less, control by domestic politics and consideration of nontrade concerns. Moreover, it must maintain, not eliminate, the possibility for exit especially when supported by consumer welfare or democratic decision. Depicted in Chart 2 above, my reform package is therefore situated at *Point 5* (“*Suggested Reform*”): significantly more participation and politics and slightly less discipline or law as compared to the present system.

Importantly, when implemented with care, the increase in politics and participation ought not deadlock the political process; nor should maintaining certain exit options undermine the WTO's normative structure. On the contrary, the mere availability of certain exit options, such as safeguards or temporary compensation/suspension in the event of violation, should facilitate reaching a political consensus and thus make rulemaking more efficient. Equally, stronger outlets for voice and participation—more politics and hence more support for WTO rules—should increase the legitimacy of the trade system, strengthen the support for and effectiveness of the DSU, and eventually reduce pressure on the exit option. Coming full circle, this reduced pressure to exit because of higher levels of support would mean that

212. Examining a very specific reform proposal in isolation, one could, for example, impose stricter remedies in the DSU; that is, further *reduce* exit, but make it possible—or, reestablish the equilibrium—by offering *more* voice or participation through public panel meetings and/or *increasing* exit elsewhere through explicitly denying direct effect of WTO law in domestic courts.

the flexibility or exit options built into the system would be used only in exceptional circumstances.²¹³ They would, in other words, strengthen, not undermine, the credibility of the WTO.

1. *More Politics, Participation, and Contestation*

Rather than *decrease* politics and participation—as some have suggested, for example, by getting rid of the WTO consensus rule or depoliticizing WTO affairs—I suggest broadening the space for political debate and contestation. For the world trade system to be legitimate and sustainable, especially with a strong normative structure, more, not less, politics are needed.²¹⁴ In large part because of its foundational mechanics to overcome protectionism by insulating export-interests from domestic politics, the world trade system remains too technocratic and too isolated from popular support. To increase participation and support, the consensus rule must be maintained²¹⁵ but the participation of individual WTO members as well as nonstate actors increased. The role consensus plays in the internal and external legitimacy of the world trade system largely compensates for the delay and *lourdeur* in WTO decisionmaking, as well as for the sometimes limited outcome in trade negotiations.²¹⁶ The so-called bicycle club of trade must be disbanded. It takes exporters and producers as the core constituency of the system and assumes that, to keep their support, the world trade system requires ever more liberalization; otherwise, the bicycle will fall over. To survive as a legitimate organization, the WTO must extend its base to include consumers and citizens. It must, in other words, play out its strongest card: that genuine free trade benefits the masses, not the few. Now that those majority groups are increasingly better organized, be it in the political process or through NGOs, their voices must be heard directly. The

213. Another example of this is the increase, with the creation of the WTO, in reservations to renegotiate tariff concessions pursuant to GATT art. XXVIII:5. See *supra* note 196. This increase in reservations or potential exit options, however, did not result in more actual renegotiations taking place. On the contrary, during the period 1995–1999, the lowest number of tariff renegotiations actually took place (eight as opposed to, for example, fifty-six between 1980 and 1999). HODA, *supra* note 196, at 88, 107. This shows that the mere existence of exit options can be enough and need not necessarily lead to more instances of actual exit.

214. See Thomas Cottier, *Limits to International Trade: The Constitutional Challenge*, 2000 AM. SOC'Y INT'L L. PROC. 220, 221; Howse, *supra* note 26; Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227, 248–49 (Roger B. Porter et al. eds., 2001); David Kennedy, *The Forgotten Politics of International Governance*, 2001 EUR. HUM. RTS. L. REV. 117, 124; von Bogdandy, *supra* note 19.

215. In support of the consensus rule, see *supra* Section II.A.1.

216. In terms of the trilemma introduced by Dani Rodrik—deep economic integration versus nation state versus democratic politics—limited economic integration or results in trade negotiations because of the consensus rule may well be the price to pay for placating concerns of state sovereignty and democracy. Rodrik, *supra* note 204, at 13–18; see also Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167, 168 (2001); Jeffrey L. Dunoff, *Mission Impossible: Resolving the WTO's Trilemma 8* (unpublished manuscript, on file with the author).

proxy of exporters/producers allegedly representing majority interests is no longer needed and can, in any event, no longer suffice.

In practical terms, political reinforcement and higher levels of contestation could be achieved through more active and frequent participation of senior policymakers in Geneva-based discussions,²¹⁷ obliging countries that plan to block a broad consensus to explain in writing why the matter is one of vital interest to them²¹⁸ and implementing the currently dead letter rule that when consensus cannot be reached at a particular meeting, the matter must be transferred to the WTO's General Council, thereby exposing contentious issues to a more visible and political debate.²¹⁹ Other ways to ensure participation and contestation in WTO decisionmaking include more transparency in the process itself, such as public meetings, readily available and readable documents and position papers, and openness in the formation and membership of smaller informal groups that meet even before an issue is put on the WTO table.²²⁰ When it comes to developing countries, regional and issue groupings can strengthen their voice or participation, as is increasingly the case through, for example, the African Group; the Group of 20, mainly large developing countries; and the Group of 90, a broader cross-section of developing countries including in particular the poorest ones.²²¹ In addition, more attention to developing countries as well as technical assistance from the rich world is needed to ensure that the poorest countries are at least represented at WTO meetings that affect them, and to clearly define what the interests of a given developing country are in a specific trade matter. Too often it is not so much that developing country interests are not sufficiently *defended*; it is that they are not sufficiently *defined*.

Increased voice or participation by nonstate actors, such as NGOs, small businesses, the rural poor, and citizens at large, ought not focus so much on having a seat or microphone in WTO meetings (as useful as this may be),²²² nor does it require any explicit approval by WTO members. Given that the WTO matters and carries consequences, and exit from it has been signifi-

217. See SUTHERLAND REPORT, *supra* note 18, at 70.

218. *Id.* at 64.

219. See Rule 33 of the respective Rules of Procedure of the subordinate Councils, Committees, and other bodies of the WTO, referred to in Ehlermann & Ehling, *supra* note 74, at 52.

220. See MARKUS KRAJEWSKI, FROM GREEN ROOM TO GLASS ROOM—PARTICIPATION OF DEVELOPING COUNTRIES AND INTERNAL TRANSPARENCY IN THE WTO DECISION-MAKING PROCESS 6–11 (2000); Jeffrey J. Schott & Jayashree Watal, *Decision Making in the WTO*, in THE WTO AFTER SEATTLE 283, 285–89 (Jeffrey J. Schott ed., 2000).

221. Such groupings or coalitions need not be permanent and may, given the heterogeneous nature of the vast number of developing countries, depend on a particular issue. The changing coalitions that can be formed within the informal consensus process offer a distinct advantage over weighted voting, in which coalitions are fixed for all questions based on, for example, regional geography.

222. See, e.g., Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123, 131 (1998); Gabrielle Marceau & Peter N. Pedersen, *Is the WTO Open and Transparent?*, 33 J. WORLD TRADE 5, 44–45 (1999).

cantly reduced, state and nonstate actors alike *are* using the voice mechanism and injecting politics in the debates, whether the WTO as an organization or its individual members like it or not. Voice is activated, for example, when citizens protest at WTO Ministerial Meetings, when NGOs issue reports or give interviews criticizing the TRIPS agreement or export subsidies in the rich world, or when business associations bash the latest WTO panel report.²²³ In other words, nonstate actors can and do influence the WTO political process even without a formal say or vote in WTO decisionmaking. In fact, rather than NGOs and citizens needing the help or blessing of the WTO, for example through formal permission to attend WTO meetings, it is the WTO that needs the input and support of NGOs and citizens to implement and legitimize its activities.²²⁴ Crucially, the sounding board of NGOs is not limited to, or even most important in, Geneva. Although NGOs have an important lobbying and information role to play at the WTO itself, adding social and expert legitimacy to the organization, their activity is even more crucial at the grass-roots level. They constitute a direct, transnational interface or voice mechanism through which citizens and consumers can transmit concerns and obtain information about WTO activities and decisions. To enable and foster these diverse forms of participation, contestation, and dissemination, the WTO itself must improve the transparency of its activities, including its dispute settlement process. To bring the WTO closer to the public, the creation of regional WTO offices must be considered. In addition, thought could be given to setting up a WTO inspection mechanism similar to that available in the World Bank and regional development banks.²²⁵

More voice or input ought finally be given to other international organizations including those addressing nontrade concerns. Because of the strength of the WTO's legal-normative structure, in particular its automatic dispute process, the WTO is too often portrayed, most recently in the *Sutherland Report* itself,²²⁶ as a set of rules that prevail over other international

223. As Hirschman points out, voice is broader than formal input in decisionmaking. It can be equated with interest articulation and "is a far more 'messy' concept [than exit] because it can be graduated, all the way from faint grumbling to violent protest," from contestation to kicking up a fuss. HIRSCHMAN, *supra* note 15, at 16.

224. See Steve Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. J. INT'L L. & POL. 299, 353 (2002); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

225. See INSPECTION PANEL OF THE WORLD BANK, WORLD BANK, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL 10 YEARS ON (2003). A similar system for the WTO could increase its accountability in that it permits affected groups and individuals to challenge the substance of official WTO activities—such as technical cooperation—under the guidelines and rules of the WTO itself.

226. SUTHERLAND REPORT, *supra* note 18, at 38 ("'[C]onditionalities' imposed by the IMF and World Bank should not only be supportive but consistent with WTO obligations."); *id.* at 39 ("The WTO legal system is part of the international legal system, but it is a *lex specialis*. This *lex specialis*, *qua lex specialis* cannot be changed from the outside by other international organizations that have different membership and different rules regarding the creation of rules."). The latter statement is in direct contradiction of Articles 30 and 48 of the Vienna Convention on the Law of

law.²²⁷ Given the broad field and scope of the trade system—at least tangentially affecting the protection of the environment, human rights, cultural diversity, etc.—this WTO “superiority complex” frequently takes other international negotiations hostage.²²⁸ Both in its lawmaking and dispute settlement, the WTO must take account of activities and rules created elsewhere, in particular those that the disputing parties themselves have consented to. This is not a call for the WTO itself to engage in environmental or human rights lawmaking.²²⁹ Rather, let other organizations do this, but when such is done, the WTO, as a part of the broader international system, must take cognizance and when appropriate defer to the rules agreed to in those other fora.²³⁰ WTO cooperation with other international rules and organizations is part and parcel of greater contestation and participation in the world trade system itself. No matter how elusive and messy, such coordination between, for example, trade and human rights or environmental regimes “highlight[s] the contingency of the limits of individual regimes, their dependence on other regimes, and the politics of regime-definition.”²³¹

2. *Slightly Reduce Discipline and Maintain and Clarify Exit Options*

The increase in politics, voice, and participation of both state and nonstate actors advocated above ought to offer a more solid basis of support for a strong WTO normative regime. Yet, to facilitate this messy voice mechanism—in particular, consensus building and the varied avenues for input from nonstate actors—and to prevent deadlock in the political decisionmaking process, it is important to keep certain exit options open and not to overlegalize the system. With the assurance of exit in the worst-case scenario, WTO members will more easily join a political consensus to create new

Treaties addressing, respectively, the interaction between earlier and later treaties and *inter se* modifications of multilateral treaties.

227. Keohane speaks of partial globalization. ROBERT O. KEOHANE, *POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* (2002). For Ruggie, a crucial element in the globalization backlash is “a growing imbalance in global rule making. Those rules that favor global market expansion have become more robust and enforceable But rules intended to promote equally valid social objectives, be they labor standards, human rights, environmental quality or poverty reduction, lag behind and in some instances actually have become weaker.” John Gerard Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in *TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE* 93, 96–97 (David Held & Mathias Koenig-Archibugi eds., 2003).

228. See Joost Pauwelyn, *WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for “Conflict Diamonds”*, 24 *MICH. J. INT’L L.* 1177 (2003).

229. *Contra* Andrew T. Guzman, *Global Governance and the WTO*, 45 *HARV. INT’L L.J.* 303, 307 (2004) (advocating that the WTO itself should negotiate treaties on nontrade concerns).

230. See JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 158–212 (2003).

231. MARTTI KOSKENNIEMI, *GLOBAL LEGAL PLURALISM: MULTIPLE REGIMES AND MULTIPLE MODES OF THOUGHT* 20 (2005), available at <http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf>.

rules. Crucially, limited exit options and slightly lower levels of discipline may offer important democratic safety valves and thereby respond to criticisms of a WTO constitution-type construct that imposes free trade over and above anything else. In large part because of its foundational mechanics of overcoming protectionism by insulating export-interests from domestic politics, the world trade system risks being too rigid or legalized to respond to valid flexibility demands of representative politics and of other international regimes.²³² Limited exit options, when combined with the suggested high levels of participation, would eventually not often be resorted to; given the high levels of participation in lawmaking and the other pressures felt through the voice mechanism, in particular from consumers and businesses in favor of free trade, countries ought only exercise these exit options in exceptional circumstances. In the end, therefore, rather than undermine the normative structure of the WTO, limited exit or somewhat lower levels of discipline—in tandem with higher levels of participation and politics—is the best recipe for an effective and legitimate world trade system.

In practical terms, the WTO should relinquish its obsession with the single-package idea.²³³ Given the huge diversity among WTO members, both in terms of economic development and noneconomic preferences, WTO agreements and rules ought not always be binding on all WTO members. With close to 150 members, differentiation or a multiple-speed WTO is unavoidable. Rather than force new commitments on unwilling countries through majority voting or block the entire process by insisting on consensus amongst all players, the system must recognize its diversity and tailormake its rules to its different constituencies. Even soft law, or political declarations or targets that are not legally binding, as an alternative to the usually hard WTO commitments could, in certain cases, be considered.²³⁴ The need for consensus amongst all WTO members to add a plurilateral agreement to the WTO treaty, even if such agreement is binding only on some WTO members, must be revisited. Even within the E.U., with its far more homogeneous membership, this strict requirement for differentiation no longer applies.²³⁵ Although some control by the entire WTO membership over new agreements is useful, for example to make sure that plurilateral agreements do not harm the rights of third parties, a single member ought not have a veto to block further WTO progress by others.

In addition, the WTO must maintain its broad, substantive exceptions, tariff and other renegotiation provisions, waiver system, and safety valves in case of violation in the form of temporary compensation and suspension of

232. See *supra* note 211.

233. SUTHERLAND REPORT, *supra* note 18, at 65–66 (referring to “variable geometry”).

234. See Kenneth W. Abbott & Duncan Snidal, *International Action on Bribery and Corruption: Why the Dog Didn't Bark in the WTO*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW* 177 (Daniel Kennedy & James Southwick eds., 2002).

235. European Constitution, *supra* note 142, art. III-325, 2004 O.J. (C 310) 146–48; see Bruno De Witte et al., *Introduction to THE MANY FACES OF DIFFERENTIATION IN E.U. LAW*, at ix, ix (Bruno De Witte et al. eds., 2001).

concessions. The scope for bilateral settlement of trade disputes and the conclusion of nontrade agreements in other international fora must be clarified. Given that WTO obligations are not collective obligations binding *erga omnes partes*,²³⁶ settlements and non-WTO treaties in deviation of WTO rules must be accepted as permissible for as long as they do not affect the rights of third parties.

In turn, safeguards remain an important safety valve under existing commitments and a crucial instrument in obtaining new commitments.²³⁷ The Appellate Body, in contrast, has taken an openly unsympathetic stance against safeguards, calling them purely protectionist measures in response to fair trade, or a sudden increase in imports. It has contrasted safeguards, in particular, to antidumping measures, which it regards as a reaction to unfair trade in the form of dumped imports.²³⁸ As a result, the Appellate Body has strictly interpreted the conditions for safeguards and so far not found a single safeguard measure to be in line with WTO rules.²³⁹ The Appellate Body's strict interpretation of safeguards and rather loose approach to antidumping measures provides an incentive for WTO members to exploit the loopholes of the antidumping agreement. Unlike safeguards—which must, in principle, be imposed on all imports, offset only injury caused to the domestic industry and be compensated for, at least after three years, in some cases, as of their enactment—antidumping measures are subject to manipulation,²⁴⁰ are discriminatory, offset the entire dumping margin—which is often higher than the injury caused—and must never be compensated for.²⁴¹ Rather than inciting the use and abuse of antidumping, the Appellate Body should recognize the crucial role, transparency, and benefits linked to safeguards and promote safeguards over antidumping measures, or at least put them on an equal footing.

At the same time, WTO contingency measures—safeguards, antidumping duties, and countervailing duties to offset subsidies—focus exclusively

236. See Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT'L L. 907 (2003).

237. See Claude E. Barfield, *U.S. Steel Tariffs Gave Safeguards a Bad Name*, FIN. TIMES, Dec. 8, 2003, at 13 (U.S. ed.).

238. See Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2 WORLD TRADE REV. 261 (2003). The distinction between fair and unfair trade is questionable. Any economist will explain why dumping, as it is defined by the WTO (which permits the artificial reconstruction of cost of production and provides wiggling room to find dumping for many imports, if one looks and calculates hard enough), is most often *not* unfair.

239. See William J. Davey, *The WTO Dispute Settlement System: The First Decade*, Paper presented at the World Trade Forum (June 4–5, 2004) (on file with the author) (criticizing the Appellate Body's record on safeguards); Sykes, *supra* note 238.

240. See CLAUDE BARFIELD, *HIGH-TECH PROTECTIONISM: THE IRRATIONALITY OF ANTI-DUMPING LAWS* 11 (2003) (“This process [of establishing whether there is dumping] is essentially pro forma: Between 1980 and 1997, the [U.S. Commerce] department ruled that dumping was taking place in 96 percent of the cases it reviewed.”).

241. See Joost Pauwelyn, *A Comparative Analysis of Trade Remedies in the WTO, in SAFE-GUARDS UNDER THE WTO AGREEMENT: ISSUES AND PROPOSALS FOR A MORE EFFECTIVE MECHANISM* 21 (Araki Ichiro & Kawase Tsuyoshi eds., 2004).

on harm to competing *producers*. They share one common feature: the reintroduction of trade restrictions is permitted only when producer welfare has been, or threatens to be, negatively affected either as a result of cheap imports, subsidies to foreign producers, or increased imports—which trigger, respectively, antidumping duties, countervailing duties, and safeguards. Harm to consumers or considerations of consumer welfare play no role whatsoever. First, before raising trade barriers against cheaper imports, countries currently must not consider the harm they thereby cause to consumers. Second, no escape clause or safety valve exists to reintroduce trade restrictions based on consumer concerns or so-called collective preferences of citizens on nontrade issues ranging from the death penalty and cultural preferences to GMOs and welfare state interventions.²⁴² Even when democratically expressed as a majority opinion, such consumer concerns can only be taken into account under the limited list of substantive exceptions, such as GATT Article XX. The exclusive focus of WTO contingency measures on producer welfare confirms the system's exporter/producer-driven nature. As pointed out earlier, if the WTO is to survive as a legitimate institution, it must expand its base of supporters beyond exporters/producers and include consumers and citizens at large, who are, after all, the main beneficiaries of liberalized trade. Much as safety valves were needed to attract and maintain *producer* support in the form of safeguards and antidumping and countervailing duties in the original GATT, a WTO genuinely transformed into a consumer-driven organization must have clear and sufficient safety valves to attract and maintain *consumer* support.²⁴³

Finally, although the exit-voice balance for each individual WTO member may be different, depending in particular on its relative power and internal political system, given that the possibility and comfort of exit options is so important in the WTO structure, it must be guaranteed for all WTO members, including developing countries. The major concern for developing countries in the WTO simply is not, as many perceive it today, how developing countries will succeed in pushing their complaints *against* rich developed nations.²⁴⁴ Rather, the big question will be how developing

242. Pascal Lamy, The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation, Speech at Conference on "Collective Preferences and Global Governance: What Future for the Multilateral Trading System" (Sept. 15, 2004), available at http://trade-info.cec.eu.int/doclib/docs/2004/september/tradoc_118929.pdf; Rodrik, *supra* note 204.

243. For such an alternative safeguard mechanism, linked to compulsory compensation, see Lamy, *supra* note 242. See also Patrick A. Messerlin, *Antidumping and Safeguards*, in THE WTO AFTER SEATTLE 159 (Jeffrey J. Schott ed., 2000); Heinz Hauser & Alexander Roitinger, New Concepts for Dispute Settlement Implementation (Oct. 2004) (unpublished manuscript, on file with the author) (suggesting the replacement of antidumping and safeguards with one safeguard mechanism that can be invoked for any reason, not just injury to the domestic industry, but coupled with an obligation to pay compensation).

244. See Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719 (2003). In most cases such complaints will be successful, if they have legal merit, because of the peer pressure on, and example-setting function of, those rich members, not because of tougher remedies. Indeed, not a single panel or Appellate Body recommendation involving a WTO dispute by a developing

countries can take equal advantage as *defendants* of the escape clauses and other exit options just described, especially against rich nations. Few of those options²⁴⁵ include differential treatment for developing countries. Thought should be given to whether and how such differential rules could be included without making escape clauses too easy an option for developing countries. After all, in most cases, trade rules are also beneficial for the country reducing trade barriers. The costly and complex procedures for the imposition of safeguards could, for example, be simplified when pursued by developing countries; waivers for developing countries could be granted by a lower majority and extended for longer periods; the compensation that developing countries should pay under tariff or GATS re-negotiations or when settling a dispute as a defendant could be lowered, as could the level of suspensions in response to breach by developing countries. With developing countries committing themselves to ever more WTO rules, the importance of flexibility and limited exit options for those countries—and for the sustainability and legitimacy of the world trade system as a whole—will only increase.

CONCLUSION

This Article challenges a number of common perceptions about the world trade system. Contrary to conventional wisdom, the system did not evolve from trade *politics* to trade *law*. Rather, both the level of law and the level of politics gradually increased. More politics and participation, in particular consensus decisionmaking, *enabled* more law and discipline, including the legalization of GATT's dispute process. Conversely, more law and discipline, in particular the WTO's smooth and automatic enforcement mechanism, *required* more politics and participation, including a vigorous defense by countries of the consensus rule. More than the traditional from-politics-to-law story, this interactive narrative between politics and law, participation and discipline, voice and exit, better explains why, for example, decisionmaking evolved from majority voting to consensus, and why enforcement evolved from a diplomatic system to a quasi-judicial one. The alternative narrative demonstrates further that increased legalization in the form of more supervision by the WTO must *not* come at the expense of less politics in the form of less input from member countries. Rather, more discipline and law *requires and leads to* higher levels of participation and contestation: more politics. Moreover, through this lens, the current combination of a highly efficient dispute settlement system and a consensus-based, inefficient rulemaking process no longer strikes one as a paradox.

country against a developed country remains unimplemented. Almost all of the problems with non-compliance were disputes between the E.C. and the U.S.

245. There are certain substantive exceptions and safeguards that cannot be applied *against* certain developing countries. WTO Agreement, *supra* note 3, Agreement on Safeguards, Annex 1A art. 9.1, 1869 U.N.T.S. 154.

Instead, it is seen as a logical—although not necessarily optimal—balance between high discipline or law and high participation or politics. In prescriptive terms, this Article portrays a fortress WTO or a regime that currently lacks both input and output legitimacy. Given the prevailing schools of thought, the risk of a fortress WTO—over-legalized, depoliticized, and forcing a uniform, regulatory straitjacket upon countries and their peoples—is, indeed, looming. To avoid this threat, the Article rejects the most common proposals for WTO reform. First, replacing the consensus rule with majority-based decisionmaking (the insider, institutionalist perspective); further legalizing the system with less exit options and a stronger dispute process (the legalist view); or a stricter separation of WTO affairs from domestic politics (advocated by both the utilitarian and the constitutional/human rights schools), may each make the system more efficient in the short term. When implemented in isolation, however, these reforms would undermine the support and legitimacy of the world trade system: *efficiency without loyalty*. Second, reintroducing political vetoes in the dispute process as in the conservative, sovereigntist perspective or subjecting the system to full control by representative politics as advocated by left-leaning cosmopolitans are reforms that may increase the short-term support for, and legitimacy of, the WTO. Yet they would quickly render the system ineffective and dramatically reduce gains from trade: *loyalty without efficiency*. As an alternative to these two strands of proposals, which focus exclusively on one side of the law-and-politics spectrum and, quite surprisingly, lump together unlikely allies such as utilitarians and human rights scholars, sovereigntists and cosmopolitans, this Article suggests a more balanced reform package that tackles both sides of the spectrum. First, the WTO needs more, not less, politics; it needs participation and contestation, from both state and nonstate actors, both in and outside the WTO. Second, the system must maintain and clarify, not eliminate, certain escape clauses and exit options, especially those tailored to consumer welfare, and make them viable also for weak countries. With the right balance between flexibility and precommitment, politics and law, participation and discipline, the world trade system can combine efficiency and legitimacy; that is, it can reap the gains from trade and enjoy broad-based support.

