

Reimagining International Trade Regulation

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In 2023, the multilateral trading system commemorated its diamond jubilee amid its most severe crisis. How can this crisis be surmounted? Does the trade regime’s legal and institutional program, spanning over three-quarters of a century, require replacement? At a moment of inflection in international trade relations, this Article delves into the past, contending that conventional thinking about the laws and institutions of trade, rather than the laws and institutions themselves, imposes the biggest constraints on international economic cooperation. It posits that international trade regulation has been conceptualized around the binaries of “liberalized versus restricted trade” and “free trade versus protectionism” and that a new vocabulary is needed to navigate the current crisis. The Article begins by weaving together the dominant historical narratives of the trading system to portray the ways in which dominant accounts have been tethered to these two binaries, and the extent to which this impulse is distinctly Anglocentric. It then dismantles this overly limited view by offering an alternative historical account of the trade regime that transcends these distinctions and the Anglosphere. By comparing the two accounts, the Article reveals why the dominant disciplinary binaries are empty and why overcoming the Anglocentric bias is pivotal to reimagining international trade regulation.

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INTRODUCTION

Ask any international trade expert about the objectives of the multilateral trading system, and their response will most certainly reference promoting "trade liberalization" by rolling back so-called "barriers to trade." This view is not confined to scholars and popular commentators alone. A cursory review of the preambles of both the General Agreement on Tariffs and Trade (GATT) and the agreement establishing the World Trade Organization (WTO) supports the view that the ideal of "free trade" is embedded in the trade regime's program. The point of departure for this Article, however, is that this focus on "trade liberalization" and breaking down "barriers to trade" is misguided. The GATT/WTO's liberalizing mandate is compatible with a very broad range of political orientations. As this Article illustrates, the direction of the trading system is

determined more by collective beliefs about the proper role of the state in relation to the market than by its mandate to remove barriers.¹

Scholars have long argued that, because any form of government action can impact trade, any attempt to give meaning to the terms “barriers to trade” requires distinguishing forms of government action that are permissible from those that are to be disciplined by law. They often examine the past of the multilateral trading system to demonstrate that this distinction evolves over time and derives all its content from the conception of desirable and legitimate state-market relations that serves as its baseline. Hence, the GATT/WTO’s historical trajectory reveals that a “barrier to trade” has always been premised on extra-legal factors: the attitudes prevailing at a particular moment toward a preferred imaginary pattern of “undistorted” trade.² Indeed, throughout the history of the trade regime, regulations associated with both active and passive government have been understood as “undistorting.” The prevailing attitudes of international trade experts toward tariffs (passive government) and intellectual property (active government), are the most fashionable examples of this duality, but hardly the only ones.³

The process by which certain government actions are deemed desirable or legitimate and exempt from scrutiny, while others are regarded as undesirable or illegitimate and construed as “barriers to trade,” is not only fluid and elastic, but also, paradoxically, parochial and self-contained. The determination of desirability and legitimacy within the international trade field today depends on commonsense and implicit notions about the role of government that have been dominated by a narrow set of knowledge practices. Although ideas about desirability and legitimacy are articulated through various networks laying claims

1. See Andrew T. F. Lang, *Heterodox Markets and ‘Market Distortions’ in the Global Trading System*, 22 J. INT’L ECON. L. 677, 682–87 (2019) [hereinafter Lang, *Heterodox Markets and ‘Market Distortions’*]; ANDREW T. F. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER*, 5, 307–08 (2011) [hereinafter LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*]. But see PETROS C. MAVROIDIS & ANDRE SAPIR, *CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS* 4–7, 160–62 (2021) (maintaining that a “liberal understanding” reflecting a set of basic state-market capitalist principles underpins the multilateral trading system).

2. The insight that a distinctive conception of state-market relations serves as a heuristic for the supposed “undistorted” or “normal” market has received significant attention in the literature. See, e.g., Lang, *Heterodox Markets and ‘Market Distortions’ in the Global Trading System*, *supra* note 1; LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 169–72, 226–28; DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* 40–44, 51, 190–95 (2016); ROBERT L. HOWSE, ANTONIA ELIASON, & MICHAEL TREBILCOCK, *THE REGULATION OF INTERNATIONAL TRADE* 391 (2012); Robert Howse, *From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94, 96 (2002); Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987) [hereinafter Tarullo, *Beyond Normalcy in the Regulation of International Trade*]; Daniel K. Tarullo, *Logic, Myth, and the International Economic Order*, 26 HARV. INT’L L. J. 533 (1985) [hereinafter Tarullo, *Logic, Myth, and the International Economic Order*].

3. This Article delves into many other examples of this duality where a whole range of government regulations are typecast as active “distorting” legal interventions, while the entire global apparatus set up by governments to govern their trade relations is depicted as a passive “undistorting” legal framework.

to the field, ranging from the WTO's many multilateral fora to a European student-run moot court competition, those that are presumed as universal truths or considered as settled understandings have been predominantly incubated in the Anglo-American intellectual cosmos. Since as far back as Adam Smith, international trade experts' collective assumptions about the duality between the market and the state have been dominated by a disciplinary consciousness forged principally within the confines of the Anglo-American episteme.⁴ As a result, the ideas about desirable and legitimate trade governance that have been most authoritative and persuasive to those who are best positioned to shape the direction of international trade policy and law have been significantly bound. They have turned to the institutional and regulatory forms most familiar to the Anglosphere and have, as a result, descended from an equally limited (Anglocentric) conception of state-market relations.⁵ This dynamic has bred a path-dependent view of trade governance slanted toward a particular version of Anglocentric universalism, producing a community of international trade experts that is often more catholic (Anglo-American) than the pope (the United Kingdom and United States).

Nowhere is this dynamic more apparent than in how the field interprets its own history. International trade regulation—and even more so, GATT/WTO law—has been and continues to be historicized principally around narratives and vocabularies that are, at their core, provincial. International trade experts, and particularly legal professionals, whether trained in North America, Europe, or the Global South, are extremely likely to be inducted into the discipline in the context of a historical narrative that is lopsidedly centered on the Anglo-American world.⁶ Even the views often articulated by some of the trade regime's most progressive legal critics revolve around Britons and Americans.⁷ This is at least odd. Despite the combined hegemony of the United Kingdom and United States in trade policymaking throughout the last century, there is nothing intrinsic about the multilateral trading system's past that makes it chiefly British and American.

4. See, e.g., DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* (1996); see also MARC-WILLIAM PALEN, *THE "CONSPIRACY" OF FREE TRADE: THE ANGLO-AMERICAN STRUGGLE OVER EMPIRE AND ECONOMIC GLOBALISATION 1846–96* (2016).

5. For an account of how a narrow view has taken form within the United States, see David W. Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. INT'L L. REV. 671 (1995) (especially at the beginning describing how knowledge is passed on, and at the end comparing the typical public international law scholar with the cosmopolitan "realist" international economic lawyer).

6. See, e.g., the sections covering the history of the trade regime in four of the most popular books used in international trade law courses (two American-style casebooks and two European-style doctrinal textbooks): JOHN JACKSON, WILLIAM DAVEY, & ALAN O. SYKES, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT* 155–59 (2021); PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 86–93 (2017); JOOST H.B. PAUWELYN, ANDREW T. GUZMAN, & JENNIFER A. HILLMAN, *INTERNATIONAL TRADE LAW* 86–90 (2016); MITSUO MATSUSHITA, THOMAS SCHOENBAUM, PETROS C. MAVROIDIS, & MICHAEL HAHN, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY*, *THE WORLD TRADE ORGANIZATION* 1–11 (2015).

7. See *infra* Part I.

There is also nothing inherent in Anglo-focused storytelling that makes it more authoritative or coherent. As this Article explains, there are other ways to historicize the field that are not only persuasive, but also, given the ensuing tensions between the East (i.e. China) and West (e.g. the United States and Europe), more likely to invigorate the politics of global economic governance (which are currently consumed by othering)⁸ and trigger a discussion about how to make international trade regulation a force for good capable of rising to the challenges of the twenty-first century.

This Article proceeds in two parts. Part I reviews both well-known critical and mainstream (including officially-endorsed GATT/WTO) scholarship to develop an account familiar to international trade law experts supporting its thesis that the dominant historical narratives of the multilateral trading system have been tethered to the binaries of “liberalized versus restricted trade” and “free trade versus protectionism.” The aim is not to cover the entirety of global trade relations, but to hone in on the GATT/WTO given its significance in shaping the consciousness of international trade experts worldwide. This Part illustrates the extent to which the storytelling practices of the multilateral trading system revolve around the Anglosphere and, as a result, how much of the field of international trade law is historicized through the lens of “barriers to trade”—particularly from an Anglocentric perspective.

The first half of this Article offers a nuanced account of the trade regime’s past by interweaving dissenting and establishment dominant narratives. While establishment narratives are more prolific, they typically revolve around the trade regime’s material frameworks, overestimating the role of liberal economic thought. Their emphasis on visible and formal institutions leads them to neglect the GATT/WTO’s wider ideational dimensions that are critical to uncovering the field’s hidden forms of consciousness, and hence, to exposing the insufficiencies of dominant storytelling practices. As this interweaving, constructivist-enhancing exercise unveils in different ways, both critical and mainstream dominant narratives take for granted the rather vast dimension of supranational state planning that the extant international legal order impels. Both narratives also work too hard to contrast state interventionism with market freedom and accentuate the divide between active and passive government. Because dominant narratives neglect the constitutive role of law and rely excessively on the binaries of “liberalized versus restricted trade” and “free trade versus protectionism,” the tendency within (Anglocentric) trade discourse is to problematize the field along the artificial lines of coercive versus non-coercive regulation, thereby significantly reducing the scope of the analytical framework under which desirability/legitimacy is likely to be understood.⁹

8. See, e.g., GREGORY SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM* xxii n.19 (2021) (capturing the stance prevailing among international trade experts toward China with the quote: “now if you are not a China basher, you are called a ‘China dove’”).

9. For a well-known articulation on how coercive and noncoercive law operates as a false binary, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923).

In an effort to unpack the limitations and implications of this parochial way of thinking, Part II of the Article develops an account of the trading system that is not centered on the Anglo-American world. By casting the limelight on Central Europe¹⁰—a region that throughout the last hundred years has been especially attentive to questions of global trade governance—Part II reveals just how much the dominant narratives have overlooked law’s constitutive dimension and how fixated they have become with the paradigm of trade “liberated” from human intervention, or, to refer to its equivalent in the critical scholarship, of markets “disembedded” from society and its institutions.¹¹

Part II redirects attention to a historical narrative that challenges the notion of international trade as a realm of “freedom,” with its governance devoid of any human intervention or institutional restraint. The choice of this alternative narrative lies in its power to demystify the notion of liberalized or free trade as “unrestricted,” “unprotected,” and “undistorted” trade, and to reframe the discourse of international trade, moving it away from the false dichotomy of active state regulation and passive market freedom that pervades it. The aim is to introduce a historical dimension that enables a transition away from the dominant disciplinary paradigm, not to uncover some hidden origins of the trade regime or provide a more complete account of its past. In other words, the objective of this alternative account is primarily instrumental. The Article does not seek to recast the history of the multilateral trading system, so much as to offer an additional narrative of its past that can most compellingly contribute to revealing the emptiness of the “liberalized versus restricted trade” and “free trade versus protectionism” vocabulary and to setting the legal and institutional imagination loose.

In sharp contrast to both critical and establishment Anglocentric narratives, the account developed in Part II asks not whether trade should be “liberalized” or “restricted” and “free” or “protected,” but whether it should be “political” or “anti-political” and governed through “national” or “supranational” institutions—with these distinctions understood as a struggle over the level at which to “depoliticize” the market, rather than over whether it should be governed or left ungoverned. This framing unveils that the story of the multilateral trading system need not come with the undertow of a purportedly “unrestricted,” “unprotected,” and “undistorted” market against which to weigh the desirability and legitimacy of government action. Instead, by placing the law’s constitutive dimension front and

10. The label “Central Europe” is used in this Article broadly and is intended to capture both West-Central and East-Central Europe and to distinguish this region of Europe from the strictly “western” part of the continent, roughly encompassing the United Kingdom, Ireland, France, Belgium and the Netherlands of today, and the “eastern” part, roughly encompassing modern Russia, Belarus, and Ukraine. For an overview of the debates on the terminology, see Robin Okey, *Central Europe / Eastern Europe: Behind the Definitions*, 137 PAST & PRESENT 102, 103–06 (1992).

11. The notion of a self-regulating market “disembedded” from society, which has become a central feature in the framing of critical Anglocentric narratives, was first introduced in KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944).

center, it can be narrated as a confrontation between democratic politics and the globally integrated market.

Table 1:
List of the different binaries used throughout this Article

Anglo-American	Central European
Liberalized v. restricted	Supranational v. national
Free v. protected	Anti-political v. political
Undistorted v. distorted	<i>Dominium v. imperium</i>
Unregulated v. regulated	
Ungoverned v. governed	
Disembedded v. embedded	
Free market v. policy space	
<i>Laissez faire v. dirigisme</i>	

The Central European vantage point is illuminating because it suddenly allows the regulated market to emerge as a necessary and defining feature of the trade regime. “Coercion,” rather than “freedom,” appears ingrained in the program of the GATT/WTO. In effect, even the most “liberated” and “disembedded” forms of international trade regulation implicate government action and involve the mass deployment of statecraft and law. This fact is regularly underestimated by the dominant narratives. Their focus on the friction between “liberalized and restricted trade” is not only misleading, but also constraining. By focusing on this supposed friction, dominant narratives have been reducing the discussion of desirability and legitimacy within the field to tearing down “barriers to trade” or, in the most progressive of debates, to determining where to draw the line on what constitutes a “barrier to trade.” Similarly, dominant narratives’ fixation on the discord between “free trade and protectionism” is not only deceptive, but also problematic. By fixating on this presumed discord, they have been creating the false impression that it is in the nature of trade regulation to channel law’s coercive potential primarily against the subset of organized interest groups presumed to be favored through said demarcation of “barriers to trade.”

Hence, the ultimate goal of this Article is to steer the discourse surrounding the field away from the narrow and overworked struggles over how open the trading system should be and how to control demands for government support of a small subset of political-pressure groups, and in the direction of a different set of foundational questions that get at the type of trade governance that can more effectively help grapple with the policy implications arising from China’s economic ascendance and address some of humanity’s most pressing and existential challenges, including climate change, food insecurity, and the many

economic and social inequalities persistent across the world. Only by embracing epistemic pluralism and transcending the narratives and vocabulary that have long dominated its consciousness can there truly be a trade regime capable of addressing the twenty-first century's challenges and surmounting its deep-rooted crisis.

I. COMPILING THE DOMINANT ANGLOCENTRIC NARRATIVES OF THE
TRADING SYSTEM'S PAST

A representation of the dominant history of the multilateral trading system capable of capturing the wide panoply of debates about the trade regime's past demands, at the very least, an act of storytelling that features both establishment and critical points of view. This is no simple feat because differences of view regarding the biography of the trading system abound in the field. The most significant difference, however, lies in the choices involved in presenting the GATT/WTO's program over time. All dominant views employ a timeline in which "free" or "liberalized" trade, and "restricted," "protected," "distorted," "regulated," or "governed" trade are fixed on opposite extremes. Dominant mainstream narratives, however, regularly place the trade regime on a trajectory that points gradually and incrementally in the direction of the free market, while dominant progressive ones tend to situate it in the context of a messier, more nuanced affair. Mainstream narratives thus commonly turn to David Ricardo for authority, portraying the WTO somewhat self-servingly as the natural and inevitable improvement to the GATT and as an imperfect but nevertheless mostly successful program for keeping "protectionism" at bay and setting loose each economy's "comparative advantage." In contrast, building off the work of Karl Polanyi, progressive narratives usually situate the multilateral trading system in the shift from "classical liberalism" to "embedded liberalism," and then reposition it around "neoliberalism," on occasion harkening back to the era of the GATT with a degree of nostalgia. Unsurprisingly, conventional narratives typically place more emphasis on the trade regime's more visible material frameworks, while unconventional ones are more attentive to its often-concealed ideational dimensions.¹²

The dominant establishment and critical historical narratives are not presented independently of each other in this first Part. Rather, they are woven together with the aim of giving the multilateral trading system's ideational and informal planes—which are seldom embraced and neither sufficiently articulated nor understood—as much attention as its material and formal frameworks. There are compelling reasons to do so. There is a growing body of literature laying out how the ambiguous and continuously contested concepts that impart meaning to

12. This difference in historicizing the GATT/WTO is best exemplified by the fact that the most thorough mainstream account of the multilateral trading system's past (and future) officially endorsed by the WTO fails to have in its 646-page text even the slightest mention of the concept of "embedded liberalism." See generally CRAIG VANGRASSTEK, *THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION* (2013).

the field of international trade (such as “free trade,” “unfair trade,” and “protectionism”) tend to obscure the highly complicated power struggles implicated in institutionalizing its program.¹³ In effect, more than what the multilateral trade agreements may say on their face or the reasons invoked in a panel or Appellate Body report, it has been the complex and evolving attitudes concerning what constitutes a “barrier to trade,” a “subsidy,” and “discrimination” that have defined the multilateral trading system’s orientation.

What follows, therefore, is an attempt at a more constructivist account of the dominant history of the GATT/WTO that reconciles the diverse views of the international trade field’s most prominent establishment and critical raconteurs. It hinges significantly on Craig VanGrasstek’s official history of the WTO;¹⁴ on Benn Steil’s opus on Bretton Woods;¹⁵ on the writings of many of the most authoritative scholars and chroniclers of the trade regime’s past, namely John Jackson (who is also a protagonist of the story),¹⁶ Robert Hudec,¹⁷ Gilbert

13. See Anne Orford, *How to Think about the Battle for State at the WTO*, 24 GERMAN L.J. 45, 55 (2023) [hereinafter Orford, *How to Think about the Battle for State at the WTO*]; Andrew T. F. Lang, *Protectionism’s Many Faces - Symposium: International Trade in the Trump Era*, 44 YALE J. INT’L L. ONLINE 54, 54–60 (2019); Anne Orford, *Theorizing Free Trade*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 701, 703–10 (Anne Orford & Florian Hoffmann eds., 2016) [hereinafter Orford, *Theorizing Free Trade*]; Anne Orford, *Food Security, Free Trade, and the Battle for the State*, 11 J. INT’L L. & INT’L REL. 1, 31–32 (2015) [hereinafter Orford, *Food Security, Free Trade, and the Battle for the State*]; ROBERTO MANGABEIRA UNGER, *FREE TRADE REIMAGINED: THE WORLD DIVISION OF LABOR AND THE METHOD OF ECONOMICS* 9, 13–15, 25–28 (2010); LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 4–6, 164–72, 227; Howse, *supra* note 2, at 101–08; Tarullo, *Beyond Normalcy in the Regulation of International Trade*, *supra* note 2, at 552–99; Tarullo, *Logic, Myth, and the International Economic Order*, *supra* note 2, at 535–47.

14. VANGRASSTEK, *supra* note 12.

15. See BENN STEIL, *THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER* 3 (2013).

16. See John H. Jackson, *The Evolution of the World Trading System: The Legal and Institutional Context*, THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW (Daniel Bethlehem et al. eds., 2009) [hereinafter Jackson, *The Evolution of the World Trading System*]; see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1995) [hereinafter Jackson, *THE WORLD TRADING SYSTEM*]; see JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990) [hereinafter JACKSON, *RESTRUCTURING THE GATT SYSTEM*]; see John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93 (1978) [hereinafter Jackson, *The Crumbling Institutions of the Liberal Trade System*]; JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE* (1969) [hereinafter Jackson, *WORLD TRADE AND THE LAW OF GATT*].

17. See Robert E. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, in THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL (Jagdish N. Bhagwati & Mathias Hirsch eds., 1998) [hereinafter Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*]; see ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993) [hereinafter HUDEC, *ENFORCING INTERNATIONAL TRADE LAW*]; see ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1990) [hereinafter HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY*]; see Robert E. Hudec, *The GATT Legal System: A Diplomat’s Jurisprudence*, 4 J. WORLD TRADE L. 615 (1970) [hereinafter Hudec, *The GATT Legal System*].

Winham,¹⁸ Joseph Weiler,¹⁹ Douglas Irwin²⁰ (also in collaboration with Petros Mavroidis and Alan Sykes),²¹ and John Barton, Judith Goldstein, Timothy Joslin, and Richard Steinberg;²² on the contributions of certain insiders in Gabrielle Marceau's edited volume on the history of lawyers in the GATT/WTO;²³ and on two distinct critical accounts from outsiders, with Robert Howse²⁴ and Andrew Lang²⁵ exemplifying one strand, and William Anthony Lovett, Alfred Eckes, and Richard Brinkman the other.²⁶

A. *The GATT*

1. *"Embedded liberalism" and a limited conception of "barriers to trade"*

In tracing the origins of the WTO, dominant trade commentators often point first to the GATT and to the period leading to the end of World War II. A tension between two competing views, held, not unsurprisingly, by the political and intellectual elite of the two countries that put together the blueprint for the postwar economic order, enveloped the era of international postwar planning. On one hand, there was a liberal strand of thinking that presented "trade liberalization" as the defining feature of the trading system. In support of this position was the notion that the "protectionist" policies and "beggar-thy-neighbor" strategies of "economic nationalists" during the interwar years, provoked in no small part by

18. See Gilbert R. Winham, *The Evolution of the World Trading System — the Economic and Policy Context*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW (Daniel Bethlehem et al. eds., 2009) [hereinafter Winham, *The Evolution of the World Trading System*]; see GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION (1986) [hereinafter WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION].

19. See Joseph H. H. Weiler, *Law, Culture, and Values in the WTO — Gazing into the Crystal Ball*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW (Daniel Bethlehem et al. eds., 2009); see Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191 (2001) [hereinafter Weiler, *The Rule of Lawyers and the Ethos of Diplomats*].

20. See DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY (2019).

21. See DOUGLAS A. IRWIN, PETROS C. MAVROIDIS, & ALAN O. SYKES, THE GENESIS OF THE GATT, (2008).

22. See JOHN H. BARTON, JUDITH GOLDSTEIN, TIMOTHY JOSLIN, & RICHARD STEINBERG, THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO, (2008).

23. See A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO - THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM (Gabrielle Marceau ed., 2015).

24. See Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. , 9 (2016) [hereinafter Howse, *The World Trade Organization 20 Years On*]; Howse, *supra* note 2; see Robert Howse, *The House That Jackson Built: Restructuring the GATT System*, 20 MICH. J. INT'L L. 107 (1999) [hereinafter Howse, *The House That Jackson Built*].

25. LANG, WORLD TRADE LAW AFTER NEOLIBERALISM, *supra* note 1.

26. WILLIAM ANTHONY LOVETT, ALFRED ECKES & RICHARD BRINKMAN, U.S. TRADE POLICY: HISTORY, THEORY, AND THE WTO (2d ed. 2004).

the 1930 United States Hawley-Smoot Tariff Act, had significantly contributed to the Great Depression and fueled the hostilities and resentment that led to World War II.²⁷ Although the era's flawed fiscal and monetary choices had laid the groundwork for the problems that ensued, this school of thought asserts that it was the low trade volumes attributable to the spread of "trade restrictions" that had truly worsened the situation.²⁸

Those who supported this thesis held that in order to have a true chance at lasting "world peace," civilized nations would have to commit to some version of unhampered, nondiscriminatory trade. Leading this line of thinking was the United States Department of State, with Secretary Cordell Hull as its most prominent figure.²⁹ Liberal-minded and market-oriented diplomats in Washington, led by Hull and subsequently William Clayton, Harry Hawkins, and Clair Wilcox (who headed the American GATT delegation) fought zealously for the attainment of nondiscriminatory trade and the elimination of imperial preferences and other forms of "protectionism" that had proliferated in the 1930s, notably high tariffs, quantitative restrictions, and exchange controls.³⁰ As commentators observe, what allowed the State Department's program of "trade liberalization" to gain momentum was its divorce from congressional politics and reconfiguration in terms of reciprocal concessions with willing partners. Over time, this combination not only strengthened American export-oriented interests but also positioned them against "protectionism" globally by tying reduced "barriers to trade" abroad to lower "barriers to trade" at home.³¹

On the other hand, there was the contrasting view asserting that the fundamental issue facing postwar planners was the maintenance of "full employment." This viewpoint contended that the "instability" of unfettered markets, along with the period's high levels of unemployment, had led to the political upheavals of the first half of the twentieth century and, ultimately, to World War II. While trade liberalization could stimulate global demand and spur growth, the experience of the Great Depression had shown that countries with open economies were excessively vulnerable to external economic disruptions. Furthermore, an additional layer of vulnerability arose from the proposed regime of fixed exchange rates at Bretton Woods. Trade liberalization, coupled with the commitment to maintain stable currency conversions could, in the context of extended balance-of-payment misalignments, put significant strains on a nation's reserves and undermine the order that the postwar economic system sought to attain. Hence, as a condition to maintaining relatively open and integrated

27. IRWIN ET AL., *supra* note 21, at 5–6.

28. *Id.*

29. IRWIN, *supra* note 20, at 420; *see also* STEIL, *supra* note 15, at 116–17, 143 (depicting Hull as a trade-obsessed free market fundamentalist).

30. IRWIN ET AL., *supra* note 21, at 6, 10, 22–24.

31. IRWIN, *supra* note 20, at 26, 420, 432, 483, 490; IRWIN ET AL., *supra* note 21, at 187–88; *see also* LOVETT ET AL., *supra* note 26, at 56–57 (clarifying that the underlying goal was to lower tariffs, not necessarily to obtain hard bargained equivalent concessions).

economies, countries needed to preserve the ability to impose trade “restrictions” and other economic controls.

Those who identified with this second strand of thinking viewed economic integration as a source of “instability.” They supported trade liberalization but only insofar as it did not undermine the ability of postwar governments to secure macroeconomic stability.³² The figure that best embodied this approach was John Maynard Keynes, the famed economist who spearheaded the United Kingdom’s Treasury postwar efforts at Bretton Woods, and who had in 1930 first articulated his position on “full employment” in *Treatise on Money*, thereafter perfecting it in *The General Theory*.³³ The British Treasury, along with the Economic Section of the War Cabinet Secretariat, played an important role in shaping the United Kingdom’s trade negotiations, which were led by Hugh Dalton and Stafford Cripps of the Board of Trade in London.³⁴ Unlike the American “trade liberalization” program, the British approach to trade ordering rested less on a particular vested interest group for domestic support and more on a shared understanding that a robust activist state was necessary to rebuild its war-torn economy. There was also a collective concern that allowing Washington to unilaterally dictate the rules of the postwar order would mean relinquishing the United Kingdom’s longstanding imperial economic power.

The original blueprint for the multilateral trading system was the Charter for an International Trade Organization (ITO).³⁵ The “Havana Charter,” as this blueprint has come to be known, contained chapters on, among other matters, employment and economic activity (II), economic development and reconstruction (III), and inter-governmental commodity agreements (VI) that more closely reflected a combination of American State Department and British Treasury lines of thinking. It also included a chapter on general commercial policy (IV), the clauses of which hinged on the principles the United States had agreed to in earlier trade agreements, and were thus more liberal in bent.³⁶ The ITO was meant to serve as the trade counterpart of the Bretton Woods institutions, which were primarily focused on monetary affairs and postwar reconstruction—the International Monetary Fund (IMF) and the World Bank. Nevertheless, the GATT stood as the sole trade institution to materialize after World War II.

The GATT emerged from a parallel negotiation initiated by Canada, involving a smaller coalition of like-minded nations more boldly committed to mutual reductions in customs duties. These nations were able to reach an

32. STEIL, *supra* note 15, at 80, 142.

33. *Id.* ch. 4; see JOHN MAYNARD KEYNES, A TREATISE ON MONEY (1930); JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1936); see also John Maynard Keynes, *National Self-Sufficiency*, 22 YALE REV. 755, 756–59 (Jun. 1933) (dismissing the causal link between trade and peace).

34. IRWIN ET AL., *supra* note 21, at 25–27.

35. United Nations Conference on Trade and Employment, U.N. Doc. E/CONF.2/78, U.N. Sales No. 1948.II.D.4 (Mar. 24, 1948)

36. BARTON ET AL., *supra* note 22, at 34–35; IRWIN, *supra* note 20, at 479–80; JACKSON, WORLD TRADE AND THE LAW OF GATT, *supra* note 16, at 37.

agreement in 1947, just before the expiration of the authority granted to American negotiators by their own Congress. This authority had been conferred solely for the purposes of producing a “tariff” deal. The GATT, therefore, was intended not as an ambitious Havana-like agreement, but as an interim arrangement focusing on customs duties, with participants acting as “contracting parties” rather than as “members” of a formal organization, which would govern trade until such time as the foundational charter for the ITO was ready to be approved by the United States Congress.³⁷

While the GATT was supposed to be circumscribed to tariffs, to prevent tariff reductions (GATT Part I) from being undermined by other measures, its drafters decided to incorporate many of the provisions of chapter IV of the Havana Charter concerning “non-tariff barriers” (GATT Part II), including its open-ended Article 93 safeguarding against all forms of treaty nullification or impairment. Therefore, despite the fact that the GATT contained disciplines extending beyond the purview of customs duties, it passed scrutiny in Washington due to the generalized understanding that these other “non-tariff” provisions were necessary for the protection of the tariff concessions reached.³⁸

The determination of the American government to swiftly bring the GATT into effect by executive order, alongside twenty-two other countries, followed by its subsequent inability to secure the ratification of the Havana Charter before its Congress, resulted in the global trade order being anchored in a modest, more liberal vision of governance.³⁹ Interestingly, some analysts suggest that the downfall of the ITO stemmed from the Havana Charter’s inclusion of a more balanced compromise between the “Hullian” and “Keynesian” visions of the world, deviating significantly from the American liberal economic perspective.⁴⁰

In any case, other historians have pointed out that despite differences between the State Department of the United States and the Exchequer of the United Kingdom, there was substantial common ground between the treasury divisions of both nations. Harry Dexter White, the Treasury official who led the United States’ Bretton Woods delegation, and Keynes, were of a similar mind in supporting liberalized trade but insisting that government action should be pursued to keep deflation, unemployment, and global payments imbalances at bay.⁴¹ As it happens, White was a product of the American “New Deal,” a

37. IRWIN ET AL., *supra* note 21, at 96.

38. JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 16, at 37; JACKSON, *WORLD TRADE AND THE LAW OF GATT*, *supra* note 16, at 43–45, 62; BARTON ET AL., *supra* note 22, at 48; IRWIN ET AL., *supra* note 21, at 140.

39. Note that although more liberal and market-oriented than the ITO, the GATT was nevertheless drafted in such a way as to accommodate a range of institutional choices. Few if any serious requirements on subsidies and state-owned enterprises were included and large-scale government programs in the agricultural sector were allowed.

40. IRWIN, *supra* note 20, at 503–06; LOVETT ET AL., *supra* note 26, at 59; LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 28; WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION*, *supra* note 18, at 33.

41. STEIL, *supra* note 15, at 137, 142, 160.

program started by President Franklin D. Roosevelt that openly embraced the concept of a government-regulated economy. While White was a more liberal economist than Keynes, he was no *laissez-faire* ideologue. He openly embraced the use of trade restrictions for political and economic development objectives and described his vision of global economic ordering as a “New Deal for a new world.”⁴² Consequently, despite the failure of the Havana Charter, scholars often refer to the context of the GATT as one of a shared normative commitment to an interventionist program of a “Keynesian” kind. In effect, not only did the GATT begin by stating its goal as “ensuring full employment,”⁴³ but it was also brought into effect via a Protocol of Provisional Application (PPA) that grandfathered “non-tariff” trade “restrictions” and other market controls in place at the time of its signing,⁴⁴ a compromise that would endure nearly fifty years.

Accordingly, in the immediate postwar period, the combined view of the “Keynesian” British Exchequer and American “New Deal” Treasury held sway. This influence manifested in at least two significant ways: firstly, generally in the economic policy sphere, as a shared understanding of what constituted normal and appropriate government action, and secondly, particularly among trade experts, as a shared understanding on the desirability and legitimacy of measures based on their “form” or “intent.”⁴⁵ Due to the trading system’s small size and cohesive membership, this collective normative vision took hold, leaving many aspects of trade governance undefined. And, as the GATT functioned like a club of like-minded nations, during these early years there never arose a need for the contracting parties to engage in any fundamental contestations to the regime.⁴⁶

While the PPA allowed the GATT to prevail despite the ill fate of the ITO, it did so in the context of a fragile and uncertain institutional scenario. For this reason, in these early years, trade officials embraced a pragmatic, flexible, and trial-and-error approach to trade governance.⁴⁷ Structurally entrenched in the field of diplomacy, this approach entailed dispute settlement practices that deliberately resorted to ambiguity. The provisions of the GATT were made out to be open-ended and its text given only as much weight as internal and informal norms. Panel reports were purposefully not oriented toward stating the law but were left vague and aimed at reaching a satisfactory conclusion by consensus of all parties.⁴⁸ A tight-knit, communitarian ethos that emphasized shared values, personal relationships, the non-escalation of conflict, and a compromise-based

42. *Id.* at 1, 23, 135.

43. General Agreement on Tariffs and Trade, No. 55 U.N.T.S. 194, T.I.A.S. 1700, pmbl. (Jan. 1948).

44. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, No. 55 U.N.T.S. 308, T.I.A.S. 1700, ¶ 1(b) (Jan. 1948).

45. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 206–09, 306–07.

46. BARTON ET AL., *supra* note 22, at 2, 51.

47. JACKSON, *THE EVOLUTION OF THE WORLD TRADING SYSTEM*, *supra* note 16, at 31, 45–46.

48. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, *supra* note 17, at 106–07; Hudec, *The GATT Legal System*, *supra* note 17, at 630–36.

settlement of disputes became a prominent feature of the trade regime.⁴⁹ Prevailing over a strict and legalistic approach (with even a certain animosity toward lawyers),⁵⁰ this diplomatic management of trade was held together by a shared understanding of what desirable and legitimate government action looked like. “Trade liberalization” was thus pursued progressively but selectively, not through the rigid application of a set of legal norms, but rather to the extent necessary to ensure full employment under conditions of economic stability. The reduction of “barriers to trade” was taken up as the banner project of further developments to the regime, but it was enveloped by a broader conviction that favored regulatory intervention as the means to prevent or offset external shocks and raise standards of living.⁵¹ In the initial decades of the GATT’s existence, “managed trade” blended in with “free trade” as part of a political bargain that one American professor famously described as “embedded liberalism.”⁵²

Commentators recall that in the 1950s and 1960s, trade experts embraced a narrow understanding of the forms of government action perceived as “barriers to trade.”⁵³ The term applied only to trade in goods, and it predominantly covered tariffs (GATT Part I) and those “non-tariff barriers” (GATT Part II) that had been known or commonly used during the interwar years, such as quotas and exchange controls. Indeed, as mentioned above, Part II of the GATT had been intended as a backstop to Part I, serving as a necessary but ancillary part. A similarly narrow approach was followed with respect to the conceptualization of “subsidies.” The GATT made no effort to define the term, leaving its scope manifestly vague because trade experts viewed direct governmental assistance in industry and agriculture not only as permissible, but moreover as an essential state function.⁵⁴ The desirability and legitimacy of all these “non-tariff” policy measures was largely determined by their “form,” with legitimacy inferred from their “intentions.” Therefore, while it was recognized that a wide range of government actions could restrict trade, in practice, only those measures that had both an intentional and considerable impact on the market were subject to scrutiny.⁵⁵

49. Weiler, *The Rule of Lawyers and the Ethos of Diplomats*, *supra* note 19, at 194–95.

50. See Gabrielle Marceau et al., *Introduction and Overview*, in *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO* 1, 18–25 (Gabrielle Marceau ed., 2015) (describing multiple instances in which the presence of lawyers was precluded or purposefully concealed).

51. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 197–205.

52. John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 *INT’L ORG.* 379, 392 (1982); See also John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order*, in *INTERNATIONAL REGIMES* 384, 195 (Stephen D. Krasner ed., 1983).

53. BARTON ET AL., *supra* note 22, at 91.

54. Richard R. Rivers & John D. Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 11 *LAW & POL’Y INT’L BUS.* 1447, 1449–53 (1979).

55. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 206–09, 226.

2. “Embedded liberalism” begins to unravel

The trade regime’s foundational political bargain began to fracture between the late 1960s and early-to-mid 1970s. Several causes are typically identified in the dominant literature. First, after World War II, the United States and the Soviet Union entered into the Cold War. To counteract the threats arising from this period of geopolitical tension, the United States not only provided generous foreign aid but also overlooked many allies’ trade restrictions and offered concessions that were not fully reciprocal.⁵⁶ Given that many countries were struggling to rebuild their economies after World War II, a tolerance for asymmetries had been the sensible course. Furthermore, because the United States had emerged as the world’s dominant economic power, during the two decades following the adoption of the GATT, it could afford to follow a more lenient approach to reciprocal trade. In fact, during that period, trade asymmetries worked in the opposite direction, with imports to the United States remaining exceptionally low and exports surging high.⁵⁷ However, as the American balance of payments position shifted from surplus to deficit and other countries (especially Japan) refused to revalue their currencies, the postwar balance began to crack. Analysts thus contend that under the mounting economic pressures of the 1970s, the United States could no longer hold the system together.⁵⁸

Second, two seemingly conflicting yet mutually reinforcing phenomena came into their own during this period at the GATT. Both due to the very success of “embedded liberalism” and the reorientation of the high politics of international relations away from trade and finance and toward international security and other priorities of the Cold War, an increasingly specialized and technocratic faction of experts blossomed in and around the multilateral system. For example, one commentator describes the trade professionals of this time as a network of insiders comparatively disconnected from, and uninterested in, the political foundations that had initially defined their field. This scholar also indicates that in their search for authority, trade experts had veered in the direction of economics, relying increasingly on its basic insights which endorsed a strict adherence to the “free trade” ideal.⁵⁹ Another commentator describes how, starting in the late 1960s, the contracting parties of the GATT began to increasingly resort to outside technical expertise in dispute settlement, as a reflection of both the growing complexity of disputes and the appeal of expertise in resolving them.⁶⁰

As international trade practice coalesced around specialized technocratic-economic expertise, an opposing shift also occurred. Between the 1960s and 1970s, membership in the multilateral system more than doubled. As one

56. LOVETT ET AL., *supra* note 26, at 4–8, 60–62.

57. IRWIN, *supra* note 20, at 492, 534. *But see id.* at 496–97 (noting that the shortage of dollars in foreign markets caused by the period’s trade imbalance further bolstered the need to open access to American markets).

58. *Id.* at 542; LOVETT ET AL., *supra* note 26, at 76–77.

59. Howse, *supra* note 2, at 98–99.

60. LANG, WORLD TRADE LAW AFTER NEOLIBERALISM, *supra* note 1, at 247–52.

commentator recalls, this institutional enlargement tested the limits of the GATT and its officials. To cope with the growing internal demand for the trade regime and its staff, alongside the technification of trade experts, came their specialization and the need to outsource work to different divisions within the organization. This caused distress, especially for the GATT's dispute settlement arm, as panels charged with resolving differences began receiving often incongruous guidance from experts inside the GATT who were disconnected from one another, leading to the dispute settlement function issuing decisions increasingly in conflict with each other.⁶¹

Moreover, as the number of contracting parties to the GATT grew, so did the trade regime's institutional diversity. This expansion and diversification eroded the consensus that had once developed around the contours of desirable and legitimate government action, causing the collective purpose of the GATT to slowly rupture. In an effort to foster agreement among the principals of the organization while maintaining control over its institutional direction, an inner circle of 18 countries spearheaded by the United States formed, paving the way for a model of invitation-only small-group decision-making that was eventually dubbed the "Green Room" meetings.⁶²

While an enlarged and varied membership started to unravel the organizational limits of the GATT and cast light on competing conceptions of the role of the state, it also brought to the fore a new range of policy instruments and trade arrangements that had been operating outside the norm of earlier GATT practice. Indeed, by 1969, a report had already been issued in Washington highlighting the changing environment and the need to make sense of "non-tariff barriers."⁶³ This trend was further compounded in the 1970s by the tendency of many contracting parties (including, notably, the United States) to shield their economies from the decade's disruptive economic environment with an array of creative measures, the most notorious of which were voluntary export restraints and orderly marketing arrangements.⁶⁴ As a result, a fragmented but heightened suspicion of ever more visible forms of domestic policy measures emerged. This widened understanding of and animosity toward domestic regulation, coupled with a demand for stricter trade scrutiny grounded on the firmer pursuit of "trade liberalization" espoused by the discipline of economics, gradually enveloped the dominant view at the GATT.

61. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, *supra* note 17, at 112–13; HUDEC, ENFORCING INTERNATIONAL TRADE LAW, *supra* note 17, at 43–57.

62. BARTON ET AL., *supra* note 22, at 51–52; *See generally* VANGRASSTEK, *supra* note 12, at 204–08.

63. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION, *supra* note 18, at 73–74.

64. IRWIN, *supra* note 20, at 537–38, 548, 561–63; LANG, WORLD TRADE LAW AFTER NEOLIBERALISM, *supra* note 1, at 221–22.

3. "Protectionism" and "unfair trade"

Meanwhile, the global business environment was experiencing a transformation like no other. Distances of time, space, and costs were being cut by the arrival of containerization and the wide-bodied aircraft, while exchanges of information accelerated as a result of satellite communication. These and other technological innovations in transportation and telecommunications allowed businesses of all sizes to better integrate processes and source raw materials and intermediate products from around the world in the quest for cost reductions. They also enabled large businesses to establish themselves in all major markets and achieve efficiencies by either shifting production overseas and engaging in intra-firm trade or outsourcing operations to other enterprises in labor-intensive markets, while spurring both inter- and intra-industry trade.⁶⁵ The day of the transnational corporation, which operated in an internationalized economy, integrated to yet tethered by the geographies of nation-states, seemed to be drawing to a close. In its place, an era of the global corporation was emerging, where networks of production flourished across borders as if in a single market. These revolutionary developments in the way of doing business would come to be articulated and popularized by an American professor under the vast umbrella of the term "globalization."⁶⁶

These transformations in supply chains, along with the United States' overvalued dollar and strong middle class, were leveraged by many nations for economic growth. Low and middle-income economies began to manufacture inputs and relatively cheaper products for export. At the same time, Western Europe and Japan reemerged on the world economic scene. Trade expanded rapidly, and foreign products flooded American markets. Faced with competition from foreign industries for the first time since the war, the United States' trade surplus plummeted (a trend that was further exacerbated in the second half of the 1970s). Predictably, import-sensitive firms and workers from the United States began to complain loudly of other countries "cheating," escalating concerns about large-scale government assistance programs provided to competitors abroad, especially in Japan. However, export-leaning American firms also lashed out, raising allegations of foreign market access restrictions far exceeding those in place at home. Slowly but surely, not only foreign government "protectionism," but also overseas "free riding" made possible by the United States' more generous trade concessions and soft stance on reciprocal trade, became the prevalent rationalizations for the United States' relatively diminishing gains from trade, as well as for the declining competitiveness of American industry.⁶⁷ Eventually,

65. LOVETT ET AL., *supra* note 26, at 68–69.

66. Theodore Levitt, *The Globalization of Markets*, 61 HARV. BUS. REV. 92 (1983); *See also* THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005) (for an account that exemplifies how much this phenomenon has informed twenty-first century thinking).

67. LOVETT ET AL., *supra* note 26, at 70. *But see* IRWIN, *supra* note 20, at 550 (recalling that while members of Congress believed that other countries restricted imports more, for the year 1966, non-tariff barriers of the United States were more significant than those of European Economic

Capitol Hill was overtaken by a widespread and generalized perception of what was regarded as “unfair trade.”⁶⁸

Simultaneously, the community that coalesced around the GATT gave validity to this perception with, as mentioned above, its adherence to a purer ideal of “free trade” and a shift in attention to internal regulation, which was increasingly identified as the primary obstacle to “trade liberalization.” The effect was mutually reinforcing. The American “unfair trade” grievance spilled quickly into the multilateral arena, and in so doing further fueled the idea that trade restrictions had been creeping up “behind the border,” undermining the operation of the GATT.⁶⁹ Soon enough, Part II of the GATT was not only deemed ill-equipped to meet the needs of the time, but it also became the principal rather than ancillary focus of trade governance.

4. *Setting the stage for “free” and “liberalized” trade*

To add fuel to the trade backlash and the general decline of American economic hegemony, the year 1973 brought along an oil crisis and a recession, which later became stagflation. Against this backdrop, the United States’ Trade Act of 1974 came onto the scene. The Trade Act empowered the American administration to pursue an additional round of multilateral trade negotiations, setting up a “fast track” process that expanded its authority beyond customs duties-type agreements, thus enabling negotiations requiring implementing legislation that could take on the creeping problem of “non-tariff barriers to and other distortions of trade.”⁷⁰ In framing its scope, the Trade Act called for “substantially equivalent competitive opportunities” for both American import-competing and export-oriented firms, urging the government to reestablish “fairness and equity” in international trade.⁷¹

As mandated by the Trade Act, in the years that followed the United States turned aggressively to reciprocity.⁷² In an effort to secure equivalent concessions

Community or Japan), 560 (noting further that despite the trade deficits of the 1970s, the United States maintained trade surplus in agricultural and manufactured goods and services, and affirming that even though manufacturing jobs were lost during the 1970s, most studies indicate that the decline was due to changes in demand and productivity rather than trade deficits); *See also* LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 225 (observing that there is little economic support for the perception that the United States maintained more barriers to trade, and moreover, that there is insufficient data of the trade restrictive effects of other countries’ non-tariff barriers or evidence to confirm that the United States’ relative diminishing gains from trade resulted from such barriers).

68. IRWIN, *supra* note 20, at 531; *See* LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 224–26.

69. The idea was that new “barriers to trade” had artfully sprung up due to the very successes of earlier rounds of tariff liberalization. This belief still holds true today in official circles. *See* WTO | *Understanding the WTO - The GATT Years: From Havana to Marrakesh*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (visited Apr. 29, 2022).

70. Trade Act of 1974, Pub. L. No. 93-618, § 102, 88 Stat. 1978, 1982-83 (1975) (codified as amended at 19 U.S.C. § 2112).

71. *Id.* § 2(2)-2(3) (codified at 19 U.S.C. § 2102(2)-2102(3)).

72. *See id.* § 126 (codified at 19 U.S.C. § 2136).

on non-tariff measures and fend off “protectionism” while abating concerns about “free riding” that could stem from the unconditional most-favored-nation (MFN) principle that had underpinned the GATT since its inception, American officials sought to strike deals around a series of trade “codes,” the benefits of which were intended to apply only to the parties that accepted their disciplines in their totality.⁷³ Consistent with the literal meaning of the terms “*barriers to trade*” and “*trade restriction*,” these codes targeted many forms of non-tariff measures that *discouraged* international trade through increases in price (standards, customs valuation, import licensing procedures) or decreases in output (government purchase constraints). Paradoxically, however, the codes governing antidumping and subsidies were also aimed at non-tariff measures that *encouraged* international trade via price reductions and output increases. The existence of legal rules that sought to limit dumping and subsidization are nevertheless puzzling only at first glance, as the American “unfair trade” discourse had been anchored in both import-competing and export-oriented complaints about “protectionism,” broadly understood then as government support to industries in other countries that differed from that available in the United States. In putting the codes together, therefore, there was a clear and deliberate effort to repurpose the trade regime to not only serve the interests of American firms seeking more market access abroad, but also of local firms vulnerable to disruptions from international trade at home.⁷⁴

Notably, as one scholar argues, the Trade Act of 1974 set the stage for at least three powerful transformations within the multilateral system.⁷⁵ First, the Trade Act fomented a management of international trade that made the regime more amenable to organized private interests, gradually doing away with the institutional public interest orientation that had accompanied it during the immediate postwar era.⁷⁶ Second, it set in motion a normative approach that emphasized the individual goals and purposes of each contracting party to the GATT, causing a meaningful departure from the collective purpose that was the main feature of the embedded liberal mindset.⁷⁷ Finally, the Trade Act prompted a fundamental shift in trade officials’ understanding of the role of law and dispute settlement, with the rigid application of the provisions of the GATT (enhanced by specialized technocratic expertise) becoming an end in itself, rather than the means to achieving the regime’s collective purpose.⁷⁸

73. LOVETT ET AL., *supra* note 26, at 73. *But see* BARTON ET AL., *supra* note 22, at 65 (observing that due to geostrategic concerns relating to the Cold War, at the end of the “Tokyo Round” the United States nevertheless agreed to extend the benefits of the codes, except the one governing government procurement, to all members on an MFN basis).

74. *See* Rivers & Greenwald, *supra* note 54, at 1451–55 (contrasting the different objectives sought in relation to subsidies and countervailing measures, and the diametrically opposed view of American and European delegations).

75. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 229–37, 241–53.

76. *Id.* at 229–30.

77. *Id.* at 235.

78. *Id.* at 242–46, 252–53.

In addition to emphasizing “unfair trade,” the Trade Act of 1974 also rested on arrangements that incrementally interwove the institutions of international trade with those of organized private interest groups. It introduced the famous Section 301 procedure allowing American exporters to petition for actions including retaliatory duties against countries whose import practices “impair[ed] the value trade commitments made to the United States” or whose policies “burden[ed] or restrict[ed] United States commerce.” It also eased the requirements for receiving escape-clause protection, relief from dumping and subsidization, and trade adjustment assistance. Hence, the Trade Act adopted an approach that protected a whole range of producer interests in the United States. In furtherance of American export-oriented industry, it tied liberalization to mechanisms that would ensure that “free trade” outcomes were reciprocal, and, with concerns of import-sensitive firms in mind, it devised means to counter other countries’ “protectionism” with government assistance from Washington.⁷⁹ Tariff-raising powers had historically resided with Congress, but since 1917 had been gradually turned over to the Executive, where a specialized and more comprehensive management of trade could take place. With the passage of the Trade Act of 1974, the channeling of tariff-raising pressures to the administration was thus reinforced, and consideration for a wider range of organized private interests bolstered with a variety of enforcement mechanisms.⁸⁰

A lesser-known provision of the Trade Act invigorated the relationship with organized private interests even further in the realm of tariff-reducing action, which, since the Reciprocal Trade Agreement Act of 1934, had also been regularly bestowed on the Executive.⁸¹ Section 377 established a large network of Private Sector Advisory Committees that cleared the way for the participation of special interests in trade negotiations and radically increased private sector power over the positions taken by the administration. While American trade officials had always given heed to sectorial interests, the Trade Act bureaucratized that relationship. Its advisory committees vastly improved the organization of lobbying efforts, providing efficient information channels and legitimizing a structure through which organized political pressure groups could influence government outcomes. It made trade officials more responsive to claims from both export-oriented and import-competing producers, while fostering a tighter and more institutionalized relationship between special interests and the administration.⁸²

79. Note, however, that the Trade Act of 1974 also provided unilateral duty-free access to developing countries through the Generalized System of Preferences. For more on preferential treatment of developing countries, see *infra* section II.B.2.

80. Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1097, 1115–25 (2020) (providing an overview of tariff-raising delegations made by Congress to the Executive, including through the Trade Act).

81. *Id.* at 1109–14.

82. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION, *supra* note 18, at 314–17.

The Trade Act also set a new tone for the conduct of states vis-à-vis each other, particularly with respect to trade negotiations. As mentioned above, the distinctive political mentality that the architects of the multilateral trading system jointly held during the immediate postwar period had been wearing away with the coming of new generations of technocratic trade experts. At the same time, the common institutional values that the community of trade officials at GATT initially shared had begun to break apart as the membership of the multilateral regime expanded. Because of these forces, the notion of the trade regime as a diplomatic project with a common purpose was already eroding. With the approach toward trade negotiations ushered in by the United States following the Trade Act of 1974, that trend was exacerbated. The idea of a collective vision underlying the regime started to fade away, and, in its place, a dynamic hinged on the immediate interests of each individual state entered into the picture.⁸³ As a political historian points out, the new aggressiveness exhibited at the negotiating table by the United States was characterized by a willingness to push for specific commercial objectives at the expense of entrenched institutional values.⁸⁴ By the turn of the decade, an increased disposition to forgo principles once deeply rooted within the multilateral regime, such as tolerance for many forms of trade management and government intervention, would be commonplace. The individual purposes and goals of each state would subsume the GATT's shared postwar purpose, thus reconceiving the nature of the multilateral system as one in which self-interested trade bargaining, as opposed to a collective political cooperation, was the primary means to the common good.⁸⁵

A final aspect of the Trade Act of 1974 that helped redefine the trade regime was its requisition to reform and revamp GATT dispute settlement.⁸⁶ As scholars recall, the United States Department of State had initially intended for the approach to international trade law to be strict and legalistic rather than flexible and political.⁸⁷ The consensus of "embedded liberalism" had pushed the trade regime away from such a program, but with the perceived proliferation of "unfair trade" in Washington, the strict enforcement of trade rules was once again on the table. Furthermore, with the introduction of a presumption under the Trade Act establishing that, where appropriate, cases brought under Section 301 would be taken to the multilateral system, there was also a renewed interest in working with the trade regime's dispute settlement process. Before long, the United States was

83. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 235.

84. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION*, *supra* note 18, at 387.

85. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 233–35 (in particular, describing the public choice theory that both influenced and supported this new conception of the trade regime).

86. Trade Act of 1974 § 121(a)(9) (codified at 19 U.S.C. § 2131(a)(9)).

87. See HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY*, *supra* note 17, at 22, 289; WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION*, *supra* note 18, at 32–33. *But see* Marceau et al., *supra* note 50, at 6–7 (suggesting that common law countries including the United States initially intended the approach to be technical and pragmatic, with the multilateral trading system being run by economists rather than lawyers).

not only filing GATT complaints again, but also entrusting much of the work to officials trained in the legal practice, who, in the tradition of American adversarial litigation, began to forcefully assert as many legal arguments as they could.⁸⁸ Faced with American legal practices at the other end of disputes, other governments were eventually left with no choice but to adopt similar techniques.⁸⁹ With the United States now leading the way, panel proceedings at the multilateral regime (which were at an all-time low in the decade preceding the Trade Act) finally began to both pick up⁹⁰ and gradually become more legalistic.⁹¹ In due time, this process would begin to trigger much demand for lawyers and legal expertise at the GATT, including within its Secretariat.⁹²

It was also during this period that complaints about the insufficiency of the GATT's dispute settlement process in resolving contracting parties' differences took hold.⁹³ Incidentally, John Jackson, the American trade law specialist and advocate who would later come to be celebrated by many as the "father of the WTO,"⁹⁴ was the most influential figure in articulating this position. In particular, Jackson took issue with a "power-based" management of trade differences and pushed for a more forceful turn toward a "rule-oriented" approach, persistently criticizing GATT practices and legal rules such as those allowing for the blocking of panels and their reports.⁹⁵ Through the agency of interventions such as Jackson's that called for the strengthening of dispute settlement procedures away from "negotiation/conciliation" and toward "rule integrity,"⁹⁶ the disembedding of dispute settlement from processes of trade diplomacy would run its course.⁹⁷

88. See Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, *supra* note 17, at 110–12.

89. *Id.*

90. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 139–42 (2014); See also *Visualise: Time Series | GATT Disputes Database (WTO)*, <https://gatt-disputes.wto.org/visualise/time-series> (last visited Oct. 7, 2022).

91. Marceau et al., *supra* note 50, at 25.

92. *Id.* at 29–38 (reflecting on the forces that led to the creation of the GATT's Office of Legal Affairs and describing its first few years).

93. JACKSON, *RESTRUCTURING THE GATT SYSTEM*, *supra* note 16, at 49; Jackson, *The Crumbling Institutions of the Liberal Trade System*, *supra* note 16, at 97.

94. VANGRASSTEK, *supra* note 12, at 50, 56–58.

95. JACKSON, *RESTRUCTURING THE GATT SYSTEM*, *supra* note 16, at 49–54, 65–66, 75–76; JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 16, at 125.

96. JACKSON, *RESTRUCTURING THE GATT SYSTEM*, *supra* note 16, at 66.

97. See Howse, *The House That Jackson Built*, *supra* note 24, at 108–09, 114–19 (noting, however, that Jackson proposed an organization with institutionalized political/diplomatic controls over rules-based outcomes that were ultimately not included in the structure of the WTO).

*B. The WTO**1. "Neoliberalism" and the broadening of "barriers to trade"*

After noting a combination of the transformations alluded to above, commentators within the English-language literature often concur in proclaiming that the end of the 1970s also marked an end to the embedded liberal compromise. Thereafter, the field began operating under a new logic. Two basic dimensions are often put forward in describing the new trade consciousness that ensued. First, there was a broadening of understanding of what trade experts perceived as a "barrier to trade" and a corresponding expansion of the areas of governmental activity subject to scrutiny at the GATT.⁹⁸ Amped up by the rise of public choice theory, this process entailed a much greater focus on, and attack of, domestic regulation and, not infrequently, a stigmatization of economies that relied more heavily on regulatory intervention.⁹⁹ Second, there was a persistent process of international convergence, alignment, and harmonization.¹⁰⁰ Initially, this enterprise entailed making differences between countries more visible.¹⁰¹ Eventually, it resulted in other countries entering the conceptual fold of state-market relations at the helm of the American economic consciousness.

With the diminished notion of a collective political purpose as the bedrock of the multilateral system, gone too was the limiting effect that this outlook had on the scope of operation of the GATT. The period's new epistemic reality thus facilitated a broadening of the GATT's domain and a widening of vision of what constituted "barriers to trade." For instance, through diplomatic pressure from the United States, it was finally possible to construe the term "subsidies" to include a whole slew of forms of state support.¹⁰² Additionally, in keeping with the turn to technocratic-economic knowledge, the focus was cast on the economic "effects" of government action rather than its "form" or "intent."¹⁰³ This reorientation of attention away from "aims" and toward trade-restrictive "effects" stimulated the legal sensitivity of trade experts, causing the gamut of non-tariff barriers targeted at the trade regime to dramatically increase.¹⁰⁴ Measures once regarded as legitimate domestic regulations were now contrived as illegitimate market distortions and denounced. In contesting such regulations (which had previously not been conceived as trade policy measures), trade experts increasingly relied on legal and economic technicalities, while they completely abandoned the

98. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 238–39.

99. *Id.* at 234–39.

100. *Id.* at 223–28, 271.

101. *Id.* at 227–28.

102. Rivers & Greenwald, *supra* note 54, at 1470–74; Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, No. 1186 U.N.T.S. 204, T.I.A.S. 9619, art. 11.3 (Apr. 1979).

103. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 226–27.

104. *Id.* at 223–28, 238–40.

possibility of pursuing “non-violation” complaints—an option which had been passed down from the politics of the Havana Charter.¹⁰⁵

The turn toward “effects” was as much a hermeneutic shift, triggering a redeployment of legal scrutiny over the GATT’s text, as it was an ontological one, stimulating trade experts’ cultural and political sensitivity,¹⁰⁶ to the point of displacing some of the field’s enduring vernacular. As one commentator observed, from the 1980s onwards, the vocabulary of “trade barriers” and “trade restrictions” became increasingly overtaken by that of “trade distortions.”¹⁰⁷ This linguistic recalibration was not only consistent with the growing reliance on economic expertise, but it also better served the interests of the diverse groups of American producers previously championed by the Trade Act. As opposed to “barrier” or “restriction,” the term “distortion” implied repudiating any action that diverged from the ideal of “free trade,” even if the action in question, such as government support through subsidization, did not necessarily discourage international trade flows through limitations in output or price. In this way, the language describing the trade actions regarded as undesirable and illegitimate better captured the mounting enmity toward government assistance, reflecting the ails of both export-oriented industry and import-competing firms in the United States¹⁰⁸—ails that intensified throughout the 1980s.¹⁰⁹

This remaking of the trade regime progressed in tandem with broader political, economic, and cultural changes that enabled the widespread disembedding of markets.¹¹⁰ The trade regime’s new reality thus took hold amid the global shift towards the ideas and ideologies of the economic right (e.g., the conservative revolution and the Washington Consensus), the mounting of an intellectual campaign against Keynesian policies, the rise of Ronald Reagan and Margaret Thatcher, and ultimately the fall of Communism and the end of the Cold War. Together, these developments led to a recasting of the role of government, with inflation targeting taking precedence over full employment, and control of the economy shifting to the private sector in increasingly deregulated markets. This approach, which triggered the global resurgence of economic liberalism, came to be known as “neoliberalism.”

As the American and British economies became progressively deregulated and hostile to government intervention, more of the differences between these

105. *Id.* at 251–52; Howse, *supra* note 2, at 98–101.

106. *See* Weiler, *Law, Culture, and Values in the WTO*, *supra* note 19, at 758 (comparing the trade effects method with two other approaches, both analytically and in terms of their significance in defining the culture and values at the WTO).

107. *See* LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 226–27. This linguistic transformation was presaged by the Trade Act of 1974. The terms “a barrier to (or other distortion of) international trade” appear 66 times in its text. *See generally* Trade Act of 1974 (codified at 19 U.S.C. § 2111–2462).

108. The Trade Act of 1974 thus plainly confirmed that “the term ‘distortion’ includes a subsidy.” *See* Trade Act of 1974 § 102(g)(2) (codified at 19 U.S.C. § 1401(a)).

109. IRWIN, *supra* note 20, at 573.

110. Howse, *supra* note 2, at 108.

countries and others diverging from the Anglo-American path became visible.¹¹¹ During this period, with the aid of Reaganomics and Thatcherism, institutional and regulatory differences were delegitimized and either reimagined as trade “distortions” or cast as “unfair.”¹¹² The pendulum thus swung from construing trade “discrimination” as the outright and sole privileging of domestic producers to the detriment of their foreign counterparts, to encompass full blown suspicion of any government planning that deviated from Anglo-American benchmarks. In exemplifying this new ethos of international trade, dominant Anglophone commentators consistently point to the 1980s trade frictions between the United States and Japan, attributed in one part to an overvalued dollar propped up by Japanese investment lured in by high American interest rates, and in another part to the “uneveled playing field” that resulted from the support programs and industrial policies of the Japanese Ministry of International Trade and Industry.¹¹³ Before long, stricter European sanitary and phytosanitary regulations and lower emerging market standards in labor and environmental regulation were challenged or brought closer to American benchmarks under Free Trade Agreements (FTAs).

2. “Neoliberalism” comes of age

The ideational transformations of this period sowed the seeds of the material changes to come. Most developed countries had become trade dependent, but the world economy kept performing poorly as the 1980s set in. A second oil crisis erupted in 1979, pushing inflation to new double-digit highs. The Federal Reserve responded with an unprecedented interest rate shock, triggering an economic downturn that profoundly affected much of the world. Gone was the “Golden Age of Capitalism.” The first half of the 1980s was thus enveloped by the perception that the legal rules of the GATT were simply insufficient. New issues had arisen that the multilateral system did not address. Services had started to rival goods in global trade flows, while counterfeit goods and violations of American intellectual property protections proliferated. At the same time, export restraints, quotas, subsidies, and other trade “distortions” abounded. Trade in textiles operated as a “protectionist” enterprise, while state assistance in agriculture in the European Communities and elsewhere was on the rise.¹¹⁴ Although the United States had contributed to this situation by having co-conspired around the Multifiber Arrangement (by some accounts the costliest trade intervention of the period),¹¹⁵ it was practically alone in wanting to do something about it.¹¹⁶

111. Jackson, *The Crumbling Institutions of the Liberal Trade System*, *supra* note 16, at 94–95 (referring to European economies).

112. Howse, *supra* note 2, at 101.

113. IRWIN, *supra* note 20, at 603–10; LOVETT ET AL., *supra* note 26, at 76–78.

114. Winham, *The Evolution of the World Trading System*, *supra* note 18, at 19–20.

115. IRWIN, *supra* note 20, at 591–92.

116. *Id.* at 644.

With the goal of addressing these concerns and stimulating a struggling economy, the United States attempted to launch a new trade round in 1982. It was turned down, and it was not until 1986 that a critical mass of more than one hundred countries deeply afflicted by the Federal Reserve's interest rate policies agreed to kick off an ambitious reform agenda. This "Uruguay Round," as it has come to be known, was made possible only because the United States took on the responsibility of setting it in motion and aggressively pursuing the issues its private sector attributed to a stifling economy: "protectionism" overseas to companies exporting agricultural and industrial goods alongside foreign government support of domestic investment and services firms, as well as, conversely, a lack of protection of intellectual property abroad.¹¹⁷ It was, in no small part, also enabled by the United States' aggressive use of the Trade Act's Section 301, which had triggered widespread antipathy toward the American unilateral "power-based" management of trade.¹¹⁸

Because the approach of negotiating codes had fallen short in addressing "free riding" (the codes, save the one on government procurement, had ultimately been extended on an MFN basis), during this new round the American position was that all countries must pull their weight by making reciprocal concessions on all agenda items, which would be multilateralized.¹¹⁹ However, most developing countries maintained from the outset that they would not sign onto agreements on investment, services, and intellectual property that mainly represented American corporate interests. To affect its desired result, therefore, the United States joined forces with the European Communities to pursue a "single undertaking" approach to negotiations, an idea first consigned in the 1986 Ministerial Declaration.¹²⁰ As embodied in the treaty establishing the WTO, most of the agreements reached were "integral parts" of the WTO and "binding on all members."¹²¹ This became one of the most consequential decisions of the Uruguay Round, allowing much of the American corporate-driven policy agenda to become compulsory worldwide.

The 1986 Ministerial Declaration did not envision the establishment of the WTO. In fact, the United States was hostile to the idea, viewing the discussion as

117. HUGO PAEMEN & ALEXANDRA BENSCH, *FROM THE GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND* 91 (Universitaire Pers Leuven 1995); IRWIN, *supra* note 20, at 646, 651, 691–92; *See generally* CHARAN DEVEREAUX, ROBERT Z. LAWRENCE, & MICHAEL D. WATKINS, *CASE STUDIES IN US TRADE NEGOTIATION, VOLUME 1: MAKING THE RULES* (2006); *See also* Juan A. Marchetti & Petros C. Mavroidis, *The Genesis of the GATS (General Agreement on Trade in Services)*, 22 *EUR. J. INT'L L.* 689, 692–94, 717–19 (2011) (tracing the GATS back to American financial institutions and their lobbying groups).

118. VANGRASSTEK, *supra* note 12, at 52–53, 235–36; *see also* IRWIN, *supra* note 20, at 648–49, 651.

119. IRWIN, *supra* note 20, at 645; BARTON ET AL., *supra* note 22, at 93, 108–18, 167; VANGRASSTEK, *supra* note 12, at 62–64; PAEMEN & BENSCH, *supra* note 117, at 115.

120. Ministerial Declaration on the Uruguay Round, General Agreement on Tariffs and Trade, pt. I.B(ii) (1986). *But see* VANGRASSTEK, *supra* note 12, at 49–50 (noting that the term "single undertaking" was initially understood to refer to the sequencing of the negotiation, with no issues settled until agreement was reached on all topics, rather than to the indivisibility of the final package).

121. Marrakesh Agreement Establishing the World Trade Organization, No. 1867 U.N.T.S. 154, 33 I.L.M. 1144, art. II.2 (Jan. 1995).

a distraction from the substantive work of eliminating the type of regulatory intervention that was unlike the interventions it practiced at home.¹²² However, John Jackson, the American legal scholar who had written about the institutional defects of the GATT for many years, took upon himself the task of advocating for a new institution for international trade, which “for simplicity’s sake” he baptized the “World Trade Organization.”¹²³

The idea was received with hesitation at first, but slowly gathered force once the Canadian delegation took the lead. Debra Steger, an Ottawa lawyer, negotiator, and former student of Jackson’s, was one of several Canadians instrumental in this regard. Steger shared Jackson’s misgivings about the GATT, including those regarding its prolonged provisional nature and its weak dispute settlement system. In 1990, working with Jackson and drawing significantly on his scholarship, she managed to persuade Canadian Minister of Trade John Crosbie to start the conversation on the creation of the WTO. That same year she also started work with her European counterparts on a draft charter for a new international trade organization.¹²⁴ Steger, furthermore, also advanced the cause of the judicialization of the trade regime, channeling much of her efforts to an understanding on dispute settlement that also drew from Jackson’s scholarship, and in particular his idea of an “appellate tribunal.”¹²⁵ The United States would eventually come around to the idea of an international trade organization, but only after the Europeans agreed to drop the name they had advanced for the institution, “Multilateral Trade Organization,” in favor of Jackson’s WTO.¹²⁶ The agreement establishing the WTO, along with all other Uruguay Round agreements, would be signed in the Ministerial Meeting of 1994, just a day before the expiration of the negotiating authority of the United States.¹²⁷ Steger would see the birth of the Appellate Body and become the first director of its Secretariat.¹²⁸

When the round came to an end, the multilateral trading system was completely transformed. A formal institution was created, putting an end to the 47 years of GATT provisionality. The scope of the agreements was dramatically expanded, with new disciplines in areas such as services, investment, and intellectual property around which American corporations demanded “fair” and binding commitments. Furthermore, agreements were struck in textiles and agriculture, two areas in which all previous rounds had been ineffective. Finally, all but four codes were made subject to multilateral application, with their disciplines effectively tackling “non-tariff” distortions that had either crept up “behind the border” or had previously been off the table, as they had been considered to reside solely in the province of domestic regulation. This was

122. IRWIN, *supra* note 20, at 649; VANGRASSTEK, *supra* note 12, at 13–14.

123. JACKSON, RESTRUCTURING THE GATT SYSTEM, *supra* note 16, at 94.

124. VANGRASSTEK, *supra* note 12, at 58–68.

125. *Id.* at 241–42, 593–94.

126. *Id.* at 67; IRWIN, *supra* note 20, at 650–51.

127. VANGRASSTEK, *supra* note 12, at 70–72.

128. *Id.* at 241, 593.

accomplished by, among other techniques, resorting to regulatory harmonization and legal presumptions favoring international, least-trade-restrictive or science-based standards, and using other legal formulas to effectively widen the range of measures that would need to be disciplined and rolled back. Unlike the material achievements of all other rounds held under GATT auspices, which evoked the idea of gradual and incremental progress, the results of the Uruguay Round would be reckoned as sweeping and profound, elevating the profile of the multilateral trading system in international economic relations and drastically expanding its reach.¹²⁹

For the most part, the new rules appeared to reduce the legal flexibility that countries had enjoyed under the era of embedded liberalism. Compared to the GATT, most of the new agreements contained minimal carve-out provisions or safeguard arrangements, if any, and there were few provisions allowing members to reverse their commitments or rebalance concessions at a sensible political and economic cost.¹³⁰ Moreover, distinctive diplomatic elements of the GATT era were abandoned and replaced by the foundations of a judicialized, lawyer-oriented order, with formal procedure, appellate review, and automatically adopted panel reports.¹³¹

After the round, the United States and Europe withdrew from the 1947 GATT and terminated any MFN guarantees they had made under that agreement to countries that did not join the WTO. In its place, a 1994 GATT was born, which, although “legally distinct” from its predecessor, was virtually identical. The point of this move was to compel other countries to join the new trade regime and ensure that its agreements, especially those governing investment, services, and intellectual property, had mass membership. The tactic, along with the “single undertaking” approach, accomplished the desired effect. The old system, which its detractors reproached for allowing for the “power-based” management of trade, was now to be replaced with a new one arrived at through bargaining that was equally “power-based.”¹³² By the end of the Uruguay Round, the countries bound by the disciplines of the enlarged subsidies, standards (technical barriers and sanitary and phytosanitary measures), customs valuation, anti-dumping, and import licensing codes more than tripled in most cases.¹³³ And, on the new issues, the United States’ strategy of both withholding approval of Jackson’s institution until the end, and warning that its Congress could repeat history and reject the agreements, allowed it to get much of what it sought (the only disappointing

129. See LORI WALLACH & PATRICK WOODALL, WHOSE TRADE ORGANIZATION?: A COMPREHENSIVE GUIDE TO THE WTO 1-2 (2004); Winham, *The Evolution of the World Trading System*, *supra* note 18, at 19; Weiler, *The Rule of Lawyers and the Ethos of Diplomats*, *supra* note 19, at 191.

130. Howse, *supra* note 2, at 113.

131. VANGRASSTEK, *supra* note 12, at 239.

132. BARTON ET AL., *supra* note 22, at 65–66; VANGRASSTEK, *supra* note 12, at 51.

133. The number of GATT parties that signed on to the Tokyo Round codes ranged from 13 (government procurement) to 47 (standards). In contrast, 128 WTO members were bound by the organization’s multilateral trade agreements upon its entry into force.

outcome being the agreement on investment, the text of which was not as ambitious as initially sought).¹³⁴

3. *Developing-country contestation*

Given the manner in which the Uruguay Round agreements were concluded, it is not surprising to find traces of sentiments expressing dissatisfaction with the round. The prevailing perception gradually became one of perceived unfairness, with the belief that the United States secured much deeper concessions than it offered. This perception was further intensified by the argument that, on the whole, the outcomes of the round primarily favored corporate and other organized private interests. American corporations emerged as the primary beneficiaries, obtaining disproportionately more advantages than any other group received. Over time, these claims about the uneven results of the Uruguay Round would find support in studies and models used by Anglophone commentators.¹³⁵

Developed countries agreed to phase out their textile practices (which had actually provided high rents for developing-country producers) and improve market access in agriculture, but only in exchange for multilateral commitments in areas that had originally been redlined by developing countries, such as services, where reforms they had been undertaking during the neoliberal era were finally locked in,¹³⁶ and intellectual property, where the United States asserted its regulatory regime.¹³⁷ Developed-country concessions in textiles and agriculture brought the rules applicable to those sectors more in line with those of other products, but textile and agricultural tariffs remained high. Additionally, concessions of developed countries took effect only after a long-term of phasing-in, while equivalent concessions of developing countries took effect rather early.¹³⁸ Developing countries ostensibly accepted these asymmetrical outcomes only because the alternative, which would have entailed cutting them off from access to American and European markets, would have left them even worse off.¹³⁹

Developing-country disillusionment with the new multilateral trading system was slow to sink in, but a breakdown of consensus on a new “millennium round,” abetted in part by a series of large-scale anti-globalization protests that took place in 1999 during the first Ministerial to be hosted by the United States (and remembered today as the “battle in Seattle”), was a first major sign of distress. Two years later, bred by the bitter experience at Seattle and hoping to

134. VANGRASSTEK, *supra* note 12, at 48, 64.

135. BARTON ET AL., *supra* note 22, at 66, 166–67.

136. VANGRASSTEK, *supra* note 12, at 340 (commenting on the GATS’s most successful accomplishment).

137. PAEMEN & BENSCH, *supra* note 117, at 166–67 (describing how Americans were unbending and aggressive, moving “heaven and earth” to get their way on intellectual property matters); *See also* DEVEREAUX ET AL., *supra* note 117, at 37–134.

138. BARTON ET AL., *supra* note 22, at 94–105.

139. *Id.* at 66.

make the round more appealing to developing countries, the WTO's Secretariat rebranded it as a "development agenda."¹⁴⁰ This move, along with the terrorist attacks on the World Trade Center, galvanized support for the launching of a new round.¹⁴¹

The "Doha Round," as it has come to be known, had ambitious goals, seeking to achieve major reform through a work program that covered some 20 different areas of trade. By the turn of the millennium, however, developing countries had come to realize that most of the Uruguay Round outcomes did not adequately reflect their interests. Their position was that the new disciplines on intellectual property, investment, subsidies, sanitary and phytosanitary measures, anti-dumping, textiles, and agriculture had gone too far, constraining their "policy space," and therefore had to be re-balanced.¹⁴²

India was the most prominent critic, leading developing-country opposition to further expansion of the trade regime under the aegis of the "Like-Minded Group."¹⁴³ Having recently suffered defeats at the panel and Appellate Body levels in relation to the patenting of pharmaceutical products, India was particularly concerned with the ramifications of the new legal consensus on intellectual property protection.¹⁴⁴ An HIV/AIDS crisis was underway, and access to life-saving medicine was being hampered by the law of the WTO.¹⁴⁵ Anticipating that Indian opposition would impede the development of the new round, the United States decided to yield on intellectual property and allow for both a mandate that underscored the right to public health and an amendment/waiver for compulsory licensing for exports to go through.¹⁴⁶

This compromise notwithstanding, with Brazil and South Africa entering the fold and joining India in leading the resistance to further market disembedding under the auspices of the "G20" coalition, the gap between countries continued to widen.¹⁴⁷ To make matters worse, the United States and the European Communities backpedaled from further liberalization in agriculture, recanting on the Doha Round's commitment to the elimination of agricultural export subsidies.

140. VANGRASSTEK, *supra* note 12, at 395–96, 408–9; IRWIN, *supra* note 20, at 674–75.

141. VANGRASSTEK, *supra* note 12, at 398–401; IRWIN, *supra* note 20, at 674.

142. VANGRASSTEK, *supra* note 12, at 350; *See also* BARTON ET AL., *supra* note 22, at 167–68 (describing developing-country discontent).

143. VANGRASSTEK, *supra* note 12, at 376. The group's membership fluctuated but also included Cuba, the Dominican Republic, Egypt, El Salvador, Honduras, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Nigeria, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe.

144. *See* Appellate Body Report, *India–Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/AB/R (adopted Jan. 16, 1998).

145. VANGRASSTEK, *supra* note 12, at 354–356.

146. *See* Ministerial Declaration on the TRIPS Agreement and Public Health of 14 Nov. 2001, World Trade Organization (2001); Protocol Amending the TRIPS Agreement, No. W.T.O.T.S. 34, WTO Docs. WT/Let/508, WT/L/641, 3248 U.N.T.S. (pending) (Jan. 2017).

147. Not to be confused with the block that emerged after the 2008 financial crisis. The 2000s "Cancun-era" G20 coalition at the WTO was comprised of Argentina, Bolivia, Brazil, Chile, China, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, Tanzania, Uruguay, Venezuela, and Zimbabwe.

The round quickly became deadlocked along north-south lines. Years later, some advances on the Doha issues would be made, but they would be limited principally to border measures, with members reaching an agreement on trade facilitation in 2013, on the elimination of agricultural export subsidies in 2015, and on certain disciplines concerning fisheries subsidies in 2022.¹⁴⁸

The most significant progress was made outside of the Doha agenda. Throughout the 1990s and 2000s, and at the behest of American corporate interests, the United States continued to seek other deals that required no action from Congress.¹⁴⁹ Perhaps the most important of these non-Doha agreements concerned information technology goods.¹⁵⁰ Negotiations had already been initiated outside the WTO by American computer manufacturers. Frustrated by the failure of the Uruguay Round to eliminate tariffs in software and hardware, the industry lobbied members harder. The idea was initially met with resistance from the European Communities, but after successfully bringing Canada onboard, an agreement on duty-free access to information technology goods was struck at the WTO.¹⁵¹ Reached mostly among developed countries, the agreement was subsequently expanded to incorporate developing countries and broaden in terms of product coverage.¹⁵² Similar developments also took form in relation to government procurement in foreign markets, where American special interests demanded increased access. The United States had long pressed for reforms in this area, but the European Communities and Japan had been reluctant to proceed. The United States soldiered on. After more than a decade of negotiations, a revised agreement was eventually completed, attracting several developing countries along the way.¹⁵³

148. See Ministerial Decision on Export Competition of 19 Dec. 2015, World Trade Organization (2015); Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, No. W.T.O.T.S. 47, WTO Docs. WT/Let/1030, WT/L/940, 3248 U.N.T.S. (pending) (Feb. 2017); Ministerial Decision on the Agreement on Fisheries Subsidies of 17 June 2022, World Trade Organization (2022); See generally VANGRASSTEK, *supra* note 12, at 413–456.

149. VANGRASSTEK, *supra* note 12, at 338 (remarking that Americans “got something for nothing” with these deals as they required no changes to United States law).

150. Note that a series of other post-Uruguay, non-Doha WTO agreements relating to services were concluded, all of which concerned unfinished sectoral work from the Uruguay Round. However, services liberalization has faced resistance from many developing countries, prompting conversations to proceed outside of the WTO. In 2013, plurilateral negotiations on a proposed “Trade in Services Agreement” were launched, but those negotiations have since stalled.

151. VANGRASSTEK, *supra* note 12, at 347–48 (citing the WTO’s 2012 report on “15 Years of the Information Technology Agreement Trade, Innovation and Global Production Networks”); See Ministerial Declaration on Trade in Information Technology Products of 13 December 1996, World Trade Organization (1996).

152. See Ministerial Declaration on the Expansion of Trade in Information Technology Products of 16 December 2015, World Trade Organization (2015). Also note that during this period members agreed to a moratorium on duties to ecommerce that has ever since been extended. See Ministerial Declaration on Global Electronic Commerce of 20 May 1998, World Trade Organization (1998).

153. VANGRASSTEK, *supra* note 12, at 361–63; see Protocol Amending the Agreement on Government Procurement, 3008 U.N.T.S. 208 (Apr. 2014).

Furthermore, undiscouraged by Doha and determined to continue to put pressure on reluctant reformers, the United States also embarked on a campaign of FTAs molded after the North America Free Trade Agreement (NAFTA). NAFTA was a treaty that had been concluded almost parallel to the Uruguay Round, becoming a model for other countries to follow. The focus was cast on hemispheric trade, but also on strategic deals in the Middle East and certain parts of Asia and the Pacific with like-minded nations under the label of “competitive liberalization.”¹⁵⁴ Although these agreements had the “free trade” label on them, they typically obtruded beyond trade policy, cutting further into governmental “policy space” in areas such as intellectual property rights, competition policy, and investor protection. Accordingly, they were regularly accused of further advancing both American economic ideology and corporate interests.¹⁵⁵

Despite developing-country resistance, the globalization of business activity was in full steam. Opportunely, the liberalization of capital flows was by now well coupled on to the trade agenda and outflanking the efforts to open and deregulate trade. Endorsed by the Washington Consensus since the 1990s, and at the instigation of Wall Street and the United States Treasury, the removal of controls over not only foreign direct investment but also portfolio investment had spread across the globe and been pushed on developing countries by the IMF and World Bank.¹⁵⁶

As capital markets burgeoned and American investors moved abroad, a new player quickly began to catch up to the United States on the world economic scene. Growing close to 10 percent per year for nearly three decades, by the early 2000s, China had become the world’s second-largest economy.¹⁵⁷ It had also sought accession to the WTO and agreed to abide by the rules of the multilateral trading system, a trend followed by the states of the former Soviet Union and eventually even Russia itself. The era of the global liberal market had come of age. The WTO was now truly a global institution, further impressing upon the idea, already consigned to this period by one American scholar of “the end of history.”¹⁵⁸

4. *The return of “protectionism” and “unfair trade”*

The liberal political, social, and economic system that prevailed in the western world at the turn of the millennium, however, would be neither the ultimate model of governance nor the last one. In 2007, the worst financial crisis since the Great Depression erupted. Rooted in the deregulation of financial markets and a lack of government oversight, this “Great Recession,” as it is sometimes remembered, was caused principally by predatory lending to low-

154. IRWIN, *supra* note 20, at 676.

155. LOVETT ET AL., *supra* note 26, at 88–90.

156. *Id.* at 89.

157. IRWIN, *supra* note 20, at 666.

158. Francis Fukuyama, *The End of History?*, 16 NAT’L INTEREST 3, 5 (1989); *See also* FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

income American homebuyers and excessive risk-taking by global financial institutions, which led in 2008 to the bursting of a housing bubble in the United States. The event triggered a global crisis, resulting in a severe erosion of the prevailing neoliberal mindset and a sudden shift in attention to wealth and income inequality.

As it happens, in the two decades preceding the recession, a surge of imports from China and a considerable drop in American manufacturing jobs in import-competing industries had simultaneously sprung up. Some of the disruption to labor markets in the United States could indeed be explained by the “China import shock,” but except for losses in apparel, footwear, and furniture industries, most of it was believed to be attributable to higher productivity derived from technological innovations.¹⁵⁹ Trade with China, however, would not go unnoticed in Washington, creating an environment reminiscent of United States-Japan trade frictions of the 1970s to 1980s. “Unfair trade” discourse returned to Capitol Hill, initially in the form of complaints about currency manipulation.¹⁶⁰ Eventually, it was followed by allegations of subsidization and counterfeiting. Accusations that Chinese state-owned enterprises were subject to “protectionism” and not “playing by the rules,” and that forced technology transfer had become a condition for accessing the Chinese market, were soon being heard aloud in Washington.¹⁶¹

Negotiations at the multilateral trading system started to falter even before the “unfair trade” discourse made a return. Trade commentators regularly note that during the first decade of the twenty-first century, the WTO’s rulemaking function began to falter and was overshadowed by its “crown jewel,” the dispute settlement function. As the trade regime moved well into governance “behind the border,” disagreements on the principles needed to guide rulemaking became the norm, weakening consensus decision-making and transferring political pressure over to the WTO’s judicialized dispute settlement arm. Indeed, the contestation of domestic regulation that had taken off in the 1980s and 1990s had continued into the 2000s, helping consolidate the resignification of the term “barriers to trade.” By the 2010s, the multilateral trading system had broadened its reach to a point where it was difficult to imagine an area of regulation outside its operational scope.¹⁶² Famously described by an American trade economist as the defining

159. See David H. Autor, David Dorn, & Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121 (Oct. 2013) (attributing one-quarter of the aggregate decline in manufacturing employment in the United States to imports from China); IRWIN, *supra* note 20, at 667–68; See also World Trade Organization, Trade, Technology and Jobs, World Trade Organization Rep. No. 2017 (2017) *contra* Robert E. Scott, *Manufacturing Job Loss: Trade, Not Productivity, Is the Culprit*, No. 402 (EPI Aug. 2015).

160. IRWIN, *supra* note 20, at 670.

161. MAVROIDIS & SAPIR, *supra* note 1, at 2–3, 59–62. For a longer list of accusations, see PETER NAVARRO & GREG AUTRY, *DEATH BY CHINA: CONFRONTING THE DRAGON - A GLOBAL CALL TO ACTION* (2011).

162. LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 308–9.

characteristic of economic “hyperglobalization,”¹⁶³ this vast expansion of the trade regime’s boundaries well into the territory of domestic regulatory affairs led to Doha-style deadlocks. Coupled with the regime’s preference for dispute settlement through litigation, it also encouraged more and more members, including developing countries, to bring legal cases against one another.

The trade regime’s judicialization was fostered further for many developing countries through the creation of the Advisory Centre on WTO Law (ACWL), an independent international organization erected to help them develop their legal capacity. The creation of not only new legal rules, but also bodies and organizations around international trade litigation, played a critical part in the judicialization of the WTO. However, the process of judicialization extended far beyond brick-and-mortar institutions, with litigation practices evolving to include private counsel representation and amicus curiae interventions, further deepening this trend and cultivating a lawyer-dominated culture around trade disputes.¹⁶⁴ For instance, some of the larger emerging countries like China, India, and Brazil became key stakeholders in the system by developing a legal capacity on their own.¹⁶⁵ Soon enough, a WTO dispute settlement practice was flourishing, leading to the creation of an unrivaled, “independent” international jurisprudence that spurred the interest of lawyers within and beyond the trade sphere. This phenomenon, widely celebrated by both dominant and critical trade law scholars, together with the community’s own internal conviction that its legal rules could not exist in “clinical isolation,” helped entrench the notion of international trade law as a vital and exemplary area of public international law.¹⁶⁶

While legal scholars welcomed the system’s shift to judicialization, not all WTO members were as pleased. This is particularly true of the United States, a country where the switch to compulsory adjudication, binding outcomes, and appellate review was seen as a grand bargain. As noted by commentators, the United States had given up its authority to impose unilateral (Section 301) trade actions during the Uruguay Round, but only in exchange for a system that enforced the Round’s substantive outcomes without “adding to or diminishing” the rights and obligations agreed.¹⁶⁷ Naturally, the architects of the WTO had left important aspects of the legal texts undefined and open to interpretation.¹⁶⁸ However, what started as panels’ and especially the Appellate Body’s pursuit to

163. DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* xvii, 76–88 (2012).

164. Weiler, *The Rule of Lawyers and the Ethos of Diplomats*, *supra* note 19, at 197–204.

165. *See generally* SHAFFER, *supra* note 8.

166. *See* Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in *THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* 35 (Joseph H. H. Weiler ed., 2000); Howse, *The World Trade Organization 20 Years On*, *supra* note 24, at 30–36; Marceau et al., *supra* note 50, at 50–51, 56.

167. BARTON ET AL., *supra* note 22, at 73.

168. VANGRASSTEK, *supra* note 12, at 27–28; LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM*, *supra* note 1, at 5–6.

fill legal gaps and clarify legal ambiguities, developed into a sweeping legal discourse that bred a whole body of new law and started to put into question the limits of the Appellate Body's political space.¹⁶⁹ Critically, this expansive judicial lawmaking hit a nerve with the Americans, as it led, consistently, to the striking down of "zeroing," an antidumping-duty calculation device used by the United States to "protect" its import-competing producers.¹⁷⁰

The current state of affairs of the trade regime is closely tied to these developments and is still being written. Characteristically, for most trade experts, it is defined by a backlash to trade and globalization, triggered principally within the Anglo-American world. Animated in no small part by the imprinting of inequality and job losses in the consciousness of British and American voters, it is epitomized by, on one hand, the "Brexit" vote in the United Kingdom, a process that was finally brought to completion by prime minister Boris Johnson and culminated with the country breaking away from the European Union in 2020, and, on the other hand, the election of Donald Trump in the United States, a Republican elected on a "protectionist" "America First" agenda who won by appealing to import-sensitive regions affected by trade from China.¹⁷¹ President Trump quickly pounced on China and started a bilateral trade war. He also blocked the functioning of the WTO's Appellate Body over accusations of judicial overreach—a move, inspired by the previous administration's blocking of numerous Appellate Body appointments and reappointments. The move was understood by many trade experts as retaliation for the position taken earlier by the dispute settlement system concerning the United States' use of trade remedies, most notably "zeroing," which had become the single most frequently disputed issue at the WTO.

At the time of writing this Article, the United States continued defying the rules and dispute settlement practices of the organization it had once championed. This U-turn in trade was explained in part by the country's failure to protect workers through trade adjustment programs and its lack of social safety nets. However, it was bolstered by a series of other developments that hastened the reconsideration of the stance toward government intervention. In 2020, the COVID-19 outbreak paralyzed the world. A global pandemic swept in, followed shortly after by high inflation, which was compounded worldwide by persistent supply chain problems and Russia's invasion of Ukraine. Simultaneously, as a heightened global awareness of climate change solidified, it became clear that

169. Orford, *How to Think about the Battle for State at the WTO*, *supra* note 13, at 57–59.

170. See BARTON ET AL., *supra* note 22, at 75–87 (noting that the Appellate Body has often rendered decisions that either run contrary to mass appeal or the view of important non-state actors, and that the most important political source of dissatisfaction comes from within the United States).

171. See David Autor, David Dorn, Gordon Hanson & Kaveh Majlesi, *A Note on the Effect of Rising Trade Exposure on the 2016 Presidential Election: Appendix to Autor, Dorn, Hanson, and Majlesi "Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure"*, MIT (2017); David Autor, David Dorn, Gordon Hanson & Kaveh Majlesi, *Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure*, 110 AM. ECON. REV. 3139 (2020) (for analysis in trade-exposed American electoral districts prior to the 2016 national election).

China would not abandon its economic model (despite longstanding expectations that its accession to the WTO would lead it to do so), and that its rise posed the biggest threat yet to the economic and national security of the United States. China's extraordinary success pursuing economic policies that defied the logic of trade experts, along with a strong government response to the pandemic and a reinvigorated policy debate around how to actively control inflation and combat the climate crisis, reenforced the paradigm shift away from "neoliberalism" and ushered the return of "industrial policy" in the United States.

Meanwhile, many countries continued to draw red lines around the further expansion of the trade regime. This prompted the WTO Secretariat to scramble to have members come to any possible agreement on a small subset of issues, including fisheries subsidies and waivers for intellectual property rights for lifesaving COVID-19 vaccines, diagnostic tests, and treatments, during the first Ministerial Conference to take place in the aftermath of the pandemic. Even though an overwhelming number of WTO members, as well as the World Health Organization, endorsed prioritizing human health over intellectual property through a comprehensive waiver, the initiative was met with developed-country resistance and was, in the end, anything but comprehensive: it excluded COVID-19 tests and treatments and was framed solely in the context of compulsory licensing, authorizing countries to set aside only one of its many conditions. All of these developments reinforced a growing consensus that the emphasis on "liberalized trade" had come at the expense of other critical priorities including "economic resilience," "national security," "industrial development," "climate action," "social inclusion," and "global health." In the eyes of dominant Anglophone observers, they set the stage for the unwinding of trade integration, the resurgence of "protectionism," the re-shoring of production, "deglobalization," and, ultimately, the unraveling of the multilateral trading system and its neoliberal truce.¹⁷²

II. UNCOVERING NARRATIVES OF THE TRADING SYSTEM THAT OVERCOME ANGLOCENTRISM

The focus on the law and politics of the Anglosphere is a consequence of rendering the dominant story of the trade regime in accordance with the players,

172. See Edward Alden, *Trump, China, and Steel Tariffs: The Day the WTO Died*, COUNCIL ON FOREIGN RELATIONS (Mar. 9, 2018), <https://www.cfr.org/blog/trump-china-and-steel-tariffs-day-wto-died>; Chad P. Bown & Douglas A. Irwin, *Trump's Assault on the Global Trading System and Why Decoupling from China Will Change Everything*, 98 FOREIGN AFFAIRS (Aug. 12, 2019), <https://www.foreignaffairs.com/articles/asia/2019-08-12/trumps-assault-global-trading-system>; Edward Wong & Ana Swanson, *Ukraine War and Pandemic Force Nations to Retreat From Globalization*, N.Y. TIMES (Mar. 22, 2022), <https://www.nytimes.com/2022/03/22/us/politics/russia-china-global-economy.html>; The Economist, *The Tricky Restructuring of Global Supply Chains: Why Too Much Resilience is Dangerous*, ECONOMIST (Jun. 16, 2022), <https://www.economist.com/leaders/2022/06/16/the-tricky-restructuring-of-global-supply-chains>; Alan Beattie, Opinion, *The WTO's Marathon Exercise in Staying Alive*, FINANCIAL TIMES (Jun. 17, 2022), <https://www.ft.com/content/ae5599ef-2710-43f3-bf08-9d2799f1b884>.

locations, events, and themes chosen by the scholars and texts selected above. The Anglocentric bias, however, is neither inevitable nor the only compelling perspective through which to historicize the field. There are stories about the origins, evolution, and current state of the GATT/WTO that do not revolve around the politics of Hull and Keynes, Reagan and Thatcher, or Trump and Johnson, and that move beyond the narrow focus on “barriers to trade.” As this Part of the Article reveals, there are neglected dimensions to the past of the multilateral trading system that cast a very different light on its program.

However, before setting out to develop an alternative narrative, a disclaimer is in order. The account that follows is as parochial as the Anglocentric one that precedes it. It is presented here not with the intention of supplanting the dominant narratives nor as a means of unearthing the true origins of the trade regime. Further, even though it might well be the effect, the goal in offering an alternative story is not to produce a more comprehensive picture of the multilateral trading system’s history. Instead, the objective is to widen the lens through which the program of the trade regime is understood. By unpacking the limitations of Anglocentric storytelling and its overreliance on the binaries of “liberalized versus restricted trade” and “free trade versus protectionism,” the aim is to draw attention to the importance of epistemic pluralism when considering how best to organize trade to meaningfully take on this century’s most pressing challenges.

This section’s account is inspired by neither Ricardo nor Polanyi, but by Michel Foucault and his 1970s lectures in which he examined the history and evolution (genealogy) of the German variant of economic liberalism known as “ordoliberalism” and contrasted it with the genealogy of other movements that have focused on social engineering through economic ordering.¹⁷³ As scholars recall, a relatively recent translation of these lectures reintroduced intellectuals outside of Germany to this variant, sparking a new wave of interest among a group of commentators that is put to service below.¹⁷⁴

The proceeding account also owes a great deal of its sapience to Jürgen Habermas. The German philosopher’s normative approach to international legal ordering, which embraces the “constitutionalization” of international law while presenting governance as a tiered “multilevel” system composed of both “supranational” and national, regional, and global “transnational” regimes, provides much of the impetus for the story that follows.¹⁷⁵ Its portrayal is based

173. See MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978–79* (Arnold I. Davidson ed., Graham Burchell trans., Palgrave Macmillan 2008).

174. ANNE ORFORD, *INTERNATIONAL LAW AND THE POLITICS OF HISTORY* 50–51, 265–71 (2021); Christian Joerges & Josef Hien, *Introduction: Objectives and Contents of the Volume*, in *ORDOLIBERALISM, LAW AND THE RULE OF ECONOMICS* 1, 1–2 (Josef Hien & Christian Joerges eds., 2017).

175. See Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law Europe and Democracy: An Exchange*, 23 *EUR. J. INT’L L.* 335 (2012); Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society*, 15 *CONSTELLATIONS* 444 (2008); Jürgen Habermas, *A Political Constitution for the Pluralist World Society*, in *BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS* 312 (Ciaran Cronin trans., 2008).

primarily on the contributions of Christian Joerges,¹⁷⁶ also with Josef Hien¹⁷⁷ and Michelle Everson,¹⁷⁸ scholars who have helped link ordoliberalism's national program to the project of regional (European) economic integration; on Quinn Slobodian's iconic monograph on economic globalism,¹⁷⁹ as well as on some of Anne Orford's scholarship,¹⁸⁰ two academics who have been strategic in combining ordoliberal and Hayekian thinking and linking it further to global economic integration; and on the writings of Jan Tumlrir,¹⁸¹ Frieder Roessler,¹⁸² and Ernst-Ulrich Petersmann,¹⁸³ intellectuals and former GATT/WTO officials who are also protagonists of the story.

176. Christian Joerges, *The Overburdening of Law by Ordoliberalism and the Integration Project*, in *ORDOLIBERALISM, LAW AND THE RULE OF ECONOMICS* 179 (Josef Hien & Christian Joerges eds., 2017) [hereinafter Joerges, *The Overburdening of Law by Ordoliberalism and the Integration Project*]; Christian Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 15 *GERMAN L. J.* 985 (2014) [hereinafter Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*]; Christian Joerges, *What Is Left of the European Economic Constitution: A Melancholic Eulogy*, 30 *EURO. L. REV.* 461 (2004) [hereinafter Joerges, *What Is Left of the European Economic Constitution*]; Christian Joerges, *The Science of Private Law and the Nation-State*, in *THE EUROPEANISATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION* 47 (Francis Snyder ed., 2000) [hereinafter Joerges, *The Science of Private Law and the Nation-State*].

177. Christian Joerges & Josef Hien, *Dead Man Walking? Current European Interest in the Ordoliberal Tradition*, 24 *EURO. L. J.* 142 (2018); Joerges & Hien, *supra* note 173.

178. Christian Joerges & Michelle Everson, *The Legal Proprium of the Economic Constitution*, in *THE LAW OF POLITICAL ECONOMY: TRANSFORMATION IN THE FUNCTION OF LAW* 33 (Poul F. Kjaer ed., 2020).

179. QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018).

180. Orford, *Theorizing Free Trade*, *supra* note 13; Anne Orford, *Law, Economics, and the History of Free Trade: A Response*, 11 *J. INT'L L. & INT'L REL.* 155 (2015) [hereinafter Orford, *Law, Economics, and the History of Free Trade*]; Orford, *Food Security, Free Trade, and the Battle for the State*, *supra* note 13.

181. See JAN TUMLRIR, *PROTECTIONISM: TRADE POLICY IN DEMOCRATIC SOCIETIES* (1985) [hereinafter TUMLRIR, *PROTECTIONISM*]; Jan Tumlrir, *International Economic Order and Democratic Constitutionalism*, *BAND 34 ORDO* 71 (1983); Jan Tumlrir, *Can the International Economic Order Be Saved?*, 1 *WORLD ECON.* 3 (1977) [hereinafter Tumlrir, *Can the International Economic Order Be Saved?*].

182. See Frieder Roessler, *Democracy, Redistribution and the WTO: A Comment on Quinn Slobodian's Book Globalists: The End of Empire and the Birth of Neoliberalism* *Book Reviews*, 18 *WORLD TRADE REV.* 353 (2019) [hereinafter Roessler, *Democracy, Redistribution and the WTO*]; Frieder Roessler, *The Institutional Balance between the Judicial and the Political Organs of the WTO*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW* 325 (Marco Bronckers & Reinhard Quick eds., 2000); Frieder Roessler, *The Constitutional Function of the Multilateral Trade Order*, in *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1993); Frieder Roessler, *Law, de Facto Agreements and Declarations of Principle in International Economic Relations*, 21 *GERMAN Y.B. INT'L L.* 27 (1978) [hereinafter Roessler, *Law, de Facto Agreements and Declarations of Principle in International Economic Relations*].

183. See Ernst-Ulrich Petersmann & Armin Steinbach, *Neo-Liberalism, State-Capitalism and Ordo-Liberalism: 'Institutional Economics' and 'Constitutional Choices' in Multilevel Trade Regulation*, 22 *J. WORLD INV. & TRADE* 1 (2021); Ernst-Ulrich Petersmann, *Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trading System*, in *THE APPELLATE BODY OF THE WTO AND ITS REFORM* 15 (Chang-fa Lo et al. eds., 2020); Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises Snipings*, 18

A. The GATT

1. First-generation “ordoliberalism” and a “depoliticized” and “supranationalized” trade governance

Under the dominant approaches, the story of international trade regulation is positioned as a battleground between active state interventionism and passive market freedom. Unsurprisingly, the characters that give meaning to this story are primarily situated between Bretton Woods, Washington, London, and Ottawa. However, the contemporary telos for international trade need not be localized in the Anglo-American cosmos nor logically set around the simplistic dimension of a “regulated” versus “unregulated” world. To be sure, this tension regarding the degree of “openness” of the trade regime is not the sole or predetermined baseline for conceptualizing the history of the multilateral trading system. In fact, by turning first to the interwar years instead of the postwar planning era and focusing on Central Europe rather than on the United Kingdom and the United States, a very different narrative emerges.

The collapse of the Austro-Hungarian Empire marked a pivotal moment, and it profoundly shaped the interwar period. For Central and Eastern Europeans in particular, this collapse ushered in an era characterized by the consolidation of modern democracy, the emergence of the nation-state, and the perceived “disintegration” of the nineteenth century’s liberal economic order.¹⁸⁴ The Central European story of the multilateral trading system, therefore, begins in the context of an era as turbulent as the postwar period. This era’s perspective, as detailed below, makes it possible to view the prelude to the WTO within the context of the broader imperative to reconcile national political self-determination with global economic interdependence and to conceptualize a paradigm for the regulation of international trade where the clash between *imperium* and

WORLD TRADE REV. 503 (2019); Ernst-Ulrich Petersmann, *Globalists: The End of Empire and the Birth of Neoliberalism*, 21 J. INT’L ECON. L. 915 (2018); Ernst-Ulrich Petersmann, *The Establishment of a GATT Office of Legal Affairs and the Limits of ‘Public Reason’ in the GATT/WTO Dispute Settlement System*, in A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO 182 (Gabrielle Marceau ed., 2015); ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY (2012); Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND INTERNATIONAL ECONOMIC LAW 5 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2011); THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1991); Ernst-Ulrich Petersmann, *Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 33 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1991); ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991); Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On the Domestic Policy Functions of International Rules*, 41 AUSSENWIRTSCHAFT 405 (1986).

184. Orford, *How to Think about the Battle for State at the WTO*, *supra* note 13, at 49–50; Orford, *Food Security, Free Trade, and the Battle for the State*, *supra* note 13, at 50–51, 56; SLOBODIAN, *supra* note 179, at 186–87.

*dominium*¹⁸⁵ takes precedence over the traditional conflict between *dirigisme* and *laissez-faire*.¹⁸⁶

In tracing the Central European origins of the trade regime, two interwar experiences that significantly influenced Austria and Germany, and subsequently Central Europe, come to the forefront. The first of these experiences revolves around the emergence of both Soviet Union Communism and German National Socialism. In Austria, these events manifested uniquely in the phenomenon known as “Red Vienna.” The July 1927 revolt in the Austrian capital, coupled with the rise to power of Social Democrats, convinced many intellectuals in Austria that democratic processes could not only succeed but also effectively disrupt market processes, like income divergence, which had been offset following the revolt largely as a result of collective bargaining schemes and the success of labor unions in exerting upward pressure on wages.¹⁸⁷ Meanwhile, as communism gained ground in Eastern Europe after the Bolshevik Revolution and nationalism surged in Central Europe following the collapse of the Habsburg Empire, Germany also found itself facing unprecedented democratic pressures.¹⁸⁸ Rather quickly, the region became engulfed by a fear of “mass” demands for democracy coming from both the political left and the political right.¹⁸⁹ This fear was particularly intense among economic liberals who became preoccupied with devising ways to insulate markets from perceived threats posed by “collectivist” political forces.¹⁹⁰

The second interwar experience that was imprinted on Central Europeans during this period was the Great Depression. Because of how far it extended, thinkers in Central Europe became increasingly aware of the interdependence of national markets, and, accordingly, of the need to seek solutions on a global scale.¹⁹¹ Because of its scope and timing, they also began to lose faith in statistics and the power of mathematically informed theories of markets and developed a sense of the economy as something beyond human understanding. By the end of the Depression, many Central European economists strongly believed that

185. CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 235 (2003); See also Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927–28) (for a well-known articulation of these two opposed modes—and the misconceptions and contradictions that arise from them—in the legal scholarship); MARTTI KOSKENNIEMI, *TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER, 1300–1870* (2021) (for the treatment of this binary in the context of international law).

186. See SLOBODIAN, *supra* note 179, at 10–11, 116–17.

187. *Id.* at 46 (also noting that some thinkers believed unions were the reason the 1929 slump turned into the Great Depression).

188. Joerges, *What Is Left of the European Economic Constitution*, *supra* note 175, at 80–81.

189. SLOBODIAN, *supra* note 179, at 42–47.

190. Jean Solchany, *Wilhelm Ropke as a Key Actor of Transnational Neoliberalism After 1945*, in *RE-INVENTING WESTERN CIVILISATION: TRANSNATIONAL RECONSTRUCTIONS OF LIBERALISM IN EUROPE IN THE TWENTIETH CENTURY* 95, 100–102 (Niklas Olsen & Hagen Schulz-Forberg eds., 2014).

191. SLOBODIAN, *supra* note 179, at 69.

comprehensive knowledge about the world was elusive and that there was little value in turning to scientific knowledge to predict and prevent economic crises.¹⁹² Additionally, they also came to the realization that a stable global economy would not naturally produce itself.¹⁹³ Given that stable world trade could be neither the product of enlightenment nor the self-regulating market, Central European intellectuals became convinced that the only proper role for government was to contain and protect the global economy from internal political disruption.

As it happens, these experiences led Austrians Friedrich von Hayek and Ludwig von Mises, German “ordoliberals” Wilhelm Röpke and Alexander Rüstow, and other liberal-minded Central European intellectuals of the 1930s to a profound realization: they recognized that a liberal world economy would not spontaneously emerge, and that extra-economic means were essential for its protection.¹⁹⁴ This realization prompted a gradual shift in their focus from economics to the realms of statecraft and law.¹⁹⁵ As fate would have it, these intellectuals were drawn to Switzerland, where they found the institutions to host them. With figures like William Rappard, whose name adorns the building that houses the WTO today, providing assistance,¹⁹⁶ they turned their attention to the Swiss enclave of Geneva—the city that would later become the headquarters of the GATT and WTO. Geneva offered them a refuge to channel their efforts into developing proposals that would allow the market economy to operate as a so-called “competitive order” shielded from the democratic forces they so feared.¹⁹⁷

As some commentators recall, the defining characteristic of these efforts was the shift to the German concept of *Ordnungspolitik* (the ordering of economic policy through law).¹⁹⁸ There was a recognition that the powers originally held by national governments could be redirected and vested in institutions of a “supranational” order—a concept that stood in opposition to an “international” or “transnational” order which involved excessive deference to the principle of national sovereignty.¹⁹⁹ The result was the emergence of a project of a “doubled” world order where “political” nation-states were confronted with “anti-political” global markets.²⁰⁰ Hence, a drive for the “*depolitization*” of economic policy

192. *Id.* at 58, 77–87.

193. Solchany, *supra* note 190, at 99–100; SLOBODIAN, *supra* note 179, at 94–95.

194. SLOBODIAN, *supra* note 179, at 11, 83, 86–87; *See also* Hagen Schulz-Forberg, *Embedded Early Neoliberalism: Transnational Origins of the Agenda of Liberalism Reconsidered*, in *NINE LIVES OF NEOLIBERALISM* 169, 171–77 (Dieter Plehwe et al. eds., 2020); Solchany, *supra* note 190, at 102.

195. SLOBODIAN, *supra* note 179, at 11, 83, 86–87.

196. *Id.* at 74–75.

197. Schulz-Forberg, *supra* note 194, at 176–77; Orford, *Theorizing Free Trade*, *supra* note 13, at 725–26; Orford, *Food Security, Free Trade, and the Battle for the State*, *supra* note 13, at 56.

198. Joerges & Hien, *supra* note 174, at 3–4; Joerges, *The Overburdening of Law by Ordoliberalism and the Integration Project*, *supra* note 175, at 183; Joerges, *Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, *supra* note 175, at 987.

199. SLOBODIAN, *supra* note 179, at 184.

200. *Id.* at 15, 116–17; Joerges, *What Is Left of the European Economic Constitution*, *supra* note 176, at 83–86 (referring to the project as applied to Europe).

through the juridification of a “supranational” order became the central focus of Central European economists. This project took root at Mont Pelerin, Switzerland, coinciding with the time when nations gathered on the opposite shore of Lake Geneva to finalize the Charter of the ITO.²⁰¹

This project captured the interest of intellectuals beyond Central Europe, drawing in figures like Lionel Robbins. Robbins, an economist almost as famous as Keynes, became the leading British figure of the “Mont Pelerin Society”—as the group of Geneva-based liberal intellectuals came to be known. His influence extended to subsequent generations of economic liberals, including his colleague James Meade, who succeeded him as Director of the Economic Section of the War Cabinet Secretariat of the United Kingdom in 1946. Robbins and Meade likely exerted the most substantial intellectual influence on the institutional design of the ITO, a design which later served as the blueprint for the GATT.²⁰²

2. “Liberalized versus restricted trade” revisited

By tracing the GATT back to interwar characters of the likes of Hayek, Mises, Röpke, and Rüstow rather than to Hull and Keynes, this account provides an additional layer typically absent in Anglocentric storytelling that presents the ideas that inspired the multilateral trading system as being fueled by neither the fear of too much nor too little government regulation. Instead, these ideas emerge as animated by the mistrust of domestic politics and skepticism toward economics. Indeed, while it is typically remembered that interwar Mont Pelerin intellectuals were advocates of limiting the powers of national governments,²⁰³ it is often forgotten that most were originally very much in favor of forms of planning that scaled beyond the nation-state. Hayek himself advocated for a powerful supranational authority in his most famous work, *Road to Serfdom*.²⁰⁴

The power of this Central European account lies not only in featuring key GATT/WTO forefathers who have been less prominent in the English-language literature on the trade regime, but also in depicting them as politics-fearing globalists who openly endorsed rolling out the state through various forms of supranational regulation. This portrayal contrasts with the conventional image of

201. SLOBODIAN, *supra* note 179, at 126–27 (referring to the “neoliberal” movement and its meeting in the spring of 1947).

202. Orford, *How to Think about the Battle for State at the WTO*, *supra* note 13, at 49–50; Orford, *Theorizing Free Trade*, *supra* note 13, at 728–29; *see also* SLOBODIAN, *supra* note 179, at 99–102, 126–27 (presenting Robbins’ idea of a world economic federation and chronicling his involvement with the Mont Pelerin Society); ERNEST FRANCIS PENROSE, *ECONOMIC PLANNING FOR THE PEACE*, 89–90 (1953) (describing Meade as the “originator” of the Havana Charter and the ITO).

203. Orford, *Theorizing Free Trade*, *supra* note 13, at 727–28; Orford, *Food Security, Free Trade, and the Battle for the State*, *supra* note 13, at 57–58.

204. *See* FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* ch. 15 (1944). Note, however, that Hayek would later recast his position as an opposition to global government of any form. *See* SLOBODIAN, *supra* note 179, at 91. Some of the other Central European economists associated with the ordoliberal movement would also come to disavow constitutionalist supranational governance-oriented conceptualizations of their position.

them as market fundamentalists or prophets of the small state.²⁰⁵ This move allows the account introduced herein to swiftly unpack themes such as the aversion to politics and diplomacy, which, in Anglocentric accounts, generally come into play only around the 1970s. By inserting “neoliberalism” into the narrative as early as the 1930s and intertwining it with “ordoliberalism” (a parallel intellectual movement coined as such by a German economist),²⁰⁶ a new plane emerges. This new plane allows the history of the GATT to unfold as a joint “Hayekian” and “ordoliberal” battle to encase markets, rather than as a struggle to liberate them.²⁰⁷

This new dimension exposes a structural bias at the heart of the dominant way of thinking about international trade regulation.²⁰⁸ The Anglo-American canon of the trade regime is regularly beset by a claim of neutrality as central to both the international institutional architecture and the market freedom paradigm. Its reconstructions of the past situate the GATT/WTO as either in a continuous incremental path toward “liberalized trade” (in more traditional accounts) or in a fluid and difficult trajectory that oscillates between “classical liberalism,” “embedded liberalism,” “neoliberalism,” and back (as in the more nuanced story assembled in Part I above), all while pivoting around the fulcrum of some imagined unregulated/ungoverned, “unrestricted” market. By attaching so much weight to the dyad of restricted/liberalized trade, or of embedded/disembedded markets (to use Polanyian terms), the Anglocentric history of the trade regime vastly ignores the considerable institutional planes of the trade regime and the coercive elements at play in its governance. The Central European account, in contrast, presents the global market as deliberately restricted by, and embedded in, legal and institutional processes. By revealing that coercive state intervention has been a necessary precondition to international trade ordering (from the very

205. See Ernst-Ulrich Petersmann, *Globalists Book Review*, *supra* note 183, at 915 (reviewing Slobodian’s book and situating “ordoglobalists” on par with Keynes and Polanyi by virtue of their endorsement of more multilevel regulation); see also Schulz-Forberg, *supra* note 194, at 194–95 (making a similar argument).

206. Hero Moeller, *Liberalismus*, 162 JAHRBÜCHER FÜR NATIONALÖKONOMIE UND STATISTIK 214, 224 (1950).

207. See SLOBODIAN, *supra* note 179, at 12–16; see also Roessler, *Democracy, Redistribution and the WTO*, *supra* note 182, at 357–58 (describing the main function of the rules, negotiations, and dispute settlement process of the GATT as that of insulating trade from internal “sectorial interests” and the “political pressure of import-competing industries” through a “constitutional framework of trade policymaking,” despite stating that the institutional function of the GATT was not to “encase” the global market). Note that although many distinctions have been drawn in the literature between (American and Austrian) neoliberalism and (German) ordoliberalism, it has also been argued that Hayek’s program between the 1930s and 1950s was hardly indistinguishable from that of ordoliberals. See Stefan Kolev, *When Liberty Presupposes Order: F. A. Hayek’s Learning Ordoliberalism*, No. 21/02 (2021); Solchany, *supra* note 190, at 111–13. The term “Hayekian” as used in this Article is intended therefore as a reference to the political economy of Hayek of these years.

208. For a famous treatment of “structural bias,” see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 600–14 (2006).

beginning), it unveils a false consciousness that is pervasive among dominant Anglocentric conceptions of the field.²⁰⁹

3. *Trade history is politics*

The ordoliberal-Hayekian perspective is worthwhile not only for bringing a significant blind spot of the dominant narrative into view, but also for its potential to emancipate the intellectual, pedagogical, and professional consciousness of international trade. By giving prominence to other meaningful locations like Geneva, the longstanding epicenter of the multilateral regime, and highlighting key actors like Central Europeans, who have been and remain deeply engaged in questions of global trade governance, it contributes to a more balanced portrayal of the GATT/WTO's past. This approach renders history less susceptible to one-sided instrumentalization by accounts that tend to be skewed toward a parochial Anglo-focused outlook on the world.

To illustrate, consider the Havana Charter. The demise of the ITO, when viewed through the lens of the combined Hayekian-ordoliberal narrative rather than through the framework of its provincial (Anglocentric) reconstruction, takes on an entirely new meaning. Accounts within the Anglo-American literature typically attribute the failure of the ITO to a lack of support from the business community. These accounts also highlight objections from contradictors regarding the perceived bureaucratic nature of the ITO, its egalitarian structure, and its Charter's apparent excessive deference to certain forms of government regulation.²¹⁰ They construe the objections as concerns that the Charter would unduly encroach on the sovereignty of member states, and particularly that of the United States. However, when the business community's objections are considered outside the confines of a parochial-American mindset, they can easily be recast as concerns that the Charter did not constrain the sovereignty of the ITO's members enough.

As one historian points out, two intellectuals stand out on the subject of the ITO's demise: Polish-Swiss Michael Heilperin and Romanian-American Philip Cortney. The latter is consistently credited with leading the campaign that led to the defeat of the Havana Charter. Both men were not only members of the Mont Pelerin Society, notably influenced by the ideas of Mises (who was a personal friend), but also consistent advocates against the ITO in the international arena and on behalf of the global business community.²¹¹ Speaking to and on behalf of

209. See ERNST-ULRICH PETERSMANN, *INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY*, *supra* note 183 (denouncing the "Anglo-Saxon belief" that markets can function independent of legal regimes); see also SLOBODIAN, *supra* note 179, at 16 (discussing why the terms "encasement of the market" describe the international dimensions of the WTO project better than the Polanyian terms of "dis-embedding the economy").

210. LOVETT ET AL., *supra* note 26, at 59; IRWIN, *supra* note 20, at 503–06; WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION*, *supra* note 18, at 33; see also SLOBODIAN, *supra* note 179, at 129 (citing hearings before the United States House Committee on Foreign Affairs).

211. SLOBODIAN, *supra* note 179, at 132.

the International Chamber of Commerce (ICC), Heilperin and Cortney repeatedly complained about the Charter's one-country, one-vote rule and the number of exceptions, emergency clauses, and opt-outs it contained.²¹² The objection to the voting system, typically portrayed as a reaction to a structure perceived by Americans as disproportionate given their economic dominance and the postwar voting balance struck at Bretton Woods, emerges as a broader reproach to the extension of national political systems when considered within the context of the ICC and the global business community.²¹³ Likewise, the grievance regarding the increasing number of exceptions, frequently portrayed as a reaction against regulations that might permit foreign interference in the United States' commercial policy, is transformed into a broader rejection of governance structures resembling day-to-day democratic decision-making the moment it is de-Americanized.²¹⁴

In this way, once it is understood outside the context of a provincial-American predisposition, opposition to the ITO stands out not as resistance to an organization that threatened the (American) self-governing state but as a reaction to one that did not do enough to insulate the (global) market from national politics and democratic decision-making. Indeed, contrary to the belief that it might infringe on members' sovereignty, what distinguished the Havana Charter was its *deference* to the internal affairs of sovereign states. It even contained a provision that instructed the ITO to "not attempt to take action which would involve passing judgment *in any way* on essentially political matters."²¹⁵ This is a feature that is found neither in the GATT nor the WTO, instruments which received favorable American approbation.²¹⁶ Fittingly, therefore, once the United States' provincialism is overcome, Heilperin's and Cortney's objections to the ITO come to light as part of a program to protect the global market rather than as moves to defend the sovereignty of the American State.

This Article's dominant account, while inclusive of both establishment and critical voices, makes its version of the contemporary history of international trade seem both sufficient and inevitable. It also gives the impression that a consensus has already been forged around the determining material and ideational dimensions of the GATT/WTO. The problem with presenting the story of the multilateral trading system in that way is that it comes in the face of experiences, perspectives, and dimensions that have been marginalized or left out, and of a narrative that can always be complicated further.

212. *Id.* at 126–33; IRWIN, *supra* note 20, at 505–06.

213. TUMLIR, PROTECTIONISM, *supra* note 181, at 25–26.

214. *Id.* at 26–27.

215. United Nations Conference on Trade and Employment, U.N. Doc. E/CONF.2/78, Sales No. 1948.II.D.4, art. 86 (Mar. 24, 1948).

216. The GATT contains general and essential security exceptions, as well as an opt-out provision which was attenuated via art. XIII of the WTO Agreement, but nothing comparable to art. 86 of the Havana Charter.

While storytelling is often perceived as a truth-telling pursuit, ambiguity lies at its core. It is an endeavor that navigates between the lines of truth, invention, and imagination. The account developed in the first half of this Article was not discovered—it was constructed. Its style deliberately draws on dominant voices, a common feature in GATT/WTO storytelling, which leads to an overemphasis on aspects that align with a dominant view of governance (typically liberal and Anglocentric). This focus tends to overlook many other struggles that impart meaning to the field. While such an approach lends coherence and persuasiveness to the dominant account, it also renders it overly susceptible to one-sided instrumentalization.²¹⁷

Hence, a preliminary conclusion to draw from placing the Anglo-American and Central European accounts against each other is that all accounts of the trade regime’s past, including Part II’s, involve normative and political choices about what to include and what to omit. For this reason alone, the historical method blurs the distinction between reconstructing the past and endorsing specific political projects. As a method, it should be thought of as “*whose-story*,” not “*history*.” Consequently, turning to it for apolitical authority or for making neutral and impartial claims about the content and meaning of law represents a misguided approach to the intellectual, pedagogical, and professional practices of international trade.²¹⁸

B. The WTO

1. Second-generation “ordoliberalism” and “economic constitutionalism”

The fact that the GATT was primarily negotiated between Britons and Americans presents a limitation to a postwar Central European account of the multilateral trading system. However, this constraint does not carry over to the WTO, as that more recent iteration of the trade regime involved a broader set of countries. As a result, both dominant Anglocentric and Hayekian/ordoliberal narratives of the WTO incorporate stories featuring continental Europe and, by implication, Central Europeans. Unlike most dominant narratives, this Section’s account approaches the subject of European participation predominantly from the less understood informal-ideational direction, placing less emphasis on the well-known formal-material dimensions.

Many years before the Anglocentric preoccupation with non-tariff “barriers to trade” came into the picture, a group of ordoliberal intellectuals was already sowing the seeds of what would become the WTO. The leading exponent of this group was Ernst-Joachim Mestmäcker, a legal scholar and member of the Mont

217. See Orford, *How to Think about the Battle for State at the WTO*, *supra* note 13, at 49–55; Orford, *Theorizing Free Trade*, *supra* note 13, at 701, 704–10; Orford, *Law, Economics, and the History of Free Trade*, *supra* note 180, at 177.

218. See also ORFORD, *supra* note 174, at 265 (for a more elaborate discussion about the limitations of storytelling as also applicable to a joint Hayekian-ordoliberal account).

Pelerin Society who, along with several other German jurists, became captivated by the concept of the *Wirtschaftsverfassung* (economic constitution) and the notion that law should be assigned a constitutive function in the ordering of the economy²¹⁹—ideas which all dated back to the earlier generation of Mont Pelerin intellectuals.²²⁰ As some commentators note, Mestmäcker and this group of ordoliberal lawyers identified with the belief that National Socialists had managed to seize power during the Weimer Republic era because the prevailing German legal and institutional framework was ill-equipped to deal with democratic pluralism. They reasoned, therefore, that a “strong state” was critical for the economy.²²¹ As a result, this second generation of ordoliberals became resolute in establishing a postwar German economic order that was both “nomocratic” and “state-guaranteed,” yet also “supreme” and detached from the social and labor dimensions of the *soziale Marktwirtschaft* (social market economy) that was propping up.²²² As that initiative took off and was met with domestic resistance, they also endeavored to scale it up beyond the German State to the “supranational” level. The method by which they set out to expand their model of economic ordering entailed situating the project of European economic integration—which had culminated in the formation of the European Economic Community (EEC)—within the framework of “economic constitutionalism.”²²³ This reframing helped cement the view that the Treaty of Rome was the example of economic governance that every nation should follow.²²⁴

Mestmäcker considered the EEC to be a model of economic governance because it contained the foundations for “progressively restraining” economic power.²²⁵ In effect, in 1957, the EEC Treaty not only introduced presumably irrevocable economic freedoms that were typically framed in the form of negative legal prescriptions, but also established the institutions to ensure them. In the decade following the treaty’s adoption, through a series of seminal judgments that consolidated the “supremacy” of the EEC and the “direct effect” of the Treaty of Rome, the European Court of Justice took the concept of the “economic

219. Joerges & Hien, *supra* note 177, at 144; Joerges & Hien, *supra* note 174, at 3–5; Joerges, *Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, *supra* note 176, at 986–87.

220. Joerges, *What Is Left of the European Economic Constitution*, *supra* note 176, at 80.

221. Joerges & Hien, *supra* note 177, at 147; Joerges, *The Science of Private Law and the Nation-State*, *supra* note 176, at 56–57; see also Hagen Schulz-Forberg, *Laying the Groundwork: The Semantics of Neoliberalism in the 1930s*, in *RE-INVENTING WESTERN CIVILISATION: TRANSNATIONAL RECONSTRUCTIONS OF LIBERALISM IN EUROPE IN THE TWENTIETH CENTURY* 13, 29–35 (Niklas Olsen & Hagen Schulz-Forberg eds., 2014) (tracing the concept of the “strong state” back to Alexander Rüstow and linking it further to German jurist Carl Schmitt).

222. Joerges, *Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, *supra* note 176, at 989–90; Joerges, *What Is Left of the European Economic Constitution*, *supra* note 176, at 83–86.

223. SLOBODIAN, *supra* note 179, at 204, 208–10, 213–14.

224. *Id.*

225. Ernst-Joachim Mestmäcker, *Concentration and Competition in the EEC*, 6 J. WORLD TRADE 615, 621 (Dec. 1972).

constitution” both quite literally and to heart, gradually empowering private individuals and domestic courts to tame economic policy via community law.²²⁶

On the one hand, in asserting primacy over domestic law, the EEC Treaty provided legal protection to the (European) market; on the other hand, by establishing judicial institutions that furthered an economic-integration-through-law agenda, it enabled the gradual erosion of the political authority of the region’s nation-states.²²⁷ In effect, democracy was not a central component of the EEC project during its formative phase; instead, democratic politics remained primarily at the member States’ level.²²⁸ Given all these factors, it is unsurprising that the second generation of ordoliberals viewed the EEC as both a champion and an advancement of their project. Combining first-generation ordoliberal concepts with innovative enforcement mechanisms capable of maintaining the “depolicitization” of the market, the European “economic constitution” was hailed as the next-generation blueprint for safeguarding trade from political influences.²²⁹

2. *Developing-country contestation*

Paradoxically, during the 1950s and 1960s, while a cohort of young, constitutionalist ordoliberal lawyers continued to fervently advocate for European economic integration, another faction of older Hayekian economists vehemently opposed the Treaty of Rome. This second group objected to the EEC Treaty, not only because they believed the EEC’s very existence undermined a more “universal” project of global economic integration, but also because they saw the EEC as providing legal cover to preferential concessions extended to Africa dating back to the imperial era.²³⁰ These concessions were perceived by Hayekian economists as flouting the principles of the multilateral trading system. Indeed, imperial preferences had been a subject of discord during the GATT negotiations, and while Europeans had succeeded in securing carve-outs for them, their effect had been largely tempered down as a result of surging postwar inflation.²³¹ As prices stabilized, however, the discord resurfaced.

A character notoriously opposed to the EEC’s approach to economic integration was Gottfried Haberler, an Austrian economist who had been a student of Mises and was a card-carrying member of the Mont Pelerin Society. In 1958,

226. Joerges, *The Overburdening of Law by Ordoliberalism and the Integration Project*, *supra* note 176, at 188.

227. *Id.* at 189.

228. HAGEN SCHULZ-FORBERG & BO STRÅTH, *THE POLITICAL HISTORY OF EUROPEAN INTEGRATION: THE HYPOCRISY OF DEMOCRACY-THROUGH-MARKET* 4 (2010).

229. Joerges, *What Is Left of the European Economic Constitution*, *supra* note 176, at 83–84; *see also* Joerges & Everson, *supra* note 178, at 40–41, 46–47 (describing Mestmäcker’s position in relation to democratic politics and the legitimacy of the EEC Treaty).

230. SLOBODIAN, *supra* note 179, at 183, 189, 191–93.

231. IRWIN ET AL., *supra* note 21, at 94 (noting too that this outcome resulted from the fact that many import duties took the form of specific duties).

Haberler, along with Meade and other liberal economists, coauthored a report for the GATT that took aim at the EEC.²³² Now known as the “Haberler Report,” the document is formally credited with “providing the initial guidelines for the work of the GATT.”²³³ Because the overall thrust of the report was to condemn developed-country use of trade preferences and subsidies (especially in the agricultural sector), its most significant effect was to bolster a developing-country campaign within the GATT calling for improvements in developing countries’ access to foreign markets. Most of the demands of developing countries were aimed at shifting the approach of the trade regime from reciprocity to unilateral concessions for exports such as commodities, which developing countries relied on most for their economic development.²³⁴ The campaign resulted in the filing of the multilateral trading system’s first nullification and impairment complaint, targeting the entire developed-country membership. While the campaign helped erode the principle of reciprocity, most of the demands were not acceded to.²³⁵ As a result, developing countries decided to adopt a strategy borrowed directly from the EEC’s playbook. With a view to stimulating their economic development, they formed weak customs unions and free trade areas with other developing countries that the community of experts gathering at the multilateral trading system was in no position to object to, despite these arrangements being openly contrary to the disciplines of the GATT.²³⁶ Before long, this community would not only openly welcome various types of preferential trade regimes, but also embrace an approach that allowed a significant portion of trade governance to operate outside the strictures of GATT law.

As it happens, starting in the mid-1960s, developing countries attempted to fundamentally transform their relationship with the developed world. In a variety of forums, with the leadership of Brazil and India under coalitions such as the Group of 77 and the intellectual guidance of characters such as Argentinian economist Raúl Prebisch, developing countries pushed for a “New International Economic Order” (NIEO) that would support them on their path to economic development. With their calls for a NIEO, developing countries were able to score a few victories. For example, they were able to pass resolutions at the United Nations recognizing, on one hand, their permanent sovereignty over their own natural resources and economic activities and their right to regulate foreign investment, and, on the other hand, the duty of developed countries to extend preferential tariff treatment to developing countries and assist them with

232. General Agreement on Tariffs and Trade, Trends in International Trade: Report by a Panel of Experts, General Agreement on Tariffs and Trade Rep. No. GATT/1958-3 (Oct. 1958).

233. World Trade Organization, *Press Brief: Fiftieth Anniversary of the Multilateral Trading System*, https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm (last visited Nov. 8, 2024).

234. ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 52–56 (2011).

235. *Id.* at 57–59.

236. BARTON ET AL., *supra* note 22, at 162; HUDEC, *supra* note 234, at 60. Note that many years later developing countries were given more latitude with respect to their customs unions and free trade areas through the so-called “Enabling Clause.” See *supra* note 221.

economic development, as well as the need for all states to work together to stabilize commodity prices.²³⁷ They were also finally able to put pressure on developed countries to agree on commitments on “trade and development.” Eventually incorporated into the GATT as Part IV in 1966, however, these new provisions were merely statements of principle with a legalistic semblance of commitments that did nothing to change the existing legal and economic relationship between developing and developed countries.²³⁸

This experience with Part IV taught GATT delegates about the formidable challenges associated with effecting substantial changes within the multilateral framework beyond a hortatory articulation of principles. Ultimately, developed countries took minimal action to embrace the recommendations outlined in the Haberler Report, which would have necessitated fundamental alterations to the multilateral trading system. Instead, they chose to persist in practices that contravened both the letter and spirit of the GATT, appeasing developing country demands for improved market access in two ways: initially through specific and bilateral MFN-inconsistent tariff preferences, and eventually by way of the Generalized System of Preferences instituted in 1971 under the aegis of the United Nations Conference on Trade and Development.²³⁹

According to one ordoliberal lawyer, these “*de facto*” concessions allowed developed countries to continue to shape the economic events of the decade in accordance with their interests, all while avoiding the procedural difficulties of consolidating changes to the trade regime on a “*de jure*” basis.²⁴⁰ Simultaneously, however, these initiatives reinstated an atmosphere of pragmatism and compromise at the GATT, cultivating an environment where strict adherence to the foundational principles and legal provisions of the trade regime was far from the prevailing norm. By the onset of the disruptive economic environment in the 1970s, this permissive attitude had already engendered a culture of tolerance within the multilateral trading system, paving the way for the acceptance of voluntary export restraints and orderly marketing arrangements that eventually emerged.²⁴¹

237. G.A. Res. 3201 (S-VI) (May 1, 1974); G.A. Res. 3202 (S-VI) (May 1, 1974); G.A. Res. 3281 (XXIX) (Dec. 12, 1974).

238. HUDEC, *supra* note 234, at 64–65.

239. TUMLIR, PROTECTIONISM, *supra* note 181, at 30; Decision on the Generalized System of Preferences (Jun. 25, 1971), General Agreement on Tariffs and Trade BISD (18th Supp. 1971). Note that the Generalized System of Preferences remained on questionable legal grounds, operating through a temporary and exceptional waiver authorized under GATT art. XXV:5 (a provision that was not meant for general waivers applicable to entire groups of contracting parties) until a permanent legal solution was reached many years later in the form of a Decision of the contracting parties known as the “Enabling Clause.” See Decision on Differentiation and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Nov. 28, 1979), General Agreement on Tariffs and Trade BISD (26th Supp. 1979).

240. Roessler, *Law, de Facto Agreements and Declarations of Principle in International Economic Relations*, *supra* note 182, at 51–52, 57–58.

241. TUMLIR, PROTECTIONISM, *supra* note 181, at 30, 39–43; SLOBODIAN, *supra* note 179, at 215–21, 235, 243.

3. *Third-generation “ordoliberalism” and a “nomocratic” and “multilevel” trade governance*

Unsurprisingly, as the decade came to an end, a small but influential and well-positioned group of ordoliberals in Geneva recognized that the rules of the multilateral trading system were both unenforceable and insufficient. Alarmed by the proliferation of GATT-inconsistent arrangements and policies, this new generation of ordoliberals picked up the idea of the “economic constitution” from where the second generation of ordoliberals had left off, and in so doing helped set in motion the final transformation that led the GATT to fold into the WTO.²⁴²

Three Central Europeans stand out here: Jan Tumlir, Frieder Roessler (who had studied with Hayek), and Ernst-Ulrich Petersmann (who had studied under Hayek). All three men ended up based in Geneva and working at the GATT as they drew inspiration from the two generations of ordoliberal and Hayekian intellectuals that preceded them. From the first generation they took the importance of institutional design. From the second generation they took a combined constitutionalist and universalist position, vigorously championing the idea of extending the “economic constitution” of the EEC beyond Europe to cover all the world as part of a system of “multilevel” trade governance.²⁴³

Hailing from Czechoslovakia, Tumlir was the first to join the GATT in 1964, serving as the head of its research division until his death in 1985. Roessler from Germany arrived next in 1973, followed by Petersmann, also a German in 1981. Together with Hielke van Tuinen and Åke Lindén, Roessler and Petersmann became the first members of the GATT’s Office of Legal Affairs.²⁴⁴ While Tumlir, as the oldest, was the first to articulate a Hayekian/ordoliberal theory for the trade regime,²⁴⁵ they all fed the intellectual stream that led to the creation of the WTO. Through their writings, they consistently advocated for the “supranational” regulation of international trade, favoring it over national approaches. They also called for the shifting of power from diplomats and politicians to judicialized bodies as they promoted a “nomocratic” and “rules-based” trade program modeled after the EEC Treaty’s self-imposed and negatively-framed legal prescriptions, which could constrain the ability of governments to conduct trade policy.²⁴⁶

242. See Petersmann & Steinbach, *supra* note 183 (stating that lawyers working at the GATT’s economic research and legal divisions were influenced by ordoliberalism); Ernst-Ulrich Petersmann, *Between “Member-Driven Governance” and “Judicialization,” supra* note 183, at 18, 38–39 (describing the approach to trade governance of the WTO as the product of “ordo-liberal” thinking); Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises Snipings, supra* note 183, at 518–25 (affirming “Geneva-ordoliberalism” underpins the legal and dispute settlement system of the WTO).

243. SLOBODIAN, *supra* note 179, at 244–57.

244. Marceau et al., *supra* note 50, at 34–36.

245. See TUMLIR, *Can the International Economic Order Be Saved?*, *supra* note 181.

246. See Roessler, *The Constitutional Function of the Multilateral Trade Order, supra* note 182, at 53–62; ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW, *supra* note 183, pt. III.4; Ernst-Ulrich Petersmann,

This third generation aimed to usher in a new approach that would offset the pragmatist one prevailing at the GATT and bring an end to NIEO-style demands for preferential treatment that intellectuals in Geneva believed were eroding the foundational principles of the trade regime.²⁴⁷ Inadvertently, this approach found support in the 1980s in the form of unprecedented interest rate hikes by the United States Federal Reserve. These hikes triggered a debt crisis that forced many developing countries to embrace economic orthodoxy and forsake the ambitions of the NIEO movement.²⁴⁸

After Tumlr's sudden passing in 1985, Petersmann became the leading proponent of "ordoliberalism" at the GATT. Roessler became the first director of its Legal Affairs Division (an operational unit with higher status than that of its predecessor, the Office of Legal Affairs) and subsequently of the WTO. With their work, they reached GATT reformers of many nations. Petersmann published most profusely and was particularly influential with his outpouring of thought pieces during the course of the Uruguay Round.²⁴⁹ He also hosted meetings and conferences with GATT officials, academics, and negotiators of numerous countries on the subject of GATT reform,²⁵⁰ and served as the secretary of the negotiating group on the understanding on dispute settlement that led to the "depoliticized" and "nomocratic" management of international trade.²⁵¹ Roessler, in turn, was closely involved in many aspects of the round's negotiations and drafted the bulk of the decisions that enabled the transition from the GATT to the WTO.²⁵² He would eventually become the head of the ACWL, leading the efforts

Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System, *supra* note 183, at 33–113; Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On the Domestic Policy Functions of International Rules*, *supra* note 183, at 405–39; TUMLR, *PROTECTIONISM*, *supra* note 181, at 56–69; TUMLR, *International Economic Order and Democratic Constitutionalism*, *supra* note 181, at 71–83; *See also* Roessler, *Democracy, Redistribution and the WTO*, *supra* note 182, at 357 (describing Tumlr's position on economic governance). For more recent iterations of their position, *see* Petersmann & Steinbach, *supra* note 183, at 4–16; Ernst-Ulrich Petersmann, *Between "Member-Driven Governance" and "Judicialization," supra* note 183, at 17–20, 38–39; Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises Snipings*, *supra* note 183, at 515–19, 522; ERNST-ULRICH PETERSMANN, *INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY*, *supra* note 183, at 30–31, 185–89, 436; Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, *supra* note 182, at 45–46; Roessler, *The Institutional Balance between the Judicial and the Political Organs of the WTO*, *supra* note 182, at 325–45.

247. SLOBODIAN, *supra* note 179, at 244–51.

248. BARTON ET AL., *supra* note 22, at 163–64.

249. Amelia Porges, *The Legal Affairs Division and Law in the GATT and the Uruguay Round*, in *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO* 229 (Gabrielle Marceau ed., 2015).

250. *See generally* THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS, *supra* note 182.

251. Ernst-Ulrich Petersmann, *The Establishment of a GATT Office of Legal Affairs and the Limits of 'Public Reason,' supra* note 183, at 183.

252. Gabrielle Marceau, *From the GATT to the WTO: The Expanding Duties of the Legal Affairs Division in Non-Panel Matters*, in *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO* 244, 252 (Gabrielle Marceau ed., 2015); *See also* VANGRASSTEK, *supra* note 12, at 590–91 (for Roessler's biography); Porges, *supra* note 248, at 229.

to consolidate the depoliticized *nomocratization* of the trade regime for developing countries.

One of the groups that closely collaborated with these men during their GATT Secretariat duties was the Legal Service of the European Communities. This group drafted and circulated the first paper outlining the institutional framework for a new international organization for trade.²⁵³ Another European, Renato Ruggiero, an Italian Trade Minister who would later become the WTO's second Director-General, also played a crucial role. Ruggiero, whose country held the rotating presidency of the European Council at the time, was not only a vocal proponent of a new ITO, but also the first to advance the idea of its creation on behalf of all European nations in February of 1990, months ahead of the Canadian delegation backed by John Jackson.²⁵⁴

4. *"Liberalized versus restricted trade" revisited: an epilogue*

In analyzing the history of the multilateral trading system, dominant accounts often quickly glance over just how much the EEC served as a model for economic governance—the EEC is referred to mostly in the context of the bloc of nations it represented, and as an institution, is normally given just a minor and incidental historical part, if any.²⁵⁵ They also tend to downplay the role that the NIEO and developing countries played in shaping the ideational context of the WTO during the 1960s and 1970s.²⁵⁶ There is an excessive focus on the Anglocentric dimensions of the trade regime, reflecting the politics of Reagan and Thatcher in the 1980s and 1990s. This emphasis comes at the expense of other dimensions of the period, such as those represented by the perspectives of Central Europeans of the likes of Tumlrir, Roessler, and Petersmann, which are vastly minimized or completely ignored.²⁵⁷ These oversights have important ramifications because they have the effect of concealing an otherwise central feature of the project of the multilateral trading system. The dominant narratives' excessive focus on "liberalized trade" or on the Polanyian "disembedded" market makes it sound as if a neutral, "undistorted," and "unrestricted" version of trade was eventually within reach. The joint Hayekian-ordoliberal account presented in the second half of the Article reveals instead that the global market is a legal construct, and that economic distortion and legal and institutional restrictions have been constant throughout the trade regime's history.

Rather than situating the story within an ongoing confrontation between "regulated and unregulated," "governed and ungoverned" trade, dominated by

253. VANGRASSTEK, *supra* note 12, at 58–60.

254. VAN DEN BOSSCHE & ZDOUC, *supra* note 6, at 91; VANGRASSTEK, *supra* note 12, at 58.

255. *See, e.g.*, the official version of that history as captured in VANGRASSTEK, *supra* note 12.

256. *Id.* at 159 (referring to the NIEO in passing in one paragraph and only for purposes of describing the institutional relationship between the WTO and UNCTAD). Two notable exceptions are HUDEC, *supra* note 234, and BARTON ET AL., *supra* note 22.

257. Note, however, that both accounts present developing-country concerns as peripheral. The positions of developing countries are never the story itself. *See supra* sections I.B.3, II.B.2.

questions about the scope of “barriers to trade” and the tension between preserving “regulatory autonomy” and promoting the “free market,” the history of the multilateral trading system can be narrated as a struggle between a nationalist and a supranationalist program of governance in which the power of law to insulate markets (*dominium*) from the democratic control of domestic politics (*imperium*) takes precedence. Accordingly, while it may be said that in neglecting the ideational dimensions of the GATT/WTO mainstream Anglocentric narratives have overestimated the role of liberal economic thought, it is also true that in disregarding the Central European narrative presented in Part II of this Article, both mainstream and critical Anglocentric accounts have underestimated the role of statecraft and law. This point is simple yet powerful.

With the trade regime’s claim to “liberalization,” its treaty language articulated as negative rights that provide members with freedom from “barriers to trade” and its power to “say no” to government action labeled as “discriminatory” or deemed a “subsidy,” it is easy to come away with the impression of a passive program for international trade, the goal of which is ultimately to relieve the global market from the coercive attributes of state regulation. This notion that the nature of the multilateral trading system is to suppress coercion, however, is completely misleading. As the account presented in the second half of this Article demonstrates, legally constituted coercion has been a necessary feature of international trade ordering all along. Coercion irresistibly occurs in the form of background legal constraints and institutional arrangements. Therefore, unlike the narrative presented in Part I, “neoliberalism” did not usher in the demise of “managed trade” in the style of “embedded liberalism.” Instead, it marked the inception of an intensified form of “corporate-managed trade,” as some outsiders have argued for years.²⁵⁸

Moreover, it must be remembered that in an interdependent world, one country’s “barrier to trade” is another’s “policy space.”²⁵⁹ Since the opening of markets through the trade regime necessarily entails imposing an international legal restriction on government action, the dynamics of trade governance have always implicated and will always entail mutual coercion. It is precisely because international trade law’s role is to define the terrain within which to bargain around those dynamics that it works not to eliminate coercion, but to arbitrate and provide each country with varying degrees of coercive power.²⁶⁰

5. “Free trade versus protectionism” revisited

Ironically, although the Central European narrative underscores the separation of *dominium* and *imperium* and professes the decoupling of the global

258. LORI WALLACH & PATRICK WOODALL, WHOSE TRADE ORGANIZATION?, *supra* note 129, at 4.

259. LANG, WORLD TRADE LAW AFTER NEOLIBERALISM, *supra* note 1, at 344.

260. The notion that legal ordering is inherently coercive, as well as its necessary implication that there is bargaining power on both sides, is a central legal realist insight famously articulated in Hale, *supra* note 9.

market from the sphere of politics, its focus on the constitutive dimension of law uniquely reveals the profound and indissoluble convergence of politics and economic governance. This focus not only helps dispel misconceptions associated with the Anglo-American inclination to situate the field around the distinction between “liberalized” and “restricted” trade, but it also helps unravel those that stem from its tendency to fixate on the divide between “free trade” and “protectionism.”

In Part I of this Article, the concept of “protectionism” is commonly employed to describe an advantage believed to be granted by a government to a specific organized domestic interest group. This advantage is assumed to result from undesirable and illegitimate political pressure and is often associated with the demarcation of “barriers to trade” or “distortion” prevailing at a particular moment in time. Similarly consistent with the provincial thrust of Part I’s historical account, the concept is invoked in situations where the Anglo-American legal and institutional framework fails to provide its own producers with the type of government assistance that is granted overseas to foreign counterparts—with the label of “unfair trade” also typically employed in that last scenario.²⁶¹ Government support that does not comport with the period’s benchmark for “barriers to trade” or “distortion,” or that does not correspond to the type of state assistance that is most visible and familiar to the Anglosphere, is seldom if ever denoted as “protectionist” or “unfair.”

Blatant examples of such assistance today include sweeping tax cuts, the product of effective lobbying efforts, bestowed on particular tax residents via legislation or loopholes sanctioned by the tax administration; liquidity channeled to certain influential national institutional investors by the monetary authority through the printing of colossal sums of money; towering amounts of public resources funneled into new and specific technologies, often through the military-industrial complex, that directly trickle down to other domestic sectorial industries; and legal protections afforded via bilateral investment treaties and investment chapters of FTAs to investors of capital-intensive countries (and sometimes solely in certain industries). Meanwhile, the bulk of the coercive force of the concept of “protectionism” falls either upon the import-competing groups that manage to effectively petition for tariff support, or to governments that cannot afford the massive tax cuts, expansionary monetary policies, mammoth defense budgets, or whopping diplomatic apparatus that the most common and longstanding Anglocentric forms of government assistance demand. Dominant accounts of international trade thus encourage a one-sided conception of “protectionism” that draws a skewed association between the project of the multilateral trading system and a subset of interest groups, leading international trade experts to consume themselves with a second and equally pervasive false distinction between the coercive and noncoercive dimensions of international trade regulation.

261. *Supra* sections I.A.3, I.B.3, I.B.4.

Admittedly, given the trade regime's complete repudiation of "disguised restrictions on international trade," even in the context of "general exceptions" in which public interests are unquestionably at stake, it is almost natural to suppose that an underlying goal of the multilateral trading system is to eliminate political pressure groups and their "protectionist purposes." Yet, the reality is that there has always been and always will be deliberate forms of domestic interest group protection inherent in the ordering of international trade. Perhaps the most pervasive, yet neglected, form of deliberate "protectionism" in the trade governance sphere is found in the GATT/WTO's mandate to remove barriers and the numerous disciplines that provide it with meaning. The underlying "protectionist" purpose of these disciplines is to support the interests of domestic export-leaning producers in foreign markets. However, because this deliberate form of protectionism has been traditionally decoupled from the dominant understanding of "economic nationalism" and instead been legally sanctioned and accredited with growing the economic pie, it is seldom, if ever, referred to as "protectionist," even outside Anglo-American discourse.

Numerous other types of deliberate, legally-constituted forms of protectionism pervade the field of international trade law. Tariffs have always been hailed as import-competing interests' permitted form of protectionism on account of the trade regime never setting out to prohibit them outright. However, since the inception of the multilateral trading system in 1947, trade remedies such as antidumping duties and countervailing measures have also underpinned the regime. These so-called "defensive" measures are overtly rooted in the protection of import-sensitive producers as well, yet they are often disregarded and are less likely to be labelled as "protectionist," notwithstanding the fact that they are clearly not understood to be aimed at growing the economic pie. The events of the 1970s surrounding the Subsidies Code tell a story of protectionism bargained between American import-competing against European and other countries' export-oriented interests.²⁶² This code and its successor, the Agreement on Subsidies and Countervailing Measures are rarely ever deemed "protectionist" even though the brunt of their disciplines either restrict or cancel out government assistance that grows the economic pie. And, in the mid-1980s to mid-1990s, even though there was a heightened animosity toward government regulation on account of a "neoliberal" (public-choice-theory inspired) fear that the rolling out of government led to "capture" by special interests, the scaling back of government that ensued and that bolstered the conditions for the creation of the WTO and the eruption of FTAs across the world was grounded in the corporate takeover of the global economic agenda.²⁶³ However, the Uruguay Round is scarcely considered a "protectionist" venture.

262. Rivers & Greenwald, *supra* note 54, at 1451–55.

263. *Supra* section I.B.2. See also Dani Rodrik, *What Do Trade Agreements Really Do?*, 32 J. ECON. PERSPECTIVES 73, 82–87 (2018) (describing how trade agreements have become a vehicle for protecting the interests of special lobbies, business groups, multinational corporations, and international investors).

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the most flagrant example of a Uruguay Round outcome that is both deliberately protectionist and largely zero-sum. The legal rules of the TRIPS Agreement, which can be plainly traced back to the furtherance of American corporate interests,²⁶⁴ were cleverly presented to other countries as mechanisms that would create incentives to spur innovation in economies where those rules were not as expansive. So far, however, it has not been possible to tie the TRIPS Agreement's more stringent protections with a significant increase in the supply of innovation either targeted specifically to developing-country markets or more globally.²⁶⁵ Rather, as in standard textbook cases, the legal rules have served to spread the costs of research and development and transfer rents from developing-country to developed-country consumers.²⁶⁶ The protectionist purpose, moreover, can be extricated from international trade disciplines as mundane and mechanic as those on rules of origin, which, in the context of FTA's, help protect free trade area producers of final and intermediate goods, often diverting rather than creating trade.²⁶⁷

6. *Trade law is politics*

Despite the structural bias that dominates its current vocabulary, virtually all disciplines of the trade regime harken back to the interests of some domestic group and involve tradeoffs of political pressures. To put it in a way that resonates with the dominant account's story about the turn to "trade effects:" paradoxically, virtually every government action falling within the realm of international trade regulation "has the effect" of protecting some producer group. Global trade governance has always been political and always will be concerned with protecting domestic interests through law, whether the interests be grouped as import-competing interests, export-oriented interests, importing interests, vested interests, sectorial interests, special interests, corporate interests, or in any other way. Economic governance and politics, *dominium* and *imperium*, are completely intertwined. Put simply, international trade regulation is inherently protectionist, restrictive, and coercive. Hence, the binaries of "liberalized versus restricted trade" and "free trade versus protectionism" that have dominated the field's legal and historical consciousness serve no genuine functional purpose. They are incapable of providing any content for, let alone resolving the difficult and complex policy choices involved in, the ordering of international trade. Setting aside the clamor for a "rules-based" trading system echoed in both Part I and II of

264. PAEMEN & BENSCH, *supra* note 117, at 166–67; DEVEREAUX ET AL., *supra* note 117, at 37–134.

265. Cassandra Mehlig Sweet & Dalibor Sacha Eterovic Maggio, *Do Stronger Intellectual Property Rights Increase Innovation?*, 66 WORLD DEVELOPMENT 665, 671–74 (2015).

266. See, e.g., KENNETH A. REINERT, AN INTRODUCTION TO INTERNATIONAL ECONOMICS: NEW PERSPECTIVES ON THE WORLD ECONOMY 157 (2021).

267. Anne O. Krueger, *Free Trade Agreements as Protectionist Devices: Rules of Origin*, in TRADE, THEORY AND ECONOMETRICS 91, 94–100 (James R. Melvin et al. eds., 1999).

this Article, when assessing trade relations the questions that truly carry weight have much less to do with how “juridical” the trade regime is, than with who has the power to get the rules that protect their interests codified within the regime and which competing societal claims are ultimately furthered by its legal framework. The question of which ordering of interests is better for humanity is, of course, a much more complicated matter.

However, before even setting out to answer that last question, it must be noted that the interests of producers and corporations have been disproportionately and overwhelmingly codified and furthered through international trade law—a sentiment that, to the dominant narratives’ merit, is effectively captured by their emphasis on the events surrounding the Trump and Johnson administrations. Although seemingly neutral, GATT/WTO law has been conceived and primarily developed to distribute political and economic gains in favor of private pressure groups and their rent-seeking interests, to the exclusion and often detriment of groups that represent the general public interest. The world is full of injustices, to be sure. Nevertheless, it would seem impossible to overlook the role that international trade law and the practices that have emerged from it have played in protecting some interests over others, and consequently also impossible to ignore their part in exacerbating inequality, class struggle, and distributive conflict. In their interactions with the institutions of trade governance, however, only rarely are international trade experts impelled to think about their responsibility in perpetuating these disfunctions.

It goes hand in hand with the dominant knowledge practices of international trade to think that representing the interests of a client, employer, and even a government, is work and routine rather than governance. Instead, it is normal to view public governance as a function of a sovereign, that is to say, as something that is to be found mainly in the domain of the nation-state and residing squarely in the legislative, administrative, and adjudicatory functions of government.²⁶⁸ Yet, as this Article has aimed to convey, governance is far from constrained to the national sphere, and it is certainly not bound to the traditional functions of government. International law is what the individuals who work within it make of it.²⁶⁹ Because the intellectual, pedagogical, and professional consciousness that emerges in the international legal sphere is as constitutive as international law itself, it is in the broader ideational culture of the trading system where not only a shared responsibility for the problems that arise from trade governance lies, but also where the potential to correct them can be found. Accordingly, setting out to think of international trade in terms of the type of epistemic community it has

268. See David Kennedy, *Law in Global Political Economy: Now You See It, Now You Don't*, in *THE LAW OF POLITICAL ECONOMY: TRANSFORMATION IN THE FUNCTION OF LAW* 127, 143–45 (Poul F. Kjaer ed., 2020) (describing the constraining effect of thinking in terms of “global administrative space” as a “public governance function” and making a similar argument).

269. See, e.g., KOSKENNIEMI, *supra* note 205, at 615 (noting that international law is “what international lawyers make of it”); Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 *AUST. YBIL* 1, 17 (1995) (stating that what determines the direction of international law is “what international lawyers do and how they think about what they are doing”).

been fostering and the balance its laws and institutions have been striking in the relationships of power between different groups in society, rather than in how open (liberalized or restricted) and political (free or protectionist) it is, has to be the new imperative if international trade regulation is to ever be retooled to meet the challenges of the twenty-first century.

CONCLUSION

Lurking in the background of the international legal order are collective beliefs about the proper role of the state in relation to the market that are passed down through stories connecting the present with the past. These stories involve selective choices about which players, locations, events, and themes to invoke that do much of the work in setting up the lessons that are ultimately taken away by the tradition that embraces them. In the case of international trade regulation, that tradition is a construct with no inherent basis: “free trade.”²⁷⁰ As a result, it should come as no surprise that the beliefs about trade governance that have been passed down through dominant storytelling practices have served a political purpose. They have not only conveyed meaning to the trade regime’s program, but, more importantly, as one scholar observes, have functioned as “law in hiding.”²⁷¹

However, stories about international law’s past tend to align with the epistemic positions of the jurisdictions in which they emerge.²⁷² This alignment is particularly evident in the context of international trade regulation, where dominant historical accounts have not only fulfilled a political function, but also exhibited marked partisanship, reinforcing a liberal Anglo-American view of an imagined state-market duality across the globe. This is a problematic outcome for international economic affairs because every society has a different conception of the proper role of the state in relation to the market.²⁷³ A program for world economic ordering that is associated predominantly with one dominant view of state-market relations will eventually work to alienate countries that fail to align with that view. This often leads to simplistic and reductionist binaries of “us” versus “them” that end up fueling nationalism and populism domestically, while undermining the international efforts that are necessary to address the intricate and interconnected problems of our time.

Dominant historical narratives have shaped an understanding of international trade regulation that is beholden to the dichotomy between active state regulation

270. LARS MAGNUSSON, *THE TRADITION OF FREE TRADE* (2004); *See generally*, Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* (Eric Hobsbawm & Terence Ranger eds., 2012).

271. *See* Odette Lienau, *Law in Hiding: Market Principles in the Global Legal Order*, 68 *HASTINGS L.J.* 541 (2017) (referring to the legal regimes for global finance and sovereign debt).

272. John Fabian Witt, *The View from the U.S. Leviathan: Histories of International Law in the Hegemon*, in *THE CAMBRIDGE HISTORY OF INTERNATIONAL LAW: THE HISTORIOGRAPHY OF INTERNATIONAL LAW* vol. 1, ch. 14 (Randall Lesaffer & Anne Peters, eds., 2024).

273. *See, e.g.*, *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* (Peter A. Hall & David Soskice eds., 2001).

or passive market freedom, and that also overlooks law's constitutive dimension and power-laden structure. The narratives' overreliance on the parochial struggle of restricting and liberalizing trade or on the Polanyian framework of embedding and disembedding the market is unfortunate, as it tends to truncate broader debate within the field by reducing the discussion about desirability and legitimacy to markets' degree of openness.²⁷⁴ In effect, even within the most progressive circles, there is an overwhelming tendency to situate policy options within the false choice of preserving the state's "regulatory autonomy" or "policy space" and promoting the "free market."²⁷⁵ The notion of reintegrating the state into the market is conceptually limiting, as the state has always played a major role in shaping market dynamics. The crucial inquiry lies in determining the type of state that is needed for each specific context. Moreover, there is no true and unique duality between the state and the market or between society and the economy. Instead, the possibilities are infinite: there are countless planes of analysis and endless potential configurations within each plane.

Furthermore, the dominant narratives' inattention to how certain forms of power have been articulated through trade law is also counterproductive as it encourages the perpetuation of forms of market relations and preexisting background Anglocentric knowledge dynamics that have routinely manifest themselves as a bias in favor of limited government and powerful and well-organized rent-seeking interests. In obscuring the fact that the world economy never operates out of its own accord and that there is an inextricable coercive (legal) element at work in the ordering of international trade, it needlessly antagonizes government and fuels distrust in the state, all while rendering opaque the trade regime's complex and pronounced distributional effects. These outcomes are detrimental to international economic relations because they get in the way of the legal and institutional imaginary's potential, encumbering moves that seek to fundamentally question whose interests international trade law is and

274. Lang, *Heterodox Markets and 'Market Distortions' in the Global Trading System*, *supra* note 1, at 697; Andrew T. F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INT'L ECON. L. 81 (2006); See Richard Baldwin & Dmitry Grozoubski, *The 'WTO Rising' Imperative*, VOXEU, CEPR POLICY PORTAL (Jun. 3, 2022), <https://voxeu.org/article/wto-rising-imperative> (for an account that captures trade experts' obsession with the degree of openness to trade through the dyad of more/less free trade); World Trade Organization, *Economic Resilience and Trade*, World Trade Organization Rep. No. 2021 (2021) (calling for "more not less" international trade integration); *The Tricky Restructuring of Global Supply Chains*, *supra* note 158 (pleading for cosmopolitans to embrace a new phase of globalization that "involves the maximum possible degree of openness"); I. M. Destler & Marcus Noland, *Constant Ends, Flexible Means: C. Fred Bergsten and the Quest for Open Trade*, in C. FRED BERGSTEN AND THE WORLD ECONOMY 15, 17–18 (Michael Mussa ed., 2006) (referring to the trade "bicycle theory," which holds that the trade program requires continual forward momentum toward openness).

275. See, e.g., RACHEL DENAE THRASHER, *CONSTRAINING DEVELOPMENT: THE SHRINKING OF POLICY SPACE IN THE INTERNATIONAL TRADE REGIME* (2021) (for a recent example); *PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND INTERNATIONAL FINANCIAL INSTITUTIONS* (Kevin P. Gallagher ed., 2005) (for a volume with a wide range of progressive views hinging on the same misleading tension).

is not serving, and offer transformative alternatives on how it might be reconstituted to better serve humanity in the twenty-first century.

Provincial (dominant Anglocentric) storytelling has been the predominant style used in historicizing international trade. The field, however, needs to be steered away from narratives that tend to alienate rather than enable divergences between countries and displace rather than welcome questions of underlying coercion and power. International trade discourse needs to be opened to a plurality of epistemic approaches—ones capable of transcending the familiar but constraining binaries of “liberalized versus restricted trade” and “free trade versus protectionism,” and better equipped to come to terms with the economic rise of China and grapple with the century’s existential challenges. History and knowledge practices are upstream of policy and political struggles, and ultimately of transformational change. Only by broadening the field’s intellectual cosmos and bringing in other vocabularies that supply it with meaning can there be a redirection of the trade regime that is both structural and enduring.

International trade experts must rise above the conventional terms of the debate in order to help combat climate change and food insecurity, begin to reduce the sharp divide between the returns to capital and labor that has led to an unprecedented rise in inequality, and break the gap between developed and developing countries over global value chains and knowledge-intensive styles of production that prevents the latter from reaping the full benefits of globalization and catching up. International trade alone cannot solve these problems, but, given the current state of play of trade governance, it is easier to think of international trade regulation as contributing to the problem rather than serving as a solution. A new and different extra-legal consciousness capable of redirecting trade experts’ critical impulses is direly needed. It is time to debunk the Anglocentric myths about there being an undistorted and political-pressure-group-free form of international trade regulation, and replace the olden and worn-out debates about how much free trade to have and how to do away with political demands for government support with new and innovative thinking about the ways to conceive, develop, and organize the type of trade that is needed to take on this century’s highly complex and pressing challenges. A first but necessary step in that direction is to overcome the “liberalized versus restricted trade” and “free trade versus protectionism” binaries that stand in the way of international trade’s legal and institutional *reimagination*.