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Observations on Trade Law and Globalization

SARA DILLON*

I imagine most people with an interest in the subject have their own working definition of globalization. My definition goes something like this: Globalization is at least in part about the spread of mass markets and common tastes, albeit with variations. International trade law, by reducing the possibility that individual countries can “prefer” their own productions, is one of the mechanisms for facilitating the spread of these common tastes.¹ I am by no means implying that the global tastes are elevated ones; in fact, the mass-appeal products sought might be inferior in many ways to what came before. The irony of the franchise, for instance, is that *better* or *worse* does not matter—only sameness.² The important thing is that the tastes are commonly held across a national-culture-free zone, and recognized as such.

Rather than pursuing the more philosophical question of the importance of trade and/or globalization, we might consider the importance of studying international trade law, and how we should study it, as well as how we are studying it now. I will offer a modest, if stinging critique of how international trade law seems to have entered the legal academy as a discipline.

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¹ At the most basic level, GATT Article I, General Most-Favored Nation Treatment, requires participating States to treat the products of all participating trading partners without discrimination; Article III, National Treatment on Internal Taxation and Regulation requires these States to treat importing products in the same way they treat their own domestic products; and Article XI, General Elimination of Quantitative Restrictions, requires that Member States not to set up quantitative barriers to the importation of products.

² See David Leebron, *Claims for Harmonization: A Theoretical Framework*, 27 *Can. Bus. L.J.* 63, 66 (1996). Leebron argues "the term 'harmonization' is something of a misnomer insofar as it might be regarded as deriving from the musical notion of harmony, for it is difference, not sameness, that makes for musical harmony." *Id.* at 67.

In this regard, one notices in recent years a proliferation of glossy advertising for interdisciplinary studies, in law as in other fields. But in fact, international trade law has contentedly taken its place in the pantheon of hermetically sealed subject matter areas. No idea is so often expressed and so strenuously avoided as truly interdisciplinary studies. Legal training particularly encourages a devotion to the decontextualized “dispute.” Standing ready to win for one’s side is a respected mode of concern; whereas advocating for law reform is generally considered “fluffy” and “non-rigorous.”

I am struck by the manner in which international trade law has become a regular feature in law school course offerings, and doubt that this occurred because of an awakening to its inherent importance to the curriculum.³ Rather, I think that there were clear legal/historical developments that made the inclusion of trade law “all right,” acceptable as a branch of study, because it came to be seen as sufficiently legal. Given the fact that international trade law is “here,” I would like in the course of this article to offer my own prescription for how to revise our pedagogical approach to it, by endowing the subject, including its disputes, with meaning and significance, rather than mystifying it in the technical sense.

As a general matter, and with some notable exceptions, there is a striking and tragic gulf between humanists or “human rights people,” and those engaged in economic law subjects. As it happens, the courses I teach represent several universes of concern: international trade, primarily the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA), European Union (EU) Law (with everything from free movement of goods through social policy, the environment, and even war and peace), as well as the more recent international children’s rights. I like systems critiques. I like to examine systems—global trade regulation as a totality, the EU as an architectural construct, or the United Nations (UN) human rights system, such as it is. For myself, I am certain about whether I would prefer to be stranded on a desert island with human rights people on the one hand, or economic lawyers on the other. But be that as it may, in terms of the construction of global law, or global governance as some like to put it, this split, this divide, between the thinking of trade specialists and humanistic lawyers, has become profound, even absurd.

³ A survey of 184 ABA accredited law schools in the United States found that 99 had at least one course in International Trade. Survey results on file with the author.

Since I am the permanently alienated humanist in the house of economic law technicians, maybe my own example will shed some light on the problem. At the same time, as I have become more involved in children's rights themes, I am equally impatient with the often sterile focus of human rights specialists on the UN reporting system.⁴ It seems to me that human rights specialists do not know how to advocate for law reform at global trade level, because they leave the entire operation to trade law specialists, perhaps on the assumption that it all looks so hard, they must know what they are doing, even if what they are doing is quite ill conceived.⁵

In one sense, I stumbled into the teaching of trade law, was chosen by it rather than embracing it as a matter of inclination, but this was coincidentally at the very point when the WTO was being created. I remember my Dean at University College Dublin asking whether I couldn't just "read the General Agreement on Tarrifs and Trade GATT with them?" And that I certainly went on to do. You will recall that in 1995, the WTO came into being and the talk of the town was that the old GATT system was being replaced by something more legalistic, the so-called judicialization and legalization of international trade regulation.⁶ There was a distinct lawyerly thrill of pleasure.

⁴ Unlike the WTO's dispute resolution mechanism, the UN's human rights treaty bodies have no effective enforcement mechanisms, but rely on a reporting system where States report on their application and compliance with treaty requirements and a Committee responds to the reports.

⁵ Though tangentially criticizing the WTO, human rights specialist groups such as Human Rights Watch and Amnesty International, who address many trade related issues such as human trafficking, bonded labor, child labor, etc., have not established coherent and sustained strategies to advocate that the WTO address trade-related human rights problems. Bryan Schwartz speculates as to why this might be. He writes:

"The style of WTO opinions tends to be dry, lawyerly and technical. Those who write the decisions are no doubt anxious to demonstrate to governments and the wider public that their decisions are not based on subjective political values. Rather, the adjudicators involved are anxious to demonstrate that any conclusions they reach flow inexorably from the application of logic to the precise words of the trade provision at issue."

Bryan Schwartz, *Lawyers and the Emerging World Constitution*, 1 *Asper Rev. Int'l Bus. & Trade L.* 1, 7 (2001). He calls this tendency "seeking legitimacy through technicality." Id.

⁶ Marrakech Agreement Establishing the World Trade Organization, arts. XI, XII, Legal Instruments - Results of the Uruguay Round vol. 31, 33 I.L.M. 1226 (1994)

The old GATT system, dating from the immediate postwar period, was based on non-discrimination and anti-protectionist principles.⁷ Disputes were resolved under an essentially diplomatic regime; the conclusions of the panel hearing the dispute could be blocked by the losing nation, thus evading the full legal implications of such a ruling.⁸ Panels were ad hoc bodies of trade specialists, put together for the purpose of hearing a particular dispute. It seems safe to say that the public imagination was not frequently gripped by the doings at “the GATT,” except perhaps at moments like the handing down of the Tuna Dolphin panel report.⁹

But in 1995, there was *legal* excitement for a number of reasons. An enforceable dispute resolution mechanism in the form of a Dispute Settlement Understanding was created; in addition to the ad hoc panels, there would also be an appellate layer of review in the form of the Appellate Body, permanent and to that extent “court-like.”¹⁰ In addition to the development of enforcement mechanisms, there were also many new areas of substantive trade law brought into the mix, to which all WTO member countries would

[hereinafter WTO Agreement] (requiring all ratifying Members to accept agreements settled at the Uruguay Round of trade negotiations). Between 1986 and 1994, the negotiators at the Uruguay Round created an intergovernmental organization (the WTO) that would enshrine the principles of the previous General Agreement on Tariffs and Trade (the GATT) relating to the trade in goods while adding agreements on trade in services, trade-related intellectual property, dispute settlement, and other supplemental agreements. *See generally* Raj Bhala & Kevin Kennedy, *World Trade Law* 8-15 (2d ed.) (2000) (explaining WTO's creation and mandate).

⁷ General Agreement on Tariffs and Trade, *opened for signature*, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

⁸ Patrick M. Moore, *Current Development: The Decisions Bridging the GATT 1947 and the WTO Agreement*, 90 Am. J. Int'l L. 317, 319 (1996).

⁹ United States – Prohibition of Imports of Tuna and Tuna Products from Canada (Tuna/Dolphin I), Feb. 22, 1982, GATT B.I.S.D. (29th Supp.), para. 4.8 (1982) ; United States – Restrictions on Imports of Tuna (Tuna/Dolphin II), Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) para. 5.26 (1993), reprinted in 30 ILM 1594 (1991).

¹⁰ Dispute Settlement Understanding, WTO Agreement, *supra* note 6, arts. 46, Annex 2 [hereinafter DSU] (outlining procedures for WTO Members attempting to resolve complaints). DSU Article 4 encourages Members to first attempt to come to a mutual settlement of their dispute through good faith consultations. *Id.* art. 4. DSU Article 5 allows Members to voluntarily submit their dispute to conciliation and mediation by the WTO. *Id.* art. 5. DSU Article 6 permits the complaining Member to request the establishment of a WTO Panel, composed of individuals from a list of experienced practitioners, to settle the dispute. *Id.* art. 6. DSU Article 17 establishes a permanent WTO Appellate Body to hear appeals from Panel decisions. *Id.* art. 17.

have to adhere, notably Trade-Related Aspects of Intellectual Property Rights (TRIPS), Trade-Related Investment Measures (TRIMS), Sanitary and Phytosanitary Measures (SPS) and the Services Agreement. The Safeguards, Anti-Dumping and Subsidies Agreements placed greater discipline on the use of self-protective measures by national governments.¹¹ Seen as a package, the Uruguay Round results brought global trade regulation, that dull-sounding creature, into the informed public's consciousness.

At least part of the reason for this flurry of attention was that this was...well, law. It could be studied as other types of "real law" were studied. It was not aspirational or platitudinous in the manner of UN-centric human rights "law," it was not simply soft law.¹² Participating countries (more or less everyone, with several notable exceptions) had agreed, really agreed, to either offer compensation or accept the legitimacy of trade sanctions against them in the event of losing a dispute—the sanctions of course being imposed by the prevailing party.¹³ While the Appellate Body was not strictly bound to adhere to its own pronouncements, decisions of the new and permanent Appellate Body felt important. They had global persuasive value; the whole system seemed to take on a concreteness and predictability unusual in international law. One's students might still whine, "But what happens if a country doesn't go along with it?" but legal system it nevertheless appeared now to be.¹⁴ This question may still be raised, but so far, genuine crises have been avoided—crises such as this: *Country X will not accept this ruling and rejects the WTO as a forum for adjudication.*

¹¹ WTO Agreement, *supra* note 6, annex 1A.

¹² The WTO's Dispute Settlement Understanding (DSU) creates a legalistic dispute settlement system, leading to rulings by an ad hoc panel and an Appellate Body, which, after adoption by the DSB, have binding effects on the disputing Member States and may lead to significant costs if disregarded by a loser. This could take the form of retaliatory tariffs placed on products of the "losing" country by the prevailing party. WTO Dispute Resolution Understanding, *supra* note 6, annex 2 [hereinafter DSU].

¹³ DSU, *supra* note 12, arts. 21 & 22.

¹⁴ There have been examples of a Member State not complying with Appellate Body reports, particularly the European Union's non-compliance in the Bananas and Beef Hormones cases. See Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 Minn. J. Global Trade 133 (2001) [hereinafter Brimeyer].

For different reasons, even now I also find the concept of true international *legality* suggestive to the point of thrilling, but only to the extent that the principle can at some point in the future be applied to other areas of human concern than trade law. At its inception, there was very little articulated about the political goals of the new WTO. Ten years on, the question of overarching objectives has, if anything, become even more muted over time.¹⁵ The post-World War II GATT system, like the European Community (EC), was created to ensure international peace and stability, on the theory that economic integration facilitates peaceful co-existence.¹⁶ It was unclear what role “war and peace issues” played in the Uruguay Round, where the emphasis was rather on billions and trillions in wealth being created in the near term, with that great cheerleader for all that is good, Peter Sutherland, finding himself very much the right man at the right time.¹⁷

Because the EU does not merely rely on a shared sense of wealth creation, efficiency and improved economic growth, the EU is correspondingly more complex and complete. We are witnessing a moment of historical intensification in that regard, in that the new European Constitution will go far beyond ideas of a common market to fully embrace an EU mandate for human rights, and global security, in which the EU will participate on a newly coherent and unified basis—or so the myth of the “constitutional treaty” goes.¹⁸ If nothing else, the EU will have the capacity

¹⁵ The Doha Development Agenda was established to set objectives for multilateral agreements that would accelerate economic development for developing countries, particularly with regard to agricultural policies but also including, investment, environment, and competition policy. See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). At the subsequent Ministerial Meeting in Cancun, however, these negotiations collapsed when over twenty developing countries walked out in protest to the unwillingness of the US and EU to give adequate concessions regarding agriculture. See Cleve D. Johnson, *A Barren Harvest for the Developing World? Presidential "Trade Promotion Authority" and the Unfulfilled Promise of Agriculture Negotiations in the Doha Round*, 32 Ga. J. Int'l & Comp. L. 437 (2004).

¹⁶ See John H. Jackson, *The Boundaries of the WTO: Afterword: The Linkage Problem--Comments on Five Texts*, 96 Am. J. Int'l L. 118, 121-22 (2002).

¹⁷ Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. Rev. 733, 757 (2001)

¹⁸ See the Draft Treaty Establishing a Constitution for Europe and accompanying materials, at <http://european-convention.eu.int>.

to become more nearly than ever before the federal superstate of Europhile vision and Euroskeptic nightmare.¹⁹

But the WTO presented itself as a different sort of animal, as I will describe. I have suggested elsewhere that if the WTO could be seen as part of a larger project of global governance, then so far we had only a Department of Commerce.²⁰ While both systems, the WTO and the EU, have created a made-for-measure language of rationality, at least the EU's special lingo made one feel that there was some sort of courtly significance involved. To read the decisions of the European Court of Justice is to participate in a complex exercise. To master the language of the WTO exacts a different price from the pupil. A more frightening prospect is that the hyper-textualism and thousand-part tests of WTO law exactly suited the newly-minted trade law specialists, for whom the decontextualized aspect of WTO law was actually an academic plus.

It has always been my wish that people who hate reading economic law, including what I consider to be extraordinarily turgid panel and Appellate Body reports, would embrace these documents with zest. To the extent that trade law attracts a certain variety of specialist, due to its alien tone and its inhuman or anti-human characteristics (because so strictly decontextualized), and to the extent that it attracts people who actually enjoy the intellectual milieu created by the new subject matter, we are faced with a global governance challenge, one which I will explore below.

What was the big deal about 1995?

The so-called "Uruguay Round negotiations" spanned the late 1980s and early 1990s, roughly corresponding to the Single Market program in

¹⁹ See Grainne de Burca, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, 61 Wash & Lee L. Rev. 555 (2004); see also Stephen C. Sieberson, *The Proposed European Union Constitution -- Will it Eliminate the EU's Democratic Deficit?*, 10 Colum. J. Eur. L. 173 (2004).

²⁰ See Joseph E. Stiglitz, *Globalization and Its Discontents* 22-23 (Norton, 2002). Stiglitz writes, "we have a system that might be called global governance without global government, one in which a few institutions - the World Bank, the IMF, the WTO - and a few players - the finance, commerce and trade ministries, closely linked to certain financial and commercial interests - dominate the scene, but in which many of those affected by their decisions are left almost voiceless." Also cite to my Linkage article, where I coincidentally expressed a similar thought

Europe.²¹ These negotiations resulted in a set of new trade laws that were adopted according to an all-or-nothing principle thus: if participating countries wished to join, they would have to accept *everything*, the “whole package,” from soup to nuts, including those agreements that might go against their particular economic or developmental interests.²²

In that sense, I see many of the early WTO cases in studies of “tough luck,” perhaps analogous to early European Community cases where the European Court of Justice informed resistant Member States that they have just agreed to an unending, unyielding supranational system, into which they have poured significant amounts of their sovereignty and constitutional traditions.²³ Resistance is futile, what you had hoped meant is irrelevant, and—characteristic of WTO law—only the text ultimately counts. (Nothing could be further from the truth, of course, in EU law.)

²¹ See generally Sara Dillon, *International Trade Law and Economic Law and the European Union* (Hart, 2002) [*hereinafter* Dillon].

²² Starting with the Uruguay Round accords, countries have had to participate in all of the negotiated agreements as part of a “single undertaking.” This requirement meant that developing countries had to commit to substantially greater reforms of their trade barriers and trade practices than they did in the past. In the Uruguay Round, many countries had to accept obligations developed without their substantial participation, and which required the implementation and enforcement of regulatory policies that they have had great difficulty in fulfilling. See Jeffrey J. Schott & Jayashree Watal, *Decision Making in the WTO*, in *The WTO After Seattle* 283, 284-285 (Jeffrey J. Schott ed., 2000).

²³ See, e.g., Case 6/64, *Costa v. Ente Nazionale Per L’Energia Eletrica (ENEL)*, ECR 585 (1964) (“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and ... more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves”); Case 106/77, *Amministrazione Delle Finanze Dello Stato v. Simmenthal SpA (Simmenthal II)*, ECR 629 (1978) (“every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule”); Case C-213/89, *The Queen v. Secretary of State for Fransport, ex parte Factortame LTD (Factortame I)*, ECR I-2433 (1990) (“The full effectiveness of Community law would be ... much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief”); Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lubeck-ost*, ECR 4199 (1987) (holding the European Court of Justice has sole jurisdiction to declare Community acts invalid).

One of my personal favorites of the early WTO cases is the “Indian Pharmaceuticals” case, where India is pounced upon by the United States and the EC to make sure that it scrupulously adheres to the terms of the transition to patent protection for pharmaceutical products.²⁴ What interested me so much at the time the panel and Appellate Body reports came down was that on issues relating to whether India *could* live up to the TRIPS Agreement the reports were silent. On social issues, issues of poverty and impossibility and national self interest, including conflicting economic imperatives, the reports had essentially not a word to say. The rulings were based on – or grew out of – the text of the TRIPS Agreement.²⁵ Context was absent or deemed irrelevant. How eager we are, by contrast, to invoke context and difficulties and process when we are speaking of full and immediate implementation of human rights imperatives!

One could argue, of course, that with the death of GATT a la carte, there really was nothing outside “the text” to discuss. India had signed up to the terms of the TRIPS Agreement, so whatever other political concerns it had, or difficulties, or internal resistance, were no longer relevant, even though this was a “State to State” law and an international law system. The panels and the Appellate Body are specialized bodies; they do not deal seriously with conflicting national laws outside the subject matter of the “national measure” being challenged, and only to a limited degree other sectors of international law.²⁶ They do at times give the nod to other (non-trade) treaties, but the Appellate Body has never struck me as analogous to real courts of law, where it is standard practice to balance and synthesize various and potentially conflicting principles of law. International trade law, WTO law, is a technocratic branch of law, but with implications that go far beyond the technocratic. This disconnect is in many ways tragic.

²⁴ WTO, Report of the Appellate Body, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Dec. 19, 1997)

²⁵ WTO Agreement, *supra* note 5, annex 1C.

²⁶ See Jeffery Atik, *Global Trade Issues in the New Millennium: Democratizing the WTO*, 33 Geo. Wash. Int'l L. Rev. 451, 452 (2001). Atik states: “Although the WTO is still of recent origin it yields considerable (and unexpected) power. The substantive terms of its agreements limit the scope of action for national regulation, stripping power away from states. Its enhanced dispute resolution mimics a form of hierarchical supremacy: WTO rules act as a super-constitutional text with a force superior to ordinary national enactments. Once the WTO Dispute Settlement Body finds that a national measure is inconsistent with a WTO obligation, the WTO member is expected to bring its law into conformity.” *Id.*

There were other early cases that struck me as profoundly important and interesting, when seen through the prism of trade values opposed to “other” values. Two of the most instructive battles taking place between the US and the EC were the Beef Hormones case and the Bananas case.²⁷ Although the EC is happy to use WTO law as a blunt instrument when necessary, in these cases the EC’s regulatory values were at stake, and the powerful EC, simply put, lost.²⁸

The Uruguay Round’s Sanitary and Phytosanitary Measures (SPS) Agreement, upon which the Beef Hormones case was argued, was a startling document, in that it placed an explicit burden on countries to justify their food safety rules, and mystified the idea of “scientific evidence.” Consumer protection rules that involve additives and pests are difficult enough to achieve at national level, and despite the kindler, gentler rhetoric of the Appellate Body to the effect that countries were indeed “free to choose” their “appropriate” level of protection, as far as I could ever read the agreement and the decisions taken under it, the bottom line was that without some scientific basis for a restrictive national regulation, the WTO would have the power to invalidate it.²⁹

Many might ask, well, what is wrong with that? National regulations purportedly based on harm to human or animal health must be justified in scientific terms, or be struck down in the name of free trade. Trade law rules out only hypochondria, hypersensitivity, and perhaps in the process blots out historical memory of other times when the populace was told: “it is safe, all the scientists say so.” The EC attempted to urge a “limits to science” approach in its Beef Hormones defense.³⁰ The United States has acted on the same sort of impulse—prove that it is justified or give it up—in its more

²⁷ See WTO, Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (Jan. 16, 1998) [hereinafter *Beef Hormones*]; WTO, Report of the Appellate Body, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997). See also, Terence P. Stewart & David S. Johanson, *The WTO Beef Hormone Dispute: An Analysis of the Appellate Body Decision*, 5 U.C. Davis J. Int'l L. & Pol'y 219 (1999); Hunter R. Clark, *The WTO Banana Dispute Settlement and Its Implications for Trade Relations between the United States and the European Union*, 35 Cornell Int'l L.J. 291 (2002).

²⁸ See Brimeyer, *supra* note 14; 147-162.

²⁹ WTO Agreement, *supra* note 5, at annex 1A – Agreement on the Application of Sanitary and Phytosanitary Measures.

³⁰ *Beef Hormones*, *supra* note 28, paras. 177-180.

recent challenge to the EU's reluctance to allow the commercial use of genetically modified organisms (GMOs).³¹ Miffed that the EC has not allowed the release of GMOs under laws that actually do make such controlled releases possible, the US has again dared the EU to present a scientific defense where perhaps none truly exists. The point to me is that public pressure of the "No thank you, just don't want it" variety, whether or not it is strictly rational or totally scientific, gets demoted in the regulatory process.

As mentioned above, these recent cases have their roots in the Tuna-Dolphin dispute of the early 1990s, although the Tuna-Dolphin reports remained blocked by the US.³² The upshot of Tuna-Dolphin, however, was that the US could not refuse to import tuna on the basis that it disapproved of the manner in which the tuna was caught, based on its environmental or regulatory values. So interesting was this stark dilemma to the academic mind that certain academic careers seemed to be formed in the cauldron of Tuna-Dolphin analysis. But after 1995, with the binding nature of the dispute resolution system, the stakes were much higher. It was no longer open to countries to shrug off the decisions of the WTO panels, let alone those of the new Appellate Body.

The reaction to this new legal reality appeared to lead in several different directions in the late 1990s and beyond. First of all, from around 1998 through September 11 (after which I believe it faltered), there was the anti-globalization movement. While some of the criticism leveled at the WTO was incoherent, the WTO did clearly become a symbol of globalization, and thus a focus of dissent.³³ It seems obvious that this occurred because

³¹ See Permanent Mission of the United States, First Submission of the United States in European Communities - Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291, 292 & 293 (Apr. 21, 2004). See also David Winickoff, Sheila Jasanoff, Lawrence Busch, Robin Grove-White, Brian Wynne, *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law*, 30 *Yale J. Int'l L.* 81 (2005).

³² See GATT, Report of the Dispute Panel, *United States-Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT B.I.S.D. (29th Supp.) (Feb. 22, 1982) (unadopted); GATT, Report of the Dispute Panel, *United States - Restrictions on Imports of Tuna*, GATT B.I.S.D. (39th Supp.) (Aug. 16, 1991), reprinted in 30 *ILM* 1594 (1991) (unadopted).

³³ See generally G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 *Duke L.J.* 829 (1995) (describing the creation of the WTO and the new "legalism" in international trade

WTO was now seen as law, even if far more significant decisions were being taken by international economic bodies such as the IMF and World Bank. The WTO gained attention because of its binding nature. Disputes, cases, laws and rules make for visibility – and public presence. The WTO was an instance of the transnational economic forces of big business and the stronger countries getting their way over national resistance. So, even if it could be argued that what the WTO was achieving was relatively modest in global terms, it makes sense that the protesters had the WTO squarely in their sites.

For me, it was the potential of the WTO – the *idea* – of the WTO that was striking. Its power over national regulation was, at least at global level, unparalleled. In writing my own book, it seems to me that one of my own objectives was to make the specific nature of the individual disputes—the clash between national laws and trade principles—intelligible to a wider audience so that more of the critics could get an idea of what they were actually criticizing.³⁴ It was and still is my belief that this global trade law should be seen as contestable.

A second strand of “trade law studies” was represented by the “earnest analysts,” those who wrote piles of law review articles on all the “trade and” subjects – trade and the environment, trade and labor – asking such questions as whether the WTO could in the end be a force for good in these areas.³⁵ Beyond this kind of analysis lurked a more fundamental question: what was the basis for this newly binding global law, when binding international law is otherwise so hard to come by? Was there more to this than just the legal arm of transnational business? In the parlance of a few years ago, what was the legitimacy of the WTO?³⁶

law); David A. Gantz, *Failed Efforts to Initiate the "Millenium Round" in Seattle: Lessons for Future Global Trade Negotiations*, 17 *Ariz. J. Int'l & Comp. L.* 349, 350-57 (2000) (outlining some of the reasons for the first major protests against the WTO in Seattle in 1999).

³⁴ See Dillon, *supra* note 21, at preface.

³⁵ See, e.g., Steve Charnovitz, *Trade Law and Global Governance* (Cameron May, 2002); Steve Charnovitz, *The Boundaries of the WTO: Triangulating the World Trade Organization*, 96 *Am. J. Int'l L.* 28 (2002); Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 *Cornell Int'l L.J.* 459 (1994). Robert Schaeffer, *Trading Away the Planet*, 15 *Greenpeace*, Sept.-Oct. 1990.

³⁶ See Robert Howse, *The Boundaries of the WTO: From Politics to Technocracy--and Back Again: The Fate of the Multilateral Trading Regime*, 96 *Am. J. Int'l L.* 94 (2002); Robert Howse, *The Legitimacy of the World Trade Organization*, in *The*

At some point, the criticism of the WTO as a symbol of globalization led to corresponding expectations that the WTO could somehow, through the power of trade law, present a legal response to child labor and human rights abuses.³⁷ I always had the impulse to point out that the WTO had no such role, no such explicit mandate, no such subject matter jurisdiction. But real lawyers like “law,” and for a period of several years, the WTO remained an irresistible focus on all sides.

My impression is that this set of legitimacy questions was never really sorted out to any satisfactory degree. Rather, the very earnest participants got bored by their own debate. If the WTO were to be altered in any significant way, all that could happen would be a turning back to a pre-1995-like situation, where diplomacy predominated over law. Should the US Congress, driven by constituency conflicts over these issues, ever really say “enough,” that too much sovereignty and protectionist discretion had been sacrificed to the needs of transnational business, then such a turning back would be the likely result.³⁸ A more progressive, complex, global governance — oriented *WTO plus* was hardly on the cards. But the WTO simply moved forward, as it was, from one issue and minor *frisson* to another, with the US Congress trying to ensure that an evolving WTO served the multiple interests and needs of the

Legitimacy of International Organizations 355 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001), Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence, in The EU, The WTO, and NAFTA: Towards a Common Law of International Trade* 59 (J.H.H. Weiler ed., Oxford Univ. Press 2000); Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement, in Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* 334 (Roger B. Porter, Pierre Sauve, Arvind Subramanian, & Americo Beviglia Zampetti eds., 2001).

³⁷ See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 *Am. J. Int'l L.* 535 (2001). But see Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harv. Int'l L.J.* 333, 342 (1999) (arguing that WTO dispute resolution is authorized to directly apply only WTO law).

³⁸ U.S. Congressional distaste for the WTO dispute resolution process was expressed by Senator Max Baucus, stating that WTO panels are “making up rules that the US never negotiated, that Congress never approved, and I suspect, that Congress would never approve.” *US DSU Proposal Receives Mixed Reactions*, Bridges Wkly. Trade News Dig., Dec. 20, 2002, at <http://www.ictsd.org/weekly/02-12-20/wtoinbrief.htm>

US, even if this incidentally and correspondingly greatly disadvantaged one's trading partners.³⁹

I personally got stuck at this chronological place in the debate. I wanted to know, I still want to know, what the overall effect on human welfare was of eliminating ever more national regulations with the potential of restricting trade. I wanted to know why the WTO should have a binding dispute resolution mechanism when human rights law and other branches of international law do not—why is human rights law of all things notoriously “fluffy,” unlawyerlike, aspirational? I realize that the question sounds naïve, but that impression of naïveté is a function of lawyers' preference for minutiae, rather than any problem with the question itself.

I think the community of trade law scholars simply got tired of this debate and moved on to a more accepting kind of insiders' analysis. It became far trendier to treat the Appellate Body as an established court and to examine all disputes, whatever their subject matter, as a treasure trove of legal principles and jurisprudential tests.⁴⁰ The Appellate Body turned out to be a reliable and respectable target of lawyerly attention.

We recently marked the tenth anniversary of the NAFTA Agreement. NAFTA of course has triggered a variety of changes in the North American trade relationship: tariffs lowered or removed, other trade related restrictions

³⁹ A report transmitted by the Secretary of Commerce to Congress concluded that the disputes referred to the DSB generally "have been handled expeditiously and with professionalism" and that "WTO dispute settlement has benefited a wide range of U.S. industries and their workers," but adds that "the United States does not agree with the approach that WTO panels and the Appellate Body have sometimes taken in disputes," and criticizes several specific instances of judicial lawmaking in trade remedy cases. The report suggested some measured fine-tuning to offer "greater member control over the dispute settlement process," and noted that though judicial lawmaking at the WTO has become a political irritant in the US, Appellate Body lawmaking has only marginally weakened U.S. trade remedy laws, but is operating near its political limits. Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body, Report to the Congress Transmitted by the Secretary of Commerce 8-10 (Dec. 30, 2002), *available at* <http://www.ita.doc.gov/FinalDec31ReportCorrected.pdf>.

⁴⁰ See generally Thomas Cottier & Petros C. Mavroidis, editors, Patrick Blatter, associate editor, *Does the WTO Judge Trespass His Mandate?*, The Role of Judge in International Trade Regulation: Experience and Lessons for the WTO, (University of Michigan Press, 2003).

eliminated, greater rights for investors. Yet, despite all this, a recent Carnegie Endowment report indicated that the overall economic effect on the average Mexican was a wash.⁴¹ NAFTA had not brought significantly higher levels of employment, had not led to general prosperity, had not raised the boats of the poor. Indeed, in the agricultural sector, the effect was dazzlingly negative.⁴² This lack of a measurable benefit for most people went mostly unremarked. Perhaps the study of law in general does not encourage linking technique to larger purposes. Maybe it is not the job of a lawyer to wonder what a particular set of laws is designed to achieve. It does seem an amazing abdication of responsibility, however, to ignore these implications altogether.

As with all branches of law, it is the tendency of trade lawyers to think in terms of particular disputes. Lawyers love, or at least gravitate towards, judicial standards applied to dispute resolution. As if of mystical interest for its own sake, the test that decides the day in court is an object of devotion for lawyers.

Although many might disagree with me on this, reading panel and Appellate Body decisions is at best an acquired taste. The more sensitive among us will flock to a field of study with some more recognizable link to the realm of human concern. As a consequence, the specialist discourse around trade law becomes increasingly limited to those able to follow the hair-splitting discussions characteristic of the rulings. This is even more the case as the “legitimacy” discussion dies away, and the WTO is increasingly accepted for “being what it is”.

I imagine high school students still read Kafka’s *The Trial*.⁴³ Perhaps it should be required reading in law schools, as it is of far more intellectual relevance than *One L*.⁴⁴ Looking back on what we were meant to read *The Trial* for, beyond the anti-totalitarian slant to American secondary education, surely it was meant to indicate that we must be on guard against the perversions of a legal system that is all detail and no significance; all process and no explanation. This is a fairly portable lesson, and one that should caution us in accepting the deadpan detail of trade law disputes.

⁴¹ Sandra Polaski, *Jobs, Wages and Household Income, in NAFTA's Promise and Reality* 24 (CEIP, 2003) available at http://www.ceip.org/files/pdf/NAFTA_Report_ChapterOne.pdf.

⁴² *Id.* at 10-13.

⁴³ Franz Kafka, *The Trial* (N.Y.: Schocken, 1925).

⁴⁴ Scott Turow, *One L* (N.Y.: Putnam, 1977).

It is often said that EU law, with its complex legislative process, elaborate separation of powers principles, and dense body of regulation, is technocratic and off-putting.⁴⁵ I actually find EU law to be immensely poetic, especially the decisions of the Court of Justice.⁴⁶ This is particularly true in comparison with international trade law. The ECJ hovers between context and text, compressing historical meaning into the ultimate legal *bon mot*.

As for international trade law, it is rewarding if and when we maintain an interest in the very issues that, as I have explained, seem to have died away in the last few years. Identifying the judicial qualities of the Appellate Body, and pondering whether it is “activist” as a court, seem to be questions that put the cart very much before the horse.⁴⁷ Perhaps taking such questions as our focus makes WTO law appear to be pleasingly self evident, makes trade law appear to be a regular law subject, even though we have not yet begun to sort out such foundational matters as whether trade law should endure *in its present form* at all.

Last year’s collapse of the Doha Round talks at Cancun were of interest, in that an organized bloc of developing countries refused to repeat the experience of the Uruguay Round, where the wealthiest countries were essentially able to dictate the terms.⁴⁸ At Cancun, it became clear that agricultural reform, including the elimination of heavily distorting agricultural subsidies by the US and EC, would be a precondition for any real progress. This flurry of activity forced a revisit to buried issues of fairness and distribution of gains, but so briefly and in such a limited way, that it would be unjustified on this basis alone to make predictions about a new departure for global trade law.

I can offer my own prescriptions for the future study of international trade law, knowing full well that these recommendations will likely not be heeded. As tempting as such an approach appears to be, I do not think that studying WTO law, or WTO law with a twist of NAFTA, makes sense in

⁴⁵ See, e.g., David A.O. Edward, *What Kind of Law Does Europe Need? The Role of Law, Lawyers and Judges in Contemporary European Integration*, 5 Colum. J. Eur. L. 1, 7-8 (1999).

⁴⁶ See *supra* note 23.

⁴⁷ See, e.g., J. Patrick Kelly, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 NW. J. Int'l L. & Bus. 353 (2002).

⁴⁸ See Melaku Geboye Desta, *The Bumpy Ride Towards the Establishment of "a Fair and Market Oriented Agricultural Trading System" at the WTO: Reflections Following the Cancun Setback*, 8 Drake J. Agric. L. 489 (2003).

isolation from other international institutions. We should know much more than we do about the development potential of trade rules and principles, or indeed the lack of such potential. Mystifying the disputes and the attendant “jurisprudence” cannot bring us any closer to such insights. I would suggest adopting an international economic law approach that covers the decision-making methodology of the International Monetary Fund and World Bank so that the big three of international economic institutions can be seen as working in tandem, and their collective goals can be better scrutinized. It is the IMF and World Bank that could steer aid and investment in a manner calculated to achieve development results.⁴⁹ A serious and hard-hitting human rights dimension would also be an essential feature of such a field of study. On that basis and foundation, “non-discrimination in trade” might actually have some significant wealth creation power. On its own, trade law seems to generate an endless series of empty legal gestures.

I recognize that what I advocate is implicitly rejected by mainstream “trade studies” in favor of a focus on “the dispute,” since that fits so comfortably into the hegemony of the “case method” approach to legal studies. Despite the prevalent “trade and” fatigue, human rights people should begin to invade the inner sanctum of international trade meetings and conferences, where, as in so many other fields, a repetitious band of “experts” and specialists preside. Law schools and lawyers, as a product of these schools, distrust the big ideas, the context, the great notion that inspires and propels reform. We need to know whether we are about “constructing global governance,” or merely “removing barriers to trade” in the name of greater global efficiency and that rather silly anachronism, comparative advantage. If the former, then the study of international trade law has the potential to become a wonderful process, as students are encouraged to link trade rules to human—yes, *human*--development goals.

⁴⁹ For history and analysis of past and present development models of the IMF and World Bank, see Jeremy J. Sanders, *The World Bank and the IMF: Fostering Growth in the Global Market*, 9 Currents Int'l Trade L.J. 37 (2000).