Throwing Eggs at Windows: Legal and Institutional Globalization in the 21st-Century Economy

John W. Head *

Synopsis

Like an egg thrown at a window, economic globalization looks like an unstoppable force hurtling toward an immovable object—state sovereignty. Although the outcome is not sure, I believe the window will break, both because the window has become brittle and because the egg has a tough shell and much momentum. If so, we shall be opening a new chapter in legal and political organization, similar in some ways to an earlier chapter-opening era when the Westphalian state-centered system began. A key task we face now is to examine critically the main institutions of economic globalization—especially the WTO, the IMF, and the World Bank—to see whether and how those institutions and the rules they administer can serve the interests of the world community in this new century. This article tries to set the stage for such an examination by identifying strengths and weaknesses of one of these institutions, the WTO. The article concludes that the WTO, if modified to overcome some important weaknesses, can serve a key role in a new, more complex framework of governance that relies on linkages among international organizations, states, private business interests, and non-government entities committed to civil society.

I. WHICH WILL BREAK—THE EGG OR THE WINDOW?

What will happen if you throw an egg at a window? Maybe the egg will break; maybe the window will break; maybe both will break. It depends on how tough the egg is and how strong the window is. You could easily imagine throwing a little egg against a strong window and watching the egg break; but in some circumstances the window would break instead of the egg. I suggest you undertake an experiment with a variety of eggs and a window on your neighbor's house. First, pitch a

* Professor of Law, University of Kansas. Before starting an academic career, Mr. Head served as legal counsel to both the International Monetary Fund and the Asian Development Bank. More recently he has served as a legal consultant to both of those institutions and to the European Bank for Reconstruction and Development. The views expressed herein reflect Mr. Head's experiences with those institutions over the past twenty years and the helpful comments of several colleagues at the University of Kansas, including in particular the participants in the Hall Center Faculty Colloquium on "Globalization, Ethics, and Culture," for which an earlier version of this article was prepared. Exceptionally helpful observations also came from Craig Volland, President of Spectrum Technologists of Kansas City, Kansas and from Professor Raj Bhala of the George Washington University Law School. Liz Huston provided valuable research assistance. Support from the University of Kansas General Research Fund is also gratefully acknowledged.
raw egg against the window and watch the egg break. Next, get a healthy brown free-range chicken egg and throw it against the neighbor’s window. Did the egg still break? Now hard-boil one of those brown eggs and throw it against the window. Did the window crack as the egg split open? Now bring out one of the hard-boiled ostrich eggs you’ve been saving in the back of your refrigerator. Has your neighbor come out of her house yet to chat with you?

A. Globalization and Sovereignty

I visualize the globalization of recent years as a large egg. By “globalization,” I mean the process by which new multilateral institutions and rules—especially those involved in either encouraging or regulating economic activity—grow in number and authority, seemingly at the expense of local and national institutions and rules. I realize that there are numerous definitions of globalization and an overwhelming proliferation of books, articles, symposia, and hand-wringer over various aspects of it; but for me the most important aspect is economic in character, largely because it is in the economic sphere where I see globalization having the most profound legal and institutional ramifications.

The features of this economic globalization that I shall focus on in this article include the World Trade Organization (WTO), the International Monetary Fund (IMF), and the World Bank, as well as the operations of those institutions in administering rules and policies governing international trade, national and international economic affairs, and national economic development financing. For reasons I shall turn to shortly, I view these institutions, and their rules and operations, as constituting a dense mass with substantial momentum, rather like a large hard-boiled egg hurtling through the air.

I visualize the concept of state sovereignty, in these opening years of the 21st century, as a window made of old and brittle glass that has weathered many storms. “Sovereignty,” like “globalization,” carries myriad meanings. One of the oldest is Jean Bodin’s 16th-century view of sovereignty as the unity of government in a single sovereign with ex-

---
clusive power to make the laws and not be bound by those laws—but bound nevertheless by other, higher laws.\textsuperscript{2} Another view, long accepted, essentially equates sovereignty with absolute power of a state to manage its affairs, both internally and externally, without challenge or interference.\textsuperscript{3} This view gained support from the work of Thomas Hobbes, whose 17th-century book \textit{Leviathan} identified sovereignty with might instead of with legal right.\textsuperscript{4} With the coming of constitutional government, Locke and Rousseau propounded the theory of “popular sovereignty,” under which the people as a whole are the holders of sovereignty in a state.\textsuperscript{5} Some writers still hew to this theory today.\textsuperscript{6} Other writers, whose views I find more persuasive, regard the concept of indivisible sovereignty of states as increasingly weak and fragile.\textsuperscript{7}

B. A Changing Landscape and a Grotian Moment

It is tempting for anyone to regard his own day as one of significance. Yielding to that temptation, I wrote an article about eight years

\begin{itemize}
\item 2. See J.L. Briely, \textit{The Law of Nations} 9 (Sir Humphrey Waldock ed., 6th ed. 1963) (discussing Bodin’s view of being bound by divine and fundamental laws of state). For translated excerpts from Bodin’s \textit{Six Livres de la Republique}, see Jean Bodin, \textit{On Sovereignty: Four Chapters from The Six Books of the Commonwealth} (Julian H. Franklin ed. & trans., 1992). According to Bodin, the sovereign, though supreme within his own kingdom, was bound by divine law, natural law, and the customs and traditions of the people being ruled. See Charles S. Edwards, Hugo Grotius: The Miracle of Holland 84 (1981). Briely explains that for Bodin, sovereignty “was an essential principle of internal political order, and he would certainly have been surprised if he could have foreseen that later writers would distort it into a principle of international disorder, and use it to prove that by their very nature states are above the law.” Briely, supra, at 10.
\item 3. See Briely, supranote 2, at 11 (noting the changes by which “sovereignty came . . . to be identified with absolute power above the law, and . . . what was originally an attribute of a personal ruler inside the state came to be regarded as an attribute of the state itself in its relations to other states”); see also John Henry Merryman, \textit{The Civil Law Tradition} 20–21 (2d ed. 1985) (explaining the “inner face” and “outer face” of sovereignty that prevailed in Europe in the centuries following the crystallization of the nation-state as the fundamental political unit).
\item 4. Briely, supra note 2, at 12–13.
\item 5. Id. at 14. Briely, critical of this conceptualization of sovereignty, says that “the doctrine of popular sovereignty has had beneficial results, but as a scientific doctrine it rests on a confusion of thought.” \textit{Id}.
\item 6. See W. Michael Reisman, \textit{Sovereignty and Human Rights in Contemporary International Law}, 84 A.M. Int’l L. 866, 867 (1990) (explaining that with the American and French Revolutions “the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty”; and emphasizing that “by the end of the Second World War, popular sovereignty was firmly rooted”).
\item 7. See Mark W. Janis, \textit{International Law?}, 32 Harv. Int’l L.J. 363, 368–69 (1991) (hereinafter Janis I) (noting that “[a] the world’s transactions—be they economic, environmental, cultural, military, political or social—increasingly transcend national boundaries, so the utility of the concept of the sovereign state diminishes”; and asserting that “the grand simplicity of the sovereign state . . . is in serious decline and the theory and reality of indivisible sovereignty will be weaker still in the coming century”).
\end{itemize}
ago suggesting that ours is an age of important change, legally and politically, that represents a new chapter in the history of what we have called "international law" for the past two hundred years. I stated that the past fifty years had seen "a move toward 'multilateralization'—attempts to deal with the frictions of an ever-shrinking world through the establishment of new legal regimes designed to apply globally, or nearly so." Specifically, I drew attention to the rise of public international organizations—entities that until 1944 had only faint and checkered precedents—and to the proliferation of multilateral sets of rules of an economic and social character.

The past eight years have seen even more developments of that same type, both in the economic realm and in areas that are increasingly regarded as related to economic matters, including environmental protection and human rights. For example, in the last eight years:

- the WTO was created, resurrecting an institutional design that dated from the late 1940s for a triad of organizations to handle trade, currencies, and development;

- accompanying the WTO's creation was a score of binding trade treaties regulating how states can handle imports and exports, investment and services, and other related matters;

- China completed the most difficult part of its decades-long campaign for GATT accession, promising a tectonic shift in that country's economy and probably in the application of GATT rules as well;

- the Asian financial crisis brought havoc to world economic markets and a new critical attention to the role of the IMF;

---

9. For example, the International Telegraphic Union and the Universal Postal Union were established in 1865 and 1874, respectively, and the League of Nations began operations in 1920. Id. at 623.
10. See id. at 607–35 (discussing two separate aspects of "multilateralization").
the euro came into reality, both in intangible and tangible forms, to displace national currencies in many European countries;

- the Organization for Economic Co-Operation and Development (OECD) convention to outlaw bribery and corruption was concluded and entered into force, and new OECD guidelines for multinational corporations were issued;\(^{12}\) and

- a phenomenal outpouring of interest and dissent from many groups of people—the so-called "NGO swarm"\(^ {13} \)—started descending on the WTO (starting in Seattle in November 1999) and on the IMF and the World Bank.

On non-economic fronts, the last eight years have brought similarly important developments.\(^ {14} \) The massive U.N. Convention on the Law of the Sea, one of the most comprehensive and detailed treaties ever created, came into effect; many of its provisions deal with matters of environmental protection. The Kyoto Protocol on global warming emerged. In the area of human rights, the International Criminal Tribunal for the former Yugoslavia and Rwanda were established, and then the International Criminal Court (ICC) was chartered, bringing to fruition a process that began with the Nuremberg Charter and Tribunal, effectively extending international legal responsibility to individuals. On a parallel track, prosecution of several warlords (most notably Milosevic) for human rights violations has begun and already yielded some convictions.\(^ {15} \) The placing of international legal responsibility on individuals also appears most recently in the U.S. actions to pursue and deal with Osama bin Laden following the terrorist attacks of September 11.

Yielding again to the temptation I referred to above, I would assert that we stand at an important historical juncture. The past several dec-

---

12. For more information on OECD, see its website at http://www.oecd.org.
13. For the background to this term, see Chi Carmody, Beyond the Proposals: Public Participation in International Economic Law, 15 Am. U. Int’l L. Rev. 1321, 1325 (2000).
14. All of the developments referred to in this paragraph have been thoroughly described elsewhere. For general explanations of most of them, see Mark W. Janis, An Introduction to International Law (3d ed. 1999) [hereinafter Janis II]. Treaties referred to in this paragraph are cited in Janis II, supra, and are reprinted in various volumes of Burns H. Weston, International Law & World Order: Basic Documents (looseleaf) [hereinafter Weston I].
15. For information on the work of international criminal tribunals, see their websites at http://www.un.org/icty/ and http://www.ictr.org.
ades have seen an explosion in the number of nation-states, a proliferation of international organizations to which those nation-states have increasingly surrendered crucial elements of national authority—over the use of force, over economic and financial policy-making, and over the treatment of their own nationals and their own environmental resources—and a mobilization of private individuals and their interest groups, aided by revolutionary new technologies for getting and communicating information. This really is a new day.

For several years, some writers have been claiming that the times we live in resemble the mid-1600s, when the Thirty Years War was fueling the furnace from which the nation-state would emerge as the fundamental political and legal unit in Europe. At that time, an old order, based on the primacy of the Church, was giving way to a new order, that of the nation-state. Hugo Grotius, widely regarded as the father of modern international law (at least in the West), wrote his treatise *De Jure Belli ac Pacis* (The Law of War and Peace) as a guide to the new rules he saw emerging from that chaotic time. In doing so, he essentially married the old to the new—he acknowledged the primacy of the nation-state, but he insisted that the nation-state was subject in its external relations to the principles of natural law that had governed behavior under the old regime. The gist of Grotius’s view of the “law of nations” (the terminology current at the time), is that the relations between sovereigns on behalf of their states are governed by binding rules derived from two sources: *jus gentium voluntarium* and natural law, with *jus gentium voluntarium* based on consent of states as manifested in custom and usage, and with the law of nature a set of broad and unchanging principles of justice derived from Christian theology.

16. See JANIS II, supra note 16, at 158 (noting that there are “nearly 200 sovereign states, three times as many as before the Second World War”).


[It] is [their] conviction that the complexity and interconnectedness of international life is establishing what Richard Falk and others have called “The Grotian Moment”—that is, a period of normative uncertainty in which the old statist order of international relations is being superseded, but not yet fully or in any precisely defined direction or manner.

WESTON II, supra, at 1086–87 (footnote omitted).

18. For a more detailed discussion of this point, and references to Grotius’ works and life, see HEAD I, supra note 8, at 607–08, 612–16. For an explanation of why a Eurocentric view of international law—born in Europe with the rise of nation-states—predominates in the world today (rather than other, older views reflecting, say, Islamic or Chinese perspectives), see id. at 620–21.
Is our day like Grotius’ day? Are we in the midst of another “Grotian Moment” that calls for a new conceptualization of international law? Maybe. Numerous books and articles have appeared in recent years announcing the death of the nation-state. However, I hear the funeral bells not for the state itself but rather for the old notion of state sovereignty that pictured the state as a singular, impenetrable lawmaker free to do as it pleases. The state itself remains strong but shares the stage with other sources of law.

Perhaps we can usefully construct a timeline that will help us compare our day with Grotius’ day. Let us focus on two related aspects—the sources of the applicable rules and the coverage of those rules (that is, what entities they apply to).

In the mid-1600s the “law of nations” comprised, according to Grotius, the two sources of law mentioned above—jus gentium voluntarium and natural law. The rules of the “law of nations” were to apply to the heads of state in the nation-states of Europe (it was to those persons, Christian princes all, that Grotius mainly addressed his treatise) and to a certain extent also to other individuals. In the years that followed, two things happened. First, the element of natural law gradually lost favor and disappeared from the “law of nations,” so that by the latter part of the eighteenth century the dominant view was that the only rules governing relations between states were voluntary in character. Second, at about the same time (the late 1700s), Jeremy Bentham coined the term “international law,” one effect of which was to essentially remove individuals from the coverage of international law.

The situation throughout the nineteenth century and the first several decades of the twentieth had simplicity in its favor: international law governed relations between states and derived from rules “emanating from their own free will.” It is that concept of international law—applicable only to states and arising out of their exercise of absolute and

20. See Falk I, supra note 17, at 1090 (explaining that “[t]he Grotian solution presupposed the personal character of royal rulership in Europe,” a reality no longer true today); see also Janis II, supra note 14, at 236–40 (noting that the “law of nations” was intended to apply to individuals as well as to states).
22. In one of the most famous definitions of international law, the Permanent Court of International Justice declared in the 1927 Lotus case that “[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . .” S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7).
singular sovereignty as the sole law-givers—that I believe the second half of the twentieth century has made obsolete. That was a central thesis of the article I wrote eight years ago, and I am even more convinced of it now, with the dramatic recent developments I enumerated above.

The specific changes that have occurred in the past half-century, and at an accelerating pace, fall into three main categories of relevance to economic globalization. First, the coverage or applicability of international law has expanded to include international organizations. Whereas the capacity and status of international organizations was unsettled in the middle of the twentieth century—for example, it took a decision of the International Court of Justice to settle the issue of whether the United Nations was an international legal personality with capacity to sue a state—now there is no question that international organizations (that is, public intergovernmental organizations with states as members, such as the U.N., WTO, IMF, and World Bank) have international legal personality.

Second, the coverage of international law has expanded in another way: to include (again) individuals. The massive body of human rights law that has developed since the middle of the twentieth century is a testament to the efforts to impose on governments international legal obligations governing their treatment of persons within their territorial borders. As noted above, the recent moves to create the ICC and to prosecute individuals accused of humanitarian crimes underscore that development.

Third, the sources of international rules have started expanding; no longer is the nation-state the sole source of such rules. At least to a limited extent, international organizations are creating rules independently of any nation-state. These rules govern, for example, the terms and conditions under which international civil servants are appointed and

24. See, e.g., Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, art. 6, 25 I.L.M. 543, 549 (not in force) (stating that international organizations have the capacity to conclude treaties).
25. As one commentator explains, the treaty establishing the ICC “recognizes the international legal personality of the individual in at least six ways,” which he then describes. Kenneth S. Gallant, Court to Mark Progress on International Legal Personality of Individuals, INT’L ORGS. (Am. Soc’y of Int’l Law, Washington, D.C.), Spring 2001, at 11.
the application of terms and conditions in loan agreements by some international development finance institutions.\textsuperscript{27}

Table A presents in tabular form the account I have just given about how the coverage and sources of international law have changed.

\begin{table}
\centering
\caption{Changes in the Sources and Coverage of Rules of International Law}
\begin{tabular}{lccc}
\hline
\hline
actions of states (\textit{ijus}) & actions of states (\textit{ijus}) & actions of states (\textit{ijus}) \\
+ natural law & + actions of int'l org's & \\
\hline
\textbf{Coverage of the rules} & & & \\
heads of states & states & states \\
+ individuals & + individuals & + int'l org's \\
\hline
\end{tabular}
\end{table}

[Note: \textit{ijus} = \textit{jus gentium voluntarium}, the term Hugo Grotius used to refer to rules that states established voluntarily between themselves.]

I have spent some time here elaborating on the historical setting and significance of today’s economic globalization. Why? Because if we are indeed in the midst of a change as dramatic as I have portrayed it—something like a “Grotian Moment”—then we should recognize it as such and treat it accordingly. We should consider what legal and institutional outcome we want to emerge from this important day. Do we want the power of international economic organizations such as the WTO and the IMF and the World Bank to expand, perhaps at the expense of national autonomy? Or is there such danger in that expansion of power that we should arrest it?

To put these questions in the context of my metaphor, which do we want to see broken—the window or the egg? It is not, after all, a foregone conclusion which of the two of them (if either) will survive the

\textsuperscript{27} In 1994 the European Bank for Reconstruction and Development adopted standard terms and conditions for use in its public-sector lending that define “international law” to include such practice. \textit{John W. Head, Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks, 90 Am. J. Int’l L.} 214, 226–27 (1996) [hereinafter Head II].
impact, for at least some writers insist that globalization is not inevitable but can in fact be stopped or reversed. 28

II. WHAT DO WE HAVE TO WORK WITH NOW?

In order to evaluate the legal and institutional globalization of economic activity and regulation, we should first take stock of what it encompasses. In the following paragraphs I shall identify what I consider to be its key elements and why they are important to our inquiry. My survey falls into two categories—multilateral legal rules and multilateral institutions.

A. The Legal Landscape

Although rules of international law are generally regarded as consisting of two types—treaties and custom—almost all of the rules relevant to international economic law take the form of treaty provisions. The same is largely true of two other areas of law that I consider important to an analysis of economic globalization—human rights law and environmental law.

What are the main pertinent rules in these three areas? The following list will serve as a reminder for international lawyers. For others, it might come as a surprise that many of the issues of the day—economic, humanitarian, environmental—have been so carefully studied and painstakingly reduced to writing in the form of treaty provisions. It also might come as a surprise that the United States has proven an exceptionally reluctant participant in many treaty regimes, especially those regarding human rights protections and environmental protection.

Treaty rules on international trade. The centerpiece of international trade is the General Agreement on Tariffs and Trade (GATT), dat-

---

28. See Paul Streeten, Integration, Interdependence, and Globalization, FIN. & DEV., June 2001, at 34, 34–35 (noting that in some ways “the world [economy] was [actually] more integrated at the end of the nineteenth century than it is today,” and asserting that although “[i]t is often said that globalization is irreversible . . . history shows that it is highly reversible”); see also Martin Wolf, Will the Nation-State Survive Globalization?, FOREIGN AFF., Jan./Feb. 2001, at 178, 179 (noting that “[t]oday’s growing integration of the world economy is not unprecedented” in many respects, and that “the proportion of world production that is traded on global markets is not that much higher today than it was in the years leading up to World War I”).

29. These are the first two items set forth in Article 38(1) of the Statute of the International Court of Justice. Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1031, 1976 Y.B.U.N. 1052, reprinted in WESTON I, supra note 14. The other items appearing there are general principles of law, judicial decisions, and legal scholarship. Id.
ing from 1947. It establishes four key principles: (i) that a state agreeing to the GATT will provide “most favored nation” treatment (lowest tariff levels) to all other contracting states; (ii) that a contracting state will provide “national treatment” to all other contracting states (and will not, for example, impose special taxes on the resale of an item within the country simply because the item is imported); (iii) that a contracting state will not arbitrarily raise the tariff on imported goods above levels that it previously agreed to; and (iv) that a contracting state will not impose non-tariff barriers on imports, thereby circumventing some of its other GATT commitments. A fifth principle stands as an exception to some of these first four principles: in narrowly specified circumstances, a contracting state is permitted to raise tariffs or to impose certain non-tariff barriers to protect its own industries or economy from practices by other countries or companies that are regarded as unfair because they distort trade. The two main examples of this are dumping (as when a company sells merchandise overseas for a lower price than the price the company charges for like merchandise in its home country) and subsidies (as when a government makes a payment to a company or otherwise absorbs some of the costs of that company’s production or export of goods).

These principles, along with others prescribed in the GATT, have governed most international trade for half a century. A dramatic recent development in the area of international trade law, however, came in 1993 when the GATT-sponsored Uruguay Round of trade negotiations succeeded—to the surprise of many observers—in forging a score of new trade treaties that reconfirmed and greatly expanded on the GATT of 1947. These included the following:

- GATT 1994 (which incorporates by reference the original GATT signed in 1947)
- Agreement on Agriculture

---

31. Id. arts. I, II, III, and XI (respectively).
32. Id. arts. VI and XVI.
33. Id.
A novel aspect of the Uruguay Round agreements is that a party must accept them all (except the last four listed above) as a “single package” in order to become a member of the WTO, which also emerged from the Uruguay Round. Over 140 countries are now parties to these agreements. The agreements reflect the capitalist, market-based, free-trade philosophy of the Western powers, including especially the United States.

*Treaty rules on international monetary and economic management.* Unlike trade, other areas of economic activity have relatively few treaty rules yet in place—although as will be seen from the above list, some of the Uruguay Round agreements go beyond trade per se and cover international investment and intellectual property rights. Still, a few treaties

35. WTO Agreement art. 11.2 (providing that the multilateral trade agreements are integral parts of the Agreement and binding on all members).
existing outside the GATT regime do bear directly on economic affairs. Originally, the Bretton Woods agreements of 1944 (from which emerged the IMF and the World Bank, discussed below) put in place a par value system of fixed exchange rates. That system fell apart in the 1970s, and since that time states have been free, as a legal matter, to choose whatever currency system they want. The main treaty rules on the subject now call for states (i) to refrain from manipulating exchange rates or imposing certain types of exchange restrictions, and (ii) to collaborate and cooperate with the IMF in its “surveillance” (supervision) of the international monetary system.  

*Treaty rules on human rights.* Since the 1940s, human rights treaties have proliferated, and many of them have been formally accepted by most states. The two central treaties—which together with the 1948 Universal Declaration of Human Rights (a U.N. General Assembly Resolution) have been called the “international bill of human rights”—are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Both were finalized in 1966, came into force in 1976 (upon receiving the required numbers of ratifications), and have received overwhelming support, at least formally, by states. The ICCPR has over 150 parties, including the United States. The ICESCR has about the same number of parties, not including the United States.

In addition to these two treaties—by which states undertake to guarantee the right to life, freedom from slavery or torture, the right to a

---


39. *See Burns H. Weston et al., Supplement of Basic Documents to International Law and World Order* 1298–99 (3d ed. 1997) [hereinafter Weston III] (listing countries that have ratified the ICCPR).

40. *See id.* at 1297–98 (listing countries that have ratified the ICESCR).
fair trial, freedom from arbitrary arrest and detention, the right to free expression and exercise of religion, and other civil and political rights, as well as to work progressively to provide an adequate standard of living, health care, and educational opportunities—a plethora of other human rights treaties have also appeared, expanding on these protections and extending others. A few principal ones are listed below\(^\text{41}\) (the United States is a party to half of these, as marked with asterisks):

- Convention on the Prevention and Punishment of the Crime of Genocide (1948)*
- Convention Relating to the Status of Refugees (1951)
- Convention on the Elimination of All Forms of Racial Discrimination (1966)*
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- Convention Against Torture (1984)*

_Treaties on environmental protection._ Important environmental treaties date back less far than the human rights treaties discussed above. The 1972 Stockholm conference on the environment was a triggering event. The list of main environmental protection treaties includes the following\(^\text{42}\) (of which the United States is a party to about half, as marked with asterisks):

- Convention on International Trade in Endangered Species (1973)*
- International Convention for the Prevention of Pollution From Ships (1973)*
- Convention for the Prevention of Marine Pollution from Land-Based Sources (1974)*
- Geneva Convention on Long-Range Transboundary Air Pollution (1979)*
- Vienna Convention for the Protection of the Ozone Layer (1985)*

\(^{41}\) These and other human rights instruments are reprinted in WESTON I, supra note 14, and also in WESTON III, supra note 39, at 368–664.

\(^{42}\) These and other environmental protection treaties and instruments are reprinted in WESTON I, supra note 14, and also WESTON III, supra note 39, at 792–1179.
- Convention on Biological Diversity (1992)
- U.N. Framework Convention on Climate Change (1992)*
- Kyoto Protocol on Climate Change (1998)

B. The Institutional Landscape\textsuperscript{43}

My personal and anecdotal experience tells me that the average American citizen knows virtually nothing about the WTO, the IMF, or the World Bank, and only slightly more about the U.N. I would carry my discouraging and disparaging observation further: much of what the average American citizen does know about any of these institutions is incorrect. Granted, the average American citizen cannot be judged totally at fault in this regard, given the amount of misinformation available. For example, a recent article on the "ABCs of the Global Economy" instructs the reader that "[t]he most important function of the IMF is as a 'lender of last resort' to member countries that cannot borrow money from other sources."\textsuperscript{44} Compare this with the explanation given by the IMF's General Counsel: "The IMF is not a lender of last resort."\textsuperscript{45} The

\textsuperscript{43} The following paragraphs offer very simple and abbreviated summaries of highly complicated institutions. In writing these accounts, I have relied largely on my own general familiarity with the institutions, and I have not cited authority for specific propositions. For such authority, and for other descriptions (including official accounts) of these institutions, see the following sources: Raj Bhala, International Trade Law: Theory and Practice 127–41, 193–208 (2d ed. 2001) (explaining the GATT, the WTO, and the Uruguay Round); Ralph H. Folsom et al., International Trade and Investment in a Nutshell 58–73 (2d ed. 2000) (same); The Final Act of the Uruguay Round: A Summary, GATT Focus Newsletter, Dec. 1993, at 5–15 (summarizing the WTO Agreement and other agreements emerging from the Uruguay Round); International Monetary Fund, IMF Survey Supplement (2001), available at http://www.imf.org/imfsurvey (describing the IMF); Richard W. Edwards, Jr., International Monetary Collaboration (1985) (same); Head III, supra note 36 (same); Head II, supra note 27 (discussing the World Bank). See also the websites for the WTO, the IMF, and the World Bank: http://www.wto.org, http://www.imf.org, and http://worldbank.org, respectively.


\textsuperscript{45} See François Gianviti, The Reform of the International Monetary Fund (Conditionality and Surveillance), 34 Int'l Law. 107, 112 (2000) ("The Fund is not a lender of last resort. Its liquidity is limited and its financial assistance is not confined to systemic cases."). Instead, as explained briefly in later paragraphs of this Article, the IMF typically makes short-term loans of relatively small amounts to countries to support specific programs of economic and financial reform. IMF funding usually aims to give confidence to other lenders (both public sector and private sector), so
same "ABCs" article, in discussing the WTO, does a very sloppy job of summarizing the GATT.46

I direct my critical observation particularly at American citizens for two reasons. First, I believe—although again I cannot support this with any more than unscientific and anecdotal evidence—that many citizens of many other countries are better informed than Americans are about international economic affairs and institutions. Second, an electorate that is so profoundly ignorant about these three international economic institutions, which the United States itself largely created, naturally sends elected officials to Washington who are also ignorant about these institutions and what their most powerful stakeholder (the United States) should do about them.

The WTO.47 Formed in 1995 as a result of the Uruguay Round of trade negotiations, this institution operates on a one-state-one-vote basis48 in deciding issues of international trade policy. Its charter—a treaty agreed to by all of its 140-plus member countries—establishes a WTO Secretariat to facilitate the implementation of the policies that those countries collectively adopt.49 Thus, the WTO Secretariat is constrained by the terms of the twenty or so agreements I listed above—agreements that were prepared over the course of about six years by negotiators representing dozens of governments, including the U.S. Government. A lightning-rod for public concern has been the WTO's dispute resolution mechanism, which represents a sharp departure from the dispute resolution mechanism that existed under the GATT of 1947. Under the old GATT rules, any state could effectively veto the adoption of the report of a dispute settlement panel, thus blocking implementation of the recommendations contained in the report, not to mention any enforcement action in response to a state's violation of its GATT treaty obligations, such as the four principal obligations I summarized above—MFN treatment, national treatment, binding ceilings on tariff rates, and no non-tariff barriers. Under the new WTO rules, that unilateral right to

---

46. ABCs, supra note 44, at 30-31. The article mistakenly equates various rounds of GATT-sponsored negotiations with the GATT itself—somewhat like equating the provisions of the U.S. Constitution that establish the Congress with the debates and legislation that Congress engages in—and it makes two mistakes in telling what the acronym GATT stands for ("General Agreements on Trade and Tariffs," instead of "General Agreement on Tariffs and Trade").
47. For Information on the WTO, see the pertinent sources cited supra note 43.
48. WTO Agreement art. IX.1.
49. Id. art. VI.
veto no longer exists. This would seem to be a change that would generally meet with approval in a society that typically does not let a losing defendant veto a judgment entered by the court in favor of the plaintiff. However, criticism has arisen on grounds of both procedural and substantive grounds, which I explain in the next section of this article.

As a general matter, the WTO has no financial resources to make available to its member countries (a feature that distinguishes it from the IMF and the World Bank). Indeed, according to one source it has a total budget of only about $80 million—half of what the World Bank spends on travel—and a staff of only 530 people. The WTO’s Dispute Settlement Body does, however, have the power (granted by the dispute settlement rules emerging from the Uruguay Round) to authorize a state to take retaliatory trade action against another state that has disregarded its trade treaty commitments and failed to make compensation. This power, together with the sheer bulk of the rules that the WTO Secretariat is delegated by its member countries to help implement, has made the WTO a target for criticism and condemnation.

The IMF. The IMF, formed near the close of World War II along lines proposed by leading U.S. and U.K. economists and politicians, was originally designed to manage a system of fixed exchange rates. Under that system, currencies of all (or most) countries were to be made freely convertible, and the values of the currencies would be unchangeable (except within a narrow range or with prior IMF approval). This system was favored by the countries that formed and joined the IMF because predictability in the convertibility and values of currencies would help foster trade, which itself was seen as a means of improving the international economy and, ultimately, of contributing toward peaceful relations. The fixed-value system was particularly attractive compared with an inter-war period in which countries competitively manipulated the values of their currencies in an effort to gain short-term trade advantages.

52. DSU art. 22.
53. For descriptions of the IMF and the developments referred to in the following paragraphs, see the pertinent sources cited supra note 43.
54. Articles of Agreement of the International Monetary Fund, Article IV, 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 387 (Stephen Zamora & Ronald A. Brand eds., 1990) (reprint of the original version of Article IV, providing for the system of fixed exchange rates).
In order to make the system work, the IMF charter authorized the IMF to make short-term loans available to members having temporary balance-of-payments difficulties, as would occur when a bad crop year threatened export revenues.\textsuperscript{55} The IMF used this authority when necessary, and the United States borrowed from the IMF for that reason as recently as the late 1970s.

The par value system of fixed exchange rates broke down in the early 1970s when the United States announced that it would no longer abide by some of its IMF treaty obligations on currency convertibility. The IMF's members radically amended the IMF charter accordingly, and the IMF's operations were correspondingly reduced. However, when the 1982 debt crisis broke out (upon the announcements by Mexico and Brazil that they would no longer be able to service their debt obligations), the IMF took a lead role that has set the stage for its operations ever since. Now its credit operations (some of which are not technically loans but coincident unilateral undertakings) focus mostly on member countries with persistent balance-of-payments problems, and occasionally on responding to crises that threaten the international monetary system as a whole. The Asian financial crisis is an example of the latter; the IMF lent unprecedented amounts of money to Thailand, Indonesia, and Korea to stop that crisis from spreading further in Asia and elsewhere.\textsuperscript{56}

In making its loans, the IMF almost always engages in "conditional-ity." Under conditionality, the IMF disburses money to a borrowing country only on a piecemeal basis and only if the country can demonstrate that certain economic and financial policies agreed on in advance with the IMF are in fact being implemented and having the desired results. The types of policies that IMF conditionality often focuses on include such rather obvious things as (i) a reduction in government spending and foreign borrowing, (ii) a reduction in the money supply to stop or forestall inflation, and (iii) steps to strengthen banking supervision in order to protect depositors from being bilked out of their savings by dishonest or incompetent bank managers.

\textit{The World Bank.}\textsuperscript{57} The World Bank technically consists of two organizations—the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).

\textsuperscript{55} IMF Charter, \textit{supra} note 36, arts. 1(y), 5(4).
\textsuperscript{56} See Head IV, \textit{supra} note 36, at 70–71 (explaining the causes and IMF response to the financial crisis in Asia).
\textsuperscript{57} For descriptions of the World Bank and the developments referred to in the following paragraphs, see the pertinent sources cited \textit{supra} note 43.
The IBRD was formed at the same time as the IMF. At the Bretton Woods Conference in 1944, the predominant view was that three particular economic challenges of the day had to be addressed in order to help avoid a third world war—trade protectionism, currency exchange fluctuations, and rebuilding Europe. The GATT and the IMF were designed to meet the first and second of these. The IBRD was designed to meet the third one.

The IBRD’s assignment to help rebuild Europe, by serving as a financial intermediary for relatively rich investors (mainly in the United States), was soon taken over by the Marshall Plan, so the IBRD turned to its secondary assignment—to assist in the economic development of poor countries outside Europe. It does that still, by making loans at market-based interest rates. The emergence of many poor post-colonial countries in the 1950s and 1960s prompted the establishment of the IDA, which lends money at much lower interest rates. IBRD resources come mainly from private investors as explained above. IDA resources come mainly from contributions made by rich member countries. The IBRD and IDA are almost completely merged in terms of offices, staff, and policies. Together they are known as the World Bank.

World Bank loans finance the building of mainly public-sector projects that are typically less attractive to private lenders—roads, irrigation systems, schools, rural health facilities, electrical transmission facilities, railway improvements, and the like. After facing stiff criticism over the environmental disasters of some hydroelectric dams that it helped finance, the World Bank has largely stopped any new operations in that area. Like the IMF, the World Bank attaches conditions to loans it makes. These often include the adoption of internationally acceptable accounting and auditing procedures, the setting of rates at commercially viable levels, reducing debt-equity ratios, and following specified standards on environmental protection, indigenous people, involvement of NGOs in project design, and the like. Both the World Bank and the IMF have recently adopted rules on reducing corruption and improving governance in their borrowing member countries. The World Bank established an Inspection Panel in 1993 to hear claims by outsiders alleging that the World Bank has failed to follow its own stated policies.

Both the World Bank and the IMF operate on the basis of a weighted voting system, in which the largest shareholders have the larg-

este portion of votes. The United States holds about a seventeen percent shareholding (technically called a quota) in the IMF and about a fifteen percent shareholding in the World Bank. Other major shareholders include the other G-7 countries (Canada, France, Germany, Italy, Japan, and the U.K.); indeed, the G-7 countries combined control about forty-five percent of the total shareholding (and therefore votes) in the World Bank and the IMF.

III. What Should We Do About Global Free Trade and the WTO?

With the foregoing synopsis of rules and institutions as a foundation, I now turn to an assessment of some key criticisms that have been leveled at economic globalization.59 This is not an easy task, in part because there is such a cacophony of criticism; as one source has expressed it in a similar context, “[t]he problem is that the valid criticisms are buried under a heap of error, muddle and deliberate distortion.”60

Hence, my aim in this section is to sort through several of the most widely heard criticisms about the first of these three institutions—the WTO—and identify which of those criticisms I think make sense and which ones do not. I hope this will set the stage for a later consideration, in like manner, of the IMF and the World Bank. Like the foregoing factual synopsis, my evaluation here will sacrifice depth of analysis for breadth of coverage.

---

59. I draw these criticisms of the WTO, the IMF, and the World Bank from a broad range of sources, and I have presented them in what I regard as their strongest form, albeit overly simplified in many cases. With apologies to the reader wishing to study these criticisms in their purer and original forms, I have foregone citations to sources. My aim here is not to provide research guidance but a broad overview.

60. A Plague of Finance, THE ECONOMIST SURVEY, supra note 1, at 21, 21 (discussing the claim that a “Washington consensus” supported by the U.S. government, the IMF, and the World Bank serves the interests of the rich at the expense of the poor).
A. Criticisms That I Largely Dismiss

“Free trade does more economic harm than good to a national society as a whole.” I reject this assertion. I am not trained as an economist, but it seems to me almost inescapably true that reducing barriers to the trading of goods among countries brings an overall benefit to each country involved, because the lower prices that trade liberalization yields for all consumers (including domestic producers who import components) outweigh the costs imposed in the form of some lost jobs.

I am not alone, of course, in rejecting the assertion that trade liberalization does more economic harm than good overall. Many studies, conducted from various perspectives and published by sources that seem trustworthy, establish that societies gain economically, in aggregate, from trade liberalization—and, moreover, that this aggregate economic gain occurs even if a society embraces trade liberalization unilaterally (that is, without insisting on reciprocal liberalization of trade policies by other countries). These studies confirm the common sense

61. I have selected only three key criticisms to discuss here. There are others. For example, some critics condemn free trade on grounds that it does cultural harm to many societies by emasculating existing cultures and replacing them with a homogenized non-culture or a repugnant foreign culture. Related to this criticism, or perhaps a subsidiary of it, is the claim that free trade undercuts agrarian values in the United States. I find the first of these criticisms questionable as a factual matter. Even a severe choking down of international trade would probably not halt cultural change; that would require instead, a clampdown on the flow of information, which itself would probably be a violation of the right of free access to information under the ICCPR. See supra note 37. As for the second (subsidiary) criticism about agrarian values, see Jim Chen, Epiphytic Economics and the Politics of Place, 10 MINN. J. GLOBAL TRADE 1, 10–11 (2001) (asserting that clinging to agrarian values is a “destructive philosophy” whose adherents “have failed to address the severest... human issues facing globalized society,” including widespread poverty, that “would stifle wealth creation and constrict political freedom across the globe, all in order to shelter incumbent economic interests in Europe, Japan, and North America”). However, if the agrarian values argument boils down to a criticism of the providing of subsidies for environmentally unsustainable agribusiness practices of corporate interests in the United States and Europe, then I agree with it for reasons I identify below in discussing the “authenticity” of comparative advantage. See infra text accompanying note 67.

62. For summaries of such studies, and the conclusions emerging from them, see David Dollar & Aart Kraay, Trade Growth, and Poverty, FIN. & DEV., Sept. 2001, at 16, 16–19 (noting that countries adopting more liberal trade policies have seen increased growth); Profits Over People, THE ECONOMIST SURVEY, supra note 1, at 5, 6 (asserting that globalization “makes some workers worse off while making others (including the poorest of all, to begin with) better off” and, in the aggregate, “makes consumers... better off as well,” so that “given freer trade, both rich-country and poor-country living standards rise,” which “gives governments more to spend on welfare, education and other public services”).

63. See Who Elected the WTO?, THE ECONOMIST SURVEY, supra note 1, at 26, 26–27 (deriding as “an economic fallacy” the view that lowering trade barriers is a concession [and]... a sacrifice for which you require compensation”); see also Brink Lindsey, A New Track for U.S. Trade Policy, CATO INST. (Center for Trade Policy Studies, Washington, D.C.), Sept. 11, 1998, at 1, 1 (suggesting that “[f]ree traders need to take protectionist misconceptions and special interests head-on...
of Adam Smith's view of comparative advantage: it is wise for the tailor to make his shirt and buy his shoes, and for the cobbler to make his shoes and buy his shirt.\textsuperscript{64} In this respect, I think a representative of the Center for Economic and Policy Research, writing recently for the Sierra Club magazine, is simply wrong in positing that trade was "originally a means to obtain what could not be produced locally."\textsuperscript{65} Instead, trade is and always was a means of obtaining what is cheaper or better to buy than to make. To use one writer's colorful description, it is a means to "elevate the fruits of human leisure over the fruits of human labor."\textsuperscript{66}

Having said all that, I would hasten to make three points that are all more or less related to the "economic harm" argument. These points revolve around (i) the need for "authenticity" in comparative advantage, (ii) the difference between aggregate gain and individual loss from trade liberalization, and (iii) the gap that allegedly exists between trade liberalization's benefits to rich countries and its benefits to poor countries.

First, it is important to recognize that trade liberalization yields its benefits in the long term only to the extent that comparative advantage is real and not illusory. Let us use Adam Smith's cobbler-and-tailor illustration of the common sense underlying free trade. What if the cobbler, in order to get the leather he uses in making shoes, is in the practice of stealing the tailor's cattle? If that were the case, it should come as little surprise that the cobbler can supply shoes at an attractive price—but we would surely hesitate to say he has a comparative advantage and that the tailor is better off buying his shoes from the cobbler.

Some critics of the current WTO-led model of trade liberalization point to specific circumstances that resemble the example I have contrived above involving the cattle-rustling cobbler. They claim that many of the costs involved in production of agricultural or manufactured goods are not adequately accounted for and paid for by those companies or countries claiming a comparative advantage in such production.\textsuperscript{67} I

\textsuperscript{64} See Lindsey, supra note 63, at 3 (quoting Adam Smith).
\textsuperscript{65} Mark Weisbrot, Tricks of Free Trade, SIERRA, Sept./Oct. 2001, at 64, 64.
\textsuperscript{66} Chen, supra note 61, at 3.
\textsuperscript{67} One commentator has expressed it quite clearly:

The appropriate application of comparative advantage is predicated on efficient transportation and communication, which we have, and a good accounting system which we do not have. At this time calculations of advantage do not include externalities (social costs). For example the U.S. employs the world's most environmentally and socially destructive system of agriculture. If all these costs, such as loss of top soil and mining of aquifers to grow corn in the desert, were incorporated into the cost of product, and if we
agree with this claim, especially as it applies to environmental costs. I believe that deep and abiding environmental degradation occurs at alarming rates around the world at the hands of persons who, through stealth or improper influence or both, are able to engage in their rapacious behavior without cost or penalty.

However, I do not think this reality undercuts the economic rationale for trade liberalization. Trade flows are certainly distorted by such problems of environmental degradation and other externalities that make for unauthentic comparative advantage, but that does not mean that a liberal trade regime is itself the problem. Instead, action needs to be taken quickly to root out the underlying conditions that permit such problems to exist in the first place. I shall return to this point in recommending (below) much tougher environmental protections and reforms in national governance.

A second point that is related to, but distinct from, the “economic harm” argument concerns the difference between aggregate economic gain for society as a whole and economic loss for some specific members of the society. It is obviously true that some groups of workers within an economic system—textile workers in the United States, for example—will almost surely suffer more than they will benefit from removing protection from (lower-priced) imports. Whereas all consumers (including the textile workers themselves) can benefit from the reduced prices of textile products (because of lower tariff or non-tariff barriers on imported textile products), it is naturally only the textile workers who will lose their jobs as textile workers. However, society can and should deal with that distributional problem as a distributional problem, not as a grounds for withholding from all consumers the benefits of lower prices. I deal with this distributional point later, among the criticisms that I endorse and the changes I recommend in both national and international law.

A third point that is related to the “economic harm” argument also has a distributional element to it. Some critics of the WTO-led trade liberalization regime claim that economic globalization has increased the income gap between the rich countries and the poor countries of the world. They point out, for example, that “[b]y 1993 an American on the average income of the poorest 10% of the population was better off quit giving out huge subsidies, would we really have a comparative advantage over many third world farmers which have the advantage of family labor inputs? I think not. Letter from Craig S. Volland, President, Spectrum Technologists of Kansas City, Kansas, to John W. Head 5 (Nov. 29, 2001) [hereinafter Volland] (on file with author).
than two thirds of the world’s people,"68 or that economic growth slowed more in the past few decades for poorer countries than it did for richer countries,69 or that the gap between rich and poor overall in the world has increased—a fact highlighted by the 1999 U.N. Human Development Report and bemoaned by several commentators.70

Although these facts have led some critics to condemn economic globalism, and trade liberalization in particular,71 I am reluctant to jump to this conclusion. There is, I think, more to the story. Some studies emphasize that the aggregate gain emerging from trade liberalization does indeed help the poor, not just the rich.72 Some of the studies even indicate that, if measured correctly, "the growth benefits of increased trade are, on average, widely shared" and that those countries that have "globalized" in the last decade or so have both a decline in poverty and a narrowing of the gap between rich and poor.73 This suggests that even if the gap between rich and poor overall in the world has increased, the reason for that widening gap is not globalization but instead a failure of some countries to globalize.74

70. See, e.g., James W. Thomson, Globalization: Its Defenders and Dissenters, 106 BUS. & SOC’Y REV. 170, 176 (2001) (citing the U.N. Human Development Report for the proposition that "relative income inequality between nations has increased sharply since 1960").
72. See Grinding the Poor, THE ECONOMIST SURVEY, supra note 1, at 10, 10–13 (disputing the view that globalization especially hurts poor workers in developing countries). Specifically, "the evidence suggests that multinational[] corporations . . . pay a wage premium" in low-income countries that amounts to about two times the wage paid by domestic employers in those countries. Id. at 13. "Separate studies on Mexico, Venezuela, China, and Indonesia have all found that foreign investors pay their local workers significantly better than other local employers." Id. As another commentator has observed, however, wage levels alone do not give a full picture of the economic well-being of the workers who earn them, since:
[w]ages do not account for a long list of losses that have been documented in several settings . . . unhealthful working conditions, restrictions on personal freedom, loss of land and other assets in rural villages, damages from crime and violence (particularly to young women), disruption of families from sweatshops that employ only young women, lack of municipal infrastructure [and other factors].
Volland, supra note 67, at 5.
73. See Dollar & Kraay, supra note 62, at 17–18 ("[G]lobalizers are narrowing the per capita income gap. Moreover, because most of the globalizers—especially China, India, and Bangladesh—were among the poorest countries in the world twenty years ago, their growth has been a force for narrowing worldwide inequality.").
74. See id. at 18 ("The real losers from globalization are those countries that have not been able to seize the opportunities to participate in this process.").
I wish to pursue this point one step further. Even if it were shown (contrary to the evidence I have just referred to) that trade liberalization does in fact contribute to a widening of the gap between rich and poor, is that a good reason to mount a broadside attack on trade liberalization? In my view, the answer should depend largely on whether the incomes of the poor—or the levels of their economic well-being generally—are rising or falling. There seems to be little question that even if the overall gap between rich and poor is widening, the economic circumstances of the poor are in fact improving, in that absolute poverty generally is on the decline, at least in countries that have globalized. If this were not the case—that is, if economic conditions in poor countries were worsening, not improving, as a result of trade liberalization—then I would argue for quick and drastic action to stifle trade liberalization, because I believe one of the single most important challenges in today's world is to attack poverty. However, as long as trade liberalization improves economic conditions in poor countries, I would be loathe to stifle it merely out of a concern that trade liberalization is improving economic conditions faster in the rich countries. Instead, I would in that case support continued trade liberalization but seek to understand why its benefits flow more to the already-rich countries and whether some of that differential is undeserved.

"Free trade causes a 'race to the bottom' in environmental standards."

This criticism can take two forms. First, it might refer to a "race" by businesses to place their manufacturing operations in "pollution havens"—those countries that impose very light environmental requirements, or none at all. Second, it might refer to a "race" by governments themselves to relax environmental standards, presumably in a competition to attract or retain businesses within their borders.

I find the argument unpersuasive in either form, largely because (i) there seems to be very little firm evidence so far that either type of "race" is in fact being run and (ii) even if either of these types of "race" is being run, this would not be grounds to condemn trade liberalization as such. I explain both of these points in the following paragraphs.

As for the claim that businesses are racing to place their manufacturing operations in pollution havens, there seems to be only inconsistent and inconclusive evidence. There are, after all, scores of specific reasons that might prompt a business to shift its operations from one place to

75. See id.; Zakaria, supra note 71, at 25.
another. According to some observers, the cost of environmental compliance is unlikely to be a dispositive reason:

There is not much evidence, for example, that polluting industries have been migrating from developed to developing countries to take advantage of lax environmental standards. The cost of pollution control is relatively low in developed countries—"no more than 1 per cent of production costs for the average industry"—and besides, because most polluting firms are capital intensive, they tend to cluster in developed countries where capital is readily available.76

On the other hand, some observers note that "averages are meaningless in this context...[because] pollution control costs can be crucial for power plants, chemical plants, forestry and mining. Furthermore, estimates of pollution costs may not include health and safety factors governed by OSHA in the U.S. and governed by noone [sic] in many [less developed countries]."77 The fact remains, however, that little hard evidence is adduced showing a race by businesses "to the bottom."

As for the claim that countries are racing to relax their environmental standards in an effort to attract or retain pollution-prone manufacturers, there is also contradictory evidence and analysis. On the one hand, Sierra Club officials suggest that U.S. environmental and health standards have been relaxed in response to free-trade obligations,78 and other commentators hypothesize that developing countries fail to adopt environmentally friendly standards because they would prove costly for domestic producers,79 or that pollution havens might emerge in some


77. Volland, supra note 67, at 4.

78. See Dan Seligman, Poisoned Workers and Poisoned Fields: Stop NAFTA's Fast-Track Expansion to South America, at http://www.sierraclub.org/trade/environment/poisoned.asp (last visited Feb. 5, 2002) (stating that the U.S. Environmental Protection Agency, in order to help U.S. growers compete with surging imports, "has increased chemical risks to farmworkers by reducing a critical safety factor—the reentry period—the time between when pesticides are sprayed on crops, and when growers can order farmworkers to reenter the fields."); see also No Globalization without Representation!, at http://www.sierraclub.org/trade/summit/fact.asp (last visited Feb. 20, 2002) (asserting, but without offering documentary evidence, that the United States has weakened border food inspections and developed weak standards concerning imported agricultural pests).

areas of less developed countries in order to attract coal plant construction.\textsuperscript{80} Indeed, the WTO itself has acknowledged that “environmental measures are sometimes defeated because of competitiveness concerns.”\textsuperscript{81}

On the other hand, some observers find just the opposite trends at work. One source claims that “with respect either to safety or to environmental impact, signs of a race to the bottom are . . . hard to find. All the movement is the other way. Everywhere, the adoption of more demanding environmental standards gathers pace as incomes rise.”\textsuperscript{82} Another asserts that “[t]he clear trend in rich and poor countries alike is for ever tighter regulation” in terms of environmental protection—as well as in terms of labor conditions, a topic often joined with environmental protection in this context—and that “[i]f globalisation has started a race in these areas, it is to the top, not the bottom.”\textsuperscript{83}

It is worth noting in this respect that specific steps have been taken in the context of some trade agreements to prevent a possible race to the bottom by countries to attract investors seeking “pollution havens.” Although the NAFTA side agreement on environmental protection—the North American Agreement on Environmental Cooperation (NAAEC)\textsuperscript{84}—has attracted criticism as being less rigorous than it should be,\textsuperscript{85} there can be no doubt that the side agreement represents a growing appreciation of the importance of environmental protection. That same impulse led to the inclusion of environmental protection provisions in

\textsuperscript{80} Chris Baltimore, \textit{US Power Deregulation May Cause Trade Woes}, available in posting of David Orr, david@livingrivers.net, to CONS-SPST-ENERGY-FORUM@Lists.SIERRACLUB.ORG (Nov. 8, 2001) (on file with author). This article also refers to a 2001 U.S. Energy Department report “that attributed increased power plant construction in Mexico to less stringent environmental regulations.” \textit{Id}. This might be evidence of the first kind of “race to the bottom” referred to above—a move by businesses to place their operations in pollution havens.

\textsuperscript{81} \textit{WTO Report}, supra note 76.

\textsuperscript{82} \textit{Who Elected the WTO?}, supra note 63, at 26.

\textsuperscript{83} \textit{A Crisis of Legitimacy}, \textit{THE ECONOMIST SURVEY}, supra note 1, at 18, 20.


the U.S.-Jordan Free Trade Agreement of 2000— as an integral part of the treaty, rather than in the form of a side agreement—and also led to the inclusion of environmental protection as an agenda item at the recent WTO Ministerial meeting at Doha.

It appears, then, that although more liberal trade (and investment) rules do prompt an increase in production in less developed countries (bringing with it more jobs), it is by no means clear that the other linkages or "races" that some opponents of globalization complain about are in fact real or significant.

What if they were? What if unimpeachable evidence appeared tomorrow revealing a frantic race to the bottom, in either or both of the forms described above? Should we then put the brakes on trade liberalization by jettisoning the four key principles that I summarized earlier in this article and by shutting down the WTO?

Of course not. The liberal trade regime established by the GATT and the WTO rests on the proposition that general economic welfare is increased by permitting trade in goods to go forward in ways that reflect the comparative advantages enjoyed by countries or companies. One of the key principles of that liberal trade regime is that if the comparative advantage is artificial—"un authentic," to use the term I introduced above—then a country can depart from its obligation to refrain from tariff increases or to avoid non-tariff barriers. Hence, our response to a race to the bottom, if one were to occur, should not be to abandon trade liberalization generally but should instead be to pay more attention to that "authentic comparative advantage" element of the liberal trade regime. As I explain more fully below in offering several specific recommendations, I believe our aim should be to eliminate free externalities by strengthening multilateral environmental regulations and their enforcement.

"The WTO is undemocratic." I also dismiss this criticism. For one thing, I do not want the WTO to be democratic, if democracy means


87. See WTO Ministerial Declaration, WT/MIN(01)/DEC.01 (Nov. 20, 2001) ("Doha Declaration"), ¶¶ 31–33, at http://www.wto.org/English/tradwto_e/min01_1/mindecl_e.pdf (recognizing the importance of environmental protection in developing trade).

88. On the related issue of labor standards, the Chair of the AFL-CIO International Affairs Committee offers no support for a claim of a "race to the bottom"—either in the sense of companies racing to LDCs or in the sense of LDCs racing to reduce their labor standards. See Jay Mazur, Labor's New Internationalism, FOREIGN AFF., Jan./Feb. 2000, at 79, 88–91.

89. See supra text accompanying note 31.
that amateurs (I include myself in this) have the opportunity to vote on new policies (legislating) or on interpretation or application of existing rules (adjudicating). Trade policy—like, say, monetary policy—is complicated. I certainly do not want central banks to be democratic. Do you want your neighbor’s nineteen-year-old son to have a vote in the Tuesday meetings of the Federal Reserve Board?

Of course, maybe the quoted criticism means something different—that the WTO is an untethered entity that has no allegiance to political authorities (including those of the United States) and as such can impose its will arbitrarily on a country. If so, I still reject the criticism—but this time on grounds that the criticism does not square with reality. WTO membership is voluntary, and its management is selected by its member countries.90 The role of the WTO Secretariat is not to make rules but to administer rules accepted by the WTO’s member countries on a one-state-one-vote basis. Any major change in those rules requires consensus—“all 142 members, or at least a critical mass of” them, must agree before a new round of trade negotiations is launched,91 as occurred in Doha recently.92 Indeed, some commentators have implied that the WTO is too democratic, in the sense that the requirement of consensus for most policy decisions “may be a recipe for impasse, stalemate, and paralysis.”93 Whatever the merit of that view, the fact remains that there is plenty of ultimate accountability of the WTO to its constituents, which is the vast majority of national governments that have formed it, joined it, and remained part of it.

Although I dismiss the criticism that the WTO is undemocratic, I hasten to add that I largely accept two related criticisms. One of them is that the WTO is opaque in its operations, inappropriately hidden from scrutiny and insulated from external criticism. The other criticism—which goes not to the WTO but instead to the political base it rests on—is that the governments of many WTO member countries are themselves undemocratic, in the sense that they lack the institutional structures necessary to ensure that policy-makers are not “captured” by a few powerful interests but instead have at least some minimal level of competence, honesty, and objectivity in establishing and conducting

90. See WTO Agreement arts. VI (appointment of Director-General), XV (right of withdrawal).
91. Playing Games with Prosperity, supra note 51, at 28.
92. See supra note 87.
economic policy for their constituents. I summarize both of these criticisms in later paragraphs of this article.94

B. Criticisms That I Largely Endorse

In enumerating above some of the key free-trade criticisms that I dismiss, I have identified several related points that I consider well-founded. In the following paragraphs I spell out those points more fully and explain some other criticisms that I endorse.

"The benefits of free trade are not fairly distributed." It should come as no surprise that although an economic system as a whole benefits from trade liberalization, not every individual benefits from trade liberalization. There are both winners and losers. As noted above, perhaps the most obvious losers are those whose jobs disappear because they were producing goods or services that, due to a comparative advantage enjoyed by another country, are cheaper to import than to make domestically.95 Many people agree that the winners should share some of their winnings with the losers. One authority on international economic matters writes:

> [G]lobalization brings substantial net benefits to the American economy, . . . [but leaders] must acknowledge that globalization causes job and income losses in certain sectors, which exact significant psychological tolls. The government, therefore, has a responsibility to channel help from the winners to the losers, for humanitarian and equity reasons as well as to maintain political support for continued globalization efforts.96

To fulfill that obligation, the same author continues, a country "must adopt stronger safety nets, including more generous unemployment insurance eligibility and compensation levels" and other initiatives,

94. See infra text accompanying notes 114–25.
95. Viewing the equation from the other side, one author describes the situation like this: The reality is that globalization makes the world a richer place, but the wealth it creates goes disproportionately to two sorts of people. On one side are those who benefit from vastly improved access to technology and capital—which is to say, workers in developing countries. On the other are those in advanced countries who, directly or indirectly, have technology and capital to sell—which means the rich and the highly educated. Largely left out of the party, possibly even made worse off, are those who fall into neither category.
and "to provide better education and training programs." We have tried that in the United States, with the Trade Adjustment Assistance (TAA) program that has been in existence for many years. The TAA program provides three types of financial assistance—to pay retraining expenses, job-hunting expenses, and relocation expenses—for workers who, because of import competition, lose their jobs.

Unfortunately, the TAA program has never been successful. It has suffered through the years from inadequate funding, which itself reflects a lack of political support. We need to do better.

"The WTO fails to reflect environmental and labor concerns in its operations." Perhaps this criticism has generated more commentary—pro and con—than any other. The two principal magnets for anti-WTO environmental advocates have been the Shrimp-Turtle and Tuna-Dolphin cases. In the Tuna-Dolphin cases, a GATT dispute panel found that the United States had acted contrary to its GATT obligations in banning the importation of tuna caught with purse seine nets in a manner that would kill many dolphins. In the Shrimp-Turtle case, a WTO dispute body likewise found a GATT violation in the U.S. embargo of shrimp caught with fishing methods that endanger sea turtles.

While recognizing that the decisions themselves have attracted support on some reasonable grounds, I believe the decisions are unfortunate and that environmental protections should play a more central role

---

97. Id. at 26–27; see also Murphy, supra note 95, at 287 (suggesting that "every nation must find practical ways to alleviate the insecurity of its citizens, as by providing better education, more effective job retraining and employment compensation, and health and pension coverage that employees can take from job to job").


99. See BHALA, supra note 43, at 1582 (concluding that "the TAA programs have little positive impact in helping the workers and firms that lose from free trade").


101. For extensive excerpts from, and an explanation of, these cases, see BHALA, supra note 43, at 1591–1664. As explained there, the key GATT provisions at issue were paragraphs (b) and (g) of GATT Article XX, and the introductory passage (the chapeau) of Article XX. Paragraph (b) expressly permits trade restrictions that are necessary to protect human, animal or plant life or health, paragraph (g) permits, in specified circumstances, trade restrictions "relating to the conservation of exhaustible natural resources."

102. See, e.g., McGinnis & Movsesian, supra note 76, at 590–93 (asserting that the Shrimp-Turtle decision construed GATT provisions in ways that reflect a Madisonian view of promoting accountable government, as well as transparency).
in trade policy. My views rest in part on a fundamental point: the definition or concept of free trade. In examining this issue, David Driesen has identified three possible alternative concepts of free trade: "a concept based on a principle of non-discrimination, a concept based on an international non-coercion principle, and a concept based on a principle of laissez-faire government."\textsuperscript{103} After demonstrating that the pertinent literature, even going back to Adam Smith and David Ricardo, offers little clear guidance on just what "free trade" means, Driesen explains the three competing concepts. Under the first—the non-discrimination concept—free trade amounts to a prohibition on any government regulations of imports that discriminate against such imports, with "discrimination" defined as "imposition of a standard or restriction on imports that one does not impose upon one's nationals."\textsuperscript{104} Under the second—the non-coer- cion concept—free trade amounts to a prohibition on government regulations that attempt to coerce other countries into adopting a particular policy or practice.\textsuperscript{105} Under the third—the laissez-faire concept—free trade means trade unencumbered by national laws that might increase prices.\textsuperscript{106}

Driesen asserts that his three-part conceptual analysis "facilitates inquiry into which principles actually explain the decisions" in the cases mentioned above, and in other health and safety cases, "and why laissez-faire and non-coercion principles appear more troubling than facial anti-discrimination principles."\textsuperscript{107} Driesen favors "focus[ing] exclusively upon free trade as trade free of discrimination" even though this would "entail some reduction in the scope of international trade law"\textsuperscript{108} because it would permit certain types of import regulations—such as those in the Tuna-Dolphin and Shrimp-Turtle cases—so long as they did not involve discrimination.\textsuperscript{109}

I believe the same concept of "free trade" should be at work in cases involving labor standards, and human rights standards more gen-

\textsuperscript{103} Driesen, supra note 100, at 285.
\textsuperscript{104} Id. at 293.
\textsuperscript{105} Id. at 307. Theoretical support for a non-coercion principle "comes not from economic theory, but from theories of international relations." Id.
\textsuperscript{106} Id. at 293. Under this concept, trade would be "free of burdens." Id. at 291.
\textsuperscript{107} Id. at 341.
\textsuperscript{108} Id. at 344.
\textsuperscript{109} For Driesen's further explanation of what "discrimination" means in this context, see id. at 345–52. It is worth observing that the WTO Appellate Body has upheld an environmental restriction. In the French Asbestos case, France's restriction on importation of asbestos from Canada was found consistent with GATT Article XX. See European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R (Dec. 3, 2001), at http://docsonline.wto.org/gen_home.asp.
erally. Under this approach, for example, it would be GATT-legal for the United States to prohibit the importation of goods that did not meet certain minimum labor standards, as long as the prohibition did not discriminate against the imported goods by imposing the minimum labor standards on the production of the imported goods but not on the production of U.S.-produced goods. And such a (non-discriminatory) prohibition could not be struck down merely because it amounted, in effect, to coercion of other countries to adopt the specified minimum labor standards or somehow ran afoul of a broad "laissez-faire" concept of free trade.

I would go further than this. Not only should more leeway be provided to national governments to implement environmental protections and human rights standards as they see fit; in addition, the relationship between GATT rules and environmental treaties and human rights treaties should be strengthened—as, indeed, was done recently by the inclusion of environmental issues on the agenda of the 2001 WTO Ministerial Meeting at Doha.110 As with the Shrimp-Turtle and Tuna-Dolphin decisions described above, this is a controversial topic. On balance, however, I believe the long-term importance of environmental protection must outweigh the more immediate economic advantages of trade. Accordingly, the substantive protections and the procedural requirements set forth in multilateral environmental and labor treaties should take precedence over GATT substantive protections and procedural requirements.111

A first step, of course, is to strengthen the enforceability, and broaden the acceptance, of the pertinent environmental and labor treaties themselves. As shown above, there is a fairly extensive set of such treaties already, but some of them lack effective enforcement mechanisms and the United States has so far not seen fit to enter into several of them. Moreover, there is little support among developing countries that further advances either in human rights or in environmental protection will be forthcoming. As for human rights, the Clinton Administration’s support for the Child Labor Convention in December 1999 (in the midst of demonstrations calling, among other things, for better pro-

110. See supra note 87.
111. For an examination of this idea, and its application to other areas beyond environmental protection, see Marco C.E.J. Bronckers, More Power to the WTO?, 4 J. INT’L ECON. L. 41, 57-65 (2001). A similar idea is to “build[] labor rights, environmental protection, and social standards into trade accords.” Mazur, supra note 88, at 79. However, I question whether the actual protections themselves should appear as substantive provisions of the trade treaties. Instead, they would better be developed—as they have been up to now—in separate instruments.
tection of workers’ rights), and his call for an eventual linkage between trade sanctions and core labor rights, received a cool reception not only among developing countries but also from the European Union.\textsuperscript{112} More worrisome yet were the comments by Malaysian Prime Minister Mahathir bin Mohamad in 1997, when “he urged the [United Nations] to mark the fiftieth anniversary of the [Universal] Declaration of Human Rights by revising or, better, repealing it, because its human rights norms focus excessively on individual rights while neglecting the rights of society and the common good.”\textsuperscript{113}

“The WTO is opaque in its operations, inappropriately hidden from scrutiny and insulated from external criticism and involvement.” As I pointed out above, this is not the same as saying that the WTO is itself undemocratic in terms of voting and control. In my view, the WTO should be the servant of states and not the servant of other interest groups, whether corporate elites or NGO elites. However, the WTO ultimately needs to enjoy general support from the populations of its member countries, and such support will be impossible in today’s world without a dramatic change in the WTO’s current image. Instead of being seen as a faceless bureaucracy that holds secret meetings for clandestine purposes and decides trade cases behind closed doors,\textsuperscript{114} the WTO must be seen as taking the same steps that some other international economic organizations—particularly some of the multilateral development banks—have taken in the past few years. These steps include adopting a transparency or disclosure policy, making publicly available a wide range

\textsuperscript{112} See Robert Collier, Labor Rift Widens at WTO Summit: Some Diplomats Protest Pact to Protect Children, S.F. CHRON., Dec. 3, 1999, at A-1 (describing reaction of developing countries to President Clinton’s signing of the Child Labor treaty); Murphy, supra note 95, at 285 (noting that the proposed linkage between trade sanctions and labor rights “enraged many of the WTO members, especially the less-developed nations”); see also Mark Clough, Prospects for a New WTO Round, 29 INT’L BUS. LAW. 146, 147 (2001) (noting that at the Seattle meeting the United States wanted “to work within the WTO on labour standards, whereas the EU and its allies strongly opposed labour rights in the WTO”); Thomson, supra note 70, at 178 (explaining that “[t]he Clinton administration has frequently attempted to manage globalization by imposing demanding labor and environmental standards on other nations during global trade sessions . . . [and usually] the reaction from many of these nations has been immediate and rancorous”).

\textsuperscript{113} Thomas M. Franck, Are Human Rights Universal?, FOREIGN AFF., Jan./Feb. 2001, at 191, 196.

\textsuperscript{114} See Invisible Government, N.Y. Times, Nov. 29, 1999, at A15 (presenting a full-page advertisement featuring a person with no facial features and warning that the WTO “is emerging as the world’s first global government [but] . . . was elected by no-one, . . . operates in secrecy, and [has a mandate to] . . . undermine the constitutional rights of sovereign nations”); see also Greg Palast, The WTO’s Hidden Agenda, Nov. 9, 2001, at http://www.gregpalast.com/detail.cfm?artid=105&row=1 (reporting on “[f]ree confidential documents from inside the World Trade Organization Secretariat [that] . . . reveal the extraordinary secret entanglement of industry with government in designing European and American proposals for radical pro-business changes in WTO rules”).
of documents on policy and operational matters, inviting formal and informal contacts with NGOs, and providing an effective and objective mechanism for adjudicating bona fide claims brought by individuals or groups alleging that the institution has acted inconsistently with the legal rules and policies governing its operations.  

The WTO has already taken some of these steps. A visit to the WTO website shows thousands of WTO documents available to the public and a range of information about how NGOs may get those documents, contact the WTO, and participate in symposia and other meetings organized by the WTO. Given the intense public scrutiny being given now to the organization, I expect further steps to be taken along these same lines. Whether the WTO will establish an Inspection Panel, as the World Bank has, remains to be seen.

There is more to this “opaqueness” criticism. A lively debate among several commentators has focused on the question of whether, and how much, NGOs should be permitted to participate in WTO policy-making and dispute settlement proceedings. Pro-NGO commentators argue that NGO participation would reduce some of the mystery that surrounds the WTO and hence aid in gaining public support. They also assert that the WTO must have a global perspective, which cannot be achieved solely through the input of government trade officials. NGO participation, they say, could take the form of providing expert

115. For steps of these types that have been taken by the World Bank, see references on its website to the following topics: Disclosure, About Us, Inspection Panel. See http://www.worldbank.org (last visited Jan. 31, 2002).
118. See Charnovitz, supra note 117, at 331–34 (pointing out that the WTO is as isolated from the public as the GATT had been, because the dispute settlement panels bold closed sessions, the WTO refuses to provide biographical information about panel members, all WTO committees hold closed sessions, NGOs cannot attend regular meetings of the General Council, and minutes are kept secret for two years); Shell, supra note 117, at 378 (stating that the WTO needs to allow outsiders into the process to increase its support).
opinions and external perspectives in the course of both policymaking and dispute settlement—consistent with a "stakeholder" model in which all parties with a stake in trade policy would have the opportunity for input.

In opposition to expanding WTO standing or participation to include NGOs, another commentator has argued (i) that giving greater publicity to trade policy “might prove disastrous for free trade,” in part because it generally injures some domestic constituency, (ii) that only wealthy interest groups would be able to participate, with the result that democratic interests still would not be served, and (iii) that the WTO would not be able to filter out legitimate NGOs from illegitimate ones.

I agree with the first set of views—that NGO participation is vital in order to build and maintain public support for trade liberalization and for the work of the WTO in particular, and that such participation can take several forms. The NGOs themselves, of course, should meet high standards of disclosure and accountability in order to gain the necessary capacity or certification to participate.

“The WTO sometimes fails to act in the best interests of most of the world's people because the governments of many WTO member countries are themselves plagued by incompetence, corruption, and other weaknesses.” This is a criticism not of the WTO but of its member countries. I include it here because I regard it as a central reason underlying several other problems in the current regime of international trade. Many national governments lack the institutional structures necessary to ensure that policy-makers are not “captured” by a few powerful interests but instead have at least some minimal level of competence, honesty, and objectivity in establishing and conducting economic policy for their constituents. I believe that stronger national governments would enact and enforce stronger protections against the kinds of bad environmental practices and bad labor practices that many critics of the WTO condemn. Those bad practices typically come not at the hands of the gov-

120. Id. at 339. For an explanation of how submissions from NGOs are currently treated in WTO adjudicatory proceedings, see Bhala, supra note 43, at 239 (noting that the WTO “Appellate Body held that panels should treat a brief of an NGO that is appended to the brief of a Member involved in a dispute as part of that Member’s submission”).

121. Shell, supra note 117, at 377–78.


123. Id. at 318–19.

ernments themselves but at the hands of private sector entities that are able to persuade weak governments to permit the practices to continue.

How can governments be strengthened? I believe that a long-term commitment of resources is needed with two complementary aims in sight. First, the problems of profound poverty and economic despair—problems that exist in many countries—must be effectively attacked through a dramatic increase in development financing that will build schools, train teachers, improve healthcare facilities, create jobs, provide decent housing and sanitation systems, and establish social security networks. Concurrently, massive efforts must be made to build and strengthen the legal and institutional elements that are essential to the efficient running of a modern government, including effective rules on an array of economic matters—banking supervision, land registration, secured transactions, documentary payments, deposit insurance, tax collections, accounting standards, corporate governance and disclosure, business licenses, product safety, workplace standards, and so on—as well as training of officials on the administration of such rules. Special attention should be given to rules on environmental protection.

Where will the money come from for these initiatives? From a massive increase in the amounts of financial assistance provided by the rich countries, especially the United States, for international economic development. Although some Americans seem to think the United States already provides significant amounts of such assistance, the United States would in fact have to devote seven times as much money to economic development aid as it does now if it wanted to reach even the rather niggardly goal (set some time ago by the U.N.) of 0.7 percent of gross domestic product.\textsuperscript{125} The United States should, in my view, sharply reverse its recent record of international relations—a record too often infected by isolationism, unilateralism, and arrogant jingoism—and embark instead on an era of cooperative multilateralism that would bear fruit not only in the area of international trade but also in the areas of human rights and environmental protection.

C. Assessment and Prescription

I think we are substantially better off with the WTO we have than we would be with no WTO at all. I think some of the criticisms leveled

\textsuperscript{125} See Joseph Kahn, \textit{U.S. Rejects Bid to Double Foreign Aid to Poor Lands}, \textit{N.Y. Times}, Jan. 29, 2002, at A11 (reporting on the Bush administration’s rejection of an “international proposal to double foreign aid in the wake of the war in Afghanistan”).
against the WTO, and against the aim of trade liberalization that lies at its foundation, are ill-conceived. However, some of the criticisms are quite persuasive, and I think we would be much better off still with a modified WTO incorporating several changes that take account of those criticisms. I summarize below those changes.

- **Take effective action to allocate some free trade "winnings" to the free trade "losers."** Such "effective action" might take two forms, one specific to the United States and one multilateral in character.

  - First, in the United States, the TAA system for providing assistance to workers displaced by imports should be revised, reinvigorated, and adequately funded.

  - Second, at the multilateral level, a requirement should be imposed on all WTO member countries to do the same. Such a requirement could show up in a new treaty (in the next round of trade negotiations) that would also address the relationship between trade, environmental, and human rights issues (see below). If necessary, substantial financial transfers, with adequate safeguards and tough conditions, should be made by rich countries to poor countries to help fund the TAA-like programs in those poor countries.

- **Incorporate environmental standards into trade rules.** This would have several aspects.

  - First, it would involve prescribing the minimum standards of environmental protection (by cross-reference to other treaties) that WTO members are to meet.

  - Second, it would involve providing—by a clarification or, if necessary, a modification of the treaty rules—by treaty that import restrictions imposed by a WTO member for legitimate environmental protection purposes would not be regarded as violative of free-trade commitments, so long as such restrictions are not discriminatory by design or effect.

  - Third, it would multilateralize import restrictions by providing that trade in goods whose production failed to meet en-
environmental standards would attract special trade barriers—for example, "environmental countervailing duties" set at levels to offset the amount of indirect subsidies enjoyed by manufacturers in producing goods in a pollution haven.

- Fourth, it would expand the rules on "green light environmental retrofit" subsidies now appearing in the Uruguay Round Subsidies and Countervailing Measures (SCM) Agreement, so as to permit a country to subsidize the "greening" of its industrial base without fear of other countries reacting by imposing countervailing duties.

- **Incorporate labor standards into trade rules.** A similar approach should be taken for labor standards as for environmental standards (referred to above). Accompanying both sets of initiatives, there should be renewed efforts to expand the coverage and enforcement capabilities of labor treaties and environmental protection treaties.

- **Introduce further transparency and accountability into WTO operations.** This could involve several elements, including these:
  
  - Provide for additional availability of documentation and openness of some meetings.
  
  - Establish an Inspection Panel similar to—or perhaps stronger than—the one associated with the World Bank. Like the World Bank Inspection Panel described above, the WTO inspection panel would accept complaints from outsiders claiming that the WTO Secretariat or Dispute Settlement Body had acted inconsistently with the Uruguay Round treaties and its own adopted policies.

---

126. Article 8.2(c) of the SCM includes in the list of "non-actionable" subsidies certain types of "assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms." Agreement on subsidies and countervailing measures, Apr. 15, 1994 Final Act, Annex 1A, art. 8.2(c), available at http://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

127. For various views on transparency in the WTO, see Charnovitz, supra note 117, at 333–34 (discussing the WTO's lack of transparency); Jackson, supra note 93, at 77 (expressing surprise at the willingness of "some experienced diplomats . . . to see such things as WTO committee meetings made open for public attendance" and implying that such openness could be accommodated and useful).
• **Involve NGOs, properly certified, in some aspects of WTO operations.** Such involvement might take several forms, such as these:

- Rely on NGOs and other entities who will objectively certify goods as to environmental and labor standards involved in making the goods.

- Invite experts from NGOs (or identified by them) to serve as advisors to, or members of, dispute settlement panels in appropriate cases.

• **Increase dramatically the commitment of resources by rich countries to the economic development of poor countries, with special emphasis on environmental protection.** This recommendation, as explained above, is fundamental to the accomplishment of several initiatives recommended here. A proper allocation of the benefits from free trade, an adoption of environmental regulations, and an accountable national involvement in WTO affairs all require competent and honest government officials and well-functioning legal and economic institutions.

IV. **WHAT IS THE BIGGER PICTURE?**

I have summarized my views on the WTO. It is only one of the three key global economic institutions, but I must wait for a later day to offer a similar assessment of the strengths, weaknesses, and possible improvements of the other two—the IMF and the World Bank.129 In

128. For various views on appropriate roles of NGOs in WTO operations, see Ernesto Hernández-López, Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes, 35 J. WORLD TRADE L. 469 (2001); Jackson, supra note 93, at 76–78.

129. As a preview of that next installment, I enumerate here some of the many criticisms that have been leveled against these other two institutions:

- "The IMF acts illegitimately in its imposition of economic conditionality on borrowing countries";
- "The IMF gives bad economic prescriptions that do more harm than good and bring misery to the poor";
- "The weighted voting system is unfair and creates a club controlled by only a few rich countries";
- "It is unfair that rich countries who do not borrow from the IMF do not have to follow IMF advice";
- "The IMF is opaque and secretive in its operations and lacks accountability";
the meantime, I wish to sketch the outlines of the "bigger picture" into which all of these institutions, and economic globalization as a whole, may be seen to fit.

A. Global Pluralism

I suggested earlier in this article that we might regard ourselves as being in the midst of a new "Grotian Moment" of dramatic political and legal transformation, similar in some ways to that of the mid-1600s when (i) the nation-state was formally recognized as having crystallized into the fundamental political unit of Europe and (ii) Hugo Grotius offered a new concept of international law designed to reflect that new reality. As a metaphor for this, I suggested that we view economic globalization as an egg being thrown against the brittle glass window of state sovereignty.

Although the outcome is not certain, I expect the window to break. Indeed, maybe it has already broken, given the myriad ways in which states—other than the United States, at least—have already surrendered elements of their sovereignty in the past half-century. In either case, it is important that we consider how the various functions and authorities of governance should be allocated in a globalized world. It is to this subject that I now turn.

I agree with one of the leading lights in international trade law, John H. Jackson, about the approach to be taken in thinking about sovereignty and governance in the WTO:

- "The IMF fails to reflect social and environmental considerations in its operations";
- "The World Bank, like the IMF, acts illegitimately in imposing conditionality on borrowing countries";
- "The World Bank is suffering from 'policy proliferation' or 'mission creep' that undercuts its value";
- "The World Bank gives the wrong policy advice and selects the wrong projects to support";
- "In particular, the World Bank supports some projects that ruin the environment and people's lives";
- "Even in those World Bank projects that are well planned, project implementation brings disaster";
- "The World Bank, like the IMF, lacks adequate transparency and accountability";
- "World Bank appointments are influenced too much by politics and too little by qualifications."

As with the criticisms leveled against the WTO, I would dismiss some of these assertions and endorse some of them.

130. This is a central point of the article I wrote on "supranational law" eight years ago. See Head I, supra note 8. For an explanation of how various elements of state sovereignty have been surrendered in the last half-century or so, see id. at 624–28. However, as noted above, the United States has declined to participate in some of the most important treaty regimes and, in others, has retained to itself much power to act unilaterally.
The word 'sovereignty' has overtones that are totally out of date, but nevertheless the concept of sovereignty probably has some policy merit that we should think about. The policy question really involved in the sovereignty question is: How do you want to allocate power? What decisions do you want made in Geneva, Washington, Sacramento, California, or a neighborhood in Berkeley? By viewing it as a decision about how to allocate power, we can disaggregate the question of sovereignty and make people think about how to correctly design that allocation.\(^{131}\)

In my view, that same approach can be taken to thinking about allocating power more generally—that is, not just in the context of trade but in overall governance. Much work has already been done on this subject. Some of the most lucid writing on it comes from Mark Janis:

The decline of the sovereign state and its replacement by a multitude of structures and institutions that share in political and legal authority is, I think, ushering in a new era. The old concepts of “municipal” and “international” law are being supplanted by broader and more flexible legal formulations. None of the new conceptions is entirely replacing the old notions of municipal law or international law, one for the state and its citizens externally and the other for the state externally. Rather, the emerging concepts are helping constitute a new theory of international legal pluralism, a theory that reflects the real multiplicity of authoritative political structures.

In more and more circumstances, no one jurisdiction, no one authoritative structure, including any state, has the sort of exclusive legal authority that has traditionally been associated with sovereign states and their legal institutions. Rather, what we conceive of as legislative, executive and adjudicatory jurisdiction is increasingly divided among a variety of legal structures or institutions.\(^{132}\)

Central to both of these excerpts, from Jackson and Janis, is the notion of division or allocation of power among various institutions. Janis speaks of an “international legal pluralism” reminiscent of the kind of legal pluralism that existed in Europe before the rise of the nation-state.\(^{133}\) What are the various institutions, and how should power be allocated among them to make this international legal pluralism most effective?

Proposed solutions abound. For example, the World Federalist Association suggests, among other things, “a strong and empowered
UN"\textsuperscript{134} that would be "reformed and democratized"\textsuperscript{135} and that would bring "world government . . . not in the form of a giant super-state that is going to dissolve the borders of every one of the 189 present members of the UN," but rather a government "to exercise the voice, conscience, and abilities of the world community."\textsuperscript{136} Similar ideas appear in writings of the Bahá’í faith dating from the 1930s (calling for a "world federal system" that would have a world legislature, a world executive, and a world tribunal but would safeguard "the autonomy of its state members"\textsuperscript{137}), and in other, much older writings as well.\textsuperscript{138}

Central to some of these views on global governance is the notion of an international "civil society."\textsuperscript{139} One pair of authors believes the development of such a civil society offers great hope for global governance:

Civil society, made up of nonprofit organizations and voluntary associations dedicated to civic, cultural, humanitarian, and social causes, has begun to act as an independent international force. The largest and most prominent of these organizations include Amnesty International, Greenpeace, Oxfam, and the International Committee of the Red Cross; in addition, the U.N. now lists more than 3,000 civil society groups.

During the 1990s, these transnational forces effectively promoted treaties to limit global warming, establish an international criminal court, and outlaw antipersonnel land mines . . .

[The Millennium NGO Forum held at the United Nations in May 2000 . . . agreed to establish a permanent assembly of civil society organizations, mandated to meet at least every two to three years . . . .] Such a forum might earn recognition over time as an important barometer of world public opinion—and a preliminary step toward creating a global parliament. Regardless


\footnotesize{\textsuperscript{135} \textit{Id.} at 32.}

\footnotesize{\textsuperscript{136} \textit{Id.} at 33.}

\footnotesize{\textsuperscript{137} \textit{See The Bahá’ís—A PROFILE OF THE BAHÁ’Í FAITH AND ITS WORLDWIDE COMMUNITY} 75 (Bahá’í International Community, New York, 1994) (excerpting from a 1930s letter from Shoghi Effendi, a great-grandson of Bahá’u’lláh, who founded the Bahá’í religion). The founder of the Bahá’í faith forecast in the 1800s the "establishment of a world federation of nations." \textit{Id.} at 77. His great-grandson expressed a similar vision:

World unity is the goal toward which a harassed humanity is striving. Nation building has come to an end. The anarchy inherent in state sovereignty is moving towards a climax. A world, growing to maturity, must abandon this fetish, recognize the oneness and wholeness of human relationships, and establish once for all the machinery that can best incarnate this fundamental principle of its life.

\textit{Id.} at 54 (quoting Shoghi Effendi).}

\footnotesize{\textsuperscript{138} \textit{See JANIS II, supra} note 14, at 199–201 (describing various ideas for world governance that preceded the establishment of the League of Nations and U.N.).}

\footnotesize{\textsuperscript{139} \textit{E.g., Anderson, supra} note 134, at 33.}
of how this specific forum develops, civil society will continue to institutionalize itself into an independent and cohesive force within the international system.140

The importance of an international civil society, and organizations that represent various features of it, figure prominently also in many other writings.141 Some of those writings also refer to another type of player in global governance—the “corporate movers,” those “business and banking leaders [who have] . . . exercised extraordinary influence on global policy,” as illustrated by the business advisory council established formally by the United Nations and the increasing clout of the World Economic Forum.142

My own tentative view is that the institutional structure of governance might combine all four of these players: (1) public international organizations, (2) international civil society NGOs, (3) business groups, and (4) states. First, I can envision a network of interrelated public international organizations (the WTO, the IMF, the World Bank, and other inter-governmental organizations having states as members), with the lines of communication and authority between them becoming more robust and more formalized in the coming two or three decades. Second, these international organizations would be accompanied by an increasing formalized network of international civil society NGOs, constantly watching and criticizing the public international organizations.

140. Richard Falk & Andrew Strauss, Toward Global Parliament, FOREIGN AFF., Jan./Feb. 2001, at 212, 214–15. Falk and Strauss suggest specific ways in which such a global parliament might be created. One possibility is for “[c]ivil society, aided by receptive states, [to] create the assembly without resorting to a formal treaty process . . . . Another approach would rely on a treaty” that would be generated from consultations among civil society, business, and nation-states. Id. at 219.

141. See, e.g., Jean-François Richard, High Noon: We Need New Approaches to Global Problem-Solving, Fast, 4 J. INT’L ECON. L. 507, 518–19 (2001) (namining “[i]nternational civil society organizations” as one of the “three kinds of partners” that would be involved in launching new “global issues networks” to solve global problems). For a detailed account of the rise of NGOs and their influence on environmental and human rights issues, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNITY 250–70 (1995). On the same point, see JANIS II, supra note 14, at 233 (noting that an important modern phenomenon affecting both international environmental law and international human rights law is the “remarkable emergence of private advocacy groups both at the national level and as non-governmental international organizations”).

142. Falk & Strauss, supra note 140, at 215. They describe the WEF thus: “Once a year, a thousand of the world’s most powerful business executives get together with another thousand of the world’s senior policymakers to participate in a week of roundtables and presentations.” Id. The WEF and “overlapping networks of corporate elites, such as the International Chamber of Commerce, have been successful in shaping compatible global policies” to expand international trade regimes, regulate capital markets, and press a “neoliberal market philosophy.” Id.; see also Richard, supra note 141, at 519 (noting the role of “business leaders” in launching efforts to handle global problems).
Third, the powerful entities representing business and financial interests (such as the International Chamber of Commerce) would have similar functions but with different perspectives and with motives of business and profit. Between the level of the NGOs and the public international organizations would be the state, which will surely remain the central repository of administrative competence.

That last point bears special emphasis. The view I have sketched above, drawing from various authors, features the state as the central repository of administrative competence. Hence, although the institutional structure of governance I envision would be global and "pluralist," as Janis uses that term, it would not be what some people call a "global government" in the sense of a pyramidal structure of formal power. The very term "global government" (or "global governance" or "world government") gives some people the jeebies. For example, a former World Bank official includes a section entitled "No Chance for a World Government" in his essay on "new approaches to global problem-solving," even though he then expounds on the virtues of building "global issues networks" that involve all of the entities I have mentioned above—global multilateral institutions, international civil society organizations, business leaders, and national governments. Another author—approaching the topic with somewhat more earthy gusto—cautions in a solicitation letter that the U.N. Millennium Declaration is a "blueprint for global governance" that has as its goal "to end American sovereignty—and liberty—forever." The four-page letter uses "globalist" or "global" seven times.

Perhaps these authors recoil from the idea of "global government" out of a fear that anything global threatens to eclipse or destroy the state. The fear seems baseless. As one author puts it:

The proposition that globalization makes states unnecessary is even less credible than the idea that it makes states impotent. If anything, the exact opposite is true, for at least three reasons. First, the ability of a society to take advantage of the opportunities offered by international economic integration depends on the quality of public goods, such as property rights, an honest civil service, personal security, and basic education [all of which are provided at the level of the state with an appropriate legal framework].

---

143. Rischard, supra note 141, at 516–19.
144. Letter from Tom DeWeese, President, American Policy Center (undated, received by author in October 2001) (emphasis in original) (on file with author). Mr. DeWeese urged me to send a "gift of $50, $100, $250, $500 or even $1,000 [to] help preserve the American Constitution from marxist radicals at the U.N." Id. I have thus far declined.
Second, the state normally defines identity [and a sense of belonging].

Third, international governance rests on the ability of individual states to provide and guarantee stability.

[Therefore,] global governance will come not at the expense of the state but rather as an expression of the interests that the state embodies. As the source of order and basis of governance, the state will remain in the future as effective, and will be as essential, as it has ever been. 145

The state will not, however, have a monopoly on power; it will not have the kind of absolute sovereignty that held the imagination of writers three hundred years ago and that some still imagine today. Instead, under the view I have sketched above, the state would have conditional sovereignty—"contingent on [its] fulfillment of minimal basic responsibilities"146—and it would share the field with other players (some of them teammates and some of them competitors) on whom it would rely for guidance, legitimacy, and discipline. The state itself would remain, but the brittle notion of singular state sovereignty—the old and weathered window in my eggs-against-windows metaphor—would be broken.

B. Conclusions

I have attempted in this article to address four main questions regarding legal and institutional globalization in the 21st-century economy. Now I summarize the answers.

* Which will break—the egg or the window? I believe we will soon find that globalization, especially economic globalization, has accumulated enough momentum and toughness to have shattered the anachronistic concept of absolute state sovereignty, opening a new chapter in legal and political organization that bears some resemblance to an earlier age of dramatic legal and political change.

---

146. See Using "Any Means Necessary" for Humanitarian Crisis Response, POL’Y BULL. (The Stanley Foundation, Muscatine, Iowa 2001) (noting that "the International Commission on Intervention and State Sovereignty (ICISS), a group of eminent persons[,] . . . is developing a concept of sovereignty as contingent on a government’s fulfillment of minimal basic responsibilities").
• What do we have to work with now? The current rules and institutions of globalization—again, especially economic globalization—are quite extensive (more than most Americans probably realize) and have expanded importantly just in the last few years, particularly in the area of international trade but also in areas of environmental protection and human rights, to which trade now seems relevant.

• What should we do about global trading rules and the WTO? Some criticisms leveled against trade liberalization and the WTO wither under scrutiny, but some are valid and worrisome. These criticisms can be addressed by acting to offset the losses some people suffer as a result of trade liberalization, by reflecting environmental and labor concerns in WTO rules and operations, and by introducing other legal and institutional reforms to the WTO itself and to its member states.

• What is the bigger picture? In one possible scenario, the global economic organizations might fit into a system of international legal pluralism, with a structure of global governance that combines contributions and strengths of public international organizations, international civil society NGOs, business and finance groups, and states—with the latter continuing to serve as the central repository of administrative competence.