
The Death of the Trade Regime

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Abstract

In recent years, 'trade and' issues – such as trade and labour and trade and environment – have moved from the periphery to the centre of the trade agenda. But meaningful multilateral agreement in many of these areas has proven elusive. Why are these issues so intractable? Can the trade system accommodate these new issues – or do they call into question fundamental premises of the trade regime? This article explores these issues by analysing the challenges that 'trade and' issues pose to the leading economic, game theoretic and political science understandings of the trade regime. I show how, by presenting different and oftentimes novel types of difficulties, 'trade and' issues problematize the accuracy and appropriateness of the assumptions underlying these models. But models and ideas – particularly those embedded in international institutions – often have political implications, and this article outlines some of the political consequences of the efficiency model's triumph. Finally, I argue that World Trade Organization panels risk delegitimizing WTO dispute resolution if they continue to address 'trade and' issues, and detail a strategy that panels can use to advance both the conflicting values present in 'trade and' disputes and the WTO's institutional legitimacy.

In recent years, 'trade and' issues – such as trade and labour and trade and environment – have moved from the periphery to the centre of the trade agenda. But meaningful multilateral agreement in many of these areas has proven elusive. Why are these issues so intractable? Can the trade system accommodate these new issues – or do they call into question fundamental premises of the trade regime? This article explores these issues by analysing the challenges that 'trade and' issues pose to the leading economic, game theoretic and political science understandings of the trade regime. In particular, by presenting different and oftentimes novel types of difficulties, 'trade and' issues suggest that, in each instance, the model has identified the wrong problem. Second, the 'solutions' offered by each model rests upon a number of

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assumptions about the nature of states, international markets and/or the international system. But ‘trade and’ issues pose foundational questions regarding the accuracy and appropriateness of the assumptions underlying these models. But models and ideas – particularly those embedded in international institutions – often outlive their original purposes; more importantly, they have political consequences. I discuss some of the ways in which the ascendancy of the economic model and growth of the trade regime affects domestic politics. In particular, I argue that while the expanded trade regime affects the autonomy of all nations, it is likely to place greater pressures on ‘liberal’ governments, which are more likely to pursue policies to support domestic employment, and to reward ‘conservative’ governments which pursue contractionary policies. Finally, I turn to the resolution of the ‘trade and’ disputes at the World Trade Organization. By focusing on the institutional constraints facing WTO panels, and the highly contested nature of ‘trade and’ issues, I argue that panels risk delegitimizing WTO procedures if they continue to address ‘trade and’ issues. I then detail a strategy that WTO panels can use to advance both the conflicting values present in ‘trade and’ disputes and the institutional legitimacy of the WTO.

Introduction

When Grant Gilmore declared the Death of Contract,¹ he was explicitly referring to the dominant ways of analysing contract doctrine in US law schools. Gilmore argued that the traditional ways of understanding contract doctrine were rapidly becoming irrelevant, and their continued use oppressive. I believe that we are at a similar stage in our study and teaching of international trade law, at least as it occurs in Europe and the US and, perhaps, elsewhere as well. In short, recent developments in the trade world are rendering traditional ways of understanding the trade regime irrelevant, and the continued use of doctrines spawned from these models oppressive.

The first three parts of this article outline this ‘death of the trade regime’. I do so by exploring the uneasy relationship between the new ‘trade and’ agenda – trade and environment, trade and labour, trade and intellectual property, and the like – and the international trading system. The purpose of these parts of the paper is to detail the serious practical and theoretical challenges that ‘trade and’ issues pose to present understandings of the trade regime.

Part 1 briefly outlines the leading economic, game theoretic and political science models that are commonly used to explain the trade regime: (1) as a mechanism for furthering the economic efficiencies and gains from trade resulting from the exploitation of comparative advantage (the ‘efficiency model’); (2) as a solution to the collective action and public goods problems that plague the international system (the ‘collective action model’); and (3) as a post-War political bargain designed to safeguard governments’ ability to intervene in domestic economies, while, at the same time, avoiding the mutually destructive trade policies that had plagued the interwar period (the ‘embedded liberalism model’).

¹ G. Gilmore, *The Death of Contract* (2nd ed., 1995).

Part 2 briefly outlines and identifies the principal points of contention in the most important 'trade and' issues: trade and environment, trade and labour, trade and intellectual property and trade and competition. I also briefly describe two other 'trade and' issues that will become increasingly prominent in future years, trade and investment, and trade and culture. As each of these issues has been described in depth elsewhere, this section is primarily intended to orient the reader for the analysis that follows.

Part 3 explores how the various 'trade and' issues challenge each of the three leading traditional understandings of the trade regime. For example, while the efficiency model suggests that trade rules should be designed to restrict government interference with markets, analysis of the 'trade and' issues suggests that the trade rules (i.e., government action) shape – and even create – these markets in the first place. Moreover, by highlighting the necessity of trade-offs among incommensurable social values, 'trade and' issues directly challenge the premise that the trade regime should be designed primarily to maximize economic efficiency.

'Trade and' issues challenge the efficiency model in other ways as well. This model tends to translate most policy issues into trade issues. Thus, discussions about coercive labour practices or lax environmental laws are transformed into discussions of 'implicit subsidies' or 'competitive advantage'. But this economic rhetoric does not adequately capture the underlying issues, be they forced labour or environmental degradation. Moreover, economic rhetoric does not simply redescribe these issues; rather it transforms – and, in important ways, obscures – them. By failing to account fully for the non-economic values at stake in 'trade and' issues, the economic rhetoric associated with the efficiency model threatens to undermine these values.

'Trade and' issues highlight deficiencies in the collective action model as well. Under this model, the trade regime is designed to enhance inter-state cooperation and hence expand the size of the global economic pie. This model, though, is silent about how those gains ought to be distributed. But many 'trade and' disputes are primarily inter-state distributional questions. These disputes squarely challenge the premise that the problems facing the international trading community are primarily those of cooperation or collaboration, rather than those of distribution. Moreover, as discussed more fully below, the 'trade and' issues undermine the standard 'realist' assumptions that underlie the collective action mode.

Finally, 'trade and' issues expose inadequacies in the embedded liberalism model as well. As GATT disciplines expand into new areas, the trade regime increasingly pressures governments to change domestic policies. As explained below, these disciplines thus undermine the domestic policy tolerance central to the 'embedded liberalism' compromise. Moreover, as GATT disciplines have expanded, governments have inadvertently subverted their ability to manage the domestic consequences of trade liberalization. This, in turn, has provoked a negative reaction from the public that threatens to undermine the political compromise that, according to the 'embedded liberalism' model, is central to the GATT.

But models are not necessarily discarded once they outlive their usefulness. Despite their shortcomings, the three models continue to structure the way that scholars and

policy-makers understand this regime. Moreover, among these models, the efficiency model, in particular, is dominant. In Part 4 of this paper, I briefly outline some of the *political* implications of the continued use of the efficiency model. The economic liberalization prescribed by the efficiency model increases the domestic impact of global economic trends, raising in general the political salience and distributional consequences of international trade issues. More importantly, this liberalization threatens state autonomy. By ‘raising the cost’ of certain domestic policies, economic liberalization undermines the efficacy of these policies. Moreover, as demonstrated below, while economic liberalization affects domestic politics in all nations, it has a peculiar political valence – as a general matter, it constrains government activism.

Part 5 explores the political and institutional implications of the ‘death of the trade regime’ for the WTO dispute resolution system. By focusing on the institutional constraints facing WTO panels, and the highly contested nature of ‘trade and’ issues, I argue that panels risk delegitimizing WTO procedures if they continue to address ‘trade and’ issues. What, then, should panels do when faced with ‘trade and’ disputes? Drawing on arguments developed in US constitutional law scholarship, I suggest a strategy that WTO panels can use to avoid addressing the merits of ‘trade and’ issues, and thereby enhance the larger WTO system.

My goals in this paper are several. First I wish to highlight the enormous tensions between conventional understandings of the trade regime and the current trade agenda. Highlighting these deficiencies can help to open up the intellectual space necessary for a reconceptualization of the trade regime. Moreover, by describing the political implications of the dominant models, I hope to provide a political motivation for such a reconceptualization. Third, my description of the institutional constraints on WTO panels may point towards a pragmatic solution to the political difficulties that ‘trade and’ issues pose to the WTO dispute resolution system. Finally, by adopting an interdisciplinary approach, I implicitly emphasize the value of blending insights from multiple perspectives on the same phenomenon. International trade is, at once, an economic, political and legal phenomenon. A robust understanding of the trade system should therefore incorporate insights from at least these three disciplines.

History has demonstrated that the GATT system has been remarkably adaptive to changing circumstances. In detailing the ‘death of the trade regime’, I suggest the consequences that can follow when scholarly understandings of the trade system fail to respond to these changing circumstances. The larger goal of this paper is to help forestall these untoward – and avoidable – consequences.

1 Conventional Understandings of the Trade Regime

Before exploring the challenges posed by the ‘trade and’ agenda, it is useful to explore the underpinnings of the trade regime. Why do nations invest so much time, energy and effort to create and maintain the international trading system? What theory can explain why we have a trade regime, and identify the benefits it is designed to secure? This inquiry is critical, because efforts to improve the trade regime will be most

productive if based upon a clear understanding of the basic functions and purpose of the regime.

International trade scholars tend to invoke three different answers to questions like those posed above. The most common response focuses on the economic theory of comparative advantage and the gains from trade. A second answer focuses on the collective action problems and prisoner's dilemmas that arise from the anarchic nature of the international system. The third response focuses on post-War domestic politics, and the perceived need to ensure governments' ability to intervene in domestic economies to preserve stability, while avoiding the trade wars of the pre-War era. I briefly outline below each of these attempts to provide a theoretical underpinning to the international trade regime.

A The Efficiency Model: The GATT, Comparative Advantage and Gains From Trade

The leading justification for the international trade regime is the economic one: '[t]he objective [of the GATT/WTO system] is to liberalize trade that crosses national boundaries, and to pursue the benefits described in economic theory as "comparative advantage"'.² The theory of comparative advantage suggests that in the absence of trade restrictions, each nation will specialize in goods and services that it can produce relatively more efficiently than other nations. This international specialization increases the efficiency of global production and results in increased trade and greater aggregate welfare. Under this theory, global welfare is maximized through open markets that accurately price goods and services, enabling producers in each country to discover what they are comparatively good at producing.

Economists teach that trade barriers divert resources from their most highly valued uses and are inefficient intrusions into otherwise autonomously functioning markets. In particular, tariffs and other barriers transfer wealth from consumers to firms and workers in protected industries. By disciplining the use of trade restrictions, the trade regime reduces these inefficiencies and permits markets to operate free of state interference, promoting global economic wealth.

B The Collective Action Model: Solving the Prisoner's Dilemma

An alternative explanation of the trade regime focuses less on aggregate welfare and more on the decentralized nature of the international system. Adopting a game theoretic approach, many scholars argue that trading nations face a strategic situation akin to a Prisoner's Dilemma (PD). Under this understanding, the WTO/GATT system is best understood not as a means for maximizing the gains available through trade, but rather as an agreement that seeks to overcome the significant coordination or collective-action problems that confront trading nations. I call this explanation of the trade regime the 'collective action' model.

The collective action model typically rests on a number of standard 'realist'

² Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict?', 49 *Washington & Lee Law Review* (1992) 1227, at 1231.

assumptions. Under these assumptions, nations are the key actors in an anarchic international arena and state action is the key variable in analysing international relations. Moreover, these states are assumed to be rational, welfare-maximizing entities, with interests that sometimes overlap and sometimes conflict. In this context, cooperation among independent states, while often desirable, becomes deeply problematic.

Game theorists predict that, in an effort to maximize national welfare, nations may seek to limit imports and boost exports. Policies to do so include heightened tariffs, competitive exchange rate devaluations, and similar strategies designed to alter the flow of goods and capital. However, once one country adopts such a strategy, other nations are likely to follow suit. In the aggregate, these individual acts will significantly reduce international trade and hence global welfare.

To avoid this result, nations may create international rules and institutions to capture the gains available from cooperation. These institutions can provide a framework for mutually beneficial decision-making and serve to guide and constrain behaviour. Institutions also promote cooperation by, *inter alia*, reducing the transaction costs associated with international agreements.

Proponents of the collective action model point to several features of the trade regime that assist trading nations to avoid the suboptimal outcomes associated with prisoner's dilemmas. For example, Uruguay Round agreements strengthening the dispute resolution system reduce incentives to defect and therefore increase the benefits of cooperation. Similarly, the ongoing monitoring of state behaviour through the trade policy review mechanism can deter potential violations before they occur, and thereby contribute to the efficacy of cooperative agreements. Finally, the WTO's administrative, technical and other services help reduce maintenance and monitoring costs.

C The Embedded Liberalism Model: A Domestic and International Political Compromise

Yet a third model offered to explain the international trading system is the 'embedded liberalism' model. This model focuses less on the economic or collective action justifications for the GATT than on its domestic political foundations. Under this model, a principal aim of the GATT's drafters was the creation of a multilateral, non-discriminatory trade system. However, these diplomats were not doctrinaire free traders.³ To the contrary, they understood the public rejection of laissez-faire capitalism, and widespread demand for state intervention to cushion the dislocations that markets produce.

The diplomatic challenge was to design an open trading system that would preserve the state's ability to pursue domestic stability but, at the same time, prohibit the

³ As a former State Department trade policy analyst stated: 'No one was committed to "free trade"; no one expected anything like it; the term does not appear in the GATT, which simply calls for a process of liberalization with no stated objective.' Diebold, Jr., 'From the ITO to GATT – And Back?', in O. Kirshner (ed.), *The Bretton Woods – GATT System: Retrospect and Prospect after Fifty Years* (1996) 152, at 158.

mutually destructive protectionist policies that had plagued the interwar period. The embedded liberalism model understands the GATT as an international agreement carefully structured to achieve these complex ends. While the agreement is designed to reduce tariffs and other trade barriers, it also includes various clauses designed to protect domestic social interests. These include the ‘trade remedy’ rules, the Escape Clause, the balance-of-payments exceptions, and the renegotiation provision. Through these, and other, provisions the GATT attempts to capture gains from trade, but simultaneously to permit governments to minimize the dislocations resulting from increased international trade.

The underlying bargain was that, in exchange for liberal trade policies, industrialized nations would provide a variety of domestic safety nets, including unemployment compensation, severance payments and adjustment assistance.⁴ Dean John Ruggie has labelled this bargain the ‘embedded liberalism’ compromise.⁵ It ‘embeds’ a liberal international economic order within a larger commitment to interventionist domestic policies.

2 The ‘Trade And’ Agenda

In the last several years, ‘trade and’ issues have come to dominate trade policy and scholarship. In this part, I briefly outline the most important ‘trade and’ issues.

A Trade and Environment

Trade and environment issues exploded onto the US political scene in the early 1990s with the announcement of US plans to negotiate a trade agreement with Mexico and, shortly thereafter, with the leaking of a GATT panel report concluding that a US ban on the importation of Mexican tuna, caught using methods that killed large numbers of dolphins, was GATT-inconsistent. While the links between trade and the environment are complex and multi-faceted, for present purposes it is sufficient simply to identify the primary concerns that environmentalists have raised in the context of trade liberalization efforts. First, they argue that liberalized trade can cause environmental harm by promoting economic growth that results in unsustainable consumption of natural resources and increased waste production. Second, trade agreements contain market access provisions that can be used to override domestic

⁴ Empirical studies confirm that the nations most open to international trade generally have the highest rates of social spending. See generally P. J. Katzenstein, *Small States in World Markets: Industrial Policy in Europe* (1985); D. Rodrik, *Has Globalization Gone Too Far?* (1997).

⁵ See generally Ruggie, ‘International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order’, 36 *International Organization* (1982) 379, at 393 [hereinafter Ruggie, ‘Embedded Liberalism’]; Ruggie, ‘At Home Abroad, Abroad at Home: International Liberalization and Domestic Stability in the New World Economy’, 24 *Millennium* (1994) 507; Ruggie, ‘Embedded Liberalism Revisited: Institutions and Progress in International Economic Relations’, in E. Adler and B. Crawford (eds), *Progress in Postwar Economic Relations* (1991).

environmental regulations, as the *Shrimp-Turtle*, *Reformulated Gas* and *Tuna-Dolphin* cases demonstrate. Third, nations with lax environmental regimes are thought to enjoy a competitive advantage in a global marketplace, creating political pressure in nations with high environmental standards to reduce their level of environmental protection.⁶ Finally, environmentalists wish to use trade measures as leverage in global environmental protection efforts, as in treaties designed to protect the ozone layer,⁷ manage hazardous waste trade,⁸ and preserve endangered species.⁹

From the trade perspective, the use of environmental trade measures is often considered unwise if not counterproductive. First, according to neo-classical economic theory, the use of trade measures is never optimal *environmental* policy. In addition, the trade community fears that protectionists may seek to achieve their goals by invoking the politically attractive rhetoric of environmental protection. In particular, the trade community objects to measures designed to adjust for differences in domestic environmental standards, fearing that this will undo differences in comparative advantage. Finally, free traders fear that the use of trade measures for environmental purposes may undermine the cooperation necessary for the continued functioning of the trade regime.

B Trade and Labour

Unlike trade and environment issues, trade and labour issues have long been part of trade policy debates. Since the mid-19th century, reformers seeking laws to shorten work hours or prohibit child labour have confronted the argument that such measures would result in a competitive disadvantage *vis-à-vis* nations with lower standards. In response, labour advocates urged the adoption of treaties establishing common labour standards.¹⁰

In many respects, the basic arguments have changed little since that time. In particular, much of the debate continues to focus on competitiveness concerns. Reformers argue that trade in goods produced under dismal working conditions is a form of ‘unfair’ competition. Moreover, given capital mobility (resulting, in part, from trade agreements), divergent labour standards can produce a ‘race to the bottom’, leading to the deterioration of working conditions in countries with higher standards. Worse, critics argue, the threat of capital flight can depress wages in developed nations, while actual capital movements produce unemployment.

More recently, non-competitiveness-based arguments have gained prominence.

⁶ Empirical support for the competitiveness claim is scant. See, e.g., Levinson, ‘Environmental Regulations and Industry Location: International and Domestic Evidence’, in J. Bhagwati and R. E. Hudec (eds), *Fair Trade And Harmonization: Prerequisites For Free Trade?* vol. 1 (1996) 429.

⁷ Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 26 *ILM* (1987) 1550.

⁸ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, 28 *ILM* (1989) 657.

⁹ Convention on International Trade in Endangered Species, 3 March 1973, 993 UNTS 243.

¹⁰ For more on the trade and labour issue, see Leary, ‘Workers’ Rights and International Trade: The Social Clause’, in Bhagwati and Hudec, *supra* note 6, at 177; Bhala, ‘Clarifying the Trade-Labor Link’, 37 *Columbia Journal of Transnational Law* (1998) 11.

For example, many labour advocates view market access as useful leverage in upgrading the working conditions in developing nations. Others argue that the incorporation of a social clause in trade agreements would benefit workers in both developed and developing nations.

Opponents counter that conditioning international trade on enhanced workers' rights would unduly reduce the amount of welfare-enhancing international trade. They also claim that these costs would fall most heavily upon developing nations, which tend to have lower levels of worker protection, but increasingly rely upon increased exports as a vehicle for growing their economies. Finally, as in the environmental context, many trade advocates fear that arguments for conditioning trade on workers' rights is simply a form of disguised protectionism.

C Trade and Competition

Although the relationship between trade and competition policies is not new, these issues have received heightened attention in recent years as business operations have become increasingly internationalized, companies have become subject to the laws of numerous jurisdictions, and nations are increasingly reliant upon foreign investment and international capital flows. Moreover, as official trade barriers diminish – due, in part, to GATT disciplines – private market restraints have become a principal factor blocking access to international markets.

Once again, many of the tensions in this area arise primarily from divergent domestic competition laws. For example, to the extent that domestic antitrust or competition law permits collusive arrangements among domestic firms, these laws may adversely affect the ability of foreign firms to compete in domestic markets. Similarly, lax competition laws that facilitate anti-competitive behaviour – and supra-competitive profits – in domestic markets enable firms to engage in strategic pricing in foreign markets.

As these and similar issues have gained prominence, the US has sought to use its domestic antitrust laws to open foreign markets, and has invoked the right to take unilateral action under Section 301 of the 1974 Trade Act.¹¹ Other nations, in turn, have resisted these extraterritorial assertions of authority. A prominent example of trade and competition conflicts is the dispute between the US and Japan over Japan's market for photographic film. In May, 1995, the Eastman Kodak Company filed a Section 301 petition complaining that Fuji Film Company was monopolizing the sale of photographic film in Japan through private restrictive business practices tolerated by the Japanese government. Following an investigation, the United States Trade Representative unsuccessfully pressed this issue in formal WTO dispute resolution proceedings.¹²

Notwithstanding resort to a multilateral forum in the Kodak dispute, the US has often opposed the creation of international antitrust rules or multilateral enforcement

¹¹ Trade Act of 1974, Sec. 301, 19 U.S.C. Sec. 2411.

¹² Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/5 (23 April 1998).

mechanisms. Instead, it has either attempted to apply its domestic law to extraterritorial conduct or, more recently, engaged in limited forms of international (usually, bilateral) cooperation. The European Union, in contrast, ‘has used competition law to cement and expand the [EU’s] single international market . . . [and has] promot[ed the] harmonization of competition law at the international level’.¹³ These two contrasting approaches help define an ongoing legal, diplomatic, economic and political battle over the desirability of creating international competition rules.

Ironically, recent US opposition to multilateral antitrust rules as a component of the international trade system represents a marked change from US policy in the immediate post-War period. The original US proposal for an International Trade Organization prominently addressed ‘restrictions imposed by private combines and cartels’,¹⁴ as did an early draft of the ITO Charter. While the final Havana Charter contained compromise language weaker than that urged by the US, it nevertheless detailed a number of specific anti-competitive practices that could trigger ITO investigations. The Havana Charter never entered into force, of course, largely because of a protectionist turn in the US Congress. Subsequent efforts to draft international antitrust agreements have proved unsuccessful.

But while a comprehensive international agreement on antitrust law has proved elusive, competition issues are addressed in a number of areas in the Uruguay Round agreements. For example, the GATS and TRIPs Agreements address questions of market access and fair conditions of competition, as well as cooperative efforts to facilitate the control of anti-competitive practices. At the Singapore Ministerial, members agreed to establish a working group to consider ‘the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework’.¹⁵

D Trade and Intellectual Property

As with the other ‘trade and’ issues, many trade and intellectual property (IP) disputes arise out of differences among various nations’ domestic IP laws, particularly with respect to the nature and scope of IP rights protected. Often, these differences are most pronounced between developed and developing nations. Thus, developed nations have often complained about various features of developing nations’ laws, including

the absence of patentability for certain products and processes, the rapid issuance of compulsory licences without adequate compensation, limited patent lengths and discriminatory treatment in granting them, the lack of protection for industrial trade secrets, inadequate registration and enforcement procedures for trademarks and copyrights, and a host of

¹³ Waller, ‘National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law’, 18 *Cardozo Law Review* (1996) 1111.

¹⁴ Proposals for Expansion of World Trade and Employment, Dep’t of State Pub. 2411, Commercial Policy Series (1945).

¹⁵ World Trade Organization, Singapore Ministerial Declaration, para. 20, WT/MIN(96)/DEC (18 December 1996) [hereinafter Ministerial Declaration].

regulations on pricing, investment and trade that presumably influence the value of any IPRs granted.¹⁶

Related concerns include the transparency and enforceability of many developing nation IP regimes, and the alleged tolerance of certain governments for the manufacture and sale of counterfeit goods. Developing nations often justify their IP regimes as contributing to technology diffusion and transfer, thereby enhancing the proliferation of imitative technologies and products. In addition, many defend their laws as responses to perceived abuses of monopoly power associated with IP rights granted to multinational firms.¹⁷

Diverse levels of IP protection may affect trade patterns in a variety of ways. For example, if developing nation firms can obtain patents on products that are closely imitative of foreign counterparts, the domestically produced 'imitations' may capture the home market. Moreover, the local firm may be able to exclude the competing goods from the innovating foreign competitor. Finally, the developing nation firm may become a powerful rival for sales in third countries. The net result is often lower prices to consumers – at the 'cost' of reduced foreign sales by the company that financed the innovation in the first place.

As a result of these, and other tensions, intellectual property became one of the centrepieces of the Uruguay Round negotiations. One result is the TRIPs Agreement.¹⁸ As explained more fully below, this Agreement requires WTO member countries to protect each of the main categories of intellectual property and to provide effective procedures and remedies so that these rights are enforceable. TRIPs also makes the observance of these commitments subject to WTO dispute settlement procedures. The explicit purpose of this agreement is to reduce distortions to international trade.¹⁹

E Other 'Trade and' Issues

While the four 'trade and' issues outlined above have been among the most visible and contentious, they do not exhaust the universe of 'trade and' issues. Other questions, such as 'trade and investment' and 'trade and culture' will likely assume greater prominence in the future. Moreover, if the trade regime continues to expand, there will likely be additional 'trade and' issues in future years.

1 Trade and Investment

When drafting the original GATT, nations anticipated that multilateral rules on investment policy would exist alongside those for trade in goods as part of an

¹⁶ Maskus and Konan, 'Trade-Related Intellectual Property Rights: Issues and Exploratory Results', in A. V. Deardorff and R. M. Stern (eds), *Analytical and Negotiating Issues in the Global Trading System* (1994) 401, at 404.

¹⁷ *Ibid.*

¹⁸ Agreement on Trade-Related Aspects of Intellectual Property, Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1C, reprinted in 33 *ILM* (1994) 1125, 1197 [hereinafter TRIPs Agreement].

¹⁹ *Ibid.*, at preamble.

International Trade Organization. When efforts to form the ITO failed, draft provisions on investment never came into force. Thereafter, until the Uruguay Round Agreements, GATT activity in this area consisted largely of *ad hoc* responses to specific policy issues.

The TRIMs Agreement, investment provisions in the GATS and TRIPs Agreements, and creation of a working group on trade and investment at the Singapore Ministerial may signal a shift away from a piecemeal approach. Moreover, the unsuccessful effort to negotiate a Multilateral Agreement on Investment (MAI) under the auspices of the OECD will increase the political pressure on the WTO to take the lead in a multilateral agreement on investment.

However, efforts to liberalize the rules governing investment will likely prompt a series of ‘investment and’ issues. For example, generalizing from early NAFTA investment disputes, environmental NGOs criticize proposals to liberalize investment on the grounds that the increased investment – or restrictions on governments’ abilities to regulate investment – could accelerate environmental degradation. As the MAI experience demonstrates, future efforts to liberalize investment will need to address these concerns to be politically viable.

2 Trade and Culture

‘Trade and culture’ is another area of past – and likely future – conflict. These conflicts typically arise when nations, ostensibly acting to protect their cultural heritage or autonomy, restrict trade (usually imports) in cultural materials. Potential exporters argue that these restrictions on cultural products violate international trade law. Such conflicts have led to specific language on cultural products in the GATT and the NAFTA. But the inclusion of specific language has done little to eliminate or resolve such conflicts, a point explored more fully below. Here, I simply outline two of the more notable ‘trade and culture’ disputes, to give a sense of the types of conflicts that arise.

One high-profile conflict between the European Union and the US involves EU limits on foreign television and films.²⁰ As the world’s leading exporter of audio-visual products, the US has vigorously opposed this provision. Shortly after it was enacted, the US sought GATT consultations with the Community. The EC initially refused to engage in consultations, claiming, *inter alia*, that the GATT was not the proper forum to resolve the dispute and that, in any event, any US action should await the outcome of the then-pending Uruguay Round negotiations. Increasingly acrimonious bilateral negotiations did not resolve the dispute, which threatened to scuttle the entire Uruguay Round package. Ultimately, the nations agreed to disagree. Thereafter, in 1991 and again in 1994, the United States placed the Community on the ‘watch list’ for potential action under Section 301. While no formal adversarial proceedings have begun, the issue remains an irritant in EU–US relations.

²⁰ The 1989 ‘Television without Frontiers’ Directive includes a ‘local content’ provision requiring that Community broadcasters allocate no less than 50 per cent of their airtime to ‘European works’. Council Directive 89/552, OJ 1989 L 298/23.

Canada and the US have also had a number of ‘trade and culture’ disputes. One involves Sports Illustrated (SI). US-based SI sought to distribute a ‘split-run’ edition in Canada. But Canadian law prohibited the import of a hard copy of a split-run magazine.²¹ To avoid this law, SI used satellite technology to transmit an electronic copy of its magazine to a plant in Toronto, which then printed the split-run edition. Thereafter, Canada enacted an excise tax applicable to split-run magazines equal to 80 per cent of the value of the advertisements appearing in the magazines.²² The tax caused SI to halt its distribution in Canada and was successfully challenged by the US in WTO dispute resolution proceedings.²³ However, as discussed below, this dispute has not yet been satisfactorily resolved.

3 The ‘Trade And’ Challenge to Conventional Understandings of the Trade Regime

The ‘trade and’ issues outlined above highlight deficiencies in each of the three leading models used to explain the trade regime in at least two different respects. First, each of the models purports to identify a ‘problem’ that the trade regime is designed to solve. But, by presenting different and oftentimes novel types of difficulties, ‘trade and’ issues suggest that, in each instance, the model has identified the wrong ‘problem’. Second, the ‘solutions’ offered by each of the models rests upon a number of assumptions about the nature of states, international markets, and/or the international system. But the ‘trade and’ issues problematize these assumptions. To be sure, ‘trade and’ issues are not the *only* issues that raise these foundational questions. The more limited claims here are that (1) ‘trade and’ issues unavoidably highlight the deficiencies of the traditional models, and (2) the heightened political visibility of these issues renders impossible the heretofore successful strategy of ignoring or overlooking these deficiencies.

A Challenges to the Efficiency Model

Under the efficiency model, the ‘problem’ is how to maximize aggregate economic welfare, and the ‘solution’ is to reduce or eliminate government regulations that interfere with voluntary, welfare-enhancing market exchanges. For many conventional problems addressed by international trade law this may well be a useful approach. But ‘trade and’ issues frequently present different types of problems, in part because they often present tensions between economic and non-economic values. For example, labour laws and environmental laws typically are not intended to and do not serve purely economic goals. As ‘trade and’ disputes multiply, it is becoming increasingly clear that the efficiency model’s welfare maximizing calculus does not adequately account for these non-economic values. Indeed, many of these non-

²¹ Customs Tariff, R.S.C., ch. 41, S 114, sched. VII, item 9958 (1985, 3rd Supp.) (Can.).

²² An Act to Amend the Excise Tax Act and the Income Tax Act, ch. 46, 1995 S.C. (Can.) at Sec. 36(1).

²³ Canada – Certain Measures Concerning Periodicals, WT/DS 31/R (adopted 14 March 1997); Canada – Certain Measures Concerning Periodicals, AB-1997-2, WT/DS31/AB/R (adopted 30 June 1997).

economic values often cannot be realized through trade liberalization or other market mechanisms alone. Rather, they can only be achieved through governmental action or intervention.

The efficiency model fails to distinguish between environmental or labour measures and other measures that affect trade. But these laws often rest on claims that purport to trump wealth maximization claims. Thus, the increasingly common conflicts between these bodies of law and international trade law – in short, the ‘trade and’ conflicts – inescapably call into question the appropriate scope and domain of the efficiency model. These issues cannot be satisfactorily resolved by the argument that, from within the efficiency perspective, the environmental or labour rules are simply another form of welfare-reducing trade-restriction, for this response presupposes precisely the assumption that the challenged rule calls into question.²⁴

‘Trade and’ issues also raise a related set of difficulties. To the extent that we understand, say, lax environmental or labour laws as implicit subsidies to industry, we employ a rhetoric that elides many of the most important values embodied in, for example, labour or environmental laws.²⁵ Instead, cultures value diverse social goods – such as pristine lands or endangered species – in a variety of non-economic ways. For this reason, the use of economic rhetoric and analysis in these contexts obscures many of the important forms of valuation that individuals and societies commonly use. This accounts, in part, for the widespread resistance to the trade regime’s expansion into an ever increasing number of ‘trade and’ areas.

But the problems raised by using economic rhetoric in ‘trade and’ contexts is not simply that of misdescription, or of the reductionism associated with that rhetoric. A more fundamental issue is that use of this vocabulary has an important constitutive dimension. Different vocabularies do not merely ascribe properties to objects, they also instruct us how to think about them. In other words, different vocabularies

are important both because they describe in inadequate ways and because they do not merely redescribe. They also have an important constitutive dimension – that is, they may help transform how . . . we value or experience events and relationships.²⁶

Thus, the decision to incorporate ‘trade and’ issues into the trade regime, and the associated decision to apply economic rhetoric and vocabulary to social goods such as the environment has an often overlooked – but crucially important – transformative dimension. By threatening to transform our understanding of certain social goods, incorporation of the ‘trade and’ issues into the trade regime threatens the social values underlying these goods. For all of these reasons, ‘trade and’ disputes problematize the efficiency model’s premise that the central issue is how to maximize aggregate welfare.

‘Trade and’ issues also challenge the assumptions that underlie the efficiency model. As noted above, this model assumes the autonomy and priority of inter-

²⁴ Langille, ‘General Reflections of the Relationship of Trade and Labor (Or: Fair Trade is Free Trade’s Destiny)’, in Bhagwati and Hudec, *supra* note 6, at 231, 246.

²⁵ For an extended discussion of the limits of economic rhetoric, see Baron and Dunoff, ‘Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory’, 17 *Cardozo Law Review* (1996) 431.

²⁶ Sunstein, ‘Incommensurability and Valuation in Law’, 82 *Michigan Law Review* (1994) 779, at 815.

national markets, and a sharp distinction between government action and government inaction. The goal is to limit government interference with markets, so that markets can operate 'on their own'.

But markets never simply operate on their own. Rather, all markets presuppose numerous background norms, such as rules about property, contract, fraud, competition and the like. These norms do not interfere with the market; rather they enable markets to exist in the first place. Moreover, different background norms will produce vastly different markets.

The intellectual property area demonstrates this point. Prior to the TRIPs Agreement, nations varied dramatically in their protection of intellectual property rights. Absent protected or enforceable IP rights in certain developing countries, developed nation IP holders often could not or would not do business in these nations. Many firms in developed nations claimed that lax IP regimes in developing nations produced 'distorted' markets and cost them significant export revenues.

The TRIPs Agreement is designed to address many of these market 'distortions'. For each of the main IP categories, it establishes standards of protection and rules for enforcement. It also requires states to grant foreign intellectual property owners effective access to domestic fora. Finally, it provides that WTO dispute settlement mechanisms will be used to resolve disputes between member states. The purpose of this agreement is to facilitate markets in many goods and services that did not previously exist.

But this suggests that international markets do not simply form spontaneously and without government intervention; rather certain government *actions* (i.e., those required by TRIPs) are necessary to *create* or *facilitate* markets for certain goods and services in the first place. Paradoxically, free international trade, like the domestic free market, *requires* state intervention. The efficiency model presupposes a distinction between private market activity and public governmental action that 'trade and' issues undermine.²⁷

For all of these reasons, the 'trade and' issues pose serious conceptual challenges to the traditional understanding of the trade regime embodied in the efficiency model.

B Challenges to the Collective Action Model

Under the collective action model, the 'problem' is how to facilitate coordination and cooperation so as to avoid collectively sub-optimal outcomes resulting from individually 'rational' decisions. The 'solution' is to combine a binding international agreement and organization to oversee and enforce the agreement with an ongoing negotiation process. With this solution in place, nations can more easily reach

²⁷ Similar arguments undercut the efficiency model's distinction between government action that distorts trade and government inaction that permits normal trade. As the TRIPs example illustrates, both government action and inaction is potentially trade distorting, rendering problematic the efficiency model's attempt to distinguish between them on efficiency grounds. See generally Langille, *supra* note 24, at 230.

collectively optimal outcomes. Again, however, ‘trade and’ issues pose serious challenges to this model.

‘Trade and’ issues suggest that the key issues facing trading nations are distributional, rather than those of cooperation and collaboration. While distributional issues animate all the ‘trade and’ issues, the TRIPs Agreement provides an apt illustration. TRIPs provides for minimum standards of IP protection to be provided by each member. In large part, the standards are set at a level comparable to those of the major trading countries.

But there can be little doubt that an agreement partially harmonizing worldwide IP protections to developed country levels will not maximize global economic welfare. Neo-classical trade theory suggests that nations will likely differ in their abilities to innovate and to imitate. Nations that lag in innovation can enjoy significant consumer welfare gains by enacting relatively lax IP regimes (at least as compared with nations adept at innovation). Developing nations may understand international agreements that harmonize IP protection at developed nation levels to be welfare-reducing or Pareto-inferior bargains.

Many argue that the developing nations traded off a ‘loss’ in the IP context to obtain ‘gains’ elsewhere, such as textiles and agriculture. But this bargain highlights a fundamental difference between ‘trade and’ issues and other trade issues. The logic of the collective action model – as well as that of the efficiency model – suggests that cooperation and collaboration that reduces trade distortions and expands trade will always benefit the domestic welfare of the liberalizing state and global economic welfare. However, in ‘trade and’ issues, trade expansion often benefits some states at the expense of others. Models that see the central ‘problem’ as that of cooperation and collaboration – with nations having a common interest in achieving a common objective – will obscure the difficult distributional issues that drive many ‘trade and’ issues.

More generally, the explanatory and predictive powers of game theoretic approaches, including the collective action model, are driven by the ‘payoff matrix’, the costs and benefits that states receive from cooperation or defection. But these payoffs are always exogenous to the models. In other words, they are simply *assumed*. As these outcomes are invariably (and arbitrarily) predetermined, these models shed no light on how the net benefits from cooperation are distributed among various nations. Moreover – and even more unrealistically – game theoretic models frequently assume that the payoffs nations enjoy from collaboration are *symmetric*. But nations are rarely similarly situated, national interests are typically asymmetrical, and disagreements over the distribution of the benefits of cooperation are central to ‘trade and’ disputes.

This suggests that situations typically viewed as Prisoner’s Dilemmas or collaboration problems are frequently dominated by distributional issues. It also suggests why, in the IP context, developing nations agreed to a Pareto-inferior bargain. These nations were initially unwilling to ‘cooperate’ by raising their IP standards, because they believed that the gains from such ‘cooperation’ would largely accrue to developed nations. Eventually, ‘cooperation’ occurred because developing nations

were able to extract 'side payments', such as improved market access in other areas. Intensive bargaining over the nature and scope of these side payments altered the payoff structure available to the parties, and made cooperation politically feasible. Standard collective action models – which take payoff structures as given and unalterable – obscure this aspect of 'trade and' politics and thus the primary dynamic driving state behaviour in these areas.

'Trade and' issues also challenge the premises upon which the collective action model rests. As explained above, this model incorporates classic realist assumptions about the unitary state. But 'trade and' disputes reveal that this view of the monolithic, rational, maximizing state is incomplete and misleading.

Consider, for example, the extraordinary politics behind the US Clean Air Act provisions challenged in the very first 'trade and environment' dispute brought to a WTO panel. Under this law, gasoline sold in specific areas of the US had to be reformulated to reduce automotive pollution. Thereafter, the oil industry, environmental groups and Executive Branch officials engaged in extensive negotiations over implementing regulations. Eventually, EPA issued a rule giving industry various options (for a three-year period) for meeting the statutory standard. After much debate, it was decided that foreign refiners would not enjoy a similar menu of options. This rule would adversely affect Venezuela, which enjoyed a substantial share of the gas market in the north-eastern United States through its state-owned Citgo chain, and whose fuels are high in certain types of pollutants. However, this differential treatment was strongly supported by Sun Oil Company – not coincidentally, Citgo's main competitor for the gasoline market in the north-eastern US. With qualified support from the US State Department, Venezuela strongly objected to this differential treatment and, in February 1994, raised the issue at the GATT. After bilateral consultations the USTR reached a 'settlement' under which EPA would reconsider the rule, and Venezuela would not pursue its GATT claim. A new proposed rule provided that, under certain conditions, foreign refiners would enjoy the same treatment as domestic refiners. Sun 'vigorously opposed' the new rule, arguing that USTR had capitulated to Venezuela's demands. Sun lobbied Congressional supporters of the original rule, and thereafter Congress added a provision to an EPA appropriations bill blocking EPA's revised rule.²⁸ At this point Venezuela initiated WTO dispute resolution proceedings, and a WTO panel and the Appellate Body found the EPA's rule to be GATT-inconsistent.²⁹

For present purposes, the merits of the challenged regulation are of less interest than the complex, halting, and at times contradictory positions of 'the United States' in this matter, and on the essential role played by non-state actors, such as private industry. In fact, of course, there was no 'US position', but a variety of shifting positions held by Congress, the State Department, the EPA, and the USTR. Classic

²⁸ Public Law No. 103-327 (1994).

²⁹ United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/R, 29 January 1996, reprinted in 35 *ILM* (1996) 274; United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, reprinted in 35 *ILM* (1996) 603.

rationalist assumptions about the unitary, rational state, incorporated into the collective action model, are ill-equipped to explain such state behaviour. Indeed, this dispute is better understood as a sophisticated and multi-track political and economic dispute between Citgo and Sun Oil over the gasoline market in the north-east US than as a dispute between the sovereign nations of Venezuela and the United States. Again, however, to assume that state interests and behaviour are the key variables to be analysed, as the collective action model does, is to miss the important roles played by non-state actors – including private individuals, interest groups and businesses – in trade policy.³⁰

This is, of course, *not* an argument that the collective action model is without value. Game theoretic images often have great heuristic value and properly highlight issues of commitment, strategic interaction and enforcement, all of which are central to the trade regime. But, while the collective action model has great power to illuminate, it likewise possesses great power to conceal. With the rise of the ‘trade and’ issues, the power to conceal has reached dangerous and misleading proportions.

C Challenges to the Embedded Liberalism Model

Under the embedded liberalism model, the ‘problem’ is how to preserve governments’ ability to use macroeconomic policy to preserve domestic stability, but at the same time avoid restrictive trade policies like those that sparked trade wars in the 1930s. The ‘solution’ is an open and multilateral trade system, albeit one that permits domestic intervention. But the rise of ‘trade and’ issues challenges several elements of this embedded liberalism compromise.

First, this compromise promised nations wide latitude over domestic policy, free of interference by other nations. But successful challenges to environment or labour practices, and new WTO disciplines in other ‘trade and’ areas, limit government authority and undermine the policy tolerance central to the embedded liberalism compromise. Moreover, this loss of autonomy does not affect all governments and interests equally. Rather, as explained more fully below, the disciplines imposed by the WTO – as well as other forms of international economic liberalization – are more likely to significantly constrain progressive or left governments than conservative or right governments.

The increasing pressures that the expanded trade regime places on the embedded liberalism compromise manifest themselves in several other ways as well. As explained above, this compromise preserved governments’ ability to manage the dislocations caused by liberalized trade. However, by restricting the regulatory and policy tools that governments can use, trade liberalization agreements constrain governments’ ability to deliver on their end of this ‘social compact’.

Two examples – one from the industrialized north and one from the developing south – help illustrate this phenomena. US labour law has long recognized that certain restrictions on the ‘freedom to contract’ are necessary to offset the effects of unequal

³⁰ For a fuller discussion of the roles of non-state actors in WTO processes, see Dunoff, ‘The Misguided Debate over NGO Participation at the WTO’, 1 *JIEL* (1998) 433.

bargaining power. Hence, state and federal law regulate many aspects of the employment relationship, including the minimum wage, workplace health and safety, maximum hours and so forth. But the globalized economy upsets this balance:

There is no substantive difference between American workers being driven from their jobs by their fellow domestic workers who agree to work 12-hour days, earn less than the minimum wage, or be fired if they join a union – all of which are illegal under U.S. law – and their being similarly disadvantaged by foreign workers doing the same. If society is unwilling to accept the former, why should it countenance the latter? Globalization generates an inequality in bargaining power that 60 years of labor legislation has tried to prevent. It is in effect eroding a social understanding that has long been settled.³¹

Or, consider the Indian social compact, which has long included the provision of inexpensive pharmaceuticals. Thus, under Indian law, patents have not been available on pharmaceutical products.³² The TRIPs agreement requires India to provide patent protection to pharmaceuticals, which will likely produce a significant increase in the cost of medicines and decrease the government's ability to deal with India's crushing poverty. These examples suggest that as GATT disciplines expand into new substantive areas and international trade increases, governments will increasingly discover that they have inadvertently subverted their ability to manage the domestic consequences of liberalized trade in goods, services and capital.

Finally, the embedded liberalism compromise presupposes popular support for this bargain. But GATT disciplines in 'trade and' areas prompt negative public reactions. The widespread backlash against, for example, the beef-hormone reports in Europe and the tuna-dolphin reports in the US, illustrate how public concern over 'trade and' issues will not be limited to a particular panel report or recommendation, but can be generalized into hostility toward trade regimes. The politics surrounding President Clinton's failure to obtain 'fast-track' authority illustrates how these concerns can be exploited in ways that threaten to undermine multilateral trade initiatives. The perception that trade bodies have overstepped their appropriate limits can easily escalate into a larger legitimacy critique that undermines public support for trade regimes.

These political tensions illustrate yet another challenge that 'trade and' issues pose to the embedded liberalism model. The model presupposes a sharp distinction between 'domestic' matters and those that are properly matters of 'international' concern. However, the rise of the 'trade and' agenda reflects, in part, the blurring of the line between 'domestic' and 'international' economic policy. Indeed, in the 'trade and' context, even the WTO Director-General has critiqued as 'increasingly facile and irrelevant' the distinction between international and domestic policy.³³ The erosion of this distinction explains the pressures for WTO disciplines in new areas; however, any

³¹ Rodrik, *supra* note 4, at 29.

³² The Patents Act, 1970, No. 39 Sec. 5(a)–(b) (1970) (India).

³³ See, e.g., Ruggerio, 'The Road Ahead: International Trade Policy in the Era of the WTO', Sylvia Ostry Lecture, 28 May 1996. Available at <<http://www.wto.org>>.

such efforts in the ‘trade and’ areas unavoidably challenge the assumptions underlying the embedded liberalism model.

For all of these reasons, the trade regime’s expansion into the ‘trade and’ areas tends to undermine the conventional understanding of that regime as embodied in the ‘embedded liberalism’ model.

4 Political Consequences of the Continued Use of the Efficiency Model

Does it matter if new developments undermine leading academic models of the trade regime? What follows from the continued use of these models, particularly the efficiency model?

The intellectual triumph of the efficiency model helped set the stage for the dramatic liberalization of the international economy. While there has been substantial *economic* analysis of global economic liberalization, the *political* consequences of this liberalization have received less attention. For present purposes, two effects are particularly salient: heightened conflict among domestic constituencies over the economic and political benefits of increased trade, and increased constraints on government autonomy.

Trade liberalization and expansion increases the domestic impact of international economic trends, and hence the political importance of international economic issues. The widespread public debate over various ‘trade and’ issues underlines the increased political salience of international economic issues. But who gains – and who loses – when the resolution of these controversies is guided by the principles associated with the efficiency model?

As discussed above, the efficiency (and collective action) models suggest that expanded trade will increase aggregate welfare. But, as we have seen, these models are silent regarding how these gains will be distributed. More sophisticated economic models address this issue; the Heckscher-Ohlin trade model, for example, predicts that nations will export goods that are intensive in the factors it has in abundance, and import goods intensive in factors in which it is scarce. Under this model, trade liberalization typically benefits a nation’s abundant factors, and harms its scarce factors. This suggests that future battles over trade policy may well heighten conflicts between labourers, landowners, industrialists and other particular groupings.

Other economic theories suggest that these political cleavages will fall along sectoral, rather than factor lines. For example, the Ricardo-Viner model suggests that the fault lines will be drawn between *industries* where the nation enjoys comparative advantage and those that are not internationally competitive, rather than between productive factors. Thus, for example, workers at and investors in, say, computer software companies may have common trade interests that differ from those of both groups in, say, the US steel industry. Others have argued that increased economic interdependence increases the likelihood that firms within the same industry will diverge in the degree of their international orientation, and therefore in approach to

trade policy. These theories, for present purposes, are complementary, in that each attempts to identify the political cleavages produced by trade politics, and directs our attention to the distributional consequences of trade liberalization.

A more important impact on domestic politics, alluded to above, is the way in which economic liberalization undermines the efficacy of certain policies. From the right, some argue that the international institutions and economic liberalization associated with the efficiency model's triumph compromise national sovereignty. Some on the left view economic liberalization as a threat to the continued existence of the welfare state and other progressive policies. While both positions are exaggerated, they properly direct our attention to the ways in which the expanded trade regime constrains state autonomy.

In an era of liberalized trade, governments increasingly focus on issues of international competitiveness. Indeed, as detailed above, competitiveness concerns play a central role in 'trade and' debates. The efficiency model suggests that, in a global economy, non-competitive nations will suffer heightened unemployment and reduced growth. Large trade deficits are disfavoured, according to this model, because they produce capital outflows, while mercantilist measures are undesirable because they reduce aggregate welfare.

How can nations ensure that their producers are internationally competitive? Neo-classical economic analysis associated with the efficiency model suggests a number of policies. First, government spending is understood as an implicit tax on producers. The argument is that heavily taxed firms in nation A cannot be expected to successfully compete against lightly taxed firms in nation B. Hence competitiveness concerns suggest, in general, reductions in government spending. Budget deficits are similarly disfavoured because they constrain future generations with the burden of paying off the public debt. The case for these policies is greatly magnified by capital mobility.

Thus, economic liberalization can 'raise the cost' of various policies. Firms can relocate – or threaten to relocate – when actual or potential government policies would impose costs on them. Greater international economic liberalization strengthens the firms' hands in this negotiation with national governments, thus constraining domestic policies. This dynamic can be seen in areas that give rise to 'trade and' disputes, such as labour and environment. Moreover, competitiveness and capital flight concerns threaten to undermine the effectiveness of fiscal and monetary policies. Capital mobility complicates efforts to pursue expansive or interventionist fiscal policies, as international investors may anticipate that they will shoulder these costs but enjoy few of the associated benefits, and hence threaten 'exit'. Many political economists argue that this loss of autonomy is more likely to place special pressures on liberal or left governments, which often favour expansionary policies that increase employment, as opposed to right or conservative governments which generally tend to favour price stability over full employment. Thus, while the economic liberalization associated with the efficiency model affects domestic politics in all nations, it has a peculiar political valence.

5 ‘Trade and’ Issues and WTO Dispute Resolution

Many of the features that render ‘trade and’ issues so difficult for the models also render them problematic for WTO dispute resolution. By focusing on the institutional constraints facing WTO panels, and the highly contested nature of many ‘trade and’ issues, I argue that panel resolution of ‘trade and’ issues threatens to delegitimize WTO dispute resolution. This argument is supported by the empirical claim that when panels do address ‘trade and’ issues their recommendations are often ignored and frequently do little to actually resolve the dispute. What, then, should panels do when facing ‘trade and’ disputes? Drawing on a literature that addresses similar issues faced by domestic courts, I suggest a strategy that WTO panels can use to avoid addressing the merits of ‘trade and’ issues, and, paradoxically, thereby enhance the legitimacy of the larger WTO system.

A Contested Issues, Non-compliance and Delegitimation

Panels that resolve ‘trade and’ disputes are often criticized for reports that obscure or ignore the underlying value conflicts. Many call for panels to more forthrightly articulate and balance the diverse interests at issue. Nevertheless, panels continue to slight the underlying non-economic values. Why?

Here, it is critical to focus on WTO institutional politics and the role played by WTO dispute resolution. The international trade system inevitably contains certain fundamental tensions. One, shared with other international regimes, is how to best strike a balance between pursuit of economic interests and other social interests. As noted above, the balance struck by the trade regime has proven to be extraordinarily problematic. Another, also shared with other international regimes, is how to best reconcile the persistent and competing demands of principle and expediency – how to mediate the tension between law and politics. For present purposes, I wish to reflect on this second tension.

When a domestic legislature or a WTO negotiating body considers a ‘trade and’ issue, it is both expected and appropriate for it to declare that it has weighed and struck a balance among all appropriate interests, and resolved political and policy issues through majoritarian processes. But the same is not true of WTO dispute resolution panels. While there has long been debate over whether GATT dispute resolution should be a legalistic, rule-based system or a more flexible diplomatic mechanism, the Uruguay Round Dispute Settlement Understanding (DSU) represents an unequivocal victory for the legalists. It could not be clearer that WTO panels are not intended to be simply another forum for the political resolution of controversial value conflicts. Rather, panels are to apply settled law to the facts, to resolve disputes according to pre-existing principle. The legitimacy of the dispute resolution system would be undermined if panels were understood to engage in either policy-making or deal-making.

But this raises an unavoidable obstacle to the satisfactory resolution of ‘trade and’ disputes in WTO dispute resolution. As detailed above, these disputes present issues that are among the most ‘contested’ in trade policy. To be sure, many trade policy

issues are contested in the sense that they are subject to disagreement and dispute, but the claim here is that many 'trade and' issues are 'contested' in a much more fundamental way. They are 'contested' in the sense that the fundamentals of the debate – say, the balance to be struck between economic and environmental interests – are 'up for grabs' and that participants in these debates acknowledge the legitimacy of disagreement over these fundamental issues. In this sense, the question of basic GATT policy towards tariffs is not contested, while that of GATT policy regarding, say, competition issues, is highly contested.

'Trade and' issues are currently contested in a way that appears to remove them from the legal domain, and place them squarely in the political domain. Thus, both supporters and critics of WTO jurisprudence in these areas ask WTO panels, in effect, to draw principled lines in the midst of larger political struggles; but it is precisely this contestedness that renders it almost impossible for panels to apply any nuanced test in a manner that appears to produce consistent results. Inconsistent results in these controversial areas would invite the criticism that the outcomes are simply political. This criticism is important, because WTO dispute resolution panels, no less than other adjudicatory fora, 'must act rigorously on principle, lest [they] undermine ... the justification for [their] power'.³⁴ In other words, panels that created and applied sensitive, multifaceted tests truer to the underlying values at stake in 'trade and' issues would unavoidably appear political and hence undermine their institutional position. And any perceived 'delegalization' of WTO dispute resolution proceedings would threaten to delegitimize these proceedings.

'Trade and' issues threaten WTO dispute resolution in yet another way. Precisely because these issues are so contested, and because panel reports are understood in such highly politicized terms, the reports are frequently discounted and often do not actually resolve the dispute. Consider, for example, the European Union's response to an Appellate Body determination that an EU ban of meat imports treated with growth-producing hormones was not based on an appropriate scientific risk assessment and was hence GATT-inconsistent. Rather than lift its import ban – as the US demanded – the EU announced that it would, within 15 months, undertake an appropriate risk assessment – and, in the meantime, maintain its import ban. Or, consider, for example, the Canadian response to a panel finding that its policies regarding 'split-run' magazines were GATT-inconsistent. This result was surely predictable under established GATT jurisprudence, but nevertheless sparked a political firestorm in Canada. Thereafter, instead of trying to open its magazine market, the Canadian government sought new ways to block these periodicals, including revising its foreign investment law. Or consider the 'tuna-dolphin' dispute. Here, two separate panels found the US ban to be GATT-inconsistent. Yet these reports

³⁴ A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed., 1986), at 69.

were met with public hostility and the US maintained its tuna embargo for a number of years thereafter.³⁵

The root problem, of course, is the extremely contested nature of the underlying issues. This cannot be solved by more artful treaty language, or better reasoned panel reports – indeed these sorts of ‘trade and’ conflicts persist even where there is specific treaty language apparently resolving the issue.³⁶ In this respect, much of the criticism of the panels’ legal reasoning in ‘trade and’ disputes is correct, but beside the point.

I believe that, at some level, the trading community recognizes the inadequacies of the WTO system in addressing ‘trade and’ disputes, the heightened risks of non-compliance in these areas, and the systemic costs associated with unsuccessful WTO attempts to resolve these issues. For example, shortly after a WTO panel released its interim report in the ‘shrimp-turtle’ dispute – finding a US law designed to protect endangered sea turtles to be GATT-inconsistent – the WTO’s Director-General pleaded that the WTO not be asked to serve as ‘judge, jury and police’ on international environmental matters. He warned that

[a]sking the WTO to solve issues which are not central to its work, especially when these are issues which governments have failed to address satisfactorily in other contexts, is not just a recipe for failure. It could do untold harm to the trading system itself.³⁷

These concerns explain, in part, recent attempts to move large categories of ‘trade and’ disputes outside the WTO context. The WTO Ministerial Declaration that ‘trade and labour’ issues would be best housed in the International Labour Organisation is a prominent example.³⁸ The recent EU communication regarding ‘Trade and the Environment in the New WTO Round’³⁹ and the former Director-General Ruggiero’s call for a ‘Global Environmental Organization’⁴⁰ similarly reflect concern over the undue pressures that ‘trade and environment’ issues place upon WTO dispute resolution. A less systematic – but more common – strategy is for governments to simply refuse to pursue ‘trade and’ disputes through formal dispute resolution procedures, and instead live with a quiet but uneasy status quo.

Given the institutional constraints on WTO panels, and the heightened risks of non-compliance, it is politically naive to urge WTO panels to ‘struggle openly’ with the value conflicts raised by ‘trade and’ issues. In this context, open struggle will be self-defeating. Instead, trade scholars need to ‘struggle openly’ with the dilemma that, while current WTO jurisprudence seems ill-equipped to sensibly resolve ‘trade and’

³⁵ While these reports were never formally adopted by the GATT Council, and thus were never technically binding as a matter of GATT law, there could be little doubt as to the GATT-legality of the continuing embargo. The embargoes remained until passage of the International Dolphin Conservation Program Act in 1997. Public Law No. 105–42 (1997).

³⁶ An illustrative example here is the ‘trade and culture’ area, where explicit NAFTA provisions have done little to reduce such conflicts between Canada and the US.

³⁷ ‘WTO Cannot be “Judge, Jury, Police” of Environment Issues, Top Official Says’, *BNA International Environmental Daily*, 18 March 1998.

³⁸ Ministerial Declaration.

³⁹ WT/GC/W/197 (1 June 1999).

⁴⁰ Opening Remarks to the High Level Symposium on Trade and the Environment, 15 March 1999, available at <<http://www.wto.org/wto/hlms/dgenv.htm>>.

issues, the development of more refined and nuanced approaches by panels appears politically infeasible.

B Avoiding the Merits: Taking the Passive Virtues International?

If the above arguments are correct, then WTO panels presented with ‘trade and’ disputes face a Hobson’s choice. Panels can woodenly apply ill-suited rules to generate decisions that appear appropriate from the perspective of GATT jurisprudence, but that slight important social values, provoke public backlashes and are often discounted – all at a high institutional price.⁴¹ Or, panels can develop sensitive, multi-factored tests more appropriate to the issues,⁴² but that find little support in WTO texts or understandings and threaten to ‘repoliticize’ WTO dispute resolution – again, at a high institutional price.

How can panels avoid this dilemma? At least one possibility deserves serious consideration. A diverse group of scholars has detailed the dangers of using adjudication to resolve certain types of ‘contested’ domestic issues, and has suggested a highly constrained judicial role in such contexts. The starting point for these theorists is the judiciary’s relative lack of democratic legitimacy, at least as compared with other branches of government. This lack of legitimacy counsels judicial caution in the resolution of highly charged and politicized issues.

Professor Alexander Bickel attempted to provide a normative justification for the judicial strategy of avoiding certain types of contested issues. Bickel understood that adjudicatory bodies must carefully husband and strategically deploy their limited political capital. He also directed attention to

[t]he essentially important fact, so often missed, . . . that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or . . . ‘legitimate’ legislation as consistent with principle. *Or it may do neither*. It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency.⁴³

Building on this insight, Bickel urged the strategic use of ‘the mediating techniques of ‘not doing’ – jurisdictional and procedural devices such as standing, ripeness and the like – to avoid or defer evaluation of the decisions made by the elected branches of government on certain ‘contested’ issues.⁴⁴ By carefully choosing whether and when to decide ‘contested’ issues, Bickel argued, courts can avoid premature entanglement with the elected branches of government on these issues. The wise exercise of these ‘passive virtues’ can enable the judiciary to conserve scarce political capital,

⁴¹ While adjudicatory bodies must, at times, act in defiance of strong political pressures, they are most likely to do so successfully when they are defending widely shared foundational principles. But, in the ‘trade and’ context, it is precisely these principles that are up for grabs.

⁴² Many argue that the Appellate Body has moved towards the application of such a balancing approach in trade and environment cases. See, e.g., United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 October 1998). For an argument that this movement is more apparent than real, see Dunoff, ‘Border Patrol at the WTO’, 9 *YBIEL* (1998) (forthcoming).

⁴³ Bickel, *supra* note 34, at 69.

⁴⁴ *Ibid.*, at 112.

encourage wider political processes, and help maintain the judiciary's legitimacy and influence within a context of competing and otherwise more powerful elected institutions.

These sorts of arguments are extremely suggestive when juxtaposed with the 'trade and' issues and WTO dispute resolution. As argued above, these issues undermine the previously 'uncontested' understandings of the trade regime, as well as themselves presenting highly charged political issues. They ask WTO panels to review actions by legislatures and executives that often have greater claims of democratic legitimacy. And they highlight the political vulnerability of adjudicatory bodies whose claim to legitimacy lies in their distance from politics and fidelity to principle.

Moreover the arguments that adjudicatory bodies should play deferential or constrained roles in 'contested' areas of social policy may be even stronger in the WTO context than in the domestic context. Although the WTO does not present the formal separation of powers concerns that animate some theories of judicial restraint, the concerns over lack of democratic legitimacy are at least as acute in the WTO dispute resolution context. The spectre of unelected and unaccountable trade bureaucrats determining that a statute duly enacted through the majoritarian legislative processes of a sovereign nation is inconsistent with that nation's international trade obligations hardly seems to comport with most models of democratic decision-making. The 'representation-reinforcing' justification for judicial review of legislation popularized by John Hart Ely⁴⁵ and others does not translate well into the WTO context. While Ely and others are properly concerned that majoritarian political processes may inappropriately harm minority interests, 'protectionist' trade measures presumably harm many more than they help in the importing nation and, in any event, there is not even a pretext that WTO rulings are designed to 'open up' malfunctioning political processes. To the contrary, WTO proceedings are expressly about the 'merits' of the challenged trade measure. Moreover, unlike the domestic context, there is not even a measure of deference afforded the results of majoritarian processes. Finally, again unlike the domestic setting, the international system lacks a long-standing and well-established history of international tribunals that have achieved public acceptance and can declare statutes inconsistent with international obligations. To the contrary, adverse panel reports have been met with strong popular resistance in Europe, the US and elsewhere.

Significantly, other international adjudicatory fora have begun to develop and employ their own versions of the 'passive virtues'. For example, the European Court of Justice has 'visibly been practicing restraint' when considering 'contested' issues, and has increasingly disposed of contentious issues on grounds of jurisdiction (admissibility) and justiciability.⁴⁶ Some have detected a similar trend in the International

⁴⁵ J. H. Ely, *Democracy and Distrust* (1980).

⁴⁶ Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273, at 316. A classic example would be the Irish abortion case, where the ECJ held that the question of whether Ireland could regulate abortion fell outside its competence, and ruled instead only on the narrower question of whether Ireland could prevent Irish citizens from travelling to England to get abortions. See *ibid.*

Court of Justice of avoiding certain decisions in a manner that enhances larger international political processes.⁴⁷ Such actions do not appear to have harmed these bodies; to the contrary, their status is high and nations increasingly refer cases to them. So there is no apparent reason in principle why international trade tribunals could not employ this strategy.

To be sure, GATT jurisprudence has not traditionally included many of the 'mediating techniques' that Bickel described. Given their very different source of jurisdiction, panels have not developed 'ripeness', 'political question' or other doctrines that are available to domestic courts. But this is not to suggest that current WTO doctrines are natural or inevitable, or that panels could not use any of the passive virtues available to domestic courts. To the contrary, trade ministers have already decided to examine whether a more deferential standard of review should be used,⁴⁸ and panels already have at their disposal some doctrinal tools that might be of use. For example, in the Banana case, the EU argued that the US lacked standing to challenge the EU's banana regime.⁴⁹ While the Appellate Body rejected this argument in this case, it took pains to emphasize that this particular finding did not eviscerate the 'standing' doctrine and that it might be appropriately invoked in other cases.⁵⁰ The Appellate Body declined to review certain other issues by characterizing them as questions of fact, notwithstanding that these questions appeared to present mixed questions of fact and law appropriate for appellate review.⁵¹

Moreover, a variety of proposals that would give panels tools for avoiding determinations on the merits in 'trade and' issues have recently been advanced. Thus, for example, the European Union, New Zealand and Switzerland have all offered proposals that would change GATT language and effectively remove many 'trade and environment' disputes from WTO dispute resolution. One could imagine an 'abstention' proposal that would serve the same end, consistent with the arguments above. Thus, when a trade measure imposed pursuant to an international environmental treaty is challenged in the WTO, panels could defer from going forward with the matter unless and until dispute resolution procedures under the environmental treaty

⁴⁷ Perez, 'The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice', 18 *Michigan Journal of International Law* (1997) 399.

⁴⁸ The Uruguay Round Agreements provide that anti-dumping determinations challenged in WTO dispute resolution are to be afforded a measure of deference. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 17.6, in Annex 1A to Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (15 April 1994). At the Marrakesh Ministerial Conference, the Ministers decided to consider in the future whether this more deferential standard of review 'is capable of general application'. Ministerial Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, GATT doc. MTN/FA at 402.

⁴⁹ European Communities – Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, WT/DS27/AB/R, at paras 16–17 (9 September 1997).

⁵⁰ *Ibid.*, at paras 136, 138.

⁵¹ *Ibid.*, at paras 238–239 (declining to examine whether certain company is a 'juridical person of another Member [state]' for purposes of Article XXVIII).

had been exhausted. Perhaps the time has come for diplomats and trade scholars to formulate other proposals along similar lines.

C Recap: Uruguay Round Ironies

Much analysis of the Uruguay Round celebrates two different aspects of the agreements reached. First, the agreements are heralded for their extraordinarily broad scope. They provide for tariff reductions, the strengthening of existing rules in several areas, and agreements on textiles and agriculture, two sectors that have created immense difficulties for the trade regime. But the agreements are most praised for their extension of GATT disciplines to several new areas, including intellectual property, services and some areas of foreign direct investment. As detailed above, the extension of GATT disciplines to new areas – along with the increased focus on ‘non-tariff barriers’ resulting from tariff reductions – has given rise to the ‘trade and’ agenda.

The other widely heralded change is in the dispute resolution area. Under the DSU, the appointment of a dispute settlement panel upon request is automatic, unless a consensus against establishment of a panel exists. Similarly, panel reports will be adopted by the Dispute Settlement Body unless there is a consensus not to adopt it. In addition, the parties established a right of appeal to an Appellate Body, limited to examination of issues of law. Appellate Body decisions will also be automatically adopted, unless there is a consensus against such action. Finally, losing parties are to reform their GATT-inconsistent practices within a reasonable time period, or offer satisfactory alternative trade concessions. If the party does not do so, then the aggrieved party may request DSB authorization to suspend concessions ‘equivalent to the level of the nullification or impairment’ of its benefits under the relevant WTO agreement. Again, such authorization will be automatically granted absent a consensus to the contrary. In the aggregate, these changes mark a significant ‘legalization’ of the dispute resolution process.

But these two ‘accomplishments’ generate considerable tensions, and may work at cross-purposes. The expansion into new areas has given rise to the ‘trade and’ agenda and brought the accompanying ‘trade and’ disputes into the trade regime. These disputes, however, pull WTO panels outside of their areas of expertise, and the guidance offered by WTO texts on these matters is woefully inadequate. As a result, panel decisions in these contexts are widely attacked – and too frequently do little to resolve the underlying dispute. Friends of the trade regime cannot remain indifferent to these unanticipated by-products of the Uruguay Round’s successes. Hence the attractiveness of a WTO version of the ‘passive virtues’.

Of course, Uruguay Round defenders will correctly argue that a primary purpose of the DSU is to take away the ‘wobble room’ to avoid resolutions on the merits that previously existed. The pre-Uruguay Round system permitted a number of ‘outs’: the responding party could block the decision to establish a panel and could further delay by objecting to the members of the panel. Once the panel reached a decision and issued a report, the losing party could block the adoption of the report by the GATT Council,

and, until adopted, a report was not legally binding. Even if the panel report was adopted, the prevailing party could take no action in the event the other party failed to implement the report or offer satisfactory 'compensation'. In response to these perceived shortcomings, the new dispute resolution system is marked by its 'automaticity': automatic formation of panels, automatic imposition of specified timetables, automatic adoption of panel reports and automatic authorization of sanctions for non-compliance.

Thus, when there was no pressing need for panels to avoid reaching the merits, the GATT system provided multiple ways of avoiding a decision. In an effort to legalize the system – to give it more legitimacy – the Uruguay Round Agreements eliminated a number of these tools. Ironically, the maximum number of tools for controlling 'whether, when and how much to adjudicate'⁵² were available when they were unnecessary, while their numbers and use have been restricted at precisely the time that they have become most desirable.

The other irony, of course, is the suggestion that, to preserve the appearance of principled decision-making, WTO panels adopt politically expedient means of avoiding the merits of certain disputes. To be sure, this suggestion deserves more space and development than I can give it here, and poses certain obvious dangers: Can the 'expediency' that this would introduce to WTO dispute resolution be neatly cabined, or might it 'infect' the entire process? By what tools and criteria would panels determine whether and when to avoid the merits of a dispute?

While these are serious and difficult questions, they offer little guidance to panels caught in 'no-win' situations. The fledgling WTO dispute resolution system should not be expected to ignore the political costs that accompany the unsatisfactory resolution of 'trade and' disputes. More importantly, the suggestion that panels abstain from deciding certain issues is not an invitation for the exercise of 'unchanneled, undirected, unchartered discretion'.⁵³ Rather, it should be understood as a call for the exercise of prudence in the name of principle. More importantly, it represents an effort to begin a serious debate as to whether WTO panels might enhance their legitimacy and effectiveness by using tools similar to those used by domestic courts and other international adjudicatory bodies.

Conclusion

In recent years, 'trade and' issues have moved to the forefront of trade policy and scholarship. However, these issues have proven to be particularly difficult and divisive. In this paper, I have tried to demonstrate several of the ways in which these issues challenge conventional understandings of the trade regime. In particular, I have shown how the 'trade and' issues problematize each of the three leading models –

⁵² Bickel, 'The Supreme Court 1960 Term – Foreword: The Passive Virtues', 75 *Harvard Law Review* (1961) 40, at 79.

⁵³ *Ibid.*, at 49.

the efficiency, collective action, and embedded liberalism models – used to describe the trade regime. These new issues thus demonstrate the practical and theoretical need to reconceptualize our understanding of this regime.

I have then tried to show that, notwithstanding these shortcomings, the traditional models – and in particular the efficiency model – nevertheless continue to have important political consequences. In particular, I have outlined how liberalized trade and the triumph of the efficiency model affect domestic politics, and how they constrain national autonomy.

Finally, I have detailed the difficulties that ‘trade and’ issues pose for WTO dispute resolution. I then suggested that WTO panels use a version of the ‘passive virtues’ as a way to avoid at least some of these difficulties. Ironically, recent changes to the dispute resolution system makes this course of action much more difficult.

The ‘Death of the Trade Regime’ does not, of course, mean the death of international trade, or of the WTO/GATT system. To the contrary, international trade continues to expand, and the WTO/GATT system is – in some respects – as healthy as ever. But policy-makers, scholars and citizens can understand these developments more or less accurately. I have argued that traditional understandings are no longer viable. By exploring insights from economic, political science and legal scholarship, this paper implicitly calls for a creative synthesis of ideas and insights from various disciplines as we struggle toward new understandings of the trade regime. Moreover, the system can address its most pressing challenges more or less effectively. By examining several tools used by domestic courts, I have tried to suggest some strategies that WTO panels can use when considering ‘trade and’ issues.