IDENTIFYING ANTIDEMOCRATIC OUTCOMES: AUTHENTICITY, SELF-SACRIFICE, AND INTERNATIONAL TRADE

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1. INTRODUCTION

This essay examines the use of the notion of democracy by critics of specific dispute outcomes generated by international trade regimes. The establishment and expansion of the World Trade Organization ("WTO") and North American Free Trade Agreement ("NAFTA") have stimulated broader critiques which question the democratic accountability of these supranational institutions. These democratic attacks on international trade regimes undercut claims for their legitimacy.¹ I hope to identify a middle case between a totalizing view of democracy (which effectively reasserts national sovereignty over all measures) and one where the international trade regime rides roughshod over all na-

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¹ Patti Goldman of the Sierra Club Legal Defense Fund has written:

During the recent debates over NAFTA, the Uruguay Round of the GATT, and the extension of fast-track rules to both the NAFTA and the Uruguay Round, many charged that international trade agreements clash with democratic principles. This charge rings true. The international trade system operates contrary to every principle of democracy and government accountability imbedded in U.S. domestic policy making.

Patti Goldman, The Democratization of the Development of United States Trade Policy, 27 CORNELL INT'L L.J. 631, 633 (1994); see also Robert F. Housman, Democratizing International Trade Decision-making, 27 CORNELL INT'L L.J. 699, 702 (1994) ("[A]t a time when the democratic preachings of the developed world seem to be having their greatest effect on the actions of developing and transition nations, these same developed nations are rushing head first into international trade agreements that offend the essential principles of democracy.").

Published by Penn Law: Legal Scholarship Repository, 2014
tional impulses. Perhaps screens or filters can be applied to those cases where democracy objections are raised. These screens will permit democratic objections to be considered in a discriminating manner and will incorporate values other than democratic ones. I will suggest we use these filters to identify popular national measures which are: (1) authentic (and, in particular, those which are idiosyncratic) and (2) self-sacrificing. Use of these tests can permit democracy to be upheld in an additional, albeit discrete, coterie of cases. In so doing, one can recreate greater space for national autonomy without ripping apart the basic structure of the international trade systems.

1.1. International Trade and Democracy

WTO and NAFTA limit democratic expression by setting significant new bounds on the permissible range of national decisional autonomy. Like federated states, nations may no longer set product safety levels, food standards, or air quality targets without taking into account the possibility that such regulation impermissibly impedes (or will be judged to impede) the flow of trade. The construction of the trade regimes reflects a national loss of control associated with a loss of sovereignty that has serious democratic implications, particularly for those nations with strong self-images, such as democracies.

In operation, international trade regimes exert a strong discipline on national law. At times this discipline is affirmative, obliging nations to enact compliant law even where it has little internal democratic support. For example, the universalization of the recognition of intellectual property rights has been achieved through affirmative discipline. Developing countries generally had opposed recognition of intellectual property rights; owner-

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2 TRIPS, for example, imposes the requirement on all WTO members to conform national patent law to the Paris Convention. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY Round vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS]. Thus, India is forced to recognize foreign pharmaceutical patents even though this legislation is highly unpopular there. Indeed, the United States has recently cited India for its alleged failure to establish law consistent with TRIPS’ requirements. See India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Doc. WT/DS55/R (Sept. 5, 1997).

3 This is accomplished by "binding" us all in numbers, obligated to the national goal of establishing intellectual property protections.
ship of these rights is vested largely in the most developed countries. The payment of royalties for use of foreign-owned intellectual property rights would cause wealth to flow northward, from the poor to the rich. As such, there was little democratic appetite in India or Brazil for establishing these rights. By linking market access (particularly in the textile and agricultural sectors) to an acceptance of Western-style intellectual property rights in the Uruguay Round negotiations, developing countries committed themselves to enact patent, copyright, and trademark schemes. Mandated enactments of national law are relatively unusual features in the WTO and NAFTA structures, although they have played a large role in the European Union ("EU").

The trade regimes are more exposed to democratic criticism when they challenge or set aside national law. By their terms the trade regimes assert a kind of supremacy, i.e., inconsistent national law must give way to these international commitments. The further implication of this structure is that national lawmakers will learn the bounds on their remaining freedom of action and will prospectively circumscribe legislation that runs counter to international trade norms. Nations can and do enact measures that are inconsistent with international trade discipline. Conflicts between national law and international trade commitments may be inadvertent, since rulemakers often are not aware of or do not

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4 In addition to mandating conformity of national patent law with the Paris Convention, TRIPS mandates adoption of copyright law conforming to the Berne Convention and the enactment of a trademark law providing certain minimum rights to owners. See TRIPS Agreement, supra note 2, arts. 9, 15; see also GATT Focus Newsletter, Dec. 1993, at 12-14, cited in JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 889-92 (3d ed. 1995) (detailing goals and principles of GATT).

5 Mandated "approximation" or "harmonization" of national law has played an enormous role in eliminating the thicket of regulatory impediments to the establishment of the European internal market. See Daniel Vignes, The Harmonisation of National Legislation and the EEC, 15 EUR. L. REV. 358, 360-67 (1990). The central European lawmaking institutions issue "directives" that command the European Union ("EU") member states to enact national law consistent with the terms of the directives. See id. at 367-73 (detailing legal mechanisms of the EU).

understand these new limits. In other instances legislators may defiantly challenge the trade system.

1.2. "Countermands"

More focused democratic criticism has been aimed at dispute resolution outcomes where standing national measures are declared inconsistent. In these cases, the existing public order is notably disturbed. I will describe these applications of international trade discipline on national regulation as "countermands," and then will examine these countermands to see which are truly (or most offensively) antidemocratic. Within the European Union ("EU"), the European Court of Justice ("ECJ") can set aside a national measure which conflicts with the obligations contained in the Treaty of Rome. Thus, in the EU case a "countermand" will have the effect of striking down a national measure. With WTO and NAFTA dispute resolution, adverse panel reports have no immediate effect on national law; here "countermands" are largely declarations of the inconsistency of the national measure with the relevant regime. Domestic law is undisturbed by a WTO or NAFTA countermand and simply creates an obligation of the nation to dismantle the inconsistent law. WTO and NAFTA countermands can be disregarded by the offending nation to some degree.

1.2.1. The Tuna/Dolphin Example

The prototypical example of an asserted antidemocratic countermand is Tuna/Dolphin, where a popular U.S. measure was menaced by the General Agreement of Tariffs and Trade ("GATT") regime. In Tuna/Dolphin, a GATT dispute resolu-

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7 Massachusetts recently enacted state purchasing restrictions from companies doing business in Burma. See MASS. GEN. LAWS ANN., ch. 7, § 223 (West 1997). It appears that the sponsors of the act were unaware of the existence of the WTO Government Procurement Agreement (and its potential effect on the Act) at the time of its passage.


tion panel found that the U.S. import restrictions on tuna captured with purse-sein nets (which invariably killed large numbers of dolphins) were not justified. The United States effectively blocked adoption of the panel’s report; as such the “dolphin-safe” tuna import restrictions remain in place. Notwithstanding the survival of the tuna import ban, *Tuna/Dolphin* generated a tremendous reaction. Environmentalists in the United States received a dramatic wake up call that favorable U.S. environmental legislation might be struck down by international dispute resolution panels. The holding shocked the broader U.S. public, who had a fierce attachment to the welfare of dolphins and other marine mammals. The U.S. legislation deemed inconsistent by the panel was exceedingly popular. The specter of a GATT panel, setting aside a piece of U.S. legislation with the noble goal of protecting dolphins, based on the arcane demands of international trade, seemed to many Americans an assault on their democratic privileges.

1.3. The Arguments

This essay is neither an apologia for, nor a condemnation of, international trade regimes. It takes democratic critiques seriously. What I hope to work towards is defining conditions (1) where the international trade system should yield to national democratic impulses and (2) where an international trade regime can effectively support democratic values by displacing antidemocratic national measures or practices.


12 Philip Nichols has outlined a similar approach. Nichols has looked for cases where “societal values” are in play, and suggests that in some of these cases international trade discipline should yield to national will. See Philip M. Nichols, *Trade Without Values,* 90 NW. U. L. REV. 658 (1996).

13 In connection with joint U.S.-Mexican administration of the environmental quality of the border area, a public hearing was held in Mexico. The notion of a public hearing was unprecedented in Mexico. See Rebecca Reynolds
My initial point is somewhat dark in tone: democracy may be invoked to mask beggar-thy-neighbor national policies that impose economic harm on unrepresented extranationals. Thus, we should be cautious in undiscriminatingly accepting those challenges to countermands that allege democratic failure. I will suggest that assertions of antidemocratic outcomes can be screened in order to determine which objections have the most merit (from the point of view of authentic democratic expression) and where international trade discipline should yield. Resistant national measures, those which generate strong support in the face of international countermands, should be checked for their authenticity. The most persuasive cases will be those instances (1) where the national measure reflects a deeply embedded value (which at times may be idiosyncratic), and (2) where the country imposing the measure bears the greater part of the cost of any distortion imposed on international trade by the maintenance of the measure. These cases will be labeled “self-sacrificing.”

My second argument is more positive: that the international trade regime may exercise its hierarchical superiority to usefully check national policies that are patently antidemocratic. I intend this argument to be more subtle than the neoliberal credence that free trade is the expected “democratic” outcome of a non-captured, friction-free polity. Rather, this second tack involves


14 “Beggar-thy-neighbor policies” tend to increase the income and welfare of the nation imposing the policy at the expense of others. See Miltiadès Chacholiades, International Economics 181 (1990). Examples include optimal tariffs and expenditure switching policies (such as the “Buy America” program). See id. at 172, 380. Beggar-thy-neighbor policies often invite retaliation. See id. at 380. According to Jagdish Bhagwati, “[T]he Great Depression had been associated with beggar-my-neighbor policies of competitive exchange-rate depreciation and tariff escalation, each aimed at preserving and deflecting aggregate demand toward one’s own industries at the expense of those of one’s trading partners.” Jagdish Bhagwati, Protectionism 20 (1988).


16 Bhagwati describes “recent developments in the theory of political economy and international trade that replaced the orthodox view that governments are benign and omnipotent with the view that their policies may reflect lobbying by pressure groups (which lobbying may lead to defects in the visible hand that outweigh ones in the invisible hand for which remedy is sought).” Bhagwati, supra note 14, at 31.
a search for analogs to the federal dismantling of "democratically" enacted "Jim Crow" laws in the South, or the use of economic sanctions to accelerate the fall of apartheid.

The points advanced here are suggestive of reforming moves that could be applied to discrete cases reducing the possibility for "trade and . . . " style tensions. Respecting democratic will and national autonomy in these cases can further legitimate the trade system. The first reform would be to recognize the special status of national measures which are authentic and self-sacrificing. The second is to use trade principles to encourage democratic expression among all members of the international trade community.

This discussion will necessarily confront rival conceptualizations of democracy. Every nation has its own internal notions of democracy and legitimacy. These notions may not be widely shared in the international community. As such, some national measures may be viewed as more legitimate, based on an assessment of the state of democracy within the relevant nation. This line will not be pursued here. Rather the relevant critiques examined here are those which challenge the democratic legitimacy of the operation of the international trade system in specific instances. The spirit of this critique leaves national lawmaking, and its legitimacy, largely unexamined. That being said, I will still seek to look through to the level of national enactment for purposes of democratic inquiry.

Some useful progress can be made, for purposes of this essay, by defining democracy in the negative. Democracy cannot be a quality that attaches with equivalent force to all formal enactments of a popularly elected legislature. This would suggest that

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17 "Trade and . . . " captures the collisions between the demands of a regime dedicated to facilitating international trade, and the national and international pursuit of other political goals. These collisions may be seen as general phenomena: For example, one assertion is that the WTO as a whole is antithetical to sustainable development, in which case "trade and . . . " is voiced as a general critique. Alternatively, a "trade and . . . " collision may be identified in a particular case. See Trachtman, supra note 11 (explaining that "Trade and . . . " disputes may or may not signal democratic dysfunction of legitimate concern). "Trade and . . . " also identifies a body of scholarship. See Dunoff, supra note 11.

all national measures should be equally resistant to international trade scrutiny. Such a definition would leave us with our present predicament: either all national measures stand (as they are valid democratic expressions), or none do (as democracy is not a value recognized by the international trade system). Nor do I intend the use of simple (imaginary) plebiscites to test the democratic commitment behind adopted measures. Whatever democracy is, it is something more subtle than the approaches suggested.

2. DEMOCRATIC CRITIQUES

2.1. Forms of General Critique of International Trade Regimes

The establishment and expansion of the key international trade institutions have been accompanied by criticism and protest. Certain critiques are attacks on the neoliberal premises of free trade. Other critics oppose an international order dominated by multinational enterprises operating unchecked by meaningful regulation.

Opponents also assert the presence of serious democratic deficiencies to undercut the legitimacy of the trade regimes. All the major international trade institutions, such as the WTO, EU and NAFTA are at least doubly removed from the people and are thus exposed to complaints about a lack of democratic accountability. The recent U.S. ratification experiences, first with NAFTA, and later with the Uruguay Round amendments to the GATT system, prompted numerous critiques of the respective regime’s anti-democratic nature. These critics oppose the movement of author-

21 Paul Stephan has examined the link between accountability and legitimacy within international lawmaking institutions. See Paul Stephan, Accountability and International Lawmaking: Rules, Rents and Legitimacy, 17 NW. J. INT’L L. & BUS. 681 (1997).
ity over standards from arguably more democratic national institutions to less democratic international ones.  

More subtle arguments note the implicit shift of regulatory authority within national institutions. In the United States, for example, “Fast Track” authorization shifts substantive regulatory power from the Congress to the arguably less-democratically accountable executive branch. A further shift in authority runs from the states to the more distant federal government through the operation of the Supremacy Clause. Within the European Union, critics identify the “democratic deficit” attending the major EU institutions. Recent and recurring increases in the law-making role of the European Parliament are a partial response to these “democratic deficit” concerns.

A more precise legitimacy critique asserts the democratic challenge from the perspective of each participating polity. Here it is the internal democratic support for a specific nation’s participation in a regime which is challenged. For example, while Denmark’s joining the WTO may be understood as a democratic

23 It may not be a given that the more remote international institution is less democratic than the national one. See Hudec, supra note 15, at 312-13.


25 See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”). Matters traditionally left to the states may suddenly be federalized by entry of an international treaty on the subject. For example, the WTO Government Procurement Agreement, signed by the United States, now disciplines certain state purchasing procedures. See Agreement on Government Procurement, reprinted in MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. No. 316, 103d Cong., 2d Sess. 1719 (1994).


27 See Joseph H.H. Weiler, Parlement Européen, Intégration Européenne, Démocratie et Légimité, in LE PARLEMENT EUROPÉEN (Louis & Waelbroeck eds., 1988). The European democratic deficit is compounded by the fact that the central EU institutions (Council, Commission, Court of Justice) respond, if at all, to the current governments (in the parliamentary sense) of the respective member states, effectively disenfranchising those social elements in each member state habitually standing outside parliamentary majorities.
Indonesia's membership is simply another act of an autocracy. Similarly, one might be somewhat more inclined to accept NAFTA's democratic legitimacy as to the United States, fast-track doubts notwithstanding, than were one to contemplate the legitimacy of the NAFTA adhesion of Mexico. U.S. participation in NAFTA, after all, was implemented by an act of Congress and should enjoy the same presumption of legitimacy as any other federal statute. In Mexico, NAFTA was approved by the controlled Senate which can be viewed as simply having carried out the political will of then-President Salinas.

Finally, a general democratic critique may be aimed at international trade regimes which offer entry to (and imply support for) admittedly undemocratic states. In the case of the European Union, at least, a convincing embrace of democracy by entrants Spain, Portugal, and Greece had been an unavoidable ticket of admission to EU membership. The same will be insisted of the prospective former-Eastern bloc members.

In the case of NAFTA, the inclusion of Mexico into what had been a U.S.-Canada free trade area was thought to encourage more open democratic politics than has been practiced in the modern Mexican experience. Admission to NAFTA has been used as a carrot of inducement as opposed to a carrot of reward. NAFTA's supporters, within and outside Mexico, have conceded that a great deal of Mexican political reform is à faire. Critics of NAFTA often characterize hopes of political reform in Mexico as naive, and impute Mexico's democratic shortcomings to NAFTA as a whole.


29 Note, however, that a pre-ratification poll in the United States showed only 33% of the U.S. public supported NAFTA. See Taylor, supra note 22, at 2 n.4. International treaties which are signed by the President of the Republic and approved by the Camara de Senadores (Mexican Senate) are the supreme law of Mexico. See CONST. art. 133 (Mex.).


31 See Taylor, supra note 22, at 52 n.241; see also CARLOS FUENTES, A NEW TIME FOR MEXICO 132 (1996) (mentioning that NAFTA was never subject to public debate in Mexico, despite the wealth of publicity the agreement had abroad, and suggesting that the secrecy surrounding it was merely typical authoritarian treatment).

32 See Housman, supra note 1, at 721.
The WTO is quite indifferent as to the presence or absence of democracy within its ranks. Although a special regime was constructed to permit state controlled economies to appropriately interact with more market-oriented trading partners, the former GATT included a large number of Marxist-Leninist states. WTO membership currently includes Saudi Arabia, Kuwait, Indonesia, and Burma—nations which are hardly noted for democratic practices. As such, WTO may receive an antidemocratic taint from the participation of certain members. 33

Thus, in order to meet a broad democratic challenge to an international trade regime, an apologist must demonstrate (1) that the regime is sensitive to democratic expression, (2) that membership in the regime is democratically supported, and (3) that the regime does not flagrantly embrace antidemocratic governments. 34

2.2. Narrow Critiques of Particular Outcomes

An alternative line of criticism questions the democratic nature of particular trade dispute outcomes. Rather than objecting to NAFTA, they challenge a particular NAFTA countermand. I will call these specific objections “narrow critiques.” An analysis of particular narrow critiques is likely to reveal a fairly strong correlation with the general positions advocated by various anti-trade constituencies. An environmentalist opponent of WTO will reliably oppose the various WTO countermands that undermine environmental objectives. A critic unhappy with the substantive effect of a countermand will be tempted to add democratic failure to her list of substantive objections.

In order for a narrow, dispute-specific democratic critique to have independent meaning, it should do more than categorically restate the substantive objections. The critique should address democracy as a central value. The following sections present an attempt to examine admissible grounds for a democratic critique of certain trade dispute resolution outcomes in order to usefully discriminate among cases. For the sake of clarifying these arguments only, I will concede the general legitimacy of the trade regime in question. Thus, for purposes of the following sections,

33 See Nichols, supra note 18, at 310-14.
34 NAFTA and the WTO would likely fail these tests. A better case might be made for the European Union.
broader democratic objections will be put on hold, notwithstanding their robustness and appeal.

I will examine disputes about particular outcomes reached within trade-oriented fora that are challenged for inadequately weighing non-trade values. These are special critiques of an international trade regime and its pretense to scrutinize all national law and regulation for their compatibility with free trade. I am not proposing here the establishment of an even higher level of review, such as a chancery of international trade equity that could correct the rigidities and lack of democratic sensitivity of international trade law. Rather, I intend to use these *ex post* critiques as guides to craft screens that can be used by dispute resolution bodies to identify those most "touchy" cases that perhaps should be avoided.

A proponent of a *particular* rival agenda (be it environmentalism, human rights, or labor empowerment) merely wishes to catapult a higher value to trump trade. This critique, as to the world trade system, is necessarily radical (though for strategic purposes, it may be advanced on a case-by-case basis). It is easy to imagine that any such advocate might borrow the rhetoric of democracy to justify a wished-for subordination of trade hegemony. Thus, these critiques subtly or crudely equate their higher value with democratic expression. From an institutionalist perspective, however, where all values, including trade values, are in play, it is helpful to filter out for consideration those cases where democratic criticism adds more, or is more deeply founded, than to decry the subjugation of a non-trade value.

Particularistic critics have various agendas. Countermands engage the affected constituencies of the stricken measure. At the margin, international trade regimes divide and conquer by isolating opposition by the bounds of particular cases. Alliances may be formed opposing the establishment or expansion of a trade regime, such as the labor-green axis opposed to NAFTA. When

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35 Examples include GATT, WTO, and NAFTA panels, and the ECJ.
36 Use of these screens could suggest instances of abstention. Note that the recent WTO dispute resolution reforms have stripped away a country’s ability to block adoption of a panel report. See John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations*, 91 AM. J. INT’L L. 60, 61 (1997).
37 For example, increased labor rights are *per se* pro-democratic.
facing discrete countermands, however, such alliances will likely fail to coalesce. Environmentalists and labor have an uneasy relationship in domestic politics which may discourage cooperation in international matters. Groups generally inclined to oppose a trade regime may find themselves with opposing stakes in a particular dispute outcome.

3. **First Order Problems With Narrow Critiques**

3.1. **Narrow Critiques May Simply Restate Protectionism**

Are all democratic urges deserving of equal weight? Democracy may be too crude a measure for assessing the legitimacy of many trade dispute outcomes. Every panel which sets aside a national measure is open to a facial democratic challenge. Again, when stated so baldly, the democratic critique is unremarkable, and simply repeats the loss-of-sovereignty mantra: International trade panels should not tell national authorities what they can and cannot do.

Not all national measures capture the public imagination with equal force, however. The popularity of a national measure can be seen by the hue and cry which results when it is challenged by another country. No doubt dolphins engaged the American public more so than the reformulated gasoline standards. Some matters are of vital importance and democratic interest, but are popularly viewed as technical. Other matters, like the Tuna/Dolphin issue, may not represent significant volumes of trade but will trigger fierce national reactions when attacked by outsiders. Therefore, some countermands will be popularly viewed as more antidemocratic than others.

Protectionism, the central target of so much trade discipline, may be rationally and democratically instituted by a national policy. Concerted actors, such as the agricultural and steel industry lobbies, have been successful all over the world in securing protective measures. Requiring the international trade system to indulge clearly projectionist law on the theory that a state may well democratically endorse these policies would undo most of trade law and much of its economic advantage.

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39 The presence of identifiable democratic failings in the nation adopting the measure undercuts the force of the resistance to the international discipline.
Protectionism is more than an economic evil signaling the squander of potential gains in trade. It may also be a democratic evil, if it results in a faction (i.e. local producers) imposing welfare losses on the broader public (consumers who pay higher prices). The Kaldor-Hicks test is not satisfied in many cases of protectionism; the benefits received by the protected producers fail to outweigh the losses imposed on the rest of society. Thus, even if the producers' gains were captured (through a tax, for example), society is worse off (at least in a material sense). This follows from the familiar neoclassical argument that protectionism is self-defeating. It also signals a breakdown of the democratic process in many cases.

3.2. Narrow Critiques May Mask Externalization of Economic Harm

A second use (or misuse) of a narrow democratic critique is to support a national measure that has the effect of imposing economic harm on either identifiable trading partners or on the system as a whole. In many cases, the rhetoric of democracy is used to justify national measures that externalize, or would externalize if permitted to stand, economic harms internationally.

The problem here is not so much the incompatibility of international trade discipline with democracy per se, but is rather a problem of identifying what is the appropriate demos. For example, there are numerous economic policy tools available to nations to effectively export unemployment.

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According to Kaldor-Hicks efficiency, one state of affairs, S2, is more efficient than another, S1, if in going from S1 to S2, the people who benefit from the change could compensate the people who lose and still remain better off. See Jeffrie G. Murphy & Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence* 186 (rev. ed., 1990). Nevertheless, note that the Kaldor-Hicks test does not anticipate the actual payment of any compensation. See, e.g., Christopher T. Wonnell, *The Structure of a General Theory of Nondisclosure*, 41 CASE W. RES. L. REV. 329, 336 & n.41 (1991) (offering a hypothetical application of the Kaldor-Hicks test).

41 For example, there are numerous economic policy tools available to nations to effectively export unemployment.

racy operating at the North American level (were this institutionally imaginable) might prevent national externalizing moves that otherwise would have been implemented at the U.S., Canadian, or Mexican level. It may be, as some have argued, that the notion of democracy loses its force when applied at the international or universal level. Thus, an international rule-making mechanism which weighs cross-border economic effects may appeal to efficiency or wealth maximization or even distribution as a touchstone for its legitimacy, but it cannot appeal to democracy. National institutions primarily reflect national interests. There may be duties a polity owes to foreign interests affected by domestic measures, but such a duty does not include any kind of democratic franchise. Nor do we require that democracies give speculative consideration to how foreigners may have acted were a franchise available to them. The foreigner is expressly denied any democratic voice. Taken to the extreme, this line of reasoning may move a democracy to be other-disregarding in its policies.

A simple, clarifying move would be to dismiss trade objections premised on self-serving measures. The mere presence of self-interest should not automatically disqualify a democratic challenge to a particular outcome, but self-interest unchecked certainly raises serious concerns. For an internationalist, much of the attractiveness of international trade law is its encouragement of other-regarding political behavior. There is currently no developed or even articulated general theory of imposition of eco-

<http://www.law.harvard.edu/Programs/JeanMonnet/papers/95/9506ind.html>.

43 But note that EU nationals who are residents in other EU member states are permitted to vote in local and municipal elections. See Treaty Establishing the European Community, Feb. 7, 1992, art. 8(b), O.J. (C 224) 1 (1992), 1 C.M.L.R. 573 (1992) [hereinafter EC Treaty].

44 There is a body of legal literature addressing the effect of the lack of representation for out-of-state interests in U.S. Commerce Clause cases. See, e.g., Jacques Lehouef, The Economics of Federalism and the Proper Scope of the Federal Commerce Power, 31 SAN DIEGO L. REV. 555 (1994).


nomic harm in the international law. Rather, we have a patchwork of norms, including the outside limits on the imposition of boycotts and sanctions and the various strands of national and international response to defined unfair practices in trade law. An immunizing recognition of democracy may retard the development of international law that might appropriately contain cross-border economic harm.

3.3. Narrow Critiques May Restate “Trade and...” Claims

There is certainly something important about “trade and...” controversies. That is, international trade cases exist where the results driven by neoliberal principles should yield to other values. We should have the opportunity to consider, at least, whether our concerns with fairness to workers, environmental quality, or preservation of a culture justify a relaxation of trade rules.47 Which are the appropriate “trade and...” cases is more problematic. All political actors have non-trade values which they might well prefer to trump the shared interest for open markets. While greens, labor organizers and human rights activists may share a common opposition to the hegemony of the world trade system, they may differ as to which alternative values should rule, and under what circumstances.

In short, there are few widely-shared, noncontroversial values available. Where there is broad agreement across nations about higher values (such as banning goods produced by prison labor48 or protecting endangered species) the trade system has responded by recognizing exceptions.49 Other interests, less able to com-

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47 Philip Nichols calls these “societal values.” See Nichols, supra note 12, at 659.
48 See Charnovitz, supra note 11, at 323 & n.133.
49 The terms of GATT permit import restrictions on goods produced with prison labor. See GATT art. XX(e). Further prohibitions exist on trade in endangered species. See id. arts. XX(b), XX(g).

This suggests that qualifying non-trade values should earn a place on the lists of exceptions, such as the GATT’s article XX. Article 36 of the EEC Treaty is not the sole source of qualifying justifications for derogations from the Free Movement of Goods principle; there is also a general category of “mandatory requirements” which go beyond the exceptions listed. See Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 E.C.R. 649, [1979] 3 C.M.L.R. 494 (1979). “Mandatory requirements” are now labeled “public-interest objectives” under Joined Cases C-267 & C-268/91, Keck and Mithouard, 1993 E.C.R. I-6097, [1995] 1 C.M.L.R. 101 (1995).
mand the consensus necessary for vaulting above the trade regimes, may best argue for some balancing, winning some cases and losing others.

"Trade and . . ." style controversies have arisen in part because the trade regimes were unable to anticipate regulatory developments and so failed to include appropriate derogations. The Treaty of Rome does not include exceptions for environmental regulation or consumer protection; in fact environmental protection per se was outside the competency of the European Economic Community. Thus, the ECJ produced environmental and consumer protection derogations out of whole cloth. They made the correct political judgment that, had the Treaty of Rome been drafted twenty years later, such accommodations would have been expressly provided.

Likewise, GATT's treatment of environmental policies is awkward. Article XX(b) provides an accommodation for measures necessary to promote human, animal and plant life or health and Article XX(g) permits measures relating to the conversation of natural resources. Thus, GATT's compatibility with such basic environmental regulation as the Clean Air Act was an open controversy. It interesting to ponder whether most notorious "trade and . . ." cases would have arisen if GATT had been drafted in 1987 as opposed to 1947, where awareness and understanding

50 Daniel Esty has argued for a "GATT for the environment" which would be a parallel regime to the trading system capable of weighing environmental values. See generally DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE (1994).

51 Harmonization of environmental standards was authorized as an ancillary goal to the creation of the internal market. See Case 92/79, Commission v. Italy, 1990 E.C.R. 1115.


54 See id. at 780-90 (discussing the central role the Article XX(b) and Article XX(g) exceptions play in GATT).

55 Bermann makes a similar speculation with respect to Article 36 of the Treaty of Rome. See GEORGE BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW (noting that if Article 36 had been drafted in 1977 instead of 1957, it would have included consumer rights and environmental protection).
of environmental issues are heightened.\textsuperscript{56} One can imagine a redrafted Article XX section that would generally exempt environmental measures,\textsuperscript{57} subject of course to the overall limit on disguised restraints on trade.\textsuperscript{58} Those “trade and . . .” cases which simply reflect the obsolescence of the trade regime are best handled by either expressly amending the provision or by creative (and sensitive) rulings in dispute resolution.\textsuperscript{59}

In some sense, the “trade and . . .” opposition may simply point at the democracy deficit affecting all superior legal hierarchy (like U.S.-style federalism); the neoliberal trade agenda happens to be the particular set of values driving the highest order of law. “Trade and . . .” tensions may simply replay the familiar populist-democratic critique of U.S. constitutional federalism. However, as in the United States, it is not always clear that the local is more democratic than the national.

Alternate values may be directly promoted by trade opponents. An environmentalist might prefer a “sustainable development” ethic over neoliberal trade principles. On the other hand, an environmentalist might also prefer “sustainable development” over democracy.\textsuperscript{60} The democratic critique of the international trade regime is special. It signals more than substantive disagreement over policy objectives. It challenges both the ranking of public values as well as the legitimacy of the system.

“Trade and . . .” conflicts may be an unavoidable artifact of the relatively primitive institutional design of the world trade sys-


\textsuperscript{57} But note that Article XX was not amended when the GATT was restated as GATT 1994 as a part of the WTO Agreement.

\textsuperscript{58} This overall check on an otherwise permitted national measure is provided in the so-called “\textit{chapeau}” or preface of Article XX. Under the Article XX \textit{chapeau}, GATT-inconsistent national measures qualifying under an Article XX exception are permitted “[s]ubject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on [international] trade.” GATT art. XX.

\textsuperscript{59} See Charnovitz, \textit{supra} note 53 (discussing the possibility of judicial activism in WTO dispute resolution).

\textsuperscript{60} See ANNA BRAMWELL, ECOSYSTEM IN THE 20TH CENTURY 161-74 (1989) (discussing links between the early environmental movement and protofascism).
tem. We might generally agree, when facing a specific controversy, that certain non-trade values should be promoted in that context. We might not, however, be able to describe these cases ex ante, either in general principle or by providing specific exceptions. Our second best approach is to pose trade values as a dominant rule, and then deal with the anticipated slipping and sliding later. This approach would view many "trade and..." disputes as instances of institutional inaccuracy.\(^{61}\) Through the ongoing process of (appropriately informed) dispute resolution, the history of these conflicts would provide nuanced pairings of trade and other values, contouring the functioning of the trade regime to a broader experience.

A free-trade driven presumptive rule only makes sense if the authentic challenges are relatively rare. If the conflicts between trade and other values are consistent and irreducible, we have not advanced the discourse, or institutional efficiency, by putting trade first and foremost. One's view on this is likely to track one's political preferences: a free-trader will see "true" non-trade challenges as exceptional. A labor advocate might see free-trade as serving the public good only infrequently and then largely by accident.

The so-called "Washington Consensus"\(^ {62}\) sees neoliberalism as a favored principle, both as a guide for international interactions and as a higher value within respective national polities.\(^ {63}\) This—right or wrong—is a particular set of political beliefs.\(^ {64}\) An international system built on free trade can function without an insistence that free-trade be adopted as an internal test for policy making. Indeed, the creaky old GATT regime managed to function along with the creaky old non-market economies. Furthermore,

\(^{61}\) See Trachtman, supra note 11, at 19-26.

\(^{62}\) The term "Washington Consensus" is used to describe the various policy prescriptions of international lending institutions, primarily the International Monetary Fund ("IMF") for developing nations. These include tariff reductions, liberalization of restrictions on foreign direct investment and fiscal probity, often involving austerity measures. At times, implementation of these prescriptions are a condition for IMF lending. See S. Neal McKnight, Stepping Stones to Reform: The Use of Capital Controls in Economic Liberalization, 82 VA. L. REV. 859 (1996).


the so-called "interface" issues seemed more of interest to academics than the interested policy makers. Trade values will continue to enjoy an inherent advantage, even if trade discipline is open to attack and compromise through an institutionalized interaction with other values.

4. IDENTIFICATION OF ANTIDEMOCRATIC OUTCOMES

4.1. Transcendentalism

For the moment, let us accept the primary role that free trade values have, at least within the international economic regime, and ask ourselves under what conditions can the prescriptions of free trade be set aside for other values based on democratic concerns. In other words, a democratic critique of trade values should be a special critique, presenting more (and perhaps less) than a direct collision of competing values.

And, if we avoid, for the time being, a general democratic critique, how can we evaluate discrete cases to see if democratic concerns have been appropriately integrated? At one extreme, we can suggest a transcendental method: an observer might divine a democratic rod to measure trade dispute results. There may be easy cases where this feeling-in-the-dark can generate broad consensus. Apartheid is so clearly antidemocratic (and evil), and is so generally recognized as such, that import restrictions and other economic sanctions should be allowed to stand, whatever the imperatives of international trade. These clearly antidemocratic cases are few. More would be inclined to dispute, say, whether government dominated trade unionism, as exists in Mexico, is so clearly antidemocratic as to justify departures from trade discipline. And even more might fail to see how concerns about democracy justify import restrictions dedicated to preserving marine mammals. Transcendentalism, to the extent it works, marks only a small number of cases where trade discipline should yield to democracy. By negative implication, it preserves the hierarchical presumption of trade values in many more cases where a searching democratic critique might be valuable.

65 See JACKSON ET AL., supra note 4, at 1140-42 (noting problems which occur under GATT when a market economy and state trading economy "interface").
4.2. **Motives and Complex Coalitions**

Motives are important in considering a democratic critique. Indeed, it is precisely the expressiveness of democratic will that lends a presumption of legitimacy to an enactment. Motives are not easy to isolate in contemporary lawmaking, where indirect democracy is at work. While lawmakers will dutifully assert compliance with the democratic will (as they understand it), we are all keenly aware of the raging influence of interest group politics. If anything, interest group politics should be more prevalent in matters affecting international trade, as certain broad interests (such as consumers generally and the perhaps legitimate interest of extranationals) are more weakly represented.

Thus, a national opinion poll may show wide popular support for dolphin protection. The enactment of the Marine Mammal Protection Act, however, more likely results from the felicitous convergence of animal rights and U.S. fishing interests. Should tuna import restrictions be immune from the trade rules because the restrictions (and dolphins) are popular in the U.S.? Should the measures be struck down because they result from special interest politics? Legislative motives are likely to be unreliable guides in assessing which challenges should be heard.

4.3. **Authenticity and Idiosyncratic Tastes**

We can insist, as a condition to recognizing a democratic objection, that the objection be advanced in good faith and not as a pretext for antisocial behavior. Not all trade disputes involve authentic democratic expressions. Indeed, there are instances where countries have welcomed trade discipline as a viable response to internal political conflicts. Asking when a democratic objection is authentic is a transcendental technique, and so is subject to unreliability. As a screen however, it may identify the

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66 The Pelly Amendment provisions challenged by Mexico in Tuna/Dolphin were part of a statute named, with charming transparency, the Fishermen's Protective Act. See Tuna/Dolphin, supra note 10, at 171.

baldest cases where democracy is merely a guise for irresponsibility, and deflect them from further consideration.

I would further refine a test for authenticity to take into account idiosyncratic tastes: where these are present, democratic expression is worthy of greater consideration. This approach suffers from the problems of identifying motives within complex coalitions, discussed above. Still, there are situations, like *Japanese Rice*,68 where more is at stake than the desire of Japanese rice growers for protection; like *Canadian Magazines*,69 where more is at stake than the economic viability of Canadian publishers.

4.4. **Kosher Meat**

Religious or cultural practices may be a source of idiosyncratic stances. For example, Israel forbids the importation of non-kosher meat.70 The import ban on non-kosher meat can be described as idiosyncratic as (1) it is likely unique to Israel and (2) it is motivated, at least in part and probably in large part, by non-economic concerns.71 The United States agreed to not challenge the Israeli import ban on non-kosher meat as part of the U.S.-Israel Free Trade Agreement.72 Curiously, Israel does not forbid the production of non-kosher meat within its territory. Notwithstanding this clear instance of import discrimination, the United States recognized the intense interest of Israel in supporting Jewish dietary restrictions.73 While it is true U.S. non-kosher meat producers are denied access to the Israeli markets by operation of the import ban, they presumably have access to most of the world's other markets. Thus, the uniqueness of the import ban

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68 See infra discussion and accompanying notes Section 5.2.
69 See infra discussion and accompanying notes Section 5.3.
71 Again, motivation is a slippery concept in indirect politics. There were likely supporters of the import ban who acted for religious reasons; likely present too were Israeli butchers who sought protection from U.S. competition.
(and the unlikelihood that other nations will follow it) suggests that such idiosyncratic measures cause relatively less harm.

5. INTERNALIZATION AND SELF-SACRIFICE

5.1. Self-Sacrificing Measures

We should not defer blindly on democratic grounds to national measures which have the effect of externalizing economic harm. Given economic linkages, many domestic laws and regulations have effects outside the national borders. International trade regimes, such as WTO, NAFTA, and EU, by creating expectations of free trade, give content to the notion of externalization. A U.S. tuna import restriction which puts Mexican fishermen out of work should be examined; the externalized costs imposed on Mexico by the restrictions are real (they may or may not be justified).

On the other hand, the distortions created by certain national measures may be largely internalized. These measures should be given greater deference. My notion here is that democratic expression should be valued in some rough proportion to the cost the respective polity is willing to bear. In other words, this test measures the extent to which the efficiency costs introduced by a national measure are internalized. I label these cases “self-sacrificing.” That is, we should compare the internalized cost to the total cost introduced by the measure:

\[
\begin{align*}
a &= \text{Cost borne by nation imposing measure (internalized cost)} \\
b &= \text{Cost borne by other nations affected by measure (externalized cost)} \\
a + b &= \text{Total cost}
\end{align*}
\]


75 Trachtman has noted the analogy between the role territoriality plays in defining international externalities and the role of property in defining externalization in private law. See id.
\[ \frac{a}{a+b} = \text{Measure of "self-sacrifice"} \]

The greater the degree of "self-sacrifice," the more likely a democratic claim will be authentic. After all, in these cases the people invoking the measure are willing to accept economic burdens in order to enjoy certain political preferences.

Note that self-sacrificing measures may still generate considerable negative externalities, and so may be challenged by the international trade regime. Just because the imposing nation bears a sizable burden due to its trade restrictive practice does not imply necessarily that other countries do not experience significant economic harm. The international trade regimes, as presently constructed, do not generally compare the relationship between internalized and externalized distortions.\(^{76}\) Indeed, a GATT panel has held that even a \textit{de minimis} burden on international trade may be actionable.\(^ {77}\)

In the \textit{Salmon and Herring} case, a U.S.-Canada Free Trade Agreement ("FTA") panel suggests a test which considers externalization: would Canada have imposed the landing requirement (which affected both Canadian and U.S. fishing fleets) if Canadians bore all the costs of the measure. A conservation measure is bona fide, and so eligible for an exception, if the imposing nation would have enacted it even if it had it been obliged to internalize the burden on international trade.\(^ {78}\) Presumably, the test operates in the opposite direction to suggest instances of disguised restraint on trade: were a panel to find that the national measure would \textit{not} have been adopted in the case of full internalization, the measure should be presumed to be protectionist. The \textit{Salmon and Herring} test asks that one consider a hypothetical situation that is counterfactual: there are no established means by which countries will bear the externalization costs of their restrictions. In this it resembles the Kaldor-Hicks test, with its imagined (non-existent) compensations between benefited and harmed actors.\(^ {79}\)

\(^{76}\) See \textit{id.} (discussing externalization and prescriptive jurisdiction).


\(^{79}\) See discussion at \textit{supra} note 40.
Self-sacrifice is a similar, but distinct test. Rather than hypothesizing an internalization that does not exist, it measures externalization and recognizes it as a cost borne by the larger international community. It is the overall rapport between internal and external costs that is the key to the notion of self-sacrifice. Restrictions of kosher meat are unlikely to significantly harm U.S. meat producers; most of the cost of the restriction (higher meat prices) are borne by Israelis. To the extent self-sacrificing measures impose costs on the larger trading system, the nation imposing them can be said to bear some important share.

All instances of protectionism involve some degree of internalization, of course. The U.S. bears some portion of the cost of dolphin-safe import restrictions by paying higher tuna prices. Discerning self-sacrifice from protectionism will not always be easy. Protectionism involves some significant wealth transfer within the nation imposing the measure and perhaps democratic failure. Self-sacrifice involves an expression of broadly shared values and so merits a democratic presumption of legitimacy.

To some extent WTO rules tolerate the maintenance of unilateral trade restrictive measures which are self-sacrificing, in that a non-complying nation can always elect to pay compensation (or suffer retaliation). Compensation or retaliation effectively internalizes much of the external harm of the offending measure. Such compensation or retaliation may, however, cause additional distortions. Moreover, the existing liability system still forces an inflexible, negative evaluation of some measures that should be respected as relatively selfless democratic urges. The economics of the WTO dispute system may be working in a helpful direction, but its politics are problematic.

5.2. Culture and Japanese Rice

Japanese rice exclusions may be an example of a self-sacrificing measure. The Japanese pay much higher prices for domestic rice because of the absence of imports, and bear some meaningful portion of the cost of the distortion they generate. Japanese rice is not a simple case of protectionism by the Japanese rice growers;80

80 During the presentation of this essay at the Linkage as Phenomenon conference, participants offered a variety of accounts, some amusing, of the Japanese rice restrictions. One story suggested that the Japanese rice import ban was justified by land conservation and flood control concerns. The rice paddies were an important part of the overall ecosystem.
rather it is a story about idiosyncratic tastes: the almost incomprehensible preference by Japanese consumers for rice grown in Japan.

Of course, preferences go only so far in telling this story. Were Japanese consumers to prefer Japanese rice absolutely, the presence of imported rice in the Japanese market would have no effect on their patterns of consumption. One doubts the preference is quite so strong. Still, one can easily imagine the presence of some deeper cultural value reflected in the Japanese restrictions on foreign rice. And it may be that this value cannot be satisfied by permitting free consumer choice; that in some sense certain Japanese rice consumers may be offended by others consuming non-Japanese rice. 81 In other words, restrictions may be a deeper democratic result than simply reflecting either majoritarian dominance by traditionalists or capture by Japanese rice producers. If Japanese rice restrictions are a self-sacrificing measure, perhaps they should be allowed to stand.

5.3. Culture and Canadian Magazines

The importation of “split-run editions” of U.S. periodicals has been prohibited by Canadian authorities. 82 Because of “grandfather” provisions, Time and Readers Digest had been permitted to produce special Canadian editions by inserting a small amount of Canadian-interest material but relying largely around the U.S. edition content, hence the term, “split run.” 83 Sports Illustrated effectively recreated the split run practice by transmitting the content of its U.S. edition by satellite for printing in Canada. Thus, no magazines were physically imported into Canada. A small amount of Canadian editorial was added to the U.S. product and advertisements were sold to Canadian advertisers. Canada reacted to the entry of Sports Illustrated Canada by subjecting advertising placed in it to an eighty-percent excise

81 See infra discussion of psychic harm in Section 5.5.


tax. Canada also denied Sports Illustrated Canada favorable postage rates. A WTO dispute resolution panel agreed with the United States that the excise tax was discriminatory in effect, and so a violation of GATT article III.\(^{84}\)

Canada’s justification for restricting split-run editions of U.S. magazines was premised on its interest in fostering and protecting a viable Canadian culture. The effect of the Canadian ban was no doubt protectionist: Canadian periodicals could only survive if protected from the competition of U.S. magazines (who enjoy enormous efficiencies of scale). By sheltering Canadians from Sports Illustrated Canada, Canadian sports fans can read a Canadian publication which gives appropriate coverage to ice hockey and Canadian football.

The ban on U.S. produced periodicals likely meets the test for authenticity. Canadians are highly aware of their cultural vulnerability, and have a long history of encouraging and protecting Canadian culture. The Canadian measures are relatively idiosyncratic; other nations have easier times promoting a defining national culture. English Canada, at least, lacks the linguistic barriers that often operate to segment cultures.

5.4. Consumer Preferences and Japanese Alcoholic Beverages

Japan had maintained an internal taxing scheme which favored shochu, a traditional spirit, over other spirits, whiskeys and liqueurs, imported and domestic. In *Japanese Alcoholic Beverages*, the European Communities attacked this practice. Japan argued that as a matter of trade law it was free to classify goods for excise tax purposes so long as it respected national treatment; shochu was something different, and special for the Japanese.

Assume shochu is something different from vodka or other clear spirits, at least in the minds of the Japanese consumer, even though this difference might not be discerned by non-Japanese taste buds or by a chemical analysis. Shochu is also defined through regulatory differentiation. It is precisely this Japanese

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ability to so differentiate, deeply rooted in a cultural context, that may make this an authentic democratic expression, and so justify protection.

5.5. Scale Effects and German Beer

In the famous German Beer case, the European Court of Justice held that Germany could not restrict the use of the product description Bier exclusively to beverages produced according to the centuries-old Beer purity law. Rather, beer lawfully produced in other EU member states must be permitted to be described as Bier, even if the non-German beer was produced with cereals other than malted barley or contained additives. Germany raised public health and consumer protection justifications for the application of the Beer purity law to non-German beer which the Court found unpersuasive.

Article 36 does not permit an exception to the free movement of goods premised on cultural preservation. Nor did the Court see fit to recognize German national cultural concerns as a mandatory requirement under the Cassis de Dijon line of cases which would justify the maintenance of the German measure. The case, which established little new law, generated a huge public reaction in Germany, suggesting serious democratic discontent with its holding.

The result of the German beer holding is that French, Belgian and Dutch beers could be lawfully imported and sold in Germany as Bier, even though these beers did not comply with

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88 The European Court of Justice has held that national measures should not operate to “crystallize given consumer habits” along national lines. Case 170/78, Commission v. United Kingdom, 1983 E.C.R. 2265, 2287 (discussing the wine and beer excise tax case). This suggests that national cultural values may be antithetical to the establishment of the common market. But see Case C-379/87, Groener v. Minister for Education, 1989 E.C.R. 3967. The EU has taken measures to protect European cultural values, most notoriously in the Télévision sans frontière initiative. See Council Directive 89/552, 1989 O.J. (L 298) 23.
the German Beer purity law. Suppose now the following, which may or may not conform to reality:

1. Traditional German beer is greatly loved by a broad spectrum of the public. A stein of traditional German beer costs 2 DM. A small minority of the German public is less discriminating, and will prefer foreign beer if it is cheaper than 2 DM.

2. Producing traditional German beer is far more expensive than producing beer using the modern industrial methods permitted in other member states.

3. The production of traditional German beer is scale-sensitive. That is, the marginal costs of production decline over the relevant range.

What will be the effect of the entry of the foreign beer occasioned by the lifting of the effective import ban? One can imagine a sequence along the following lines. Foreign beer is introduced and quickly captures the favor of the minority of price-sensitive (and taste insensitive) consumers. German beer producers now must lose a portion of their market. Forced to contract production, the German beer producers now must price their product at a much higher level, say 3 DM. This in turn may drive more consumers towards the foreign product. The process repeats, with traditional German beer prices rising and market share declining, until stabilizing eventually with a small cult following willing to pay perhaps 8 DM for a beer.

Are German consumers overall better off? The economic answer is yes. Is this a democratic result? Here the answer is not so clear. Those price sensitive beer drinkers who first defect to the foreign beer have clearly been benefited. Cheaper beer which satisfies their demand is now available in the market. But those German beer loyalist who had been content to pay 2 DM (or more) for traditional beer, even in face of a cheaper foreign competitive product, and who can no longer find traditional beer at that price have been harmed. Lifting the import ban effects a wealth transfer between one group of beer consumers and another.

The implicit internal wealth transfer illustrated by this story may or may not be democratic. Simple majoritarianism would permit the greater number of traditional beer drinkers to force
the price sensitive consumers to pay higher prices (by operation of the import exclusion) in order to lower the cost of traditional beer. This may be a democratic result which lifting the import ban upsets. Of course, the price sensitive beer consumers may be poorer, and so the implicit wealth transfer may be regressive. Depending on how social justice notions may or may not be linked to democracy, the elimination of the import ban may also be viewed as democratic.

There may be many markets were the enjoyment of a good by a particular group in society may depend on that good enjoying an exclusive market. A good with production economies-in-scale, like German beer, may fit this pattern. Kosher meat may also be an example; kosher meat may be cheaper if all meat is kosher. That is, if non-kosher meat enters the market, the price of kosher meat may rise. There are also psychic harm type cases that fit this model: a Canadian hockey lover may be harmed if other Canadian sports fans are seduced by Sports Illustrated Canada into following NCAA football. Given the possibility of deceptive substitution, an observant Israeli may feel less trusting of the kosher quality of the meat he purchases if non-kosher meat is also present in the market.

5.6. Political Capture

There is likely a continuum of national measures inconsistent with trade discipline running from pure “beggar-thy-neighbor-dom” to pure self-sacrifice. We can expect a large number of cases where mixed motives are in operation (of authentic and protectionist kinds). In other cases the extent to which a nation imposing a measure bears an important share of its distortion cost is not so clear.

The national bearing of cost for this purpose, of course, is measured in gross; within a polity, some discrete interests may gain even if the measure causes an overall national welfare loss. Thus, to return again to tuna restrictions, even if it were shown that overall the United States was engaging in self-sacrifice (reflected largely in higher tuna prices), this does not necessarily argue that the trade system should defer on democratic grounds if the cost burden is a result of political capture by interests benefiting

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89 This may explain the Israeli ban on non-kosher meat.
from the measure. Indeed, a democratic argument could be advanced precisely for upsetting the national legislative outcome.

6. COUNTERMANDS AND ANTIMAJORITARIANISM

6.1. Democracy, Antimajoritarianism, and Trade

The American democratic experiment, perhaps more so than continental forms, is premised on a distrust of "factions," whether of the majority or minority.90 Pure majoritarianism has never been thought to be per se democratic.91 We understand that the operation of politics may permit either majorities or minorities (of the factional kind) to install legislation. Mere enactment is only prima facie democratic.

Contemporary political theory has made us aware of how factions (interest groups) can use superior organization and information cost advantages to work their will in legislation.92 These insights merely confirm a distrust of legislative outcomes as embodying democratic desires. Alan Sykes and Paul Stephan have each used public choice theory to account for the enactment of protectionist laws that favor producers over broader consumer interests.93 At times, depending on the structure of interests, protectionist measures can be favored by majorities.

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90 This insight originates from the "Madisonian theory of democracy." ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 7 (1956).

91 Plebiscites are infrequently found in the United States. California is the most notable exception. A California plebiscite, Proposition 187, limited the rights of undocumented aliens to draw on social services. The measure was approved by 59% of Californians voting, but one might argue whether it was "democratic." See Michael Doyle, Toughest Border Plan Yet, SACRAMENTO BEE, Mar. 22, 1996, at A1. For an argument that plebiscites have ruined California, see PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE (1998).


6.2. Trade System Strikes Down National Measure Favored by Majority

The trade regime can intervene usefully to secure democratic expression to minorities (or in cases of political capture, majorities). We should not be shy about insisting that nations incorporate into their regimes, along with market facilitating institutions, some democratic order. The WTO’s indifference as to the democratic qualifications of its membership should now be rejected.

Opportunities may arise for the world trading community to promote democracy: analogs to the dismantling of the Jim Crow South, where the higher (in that case, U.S. federal) authority trumped locally determined political outcomes (i.e. segregation) in a pro-democratic manner. This quest, I suppose, is optimistic; that cases exist where democracy is advanced, and not hindered by NAFTA, EU, WTO and the like. These would be felicitous and perhaps quite rare cases where “political failure” has occurred in national politics, but is corrected, in some sense, by the international trade regime. The international trade regime may create “rights” (a new legal heritage, in the EU sense) or at least expectations that may be invoked by nationals against their respective states.

NAFTA may present such an opportunity. Currently the Labor Side Agreement merely requires Mexico to enforce its existing labor code. But norms may develop under the side agreement or under NAFTA itself to require significant labor reform. This in turn may contribute to the progress of meaningful democratic progress in Mexico. Similarly, environmental NGOs in Mexico and in the United States have used NAFTA’s enforcement provisions to obtain compliance with national norms. Again, I hesitate to resemble an apologist, but the democracy question, at least with respect to NAFTA, is not entirely hopeless.


95 I do not suggest that NAFTA will compel Mexico to harmonize or otherwise bring its labor standards “up” or “down” to U.S. or Canadian levels. See Atik, supra note 56, at 93-97.

96 See id.
6.3. Trade System Imposes Measure Favored by Minority

In a greater number of instances, the international trade disciplines are affirmatively requiring national enactment. This has advanced farthest in Europe (principally through the directive) but can also be seen in NAFTA and the WTO agreements. TRIPS, for example, requires WTO member to adopt intellectual property regimes that may not otherwise command majority support within national legislatures. To the extent these requirements have effect, they do so in opposition of expected majoritarian outcomes. To stand, we might require a heightened showing of democratic legitimacy, either through identifying an offsetting gain as part of a larger bargain or by identifying a minoritarian expectation that can be appropriately cloaked by democratic values.

Enforcement disciplines may be an additional form of antiamajoritarianism. NAFTA, for example, requires its parties to enforce their respective laws on labor, the environment and intellectual property. To a certain extent, NGOs can invoke NAFTA to compel compliance within their respective countries. Thus, minorities who have secured favorable legislative outcomes can receive additional, external protection in cases of administrative non-enforcement by succeeding majority governments.

7. CONCLUSION

An examination of specific dispute phenomena may test notions about democracy and the legitimacy of the international economic order that a more general critique fails to capture. This essay addresses these more limited critiques, aimed at specific dispute resolution outcomes. I am interested throughout in identifying cases where the international trade regime is invoked by interest groups who have been shut out of local/domestic politics, or at least have failed to achieve their political ends.

We then might apply a useful screen to instances where democracy is invoked to question the appropriateness, if not the le-

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97 See supra note 2.
98 See NAFTA, supra note 87, art. 1601 (labor provisions), art. 904 (environmental provisions), art. 1701(1) (intellectual property provisions); Retreat from Harmonization, supra note 56, at 97-99.
g.itimacy, of an international trade dispute outcome. First we might ask if the national measure enjoyed the clear support of its population: a widely endorsed measure should receive greater respect. If this is so, we might ask if the nation imposing the measure has meaningfully borne a share of the distortion costs imposed on the system. If, on the other hand, we look through and cannot see a compelling instance of democratic expression, or if there is patent externalization present, then application of trade discipline seems even more appropriate. And finally, if we see cases where democracy has been disregarded, the trade system might usefully exert its hierarchical position to exact progressive change.