

# OPPORTUNISM AND TRADE LAW REVISITED: THE PSEUDO-CONSTITUTION OF THE WTO

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**Abstract:** The constitutionalization of the world trade system has elevated it in legal thinking and given it a false aura of permanency and immutability. The debate among legal academics on this has centered on the technical aspects of trade disputes rather than on the critical issue of the normative nature and effects of the system on those most affected—workers. The opportunistic actors who successfully argued for the creation and constitutionalization of the system have managed to relegate the debate about its continuing benefits to the side. They have benefited from legal scholars’ failure to adequately evaluate and analyze the real effects of the system. Being a trade law dissident is more important now than ever before.

*The language of the WTO, like the language of NAFTA, is “constitutional.” It sets up supranational governance with powers to override what had previously been the province of sovereign states. . . . [B]oth NAFTA and the WTO perform the traditional role of constitutions. They entrench certain inviolate principles or norms that are above the reach of any national legislature to alter; set limits on the behavior of governments; define rights of citizenship; establish a judicial system to interpret its own texts in the case of conflicts; and provide for the enforcement of the court’s decision.*

—Jeff Faux<sup>1</sup>

## INTRODUCTION: THE IMPORTANCE OF BEING A TRADE LAW DISSIDENT: ON THE GEOGRAPHY OF THE SCHOLAR

I recall a conversation I had with a trade law academic after a conference on various aspects of contemporary trade regulation. I expressed my objections to the whole logic and schema of global trade regulation, especially the degree to which trade law had been “constitu-

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<sup>1</sup> JEFF FAUX, *THE GLOBAL CLASS WAR: HOW AMERICA’S BIPARTISAN ELITE LOST OUR FUTURE—AND WHAT IT WILL TAKE TO WIN IT BACK* 161 (2006).

tionalized”<sup>2</sup> without affected populations understanding the relation between global trade rules and their own economic fortunes.<sup>3</sup> My interlocutor countered that global job sharing, for instance, was a positive thing, and that the movement of jobs to the more optimally efficient locales was similarly to be welcomed. I presented him in turn with a hypothetical: what if an academic located in another country—take South Africa or India, for instance—could do his university job for one-half or one-third the salary.<sup>4</sup> Would he still espouse the benefits of job movement? Would the doctrine of comparative advantage, the foundation of our free trade system, cover this situation as well? Would he still support the logic of free trade in goods and services, regardless of actual effects, but rather in the name of some higher concept?

His answer was certainly less assured when the topic of conversation turned on his own economic well-being. My very simple point is that it is far easier to support, or at least accept, the application in law of a concept when its adverse effects fall on others. When legal academics fail to grapple with the inconsistencies, perversities, and likely adverse effects of the laws about which they otherwise think and write, they also fail to engage in one of their core tasks: the process of legal reform. Law does not exist simply to give them something to write about; rather, it is the site where the legal academic intervenes on behalf of those affected by the laws in question. In the area of trade law, legal academics have failed in this all-important task.<sup>5</sup>

The geographical location of the scholar is surely relevant to the enterprise of analyzing international trade law. The effects of global trade rules fall unevenly on different nations and groups within nations. If international trade law and policy adversely affect American labor, for instance, can or should U.S. trade scholars simply continue to

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<sup>2</sup> See DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* 19 (2005) (describing constitutionalization as “associated with the emergence of a foundational device signaling a new, coherent system of social practices to constrain behavior, whose authority is legitimized by a political community whose views are represented, and which, in turn, uses a deliberative process to make law and which has the effect of realigning traditional sovereign relations among constituent entities and between itself and those sub-parts”).

<sup>3</sup> See generally Anne Peters et al., *The Constitutionalisation of International Trade Law*, in *THE PROSPECTS OF INTERNATIONAL TRADE REGULATION: FROM FRAGMENTATION TO COHERENCE* 69 (Thomas Cottier & Panagiotis Delimatsis eds., 2011) (discussing World Trade Organization (WTO) constitutionalism).

<sup>4</sup> Perhaps this could happen through satellite hookup, or some other means, as technology evolves.

<sup>5</sup> See *infra* notes 90–117 and accompanying text.

describe trade law and trade disputes as if their work was disconnected from the surrounding geographical reality? It could be argued that it is possible, even desirable, for the trade law scholar to study these rules from a neutral point of view, much like the study of human rights law, but that is to abdicate the role of the scholar as a public intellectual, in favor of the scholar as an informed technician.

I always tell my trade law students that “globalization” is not just an idea that an enlightened international populace embraced as a good one. It is not just a policy choice, or even just an aspiration, but rather a reality created, at least in large measure, through the operation of real laws reflecting particular commercial ambitions.<sup>6</sup> If one sees international and regional trade agreements as transnational constitutional law (or at least as international statutes) and trade disputes as providing interpretative case law, there is an unmistakable link between global trade regulation and the economies within which we all live and work.<sup>7</sup>

It is doubtful that members of the general public have much if any idea as to why and how phenomena such as mass “outsourcing” occur or what specific rules international and regional trade agreements actually contain.<sup>8</sup> They are, however, aware that every time their government enters into a new trade agreement, political leaders promise that this will lead to more and better jobs and greater prosperity, and will

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<sup>6</sup> See generally Sara Dillon, *Opportunism and the WTO: Corporations, Academics and ‘Member States,’* in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 53 (Colin B. Picker et al. eds., 2008) (arguing, in part, that the global trading system is the result of the opportunistic actions of multinational corporations).

<sup>7</sup> The economic effects of international trade law on our lives are discussed by a wide range of academic works. See, e.g., Dan Danielsen, *Economic Approaches to Global Regulation: Expanding the International Law and Economics Paradigm*, 10 J. INT’L BUS. & L. 23, 49–50 (2011) (discussing the economic effects of trade rules on labor and standards of living); Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT’L L. 797, 799, 856–62 (2012) (same); Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil & Mexico*, 52 VA. J. INT’L L. 551, 586–87 (2012) (same).

<sup>8</sup> See Beverley Earle et al., *A Finger in the Dike? An Examination of the Efficacy of State and Federal Attempts to Use Law to Stem Outsourcing*, 28 NW. J. INT’L L. & BUS. 89, 111–12 (2007) (noting states’ attempts to “heighten public awareness of outsourcing”); Ramkishan S. Rajan & Sadhana Srivastava, *Global Outsourcing of Services: Issues and Implications*, HARV. ASIA PAC. REV., Winter 2007, at 39, 39–40 (noting that the rapid increase in global outsourcing derives largely from a combination of increased transnational mobility and information communication technology); James Emilcar, Note, *A Proposal to Prevent Offshoring: An Analysis of the Latest Anti-Offshoring Proposals*, 11 J. INT’L BUS. & L. 205, 211 (2012) (noting Americans’ unrest as they learned from news reports about job vulnerability to foreign competition); see also Tomer Broude, *The Most-Favoured Nation Principle, Equal Protection, and Migration Policy*, 24 GEO. IMMIGR. L.J. 553, 553–54 (2010) (characterizing the origin of most international migration as economic).

contain environmental and labor protections.<sup>9</sup> It is doubtful that the public finds this rationale completely credible, but there is understandable confusion as to what the appropriate political response should be.<sup>10</sup> In short, members of the public do not understand how trade law works (although they do know that it affects them directly), and so they do not have any idea what kind of reform to ask for.<sup>11</sup>

This Article proceeds as follows: Part I discusses the history of the academic scholarship surrounding the World Trade Organization (WTO) and labor.<sup>12</sup> Part II establishes a general framework within which trade law should be analyzed, incorporating a normative evaluation of trade and the trade deficit.<sup>13</sup> Part III explores the three actors who behaved opportunistically in the creation and constitutionalization of the WTO and the accompanying world trade system: corporations, trade law scholars, and nation-states.<sup>14</sup> Part IV argues that trade law dissidents are necessary, especially as the negative effects of the trade law system are growing stronger and the constitutionalization of the trading system is becoming more ingrained.<sup>15</sup>

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<sup>9</sup> See Park, *supra* note 7, at 803 (presenting the economic theory of competitive advantage as the primary justification for trade liberalization); Zachary A. Goldfarb & Lori Montgomery, *Obama Gets Win as Congress Passes Free-Trade Agreements*, WASH. POST (Oct. 12, 2011), [http://www.washingtonpost.com/business/economy/obama-gets-win-as-congress-passes-free-trade-agreements/2011/10/12/gIQAGHeFgL\\_story.html](http://www.washingtonpost.com/business/economy/obama-gets-win-as-congress-passes-free-trade-agreements/2011/10/12/gIQAGHeFgL_story.html) (extolling the virtues of trade agreements between the United States and South Korea, Columbia, and Panama). Although trade agreements cause economic dislocation in the form of outsourcing, the competitive advantage theory predicts enhanced aggregate wealth and opportunity. Park, *supra* note 7, at 803–04.

<sup>10</sup> Park, *supra* note 7, at 820–23, 827–39 (categorizing the economic and political winners and losers of new trade agreements). Gains realized from trade agreements are spread across many people—in the form of lower prices for goods and services, for example—but the costs are felt locally by those individuals most directly affected by the import condition. *Id.* at 820. As a result, this economic disconnect creates a complex political issue of distributive justice. See *id.* at 830–39. See generally DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* (2009) (describing the history of popular resistance to ideas of free trade).

<sup>11</sup> See Park, *supra* note 7, at 817–23; Ezra Rosser, *Offsetting and the Consumption of Social Responsibility*, 89 WASH. U. L. REV. 27, 30–31 (2011) (analyzing different approaches for offsetting the ill-effects of trade law and positing “that consumption offsetting can help individuals realize their obligations”). How we determine an appropriate economic ordering will likewise determine how we assist the losers of globalization; such an ordering, however, remains undetermined. See Park, *supra* note 7, at 826.

<sup>12</sup> See *infra* notes 16–51 and accompanying text.

<sup>13</sup> See *infra* notes 52–70 and accompanying text.

<sup>14</sup> See *infra* notes 71–124 and accompanying text.

<sup>15</sup> See *infra* notes 125–150 and accompanying text.

## I. LABOR VERSUS CAPITAL: CONVENTIONAL TRADE LAWYER ANALYSIS OF LABOR AND THE WTO

Several years ago, I published an essay that I felt summed up everything I wanted to say about the WTO, both as a creation of international law and as an object of regard for legal academics.<sup>16</sup> It was the essay of a “trade law dissident,” and I had resigned myself to remain in the outer darkness in comparison to the “demi-gods” of trade law scholarship. I had the sense that most of that mainstream trade scholarship was dangerously off the mark in its narrow focus and technocratic orientation.<sup>17</sup> Yet, I was convinced that this field would continue to be dominated, problematically, by a small number of legal academics possessed of the detailed technical knowledge to grasp the workings of trade, but with little if any “useful” commentary on the interaction of empirical economic reality and the structure of international economic law, which had been quickly elevated to the “constitutional” level.<sup>18</sup> The term “useful” here refers to a scholarly contribution to the general pub-

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<sup>16</sup> See Dillon, *supra* note 6, at 53 (discussing the opportunistic actions of corporations, academics, and nation-states during the creation of the WTO).

<sup>17</sup> See generally Antonia Eliason, *Science Versus Law in WTO Jurisprudence: The (Mis)Interpretation of the Scientific Process and the (In)Sufficiency of Scientific Evidence in EC-Biotech*, 41 N.Y.U. J. INT'L L. & POL. 341 (2009) (discussing the technicalities of the Sanitary and Phytosanitary Measures Agreement and its interpretation in WTO disputes); Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case*, 41 N.Y.U. J. INT'L L. & POL. 1 (2008) (discussing the structure of the WTO and its impact on dispute settlement). *But see generally* Robert Bloink, *Is the United States Corporate Tax Policy Outsourcing America? A Critical Analysis of the Proposed Tax Holiday for Trapped CFC Earnings*, 56 VILL. L. REV. 833 (2012) (discussing the effects of tax policy on U.S. stakeholders); Sungjoon Cho, *Beyond Rationality: A Sociological Construction of the World Trade Organization*, 52 VA. J. INT'L L. 321 (2012) (critiquing the rational-institutional analysis of the WTO); Barnali Choudhury, *The Façade of Neutrality: Uncovering Gender Silences in International Trade*, 15 WM. & MARY J. WOMEN & L. 113 (2008) (discussing the social impact of international trade); Park, *supra* note 7 (discussing the impact of the global trading regime on workers and explaining how trade adjustment could be reformed).

<sup>18</sup> Of course, there are various meanings one could ascribe to “empirical.” One school of thought has it that international law in general, and international trade law studies in particular, have recently taken a “turn” in the direction of empirical analysis. See, e.g., Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 1, 3 (2012). The authors seem, however, to be referring to empirical studies of the manner in which the system actually works, rather than the link between the operation of the law and its effects on real people who bear the brunt of its effects. See *id.*; Jun Zhao & Timothy Webster, *Taking Stock: China's First Decade of Free Trade*, 33 U. PA. J. INT'L L. 65, 76 (2011) (referring to the “gravity equation” approach as the “empirical workhorse” in international trade law studies). I will use the term in this latter manner.

lic's understanding of the underlying motivations for and workings of international trade regulation.<sup>19</sup>

As “international trade law studies” developed, I could not fathom why and how so many could focus on the technique of trade disputes without acknowledging the dramatic implications for American workers embedded within the then-newly elevated global trade rules.<sup>20</sup> It could be argued that there is no *scholarly* reason to focus on “American” workers than on any other workers—that the entire project is simply a matter of denationalized economic theory.<sup>21</sup> That consistent failure to pursue an empirical approach was instructive. The intellectual basis for the trade rules in a “comparative advantage” doctrine was flimsy, the likely outcome for certain labor interests plain to see, and yet what was glaringly important to me was completely ignored by most “specialists” in the field.<sup>22</sup> My dominant impression, then as now, was that trade law was far too important to be left to trade lawyers.

The “trade and labor” problem was not lost on those concerned with labor rights and interests at the time of the WTO's creation, or

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<sup>19</sup> See Dillon, *supra* note 6, at 70–71 (citing CATHARINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 6 (2005)).

<sup>20</sup> See David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT'L L. 595, 596–98 (2010) (discussing theories of global governance in international institutions); see also Michael Patrick Tkacik, *Post-Uruguay Round GATT/WTO Dispute Settlement: Substance, Strengths, Weakness, and Causes for Concern*, 9 INT'L LEGAL PERSP. 169, 171–72, 179–84 (1997) (describing the technique of GATT and WTO dispute settlement). Even where academics analyze the interests of multi-stakeholders, the discourse often fails to consider the practical realities and import of its own analysis. See Gartner, *supra*, at 622–29. The absence of such commentary begs the question of whether one *should* be concerned with the economic dislocations in particular countries. What about the march of labor and progress in working conditions over time—can one be a scholar or intellectual in a particular country and not take that into account? Can we or should we be “post-national”? See also Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream*, 66 S. CAL. L. REV. 1599, 1603–06 (1993) (discussing the consequences of a global economy).

<sup>21</sup> See Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528, 1532, 1550–54 (2008) (arguing that even the anti-globalizers want solutions that presuppose a high degree of economic globalization) (reviewing RAWI ABDELAL, *CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE* (2007); JADGISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* (2007); SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006); JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* (2006)).

<sup>22</sup> See, e.g., Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. REV. 733, 733–34 (2001) (questioning comparative advantage as a valid basis for the superstructure of global trade rules); see also Christina Laun, Note, *The Central American Free Trade Agreement and the Decline of U.S. Manufacturing*, 17 IND. INT'L & COMP. L. REV. 431, 431–32, 438–40 (2007) (attempting to link labor effects and the operation of free trade agreements (“FTAs”)).

later.<sup>23</sup> They feared that the newly enforceable trade agreements would lead to massive job losses in the United States, and elsewhere in the developed world.<sup>24</sup> Similarly, it was speculated that corporations would exploit vulnerable workers in countries without labor standards and protections.<sup>25</sup> These two sets of fears (labor cost differentials and abusive labor conditions in the production of internationally traded goods), although distinct from one another, were certainly related.<sup>26</sup> So what was the response of trade law specialists to this looming problem? It was to focus on Article XX of the General Agreement on Tariffs and Trade (GATT)<sup>27</sup> as the situs of an imaginary battle between trade rules and labor interests, generating literally dozens of academic articles on the topic of “trade and labor.”<sup>28</sup> There was agonized discussion as to whether the

<sup>23</sup> See, e.g., Raj Bhala, *Clarifying the Trade-Labor Link*, 37 COLUM. J. TRANSNAT'L L. 11, 15, 17 (1998); Steve Charnovitz, Book Review, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards*, 11 TEMP. INT'L & COMP. L.J. 131, 154–58, 160–63 (1997); Aleah Borghard, Note, *Free Trade, Economic Rights, and Displaced Workers: It Works If You Work It*, 32 BROOK. J. INT'L L. 161, 165–70, 197–99 (2006).

<sup>24</sup> See Bhala, *supra* note 23, at 15–19. See generally Donald L. Barlett & James B. Steele, *Lost Jobs: Why Fixing the Trade Deficit Matters Most*, WHAT WENT WRONG (June 18, 2011), <http://americawhatwentwrong.org/story/lost-jobs-why-fixing-trade-deficit-matters/> (illustrating decades of recognition by U.S. policymakers that trade agreements threatened U.S. jobs and their failed, lackluster efforts at combating this phenomenon).

<sup>25</sup> See Bhala, *supra* note 23, at 15, 19–20; Joshua M. Kagan, Note, *Making Free Trade Fair: How the WTO Could Incorporate Labor Rights and Why It Should*, 43 GEO. J. INT'L L. 195, 196–98 (2011).

<sup>26</sup> See Bhala, *supra* note 23, at 17–20.

<sup>27</sup> GATT Article XX provides members with “general exceptions from international trade obligations for unilateral trade measures in pursuit of specified purposes.” Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 740 (2001); see General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, 262 [hereinafter GATT]. Exceptions include allowing the adoption of measures necessary to “protect public morals,” or to “protect human, animal or plant life or health.” GATT, *supra*, at 262. Nevertheless, Article XX's introductory paragraph qualifies these exceptions by requiring continued compliance with certain fundamental trade norms. Gaines, *supra*, at 741. This qualifier is meant to balance the right of members to practice these exceptions with members' entitlement to the rights and obligations of the remaining substantive GATT provisions, and to ensure that neither interest cancels out the other. See *id.* at 742.

<sup>28</sup> See, e.g., Renee Chartres & Bryan Mercurio, *A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards*, 37 N.C. J. INT'L L. & COM. REG. 665, 695–97, 699–704, 708–16 (2012); Justin Fraterman, Note, *Article 37(2) of the ILO Constitution: Can an ILO Interpretive Tribunal End the Hegemony of International Trade Law?*, 42 GEO. J. INT'L L. 879, 917–18 (2011); Kagan, *supra* note 25, at 208–11; see also Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28 SUFFOLK TRANSNAT'L L. REV. 243, 248–50 (2005) (discussing the International Labor Organization's role in the “trade and labor” debate and its Declaration on Fundamental Principles and Rights at Work).

WTO could “accommodate” the labor question, or whether some other, as yet unformulated international body should be given the task of synthesizing trade and labor values.<sup>29</sup>

The trade and labor conundrum was both real and serious; the manner in which it was approached, however, bore little if any relation to the fundamental problems. Article XX could do nothing to preserve the job security of American workers because it only allows for a very limited exception from international trade obligations.<sup>30</sup> Accordingly, trade lawyers were conflating two separate matters in a highly misleading manner.

The logic of these academic articles was as follows: a WTO member country might at some time enact a trade restriction on products from another member country, based on the fact that those products were produced by workers who were being treated in some abusive manner.<sup>31</sup> If that happened, would or should the WTO bodies allow that restriction to stand? It should be apparent how divorced this paradigm is from reality, and from the larger labor concerns engendered by the WTO. It is clear that no WTO member country has been or has any intention of blocking the importation of products based only on the fact that the wages of the workers in the exporting country are too low.<sup>32</sup> Thus, the central paradox and problem of liberalized trade at the global level is not touched by this template and is purely “hypothetical.”

The only situation in which the Article XX problem might arise would involve genuinely abusive labor conditions.<sup>33</sup> In the unlikely event that the customs service in the importing country identified and blocked such products, the dynamic of high-cost labor versus low-cost labor would scarcely come into the picture at all.<sup>34</sup> So it should be asked how so many law review articles on “trade and labor,” built

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<sup>29</sup> Kagan, *supra* note 25, at 197 & n.3 (citing Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347, 348 (2004) (“[T]he link between trade, labor, and the environment has been pressed in much academic and policy discourse.”)).

<sup>30</sup> See Gaines, *supra* note 27, at 740–42; *supra* note 27 and accompanying text.

<sup>31</sup> See generally Chartres & Mercurio, *supra* note 28 (formulating an argument following this structure).

<sup>32</sup> See generally Kevin Kolben, *The New Politics of Linkage: India’s Opposition to the Workers’ Rights Clause*, 13 IND. J. GLOBAL LEGAL STUD. 225 (2006) (discussing the WTO workers’ rights clause and the link between trade and labor); Thomas, *supra* note 29, at 347 (analyzing whether the WTO should contain labor standards); Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261 (2005) (discussing the trade/labor linkage).

<sup>33</sup> See GATT, *supra* note 27, at 262.

<sup>34</sup> See *id.*

around an examination of GATT Article XX, came to be written and published at all.

One threshold issue that must be dealt with has to do with the continuing relevance of nationality, national interests, and *where* the trade law scholar is intellectually situated. There is something peculiar about a trade scholarship that pays no attention to the effects of free trade on the writer's geographical context. Without defining the normative goals or values of trade rules, and the corresponding motivations within trade law scholarship, writing on global economic law seems a soulless enterprise. What should be studied is the effect of the operation of trade rules on the distribution of wealth and power within states, as well as among them. It is trendy to write about international law and globalization in terms of global "networks" and the power of nongovernmental, private initiatives. However, there are a number of problems with this idealized vision. One is that the world trade system itself is mapped out in terms of existing nation-states.<sup>35</sup> The WTO is a state-to-state system, classically part of public international law.<sup>36</sup>

This legal category-based masking gives trade law an appealing gravitas that ordinary international commercial law lacks.<sup>37</sup> As trade law is normally presented, conflicting economic and social interests within the nation-state are not accounted for, and trade disputes are presented in terms of pursuit of the "national interest" by each participating state, much as a military matter might be.<sup>38</sup> When U.S. presidential candi-

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<sup>35</sup> See Gartner, *supra* note 20, at 596–98 (framing the globalization discourse in terms of civil society participation). See generally ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (presenting a "network" theory of governmental relations and outlining a horizontal and vertical multi-stakeholder approach to global trade interests); Anne-Marie Slaughter, *Filling Power Vacuums in a New Global Legal Order*, 54 B.C. L. REV. 919 (2013) (same).

<sup>36</sup> See Dillon, *supra* note 6, at 55; Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 538 (2001) (noting the academic consensus that the WTO rules are part of public international law); *Understanding the WTO: Who We Are*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (last visited Apr. 10, 2013) (giving an overview of the WTO's composition, activities, and origins).

<sup>37</sup> See Dillon, *supra* note 6, at 54–55 (describing the creation of the WTO as a "constitutional" moment). See generally CASS, *supra* note 2 (describing the "constitutionalization" of the WTO and noting its increased weight due to its constitutionality).

<sup>38</sup> See Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1620–22 (2011) (noting that national lawmakers' primary concern is to provide particular benefits to discrete groups); Note, *(In)Efficient Breach of International Trade Law: The State of the "Free Pass" After China's Rare Earths Export Embargo*, 125 HARV. L. REV. 602, 603–04 (2011) (citing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 7 (2005) (discussing nation-states' choice to comply with international law only when it is in their self-interest)). Economic and social conditions at the national level drive national lawmakers

dates announce that they will vindicate the “national interest” at the WTO, they do not mention that what brought the United States to invest so heavily in China, and what led to the movement of so many manufacturing jobs, were the self-interested demands of U.S. corporations.<sup>39</sup> Workers have no choice but to think “national,” but this is clearly not the case for corporations.<sup>40</sup> A logical next step is to consider whether trade scholars have any national affiliations, and if they do not, whether their writing can rise above the level of bland generalities on the virtues of globalization. The economic realm, particularly the international trade realm, is one in which we cannot in fact pin down any single *national* interest.<sup>41</sup> The drafters of global and regional trade agreements, however, have remained mainly silent on the question of which forces or sectors within states are the ones most deserving of being represented in trade instruments.<sup>42</sup>

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to benefit their constituents because national lawmakers are held politically accountable by their electorate. Stephan, *supra*, at 1621.

<sup>39</sup> See Dillon, *supra* note 6, at 63–65 (describing the self-interested role of corporations in the creation of the WTO); Nicholas R. Lardy, *Permanent Normal Trade Relations for China*, BROOKINGS POL’Y BRIEF, May 2000, at 1, 7–8, available at <http://www.brookings.edu/~media/research/files/papers/2000/5/usstatedepartment%20lardy/pb58.pdf> (contending that granting permanent normal trade relations to China is in the “national interest”); Steve L. Wasserstein & Paula Beroza, *The Impact of the Financial Crisis on Global Markets: An Immediate Look at the Legal and Economical Ramifications of the U.S. Subprime and Credit Collapse on Europe and Asia*, ASPATORE SPECIAL REP. 24, at 6–7 (2008) (discussing protectionist rhetoric in the 2008 presidential election); Danielle Kurtzleben, *China Barbs Reach Fever Pitch on Campaign Trail: The Candidates Spar While the U.S. and China Exchange Charges of Unfair Trading*, U.S. NEWS & WORLD REP. (Sept. 17, 2012), <http://www.usnews.com/news/articles/2012/09/17/china-barbs-reach-fever-pitch-on-campaign-trail> (discussing the use of political rhetoric about China and the WTO on the campaign trail in the 2012 presidential election); see also Kara Loidas, Note, *United States–China Trade War: Signs of Protectionism in a Globalized Economy?*, 34 SUFFOLK TRANSNAT’L L. REV. 403, 410–20 (2011) (discussing U.S.–China trade relations at the WTO).

<sup>40</sup> See Wasserstein & Beroza, *supra* note 39, at 6–7; see also Paul Krugman, *Robots and Robber Barons*, N.Y. TIMES (Dec. 9, 2012), <http://www.nytimes.com/2012/12/10/opinion/krugman-robots-and-robber-barrons.html> (discussing the tension between labor and capital).

<sup>41</sup> See Stephan, *supra* note 38, at 1578–79, 1600, 1621–22 (distinguishing international trade law from national law). According to Professor Paul Stephan, nongovernmental actors are the primary players on the international trade law scene, rather than national actors promoting national interests. See *id.* at 1574–75.

<sup>42</sup> See, e.g., Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 HOUS. L. REV. 1187, 1217–20 (2009) (commenting that drafting the Trade Related Aspects of Intellectual Property Rights Agreement as a trade agreement illustrates the disconnect between protecting national interests and global utility maximization). Intellectual property rights provide an illustrative example because these rights touch on the health, safety, culture, and politics particular to each nation-state. *Id.* at 1232. Moreover, as nations become more

As often noted, at the global level capital is mobile, whereas labor is not.<sup>43</sup> This makes it likely that the interests of capital and labor within any given state (especially states in which workers have enjoyed relatively high salaries and benefits) will have opposing interests when it comes to the concept of a fully liberalized global economy.<sup>44</sup> Gains over time by the labor movement happen *within* nation-states, despite occasional bursts of sentiment in favor of international labor solidarity.<sup>45</sup> It is the *national* legal regime that gives form and structure to the demands of labor, generally attained over the course of many labor disputes—including strikes, threats of industrial action, and political concessions from successive governments.<sup>46</sup> Thus, for working people, there cannot be a “denationalized” global labor system, as they are inextricably bound up with the “jobs” picture within their own states.<sup>47</sup>

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developed, their intellectual property needs change, and cultural attitudes shift toward exclusive rights. *Id.* As such, protecting national interests plays a vital role in intellectual property that the global perspective cannot adequately address. *See id.*

<sup>43</sup> Park, *supra* note 7, at 805.

<sup>44</sup> *See* Jennifer Gordon, *People Are Not Bananas: How Immigration Differs from Trade*, 104 Nw. U. L. REV. 1109, 1110–11, 1144 (2010) (citing developed nations’ continuing high barriers to migration, even as trade laws have liberalized, as indicia of opposing interests); Park, *supra* note 7, at 805–06; Krugman, *supra* note 40 (discussing the opposing interests of labor and corporations).

<sup>45</sup> *See* Abraham L. Gitlow, *Ebb and Flow in America’s Trade Unions: The Present Prospect*, 63 LAB. L.J., Summer 2012, at 123, 124 (discussing the gains won by the labor movement through collective bargaining agreements); Gordon, *supra* note 44, at 1110 (explaining that all participating countries mutually benefit from trade and labor migration in classical economics). *See generally* John Godard, *The Exceptional Decline of the American Labor Movement*, 63 INDUS. & LAB. REL. REV. 82 (2009) (discussing the decline of the American labor movement and noting that the decline is an exception among developed countries).

<sup>46</sup> *See* Gordon, *supra* note 44, at 1130–33; Park, *supra* note 7, at 808–11 (explicating the influence of domestic forces and incentives on labor markets). Labor markets are also seen as domestic legal matters because the labor force is inextricably linked to national culture. *Cf.* Gordon, *supra* note 44, at 1132 (discussing immigration’s effects on culture, as immigrants join new national populations and bring the culture of their home countries to new nations). For this reason, political resistance to immigration is rooted in fear of cultural change. *Id.* Also note the role of the International Labor Organization (“ILO”) in global standard setting—though genuine protection of labor interests still occurs at the national level. *See, e.g.*, Francis Maupain, *New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization*, 20 EUR. J. INT’L L. 823, 826, 832, 840 (2009) (describing the ILO’s conception of its mission and role as a standard-setter).

<sup>47</sup> *See* Godard, *supra* note 45, at 83 (stating that labor conditions are dependent upon the institutional norms and national founding conditions of the labor movement in the United States, and noting the U.S. labor movement’s “exceptional” decline when compared to other developed countries); Kevin Kolben, *The WTO Distraction*, 21 STAN. L. & POL’Y REV. 416, 465–67 (2010) (indicating that traditional labor goals and values to protect domestic workers are deeply ingrained in societies and stand at odds with trade liberalization); *see also* Gordon, *supra* note 44, at 1144–45 (noting that even in the European

The global trade system, enshrined in the rules of the WTO and other free trade agreements (“FTAs”), has undoubtedly demonstrated its power to alter the economic fortunes of millions of people, some for the better, and some for the worse. In most cases, trade law scholars seem to have chosen not to acknowledge the negative effects of free trade rules on American labor. Despite these adverse effects, the WTO schema was well devised to give the impression of permanency. A particular national position was seen as being either “in conformity with” or “contrary to” international trade law, which thereby came to be seen as static and unquestionable.<sup>48</sup> It is also noteworthy that trade laws have hastened the demise of the nation-state as a relevant unit of consideration.<sup>49</sup> If U.S. multinational corporations operate out of and in cooperation with China, what is the “nationality” of their business? The only site where nationality continues to be enforced is for the human carriers of particular passports, who need to remain in predictable locations for the benefit of transnational business.<sup>50</sup> In ways scarcely noted in the scholarship, our notion of nationality has been profoundly altered by the operation of contemporary trade rules, with people locked into the old national boundaries, and capital enjoying unprecedented global mobility. In the next Part, I suggest a more thorough framework for evaluating the world trade system.<sup>51</sup>

## II. TRADE AND TRADE DEFICIT: A BETTER KIND OF LINKAGE

My earlier essay took as its main theme the idea of opportunism as it has pervaded the trade law context.<sup>52</sup> I defined this opportunism as a

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Union, which permits unrestricted freedom of movement for workers of its member states, significant wage disparities and resistance to open labor migration remain largely firm).

<sup>48</sup> See generally Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT’L L. 367 (2012) (arguing that it is extraordinary that scholars have consistently treated the WTO as having such authority that nations must essentially beg to retain important laws based on meaningful public policy considerations). Setting aside the instrumental/non-instrumental distinction made by the authors—which is probably less important than they indicate—it is extraordinary that it should be taken in such writing that the WTO has, and indeed should have, the power and authority to “allow” public policies relating to genuine moral values. *Id.*

<sup>49</sup> But see Stefan Ohlhoff & Hannes Schloemann, *Transcending the Nation-State? Private Parties and the Enforcement of International Trade Law*, 5 U.N. YEAR BOOK 675, 731 (2001), available at [http://www.mpil.de/shared/data/pdf/pdfmpunyb/ohlhoff\\_schloemann\\_5.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunyb/ohlhoff_schloemann_5.pdf) (arguing that the nation-state “is not (yet) being transcended”).

<sup>50</sup> See Gordon, *supra* note 44, at 1110–16.

<sup>51</sup> See *infra* notes 52–70 and accompanying text.

<sup>52</sup> See Dillon, *supra* note 6, at 53.

self-serving and self-referential reaction of players to an opportunity presented by circumstances, in this case those of the Uruguay Round trade negotiations and the creation of the WTO.<sup>53</sup> Although I understand that much of the global trade “action” is now in bilateral and regional FTAs rather than the sputtering global organizations, I still think of the WTO as having eliminated a great number of alternative political choices from the menu otherwise available to national governments.<sup>54</sup> The existence of these global agreements is characterized as eliminating “protectionism,” with its dark connotations, rather than eliminating alternative political approaches to the global economy.<sup>55</sup> The Uruguay Round agreements did in fact constitutionalize free trade ideas and put them well out of reach of political leaders.<sup>56</sup> Free trade rules became

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<sup>53</sup> See *id.*; *WTO Legal Texts: Uruguay Round*, WORLD TRADE ORG., [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) (last visited Apr. 10, 2013) (noting that the Uruguay Round negotiations resulted in approximately sixty agreements and decisions). The negotiations

took seven and a half years, almost twice the original schedule. By the end, 123 countries were taking part. It covered almost all trade, from toothbrushes to pleasure boats, from banking to telecommunications, from the genes of wild rice to AIDS treatments. It was quite simply the largest trade negotiation ever, and most probably the largest negotiation of any kind in history.

*Understanding the WTO: Basics: The Uruguay Round*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) (last visited Apr. 10, 2013) [hereinafter *Understanding the Uruguay Round*].

<sup>54</sup> See Gordon, *supra* note 44, at 1118 (noting the uptick in bilateral FTAs); see also Eli J. Kirschner, Note, *Fast Track Authority and Its Implication for Labor Protection in Free Trade Agreements*, 44 CORNELL INT’L L.J. 385, 406–07 (2011) (concluding that the “protectionist” pro-labor reform agenda was rejected by the WTO). Whereas FTAs often contain pro-labor provisions, multilateral trade agreements negotiated at the WTO do not. Kirschner, *supra*, at 396, 407. Although developed nations continue to push the WTO to formally recognize a link between trade and labor standards, developing nations resist for fear that such a link will diminish their comparative trade advantage. *Id.* at 406–07. In addition, a host of national values have been devalued under pressure from the globalized free trade agenda—not only labor-related matters.

<sup>55</sup> See Loidas, *supra* note 39, at 412, 419–420, 426 (discussing protectionism).

<sup>56</sup> See Kevin Gallagher & Timothy Wise, *The False Promise of Obama’s Trade Deals*, GUARDIAN (Sept. 8, 2011, 16:52 EDT), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/sep/08/obama-trade-deals> (citing President Barack Obama’s criticism that “[w]hile [the North American Free Trade Agreement (NAFTA)] gave broad rights to investors, it paid only lip service to the rights of labor and the importance of environmental protection”). Despite his campaign promise not to support NAFTA-style agreements in the future, President Obama was unable to achieve important reforms to post-NAFTA trade agreements. *Id.* This inability to achieve reform could be due to the constitutionalization of the free trade ideas in the Uruguay Round Agreements. See generally CASS, *supra* note 2 (discussing the constitutionalization of the WTO).

immutable facts to be acknowledged and dealt with, rather than one set of options among several available to national governments.<sup>57</sup>

In that earlier essay, I identified three main opportunistic actors in the international trade drama: (1) transnational corporations (the sector having the most to gain from international trade laws, and the driving force behind them); (2) legal academics (those who write in a specialized way about trade law); and (3) national governments (which participate in the supposedly state-to-state dispute resolution mechanisms at the WTO).<sup>58</sup> At this point in time, we are farther along the road and are seeing the empirical effects of the judicialization of “free trade,” so I would like to expand upon my earlier theory and suggest why the debate over the benefits and disbenefits of global trade rules has never been more crucial.

My overarching argument is that international trade law *seems* to be what it is not, because if presented as it really was, it would not be palatable to the general public. If it did not represent some sort of verifiable “progress,” then what was the point of it? The entire phenomenon of “trade law”<sup>59</sup> has been misleadingly described in technocratic terms, and characterized as both inevitable and irreversible.<sup>60</sup> In this way, the adverse consequences have been seen as a mere political sideshow, unrelated to the all-important technical knowledge. The specialists with the capacity to act as public intellectuals around the issue of trade law and its effects are, for the most part, not doing so. Put another way, the scholarly work that is meant to illuminate and explicate trade laws in fact hides the laws’ true significance.

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<sup>57</sup> See CASS, *supra* note 2, at 16, 19; Gallagher & Wise, *supra* note 56 (lamenting a nation-state’s inability to push for free trade reform rendered due to non-state opportunism). For example, the Trans-Pacific Partnership negotiations focused largely on investor-state investment provisions, allowing multinational institutions to sue a government directly for its regulatory actions. See Gallagher & Wise, *supra* note 56.

<sup>58</sup> See generally Dillon, *supra* note 6 (identifying opportunistic actors in international trade).

<sup>59</sup> See Justin Lahart, *Tallying the Toll of U.S.-China Trade*, WALL ST. J. (Sept. 27, 2011), <http://online.wsj.com/article/SB10001424052970204010604576595002230403020.html#> (presenting a Massachusetts Institute of Technology (MIT) study showing the empirical realities of international trade law’s implications on American factory workers). Prevailing trade theories are ill equipped to handle the surging pace of development in China and other developing nations. *Id.* The world has never seen such large countries grow so quickly. *Id.* As Professor Michael Spence has explained, “It’s not like we can look to the past and ask ourselves what happened last time this happened, because there wasn’t a last time.” *Id.* (quoting Professor Spence).

<sup>60</sup> See, e.g., David Zaring, *International Institutional Performance in Crisis*, 10 CHI. J. INT’L L. 475, 475–78 (2010) (discussing the political primacy of technocratic institutions in international law).

A fundamental question largely ignored by legal academics in this field is what international trade law was designed to achieve.<sup>61</sup> National leaders insisted during the 1990s that broad prosperity was the goal: new jobs, economic growth, and continued dynamism, progress and productivity.<sup>62</sup> It is doubtful, however, that these stated values had much to do with the political impetus behind the free trade project, as seen in global trade laws.<sup>63</sup> What's more, it is impossible to meaningfully discuss "international trade law" without facing up to these animating forces.

International trade agreements in the 1990s represented the needs and desires of transnational corporations in search of lower cost labor and freer regulatory environments.<sup>64</sup> By contrast, the approach of trade law scholars generally reinforced the myth of intergovernmental cooperation in service of an ideal with broad-ranging benefits.<sup>65</sup> Comparative

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<sup>61</sup> E.g., JESS FAUX, *THE SERVANT ECONOMY: WHERE AMERICA'S ELITE IS SENDING THE MIDDLE CLASS* 79 (2012); David M. Driesen, *What Is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279, 280–83 (2001) (posing the fundamental question: "what precisely must trade be free of in order to be 'free' rather than inappropriately shackled?"). Professor David Driesen notes that trade scholars use vague phrases such as "protectionism," "trade barriers," and "trade restrictions," in an attempt to answer this question, but he contends that this profusion of commentary fails to articulate a cohesive normative concept of free trade. See Driesen, *supra*, at 281–82. As a result of this dissonance, scholars fashion and refashion the theoretical bases for international trade law to justify its legitimacy and inevitability, while largely ignoring the practical effects of trade law on the ground. See *id.* 282–86; see also Gallagher & Wise, *supra* note 56 (discussing President Obama's promise to promote a "trade agreement for the 21st century" but commenting that in fact the trade agreement at issue, the Trans-Pacific Partnership, is really just the same, NAFTA-style agreement he campaigned against).

<sup>62</sup> See, e.g., Barlett & Steele, *supra* note 24 (providing an overview of American international trade policies); *GATT Head Warns Against Overloading WTO*, SUNSHINE ONLINE (Mar. 22, 1994, 6:18 AM), <http://www.sunsonline.org/trade/process/towards/03220094.htm> (quoting one of the greatest free trade ambassadors, Director General Peter Sutherland, who helped shepherd the GATT system into the new, legally enhanced WTO, as warning against the false lure of protectionism, and advocating for the prosperity to be attained by embracing free trade principles); see also Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 GEO. J. INT'L L. 165, 180–81 (2007) (discussing the economic justifications for international trade law). The premise for the comparative advantage theory underlying international trade law is essentially that a "rising tide raises all boats." Lewis, *supra*, at 176 (internal quotation marks omitted). Indeed, that promise was largely realized in the 1990s: from 1990 to 2006, trade volumes grew by six percent each year, far exceeding the three percent world growth rate output. ECONOMICS: MAKING SENSE OF THE MODERN ECONOMY 179 (Simon Cox ed., 2d ed. 2006).

<sup>63</sup> See Dillon, *supra* note 6, at 54–55.

<sup>64</sup> See *id.* at 63–65; see also Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 304 (2004) (mentioning the impact of environmental policy, labor, and human rights on the international trade regime).

<sup>65</sup> See John O. McGinnis & Mark L. Movsesian, *Commentary, The World Trade Constitution*, 114 HARV. L. REV. 511, 521–25 (2000) (describing the logic of free trade as benefiting all countries in the long run).

advantage was presented in passing as a doctrine of unassailable pedigree; the global economy was presented as having been wrongly “obstructed” in its quest for wealth creation.<sup>66</sup> The WTO was described as a corrective, a virtuous form of international law that, like human rights law, would restrain the negative tendencies of national policy.<sup>67</sup> Nation-to-nation trade disputes, it was suggested, would play out to see which party could “prevail” within the discipline-imposing jurisprudence of one of the WTO bodies.<sup>68</sup>

These underlying premises for the design and operation of the WTO and FTAs were taken to be settled, true, and unquestionable in a scholarship that focused only on the technical workings of the system in the form of disputes.<sup>69</sup> I would argue that the value of the disputes was more functional than essential, in that each played a part in defining the outer borders of the “trade law” empire, by dealing with issues that had long simmered at the margins of familiar trade concepts, rules, and obligations. A false emphasis on particular disputes explains why trade scholars have spent so much time writing about hypothetical trade conflicts, with advocacy for one discrete outcome or another, in the most narrowly defined policy terms. A better approach, and one that I explain more fully in the following Part, is to address the opportunistic actions of corporations, trade scholars, and nation-states, and to challenge the theoretical underpinnings of the entire global trade system.<sup>70</sup>

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<sup>66</sup> See *id.* (explicating the comparative advantage theory).

<sup>67</sup> See Pascal Lamy, Dir. Gen., World Trade Org., Speech to the Lowy Institute in Sydney, Australia: Protectionism Cannot Be ‘Smart’ (Mar. 2, 2009), transcript available at [http://www.wto.org/English/news\\_e/sppl\\_e/sppl117\\_e.htm](http://www.wto.org/English/news_e/sppl_e/sppl117_e.htm).

<sup>68</sup> See, e.g., Guzman, *supra* note 64, at 307 (calling for enhanced global governance by intergovernmental cooperation and the inclusion of non-trade related topics in the WTO’s dispute settlement procedures); see also Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT’L L. 221, 226–29 (2006) (calling for member state cooperation to achieve the WTO’s aspirational goal of broad economic development ideals). Like many academics, Tomer Broude frames his two-pronged analysis of the WTO in terms of its functional legitimacy, as derived by the participation of its member states, and its aspirational legitimacy, as derived by the progress toward enhancing overall wealth among its member states. See Broude, *supra*, at 226–29.

<sup>69</sup> See *supra* note 17.

<sup>70</sup> See *infra* notes 71–150 and accompanying text.

### III. REVISITING THE WORK OF A TRADE LAW DISSIDENT: THE OPPORTUNISTIC ACTORS IN THE REALM OF GLOBAL TRADE LAW

#### A. *The First Set: Corporations*

The real key to understanding the trade agreement dynamic is in considering the wishes of the most powerful transnational corporations.<sup>71</sup> Rather than a regime for the peaceful settlement of “state interests versus state interests,” the WTO (as well as some regional trade organizations) should be described in a completely different manner.<sup>72</sup> Some commentators on the American economy have made the case that international and regional trade laws, in the form of international agreements, are part of a larger scenario in which the interests of the very wealthy dominate the development of national policies.<sup>73</sup> Nowhere is this more apparent than in the United States, where successive governments have succumbed to the needs of transnational corporations in the realms of trade, taxation, and financial deregulation.<sup>74</sup> These scholars provide extensive, if somewhat predictable, case studies, such as the example of Apple—a prominent and innovative American company that now makes virtually none of its products in the United States.<sup>75</sup> American companies want to manufacture their goods in the

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<sup>71</sup> See Dillon, *supra* note 6, at 63–65; Joel Slawotsky, Essay, *The Global Corporation as International Law Actor*, 52 VA. J. INT’L L. DIG. 79, 84 (2012), [http://www.vjil.org/assets/pdfs/vjilonline2/Slawotsky\\_Post\\_Production.pdf](http://www.vjil.org/assets/pdfs/vjilonline2/Slawotsky_Post_Production.pdf) (considering transnational corporations as quasi-state actors in international law). As Professor Joel Slawotsky has explained:

The narrow view distinguishing between “sovereigns” and “corporations” must yield to the new realities: multiple actors exist spanning the globe that possess both public and private actor characteristics in varying degrees. These hybrid actors operate across borders and utilize major bases of business operations over continents, and exert enormous influence.

Slawotsky, *supra*, at 85.

<sup>72</sup> See Slawotsky, *supra* note 71, at 85 (arguing that state actors are not the sole participants in international trade law).

<sup>73</sup> See, e.g., Barlett & Steele, *supra* note 24 (emphasizing corporate influence on international trade policies in America).

<sup>74</sup> See Calvin Woodward, *Fact Check: Clinton, Obama and NAFTA*, USA TODAY (Feb. 26, 2008, 10:42 PM), [http://www.usatoday.com/news/politics/2008-02-26-3154589503\\_x.htm](http://www.usatoday.com/news/politics/2008-02-26-3154589503_x.htm) (quoting President Barack Obama, who criticized U.S. international trade policy by stating that, “The problem in a lot of our trade agreements is that the administration tends to negotiate on behalf of multinational companies instead of workers and communities”). Corporate opportunism is also a political reality for presidential candidates; Governor Mitt Romney’s tough campaign rhetoric against China places him at odds with transnational corporate opportunism. See Kurtzleben, *supra* note 39.

<sup>75</sup> See DONALD L. BARLETT & JAMES B. STEELE, *THE BETRAYAL OF THE AMERICAN DREAM*, at xi–xii, xvi, 83–97 (2012); Steve Weinberg, *Journalistic Duo Who Author Bestsellers*

cheapest and easiest locations, with the assurance that trade rules will allow them to ship these back to the United States, as well as to other markets.<sup>76</sup> It has long been clear that the corporate structure creates pressure on companies to serve the bottom line in the short term, in a manner pleasing to shareholders.<sup>77</sup> Often this attention to short-term profit is inconsistent with making goods in the United States, or in any more developed jurisdiction.<sup>78</sup>

Assuming this to be the case, reality is at odds with the view that our FTAs are based on a venerable doctrine of comparative advantage.<sup>79</sup> In the mythology of the WTO, most nations came to accept the idea that their citizens would enjoy greater prosperity if they embraced the sometimes difficult doctrine of trade openness, with a view to long-term efficiency and export opportunities.<sup>80</sup> It is normal for there to be public discussion at the advent of a new law concerning whether that law is a net good for most people.<sup>81</sup>

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*Do It Again*, USA TODAY (Aug. 27, 2012, 11:55 AM), <http://www.usatoday.com/money/books/reviews/story/2012-08-26/Betrayal-of-American-Dream-james-steele-donald-barlett/57290904/1> (highlighting the Donald Barlett and James Steele book, *The Betrayal of the American Dream*, which examines outsourcing by Apple). As Apple reaped huge profits, it moved much of its operations to China, leaving American workers behind. Weinberg, *supra*. “If the United States is unable to retain the benefits of a successful company like Apple and its potential to provide huge numbers of good jobs in this country for years to come, what does that say about our ability to encourage future innovators and provide employment here at home?” BARLETT & STEELE, *supra*, at xi.

<sup>76</sup> See Weinberg, *supra* note 75 (noting the experience of Apple’s profitability due to its outsourcing of operations to China). Not only do transnational corporations influence international trade law, but they also participate in the regulatory structure of the system. Karsten Nowrot, *Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?*, 18 IND. J. GLOBAL LEGAL STUD. 803, 804–05 (2011).

<sup>77</sup> See Barlett & Steele, *supra* note 24 (describing the interplay of serving wealthy investors and the growth of the trade deficit).

<sup>78</sup> See BARLETT & STEELE, *supra* note 75, at 85, 87–91 (using Apple’s business model as an example of American companies using outsourcing to generate huge profits); Weinberg, *supra* note 75 (same).

<sup>79</sup> See McGinnis & Movsesian, *supra* note 65, at 521–25 (explicating the comparative advantage theory). According to comparative advantage theory, nations specialize in the goods and services they can efficiently produce and then trade for other goods and services. *Id.* at 521. In so doing, nations encourage productivity and innovation by using resources optimally. *Id.*

<sup>80</sup> See *id.* at 522–23; Park, *supra* note 7, at 817–19 (setting forth an efficiency rationale justifying international trade law). The efficiency of international trade is measured by the Kaldor-Hicks criteria. Park, *supra* note 7, at 817. According to Kaldor-Hicks, as long as the gains from liberalized trade outweigh any aggregate losses, society as a whole benefits. *Id.* at 818.

<sup>81</sup> See Patrick R. Goold, *The Evolution of Normative Legal Scholarship: The Case of Copyright Discourse*, 5 EUR. J. LEGAL STUD. 23, 24 (2013) (discussing the key role of scholars in nor-

At the level of political discourse, the international trade agreements of the 1990s were meant to improve the economic opportunities of the vast majority of people, including those in the United States.<sup>82</sup> It appears, however, that in all categories American workers have lost ground since the promulgation of these agreements.<sup>83</sup> To put it crudely, the history of the labor movement shows that as labor gains power and influence, corporate management loses some of its wealth.<sup>84</sup> Part of the motivation for entering into the WTO and other FTAs was surely to require labor to give back some of the gains of the last century. This, however, is not articulated by politicians of any party. Rather, the presentation of new trade agreements attempts to convince the public that new jobs—and new, hitherto unimagined opportunities—will derive directly from the agreements.<sup>85</sup> The *national* interest is invoked, as it is in the trade disputes.<sup>86</sup> It is plainly implausible, however, that the erosion in American middle-class prosperity has been a mere coincidence, appearing unexpectedly with the advent of a free trade-dominated world. What should be the reaction of trade scholars to the facts of trade deficits, job losses, declining wage levels, and other social disbenefits?

Although the new and enforceable trade agreements derived mainly from the wishes and needs of transnational corporations, they were presented as opportunities for greater prosperity, which in many

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matively evaluating laws); Park, *supra* note 7, at 819–20 (outlining the macroeconomic implications of income inequality).

<sup>82</sup> See The President's News Conference in Jakarta, 2 PUB. PAPERS 2085, 2085–94 (Nov. 15, 1994) (discussing the benefits of free trade for American workers and expressing excitement about the GATT and the Asia-Pacific Economic Cooperation); see also Gordon, *supra* note 44, at 1134–35 (discussing the overall economic gains expected from international trade).

<sup>83</sup> See Barlett & Steele, *supra* note 24 (citing the thirty-five year trade deficit promulgated by international trade agreements that “decimated” the American workforce). According to Professors Barlett and Steele, the trade deficits since 1976 add up to \$10 trillion. *Id.*

<sup>84</sup> See Bhala, *supra* note 23, at 17–20; G. William Domhoff, *Wealth, Income, and Power*, WHO RULES AM., <http://whorulesamerica.net/power/wealth.html> (last visited Apr. 10, 2013) (empirically showing the discrepancy in the growth rates of CEOs' pay and production workers' pay between 1990 and 2005).

<sup>85</sup> See Goldfarb & Montgomery, *supra* note 9 (extolling the virtues of the trade agreement between the United States and South Korea, Columbia, and Panama). According to an assessment by the U.S. International Trade Commission, the South Korea deal has the potential to create 280,000 American jobs and to increase exports by \$12 billion. *Id.*

<sup>86</sup> See *id.* (“These free-trade agreements will give our economy a much-needed shot in the arm and create tens of thousands of American jobs. . . . The passage of these agreements today is a significant victory for American workers and businesses, and will help create jobs here at home.” (quoting Montana senator Max Baucus's praise of the agreements with South Korea, Columbia, and Panama)).

cases they were not.<sup>87</sup> If not outright conspiracy, at the very least, this involved political messaging on behalf of a highly organized constituency—those forces whose aim it was to maximize corporate profits without regard to the nationality of the workforce.<sup>88</sup> This confusion allowed for a capturing of international and domestic labor policy by the interests of “capital,” thus rebalancing a hard-fought road to power on the part of labor in developed countries, particularly the United States.<sup>89</sup>

### B. *The Next Set: Trade Law Scholars*

Part of my “opportunism critique” involves the failure of trade law scholars to go beyond the technique of parsing trade agreements and disputes. A related question is whether and how commentators and analysts might deal with the “winners and losers” problem.<sup>90</sup> At the inception of the WTO, experts said that enhanced and enforceable trade rules would of course create economic winners and losers, and that it would be the task of national governments to respond to the situation of the losers.<sup>91</sup> An interesting dilemma, however, is posed when, hypothetically, a trade scholar’s country of origin enjoys a relatively high standard of living, and that standard of living is under threat from job losses attributable to the operation of trade agreements—which also have a side effect of exacerbating the maldistribution of wealth. By contrast, it would be odd for a human rights lawyer not to show some empirically based, normative predilections. Yet it is clear that trade law is discussed

<sup>87</sup> See *id.*

<sup>88</sup> See Robert Reich, *The Problem Isn't Outsourcing. It's That the Prosperity of Big Business Has Become Disconnected from the Well-Being of Most Americans*, ROBERTREICH.ORG (July 18, 2012), <http://robertreich.org/post/27527895909> (arguing that globalization networks mean there are no “American” companies). In the words of one Apple executive, “we don’t have an obligation to solve America’s problems. Our only obligation is making the best product possible.” *Id.*

<sup>89</sup> See *id.* (using Apple to illustrate corporate transnational profit mongering). Whereas Apple employs 43,000 people in the United States, it employs 700,000 workers abroad in places like China where wages are low. See *id.*

<sup>90</sup> See Park, *supra* note 7, at 803–39 (analyzing trade globalization winners and losers and proposing approaches to assist trade losers).

<sup>91</sup> See Guido Bertucci & Adriana Alberti, *Globalization and the Role of the State: Challenges and Perspectives*, in REINVENTING GOVERNMENT FOR THE TWENTY-FIRST CENTURY 17, 18–20 (Dennis A. Rondinelli & G. Shabbir Cheema eds., 2003) (discussing the role of the state in assisting those negatively affected by globalization); Stephan, *supra* note 38, at 1574–75 (describing the role of national interests in the realm of international trade law as defunct). According to Professor Paul Stephan, with the emergence of nongovernmental players in international trade, the notion that national governments will respond to economic dislocations caused by trade liberalization is outdated. See Stephan, *supra* note 38, at 1574–75.

as if it were an immutable system (hence constitutional), moving forward on its own momentum, meant to be watched and described, but not from the point of view of a critical intellectual located within a particular jurisdiction.<sup>92</sup>

At a minimum, it seems irrational to engage in academic commentary on WTO law and its disputes as if the U.S. trade deficit and job losses, both in manufacturing and in higher-end research and development and services, were a complete irrelevancy.<sup>93</sup> At the geopolitical level, states are made and remade because of changes brought about by free trade rules; within states, socioeconomic reality is rewritten.<sup>94</sup> I would argue that this dilemma should more properly be seen as “the main story” for trade law scholars than should the jurisprudence of the WTO’s Appellate Body.

Some might object to this framework and argue that global trade regulation is based upon international agreements entered into by sovereign governments, a set of commitments made in the realm of politics.<sup>95</sup> The decision to enter into such agreements—most recently and dramatically by the massive holdout economy, Russia—is quintessentially a political act.<sup>96</sup> To the extent that trade law scholars have a “task” (so the argument goes), that task is not to debate the efficacy or propriety of these agreements in the normative sense (which should be left to politicians). Rather, it is to parse, to analyze at the level of what *has* happened and what *might* happen as disputes wind their way through

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<sup>92</sup> Compare Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491 (2002) (analyzing the WTO Appellate Body’s decision in a particular case, but notably lacking a normative analysis), with Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LAB. L. & POL’Y J. 405 (2011) (synthesizing the scholarship of international migration law into a set of norms and principles).

<sup>93</sup> See Barlett & Steele, *supra* note 24 (discussing the detrimental effect of the trade deficit on the American workforce). See generally Park, *supra* note 7 (acknowledging the negative economic impact of international trade law on localities and proposing a reformed notion of “trade adjustment assistance” to ameliorate the position of trade law losers).

<sup>94</sup> See Dinwoodie & Dreyfuss, *supra* note 42, at 1233 (using intellectual property as an example of economic development at the national level changing societal needs and cultural attitudes).

<sup>95</sup> E.g., Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (establishing the WTO as a supranational body to regulate trade among member states).

<sup>96</sup> See *Russia’s Accession to the World Trade Organization (WTO)*, INT’L TRADE ADMIN. (Dec. 19, 2011, 9:42 AM), [http://www.trade.gov/mas/ian/tradeagreements/multilateral/wto/tg\\_ian\\_003531.asp](http://www.trade.gov/mas/ian/tradeagreements/multilateral/wto/tg_ian_003531.asp) (reporting on Russia’s eighteen-year effort to join the WTO). As the decision to accede to the WTO must be made by applicant states having full autonomy, it is inherently a political act. See *How to Become a Member of the WTO*, WORLD TRADE ORG., [http://wto.org/English/thewto\\_e/acc\\_e/acces\\_e.htm](http://wto.org/English/thewto_e/acc_e/acces_e.htm) (last visited Apr. 10, 2013).

the newly created system of WTO adjudication.<sup>97</sup> Dedication to the “what-if” hypothetical is the hallmark of the legal scholar, after all.<sup>98</sup> This self-imposed limitation on imagination (let’s call it an adjudicatory imagination) marks the difference between a legal scholar and a pundit, for instance. It also divides legal scholars from genuinely academic scholars, who do not tend to accept such external limitations on their intellectual role.<sup>99</sup>

Such issues as the national trade deficit and the propriety of outsourcing are generally treated as nonessential concerns outside the hardcore focus of trade scholars, who instead make careers out of the reasoning of the WTO’s Appellate Body.<sup>100</sup> Where “theory” does intrude into academic writing on trade law, it tends to be rather strictly abstracted from empirical reality: game theory or “choice” theory, for instance.<sup>101</sup> As the adverse economic effects of international trade law manifest themselves with increasing obviousness within the United

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<sup>97</sup> See Thomas, *supra* note 92, at 408–33 (synthesizing international trade law norms and analyzing their treatment by the WTO). Professor Chantal Thomas’s survey of international trade law and migration law reveals divergent rule systems, and she calls for greater coherence in rulemaking pursuant to trade agreements. See *id.* at 406–08.

<sup>98</sup> International trade law scholarship is in one sense too real-world in its focus and in another too abstract. As it fails to question the overall structure, and actual effects, it also poses and wrestles with questions that involve hypotheticals grounded, apparently, in the real world. Where it is theoretical, this does not generally involve a rigorous critique. See, e.g., Gordon, *supra* note 44, at 1142–45 (revealing asymmetry between the movement of workers and the movement of goods and its effects, but not offering a rigorous critique to bridge the gap).

<sup>99</sup> See generally Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 115 (2006) (discussing legal scholarship generally); Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009) (discussing the state of legal discourse and the failure to challenge dominant paradigms). The “adjudicatory limitation” on legal scholars exists because they feel compelled to remain tied to the actual profession and practice of law. In contrast, genuinely academic scholars are not linked in any clear or obvious way to a particular profession, and thus do not have their imaginations limited by the fact that there will be adjudication on the topic, and they do not feel compelled to make themselves relevant to such cases, or in line with what courts will say or do or value.

<sup>100</sup> But see Mark Anner, *The Impact of International Outsourcing on Unionization and Wages: Evidence from the Apparel Export Sector in Central America*, 64 INDUS. & LAB. REL. REV. 305, 306–10 (2011) (discussing the decline of unions); Brad A. Brooks-Rubin, *Monumental Flaws and Dysfunctions: Some Suggestions for Mending the Broken Trade Adjustment Assistance Certification Process*, 11 ILSA J. INT’L & COMP. L. 371, 371–72 (2005) (linking trade laws to outsourcing).

<sup>101</sup> See, e.g., Gordon, *supra* note 44, at 1111–16 (seeking trade, immigration, and wealth maximization through analysis of economic and labor migration theories). See generally Kevin Banks, *Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law*, 32 BERKELEY J. EMP. & LAB. L. 45 (2011) (discussing game theory); Danielsen, *supra* note 7 (discussing game and choice theory).

States, I would reiterate with even greater force what I said some years ago: that analysis of international trade disputes is not on its own an intellectually worthy activity, and serves only to validate by implication the free trade system that has been presented as a *fait accompli* to an uncomprehending public.<sup>102</sup> Even less worthy is a focus on hypothetical matchups between trade and the environment or trade and labor policies, all within the safe confines of the WTO adjudication structure.<sup>103</sup>

To some extent, my analysis in that earlier essay reflected my larger sense of frustration that legal academics often excel at the descriptive and utterly fail when it comes to the analytical—they quickly become adept at the technique of a new branch of law, but are amazingly dull when it comes to using their grasp of legal detail to evaluate whether the underlying law is a positive or negative development, seen in the light of human need.<sup>104</sup> This is also reflective of the identity confusion in law schools between professional school and graduate school, and of the fact that many legal academics have never been true academics, in the sense of intellectuals working on behalf of the public good.<sup>105</sup> In common with other lawyers, legal academics are trained to think in terms of winning or losing, and simply apply that orientation to state-to-state disputes.<sup>106</sup> As in other contexts, legal academics tend to ignore the dimension of real law reform.

Having written on global trade regulation for a number of years, I have seen this field as particularly burdened with layers of obfuscation; nothing that has happened in the last few years has changed my mind on this point. This is all the more remarkable in light of the burgeoning trade deficit in the United States and the now chronic loss of jobs attributable to the “free movement” of transnational corporations.<sup>107</sup>

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<sup>102</sup> See Sara Dillon, *A Farewell to “Linkage”: International Trade Law and Global Sustainability Indicators*, 55 RUTGERS L. REV. 87, 87 (2002).

<sup>103</sup> E.g., Mark S. Blodgett & Richard J. Hunter, Jr., *The Environment and Trade Agreements: Should the WTO Become More Actively Involved?*, 33 HASTINGS INT’L & COMP. L. REV. 1, 16–19 (2010) (hypothesizing on an enhanced WTO role in environmental challenges).

<sup>104</sup> See Dillon, *supra* note 6, at 70–71. *But see* Broude, *supra* note 8, at 554–55 (inferring that fundamental human rights law of equal protection and nondiscrimination flows from treating migration policy as an economic activity). According to Professor Tomer Broude, the applicability of human rights law is a positive development in light of real-world immigrant realities. Broude, *supra* note 8, at 555.

<sup>105</sup> See generally Schlag, *supra* note 99 (discussing the state of legal scholarship and legal scholars’ relation to the practice of law).

<sup>106</sup> See Park, *supra* note 7, at 798–99, 803–08 (identifying globalization winners and losers and applying the model to participating state actors).

<sup>107</sup> Fritz Hollings, *Outsourcing: How America Is Losing the Trade War*, HUFFINGTON POST (Aug. 28, 2008, 3:13 PM), <http://www.huffingtonpost.com/sen-ernest-frederick-hollings/>

Certainly from the point of view of labor rights and labor conditions in the developed world, the toll taken by international trade law is hard to ignore; yet, ignored it continues to be in the discourse of most trade law commentators.<sup>108</sup>

It could be objected that there is no clear cause and effect between global trade laws and the massive job losses within the American economy, an argument made by at least one liberal or progressive economist.<sup>109</sup> This strikes me as implausible, since the link is fairly unmistakable.<sup>110</sup> Yet, there are still some who argue that, with the right training and positioning, American workers can get a hold of the higher-end jobs of the global economy.<sup>111</sup> It may also be argued that ideas of a “national economy” are passé, and that we should no longer be thinking in terms of the national, but rather in terms of the global.<sup>112</sup> Yet, it also seems clear that for a particular worker in a particular industry, there are few ways in which he or she can gain satisfaction—happiness if you will—from the thought that his or her job has gravitated to some other part of the world.<sup>113</sup>

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outsourcing-how-america-i\_b\_122170.html (decrying outsourcing as a consequence of trade liberalization laws and transnational corporations).

<sup>108</sup> See, e.g., Barlett & Steele, *supra* note 24 (arguing that the trade deficit has “decimated the American workforce, blocked the creation of millions of jobs, created millions more jobs for people in other countries, triggered pay cuts for millions of workers who still have jobs in the United States, and generally lowered the standard of living for many”); Lewis, *supra* note 62, at 172 (inferring comparative advantage benefits could be more fully realized if poorer countries could move trade more efficiently). *But see* Drusilla K. Brown, *Labor Standards: Where Do They Belong on the International Trade Agenda?*, J. ECON. PERSP., Summer 2001, at 89, 89–90 (noting that there is a growing movement to include labor standards in the WTO). Part of economic development is the development of labor rights, employment security, and a share in the nation’s overall wealth. *See* Lewis, *supra* note 62, at 172.

<sup>109</sup> See, e.g., Paul Krugman, *Off and Out with Mitt Romney*, N.Y. TIMES (July 4, 2012), <http://krugman.blogs.nytimes.com/2012/07/04/off-and-out-with-mitt-romney/> (declaring that there is no meaningful connection between American business (job losses) and macroeconomic policy (trade laws)).

<sup>110</sup> See Barlett & Steele, *supra* note 24; Lahart, *supra* note 59.

<sup>111</sup> See Reich, *supra* note 88 (arguing for a national strategy to enhance America’s ability to compete for high-end jobs in the global economy by improving infrastructure, education, and job training).

<sup>112</sup> See Gartner, *supra* note 20, at 597–98 (arguing that the traditional nation-state approach is inadequate to address global trade). Rejecting exclusively inter-governmental arrangements, Professor David Gartner contends that international institutions like the WTO must engage participation from non-state actors to successfully address complex global issues in the twenty-first century. *See id.*

<sup>113</sup> See Lahart, *supra* note 59 (citing a study by MIT economists indicating that Chinese imports have damaged the U.S. economy more deeply than expected). According to the MIT study, the regions of the United States most exposed to Chinese imports experienced greater losses in manufacturing jobs. David H. Autor et al., *The China Syndrome: Local Labor Market*

The WTO and its rules have been presented as part of a broader international “rule of law”—but in fact there has been no corresponding drive toward global governance that would encompass noneconomic values as well.<sup>114</sup> National workers are essentially bottled up within their nation-states, where all the mobility and dynamic opportunity has gone to the transnational corporate sector.<sup>115</sup> Unlike an international law sphere like human rights, for instance, from which all might benefit, the laws enshrining free trade are premised on competition and inevitable losses.<sup>116</sup> The issue of where these losses will fall and how they should fall cannot simply be dismissed as a matter for “the nation state.”<sup>117</sup> International trade scholars have failed to use their expertise in the service of responding to the plight of the “losers” in the global trading system. Calling for competitive “losses” to be left up to weakened nation-states is an intellectually indefensible position.

### C. *The Final Set: Nation-States Shadow Boxing at the WTO*

I have already described my idea that the WTO is ingeniously presented as a nation-to-nation system, quintessentially “inter-national,” one in which nations and their leaders pursue the national interest in an orderly, structured fashion. The two-pronged justification for this approach has always been that increasing volumes of ever freer trade inevitably delivers general prosperity (for developed and developing

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*Effects of Import Competition in the United States*, AM. ECON. REV. (forthcoming) (manuscript at \*2), available at <http://economics.mit.edu/files/6613>. More importantly, these regions saw an overall employment decline coupled with an increase in workers receiving unemployment insurance, food stamps, and disability payments. *Id.* at \*4–\*5; Lahart, *supra* note 59.

<sup>114</sup> See Broude, *supra* note 68, at 247–52 (presenting the WTO’s global purpose); Pauwelyn, *supra* note 36, at 577–78 (describing the WTO as being embedded in and part of public international law, but not discussing a movement toward global governance).

<sup>115</sup> See Krugman, *supra* note 109 (emphasizing the asymmetrical reality of global trade liberalization and the power of corporations with respect to outsourcing decisions); Meghnad Desai, Talk at Global Dimensions Seminar: Global Trade in Historical Context (Jan. 11, 2001), transcript available at <http://www.lse.ac.uk/collections/globalDimensions/seminars/trade/desai1.htm> (discussing the evolution of labor and capital mobility). Economist Paul Krugman characterizes domestic outsourcing as a “redistribution from middle-class Americans to a small minority [elite].” Krugman, *supra* note 109.

<sup>116</sup> See Broude, *supra* note 8, at 555–57; Gordon, *supra* note 44, at 1130–36 (explaining the fundamental asymmetry between trade and human rights). See generally Park, *supra* note 7 (discussing the fundamental principle that comparative advantage, the theory on which free trade is based, produces winners and losers).

<sup>117</sup> See Gartner, *supra* note 20, at 597–98 (urging global cooperation between nation-states and non-state actors).

countries alike), and peaceful international relations (the WTO as an arm of the international rule of law).<sup>118</sup>

Current events reflect a growing skepticism among the general public toward these justifications, as well as a confirmation of the false “national interest” paradigm within which trade relations are conducted. The 2012 presidential campaign provided a perfect demonstration of the continued anachronistic use of “national” depictions in what might better be seen as a class-based, essentially non-national conceptual framework. On the one hand, Governor Mitt Romney accused the Obama administration of being “soft” on China, and of allowing China to dominate the United States.<sup>119</sup> On the other hand, the Obama administration made a great deal of the fact that it was using the WTO dispute resolution system to bring China into line, to “play by the rules.”<sup>120</sup> But in fact, it is those “rules,” supported by all mainstream political actors in the United States, that led to this precarious state of affairs to begin with.<sup>121</sup>

In this scenario, we are distracted from the underlying denationalizing project (the stripping away of the protective powers of the state) by a state-to-state dispute resolution system that gives the appearance of nations being able to vindicate their “trade rights” in a major international forum.<sup>122</sup> As described above, the international agreements that represent “global trade regulation” have frozen political development not only between states, but within states.<sup>123</sup> Yet, playing to an unus-

<sup>118</sup> See generally *10 Things the WTO Can Do*, WORLD TRADE ORG., [http://www.wto.org/english/res\\_e/publications\\_e/wtocan\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtocan_e.htm) (last visited Apr. 10, 2013) (highlighting the WTO’s benefits).

<sup>119</sup> Kurtzleben, *supra* note 39 (discussing Governor Romney’s critique of the Obama administration’s stance on China). In a speech on September 17, 2012, Governor Romney argued that “President [Barack] Obama has spent 43 months failing to confront China’s unfair trade practices.” *Id.*

<sup>120</sup> *Id.* (reporting on President Obama’s campaign stop in Ohio). President Obama announced to the crowd that his administration was seeking redress with the WTO over China’s unfair trade practices. *Id.* According to President Obama, “[China’s trade] subsidies directly harm working men and women on the assembly line in Ohio and Michigan and across the Midwest. It’s not right; it’s against the rules; and we will not let it stand.” *Id.*

<sup>121</sup> See Barlett & Steele, *supra* note 24. See generally Dillon, *supra* note 6 (contending that the creation of the WTO was opportunistic).

<sup>122</sup> See JACQUELINE D. KRICKORIAN, INTERNATIONAL TRADE LAW AND DOMESTIC POLICY: CANADA, THE UNITED STATES, AND THE WTO 93 (2012) (noting the use of political rhetoric to assert national trade rights); Phoenix X.F. Cai, *Making WTO Remedies Work for Developing Nations: The Need for Class Actions*, 25 EMORY INT’L L. REV. 151, 154 (2011) (discussing trade rights).

<sup>123</sup> See *supra* notes 71–89, 118–122 and accompanying text. See generally Eric Reinhardt, *Tying Hands Without a Rope: Rational Response to International Institutional Constraints*, in LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL

pecting public, those running for office invoke the adjudicatory levers set in motion by the WTO and other trade forums, in order to appear as economic nationalists.<sup>124</sup> It is important to note that whatever happens within the four corners of the WTO dispute resolution system will not affect the process of shifting economic power as a result of the WTO, as well as other FTAs, a fact trade lawyers have failed to analyze.

#### IV. CONSTITUTIONALISM AND CONTESTABILITY

From the time of the WTO's creation back in the 1990s, I have been struck by the degree to which global free trade rules have been endowed with an immutable, incontestable character not justified by any proven value to those rules.<sup>125</sup> I have been equally struck, and frustrated, by the analytical insufficiency of the trade law scholarship that grew up around this new body of law. Thematically speaking, a major problem is the pseudo-constitutionalism of the WTO, and what I would call the mistaken elevation of corporate preferences to the status of legal inevitability. Constitutionalization refers to a process by which legal ideas are moved from the realm of political contestability to something more permanent, generally because of a deep social consensus that these ideas are transcendent and self-evidently good.<sup>126</sup> Thus, they must be protected against political changes and vagaries—thereby leading to the constitutional elevation. They should, however, be “correct” enough to earn this status.

The analytical failures of trade lawyers discussed above allowed for the elevation of the WTO and the global trade system to the “constitutional” level. The Uruguay Round agreements and the new dispute settlement system of the WTO raised the profile of free trade concepts and the rather trite doctrine of comparative advantage into an international imperative set beyond a nation's own willingness to open certain areas of trade with the outside world.<sup>127</sup> Instead, we now have a set of rules

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INSTITUTIONS (Daniel Drezner ed., 2002) (discussing the ability of international institutions to “tie the hands” of political actors even when enforcement is unlikely).

<sup>124</sup> See Kurtzleben, *supra* note 39 (discussing the use of trade in the 2012 presidential campaign).

<sup>125</sup> See *Understanding the Uruguay Round*, *supra* note 53.

<sup>126</sup> See generally CASS, *supra* note 2 (discussing the question of whether the law of the WTO has or has not been “constitutionalized”).

<sup>127</sup> See FAUX, *supra* note 61, at 75 (writing that in the process of accepting NAFTA and the WTO, as well as the Permanent Normal Trade Relations with China Agreement, “the American financial elites got the right to invest in low-cost overseas production, sell the products back in the U.S. market, and invest in other nations’ banking, insurance, and financial institutions”). Moreover,

that represent an idealized standard to which all nations should attempt to adhere.<sup>128</sup> In the realm of individual protections against the state, we have “constitutional rights,” and on the international plane, “human rights.” In the trade realm, it seems that nations (and, by extension, their international commercial actors), now have “trade rights.”<sup>129</sup> Through the acceptance of these trade rights, the same nations find their political choices to be constrained, even where the effects on their citizens might prove to be plainly negative, and starkly contrary to the advertised gains.<sup>130</sup> This elevation of free trade concepts I have always found troubling, and in some places even illogical, but there has been little in the way of a rigorous critique of the underlying structure of global trade regulation. During the first Obama term, it might have seemed that U.S. policy would shift away from a focus on trade rules and back to the needs of national workers, but this of course has not happened.<sup>131</sup>

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Selling these deals to the American public involved a relentless propaganda campaign masquerading as economic science. Free trade is close to a religious principle for American neo-liberal economists, and with some exceptions, they were constantly available to insist on its magical powers to bring prosperity in the form of cheap prices and high wages. The dissenters were attacked as ignorant about economics and prejudiced against foreigners.

*Id.* at 76.

<sup>128</sup> Karolina Milewicz, *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*, 16 *IND. J. GLOBAL LEGAL STUD.* 413, 431–33 (2009).

<sup>129</sup> See KRIKORIAN, *supra* note 122, at 93 (discussing trade rights); see also Robert Howse, *The World Trade Organization and the Protection of Worker’s Rights*, 3 *J. SMALL & EMERGING BUS. L.* 131, 132–35 (1999) (contrasting trade rights with workers’ rights). Writing in the context of the *Shrimp-Turtle* case, a 1998 environmental law case before the WTO Appellate Body, Professor Jacqueline Krikorian states that “the Appellate Body used a two-step approach to interpret Article XX [of the GATT], recognizing that it was designed to balance the rights of one member to invoke an exception to the GATT 1994 rules against the substantive trade rights of other members.” KRIKORIAN, *supra* note 122, at 93.

<sup>130</sup> See generally Reinhardt, *supra* note 123 (discussing politicians’ inability to act because their hands are tied by international institutions).

<sup>131</sup> See Alexis Early, *Where the Rubber Meets the Road: What Chinese Tires Mean for Obama’s Trade Policy*, *BUS. L. BRIEF*, Spring 2010, at 63, 67. During the 2008 campaign only Senator John McCain came out in support of FTAs and NAFTA; then-Senator Obama, however, turned to the Democratic labor base and invoked ideas of economic nationalism. *Id.*; see also Christopher Alessi & Robert McMahon, *U.S. Trade Policy*, *COUNCIL ON FOREIGN REL.* <http://www.cfr.org/trade/us-trade-policy/p17859> (last updated Mar. 14, 2012) (“President Obama’s views on free trade have shifted since he was elected in 2008 in the midst of a global financial crisis. As a candidate for president, Obama was largely skeptical of the Bush administration’s free trade policy. He questioned the wisdom of NAFTA and other FTAs, and argued that the agreements did not include adequate safeguards for American workers.”).

Prior to 1995, although free trade ideas had been making inroads into the political discretion of nation-states, there was no internationally imposed obligation to adhere to trade laws when the political pain was too great.<sup>132</sup> For the most intractable trade conflicts, long-term negotiation, rather than legalized coercion, was the way to go.<sup>133</sup> This to some extent allowed national governments to respond to different sorts of political inputs—that is, from labor, from national producers, and from transnational corporate interests.<sup>134</sup> With the promulgation of the Uruguay Round agreements, there was a sense of the triumph of virtuous “free trade,” as opposed to gloomy and retrograde “protectionism.”<sup>135</sup> In fact, there was a broad claim made that, with the advent of the WTO, the rule of law would finally prevail in the trade arena, and that states would police each other through the dispute settlement system.<sup>136</sup>

During this period of “legalization” or even “constitutionalization,” it was not made apparent to the general public that the ability of any particular state to make political choices that ran counter to WTO rules would be severely limited.<sup>137</sup> Even today, it is unclear what the general public understands when news reports indicate that “the world trade body rules that.”<sup>138</sup> The changes of the 1990s were not presented by politicians and trade lawyers alike for what they were—the triumph of the wishes of transnational corporations—but rather as a breakthrough for humanity itself, with self-evidently good free trade ideas as finally

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<sup>132</sup> See Tkacik, *supra* note 20, at 174–79 (describing the transition from the GATT dispute settlement system to that of the WTO).

<sup>133</sup> See *id.* at 174–75 (noting one scholar’s opinion that the GATT 1947 dispute settlement was not legalistic enough and required consensus in the GATT General Council for any decision to be adopted).

<sup>134</sup> See *id.* (noting that even the party against whom the decision was made could refuse to adopt the report, and therefore the report would not be adopted).

<sup>135</sup> See *Understanding the Uruguay Round*, *supra* note 53.

<sup>136</sup> One of the strongest advocates for the international rule of law through global trade rules is the WTO’s current director-general, Pascal Lamy. See Larry Elliott, *Lamy’s Lament on Trade Liberalisation*, *GUARDIAN* (Jan. 28, 2010, 14.30 EST), <http://www.guardian.co.uk/commentisfree/2010/jan/28/davos-wto> (describing the dilemma in which Lamy has recently found himself with the proliferation of bilateral trade agreements outside the WTO).

<sup>137</sup> See FAUX, *supra* note 61, at 79.

<sup>138</sup> See *World Trade Organization: US Rules About Country of Origin Label on Meat Wrong*, *NEOGEN BLOG* (June 29, 2012), <http://www.neogen.com/blog/?p=851> (“The U.S. must make changes to a program requiring the labeling of meat with its country of origin, following a ruling handed down from the World Trade Organization (WTO) today.”); see also Bryan Mercurio & Rebecca Laforgia, *Expanding Democracy: Why Australia Should Negotiate for Open and Transparent Dispute Settlement in Its Free Trade Agreements*, 6 *MELB. J. INT’L L.* 485, 498 (2005) (discussing the United States’ need for transparency for the public to understand the Dispute Settlement Understanding and the WTO).

attaining their rightful status.<sup>139</sup> This process of legalization conveniently left little if any room for interrogation of the free trade concepts upon which the new laws were ostensibly based. Trade was presented as an aspect or subset of the international rule of law, and who could argue with that?<sup>140</sup> Other (non-trade) areas on the international rule of law map were presented as “difficult” to make truly enforceable.<sup>141</sup> Miraculously, the trade rules were presented as ripe for judicialization.<sup>142</sup>

In addition to their role as champions of the “rightness” of free trade as an animating idea, the trade lawyers and economists who supported this new system also seemed to be on the side of dynamism and globalization. Globalization as a term of art conflated enlightenment and mobility with the free trade agenda, contributing to the sense of trade law as an uncontested historical inevitability. Globalization appealed to that part of us that “likes to travel”—that is, those who could afford to travel after free trade’s readjustment of per capita national wealth. Liberalized trade borrowed from what I think of as a false dynamism, presented as creating, rather than destroying, opportunity. The legal paradigm was centered on “creative destruction” and the elimination of dark and nasty nationalism, something humanity no longer needed, in the quest for economic growth.<sup>143</sup>

With the full establishment of international trade laws, those most in the know presented this phenomenon as a pathway to unobstructed

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<sup>139</sup> See generally Dillon, *supra* note 6 (describing the opportunistic actions of corporations, scholars, and nation-states in the creation of the WTO).

<sup>140</sup> The new rules were presented as an opportunity for one’s own country to vindicate that country’s “rights”—thus making it appear that the agreements would give a positive benefit by restraining the negative behavior of other nations. See Ernst-Ulrich Petersmann, *The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and by the International Labor Organization: Is It Relevant for WTO Law and Policy?*, in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE 357, 357–58 (Ernst-Ulrich Petersmann & James Harrison eds., 2005) (discussing the issue of where the WTO fits within the larger international rule of law).

<sup>141</sup> See Margaux J. Hall, *Using International Law to Promote Millennium Health Targets: A Role for the CEDAW Optional Protocol in Reducing Maternal Mortality*, 28 WIS. INT’L L.J. 74, 86–87, 91 (2010) (lamenting this lack of enforceability and emphasizing that “weaknesses are not unique in the CEDAW Optional Protocol context; rather, they are inherent to all international human rights treaties’ Optional Protocols where they exist. Lack of enforceability is a concern that resonates across the landscape of international human rights treaties.”).

<sup>142</sup> See Banks, *supra* note 101, at 131–32, 134.

<sup>143</sup> See Park, *supra* note 7, at 798–99 (describing economist Joseph Schumpeter’s notion of “creative destruction” as “the process by which economic growth is fostered by commercial innovation, as new, more efficient modes of production displace outdated and inefficient modes of production”).

prosperity for the many.<sup>144</sup> It should be noted that many trade scholars were more or less agnostic on this point, and turned their attention to the technique of the disputes at the expense of either positive or negative assessments of the system as a whole.<sup>145</sup> To me, the logic of the Uruguay Round—judicialized, legalized trade regulation reinforced by a false narrative of “nation-to-nation” disputes—suggested something very different from this rosy scenario. If the past hundred years in the developed world has been about the struggle between labor and other “public” values, against corporate interests for the attention and responsiveness of national government, the creation of the WTO could be seen as a giant reset of the clock.<sup>146</sup> It seems a basic truism that the bargaining power of labor has to do with its indispensability to ongoing industrial productivity.<sup>147</sup> As transnational corporations became increasingly free to roam the world in search of the most advantageous labor and environmental conditions (thereby greatly reducing the “indispensability” of labor), that advantage of local labor was simply lost.<sup>148</sup> Job losses and a deepening trade deficit did indeed follow the acceptance of more FTAs.<sup>149</sup> It seemed apparent that this demotion of labor was no random or accidental by-product of the collective desire for “globalization,” but rather one of the main driving forces in the globalization of trade rules. Transnational corporations were increasingly empowered to burst the boundaries of the nation-state, restoring to themselves the kind of power over working people they had in the good old days of

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<sup>144</sup> See Barlett & Steele, *supra* note 24 (describing Presidents George H.W. Bush and Bill Clinton’s descriptions of NAFTA as being good for the United States and for U.S. workers).

<sup>145</sup> See Dillon, *supra* note 102, at 87 (arguing that many “trade and” critiques are technical in nature and inward-looking). See generally *supra* note 17.

<sup>146</sup> See Michael Lind, *The Cost of Free Trade*, AM. PROSPECT, Dec. 1, 2011, at 54, available at <http://prospect.org/article/cost-free-trade> (arguing that successive American administrations have ignored the interests of American workers in favor of pursuing free trade ideals).

<sup>147</sup> See generally Thomas, *supra* note 29 (discussing international labor law and its linkage to the international trading regime); Trebilcock & Howse, *supra* note 32 (discussing the trade/labor linkage).

<sup>148</sup> See William E. Forbath, *The Distributive Constitution and Workers’ Rights*, 72 OHIO ST. L.J. 1115, 1139–40 (2011) (giving a sense of the historic demise of the American labor movement); see also Kenneth Casebeer, *O My Sons and Daughters, How Do I Immiserate Thee: Let Me Count the Ways*, 29 HOFSTRA LAB. & EMP. L.J. 1, 1–5 (2011) (same).

<sup>149</sup> See FAUX, *supra* note 61, at 76–81 (arguing that the ruling class in the United States was indifferent to the loss of economic security experienced by U.S. workers with the rise of FTAs).

late nineteenth-century America.<sup>150</sup> A global Gilded Age ensued; indeed, we may be only at the very beginning of that process, and are still living on credit cards to mask this reality from ourselves. At such problematic moments, *process presentation* is everything. International trade lawyers and academics have a great deal to do with this presentation, insofar as they provide a professional, intellectual gloss on the otherwise rather crude and problematic idea of maximum free trade.

#### CONCLUSION

The WTO and other FTAs have been presented as a set of rules that can ensure internationally virtuous national behavior—(falsely) analogous to human rights law. Nations are said to require policing because of their unfortunate tendency to national “protectionism.” In that tableau, the WTO is the answer to a frustrated world’s prayer. Trade law restrains undesirable impulses, and frees the better self of any nation. A more accurate presentation might have been that the WTO reflected a wish list for multinational corporations, but given the structure of trade law (i.e., commandments for nations to follow in order to be better global citizens), this is difficult for most people to perceive. A significant fact is that these international laws reconfigured the balance of power not only among, but more strikingly *within*, states. Most people—including those without specialized access to the arcane subject matter—could not be expected to grasp this process fully, and with all the virtuous progress about, could hardly be expected to denounce such wondrous international developments as globalization, economic liberalization, and unfettered opportunity. Accepting without protest the constitutionalization of free trade concepts and corresponding global trade rules, legal scholars turned the intellectual pursuit of “international trade law” into a technocratic, and often self-serving, discipline. It should come as no surprise that there is very little informed analysis to guide the public and policymakers as global free trade continues to affect the distribution of wealth, power, and employment across and within national boundaries.

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<sup>150</sup> See generally William Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989) (giving an overview of the role of law in furthering the labor movement’s agenda).

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