

Statecraft, Trade and The Order of States

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Introduction

In 1989, Francis Fukuyama announced “the end of history.”² This was not the first time this bold claim had been made, for Hegel had argued as much about Napoleon’s victory at Jena in 1806. But Fukuyama was not declaring the triumph of the state-nation, as Hegel had done.³ Rather, he was saying that the great struggle between democracy, fascism and communism was over. After defeating the Axis in World War II, and following the fall of the Iron Curtain, Fukuyama believed that democracy had triumphed and would, henceforth, be the preferred model for State⁴ government.⁵

It now appears that, like Hegel, Fukuyama was mistaken in his claim for the end of history. While it is true that democracy defeated fascism and communism in the ideological struggle for political dominance, the State as we know it continues to evolve. History has not ended. The story continues, and as has been the case before it is only the

² Francis Fukuyama, *The End of History*, THE NATIONAL INTEREST 3-18 (Summer 1989). As he had for so many intellectuals of his generation, Fukuyama’s Hegel came by way of Alexandre Kojève. *For discussion, see SHADIA B. DRURY, ALEXANDRE KOJEVE: THE ROOTS OF POSTMODERN POLITICS 179-198 (1994).*

³ The state-nation is the constitutional manifestation of the state that is characterized by a mobilization of a nation, that is, “a national, ethnocultural group” to benefit the State. *See infra* note 4. This form of the State, exemplified by Napoleonic France, dominated Europe and America in the 19th Century and ultimately gave rise to the nation-state with the advent of World War I. For a general description, see PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 146, 144-204 (2002).

⁴ We use the word “state” in two different senses. When we write “State,” we are referring to the political entity that has evolved in the Western world over roughly the last 500 years. *See* J.S. MCCLELLAND, *A HISTORY OF WESTERN POLITICAL THOUGHT* 280 (1996) (dating the birth of the modern state in 1500). The State is composed of many “states,” like Italy or the Republic of Latvia. When we refer to these individual states, we refer to them as a “state.” For discussion of the various phases of the State’s development, and their relation to a variety of constitutional orders, see BOBBITT AT 69-347.

⁵ According to Fukuyama, the liberal democratic model soundly beat fascism and communism because, simply put, it was a better idea. It had no problem besting the fascist ideology of expansionism and racial superiority. In time it demonstrated the untenability of the Marxist idea of class struggle because the State that Fukuyama wrote about was legitimated by its enablement of the welfare of the nation, and the growth of a strong middle class had radically changed the social reality in which Marx wrote. In the end, Fukuyama argues, all good government would be organized along the lines of the liberal democratic model, applied to govern an ethnic or otherwise discrete nation that would protect the rights of minorities. *See* Fukuyama, *supra* note 2, at 3-18.

nature of the State⁶ that is changing.⁷ Identifying these changes, gauging their significance, and evaluating their relationship with respect to other features of the relations between states is central to understanding how and why the State continues to evolve.

Recent scholarship on the State has largely focused on foreign policy, that is, the “strategic” aspects of the relations between states.⁸ One of the more interesting claims in this regard is that the very nature of the State (what we call Statecraft) has evolved in response to developments unique to the twentieth century.⁹ These developments, which include the commodification of weapons of mass destruction and the diminished importance of sovereignty,¹⁰ have engendered a new approach to strategy.¹¹ From the

⁶ The State is both a political institution and an idea. Two of the defining features of the modern form of the State –sovereignty and control of power – are connected to two larger dimensions of the State, which we will call the inner and the outer. The most obvious aspect of sovereignty is control over geography. Sovereignty is an attribute of “states” and sovereignty matters most in relations between states. See G.W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* § 331 (T.M. Knox trans. 1977) (“[E]very state is sovereign and autonomous against its neighbors.”).

⁷ Some see the end of the State marked by a transition to other, more complicated organizing forms. See MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* vii (1999) (“Globally speaking, the international system is moving away from an assembly of distinct, territorial, sovereign, legally equal states toward different, more hierarchical, and in many ways more complicated structures.”. See also ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 32 (2004) (“The conception of the unitary state is a fiction.”).

⁸ See ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003); ROBERT COOPER, *THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY* (2003); PHILIP BOBBITT, *supra* note 3, at 5-17.

⁹ PHILIP BOBBITT, *supra* note 3, at 677-714. The five developments are: (1) an international system of trade and finance that promotes exchanges of goods, and talent, and the free movement of capital; (2) threats that do not observe national boundaries (e.g., AIDS and SARS); (3) loss of state control over culture; (4) commodification of weapons of mass destruction; and (5) a global system of human rights which imposes legal rules on nations that have not been ratified by the nation-state.

¹⁰ For discussion, see, K.J. Keith, *Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?* 63 *CAMBRIDGE L.J.* 581 (2004). For discussion of sovereignty in the context of the WTO, see KENT JONES, *WHO’S AFRAID OF THE WTO?* 92-104 (2004). A strong defense of sovereignty in the context of international law and constitutional government is found in JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005).

¹¹ See Lee Feinstein and Anne-Marie Slaughter, *A Duty to Prevent*, *FOREIGN AFFAIRS*, January/February (2004) (arguing for pre-emptive military action in a world of global terrorism and WMD). See also

perspective of strategy, this development requires us to rethink the basis for the State's claim to legitimacy in the 21st century.¹² Given its importance, it is no surprise that many scholars have devoted their attention to changes in strategy and their relation to the continuing evolution of the State.¹³ We agree that the State is changing. We further agree that these changes require a rethinking of strategic defense in a world of asymmetric warfare and global networked terrorism.¹⁴ We do not intend to add to the literature on strategy, however. Our project draws upon this literature, but is distinctly different.

Our project examines the extent to which the global trade system¹⁵ should respond to fundamental shifts in the nature of the State and of international relations.¹⁶ Our thesis is that, much like the strategic and foreign policy of states is linked to their internal constitutional order,¹⁷ the trade policy of states is another external dimension of the State

FRANCIS FUKUYAMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* 98 (2004) (“[T]he existence of WMD in the hands of non-state actors poses a new and extremely severe type of security problem that would almost certainly justify intervention on the part of a country threatened in that manner.”).

¹² Legitimacy is an historical achievement. See BOBBITT, *supra* note 3, at 207 (“[H]istory is the medium by which the legitimacy of the constitutional structure is married to the success of the strategy of the state.”). ROBERT COOPER, *supra* note 8, at 149 (“In the end, durable and reliable peace depends on creating legitimacy.”).

¹³ See ROBERT COOPER, *supra* note 8, at 3 (“What has been emerging into the daylight since 1989 is not a rearrangement of the old system but a new system. Behind this lies a new form of statehood . . .”).

¹⁴ See, e.g., PHILIP HEYMANN, *TERRORISM, FREEDOM AND SECURITY: WINNING WITHOUT WAR* 37-87 (2003) (discussing terrorism, intelligence, and “war” after 9/11).

¹⁵ By the “global trade system” we mean the structures and practices of the GATT/WTO. See generally, http://www.wto.org/english/thewto_e/thewto_e.htm (last visited April 6, 2005).

¹⁶ For discussion, see *GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION* (Miles Kahler & David A. Lake eds., 2003); JEAN-MARIE GUEHENNO, *THE END OF THE NATION STATE* (Victoria Elliot trans., 2000); KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* (1995).

¹⁷ The “internal constitutional order” is expressed through law, both public and private. BOBBITT, *supra* note 3, at xxiii.

and also connected to the State's inner order (law). The experience of the 20th century shows that states must acknowledge overarching structural changes within their domestic spheres, then identify in a timely fashion how these shifts affect their interaction with the rest of the international economic community. In turn, states must adjust external trade policy objectives and strategies of the international community to accord with their intrinsic political and ideological goals. The failure to do so at the appropriate time will hamper the internal economic health of states and may also hamper free states in existential struggles against totalitarian movements.¹⁸

Our article proceeds in three principal parts. In Part I, we provide a detailed defense of the claim that history has not ended and, further, why the State continues to evolve in the twenty-first century. We identify the modern states of the 20th century as nation-states. These states were born out of the prior evolutionary stage of the State, during which the State sought to solidify itself by drawing on its subjects as a supportive bloc and, in the process, created the nation whose welfare and security became the legitimating basis of the State. Modern states maintained security vis-a-vis one another through a balance of powers.¹⁹ They used law to foster the welfare of the nation. While Europe and the United States, among others, took different routes to welfare, the welfare systems of the modern states had as their common denominator a commitment to the

¹⁸ While we do discuss many events, both current and historical, this is an essay about ideas. Mindful that “[i]deas are always both lagging and leading indicators of reality” (H.W. Brands, *Ideas and Foreign Affairs* in *A COMPANION TO FOREIGN RELATIONS* 1-14 (Robert Schulzinger ed., 2002)), we attempt to get ahead of coming events and anticipate those events with ideas that will accommodate a future toward which the states that comprise the world trading system are already moving.

¹⁹ For discussion of balance of powers and a defense of “Offensive Realism,” see JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001).

nation as the basis for their legitimacy.²⁰ We posit that, in the 21st century, the modern states are being replaced by post-modern states. There are several reasons for this, including the inability of states to maintain the provision of welfare as a legitimating basis and to guarantee security when confronted with global networked terrorism, weapons of mass destruction, and the proliferation of diffuse threats.

Part II argues that, just like law and strategy evolve through an interdependent and dynamic relationship, Statecraft and the international commercial order of states engender each other's evolution. The domestic constitutional architecture of the State,²¹ such as its organization around a nation and its legitimization through the promotion of that nation's welfare, have profound repercussions on the ordering of the international trade system. At the same time, shifts in the foundational rules of the international trade system and in patterns of international economic activity (such as the rise of a new set of international economic actors or transformations in currency markets) affect the ability of the State to maintain its domestic statecraft and tend to transform the inner order of the State. Like Jacob's ladder, the State and the order of states are animated by a constant interaction going from bottom to top, and vice versa, in a dynamic motion that shape both spheres and, in turn, propels them forward through various stages of history. Just as Fukuyama and Hegel were misled into thinking that strategic and political history ended, theorists of trade might misinterpret a historical transformation of sufficient significance as sounding the end of trade history. In truth, however, the story continues.

²⁰ A recent discussion is found in Arthur Waldron, *Europe's Crisis*, COMMENTARY, __-__, July-August 2003.

²¹ We will explain below the meaning of constitutional choices, as used in this context.

We support our theory in Part II by an analysis of the relationship between trade and the State over the course of the last two world wars, culminating with Bretton Woods. We explain why Bretton Woods accorded with the essential elements of Statecraft in the modern world. We argue that the institutionalization of comparative advantage by Bretton Woods was only another stage in the evolution of the State. Bretton Woods set in motion transformations in the order of states which, in turn, contributed to the continued metamorphosis of Statecraft, and made a new trade order of states necessary.

In Part III, we explain how the Bretton Woods order is becoming obsolete because of fundamental shifts in Statecraft. We begin by explaining how the main interpretive and institutional issues that faced the Bretton Woods system, and its World Trade Organization successor, were a function of Statecraft in the modern world of nation-states. We claim that the nexus between the inner and outer dimensions of the State is gradually pushing the trade world to revisit its reliance on comparative advantage as the animating norm of the trading system. We argue that a new Bretton Woods is needed and, with it, a new legitimating trade norm for states, one we identify as “enablement of global economic opportunity.” We do not merely recommend a new global trade norm. We complete our argument with a description of a new set of global institutions for world trade, institutions that enable us to make sense of current changes as we approach an uncertain future.

The upshot of our argument is three-fold: (i) first, history never ends, and the interdependent mechanics of Statecraft and the order of states will, in each generation, usher in the need for revising the international commercial order and have a new

constitutional moment; (ii) second, theoreticians and planners of trade can predict not only the issues that a trade system will generate at any moment in history, but also decipher and anticipate the contours of the next generation. To do this, however, they must understand the mechanics of Statecraft and the order of states. (ii) third, each constitutional moment is bound to set in motion transformative mechanisms that essentially plant the seeds of the succeeding generation, and the time has come for a new constitutional moment of trade. Our goal is to outline the contours of the new constitutional moment that we believe is needed and of the era that it should usher in.

I. The End of History...and Its Continuation

Fukuyama's end of history begins in 1989 with the fall of the Berlin Wall. The Second World War ended with the demise of fascism. The fall of the Wall in 1989 marked the endgame for communism and, with it, the triumph of democracy.²² According to Robert Cooper, 1989 did not mark the end of history, but rather set the stage for the emergence of a new form of the State – the “post-modern state.”²³ Similarly, Philip Bobbitt rejects Fukuyama's claim and sees 1989 as a step in the evolution of the State.²⁴ He identifies the new form of the State as the “market-state” which, he argues, will succeed the nation-state. These two theorists of the State agree on a number of defining characteristics of the new form of State that, in their view, confirm the continuing evolution of the State. Further, their theories point to a nexus and an

²² For historical details, see FRANCOIS FURET, *THE PASSING OF AN ILLUSION* (Deborah Furet trans. 2000).

²³ See Cooper, *supra* note 8, at 26 (identifying “post-modern Europe” with The Treaty of Rome (1957) and the Treaty on Conventional Forces in Europe).

²⁴ See BOBBITT, *supra* note 3, at 611-639.

interplay between the inner face of the state (its constitutional order) and its strategic foreign policy and military objectives. We think Bobbitt and Cooper are right about the State.²⁵ But the story they tell is incomplete.

The State has both internal and external dimensions. States express their relations with other states in two aspects. The first is through strategy. The most obvious example of strategy is war. Strategic decisions are connected to the inner dimension of the State through law. The second external dimension of the State is trade. Like strategy, trade is a matter of the relations between and among states. And as with strategy, the outer dimension of trade is internally expressed through law. Taken together, Statecraft consists of strategy and trade, the two outer dimensions of the State.

The modern era of strategy, which ended around 1989, spanned the better part of the 20th century, commencing with World War I, continuing through the defeat of fascism and ending with the fall of communism. During that period, the liberal democracies organized themselves as modern welfare nation-states.²⁶ A commitment to sovereignty drove the internal and external dimensions of the modern state.²⁷ Modern states adhered to relatively absolutist notions of sovereignty over internal policy choices and external policy and military objectives.²⁸ The notion of sovereignty was intricately linked to the nation as a constitutive feature of the State, to welfare as the legitimating drive of the State, and to the balance of powers as a key component of the State's external strategy.

²⁵ We note that even Marxists affirm the evolution of the State over claims for its demise. See ANTONIO NEGRI & MICHAEL HARDT, *EMPIRE* (2001) and *MULTITUDE* (2004).

²⁶ For ease of reference, we will refer to these as "modern states."

²⁷ See generally, BOBBITT, *supra* note 3, at xxv-xxvii.

²⁸ *Id.*

Sovereignty is tied to the idea of the nation. The essential goal of the State was to protect the nation against external threats and to provide for its internal welfare. Thus, modern states would tolerate few intrusions into their domestic affairs. From a military standpoint, the sovereignty principle was enshrined in the U.N. Charter, which prohibits states from violating one another's sovereignty unless acting in self-defense or in defense of an allied state that has itself been invaded.²⁹ This principle held fast through the end of the 20th century wars with one important exception, that of colonial wars.³⁰

The other corollary of the notion of sovereignty for nation-states was the idea of equal rights between states. At the United Nations, for example, a fiction was maintained, (albeit tempered by rules such as the Security Council veto that recognized the superior power of World War II's victors) that each nation had an equal vote. The internal model of the State that Fukuyama described, characterized by a commitment to the protection of individual rights and the consent of the governed, was replicated internationally. The intended outcome was a society of modern nation-states that would have formal equality, and that could not violate each other's territory. Throughout this period of history, sovereignty had been inextricably tied to the concept of a nation. The nation was sovereign, and although it was largely ethnic, it defined itself by its physical borders and the population that it had inherited throughout centuries of evolution. Having grown and become more powerful, the modern state underwent a metamorphosis from state-nation, a state supported by a nation, to nation-state, a state supporting its nation. The primary means of support was the notion of welfare - coupled with a system

²⁹ Art. 51, U.N. Charter, available at <http://www.un.org/aboutun/charter/>.

³⁰ For discussion of colonial wars, see *infra* at text accompanying notes 31-35.

of protection of minority rights or rights deemed fundamental - as its legitimating objective.

Europe and the United States differed in their domestic approach to providing welfare to the citizenry. Europe had a stronger set of social entitlements, such as unemployment benefits, large family allowances, strong employee protection, early and generous retirement benefits, just to name a few features. For several reasons, some historical and some structural, the United States did not adopt social entitlement packages to the extent that Europe had.³¹ Nevertheless, like Europe, the legitimacy of the government of the United States depended in substantial part on its promotion of the welfare of large middle and working classes.³²

On the international scene, the society of modern nation-states attempted again to export its domestic ideas. The discourse over development, for example, has been dominated by the model of the sovereign nation-state and its extension of welfare to other sovereign nations. Africa is a prime example of this phenomenon. The modern sensibility could not tolerate colonialism. It viewed the African peoples as “foreign nations,” whose status as nations entitled them to a state. Not surprisingly, the idea of “the nation” also made its way to the colonized, who often came to age and were educated in systems that viewed the nation-state, governed by democratic principles, as the ultimate form of human organization. The result was a push to end colonialism and to substitute a government of the nation (at least formally) for that of the colonizers; put otherwise, the colonized became unwilling to live under a state controlled by another

³¹ For discussion and possible explanation, see JOHN MICKLETHWAIT & ADRIAN WOOLRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* (2004).

³² COOPER, *supra* note 8, at 42-43.

“nation,” and made it difficult for the colonizer to retain such control.³³ The upshot (which of course did not come to pass) would be a nation state governed by democratic principles, which would gradually develop and achieve parity with its Western big siblings.

Lastly, the notion of balance of power was linked to the concepts of sovereignty and of the nation as the interlocutor of the state in its quest for legitimacy. In the modern system, nation-states with strong sovereign powers maintained international orders by balancing each other’s powers. Balance of powers, rather than the hegemonic domination of an empire or superpower, was the preferred method of achieving order.³⁴ The modern world viewed states as equal citizens of world society. The concept of hegemony was antithetical to this worldview, however fictional or detached from reality it might have been. Thus, it was the alternative, an order based on balance among equals (or a substantial group of equals), that came to dominate the Western world in the modern era.

Today, the modern state is gradually declining in various parts of the world but especially so in Europe. To be sure, the nations of the world continue to adhere to a substantial extent to territorial and constitutional Statecraft of the kind that emerged in the 20th century. However, a foundational transformative shift similar to the one that brought about the nation-state in the 20th century is taking place.

The first essential characteristic of the society of post-modern states that is relevant to our thesis is that notions of sovereignty and borders are gradually losing the

³³ See FRANZ FANON, *THE WRETCHED OF THE EARTH* (1965).

³⁴ When he wedded balance of powers to the idea of “containment,” George Kennan authored the US approach to the Cold War. See X, *The Sources of Soviet Conduct*, 25 *FOREIGN AFFAIRS* 566-582 (1947).

central role they played in the modern era.³⁵ Increasingly, post modern states accept, to various degrees, control-sharing over domestic matters with supranational or global regimes and institutions.³⁶ Next, states are experiencing a loss of domestic control because, as we will describe further later, traditional tools for regulating industry, such as monetary policy, have been rendered less effective by increasingly diffuse, cross-border forces, and because of the rise of environmental, health and security threats that are also too diffuse to be controlled by domestic policy only.³⁷ Further, the once-rigid international rules on the use of force have given way to a nascent principle of customary international law that permits foreign intervention in the affairs of a state that engages in egregious violations of human rights (e.g., Serbia, Rwanda) or threaten sensitive areas of international finance or commerce.³⁸ All in all, sovereignty, while still a foundational basis of international relations, is gradually eroding.

Welfare has also begun to fade as the legitimating basis for the State.³⁹ The decline of welfare is taking two discrete forms: the strong pressure in Continental Europe on the cradle to grave systems established in the 20th century⁴⁰ and, perhaps more significantly, the failure of the welfare state to take root in the South. Europe is

³⁵ See ROBERT COOPER, *supra* note 8, at 66-67.

³⁶ *Id.* at 27 (“The legitimate monopoly on force that is the essence of statehood is thus subject to international – but self-imposed – constraints.”).

³⁷ *Id.* at 102.

³⁸ *Id.* at 59.

³⁹ See BOBBITT, *supra* note 3, at 240-242.

⁴⁰ The situation is most acute in Germany. See Mark Landler, *German Joblessness Rises As Benefits Are Reduced*, Late Edition - Final, Section C, Page 5, Column 1, 2/3/2005. The complexities of the German context are discussed in PETER BLESES & MARTIN SEELEIB-KAIER, *THE DUAL TRANSFORMATION OF THE GERMAN WELFARE STATE* (2004). See also GABOR STEINGART, *DEUTSCHLAND: DER ABSTIEG EINES SUPERPOWER* (2004) (the story of Germany’s decline since 1945).

witnessing a dual internal phenomenon when it comes to welfare. In part, the welfare system is viewed as an inalienable set of social rights, a core component of the *acquis social* set of progressive measures that should never be reversed. Britain, for example, is increasing its public spending on welfare.⁴¹ In France, any governmental attempt to decrease the level of benefits in a meaningful manner is sure to be met with unrest and protest of the kind that paralyzed the country at various times in recent years. At the same time, the State by all accounts is rapidly losing its ability to sustain the welfare programs. The aging of the European population endangers retirement schemes. The economic burdens placed on employers are deterring employment, social mobility, and fluid growth, and they consistently fall short of generating the income necessary to shore up the system, which is constantly running at a deficit.

The South provides an even bleaker illustration of the waning of welfare. The adoption by decolonized nations of the boundaries inherited from colonial powers was, by and large, not followed by the adoption of welfare systems that replicate the West's. The reasons are manifold. In many countries, particular ethnic or other discrete groups vied for power and control of resources to be redistributed among themselves, not to the "nation." The nation, for that matter, did not really exist. It was created by the colonial powers and used as a catalyst and focal point for achieving independence. When domestic politics started to take their course, the groupings began to focus more on ethnic, tribal, and other more natural identification markers, and less on the concept of the nation as defined in colonial times. Furthermore, on a fundamental economic level,

⁴¹ 2004 HM SPENDING REVIEW, PN A2, 12 July 2004, http://www.hm-treasury.gov.uk/spending_review/spend_sr04/press/spend_sr04_press13.cfm; *see also* Rachel Smithes, *Public and Private Welfare Activity in the United Kingdom, 1979-1999*, available at <http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper93.pdf>

the developing countries did not follow the industrialization and “state-nation” strengthening pattern that characterized the West. They inherited a State, which was viewed from the West with lenses developed through centuries of a unique history, but which in reality had as little likelihood of pursuing its citizens’ welfare than, say, the French Kingdoms that preceded the Revolution.

The difficulty of achieving welfare will arguably lead governments to shift their focus towards the maximization of economic opportunity. Such policies could take many forms. In Japan, for example, the government may focus on subsidizing research and development to give domestic industries the best possible edge.⁴² Elsewhere, the emphasis may be on providing education and infrastructure, all the while deregulating markets.⁴³ In yet other societies, the emphasis may be on creating commercial structures that give workers ownership stakes, so as to maximize their opportunity for economic advancement.⁴⁴ In all events, the bottom line is that instead of focusing on ensuring the welfare of everyone, the State will gradually shift its foundational approach towards maximizing the economic opportunity available to all. While welfare policies of course continue to obtain in Europe and throughout the world, the tide of history seems to shift away from welfare as the core element of Statecraft that was axiomatic in the modern world.

In sum, the developments described above have resulted in a trend towards the modern state’s loss of its ability to control the domestic arena and to enact policies that

⁴² BOBBITT, *supra* note 3, at 284.

⁴³ *Id.* at 670-71.

⁴⁴ *Id.* at 673.

would protect the welfare of the nation.⁴⁵ To be sure, the world is not completely post-modern. As Cooper notes,⁴⁶ post-modern states live alongside modern and even pre-modern states.⁴⁷ In addition, there are various pre-modern states on the international scene, where the official organs of the State do not even enjoy exclusive use of force within their own borders. Nevertheless, we believe that the trend that we are describing provides an accurate account of a transformational move in Statecraft and international relations.

⁴⁵ For an insightful analysis of the complex relation between states and transnational firms and control of the domestic arena, see Saskia Sassen, *The State and Globalization*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 91-110 (Rodney B. Hall and Thomas J. Bierstecker eds. 2002).

⁴⁶ See COOPER, *supra* note 8, at 16-26.

⁴⁷ Certain important players on the international scene, such as Indonesia and India, may still qualify as modern states. These states, while operating in an increasingly post-modern world, continue to adhere to notions of sovereignty and nation, and they are not characterized by the same degree of diffuseness that is increasingly apparent in post-modern states. *Cf.*, e.g., Gurcharan Das, *Is India Shining?* WALL ST. J. EUR., May 4, 2004, at A8 (discussing India's drive to achieve 'nation-building' through economic success).

II: Jacob's Ladder: Statecraft, Trade and the Order of States: A Theory of Interwoven Mechanics

The foundational notions of the international trading system reflect not so much the outcome of a material dialectic among states (e.g., the historical recognition of the damage that arose from the failure to follow a comparative advantage model) but rather they arise from the interwoven architecture of State and of the international trade order of states, and from the dynamic evolution of both planes that stem from parallel yet related metamorphoses. Transformations in domestic statecraft drive the evolution of the international trade order and, in turn, transformative shifts on the international commercial plane tend to change the domestic configuration of the State.

This relationship of interdependence and connectedness is dynamic and manifests itself on a foundational level. The domestic constitutional architecture of the State,⁴⁸ such as its organization around a nation and its self-legitimization through the promotion of that nation's welfare,⁴⁹ have profound repercussions on the ordering of the international trade system.⁵⁰ At the same time, shifts in the foundational rules of the

⁴⁸ We will explain below the meaning of constitutional choices, as used in this context.

⁴⁹ We use the concept of welfare to capture broadly the policies of the nation-state that foster a broad level of acceptance of the modern liberal democracies by the different elements of the constituent nations. Western Europe, Asia and the United States were the more powerful elements of the players on the international order. In addition to its security and strategic functions, the State as lived by all these players redistributed wealth, provided a safety net for the nation, and protected economic and other rights for broad segments of the population. The policy choices and the law that sprung from this fundamental element of Statecraft spanned a substantial part of the inner order of the states (including labor laws, unemployment benefits, retirement rules, aid to families, taxation law, subsidies, public investment and other central components of the domestic legal and regulatory order). As discussed below, nation-states such as France, the United States or Japan took different approaches to achieving welfare, but their inner orders shared the essential hallmarks of legitimacy of the nation-state in relation to the nation.

⁵⁰ The association of welfare with the nation-state deepened as the 20th century, Cooper's modern era. See Michael Hart, *Coercion or Cooperation: Social Policy and Future Trade Negotiations*, 20 Can.-U.S. L.J.

international trade system and in patterns of international economic activity, such as the rise of a new set of international economic actors or transformations in currency markets, affect the ability of the State to maintain its domestic statecraft and tend to transform the inner order of the State.⁵¹ Like Jacob's ladder, the State and the order of states are animated by a constant interaction going from bottom to top, and vice versa, in a dynamic motion that shape both spheres and, in turn, propel them forward through various stages of history. Just as Fukuyama and Hegel were lured into thinking that strategic and political history ended, trade theorists might misinterpret a historical transformation of sufficient significance as sounding the end of trade history. In truth, however, the story is always bound to continue.

As detailed below, the dynamic relationship of interdependence and connectedness between State and the order of states may be observed at a descriptive level. In addition, as a normative matter, states must acknowledge overarching structural changes within their domestic sphere as well as on the international plane, and quickly identify how these shifts affect their interaction with the rest of the international economic community. Trade policy must then be adjusted to accord with internal political and ideological goals and with the evolving international scene. To be sure,

351, 377 (“Over the course of the twentieth century, the attributes of the nation-state grew further to embrace the social welfare state. By the middle of the century, attributes of the nation-state included not only territorial and national integrity, but also the capacity to promote the economic and social well-being of its citizens. At the same time, the post-war system of multilateral rules and organizations became the latest expression of rules to govern inter-state relations. As with the expansion in the attributes of the nation-state, the range of issues addressed by the rules of inter-state relations had similarly expanded.”)

⁵¹ *Id.* (“Today we face a new reality. Advances in transportation and communications technology have made it possible to breach the territorial, social and cultural integrity of the nation-state on a daily basis. The convergence of popular cultures and the crisis of the welfare state all point to the need to develop a new definition of sovereignty as well as a new set of norms and rules for inter-state relations. In short, we need a new set of rules that recognizes that the realm of goods, services, capital and technology has largely escaped from the effective regulation of the territorial nation-state, while its people remain largely attached to it.”)

structural shifts do not happen overnight. However, there comes a point in time when a constitutional moment is needed. States must come together then and recognize that Statecraft and the order of states has undergone a metamorphosis of sufficient maturity and magnitude to warrant a new set of constitutional rules.⁵²

The constitutional moment is a rite of passage, in that it marks an international awareness that change has happened, and a crucial exercise in recognizing the nature of the change and in instilling throughout the system fundamental new norms that will take their course throughout the new era. The states' failure to recognize the constitutional moment will not only prejudice them economically, but also possibly hamper the achievement of their non-trade strategic foreign policy objectives. Ending history, then, is not only an academic and intellectual mistake; rather, it is as dangerous an illusion as believing that invaders may be repelled in World War II with a Maginot Line born out of World War I, in that the human difficulty in stepping out of deeply rooted paradigms to look at the future is bound to generate defeat in the present.

We have selected the 20th century as a historical prism from which to illustrate our theory, focusing on the GATT/WTO, but also making incursions into the European Union and regional arrangements such as the NAFTA to illustrate our point on a comparative basis.

A. Failure and Redemption.

⁵² We argue in Part III that such a constitutional moment has become necessary in the early part of the 20th century. As illustrated in various contexts below, we use the notion of constitutional moment as a conscious choice based on the interaction of Statecraft as inner law. It relates less to a change in the ordering of society that legitimizes the adoption of certain constitutional norms, than to the infusion of new norms to recognizing the interaction between inner state order and the international order of states. Cf. Bruce Ackerman, *Fidelity as Synthesis*, 65 Fordham L. Rev. 1519 (1997)(Ackerman defines a constitutional moment as a moment that "occurs when a rising political movement succeeds in placing a new problematic at the center of American political life).

The 20th century trade story, as classically told, is one of failure and redemption. In this instance, beginning the inquiry with an exploration of redemption, and telling the story with the voice of an economist, makes the contours of failure clearer. Redemption happens after World War II, with the incorporation into the GATT of the theories of absolute and comparative advantage developed by Adam Smith and David Ricardo.⁵³ Both economists posited that states would maximize their wealth by unilaterally eliminating import restrictions.⁵⁴ However, they did not address the use of law to erect an international system that would institutionalize their economic insights.⁵⁵ The GATT did that. At its core, the GATT established three “disciplines” that removed states’ ability to discriminate against one another in an effort to protect the domestic economy: tariff bindings, a non-discrimination norm applicable to internal taxation and regulation, and a prohibition of quotas and like measures.⁵⁶

The first anti-protectionism discipline created a framework for the GATT Contracting Parties to bind the tariffs that they imposed on foreign products, the primary protectionist barrier of the first half of the 20th Century.⁵⁷ The GATT did not require its constituent states actually to reduce tariffs. Rather, the regulatory framework called for

⁵³ See KYLE BAGWELL & ROBERT W. STAIGER, GATT-THINK (Nat’ Bureau of Econ. Research, Discussion Paper No. 8005 (2000).

⁵⁴ See, e.g., JACQUES MOLLE, THE ECONOMICS OF EUROPEAN INTEGRATION (2001).

⁵⁵ Robert Howse, *Symposium: The Boundaries of the WTO: From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, 96 A.J.I.L. 94 (2002).

⁵⁶ This removal of barriers to trade spurred a sharp increase in cross border economic activities among nation-states over the second half of the twentieth century. The GATT took off with [23] Contracting Parties, gradually took hold in over [150] nations. It progressively reached to new subject matter areas, such as intellectual property and trade in services. These developments are what grants to Bretton Woods, in retrospect, its status as a constitutional moment.

⁵⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

multilateral negotiations of ceilings (the “bindings”) that, once agreed upon, would establish the maximum duty that the concerned state may legally apply for the relevant product category.⁵⁸ In turn, each state committed, under the Most Favored Nation Clause of the GATT, to extend to all trading partners the lowest tariff concession chosen by the state with respect to any partner. This framework created an institutional framework for the gradual reduction by the Contracting Parties of global tariffs. This structure generated eight rounds of trade negotiations, and a drastic reduction of the global tariff barriers to trade that prevailed before Bretton Woods.⁵⁹

The second discipline required the Contracting Parties to respect a non-discrimination norm that guarantees all imported products the same treatment as “like” domestic products with respect to internal taxation and regulation.⁶⁰ At its core, the “national treatment” discipline prevents the circumvention of a tariff binding by the imposition of a discriminatory burden in the form of, by way of example, internal sales tax.⁶¹

The concept of discrimination is of course laden with ambiguity and has generated substantial controversy, in no small part because it has brought to the

⁵⁸ The tariff bindings system was supplemented by the Most Favored Nation clause of the GATT. The tariff bindings, as explained in the text, established a maximum allowable tariff. Correlatively, it left each Contracting Party free to lower their tariffs with respect to any trading partner. Under the MFN principle, however, each Contracting Party had to extend to all other GATT members the lowest tariff rate applied by the Contracting Party in any product category. GATT art. II.

⁵⁹ The GATT sought to “tariffy” barriers to trade so as to establish a transparent framework for tariff reduction negotiations in successive “rounds.” Over the course of the eight rounds that were completed since the GATT came into effect among its original 23 signatories, the average tariff among Contracting Parties has gone down from above 40% to less than 4%. *See* www.wto.org.

⁶⁰ GATT art. III.

⁶¹ *See, e.g.*, Report of Panel, Japan Customs-Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Products (Nov. 10, 1987).

international plane challenges to national policies ostensibly unrelated to trade that disparately impacts foreign products.⁶² However, putting aside interpretive difficulties, the national treatment component of the GATT is an indispensable element of any treaty of integration that includes a tariff reduction scheme. Without a national treatment discipline, a member state of such a treaty could impose discriminatory taxation or regulation on foreign products so as to avoid its tariff obligations.⁶³ In the panoply of international measures to eliminate protectionism, national treatment is an indispensable tool.

The third discipline prohibits the imposition of quantitative restrictions to trade and their functional equivalents.⁶⁴ The purpose of this discipline, and the interpretive questions that it has generated, parallel the national treatment story. Here, too, the founders of the GATT evidently sought to deprive states of a weapon of circumvention of the tariff discipline. If State A cannot protect a sector of the economy by imposing a

⁶² *See, e.g.*, Report of Panel, Japan-Taxes on Alcoholic Beverages, WT DS-8-R (July 11, 1996). In this case, the WTO rejected the argument of the United States to the effect that an aim and effect test should be applied to root out protectionism when determining whether the national treatment provisions of the GATT were violated. The literature and commentary on national treatment are of course voluminous and they lie squarely beyond the scope of this Article. Suffice it to say that, even with an explicit mandate to root out protectionism and to shelter national laws that furthers legitimate government purposes, national laws that involved both protectionist and legitimate purposes might be challenged. In *Reformulated Gasoline*, for example, the WTO was asked to evaluate the legality of a United States regulation, promulgated pursuant to the Clean Air Act, which imposed more onerous requirements on foreign companies ostensibly on the grounds that compliance with the substantive norm of the statute was difficult. While a protectionist purpose might be inferred from the record, it is also evident that the United States' interest in protecting its environment were at stake. *See* Report of the Appellate Body, United States -- Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, (Apr. 26, 1996)

⁶³ Imagine, to illustrate this point, that State A agrees not to impose a tariff on State B's cars in excess of 5%. If State A enacted a discriminatory sales tax, which burdens State B's cars by say 10%, it would have achieved a functionally equivalent economic result as a 10% tariff would accomplish. The difficult questions of interpretation arise when, for example, the internal sales tax applies to cars that consume more than a specified level of gasoline per mile, and State A's sales tax disproportionately burden State B's cars because they tend to belong the category of products that is affected by the (ostensibly neutral) definition.

⁶⁴ GATT art. XI.

tariff,⁶⁵ it should not have the opportunity to do so by applying a quota to the imported products.⁶⁶ The interpretative problems associated with this GATT discipline relate of course to what is a quota⁶⁷ and also to the validity under international law of justifications asserted by a state to defend what otherwise would amount to an illegal quantitative restriction.⁶⁸

The GATT, then, institutionalized on a multi-lateral level the classical economic theories of Ricardo and Smith. The orthodox economic account of the GATT speaks of redemption because it contrasts the GATT with the economic failures that preceded World War II. While the story has nuances, its motif is that the main trading partners failed to recognize that commerce should be based on comparative advantage and that states should remove artificial barriers to trade. In characteristic fashion, the economists wrote another chapter in the Book of Mistakes from the Inter-War Period. Not only did Versailles oppress Germany instead of bringing it into Europe's fold as a partner, but the liberal democracies stubbornly insisted on rejecting a timeless notion of economic organization. It was not enough for the democracies to fail strategically and allow fascism to take over Germany; they also had to deprive themselves of economic unity and

⁶⁵ By way of example, if a 1000% tariff on foreign luxury cars would result in a drop in import from 1,000,000 cars to 1000 cars, a regulating state may achieve the same economic outcome by imposing a 1000 cars annual quota.

⁶⁶ *See, e.g.*, GATT Dispute Panel Report on Japanese Measures on Imports of Leather, GATT B.I.S.D. (31st Supp.) t 94 (May 15, 1984), available at www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm.

⁶⁷ *See, e.g.*, Report of the Panel, Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, DS 10/R-37S/200 (Nov. 7, 1990).

⁶⁸ *See, e.g.*, Report of the Appellate Body, United States – Import Prohibition on Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998)[*hereinafter Shrimp I*].

strength by giving in to protectionist impulses at the very time when they needed to join forces in the fight against fascism.⁶⁹

Bretton Woods is the constitutional moment of this story in that it reflects the understanding of the historical mistake made by the liberal democracies. Here as well, the discourse often assumes an end of history. While the international legal order grew, it remained essentially committed to its original mission.⁷⁰ The Book of Mistakes had to be rewritten into the Book of Redemption. Economic collapse caused by trade wars would not only be unthinkable, but made impossible by a trading system that adopted comparative advantage as its foundational value.⁷¹

To be sure, the end of economic history has its nuances and does not entirely stop with the system put into place with GATT. The GATT does not merely establish three disciplines intended to combat economic protectionism. Over time, the trade system established intellectual property norms that protect the intangible assets of the enterprises of Contracting Parties throughout the trading world.⁷² Rules on procurement, dumping,

⁶⁹ See, e.g., Paul R. Krugman, *A Loss of (Theoretical) Nerve: The Narrow and Broad Arguments for Free Trade*, 83 *Am.U.L.Rev.* 62 (1993). See also JACQUES MOLLE, *THE ECONOMICS OF EUROPEAN INTEGRATION* (2001). See Jagdish N. Bhagwati, *The Generalized Theory of Distortions and Welfare*, in *Trade, Balance of Payments and Growth: Papers in International Economics in Honor of Charles P. Kindleberger* 69 (Jagdish N. Bhagwati et al. eds., 1971); Jagdish N. Bhagwati et al., *Domestic Distortions, Tariffs and the Theory of Optimum Subsidy*, 71 *J. Pol. Econ.* 44 (1963); Harry G. Johnson, *Optimal Trade Intervention in the Presence of Domestic Distortions*, in *Trade, Growth and the Balance of Payments: Essays in Honor of Gottfried Haberler* (Richard E. Caves et al. eds., 1965); Peter J. Lloyd, *A More General Theory of Price Distortions in Open Economies*, 4 *J. Int'l Econ.* 365 (1974).

⁷⁰ The parallel with the strategic story of the post-War period is striking. In his grand declaration of 1950, Robert Schuman captured the strategic sentiment that spurred the unification of Europe when famously declared that “a united Europe was not achieved and we had war.” Schuman Declaration of 9 May 1950.

⁷¹ See *The Bretton Woods Project, Background to the Issues* (stating that forty-three countries that met at Bretton Woods conceived of the World Bank and IMF during World War II to help rebuild Europe in post-war reconstruction efforts), available at <http://www.brettonwoodsproject.org/background/index.shtml> (last visited Sept. 23, 2003).

⁷² TRIPs established minimum levels of protection regarding patents, copyright and trademarks that the Contracting Parties must transpose into domestic law. The rationale for TRIPs is that opening up barriers

subsidies, technical barriers to trade, and sanitary measures were adopted.⁷³ The WTO established a system of judicial remedies which, albeit State to State, produces decisions and reasoned opinions that are reminiscent of the domestic systems of justice in liberal democracies.⁷⁴ The Doha Round of negotiations could well take an historical step in eliminating subsidies and other protective measure related to agricultural products, thereby denting systems of protection of farmers that have deep historical and political roots in Europe and other industrialized areas.⁷⁵

to trade would give undertakings in countries with lesser intellectual property protection access to products protected in other jurisdictions. Without intellectual property protection in the importing jurisdiction, these undertakings could lawfully infringe on rights that are protected in the foreign jurisdiction. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex IC, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]; Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 144-47 (2d ed. 2003).

⁷³ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1140 (1994) [hereinafter SPM Agreement]; Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1140 (1994) [hereinafter TBT Agreement]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1140 (1994) [hereinafter Antidumping (AD) Agreement]; Agreement on Subsidies and Countervailing Measures, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1140 (1994) [hereinafter SCM Agreement].

⁷⁴ See Understanding on Rules and Procedures Governing the Settlement of Disputes, http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm. See also Eric A. Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1.

⁷⁵ The Doha WTO Ministerial Declaration of 2001 provides in pertinent parts:

“1. The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development.

...

2. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this

However, these were all new chapters within the end of history paradigm. Doha may bring in more access for developing countries' produce.⁷⁶ The WTO's Dispute Settlement Body, even if it evolved into a system of access for individuals over the next generations, seeks at its core to eliminate the Contracting Parties' ability to selectively exit their substantive obligations.⁷⁷ Its jurisprudence in such seminal cases as Shrimp/Turtle or Reformulated Gasoline address the conflict between trade liberalization and countervailing domestic policies.⁷⁸ Intellectual property or technical barriers to trade rules begin the process of harmonization that, as the European experience illustrates, goes hand in hand with market access.⁷⁹ Anti-dumping regulates such market access by

Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.

⁷⁶ See, e.g., Eugenia McGill, *Poverty and Social Analysis of Trade Agreements: A More Coherent Approach?*, 27 B.C. Int'l & Comp. L. Rev. 371 (2004).

⁷⁷ The concept of selective exit was articulated by Professor Weiler in his seminal article, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991). While the concept is multifaceted, and Professor Weiler uses it in conjunction with an analysis of States' participation in supranational lawmaking, it captures at its core the ability of states to escape their international obligations selectively, all the while avoiding enforcement by other countries because of enforcement deficiencies. One of the starkest examples involves international laws that can only be litigated at the International Court of Justice level, where states cannot be forced to appear unless they consent to jurisdiction. See Statute of the International Court of Justice, Oct. 24, 1945, art. 36(1)-(3), 59 Stat 1031, T.S. No. 993 [hereinafter ICJ Statute], U.N. CHARTER, art. 36. The old GATT panel system, which allowed the losing party to veto the decision, also illustrates the workings of selective exit under international law. The overhauled WTO is of course a State-to-State system, and dispute resolution frameworks of that type face the customary difficulties inherent in States' logistical limitations and reluctance to sue other states when they themselves are likely to be in violation of the given treaty. The new system, however, removes countries' ability to escape their obligations in that decisions are binding, and failure to respect them may result in sanctions. See, e.g., BERNARD HOEKMAN & MICHAEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* (1995).

⁷⁸ See, e.g., Andrew L. Strauss, *From Gutzwiller to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769 (1998).

⁷⁹ The TRIPS Agreement, for example, establishes a minimal level of intellectual property protection that the GATT Contracting Parties must provide under domestic law.

precluding trade practices that are deemed unfair and anti-competitive.⁸⁰ When Bretton Woods ushered in a trade liberalization framework, it set in motion a historical course that was bound to generate the issues that these international regulatory frameworks address, and that future rules will continue to address. However, as we describe below, while Bretton Woods surely has retained enormous relevance, the transformative shifts that it has generated require a new constitutional moment.

Before we reach the new constitutional moment, however, we must continue to tell the story of Bretton Woods. The economist has now finished its discourse, and in come the lawyer and the theoretician of the State. As Keynes wrote, the lawyers were the “poets of Bretton Woods.” In order to understand our theory, we must now explain the contours of their poetry.⁸¹

B. Bretton Woods and the State.

All serious students of trade have learned that the economic ideology of trade provides only a partial, and perhaps even junior, account of the original intent of the framers of the GATT and the reasons for its general acceptance by the Contracting Parties. In order to understand the GATT, one has to look at internal foundational frameworks of the major players that brought about its formation after World War II.⁸² These constitutional rules⁸³ help explain why the major economic powers that formed the

⁸⁰ See Anti-Dumping Code, (Agreement on Implementation of the GATT Article IV), http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#fAgreement.

⁸¹ See Anne-Marie Slaughter, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in *THE WORLD TRADING SYSTEM: CRITICAL PERSPECTIVES ON THE WORLD ECONOMY* 50 (Robert Howse ed., 1988), reprinted in JOHN GERARD RUGGIE, *MULTILATERALISM MATTERS* 125 (1993).

⁸² See Howse, *supra* note 81, at 96-98.

⁸³ We will define the meaning of “constitutional rules” below.

GATT chose the legal structure that it embodied, and why they mustered the political willingness to accept the trade disciplines that the treaty imposed on them. This account complements the economic story. It essentially holds that the internal configuration of the states that formed the GATT had to work in harmony with the international system that they put in place. States did not simply have an economic epiphany. They chose GATT because they could maintain their domestic architecture, all the while entering into an international framework that allowed them to expand the global economic pie.

While this account goes deeper than the economic tale, again it has an end of history flavor. The story assumes that the State reached its apex when it organized itself along modern liberal democratic lines and established an internal constitutional framework for redistributing resources. It starts with the constitutional rules that were fundamental to modern liberal democracies after World War II. These included broad legal and policy schemes that embodied a given state's wealth choices as to redistributive justice and the relationship between various economic segments of society. Indeed, the internal system of all major GATT players rested on the redistribution of wealth and control of the domestic economy through interventionist, welfare policies. This is best explained in broad strokes. In Europe, these policies would take the shape of public enterprise, unemployment compensation, housing aid, help to large families, and other policies intended to transfer wealth from high income segments of society to lower income workers and to protect discrete classes deemed to be disadvantaged in the market. In the United States, the emphasis was more exclusively on tax and transfer policies. Japan, for its part, relied heavily on centralized planning of industrial activity and

subsidies of research and development that would shore up enterprises that housed a large part of the domestic workforce.⁸⁴

Despite their different viewpoints regarding, all major players shared a basic philosophy of domestic statecraft that went hand-in-hand with liberalized trade.⁸⁵ Liberalized trade worked not only because comparative advantage was the right foundational principle for international commerce. Rather, Bretton Woods also allowed the Contracting Parties to marry international economic policies and an international order of states that tended to maximize wealth creation with a legal framework that protected their ability to control the domestic economy. The negative covenants of the GATT, as originally structured, left the Contracting Parties free to utilize interventionist domestic policies. It is of course true that trade liberalization conflicted with domestic policies in many instances, and that many battles have been waged on this front. The system, though, was designed for the State to have the means to repel trade liberalization.⁸⁶

Simplistically put, it allowed for a maximization of the global output and economic pie available for redistribution to each nation-state. The tariffs, national treatment and quotas rule did not, as originally framed and implemented, supplant domestic rules on redistributive justice. France, for example, could extend housing aid to

⁸⁴ DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* (1996); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE*, ch. 1 (2d ed. 1999); JOHN GERARD RUGGIE, *MULTILATERALISM MATTERS* (1993).

⁸⁵ See JOHN G. RUGGIE, *Embedded Liberalism and the Postwar Economic Regimes*, in *CONSTRUCTING THE WORLD POLICY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION* (1998); Howse, *supra* note ***, Jeffrey Dunoff, *The Death of the Trade Regime*, 10 *Eur. J. Int'l L.* 733 (1999).

⁸⁶ *Id.*

disadvantaged workers, provide for workforce-protective labor rules, maintain a nationalized health system, keep a government stake in major enterprises, or pay grants upon the birth of a third child, without any interference from the international trade rules.⁸⁷ Japan's Ministry of Trade and Industry could continue its indicative planning, and the United States could freely tax and spend, without running afoul or being hindered by the international system.⁸⁸ While the international system contained domestic protectionist urges of the type that produced the "beggar-thy-neighbor" policies that preceded World War II, it married itself well with the economic ethos of the modern liberal democracies.⁸⁹

The harmonious functioning of domestic constitutional rules and international law came hand in hand with historical tendencies that made comparative advantage a better foundational norm for the international trading system than the domestically driven, mercantilist policies that preceded World War II. These policies, embodied in statutes such as the Smoot Hawley Tariff Act of 1930,⁹⁰ were clearly thought by the GATT founders to have contributed to the economic disasters of the 1930s and to the advent of

⁸⁷ See Lionel Jospin, *Equilibriste*, Economist, July 26, 1997, at 41; Roger Cohen, *France v. U.S.: Warring Versions of Capitalism*, N.Y. Times, Oct. 20, 1997, at A10; European Commission, *Social Protection in the Member States 13-23* (1997) (summarizing social protection trend and Member States' reforms).

⁸⁸ See *Asian Economies: More Myth than Miracle?*, The Washington Post, November 25, 1997, at 1; *see also* *RETHINKING THE EAST ASIAN MIRACLE* (Joseph E. Stiglitz & Shahid Yusuf eds., 2000).

⁸⁹ The "good governance" justification for the GATT framework, which in substance holds that international trade increases domestic welfare by containing narrow protectionist interests that may have disproportionate political clout, is a familiar element of the standard "GATT rationale list." Brett Williams, *The Influence and Lack of Influence of Principles in the Negotiation for China's Access to the World Trade Organization*, 33 *Geo. Wash Int'l L. Rev.* 791 (2001). Cite to WTO web site too.

⁹⁰ See generally *Great Depression*, at [http://www.education.yahoo.com/search/be?1b\[fct<\]extended,38,0>p11%3AG/great depression](http://www.education.yahoo.com/search/be?1b[fct<]extended,38,0>p11%3AG/great+depression) (last visited Aug. 21, 2002); *Hawley-Smoot Tariff Act*, *Col. Encyclopedia* (6th Ed. 2001), available at <http://www.bartleby.com/65/ha/HawleySm.html> (last visited April 5, 2005) (stating that "the act brought retaliatory tariffs from foreign countries, U.S. foreign trade suffered a sharp decline, and the depression intensified").

fascism as a contender for control of statecraft.⁹¹ By binding the liberal democracies to a set of rules that would not only make such disasters legally impossible but would also not threaten their perception of economic sovereignty, the GATT created a world trade system that accorded with internal law and politics.⁹²

Economic prose and legal poetry, then, created a system that many observers analyze with static, end of history lenses. Much ink has been shed on how to improve it, but most of the critiques operate within the confines of the Bretton Woods constitutional moment in that they accept the State as understood at Bretton Woods as the domestic participant in the order of states. Consider the prime topics of contention in today's trade world: The battle waged at the border of trade liberalization and conflicting domestic policies assumes a sovereign State to which the order of states leaves the prerogative to regulate its territory and to redistribute resources. Whether or not the United States can legally exclude shrimp caught at the expense of sea turtles or France can legally ban the import of asbestos, the stakes relate to the precise location of the border between domestic and international forces.⁹³ The developing countries' plight, which pervades

⁹¹ See Howse, *supra* note 81. See also DOUGLAS A. IRWIN, AN INTELLECTUAL HISTORY OF FREE TRADE (1996).

⁹² As Professor Weiler pointed out, the economic ethos of the GATT was largely a result of the creation by the professional trade elite that the GATT created of norms intended to project the impression that the organization was grounded in "economic science" and insulated from crass politics. "A dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms. The GATT successfully managed a relative insulation from the 'outside' world of international relations and established among its practitioners a closely knit environment revolving round a certain of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term first-name networks." Joseph H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM 334, 336-337 (Roger B. Porter, Pierre Sauve, Arvind Subramanian, and Americo Beviglia Zampetti eds. 2001).

⁹³ See, e.g., Howard F. Chang, *Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 S.CAL.L.REV. 31 (2000).

the Doha Round, is couched principally in terms of market access and the end of hypocrisy.⁹⁴ If Doha had a slogan, it would be that its participants should let Bretton Woods ring throughout the world. At the end of the day, the trading world is still engaged in the concretization of a constitutional moment that, as we describe later, has not run its course yet, but is in need of a fresh look in light of the transformative shifts that it has brought about.

C. The State and the Order of States.

Our theory posits that the relationship between the domestic constitutional realm and the international trade order of states goes well beyond the marriage of a good economic idea with a legal system that makes its acceptance politically palatable. We depart from the notion that Bretton Woods, joining comparative advantage with a theory of the State as having reached its highest expression in the form of the modern liberal democracy, ended the trade history. Rather, we submit that Bretton Woods ushered in a constitutional moment that acknowledged both the then current evolutionary stage of the State and the new order of states that Statecraft metamorphosis had generated.

Our starting point coincides with the analysis of Bretton Woods as a joint political and economic enterprise in that we agree that the Keynesian welfare state was particularly well suited for the GATT framework and its introduction of comparative advantage and anti-protectionist rules. Keynes was right to call the lawyers, and the political theory that they wrote into the Treaty, the “poets of Bretton Woods.”⁹⁵ The GATT, as explained above, sheltered welfare policies and left constituent states free to

⁹⁴ See *supra* note 75 and accompanying text.

⁹⁵ See Howse, *supra* note 55; Slaughter, *supra* note 81.

act as experimental laboratories on how best to improve their people's welfare. In addition, it created sufficient ambiguity in the system to permit States to "exit selectively" the tenets of free trade based on domestic welfare requirements.⁹⁶ All in all, it is true that the GATT established a framework that insulated domestic politics and redistributive justice choices from international intervention, and to that extent it accorded with the ethos of the welfare state.

However, in our account, Bretton Woods came, and (as explained below) it came too late, to crystallize in a constitutional moment transformations that had previously taken place and to take one more constitutional snapshot in the story of human organizational evolution. Recognizing it as such mandates inquiry into what the next constitutional stage should be, and when the rite of passage that will be necessary to set it in motion should be held. That is our task in Part III. For the moment, let us explain Bretton Woods that was (and the Bretton Woods that should have come earlier) through our lens.

As discussed in Part I, the State may be understood as a constant entity that undergoes successive constitutional cycles. During each cycle, the State follows relatively stable constitutional features, on both domestic and international planes. At the same time, often as a result of the operation of these constitutional features, new realities arise to confront states and force them to adjust their fundamental constitutional elements and gradually usher in yet another cycle. Again, the end of history observation, whether made by Hegel or Fukuyama, does not sound in a messianic era of Kantian "perpetual

⁹⁶ See GATT, art. VI; Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1140 (1994) [hereinafter Safeguards Agreement].

peace”⁹⁷ nor an end to the evolution of Statecraft. Those voices, however, keenly reflect a sentiment of transformation, widely felt, that should prompt an inquiry as to whether a new constitutional cycle may be at hand.

The State that Bretton Woods faced arose from a period of solidification of the “nation” as its basis. At least in Europe, the respective nations who stood behind the 20th century states had been formed by coming together under a State that strived to amass resources and chose to fight wars in furtherance of their own solidification goals.⁹⁸ On the international scene, the complex colonizing enterprise had strong commercial motivations and by all accounts generated substantial economic benefits to the colonizers.⁹⁹ This influenced the respective political and economic powers of the nation-states that dominated the international scenes, in particular the European states. At the same time, domestically, the process of building the nation generated a population comprised of various segments, including large working classes, a bourgeoisie and upper classes or nobility, who were collectively affiliated with a single state.¹⁰⁰ They came to form a nation with which the State now had to contend.

The focal point of our inquiry is not the organizational nature of the State as a modern liberal democracy, but rather the solidification process that it experienced, the attendant birth of a nation as its support, and the evolution in Statecraft that arose out of

⁹⁷ Immanuel Kant, *PERPETUAL PEACE* 21 (N.Y. Liberal Arts Press 1948 trans.); *see also* KAGAN, *supra* note 8; INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATIONS* 251 (1971).

⁹⁸ BOBBITT, *supra* note 3, at 144-204, 468-77.

⁹⁹ *See, generally*, Ruth E. Gordon and Jon H. Sylvester, *Deconstructing Development*, 22 *Wis. Int'l L.J.* 1 (2004).

¹⁰⁰ *See generally* Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1991).

those phenomena. It is against this Statecraft background that the competing theories of Marxism, fascism and modern liberal democracy would oppose one another for control of the State. All models spoke to the nation, the new “sovereign,” that had come to form the basis of the State. Under the scenarios envisaged by all models, whether a triumph of the workers, an eternal Reich, or a Fukuyama ending, Statecraft history would in fact run out its course and end with a particular form of organization in relation to the nation.¹⁰¹ In the Marxist vision, the workers would achieve perpetual control of the State through a final class warfare. The fascist regime would conquer and rule forever. Modern liberal democracies would establish regimes that, in various shapes and forms, featured several of the fundamental hallmarks of democracy identified by Fukuyama and many others. In all cases, the nation was the basis of the State, and the welfare of the nation its legitimating drive, a common objective to be achieved though different routes. Without this evolution of Statecraft, the competing ideologies would not have had any territory to conquer.¹⁰²

The significance of the nature of Statecraft for Bretton Woods lies in the natural harmony between Statecraft in a nation-State and comparative advantage. We agree with scholars such as Ruggie that from a political standpoint, Bretton Woods worked well for

¹⁰¹ See, generally, Hugh Seton-Watson, *Nations and States: An Enquiry into the Origins of Nations and the Politics of Nationalism* 1 (1977); Joseph Stalin, *Marxism and the National and Colonial Question* 8 (I. Tovstukha trans., International Publishers, n.d.); Walker Connor, *Ethnonationalism: The Quest for Understanding* 89-113 (1994), which aptly entitles the chapter on the meaning of “nation” and related terms “Terminological Chaos”; E.J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* 1-13 (1990); Hugh Seton-Watson, *Nations and States: An Enquiry into the Origins of Nations and the Politics of Nationalism* 5 (1977); Yael Tamir, *Liberal Nationalism* 58-69 (1993). This is true even though, under Marxist theory, the nation-state would ultimately wither away in favor of an international workers rule.

¹⁰² Cf. Ernest Gellner, *Nations and Nationalism* (1983); Anthony Smith, *Theories of Nationalism* (1971).

modern liberal democracies.¹⁰³ We agree with Keynes that, without the delicate poetry of Bretton Woods, the modern liberal democracies might not have accepted the GATT as they did.¹⁰⁴ We accept the economists' account of comparative advantage as a better norm for the trading world in the 20th century than mercantilism.¹⁰⁵ However, our story is about Statecraft, as a set of ideas and concepts and as the concrete manifestation of those ideas in the domestic and international realms, and in the ladder that links them. We submit that, in the realm of pure ideas and their manifestation in the economic reality of the states, the modern liberal democracies had, by 1917, sufficient evidence of the need for a trade constitutional moment to hold Bretton Woods then, in lieu of the Treaty of Versailles, but only as the next stage of the evolution of Statecraft and the order of states.

By then the nation-state, and the internal economic order that it had generated, resulted in an industrialized world subdivided into discrete national economies, a nation owning virtually all means of production within the territory governed by each nation-state, the welfare of the nation as the legitimating drive of the State, and states having (as a result of these phenomena) the means and the incentive to regulate and control the domestic realm.¹⁰⁶ The very elements that changed the nature of Statecraft, from a State supported by then nation to a State harnessing itself to the nation, were reflected in the

¹⁰³ See JOHN G. RUGGIE, *Embedded Liberalism and the Postwar Economic Regimes*, in CONSTRUCTING THE WORLD POLICY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION (1998);

¹⁰⁴ See Howse, *supra* note 81.

¹⁰⁵ See, e.g., Paul R. Krugman, *A Loss of (Theoretical) Nerve: The Narrow and Broad Arguments for Free Trade*, 83 *Am.U.L.Rev.* 62 (1993). See also JACQUES MOLLE, *THE ECONOMICS OF EUROPEAN INTEGRATION* (2001).

¹⁰⁶ See Hart, *supra* note [50].

domestic reality.¹⁰⁷ Unlike today,¹⁰⁸ the main assets of each state lay in the hands of the nation. Industrial, agricultural and other output could be characterized, on a consistent basis, with the nation. The trading world could be subdivided into blocs, each of which was comprised of an aggregate of goods, capital, assets, currency and other resources that in a real sense belonged to the nation. The presence of these resources enabled the State to maintain a substantial degree of control over the nation, and to implement welfare policies of the type acknowledged by Bretton Woods. These were the concrete manifestations of Statecraft as a set of ideas. Given these circumstances, and the ideas upon which they rested, the foundational norms of the trade order of states had to change.

The interwoven and dynamic architecture of Statecraft and the order of states had generated a clearing for a new constitutional moment by 1917. The solidification period that preceded the Bretton Woods world was marked by relatively mercantilist and inward oriented policies that made good sense at the time.¹⁰⁹ Inward looking policies, whether on an international or a domestic realm, created a nation-State architecture. This architecture made the very order of states that generated it obsolete and created a need for

¹⁰⁷ See Hart, *supra* note [50].

¹⁰⁸ “Today we face a new reality. Advances in transportation and communications technology have made it possible to breach the territorial, social and cultural integrity of the nation-state on a daily basis. The convergence of popular cultures and the crisis of the welfare state all point to the need to develop a new definition of sovereignty as well as a new set of norms and rules for inter-state relations. In short, we need a new set of rules that recognizes that the realm of goods, services, capital and technology has largely escaped from the effective regulation of the territorial nation-state, while its people remain largely attached to it.” *Id.*

¹⁰⁹ The story of course has important nuances and, while mercantilism prevailed until the opening years of the 19th century, liberalized policies and treaties were entered into before Bretton Woods. The transformative mechanisms set in motion by Bretton Woods, however, generated such a radical metamorphosis of the legal and economic frameworks for trade that we may accept that milestone as a constitutional moment that breathed legal and institutional life to the economic theories of Ricardo and Adam Smith. See, generally, Milton L. Myers, *The Soul of Modern Economic Man: Ideas of Self-Interest, Thomas Hobbs to Adam Smith* (1983).

a new constitutional moment. Bretton Woods became necessary, not because it was the height of human organizational evolution, but because a new stage, born out of the metamorphoses of the prior era, had arrived. Alas, Bretton Woods ushered in the constitutional moment, but too late, and only for the next stage of history.¹¹⁰

An understanding of the state of Statecraft in 1917 would have enabled the trading states to grasp the constitutional moment of Bretton Woods closer to the time when it became ripe. By then, it made sense to shake off completely the lingering habit of following mercantilist policies that, in light of the advent of a collectivity of nation-states divided along economic lines coextensive with the nation, had become increasingly obsolete. Before World War I, it was not necessarily unreasonable for states to engage in a self-interested trade policy. To be sure, mercantilist policies may be explained by various other theories, such as the capture of politicians by narrow economic interests that do not maximize the welfare of the nation. True, mercantilist policies were tempered by various treaties and arrangements that were based on free trade concepts, and commercial actors from various states of course conducted business together. However, the collectivity of states was not ready before 1917 to institutionalize the principle of comparative advantage and generally open up borders to trade because neither the process of internal solidification nor the outward quest for resources accorded with policies of liberalization of international commerce. When these very processes yielded modern liberal democratic states dedicated to enhancing the welfare of a “nation” that had matured in the course of supporting the state and that had control over were essentially national industries and means of production, it made sense for these states to

¹¹⁰ See Jean Monnet Program Materials, The Grammar and Syntax of Trade, Unit I, http://www.jeanmonnetprogram.org/wto/PDF-files/WTO_2004_UnitI.pdf (quoting WTO arguments that peace is a function of trade cooperation and dispute resolution).

shift the international trade components of their Statecraft to incorporate the tenets of Smith and Ricardo.

In other words, in the inter-War period, when both fascism and communism were still viable alternatives, states that affiliated themselves with modern liberal democratic ideals faced a transformed domestic landscape that made a change from mercantilist-oriented policies to policies such as those effected by Bretton Woods both possible and desirable. A relatively substantial middle class, and a working class whose condition was steadily improving, formed the core of the nation. The State was shifting in its quest for legitimacy from harnessing the nation to solidify itself to harnessing itself to provide for the nation's welfare. The world of modern liberal democracies came to be divided into units of economic activity coextensive with these nations. The State had control over internal matters related to the welfare of the nation. To accept comparative advantage as a trade generating principle, within a system where domestic control was needed and feasible, was the logical order of states given the state of Statecraft. In hindsight, it is clear that the demise of the mercantilist system that occurred at Bretton Woods, and that was further effectuated through the Marshall Plan and the gradual rise of European Community, should have occurred at the end of World War I, together with (or better yet instead of) the Versailles Treaty. If it did not, it was in part because of a lingering habit of following a model that evolved in an era that featured Statecraft principles that had become obsolete, and the failure to step out of that habit to look at Statecraft and its relationship with the order of states.

The last pieces of the Statecraft puzzle lie in the concept of balance of powers and in the connection between strategy, war and the trade order of states. The modern world

that Cooper describes includes balance of powers as an essential feature.¹¹¹ A multipolar world of solidified nation-states rests on a balance of powers among its constituent entities. In the trade world, this phenomenon is also replicated, and here again the Bretton Woods moment may be understood as recognizing, albeit too late, that phenomenon. Bretton Woods joined the theory of comparative advantage with substantial cross-Atlantic investment into sovereign, and democratic, blocs in Western Europe (and Japan) as part of the Marshall Plan. The new trade system respected borders and sovereignty, and it allowed states to advance national welfare through internal policies. The Marshall Plan's infusion of capital into Europe created trading partners whose economic strengths would enable them to maintain the requisite balance of powers.¹¹² In other words, the Bretton Woods/Marshall Plan system was comprised of trading "nations," organized as states, who had economic powers sufficient to check one another and who would remove barriers to trade while respecting one another's national sovereignty.

The commercial system put in place at Bretton Woods also accorded with the strategic and political needs of the World War II victors. We are unlikely to ever know whether fascism might have been defeated earlier if Bretton Woods and the Marshall Plan had been adopted instead of Versailles. Whether Schuman was right when he famously declared that binding the European warriors to a partnership would be the only way to peace, or whether Cooper is right that fascism had to die a natural death as an idea

¹¹¹ COOPER, *supra* note 8, at 23-26.

¹¹² See Robert Hall, International Economic Co-operation after 1945, 33 HISTORY TODAY 12, 13 (Dec. 1983).

before democracy would prevail,¹¹³ we will never know. The point, though, is that the failure of the world trade system to identify early the need to rethink its foundational principles, and the direction of trade, did not give trade a chance to further peace.

This was the commercial framework that prevailed from the First World War until the defeat of communism. Far from being the “end of history,” however, the modern liberal democracies’ triumph has simply ushered in a new era of struggle. History seems to have a habit of giving mortals a brief respite between crises. The “roaring twenties” preceded the advent of fascism and Hitler’s rise to power.¹¹⁴ The “optimistic nineties,” marked by a relative era of peace, prosperity, and the illusory faith that globalization could promote worldwide democracy and economic growth, are clearly being followed by another dark era, marked not by initial public offerings and young globetrotting idealists, but by deeply pernicious and diffuse threats. The parallel is striking. Now, as then, Statecraft faces a transformed landscape and moving forces, which demand a reevaluation of trade policy and an adjustment of the international commercial order of States for a new era.

¹¹³ COOPER, *supra* note 8, at 52-55.

¹¹⁴ *See generally* Ray Unger, This Isn't Your Grandfather's Recession, at <http://www.ungercap.com/articles/111601.html> (last visited Mar. 16, 2002).

III: Trade and the Needs of the 21st Century

Part II posits that the Bretton Woods order of states arose out of the evolution of Statecraft within the collectivity of nation-states that entered into the Treaty. At its core, the structural system that Bretton Woods put in place relied on the rejection of protectionism. Removing barriers to trade would enable specialization in products where each nation has a comparative advantage. The institutionalization of comparative advantage would increase the global pie. In the domestic realm, trade restrictions would no longer be used as a means of achieving a wealth transfer objective. This accorded with principles of good governance in that international rules would prevent national governments from caving in to protectionist domestic pressures, thereby compelling states to follow the system that best served the welfare of the nation. As Ruggie noted, the system also worked in harmony with liberal democratic political organization because the constituent states could maintain domestic organization all the while entering into a treaty that would increase the resources available to foster that organization.¹¹⁵

We submit that the GATT theoretical framework was a time-bound function of Statecraft in the generation of the nation-state: The State harnessed itself to the nation. Its legitimating drive focused on the improvement of the nation's welfare, which expressed itself through wealth redistribution and other policies that varied from state to state.¹¹⁶ Comparative advantage, as expressed through a trade-liberalizing order of states, complemented domestic control over these policies in that it generated additional

¹¹⁵ See *supra* note 85 and accompanying text.

¹¹⁶ See BOBBITT, *supra* note 3, at 208-209.

resources for redistribution regardless of the exact contours of the domestic system that was put in place.¹¹⁷ Put otherwise, Bretton Woods established a modern order of states consistent with the solidified State that lies at the core of modern Statecraft. However, Bretton Woods did not signal the end of trade history. Rather, it belatedly ushered in a trade order of states that set in motion interconnected transformative movements that were bound to ultimately usher in a new constitutional period. Our claim is that the time has come for a new constitutional moment to usher in that period.

In this Part III, we proceed in three steps. First, we explain the successive generations of trade issues that the GATT (and later the WTO) faced, through the lens of modern Statecraft and the order of states. Next, we argue that the Bretton Woods trade system was bound to generate a transformation of Statecraft from modern to post-modern which, over time, would result in the erosion of comparative advantage as the foundational norm of the system and require a new constitutional norm and moment. Our claim here is that Bretton Woods, which was born out of the solidification of the State, generated an international order that (ironically) was bound in time to weaken the State and necessitate a passage to a new constitutional era. We then identify the “enablement of global economic opportunity” as the new foundational norm for the system, to be superimposed on comparative advantage in overhauled substantive and institutional frameworks that a new constitutional moment should usher in.

The upshot of our argument is also three-fold: (i) first, history never ends, and the interdependent mechanics of Statecraft and the order of states will, in each generation, usher in the need for revising the international commercial order and have a

¹¹⁷ As explained above this allowed the constituent states to follow various policies intended to achieve the welfare of the nation, such as cradle to grave systems in France or indicative planning in Japan. *See supra* notes ___ to ___.

new constitutional moment; (ii) second, theoreticians and planners of trade can predict not only the issues that a trade system will generate at any moment in history, but also decipher and anticipate the contours of the next generation, if they understand the mechanics of Statecraft and the order of states. (ii) third, each constitutional moment is bound to set in motion transformative mechanisms that essentially plant the seeds of the succeeding generation, and the time has come for a new constitutional moment of trade.

A. The Bretton Woods World.

Bretton Woods inherited and shaped a world subdivided into national economies coextensive with the nation-states that established the trade order of GATT. The theoretical foundation of the system respected sovereignty, left it to internal domestic policy to control the redistribution of wealth, and removed trade restrictions as protectionist tools from the panoply of government interventionist policies. Fiscal policy, monetary control, welfare enhancing mechanisms and other means of domestic control over redistributive justice were, at least in theory, left untouched. The solidified states that comprised the system had the ability to control and manage their economies. They acted on the international scene as the agents of their national industries, and the primary interlocutors of trade. They gave their national industries access to new markets, controlled foreign producers' access to domestic markets, lowered prices for their consumers, and operated in a system that allowed them to promote the welfare of the nation and achieve their legitimating drive.¹¹⁸

Looking at the Bretton Woods order of states after World War II through the lens of Statecraft in the nation-state, a theoretician of trade could have articulated the principal

¹¹⁸ See, generally, KYLE BAGWELL & ROBERT W. STAIGER, GATT-THINK (Nat' Bureau of Econ. Research, Discussion Paper No. 8005 (2000)).

legal and structural issues that would face the system over the next decades. The principal elements of Statecraft were welfare, the nation, and sovereignty.¹¹⁹ Each was tested, predictably, by the GATT order of states. Trade 101 teaches that the removal of barriers to cross border flow of goods and services causes friction among the domestic policies of the constituent states.¹²⁰ The friction stems from the disparity in regulatory environment that obtain within those states. It is not possible to import a product without, to some extent, importing the regulatory environment in which it was made. A Korean automobile worker may make one-tenth of the income that a Detroit worker would have earned for a similar product. He or she may work in a factory where occupational safety standards lag far behind those of the United States and Michigan. When an American dealer imports cars manufactured under these conditions, they essentially dilute the United States labor and occupational safety legislation to the extent of the market share of the Korean automobile industry.

The important trade cases that the GATT and its WTO successor faced reflect the friction between the economic control policies of the nation-states. Scholars often use the vague prism of “sovereignty” to capture the battles that have taken place.¹²¹ Trade may erode sovereignty, the analysis goes, because it thrusts in the name of economic *laissez faire* and liberalism laxer regulatory standards onto the domestic sphere. Trade rules, for

¹¹⁹ See COOPER, *supra* note 8, at 6-10, 21-27.

¹²⁰ See generally See, e.g., John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 A.J.I.L. 782 (2003); Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 1, 40-54 (2000).

¹²¹ See Jeffrey Atik, *Democratizing the WTO*, 33 GEO. WASH. INT’L L. REV. 451 (2001); Kal Raustialia, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401 (2000); Anne-Marie Slaughter, *Building Global Democracy*, 1 CHI. J. INT’L L. 223 (2000); Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999).

example, may be invoked to attempt to compel France to accept asbestos products lawfully marketed in Canada or higher hormone content in meat products that comply with United States standards.¹²² It may deprive the United States of the tools to protect sea turtles and dolphins against unconcerned fishing undertakings.¹²³ It may prevent Japan from protecting a disfavored minority that specializes in leather products that the rest of the world can manufacture more cheaply.¹²⁴ It will cause Western workers to lose jobs to countries where protection of labor runs low on the scale of priorities.¹²⁵

We submit that these issues are not “absolute” issues facing the trade world, but they had significance principally because they arose in a trading system where Statecraft

¹²² See WTO Appellate Body Report on EC Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (March 12, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf. The Appellate Body upheld the panel's Article XX(b) ruling, which preserved France's right to ban asbestos. The Body rejected Canada's argument that France had insufficient scientific evidence to show that asbestos posed a significant risk to human health and held that no arbitrary discrimination against Canada had occurred. See also WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, (98-0099), AB-1997-4, 1998 WTO DS LEXIS 5 (Jan. 16, 1998) ¶¶ 1-3, available at http://www.wto.org/english/tratop_e/dispu_e/hormab.pdf.

¹²³ See WTO Appellate Body Report on U.S. Import Prohibition of Certain Shrimp and Shrimp Products, 38 I.L.M. 118, 118 (Oct. 12, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf. In the *Shrimp-Turtle* case, the Appellate Body ruled that the claim of India, Malaysia, Pakistan, and Thailand against a United States law, which prohibited the import of shrimp from countries that typically harvested shrimp with methods that killed sea turtles, that is, without using specific turtle-excluding devices, was successful under Article XX(g) because the law was a form of "unjustifiable discrimination" because it required that the U.S. certify the nations wanting to import shrimp. See also *supra* text accompanying note 68; Chang, *supra* note 93.

¹²⁴ See Report of Panel on Japanese Measures on Imports of Leather, L/5623 - 31S/94 (May 16, 1984), available at <http://www.worldtradelaw.net/reports/gattpanels/japanleatherIII.pdf>; see also S.M. Pekkanen, Aggressive Legalism: The Rules of the WTO and Japan's Emerging Trade Strategy, *THE WORLD ECONOMY*, vol. 24, iss. 5, 707-37 (May 2001), pp. 707-737(31).

¹²⁵ See David Lopez, Dispute Resolution Under NAFTA: Lessons from the Early Experience, *TEX. INT'L L.J.* 32, no.2 (1997)(discussing in part the Side Agreement on Labor of NAFTA); see also John J. Audley, Demetrios G. Papademetriou, Sandra Polaski and Scott Vaughan, *NAFTA's Promise and Reality: Lessons from Mexico for the Hemisphere*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, November 2003; available at www.ceip.org/pubs; Marley Weiss, *Two Steps Forward, One Step Back — Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, *U. S.F. L. REV.*, Vol. 37, No. 689 (2003); Jose E. Alvarez, *Critical Race Theory and the North American Free Trade Agreement's Chapter 11*, 28 *U. MIAMI INTER-AM. L. REV.* 303 (1997).

was defined by welfare, sovereignty and the nation. To illustrate our point, let us start with a far-fetched hypothetical. Imagine a world where the main elements of Statecraft relate to the State's ability to protect its subjects against physical harm, and where there is no regulation of economic life.¹²⁶ Assume that, as in the 20th century, each state had industries that are essentially national in nature, but that fostering the welfare of the nation was not a legitimating drive of states. Nonetheless, through market forces, certain states achieved a voluntary level of labor, environmental, health and safety protection that matches that of the Western nation-states of the 20th century. In other states, no such welfare standards apply. If the GATT operated in such a world, there would be no need for states to address the tension among regulatory environments, because (put simply) there would be no regulatory environments. While discrete industries may change their practices in response to market forces, or ask for protectionist measures to shelter their voluntary practices, the states would not have a vital interest in combating lesser standards because the welfare of the nation would not be part of their legitimating drive. In the GATT modern world, however, the State's promotion of welfare is an essential element of Statecraft and the tension, between States rather than between domestic policies and trade, is bound to arise.

The entire GATT and WTO framework, and the interpretive issues and dispute resolution institutions that they spawned, can be explained by looking at it through this prism. In the cases that dominate the trade literature, domestic policies from the state's panoply of nation-welfare promotion come under challenge. These policies include

¹²⁶ Max Weber, *Politics as a Vocation* (1918)(full essay available at <http://ssr1.uchicago.edu/PRELIMS/Theory/weber.html#WEBER8>).

labor, health, consumer, environmental and conservation regulatory frameworks.¹²⁷ In all instances, the states vied to lose as little control as possible over their ability to enhance legitimacy through the relevant policies. The hermeneutics of the GATT and WTO decisions focused heavily on the need to shelter sovereignty, and on deciphering a justification for infringing on the aspects of Statecraft that are essential to the nation-state. The battle took place on a state-to-state level, because allowing private party access would, as was the case in Europe, would unsettle Statecraft. The common denominator of the cases was their focus on the extent to which a state may reject another state's policies by denying import of a product manufactured or marketed in violation of rules of the importing state that are essential to Statecraft in the nation-state.¹²⁸

In other words, the essential elements of Statecraft in the modern world drove the main interpretive issues of the GATT/WTO. Bretton Woods took on a world divided into

¹²⁷ Compare, e.g., Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004) with John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000).

¹²⁸ In the European Union, the European Court of Justice faced essentially the same questions as the GATT/WTO. It had to decide whether France could apply its worker safety rules, which relied on automation more than on training, to block the import of German woodworking machines. Case 188/84, *Commission v. France*, 1986 E.C.R. 419. It had to decide whether England could properly apply its obscenity laws to ban the import of Danish pornography. Case 34/79, *Regina v. Henn*, 1979 E.C.R. 3795. It ruled on the legality of applying German liquor content standards to ban the importation of French spirits with a slightly lower alcohol content. Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung (Cassis de Dijon)*, 1979 E.C.R. 649. It had to determine whether various consumer protection rules, including bans on advertising deemed deceptive, could be applied by member states against materials and products lawfully marketed elsewhere in the Union. See, e.g., *Joined Cases C-267-68/91, Criminal Proceedings Against Keck*, 1993 E.C.R. I-6097, available at <http://www.curia.eu.int/en/content/juris/index.htm>. In virtually all instances, the European Court was asked to determine whether a member state could apply the regulatory framework that put in place its specific view of Statecraft in the nation-state. These cases generated enormous scrutiny, and substantial criticism, because (we claim) they pitted against one another the disparate views of the European states on how best to achieve welfare for their respective nations. Significantly, the European Court adopted a "presumption of mutual reciprocity." Provided that the products at issue had been lawfully marketed somewhere in the Union, the Court would infuse its analysis with a presumption that the importing state could not ban them. This presumption reflected the assumption that the member states, albeit in different ways, had an essentially comparable approach to promoting the welfare of the nation and, on a more fundamental level, that Europe had set out to become one nation. Nevertheless, where the European Court believed that the policy at issue was an essential element of the welfare panoply of the defending State, it upheld the policy and left it to the gradual harmonization process of the European Union to eliminate disparities among regulatory environments

national, discrete economic blocs. Its interpretation, put simply, focused on how best to protect the regulatory borders of these blocs.

In addition, the institutional and dispute resolution structure of the GATT/WTO also arose out of Statecraft in the modern world. Unlike Europe, the GATT/WTO established a State-to-State system of dispute resolution. Until the establishment of the Dispute Settlement Body, defending states had the option to reject adverse decisions.¹²⁹ Even after this rule was reversed, and a system of trade tribunals with the hallmarks of Western courts was established, states were substantially sheltered from challenges by the natural tendencies of governments to use limited legal resources sparingly and to avoid legal challenges to other states out of concern that their own non-compliance might be attacked in retaliation.¹³⁰ The upshot of the system was to give its members a substantial ability to “selectively exit” its tenets.¹³¹ Sovereignty, understood as the ability to maintain control over policies intended to foster the welfare of the nations, could be protected to a much larger extent than in a system of judicial remedies such as that of the

¹²⁹ See John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AJIL (January 2004); John Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AJIL (2004) 782-802.

¹³⁰ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 256-57 (7th ed., 1997) (providing an overview of the espousal doctrine); Clyde C. Pearce & Jack Coe, Jr., *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT’L & COMPARATIVE L. REV. 311, 317-19 nn. 27-28 (2000) (discussing some of the obstacles to bringing state-to-state claims under the espousal doctrine).

¹³¹ Weiler, *supra* note 77, at 2411-12 (stating, “[t]he ‘closure of selective Exit’ signifies the process curtailing the ability of the Member States to practice a selective application of the *acquis communautaire*, the erection of restraints on their ability to violate or disregard their binding obligations under the Treaties and the laws adopted by Community institutions.”)

European Union, where individuals have the virtually unfettered ability to enforce the trade norms against domestic rules.¹³²

B. Jacob's Ladder Revisited: The Metamorphosis of the Bretton Woods World.

The Bretton Woods order, in conjunction with other factors, generated foundational shifts in domestic Statecraft and a transformed international economic landscape. We posit that the Bretton Woods world has so fundamentally changed that a new constitutional moment is now at hand. In this subpart, we outline the metamorphoses that we believe are ushering in the new constitutional era. In the next subpart, we will delineate the contours of this era, and the foundational norms and institutional framework that should be put in place.

The world can no longer be viewed as a subdivision of national economies coextensive with the nation-states shored up by national middle classes and other segments of the population that own means of production that are essentially national in nature. The GATT/WTO opened up borders to trade in goods and services. The constitutional moment of Bretton Woods can be captured by the concept of openness that comparative lies at the root of comparative advantage. The very language of trade, which relies on fundamental notions such as “market access,” “cross border flow of goods,” or “removal of barriers,” reflects the establishment of an international system where discrete

¹³² We can also see this principle at work in GATT provisions such as the Safeguards Agreement. Recognizing that international trade patterns may have sudden adverse consequences upon domestic industry, the GATT Agreement on Safeguards was drafted to offer domestic government a way to escape their trade obligations and offer relief to the affected industry by allowing the domestic authority to implement temporary tariffs. The safeguard measures are intended as extraordinary measures to be used in emergency situations, and a domestic authority's decision to invoke the Safeguards is subject to review by the Dispute Settlement Body. Despite its narrow purpose, the broad language of the Agreement creates the potential for abuse, allowing protectionism to flourish under the guise of legality.

markets will tend to integrate into a global marketplace. In that marketplace, goods will be freely exchanged, by consumers as well as producers.

The national nature of the means of production is bound to erode as a result of an order such as that installed by Bretton Woods. Domestic producers will elect to purchase components necessary for their output, or simply products for domestic resale, from jurisdictions that have a comparative advantage. That cross border import is the archetypal activity that Bretton Woods contemplates. The story, however, will not end there. Domestic manufacturers will in all likelihood seek to acquire equity or other stakes in the enterprises from which they buy, so as to increase their profit margins. Conversely, sellers will seek to participate in the profits of the companies that import their products. Further, the Bretton Woods world was bound (as it did) to increase the incidence of joint ventures and other cross border partnerships.¹³³ The openness and sheer magnitude of the markets, and the increased competition that liberalized trade generates, makes such enterprises an inevitable part of commercial life.

The overlapping of ownership and the spread of production has made it increasingly difficult to identify a particular product as belonging to one nation versus another. A handbag manufactured in China, designed in Italy, bearing a French Brand, and marked as “Made in Italy” is not a product of any particular country, whatever rules of origin might have to say about its classification for tariff purposes. DaimlerChrysler manufactures cars that traditionally were viewed as quintessentially German (such as Mercedes Benz) and American (such as Jeep). The company entered into a strategic alliance with Mitsubishi Motors and as a result it also markets brands that have been

¹³³ See CHARLES W.L. HILL, *INTERNATIONAL BUSINESS: COMPETING IN THE GLOBAL MARKETPLACE*, ch.10 (2003)(the effects of the Bretton Woods system includes the facilitated creation and subsequent increase in international joint ventures and partnerships).

associated with Asia.¹³⁴ Its one billion shares, it goes without saying, are owned by investors from all continents. The phenomenon obtains even on a small scale: New York's Garment District has shifted its production *en masse* from Brooklyn to the Far East. These U.S. garment manufacturers began the shift by shipping materials for fabrication, and later they came to acquire factories or enter into strategic alliances with their producers. Conversely, the Far East manufacturers have increasingly acquired stakes in their clients.

This transformation of economic activity was compounded by the revolution in global communications that the trading world experienced. The steel mill, textiles plant, or agricultural field of the 20th century have now been replaced by a computer workstation that can be run from virtually anywhere in the world. Microchips can be manufactured in Silicon Valley from computer software including codes written in India that, in the aggregate, can be compared to a factory in their complexity.¹³⁵ Transcription services can be outsourced via access service provider software to the Philippines.¹³⁶ An American appellate brief can be researched and written in Jamaica, and filed by a licensed attorney in Camden, New Jersey. Increased trade and competition were bound to generate innovation, and the communications breakthroughs that came about furthered

¹³⁴ *DaimlerChrysler, Hyundai, and Mitsubishi Motors to Form Global Engine Alliance*, Top Story (Seoul/Stuttgart/Tokyo, May 05, 2002)(available at <http://www.daimlerchrysler.com/dccom/0,,0-5-7153-1-9426-1-0-0-0-0-0-8-7145-0-0-0-0-0-1,00.html>) ; see also *Courtship of Giants*, TIME, Business Notes (Mar. 19, 1990)(available at <http://www.time.com/time/archive/preview/0,10987,969608,00.html>).

¹³⁵ *The new geography of the IT industry*, THE ECONOMIST (Jul. 17, 2003); see also *How countries go high-tech*, THE ECONOMIST (Nov. 8, 2001)(available at www.economist.com)(discussing outsourcing of IT technology to India).

¹³⁶ Press Release, *Philippines to showcase IT services edge in outsourcing expo*, E-SERVICES-PHILIPPINES, available at <http://www.e-servicesphils.com/mediaroom.php?mrid=16>

the establishment of a global marketplace where the phenomenon of discrete national economies has eroded.

In the course of the metamorphosis of the Bretton Woods world, the State lost control over fundamental tools of wealth transfer and protection of the domestic economy that the Bretton Woods order contemplated would stay within the domestic Statecraft realm. Monetary policy, for example, is increasingly escaping control by states. The sheer magnitude of markets for currencies is gradually resulting in the transformation of money from a tool of exchange, which can be manipulated domestically, to a mere commodity.¹³⁷ Public debt is increasingly being held by foreign actors, and is being regulated more by the interplay of commercial interests than by domestic choices. A simplified and simplistic example is the relationship between the United States and Japan. The United States has for a long time been a main purchaser of Japanese goods, and Japan a main purchaser of U.S. debt. While of course the United States has a continuing ability to self-finance its debt, over time this phenomenon may extend to new actors on the international scene, including prominently China, with a resulting decrease in domestic control.¹³⁸

¹³⁷ Michael Burawoy, "The Great Involution: What is Russia and Where Is It Going?" Lecture at Yale University (Sept. 24, 1999)(working paper, THE GREAT INVOLUTION: RUSSIA'S RESPONSE TO THE MARKET, *available at* http://sociology.berkeley.edu/faculty/burawoy/burawoy_pdf/involution.pdf); *see also* Erin Ihde, *To Bank or Not to Bank: Edward Smith Hall on Free Trade and the Commodification of Money in Early New South Wales*, J. AUSTRALIAN STUDIES, v. 83 (2004).

¹³⁸ Working paper, Michael Burawoy, *Transition Without Transformation: Russia's Involuntary Road to Capitalism*, U.C. Berkeley (*available at* http://sociology.berkeley.edu/public_sociology/public_sociology_pdf/Burawoy.pdf)(Discussing China, Russia and the commodification of money).

This loss of control, which arises out of the impact of the trade order of states on the domestic realm, undermines states' ability to provide for the welfare of the nation in the same manner as they did in the 20th century. At the same time, as described in Part I, the states' ability to muster domestic resources to sustain their welfare on a domestic level is being challenged. The upshot is that the welfare of the nation is fading away as an essential component of Statecraft and legitimating drive of states. This pillar of the Bretton Woods world is becoming a secondary policy objective, which is bound to gradually fade away as the 21st century advances.

Concurrent with this phenomenon, sovereignty and balance of powers are also being eroded. As a result of the global marketplace that Bretton Woods has wrought, the 21st century has inherited a multipolar economic world resting on a global middle class spread across the North and the South. Brazil, India, China, and South Korea, to cite a few, have increasingly become world economic centers. The output of the non-OECD countries has reached 45% today, and is expected to reach 60% by 2015.¹³⁹ The old Second World, made up of communist countries, is being replaced by a new Second World comprised of economies formerly classified under the global heading of "developing countries." Lying within and alongside the first (post-modern) and second (modern) economies are pre-modern collectivities of people that lack the education, infrastructure and other conditions to benefit from the liberalization of trade that the WTO has brought about. These may live in Brazilian shantytowns, in Afghan mountains or in the "excluded" neighborhoods that surround Paris. The bottom line, though, is that

¹³⁹ International Economy and Prospects for Developing Countries, GLOBAL ECONOMIC PROSPECTS, ch. 1(2003), available at <http://siteresources.worldbank.org/INGEP2003/Resources/gep2003chap1.pdf>

the main interlocutors of trade are no longer national middle classes represented by their states; rather the trading world is comprised of a diffuse middle class, spread out in a multipolar economic configuration, that economists estimate to amount to a collectivity of 800 million people surrounded by those who not become meaningful participants in the global marketplace.¹⁴⁰

The metamorphosis of Bretton Woods means that the world trade system's conceptual tool for understanding itself (an aggregation of nation-states governed by the sovereignty, welfare and balance of powers principles of the 20th century) is eroding. The erosion of the nation-state and the nation's welfare as the legitimating drive for the State, the gradual decline of the model of a world subdivided into national economies, and the transformation of the means of productions, mean that comparative advantage can no longer be the sole animating norm of the world's trading system. Our thesis is that a new constitutional moment is needed to usher in a trade norm that and institutions that will supplement Bretton Woods. In the next subpart, we outline the contours of this norm, which we describe as the "enablement of global economic opportunity" and of the institutions that will need to be put in place to implement it.

C. The Enablement of Global Economic Opportunity.

i. The Norm.

The enablement of global economic opportunity is a norm that would accord with a diffuse marketplace that has moved away from a world comprised of discrete economic

¹⁴⁰ See Daniel R. Fung, *Constitutional Reform in China: The Case of Hong Kong*, 39 TEX. INT'L L.J. 467, 468 (2004) ("China is creating a whole new strata of sophisticated middle class urbanites ... that is unprecedented in certainly China's history, and, arguably, world history in terms of the life transformation of sheer numbers of people."); Tim Larimer, *A New Bourgeoisie Develops a Proletarian Taste*, N.Y. TIMES, Nov. 16, 1995, at A4 (reporting on a nascent middle class in Vietnam); Alejandro Portes et al., *Urbanization in the Caribbean Basin: Social Change During the Years of Crisis*, 29 LATIN AM. RES. REV. 3, 21 (1994) (describing the rise of an urban middle class in the Dominican Republic during the 1960s and 1970s).

units coextensive with a nation whose welfare the State is dedicated to promote. Our starting point, as with Bretton Woods, is with domestic Statecraft. The modern nation-states, we have argued in Part I, are being replaced by a collectivity of post-modern states. Whether they are called “market-states”, “post-modern”, or other label, the important substantive component of Statecraft within those states is the replacement of the welfare of the nation with the pushing and prodding of economic activity as the legitimating drive of the State. Sovereignty and balance of powers also fade away in the world of post-modern states, owing to the diffuseness that characterizes the global marketplace.¹⁴¹

We submit that instead of managing welfare, the nation, sovereignty and balance of powers, post-modern states will increasingly need to manage diffuseness, foster economic opportunity, preserve their middle class, and prod their markets to achieve the gradual extension of the middle class and its economic opportunities to the pre-modern collectivities. In turn, just like Bretton Woods established a trade order that accorded with the components of Statecraft of the modern states, a new constitutional era should usher in a trade order that accord with these transformed elements of Statecraft in the post-modern world. The trade order of states should establish rules, to be superimposed on Bretton Woods, which embody the enablement of global economic opportunity, in a constitutional rite of passage.

In many ways, economic opportunity is a logical extension of welfare promotion. The solidification of the nation in the state-nation evolutionary stage brought about the nation-state. The State’s legitimating drive became the promotion of the welfare of the

¹⁴¹ COOPER, *supra* note 8, at 26-42; *see also* BOBBITT, *supra* note 3, at 233, 523-527; Peter Drucker, *The Age of Social Transformation*, ATLANTIC MONTHLY, 53 (Nov. 1994)..

nation, in a world where sovereign economic units coexisted within a balance of powers paradigm. That world brought about an explosion of economic units into a diffuse whole, and a resulting weakening of states. Given the erosion of welfare and of the nation, the State's legitimating drive should logically move on to fostering economic opportunity and managing diffuseness. Unable to foster welfare, deprived of the nation as the object of its welfare effort, the State fell back on economic opportunity as its next best alternative.

Before we move on to describe the constitutional moment that we advocate, we shall explain how the conceptual shift to economic opportunity explains some of the current pressures and trends in the Doha negotiations. The enablement of global economic opportunity norm can be deciphered in Doha agenda under the heading of market access. The Doha agenda is dominated by issues often described as related to "developing countries."¹⁴² These issues include, among other things, the removal of "selective exit" for products such as agricultural goods with respect to which certain developing countries have a comparative advantage. To a certain extent, the enablement of global economic opportunity is a function of completing the Bretton Woods enterprise, and Doha can be understood as following the tide of history.

The completion of the Bretton Woods enterprise will necessitate some institutional overhaul that will go beyond the matters on the Doha agenda. The multipolarity and diffuseness of the new world are bound to create new protectionist pressures on domestic governments, which the institutional tools of the WTO are not equipped to

¹⁴² For illustrations involving intellectual property protection, see John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM & MARY L. REV. 549 (2003). *But cf.* Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933 (2003). For a general statement on the goals of the Doha Round, see *supra* note 75.

deal with adequately. The flow of industry to the multi-polar world is bound to affect industries that are sensitive to the economies of the United States, Europe and the other main GATT trading partners. Technology, software, services, and other functions may be serviced by developing countries. At the same time, the extraordinary comparative advantage enjoyed in the labor field by actors like China, which may marry low wages with educational and other infrastructure, will heighten the pressure to protect the domestic competitors in the U.S. and Europe through anti-dumping or safeguard measures.¹⁴³ The pressure on Doha to address development issues that go beyond the original, efficiency based goals of the WTO can be explained in part by the rise of the enablement of global economic opportunity as a norm of international commerce.

The action here still takes place within the Doha, but it necessitates a rethinking of the norms and institutional structure of the WTO in light of the next generation of trade cases that is sure to arise. The analysis here is akin to that which, as described above, could have taken place at Bretton Woods if the trade planners and theoreticians had looked at the system through the prism of the interaction between Statecraft and the order of states. From the point of view of the present, future matters and interpretive issues will include prominently cases “new protectionism,” driven by domestic demand for governments to shelter domestic industry against the cheaper labor/good education and infrastructure coming from the new trade actors.

Regrettably, the WTO is not sufficiently well equipped at the moment to address this phenomenon. As explained above, the opening up of barriers to trade among the 20th century main players resulted in the type of questions that necessitated the establishment

¹⁴³ China, especially, has been impacted by various antidumping policies. For a survey of China’s antidumping woes, see Lei Yu, Note, *Rule of Law or Rule of Protectionism: Anti-Dumping Practices Toward China and the WTO Dispute Resolution System*, 15 COLUM. J. ASIAN L. 293 (2002).

of the WTO Dispute Settlement Body. Today, the new domestic protectionist pressures will increasingly take the form of the use and abuse of anti-dumping, countervailing duty or other safeguard clauses. This is a virtually inevitable result of the change in the global commercial landscape. Simply put, the sheer number of such cases, as relates to even a single country like China, is staggering, and there is no physical way for the DSB to handle workload that the new world economy is bound to generate.

The first institutional change that a WTO system infused with the enablement of economic opportunity as its animating norm would require, is the establishment of an international trade administrative body. Most important is the extent to which the DSB should be supplemented with professional administrative tribunals that would, *ex ante*, review antidumping or safeguard determinations by a national authority. We should inspire ourselves, consistent with the cross fertilization of international norms and expertise that Professor Weiler wrote about some time ago, with experiments under the NAFTA related to the application of countervailing duties for illegal subsidies, and the difficulties (and advantages) inherent in the application of domestic law by supranational institutions. Without such a system, the domestic pressures will thwart the spread of the enablement of global economic opportunity and, just like trade before World War II, the trade system of the WTO will have failed to graduate to a new era characterized by a transformed economic and political landscape.

Beyond those adjustments to the WTO, the enablement of global economic opportunity requires the trading partners to go beyond the WTO and establish a new set of norms and institutions. In our view the first step towards finding a solution is to establish a trade institutional structure of the future that lies outside of the WTO. The

institutional structure must be diffuse, shifting with the needs of the day, in accord with Statecraft within the main states that comprise the trading world and the transformed core elements of Statecraft in the post-modern world. The challenge facing the trading partners is to establish institutions that will accommodate not just trade between modern nation-states, but trade in a post-modern world where diffuse economic by diffuse actors generate an astonishing amount of issues. We believe the solution lies in a division of the trade world along industry lines, and the establishment of a set of institutions that is described below to address the issues that arise within each subject matter area.

The diffuseness of the post-modern world has created a global middle class which is displacing the nation-state as the true interlocutor of trade. That middle class may be conceptualized as gravitating around a number of discrete industries, each of which raises a given set of issues on the global scale. Compare, for example, the fashion industry and the pharmaceutical industry. The issues of the day in the fashion industry involve the displacement of means of production to the Far East and other countries where cheap labor abounds. To respond to competition, the high-end brands are lowering their standards to tackle less luxurious markets. The mid-range brands are being squeezed out of their markets from the top by those luxury brands, and by the generic competition that come from the Far East. They are riding the tide, waiting for the new Far East players to become importing forces that they can tackle. These issues require international coordination of the type that the WTO cannot possibly supply.

The same need arises with respect to the pharmaceutical industry, albeit in an entirely different context. There, the salient issues involve the extent to which companies operating in certain states should be forced to shoulder health burdens from other states,

in particular developing states. For example, may a generic company operating in India reverse engineer a drug made by Merck, and manufacture that drug at a cheaper price? Would India have the right to permit the grant of a sublicense to manufacture the same drug to, say, an African company? Again, both industries face issues that require international regulation, but in an entirely different context.

We believe that a new trade organization, comprised of a shifting membership that is dictated by the industries at issues, should be put into place. It should have nine permanent trading partners (which we will refer to as the “Trade Commission”). The trading members could be, by way of illustration: the European Union, the United States, Brazil or an alliance of South and Latin American States, Australia, India, Indonesia, the Arab League, Japan and an alliance of the Southeast Asian “tiger states,” and the African Union. Each of these representatives comes from a region where the post-modern is juxtaposed to the modern and pre-modern world. They could be supplemented by states that are important actors in a particular industry, and address the issues that arise in connection with that industry.

In each instance, the Commission will establish programs designed to establishing the conditions necessary for the enablement of global economic opportunity. It is perhaps a cliché to say that a Marshall Plan for 21st century is needed, but when one considers the type of educational and infrastructural growth that is needed to promote the move to pre-modern societies of the type of industries that are spreading to modern societies such as India, one can see that realistic training and foundational programs may go a long way towards spreading economic opportunity to pre-modern societies.

Next, the Commission could coordinate with other international institutions. In the examples that we are providing above, the Commission would obviously coordinate with the World Health Organization when it comes to pharmaceutical companies, and with the International Labor Organization when it comes to fashion and textile. In addition, the norm of enablement of global economic opportunity carries in its penumbra other norms, such as anti-corruption norms, that could be more effectively enforced by cooperation between the Trade Commission and, say, the International Criminal Court. The integration of various institutions to handle certain subject matter areas accord with the diffuse nature of the post modern world, and its tendency to allow for supranational norms to interfere with domestic sovereignty in order to solve cross-border problems.

The cooperation with other international institutions will also address and rethink concept of “trade and...” It is clear that we still cannot think of trade without thinking of the environment, labor, consumer rights, and other potentially conflicting domestic norms that grew out of Statecraft in the modern nation-state. How to handle the 20th century generation of trade issues will continue to occupy us for years to come within the framework of the WTO. However, in addition, the post-modern world necessitates that we add to this domestic-to-international discussion an “international-to-international” discussion. To take a clear example, monetary policy can no longer be thought about as principally a domestic matter, which may require some international cooperation by institutions operating independently of the trade governing body. Lack of control of the market driven and other currency fluctuation is intricately linked to the proper flow of trade, and it can have a devastating domino effect on a trade system that fails to pay attention to it.

The “trade and ...” issues of the post-modern world will involve questions related to “trade and international finance,” “trade and national debt” and other “trade and ...” questions where the other value used to be controlled by a domestic authority, which lost in control and left an international vacuum. For example, the Trade Commission will have to regulate, in coordination with central banks and other financial institutions, the relative exchange rates of the main trading partners. The recent fall of the dollar,¹⁴⁴ and the inability or unwillingness of the traditional domestic institutions to stem the tide, could deeply unsettle the trade world. Europe could lose a substantial market share in the United States. China’s products, priced principally in dollars, could become even cheaper than they are now, and more importantly the Chinese consumer would lose a substantial amount of buying power vis-a-vis the European partners. While some international institutions do exist to handle those issues, in today’s diffuse world there is simply not enough institutional structure to address these issues effectively.

The shift in the trade world that we are advocating would anticipate and follow the historical tide before change is forced upon it (possibly in an atmosphere of crisis). While the inner constitutional and outward strategic transformation of the modern states does not make Bretton Woods irrelevant (far from it), the liberal democracies must recognize the need to adjust their trade strategy. The new world is diffuse. Its essential players are no longer confined to the West.¹⁴⁵ Strategically, the battleground has shifted from defeating fascism and communism as alternative theories of the nation-state, to defeating existential threats to the post-modern states in the form of terrorism and nuclear

¹⁴⁴ Export Opportunities Aren't Just for the Big Guys, New York Times, March 24, 2005 C.8

¹⁴⁵ See Asaf Sagiv, *Globalization: Just Do It*, Azure 85 (2005)(on file with authors)

takeover. Sovereignty and balance of powers, which made for a world comprised of discrete trading blocs that focused on a nation, are no longer the currency of the day.

Rather than a “North” and a “South,” we are faced today with diffuse blocs that cut across traditional borders, coexist within borders, and form the new stage of our political and economic evolution. From inward look and outward conquest (in the pre-modern era), via collaboration and creation of a balance bloc of sovereign nations in the North (during the modern-era), we are entering a dynamic world where North and South blend to create a diffuse society of post-modern states lying side by side with, and containing within themselves, pre-modern societies.¹⁴⁶

The fundamental challenge of the post-modern society of states will be to preserve a world where the trading blocs, within the South and the North, continue to grow and to contain countervailing forces – chief among them terrorism, the conduct of asymmetric war (especially economic warfare) through terror, and the takeover of a nuclear state by rogue forces. The strategic importance of consolidating a Northern bloc of liberal democracies is no longer the top agenda of the day. We believe that, in order for trade as the outer face of the state to follow the inner constitutional order of post-modern societies, and to further their foreign strategic goals, it must be reconfigured to accept that the 21st century principal commercial interlocutors are the trading classes of the North and the South (and, as mentioned below, the former communist states). Instead of focusing on commerce between sovereign blocs within the North, trade must recognize that trading forces within each post-market state are emanating North-South, North-North, and increasingly “eastward” towards the former communist countries.

¹⁴⁶ *Id.*

At the same time, the emerging post-modern societies of the South are surrounded by modern and, most importantly, enormous pockets of pre-modern blocs. These blocs cut across state boundaries, and they are bound to be the center of the liberal democracies' strategic security interests.¹⁴⁷ A trade system that continues to focus on a trading bloc developed out of the modern nation-states' wars cannot meet the challenges of the 21st century. Put otherwise, the failure to proactively adjust trade to recognize the new, diffuse North-South lines, may be viewed in ten, twenty, or thirty years (after we have endured a catastrophic event such as a Pakistani-launched nuclear assault or the development of a lethal Indonesian terrorist group that is not contained by that state's middle class) as an error of magnitude similar to the Treaty of Versailles. The infusion of a new value and institution to the trade system follows the inner and outer evolution of the modern liberal democratic state in the 21st century, before a catastrophic world event makes this move obvious, just like Bretton Woods and the Marshall Plan did in the 21st century.

Conclusion

Once the global collectivity sets in motion a new trade order of states, it will have triggered a new cycle which, like Bretton Woods, will generate novel substantive and institutional issues and, over time, transform Statecraft, undergo additional metamorphoses of its own, and ultimately give rise to another constitutional era. History in fact never ends, but it pauses sufficiently for each generation to recognize its place in the evolutionary path, and to organize its law, international order and institutions to reflect the needs of the moment.

In this Article, we have identified constitutional mechanisms that affect Statecraft, the order of states and transformative and evolutionary patterns that are borne out of this constitutional interaction. Further, we have articulated what we believe to be the seminal contours of the constitutional order of the early 21st century. Today's mission is to build a system for coming generations, keeping in mind that when we take on the unavoidable task of transforming the current order we also plant the seeds of an equally inevitable future constitutional metamorphosis.

It goes without saying that further study, thought and analysis will go into creating the architecture, frame and construction of the new system. Experts in each industry will identify the salient needs and submit to policy-makers and negotiators with the choices that face them. Finance and currency thinkers will study the transformed international and domestic landscape and produce the nuts and bolts of the new order. Institutional theorists will analyze the various means of breathing life to the new norms through transformed institutions. To be sure, the current system will continue to operate,

and the comparative advantage enterprise to unfold. Changes would have to be made on this front as well to reflect the transformed nature of the State, such as a revision of the rules of origin, balance of payment and other provisions that were devised for a nation-state centric system. However, in time, the GATT will have achieved its integration purpose, and the central action on the international scene will focus on how best to spread global economic opportunity.

The new order will not arise overnight. When Robert Schuman declared his vision of a constitutionally transformed Europe, he pointedly prophesized that Europe would be built through a series of “concrete achievements” which, over time, would yield a new legal order that he visualized in 1950 as the “United States of Europe.” The interaction of the various European institutions, the resolution of crises such as the Luxembourg constitutional breakdown of the 1960a, and the random workings of the political process, infused into the system an element of randomness on the road to the inevitable result: its acceptance by the constituent entities. The same animating principles will obtain in the international order of states that we are discussing.

We can already predict certain developments, albeit with no clear view of their timing and exact nature. With the erosion of the nation-state as the central unit of the system, the place of both individuals and private organizations in the international order will continue to solidify. International rules will likely rise in prominence and become increasingly available to private parties in actions against one another and against institutional players. New international financing institutions may arise to spread economic opportunity to pre-modern areas. Acceptance of the rule of law may become an even greater precondition to participation in the trade order. Partnership among states,

international institutions and private actors will take forms we can only glimpse from the vantage point of the present. Borders might have to be redrawn, and states might accept economic boundaries that are much broader and more diffuse than their political boundaries. The geographical landscape that we inherited from the colonial era and the wars of the 20th century might well become unrecognizable.

The future evolution of states and trade will surely face setbacks if not crises. But by paying heed to the evolving course of history, we stand a greater chance to steer it towards a better course. No doubt, we will continue to struggle with poverty, violence, terror, inequalities, catastrophes, and all other permanent attributes of the human condition. However, by recognizing the fundamental mechanisms that drive our domestic and international orders, we will have done all we can to organize ourselves as best as possible to face an uncertain future.