

The Shifting Allocation of Authority in International Law

Considering Sovereignty,
Supremacy and Subsidiarity

Essays in honour of
Professor Ruth Lapidot

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Democracy without Sovereignty: The Global Vocation of Political Ethics[†]

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I. INTRODUCTION

IN THE *PYTHAGORAS*, Plato reminds his audience of how men were saved from annihilation by Prometheus who gave them the knowledge of fire and the arts—only to potentially fall victim of each other through incessant war. Zeus (as always!) cleaned up the mess by giving men a foundation for co-operation and for governing themselves. He entrusted Hermes with two gifts for men: *aidos* (respect, restraint, shame, reverence, awe) and *dike* (justice or rightfulness), ‘in order to serve as the norm for cities and link men through ties of friendship’. These gifts were to be bestowed on all, not just on a small elite. Thus, for Plato, who explores in the *Pythagoras* the very foundations of experimental democracy in Athens, Zeus did not choose to give men formal laws or institutions, a list of permitted or banned actions, but a *relationship to law and polis*.¹ As Socrates tells his companion in Plato’s later *Minos*, Zeus may have taught law-makers but he himself did not make law.

This chapter will therefore argue that as we embark on a new age of governance between all mankind, these Platonic lessons need to be revisited anew. In our view, if, in a localised context, a political ethics *à la Plato* must emphasise behavioural guidelines above specific institutions or strict rules of action, this is all the more the case in a context where *aidos* and *dike* must be pursued not only between men and women, but

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¹ F Ost and L van Eynde, *Faust ou les Frontières Du Savoir* (Belgium, Fonds national de la recherche scientifique, 2002).

between groups, nations and transnational associations. In the current, experimental stage of global governance, we believe that such an ethics ought to take central stage.

In this spirit, our essay challenges the notion that legitimate global governance should be conceived primarily in terms of the proper allocation or delegation of authority to global institutions. The interdependence of the local, national and global in today's world, as well as the connections between different realms of global governance (eg, trade and human rights, investment and environment), means that it is impossible to protect and promote democratic politics through a stable division of competences between local and national 'democratic' institutions and global institutions, or by restricting the mandate of particular global institutions to an agreed 'subject matter'. Instead, as we discuss below, we need to focus on the manner in which power is exercised by diverse agents in global sites of decision and deliberation, some highly institutionalised and others better characterised as informal networks.² Assessing and hopefully shaping the conduct of agents in global sites of governance in accordance with a political ethics of democracy offers considerable promise as an alternative—or perhaps complementary and mutually reinforcing—approach to legitimacy.

In this essay, we start by revisiting the principles of subsidiarity and supremacy in the EU context to argue that they should be understood as guiding principles of 'transnational democracy', ie, as a *horizontal* reading of sovereignty transfer—their import for the global level, in other words, is more heuristic than legalistic. Second, we make the general case for a global political ethics, by arguing that neither strict reliance on indirect accountability, in other words a limited reading of 'subsidiarity', nor simply granting 'supremacy' to international law, can 'buy' legitimacy at the global level. Third, we review the story of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) in this light by focusing on both the illusion from below—technical expertise—and the illusion from above—constitutionalisation—that have underpinned their fifty-year history. We deal with these illusions by turning to architectural reform and its limits, before, finally, suggesting the outlines of the kind of transnational ethics we have in mind.

II. SOVEREIGNTY, SUBSIDIARITY AND SUPREMACY: THE HORIZONTAL READING OF EUROPEAN INTEGRATION

There is no denying the enigmatic spell sovereignty continues to have over our political imagination, including in the worlds of law and social

² A-M Slaughter, *A New World Order* (Princeton University Press, 2004).

science. The concept of sovereignty remains indispensable not only as the founding myth but also as the constitutive *language* of the modern international society of states; but it is at the same time deeply problematic and contested. The premise of this book is that sovereignty has become divided, shared, relocated, exploded, overlapping. In short: that we must give up once and for all, not the idea of sovereignty per se, but the fetishism of indivisibility which continues to plague international law and international relations. Indeed, our editors argue, international law has become partly 'verticalised', ie, that a vertical dimension has been added to the traditional 'horizontal' one defined around traditional state sovereignty and inter-state relations. The broad compact of norms and regimes that governs the actions of actors in the international system not only affects the formal allocation of authority with or away from sovereign nation-states, but perhaps more importantly how power is legitimised politically and how it is exercised and by whom. In this context, we argue that supremacy and subsidiarity are less *allocative* principles than *legimitising* norms. And under this reading, they function as guiding norms for political processes rather than institutional structures per se.

While the EU operates for this project as the *ontological avant-garde in the international system*, we must recognise that the capacity to transcend the aforementioned fetishism of indivisibility is shared to very different degrees among European peoples and their collective psyche. There is still a gulf between Rousseauist notions of supreme and exclusive authority within an exclusive territory and German federalism for instance. Thus, the case of the EU is illustrative precisely because, while this is where supremacy and subsidiarity are most formally entrenched, the practice associated with their adoption has been fluid and contested.

The EU case in particular encourages us to reconsider what we mean by 'verticality' and 'horizontality'. At least in the European version of federalism, verticality ought to be distinguished from hierarchy and the federal model from a federal state.³ The fractal theory—of reproduction of similar patterns at different levels—is more relevant than the Russian doll vision of Europe. The EU system organises a dialogue between authorities rather than presenting a simple rule as to who prevails. This is why during the Convention debates, the formalisation of even the seemingly straightforward and entrenched principle of supremacy was contested—at least by the legally minded Brits (and here we say legally minded rather than sovereignty minded advisedly). Most fundamentally, to the prevailing notion of horizontal juxtaposition of sovereignty (which would be more traditional than the vertical transfer this book is

³ K Nicolaidis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (Oxford University Press, 2001).

concerned with), we must add a much deeper horizontal *transfer* of sovereignty associated in particular with the principle of mutual recognition.⁴ Both notions of supremacy and subsidiarity can be seen as much as principles organising such horizontal transfer of sovereignty (even though through the verticalisation of rules) as principles of vertical allocation. That is because the EU can be characterised by the tension between the legal hierarchy of norms expressed through the principle of supremacy and the equality between its Member States coupled with the absence of an overarching political authority as with classic federal states. European law constrains states not only through allocating authority but in anchoring their behaviour towards each other, a logic described by Daniel Halberstam as stemming from the principle of loyalty.

Such a horizontal reading of subsidiarity and supremacy follows directly from the limits of the notion of sovereignty in a world where laws and actions within a polity increasingly have external effects. Supremacy and subsidiarity therefore can be defined in a dialectic way as complementary principles to deal with the fundamental conundrum of transnational democracy. Supremacy serves as a meta-norm of *conflict of law* between Member States such as to enhance the representation of foreigners inside the jurisdiction of every Member State, and to ask when and to what extent these interests should trump the domestic social contract. Subsidiarity, in turn, serves to mitigate the impact of foreign laws unaccountable to our own, and thus to circumscribe the domain within which this powerful logic of supremacy operates.

Many commentators view the supremacy debate as a process of constructive dialogue between the Community and national judges about the Union's evolving legal order—reminding the Court of Justice of the importance of protecting fundamental rights against potential infringements by the Union institutions, or of enforcing the limits to Union competences which are intended to safeguard national sovereignty.⁵ But, whatever its constitutional nature, the principle of supremacy could not resolve the long-running *Kompetenz–Kompetenz* debate on the allocation of ultimate sovereignty, and the power of constitutional review, between the Union and its individual Member States. Supremacy exists *at the Union level*, but the whole point of the *Kompetenz–Kompetenz* debate is that the authority of those statements *at the national level* remains contested by certain domestic courts. Indeed, many legal scholars contest the existence

⁴ See K Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 *Journal of European Public Policy* 682; See also, K Nicolaidis, 'Kir Forever? The Journey of a Political Scientist in the Landscape of Recognition', in M Maduro (ed), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2007).

⁵ M Dougan, 'The Convention's Draft Constitutional Treaty: A "Tidying-Up Exercise" That Needs Some Tidying-Up of its Own' (2003) Federal Trust Constitutional Online Essay 27/03.

of a hierarchical relationship between the Community and the various national legal orders, and endow the principle of supremacy with a much more specific meaning, ie, as a device for settling concrete conflicts between Community and national law in cases where EU law has direct effect.⁶

This means in turn that the principle of supremacy is not unconditional. In certain situations, the imperative of disapplying national rules that are incompatible with provisions of Community law must be balanced against other equally fundamental principles of the Treaty system, such as the need for legal certainty and the protection of legitimate expectations. This conflict between supremacy as hierarchy and its reception into the national constitutional environment brings us back to the deep horizontal nature of the EU as organising the transfer of sovereignty between states rather than above states.

Similarly, as we argued in *The Federal Vision*, the norm of subsidiarity is less useful as a guide for the allocation of authority between the state and EU level, than as a multifaceted principle for rethinking European federalism in general. In other words, the practical success of subsidiarity in the EU depends in part on the capacity of EU actors to embrace this spirit of federal union which cannot be easily be subsumed in a vertical paradigm of centralisation–decentralisation and optimal allocation of powers. In terms of polity, the paradigm of federal union and horizontal sovereignty transfer calls for conceiving the EU as a *demoi-cracy* whereby identities and social bargains are shared and overlapping rather than merged and subsumed under a single umbrella.⁷ In other words, *demoi-cracy* serves as a political philosophy principle to adjudicate the diversity between polities in the same way that supremacy and subsidiarity serve as legal principles to adjudicate conflicts of laws between states.

In sum, even in the EU context, a paradigm of legally framed vertical allocation of authority only takes us so far. Instead, we need to understand supremacy and subsidiarity as heuristics or boundary conditions for the dialogue between levels of governance, as a baseline for accountability for governance beyond the state. It is in terms of such a reading that we go on to explore the issue of power allocation at the global level.

III. FROM THE EU TO THE GLOBAL: THE FATE OF POLITICS

This diagnosis is all the more true at the global level. To come back to our initial question, how do or can allocative principles help achieve greater legitimacy for governance beyond the state without even an embryonic

⁶ *Ibid.*

⁷ N Nicolaidis, 'We the Peoples of Europe' (November/December 2004) *Foreign Affairs* 97–110.

polity such as the EU possesses? The classic response has been to describe how indirect accountability to domestic democratic polities has been refined recently along the lines of a delegation model.⁸ But accountability to citizens through domestic representative institutions is burdened by problems of agency costs and information asymmetries,⁹ and indeed it is precisely for this reason that we witness concern about a democratic deficit and a legitimacy crisis of global governance. Alternatively, many authors have tried to come up with imaginative proposals for reshaping global institutions at least partially along the lines of domestic institutions of representative democracy.¹⁰

The objections to both these lines are well rehearsed. Domestic institutions of representative democracy which aspire to the peaceful management of social conflict are far from an adequate source of legitimacy, even in the traditional domestic context. We know that these institutions are vulnerable to capture by the most powerful interests, to demagogical manipulation, to rational ignorance and indifference of the public, to biased time horizons, and the ebb and flow of fashion and electoral cycles. As Moravcsik argues, the fact that political outcomes often do not match the interests of the 'median voter' but that of the louder bullies in the ring provides a justification for non-majoritarian and 'apolitical' institutions of governance in domestic contexts (even if more democracy and better politics may be theoretically more satisfying answers to the imperfections of real-world representative democracy as we know it).¹¹ At the same time, partly due to globalisation and the increasing complexity, velocity and specialisation of the public function, executives and bureaucratic elites have been strengthened in domestic polities and the role of legislatures correspondingly diminished.

Beyond the domestic polity, the delegation of governance to actors who are insulated from the rough and tumble of daily democratic politics has often been defended on the grounds that the delegated issues are less salient in terms of citizen's preferences and more technical, while at the same time polities are hugely less homogeneous and more dispersed than at the national or sub-national level. More generally, as Sassen puts it, the

⁸ R Keohane and R Grant, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29; D Held and M Koenig-Archibugi (eds), *Global Governance and Public Accountability* (London, Blackwell, 2005).

⁹ R Howse, 'How to Begin to Think About the "Democratic Deficit"' at the WTO' in S Griller (ed), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order*, European Community Studies Association of Austria (ECSA Austria), Publication Series 5 (Wien, New York, Springer-Verlag, 2003) 79–101. C Coglianese and K Nicolaidis, 'Securing Subsidiarity: Mechanisms for Allocating Authority in Tiered Regimes' in Nicolaidis and Howse, above n 3.

¹⁰ I Clark, *Globalization and International Relations Theory* (Oxford University Press, 1999); D Held and A McGrew, *The Global Transformations* (Cambridge, Polity, 2000).

¹¹ A Moravcsik, 'Is there a "Democratic Deficit" in World Politics? A Framework for Analysis' (2004) 39 *Government and Opposition* 336.

national has been disassembled and state agendas denationalised: jurisdictional and territorial boundaries no longer match in any coherent way.¹² Such arguments are not easy to dismiss either on functional or normative grounds. In these circumstances, a reorientation towards the political ethics of democracy may be seen not simply as second-best ersatz for fully blown representative institutions at the global level, but as something that is perhaps ever more necessary for domestic governance as well.

In short, we suggest that instead of *reproducing* democratic institutions at the global level, we ought to take up the challenge of making the behaviour of agents who exercise power or authority in global sites conform to a political ethics, values and practices that exemplify the spirit and practice of democratic polity. In order to clarify what we mean by political ethics, we must start with the role of politics in the design of global governance.

The very notion of 'governance' and the *problematique* of legitimacy and justice that have become so prominent today rest on the increasing obsolescence of the traditional model of international 'politics' as inter-state diplomacy, ie, the international version of delegation and insulation.¹³ Global governance comes into play not only through the legalisation of international co-operation but through its concurrent perception and contestation as a lasting system of rules and praxis autonomous from ad hoc bargains.¹⁴ Today we can no longer ask *whether* but to *what extent* can indirect democracy and indirect accountability through the 'sovereign' state and its consent suffice to legitimise global governance. To the extent that it cannot, we enter the realm of global politics, or what we could call 'democratised governance'. Let us take one step back.

At a most general level, let us posit that modern governance systems rely on at least three sources of legitimacy: constitutional settlement, the politics of democracy, and technical expertise or effectiveness. If this is the case across issue areas, then, we would argue, not only will different *loci* of global governance need to rely on different balancing between these three sources, not only will such balancing evolve over time, but the legitimacy acquired on one ground will affect the others in complex and unpredictable ways. Legitimate global governance cannot be reduced to the imaginary test of a 'global opinion poll'. Rather, and with David Beetham, we would argue that legitimacy is not grounded in people's beliefs in the abstract but in the degree to which a set of power relations can be *justified in terms of* people's beliefs, values and expectations, even

¹² S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006).

¹³ R Keohane and J Nye *Power and Interdependence* (3rd ed, New York, Longman, 1979; reprinted 2001).

¹⁴ See special issue on International Regimes, *International Organisation*, Fall 2002.

as either these beliefs and expectations or the capacity of the system to translate them into outcomes changes over time.¹⁵ Sustained legitimacy therefore requires both consistency in purpose and flexibility in action. In this, we echo Ruggie's characterisation of political authority as 'a fusion of power with legitimate political purpose'.¹⁶ Assessing the legitimacy of a given part of the global governance system therefore consists in asking how and to what extent the balance between the sources of legitimacy continues to support people's beliefs, values and expectations—bracketing for the moment the fundamental question as to who these peoples are and how their beliefs, values and expectations are to be measured. But how could such assessment operate outside of politics?

Let us zoom in on the governance of the global trading system. Here we argue that the governance of the trading system is currently off-balance. Historically, as it evolved over time from the GATT, managed by a low-key group of experts, to the semi-constitutionalised WTO, the space for politics in its midst has shrunk, while it should rather have expanded—a point conveyed by the self-styled anti-globalisers as they create new spaces for contestation in the street or on the Web. In their world, power and purpose are radically at odds, as the perceived powerlessness of the *citoyens du monde* engages with and 'democratises' at last the asymmetries in *state* bargaining power between the haves and the have-nots of globalisation.

In our schema, then, politics in the global governance of trade is threatened by two illusions, which are—as we see it—two illusions without a future. These illusions in turn both can be read as stemming from misreadings of the principles of supremacy and subsidiarity.

The first illusion—the illusion from below—is that conflicts over trade can be resolved by a technocratic insiders' network composed of trade law specialists, economists and scientists. Susan Strange has argued forcefully that global power has come to reside to a great extent in those holding key positions in 'the knowledge structure'—a claim bolstered with each stage of the rise of professional elites (dating back two centuries) and of the scientific revolution (genetics, risk assessment, etc). Reliance on the combination of trade law expertise and the scientific method (with its legitimacy-enhancing claim to consistency, reliability and transparency) becomes the basis for deriving 'truths' on which to pass judgment over domestic policies. The problem for many today is compounded by the 'privatisation' of decision-making by standards-setting bodies, international professional bodies and the like, which are

¹⁵ D Beetham, *The Legitimation of Power* (London, Macmillan, 1991), see also Leonardo Martinez, 'Bottom-Up Legitimacy: Fusing Power and Purpose in the WTO' (Oxford University, mimeo, 2000).

¹⁶ J Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organization* 382.

able to pre-empt public regulatory processes or substitute for them. Under the first illusion, therefore, subsidiarity has come to be captured by all those who are in a position to decide that somehow it is (scientifically, legally) right and proper to allocate authority to them or the likes of them.

But political space in the world of global trade is also increasingly threatened from above—witness the attempt to ‘constitutionalise’ the WTO as a form of higher law with ‘supremacy’, a set of authoritative rules placing beyond contestation a particular historical view of the appropriate limits of legitimate governmental action (‘intervention’) where there are effects on international trade, investment or intellectual property. As we have argued elsewhere, such hand-tying at the international level without extraordinary levels of democratic consent and a foundation in political and regulatory co-operation would only increase the WTO’s unpopularity.¹⁷

Thus, while both some degree of expert management and some elements of constitutionalisation are (desirable) facts of life for the WTO, we cannot rely on emphasising either as the primary source of legitimacy. To be sure, both these ‘apolitical’ realms require democratic foundations as a *sine qua non*. But that would not be enough. While many of the conditions that may justify bypassing political processes obtain equally in the WTO and domestic contexts, it can be argued that it is precisely because more remote organisations such as the WTO (the actions of which nevertheless directly affect people’s choices) lack a grounding in mutual trust and the identity bonds underpinning solidarity impulses at the domestic level that they need to be *more* democratic, *more* political than domestic institutions.

We need to spell out, of course, what we mean by democratic politics—a democratic politics appropriate to global governance, that is neither majoritarian nor solely representative, nor, even less, a deliberative free for all. By calling for the relevance of politics at the global level we mean to highlight the *limits* of a purely legalistic interpretation of the norms of ‘subsidiarity’ and ‘supremacy’ and the mix of technocratic and constitutional illusions associated with them, even in the EU context. We seek to stress the necessarily contested and *contestable* nature of issues at stake and the necessarily *controversial* and *unpredictable* nature of the solutions crafted on a day-to-day basis. We mean to stress the importance of power relationships in the regulation of globalisation and the desirability of systematically designing systems that can mitigate such asymmetries

¹⁷ R Howse and N Nicolaidis, ‘Legitimacy and Global Governance: Why a Constitution for the WTO Is a Step Too Far?’ in Roger Porter et al (eds), *Equity, Efficiency and Legitimacy: The Multilateral System at the Millenium* (Washington DC, Brookings Institution Press, 2001); ‘Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?’ in M Verweij and T Josling (eds), *Deliberately Democratizing Multilateral Organization*, special issue of *Governance*, vol 16, no 1, January 2003.

without themselves becoming irrelevant. We also, and relatedly, believe that debates over legitimate global governance cannot bypass the question of justice beyond the state and that, in turn, such questions are eminently political.¹⁸ Finally we wish to argue that architectural approaches to enhancing the legitimacy of global governance can only take us so far. For sure, there is room for tinkering with the formal structures of decision-making, but the heart of the matter is elsewhere, in the behaviour of the relevant actors and in the beliefs, values and expectations that inspire them—as well as ultimately, in the congruence with such values underpinning other levels of governance as well as individual citizens. Our focus must shift from the play's stage and set to the performances of the actors.

This leads us to sketch a political ethics for the age of globalisation. We have argued elsewhere that such a political ethics to a great extent already characterises an idealised version of the European Union, the very EU-topia which serves as the basis for narratives of projection from the EU to the global level.¹⁹ And yet, at the EU level, just as with the global level, it has proven difficult for our political imaginations to move beyond the vertical logic of allocation of power towards a paradigm of horizontal mutual recognition.²⁰ A political ethics appropriate to the politics of globalisation will ultimately be tested on its capacity to legitimise global governance constraints on domestic political processes and socio-economic choices as well as on how each polity deals with 'the other' within, and on its capacity to speak to the fears of both current and future generations.

IV. DIAGNOSIS: FROM GATT TO WTO—THE SHIFTING BENCHMARK FOR POLITICS BEYOND THE STATE

A. Illusion From Below: Apogee and Obsolescence of Technocratic Management

The predecessor to the WTO, the GATT, notoriously came into being as the 'rump' of a failed grand design for governance of global trade—the stillborn ITO (International Trade Organisation). Like much of the Bretton

¹⁸ R Foot, J Gaddis, and A Hurrell, (eds), *Order and Justice in International Relations* (Oxford University Press, 2002). K Nicolaidis and J Lacroix, 'Order and Justice Beyond the Nation-State: Europe's Competing Paradigms' in *Order and Justice in International Relations*.

¹⁹ K Nicolaidis and R Howse, "'This is my EUtopia . . .': Narratives of Power' (2003) *Journal Of Common Market Studies*, Special Anniversary issue; and in JHH Weiler, J Peterson and I Begg (eds), *Integration in an Expanding European Union: Reassessing the Fundamentals*. (Oxford and Malden MA: Blackwell Publishing, 2003).

²⁰ Nicolaidis, 'Trusting the Poles' and 'Kir Forever?', above n 4.

Woods architecture (the World Bank, the IMF), the ITO would have, in some sense, transcended the classic model of a multilateral treaty, becoming a kind of regulatory agency on a global level.²¹ The GATT, by contrast, consisted of little more than a framework for progressive negotiation of removal of tariffs or other border restrictions among a politico-administrative elite. The GATT established two general principles for governing these negotiations. These were 'most favoured nation' (MFN), which required that negotiated benefits be generalised to all the parties to the treaty, and 'national treatment', which required that internal policies of the parties not discriminate against imports (thus protecting against the undermining of negotiated concessions on border measures through protectionist domestic policies). The GATT itself contained no formal dispute-settlement procedures, only a general provision that allowed the parties as a whole to engage in dispute settlement (Article XXIII). Apart from the national treatment principle, the GATT contained a number of other provisions, which dealt in a subtle and ambiguous manner with domestic policies entailing controversial trade effects. Consider the language of the provisions on subsidies and on state-trading enterprises in this regard. Only one kind of trade policy instrument, quantitative restrictions (QRs: Article XI), was explicitly banned by the GATT, though this ban was subject to many exceptions.

Finally, the GATT was based on the notion that the parties preserved their sovereignty with regard to dealing with matters such as health, environment and public morals, regardless of any of the GATT treaty commitments (the Article XX exception), subject to the condition that such policies not constitute arbitrary or unjustified discrimination or a disguised restriction on international trade. The decision-making rule in the GATT, whether for treaty amendments, waivers or other matters (such as legally binding settlements of disputes) was consensus, *de jure* and *de facto*. The GATT Secretariat did not really have a legal basis in the treaty, but developed as a skeleton staff to administer the treaty and organise periodic negotiations on new concessions.

Thus described, the GATT fits very well with the liberal institutionalist theories of international co-operation characteristic of the international relations literature, especially in its international regime variant.²² The GATT as an institution lacked any meaningful decision-making autonomy. Its function was to facilitate co-operation between the parties where such co-operation was mutually self-interested, by providing a loose structure to reduce the bargaining costs of mutually self-interested deals,

²¹ On the post-war multilateral institutions as projections of the New Deal regulatory state, see A-M Slaughter, 'Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State' reprinted in R Howse (ed), *The World Trading System: Critical Perspectives on the World Economy*, vol I (London, Routledge, 1998) 50.

²² R Keohane, *After Hegemony* (Princeton University Press, 1984).

to facilitate the flow and interpretation of information about compliance, and—through dispute settlement practice—to supplement decentralised monitoring and enforcement of the treaty. Through evolving practice, disputes increasingly were referred to panels of (mostly) trade diplomats, whose decisions were eventually supported by legal reasoning offered mostly by the Secretariat, but even this element of centralised monitoring of the bargain was balanced by the rule that, to be legally binding, the reports of the panels needed to be adopted by consensus of all the parties to the treaty, including the ‘losing’ party in the dispute.

If the notion of governance implies that an institution has some autonomous authority to make policy, articulate norms, stipulate priorities and resolve conflicts, the GATT had none, at least from a formal, juridical perspective. In this sense, understanding the power that it exercised in terms of a transfer of sovereignty is misguided.

Instead, from a neoliberal perspective the ‘blueprint’ of the GATT conformed well to the role of institutions in sustaining ‘cooperation under anarchy’.²³ From a constructivist perspective, the GATT also became the site for what is a classic example of an epistemic community,²⁴ or network,²⁵ a technocratic elite, devoted to the telos of free trade, deeply engaged in setting agendas for negotiations, adjusting the bargain through treaty interpretations and on-going ‘practice’, and defining the ‘norms’ appropriate to a commitment to multilateral free trade.²⁶ Through the drafting of panel reports, the promulgation of various studies and documents bearing on the interpretation and modification of existing treaty provisions, the production of an Analytical Index summarising the results of previous dispute-settlement exercises, and through the management of the daily work of various committees and working groups, the GATT insider network arguably performed important governance functions, even in the absence of a formal decision-making authority allowing it to act without an explicit consensus of the parties on any matter other than the most trivial or mundane.

This insider network was particularly successful at not involving formal mechanisms of decision-making and accountability because of its diffuse nature—for the network not only consisted of professional

²³ K Oye, *Cooperation under Anarchy* (Princeton University Press, 1985); R Axelrod and R Keohane ‘Achieving Cooperation under Anarchy: Strategies and Institutions’ (1985) 38 *World Politics* 226.

²⁴ WJ Drake and K Nicolaidis, ‘Ideas, Interests, And Institutionalization—Trade In Services And The Uruguay Round’ (1992) 46 *International Organization* 37.

²⁵ Slaughter, above n 2.

²⁶ J Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement’ in Porter, above n 17, 334, 336–7; R Keohane and J Nye, ‘The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy’ in Porter, *ibid.*, 264ff.

employees within the GATT, but delegates from influential Member States of the GATT, domestic trade officials with strong ties to the GATT institution, and even pro-GATT academics and private practitioners.²⁷ The network was thus able to exercise its informal power across the dividing lines of diplomacy and technocracy, and in the interstices between the domestic and the international.

What united the insider network was the first source of legitimacy identified above, the shared recognition of its members of their 'expertise' about the GATT, the notion that they were applying rational bureaucratic and policy tools to the management of a regime that is beneficial to everyone. Normative conflicts, which underlay issues such as whether subsidies should be viewed as legitimate domestic public policies or cheating on the co-operative equilibrium of negotiated trade concessions, could be described by members of the insider network as 'system friction'²⁸ and 'interface' challenges,²⁹ implying that a solution could be engineered by technicians of competence and goodwill. This was plausible, because through much of the GATT's history, the politics of trade was low politics, and not grand Weberian politics entailing a choice between competing gods and demons, between fundamentally conflicting values. As Keohane and Nye remark:

Politics takes place within the ground rules laid down by the regime, and generally is directed towards small advantages, favorable adjustments, or exceptions to the rules. Politics within the General Agreement on Tariffs and Trade (GATT) during much of the 1950s and 1960s conformed to this picture.³⁰

In this context, national sovereignty was an instrumental feature of the system. There was unsurprisingly a solid political basis for the acceptance of the ground rules (such as national treatment) as a baseline for sorting legitimate domestic policies from 'cheating' on trade commitment.³¹ The three decades following the post-war settlement were characterised in Ruggie's phrase by a basic transnational bargain over 'embedded liberalism'—the notion of multilateral trade liberalisation as facilitating the domestic, progressive welfare state but never trumping it.³² Within broad agreement among the major players to this ecumenical conception

²⁷ Weiler, above n 26; R Howse, 'From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime' (2002) *American Journal of International Law* 96; Nicolaidis and Howse, above n 19.

²⁸ S Ostry, *Who's on First? The Post-Cold War Trading System* (University of Chicago Press, 1997).

²⁹ J Jackson, *Sovereignty, WTO and Changing Fundamentals of International Law* (Cambridge University Press, 2006).

³⁰ R Keohane and J Nye, *Power and Interdependence: World Politics in Transition* (Boston, MA, Little Brown, 1977), 51.

³¹ Howse and Nicolaidis, above n 17.

³² Ruggie, above n 16.

of legitimate government, differences about whether specific domestic policy interventions constituted 'cheating at the margin' or even defection appeared manageable by diplomatic and technocratic techniques. It was not necessary to engage the underlying normative conflicts about the legitimate relationship between the state and the market, or to address issues of distributive justice (both intra-state and inter-state) and of relative gains.

We have discussed elsewhere the changes and stresses within domestic regimes and the global political economy that led to the pressure on, and the subsequent collapse of, the 'embedded liberalism' bargain in the 1970s and 1980s.³³ The ultimate result was the manifest failure of technocratic management³⁴ and a perceived need to negotiate new explicit *rules*, on issues that reflected basic normative conflict, such as subsidies, intellectual property rights, and food safety and other kinds of domestic risk regulation. Moreover, areas such as intellectual property rights and market access in regulated services industries raised issues of relative gains and distributive justice (most notably as between developed and developing countries). The strategy of the United States, along with other developed countries, in the Uruguay Round was to use their bargaining power to link the continuing ability of developing countries to benefit from the mutually self-interested GATT bargain to their acceptance of rules and commitments that were not clearly win-win by any means. It is sometimes suggested that this was in return for new commitments by developed countries to reduce protection on products of interest to developing countries, such as textiles and agricultural commodities. However, unlike the obligations on services and intellectual property, as well as technical regulations, the reduction of trade barriers on textiles, for example, was to be phased in over a very long period of time, with lots of scope for 'safeguards' and backtracking. Moreover, neoclassical trade theory would certainly view removal of trade barriers in the textiles and agricultural barriers as welfare-enhancing for the importing states, as well as offering new opportunities to developing country exporters. Conversely, in the area of intellectual property, and arguably too concerning some market access commitments for services and subsidies, the agreement resulted in net gain or loss across countries as well as within countries, which was one of the developments at the root of the ensuing legitimacy crisis.

³³ Howse and Nicolaidis, above n 17.

³⁴ See, eg, Robert Hudec's account of the increasing failure of the dispute-settlement system to induce compliance on issues of controversy, such as agricultural subsidies, in the 1980s: R Hudec, DL Kennedy and M Sgarbossa, 'A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989' (1993) 2 *Minnesota Journal of Global Trade* 1.

B. Illusion from Above: The Move Towards Constitutional *Fuite en Avant*

It was these negotiations that resulted in the creation of the WTO and therewith a new architecture for multilateral trade relations.³⁵ The new agreements on services and intellectual property rights, subsidies and technical regulations (among other new treaties) were put under a single umbrella with the original GATT. This reflected the principle that ‘membership’ of the WTO, benefiting from any of these treaties, required accepting them all. Moreover, for all the main treaties, there would be compulsory jurisdiction for juridical dispute settlement, with the final arbiter an appellate court autonomous from the Secretariat, or the political and diplomatic organs of the WTO. Thus, subject to a negative consensus where *all* the states’ parties blocked it, a ruling of the Appellate Body or an unappealed ruling of a panel (the tribunal of first instance) would be adopted automatically. Failure to comply with a ruling would result in authorised countermeasures for the winning party, and the meaning of compliance was also subject to arbitration.

As already noted, The GATT was an institution characterised by relatively few formal legal rules, and a large role for informal ‘governance’ by a technocratic network or epistemic community, as well as by low politics and a focus on mutually self-interested bargaining (with divergence of interests managed through linkage of concessions, ie, reciprocity). The WTO, by contrast, presents itself as system of many formal legal rules, a large number of which engage fundamental normative controversies and have distributive consequences that track in important ways existing imbalances in economic and political power among states. There is a centralised, juridical system of rule interpretation and enforcement, which further constrains the possibilities for managing and adjusting the ‘bargain’ through informal ‘governance’. The WTO judiciary’s interpretation of the rules can only be reversed by decision-making that as a matter of practice requires a consensus of the entire WTO membership (formally requiring at least a super-majority vote).

This contrast between the GATT and the WTO suggests a shift from an institution with strong, albeit informal, mechanisms for ‘governance’ to an ‘ideal-type’ of a multilateral treaty regime, ie, one where norms are specified in treaty rules that go from the general to the very detailed, with centralised mechanisms for treaty interpretation and enforcement (albeit with aggrieved states deputised as the enforcer)—characteristics longed for by international lawyers, but often not achieved. In such a context, there is still, of course, a role for day-to-day regime management by

³⁵ For a discussion on the origins and development of the constitutionalization debate, see D Cass, *The Constitutionalization of the World Trade Organisation; Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, 2005).

officials, but ‘governance’ sounds much too grand, or grandiose, a description. Thus understood, the multilateral trading regime would seem, at first glance, to confound the kind of trajectory from classic treaty law to ‘governance’ that is suggested in the thematic statement introducing the agenda for this collection of essays. That is to say, the automatic application of fully specified treaty rules, often approved through domestic parliamentary processes, replaces the ongoing management and adjustment of the bargain by a technocratic policy elite at the global level.

One could argue, using the EU as an example, that treaty law with a central court is in fact a stage on the way to institutionalised formal ‘governance’ in the WTO; however, as we have explained elsewhere, this often favoured analogy is defective, in that the EU itself had political institutions of ‘governance’ right from the start, although the role of these institutions unquestionably deepened and strengthened in dialogue with the judiciary sketched in the first part of this chapter.³⁶ The regulation of trade at the global level has not yet established the kind of dialogue and division of labour between the judicial and political sphere that has characterised governance both in the domestic and the European contexts.

Nevertheless, ‘governance’ has been occurring within the WTO system, in both formal and informal ways. *Contra* the positivists, public law adjudication itself is a form of ‘governance’—it has policy- and norm-creating and -expressing dimensions that go far beyond ‘rule application’. The Appellate Body early on explicitly understood as part of its mandate the interpretation of treaty texts that balance different values and interests;³⁷ it has also not shied away from addressing the relationship of WTO law to other international legal regimes, biodiversity and the environment, which raises important issues of policy, and engages substantive normative choices all in the context of interpretation.³⁸ In *US—Shrimp* (especially the 21.5 implementation ruling)³⁹ the Appellate Body sent important messages about the relation of the WTO system to environmentalism in its acceptance that unilateral trade measures could be used in some circumstances to induce better protection of the global environmental commons. Similarly in the *EC—Asbestos*

³⁶ Howse and Nicolaidis, above n 17.

³⁷ Appellate Body Report, European Communities—Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, adopted 13 February 1998, DSR 1998:I, 135.

³⁸ On the role of the judiciary in public law adjudication under conditions of value pluralism and normative conflict in the domestic context, see C Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 1996).

³⁹ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481.

case⁴⁰ the Appellate Body sent an important message on trade and health, by holding—contrary to the panel of first instance—that the health effects of different products cannot be taken into account in determining whether the GATT requires that they be treated the same in domestic regulation. In short, the supreme judicial authority in WTO has been drawing and redrawing its own line between acceptable and non-acceptable domestic regulation, a line broadly in keeping with an updated version of the embedded liberalism understanding—one where the domestic autonomy to be preserved is more regulatory rather than (micro- or macro-) economic policy.

Although based on a sound reading of the treaty texts, this is normative messaging that the insider network has not been too happy about. Yet because of the de facto judicial supremacy at the WTO (it takes a consensus effectively to reverse an Appellate Body interpretation), there is little they can do explicitly except to complain about ‘judicial activism’. Indeed, the Appellate Body has gone so far as to assert judicial control over matters where responsibility has also been assigned to political or diplomatic organs or processes at the WTO (review of balance of payments restrictions and of regional trading arrangements). It has not shown any particular deference to the coexisting political or diplomatic processes in these areas; moreover, in a bold, *Marbury v Madison*-like stroke, the Appellate Body has assumed the competence to determine its own authority in relation to the other organs and branches within the WTO—*Kompetenz-Kompetenz*, as it were.⁴¹

In many ways, however, the insider network continues to practice covert ‘governance’. One of the most significant phenomena in this respect is the management of the process of accession of new members to the WTO—which provides the occasion for the ‘insider network’ to communicate to the member-to-be or new member the ‘meaning’ of its commitment to the WTO. The same goes for ‘technical assistance’ to developing country members more generally. Generally, in these exercises the insider network presents itself as an authoritative guide to, and guardian of, WTO norms and policies.

Secondly, and relatedly, the insider network, which connects officials within national governments with those of other governments and in the Secretariat, operates to transmit messages about how WTO membership and rules constrain domestic policies directly into the domestic policy process itself. Typically, where there is a trade dimension to some domestic policy, a domestic trade official (usually connected to the insider

⁴⁰ Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243.

⁴¹ Appellate Body Report, India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763.

network) or external consultant (also likely to be so connected, or even recommended by the Secretariat) will weigh in on WTO consistency. The danger that a domestic policy may be anti-WTO, or lead to WTO dispute settlement, may well tip the balance against it in an inter-agency decision-making process. Many government decision-makers will never second-guess the view of their own trade officials or of insider-network authorised external consultants as to what is or is not compatible with the WTO—not only in terms of what can be justified under the current legal framework, but also where it might be desirable to press for reform or clarification of the law. Little attention is paid to the critical impact of ‘filtering channels’ between global rules and local acts.

Finally, at the global level, the insider network has a major role in shaping the shifting agenda trade rounds, with little high-level political input into the substance of the round outside a few salient meetings. This gives a fairly wide scope to the insider network for ‘informal’ governance through agenda setting, including the structuring and sequencing of certain negotiations.

Where, then, do we really see the primacy of politics—including contestation—in the WTO? To be sure, a great deal of the visible dealing and wheeling in the WTO happens in highly publicised and politicised moments of global public diplomacy—such as the signing or closing of trade rounds—where politicians increasingly pander to their respective national audiences. In between such events, formal ‘governance’ by the Appellate Body and informal ‘governance’ by the insider network (to some extent formal in as much as they still control much of the panel process), constitute the bulk of WTO activity. Democratic politics here is mostly reduced to the (limited) instances of indirect accountability.⁴² Legitimacy is supposed to flow from the constitutional features of WTO law from above and technical expertise from below.

In the context of the Doha Round, the WTO has known a few moments of what we shall call transnational legal politics. In these moments, a political negotiation not primarily managed by the insider network, and inclusive of multiple constituencies representing diverse values and interests, has given direction to WTO law and policy outside of a formal treaty amendment process. The first such moment did not even happen at the WTO but rather in Montreal with the negotiation of the Biosafety Protocol, defining the relationship between trade and the regulation of genetically modified organisms (GMOs). Not all WTO members were signatories, but the Protocol, which engaged the attention of international civil society as well as many state actors, should play a large role in the application of the WTO rules to situations involving GMOs; the failure of

⁴² Grant and Keohane, above n 8.

the panel in the *EC—Biotech* case⁴³ to take into consideration the Protocol represents old-style ‘insider-network’ governance, and had the ruling been appealed on this point, the Appellate Body would probably have reversed, given its openness to the consideration of environmental instruments in WTO interpretation, even where those instruments do not bind all WTO members.

Another moment of global politics was the negotiation of the Doha TRIPs Declaration, where the WTO membership agreed to a reading of the existing law, and indeed even to a manner of application of that law, that supported the ability of governments to limit intellectual property rights for purposes of affordable access to medicines. Again, multiple constituencies were engaged, from multinational pharmaceutical interests to health-and development-oriented non-governmental organisations. There have already been many efforts by legal scholars to characterise the TRIPs Declaration in terms of the standard categories of positive international law.

None exactly captures the distinctiveness of this moment, where the WTO system responded to normative conflict through a route quite different to that of informal insider regime management or formal legal change.⁴⁴ The TRIPs Declaration was not quite an authoritative, binding interpretation of a treaty, but merely a political statement of the delegates; it constituted normative guidance, legitimised by transnational democratic deliberation that rebalances the regime’s mainstream attitude towards intellectual property protection within the parameters of existing treaty text (a text that allows for a number of possibilities for balancing, with profoundly different messages about the relation of different interests and values to one another). In essence, it was transnational legal politics, or what may constitute the first steps towards a democratised global governance.

IV. THE LIMITS OF ARCHITECTURAL REFORM

These observations concerning ‘governance’ in the WTO should suffice to make clear that, in addressing the relationship between governance and legitimacy, it is largely misguided to focus on the architecture of the WTO as an institution, either in terms of articulating the problem or its solution. Yet, in a wide variety of contemporary literature, there is an obsession with trying to define an architectural ‘fix’ to the legitimacy challenges surrounding WTO ‘governance’. In our collaborative study of

⁴³ Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products (Biotech)*, WT/DS291/R, WT/DS292/R, WT/DS/293/R, adopted 29 September 2006.

⁴⁴ P Lamy, *L’Europe en Première Ligne* (Paris, Le Seuil, 2002).

multi-level governance in the EU and US contexts,⁴⁵ we have drawn the conclusion that comprehensive architectural solutions to interrelationships between levels of governance and their interaction and legitimacy are largely a chimera.

These fixes remain in what might be called the formal sovereignty-based paradigm of governance, power and legitimation, as they are concerned not so much with the actual normative sources of legitimacy for outcomes, but with the transfer and allocation of sovereign powers or competences to authorities at the global level. Legitimacy problems are seen as fundamentally problems of dividing or allocating 'sovereignty.' Instead, it is better to conceive of multi-level governance as a dynamic process: performance art rather than architecture. One kind of architectural fix that is often suggested is a clear allocation or reallocation of competences or jurisdictions, as between the WTO and lower levels of governance or, horizontally, between the WTO and other international institutions, the International Labour Organization, for instance.⁴⁶

As various of the contributions in *The Federal Vision* have shown, attempts to distribute exclusive or shared competences or jurisdictions to the level(s) of governance 'best' able to deal with the matter (howsoever defined) have been ineffective in addressing legitimacy, and particularly accountability concerns about multi-level governance. Because fixed competences do not capture well the interdependency of policy fields in modern government, the problem of legitimate governance is not really so much a problem of keeping each level within its own appropriate, jurisdiction but rather arises from the ongoing management of policy interdependency in concurrent fields of jurisdiction, ie, the management of the interrelationship of different levels of governance to one another in areas where both have some legitimate claim to be implicated. Moreover, democratic politics is characterised by cycles of centralisation and decentralisation, where citizens tend to view one level of governance or another as more salient in responding to their concerns. Changes in technology, prevailing beliefs, systemic characteristics and the more elusive politics of identity all contribute to influencing the political process that will determine not only levels of competence but above all the ways in which they interrelate. Effective and legitimate multi-level governance therefore requires, in as much as democracy and legitimacy are connected, a capacity to move back and forth between relative centralisation and relative decentralisation in various areas of interdependent policies.

⁴⁵ Nicolaidis and Howse, *The Federal Vision*, above n 3, see 'The Federal Visions, Levels of Governance and Legitimacy' (introductory chapter).

⁴⁶ Joel Trachtman has conceptualised the whole issue as a matter of allocating jurisdiction. See 'The World Trading System, the International Legal System and Multilevel Choice' (2006) 12 *European Law Journal* 469.

To shift this analysis to the WTO context, we can easily see that allocating to the WTO 'jurisdiction' over any subject matter of government decision-making is not what WTO rules are about in the first place. These rules place certain constraints or requirements on decision-making by governments that are deemed appropriate as part of sustaining a bargain on reciprocally liberalised trade. Even where the WTO has come closest to harmonised regulation, ie, intellectual property rights (IPRs), it could hardly be understood as operating an exclusive jurisdiction or competence. Instead, the IPR regimes provide criteria for national regimes to apply.

It can equally easily be shown that keeping the WTO 'out' of a certain area will not solve or avoid problems of legitimacy. Take the example of competition policy. There are good reasons to believe that the demands of global 'governance' with respect to competition policy ill fit the existing institutional capacities of the WTO.⁴⁷ However, if enough of the major players within the WTO believe that unilateral competition policies or anticompetitive practices by Member States are undermining a co-operative equilibrium with respect to bargained trade concessions, then to sustain the bargain it will need to be fortified with at least some rules about competition. Economists will argue that it usually makes sense to liberalise trade regardless of any agreed understanding with your trading partners about the appropriate parameters of competition policy or anticompetitive practices, and they will be right when the problem is viewed from the theory of competitive advantage. But comparative advantage is largely about unilateral trade liberalisation, and tells us nothing about the kinds of benchmarks that states may require to be able to identify cheating and defection, when what is involved is sustaining a bargain based on reciprocity, ie, a co-operative equilibrium under changing economic and social conditions, and today moreover without guidance or anchoring from an ecumenical policy paradigm such as that represented by the 'embedded liberalism' horizon.

On another front, most analysts in the insider network claim that labour rights ought to remain 'out' of the WTO, and are not a 'trade' issue. This claim has the effect of putting the burden of proof on the labour rights activists to prove that labour is something that should be 'in' the WTO. But labour is 'in' there already, to the extent that WTO rules already affect (i) the ability to use trade instruments to enforce or encourage compliance with international workers' rights, (ii) the available choices for worker adjustment to increased competition or (iii) wage inequality in individual Member States. The claim is that these effects do not merit explicit deliberation and action in the WTO because the WTO is

⁴⁷ Dan Tarullo and Merit Janow have persuasively argued along these lines. DK Tarullo, 'Competition Policy for Global Markets' (1999) 2 *Journal of International Economic Law* 445; M Janow, 'Competition Policy and the WTO' in J Bhagwati (ed), *The Uruguay Round and Beyond* (Ann Arbor, University of Michigan Press, 1998).

just ‘a trade organisation, not a labour organisation’. It is as if a plumber were to come into our house, and in the course of fixing the drains in the kitchen, were to soil the floor, chip the woodwork, create an accident hazard and then deny any accountability with the notion that she was ‘just plumbing’ and had done a great job of fixing the drains—as for any problems created, they were someone else’s responsibility, not being within the ambit of plumbing as a *techne*. Clearly, if plumbers kept talking that way, soon people would insist that the rules of plumbing had to *include* rules about not causing certain kinds of collateral damage. Here, how the plumbers interpret the existing rules about plumbing and the general norms of conduct that they consider appropriate in conducting that specialised activity will determine whether new rules of ‘plumbing’ have to be created.

One variant on the claim that labour should be outside the remit of the WTO is that there is another institution that ‘deals with’ labour, the International Labour Organization. By way of analogy, we might imagine the plumber saying that there are carpenters to deal with cabinets, cleaners to handle the stained floor, and doctors and hospitals to take care of slips and falls. But it begs the question of whether the better solution is to have plumbers who know to avoid these results while plumbing.

In the same way, formal institutional tinkering cannot help much in dealing with the ‘spillage’ of globalisation. If WTO treaty rules need to be interpreted and evolved through ‘governance’ that touches on a wide range of policy areas and human interests, and this governance cannot be ‘jurisdictionally’ circumscribed, contained or cabined off to other institutions in any kind of adequate *ex ante* manner, then we are faced squarely with how such governance can be legitimate. Clearly balancing values and the interests of multiple constituencies both inter-state and intra-state is going to be involved, so legitimacy will not fully come by any means from technical expertise. Democratic legitimacy may well be related to whether *agents* of governance conduct themselves in accordance with what we call a political ethics of governance—informed by norms such as inclusiveness, mutual respect, transparency, value pluralism, procedural justice and rational deliberation. It is to this political ethics that we now turn.

V. THE POLITICAL ETHICS OF GLOBAL SUBSIDIARITY

As an anchor for such a global political ethics, we come back to the spirit of subsidiarity, stripping the legal principle from its narrow meaning of allocation of power.⁴⁸ Instead we take it to mean that the transnational

⁴⁸ See Howse and Nicolaidis, above n 17, Nicolaidis and Howse, above n 3.

management of social conflict is more likely to be legitimate if addressed by the appropriate people in the appropriate 'space' of governance and in the appropriate way. Our argument, therefore, fits with cosmopolitan brands of international political theory which seek to identify political structures which may serve global norms of political and distributive justice while arguing that mere reliance on international institutions to do so is insufficient.⁴⁹ Instead we cannot consider which institutions are appropriate without considering which rights or *right processes* must be served by these institutions. As Caney argues, "institutions on their own are not guaranteed to produce benign policies . . . what is needed are certain political culture and certain character trait as well".⁵⁰ In short, the 'ethos of democracy' must remain about our intellectual freedom and the precious inclination anywhere and by anyone to question received wisdom and established political bargains as well as entrenched identities and interests.⁵¹ Political structures are simply shells, more or less conducive to such democratic ethos.

In the era of globalisation, increases in exchanges without corresponding convergence in polities and domestic systems are bound to lead to increased friction. Whether an issue that requires 'governance' gets resolved through informal insider network 'governance', formal adjudication, or democratised governance and transnational legal politics, may vary depending on perceptions of what is at stake as well as the relative credibility of each alternative. We can imagine in the years ahead various kinds of competition and co-operation between these three kinds of 'spaces' for governance and the constellations of agents attached to them. Analysing such patterns will be more relevant to understanding WTO legitimacy than jurisdiction and boundary definition. Generally speaking, the political ethics we call for is already visible to some extent in formal adjudication and in transnational legal politics. Thus, while the transformation of insider network 'governance' by political ethics is unlikely to be rapid or easy, eventually the network will have to make itself open to this political ethics or it will simply continue to lose to other mechanisms of governance in the competition for legitimacy.

At least since Rousseau, the essence of democratic self-determination has been the notion that citizens can only be legitimately coerced by laws of their own making; this follows from the core democratic idea of political equality: the reflection in politics of the notion of the equal moral value of each individual. Thus, in order to characterise the spirit of a

⁴⁹ See S Caney, *Justice Beyond Borders, A Global Political Theory* (Oxford University Press, 2005); KA Appiah, *Cosmopolitanism—Ethics in a World of Strangers* (London, Allen Lane, Penguin, 2006).

⁵⁰ Caney, above n 49, 172.

⁵¹ See D Campbell, *National Deconstruction: Violence, Identity and Justice in Bosnia* (Minneapolis, Minneapolis University Press, 1998), cited in Caney, above n 50.

transnational political ethics, we begin from a fundamental proposition, as obvious as it is often unstated: democracy as (qualified) majority rule implies that decisions be made by less than consensus: the question is what makes it legitimate for those who disagree—the dissenting minority, the losers with respect to a particular outcome—nevertheless to be subject to the outcome, even to be legitimately coerced by the laws and policies in question? What kinds of values and practices permit persons who disagree with or lose from particular outcomes nevertheless to view the outcomes in question as consistent with the political ideal of self-legislation or non-subordination?

A. Inclusiveness and Internalisation

Outcomes that result from the exclusion per se of the interests and values of individuals or groups from the decision-making process are likely to be inconsistent with the democratic ideal of political equality. In the WTO context, as we have already noted, such exclusion has often been justified by a formal conception of the allocation of authority between the WTO and other international organisations, or between the WTO and domestic polities. In the former case, interests and values affected or even jeopardised by trade liberalisation have been often excluded by the ‘insider’ community on the grounds that some other international organisation is ‘responsible’ for those concerns; at the same time, it has often been argued that social interests affected by trade liberalisation should seek voice through their own domestic government. Again, we have indicated why domestic politics may not be an adequate guarantee of inclusiveness.

Inclusiveness need not entail, however, the challenge of participation of every relevant group or its representatives in the various kinds of decision-making made at the WTO as a site of global governance. In a number of Appellate Body decisions, such as the *EC—Hormones*, the *US—Shrimp* and the *EC—Asbestos* cases, the Appellate Body has displayed some of this spirit of inclusiveness by showing awareness of the range and balance, and importance of the human values at stake, well beyond the interests of trade liberalisation. While the Appellate Body has displayed inclusiveness as participation by permitting submission of amicus briefs by non-governmental actors, thereby broadening the voices heard well beyond the insider community, the decisions mentioned show that inclusiveness need not always depend on participation, provided decision-makers have an ethics of inclusiveness in the way they are conscious of the full range of values and interests at stake in a given matter. Under an ethics consistent with the ideal of political equality, agents—be they judges, politicians or even activists—do not need to

privilege those values and interests most characteristic of their own epistemic community.

Without formal mechanisms of participation, or minimal ones (eg, the possibility of observer status at WTO Ministerials), groups speaking for a range of values have recently been able to gain the ear of WTO delegates and negotiators; this has been notable in the case of TRIPs and the creation of the recent WTO instruments protecting access to affordable medicines; in the case of services, civil society groups have been able to sensitise delegates and negotiators as to how particular commitments under the General Agreement on Trade and Services (GATS) might affect the ability to ensure essential public services. This has been all the more remarkable because the delegations in question have often been from developing countries, whose governments have been typically known to be hostile to the direct involvement of civil society in the WTO. More generally, the creation of the NAMA 11 and G20 groups of developing countries and their push to be included in all big decisions is slowly changing the face of WTO negotiations, in part by increasing the confidence of these very countries and therefore their acceptance of other actors.

We may already be witnessing the albeit very early or limited effects on the global trend towards democratisation combined with generational change in influencing the values of those involved in the day-to-day governance processes of the WTO: one illustration is Faizel Ismail, the South African ambassador to the WTO, whose roots are in the progressive politics of the trade union movement in South Africa. In contrast, one sees the older elite-authoritarian values of an earlier generation of developing country policy elites in the decision of the previous Director General of the WTO, Suphachai Panitchpakdi to address the future governance challenges of the WTO by appointing a task force of elderly 'wise' gentlemen—the Sutherland Committee—tasked with consulting with no one in their deliberations as to the future of the Organization.

B. Review and Revision

In contrast to the Schmittean politics of friend/enemy, which gains its intensity from the possibility that one side will permanently suppress or annihilate the other in political struggle, a democratic political ethics will place a high value on opportunities to revisit and revise particular outcomes. This is not unrelated to inclusiveness in its connection to political equality. The possibility of review and revision allows 'losers' to have confidence that the fact that a particular outcome unfavourable to their values or interests does not indicate exclusion from or subordination in political life—they live to fight another day. Perhaps this is where the

tension between our political ethics and the constitutionalist vision of the WTO is most visible, as the latter regards the *acquis* of each negotiating round as an irreversible 'progression' towards a global economic constitution.

This mindset has been seen in the attitude of a number of very significant developed countries to the meaning of the Doha Round as a development round. For many developing countries, calling the Round a development round had been seen as an opportunity to revisit and rebalance the Uruguay Round outcome, which was widely seen as unfair to developing countries; for the developed countries in question, new pro-development concessions are possible (based more or less on reciprocity—there is some openness to special and differential treatment), but there is the strong taboo that the main treaties of the Uruguay Round package cannot be 'opened up.' It is notable that even where review has been built into the WTO treaties themselves, such as with respect to services liberalisation, non-actionable subsidies and the need for safeguards with respect of service, such review processes have been long delayed or blocked. But such review processes were precisely put into the agreements in part at least to assure 'losers' that the matter would be reconsidered at a future point in time, in light of experience and changing perceptions. We believe that the trials and tribulations of the Doha Round, its likely closure on a minimalist and disappointing result, is due to no little extent to the betrayal of this spirit of return.

Here political ethics would point to an anti-architecture architecture: a consideration of political and legal mechanisms and devices that allow the membership collectively, but also individual members, to revisit and rebalance their rights and obligations. We fully admit that there may be some trade-off here with the value of the WTO system as a 'rules-based' system; however, we observe, with Jon Elster, that pre-commitment always involves tying someone *else's* hands, and thus is problematic from the point of view of democratic political equality and political ethics.⁵²

C. Checks and Balances

The political ethics of democracy draw not only on the ideal of participation and self-determination *qua* Rousseau, but also the ideas of classical liberalism, *qua* Montesquieu and Madison, of which one of considerable importance is that of checks and balances, or separation of powers. Here, the thinkers of the eighteenth century understood that the functioning of the separation of powers depended not just on the actual architecture

⁵² J Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge University Press, 2002).

allocating competences but in the sense of each estate of its (limited) authority and legitimacy, its independent but at the same time non-hegemonic spirit. Because democracy can degenerate into faction, even majoritarian faction that menaces political equality, checks and balances are important as counterweight to any single institution or faction hegemonising decision-making to the exclusion or subordination of other interests and values.

Recently, the UN human rights institutions have begun to raise issues about decision-making in the WTO on behalf of constituencies and values traditionally excluded or marginalised there. This entails a certain spirit of contestation between institutions. International lawyers often regard tensions between institutions and regimes in international law as something negative—‘fragmentation’ or ‘cacophony’—and many architectural proposals seek ‘coherence’.⁵³ ‘Coherence’ can reflect the value of checks and balance if it means that outcomes should reflect in a balanced way the full range of values and interests at stake. But often ‘coherence’ is understood in the manner discussed above, as an attempt at enforcing a kind of ‘watertight compartments’ view of competences (the WTO is a ‘trade’ organisation not an ‘aid’ or a ‘human rights’ organisation and the latter have no business meddling in the former—they should stick to their own ‘work’). Under the constitutionalisation school, our illusion from above, such coherence would be enforced, once and for all, through a system of rules brought outside of the political arena.

Attempts at co-operation, when not undertaken with the appropriate spirit of independence and contestation reflected in democratic political ethics, can result in co-optation, as happened when the WTO and the WHO secretariats ‘co-operated’ to write a study on trade and health; the WTO point of view, one quite narrow in terms of giving play to the value of human health in limiting trade liberalisation commitments, was more or less simply accepted by the WHO, which did not see its own expertise and distinctive constituencies as a basis for questioning or challenging the way that WTO law was interpreted and applied in health-related matters. Within the WTO, the outlook of the traditional trade policy elite has been opposed to any notion of a real separation of powers, or spirit of contestation between ‘branches’ of governance within the WTO. The notion of a ‘member-driven organisation’ has been used to attempt to suppress independence of spirit in the executive and judicial branches of the WTO, the Secretariat and the Appellate Body, respectively. In the former case, delegates have pressed for the rebuke of a secretariat official who made progressive-oriented comments on crucial issues concerning trade human rights and the environment. In the latter case, delegates

⁵³ See special issue of the *Michigan Journal of International Law on Diversity or Cacophony?: New Sources of Norms in International Law Symposium* (2004) 25 *Michigan Journal of International Law*.

attempted to intimidate the Appellate Body of the WTO into reversing its decision to allow amicus submissions from non-governmental actors.

D. Compromise and Compensation

Often, in democratic politics, the losers in particular debates and decisions are nevertheless able to accept the outcomes as legitimate, and consistent with a sense of their equal moral value as human beings, because this value is acknowledged through specific elements of compromise or mitigation, and/or some form of compensation. The more WTO outcomes in negotiation are characterised as ‘constitutional’—ie, the ‘right’ rules—the less does the spirit of compromise and compensation, very typical of the ‘embedded liberalism’ of the original GATT, enter into the picture. Appropriate adjustment to trade liberalisation, once a central theme or preoccupation, has become peripheral in WTO negotiations. Apart from longer phase-in periods for developing countries in the case of some agreements, and the very generous ‘safeguards’ that developed countries managed to maintain in textiles and agriculture for those concentrated interests, the negotiation outcomes of the Uruguay Round displayed little sensitivity to needs for mitigation and compensation. Concepts such as ‘aid for trade’ have acquired some purchase in the current negotiations and promise to revive a spirit a compromise and compensation; but these ideas are all too easily blocked or watered-down by free-trade purists who balk at the notion of the WTO becoming an ‘aid agency’. And aid for trade itself can become an instrument simply to enforce rather than compensate for outcomes of trade liberalisation. Domestic policy space for adjustment remains largely off of the table in the negotiations, inasmuch as it would require some retreat from the Uruguay Round outcomes or significant new flexibilities (eg, a new list of permitted non-actionable subsidies that facilitate adjustment).

VI. CONCLUSION: THE LEGITIMACY OF THE WTO CANNOT BE WON BY ARCHITECTURAL REFORM BUT DEMANDS A TRANSNATIONAL POLITICAL ETHICS

In the end, we argue, a genuine spirit of democracy at the global level calls for the fine-tuning of a transnational political ethics for our age of globalisation. Such ethics must start by speaking to the relationship between the universal and the local, the global and the regional. When considering the transfer from the EU to the global level of norms such as supremacy and subsidiarity, we have argued that we must distinguish between two aspects of the EU: on the one hand, the emergence of the EU

as a political community which makes the export of its model a difficult proposition; and on the other hand, the insights linked to the fine-tuning of subsidiarity inside the EU that could inspire a model of global subsidiarity.

Such a model must itself be considered under the banner of transnationalism, contrasted on the one hand with sovereignty-centred law or legal nationalism, and on the other with supranational centred law or tradition constitutionalism, which both revolve around the trope of the state. Under a transnational paradigm, we recover the notion of horizontality as an organising principle but divorced from the notion of homogeneous and sovereign jurisdiction. It is fair to say, therefore, that such a transnational model of horizontal transfer of sovereignty raises normative concerns of its own. Legal transnationalism in the EU must first be understood in the spirit of Kantian cosmopolitan law as the consequence of greater accountability of a national system regarding how strangers to the jurisdiction are affected by its actions, thus addressing beyond the state one of the core challenge of democracy, eg, the disjunction between those deciding and those affected by political and legal decisions.

We have argued that global or transnational ethics must and can address such disjunction by incorporating other-regarding and minority-regarding consideration into decision-making and decision-shaping: including agents and values from outside one's circle; a commitment to returning to past outcomes on grounds not only of external change but also internal fallibility; incorporating checks and balances in the global management of economic exchange; and finally, taking seriously the need to compensate all those who for one reason or another tend to remain losers in our globalising world.