

The Political Economy of International Trade Law

Essays in Honor of Robert E. Hudec

edited by

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PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa
<http://www.cambridge.org>

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First published 2002

Printed in the United Kingdom at the University Press, Cambridge

Typeface Lexicon 1 A 9/12.5 pt. *System* L^AT_EX 2_ε [TB]

A catalogue record for this book is available from the British Library

ISBN 0 521 81319 0 hardback

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1 Sovereignty, subsidiarity, and separation of powers: The high-wire balancing act of globalization

JOHN H. JACKSON

I Introduction

I am delighted and honored to be able to participate in this volume, assembled to express appreciation of the lifetime achievements of Professor Robert Hudec. Bob and I have been friends and professional collaborators and protagonists for so many decades now that I do not want to explain it in too great detail. However, there is no question that his enormous output of research, writing, and thinking has made a substantial contribution to world order and to the burgeoning new subject of international economic law. I hope my tentative writing in this manuscript will do honor to Professor Hudec's accomplishments.

The overall theme of this volume is "Transcending the Ostensible," and clearly the core subject of the book relates to the international economic system, particularly the trading system and related subjects. From the point of view of international economic law, therefore, the terrain is extraordinarily broad. What I plan to do here is to focus on a subject that is even broader, that has enormous implications for international economic law, but also other parts of international law, and, in doing so, I will try to relate that subject to the current problems of the World Trade Organization (WTO).

Although it may not be completely obvious, my topic of "Sovereignty, subsidiarity, and separation of powers: the high wire balancing act of globalization" is in many ways at the center of a great deal of the current trade system diplomacy and jurisprudence development. You can see manifestations of the mental struggle on this subject in the remarkably articulate and carefully written Appellate Body opinions of the new WTO Dispute Settlement System.

Perhaps another way to put this is to quote from my own book, *The World Trading System*,¹ in the last paragraph of the second edition. There I note two remarkable quotations: one is Tip O'Neill's statement that "all politics is local,"² the other is by Peter Drucker in a *Foreign Affairs* article which states "all economics is

1 JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (MIT Press, 2d ed. 1997).

2 See THOMAS P. O'NEILL & GERY HYMEL, *ALL POLITICS IS LOCAL* (New York Times Books, 1994). "Tip" O'Neill was the Speaker of the US House of Representatives.

international.”³ Here we can see an enormous tension that is at least partly due to the essential structures of democratic governments in the world.

Let me note several areas of public policy debate (selected from a list of dozens) and ask you what they seem to have in common:

- (1) Question of teaching evolution in local public schools.
- (2) Treaty application in domestic laws, such as in the US the concept of “self-executing.”
- (3) A vote by a Kentucky county on whether to remain “dry,” or become “wet,” which means whether to allow the sale of alcoholic beverages in restaurants, etc.
- (4) A look at the domestic court systems in Mexico and China.
- (5) Food safety regulations on cheeses in Italy.
- (6) Regulation by states of voting in presidential elections.
- (7) Corruption in national governments, local governments, and international organizations.
- (8) Asian financial crisis.

Although it may not be apparent, the phenomenon of globalization relates to each of those subjects, and in this brief essay, I think you will be able to see those connections.

Some say that globalization is not really a new phenomenon, arguing that in the late nineteenth century and early twentieth century, in certain ways, the world was just as “globalized” in the sense of free movement of labor, investment, and goods, as is the case today. However, I think there are some very profound circumstances today that differ from those of earlier centuries. In particular, technology has transformed both communication and transportation, which previously had been, to some extent, natural barriers to trade. In addition, in major industrialized economies, there is a strong shift to services as a major proportion of the gross domestic product. Furthermore, computer technology and media changes are having a major effect on our societies. All this requires us to face concepts about international interdependence that are quite different than has previously been the case. Thus it is hard to ignore the fact that something profound is happening to affect the evolution of international law jurisprudence, including international economic law.

I have enjoyed the popular book by a *New York Times* correspondent, Thomas Friedman, published in 1999, entitled *The Lexus and the Olive Tree*. Particularly, I was struck by the introduction to his book, when Friedman recalls that he was asked about his approach to globalization. He answered, “I feel about globalization a lot like I feel about the dawn. Generally speaking, I think it is a good thing that the sun

³ See Peter F. Drucker, *Trade Lessons from the World Economy*, 73:1 FOREIGN AFFAIRS 99 (Jan./Feb. 1994).

comes up everyday. It does more good than harm. But even if I didn't much care for the dawn, there isn't much I could do about it."⁴

This article is part of a work in progress. It presents some of my preliminary ideas, but it also builds on several other works of mine, published and unpublished, during the course of the last decade.⁵ This presentation takes up part of a rather vast outline, which is leading to a considerably longer work.

What I intend to do is to examine certain key concepts of sovereignty, and discuss their roles in the context of international law generally, international relations, other disciplines, and, of course, with a focus on the relationship to international economic law which often means the WTO.

National government leaders and politicians as well as special interest representatives too often invoke the term "sovereignty" to mislead needed debate. Likewise, international elites often assume that "international is better," and this, we can also say, is not always the case. What is needed is a close analysis of the policy framework that can get us away from these preconceived "mantras."⁶ My objective is to try to shed some light on these policy debates, or in some cases, policy dilemmas, and to describe some of the policy framework that needs to be addressed.

The subject has been extensively addressed in different kinds of frameworks, or academic disciplines. For example, I have been educated by a number of books from political science and international relations disciplines, many of which have important insights and have helped me in my thinking.⁷ However, in many of those works, I have found the focus was on how to describe the concept of "sovereignty" and how it operated in the past and present in international relations. I intend to address a somewhat different question, namely, I want to consider the question of what, if any, are the *valid* issues raised in so-called "sovereignty" debates, and how can we analyze those issues for *future* impact on policy.

4 THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* at xviii (Farrar, Straus & Giroux, 1999).

5 JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 367–395, 328–366 (Cambridge University Press, 2000), reprinted from: John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUMBIA J. TRANSNAT'L L. 157–188 (1997) and John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310–340 (1992).

6 John H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras Revisited,"* 4 J. INT'L ECON. L. 67–78 (2001) (addressing "mantras" related to the WTO).

7 See, e.g., Friedman, *supra* note 4; *THE GREENING OF SOVEREIGNTY IN WORLD POLITICS* (MIT Press, Karen T. Liftin ed., 1998); *SUBSIDIARITY AND SHARED RESPONSIBILITY: NEW CHALLENGES FOR EU ENVIRONMENTAL POLICY* (Nomos Verlagsgesellschaft, Ute Collier, Jonathan Golub, & Alexander Kreher eds., 1997); *MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE* (Pennsylvania State University Press, 1995); Centre for Economic Policy Research (CEPR), *Making Sense of Subsidiarity*, in *ANNUAL REPORT: MONITORING EUROPEAN INTEGRATION* 4 (1993); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (Princeton University Press, 1999); *STATE SOVEREIGNTY AS A SOCIAL CONSTRUCT* (Cambridge University Press, Thomas J. Biersteker & Cynthia Weber eds., 1996).

I will do this in five further parts of this manuscript, namely parts II through VI:

In part II, I will take up the traditional sovereignty concepts and their role in international relations. I will try to explore what they really mean, and how they have been applied.

In part III, I want to outline some of what I call the “real policy values” of sovereignty concepts. What is there that we should really be examining that is often disguised by the use of the term sovereignty?

In part IV, I will turn to the subject that is my answer to the question posed previously, namely, my exploration of the “allocation of power” as being the critical question.

In part V, I briefly describe several examples of power allocation disputes.

In part VI, I turn to the WTO’s role and its future in light of the question and subject I have posed, and suggest some perspectives and conclusions.

II Traditional sovereignty concepts and their role in international relations

There has already been a considerable amount of literature concerning the issue of “sovereignty,” and various concepts to which it might refer.⁸ Most of this literature is very critical of the idea of “sovereignty” as it has generally been known. For example, one eminent scholar has described the concept as “organized hypocrisy.”⁹ This same author writes that there are at least four different meanings of sovereignty (some of which overlap). He describes: “*domestic sovereignty*, referring to the organization of public authority within a state and to the level of effective control exercised by those holding authority; *interdependent sovereignty*, referring to the ability of public authorities to control trans-border movement; *international legal sovereignty*, referring to the mutual recognition of states or other entities; and *Westphalian sovereignty*, referring to the exclusion of external actors from domestic authority configurations.”¹⁰

Some other authors have described sovereignty as being “of more value for purposes of oratory and persuasion than of science and law.”¹¹ Still others have explored sovereignty as a “social construct,” saying “numerous practices participate in the social construction of a territorial state as sovereign, including the stabilization of state boundaries, the recognition of territorial states as sovereign, and the conferring of rights onto sovereign states.” The approach of these authors seems to be that there are no particularly inherent characteristics in the concept of sovereignty, but it depends very much on the custom and practices of nation-states and international systems.¹²

8 Jackson, *supra* note 6. 9 KRASNER, *supra* note 7, at 9. 10 *Id.*

11 FOWLER & BUNCK, *supra* note 7, at 21.

12 STATE SOVEREIGNTY AS A SOCIAL CONSTRUCT, *supra* note 7, at 278ff.

Some of the discussion about the role of “sovereignty” also focuses on the principle of “subsidiarity,” which is variously defined, but roughly means a principle that governmental function should be allocated among hierarchical governmental institutions, to those as near as possible to the most concerned constituents, usually down the hierarchical scale. In the minds of some, therefore, an allocation to a higher level of government would require a special justification as to why a higher level governmental institutional power was necessary to achieve the desired goals.

In addition, most authors cite a very large number of “anomaly examples,” mainly situations of governmental entities that simply do not fit into the normal concepts of sovereignty or non-sovereignty.¹³ Sovereignty is sometimes divided up, sometimes temporary, sometimes nominal, to facilitate a diplomatic compromise, etc. We have recently seen some indications of this in the context of negotiations during the past few months, relating to the “Middle East settlement” and the role of Jerusalem.

Thus, the concept of sovereignty seems quite often to be extremely, and perhaps purposefully, misleading, and a crutch to politicians and media to avoid the tough and very complex (as we see below) thinking that should be taken up about real policy issues that are involved.¹⁴

In the area of trade policy, many specific instances can be cited as use of constructs to avoid some of the implications of “sovereignty concepts.” Perhaps a striking example is the General Agreement on Tariffs and Trade (GATT) and now, WTO, criteria for membership, which do not focus on a “sovereign entity,” but instead on “an independent customs territory.”¹⁵

Sometimes the principle of non-interference on a nation-state level is closely linked to sovereignty, yet in the real world of today’s “globalization,” there are innumerable instances of how actions by one nation (particularly an economically powerful nation) can constrain and influence the internal affairs of other nations. In addition, there are examples of powerful nations influencing the domestic elections of other nations and also linking certain policies or advantages, such as aid, to domestic policies relating to subjects such as human rights. Likewise, international organizations partake in some of these linkages, such as the so-called IMF “conditionality.”

Professor Henkin himself has written perceptively, “for legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era.”¹⁶ It would indeed be nice to get rid of the “s word” (as he says in another work),¹⁷ but it does not seem very likely that we will be rid of this nuisance,

13 ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* (Cambridge University Press, 1990).

14 See works in note 7, *supra*. 15 GATT Article 35, WTO Article XIII.

16 LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 9–10 (1995), quoted in JACKSON, *THE JURISPRUDENCE OF THE GATT AND THE WTO*, *supra* note 5, at 367.

17 JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO*, *supra* note 5, at 368.

and even if we were, we would have to invent some other term to cover some of the concepts that the word “sovereignty” refers to. Somehow, I have the view that to try to completely eliminate the word or the concepts associated with “sovereignty” would miss some important principles. This leads me to the next part of this article.

III The real policy values of sovereignty concepts

A The valid policy role of sovereignty concepts

In 1994, when I testified before several Congressional committees concerning the Uruguay Round Agreement Implementation Act, I found myself pondering why some of the other witnesses were making such a big thing of sovereignty. In that pondering, I realized that there were some valid concepts and ideas, however ineptly or, at least, inexplicitly expressed, which should be considered in connection with such questions as whether a country should join the WTO. Among the more articulate statements on this subject was, for example, Ralph Nader’s testimony in one hearing¹⁸ which included the following:

Few people have considered what adoption of the Uruguay Round agreement would mean to U.S. democracy, sovereignty and legislative prerogatives. As the world prepares to enter the twenty-first century, the proposed WTO system of international governance would lead nations in the wrong direction. The terms of the Uruguay Round would expand the nature of the world trade rules in an autocratic and backwards-looking manner, replacing the GATT contract existing since 1947 with a new international organization – the World Trade GATT Organization. The system of international governance of the World Trade Organization would be chronically secretive, non-participatory and not subject to an independent appeals process. Yet decisions arising from such governance can pull down our higher living standards in key areas or impose trade fines and other sanctions until such degradation is accepted . . . A major result of this transformation to a World Trade Organization would be to undermine citizen control and chill the ability of domestic democratic bodies to make decisions on a vast array of domestic policies from food safety to federal and state procurement to communications and foreign investment policies.

This and other worthy worries have led me to take a somewhat different tack in the analysis of sovereignty. For example, I have written:

In broad brush I see the “antiquated” definition of “sovereignty” that should be “relegated” as something like the notion of a nation-state’s supreme

¹⁸ US Senate Committee on Foreign Relations, The World Trade Organization: Hearing before the Committee on Foreign Relations, 104th Cong., 2^d sess., June 14, 1994.

absolute power and authority over its subjects and territory, unfettered by any higher law or rule (except perhaps ethical or religious standards) unless the nation-state consents in an individual and meaningful way. It could be characterized as the nation-state's power (embodied in the Prince?) to violate virgins, chop off heads, arbitrarily confiscate property, and all sorts of other excessive and inappropriate actions.

No sensible person would agree that such an antiquated version of sovereignty exists at all in today's world. A multitude of treaties and customary international law norms impose international legal constraints (at least) that circumscribe extreme forms of arbitrary actions on even a sovereign's own citizens.

But then what does "sovereignty," as practically used today, signify? I will suggest a tentative hypothesis: most (but not all) of the time when "sovereignty" is used in current policy debates, it really refers to questions about the allocation of power; that is normally government decision-making power . . . That is, when a party argues that the US should not accept a treaty because it takes away US sovereignty to do so, what the party most often really means is that he or she believes a certain set of decisions should, as a matter of good government policy, be made at the nation-state (US) level and not at an international level.¹⁹

Another way to put it is to ask whether a certain governmental decision should be made in Geneva, Washington DC, Sacramento, Berkeley, or even a smaller sub-national or sub-federal unit of government.

Clearly, the answer to this question of where decisions about a certain matter should be made will differ for many different subjects. There may be one approach to fixing potholes in streets or requiring sidewalks. There may be another approach for educational standards and budgets, yet another for food safety standards, and of course, still another for rules that are necessary to have an integrated global market work efficiently in a way that creates more wealth for the whole world.

B The values involved in power allocation policy analysis

There are clearly many values or policy objectives that could influence a consideration about the appropriate level or other (horizontal) distribution of power among a landscape of government and non-government institutions.

1 *Reasons for preferring government action at an international level*

A large number of reasons could be given for preferring an international-level power allocation. Some of these reasons relate to the need for what economists call

19 JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO*, *supra* note 5, at 369.

“coordination benefits,” and are sometimes analyzed in game theory as “the Prisoner’s Dilemma.” This describes situations where, if governments each act in their own interest without any coordination, the result will be damaging to everyone. Whereas matters would be improved if they could make certain, presumably minimal, constraints effective so as to avoid the dangers of separate action. Likewise, there is much discussion about the so-called “race to the bottom,” in relation to necessary government regulation²⁰ and the worry that competition among nation-states could lead to a degradation of important socially needed economic regulation.

Sometimes economists suggest that upward placement of government decision-making is particularly needed where there is so-called “factor mobility,” such as investment funds, or personal migration, etc. This is partly because governments find it more difficult to either tax or regulate in an effective way when there is such factor mobility.

The area of the environment seems to be one which directly engages these issues of power allocation, and such issues as those involved in the so-called “global commons,” or where actions that degrade the environment have “spill-over effects,” are given as examples for a need for higher supervision.

Many other issues can be listed, and many other arguments can be made. General subject matters are very controversial in this regard. For example, at what level should competition policy (monopoly policy) be handled? What about human rights? Democratic values and democratic institutions? Questions of local corruption or crony favoritism might seem to call for a higher level of supervision.

2 *Values or goals that suggest allocating power more locally; the principle of “subsidiarity”*

Advocates of subsidiarity (which is a concept much discussed in Europe) note the value of having government decisions made as far down the “power ladder” as possible. There are a number of policy values involved here²¹ and historically there has been reference to some Catholic philosophy of the nineteenth and early twentieth centuries.²² One of the basic ideas is that by being closer to the constituents, a government decision can more reflect the subtleties and necessary complexity and detail that most benefits those constituents. As Governor George W. Bush said in

20 John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT’L ECON. L. 3–14 (2000).

21 CEPR, *supra* note 7, at 4.

22 For a succinct overview of some of the history of the concept of subsidiarity with mention of sources that go back as far as Aristotle and a book from the sixteenth century by political philosopher Johannes Althusius, leading to nineteenth- and twentieth-century Catholic social philosophers, including the apple and cyclical “quadragesimo anno” (fortieth year) in 1931, see the World Bank Institute, *Intergovernmental Fiscal Relations and Local Financial Management Programs*, at topic 3 (*Constitutional Legal Framework and Guidelines*), reproduced at web site www1.worldbank.org/wbiet/decentralization/topic03.2.html (visited Dec. 14, 2000).

the 2000 Presidential Election discourse recently absorbing our country, “governments that know your name are more likely to know your needs.”²³

Likewise, it is often said that the decision-making that is furthest down the ladder and closest to the constituent will be policed by a greater sense of accountability. Indeed, there are many illustrations of the dangers of distant power, including of course, the origins of our own country, the United States, in its rebellion in the eighteenth century against England. Likewise, colonialism, particularly twentieth-century, post-Second World War colonialism and the move to “de-colonize” raised a number of these issues. It is often found that decisions made remote from constituents become distorted to accommodate the decision-makers’ goals, which are local to their own location and institution, not to accommodate the targeted “beneficiaries.”

In the United States, there is an enormous amount of discussion about “federalism,” which really engages these same issues.²⁴ There is a worry that “inside the beltway” decisions often neglect the facts and details “on the ground” in local areas, remote from the center, partly to accommodate the particular, relatively selfish, goals of some senators or other members of the US Congress. Indeed, the US Supreme Court has, during the last decade, been paying a great deal of attention to the “constitutional federalism” questions, and one has to think about whether the Supreme Court’s attitudes are totally based on an appropriate view of the US Constitution, or are they at least partially motivated by policy considerations (not necessarily *inappropriate*) about where power should reside.²⁵

3 *Some other policy goals and values – cutting both ways?*

Sometimes the controversy over what level to place a government decision is truly a controversy over the substance of an issue. Thus, national leaders will sometimes use international norms to further policy that they feel is important to implement at their own level, but which is difficult to implement because of the structure of their national constitution, or political landscape. Likewise, other leaders may want to retain power over certain issues at the national or even sub-national level, because they feel they have more control at those levels to pursue those policies that they favor, in contrast to others who want the issue placed at another level of government because they have more control there.

Another policy that can cut both ways (up and down the ladder) is the policy of preventing a governmental institution from *misusing* power. Thus, those who wish

23 Campaign speech by Governor George W. Bush made to the annual convention of the National Conference of State Legislatures in Chicago during the week before July 20, 2000, as recorded at the web site for the PBS online news hour for the date July 20, 2000, segment entitled “On the Stump,” www.pbs.org (visited July 21, 2000).

24 The fuss about regulating the Florida presidential elector selection is a striking example; see part V.B. *infra*.

25 See, e.g., Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11 (2000).

to have governmental decisions made at a higher level such as at the international level, must also consider the potential for misuse of the power that could occur in such international institutions. Since quite often the constraints on international institutions are less effective than on national institutions (e.g., lack of elections, etc.), this may be the core of an argument against placing power at the higher level. On the other hand, power can also clearly be misused at lower levels of government. Likewise, there is generally a “separation of powers” principle which could apply. Clearly the US Constitution has as its centerpiece the separation of power principle to avoid monopolies of power, which then lead to misuse. Such separation can be as between various relatively “equal” levels of governmental action, or as between higher or lower levels of governmental action. Thus, in considering how governments should make certain decisions, it may be decided that only a portion of a power would be allocated to the higher level, retaining to a lower level some powers that would be used to check the higher level. To some extent, the implementation of treaties, without having direct application in domestic legal systems, is potentially such a check against power at the higher level. But allocation of greater power effect to the higher-level treaty may also check lower-level misuse of power.

Another aspect of the decision involving values relating to the allocation of power is the policy goal of “rule orientation” in the matter concerned. Particularly for economic purposes, for example, a rule system that provides additional clarity, security, and predictability can be very significant, particularly when the subject matter involves millions of entrepreneurs (“decentralized decision-making” as part of the market system). So part of the consideration regarding what level to place governmental power on might deal with the question of whether different levels have different abilities to make an effective rule-oriented program.

IV The power allocation policy analysis landscape and roadmap

A The fuzzy map of the landscape

Based on the analysis of the previous parts of this chapter, we can now see that a key question is *how* to allocate power among different human institutions. It is probably not surprising that this question is a very complex one to answer. There are many factors to consider, some of which are discussed below. To some extent, these all center around a common question of “power,” and therefore, in some ways, this question relates to virtually all of government and political science studies, as well as international relations, economics, law, etc. When one has to develop the landscape of this policy analysis, one recognizes that a huge number of specific substantive policies play a part, as well as what we might call “procedural”

or “institutional” policies (how to design the appropriate institutions). Some of these policies are, typically, not congruent in the directions that they would suggest allocation of power should occur. That is, differing policies often pose dilemmas for policy makers, where they must engage in a certain amount of “balancing.”

Indeed, the policy landscape is so complex that one can question whether it is possible to arrive at any worthwhile generalizations. It could be argued that the complexity is such that each case has to be decided *sui generis*, that is, on a “case by case” basis (to use a phrase often indulged in by judicial institutions).

Nevertheless, I will attempt some restrained and constrained generalizations, more in the manner of indicative road map directions or inventory/checklists of the type of subjects and factors that are to be considered.

B Outlines of the landscape and its dimensions

You have seen in previous articles that there a number of so-called “sovereignty fictions,” which in fact have never really been true, in the sense of representing what goes on in the real world. One of these fictions is the notion of absolute power being concentrated at the head of a nation-state, but we have seen the myths and anomalies regarding that. So when we look at how to allocate power, we can realize, as a starting point, that there are two major dimensions: vertical vs. horizontal allocations. That is to say, as a matter of vertical allocation, we can consider which level of government, from the top, at the broadest multilateral level, all the way down to the local neighborhood, should receive certain kinds of allocations of power.

With respect to the horizontal allocation, we would look at important concepts such as separation of powers in the US Constitution, whereby power is allocated among legislative, executive, and judicial branches.

There is also another aspect of opposing categories that come into play here, although I will not develop that very much in this essay. That is, the allocation of power as between government institutions (at all levels and among different horizontally equal institutions) on the one hand, and to non-government institutions (private enterprise, non-governmental organizations, pro bono institutions, etc.) on the other hand. This portion of the analysis would push one into questions of market-oriented economic structures and their value, as well as their limitations.

In order to handle the issues of allocation, clearly the characteristics of institutions are very important, and must be examined carefully. The nature of the issues involved must also be examined. What type of information is needed for certain kinds of substantive issues? Then one must ask, is the institution to which power will be allocated, regarding such issues, capable of finding and processing that information?

In addition, many of the issues about democratic legitimacy come into play when one is allocating power at different levels and to different horizontally equal institutions. Issues that may call for different kinds of allocations include taxes, expenditures for public goods and services, regulating private sector agents, and a myriad of additional categories.

C Appraising the international institutions so as to compare them with national and sub-national institutions

There is a series of things that policy makers who are trying to develop an appropriate allocation of power must consider about international institutions. The following is just a simplistic checklist that will bear further analysis in later versions of this research:

- (1) Treaty rigidity, namely, the problem of amending treaties and the tendency of treaties to be unchangeable, although actual circumstances (particularly in economics) are changing very rapidly.
- (2) International organization governance questions, particularly with respect to choosing officials of the international organization. Governments tend to push favored candidates, to claim “slots,” and often do so disregarding the actual quality of the individuals concerned or the nature of the tasks to be assumed by such individuals.
- (3) International organization governance in the decision-making processes. What should be the voting structure? Should consensus be required? What are the dangers of paralysis because of the decision-making procedures?
- (4) International organization governance with respect to a fiction such as sovereign equality of nations, and the problems that arise with the one nation, one vote system. It can be argued that these two concepts, or fictions, are very anti-democratic, as compared to a system that would recognize the populations concerned in the representation and the organization. Is it fair that a mini-state, of less than one million inhabitants, should have the same weight in a voting structure as giant governments of societies that have more than one hundred million constituents each? Does such mini-state weight accentuate possibilities of “hold out” bargaining, what some call “ransom” for the hold out?
- (5) International diplomacy techniques must be examined: is it appropriate or necessary that there be special privileges for the diplomat, tax-free activities allowed, etc.?
- (6) International diplomacy as it operates substantively must also be examined, sometimes in contrast to or in diminishing a rule-oriented structure.

- (7) International government issues that relate to the allocation of an international organization's resources, such as a "headquarters mentality," where large amounts of the budget are devoted to the perks and comfort of the headquarters personnel.

D The devil in the detail: institutional details make a difference

In many cases, individually insignificant details are involved in how institutions perform their tasks, which, however, when added up, or utilized by a large number of participants, can have a degrading effect on the efficiency or the fairness of operations. For example, one can examine the constitutional "treaty-making" authorities of different levels of government. One can also examine the effect of the "direct application" or "self-executing nature" of treaties, and ask whether the treaties have a legitimate amount of democratic input, such that they should be allowed to trump nation-state level democratic and parliamentary institutions.²⁶

One can also ask how officials and persons are chosen in the international organizations, compared to nation-states, or sub-federal units. Of course, some of the issues described for evaluating international organizations, about procedures for decision-making, voting, etc., can be raised at other levels of government.

V Examples to illustrate different questions concerning power allocation

Now, I turn, very briefly, to certain kinds of *examples* that can be used to illustrate different kinds of power allocation.

A Economics and markets, in the power allocation as an example

As a "thought experiment," consider the following:²⁷

Advocates for market economics argue that the most efficient processes of decision-making in an economy rely on the private sector to handle most of the choices, and to keep the government out. However, there is a well-recognized exception of "market failure," and then it becomes necessary to analyze what is market failure.

²⁶ See, e.g., John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310–340 (1992).

²⁷ For an example of a previous article on the economic analysis of power allocation, see John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1–24 (1998).

Often, market failure lists include monopolies and competition problems, asymmetries of information or lack of information, public goods and free rider problems, and externalities. In each of those cases, one can have a look at how the economics of a globalized economically interdependent world operates. It is quite likely that in some cases, one could make one kind of judgment about the existence of market failure, if it is appraised only at the nation-state level, but come to a different conclusion when one is looking at a broader, global or international level. Monopoly judgments will depend somewhat on how one defines the market. Are borders really open, and thus does a single producer within a nation-state really have to face competition and does not have monopoly power? Asymmetries of information are found across national borders, particularly in different cultures and different languages.

Then, even if there is a judgment as to the existence of market failure that should lead to a government response, the kinds of government responses possible at the nation-state level differ dramatically from those at the international level. Most often, the international level institutions do not have powers to effectively tax, subsidize, or in a major way, alter market mechanisms (such as setting up tradable permits). Another governmental response is to have rules and prohibitions. Often at the international level, this is almost the only available government response, and it even raises a very important realistic question as to whether a particular rule or prohibition will in fact be effective, i.e. followed, and therefore operate efficiently to correct the market failure.

B Several other examples mentioned

Many examples could be given to illustrate the policy analysis and landscape described above.

For example, there has been much discussion about the appropriateness of having an international discipline for competition policy rules. Some officials and authors strongly oppose any such development, while others strongly recommend that there should be an international discipline, and some of those recommend that it be in the WTO. This is a very significant example of a complex issue regarding the allocation of power and will clearly be the subject of much future research, just as there has been much written in the past.²⁸

In addition, the power allocation problems arise in a number of issues that are not solely "economic," such as human rights, democratic entitlements, cultural and religious issues, and the effect of, or need for, local customs. Of course, important issues are constantly present about how to prevent war and diminish strife among

28 See articles grouped together in 2:3 J. INT'L ECON. L. (Sept. 1999) by authors Robert Pitofsky, Frieder Roessler, A. Douglas Melamed, Patricia Smith, Merit Janow, and Daniel Tarullo.

nations, and what that implies for allocating certain subjects to different levels of government.

Another example is the fascinating developments in the European Community, which is going through a very significant constitutional evolution, partly inevitable given the vast subject matter of the Community, but also accentuated by the eminence of potential additions to the EU membership. Many of the issues it is discussing have, as the “central perplexity,” questions about how to allocate power between the European Union institutions and Member State governments on the one hand, and between different parts of the European Union institutions (e.g., the Luxembourg court compared to the Commission, or to the Council) on the other.

Very recently we have seen a remarkable debate with many strident overtones concerning power allocation within the United States, both horizontal and vertical. This debate is poignantly represented in the December 12, 2000, opinion of the United States Supreme Court in the case of *George W. Bush, et al. v. Albert Gore, Jr., et al.*²⁹ In this case, we can see words directly raising some of the issues of this article. For example, the majority *per curiam* opinion includes the following paragraph:

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.³⁰

In addition, in the concurring opinion by Chief Justice Rehnquist, in which he is joined by Justice Scalia and Justice Thomas, we see the following sentences:

Of course, in ordinary cases, the distribution of powers among the branches of a State’s government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV, §4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of the State’s government. This is one of them. Article II, §1, cl. 2.³¹

On the other side of some of these issues, we see language in the dissenting opinions, including some very pointed language in the dissent by Justice Ginsburg, in which she is joined (as to this part) by Justices Stephens, Souter, and Breyer.

The Chief Justice contradicts the basic principle that a State may organize itself as it sees fit.³²

²⁹ *George W. Bush, et al. v. Albert Gore, Jr., et al.*, 531 U.S. 98 (2000). ³⁰ *Id.* at 111.

³¹ *Id.* (Rehnquist, C.J., concurring, at 112). ³² *Id.* (Ginsburg, J., dissenting, at 141).

Quoting an earlier case by the Supreme Court:

The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.³³

Other issues that are the basis of considerable debate about allocating decision-making authority at different levels of government include many environmental policy issues, as well as food safety issues (perhaps going to the core of “sovereignty”).

VI The WTO role and future in the light of power allocation policy analysis

The rather elaborate analysis that I have only outlined in the previous parts of this chapter can now be applied to various subjects and endeavors, recognizing, however, the caveats that I have mentioned in Part IV. In this part of the essay, I will briefly sketch a relationship of the above analysis to the WTO and its future. Some of these considerations may have influence on the way the WTO should evolve. It is also likely that the analysis could affect the WTO’s coordination with other international organizations, such as the Organization for Economic Cooperation and Development, International Labor Organization, United Nations, United Nations Conference on Trade and Development, etc. Similar analysis following some of the landscape discussed above could also be applied separately to those organizations, or any other international organizations (as well as nation-states and sub-national units of government).

Turning to the WTO, I believe it is fair to say that it is a crowning achievement of the development of international economic institutions since the Second World War. In many ways, it is the “missing third leg” to the stool of the Bretton Woods systems.³⁴ In the short period since the creation of the WTO to replace the GATT, the WTO has been described as the most significant of the economic institutions, even when compared to the World Bank and the IMF. Certainly there is enormous potential for the WTO, but also it is coming under increasingly severe criticisms and opposition. Some of this criticism and opposition stems from a fear about the potential power of the WTO, and indeed, that leads directly into the problem in this paper, namely considerations that should affect allocation of power on many of the subjects that could be in the cognizance of the WTO.

One of the important attributes of the WTO is its relative dedication to a “rule-oriented” system, which is an attribute particularly important to market-oriented

33 *Id.* (Ginsburg, J., dissenting, at 142).

34 JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 1, at 31.

economic principles that include decentralized decision-making by millions and millions of private entrepreneurs. This stability and predictability of the institutional framework for the world market is an important ingredient for the efficiency and fairness of that market system.

An important starting point for a power allocation analysis relevant to the WTO is the recognition of the impact of globalization on the ability of nation-state (or sub-national) units of governments to govern, that is, to carry out and effectively implement regulatory or other measures needed to aid constituents to achieve their individual lifestyle goals. Many of the factors I mentioned in Part IV are heavily influenced by the effective and real constraints imposed on governments by the interdependence embodied in globalization. These are facts of economic (and political) realities which themselves can be seldom influenced by nation-states acting alone. Illustrations have been mentioned already, including dangers of protectionist policies, risks of monopolies, risks of great environmental damage, actions by some political or economic (governmental or non-governmental) entities which violate widely accepted humanitarian or human liberty norms. Many of these problems suggest a strong need for the “coordination benefits” that international level institutions can supply.

One can also easily list a number of additional subjects beyond those which are currently under the formal competence of the WTO, which will require some type of coordinating activity of institutions that go beyond nation-state sovereignty. Indeed, almost every aspect of economic regulation now concerns activities that cross national borders and that raise issues of multilateral supervision and cooperation. A penetrating analysis of this cannot be done here, but I think the proposition should be reasonably obvious to those who have had any experience in the problems of economic interdependence, globalization, multinationalization, etc.

Globalization is forcing the creation or adaptation of institutions that can cope with some of these problems. Clearly, many of these problems could involve more than just border measures (and indeed, the GATT itself has never limited itself to just border measures, but includes a number of clauses that penetrate deeply into nation-state “sovereignty” decisions about economic regulation). This means that any international cooperative mechanism will, of necessity, clash with national “sovereignty,” and with special national interests whose particular economic well being will be affected by the international decisions. It is not surprising therefore, that the WTO is both a candidate for filling institutional needs to solve current world level problems, but also is currently coming under attack.

Nevertheless, increasingly, nation-states often cannot regulate effectively in the globalized economy, and as noted in previous parts of this essay, this is particularly relevant to economic factors that are quite global and mobile (investment, monetary payments and monetary policy, even free movement of persons). As outlined by very eminent economists in recent decades (such as Douglas North and Ronald

Coase³⁵) markets will not work unless there are effective human institutions to provide the framework that protects the market working. So, that is the core problem, as I see it, of the globalization-caused needs for developing appropriate international institutions. If a thorough analysis would lead to a conclusion that the WTO is a good place to concentrate some of these cooperation activities, one could see the WTO becoming essentially an international economic regulatory level of government. This, of course, is scary to many people.

A politics of sustainable globalization, though, needs more than just the correct picture of what is happening in the world. It also needs the right balance of policies. This to me is what Integrationist Social Safety-Nettism is all about. We Integrationist Social-Safety-Netters believe that there are a lot of things we can do in this era of globalization that are not all that expensive, do not involve radical income redistribution – or lavish compensatory welfare spending programs that would violate the economic rules of the Golden Straitjacket – but are worth doing to promote social stability and to prevent our own society from drifting into one of the high walls and tinted windows more than it already has.

My Integrationist Social-Safety-Nettism would focus on democratizing globalization educationally, financially, and politically for as many people as possible, but in ways that are still broadly consistent with integration and free markets.³⁶

But the WTO has a number of systemic or “constitutional” problems, which clearly are affecting, and will continue to affect, its place in the overall landscape of power allocation. The WTO foundations are deeply embedded in the historical context of its “constitution,” which is to say, embedded in the past century of trade policy and negotiation, much of which is influenced by nineteenth century concepts. These concepts may imply too much emphasis on “reciprocity,” which seems strongly related to mercantilist concepts so much under criticism by current international economists. These concepts also involve a higher degree of emphasis on “sovereignty,” including many of its fictions, than may be appropriate for today’s globalized system. For example, a number of the measures embedded in the treaty language of the WTO, especially the GATT, are exceptions that were included in the past for national or nation-state special political needs, viz. the escape clause, antidumping, countervailing duties, etc.

In addition, and related to the previous statements, it can be argued that the WTO is weighted too much overall, in its rules and decision-making processes, in favor of a tilt towards producer-oriented approaches. This emphasis on “market

35 See DOUGLAS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (Cambridge University Press, 1990); RONALD H. COASE, *THE FIRM, THE MARKET AND THE LAW*, ch. 5 (University of Chicago Press, 1988) (reprint of 1960 article).

36 FRIEDMAN, *supra* note 4, at 358.

access” – for diplomats’ home producers to gain markets abroad, while at the same time limiting that producing market when it comes to imports of goods from other producer countries – creates a constant tension in the procedures, negotiations, and even in the dispute settlement system of the WTO.

Likewise, the WTO has a number of institutional difficulties, including decision-making that is too dependent on a “consensus” approach, and decision-making authorities in the WTO Charter which have been extremely constrained, to protect “nation-state sovereignty.” Some of these institutional problems run the risk of pushing important decision activities into the dispute settlement system, where that system is called upon to play a more “law making” rather than “law applying” role.³⁷

In addition, the WTO has a number of serious institutional or “constitutional” faults and problems. It is appropriately criticized for its relative lack of openness (although much progress about this has been achieved). It is likewise vulnerable to criticism about its antiquated, sloppy, and inefficient relationships to non-government organizations. Some of these problems stem from out-dated attitudes about the modes of diplomacy and an exaggerated sense of privilege for nation-state diplomats who claim legitimacy (whether democratic or not). On the other hand, some opposition to any changes comes from Third World fears that the changes could be inappropriately implemented in a way that could be abused by some of the great trading powers, fears that have considerable basis in fact.

Nevertheless, the analysis regarding allocating power, particularly in the face of needs of international cooperative mechanisms for the globalized market, cannot stop at the WTO. It must also look at alternatives. These alternatives can include lower than multilateral institutions, such as regional institutions, bilateral treaties of institutions, and even unilateral actions. They can include depending on nation-states’ decisions, *ad hoc* diplomacy, and quite a number of other possibilities. So the power allocation analysis becomes an enormous and complex landscape. This means that the agenda for that analysis, and therefore the agenda for consideration of the evolutionary needs of the WTO, is quite long.

The question is not whether the WTO, as now constituted, should be the location of additional inter-nation coordinating power, but whether, given the alternatives, the WTO is capable of evolving into the best location for such power allocation.

Clearly, many of these issues require further thought and research, but the complexities (and uncertainties) are so great that one should not expect a “roadmap” that is very detailed.

³⁷ See, e.g., John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems* 1 J. INT’L ECON. L. 329–351 (1998).