Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization

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Abstract

It would appear that some critics’ cure for the World Trade Organization (“WTO”) is to build it up, while for others, the cure is to tear it down, or at least to diminish its competence. This seeming contradiction makes it difficult to assess and respond to legitimate criticisms of the WTO. The purpose of this Essay is to address this apparent conundrum. In particular, we attempt to shed light on it by (1) describing the nature of the imbalance that exists in the world trading system today (Part I); (2) offering an historical and legal framework for understanding the seemingly conflicting pressures that imbalance has created (Parts II and III); and (3) identifying and evaluating options for moving forward, taking those pressures into account (Part IV).
HOMAGE TO A BULL MOOSE: APPLYING LESSONS OF HISTORY TO MEET THE CHALLENGES OF GLOBALIZATION

Theodore R. Posner* & Timothy M. Reif**

INTRODUCTION

The World War II career of General George Smith Patton, Jr. is chronicled in the 1970 Academy Award-winning movie named after its subject. One scene captures Patton’s extraordinary knowledge of military history and his exceptional skills as a tactician. It is dawn near Vendum in western France in August 1944. Patton, surveying the dead and wounded soldiers and the smoldering hulks of tanks following a night battle with a German armored division, concludes that the German army is finished:

You know how I’m sure they’re finished out there? The carts. They’ve been using carts to move their wounded and their supplies. The carts came to me in my dream, kept buzzing around in my head. Then, I remembered. That nightmare in the snow. The endless, agonizing, retreat from Moscow. How cold it was. We took the wounded and what was left of the supplies and threw them in carts. Napoleon was finished. There wasn’t any color left. Not even the red of blood. Only the snow.2

Patton’s reference was to Napoleon’s retreat from Moscow that started in October 1812, pursued by the Russian army under the command of General Mikhail Kutuzov, Supreme Commander of the Russian Forces under Czar Alexander I.3 The relevance of the historical reference was Patton’s tactical conclusion that the allies had been presented with a moment of opportunity

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1. PATTON (20th Century Fox 1990). The movie won eight Academy Awards in 1970, including Best Movie and Best Actor for George C. Scott in the title role.
2. Id.
and that his Third Army should continue to attack directly across France and on into Germany.\(^4\)

The example of General Patton—and, in fact, the entire allied command led by General Eisenhower\(^5\)—illustrates the importance of recalling relevant episodes in history and applying lessons derived from those episodes. World War II presented the defining moral, political, and military challenge of the twentieth century. The example of Generals Eisenhower, Marshall, Bradley, Patton, and others is vital for us today as the United States and virtually every other country in the world grapple with the vast potential and imposing challenges of economic globalization.

Since the World Trade Organization\(^6\) ("WTO") ministerial in Seattle in December 1999, there has been much discussion of the meaning of the events there—in particular, what the critics of the WTO are most concerned about and how their concerns can be addressed. A number of commentators have pointed out that, in key respects, WTO critics are united in their unhappiness, but divided in the reasons behind it.\(^7\) For example, those

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4. This judgment was confirmed by, among others, General Omar N. Bradley. See OMAR N.BRADLEY, A SOLDIER'S STORY 432 (1951). Paul Reif, Timothy Reif's father, served in the Army Intelligence Corps under Bradley in North Africa and the invasion of Sicily.
7. See Steve Pearlstein, Trade Theory Collides With Angry Reality, WASH. POST, Dec. 3, 1999, at A1 (noting "serious disagreements within the ranks of the anti-globalization movement"); see also Helene Cooper, Some Hazy, Some Erudite and All Angry, WTO Protestors are Hard to Dismiss, WALL ST. J., Nov. 30, 1999, at A2 (referring to "sheer diversity of the groups that have come [to Seattle] to vent their ire at free trade and corporate globalization"); James Cox, What Protestors Want From the WTO, USA TODAY, Dec. 2, 1999, at O2A (describing disparate goals of WTO protestors); James Cox & Del Jones, This Weird Jamboree, USA TODAY Dec. 2, 1999, at 1 (stating that "[a]nti-WTO forces are united by a profound mistrust of globalization—and almost nothing else"); Margot Hornblower, The Battle in Seattle, TIME, Nov. 29, 1999, at 40, 42 (observing that "[t]he antiglobalist message resonates across a broad swath of ideology, from the isolationist Buchananite right to a kaleidoscope of left-wing groups"); Kim Murphy, In the Streets of Seattle, Echos of Turbulent '60s Protest, L.A. TIMES, Dec. 1, 1999, at A1 (noting that "[r]arely if ever have such unlikely groups joined forces in protest"); Steven Pearlstein, Protest's Architect Gratified, WASH. POST, Dec. 2, 1999, at A01 (observing that "[t]he throng of protesters in Seattle was uniquely diverse . . . united by a common concern about the impact of globalization"); Skirmishes in Seattle, TIMES London, Dec. 2, 1999, at 27 (editorial describing protestors as having "a rag-bag of diverse causes"); Mark Suzman & Frances Williams, Clinton Sympathetic to Protestors who Force Delay in WTO Meet-
concerned about strengthening adherence to internationally recognized labor standards urge that the WTO be given competence over those issues. By contrast, many of those concerned about the impact of trade rules on environmental protection and conservation would like the WTO to stay out of those areas or accord significantly greater deference to national regulatory authorities.

It would appear that some critics' cure for the WTO is to build it up, while for others, the cure is to tear it down, or at least to diminish its competence. This seeming contradiction makes it difficult to assess and respond to legitimate criticisms of the WTO.

The purpose of this Essay is to address this apparent conundrum. In particular, we attempt to shed light on it by (1) describing the nature of the imbalance that exists in the world trading system today (Part I); (2) offering an historical and legal framework for understanding the seemingly conflicting pressures that imbalance has created (Parts II and III); and:

8. See Nancy Cleeland, Labor Leaders Want Worker Safeguards Built Into Trade Accords, L.A. TIMES, Dec. 3, 1999, at A11; see also Cox, What Protestors Want, supra note 7, at 02A (noting that "[unions] want 'core' labor standards written into WTO rules"); Steven Greenhouse & Joseph Kahn, U.S. Efforts to Add Labor Standards to Agenda Fails, N.Y. TIMES, Dec. 3, 1999, at A1 (quoting AFL-CIO President John Sweeney stating that an eventual working group on trade and labor issues must be "part of the W.T.O."); Del Jones, Unions Call for Fair Trade Practices, USA TODAY, Dec. 1, 1999, at 3B (providing that "[w]hat union leaders want is to set international labor standards. If a country does not permit unions or encourages child labor, the WTO should be able to find it guilty of unfair trade just as it now does when exporters flood another country with cheap products"); Guy de Jonquières & Mark Suzman, Clinton Push for WTO Labor Rules Draws Opposition, FIN. TIMES, Dec. 2, 1999, at 1 (stating that "U.S. labour unions, which accounted for most of the demonstrators, want the WTO to take a central role in enforcing core labour standards worldwide"); Sebastian Mallaby, Big Nongovernment, WASH. POST, Nov. 30, 1999, at A29 (noting some protestors' interest in "new rules they want inserted in the WTO charter"); Suzman & Williams, supra, note 7, at 1 (quoting Teamsters President James Hoffa stating: "[w]e're basically putting a human face on the WTO. . . . It has to consider human rights and worker rights along with trade.").

9. See, e.g., Hornblower, supra note 7, at 41 (quoting Lori Wallach, Director of Public Citizen's Global Trade Watch, stating, "The WTO is an octopus with an arm into every little crevice of democracy. . . . It trumps domestic laws and international treaties and imposes one-size-fits-all rules."); The WTO Protest Pits: Luke Skywalkers against Darth Vader, SEATTLE POST INTELLIGENCER, Nov. 30, 1999, at A22 (describing protestors' ambition as "to destroy the WTO and the liberal trading system it represents").
(3) identifying and evaluating options for moving forward, taking those pressures into account (Part IV).

We start our analysis with two basic premises. First, the WTO, since it was established in 1995, has provided a robust mechanism for adjudicating disputes between WTO Members. Second, the success of WTO dispute settlement has focused attention on a fundamental imbalance in the rules-based trading system between the ability of governments to keep the channels of commerce free from barriers ("the policing function") and their ability to shape the process of globalization so that it affirmatively promotes values such as worker rights and a clean environment ("the shaping function").

By "shaping" commerce, we mean regulating commerce in ways designed to achieve ends that may or may not, strictly speaking, be commercial. Those ends could include a clean environment, protection of worker rights, and promotion of human rights, among others. Shaping has two dimensions. The first is deference to "legitimate" national laws (i.e., laws that are not merely pretexts for protection of national markets), notwithstanding their potential to diminish to some extent the free flow of commerce. The second is the articulation and enforcement of common standards among sovereign states, recognizing that the pursuit of such standards may—at least in the short term—impose a slight burden on the flow of trade.

A hypothetical illustration of the first dimension is a dispute settlement panel upholding a country's nondiscriminatory prohibition on the importation of shrimp caught in ways that endanger sea turtles. A hypothetical illustration of the second dimension is a multinational rule prohibiting trade in endangered species.

The thesis of this Essay is that the main challenge for the world trading system is to achieve better balance between the


policing function and the shaping function. The strength of the policing function, as embodied primarily in the dispute settlement mechanism, makes the weakness of the shaping function more clear. The disparity between them, we contend, is a key factor in the increasingly vocal criticism of the WTO. In the long run, a continued state of imbalance between these two functions is likely to be unsustainable.

In Part II, we offer an historical analogy to the Progressive Era in the United States in the early twentieth century to help shed light on the nature of the current imbalance in the world trading system.\textsuperscript{13} Then as now, economic integration was rapidly outpacing the development of rules to govern it. Then as now, juridical bodies—federal courts in the United States, dispute settlement panels in the WTO—were facilitating the economic trend by upholding challenges to state laws that impeded interstate commerce. Then as now, there was mounting popular concern about an apparent bias in the regulation of commerce toward the interests of big corporations. Then as now, there was a split among the system’s critics between those who would expand the regulatory powers of central governing authorities and those who would seek a solution in local governments. And, then as now, there was an intense debate over what subjects properly come within the purview of “regulation of commerce.”

The example of the Progressive Era and the Progressive Movement offer useful parallels with current challenges in the context of economic globalization, which brings us to the title of our Essay. The historical figure most closely associated with the Progressive Movement in the United States is President Theodore Roosevelt. As President from 1901 to 1908, and as the nominee of the Bull Moose Party in the Presidential election of 1912, Roosevelt articulated and began to implement an agenda to respond to the changed realities that industrialization and related economic and technological forces were creating in the United States at that time. Roosevelt consistently advocated an activist and forward-looking agenda that embraced the changes

\textsuperscript{13} The Progressive Era is commonly thought to date from approximately 1900 to approximately 1914. See RICHARD HOFSTADTER, THE AGE OF REFORM 3 (1955). Hofstadter cites what he identifies as three “almost continuous” stages of the reform movements in the United States from the late 19th century to the mid 20th Century as being (agrarian) populism in the 1890s; the Progressive Movement, 1900-1914; and the New Deal, whose most dynamic phase was concentrations in the mid-1930s. See id.
of his time and sought to create government mechanisms, where necessary, to harness those changes so that the public would derive the maximum benefit. Roosevelt once stated:

> We propose to lift the burdens from the lowly and the weary, from the poor and the oppressed. We propose to stand for the sacred rights of childhood and womanhood. Nay, more, we propose to see that manhood is not crushed out of the men who toil, by excessive hours of labor, by underpayment, by injustice and oppression. When this purpose can only be secured by the collective action of our people through their governmental agencies, we propose to secure it.¹⁴

> We need good laws just as a carpenter needs good instruments. If he has no tools, the best carpenter alive cannot do good work. But the best tools will not make a good carpenter, any more than to give a coward a rifle will make him a good soldier. We wish to see the mass of our people move steadily upward to a higher social, industrial, and political level.¹⁵

As President Roosevelt’s comments foreshadow, the Progressive Movement unleashed a series of proposals in areas from working conditions to antitrust law to shape the process of industrialization and maximize its benefits. In the United States, the imbalance between policing and shaping was resolved by Congress’s taking a more active role in legislating pursuant to its authority to regulate commerce among the states. This was made possible, as a constitutional matter, by a shift in the Supreme Court’s interpretation of the scope of Congress’s power to regulate commerce.¹⁶

As we discuss below, we do not doubt that many distinctions can be drawn between the U.S. experience and the experience of the world trading system today. Nonetheless, we believe the U.S. example is most instructive about the tension within a commercial system where economic processes have evolved more quickly than the regulatory mechanisms to govern them. That is to say, it is most instructive about the current predicament of the


¹⁶. The critical shift was announced in NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937).
WTO and the world trading system, and less so about a precise \textit{prescription} for addressing the problem.

In the problem-solving spirit of President Roosevelt, we devote Part IV of this Essay to examining tools that may be available to the world trading system to improve the balance between its policing and shaping functions.

I. THE IMBALANCE

In this section, we explain our two basic premises: namely, that (1) the WTO dispute settlement system has proved to be remarkably effective in its first six years, and (2) the strength of this mechanism has pointed up the imbalance between policing and shaping.

A. Rules To Promote Trade, Strong Dispute Settlement

From the WTO's establishment on January 1, 1995, through December 13, 2000, 214 complaints had been filed under the dispute settlement provisions of the WTO\textsuperscript{17} (a comparable number in six years to the complaints filed in more than forty years under the WTO's predecessor regime, the General Agreement on Tariffs and Trade\textsuperscript{18} ("GATT")). By any standard, a system able to process such a large number of complaints and able to facilitate a resolution of more than half of those without resort to formal adjudication can be considered efficient. That is particularly true when contrasted with its predecessor mechanism under GATT, under which one party could block dispute settlement on a particular matter—or delay it indefinitely—at one or more points, including formation of the panel, agreement on terms of reference, adoption of the panel report, and suspension of concessions.

The efficiency of the system in processing complaints is matched by the wide range of matters that have been presented to it. In particular, an increasing number of cases have concerned domestic regulatory policies that, not long ago, might

\textsuperscript{17} See World Trade Organization, Overview of the State of Play of WTO Disputes, at http://www.wto.org/english/tratop_e/disp_e/disp_e.htm.

not have been considered part of the "trade" landscape. Complainants have addressed U.S. rules intended to protect sea turtles, an Australian quarantine on certain salmon imports, E.U. regulations concerning importation of hormone-treated beef, Japanese restrictions on the distribution, pricing, and marketing of film, and Massachusetts rules barring state agency procurement from vendors that dealt in or with the country of Burma (a protest against Burma's atrocious human rights record).

It is not particularly surprising that these matters have become an increasing point of focus for WTO dispute settlement. GATT and WTO rules have sharply reduced tariff and traditional non-tariff barriers; the remaining legal issues in these areas tend to be relatively clear and, therefore, relatively easy to resolve. The more difficult—and increasingly important—WTO cases involve the kinds of regulations involved in the cases noted above: typically, regulations that on their face do not discriminate against imports, but that, nonetheless, may place a disproportionate burden on imports (as compared to domestic products or services) or may impede commerce to some extent.

It is vital for several reasons that WTO panels develop an ability to distinguish correctly between facially-neutral measures applied to protect local competitors and measures applied for valid regulatory purposes. In this regard, the WTO's treatment of facially neutral measures presents two basic issues in terms of the policing-shaping balance. First, where GATT/WTO rules


provide for taking into account ends that may or may not, strictly speaking be "commercial" (e.g., GATT Article XX), do these rules do so in an adequate way? Second, do existing rules reflect an appropriate balance between policing and shaping? Or, does the current structure of the system reinforce a view that any domestic law or regulation is a potential trade barrier and, therefore, a target for elimination by the WTO?25

B. Tensions Within the System—Pressures for Change

Many critics of the WTO (especially in the United States) consider that its members have found a workable mechanism to enforce adherence to rules, but have harnessed that mechanism to an incomplete and therefore biased set of rules. These groups have responded in different ways. Some have urged reform of WTO rules, mostly by expanding them to cover emerging issues, such as the nexus between trade and labor market standards. For example, in a major address shortly before the 1999 WTO Seattle Ministerial, AFL-CIO President John Sweeney called upon the WTO to “incorporate rules to enforce workers’ rights and environmental and consumer protections and compliance should be required of any new member.”26 This position regards dismantling the WTO as a last resort, only if all else fails.

By contrast, others, including certain environmental and human rights groups, see dismantling the WTO or strictly limiting its powers as an option of first resort.27 These groups seem


26. John Sweeney, Making the Global Economy Work for Working Families: Beyond the WTO, Remarks at the National Press Club, Washington, D.C. (Nov. 19, 1999). In his Pre-Seattle remarks, Mr. Sweeney referred to the WTO as “a constitution with a Bill of Rights that guarantees only the rights of property.” Id. at 3. The implication is that this “Bill of Rights” ought to be expanded, not abandoned.

less concerned about balancing the rules enforced by the WTO and more concerned about confining the authority of the WTO, whatever the rules it enforces. Thus, in his preface to a monograph sharply criticizing the first five years of the WTO, Ralph Nader states, “One of the clearest lessons that emerges from a study of industrialized societies is that the centralization of commerce is environmentally and democratically unsound. No one denies the usefulness of some international trade. But societies need to focus their attention on fostering community-oriented production.”

From this point of view, no amount of reform of the WTO is enough. This second brand of criticism tends to demonize the WTO, harkening back to images of “GATTzilla.”

As we see it, while the reformers and the dismantlers may diverge in their prescription, their perception of the problem is essentially the same: that trade rules focus on policing largely to the exclusion of shaping. As one observer recently commented, “The steamroller of economic globalism is not matched by the development of a global politics that can respond to it.” Economic growth and integration have outpaced the development of political institutions that govern economic processes. The existing rules of commerce were designed primarily to address transactions within nation states. They have not caught up with the fact that national borders are increasingly irrelevant to producers and consumers. To the extent that the rules do take the globalization phenomenon into account, they do so in a way that essentially encourages the existing trend.

The sense that there is a serious disconnect between the scope of economic processes and the reach of rules to govern those processes is not limited to a handful of critics at the fringes. A recent survey of U.S. public opinion suggests that the American public perceives the same imbalance: “[a] strong ma-

28. See Ralph Nader, Preface to Wallach & Sforza, supra note 27, at xi.
29. See id. at 13.
31. See Fareed Zakaria, Globalization Grows Up and Gets Political, N.Y. TIMES, Dec. 31, 2000, §4 at 9 (arguing that politics of globalization will have to catch up with economics of globalization in the coming decade); Philip Stephens, Broken Borders of the Nation State, FIN. TIMES, Dec. 3, 1999, at 19 (arguing that “economics rather than politicians is forcing the pace of integration”).
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More than a century and a half later, the Supreme Court echoed Hamilton’s words, observing that achieving uniformity in the regulation of commerce among the states was “[t]he sole purpose for which Virginia initiated the movement which ultimately produced the Constitution.” Indeed, “The necessity of centralized regulation of commerce among the states was so obvious and so fully recognized that the few words of the Commerce Clause were little illuminated by debate.”

Much has been written about the development of Commerce Clause jurisprudence. Our purpose here is not to re-till that soil. Rather, it is to review, in broad strokes, the evolution of the Commerce Clause to illustrate the parallels in the current evolution of the regime governing global commerce. For purposes of this discussion, we identify three discrete phases in the evolution of the Commerce Clause.

B. Phase 1: 1793-1870s, The Dormant Commerce Clause Doctrine Assumes the Creation of a National Market

The first phase runs from the founding of the Republic to approximately the mid-1870s. During this period, Congress exercised its Commerce Clause power sparingly and within a narrowly defined scope (by today’s standards). The focus of regulation was on the byways and instrumentalities of commerce (e.g., licensing of vessels on navigable waters, provision of interstate highways, regulation of interstate rail transport, regulation of telegraph lines). For example, the first Commerce Clause case to come before the Supreme Court dealt with vessel licensing. The matter concerned a conflict between New York’s grant of an exclusive license to a company running steamboats between New York and New Jersey, and the federal government’s grant under a federal statute of a competing license to...
another company. At issue was whether the term "commerce" encompassed "navigation" or, as the holder of the New York license contended, was restricted to "traffic, to buying and selling, or the interchange of commodities." The Court held that the term did, indeed, encompass navigation. It then went on to provide an expansive interpretation of Congress's Commerce Clause power, the implications of which would not be fully realized until years later.

Shortly after the Gibbons decision, the Court articulated the so-called "dormant commerce clause" doctrine in the matter of Willson v. Black Bird Creek Marsh Co. The doctrine addressed the issue of congressional silence in the face of state measures that impede the flow of interstate commerce. In theory, the states might erect numerous illegitimate barriers to commerce. It would be impracticable for Congress to address each separately. To deal with this problem, the Court found the power in the federal judiciary to interpret congressional silence as authority to strike impermissible state impediments to commerce as unconstitutional. As the Court explained in subsequent cases, the dormant Commerce Clause doctrine is either inherent in the Commerce Clause itself (on the theory that the grant of power to Congress necessarily preempted state laws impeding commerce) or implicit in Congress's silence. In fact, the Court in Willson upheld the state regulation at issue. But here, as in Gibbons, the seeds of future tension were sown.

40. Id. at 189, 193.
41. Id. at 189.
42. Id. at 193 ("The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'").
43. 27 U.S. 245, 252 (1829).
44. See H.P. Hood & Sons, 336 U.S. at 533, 535 (1949) ("distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and the law. [This] Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety."). See generally Gerald Gunther, Constitutional Law 213 (12th ed. 1991) (to justify dormant Commerce Clause doctrine, Court "has relied largely on history and on inferences from the federal structure").
45. Willson, 27 U.S. at 252 (holding that Delaware's authorization to company to
One of the first instances of application of the dormant Commerce Clause doctrine to strike down a state law was the Court's 1876 decision in *Welton v. Missouri*. That matter concerned a state law requiring a "peddler's license" to sell goods from out-of-state but not to sell goods from in-state. The Court held that this plainly discriminatory law (analogous, in WTO terms, to a violation of the core principle of national treatment) was unconstitutional, notwithstanding that there was no conflicting federal regulation. Applying the dormant Commerce Clause doctrine, the Court found that Congress's "inaction on this subject... is equivalent to a declaration that inter-state commerce shall be free and untrammeled." Following *Welton*, the Court entered into a period of robust activity under the dormant Commerce Clause, often striking down state laws as illegitimate impediments to interstate commerce.

In sum, the first phase in the evolution of Commerce Clause jurisprudence was characterized principally by the Court's development and application of the dormant Commerce Clause doctrine in a manner that promoted and facilitated the economic integration of the United States.

C. Phase 2: 1870s-1937, the Court Limits Congress's Power to Regulate Commerce

The second key phase of Commerce Clause jurisprudence began in the mid-1870s, with the industrialization of the U.S. economy and Congress's responses. As one scholar summarized the profound changes occurring in American society in the late nineteenth and early twentieth centuries:

The conditions of American life changed rapidly following the Civil War. Agriculture was made over; railroads were laid

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46. 91 U.S. 275 (1876).
47. Id. at 282.
48. See The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 6, 103d Cong., 1st Sess., at 160 (citing E. Parmalee Prentice & John Egan, The Commerce Clause of the Federal Constitution 14 (Callagan & Co., eds., 1898)) (noting that "[o]f the approximately 1400 cases which reached the Supreme Court under the [commerce] clause prior to 1900, the overwhelming proportion stemmed from state legislation"). "The result was that, generally, the guiding lines in construction of the clause were initially laid down in the context of curbing state power rather than in that of its operation as a source of national power." Id.
down; the population soared; villages became towns and towns became huge cities; business and labor organizations appeared. America was rapidly being transformed into an urban, industrialized, capitalist society. These changing conditions created a host of difficult problems and made it essential that older ideas be adjusted or abandoned and that new institutions and doctrines be devised.  

In response to these changes, Congress passed a number of laws regulating the operation of interstate rail carriers, clearly instruments of interstate commerce. However, Congress’s responses went beyond regulating the manner of their movement from state to state to new aspects of commercial activity. For example, an act of 1873 regulated the rail transport of livestock, “so as to preserve the health and safety of the animals.” This was followed by the Safety Appliance Act of 1893, the Hours of Service Act of 1907, and the Federal Employers Liability Acts of 1906 and 1908, all governing various aspects of employment on the interstate rail system.

Moreover, this period saw Congress beginning to use its jurisdiction over interstate commerce to enact laws intended to protect the safety and health (including moral health) of the nation. This category of laws included prohibitions on the interstate transport of diseased livestock, lottery tickets, and prostitutes. Essentially, Congress found in the Commerce Clause the authority to exercise what had been referred to as the “police power” when exercised by the states.

The Supreme Court responded to Congress’s exercises of the Commerce Clause power with two divergent lines of decisions. On the one hand, the Court upheld regulation of the railroads and nationwide health- and safety-based restrictions. However, the Court drew the line when it came to broader economic regulation. Here, the Court’s approach was to compart-

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50. See The Constitution of the United States of America: Analysis and Interpretation, supra note 48, at 176 (citing 17 Stat. 353 (1873)).
51. Id. at 179.
52. Id. at 203.
mentalize economic processes by applying a narrow definition of the term “commerce.” The Court found that all of the activity that took place within a state before a product entered the stream of interstate commerce or after it reached its final destination was beyond Congress’s reach.

In brief, the Court focused very narrowly on the particular activity that Congress was seeking to regulate, rather than on the larger transaction of which that activity was a part. This led the Court to hold beyond Congress’s Commerce Clause power laws affecting everything from wages and hours, to workplace conditions, to child labor. For example, in 1916, Congress enacted a statute prohibiting interstate commerce in products of child labor. Two years later, in *Hammer v. Dagenhart*, the Supreme Court struck down the law, holding: “[T]he mere fact that [products made from child labor] were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.”

The views expressed in the Court’s closely divided opinions in *Hammer* and other cases foreshadow many of the debates occurring today over the proper scope of international rules governing globalization. The nexus between labor standards and commerce is a good example. The arguments of those who would keep labor standards off of the world trade agenda today contain echoes of the Court’s reasoning in *Hammer*, when it stated: “[m]any causes may co-operate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions.”

The major exception to the Court’s narrow approach was its treatment of antitrust law. The Sherman Antitrust Act was en-

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54. See, e.g., Carter v. Carter Coal, 298 U.S. 238, 303 (1936) (“Mining brings the subject matter of commerce into existence. Commerce disposes of it.”); Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (drawing distinction between direct and indirect effects on interstate commerce and recognizing Congress’s power to regulate former but not latter); Hammer v. Dagenhart, 247 U.S. 251, 272 (1918) (stating that “[o]ver interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation”); Kidd v. Pearson, 128 U.S. 1 (1888).


56. 247 U.S. 251 (1918).

57. Id. at 272.

58. Id. at 273.
acted in 1890. The Court first considered the Act in 1895, holding that monopolization of sugar manufacturing did not amount to monopolization of commerce. However, ten years later, in the seminal case of Swift & Co. v. United States, the Court moved beyond its compartmentalized view of economic processes when it came to competition. Swift involved practices that amounted to price fixing in the Chicago livestock and meat markets. Instead of focusing narrowly on particular practices, such as bidding at the stockyards, the Court looked at the big picture and held that the practices at issue were all part of "commerce" and subject to Congress's power.

In Swift, the Court conceived of commerce as a flow of activity, rather than a discrete event along the path from production to consumption. However, that seemingly common-sense approach remained the exception for some time. The main trend during this period was the Court's continuing compartmentalization of economic processes in a way that strictly constrained Congress's efforts to enact economic regulations.

The net result of the Court's aggressive invocation of the dormant Commerce Clause, coupled with its narrowly drawn constraints on congressional authority, was to facilitate the expansion of economic activity on a national scale, while constraining the power of the federal government to regulate on that same scale. Put another way, the dynamic on display at the beginning of the twentieth century was a robust exercise of the policing function in the service of national economic expansion, coupled with a relatively weak exercise of the shaping function—roughly the same dynamic that is occurring in the world economy today.

This imbalance was very much the impetus for the Progressive Movement that coalesced in the first decades of the twentieth century. People were used to state and local government being the primary locus of rule making and rule enforcement. But as economic activity took on a national scope, state and local governments were not adequately equipped to deal with new

60. See United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895).
61. 196 U.S. 375 (1905).
62. See id. at 398-99 ("[T]he current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."),
regulatory challenges.63

A sense of disconnect between the economic and political spheres prompted a proliferation of ideas for reform. Some, such as Louis Brandeis, urged that state and local governments be the primary engines of change, while others, such as Theodore Roosevelt, argued that as commerce took on a national scope, so the power of government to shape the rules should go national.64 But, despite divergent prescriptions, both factions put pressure on the system for change, such that the Progressive Movement became a major national political force.

Many of the reforms spawned by the Progressive Movement are familiar: federal regulation of food and drug safety, federal antitrust laws, a nationwide program of conservation of natural resources, a federal income tax, federal regulation of the securities markets, and national labor standards. In general, these reforms were in the nature of what we have called government's shaping function. As we have seen, the Court's limitation on Congress's power was the principal constitutional barrier to the Progressive agenda. It prevented the shaping function of the federal government from becoming as robust as the policing function had become through the Court's invocation of the dormant Commerce Clause.

D. Phase 3: 1937 to 2001, the Court Liberates Congress's Power and Balance is Restored

The third phase in Commerce Clause evolution began in 1937, when the Court upheld the National Labor Relations Act of 1935 in *NLRB v. Jones & Laughlin Steel*.65 Over the previous two decades, pressure for the Progressive agenda had continued to build. That pressure reached its peak during the Great Depression, when President Franklin Roosevelt attempted to put

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63. See Michael J. Sandel, *America's Search for a New Public Philosophy*, ATLANTIC MONTHLY, Mar. 1996, at 57 (stating that "new forms of commerce and communication spilled across familiar political boundaries and created networks of interdependence among people in distant places. But the new interdependence did not carry with it a new sense of community.").


65. 301 U.S. 1 (1937).
large parts of that agenda into effect through the New Deal. The Court’s adherence to its narrow interpretation of Congress’s power ultimately met with the President’s famous threat to pack the Court with Justices sympathetic to the New Deal. Out of this crisis arose a revolution in the Court’s interpretation of the Commerce Clause and a watershed in the history of Congress’s power under that provision.

The Court in Jones & Laughlin Steel abandoned the distinctions between “direct” and “indirect” effects on commerce and between “production” or “manufacturing” and “commerce,” to which it had clung for so many years. Instead, the Court held that the correct inquiry is whether intrastate activities have “such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.”

The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a ‘flow’ of interstate or foreign commerce. Burdens or obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact ‘all appropriate legislation’ for ‘its protection and advancement;’ to adopt measures ‘to promote its growth and insure its safety;’ ‘to foster, protect, control and restrain.’ That power is plenary and may be exerted to protect interstate commerce ‘no matter what the source of the dangers which threaten it.’

Then, in one fell swoop, the Court abandoned the reasoning it had used for more than thirty years to restrict Congress’s Commerce Clause power, stating: “[T]he fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved.”

Cases following Jones & Laughlin Steel reinforced a new, expansive interpretation of the Commerce Clause. In 1941, the Court overruled Hammer and upheld the Fair Labor Standards Act as a constitutional exercise of Congress’s power. In 1942,

67. Id. at 36-37.
68. Id. at 40.
the Court held Congress's power to reach even conduct whose connection to interstate commerce was seemingly negligible (in this case, production on a small family farm of wheat for consumption on the farm). 71

The Court's new, expansive interpretation of the Commerce Clause enabled Congress to enact laws in areas that, under the Court's previous approach, would have been ruled well beyond Congress's reach, including civil rights laws, labor laws, environmental laws, and criminal laws. Challenges to these new exercises of power, most notably in the civil rights area, generally were defeated. 72

In sum, two key dimensions stand out in the U.S. experience. First, the Supreme Court—through the development and enforcement of the dormant Commerce Clause doctrine—facilitated the trend toward integration of the national economy. In this context, the Court first assumed and then continued to exercise a strong "policing" function. Second, the scope of Congress's power to regulate commerce, as defined by the Court, remained very narrow for over a century, until various events precipitated a major interpretive shift. In this context, the federal government's "shaping" function was strictly constrained for more than thirty years.

These same dimensions are vital parts of today's world trading system: (1) the trend toward globalization of economic processes is greatly facilitated by a legal system that keeps the channels of commerce free from WTO-inconsistent regulatory impediments and (2) the consensus on what properly comes within the scope of regulation of commerce is still very limited. In short, the world trading system is grappling with questions of whether its rules should reach issues such as the regulation of labor markets and effective enforcement of competition laws and environmental standards, just as the U.S. government grappled with similar issues a century ago.

70.  See United States v. Darby, 312 U.S. 100, 115 (1941).
III. CONCLUSIONS FROM THE U.S. EXPERIENCE: STRENGTHS AND WEAKNESSES OF THE HISTORICAL ANALOGY

The next question is: What are the strengths or weaknesses of using the U.S. experience as a tool to understand and deal with the imbalance in world trading rules today?

In the United States, the legislative solution to the policing-shaping imbalance was predicated on key features of the U.S. legal and political system, as well as on economic, social, and other characteristics of the United States as a country. In particular, the Constitution provided a textual basis for a legislative solution by vesting power to regulate commerce in a federal legislature. Strong democratic institutions provided political legitimacy to that solution. If the people felt that Congress was going too far in its regulation of commerce, they could always express their opposition freely and ultimately elect more restrained legislators.\(^7\) And, relative homogeneity made a federal legislative solution practicable; that is, common rules could be implemented with relative ease across the country.

By contrast, the structural features that characterize the world trading system today are different in at least five significant respects. First, the WTO today is a far more limited institution than was the U.S. Government, even a century ago. The world trading system has no Commerce Clause. Indeed, it has no legislature. It has “laws” in the form of the agreements of the WTO and a “court” in the form of the panels and the Appellate Body operating under the Dispute Settlement Understanding. However, those elements do not comprise a “government” in the usual meaning of that term. The WTO’s jurisdiction is limited to the areas that have been negotiated since 1947. It makes law only rarely, when consensus can be achieved among its 140 members. It has no power to force compliance with its decisions; it is in large measure the long-term interest of its members in the integrity of the system that results in compliance.

Second, there is substantial diversity among the 140 members. This group of countries represents the full spectrum of

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73. As the Supreme Court stated in its very first Commerce Clause case, “The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are . . . the sole restraints” on its exercise of the power to regulate commerce. Gibbons 22 U.S. at 197.
economic development. Political, legal, and cultural institutions also vary widely from country to country. The degree of diversity suggests certain limits on the ability to use negotiation to bring about a better balance between policing and shaping.

A third key feature of the WTO system is its relative newness. The modern regime of rules-based trade, with quasi-judicial, binding dispute settlement at its core, is only six years old. The youth of the WTO's institutions presents both opportunities and challenges. The WTO—particularly, its dispute settlement system—is not burdened with decades of entrenched practices and, therefore, may in principle be able to respond to the evolving needs of the system. At the same time, these institutions are in the process of building their legitimacy and, therefore, are still relatively weak.

A fourth feature is the multiplicity of forums for developing rules. In addition to the WTO, there are regional arrangements, such as the Asia Pacific Economic Cooperation forum; free trade agreements, such as the North American Free Trade Agreement; customs unions, such as Mercosur; bilateral agreements, such as the recently completed agreement between the United States and Vietnam; and preferential trade arrangements, under the Generalized System of Preferences and similar laws.

These multiple arrangements offer the possibility of addressing in smaller contexts newer issues or problems as to which broad international consensus has not been reached. For example, in the 1980s, the United States was able to press for the development of international rules protecting intellectual property rights utilizing U.S. law, bilateral agreements, and even-

tually the NAFTA, before finally concluding the Agreement on Trade-Related Aspects of Intellectual Property Rights\(^7\) ("TRIPs") in the WTO. Similarly, today, areas such as the intersection between trade and labor standards, competition policy, investment issues, and the intersection between trade and environmental regulation may usefully be pursued in these narrower contexts.

A fifth dimension is the relatively high degree of influence that larger trading countries—the United States, the European Union, Japan, Canada, and a handful of other countries—can have on shaping global trade rules. The leverage these countries have derives largely from the heavy reliance of other countries on access to their markets. As the example of intellectual property rights makes clear, these larger trading countries can have more of an opportunity to influence the agenda and, to a degree, the outcome of negotiations.

In sum, the world trading system faces an imbalance between policing and shaping very similar to the imbalance faced by the United States a century ago. But the structure of the world trading system is fundamentally different from the structure of the U.S. government in ways that make the solution achieved in the United States of limited relevance as a model.

IV. TOOLS FOR ACHIEVING A BETTER BALANCE IN THE WORLD TRADING SYSTEM

Bearing in mind the key structural features discussed above, we now explore three options that may be available to the world trading system for bringing about a better balance between policing and shaping (1) amendment or elaboration of WTO rules, (2) operation of WTO dispute settlement, and (3) utilization of mechanisms outside the WTO. These are not necessarily the only channels for change. However, they provide good illustrations of the possibilities in this area.

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A. Multilateral Decision Making

The WTO Agreement provides two formal mechanisms for changing or clarifying WTO rules: (1) interpretations of the WTO agreements and (2) amendment of the WTO agreements. In both cases, the ordinary practice is for decisions to be made by consensus.\(^8\)

Interpretations may be made by either the Ministerial Conference or the General Council of the WTO, both of which are comprised of representatives of all WTO members.\(^8\) The Ministerial Conference, which convenes at least once every two years, is the primary decision making body of the WTO. The General Council carries out the functions of the Ministerial Conference in the intervals between meetings of the Conference.\(^8\) If there is a failure of consensus within the Ministerial Conference or General Council, then interpretations may be adopted by a three-fourths majority of the members.\(^8\)

The amendment process is more complicated.\(^8\) A preliminary decision on whether to submit an amendment to WTO members must be made in the first instance by the Ministerial Conference. This decision ordinarily must be made by consensus, but may be made by a two-thirds majority if consensus is not reached within ninety days of the formal proposal of an amendment.\(^8\) The rules governing adoption of amendments vary depending on the nature of the amendment, with some requiring consensus,\(^8\) while others require only a two-thirds majority.\(^8\)

At least one thing is clear about WTO interpretations and amendments: they are not designed to be taken regularly or

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8. See WTO Agreement arts. IX(1) (interpretation), X(1) (amendment).
81. Id. art. IV(1).
82. Id. art. IV(2). For the General Council to act on a formal interpretation, that interpretation must be recommended by the Council on Trade in Goods, the Council on Trade in Services or the TRIPs Council (each of which follows the practice of consensus decision making).
83. Id.
84. While the hurdles to consideration of interpretations are slightly lower, the scope of what can be accomplished through interpretations is also more limited. The Agreement Establishing the WTO expressly provides that the interpretation process "shall not be used in a manner that would undermine the amendment provisions in Article X." WTO Agreement art. IX(2).
85. Id. art. X(1).
86. Id. art. X(2).
87. Amendments adopted by two-thirds majority apply to only those members that accept them if those amendments alter WTO rights and obligations. Id. art. X(3),(4).
readily. In fact, there has not been a single interpretation or amendment adopted since the WTO came into effect in 1995, and there were only six amendments (the last in 1965) in the previous forty-eight years of GATT.\textsuperscript{88} Moreover, the interpretation or amendment process—particularly, achieving a consensus—is only likely to become more difficult as the number of WTO members grows.

As a result, for the foreseeable future, changes to WTO rules are likely to continue to be made almost exclusively in the context of negotiations involving a defined variety of areas of interest to all members. As the Tokyo and Uruguay Rounds illustrated, such negotiations can take more than five years to complete.\textsuperscript{89}

B. Dispute Settlement

A second channel for adjusting the balance between the shaping and policing functions is through decisions of WTO dispute settlement panels and the Appellate Body. In this area, the opportunity is not in the creation of new rules to shape the globalization process, but rather in the application of existing rules that already provide at least a few general guideposts that incorporate considerations that may or may not, strictly speaking, be commercial.

To understand this opportunity, recall that in Part I, we defined the "shaping" function as having two basic dimensions: (1) deference to "legitimate" national laws (i.e., laws that are not merely pretexts for protection of national markets), notwithstanding their potential to diminish the free flow of commerce and (2) articulation and enforcement of common standards among sovereign states, recognizing that the pursuit of such standards may impose a slight burden on the flow of trade.

In this regard, there are several ways under current WTO rules for panels and the Appellate Body to affect the first dimension of the shaping function. One obvious way is through application of the exceptions provided at Article XX of the GATT. Article XX permits parties to derogate from other GATT provi-
sions to enforce certain measures, including for the protection of "human, animal or plant life or health,"\textsuperscript{90} in relation to "products of prison labour,"\textsuperscript{91} or in relation to "conservation of exhaustible natural resources."\textsuperscript{92}

However, as is apparent, the Article XX exceptions cover a limited number of policy areas. As Professor Frieder Roessler observes, "[T]here are far more legitimate policy goals that can only be attained by distinguishing between different product categories. For instance, policies designed to harmonize technical standards, to avoid the accumulation of waste, or to tax the consumption of luxury goods are not among the policies covered by the exemptions in Article XX."\textsuperscript{93}

In addition to Article XX, there is a second way for panels and the Appellate Body to incorporate a consideration of valid non-commercial policy objectives into their decisions. To illustrate this point, we use the example of panel determinations of whether national laws, regulations, or other measures are inconsistent with the national treatment provisions of a WTO agreement. The core national treatment obligation, in agreements such as the GATT, the General Agreement on Trade in Services \textsuperscript{94} ("GATS"), and TRIPs, requires that WTO members accord to imported products or services treatment "no less favorable" than that accorded to "like" domestic products or services.

For more than a decade, the key issue for panels applying the national treatment obligation has been national laws that do not on their face discriminate against imported goods or services.\textsuperscript{95} It is in this context—i.e., cases involving facially neutral

\textsuperscript{90} GATT art. XX(b).
\textsuperscript{91} Id. art. XX(e).
\textsuperscript{92} Id. art. XX(g), which provides in full that measures must be "relating to conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." A measure that meets any one of the Article XX tests must also meet the general Article XX requirements that "(a) it not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and (b) it not be a disguised restriction on international trade."


\textsuperscript{94} General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 28, 33 I.L.M. 1168 (1994) [hereinafter GATS].

\textsuperscript{95} See, e.g., United States—Measures Affecting Alcoholic and Malt Beverages, Panel Re-
measures—that panels have begun to take into account the policy purposes (as well as effects) of such measures.\footnote{96} Consideration of regulatory objects and effects can arise under different parts of a panel's national treatment analysis, for example, in the (1) "like products or services" analysis or (2) "no less favorable treatment" analysis. For example, the purpose behind a regulation that accords different treatment to two products alleged to be "like products" could influence a panel's determination of that issue. As a consequence, a distinction based on legitimate policy could favor a determination that the products distinguished are not like products, and that, therefore, there is no violation. In taking into account objects and effects in applying the texts of the agreements themselves, panels necessarily shape the development of international trading rules.

To illustrate how this jurisprudence has developed, we offer three examples. In \textit{United States—Measures Affecting Alcoholic and Malt Beverages},\footnote{97} the Government of Canada challenged numerous U.S. state laws that it claimed had a disproportionate impact on its exports to the United States. With respect to two particular state statutes, Canada presented strong evidence that each provision had a disproportionate (and negative) impact on its exports. The first related to a Mississippi provision that applied a lower rate of taxation on wine made from a certain variety of grape.\footnote{98} The panel rejected the U.S. argument that the Mississippi grapes were not "like" other grapes and found that the regulation violated the United States' national treatment obligations under Article III of GATT. The panel noted that the preferential treatment of wine made from grapes grown in a very limited area of North America was a "rather exceptional basis for a tax distinction" and afforded "protection to local production


\footnote{97. \textit{Id.}}
\footnote{98. \textit{Id.} at paras. 5.23-26.}
of wine.” In a revealing comment, the panel added that “the United States did not claim any public policy purpose for this Mississippi tax provision other than to subsidize small local producers.”

By contrast, the panel affirmed the second provision, a Colorado state law that restricted the distribution of beer with an alcohol content greater than 3.2% by weight. The panel did not take issue with Canada’s contention that Colorado’s discrimination against beer with a higher alcoholic content disproportionately disadvantaged its exports relative to competing U.S. products. However, the panel declined to find against the Colorado law, holding that, for these purposes, beer with high alcohol content was not “like” beer with low alcohol content. The gist of the panel’s reasoning was that the distinction was based on valid public policy grounds:

In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties. . . . On the basis of the evidence submitted, the Panel noted that the relevant laws were passed against the background of the Temperance movement in the United States. . . . [Moreover,] both the statements of the parties and the legislative history suggest that the alcohol content of beer has not been singled out as a means of favouring domestic producers over foreign producers.

This form of analysis reached its fullest exposition in 1994, in United States—Taxes on Automobiles. Since then, however, the WTO Appellate Body has issued decisions that have been construed as limitations on the extent to which the public policy purpose and effects of a statute may be taken into account in evaluating its WTO-consistency (e.g., in analyzing whether the foreign and domestic goods being compared are “like products”). The parameters of this Essay do not permit a detailed

99. Id. at para. 5.26.
100. Id.
101. Id. at para 5.70.
102. Id. at para 5.74.
parsing of the relevant Appellate Body decisions in this regard.\(^\text{105}\) However, our view is that those decisions do not shut the door on an appropriate evaluation of the public policy purpose of facially-neutral legislation in the consideration of its WTO-consistency. We are not alone in holding this view. Professor Robert Hudec agrees that the more flexible approach to this vital area of dispute settlement is likely to live on, albeit not as an express element of panels' analyses.\(^\text{106}\) Indeed, if Professor Hudec and we were proved to be wrong, and Appellate Body decisions were seen to preclude an evaluation in some way of the public policy purposes of facially-neutral legislation, WTO panels would be deprived of the authority to exercise reasoned judgment.

The development of national treatment jurisprudence in facially neutral cases has been the subject of extensive scholarly discourse and debate.\(^\text{107}\) Our purpose here is not to contribute an additional in-depth analysis of the relevant case law and principles. Rather, it is to highlight that this area provides an additional channel for panels to apply the first dimension of the shaping function: namely, deferring to national regulations in appropriate circumstances. Panels can do so by taking into account, in the words of Professor Hudec, whether a measure has "a bona fide regulatory purpose and whether [its] effect on conditions of competition is protective."\(^\text{108}\)

If panels exercise sound judgment in this fashion—based on sound jurisprudence, using the text and interpretative history of the relevant WTO agreement—they can advance the shaping process in a way that may begin to adjust the balance between policing and shaping. As Hudec concludes: "So long as the tribunal gets it right most of the time—that is, decides its cases


\(^{106}\) See Robert E. Hudec, GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test, 32 Int'l L., 619, 634 (1998); see also id. at 635 (Appellate Body's apparent rejection of aim and effects approach "does not mean, however, that the "aim and effects" approach has been exterminated. It simply means that it will remain under ground.").


\(^{108}\) See Hudec, supra note 106, at 627.
according to the larger community's perception of right and wrong behavior—the decisions tend to be accepted, and in an opaque sort of way they even succeed in guiding conduct toward the proper goals.\textsuperscript{109}

C. Mechanisms Outside the WTO

A third way to affect the balance between policing and shaping is for countries to use a variety of forums outside the WTO, including regional arrangements, bilateral agreements, and preferential trade arrangements.\textsuperscript{110} Over the past two years, the United States has used several new initiatives outside the WTO to bring the issue of labor standards into the trade agenda. For example, in January 1999, the United States entered into an agreement with Cambodia establishing a quota on textile and apparel products that the United States would import from Cambodia. The agreement contained a novel escalator clause, whereby the quota would be increased if, in December 1999, the United States determined that Cambodia was in "substantial compliance" with Cambodia's own laws embodying international core labor standards.

As it turned out, Cambodia did make significant progress by November, but not enough to support a finding of "substantial compliance."\textsuperscript{111} Under a strict reading of the agreement, it was an all-or-nothing deal. But, the United States recognized that Cambodia's progress should not go unrewarded. Therefore, in May 2000, in exchange for certain commitments on further progress, the United States granted Cambodia a partial expansion of its quota.\textsuperscript{112} The May commitments included continuous monitoring by the International Labor Organization ("ILO"). Subsequently, the United States identified additional labor-related

\textsuperscript{109} Id. at 634.

\textsuperscript{110} WTO rules permit certain special relationships to develop among subsets of members. For example, Article XXIV of GATT permits parties to enter into free trade agreements, provided that (with certain limited exceptions) duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories. A similar provision with respect to services is contained in Article V of the GATS. Also, developed country members have obtained waivers to provide special preferences to developing countries. See Decision of 28 November 1979 on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries.

\textsuperscript{111} 64 Fed. Reg. 70217 (Dec. 16, 1999).

\textsuperscript{112} 65 Fed. Reg. 30571 (May 12, 2000).
benchmarks and, in September 2000, granted an additional quota increase, in recognition of progress toward meeting those benchmarks.113

The Cambodia case is remarkable in several respects. First, while WTO members were quarreling over the premise that there is an inherent link between trade and labor issues, the two parties to this agreement effectively acknowledged that there is such a link. Second, they did so in a way that was trade-enhancing, rather than trade-restricting. The motivation for Cambodia to improve worker rights protection was an expansion of quota in case of success, not a reduction of quota in case of failure. Thus, the agreement serves as a retort to those who claim that the goal of those who point out connections between trade and labor standards is rank "protectionism." Third, while countries were arguing over how the WTO and the ILO might be brought together to work on trade-and-labor matters, the United States and Cambodia developed at least one working model for bringing the ILO into this area. The two countries harnessed the labor expertise and resources of that organization to help monitor Cambodia's implementation of its obligations under its agreement with the United States.

A second example is the recently signed free trade agreement between the United States and Jordan.114 As in the case of the Cambodia agreement, this bilateral setting presented an opportunity to address the nexus between trade and labor standards (as well as the linkage between trade and environmental regulation) that had proved intractable at the November 1999 WTO Ministerial. In the agreement's preamble, the parties express their mutual desire to promote higher labor standards and effective enforcement of labor law. In the body of the agreement, each party undertakes that it will "not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."115 And, by operation of the agreement's dispute settlement provi-


114. See Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area art. 6.4(a).

115. Id.
sions (Article 17), that commitment will be enforceable through the same mechanism as other parts of the agreement.

A third illustration is the operation of preferential trade programs. Under its Generalized System of Preferences\(^\text{116}\) ("GSP"), the United States provides duty-free treatment to certain imports from qualifying developing countries. In the case of certain groups of countries (sub-Saharan Africa, the Caribbean Basin and Central America, and the Andean countries), the United States provides additional trade preferences (i.e., duty-free treatment for categories of goods not covered by GSP and relaxation of quantitative restrictions that ordinarily would apply to certain goods).\(^\text{117}\)

Each of the preferential trade programs contains a list of criteria that must be evaluated before the President designates a country for beneficiary status. These include factors such as level of development, extent of protection of intellectual property rights, extent of market access for U.S. goods and services, and (since 1984) steps to accord core internationally recognized worker rights. The same criteria apply in determining whether a country's benefits should be limited, suspended, or withdrawn.

In 2000, the United States expanded benefits under the Caribbean Basin trade preference program.\(^\text{118}\) In doing so, Congress strengthened the eligibility criteria relating to worker rights in several key respects.\(^\text{119}\) In fact, in making its initial designation of countries eligible for the expanded benefits, the Administration took this higher standard seriously and even granted certain countries eligibility on a probationary basis.\(^\text{120}\)

\(^\text{119}\) For example, the new law required a higher standard to evaluate whether core rights were being adequately protected and included an additional element relating to the worst forms of child labor, which countries committed to eradicate in ILO Convention 182. See Worst Forms of Child Labour Convention, U.N. ESCOR, 56th Sess., Annex, Agenda Item 10, U.N. Doc. E/CN.4/2000/51, para. 4 (2000) [hereinafter Convention No. 182].
\(^\text{120}\) See Office of the United States Trade Representative, USTR Announces AGOA/CBI Country Designations, Release No. 00-67 (Oct. 2, 2000) ("Guatemala, El Salvador, Honduras and Nicaragua will be subject to further review or monitoring with respect to worker rights issues.")
As in the Cambodia and Jordan agreements, the United States used the expansion of trade preferences to the Caribbean Basin countries as an opportunity to shape trade as it expanded trade. Each of these cases illustrates the possibility of accomplishing outside the WTO objectives that may not be achievable on a worldwide basis in the short term. These mechanisms are important both in and of themselves and in their capacity to cultivate broader support for shaping trade as well as policing and expanding trade.

In fact, there is specific precedent for initiatives begun on a unilateral or bilateral basis percolating up to the multilateral level. This, in essence, is the story of TRIPs, as noted above.

TRIPs offers a model for articulating and enforcing rules in small settings and then broadening on that experience in increasingly larger settings. We expect that this model will be followed in other areas, particularly in view of the structural limitations on shaping trade through the WTO. The recent efforts on trade and labor seem to bear this out. If the United States continues to make that issue a priority in future bilateral and regional trade arrangements, it may eventually become a part of the multilateral agenda in the way that intellectual property did.

CONCLUSION

A. Summary of Argument

In this Essay, we have tried to explore the key dimensions of what appears to be a growing dilemma for the world trading system. The economy has taken on global dimensions, but regulation of the economy is still largely the province of sovereign states. To the extent that states have agreed to put in place an enforceable rules-based regime through creation of the WTO, the rules are seen as encouraging rather than shaping economic globalization. In short, there is a growing sense of imbalance between the policing function and the shaping function of rules-based world trade.

To underscore the significance of this imbalance we reviewed the history of the analogous situation in the United States in the early twentieth century. While the context was different in several respects, the concept was the same. The country was trying to grapple with the realization that the national economy had become truly national, but regulation of the economy was
still largely a state-based matter. To the extent that the federal government was involved in regulation of the economy, it was through the Supreme Court's invocation of the dormant Commerce Clause as a mechanism for keeping the channels of commerce unfettered. The sense of imbalance between policing of commerce and shaping of commerce drove the Progressive Movement and eventually led to a sea change in the role of the federal legislature in shaping commerce.

The lesson we take from the historical analogy is that an imbalance between policing and shaping of commerce within an integrated economic system puts pressure on the system. The more stark the imbalance and the longer it lasts, the greater the pressure will be. Eventually, the pressure can bring the system to a point of crisis. For the system to endure, there must be outlets for this pressure that can bring about an adjustment in the balance between policing and shaping.

In the United States, the principal outlet was an expansion of active regulation of interstate commerce by the federal legislature. An updated interpretation of the constitutional power to "regulate commerce" was supplied by the Supreme Court, which affirmed Congress's role under the Constitution to regulate interstate commerce, including by passing laws affecting everything from workplace safety, to protection of the environment, to civil rights.

The world trading system does not have a legislature endowed with the power to regulate commerce. But there is at least the potential that a variety of mechanisms can be used to adjust the balance between policing and shaping. In particular, we see potentially important roles for the WTO dispute settlement mechanism and for the web of trade arrangements that WTO members are building outside the WTO. WTO dispute settlement can mediate the inherent tension between free-flowing commerce and national autonomy. How it does that may alleviate concerns by some that rules-based trade is only about making the world safe for multinational corporations. Meanwhile, trade arrangements outside the WTO can be used to articulate and implement norms that are not easily introduced in a worldwide setting in the first instance.

It is vital that the United States and other players in the world trading system understand the role that these tools can
play in adjusting the balance between policing and shaping. If they do, they may well be able to avoid an eventual crisis of legitimacy in the world trading system.

B. Final Thoughts

In closing, we would like to address two concerns that some may have with the thoughts and proposals discussed in this Essay.

First, there is clearly a concern among some that addressing regulatory issues such as labor and environmental standards could lead to an unraveling of the progress the GATT and the WTO have achieved to expand international trade and promote economic growth around the world. Put another way, the question is whether rectifying the imbalance between the policing and shaping functions of international trading rules will lead to a significant weakening of the policing function. Those who hold these concerns often assert that addressing non-commercial issues in some manner in a "trade" context will put us on a slippery slope of trade de-liberalization. They point out that some who seek to address labor standards, environmental regulation, and other similar matters may be using these issues as stalking horses for blocking trade liberalization or even rolling back the clock.

These are valid questions and merit serious answers. On the subject of whether rectifying the current imbalance would risk putting the world trading system on a slippery slope, we offer two points. First, the example of the Progressive Era in the United States should provide a substantial measure of comfort. There, the result of strengthening the ability to shape the rules of commerce was not the atomization or dismantling of the national economy that had been cemented through the Supreme Court's application of the dormant Commerce Clause or the rollback of industrialization. To the contrary, finding appropriate ways to regulate trusts, provide health and safety and other standards for workers and consumers, strengthening environmental regulation, and enforcing civil rights have served only to strengthen the U.S. economy—to say nothing of the benefits these steps have generated for American society.

A second point in response to the slippery slope concern is that, to the extent there is a slippery slope, the GATT system has
been on that slope from the start. The fundamental national treatment principle of the GATT (Article III), and the enumerated exceptions that may be invoked to justify deviation from GATT Principles (Article XX), among other provisions, by their express language and interpretative histories, enable a consideration of public policy purposes in the determination of whether a measure violates the GATT. The issue is not whether these considerations should enter into the equation, but how.

With respect to the question of the motives of some of those who seek inclusion of labor and environmental issues on the trade agenda, our response is that it is always possible to question the motives of some who hold a particular position. That is not the key point. The key question is whether answers can be found to tensions in the trading system that even its most ardent advocates recognize.

Second, some may ask: why focus on U.S. history exclusively in addressing issues that confront an international trading system of which the United States is only one member? Isn't the history of other countries also relevant? Our answer is: of course. In fact, we hope that this Essay will prompt others to offer additional constructive proposals—including ones based on the history of other countries—for how best to advance global trading rules at this critical time. Just as the disparities in levels of economic development, culture and other variables are challenges for the world trading system, so the diversity of tradition and sources of knowledge and wisdom are a key strength.

As the philosopher George Santayana wrote: "Those who forget the past are doomed to repeat it." We have no choice but to remember and then to use any historical analogy (including the one offered here) with analytical rigor and care.

In regard to the Progressive Era in the United States, there are important benefits that can be gained by examining its lessons. First, policy makers in the United States must continue to address our own issues with respect to U.S. goals for the world trading system. To that extent, our own history, of course, speaks with particular force. For other countries and the world, we hope that the example of the Progressive Era will illustrate that the kinds of tensions currently confronting the world trading system have arisen in other contexts and have been addressed successfully.
Some have suggested that the United States is now at a stage of development at which it can afford to have and act upon concerns related to labor standards—and that the United States should allow other countries to go through the same maturing process as it did over the last century. The response to that concern is that the process of accelerating the shaping of trade rules should not—and need not—deny to any developing country a comparative advantage. With that in mind, if one group of countries has learned from an historical experience in a way that can benefit other countries without their having to reinvent the wheel, it seems to us that there is no reason not to learn from and apply that experience. As President Clinton stated in remarks at the 2000 World Economic Forum, addressing the same historical parallels we have discussed in this Essay: "The answer is to look [at] what happened in the transition from the agricultural economy to the industrial economy, develop a twenty-first century version of that, and get it done much, much faster—not to run to the past, but not to deny the present."\textsuperscript{121}

In short, the imperative for all those who care about the world trading system and seek to improve it is to have an honest dialogue about its shortcomings and advance creative and constructive proposals to overcome them. To achieve the dialogue and make meaningful changes, we must all be willing and able to put aside preconceptions, pride and fears and get on with the task of making improvements.

At the end of \textit{Patton}, the general is pictured alone with his bull terrier, walking off into a field near allied headquarters. It is after the German surrender and General Eisenhower has just relieved Patton of his command of the U.S. Third Army. Again turning to history, Patton recalls a tradition of Roman conquerors:

For more than a thousand years, Roman conquerors returning from the wars enjoyed the honor of a triumph: a tumultuous parade. In the procession came trumpeters and musicians and strange animals from the conquered territories, together with carts laden with treasure and captured armaments. The conqueror rode in a triumphal chariot. . . .

\textsuperscript{121} President William Clinton, Remarks at World Economic Forum, Davos, Switzerland (Jan. 29, 2000).
A slave stood behind the conqueror holding a golden crown, whispering in his ear a warning—that all glory is fleeting.

The GATT/WTO system has achieved much in its first half-century. Much more remains to be done. This is no time to dwell defensively on the system’s accomplishments as an excuse to not moving ahead aggressively to address its shortcomings. Rather, we should articulate the important benefits that trade liberalization has brought, then roll up our sleeves and undertake the improvements necessary to make the system even stronger for the next fifty years.