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RECEIVING THE INTERNATIONAL

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I. AN INTUITION: INTERNATIONALIZATION STRENGTHENS THE PRIVATE  
AND THE TECHNOCRATIC

Let me begin by thanking the University of Connecticut School of Law for the honor to deliver the first Elihu Burritt Lecture in International Law. I would like to use this opportunity to reflect on a commonplace in current discussions about government, politics and law: namely, that things are becoming more and more international in ways that will change both public law and political culture.

For some, this internationalization is exciting: new opportunities, new technologies, an escape from all the rigidities and disappointments of local politics. Others see internationalization more as something to be gotten used to; a necessary, if unfortunate fact of contemporary political life.

“Things are getting more international” — we might start with some rather obvious observations about this way of thinking. In the first place, internationalization is commonly treated as a fact; an inevitable, ineluctable fact. It is seen, moreover, as a general phenomenon — a broad pro-

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cess which springs from what seem almost natural developments in technology and the worlds of commerce and finance.

At the same time, and perhaps most significantly, internationalization seems to facilitate more than a simple shift in the jurisdictional level at which government or politics or legal regulation is conducted. For the thrilled as for the wary, internationalization promises a change in how things are governed.

Perhaps government or politics or law will no longer seem as comfortable or predictable in the bracing international wind. Perhaps the international regulatory environment will seem less Byzantine, more rational, easier to assess. It is common to feel that as ever broader dimensions of public life come to be discussed in international terms, the terms of the discussion will become narrower and more technocratic.

I am particularly interested in the rather widespread perception (common in left, populist or progressive circles) that the international is somehow skewed against progressive politics, as if some sorts of politics — consumer protection, social policy, environmental regulation — were only possible at the national level or required a form of state and sovereignty which, tragically, the new international order cannot provide; or maybe as if the whole realm of international government — the GATT, the European Union, Brussels, New York, Geneva — had somehow fallen inescapably into the hands of the right.

I should say that, in my experience, the pressures and promises of an inescapable internationalization are felt in both large and small nations — as much by the new or smaller members of the European Union (EU) as by the United States, as much by the developed as by the developing world. It is also true, of course, that the idea that politics will be or is being transformed by internationalization is hardly new — it has been ubiquitous in political rhetoric for at least a century. If we leave some utopian socialists and progressives aside, moreover, internationalization has always had the same general valence — somehow the potential for social regulation, for progressive politics, will be reduced.

Of course, one also hears enthusiasm for internationalization in progressive circles, particularly when they feel stymied by conservative nationalism on the local or national front — at least the international will bring with it the liberal or libertarian spirit of commerce. In their most idealistic moments it may even seem possible to rebuild internationally the welfare state being dismantled at home. If “all politics is local,” the international promises an escape from politics. Or perhaps, the international is simply a new locality, beckoning a politics more rational, egalitarian,

civilized — more liberal, in short. Still, even this hope seems structurally limited — what we can hope for internationally will, it seems, inevitably be less than we have grown accustomed to at home, at best a lowest common denominator of public aspiration, a liberalism of the nineteenth century: secular, pluralist, tolerant, mercantile rather than regulatory or redistributive.

Whether the left is hopeful about the liberal commercial spirit or anxious about the fate of social regulation outside the national context, however, the basic idea is similar — the inevitable and general move to the international will automatically transform political life in a general way, aligning it more closely with the “needs” of international commercial activity.

In this conception, internationalization means, in short, a move from public to private. The state will be weaker and commerce will be strengthened. This is the idea that I would like to explore here today.

This internationalization seems to have two unavoidable consequences for political thought. First, we will have to lower our expectations about what public authorities — any public authority — can accomplish. We will have to accept the limitations imposed on regulatory initiatives by the larger, more forceful, inescapable operations of the international market which wear away at sovereignty like waves at yesterday’s sandcastles.

In this view, trade dilutes the capacity to regulate, perhaps by placing regulators in a market of their own, competing for the favors of fickle financiers. This suggests a strategy for the left: to carve out from the international islands of local sovereignty, regulatory oases for the public interest in the harshly commercial international market.

Second, political cultures, which seem local, will somehow have to receive, adapt to, and adopt the international. Politics will itself have to internationalize, seek in Brussels what can no longer be guaranteed in Rome - in the General Agreement on Tariffs and Trade (GATT) what can no longer be bargained by “social partners” in a national parliament. In this view, for example, the protections of a familiar national labor law regime must be won again in the European Union or the GATT. This view also suggests a strategy for the left: to pursue a progressive agenda at the supranational level.

Both of these strategies are familiar. Indeed, these ideas are the same whether we listen to a speech on the floor of the U.S. Senate about the North American Free Trade Agreement (NAFTA) or GATT, or speak to an environmentalist or labor activist in Madrid, Vienna, or Budapest

about the European Union.

The conflicts between these two general strategies often define debate on the left. We repeatedly find what is treated as a defining choice between embrace and opposition to the international — protection and internationalization — whether in debate about Maastricht, about European Free Trade Agreement (EFTA) membership in the European Union, about NAFTA or about the role of national or regional autonomy in development.

And there is, of course, an analog on the right: to whip the left between the poles of protectionism and abandonment of sovereignty, between refusing the fact of globalization and enthusiasm for international government.

The relationship between these rhetorical poles, moreover, is not equal. To the extent internationalization seems inevitable and general, those who embrace it seem modern, reasonable, realistic, and pragmatic, while those who do not seem nostalgic, rigid, radical. But it is not just the strategy of the oasis which seems weak. At the supranational level, the public interest seems doomed to settle for less, given the weakness of international public law, the apparent harmony of commercial interests with internationalization and the lowest-common-denominator quality of much harmonized regulation. At its most extreme, thinking about internationalization in terms of these two strategies can leave the left divided and demoralized, arguing in both cases for a return to state power, nationally or internationally, as the state comes to seem ever more an anachronism.

I should say that I do not share the common sense notion that the internationalization of public policy is inevitable. We are as familiar, after all, with general analyses of modernity which tilt as firmly in the opposite direction; society is fragmenting, people work at home, the family is falling apart, all politics is local. Nor do I feel that a shift in the *level* at which policy is made will inexorably alter its political content. It does not seem to me that the international policy regime suffers from a *general* political weakness or is, as a *general* matter, necessarily more technocratic or attuned to the “interests of business” than any other governmental unit. I am skeptical about claims that internationalization brings with it a general transfer of power from public to private authorities.

In fact, it seems the redistributive consequences of *particular* regulatory initiatives, internationally as well as locally, are notoriously difficult to assess or predict, and very little can be said *a priori* about political or legal initiatives simply on the basis of the *level* of government involved.

The shifting and fragmented interests of those participating and affected by exercises of state power routinely complicate and confound our assessment of their efficacy, especially when we try to compare gross aggregations like "national" and "international" regulation. At the same time, our expectations about the autonomy of public authority and the efficiency of its law as an instrument of social policy has been eroded both nationally and internationally. You often get the opposite of what you bargained for, principles and rules often seem indeterminate in application, we routinely experience a gap between statutes and social life, and so forth.

Still, the intuition that internationalization will enhance the *private* at the expense of the *public*, commerce at the expense of the state, remains strong. This afternoon, I would like to explore some possible, if unsatisfactory, explanations for that intuition.

## II. THE INTERNATIONAL WEAKENS THE PUBLIC AND THE POLITICAL? THREE EXPLANATIONS AND THREE REGIMES

A first possible explanation for the feeling that politics will be transformed by internationalization might focus simply on who is likely to be involved. Perhaps those involved in *international* affairs just turn out to be, in Anglo-American terms more "conservative" or in European terms, more "liberal" than national or local politicians. Perhaps those involved with "business" are more likely to have been interested in and captured the international regime, grass roots organizations finding it more difficult to play the cosmopolitan game.

This would, of course, come as a surprise to Margaret Thatcher, for whom the problem is more that everyone in the international is a socialist. It echoes a familiar prejudice — nativist left and cosmopolitan right — which is as well known, and as difficult to pin down, in reverse — a nationalist right and a cosmopolitan left. We know that just as it is often difficult for local interest groups to out lobby the multinationals in Brussels, it is often easier to work in a focused federal or international environment than to outspend the right on the machinery of local organizing.

My sense, moreover, is that when people talk about internationalization, they have in mind something more than an accident of personnel; something structural, something in the way politics is organized which will move it towards the private or the technocratic. Such a structural change might, of course, attract technocrats and politicians of a particular sort to Brussels or New York or Geneva, but it would not be simply that for the moment those towns had been captured by the parties of commerce.

It turns out, moreover, that most people in international political culture understand themselves to be what Americans would call "liberal": wanting an international public order, skeptical of market logic, critical of those not broad minded about national industrial policy or the participation of non-market economies in the international economic regime. These people turn out to be quite hopeful about a renewal of international politics, often by harnessing national institutions and courts to its spirit. If commerce is king internationally, it is a commerce that yearns for public order, a private interest which knows it needs the state.

A second possible explanation for the intuition that politics and public law will be transformed by internationalization, and will move from public to private interest, might focus on the inevitable erosion of something called "sovereignty." With sovereignty, in some general way, goes both an antiquated formalism about public life and our most well developed mechanisms for public choice or the regulation of private commercial behavior.

In this view, sovereignty establishes states as public subjects, concentrating public will in a single voice, absolute within its delimited sphere and formally equal in its relations with other sovereigns. This is the sovereignty which divides international from national competence and public from private action; which establishes the formal consent of governments as the sole basis for legitimate international institutional or normative activity and the will of the sovereign as the basis for public "intervention" in the market. By eroding sovereignty, internationalization will eliminate both the unitary locus for regulation and the formal jurisdictional boundaries necessary for a vigorous public law.

This way of putting it is appealing both to those who want to stem the tide ("not one inch of British sovereignty") and to those who celebrate the international as finally putting an end to the unhappy life of the nation state. But this so-long-sovereignty song is only so appealing.

It is not fully satisfying partly because analysts of law and government have been relentlessly hostile to this set of ideas about "sovereignty" at the national and international level throughout the modern era. For a hundred years we have not had the idea that national public regulation of commerce required either a unitary site or formal jurisdictional boundaries. Two main convictions support this antiformalism about public law.

First, we have become convinced that, as a matter of fact, sovereignty in this sense is not a good description of what states or governments are actually like. For each modernist generation it has seemed that unitary sovereign states exercising power within formal jurisdictions are being

swept aside by technological, social and political developments which fragment political and legal authority in myriad ways and weave national political cultures into one another, uniting or blending civic and civil cultures.

Second, we have been antiformalists about public law sovereignty, nationally and internationally, because the conceptual apparatus necessary for a formal notion like "sovereignty" to perform all the miraculous functions attributed to it — delimiting jurisdictions, dividing national from international, and so on — is not available. In each generation, it has seemed that new theoretical insights, often from other disciplines, allow us to see, as if for the first time, that formal ideas about "sovereignty" and the "state" are illusions, linguistic misunderstandings, inconvenient superstitions or religious fantasies the secular pragmatist best sets to one side.

As a result, we might say sovereignty's death has already been quite adequately announced, without reducing the capacity for public regulation, indeed precisely as the welfare state has expanded. Even Hans Kelsen, that paragon of positivism, spoke of sovereignty in these terms in 1941:

The state as a power back of the law, as sustainer, creator, or source of the law, — all these expressions are only verbal doublings toward which our thinking and our language incline, such as the animistic presentations according to which "souls" inhabit things; dryads, trees, nymphs, springs; or, to give an example not only from the thinking of the primitives but also from that of civilized peoples, the concept of force in modern physics. . . . Again and again, the "state" that is sought back of the legal order proves to be the legal order itself, just as God, who is sought behind nature . . . can be conceived of only as this very nature itself.<sup>1</sup>

It would therefore be puzzling, even naive, were we, as sophisticated modernists late in the twentieth century, to explain our unease about internationalization as the loss of something called "sovereignty."

It would be doubly strange, in fact, because internationalization has also, in a sense, been carried out in the name of sovereignty. However much we love to hate sovereignty, it reappears in our dreams and desires,

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1. HANS KELSEN, *LAW AND PEACE IN INTERNATIONAL RELATIONS: THE OLIVER WENDELL HOLMES LECTURES, 1940-41*, at 69-74 (1942).

carrying the international governmental aspirations of each age; great projects of order, peace, security, liberation, peaceful change. Far from eroding the sovereignty of public law, internationalization has repeatedly posed as the public order sovereign's ultimate expression and all around best friend.

In the late nineteenth century, sovereignty *was* thought to formalize the boundary between international and national law, and between public and private, establishing a world of legally stable authorities absolute within their jurisdictions. Sovereignty permitted standardization of international law's unit of account: all states, objective territoriality, monopolies of force, localizations of force. Sovereignty as a leveler expressed the aspiration to equality and tolerance, as in the example famous for its improbability, Russia and Geneva, sovereigns equal in the eyes of the law.

After the First World War, rallying against what seemed an earlier international law wed to formalism, to abstraction, to moralism, to an old and discredited order of empire and power politics, the more energetic proponents of international order launched a campaign for a new international law. The cozy nineteenth century doctrinal world would thenceforth give way to the scorched earth positivism and clear jurisdictional boundaries of the Permanent Court of International Justice and the codifications of the 1920s. For the modern international lawyer of this period, sovereignty would permit the triumph of form over substance — an aspirational liberalism, cosmopolitan heritage of the Austro-Hungarian Empire. This would be the sovereignty of surfaces common to Freud and Kelsen. And on this basis would be built an international order of interchangeable state sovereign parts for which international law could become universal.

In the interwar period, state sovereignty was not the enemy of international order, system, or law, but its foundation. On sovereignty could be constructed a legislative method and a practice of codification, through the new doctrinal project of "sources" which preoccupied both the Permanent Court of International Justice and the academy of codifiers. On sovereignty could be constructed a procedural public order, a neutral jurisdictional grid, and with it a value-free international pluralism to replace the aspiration for substantive norms. At the same time, these moderns would tease from sovereignty a lexicon of substantive principles: territoriality, good faith, and perhaps most spectacularly, a law of force, refining the efficiency of force, cabining it within the boundaries of sovereignty — respectful of neutrals and noncombatant private citizens, efficient to sov-



ereign objectives. A toolkit of international policy mechanisms and institutions would also be launched in this period in sovereignty's name, from Upper Silesia to South West Africa.

After the Second World War, the international institutional regime fully absorbed the more open sovereignty of French sociological jurisprudence, British pragmatism and American realism, and perhaps also of socialism — national and otherwise. This would be a sovereignty of disaggregated rights to be pragmatically bundled, rearranged and balanced, a sovereignty of management. Sovereignty, like property, would be demystified, available to be parcelled out, rearranged by law, managed by lawyers, technocrats, and social engineers. The result would be an asymmetric world of multiple voices and authorities. The internationalization of this new sovereignty would provide a steady optic for international institutionalists, poised with the international for intervention in the local, and would be the basis for dozens of overlapping international regimes.

In a way, internationalization has always been announced as both the triumph of a *particular* vision of sovereignty, a *particular* conception of international government and law, and as sovereignty's last death rattle. As a consequence, a focus on "sovereignty" is not particularly helpful in understanding the relationship between internationalization and our political culture.

So what is going on? How does internationalisation seem to bring with it a reduction in public political potential and an increase in the technocratic? Why should we fear (or hope) that internationalization will inevitably strengthen the hands of business, commerce, the private?

A third possible explanation looks to the structure of the particular regimes in place internationally. Perhaps something in the regimes of international economic law (the GATT system) and public international law (the U.N. system), or in the relation *between* these regimes, privileges the private over the public or reduces politics to the technocratic.

As it turns out, each of these regimes, in its own way *does* seem to change the procedures and objectives of government, *does* seem ineluctably technocratic and part of an apparently inevitable process of internationalization. The relationship between these two regimes (Public International Law Weak / International Economic Law Strong) seems, at first glance, to support the intuition that internationalization will bring with it a move from public to private. If public international law has built its scheme of public order on an analogy to private law — treaties equal contracts, territorial jurisdiction equals property — international economic law has established an order *of* private law, promising a society both

outside and without the state, an order without a public.

Indeed, an important clue to our feelings about internationalization lies in common sense about the difference between public and private law which has survived globalization, emerging, in fact, largely untouched by the critiques of the welfare state waged in the name of public law antiformalism. Let us look at these regimes one at a time: the regime of international economic law and of public international law.

#### A. *The Cosmopolitan Regime of International Economic Law*

At first blush, it does appear that this regime (if the decentralized mechanisms of international private law and the institutions of GATT can be called a "regime") aims precisely to replace national public politics with an international commercial technocracy. Or, perhaps more correctly, to harness national political elites to the objectives of a liberal international commercial order, in which many types of domestic political activities and regulations will be eliminated or downplayed.

Broadly conceived, the international trade regime divides traders and trade relations into the normal and the deviant. Normal trade is open, structured solely by comparative costs and pursued by private actors without government intervention. Normal traders are diversified, developed economies with stable currencies that free private enterprises to participate in trade without what seems abnormal state support or regulation. Everything else, subsidies, dumping, cartels, dependence, instability, state trading, underdevelopment, undue vulnerability to imports, exchange rate instability or price supports, is abnormal.

In normal situations, governments adopt a passive, laissez faire attitude toward international commercial activities which are supported by the background norms of "private international law": rules about property and contract, mechanisms to stabilize jurisdictional conflicts while liberating private actors to choose forums, and ad hoc mechanisms of dispute resolution. These facilitating rules seem outside or before the fray of political struggle or regulatory policy and somehow outside the realm of public state "sovereignty." Indeed, the freedom from public policy renders international commercial law several degrees more formal than its domestic counterparts, a skew defended as a bulwark against national self-dealing and as responsive to the greater risks and uncertainties of trade with foreigners. The dominant players in this scheme are private traders, and to a far greater extent than in even the most laissez-faire national system, they legislate the rules that govern their trade through contract. When governments do participate, they operate "commercially," i.e., as private

actors. In normal situations with normal trading partners, tariffs, quantitative restrictions, subsidies and any other national public activity which can be interpreted to "distort" the flows of trade are to be reduced to a minimum. National state public interventions, if only as a result of the arbitrary formalism of national jurisdictional boundaries, are only likely to get in the way.

The international economic law system itself is a decentralized scheme of interstate bargaining, as in the recent Uruguay Round, aimed either to reduce government involvement in commerce on a reciprocal basis or to strengthen national commitments to a functioning regime of background norms supporting commerce. Government "intervention" is permitted as a sanction against a trader which acts abnormally or unfairly: its imports may be restricted or subjected to special duties, its domestic competitors may be subsidized or protected while they "adjust."

As it turns out, of course, the international trade regime is overwhelmingly composed of exceptional measures designed to overcome perceived abnormalities or unfair practices, and the image of "normal" traders remains largely a fantasy, particularly where underdeveloped economies are involved. Nevertheless, the important common point is that government action in all these situations, like all other public activity which impinge on free commercial exchange, is figured as exceptional.

In this overall conception, it *does* seem that internationalization will alter political culture, reinterpreting and reducing the role of the state. It will, in effect, complete the antiformalist critique of state sovereignty. The state's role is either passive, like a map, staying out of the way as economic activity flows about, or facilitative, enlisted as exceptionally may be necessary in the implementation of international commercial objectives. All other national political activity is just mud in the gears.

The national political arena works best as a mopping up operation, attuned to the needs and rules of the international regime and managed in the spirit of liberal trade. National actors will generate synergy when they implement and translate the imperatives of the trade regime. This national authority is welcomed into the international trade regime. Internationalization poses no threat to, indeed even requires national policy of this sort. On the other hand, governments seem constantly tempted to operate in a different, more parochial spirit; to misuse or interpret cynically the facilitative rules of international economic law. Such national policy making which fancies itself autonomous, unitary or sovereign, which relies on outmoded images of autonomy and seeks to subvert the spirit of free trade, by contrast, seems incompatible with internationalization.

In this sense, you might say that the international regime is tilted against innovative national regulatory initiatives and brings deregulatory pressure to bear on the national political decision making. National social or consumer protection or environmental policy seems automatically at risk of seeming an impediment to the "needs" of international commerce.

It is important, however, to qualify this observation in three crucial respects.

First, the international trade regime, even at its most imperious, does *not* see itself disabling the *mechanisms* of national or local legislation, does not aspire to replace the institutions of public law, still less to establish an international state. International economic law reorients us away from the *level* at which the regime operates and toward its substantive *spirit* or policy orientation. The international trade law regime is a *mélange* of law and non-law, institutions and non-institutions, a scattered array of obligations and sites for bilateral or multilateral engagement. As a result, the international trade law "manager" might as easily work for a national as an international governmental body, for a corporation or a union as for the state, and so on. The point is the *spirit* with which he or she manages or makes policy choices.

International economic law is a complex edifice of institutions and treaties, of which GATT is the most important. But what has distinguished the international trade regime is the vague, loose, open-textured nature of its legal regime. Maybe the GATT is an international institution, maybe it is not; maybe the GATT is a binding treaty, maybe not. The most basic provisions are riddled with exceptions and sectoral exemptions, and the only available enforcement mechanism is a shifting process of consensual dispute resolution and bargaining. Managing interdependence simply means enhancing the rules and practices which bring stability and growth to the international economy. It is in this sense that the sophisticated practitioner sees the spirit of this regime to be far more important than its legal form.

The second qualification comes from the observation that for the international economic law regime, this spirit is a very flexible thing. There is no clear sense about the particular international or national rules that are *in fact* facilitative of commerce or that can be certified *a priori* to be in the spirit of liberal trade. Even the most basic rules against subsidies or dumping are acknowledged to be far too vague and contradictory to be self-executing. Sometimes they are helpful, sometimes they are not.

As viewed by international economic law, sometimes national legislative regimes are hidden subsidies or hidden barriers to trade, and some-

times differences in regulatory cultures are necessary to sustain comparative advantage. Although particular rules will often be opposed in the *name* of free trade, it is almost impossible to know in advance if this opposition is in good faith. In fact, every sophisticated international economic law expert knows that you need regulation to have a market. And just about any national regime can, in fact, be accommodated to the international economic law regime; even the regimes of non-market societies, developing countries, countries with unstable currencies and so forth. The international trade regime prides itself on an ability to design appropriate interface mechanisms which will permit the widest diversity of national regulatory regimes to participate in the international economy. These interface mechanisms are largely technical methods for treating abnormal trades and traders *as if* they were normal arm's length transactions; methods, if you like, of simulation. But there seems no limit to the number or abnormality of trade which might be so simulated. Not only might the Chinese communist regime be accommodated to GATT, but, in some sense, the most sophisticated of "normal" trading arrangements are themselves stabilized by repeated simulation in a variety of future and secondary markets. In this sense, it is simply not true that participation in international commerce compels or precludes any particular national political or legal regime as a matter of logic or ideology.

The international economic regime, in short, although it advocates public management attuned to the "needs of commerce" and seems to figure national state action as exceptional, as unnecessary or unwise formalism, erecting "barriers to trade," in fact does not give the "needs of commerce" any firm content or status. There is no international public order mandate other than the bargains struck by states themselves and *any* national political activity can be defended and accommodated.

If we take the international economic law regime as a whole, then, it would be a misunderstanding to think of it as compulsorily narrowing the range of national political options in any conventional sense. Nor would it seem to require a more technocratic style of government. It is true that the liberal policy manager will be attuned more to the spirit of trade than to parochial political concerns, but the mainspring of the international regime which will discipline national parochialism is precisely the most aggressive political bargaining and competition among sovereign regulatory establishments.

In this sense, the international economic law regime is more than a set of legal forms — it is also a sensibility, a practice, a social form. We might term this common sensibility "cosmopolitanism." The cosmopolitan

policy scientist lives in a fluid world, outside or perhaps beyond the neat jurisdictional delineations of public authority. He is concerned about harnessing public and private actors to the management of complex forces (public and private, governmental and commercial) which constitute the international market. His goal is less a strengthened international order than a widespread and vigorously liberal spirit. The cosmopolitan world is an ethereal rootless space, suggestive of international finance and private commerce, associated perhaps with New York or Frankfurt or Hong Kong. In this world, sovereigns are marginal, bundles of rights to be avoided or deployed.

But the cosmopolitan world is not a "private" world. Quite the contrary, it takes for granted, or even promotes a kind of decentralized international public order. As a matter of temperament, it leaves room for, is tolerant of, all sorts of national and local political initiatives. All we can say is that it is antiformalist about public law and institutions, at all levels. But so is just about everyone else.

To substantiate our sense that internationalization will weaken the public and strengthen the private, we must look elsewhere. But the regime of international economic law gives us two important clues about our intuition.

The first clue is international economic law's attitude towards private law. The international trade regime's claim to leave the public capacity undisturbed is false to the extent the international trade regime strengthens the idea, long attacked, even abandoned nationally, that the realm of private law (contracts, property, etc.) is an apolitical realm, merely supportive of commerce, immune from public or political contestation or without redistributive consequences.

Indeed, even as international economic law eschews public or political ambition, remains agnostic about regulation, both nationally and internationally, it holds firmly to the idea that facilitating international commerce means, at its minimum or at its core, defending the ability of market actors to rely on the norms of (largely national) private law (rules of contract, property and so forth) without hindrance. Doing so will allow economic factors to flow freely across borders, unhindered by the formalism of jurisdictional concerns, liberated from the old world of local political interventions. In fact, the world of international private law contains just the combination of hyper-formality (standard terms, absolute property rights) and "reasonableness," or "comity," even policy, of conflicting rights and clashing institutional prerogatives, which opens domestic private law to the politics of adjudication.

The second clue to international economic law's contribution to our intuition about internationalization's inevitable alignment with the "needs of commerce" lies in its rather flimsy sense of the politically possible, in its low aspiration for public policy.

To the extent governments deviate from the international economic regime's ideals or impinge on its rules, there is not much that the international regime feels it can or should do, legally or politically. All the international economic regime seeks, at its most sophisticated, is that such local governmental initiatives remain *transparent* in the hope that as particular measures become visible, a decentralized process of bargaining will lead to their termination where they hinder the spirit of liberal trade. The point, in short, is a matter of spiritual orientation in the policy class, a vigilance about duplicitous government action which belies the spirit of liberal trade.

This attitude makes it difficult to credit the cosmopolitan's easy assurance that any loss of national regulatory capacity can simply be made up by international, or European, regulation. To explore the suggestion that an international *public* law regime could take up the slack, however, we must look briefly at the other significant international regime: that of public international law.

#### B. *The Metropolitan World of Public International Law*

If we still retain a feeling that somehow internationalization will cramp our political style, it is of course possible to compensate by adding international regulatory machinery to the decentralized international economic law regime. To get a full sense for internationalization, we need to look also, if briefly, at the overtly public international law regimes which have grown up alongside the trade system, seeking to transfer to the international arena the full throated regulatory and political culture we are used to at the national level.

It is quite usual to feel that the international economic regime can only be regulated, can only be subjected to a public political control, by transferring to the international level, be it in Brussels or wherever, the statutory forms of regulation which we think of as having been able to tame and channel national market forces. The only way to preserve redistributive bargains struck through national political struggle is to transfer them to the international level. The cosmopolitan may be quite enthusiastic about this effort, may even help to promote it, and will usually hold out the *promise* of a substantive international legal regime which would/could cure whatever political or public deficit remained after the

internationalization of the commercial system.

And yet the mechanisms for doing so seem so cumbersome and inadequate. We might trace our sense that internationalization moves politics from public to private, strengthens commerce at the expense of the state, to the unequal relationship we intuit between the cosmopolitan trader and his public international brother.

Indeed, the world of public international law, like the institutional apparatus of the U.N. family, seems hopeless in the face of the international market. Public international institutions seem, as they have seemed in every generation, far too focused on the state to regulate market actors, and far too formal in their approach to law to be able to construct a modern market regulatory regime. International institutions have too state-focused an attitude about politics and are entirely too dependent upon outdated notions about sovereignty to be effective. Their bureaucracies have become bloated by sovereign patronage; their normative contributions more rhetoric than regulation. International institutions seem committed to imitating a form of sovereignty which is no longer available, even nationally.

Moreover, the public international regime seems to operate with an entirely different sensibility from the cosmopolitanism of the international economic order. It is a sensibility which seems, to cosmopolitan ears, not to have absorbed the antiformalist critique of public sovereignty.

Like the policy mavens of international economic law, public international lawyers and institutions share a sensibility or style, a style which we might term "metropolitan." The metropolitan lives in a radial space rooted in international capitals like London or Paris and linked to the world of colonialism as much as to the United Nation's new world order. This is the international world of war and peace, norms and national interests, intergovernmental interventions, cultural representations and universal rights.

The metropolitan lawyer or policy scientist governs a conceptually delineated space arranged in interconnected levels, planes or spheres of international and national, each related to the others as jurisdictional arenas for public policy development and implementation. This metropolitan situates himself firmly with the international and worries about the triggers, conditions and opportunities for intervention in the national. Despite his repeated gesture against national sovereignty, he works for sovereignty's renewal, though at the international level. He is concerned about government and administration, and beckons the intelligentsia to a personal commitment to public service with an international orientation.



From this perspective, the fluid world of the cosmopolitan imagination seems unmanageable.

The metropolitan seems hamhanded around the suave cosmopolitan, rooted in precisely the forms of sovereignty and exactly the jurisdictional boundaries which must be set to one side to manage effectively in a liberal spirit. To the extent that internationalization will mean the displacement of the public sovereign order by private rationality, the metropolitan, of course, is put at an automatic disadvantage.

Indeed, we might read these two styles, taken together, as a sort of collusion to eviscerate the public or the political and eliminate the fora of social participation and collective responsibility from international life. In this familiar view, the public is attacked by a self-effacing (largely private) cosmopolitanism and left undefended by a (largely public) metropolitan imagination cross-dressing its theoretical obsession with the unsolvable riddles of sovereign order as pragmatism about world public policy. There is a lot of truth in this *pas de deux* of cosmopolitan days and metropolitan dreams.

A great deal of the urgency in the progressive case for building international institutions has come from the fear that the international regulatory project would fall behind the natural advances of the international market. In this view, technology and a naturally shrinking globe are creating a global economic area as a matter of fact, while the international political projects of regulation remain wedded to the false boundaries of state sovereignty. It is only the *public* realm which is too formal, too focused on the state, too narrow in its conception of politics, outdated in matters of language. The *private* sector is certainly not hung up on jurisdictional boundaries and imaginary authorities. The urgent rejection of state sovereignty by public international lawyers and their embrace of international regulatory projects at least partly reflects a desire that the public realm catch up with the private, hence, the new-age ambition to learn from the market that we might contain its excesses. The market's slick modern flexibility makes earlier international institutionalists, and indeed everyone associated with public law and culture, seem hopelessly backward.

But we must qualify this sense of public inadequacy in important ways.

If the international regulatory project were purely public and the international economic regime purely private, this problem might well arise. But, as we saw, the international economic regime, the cosmopolitan's international order, does not reduce the realm of the polit-

ical; it simply seeks to harness it to the liberal spirit of international commerce. There is no structural demobilization of the public. Indeed, the public may expand to a wide range of local, international, and national institutions.

Similarly, the sophisticated metropolitan regulator is not focused exclusively on *public* order. Quite the opposite, the most sophisticated international regulatory regimes are precisely arranged as partnerships between industrial, non-governmental and government actors. Nor, it turns out, is the contemporary public international lawyer a formalist. In fact, public international law has fully absorbed the critiques of formalism about sovereignty, and has completely adapted to the most decentered sociologically inspired understanding of the international public law regime and the most relativist or rhetorically up-to-date notions about the symbolic rather than the literal quality of normative discourse.

In this sense the international and the national differ little — we have lost faith in the formal efficacy of public law both nationally and internationally, even as we retain faith in a post-formalist public order for both the nation and the world.

Why then does international public law seem weak, and the international trade regime strong? Where are we to lay our sense that internationalization will narrow politics, render our public thought technocratic?

One clue might be the quite common view, unarticulated but common to metropolitans and cosmopolitans alike, that only international governments must be made, while the international market makes itself.

In this view, the international government that will be erected, whether it will be made nationally, locally, regionally, wherever, will be political precisely to the extent it is *public* — and by this is meant a juridically concentrated site for active intervention in a naturally occurring private terrain.

This makes international economic law seem passive, accommodating a natural force, while the public international legal order seems active, trying to construct a regulatory apparatus. It also makes the international economic regime seem comfortably antiformalist — eschewing the construction of sovereign forms — while the public international lawyer seems unable to do without the only legal tools available to consolidate political power for intervention and regulation.

As has been recognized since the last century, this whole set of ideas dramatically obscures the process by which a market is constructed; the choices required to elaborate, enforce and interpret the background norms of private law, the financial and other service institutions which must be

put in place. It not only makes the state seem too active, too able to will, to govern, it also makes the private seem too depoliticized, too immune from contestation, outside the proper scope of government.

In some sense, it is impossible for the public to lag behind the private, or the government to lag behind the market. The idea of a lag simply expresses an unwillingness to treat the entities and choices which *do* structure the activities of private actors as open to public debate or participation. And in some sense, it is impossible for public law forms to lag behind private pragmatism or efficiency. Anti-formalism only about public law simply obscures the political choices and roles of private law. We might lay our intuition that internationalization will bring with it a narrowing of political possibility to an intensification of this false image of the politics — or un-politics — of private law; an idea which also plagues our thinking about national political activity.

For both the cosmopolitan and metropolitan international lawyer, it seems obvious that a system of private transactions operates outside or before the sovereign, constituted on the basis of a different sort of politics, perhaps more minimal or consensual. For the metropolitan internationalist, internationalization will simply place this private sphere in the context of an international rather than a national public sovereignty.

The difficulty is that, for the moment, at least, the project of building an international public order which could perform this regulatory feat must remain a dream. And it must remain a dream not least because the legal and conceptual tools to construct such a juridical concentration of political authority, as we have learned from the antiformalist critiques of national public law and the mechanisms of the welfare states, are not available. Even were we to succeed, we would simply have duplicated internationally precisely those outmoded regulatory forms rooted in formalism which have failed at the national level.

The persistence of this idea makes it less surprising that the problem of internationalization would be perceived as a *general* one which could be solved by a general institutional form. If the problem is the erosion or inadequacy or rigidity of the national public state, rather than dissatisfaction with the redistributive or other consequences of one or another particular decisions, it seems only natural that the solution is to strengthen the general international public order — almost regardless of the details of particular issues. To the extent those choices are embedded in the regime of private law, they will remain outside the discussion.

Indeed, for all the hand wringing about internationalization, this focus on the *level* at which public order is to be erected makes it possible

to talk about reforming the entire international institutional and regulatory system, and talk about it as a progressive project, without talking about the specific redistributive consequences for anybody. It is in this sense that a preoccupation with governance, its structure, level or spirit, diminishes politics to the technocratic.

*C. The European Union: Whether Metropolitan or Cosmopolitan, Politics is Always Somewhere Else*

It is worth looking for a moment at the European Union, the most developed international regime which might evoke our concern about the politics of the international. The EU has been structured by the interaction of an economic and a political idea which track, in some sense, the cosmopolitan and metropolitan sensibilities animating the broader international legal and political regime.

The European Union *does* seem to reduce the realm of the political, shrinking the public sphere as it strengthens the hand of commerce. It does so mainly through its focus on building an "internal market" which allows the free play of commercial forces throughout the Union, unhindered by the formalities of national jurisdiction, in an institutional structure which privileges the new forms of administrative governance over old-fashioned parliamentary sovereignty. The EU has even developed a name for the phenomenon: the "democracy deficit."

The EU's economic idea is sophisticated and cosmopolitan. It combines deregulation and technocratic expertise. National governments, in this vision will simply be left alone, urged or required to stay out of the way, or placed in a structured reciprocal negotiation to reduce impediments to the free movement of the factors of production among the member states.

The internal market is conceived to liberate private forces over a larger geographical terrain by dismantling national government, regulatory differences and tariffs. But the regime is not intended to replace national public authority with international private authority. Quite the opposite. The economic regime will require a harmonization of regulation, an aggressive antitrust regime, and a continual bargaining among public authorities about their regulatory efforts.

The tools to build the international market are large scale legislative and administrative interventions. The objective is deregulation, the means, expertise. Broadly speaking, the implementation of the famous internal economic freedoms (free movement of workers, goods and capital, freedom of establishment, freedom to provide cross border services) has

repeatedly moved from liberalization to regulatory harmonization through either the setting of minimum standards plus mutual recognition, or the development of a unified EU wide regulatory regime.

Taken together, the EU's economic freedoms and policies have produced both a deep governmental presence in the European market and a transformation of deregulatory ambition into sophisticated technical regulation, a move from opposing national regulatory distortions to promoting a unified and technocratic standardization.

The EU's political idea is similarly advanced, combining centralization with sectoral functionalism. On the one hand, the EC is committed to a project of government building, coordination, harmonization and unification of legislation. This is a classic metropolitan endeavor — sneaking up on national sovereignty, replacing it with a European public law. As a modern metropolitan effort, however, the EU has from the start differentiated this government building project from the historical project of nation building, or the project by which the great state institutions were built in the last century. In the sphere of public law and politics, the EU's institution building enterprise has fully absorbed the anti-formalist critique of the nation state. For Brussels, the European legislative and legal structure is the technical implementation of legally delegated sectoral competences rather than the juridical concentration of absolute authority.

For one thing, the political combination of centralization and sectoral functionalism has rendered the EU's governmental apparatus less visible than a more conventional national liberal market democracy. Because the Brussels political apparatus is structured to supplement, complement and sneak up on sovereign states, rather than displace them, the politics of industrial policy and market intervention remain oddly difficult to locate, submerged at both the EC and member state levels in a self-image of formally limited administrative action dispersed among myriad institutions, nationally and internationally.

The political arguments which move the establishment in Brussels are not rooted in the implementation of a party political program. Brussels responds, on the one hand, to apparently depoliticized, small scale and technical arguments about the efficient or most appropriate form for regulation, and on the other, to arguments about the impact of a given regulatory initiative on the *general* ambition to build or extend the internal market idea. The only politics acknowledged by the European institutions is one which responds to the imperatives of technical expertise and "Community building" or "establishing the internal market."

Both in Brussels and in the national capitals, this political regime is

able to pose as the legal implementation of a politics established elsewhere. The EU is either technical and administrative — or political in the very limited sense that it establishes itself as expertise in service of technical necessity and as a legislative instance which opposes the politics of government. In EU related matters, the Member States seem similarly depoliticized — they are either implementing EU legislation or adjusting the imperatives of an internal market to their own largely executive sovereignty.

The familiar forms of political life have been transformed as they have migrated to Brussels. The EU decision-making process has shifted legislative competence from parliaments to the executive as it has moved authority from the regions to the center, fragmenting the state. The administration has become a more transient and flexible process with significant legislative authority and responsive to the technical political imperatives of expertise. The judiciary has transcended its classic role as keeper of the dogmatics of constitutional limitation; although the Court, rather than the elected parliament, remains the only institution empowered to control the executive organs. Perhaps most dramatically, the EU has institutionalized the parliament as a promise, a place holder for the democratic aspiration, and a complex practice of advisory co-decision in which the administration and judiciary are its closest allies rather than competitive adversaries. All this transpires with only the vaguest commitments to the classic human rights norms we associate in our more nostalgic moments with parliamentary democracy.

The result is a broad political culture with a technocrat and legal face, in which politics is treated as having somehow already happened elsewhere — in the treaty, the European Summit, in the Member States, or in the Council and so forth. The political instance is freed from the institutions and pressure points of a mass politics and responsive to the bureaucratic imperatives of managing “industrial policy” and the wishes of Member State governments. Politics is either an aspiration for institutional designers or has been transformed into a management problem for updated institutional players.

This democracy-as-management vision is nowhere more startling than in the bizarre Keynesian discussion about the EU’s “democracy deficit.” Democracy is a policy orientation; a managerial spirit. On the one hand, in a market oriented governmental structure of delegated powers, institutional reforms lag behind increasing regulatory competences. On the other hand, popular perceptions of legitimacy place an unnatural limit on the system’s ability to respond flexibly to a changing market.

The result is a structural deficit that must be managed by policies directly engaging the "European citizen" (signage changes, coinage of the ECU, education about European rights and culture, etc.) and a continual process of institutional reform.

There is much not to feel comfortable with in this structure. The EU seems to track one's worst fears about the internationalization of public life. The political has become technocratic. The government exists only to serve the market. Together, the cosmopolitan and metropolitan sensibilities seem to have gutted the regime of any site for political engagement and turned it over to the logic of international commerce.

But we must be careful. This proves too much and too little. One difficulty is the nagging feeling that there is nothing *unique* about the European level at which all this seems to have taken place. Indeed, we are familiar with precisely the same sorts of developments in many national states — even cities. It is only against the implicit comparative background of a "sovereign who could really intervene in the market and get things done" that we blanch at this modern Brussels confection.

But this nostalgic image of national political cultures is itself mostly fantasy. It is simply not true that "the state" or "the legislator" exist as formally delimited political instances onto which the law concentrates absolute authority for intervention in civil society. Or that civil society is a depoliticized terrain awaiting state regulation or intervention. In an ironic way, the whole drive for internationalization began where faith in this idea about national politics waned. It began, in other words, with an antiformalist critique of public law and sovereignty, and with awareness of the politics of adjudication, the policy choices of private law, the public authority of property holders.

A second difficulty is the feeling that the problem, as stated, might well be quite easily solved (at the European as at the national level) simply by reinvigorating the institutions of public sovereignty. In the EU context, no one is more emphatic on this point than the Eurocrats themselves; we must, they insist, strengthen local and regional political authorities, increase the breadth of EU wide regulatory competence and inaugurate at the European level a parliamentary process modeled on the national legislatures, thus curing the "democratic deficit."

But we know that this has also not worked at the national level, that it has not been possible to cabin political power in identifiable institutions and forms, that the welfare state as a model for wise or informed public decision making has been called into question throughout the west.

### III. SOME FINAL SPECULATIVE THOUGHTS

Suddenly the whole problem no longer seems one of *national* and *international* government, but a problem of *government*. In some way the idea of politics as a contestation over the spoils, over entitlement, distribution, interest, has been displaced by a more technocratic discourse, attuned only to general directions (in the public interest/for private interest) and fought, ironically, about sovereign levels or forms (international or national, local or federal).

But neither the general direction nor the difference between levels can be given sufficient content to be helpful. It is ultimately only possible to figure out what will be in the needs of "commerce" in a specific and tentative way. Business pulls in different directions and is not simply hostile to state action as a general matter. Neither can we be sure, in a general way, what will be the redistributive consequences of internationalization.

Our intuition that internationalization strengthens commerce at the expense of public interest must remain that — an unhelpful and distracting intuition, rooted in an instinctive, if inaccurate, sense for the formalism of public law and the apolitical nature of private law. Our political intuitions about globalization arise from the relationships among rhetorical positions and sensibilities, which routinely cast either the national or the international as locus for the promises or perils of sovereignty. At the same time, for all their antiformalism, both metropolitan and cosmopolitans, both the trade regime and the public regulatory regime, leave unacknowledged the politics of the private.

We might therefore locate the politics of this broad international style in its commitment to a doubled idea about sovereignty: public sovereignty as promise and peril, alternatively projected as formal and antiformal, while private law remains outside the politics of sovereignty. This set of ideas has, of course, been universally criticized, both because it is not a good description of how politics actually works in the public realm and because the normative and linguistic framework to sustain this sort of formal division between public and private, or the mechanics of a de-politicized private law machinery, are not available.

Sovereignty, as the juridical concentration of power in public hands for intervention in civil society, has brought with it a constellation of familiar ideas: politics as public discourse about state intervention in civil society, law as a technical mechanism to focus and enable an interventionist politics, power as a force to be juridically concentrated and allocat-



ed, the national state as the primary organ of politics; sovereignty as a juridical absolute. These ideas are commonly associated with a commitment to the separation of public and private, especially in law, with public law the discourse of state action toward a passive civil society, itself structured by the apolitical or consensual rules of private law.

But these ideas, with their critiques, remain the animating rhetorics of globalization, and defining character commitments for metropolitans and cosmopolitans alike. As a result, we might think less of a general transformation of politics, or of a necessary erosion of the national by the international, than of the triumph in international law and policy of one conception, one rhetoric, for politics. When people debate the general politics of globalization, they figure politics as a general site for the management of allocative efficiency, fragmented into debate about governmental structure rather than as a set of particular sites for struggle over distribution and social policy. This focus is reinforced by background assumptions about the relatively de-politicized character of private law and the correlative unavailability of a meaningful politics outside the state apparatus, whether national or international.

We might shake this rhetorical framework by approaching the international as we approach national political culture; with our anti-formalist powder dry. It might be helpful in doing so to realize that the international regime offers less the turn *to* private interest than the turn *from* private law. And it is to the politics of the private that we must return.

In this vision, the problem would not be a general failure of national governments, still less a necessary erosion of the national by the international. We would not think of an international institutional regime which remained to be built or reformed, but which already existed, in all the forms of power and sites of choice accompanying the international market.

Since the project would be less to build a new public order than to recognize and engage the order which currently structures civil society *as if* it were public (whether understood as public or private, international, state or local, even familial), sometimes the right thing to do would be to promote the state as a locus of intervention, even to insist on form, and sometimes it would be better to champion an international institution; sometimes a local court, sometimes a private person or corporate player.

In this conception there is no general problem, and no general solution. Saying that "things are getting more and more international" is a way of not talking about who is getting what. When that question is brought into focus, sometimes what is needed is more formalism, some-

times less; sometimes more state focus, sometimes less. Once we let go of the idea that a natural private realm needing public intervention could survive the rejection of a public sovereignty, we are without a general theory to orient our reform. Neither international nor national, neither public nor private will be sure routes. Perhaps instead we will become interested in a particular redistributive struggle and strategize together about what to do.