

Sovereignty and Complex Interdependence: Some Surprising Indications of their Compatibility

Charles Sabel

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A little more than a decade ago, Thomas Nagel published a thoughtful but, as it then seemed, rearguard defense of the distinctive moral integrity of the sovereign state.¹ In Nagel's view, only when the citizens of a polity are the co-authors of the laws that bind them does the implication of their wills subject the procedures and substance of lawmaking to the requirements of egalitarian justice. Nagel acknowledged the numerous rule-based regimes and institutions that regulate cooperation among private actors and states beyond sovereign borders, often circumscribing domestic law making, sometimes with direct consequences for individual citizens and firms. But these international organizations trace back to contracts among sovereign states: contracts that do not directly implicate the will of citizens, and therefore, Nagel argued, do not trigger the obligations of justice. Outside the state, Nagel concluded, the only obligations we owe others are those prescribed by a humanitarian minimum.

¹ Nagel, Thomas. "The Problem of Global Justice." *Philosophy & Public Affairs* 33.2 (2005): 113-147.

Joshua Cohen and I challenged Nagel's conclusion as inconsistent with the demands for accountability and responsiveness even then legitimately placed on international organizations, and acknowledged by them.² We argued that the notion of an implication of will was simply too malleable to serve as the sole trigger for the requirements of justice. Nagel himself acknowledged that colonial or occupying powers could implicate the will of those subject to their authority merely by imposing rules on them, regardless of their consent. Could not the same be said for the International Monetary Fund or World Trade Organization (WTO) in the many cases where nominally sovereign states are constrained by circumstance to accept conditions and rules dictated by these organizations, as prerequisites for engagement in global capital markets or commerce? Why, moreover, should the contractual origins of these and similar institutions relieve them of the responsibilities of justice in regulating the international conditions of cooperation? Surely it is the effective operation of an institution, not the formalities of its origin or status, which determine its moral responsibilities. How, otherwise, can we understand why an occupying power triggers a responsibility of justice in governing the occupied?

Thus, while we agreed with Nagel's rejection of cosmopolitan (and any other) monism—the idea that a single set of norms governs individuals in all circumstances, though the implication of the norms may differ according to the setting—we rejected for all these considerations a dualism that applied norms of justice within sovereign states and a humanitarian minimum outside. Connecting to a line of thought that reaches, in only one of its branches, from Locke to Rawls, we argued instead for a pluralist political morality, in which norms applied to a relation or association among persons vary according to morally salient features of that relation. More exactly, we argued that international cooperation and mutual

² Cohen, Joshua, and Charles Sabel. "Extra Rempublicam Nulla Justitia?." *Philosophy & Public Affairs* 34.2 (2006): 147-175.

This essay draws on that one as well as: Hoekman, Bernard M., and Charles Sabel. "Trade Agreements, Regulatory Sovereignty and Democratic Legitimacy." Draft, (January 2017); and Herrigel, Gary, Peer Hull Kristensen, and Charles Sabel. "Regulation Under Uncertainty: The Co-evolution of Industry and Regulation." *Regulation & Governance* (2017).

dependence embodied in institutions and rule-based regimes created obligations of membership and inclusion: that the well-being of those affected by the operation of such institutions and regimes be taken into account in determining the process by which they make decisions and what those decisions may permissibly be.³

Apart from a conjecture that one day the WTO might require all trade rules be standards-based, and require all standards to allow in their application for adjustment to national contexts, we were silent about the relation among the plural norms inevitably generated in a world of interdependence at various scales. Yet we had not challenged the distinctive importance of state sovereign as the vessel and expression of democracy. Our argument was rather that democratic sovereignty was not distinctive in a way that precluded many other norms of justice beyond the state, in the global realm. Thus, the reader might be left to wonder how conflicts between norms arising from domestic legislation or administration and norms arising in international regimes or in disagreements between national democracies were to be resolved in a plural order that did not rank them hierarchically? Using Nagel's dualism as a foil allowed us to distinguish pluralism from cosmopolitan monism with some precision, without requiring exploration of conspicuous tensions within pluralism as a freestanding system.

³ For a closely related idea see Fraser's "all-subjected" principle, according to which "all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it. On this view, what turns a collection of people into fellow subjects of justice is neither shared citizenship or nationality, nor common possession of abstract personhood, nor the sheer fact of causal interdependence, but rather their joint subjection to a structure of governance that sets the ground rules that govern their interaction. For any such governance structure, the all-subjected principle matches the scope of moral concern to that of subjection." Fraser, Nancy. *Scales of Justice: Reimagining Political Space in a Globalizing World*. Columbia University Press, 2009, pp.64-65. See also in this connection Kumm's concept of "justice sensitive externalities" in Kumm, Matthias. "Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities and the Proper Domain of the Consent Requirement in International Law." *Law & Contemp. Probs.* 79 (2016): 239. For a useful typology of positions in the current discussion of these themes, in which the view we advance would be classed as "cosmopolitan pluralism," see Zürn, Michael. "Survey Article: Four Models of a Global Order with Cosmopolitan Intent: An Empirical Assessment." *Journal of Political Philosophy* 24.1 (2016): 88-119.

A decade ago the incompleteness of our claims may have been excusable. History seemed very much on our side. International organizations and regimes were becoming more assertive in setting the terms of global exchange and cooperation; their independent capacity to generate norms binding on states, and individuals and firms within them, was ever more openly acknowledged; and this rule making was more and more explicitly subject to norms of transparency and requirements of reason giving in the justification of decisions familiar from the democratic practice of the administrative state. Nagel's arguments seemed to preclude the debate in progress about how to understand and advance these developments.

In recent years history has, let us say noncommittally, taken a breather.

Within the rich nation states, the idea of egalitarian justice for citizens is often turning, under populist pressure, into a welfare state chauvinism: equal and generous treatment for the sons and daughters of the people, but the exclusion of the others. The very idea that international cooperation creates obligations towards those it affects is becoming in some quarters a trammel, like the constitutional judiciary and the separation of powers, on the people's rights to pursue its interest. If treaties do not serve our interests, we remake them to our advantage. The United States has withdrawn from pending agreements, such as the Trans Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) and insists on renegotiating long-standing ones, such as the North American Free Trade Agreement (NAFTA).

Nor is criticism of interdependence and trade restricted to indignant and despairing populists and their political leaders. Many thoughtful advocates of social

democratic solidarity within the traditional, inclusive welfare state, and of domestic diversity and opening to the world, have reluctantly concluded that rule-making by international (or, in the case of the European Union or EU, supranational) regimes and institutions leads inevitably to technocracy; and under technocracy the alien norms of the global market displace national democracy.⁴ So long as there is no global demos and with it a global, democratic state, there is no method of accountability or political oversight to reconcile democratically legitimate differences in domestic values with the uniform rules of world trade. The protection of democracy and social solidarity requires reassertion of sovereignty.

The favoring breezes of plausibility that propelled our argument along have thus swung around about and gathered strength. A harsh wind now blows globalization back, driving the very idea of pluralism onto the shoal.

And yet, and yet. Even as the incompatibility of democratic sovereignty and globalization is hardening into a theoretical necessity, practice is demonstrating, at least in some realms, their compatibility. A closer look at the development of trade negotiations, I will argue, shows that trade agreements among rich countries as well as between them and middle-income partners—unmediated by the WTO but mindful of its norms—have reduced tariffs to negligible levels and come to focus on reconciling regulatory differences. As attention has shifted to these non-tariff measures (NTMs), institutions and practices emerged that allow partners, sector by sector, deliberately to investigate and learn from one another's practices, eventually recognizing the equivalence of regimes that are not strictly identical—and in the process extending domestic political oversight to relations

⁴ Rodrik, Dani. *The Globalization Paradox: Why Global Markets, States, and Democracy Can't Coexist*. Oxford University Press, (2011); Scharpf, Fritz W. *De-Constitutionalization and Majority Rule: A Democratic Vision for Europe*. No. 16/14. MPIfG Discussion Paper, 2016.

among states while often heightening domestic accountability. These institutions and practices have developed in the last decades in persistent cooperation among regulators in sectors as different as civil aviation, food, and pharmaceuticals. They have been little noticed, except in broad outline, by trade specialists, and registered, if at all, as a conspiracy among experts by the larger public. Absent a trade war or still greater calamity, these innovations will likely survive, and perhaps thrive, even if the new vintage trade agreements that openly acknowledge their centrality are not consummated.

These emerging institutions of regulatory equivalence amount to a kind of existence proof of what much contemporary theorizing denies: the possibility of integrating democracy and normative engagement beyond the nation state. The aim of this essay is to document some of these developments and begin to draw out their implications for the democratic governance of trade and the international order generally. This intent explains, and I hope justifies, the focus here on only one slice of the broader question of relations among norms in a plural order, in disregard of the many urgent questions of distributive justice rightly raised in connection with current trade arrangements (and addressed, in part, in a longer essay on current trade negotiations on which this one draws).⁵

To underscore the generality of the sovereigntist argument in current discussion, and the different starting points from which it is reached, the next part looks briefly at two variants of the concern about an inevitable conflict between supranational technocracy and domestic values: one focused on the tension between the WTO and national democracy, and the other on the fault line between EU and national or member-state regulation. Part 3 sets out the circumstances of international exchange as they are, and for the most part are expressly assumed to be,

⁵Hoekman, Sabel (2017).

in the “mega-regional” trade negotiations within the club of rich nations—for instance, between the EU and the US in TTIP.

I say the circumstances are for the most part expressly acknowledged in trade discussion because the institutional details of sectoral regulatory cooperation—crucial to understanding the way plural values are actually being deliberately reconciled in trade—are incorporated by very general reference in trade documents. Trade negotiators (as opposed to regulators) often have little direct knowledge of them. The public knows still less, but enough to suspect that it is being kept in the dark; trade economists treat regulations largely as costs and pay scant attention to changes in the nature of regulation itself; and political economists attend to the coalitions for and against more trade—today a division between business (largely for) and civil society (largely against)—not the substance of their disagreements. Part 4, therefore, presents two detailed, illustrative case studies to suggest how sectoral regulatory equivalence works in practice, and how the reciprocal monitoring it establishes can be at once preference transforming, sovereignty respecting and accountability enhancing.

Part 5 addresses an apparent chink in this armor of accountability. It traces successive changes in drafts of the EU TTIP treaty proposal to demonstrate how the initial exploration of the possibility of reconciling regulatory differences, now widely seen as opening the door to special interests and insider manipulation, can be subject to the same kind of democratic oversight provided by reciprocal investigation of regulatory practices once a regime of equivalence is established.

Part 6, by way of conclusion, reviews the incremental enlargement and reconceptualization of sovereignty through determination of regulatory equivalence as a response to the various assertions of the incompatibility of domestic and global or EU norms. More speculatively, this response is presented as a distinctive mechanism for the step-by-step construction of a kind of federated international regulatory authority—a novel realization of Kant’s “negative surrogate” for a world state—because this cooperation arises not, as conventionally thought, from the

displacement of politics by economic interests or the reverse, but rather by the ongoing redefinition of each provoked by differences regarding the other.

These arguments rollover outstanding intellectual debts. In redeeming some of the original claims, I incur new obligations, to be met, I can only hope, through a renewed collaboration. In that spirit, think of this essay as restarting the earlier one, informed throughout by the same commitment to defend the political and intellectual debate against skepticism about practical possibilities that, in the intervening years, has become all the more paralyzing because it sees global cooperation itself as a threat to sovereignty as a condition of democracy.

2. Other roads to the sovereigntist turn

Perhaps the most general formulation of the thesis that globalization is incompatible with national democracy is Rodrik's globalization trilemma.⁶ It does not invoke Nagel's implication of will as a distinctive, norm-generating criterion, but it concludes by a closely related argument that there is a practically unbridgeable gulf between the nation state as a repository of value and the rules of global commerce. A key assumption—fully validated, as we will see, by the centrality of normative concerns in current trade discussions—is that markets require complementary regulatory regimes specifying the characteristics that various goods, and the processes by which they are produced, must possess to be merchantable. These regulatory regimes can reflect the plurality of values (equity as between partners in exchange; concern for the environment and other externalities) that historically condition commerce in the democratic nation state, or they can respond only the concerns of efficiency as technocrats, dedicated to minimizing

⁶ Rodrik (2011).

market friction, understand them. A corollary of the complementarity of markets and regulation is that global markets require a global regulator.

The incompatibility of globalization with the democratic nation state follows directly. For suppose that the global regulatory regime is centered in a technocratic body, established by treaty among states the world over, but only remotely accountable to them. In this case the nation state persists, but democracy must defer to the technocratic decisions that foster globalization. More exactly, the outcome is what Rodrik calls hyper globalization or deep integration: the condition where the uniformity of the global market approaches the uniformity of domestic ones, but precisely because it is homogeneous cannot accommodate the complex of values that legitimate exchange in any particular place.

But imagine, as an extravagant and indeed otherworldly counterfactual, that the global regulator is democratically responsive to a global polity. In that case there is globalization and democracy, but the nation state is displaced. There could be disagreement about whether this global democracy is subject to the obligations of egalitarian justice because democracy, at any scale, implicates the wills of citizens. But we would be discussing a phantom. The only democracies we know live in the nation state.

If, finally, we choose to safeguard living democracy in the nation state, we must forego economic globalization, because, given the implausibility of a world-spanning democracy, there is no acceptable global regulator for global markets. Hence the trilemma: choose as we will we cannot have the advantages of democracy, the nation state and globalization at the same time. The real choice, Rodrik argues, is between the technocratic regime we have—and the wave of anti-globalization its denial of other values inevitably provokes—and a return to the pre-WTO rules of the trade, which prevented the cascades of protectionism

that destroyed world trade in the 1930s but otherwise left nation states largely free to regulate themselves as they chose.

Scharpf's call to sharply curtail the powers of the EU, and even repatriate some of its authority to the member states, is rooted in the distinction, introduced by Tinbergen, between positive and negative integration.⁷ Negative integration, or market making, refers to the removal of barriers to trade, such as tariffs or NTMs. It is inherently de-regulatory. Positive integration refers to market-correcting measures: health and safety regulations, rules governing permissible terms in contracts, transfer payments from winners to losers in the operation of markets—in general all measures that ensure market exchanges respect public values. We might say that positive integration embeds the economy in society, setting aside the question of the degree to which society is conceived as a self-creating polity, or is rather (in the manner of the German *Genossenschaftslehre*) rooted in pre-political affinities and associations.

Scharpf's argument is that the EU, because of certain congenital defects in its design, has been extremely effective at negative integration while blocking positive, socially embedding re-regulation. Generally speaking, the current situation is analogous to that of the US before the New Deal, when the Lockner jurisprudence of the Supreme Court obstructed state and local regulation of markets, and Congress had not yet authorized national supervision. The Court of Justice of the EU (CJEU) accordingly plays an important part in Scharpf's account. Because it was founded to defend economic freedoms (free movement of goods, capital, services and people), and because, as a court, it is not in principle authorized to consider other values except to the extent expressly permitted by legislation (limited in the EU by jurisdictional constraints), the CJEU acts directly and indirectly as an engine of deregulation: directly by removing NTMs (*Cassis de Dijon*), and indirectly by an expansive defense of economic freedoms that un-

⁷ Scharpf (2016).

dermines collective bargaining regimes, social insurance systems, and the other institutions that together ensure positive integration. In effect, then, the CJEU, in consort with market-friendly directorates in the EU executive or Commission, functions as the equivalent of the global technocrats of the WTO to regulate the (hyper-integrated) single market in the interests of efficient commerce with disregard to national, democratic values. These design defects of the EU, were magnified by the financial crisis, making all the more urgent a clear limitation of Union authority and with it greater scope for member state defense of national solidarity.

Taken narrowly, as claims about the necessarily de-regulatory effects of technocratic, peak regulators—the WTO and the CJEU—neither argument is empirically compelling. A recent, authoritative review of the jurisprudence of the WTO finds that the Appellate Body (AB), far from actively advancing deep integration and hyperglobalization, has left ample room for national regulatory autonomy in the manner of the pre-WTO General Agreement on Tariffs and Trade (GATT)—to the disappointment, it seems, of the Organizations’ sponsors.⁸ The CJEU has emerged as a defender of fundamental rights (to freedom of expression, in *Schmidberger*, or against age discrimination, in *Mangold*) even when these conflict with economic freedoms. It prohibits unjust contract terms when national courts fail to offer such protection. Many of the cases cited to suggest hostility to

⁸ “In the presence of backlash against the Uruguay Round result that created the WTO and more generally the intense contestation of neo-liberal globalization or ‘deep integration’, the Appellate Body sought to discern in the corpus of WTO treaties an equilibrium between domestic regulatory autonomy and trade liberalization very much inspired by, or anchored in, the original GATT – a respect for regulatory diversity and flexibility towards domestic policy interventions that characterized the GATT in the period when it enjoyed the greatest legitimacy or acceptance (post-war embedded liberalism). Howse, Robert. “The World Trade Organization 20 Years On: Global Governance by Judiciary.” *European Journal of International Law* 27.1 (2016): 9-77.

collective bargaining can be understood as criticisms of opaque arrangements favoring insiders, and so on.⁹

But a narrow reading is irrelevant for present purposes. Both the EU and the world trade order embodied in the WTO are rightly seen as unaccountable in important ways; the globalization paradox and the tension between negative and positive integration capture the widespread anxiety that these defects cannot be addressed because there is, in fact, no way to make the participation in world markets required by economic development compatible with assurance that exchange is regulated in accord with domestic values, as required by democracy. The goal of the remainder of this essay is to provide a significant counterexample to the claim that national democracy is incompatible with world markets, or, put the other way around, an existence proof of the possibility of institutions reconciling them.

3. The circumstances of global exchange

Here, in a highly compressed form, are the circumstances that shape the scope and the aims of the current generation of trade negotiations. While there is some disagreement about the developments underlying these shaping conditions, there is much less about the conditions themselves. I focus on the latter, presenting only enough of my own view of the former to suggest why I think the closely linked changes in the nature of trade and regulation have common causes in a transformation of production—an argument that will figure in the subsequent discussion.

⁹ Gerstenberg, Oliver. *Constitutionalizing Social Rights: Euroconstitutionalism and Its Discontents*, Cambridge University Press, forthcoming 2018.

- The successes of the WTO have reduced tariffs, especially among rich nations to nuisance levels—the costs of collecting the duties often exceed the revenues they produce.
- The decrease in tariffs has led to greatly increased emphasis in trade negotiations on NTMs, particularly regulatory differences regarding variant interpretation of the requirements of protecting public health and safety and the environment, and ways of determining that the requirements have been met. Though these differences are often subtle, they are also often of visceral importance. Among rich countries, none will abandon its commitments in favor of those of the others simply to encourage trade.
- Three profound, linked changes in the organization of production have redirected trade flows, making the reduction of NTMs all the more pressing. The first is vertical dis-integration or the decomposition of production into discreet tasks accomplished by independent firms collaborating with many clients and linked to each other and the final producer in supply chains. The more volatile and uncertain markets became, the riskier it was for vertically integrated mass producers to own component suppliers whose products could abruptly become obsolete because of unforeseen innovation or superfluous because of a shift in demand. The second is the globalization of supply chains. Production facilities are located where the costs of production are lowest, or where they can serve important markets with distinct characteristics. The third is the shift within these supply chains to just-in-time or continuous improvement production and design systems based on immediate error detection and correspondingly short learning cycles. Mass producers hedged against breakdowns in operations by holding large buffer inventories of work-in-progress. Uncertainty dramatically increased the cost of these hedges, just as it increased the costs of owning suppliers. Firms responded by eliminating the buffers — at the limit producing one piece at a time. Breakdowns thus stop production, and operations only resume when the disruption is traced to its

source and corrected. Because of these changes, export products are typically composed of many imported components and subassemblies, leading to enormous increases in intra-firm and intra-industry trade; and delays and disruptions can be ruinously costly. As production itself becomes more and more dependent on untrammelled trade, and tariffs are eliminated, NTMs are of vital importance.

- These changes are reflected in a fundamental shift in the political economy of trade negotiations. Traditional trade negotiations pitted firms that stood to gain from exports against firms threatened by imports. Today, particularly in the transatlantic negotiations, the overwhelming majority of politically active companies are in favor of NTM costs, though their regulatory preferences still differ. Opposition comes from consumer and civil society groups, who fear that negotiations aimed at reducing regulatory differences will open the door to lowering standards and displacing jobs.
- To reduce regulatory trade costs the trade partners aim, where possible, to reconcile their differences by establishing, sector by sector, the equivalence of regulatory regimes: agreeing on the essential requirements imposed on regulated entities and demonstrating to each other, and the public, comparable rates of compliance, while allowing the means to these ends to differ from jurisdiction to jurisdiction according to variations in their circumstances. Reduction of trade costs can, in other words, only be achieved by clarifying shared values and establishing confidence that they are mutually respected, in ways specific to each party.
- As trade policy focuses more on the effects of regulatory differences, the nature of regulation is changing in ways that reflect the changes in production, and that complicate the determination of equivalence. Because of increasing uncertainty—especially the inability to anticipate hazards produced by new, globalized methods of production and the increasingly rapid combination of novel technologies in new products—the regulator’s traditional emphasis on fixing conditions for market operators, and assur-

ing continuing compliance with them, is being complemented by greatly increased attention to detecting and responding to latent hazards unnoticed when products initially are approved for sale. This change is marked by the diffusion of requirements, mandated by public regulation and by private standards enforced by contract among supply chain partners, to report breakdowns in control that threaten the safety of products or production processes, to trace these incidents to their source and root cause, and to take corrective and preventative action. The just-in-time disciplines that enable smooth operation within supply chains also equip firms to detect and report such breakdowns.

- This response to latent hazards requires not only that trade partners currently achieve essentially equivalent results, but also that each regulator demonstrates to the other a comparably robust capacity to learn from mistakes and advances—its own, and others’—and update its requirements and methods accordingly. The warranty of a system’s equivalence to others safeguarding similar values, is thus not just its ability to assure compliance at some acceptable level and rate, but also rather its ability to improve from its regulatory shortfalls. The trade goal of regulatory equivalence thus entails close ongoing collaboration among regulatory officials—on the ground, inspecting facilities and products, and in high management—in interpreting existing rules and devising new ones, while allowing for continuing differences in the way shared outcomes are achieved.
- At its best, such international collaboration allows regulators to learn from one another, improving their ability effectively and accountably to defend the values entrusted to them. When this is so, reductions in trade costs and improvements in regulatory control of markets—reflecting shared values and respect for persisting differences—can be complementary, not conflicting, and sovereign self-determination can be reconciled with the stepwise extension of economic exchange and regulatory cooperation. By

the same token continuing, a mutual review can heighten domestic political accountability.

- The WTO, because of political blockages among its highly diverse members and internal organizational rigidity, is incapable of addressing NTMs and the efforts leading to regulatory equivalence. The major, developed trading nations have therefore sought to establish frameworks
- for (sectoral) regulatory cooperation by negotiating mega-regional agreements.
- Under pressure from a skeptical public, this regulatory cooperation is, in recent treaty drafts, methodically subjected to political oversight at every step so that close collaboration does not become a cabal of experts acting out of sight of the public.

This stylization of the facts of global commerce omits prominent questions regarding the scope of investor protections against expropriation by host states (investor-state dispute settlement, or ISDS) and protection of rights to intellectual property. If expansive interpretations of those rights win out much of the discussion about regulation would be vexed and the space for domestic policy making sharply constrained. But the concern here is not with the near-term future of trade agreements, but rather the way current developments may enlarge our understanding of sovereignty and democratic accountability in a world of plural values. For this reason, we set these justly controversial issues aside and look at the operation of sectoral regulatory cooperation in practice.

4. Interdependence and Regulatory Equivalence: Two Examples

In a world where inputs are globally sourced and potentially hazardous products globally distributed, regulatory systems must encompass relevant trade partners to be effective. The drive to establish regulatory equivalence between trade

partners with similar values follows directly from this mutual, imperative need to determine whether each party's hazard detection systems in operation warrant the confidence of the other. Put generally, when globalized co-production of innovative products introduces latent hazards, the national regulatory systems that provide early warning of possible dangers and quick responses to breakdowns must be able to rely on one another's oversight of the linked producers. This, in turn, leads to ongoing scrutiny of partners' regulatory practices in particular domains and, in the light of investigations and deliberations that differences and failures provoke, mutual adjustment—without jeopardizing the right of unilateral withdrawal from agreements that is the continuing prerogative of sovereignty.

The steps leading to the Food Safety Systems Recognition Arrangement—a declaration of regulatory equivalency—recently signed by the Food and Drug Administration (FDA), the Canadian Food Inspection Agency (CFIA), and the Department of Health of Canada (HC) provide a first illustration of the general tendencies prompting closer regulatory coordination. Above all, a look at the process of establishing equivalence draws attention to exacting reciprocal scrutiny of regulatory ends and means—and thus presumptively to heightened possibilities for domestic review and accountability in the partner countries—needed to establish confidence that equivalence can work.

In the US, outbreaks of food borne illness transmitted by leafy greens (especially dangerous because often eaten raw) led California wholesalers to create in 2006 a regime—contractual, but enforced by a state inspectorate—requiring growers to conduct a hazard analysis of the critical control points (HACCP) review of their farms, identifying the points at which pathogens could enter the production process, and proposing and testing methods of avoiding or mitigating those risks. The Food Safety Modernization Act (FSMA) of 2010 codified this regime, extended it to many more products under the jurisdiction of the FDA and established procedures for responding to breakdowns in controls. As the US was

modernizing its food safety legislation, Canada was doing the same: like the FSMA, the Safe Food for Canadians Act (SFCA), passed in 2012, mandated HACCP controls for the entire supply chain, incident reporting and traceability; and like the FSMA the SFCA anticipated close cooperation with the regulators in key trading partners. For both countries, the determination proceeded in two steps: first, a careful desk review of the partner's standards and procedures to ascertain how general organizational goals are translated into specific standards and routines, and to verify that the routines are routinely followed. Then observation by field teams of the partner's audit of a range of food-processing plants and reference laboratories to understand how experience on the ground is translated into decisions and documents.

The FDA's desk review began with the development of an International Comparability Assessment Tool (ICAT) for assessing the robustness of a trading partner's food safety system in ten domains such as inspections and responses to outbreaks of food-related illness.¹⁰ A capable partner authority is expected to conduct "periodic self-assessments and quality assurance reviews" of its inspection and other programs to "determine areas or functions...that need improvement, to develop improvement plans and to establish timelines for implementing improvements;" similarly a robust food-safety system is expected to include periodic review of enforcement actions "to assess areas in need of improvement or corrective action," and update "policies and practices based on findings." The ICAT review also included presentation by Canadian officials at the national and provincial levels of case studies that, starting with source documents such as audit reports, documented the chain of decision making in particular product recalls and enforcement actions against firms, allowing the US reviewers to determine whether the information generated by the Canadian food-safety system

¹⁰ The following draws is based on the FDA's presentation of ICAT. FDA, "Draft: International Comparability Assessment Tool (ICAT)," International Interagency Coordination, www.fda.gov. (2010). Available at <http://www.fda.gov/downloads/Food/InternationalInteragencyCoordination/UCM331177.pdf>.

was effectively used to serve its expressed goals. This extended desk review was then complemented by weeks of site visits in which a pair of three-member, interdisciplinary US teams (one in the West of Canada, one in the East) prepared to shadow Canadian inspectors in various plants by reviewing their training records, then observed the actual inspection of processing facilities, with attention to the records consulted and interactions with key managers. The entire process is meticulously described in a report in which the FDA reviewers recommend “a positive finding of system recognition”—current FDA lingo for a determination of regulatory equivalence.¹¹

As a second example illustrating the trajectory and governance mechanisms of sectoral regulatory collaboration based on continuing mutual scrutiny, consider the agreement on “cooperation in the regulation of civil aviation safety” or Bilateral Aviation Safety Agreement (BASA) entered into by the US and EU in 2011.¹² Civil aviation is, like pharmaceuticals, among the most rigorously and successfully regulated industries: passenger fatalities per 100 million passenger-kilometers flown globally in commercial air transport fell from 0.8 in 1960 to 0.08 in 1980 and 0.03 in 1990; since then it has ranged between 0.05 and 0.01.¹³ The International Civil Aviation Organization (ICAO), formed under the Chicago Convention on International Civil Aviation in 1944, provides the framework for international regulation in the sector. ICAO establishes a “mutual acceptance” regime in which the certification by one signatory that equipment or flight crews under its jurisdiction meet ICAO standards is accepted by other signatories. Mutual ac-

¹¹ FDA, “Report of the Systems Recognition Assessment of Canada,” International Interagency Coordination, www.fda.gov. (2013). Available at <http://www.fda.gov/downloads/Food/InternationalInteragencyCoordination/UCM503960.pdf>

¹² EU-US BASA, “International Agreements Council Decision of 7 March 2011 concerning the conclusion of the Agreement between the United States of America and the European Community on cooperation in the regulation of civil aviation safety,” Official Journal of the European Union, (September 11, 2011). Last accessed on 11/9/17, available online at: http://eur-lex.europa.eu/resource.html?uri=cellar:64d9e1a2-633c-4e91-bbf5-053e5ab1b432.0010.02/DOC_1&format=PDF

¹³ International Civil Aviation Organization, “Outlook for Air Transport to the Year 2025,” ICAO Circular Cir. 313 AT/134, (September 2007).

ceptance does not amount to agreement of regulatory equivalence for three reasons. First, ICAO only establishes minimum standards; more demanding jurisdictions such as the US, EU, Japan, China, Brazil and Canada insist on more rigorous ones. Second, innovation outpaces the capacity of ICAO's 191 member states to establish new standards, so, for example, it may be impossible to certify designs for next generation equipment under ICAO. Third, even when standards are available and acceptable to all parties, the capacity and willingness to engage in conformance testing varies greatly among the signatories, and some will not accept the certifications of the others.¹⁴

For all these reasons the states insistent on higher civil aviation standards enter bilateral agreements with peers. Beginning in 1996, the US negotiated BASA's formal framework agreements in which the partner countries by treaty or executive order authorize their respective air safety authorities (called Technical Agents or TA's) to scrutinize each other's practices and treat those found equivalent as common technical implementation procedures (TIP's) for certification purposes. Of these agreements the EU-US BASA, covering principally the airworthiness of equipment from design to manufacture and maintenance, as well as conformity to environmental standards, is the most comprehensive and developed, with a formal governance structure for resolution of disputes and possible extension of the agreement to additional areas of air safety.¹⁵

Like the ICAO, the EU-US BASA establishes the principle of mutual acceptance, but in a distinctive sense: each party insists on compliance with its own, distinct standards, but agrees to rely "to the maximum extent practicable" on the other

¹⁴ Jennison, Michael. "Future of Aviation Safety Regulation: New US-EU Agreement Harmonizes and Consolidates the Transatlantic Regime, but What Is the Potential for Genuine Regulatory Reform?" *Air & Space L.* 38 (2013): 333-350.; Eisner, Neil and Richard W. Parker. "Learning from Experience: Three Case Studies in International Regulatory Cooperation, A Report Prepared for the European Commission." (2016).

¹⁵ Jennison (2013): 338-9.

party's certifications that its products or services do so.¹⁶ Formally this means that an Airbus designed in the EU must be certified by the TA in the EU, the European Air Safety Agency (EASA) as meeting the airworthiness or "type" requirements of the TA in the US, the Federal Aviation Administration (FAA), and that a maintenance station in the US repairing Airbus equipment must be certified by the FAA as meeting EASA standards.

But in practice and by design, this kind of reciprocal acceptance of compliance certifications shades into collaboration and de facto recognition of the equivalence of many standards. With regard to maintenance stations, each authority determined before entering the agreement that the other's basic system for quality control and reporting was equivalent to its own, and listed separately in the maintenance annex to the BASA a small number of "special conditions": "requirements [in the relevant regulation of either party] that have been found, based on a comparison of the regulatory maintenance systems, not to be common to both systems and are significant enough that they must be addressed."¹⁷ Thus EASA can certify a repair facility in the EU performing work on US equipment as meeting FAA requirements only if it complies with EASA's standards *and* meets the special conditions defined by the FAA.¹⁸

Similarly, in certifying the design of new aircraft types, the authorities first determined the equivalence of their respective methods of ascertaining an organization's qualification to produce reliable aircraft designs and a manufacture's capacity to maintain a reliable quality control system, and then provided for the exceptional cases where equivalence cannot be presumed. For example, early in

¹⁶ EU-US BASA (2011): Annex 1, 3.2.4

¹⁷ EU-US BASA (2011): Annex 2X.5.

¹⁸ European Aviation Safety Agency and the Federal Aviation Administration, "Agreement/Annex 2/ Maintenance," *The Aviation Safety Agreement Between The United States and The European Community*, EASA/FAA Workshops in the US presentation, (September 11, 2011): Slide 23.

the design process, when encountering novel, unregulated design elements (also called “special conditions”)¹⁹ the FAA and EASA, separately or together, can issue new standards maintaining “a level of safety equivalent to that established in the [existing] regulations”; likewise, either authority can waive the obligation to conform with a particular certification requirement when differences are thought to be inconsequential, or find that different design features or test methods achieve an “equivalent level of safety.” Only if a difference in the scope and stringency of requirements does not fall under one of these exceptions will one of the authorities find a “Significant Standards Difference” and (if further discussion does not resolve the issue) declare the difference a “validation item,” meaning that it will test for itself whether the other party has made an adjustment that meets its standard.²⁰ Regulatory cooperation in the sense of enlarging the scope of reciprocal acceptance also extends to consideration of deep changes in the nature of design standards—for example, from specifications of permissible equipment to specifications of the level of performance the proposed equipment must attain—that reflect the broad changes in the organization of production and the overall context of regulation set out above.

The governance structure created by the Agreement is accordingly designed to encourage resolution of disputes arising under current arrangements but also to extend regulatory cooperation. As its name indicates, the Bilateral Oversight Board (BOB), including representatives of the TA’s (and, for the EU, representatives of the member state regulatory authorities with continuing air safety jurisdiction), reviews progress under the BASA and sets the agenda for further reform. It is the final arbiter of disputes and has explicit authority to approve new,

¹⁹ European Aviation Safety Agency and the Federal Aviation Administration, “Technical Implementation Procedures for Airworthiness and Environmental Certification between the Federal Aviation Administration of the United States of America and the European Aviation Safety Agency of the European Union,” www.faa.gov. Revision 5, (September 15, 2015).

²⁰ Eisner, Neil and Richard W. Parker (2016): 24.

domain-specific annexes. A Certification Oversight Board, composed of representatives of the TA's with expertise in airworthiness certification and environmental testing, and a Joint Maintenance Coordination Board, with TA representatives whose expertise is in repair, coordinate the technical discussions between the authorities in their respective domains and whenever possible resolve disputes arising from those discussions, referring only intractable ones to the BOB. This ensures that disputes are normally resolved at relatively low levels of the administrative structure, by persons likely to have deep knowledge of the issues, rather than by higher authorities with limited understanding of current practices. If a party, after the fruitless pursuit of a remedy, loses confidence in a class of approvals issued by the other, it suspends acceptance of only that kind of approval, without disturbing the remainder of the agreement. Because of this severability, each authority understands that the other could indeed act on a particularly vehement objection to a test or standard without fear of precipitating a political crisis; the credibility of this threat has a deterrent effect that reduces the chances that the power of partial suspension will actually be exercised.

But perhaps civil aviation and food safety are exceptional cases, and not, as suggested here, examples of general tendencies in the development of regulation and regulatory cooperation? A recent study of the EU-US BASA raises this possibility, arguing that the role of ICAO as an international standard setter and the high degree of ex post liability for aviation accidents—the near certainty that negligence will be uncovered and heavily sanctioned—make the case unusual, if not singular, and caution against generalization.²¹ But this particular argument at least is unpersuasive. Industry-specific organizations with the authority to set minimum standards for their members and to frame the agenda for further reform are today pervasive, if not ubiquitous. The *Codex Alimentarius* plays this role globally for food safety (helping to diffuse HACCP-based regulation), as

²¹ Eisner, Neil and Richard W. Parker (2016)

does the International Maritime Organization in maritime safety, the Forest Stewardship Council (an NGO convening stakeholders to set standards, many of which are treated in effect as guidance to compliance with public regulation)²² in forestry products, and the International Conference on Harmonization in the area of pharmaceutical regulation, initially among regulators in the US, EU and Japan, and now globally. None of these organizations or the many others like them displaces national, bilateral or (mega-)regional regulation any more than ICAO displaces the FAA, EASA or the results of their cooperation under the EU-US BASA. In all these cases the “global” standard setter, whatever its actual scope, provides an invaluable forum for crystalizing consensus, exposing new ideas and initiatives to informed criticism, generalizing successes and at times calling attention to egregious cases of non-compliance with minimal norms. But whatever their exact role, these organizations are a common feature in the current regulatory landscape, not a distinctive outcropping that can explain the outcome in civil aviation or any other particular sector.

Ex post liability too is becoming commonplace. The spread of incident reporting systems, including the obligation to trace serious defects to their source, together with the spread of just-in-time production makes it harder and harder to escape liability for negligence: faults are registered in the course of production and failure, especially repeated and systematic failure, to take corrective action makes it difficult to disclaim liability. Imminent changes, suggested again by the trajectory of civil air regulation, could well make liability all but inescapable. Through the 1970s improvements in air safety largely resulted from investigation of aircraft accidents. As the number of accidents declined, reports of incidents—

²² Firms that comply with the standard are presumed to have thereby complied with a legal obligation, imposed by the EU, that importers exercise due diligence in determining that timber they market has not been illegally logged. See Overdevest, Christine and Jonathan Zeitlin. "Experimentalism in Transnational Forest Governance: Implementing EU Forest Law Enforcement Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana." *Regulation & Governance* (2017).

out-of-control events that could lead to accidents—spurred further improvements. As the number of incidents declines ICAO now argues that emergent hazards are best detected by continuous, real-time monitoring of engines and aircraft.²³ This example, too, could be multiplied.

Still, the cases presented might be exceptional on other grounds. However much they might ramify—aircraft safety involves design, manufacturing, maintenance and operations; food safety spans farms, processing, retail distribution—these domains may be discrete or bounded in the sense that they do not implicate what we might think of roughly as core sovereign prerogatives such as the monopoly control of force or the power of taxation. Regulation in other areas might, however, lead to such a “sovereigntist” ascent, the anticipation of which might stop efforts at mutual accommodation through regulatory equivalence before, or as they begin.

A case in point might be banking and other financial services, where, as the recent financial crisis showed, failures of regulation in one jurisdiction can be rapidly transmitted to others, with catastrophic consequences. Within the EU, for instance, efforts to establish regulatory equivalence in banking—passporting in the jargon—may have touched off such an upward progression. To list only the most prominent reforms under discussion: regulatory equivalence requires equivalent systems of deposit insurance, of resolution of insolvent banks, of common, risk-adjusted capital reserve requirements (which must be compatible with Basil IV international standards now under construction) and of a “single rule book” for evaluating the underwriting practices of systematically important and ordinary banks.²⁴ Perhaps these regulatory domains are so intertwined that they can on-

²³ Ratajczyk, Mikołaj. "Regulatory Framework for a Performance-Based Approach to Air Safety Management in the European Union." *Air & Space L.* 36 (2011): 401; Jennison (2013): 349-50.

²⁴ See generally on EU banking reform: Ferran, Eilis. "Financial Supervision" in Daniel Mügge (ed.), *Europe and the Governance of Global Finance*, Oxford University Press 2014, pp. 16-34;

ly be managed by a single, central authority, so the search for mutual adjustment through regulatory equivalence results in the creation of a de facto banking or financial-markets sovereign, if not a new sovereign *tout court*? If there were many such domains regulatory equivalence would remain marginal and the choice might be, in fact, between a global technocracy and more or less democratically accountable megaregional ones.

But there are important counter considerations and counter-evidence. The main counter consideration is that under uncertainty, regulatory homogeneity is unacceptably risky. Imposing uniform rules (for example, treating sovereign debt as riskless) is a receipt for disaster when, as all but inevitably happens, some of the uniform rules are inapplicable or unintentionally induce risky behavior themselves. By the same token, uniform requirements choke off the exploration of diverse, contextualized responses to local conditions and with them the possibilities of mutual learning that, as argued repeatedly here, is indispensable to rapid adjustment under uncertainty.

These considerations are very much in evidence in the EU debate on banking reform, as counterweights to arguments for centralization and uniformity. The Chair of the Supervisory Board of the European Central Bank, which helps create the framework for and monitors the results of banking supervision in Member States, cautioned against “pursuing a one-size-fits-all supervision” in favor of an approach that ensures “consistency across institutions and supervision tailored to credit institutions’ specificities” to “accommodate banking diversity”—considered to be “very desirable from a financial stability perspective.”²⁵ How to

Zeitlin, Jonathan. "EU Experimentalist Governance in Times of Crisis." *West European Politics* 39.5 (2016): 1073-1094, especially 1077-83.

²⁵ Nouy, Danièle. "Presentation of the First ECB Annual Report on Supervisory Activities at the European Parliament's Economic and Monetary Affairs Committee", European Central Bank, Brussels, (March 31, 2015). Available at <https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150331.en.html>.

institutionalize a framework maintaining consistency while allowing and learning from diversity—the stuff of regulatory equivalence—remains open question in this and other domains. But in this case, at least, the apparent exception accords with the rule.²⁶

Further examination in the light of yet more experience may show that these examples are outliers, not forerunners. But, for now, we will regard them as illustrative of the broad changes reshaping regulation as regulation becomes more and more central to trade.

5. Making regulatory cooperation more democratically accountable

The regulatory cooperation just described results in agreements formalizing joint oversight and governance processes that meet the usual standards of administrative accountability in democracies if only because they operate, as the case studies show, within and subject to the usual, domestic administrative procedures. Regulatory cooperation culminating in recognition of regulatory equivalence may also provide, through reciprocal inspections and the like, richer and more timely information on (potential) regulatory failures, and therefore greater possibilities for stakeholders to articulate their interests than normally available in well-functioning democracies. But because this deep cooperation emerges gradually, one sector at a time, often focusing on technical themes, and engaging the most immediately concerned stakeholders first, it tends to escape notice until it is a—formal—*fait accompli*, and often continues unremarked after as well. Can the process of reaching formal agreement to cooperate itself be subjected to formal democratic oversight, so that the ex post accountability provided by reciprocal monitoring and reporting is complemented and completed by ex ante democratic

²⁶ Ferran (2014).

supervision of the steps towards agreeing on formal cooperation? Recent controversies regarding trade agreements have spurred careful reflection on how this can be done.

The problem of democratically domesticating the early, tentative and informal steps towards regulatory cooperation is politically urgent. To the skeptic, regulatory cooperation, as a series of distinct, often technical discussions among government experts and private interests, menaces democracy and sovereignty. Especially in its early stages, it is pervasive and diffuse to the point of near invisibility: To authorize regulatory cooperation is to invite foreign officials and stakeholders to sit in the innermost circles of domestic decision-making, where they can weaken rules and subvert national values all the more effectively because they act out of sight. Fears of this kind have animated the widespread opposition of civil-society organizations to mega-regional agreements, including TTIP, as noted above.

If nothing else, the extension of ISDS claims and their encroachment on domestic regulatory autonomy warrants such concern. ISDS originated as an extra-territorial system of arbitration, anchored in bi- and multi-lateral treaties, to protect foreign investors from expropriation by predatory states. By incremental steps, it has become a system in which, at the limit, foreign investors can claim compensation for *any* change in government policy adverse to their interests, even if the change applies alike to both foreign and domestic investors and is decided under established and legitimate procedures. Although these claims are rarely successful, the very possibility of making them can have a chilling effect on regulation.

To see how a general, hortatory commitment to exploring collaboration could be manipulated to chilling effect take Article 9 of the 2015 EU draft chapter on regu-

latory cooperation. It provides that “[t]he Parties shall participate constructively in regulatory exchanges;” and that, beyond early notification of consideration of trade-relevant measures (required in Article 5), “a Party shall provide to the other Party, if the other Party so requests, complementary available information related to the planned regulatory acts under discussion.” “Constructive participation” is an extremely open-ended standard. By itself, it might entail almost nothing beyond civility. But given the differences in the level of regulatory cooperation across sectors, cooperation in some domains will be very “constructive” indeed. A regulated entity might therefore challenge the validity of an unwelcome partner country measure on procedural grounds before a dispute settlement body (contemplated in the 2015 draft), arguing that the “regulatory exchanges” leading to the measure’s adoption fell short of the standard set by more extensive efforts between the parties. Or the dissatisfied entity might demand more and more “complementary” information, aiming for “paralysis through analysis,” and raising the standard that regulators subsequently must meet to demonstrate “constructive” participation in cooperative exchanges. In these ways, the long-term, cumulative effect of a general commitment to foster regulatory cooperation that on its face seems little more than an exhortation to comity would indeed be a chill on regulation.

Responding to such concerns, the 2016 draft chapter methodically eliminates this possibility. The general, freestanding obligation to cooperate in (trade-relevant) regulation is eliminated. Under Article x.3 regulatory cooperation begins only when “regulatory authorities of both Parties have determined common interest”; and “[c]ooperation activities towards furthering regulatory compatibility” remain under the control of “the relevant regulatory authorities of both Parties” (Article x.4).²⁷ Cooperation once begun does “not oblige the Parties to achieve any par-

²⁷ In its commentary on the current draft chapter the EU Commission stresses, “Any new regulatory cooperation initiative must be based on the common interest of regulators.” European Commission, (2016): 3; Hayek (1939).

ticular regulatory outcome (Article x.1). The regulators are accountable to political oversight bodies and the public. Progress on regulatory cooperation must be “regularly reviewed at Ministerial level with full participation by the relevant regulatory authorities concerned”; stakeholder involvement—deemed “critical for the success of regulatory cooperation”—is to be assured through dialogue with “interested natural and legal persons, both at the Ministerial and working levels.” (Annex) Recourse to dispute resolution is explicitly excluded from the current draft (x.9). In addition to these specific procedural assurances, the draft chapter echoes the draft on regulatory coherence in reasserting the regulatory sovereignty of the parties, especially the right of each party to achieve the relevant public policy objectives “at the level of protection it considers appropriate, in accordance with its regulatory framework and principles” (Article x1).

Ideally this proposed formalization of the early stages of regulatory cooperation would enhance the accountability of regulatory equivalence were it to be established in a particular domain. Perhaps the regular reviews of the progress of regulatory cooperation, including regulators and ministerial-level representatives, could be continued and integrated with the reciprocal monitoring established under the regime of regulatory equivalence. In this way, topics such as the risk of workforce displacement and other harms resulting from increased trade, which are likely to be salient at the beginning of efforts to reduce NTMs, can be carried forward and kept on the agenda, in full public view, as the new rules are put into practice. Similarly, deliberate efforts to expand the circle of stakeholders to address public concerns at the early, politically volatile stages of discussion could lead to wider, continuing participation later.

But even if developments fall short of the ideal, the combination of explicit democratic control over the formative stages of regulatory cooperation, and the augmented oversight possibilities provided by knowledgeable, partner scrutiny of domestic institutions make regulatory equivalence at least as accountable as fa-

miliar, domestic administrative procedures, extending the cooperative reach of sovereignty without undermining the right of national self-determination.

But the possibility of continuing democratic oversight of regulatory cooperation notwithstanding there will surely be occasions, perhaps many, where potential partners cannot agree on adjustments and prefer instead to keep certain markets closed to (expanded) trade. Under agreements such as the EU TTIP draft, they are free to do so. These case-by-case decisions will naturally provoke domestic conflict, to be resolved as democratically as national politics allows; but none of these choices will be so coercively fateful as to compel a trade opening: No country would be forced to endure the pretense of choosing between submission to a trade regime that aims in theory (though not in practice) at more and more uniformity, and independence at the price of exclusion from world markets.

Accepting *arguendo* these results, consider, by way of conclusion, how the process of norm elaboration discussed above responds to the various claims of the incompatibility of national democracy and the globalization of markets, and suggest that these emergent institutions may constitute a novel and unsuspected mechanism of international cooperation in the absence of a global state or technocratic authority.

7. Sovereignty and complex interdependence: some elements of reconciliation

The claim that the democratic determination of public values is limited to the state comes, we saw, in three forms: Rodik's globalization trilemma, in which markets can be global only if subject to homogenizing technocratic regulation; Nagel's claim that the obligations of justice are triggered only by democratic sovereignty and thus that international regimes based merely on contract, without

implicating the citizens' will, are normatively barren; and Scharpf's claim that the market-making, negative integration fostered by supranational institutions displaces the market-correcting, positive integration achieved in the social democratic state. All of these views rest on the assumption that only the nation-state can embody and protect the values of its citizens, so that any international regime that facilitates commerce by subjecting different states to common rules must subvert domestic norms. To show that there is a path around each of these asserted impasses is to provide elements—for now mostly procedural—of a conception of sovereignty compatible with the fact of complex, global interdependence.

Take first the trilemma. There is no necessary trilemma of globalization when the regulatory complement to markets is built sector by sector, through cooperative determination of regulatory equivalence on the lines described above. Under these conditions, there is no distinct global regulator, democratic or not. Regulation emerges from bi- and multi-lateral discussion and reciprocal review of goals and procedures among national regulators, each subject to ongoing oversight by political authorities, with the power—clearly acknowledged in the 2016 EU TTIP draft—to approve final decisions and to reverse them when necessary. The outcomes of this process will differ from those each party would have arrived at in autarkic isolation because they will reflect the facts of economic interdependence, especially differences in regulatory values and institutional approaches. But unless decisions are truly sovereign only if taken in willful indifference to the circumstances and opinions of the rest of the world, it seems fair to say that cooperative determination of regulatory equivalence within mega-regional agreements creates starting points for reconciling globalization with the nation-state and democracy. And since members of the WTO not party to mega-regional agreements would nonetheless under the Organization's current rules presumptively be accorded the "national treatment" due to treaty parties provided they demonstrate the equivalence of their own regulatory regimes, the initial agree-

ments might induce successive waves of (mutual) adjustment, just as the creation of the WTO did in its day.²⁸ The result, this time around, would in the long term be to create a global regime despite the absence of a truly global founding agreement. In the most favorable case, again presaged by the EU draft TTIP chapter on regulatory cooperation, the extension of equivalence sector by sector and to additional parties would not just conserve the essentials of national democratic accountability amidst globalization but would, by regularizing rigorous reciprocal review and with it the possibility of questioning regulatory means and ends, make oversight more responsive and inclusive. Globalization under these terms might thus enhance national democracy.

We arrive at a similar conclusion in re-examining the supposed dualism of morally obligating sovereignty and morally neutral contracts between cooperating regulators. The puzzle is this: How can it be that the non-binding agreements described above, subject to continuing political oversight and unilaterally revocable, implicate the will of the sovereign and the citizens in international commitments, without delegating authority to unaccountable bodies? To find a solution it is helpful to return briefly to the role of uncertainty in shaping the circumstances of global exchange.

Recall that uncertainty figured in that discussion both as a cause of the reorganization of production—from vertically integrated to disintegrated, and from mass to just-in-time production—and as a cause of increasing regulatory emphasis on ex post incident reporting of latent hazards that escaped ex ante review. Uncertainty produces cognate changes in contracting relations between innovative firms. Under relatively stable conditions, contracts between sophisticated parties are exchanges of highly detailed promises (and the penalties in case of breach).

²⁸ Pauwelyn, Joost. “WTO Panelists Are From Mars, ICSID Arbitrators Are From Venus: Why? And Does it Matter?” *Social Science Research Network* (2015); Howse (2016).

But as the economy becomes more innovative and firms increasingly operate at the edge of established solutions, neither party can say exactly what is feasible. The nature of collaboration changes from a precise division of labor to a joint exploration of possibilities. In these cases, no particular outcome of the collaboration can be specified in advance; indeed at the farthest frontier of practical knowledge collaboration can end in failure to produce any useful outcome at all. Only if such collaborations produce marketable results do purchase orders (in the case of components entering supply chains) obligate the supplier to produce and the buyer to pay for specified quantities of the good at a certain date and price.

Under these circumstances the nature of contract itself changes as well. Instead of defining precisely each party's obligations, the contract establishes broad goals and a regime for evaluating achievement of them: regular, joint reviews of progress towards interim targets or milestones, as well as procedures for evaluating results and resolving disagreements in interpretation. The information exchanged under such contracts allows each party to evaluate the capacities and good faith of the other, and in so doing the prospects of both the particular project and joint efforts generally. As collaboration progresses, each party comes to rely increasingly on the capacities of the other, deterring opportunistic defection even in the absence of an explicit commitment to purchase anything in advance. Put another way, the formal requirements of the contract—the obligations of regular review and deliberate consideration of the interim results—create the conditions in which informal norms and self-interested calculations bind the parties to continue promising collaboration in good faith.²⁹

Regulatory cooperation of the kind described between the US and Canada in food safety and between the US and the EU in civil aviation can be understood

²⁹ Gilson, Ronald J., Charles F. Sabel, and Robert E. Scott. "Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration." *Columbia Law Review* (2009): 431-502.

as instances of regulator-to-regulator contracts of the same novel type. In these cases the exploration of the possibility of regulatory equivalence entails no obligation to find it; and once equivalence has been established, it must be re-established by periodic review. But this disciplined reciprocal scrutiny leads to protocols for reciprocal review of procedures and—in the more mature case of civil aviation—governance institutions whose jurisdiction ranges from local dispute resolution to joint formulation of new rules. These protocols and governance institutions give each party warranted confidence in the robustness and adaptability of the other, increasing the breadth and depth of their shared understandings and making it less and less likely that either will exercise the continuing right to unilaterally end cooperation. Long-term mutual reliance is thus the outcome of continuing mutual review, not of an initial commitment to long-term collaboration. So far as we can tell these contracts are subject to at least the same scrutiny as normal administrative rule making; because they are scrutinized—in progress practice and regularly—in the mirror of the partner’s ongoing reviews, they are if anything scrutinized more carefully. The wills of the citizens, or at least those affected by them, are therefore implicated in their content. Because the rules are never fixed and final, or delegated for interpretive purposes to an autonomous, international entity, the idea that the institutional origin and form of these agreements deprives their operation of normative effect is even less plausible than it was in Nagel’s original rendition of the claim.

And what of the supposed tendency of negative integration to crowd out positive, undoing political limits to markets for the sake of untrammelled commerce? At least in principle that tension does not exist in the circumstances of global exchange reflected in new-vintage trade proposals among rich countries or between them and middle-income partners. The barriers to trade are NTMs. Among rich countries, none has in trade negotiations been willing to abandon its own regulations, adopt the regulations of another, or simply defer to an international standard, for economic gain. Refusing to defer to each other, the rich countries

are still less likely to defer to middle-income economies, where regulatory protections are likely to be spotty at best, and where deregulation would be patently dangerous. Negative integration in the sense of a shift from nationally legitimate norms to norms whose sole justification is furthering international commerce is not under discussion. Debate and deliberation are about the mutual adjustment of existing regulations, and agreeing a (sector-by-sector) process of continuing revision. The aim of negotiations is to arrive at forms of—equivalent—positive regulation agreeable to all parties; if one regards the proposals of the other as equivalent to de-regulation, it is free to reject them.

Understood as the regulation of trade without a global regulator, as a deliberation-inducing contract among nations under uncertainty and as the mutual adjustment of regulation beyond the dichotomy of positive and negative integration the emergent institutions of regulatory equivalence suggest a practical, if partial, possibility for realizing Kant's "negative surrogate": a portmanteau term today for a *Völkerbund* or federation of democratic republics, growing incrementally through voluntary association, as a substitute for a global state. The conventional accounts of the emergence of such a horizontal international order rely on distinct, self-reinforcing economic and political dynamics. The defining characteristic of the novel institutions is the entanglement of the two.

In one familiar argument for voluntary sovereign federation—the *doux commerce* thesis associated with Montesquieu—trade predominates. It is an emollient of political differences, perhaps a solvent of politics generally. Commerce all but creates its own international constitution.³⁰ In the other strand of the usual account of federative or horizontal order, politics leads trade by creating an international (but not necessarily global) regulatory armature that encourages the expansion of commerce. This idea is prominent in Kant's idea of a democratic peace: Because republics are accountable to their citizens, who bear the costs of

³⁰ Larrère, Catherine. "Montesquieu et le «doux commerce»: Un Paradigme du Libéralisme." *Cahiers d'histoire. Revue d'histoire Critique* 123 (2014): 21-38

sovereign folly and therefore contain it, they avoid war on each other, but willingly trade goods and (like) ideas.³¹ Related assumptions underpin Rawls' conception of a law of peoples as the normative frame of an international society of "decent" societies.³² Variants of the *doux commerce* and democratic peace ideas can be combined to explain the possibility of complex structures amalgamating elements of a global authority in some domains and federation in others,³³ or of forms of political federation that limit state intervention in the economy.³⁴

What is distinctive of international cooperation through the construction of regulatory equivalence is precisely that it does not distinguish economic interests from political commitments in the first place. Regulatory differences, themselves fusing the two, provoke reconsideration of existing regulatory norms and practices, and with them the interests and values they reflect and imply. In the usual accounts, cooperation supposes broad, shared agreement, as in mutual republican recognition, or a common interest in the benefits of trade. Here, agreement is discovered and interests made mutual through the exploration of differences at once economic and political.

Of course, the "discoveries" of regulatory equivalence are modest indeed compared to the promises of *doux commerce* or the democratic peace. Perhaps in

³¹ Cavallar, Georg. *Kant's Embedded Cosmopolitanism: History, Philosophy and Education for World Citizens*. Vol. 183. Walter de Gruyter GmbH & Co KG, (2015); Kleingeld, Pauline. "Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship." Cambridge University Press, (2011); Kant, Immanuel. "*Perpetual Peace: A Philosophical Sketch*." Cambridge: Cambridge University Press, (1970).

³² Rawls, John. "The Law of Peoples with 'The Idea of Public Reason Revisited.'" Harvard University Press, (2001).

³³ Habermas, Jürgen. "The Divided West, Edited and Translated by C. Cronin." *Polity* 136 (2006): 115-193.

³⁴ Hayek anticipates, approvingly, a dynamic in which the desire for peace leads to political federation; federation induces economic integration; and economic integration, because of the diversity of interests it comprehends, checks regulation beyond the minimum needed to order commerce. See Hayek, Friedrich. "The Economic Conditions of Interstate Federalism." *New Commonwealth Quarterly* V, No. 2 (1939). 131-49. Rpt. in *Individualism and Economic Order*, Ch. XII. By Friedrich Hayek. Chicago: University of Chicago (1948).

time, in the aggregate, they will help reshape and enlarge our sense of democratic participation and transform international cooperation. But, for now, they are all politically sub-constitutional, confined to changes in administrative rules and procedures. The economic changes they induce, reinforcing and lending urgency to requirements for self-monitoring and rapid self-correction, may likewise have important long run, cumulative effects. But they too are now incremental and hard to identify in any case given the drift of economic development.

Yet, to return to our starting point, the timidity of regulatory equivalence, judged as the promise of domestic transformations in step with the creation a new global order, turns bold indeed when judged against the dejection of our day and, especially, warnings of friends against the delusions of self-determination and accountable cooperation beyond the state. There is it seems, against all expectation, a path of small steps forward in the face of the headwinds of history. Where it leads we cannot yet say; but we will soon know more, for we are already on it.

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