A THEORETICAL INQUIRY ON THE INDIVIDUAL RIGHT TO INTERNATIONAL FREE TRADE
THE INTERNATIONAL ANTIDUMPING REGIME AS A CASE STUDY

by

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Abstract

The paper addresses the status of individuals in international governance by examining how individual rights are represented in international free trade.

In the evolution of international trade from the GATT to the WTO, the fact that the non-discrimination principle has been well-established in trade agreements demonstrates the gradual emancipation of the individual in the global free market. However, international antidumping law, with a heritage from domestic antitrust law, has gradually developed into a discretionary trade instrument under the control of government administrations. The limited government ethic, which is supported by the emancipation ethic of international free trade, is distorted by the international antidumping regime. The contrasting development of the free trade and antidumping regimes indicates the tension between the emancipation of the individual in international trade and the growing discretionary powers of the government over foreign trade.

Further inquiry into this tension demonstrates that the paternalistic and discretionary power of the government is rooted in the myth created by social contract theory. Although social contract theory emancipated individuals from the state of nature into civil society and builds the legitimacy of government on the consent of individuals, it simplifies the dynamic evolution of social institutions into a linear development, and grounds an imaginary contract as the "first mover" of the evolution. It thus does not sufficiently illegitimatize the paternalistic power of the government.

However, the emancipation of the individual in international trade, the international development of human rights, and global democratization in general are processes of mutual influence rather than factors that are isolated from each other. Research shows the social institution is a spontaneous self-extended order based on the interaction among individuals. Accordingly, individuals should eventually participate in international trade without the trappings of nationality. Although international trade generally seems to be heading in this direction, international antidumping law indicates a backwards development which might be rooted in social contract theory. It is time to get rid of the myth of social contract theory and the paternalistic and discretionary power of the government over foreign trade, and to restore the international free trade to its inherently cosmopolitan base.

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I. Introduction: Question, Methodology and Structure

1.1 Framing the Question: the relationship between the individual and the government in a global context

In our social system, individuals are the foundation of our social structure and the final entities bearing the rights and duties and enjoying the freedoms. Most inquiries into the legitimacy of state authority will eventually reach this foundation of the individual's rights and freedoms. Individuals are central to our social system. However, individuals have not always been central to the social structure, since the individual's status in society has its own historical development: what Henry Maine has described is "from Status to Contract,"[1] from "a condition of society in which all the relations of Persons are summed up in the relations of Family ... towards ... a phase of social order in which all these relations arise from the free agreement of Individuals."[2]

A legal point of view recognizes there are three "rights holder[s]" in all societies—the state, the individual, and the group—and "... there are trilateral tensions evident in virtually all societies between rights-based claims of the state seeking to preserve unity, the Groups (cultural, ethnic, religious, etc.) seeking to preserve their particularity, and the individual seeking freedom of expression and identity."[3] Since groups are all the aggregations of individuals in different ways, central to the "trilateral tensions" is the relationship between the state and the individual.

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[1] Henry Maine, *Ancient Law* (London: J. M. Dent & Sons Ltd, 1917), 100.
[2] Ibid., 99.
[3] Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (New York: Oxford University Press, 1999), 147.

The most influential theory that explains and examines the relationship between the state and the individual is the social contract theory, which argues that the social contract that led the development of human society from the state of nature to civil society. Since, according to the social contract theory, it is the consent of the individual that sets up the government, individual rights are the boundary of the administrative power of the state, from which comes the democracy and constitutionalism. Democracy and constitutionalism argue the legitimacy of governance based on the supremacy of some fundamental individual rights over government powers, in particular those regarding individual freedom and property. In John Locke's *Second Treatise of Government*, he clearly grounds the foundation of limited government in the protection of individual's liberty and property.[4] Even Thomas Hobbes, whose interpretation of the social contract to form a government differs from that of Locke, also argues that government is to protect the individuals.[5] Therefore, for thoughts with roots in the well-recognized social contract theory, there is a common understanding that it is the government's responsibility to protect the individual.

However, the relationship between the individual and the government is not always clear and definite. On the one hand, a government's power is sometimes accused of unnecessarily infringing on individual rights, e.g. in E. U. Petersmann's arguments that government's unlimited trade policy power challenges constitutionalism and individual rights.[6] Or as Robert Nozick addresses, except for the "minimal state," "no more

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[4] John Locke, *The Second Treatise of Government* (New Jersey: Prentice Hall, 1997), 73.

[5] Thomas Hobbes, *Leviathan* (London: Penguin Books, 1968), 238.

[6] E. U. Petersmann, "Limited government and Unlimited Trade Policy Powers? Why Effective Judicial Review of Foreign Trade Restrictions Depends on Individual Rights," in *National Constitutions and International Economic Law*, eds. Meinhard Hilf and E. U. Petersmann (Netherlands: Kluwer Law and Taxation Publishers, 1993), 537-61

extensive state could be morally justified ... and more extensive state would (will) violate the rights of individuals."[7] On the other hand, current globalization is said to erode state's sovereign rights in favor of individual rights and freedom. Habermas argues that the dynamic of globalization heralds the end of the global dominance of the nation-state as a continued political model and predicts the beginning of the new "postnational constellation" era.[8] He argues that market is driving out politics thus nation-state is losing some of its traditional administrative capacities; [9] and globalization facilitates individualization and the formation of "cosmopolitan identities."[10] There is a different perception of the relationship especially in a global context.

This controversy fuels the following research to examine the status of the individual in global governance in the context of international trade in particular. This paper will identify the implications or challenges that international trade gives to the traditional perception of the relationship between the individual and government, especially the concept of "limited government."

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[7] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 333.

[8] Jurgen Habermas, *The Postnational Constellation*, ed. Max Pensky (Massachusetts: The MIT Press, 2001), 68-80. See also Jurgen Habermas, "Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight," in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, eds. James Bohman and Matthias Lutz-Bachmann (Cambridge, Massachusetts: MIT Press, 1997), 122. Habermas argues that globalization put into question the presuppositions of classical international law and the sharp distinction between domestic and foreign policies. He also argues "there is a blurring of the boundaries between domestic and foreign policy that are constitutive of state sovereignty."

[9] Habermas, *Postnational Constellation*, 79. He argues, "as markets drive out politics, the nation-state increasingly loses its capacities to raise taxes and stimulate growth, and with them the ability to secure the essential foundations of its own legitimacy."

[10] Ibid., 75-6. He argues that through intercultural contacts and multiethnic connections, globalization leads to the dynamic construction of new identities against traditional images.

1.2 Methodology: examine individual rights in the context of international trade regime

This research locates the status of individuals in the evolution process of global institutions especially the international free trade regime, which means examining a basic legal question—the legitimacy of government power over individuals—outside the law. In fact, as some scholars argue, the answers to some basic legal questions can only be found outside the realm of law. In his examination of the validity and effectiveness of the international legal order, Ian Brownlie argues, "the ultimate source of the binding force of law can only be found outside the law."[11] In their studies on the basis of international law, Robert Jennings and Arthur Watts argue "It is not possible to say why international law as a whole is binding upon the international community without entering the realm of non-legal considerations."[12]

To find the answers to basic legal questions from realms outside of law requires us to locate the status of individuals against international trade context, or to perceive legal rights in *relations*. Central to legal studies is to perceive the factor of relations, since laws in general are rules defining *relations* among different legal entities regarding their rights and freedom. As Montesquieu described at the very beginning of *The Spirit of the Laws*, laws are the "necessary *relations* arising from the nature of things" and the

[11] Ian Brownlie, *The Rule of Law in International Affaires: International Law at the Fiftieth Anniversary of the United Nations* (The Hague: Martinus Nijhoff Publishers, 1998), 11.

[12] Robert Jennings and Arthur Watts, *Oppenheim's International Law,* 9th ed. Vol. I (UK: Longman, 1992), 14.

relations between different beings.[13] Or as Pierre Bourdieu argues in his analysis on social structures, "the real is relational."[14]

It is very important to perceive legal rights in relations of dynamic mutual interaction rather than just in relations of linear causation. For the relationship between the "legitimacy of official taxation" and the "rise of a form of nationalism" as an example, on the one hand, national authority legitimatized the taxation; on the other, "the broad-based collection of taxes has likely contributed to the unification of the territory or ... to the construction, both in reality and in representation, of the state as a unitary territory..."[15] However, no enough attentions have been paid to perceiving rights in relations of dynamic mutual interaction. As a matter of fact, some studies show that the relationship between the performance of individual rights, the development of trade, and the formation and evolution of a legal system is not a result of a linear causation influence but rather the creation of indispensable and mutually-influencing factors. To understand this mutually-influencing trait of these factors, a brief review of research on the formation/development of social institutions is necessary, discussion in detail will be in next chapter, the critique of the social contract theory.

Although Montesquieu's studies more than two hundred years ago have been interpreted as environmental determinism, he did perceive social institution development against a multiplayer interaction context. According to his discussion of Chinese law in *The Spirit of the Laws*, the collectivist orientation, non-existence of fixed property, the precariousness of property, lack of extensive commerce and thus under-developed trade

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[13] Montesquieu, *The Spirit of Laws*, vol. 1, trans. Thomas Nugent (New York: Hafner Press, 1949), 1 (my italics).

[14] Pierre Bourdieu, *Practical Reason: On the Theory of Action*, trans. Randal Johnson (UK: Polity Press, 1998), 3.

[15] Ibid., 44-5.

laws are factors that are linked with each other.[16] Montesquieu here implies the environmental influence, the cultural collectivist orientation, the legal social institutional development are factors of mutual interaction.[17] However, the study of social institutional development has at least a downturn at Weberian religious influence on social economic development. On the contrasting development of capitalism in the West and the East, Weber argues while the Protestant ethic made an independent and important contribution to the rise of capitalism in the West,[18] while the consistently traditionalist nature of Confucianism, that enjoined adaptation to the given world and not the transformation of it, was the main contributor to the failure of capitalism to appear in China.[19] David S. Landes further argues that "culture makes almost all the difference."[20] In *The Wealth and Poverty of Nations*, Landes argues geography and especially culture play a part in economic development of nations, and the ability to affect an industrial revolution is dependent on certain cultural traits, without which industrialization is impossible to sustain.

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[16] Montesquieu, *Spirit of Laws*, vol. 1, 62-3.

[17] For the multiplayer interaction of different factors as geography, culture, and social institution in China, see Fei Xiaotong, *Rural China* (Beijing: Joint Publishing, 1985), 3-6. He argues that Chinese culture, as an agriculture-based culture in which the people are attached to cultivating the land, is a non-floating culture from the perspective of human-environment relationships, and results in groups being isolated into family-like rural units in terms of the relationships among peoples. This fosters a collectivist-oriented and *Gemeinschaft*-like social structure, where social relationships between individuals are based on kinship or geo-proximity, and governed by customs rather than formal rules or laws.

[18] Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (New York: Charles Scribner's Sons, 1958).

[19] Max Weber, *The Religion of China: Confucianism and Taoism*, trans. Hans H. Gerth (New York: the Free Press, 1968), 248.

[20] D. S. Landes, "Culture Makes Almost all the Difference," in *Culture Matters: How Values Shape Human Progress,* eds. Harrison, L. E. and S. P. Huntington (New York: Basic Books, 2000). See also his book, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (New York: W. W. Norton & Company Ltd., 1999).

However, it has been argued that the relationship among different factors of social development is more complicated than the Weberian argument.[21] The Mediterranean region,[22] which was "essentially and precisely one of the private ownership...a world of private trade and manufacture,"[23] was "the first to see the acceptance of a person's right to dispose over a recognized private domain, thus allowing individuals to develop a dense network of commercial relations among different communities." [24] Mediterranean civilization, as a society with a commercial orientation, is said to be a society that prefers a gesellschaft social structure,[25] as the spirit of trade or commerce is naturally attended with that of order and rule.[26] The core of trade or commerce is the exchange of properties, and the foundation of the exchange is the individual right of property. As F. A. Hayek argues, "the prior development of several property is indispensable for the development of trading, and thereby for the formation of larger coherent and cooperating

[21] I did one term paper on this research in my current master program, "Geo-cultural Influence on Religious Asceticism and the development of Capitalism: from the Protestant Ethic to the Confucian Ethic." This paper examines the Weberian thesis concerning cultural influences on economic development. After reviewing Weberian arguments and the *Analects*, the linkage between Protestant asceticism and the principles of surveillance and discipline discussed by Foucault shows that after religious asceticism has been fully internalized into secular society religion no longer directly affects capitalistic development. Moreover, further analysis shows that religious asceticism is not the final account of the different development of capitalism. This paper argues that religious asceticism is a natural culture selection responding to different natural conditions, in which culture is an indivisible and invisible dynamic process developing in a certain geo-cultural environment. It is natural conditions that prescribe the bounds of different people, nations, religions, and cultures, thereby leading to the differing development of capitalism in the West and the East.

[22] The origin of the Western Civilization, see S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996), 45.

[23] M. I. Finley, *The Ancient Economy* (California: University of California Press, 1973), 29.

[24] F. A. Hayek, *The Fatal Conceit: The Errors of Socialism* (UK: Routledge, 1988), 29.

[25] Social scientists since Marx have observed that economic and social arrangements such as these are generally associated with "collectivist" or "interdependent" social orientations as distinguished from the "individualistic" or "independent" social orientations that are characteristic of societies with economies based on hunting, fishing, trading, or the modern market economy. Richard E. Nisbett, Kaiping Peng, Incheol Choi, and Ara Norenzayan, "Culture and Systems of Thought: Holistic versus Analytic Cognition," *Psychological review* 108 (2001): 303.

[26] Hayek, *The Fatal Conceit*, 46.

structures..."[27] It is evident here that the performances of individual property rights, the developments of trade, and the formation/evolution of legal system and legal orientations are linked with each other and all consist of a holistic dynamic social evolution process. This is why the social institutional development, as Hayek argues, is a self-extended evolutional order, which is neither instinct nor reason rather something in between.[28]

Base on this understanding of the multiplayer interaction of the performance of individual rights, the development of trade, and the evolution of the legal system, thus this paper will examine the individual rights in the context of international trade regime.

1.3 Defining the Individual and Structure of the Paper

To examine individual rights in the context of the international trade regime is to look at the private side of the global governance. Although traditional examinations of global governance have long been state-centric, some still proposes a research shift from "the state-centric focus" to "the role of business and civil society actors in global economic governance."[29] Here actors of the global governance are categorized into two sectors. While the public sector is the governmental sector which is "the arena of the state," the private sector is "the business or 'for-profit' sector" which is "the arena of the market."[30] The dichotomous categorization between public and private also implies in WTO rules. In GATT/WTO provisions, "State Trading Enterprises" are distinguished from "Private

[27] Ibid., 31.
[28] Ibid., 11 ff. chapter I.
[29] Shareen Hertel, "The Private Side of Global Governance," 57(1) *Journal of International Affairs* (Fall 2003).
[30] Ibid.

Traders." According to WTO provisions, for "the governmental measures affecting imports or exports by private traders," members of the WTO must ensure the State enterprise acting in consistent with the non-discriminatory treatment requirements.[31] The WTO also deems the operation of State enterprises might create "serious obstacles to trade," and it is very important for WTO negotiation to "limit or reduce" such obstacles to international trade.[32] This public *vs.* private or state *vs.* non-state dichotomous categorization implies the recognition of the private actor as a player in the international trade arena under the pressure of economic globalization, which was impossible even only half century ago.

Similarly, T. Franck recognizes the individual has been emerging as a rights holder both in international and domestic social structure since early last century. He however categorizes the actors into "a rights triad": the individual, the group, and the state.[33] According to Franck, the group-ethnic, tribal, or other group-is one of the contenders for power "organized around linguistic, genetic, religious, historic, and territorial commonalities."[34] Group in this context is rather a political category than an entity which participates into international trade regime, thus is not of the concern of this paper. Those groups participating in the international trade regime independent from the public authority, fall into the private side of the dichotomous categorization and for the convenience of the current research will be categorized into individuals or individualized group.

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[31] Art. XVII 1(a), GATT 1994.
[32] Art. XVII 3, GATT 1994.
[33] Franck, *Empower Self*, 224.
[34] Ibid.

For the convenience of the theoretical examination of government power, the "Individual" here refers to a *private* entity, which is subject to the governmental administration and in opposite to government's *public* authority. Thus "the individual" in this paper refers not only to the natural persons, but also private companies, and other legal persons. Although whether they are or to what extent they are subjects of international law might be different between natural persons, private companies, and other legal persons, this paper will not distinguish them, because question of the subject of international law is not the concern of this paper. Also, international law applies in relation to a natural person via his nationality of certain states through the same way that international law attributes the nationality of a state to a private company or other legal person.[35]

In next section, chapter II, this paper starts with a brief review of the theoretical framework of individuals in international law, and further analyzes the traditional perception of social contract theory regarding the relationships between the individual and government. The analysis will show that the myth of social contract theory and its two-tiered social contract application of domestic and international social legal institutions are at the root of the paternalistic discretionary power of governments over the individual in international trade. The paternalistic power of government is the reason for the artificial separation of domestic trade and international trade and is an impediment to the realization of individual rights in international trade. The paper also discusses the potential shifting of the social institution theory from the myth of the Social Contract to

[35] Jennings and Watts, *Oppenheim's International Law*, 859.

its true reality as a spontaneous "extended order."[36] In chapter III and IV, this paper examines the reflection and demands of this theory shifting in the practice of international trade. This paper examines individuals' status within international trade under the WTO framework in general and the international antidumping regime in particular. The examination determines how the relationship between the individual and the government at the international level are interpreted differently than they in the domestic political legal sphere. Globalization will unveil a masked distortion of individual rights and freedom, which will challenge government's legitimacy over individuals in the international social dimension, in particular in international trade. In Chapter V, the conclusion, the paper will make a general comment on the status of individuals in global governance within the current globalization context, and its implications for individual participation in the formation of social institutions through activities in the global market mechanism. The paper argues that the traditional perception of government legitimacy, being based on individual rights and freedoms in the domestic dimension, is distorted by the governmental discretionary power over international trade, and globalization calls for an international ethic of limited government and a reconceptualization of the cosmopolitanism which base on a universal perception of individuals' rights and freedom.

[36] See Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960), and *The Fatal Conceit*, which will be discussed in Chapter II and III below.

II. Critique of Social Contract: An Holistic Inquiry into Individual Rights in the Spontaneous Self-extended Global Order

Without a historical examination, we are easily to take the current social political structure for granted, since the political reality is preexistent to every single individual. "The Rational is the Real" might be the most convenient account for the political reality. To some extent, the state was thus made to be a transcendent over every single individual. As Pierre Bourdieu puts it, at the end of the "infinite regression" of the authority of all acts stands a "state," the "last (or to the first) line in the long chain of official acts of consecration;"[37] or "The judgment of the state is the last judgment."[38]

From the point of view of political philosophy point of view, Locke, Rousseau and Kant all "base the legitimacy of government on the social compact/contrat social."[39] Social contract theory is the most well known theory that explains the establishment of the government and the relationship between the government and the individual. As Louis Henkin argues "A legitimate political society is based on the consent of the people, reflected in a social contract among the people to institute a government."[40] Social contract theory is best illustrated in the Declaration of Independence. The Declaration of Independence holds that "to secure these rights, [Life, Liberty and the pursuit of Happiness,] Governments are instituted among Men, deriving their just powers from the

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[37] Bourdieu, *Practical Reason*, 51.

[38] Ibid., 52.

[39] Jost Delbrück, "Exercising Public Authority Beyond the State: Transnational democracy and /or Alternative Legitimation Strategies?" *Indiana Journal of Global Legal Studies* 10 (Winter, 2003): 32.

[40] Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990), 5.

consent of the governed ..."[41] Or as *the Federalist* argues that the foundations of governments rest on "the solid basis of *the consent of the people.*"[42] When it comes to the international level, current international legal theory, as Ronald A. Brand described, has a "two-tiered social contract approach:" the international tier of relationships of "social contract between states" and the first tier relationship in which "individuals agree to be subjects of the state."[43] As Louis Henkin stated, "states are subject to the International Social Contract, and the end of World War II saw a new social contract in the UN Charter."[44]

At the first glance, the social contract theory well explains the formation of the social order. As a matter of fact, the theory is the source of the misconception of social development and the myth of the paternalistic discretionary power of government administration.

2.1 The Myth of Social Contract Theory as the Source of Government Paternalistic Power

In general, the theory of social contract argues that the development of social institutions, from the state of nature to civil society, began with a social contract or compact. Although the explanations of different social contract theories about the formation of

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[41] "The Declaration of Independence," para. 2 (U.S. 1776). <http://www.law.indiana.edu/uslawdocs/declaration.html >

[42] Alexander Hamilton, James Madison and John Jay, *The Federalist* (London: J. M. Dent & Sons Ltd., 1948), 110.

[43] Ronald A. Brand, "Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century," *Hastings Int'l & Comp. L. Rev.* 25 (Summer 2002): 279.

[44] Louis Henkin, "Notes from the President: The Mythology of Sovereignty," *Am. Soc'y Int'l L. Newsl.* (ASIL, Washington, DC: Mar. 1993), 1. Available on the LexisNexis Database.

social institutions are different (for example, the Lockean contract is between the governor and the people, and the Hobbesian or Rousseauian contracts are among the peoples),[45] they both root the legitimacy of government power in the individual. Rousseau, for example, describes the society under social contract as "a form of association which will defend the person and goods of each member with the collective force of all, and under which each individual, while uniting himself with the others, obeys no one but himself, and remains as free as before."[46]

Although social contract theory identifies government legitimacy as being rooted in the individuals' rights and freedom, it is still a theory of convenience rather than a theory of truth, and there is a long history of criticism of the social contract theory. More than one hundred years ago, Maine argued, the theory of social contract borrowed and misused a body of words and phrases from "the Rome jurisprudence of Contract," expanding and diluting these words from legal science into political science,[47] and Rousseau made both "the juridical and the popular error."[48] He argued that the social contract theory is "a superstition of the lawyers"[49] which "impede[s] the employment of the Historical Method of inquiry."[50]

Furthermore, the lack of "employment of the Historical Method of inquiry" to the social contract theory simplifies the description of the development of social institutions into a linear account. The theory is just a linear causal explanation of social institutional

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[45] Locke, *Second Treatise*, 112-3; Hobbes, *Leviathan*, 228-9; Jean-Jacques Rousseau, *The Social Contract* (London: Penguin Books, 1968), 81-3. Rousseau argues that law is made when "the people as a whole makes rules for the people as a whole", and "laws are really nothing other than the conditions on which civil society exists."

[46] Rousseau, *Social Contract*, 60.

[47] Henry Maine, *Ancient Law*, 203.

[48] Ibid., 181.

[49] Ibid., 53.

[50] Ibid., 52.

development, which implies the development of social institutions is a linear development leaping suddenly from the state of nature to civil society. It interprets the social contract as the "first mover" of the development of social structure. Actually, the formation and development of the government and state is a gradual and imperceptible process out of "state of nature, without any great or fundamental breach of continuity."[51] Correctly rooting government legitimacy in individuals conceals the fact that social contract theory excludes the individual from the international sphere, which makes the individual rootless in international interactions. Also, the social contract theory, because it describes international governance as nonexistent and the nations as "individuals," describes the international society as if it were still in a state of nature, and roots international governance into imaginary foundations—nations—rather than into the individual.

Although the social contract theory did happen to point out correctly the linkage between government legitimacy and the individual will, and has provided powerful impetus for struggles of human emancipation since the 18th century, it is still a problematic theory. It is problematic not only because it misperceives the dynamic social evolution as a linear development, but also because it is the source of government paternalistic power over the individual. It has dominated political and legal discourse for more than two centuries. Although the social contract is supposed to free people from the state of nature and brings them into the civil society, it did not illegitimatize the paternalistic power in the state of nature but rather replaced it with government's total

[51] Nozick, *Anarchy, State, and Utopia*, 133. Nozick criticizes the social contract theory and says that he "... see[s] little point to stretching the notion of 'compact' so that each pattern or state of separately acting individuals is viewed as arising from a social contract, even though no one had the pattern in mind or was acting to achieve it." Ibid., 132.

discretionary power. In *Leviathan*, Hobbes shows unconsciously the clear connection between the social contract and the omnipotent sovereign power.

> From this Institution of a Common-wealth are derived all the Rights, and Facultyes of him, or them, on whom the Soveraigne Power is conferred by the consent of the People assembled... because they Covenant, ... therefore, they that are subjects to a Monarch, cannot without his leave cast off Monarchy, and return to the confusion of a disunited Multitude; nor transferre their Person from him that beareth it, to another Man, or other Assembly of men: for they are bound, every man to every man, to Own, and be reputed Author of all, that he that already is their Soveraigne, shall do, and judge fit to be done: so that any one man dissenting, all the rest should break their Covenant made to that man, which is injustice...[52]

The social contract theory's legitimizing of omnipotent sovereignty not only legitimizes government's supremacy of domestic administration but also "proves" government's independence in foreign affairs. This gives rise to the "two-tiered" social contract reality,[53] the exclusion of the individual in international practice and further the separation of the domestic legal system from the international legal system. The social contract theory thus leaves leeway for a governmental totalitarian power over the individuals at the international level, which is out of the reach of social contract. To some extent, it legitimizes the government discretionary power at the international level such as that used in the international antidumping regime this paper will analyze in ensuing chapters, since individuals are subject to the innate social order.

It is fair to say that the social contract theory is a conventional account of the separation of domestic and international social systems, which causes the distortion of individual status in international interaction. Fortunately, F. A. Hayek's studies on the formation of social institutions as "the extended order" provides us with a better

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[52] Hobbes, *Leviathan*, 229.
[53] *Supra note*, 43.

understanding of the social institution at both domestic and international levels, which serves as the starting point for a holistic explanation of the representation of the individual in international trade.

2.2 *Relocating the Individual in the Dynamic Evolution of Social Institutions*

Slightly later than the emerging of the social contract theory, there already had been some research insisting on a historical examination of the evolution of social institutions in contrast to social contract theory's linear explanation. Montesquieu's environmentally determined account of the development of laws two and a half centuries ago provided a clear and simple historical explanation of social institutional development. Based on a historical method of inquiry, Montesquieu argued in *the Spirit of the Laws* that different environments with different climates, soil, etc. fostered different laws and polities, and even "prescribed the bounds of"[54] different religions. Montesquieu provided an insightful viewpoint on the development of social institutions. The development of social institutions was thus linked to the dynamic evolution of social environments.

One hundred years later, Maine published his *Ancient Law* and provided a powerful criticism of the social contract theory. Maine argued there is no such thing as "a great chasm [that] separated man in his primitive condition from man in society"[55] as Locke or Hobbes has argued, and that the composition of the state is an artificial "Legal

[54] Montesquieu, *Spirit of Laws*, vol. 2, 43.
[55] Maine, *Ancient Law*, 68.

Fiction" of family relations rather than a social contract among the people.[56] The modern state was set up only when the condition of society had developed from one in which "all the relations of Persons [were] summed up in the relations of Family" into "a phase of social order in which all these relations arise from the free agreement of Individuals."[57] Maine's argument clearly shows that the emancipation of individuals from the *Patria Potestas* (paternalistic power) is the basic condition of the development of public social order.

In the late twentieth century, F. A. Hayek's description of social institutions as the "extended order" provided a full image and new perspective on the study of the development of social institution. In *The Fatal Conceit: The Errors of Socialism*, Hayek argues that civilization depends on the "Extended Order of human cooperation." For Hayek, "the extended order resulted not from human design or intention but spontaneously," [58] and "our values and institutions are determined not simply by preceding causes but as part of a process of unconscious self-organisation of a structure or pattern."[59] Here the development of social institutions is a spontaneous self-extended evolution process rather than a linear development.

Most important of all is that the formation of the social institution is based on the interaction of ignorant single individuals. Hayek emphasizes the importance of individual activities in the formation of the extended order through his analysis of the contributions of the activities of "ignorant individuals" to the formation of market mechanism. He explains how at no moment in the process of the formation of the extended order could

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[56] Ibid., 77.
[57] Ibid., 99.
[58] Hayek, *Fatal Conceit*, 6; *Constitution of Liberty*, 59.
[59] Hayek, *Fatal Conceit*, 9. He also argues that "the extended order" is neither instinct nor reason but rather something in between. Ibid., 11 *ff.* chapter I.

individuals have been aware of the process, but their activities contributed to the formation of the extended order,[60] because this process "remains one of making use of dispersed knowledge [of individuals], rather than unifying knowledge of a number of persons."[61] Hayek also emphasizes the importance of "Several Property" (the words describing private property borrowed from Henry Maine).[62] He points out the importance of the individual rights of property to other freedoms, arguing that "freedom of individual decision is made possible by delimiting distinct individual rights, such as the rights of property."[63] He thus proposes limited government.[64] It must be more than a coincidence that John Locke also emphasizes in his *The Second Treatise of Government* the importance of freedom and property and also supports the limited government argument.

The social development as the self-extended order also points out the need of locating individual rights in the relations of mutually influencing factors of dynamic interaction which are emphasized in the methodology discussion of this paper. Since the social development is the spontaneous self-extended order, the performance of individual rights, the development of trade, and the formation/evolution of the legal system are intertwined and mutually-influencing factors in social institutional development. Individual rights were developed at the same time of as the formation of the government instead of deriving from the government authority, and thus are inherent to the individual. At the domestic level, it is thus the adoption of individual property that marks the beginning of civilization and the establishment of a government, rather than, as Hobbes

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[60] Ibid., 72.
[61] Ibid., 87.
[62] He argues that "several property is the heart of the morals of any advanced civilization", and "the prior development of several property is indispensable for the development of trading," and "the adoption of several property marks the beginning of civilization." Hayek, *Fatal Conceit*, 30-1, 34.
[63] Ibid., 63.
[64] Ibid., 33, 63.

argued, that the property rights began after the "Constitution of a Civil Power."[65] As from the international perspective, the history of international trade is that of the communication of people,[66] and trade existed even before the establishment of the government. As the performance of individual property rights, the development of trade, and the evolution of a legal system are factors which facilitate each other, the development of international trade therefore will facilitate the performance of individual property rights. In the next two chapters, this paper examines the interaction of international trade and the performance of individual rights.

Hayek's description of the development of social institutions as a spontaneous self-extended order has two important implications. Firstly, it is not only the restoration of Montesquieu's environmental relational approach, but also an amendment of Montesquieu's underestimation of the stability of human nature which he perceives man as entirely plastic, as passively responding and submitting to the outside impulses. The development of social institutions as a dynamic process rather than the linear development implied in the social contract theory provides us with a whole picture of our understanding of the individuals in global governance. From a historical point of view, the development of trade, the formation of the state, and the emancipation of individual "from status to contract," are processes intertwined with each other and constitute the dynamic evolution process of social development. Secondly, Hayek's pointing of the individual's contribution to the formation of social institutions through his analysis of the market mechanism supports our concerns about the status of the individual in global governance through the analysis of the international trade regime. This also fills the

[65] Hobbes, *Leviathan*, 203.
[66] Montesquieu, *Spirit of Laws*, vol. 1, 334.

interstices of the impotent explanation of the social contract theory for the linkage between domestic and international institutions and the exclusion of individuals in international level. Before we examine how the relationship between the individual and the government is interpreted in international trade regime in next two chapters, this paper offers a brief discussion in next section about the international social order from a dynamic evolutionary point of view.

2.3 *International Society as the Self-extended Order*

2.3.1 Deriving from social contract: nationality separating individuals

From the above analysis, we have basically found that current political theory is still under the dominance of the social contract theory. Although social contract theory well explains the domestic social institution, it still leaves the international social institutions unclear or in the state of nature.

Traditionally, international law and domestic law are viewed as separate legal systems, or at least as functioning differently in different levels and having different subjects. Long after the Westphalia era, the individual is not the subject of international law,[67] and states have been traditionally been the only subject of international law.[68] Under traditional international law, nationality is nearly the only way to link individuals

[67] Brownlie, *Rule of Law in International Affaires*, 48.

[68] Louis Henkin, *International Law: Politics and Values* (The Netherlands: Kluwer Academic Publishers, 1995), 7-8.

into international law, and thus all the relations of individuals from different countries are summed up in the relations of countries.[69]

This separation by nations naturally results in nationalistic passion—nationalism. In the modern world, nationalism has been regarded as one of the "the prime causes of hatred, violence, and repression—a source of intolerance toward people of differing geographic, ethnic, and religious backgrounds."[70] In international law it is argued that there is a "doctrine of the freedom of states in matters of nationality."[71] In the Advisory Opinion of the Permanent Court concerning the *Tunis and Morocco Nationality Decrees*, the Court insisted that, "in the present state of international law, questions of nationality are, in opinion of this Court, in principle within this reserved domain."[72] Therefore, different treatments based on nationality are generally acceptable in international law.[73]

Nationality, which keeps the individual from direct participating into the international order, is at its core a modern concept of family. Since the imagined social contract groups individuals as nations rather than some other more cosmopolitan order, it breeds the rationale for paternalistic governmental power.[74] In the next two chapters we will examine the formation of this type of power through a close look at antidumping regimes. From a historical point of view, both Maine's analysis of the state as the legal

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[69] Brownlie, *Rule of Law in International Affaires*, 48. He argues, "the principal connection between the individual and the system of international law is still *via* the status of nationality." See also Jennings and Watts, *Oppenheim's International Law*, 857. Jennings and Watts state, "nationality is the principal link between individuals and international law."

[70] Cary J. Nederman, *Worlds of Difference* (Pennsylvania: The Pennsylvania State University, 2000), 85.

[71] Ian Brownlie, *Principles of Public International Law,* 4th ed. (New York: Oxford University, 1990), 381.

[72] PCIJ, Ser. B, no. 4 (1923), 24. Cited in Brownlie, *Principles of Public International Law*, 381.

[73] Ibid., 524.

[74] *Supra note*, 52. Hobbes shows unconsciously the clear connection between the social contract and the omnipotent sovereign power.

fiction of families[75] and Locke's argument that "the government commonly began in the father"[76] point out that government originates from the structure of the patriarchal family paternalistic power is internalized into social development and forms the roots of the power of government, from which the current discretionary power of the government in international trade comes. As long as the nationality barrier in international trade has not been eliminated, the process of "*from status to contract*" has not finished at the international level.

However, there are always controversies in international law over the content or even the existence of an "international minimum standard." [77] This traditionally controversial issue indicates that there is an intrinsically problematic question on the separation of individuals by nationality at the international level. The constant questioning of an international minimum standard may not explicitly support the critique of the social contract theory. However, it does conform to the argument that the integration of international and domestic orders will allow the individual to participate in the international order.

2.3.2 The extended order: integrating domestic and international legal systems base on the foundation of individual rights

Arguments for the integration of international and domestic law have a long lineage. In the seventeenth century, the naturalist era "when all law was regarded as derived from

[75] Maine, *Ancient Law*, 77.
[76] Locke, *Second Treatise*, 59.
[77] Brownlie, *Principles of Public International Law*, 524-8.

natural law, no sharp distinction was made between international law and municipal law."[78] Kant's cosmopolitan perspective, the Perpetual Peace theory[79] introduced two hundred years ago, is based on a cosmopolitan right of individuals to universal hospitality, and Kelsen's general theory of law and state[80] both propose the integration of international and domestic legal systems. From the point of view of international practice, the current international system has gradually moved towards monism which indicates the integration of international and domestic legal systems.[81] To some extent, both Kantian cosmopolitan theory and Kelsen's international theory are ultimately grounded in the individual. The integration of international law with domestic law into a whole legal system is based on the recognition of individual rights on the international level. Morally, the claims for rights of the individual are prior to the claims for rights of the state.[82] The Kantian cosmopolitan idea is reinterpreted by Habermas within the framework of globalization based on universally recognized human rights.[83] Though politically international affairs are still governed by Hobbesian or Lockean logics of anarchy, economically the Kantian cosmopolitan idea is under formation.[84] This is particularly true in the realm of international institutions and laws governing international trade such as

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[78] Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (London: Routledge, 1997), 100.

[79] Kant's "Perpetual Peace" was built on a tripod of complementary principles-- a republican constitution, the rights of nations based on a federation of free states, and a cosmopolitan right to universal hospitality-- which are ultimately grounded in the individual. Kant, *Political Writings*, eds. Hans Reiss and H. B. Nisbet (UK: Cambridge University Press, 1991), 99-108.

[80] Brownlie, *Rule of Law in International Affaires*, 6-8.

[81] Henkin, *International Law: Politics and Values,* 66.

[82] Franck, *Empowered Self*, 252. He argues, "... among the triad of rights holders—the state, the individual, and the group—morally, the claims of individuals are entitled to priority." Also, he argues "... there are acquired rights and unacquired rights. States, groups, and individuals each may be holders of acquired rights, but only persons can also have unacquired rights."

[83] Habermas, "Kant's Idea of Perpetual Peace," 113-53.

[84] On Hobbesian, Lockean, and Kantian logic of anarchy, see Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press, 1999), 18, and Chapter 6.

the WTO, which will be examined later on. As for individual rights in international trade, Antonio F. Perez argues that

> Some international law scholars trained in the so-called 'Austrian' school have suggested that there is an international individual right to free trade, which is protected by the trend toward increasing international law limits on the freedom of states to distort international free trade through tariffs and non-tariff interventionist policies, such as antidumping and countervailing duty law. [85]

Similarly, E. U. Pertersmann argues, both for domestic and transnational trade, "freedom of trade" is "a basic individual right" and not just "a mere economic theory."[86] Here we see the arrival of the era of the spread of concerns about the individual concerns into both the international and domestic legal orders.

From this brief review, we have seen that although social contract theory correctly roots government legitimacy in the individual, it simplifies the dynamic social institutional evolution into a linear development, and excludes the activities of the individual from the development of international institutions and global governance. However, applying Hayek's argument that social institutions are the spontaneous "extended order" to the international legal system provides us with a full picture of the integration of the domestic and international systems, as well as the individual's contribution to the formation of social institutions. Historical arguments from Kantian cosmopolitanism and Kelsen's general theory of law and state, to the constant debate over an international minimum standard in international law during the last century, all encourage us to reconceptualize both the individual in global governance and the

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[85] Antonio F. Perez, "International Antitrust at the Crossroads: The End of Antitrust History or the Clash of Competition Polity Civilizations?" *Law and Policy in International Business* 33 (2002): 552, footnote 68.

[86] E. U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Switzerland: University Press Fribourg Switzerland, 1991), 463.

relationship between domestic and international legal systems against the background of current globalization. In next two chapters, the paper will examine to what extent the individual is emancipated in the evolution of international trade from the GATT to the WTO and how the national separation of individuals is being broken down by international free trade. Then the paper will touch how the relationship between the individual and the government is interpreted at the international level.

III. International Trade Regimes and Individuals: the WTO Framework in General

In the preceding chapters, we argued to perceive legal rights in interactions among different entities. It was also argued that the realization of individual rights, the development of trade, and the formation and evolution of legal system are indivisible parts of the dynamic development of social institutions. This critique of social contract theory paves the way for the examination of the individual's position in global governance, in particular in relation to international trade regimes.

In this chapter, we will analyze the protection of the individual under the WTO. The studies will show that the emancipation of individuals in international trade from the GATT to the WTO, the shifting of the protection of human rights from domestic to international levels, and the universalization of democratic ideals, are processes intertwined with each other. These processes constitute the dynamic social development of the last century. Detailed probes into the international antidumping regime will be continued in the next chapter to find out to what extent the presentation of individual rights at the international level is different or how different it is from that of the domestic sphere.

3.1 International Individual Protection in General: from political to economic protection

Protection of human rights appeared in the international sphere early in the last century, much later that at the domestic level. Since "the Virginian Declaration of Rights 1776," and the Declaration of Independence, the recognition and protection of human rights have spread gradually into domestic constitution law in the western world.[87] The mass violation of human rights during the two World Wars last century stimulated the need to establish a mechanism for the international protection of human rights. Inaugurated with "a new and decisive departure" by the UN Charter, the protection of human rights came into international law.[88] After that, it has been getting clear and inevitable that "the global system should embrace the rights of individuals."[89]

Embracing the rights of individuals at an international level is both a political and an economic process. In the political sphere, the struggling for a mechanism to protect human rights by the international society is evident. As Franck states, "At the international level, since the end of World War II, an elaborate system of rules and procedures has come to afford protection for persons' lives, liberty, personal security, privacy, conscience, and equality of opportunity."[90] During this process, the United Nations was established, to "save succeeding generations from the scourge of war," and "to reaffirm faith in fundamental human rights ..."[91] The UN Charter "indicates ... the wide possibilities of the international recognition of human rights."[92] The Genocide Convention was adopted by the General Assembly in 1948.[93] In 1966, two human rights

[87] Jennings and Watts, *Oppenheim's International Law*, 984.
[88] Ibid., 850.
[89] Franck, *Empowered Self*, 237.
[90] Ibid., 280.
[91] "Preamble," *Charter of the United Nations*.
[92] Jennings and Watts, *Oppenheim's International Law*, 988.
[93] For general information, see ibid., 993-5.

covenants, one on economic, social and cultural rights and the other on civil and political rights, were adopted by the General Assembly.[94]

The international protection of the rights of individuals in the economic sphere is also very clear, particularly in the framework created by the WTO. Because of the interactions among peoples from different regions and cultures, most international regimes have an intrinsically cosmopolitan orientation. As the international regime governing free trade, the GATT/WTO is no exception. In a WTO Panel Report on "*United States – Sections 301-310 of the Trade Act of 1974,*" the WTO Appellate Panel states that "the creation of market conditions conducive to *individual economic activity* in national and global markets" and "the provision of a secure and predictable multilateral trading system" are two of the important "objects and purposes of the DSU, and the WTO more generally."[95] As to the question of the doctrine of direct effect, although the Panel insists "neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect,"[96] the Panel still argues that:

> However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of *individual economic operators* in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.[97]

Most international regimes seek to protect individual rights and provide better living standards. Take for example the UN Charter to "promote social progress and better

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[94] For general information, see ibid., 1012-8.
[95] WT/DS152/R 7.71 (my italics).
[96] Ibid., 7.72.
[97] *Ibid.*, 7.73 (my italics).

standards of life in larger freedom,"[98] or the GATT/WTO's objective of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand..."[99]

The development of these two processes, the international protection of individuals both in political and economic spheres, reinforces the position of the individual during the dynamic interaction between the individual and the government. These two processes are interdependent, and in line with the emancipation of individuals in international level last century. Human rights are, at their core, rights of individuals "against encroachment by the state,"[100] or inalienable rights "against state interference and the abuse of power by government."[101] Franck argues that rules and procedures affording protection to individuals' rights-- lives, liberty, personal security, privacy, conscience, and equality of opportunity-- "are intended to shield individuals even against their own government ..."[102] The intertwined processes of the international protection of individuals in political and economic spheres both indicate the needs for the emancipation of individuals at the international level. As E. U. Petersmann argues, the "basic objectives of human rights law and WTO law are complementary and similar."[103]

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[98] Preamble, *UN Charter*.

[99] See Preamble of *Marrakesh Agreement establishing the World Trade Organization* or Preamble of *the General Agreement on Tariffs and Trade* (GATT 1947).

[100] Jennings and Watts, *Oppenheim's International Law*, 985.

[101] Malanczuk argues that the essence of the concept of human rights is that "every individual has certain inalienable and legally enforceable rights protecting him or her *against state interference* and the abuse of power by governments." Malanczuk, *Akehurst's International Law*, 209 (my italics).

[102] Franck, *Empowered Self*, 280.

[103] E. U. Petersmann, "The WTO Constitution and the Millennium Round," in *New Directions in International Economic Law: Essays in Honor of John H. Jackson*, eds. Marco Brondkers & Reinhard Quick (Boston: Kluwer Law International, 2000), 130.

3.2 *Application of the non-discrimination principle from "products" to "persons" and its individualistic implication*

The embracing of the rights of individuals at the international level can be seen not only in international political and economic spheres in general, but also in the development of international free trade from the GATT to the WTO, in particular in the expansion of the application of the non-discrimination principle.

The foundation of the WTO framework and all WTO documents is officially boiled down to five principles: trade without discrimination, freer trade gradually through negotiation, predictability through binding and transparency, promoting fair competition, and encouraging development and economic reform. [104] Among them, the non-discrimination principle is the most important. The non-discrimination requirement is the fundamental principle of the GATT/WTO legal framework. It includes the requirements of Most-Favoured-Nation (MFN) Treatment and National Treatment.[105] The object and purpose of the MFN Treatment, according to the opinion of the Appellate Body in *Canada – Autos*, "is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination ... also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on

[104] "Principles of the trading system," *Understanding the WTO: Basics*, available at WTO official website. < http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm >.

[105] GATT 1994 Art. I, III. See also Richard Senti and Patricia Conlan, *WTO: Regulation of World Trade after the Uruguay Round* (Zürich: Schulthess Polygraphischer Verlag, 1998), 38-42, 43-5. Malanczuk states the MFN clause "is the central principle of GATT." See Malanczuk, *Akehurst's International Law*, 229.

an MFN basis."[106] In *Japan – Alcoholic beverages II*, the Appellate Body states that the National Treatment is "to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production," and "obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products." [107] Here in WTO norms, the non-discrimination principle indicates the obligation of government not to discriminate against the products of other member states. After a decades' development from GATT to the WTO, "products" are concretized into their actual rights holders--"persons," the private entities opposite to the government which are defined as the individual in this current research. E. U. Petersmann argues the non-discriminatory rules indicate that international trade should be "determined in a decentralized manner by the citizens themselves" through the free market and "governmental trade policies should aim at maximizing individual market access and freedom of choice." [108] The historical development of the non-discrimination principle is consistent with the improvement of individual protection in international trade.

Originally, the protection of the non-discrimination principle only addressed the products, which means physical items instead of commercial transactions of "transport, transfer of patents, licenses and other 'invisibles,' or movements of capital."[109] GATT 1947 stated that "any advantage, favour, privilege or immunity granted by any contracting party to any *product* originating in or destined for any other country shall be accorded immediately and unconditionally to the *like product* originating in or destined

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[106] WT/DS139/AB/R, WT/DS142/AB/R, Appellate Body Report on *Canada – Autos*, para. 84.
[107] WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan – Alcoholic Beverages II*, para. 5.5(b).
[108] Petersmann, *Constitutional Functions and Constitutional Problems*, 108.
[109] Malanczuk, *Akehurst's International Law*, 229.

for the territories of all other contracting parties,"[110] and "the *products* of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to *like products* of national origin in respect of ..."[111] Clearly the protection of the non-discrimination principle applies to products but not persons.

However, at least as early as the Tokyo Round which lasted from 1973 to 1979, the Agreement on Technical Barriers to Trade appears to have extended the protection to "persons" rather than "products." In "*Procedures for Assessment of Conformity by Central Government Bodies,*" it obliges Members to ensure "conformity assessment procedures are prepared, adopted and applied so as to grant access for *suppliers* of like products ... of other Members under conditions no less favourable than those accorded to *suppliers* of like products of national ... in any other country, in a comparable situation; access entails *suppliers*' right to an assessment of conformity ..."[112]

Moreover, in the new agreements concluded during Uruguay Round such as the General Agreement on Trade in Services (GATS), Trade-Related Aspects of Intellectual Property Rights (TRIPS), Agreement on Preshipment Inspection (PSI), and Agreement on Government Procurement (GP), the protection of the non-discrimination principle clearly addresses the individual. The GATS Agreement states that "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and *service suppliers* of any other country,"[113] and "each Member shall accord to services and *service*

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[110] GATT 1947 Art. I (1). Emphasis mine.
[111] GATT 1947 Art III (4). Emphasis mine.
[112] Agreement on Technical Barriers to Trade, Art. 5. Emphasis mine.
[113] GATS Art. II (1).

suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and *service suppliers.*"[114] In the TRIPS Agreement, the protection of non-discrimination principle is directed to "the nationals."[115] This is also the case in the PSI Agreement and Agreement on Government Procurement; the protection is accorded to "all exporters" in the PSI Agreement,[116] and to "the products, services, and suppliers" in the Agreement on Government Procurement.[117]

Under traditional international law, only *de facto* state actions rather than *de jure* legislation in law will engage a country's State responsibility. To take improper enrichment in international law as an example, State responsibility would usually be engaged only by the expropriation of foreigner's property without appropriate compensation rather just by the promulgation of an expropriation law. However, in *Canada – Autos*, the Appellate Body argued that the prohibition of discrimination of MFN Treatment should "include both *de jure* and *de facto* discrimination."[118] As a matter of fact, it is well-established in GATT/WTO jurisprudence that "legislation providing for tax discrimination against imported products was found to be inconsistent with GATT even before it had actually been applied to specific products and thus before any given product had actually been discriminated against."[119] According to the WTO panel, the

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[114] GATS Art. XVII (1).
[115] TRIPS Art. 3(1), 4.
[116] PSI Art. 2.
[117] Agreement on Government Procurement, Art. III.
[118] WT/DS139/AB/R, WT/DS142/AB/R, Appellate Body Report on *Canada – Autos*, para. 78.
[119] WT/DS152/R 7.41. In this case, the WTO Panel cited a lot of cases: Panel Reports on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136, para. 5.2.2; *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, paras. 5.39, 5.57, 5.60 and 5.66; Panel Reports on *EEC – Regulation on Imports of Parts and Components*, adopted 16 May 1990, BISD 37S/132, paras. 5.25-5.26; *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted 7 November 1990, BISD 37S/200, para. 84 and *United States –*

principal reason for this inconsistency between jurisprudence and general international law was the "indirect impact on individuals." The Panel argued,

> In treaties which concern only the relations between States, State responsibility is incurred only when an actual violation takes place. By contrast, in a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable 'chilling effect' on the economic activities of individuals.[120]

Understanding this expansion from "products" to "persons" in the context of the WTO (an organization the benefits of which depend in part on the activity of individual operators) will give us a clearer picture of the implications of free trade development for the individual. The expansion indicates the personalization or incarnation of the products, the services, and the intellectual properties in international trade. Protection of individual properties is only possible when properties are identified with the individual. The expansion of the non-discrimination protection from products to persons is the restoration of international trade to its true nature: exchange among persons rather than products themselves. The MFN requirement at the same time gets rid of the national label of the products. International trade is restored from trade among nations to trade among individuals. This expansion generally indicates that the development of free trade from the GATT to the WTO is in line with the increasing emancipation of individuals at the international level. Further evidence of this can be found in the stipulation of judicial remedy within WTO provisions discussed in the following section.

Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted 4 October 1994, BISD 41S/131, para. 118.

[120] WT/DS152/R 7.81.

3.3 *WTO judicial remedy provisions: the individual vs. the government*

The restoration of international trade to interactions among individuals is embodied not only in the general individual concerns of the WTO and extension of the non-discrimination protection from "products" to "persons," but also in the new development of a judicial review requirement in some WTO agreements.

Judicial remedy, mainly judicial review, is basically the inherent protection of individuals from governmental abuse of power, an indispensable component of individual rights. Between the individual and the states, "only the individual is a natural construct," and "the inherent rights of persons are prior" to the "acquired rights of ... states."[121] *Ubi jus, ibi remedium*. Rights of individuals thus depend on the protection of judicial remedies, something which is well established in constitutional law.[122] Generally, judicial review is based on a basic constitutional principle, "the requirement of a 'legal basis' for governmental action," which means without a legal basis government cannot interfere with an individual's activates. [123] When it comes to foreign trade, "... [it] is fundamentally free from regulation unless some authority with law-making power has imposed or authorized a limitation."[124] It is no surprise that the WTO, an international regime resulting from free trade development intertwined with increasing international

[121] Franck, *Empowered Self*, 282.

[122] As Petersmann puts it, "... the effectiveness of international legal guarantees of freedom and non-discrimination depends on whether individuals have judicial remedies at their disposal to defend such freedoms and other rights before national and international courts." "Foreword," *National Constitutions and International Economic Law*, ix.

[123] Fred L. Morrison and Robert E. Hudec, "Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States," Hilf and Petersmann, *National Constitutions and International Economic Law*, 92.

[124] Ibid.

protection of human rights, would have some basic judicial review requirements in its legal framework.

Early in GATT 1947, there was a requirement concerning products for each member to provide judicial remedy to ensure the conformity of implementation. According to GATT 1947, each member "shall maintain, or institute" independent "judicial, arbitral or administrative tribunals or procedures" to review and correct the "administrative action relating to customs matters."[125] But if the member concerned already has procedures in force providing "objective and impartial review of administrative action," the member is not required to eliminate or substituted the procedures even if the procedures are not fully or formally independent.[126]

GATS has a similar but clearer requirement that these "judicial, arbitral or administrative tribunals or procedures" must "provide, at the request of an affected *service supplier*, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services." But again, this requirement is not binding on members for whom it would be inconsistent with the constitutional structure or nature of legal system,.[127] The requirement to maintain or institute independent "judicial, arbitral or administrative tribunals or procedures" for the purpose of "the prompt review of related administrative actions" can also be found in the Antidumping Agreement,[128] Customs Valuation Agreement,[129] Subsidies and Countervailing Measures Agreement,[130] TRIPS,[131] and Preshipment Inspection Agreement.[132]

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[125] GATT 1947, Art. X.3.
[126] Ibid.
[127] GATS, Art. VI.
[128] Art. 13.
[129] Art. 11.
[130] Art. 23.
[131] Art. 32, 41.

Generally, the embodiment of judicial remedy requirements in the WTO framework makes the protection of the individual more concrete. This highlights the tension between the nationality blockade of individual's market participation and the intrinsic emancipation tendency of free trade, and also indicates the pressures that the development of free trade places on the traditional perception of paternalistic national authority over individuals. This new development of the WTO is consistent with limited government theory.

The increasing concerns about the individual are even clearer in the eighth round of negotiations on free trade in the evolution of the GATT into the WTO. In the first five rounds negotiations on tariff reduction there is no further progress of free trade, except for UK's defence of Commonwealth preferences in the Third Round (Torquay 1950/51), and concern about regional tariff discrimination following the establishment of the EEC in Dillion Round (Geneva 1961/62).. Starting in the sixth round (Kennedy Round, Geneva 1964-67), the first multilateral negotiation, and continuing on to the seventh round (Tokyo Round, Geneva 1973-79), international free trade develops further and more issues like antidumping and subsidies are negotiated. In the eighth round (Uruguay Round, Geneva 1986-93), not only are the existing GATT provisions deepened and widened, but international trade is extended to cover trade in services and protection of intellectual property rights.[133]

International free trade in the evolution from the GATT to the WTO facilitates the emancipation of the individual at the international level. During the last century's development of free trade, the world experienced an accelerating process of

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[132] Art. 4.

[133] For these eight round's negotiation, see Senti and Conlan, *Regulation of World Trade*, 16-7.

globalization, in which – facilitated by modern technology – products, services, and capital began to flow freely from country to country, region to region. The global market, as an effective mechanism of exchange and redistribution, naturally requires equal status and fair communication which will get rid of the nationality "trappings" of products, services, and capital. Since competition "is a procedure of discovery, a procedure involved in all evolution" which allows us respond to new situations and increase our efficiency,[134] the MFN and National treatments are GATT/WTO's intrinsic requirements. "Industrialization, economic development, the emergence of an urban middle class, universal and higher education, political democratization, and revolutions in personal access to information and communications" are all circumstances facilitating the development of individualism.[135] People have shifted from identifying themselves "in collectivities: the tribe, nation, state, religion, class, culture, and language" to "beginning to define themselves as autonomous individuals."[136] Following this trend, it is inevitable that international free trade will cover more areas like trade in services and intellectual property. International trade is also inevitably being personalized: from trade between products to trade between people. In this regard, international trade has an inherently cosmopolitan orientation and functions for the emancipation of individuals.

In this chapter we examined the place of the individual in international trade regime from three perspectives. First, at an international economic level, we saw that the embracing of individual rights within the GATT/WTO framework was in line with the overall development of human rights protection after World War II. Secondly, the

[134] Hayek, *Fatal Conceit*, 19.
[135] Franck, *Empowered Self*, 279.
[136] Ibid., 278.

application of the fundamental principle of the GATT/WTO, the non-discrimination requirement, was extended to cover "persons" as well as "products." Finally, the WTO framework embodies some basic judicial remedy provisions to make the protection of the individual more concrete. At the same time that the international trade regime developed from the GATT to the WTO, of the world has undergone a period of intensive economic development and globalization, a process of the shifting of human right protection from the domestic to the international sphere, and also a process of the spreading of democratic ideas all over the world. Globalization erodes the traditional nation-state power structure and facilitates the penetration of individual rights through both international and domestic spheres. All these processes are indispensable and are part of the same dynamic process of international development. Central to these processes is the emancipation of the individual in economic, political, and social spheres to respectively different extents. As we have seen in this chapter, there is a general trend in international free trade favoring the gradual emancipation of individuals, and the emergence of an ethic of limited government in international trade regime. E. U. Petersmann argues that, "the limitation of government powers through legal guarantees of freedom and non-discrimination is the major purpose of the international GATT/WTO guarantees of liberal trade in goods and service and of non-discriminatory conditions of competition."[137] Moral priority of individuals' rights over governmental power[138] is supported by the general development

[137] E. U. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (London: Kluwer Law International, 1997), 33.

[138] Petersmann clearly argues, "individual persons and their liberties (preferences, interests) are viewed as ultimate sources of value, the legitimacy of the excise of government powers depends on the consent of the citizens, on their democratic participation in the exercise of government powers, and on the 'democratic function' of governments to enable the fullest possible realization of the equal rights of the citizens." Petersmann, "Limited government and Unlimited Trade Policy Powers," 539.

of international free trade. Louis Henkin puts it more precisely that "Constitutionalism implies limited government."[139]

[139] Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, 36.

IV. International Trade Regime and Individuals: the International Antidumping Regime in Particular

In the last chapter, the examination of the general evolution of international trade from the GATT to the WTO indicated a trend towards the gradual emancipation of the individual in the context of global free trade. This trend demonstrates the intrinsic cosmopolitan orientation of the international free trade regime in general. This chapter will go further, providing a case study of the individual in global governance in international antidumping regime in particular. Study will find out how international trade's general trend of individual emancipation has been interpreted in the development of international antidumping regime.

Apart from the economic rationale behind antidumping laws, there are also important implications for the relationship between governmental power and the rights of individuals, which, unfortunately, have been overlooked by researchers.[140] Most studies of antidumping policy focus on examining antidumping policy's economic rationale.[141] Although the predictability and transparency of the WTO norms increased in the Uruguay round, many problems regarding the antidumping regime remain. Among these problems, are some concerning unchallenged power of governments in the implementation of trade policy: there is a large degree of discretion in implementing the antidumping agreement, the standards of review contained in the WTO agreement exempt antidumping authorities from "closer scrutiny by the WTO Panel," and "loopholes and ambiguities contained in

[140] Robert W. McGee, *A Trade Policy for Free Societies: the Case against Protectionism* (Connecticut: Quorum Books, 1994), 150. He argues, "One aspect of antidumping law and policy that is rarely discussed is the relationship between antidumping laws and the legitimate functions of government."

[141] Alan V. Deardorff, "Economic Perspectives on Antidumping Law," eds. John H. Jackson and Edwin A. Vermulst, *Antidumping Law and Practice* (Hertfordshire: Harvester Wheatsheaf, 1990), 23-39.

the Agreement ... opening the door for abuse."[142] Antidumping policy also is accused of "protecting competitors rather than competition" and bringing "benefits to some enterprises at the expense of the consumers."[143] These concerns fuel the needs of current research on the interpretation of the government-individual relationship in international trade under the antidumping regime. This paper will show that the development of antidumping policy diverges completely from the general emancipation of the individual in international trade. It indicates a completely different image of the relationship between the government and the individual in international trade than that at the domestic level.

4.1 The Distortion: Antidumping Law from the Domestic to the International Level

4.1.1 Origins and early evolution: administrative approach *vs.* legal approach

The history of domestic antidumping laws extends for nearly one hundred years since the establishment of Canadian antidumping law in 1904. From a historical point of view, there are two different origins of the early development: "a heritage from competition law" in the U.S. and "defusing protectionist pressure" in Canada.[144]

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[142] Inge Nora Neufeld, *Anti-dumping and Countervailing Procedures – Use or Abuse? Implications for Developing Countries* (Geneva: United Nations, 2001), 17-8.

[143] Ibid., 15.

[144] Brian Hindley and Patrick A. Messerlin, *Antidumping Industrial Policy: Legalized Protectionism in the WTO and What to Do about it* (Washington: The AEI Press, 1996), 23-4.

Antidumping laws developed in Canada from a protectionist background. In 1904, the Liberal party government in Canada was under the pressure both from farmers to reduce the tariff and from manufacturers pressing for a higher tariff.[145] Dumping was nothing new at all at that time, and high tariffs were also common. However, the "hostility toward Germany," the "halo effect of trust-busting" and "high tariffs everywhere" made it easy for Canada to invent antidumping law as "a new way" to deal with it.[146] To combat dumping from high tariff countries and to defuse protectionist pressure, Canada passed the first antidumping law. Soon after Canada, lots of countries passed antidumping laws. By 1921, the U.S., France, the UK, Australia, New Zealand and most other Commonwealth countries had passed antidumping laws.

In contrast to the Canadian antidumping legislation's need to defuse protectionist pressure, the original objective of American antidumping law was to restore fair market competition. The first antidumping law in the U.S., the Antidumping Law of 1916, was to deal with the predatory pricing in international trade, and had a heritage from competition law, mainly from the Sherman Antitrust Act of 1890 and the Wilson Tariff Act of 1894.[147] Previously, both the Australian Industries Preservation Act of 1906, and the New Zealand antidumping provisions of 1905 had also taken the anti-trust approach.[148]

Since the early development of antidumping law in the U.S., there has been a digression in the antidumping law's purpose from antitrust law to a protectionist administration instrument. Two changes in this early evolution of U.S. antidumping law are worth mentioning here. Firstly, the offense criteria under the 1916 act was simply to

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[145] J. Michael Finger, ed. *Antidumping: How It Works and Who Gets Hurt* (Ann Arbor: The University of Michigan Press, 1993), 14.

[146] Ibid., 14-7.

[147] Hindley and Messerlin, *Antidumping Industrial Policy*, 23-4.

[148] *Ibid.*

"sell imports below the actual market value of the goods" rather than the antitrust standard "conspiracy, combination, or restraint of competition."[149] Secondly, the enforcement of the antidumping law is an administrative rather than a legal matter, which is "informal and not subject to the rules of general jurisprudence or of evidence."[150] Finger thus argues antidumping is "a bureaucratic not a legal process."[151]

The departure from criminal statutes to administrative determination is a very important turning point in early evolution of antidumping law, because the standards of proof of a criminal offense and administrative dissatisfaction are totally different.[152] As shown in Table I below, in its early development, antidumping law in the US experienced a gradual detachment from antitrust law, and a development from criminal statute to administrative legislation. Both the Sherman Act of 1890 and Section 73 of the Wilson Tariff Act of 1894 are criminal statutes dealing with predatory pricing in international trade. Even the first Antidumping Act of 1916 began to deal with "importing below actual market value" through criminal statute perspective. But from the Antidumping Act of 1921 to the Tariff Act of 1930, antidumping law in the US had finished its departure from antitrust law and built up an administrative approach. This departure indicates the transition of antidumping law from a legal approach to an administrative approach. This transition paved the way for the increasing development of government discretion power. Finger indicates:

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[149] Finger, *Antidumping*, 21-2.
[150] Ibid., 23.
[151] Ibid.
[152] For this transition, see Finger, *Antidumping*, 22-3. Finger states: "Dissatisfaction with the 1916 act was political, not legal dissatisfaction; and in politics, this dissatisfaction was relative to what a Canadian-style administrative remedy would provide. Rule of law was what was blocking things, not any particular word in the law. Enlarging the scope for action against imports would require a shift from a legal to an administrative approach—or … a bureaucratic approach."

> The importance of the shift from a legal to an administrative standard of proof and evidence should not be overlooked. It not only broadened the scope of action against imports, it also made the criteria for such action much more malleable... Thus it prepared the way for the eventual emergence of antidumping as the main vehicle for import-competing interests to press for protection—and for governments to respond to those pressures...[153]

The implications of government discretionary power in the antidumping administration will be discussed in greater detail below. Before that, this paper first would like to address antidumping law's incorporation into the international regime.

TABLE 1 Elements in Early U.S. Laws to Regulate Unfairly Trade Imports, 1890-1922

Act and Date	Major Elements
Sherman Act, 1890	• Conspiracy or combination • Restraint, monopolization, or attempt to monopolize interstate or foreign commerce • Criminal statute, strictly construed • Fine, imprisonment; triple damages
Section 73, Wilson Tariff Act, 1894	• Conspiracy or combination engaged in importing • Intent to restrain trade, increase the price in the United States • Criminal statute, strictly construed • Fine, imprisonment; triple damages
Antidumping Act, 1916	• Importing below actual market value • Intent to restrain competition or to injure a U.S. industry • Criminal statute, strictly construed • Fine, imprisonment; triple damages
Antidumping Act, 1921	• Importing below fair value • Injury to a U.S. industry • Administrative determination by the secretary of the treasury • Special duty, equal to the difference between the fair value and the import price
Section 316, Fordney-McCumber Tariff Act, 1922	• Unfair method of competition and unfair acts in importation • Effect of tendency is to destroy or substantially injure • Tariff commission, with court review only of question of law • Additional duty to offset the act or method

Source: J. Michael Finger (1993, 21).

4.1.2 Late development: evolving into an international trade regime

[153] Ibid., 24.

Intertwining with international negotiations over free trade, antidumping law in the US since World War II has developed into a more technical and more administrative procedure and merged with the international antidumping regime.

In 1954, the US changed the administrative structure of determining antidumping action. While the responsibility of investigating the existence and margin of dumping was still left with the Treasury Department, responsibility for determining injury in an antidumping action was shifted to the Tariff Commission, which later on was changed to the U.S. International Trade Commission.[154]

In the Trade Act of 1974, the coverage of U.S. antidumping law was significantly expanded. Before that, as in the Tariff Act of 1930, dumping meant selling exports at a price below the home market price.[155] If the volume of home-market sales was too small, the export price was compared with that of sales in other export markets. Only if the volume of sales in the home and other exports markets were both too small would the export price be compared with the manufacturing cost. To calculate the average home market price, the Trade Act of 1974 required the Treasury to disregard any sales that were made in the home market in substantial quantities for an extended period of time at prices below the average total cost of production.[156] Thus the average home market price would always be higher than cost. This had the effect of making selling exports below cost another form of dumping, no matter if the price was higher or lower than the home market price. Selling below cost is sometimes reasonable in particular during recessions, and domestic firms are allowed to sell below cost whenever they like except for predatory

[154] Congressional Budget Office (CBO), Congress of the United States. *How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy* (Washington: 1994), 24.

[155] 19 U.S. Code §1677b.

[156] 19 U.S. Code §2101.

pricing.[157] This change in the law expanded the coverage of U.S. antidumping law to the act of selling below cost of foreign firms, and marked a further departure from the original function of antidumping law as a protection from predatory pricing.

To carry out the agreements on nontariff measures negotiated in the Tokyo Round, the U.S. enacted the Trade Agreement Act of 1979, and repealed the Antidumping Act of 1921. In this bill, not only "injury test for imports"[158] and shorter limits for the investigation[159] were included, but also an annual review to ensure that antidumping duties were maintained at the proper levels.[160] Also in this act, the power of investigation and determination of margin in antidumping cases was moved from the Department of the Treasury to the Department of Commerce, i.e. from the department which tends to favor free trade to that which is inclined to protect domestic firms from imports.

After the Trade Agreement Act 1974, there were some more new developments towards more administrative discretion and fewer legal checks and balances in the U.S. trade laws, such as the Trade and Tariff Act of 1984 and the Omnibus Trade and Competitiveness Act of 1988. According to the Trade and Tariff Act of 1984, when determining material injury, the International Trade Commission "shall cumulatively assess the volume and effect of imports of the subject merchandises from all countries ... if such imports compete with each other and with domestic like products in the United States market."[161] The Trade Remedy Assistance Office in the ITC was also created by

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[157] Hindley and Messerlin, *Antidumping Industrial Policy*, 18-21; CBO, *U.S. Antidumping and Countervailing-Duty Policy*, 8-11; or A. V. Deardorff, "Economic Perspectives on Antidumping Law," 26-33.

[158] 19 U.S. Code 1671.

[159] 19 U.S. Code 1671b, 1671d, 1673b, 1673d.

[160] 19 U.S. Code 1675.

[161] 19 U.S. Code 1677(7)(g).

this act. Since antidumping action targets particular products, firms sometimes tried to circumvent the duties by exporting only the parts to the US and then conducting final assembly in the US. In response, the Omnibus Trade and Competitiveness Act of 1988 extended the antidumping action to cover constituent parts, slightly altered products, and products assembled in third countries. It also contained a Third Country Dumping provision.[162] According to this clause, under the petition of domestic industry, the U.S. Trade Representative could request on behalf of that industry antidumping action by another country in which dumping injured U.S. firms that exported to them. If the country refused to take action, the Trade Representative "shall promptly consult with the domestic industry on whether action under any other law of the United States is appropriate."[163] Thus the coverage of the antidumping action's protection was extended from domestic industries that produce products for U.S. consumers to those firms that produce goods for foreign consumers.

From this brief review of the historical evolution of the antidumping laws at the domestic level, we can find that the manipulation of customs valuation has long been one of the anti-import instruments, and antidumping is actually a new way to use customs valuation procedures to counter imports.[164] The early evolution of antidumping laws was also a history of the development of a legal procedure into an administrative procedure that now falls under the discretion of the governmental administration.

At the international level, the spreading of antidumping law from Canada to the U.S., Australia, UK, South Africa, and the European Community indicates the inherent

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[162] 19 U.S. Code 1677k.

[163] Ibid. Since the markets in question are in other countries, the U.S. public and consumers are obviously not involved here.

[164] Finger, *Antidumping*, 24-5.

flexibility and convenience of antidumping as a governmental instrument of trade control. But in the early decades of the GATT antidumping was not a big issue, although there was some concern that antidumping laws might compromise the tariff reduction objective of the GATT if they were overused. Antidumping did not become a significant GATT issue until at the Kennedy Round of 1964-1967.[165]

The process of the antidumping issue shifting from the domestic to the international level is also the process of antidumping "law" emerging as a major policy instrument in every government. For example, in the States, when Congress refused to legislate the changes required by the code of Kennedy round, the executive branch insisted that it had the power to implement these changes by modifying investigation and enforcement procedures. This indicated the tension between the administration and the Congress over control of U.S. trade policy.[166] As in the EC, slower growth facilitates the antidumping mechanism as "a doubly convenient means" for responding to the "displacement of domestic production by emerging Asian exporters."[167] And the antidumping mechanism also serves as a political instrument for the EC Commission to press forward with antidumping action to prevent member state governments from giving into industries' demand for protection to expand their turf.

From the brief review of the evolution of antidumping laws in domestic level and its incorporation into international trade regime, we can see that it has been a process of detachment from domestic antitrust law, as well as a process of developing more and more administrative discretion, ensuring fewer legal checks and balances. As for

[165] Ibid., 25-6.
[166] Ibid., 26.
[167] Ibid., 27.

American antidumping laws, from the Antidumping Act of 1916/21 to the Uruguay Round Agreement Act of 1994, after separating from domestic antitrust law, antidumping laws have become totally incorporated into international agreements, and became more developed and advanced. Antidumping investigation procedure is technically separated from ordinary transactions. The more administrative discretion is embedded into the antidumping procedures, the more unpredictable it is for individual economic operators. Many changes affect individual economic activity: for example the taking of all exporting country's products to determine the injury, or the expansion of antidumping coverage from products to components and slightly altered products. Antidumping policy makes the international free trade more complicated and unpredictable for individual economic activity.

The process is quite similar to what Foucault has described about the birth of the prison: the freer international trade becomes, the more governmental interference is internalized into individual economic activities. The more advanced antidumping procedure becomes, the more restraints there are on individual rights in international trade.

Furthermore, the two origins of the development of antidumping laws in the US and Canada indicates two justifications of antidumping laws: one is against predatory dumping and potential monopoly, the other is a fairness justification.[168] However, to defend the domestic public interests through fighting against predatory monopoly and ensuring fairness, we have entrusted the government with too much discretionary power in international trade. This in return could distort the relationships between the government and the individual at the international level.

[168] Hindley and Messerlin, *Antidumping Industrial Policy*, 3.

4.2 The Administration's Discretionary Logic of Antidumping Law

In sharp contrast to the development of international trade from restoring free trade between nations to free trade among individuals, antidumping laws developed from domestic antitrust laws into an administrative procedure with an expansion of government discretionary power. The process of antidumping laws developing from domestic law into international trade policy is also the process of accumulation of governments' discretionary power over foreign trade and a circumvention of domestic legal checks and balance. During this process, domestic individuals, mainly consumers, are excluded from the investigation procedure.

4.2.1 Government trade instrument orientation and discretionary implications of antidumping law

According to Finger, Canada's Antidumping Law of 1904 defines dumping as an export whose price is less than the fair market value, but amended in 1921 and 1930 extending antidumping regulations to cover "sales below fully allocated costs plus a reasonable allowance for overhead and profit."[169] Antidumping action against import "sales below full cost" came into U.S. antidumping policy through the revision of administrative

[169] Finger, *Antidumping*, 15, 28.

interpretation rather than a legislated change. In the States, according to the Tariff Act of 1930, "the foreign market value of imported merchandise ... shall be the price ... at which such or similar merchandise is sold ... in ... the home country ... in the ordinary course of trade."[170] The U.S. administrator simply interpreted sales below full cost to be not made "in the ordinary course of trade."[171] The expansion of antidumping action to below-cost sales indicates the importance that the role of power politics plays at the national level, and also indicates the important role of administrative discretion. In particular:

- Adjustments (inferences), not observations, are the major input into an antidumping investigation.
- The detail of administrative regulation provides complexity, but it does not provide precision.
- Complexity camouflages opportunity for abuse.[172]

Antidumping policy developed from antitrust law, and in its early development, antidumping laws were to a large extent an extension of antitrust laws. But modern antidumping laws are quite different. Antidumping laws are now targeted at problems linked to the actions of foreign governments.[173] In studies of antidumping law and the U.S. economy, Grey Mastel argued that "although antidumping laws also directly act against companies, their real targets are governments that pursue industrial policies aimed at taking market share, production, and employment from U.S. companies using closed markets, cartelized markets or subsidies to build production capacity."[174] Antidumping

[170] 19 U.S. Code §1677b.
[171] Finger, *Antidumping*, 28.
[172] Ibid., 29.
[173] Grey Mastel, *Antidumping Laws and the U.S. Economy* (New York: M. E. Sharpe, 1998), 15.
[174] Ibid., 138.

law thus has developed into an administrative instrument of the government in international trade war.

In the brief review of the early evolution of antidumping law, we found a transition of a legal approach into an administrative approach with increasing government discretion. The administrative discretionary power of the government is embodied both in domestic and international antidumping rules, such as "best information available" provisions and the acceptance of standard of review practice in WTO rules.

According to the U.S. antidumping legislation "Antidumping Duties 1989,"[175] antidumping procedure during "preliminary determination,"[176] "critical circumstances findings,"[177] "administrative review of orders and suspension agreements,"[178] and "calculation of foreign market value base on constructed value"[179] are based on "available information." As for the procedures on "information and argument,"[180] the antidumping authority is required to base the investigation on the "best information available." Regarding the "best information available," the 1989 antidumping regulation states:

> (a) *Use of best information available.* The Secretary will use the best information available whenever the Secretary:
> (1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or
> (2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.
> (b) *What is best information available.* The best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties.... If an interested party refuses to provide factual information

[175] 19 CFR Part 353.
[176] 19 CFR Part 353.15 (a), (e).
[177] 19 CFR Part 353.16 (b).
[178] 19 CFR Part 353.22 (c), (f).
[179] 19 CFR Part 353.50 (c).
[180] Subpart C, 19 CFR Part 353.

> requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available.[181]

Similar provision, "facts available," is available in both GATT 1947 and GATT 1994. The Agreement on Implementation of Article VI of GATT 1994 states:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.[182]

"Best information available" here is a soft administrative procedure, and governments enjoy far more discretionary power that that of early anti-trust law's criminal approach standard of proof.[183] It also gives leeway for antidumping authority to stay away from legal checks and balances. Finally, it makes it easy for concerned domestic industries to launch antidumping investigation and makes it difficult for respondents to block the investigation.[184]

At the international level, the "standard of review" practice leaves domestic antidumping authorities a large degree of discretion to implement the antidumping agreement. Concerning the consultation and dispute settlement of antidumping agreement, the Agreement on Implementation of Article VI of GATT 1994 states that:

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[181] 19 CFR Part 353.37.

182 Art. 6.8, Agreement on Implementation of Article VI of GATT 1994.

[183] Finger, *Antidumping*, 23.

[184] As for the difficulty of fulfilling demands for information, the current antidumping code in the U.S. requires antidumping authorities "to provide assistance to domestic firms filing petitions for relief under the AD/CVD laws, but it has no similar requirement for assistance to foreign firms being investigated." See CBO, *U.S. Antidumping and Countervailing-Duty Policy*, 71.

> [I]n its assessment of the facts of the matter, the [Dispute Settlement Body, "DSB"] panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.[185]

This standard of review guarantees the domestic antidumping authorities discretionary power regardless of the interests of individual economic operators, because it "allows antidumping authorities of importing countries to escape closer scrutiny by the WTO Panel and represents an undue restraint that limits effective reviews."[186]

Most important of all, antidumping laws protect "injured" industries rather than promoting consumer interests.[187] Domestic firms competing with imports and the concerned foreign exporting firms are obviously interested parties in an antidumping action. However, several other groups may be affected by an antidumping action, such as domestic consumers,[188] consuming firms,[189] and exporting firms.[190] However, the U.S. antidumping legislation only defines the "interested party" as follows:

> (1) A producer, exporter, or United States importer of the merchandise, or a trade or business association a majority of the members of which are importers of the merchandise;
> (2) The government of the home market country;
> (3) A producer in the United States of the like product or seller (other than a retailer) in the United States of the like product produced in the United States;

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[185] Article 17.6, Agreement on Implementation of Article VI of GATT 1994.

[186] Neufeld, *Anti-dumping and Countervailing Procedures*, 18.

[187] Ibid., 15.

[188] Antidumping law raises prices of importing products and therefore not only "decreases the amounts that consumers can purchase," but also limits consumers' choices in consumption.

[189] Consuming firms that purchase the imports or competing domestic products for use as inputs in their production generally benefit from cheap imports. The higher prices resulting from antidumping action raise the costs of their products and make products less competitive in the international market.

[190] Although exporting firms are not directly affected by antidumping actions, they may still get hurt by antidumping actions from other countries in retaliation for the antidumping duties the U.S. has imposed on their firms. For analysis of all possible affected groups, see CBO, *U.S. Antidumping and Countervailing-Duty Policy*, 57.

(4) A certified or recognized union or group of workers which is representative of the industry or of sellers (other than retailers) in the United States of the like product produced in the United States;
(5) A trade or business association a majority of the members of which are producers in the United States of the like product or sellers (other than retailers) in the United States of the like product produced in the United States; or
(6) An association a majority of the members of which are interested parties, as defined in paragraph ... (3), ... (4), or ... (5) of this section.[191]

Neither consumers nor the consuming firms or affected exporting firms are included in the interested parties in antidumping action. J. M. Finger argues that "Antidumping is not public policy, it is private policy ... Antidumping regulation was created by removing from antitrust law the checks and balances ... Free of the constraints that rule of law impose on antitrust, antidumping is an instrument that one competitor can use against another ..."[192]

4.2.2 The rationalistic redistribution of the cost: Consumers *vs.* Injured Domestic Industries

Since "dumping usually transfers part of the cost of protectionism from the closed markets to open markets," [193] antidumping policy inevitably has some kind of redistribution effect. While antidumping should counter foreign trade practices and protect domestic industry, it actually redistributes income from consumers in the importing country to protected industries. For example, if B is a net importer of widgets, "antidumping action by the government of B will allow the prices and profits of the B

[191] 19 CFR Part 353.2(k).
[192] Finger, *Antidumping*, 34.
[193] Grey Mastel, *Antidumping Laws and the U.S. Economy*, 16.

industry to rise ... thus redistributing income from widget *buyers* in B to widget *producers* in B, and further depressing the widget industry in A."[194]

Through the antidumping action, consumers pay more money for the final products and thus support the domestic producers. A good example is the appropriation effect of the Continued Dumping and Subsidy Offset Act (CDSOA) of 2000 in the U.S. The CDSOD came into force on October 28, 2000, as part of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001. Previously, the revenues from antidumping and countervailing duties on a given import went directly into the general Treasury. The 2000 CDSOA modified the Tariff Act of 1930 and requires that money be collected into special accounts, one for each case. At the end of the fiscal year, the money collected in those case-by-case accounts is then distributed to the domestic producers that were either petitioners or interested parties supporting the petition in the case that resulted in the duties being levied on that import. The CDSOA applied to all antidumping and countervailing duty assessments made on or after October 1, 2000. During the past three years, more than $800 million in duty revenues has been distributed under the CDSOA: $231 million in 2001, $330 million in 2002, and $293 million in 2003. [195] This practice further indicates government's discretionary redistribution of protection cost among the local industries and consumers.

Antidumping may also cause domestic industry to move abroad [196] or redistribution of international market shares.[197] In the early 1980s, Japanese liquid crystal

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[194] Hindley and Messerlin, *Antidumping Industrial Policy,* 12. Emphasis mine.

[195] "Letter to the Honorable Bill Thomas regarding CBO's economic analysis of the Continued Dumping and Subsidy Offset Act of 2000," Congressional Budget Office web site, at <http://www.cbo.gov/showdoc.cfm?index=5130&sequence=0 >

[196] Hindley and Messerlin, *Antidumping Industrial Policy*, 47, U.S. FPD Case.

[197] Ibid,, 49, EC Calcium Metal Case.

flat panel display (FPD) producers represented 90 percent of liquid crystal FPD's world output. At that time, the 15 largest U.S. computer producers closed and sold their FPD plants according to their specialization strategy. However, in 1990, seven U.S. FPD producers filed an antidumping complaint for dumping against thirteen Japanese competitors, including Toshiba, Sanyo, and Hitachi. As the result, a 62.7 percent antidumping duty was imposed on the largest subset of FPDs, the active matrix LCDs, which were produced by only two of those seven petition companies; and 7 percent duties were imposed on other subset of FPDs and electroluminescent FPDs. Two small U.S. firms were thus able to impose very high costs on the AM-LCD users, which were all the major laptop producers in the U.S. like Apple, IBM, and Compaq. To avoid the higher costs, these U.S. firms upgraded their laptop facilities offshore.[198] In this case, antidumping measures not only caused the domestic redistribution of costs between consumers and producers, but also had an international effect which benefited companies in other countries.

Antidumping action's effects on redistribution of international market shares are best illustrated by the EC calcium metal case. In 1988 a French company Péchiney, which is the only producer of calcium metal in EC, filed a dumping complaint against Russia and China that was giving the advantage to a small French firm, Extramet. Extramet is Péchiney's downstream market competitor and uses calcium imports to make products for the steel industry. In September 1989 antidumping duties of roughly 22 percent were imposed on imports from Russian and China. Since at that time Péchiney was refusing to sell calcium to Extramet, Extramet had already brought the case to the

[198] Ibid.

French Competition Council. The Council concluded in March 1992,[199] and the Appeals Court of Paris confirmed in February 1993 that Extramet was obliged to import calcium metal from Russia and China. In June 1992 the European Court of Justice repealed the antidumping duties.[200] In this case, antidumping protected Péchiney from its competitor Extramet by excluding Russia and China from the EC calcium metal market. However, there were two other world producers, in Canada and the States, whose products were more expensive than that of Russia and China but cheaper than that of Péchiney, and who consequently benefited from the antidumping duties against Russia and China. EC market shares of calcium metal were thus redistributed among Russian, Chinese and North American companies.[201]

4.3 The tension between government discretionary power and individual economic activity: distributive justice vs. commutative justice

From the above review of the historical evolution of antidumping law from domestic anti-trust law to an administrative trade instrument incorporated into the international regime, we can see a clear increasing development of government discretionary power in antidumping administration. This development is in line with the general development of the constitutional history of the U.S. According to Henkin's studies in *Constitutionalism,*

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[199] Décision 92-D-26, 31 March 1992. Cited at Patrick A. Messerlin, Competition Policy and Antidumping Reform: An Exercise in Transition, 227. Available at Institute for International Economics web site: < http://www.iie.com/publications/chapters_preview/66/13iie2350.pdf >.

[200] Case C-358/89, ruling of 11 June 1992. Cited at Patrick A. Messerlin, ibid.

[201] Ibid., 49.

Democracy, and Foreign Affairs, over the centuries the Federal government has grasped more and more discretionary power,[202] and individual rights have appeared "less or different where foreign affairs are involved."[203] Henkin's studies also found that we over-rely on foreign affairs experts for the claims of "efficiency" and carelessly sacrifice the individual rights that the founders of the Constitution had hoped to insure.[204] One century's development of international antidumping regime is in contrast to the general individual emancipation trend of the evolution of international free trade.

The central tension of the development of the international antidumping regime is the interaction between the government's unchallenged trade discretionary power and the free economic activities of the individual. The government antidumping a dministrative functions focus on redistributing costs between the consumers and the producers and even the redistribution of international market shares. For individuals, individual economic operators in domestic and international market prefer free transactions, and consumers enjoy freedom in choosing products.

The principle institution that maintains the operation of domestic and international trades is the contract,[205] which regulates the conveyance of properties between free individual economic operators. From the point of view of the legal conveyance of properties, there are two forms or directions of conveyance: vertical conveyance such as

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[202] Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, 28.

[203] Ibid., 94.

[204] Ibid., 108. He states, "In foreign affairs we are particularly susceptible to the claims of 'efficiency' at the expense of other values, to pleas that we repose full faith in 'the experts,' to demands of individual sacrifice, including the sacrifice of our obligation to scrutinize and criticize, and sacrifice of individual rights."

[205] To some extent, as Henry Maine mentioned in *Ancient Law*, modern society is capable of holding together because of "two great institutions," the Contract and the Will. Maine, *Ancient Law*, 120.

salary in the form of public revenue redistribution or inherited conveyance,[206] and horizontal conveyances of property bought and sold. Domestic and international trade is horizontal transaction regulated by the institution of the contract, which is horizontal transactions among equal parties with "agreements of will," the commutative rather than the distributive conveyances. As both domestic and international trades are horizontal conveyances, the commutative rather than distributive conveyance, less vertical distributive power interference is desirable. As a matter of fact, the Coase Theorem puts it clearly that "the initial allocation of legal entitlements does not matter from an efficiency perspective so long as they can be exchanged in a perfectly competitive market."[207] The antidumping regime, however, is the distributive interference of the "initial allocation of legal entitlements" in international trade.

As mentioned above, international antidumping laws allow the government more discretionary power not only through the rationalistic redistribution of costs among domestic producers and consumers, but also even in the redistribution of international market shares. This redistribution effect distorts international trade from domestic trade, which is based on commutative activities among individuals. This distortion challenges our traditional perception of justice, which lies at the core of the tension between governmental discretionary power and individual economic activity in antidumping administration.

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[206] Inherited conveyance is the vertical transformation of property rights from generation to generation. Through the inherited conveyance, the "prolongation of a man's legal existence in his heir, or in a group of coheirs," which is "neither more nor less than a characteristic of *the family* transferred by a fiction to *the individual*," society thus extends itself. Social development is thus possible. During this conveyance process, distributive power functions in a vertical fashion without any simultaneous (in time) mutual agreements. See Maine, *Ancient Law*, 109.

[207] Robert D. Cooter, "Coase Theorem," in *The New Palgrave: A Dictionary of Economics*, eds. John Eatwell, Murray Milgate, and Peter Newman (UK: The Macmillan Press Ltd., 1987), 457.

According to Hobbes, the justice of actions is divided into Commutative justice and Distributive justice.[208] Commutative Justice is "the Justice of a Contractor; that is, a Performance of Covenant, in Buying, and selling ... and other acts of Contract."[209] And distributive Justice is "the Justice of an Arbitrator," who performs "his Trust" to "distribute to every man his own."[210] Generally, "the rule of law precludes the pursuit of distributive, as opposed to the commutative, justice."[211]

Obviously, in every antidumping action, there are two kinds of powers intertwined in the process: the commutative function of the trade parties and the distributive function of the importing government. Therefore, the central rationale of antidumping policy is that protectionist cost can be countered, individuals' (mainly consumers') properties can be redistributed fairly, and justice can be redistributed. This falls into the category of Gallican view[212] of government which believes that social welfare can be achieved through rationalistic design rather than through individual free market activities. And according to Hayek's analysis, this rationalist approach endangers individuals' freedom and properties.[213] As a matter of fact, the central rationale of antidumping policy lies in the view that a rational designed social order would deliver not only social justice, but also a more efficient use of economic resources. Hayek argues in his *The Fatal Conceit* that this rationalistic view overlooks the facts that "the totality of resources that one could employ ... *is simply not knowable to anybody*, and therefore can

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[208] Hobbes, *Leviathan*, 208.
[209] Ibid.
[210] Ibid.
[211] Hayek, *Constitution of Liberty*, 232.
[212] Ibid., 54-6.
[213] That's the main theme of his book *Constitution of Liberty*. E.g. he argues that many of the new welfare activities of government are a threat to freedom, because they really constitute an exercise of the coercive powers of government and rest on its claiming exclusive rights in certain fields. Ibid., 258.

hardly be centrally controlled."[214] The organization of international trade and the fair allocation of resources and knowledge in the global market can be simply reached through international free trade and is beyond human design. Rational redistribution and discretionary interferences could destroy the fair commutative interaction among individual economic operators in domestic and international markets.

This chapter argues that the rationalistic prejudice in antidumping law is rooted in our traditional perception of government without any awareness of its being contrary with our beliefs about democracy and rule of law. Even a democratic government can turn into an irrational discretionary power in international trade, which endangers the performance of individual rights in international arena. One paragraph of Louis Henkin's discussion on the governance of foreign affairs is very suitable to end this chapter:

> Constitutionalism implies respect for individual rights, and foreign affairs—like other national affairs—are not exempt from paying that respect. Democracy too owes such respect, and a democratic foreign policy also has to be sensitive to individual rights. In fact, since so much of our foreign affairs is less subject to the safeguards of separation of powers, of checks and balances, and of federalism, and since in the conduct of foreign affairs our representatives are less responsive and less accountable, the claims of individual rights are in risk of being sacrificed.[215]

[214] Hayek, *Fatal Conceit*, 85.
[215] Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, 105.

V. Individuals in Global Governance: from Social Contract Theory to the Extended Order and beyond

In the evolution from the GATT to the WTO, international trade has developed towards the emancipation of individuals in the global free market. In line with the increasing recognition of the global protection of human rights, the international trade regime is seeking to create fair and predictable market conditions for individual economic activity in national and global markets. Also, the expansion of non-discrimination protection from products to persons, and the more numerous and more detailed judicial review requirements found in WTO agreements like GATS, CV, AD, SCM, PSI, and TRIPS, are indicative of the efforts to focus international trade on the activities of individuals rather than on the activities of nations. These developments demonstrate the inherently cosmopolitan orientation of global free trade. The argument for limited government, which is upheld in domestic constitutionalism, is in line with the development of global free trade in general.

However, the evolution of antidumping law from the domestic to international levels is based on different principles. In its early development, antidumping law was either a government instrument for defusing protectionist pressure (as occurred in Canada), or a legal instrument, with a heritage from antitrust law, to deal with predatory pricing (as occurred in the United States). Although antidumping law was detached from antitrust law early in its development and increasingly became an administrative trade instrument in the 1930's, it delved into the international arena only at the Kennedy Round. This occurred nearly two decades after the GATT came into force; at the time

tariffs were reduced successfully. Since then, antidumping law has been incorporated into the regime of international trade, and has gradually become more technical and administrative. In the United States, for example, the application of antidumping action gradually expanded to cover exports sold below cost, and later to cover constituent parts, slightly altered products, and products assembled in third world countries. Also, more discretionary power was granted to administrative government, as in the interpretation of "selling below cost" or the cumulative determination of "material injury." According to our analysis, antidumping actions not only restrain consumers' choice of foreign products, but also have the effect of rationalistic redistribution of protection cost to domestic industries and consumers, and redistribute domestic and international market shares. The development of antidumping law has placed additional restraints on individual economic activities in international trade.

The current study not only encourages a reconceptualization of individual rights in international law and a relocation of the individual in international trade; it demands a reconsideration of social contract theory.

Social contract theory, which has dominated political and legal arenas for more than two centuries, is more than just a branch of political theory. It is now internalized into our social life. We thus take some things for granted, such as the paternalistic power of governments over foreign trade, as was discussed in the analysis of antidumping law. In fact, social contract theory misperceives the dynamic evolution of social institutions as a simple linear social development, and grounds the imaginary social contract as the "first mover" of social institutional development. Although social contract theory roots the legitimacy of government power in the individual in the domestic realm, it does not offer

any explanation of the development of international social institutions and leaves the international order in a state of nature. Limited government and democratic participation of the individual, principles that are upheld in the domestic realm and supported by the general development of international free trade, are distorted at the international level, as was discussed in the analysis of international antidumping law.

However, the development of the social institution is a spontaneous self-extended order, as Hayek argued. From our study above, the emancipation of the individual in international trade, the development of stronger human rights from the domestic to the international level, and the global democratization of governance are processes of mutual influence rather than factors that are isolated from each other. The emancipation of the individual in international trade is restoring an international free market that is based in individual activity, rather than agreements among states.

The contrasting development of international free trade law and antidumping law illustrates that the emancipation of individuals in international trade is a complicated and dynamic process. This might be because of because of the myth of the source of the legitimacy of government. The commonly accepted social contract theory does not sufficiently illegitimatize the paternalistic power of the government. Thus, the paternalistic redistribution power of the government in international trade administration is jeopardizing the democratic rights of people without their awareness. The government's discretionary power is not only distorting international free trade, but is also endangering the integration of domestic and international systems and the emerging cosmopolitan democratic order through the participation of individuals in globalization.

It is time for us to get rid of the myth created by social contract theory, and it is also time to get rid of the paternalistic and discretionary power of the government over foreign trade. Further, it is time to propose an ethic of limited governments in international trade, and thus restore international free trade to its inherently cosmopolitan base. Otherwise, the development "from status to contract" of individuals at the international level will never be possible.

Literature Cited

Bourdieu, Pierre. *Practical Reason: On the Theory of Action*. Translated by Randal Johnson. UK: Polity Press, 1998.

Brand, Ronald A. "Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century." *Hastings Int'l & Comp. L. Rev* 25 (Summer 2002).

Brownlie, Ian. *Principles of Public International Law*. 4th ed. New York: Oxford University, 1990.

———. *The Rule of Law in International Affaires: International Law at the Fiftieth Anniversary of the United Nations*. The Hague: Martinus Nijhoff Publishers, 1998.

Congressional Budget Office, Congress of the United States. *How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy*. Washington: 1994.

———. "Letter to the Honorable Bill Thomas regarding CBO's Economic Analysis of the Continued Dumping and Subsidy Offset Act of 2000." Congressional Budget Office website.

Cooter, Robert D. "Coase Theorem." In *The New Palgrave: A Dictionary of Economics*, Edited by John Eatwell, Murray Milgate, and Peter Newman, 457-60. UK: The Macmillan Press Ltd., 1987.

Deardorff, Alan V. "Economic Perspectives on Antidumping Law." In *Antidumping Law and Practice*, edited by John H. Jackson and Edwin A. Vermulst. Hertfordshire: Harvester Wheatsheaf, 1990.

Fei, Xiaotong. *Rural China*. Beijing: Joint Publishing, 1985.

Finger, J. Michael, ed. *Antidumping: How It Works and Who Gets Hurt*. Ann Arbor: The University of Michigan Press, 1993.

Finley, M. I. *The Ancient Economy*. California: University of California Press, 1973.

Franck, Thomas M. *The Empowered Self: Law and Society in the Age of Individualism*. New York: Oxford University Press, 1999.

Fred L. Morrison, Fred L. and Robert E. Hudec. "Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States." In *National Constitutions*

and International Economic Law, edited by Meinhard Hilf and E. U. Petersmann, 91-133. Netherlands: Kluwer Law and Taxation Publishers, 1993.

Habermas, Jurgen. *The Postnational Constellation*. Edited by Max Pensky. Massachusetts: The MIT Press, 2001.

———. "Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight." In *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, edited by James Bohman, and Matthias Lutz-Bachmann. Cambridge, Massachusetts: MIT Press, 1997.

Hamilton, A., James Madison and John Jay. *The Federalist*. London: J. M. Dent & Sons Ltd., 1948.

Hayek, F. A. *The Constitution of Liberty*. Chicago: The University of Chicago Press, 1960.

———. *The Fatal Conceit: The Errors of Socialism*. UK: Routledge, 1988.

Henkin, Louis. *Constitutionalism, Democracy, and Foreign Affairs*. New York: Columbia University Press, 1990.

———. *International Law: Politics and Values*. The Netherlands: Kluwer Academic Publishers, 1995.

———. Notes from the President: The Mythology of Sovereignty. *Am. Soc'y Int'l L. Newsl.* (ASIL, Washington, D.C.: Mar. 1993).

Hertel, S. "The Private Side of Global Governance." 57(1) *Journal of International Affairs* (Fall 2003).

Hindley, B., and Patrick A. Messerlin. *Antidumping Industrial Policy: Legalized Protectionism in the WTO and What to Do about It*. Washington: The AEI Press, 1996.

Hobbes, Thomas. *Leviathan*. London: Penguin Books, 1968.

Huntington, S. P. *The Clash of Civilizations and the Remaking of World Order*. New York: Simon & Schuster, 1996.

Jennings, Robert & Arthur Watts. *Oppenheim's International Law*. 9th ed. Vol. I. UK: Longman, 1992.

Kant. *Political Writings*. Edited by Hans Reiss and H. B. Nisbet. UK: Cambridge University Press, 1991.

Locke, John. *The Second Treatise of Government*. New Jersey: Prentice Hall, 1997.

Maine, Henry. *Ancient Law*. London: J. M. Dent & Sons Ltd, 1917.

Malanczuk, Peter. *Akehurst's Modern Introduction to International Law*. 7th ed. London: Routledge, 1997.

Mastel, Grey. *Antidumping Laws and the U.S. Economy*. New York: M. E. Sharpe, 1998.

McGee, Robert W. *A Trade Policy for Free Societies: the Case against Protectionism*. Connecticut: Quorum Books, 1994.

Messerlin, Patrick A. "Competition Policy and Antidumping Reform: An Exercise in Transition." Institute for International Economics website.

Montesquieu, Baron de. *The Spirit of Laws*. Translated by Thomas Nugent. New York: Hafner Press, 1949.

Nederman, Cary J. *Worlds of Difference*. The US: The Pennsylvania State University, 2000.

Neufeld, Inge Nora. *Anti-dumping and Countervailing Procedures – Use or Abuse? Implications for Developing Countries*. Geneva: United Nations, 2001.

Nisbett, Richard E., Kaiping Peng, Incheol Choi, and Ara Norenzayan. "Culture and Systems of Thought: Holistic versus Analytic Cognition." *Psychological Review* 108 (2001).

Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974.

Petersmann, E. U. "Limited government and Unlimited Trade Policy Powers? Why Effective Judicial Review of Foreign Trade Restrictions Depends on Individual Rights." In *National Constitutions and International Economic Law,* edited by Meinhard Hilf, and E. U. Petersmann. Netherlands: Kluwer Law and Taxation Publishers, 1993.

———. *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland.* Switzerland: University Press Fribourg Switzerland, 1991.

———. *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*. London: Kluwer Law International, 1997.

———. "The WTO Constitution and the Millennium Round." In *New Directions in International Economic Law: Essays in Honor of John H. Jackson*. Edited by Marco Brondkers and Reinhard Quick. Boston: Kluwer Law International, 2000.

Perez, Antonio F. "International Antitrust at the Crossroads: The End of Antitrust History or the Clash of Competition Polity Civilizations?" *Law and Policy in International Business* 33 (2002).

Rousseau, Jean-Jacques. *The Social Contract*. London: Penguin Books, 1968.

Senti, Richard, and Patricia Conlan. *WTO: Regulation of World Trade after the Uruguay Round*. Zürich: Schulthess Polygraphischer Verlag, 1998.

Weber, Max. *The Protestant Ethic and the Spirit of Capitalism*. Trans. Talcott Parsons. New York: Charles Scribner's Sons, 1958.

———. *The Religion of China: Confucianism and Taoism*. Trans. Hans H. Gerth. New York: the Free Press, 1968.

Wendt, Alexander. *Social Theory of International Politics*. New York: Cambridge University Press, 1999.