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Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice

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Abstract

This article engages with the current internationalist debate about the 'linkage' or the proper relationship of trade and human rights law. The debate, as played out in activist commentary, scholarly journals and the reports of international institutions, is largely concerned with the substantive obligations or normative commitments involved in the two fields. This article seeks to address instead the forms of law (the patterns of relations and subject positions) that transmit, frame or accompany these obligations and commitments. It suggests that focusing on this question of the forms of law is helpful, perhaps even necessary, in developing an understanding of the political effects of appealing to democratic participation as a counter to the excesses of economic globalization. The particular focus of the article is on WTO agreements that pursue the goal of regulatory harmonization as a means of achieving greater market access and economic integration. It explores the relationship between the form of law mandated by these harmonization agreements (the form of sacrifice), and the form of law envisaged in an appeal to democratic political participation (the form of abandonment).

Key words

Trade; human rights; democracy; harmonization; sacrifice

Desiring to further the use of harmonized sanitary and phytosanitary measures between Members . . .[1]

This need to enter into a relation with someone, in spite of or over and above the peace and harmony derived from the successful creation of beauty, is what we call the necessity of critique.[2]

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1. Agreement on Sanitary and Phytosanitary Measures, 15 April 1994, in World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999), 321 (hereinafter 'SPS Agreement'), Preamble.
2. E. Levinas, 'The Transcendence of Words', in S. Hand (ed.), *The Levinas Reader* (1989),144, 147.

There is a great deal of institutional energy in the field of international law currently channelled into a debate about the relationship between trade and human rights. Much of this literature focuses on the human rights effects of the World Trade Organization (WTO) and the trade agreements negotiated and implemented under its auspices. Texts dealing with this question can be found in activist essays, scholarly literature and the reports of international institutions. Most such texts engage with the substantive content of trade or human rights law. The end of such scholarship is to produce an account of the best way to achieve a particular normative commitment, such as justice, efficiency, economic integration, human dignity or the rule of law. This article pauses to reflect upon a prior question: what are the *forms* of law which transmit, frame or accompany these substantive obligations and normative commitments? My suggestion is that focusing on this question of the forms of law embodied in the two fields of trade and human rights is helpful, perhaps even necessary, in developing an understanding of the relationship between liberal democratic politics and global capitalist economics. By referring to 'form', I mean the pattern of relations and subject positions to which these laws attempt to give shape. Trade and human rights law are expressions of the desire to create the proper order of things, the proper arrangements between subjects often imagined and constituted as parts of a greater whole (the state, the international community, the global economy). I want to suggest that the subjects and relations given form by these areas of international law are as integral to its political effects as are the substantive obligations (dealing with, say, health and safety regulation, or electoral law, or services provision) to which international agreements in these fields give rise.[3] In other words, the forms of law are not apolitical or neutral.[4] While my arguments are relevant to the relationship of trade and human rights more generally, my particular focus here will be on trade agreements that pursue the goal of regulatory harmonization as a means of achieving greater market access and economic integration. My aim is thus to explore the relationship between the form of law mandated by these harmonization agreements, and the form of law envisaged by those critics who argue that harmonization agreements are a threat to democracy and political participation.

Section 1 attempts to convey a flavour of the current debate about the 'linkage' of trade and human rights. Criticisms of the potential human rights impact of the agenda for trade, financial and investment liberalization pursued by the WTO began to surface in the aftermath of the Uruguay Round of GATT trade negotiations. The GATT was essentially an agreement about trading in goods or commodities, and took as its foundational premise the norm of non-discrimination. With the creation of the WTO at the completion of the Uruguay Round in 1995, the political nature of free trade decision-making became increasingly visible.[5] The Uruguay Round outcomes significantly expanded the range of activities brought within the

3. For a related argument about the politics of legal form, see P. Schlag, '"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction', (1989–1990) 11 *Cardozo Law Review* 1631.
4. Ibid., at 1633.
5. Agreement Establishing the World Trade Organization, 15 April 1994, in World Trade Organization, *supra* note 1, at 3.

scope of the multilateral trade regime to include trade-related aspects of intellectual property,[6] trade in services[7] and the harmonization of public health and safety regulations,[8] and greatly increased the enforcement powers of the regime through the establishment of a sophisticated dispute settlement process.[9] In addition, once a rule is agreed to as part of a trade negotiation it is very difficult to alter it, while the importance of the WTO for all its members means that the costs of withdrawal are enormous. The resulting 'irreversibility' of rules agreed to at the WTO means that proposed agreements are increasingly subject to intense scrutiny by 'outsiders' to the regime, including human rights experts and NGOs.[10] Such critics have argued that the agreements pose an illegitimate constraint on the political choices open to peoples and governments. Those trade lawyers who have engaged with this critique argue that economic freedom is the precursor to, or at least the partner of, political freedom. In the words of former WTO Director-General Mike Moore, economic globalization when combined with democratic internationalism will lead to 'longer and more sustained peace, longer and more sustained economic growth, and a fairer and better society'.[11] There is no outside to this harmonious whole, no need or desire that can or should disrupt the workings of the WTO as a 'linkage machine'.[12] Human rights can be conceived of as just one more link in a chain made larger to accommodate this set of interests. This debate often seems to lead to a dead end. The sense of being unable to move forward persists despite, or perhaps because of, the tendency of both trade lawyers and human rights lawyers to couch their arguments in terms of what must be done to prepare for the future, for that which is to come. The texts of both trade law and human rights law call for the redesign of existing societies and assume the fallibility of their present inhabitants.[13] This article will explore the relationship between the form of law which trade agreements seek to introduce (the form of sacrifice) and the form of law envisaged in an appeal to democratic political participation (the form of abandonment).

6. Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, in World Trade Organization, *supra* note 1, at 321 (hereinafter 'TRIPS').
7. General Agreement on Trade in Services, 15 April 1994, in World Trade Organization, *supra* note 1, at 284 (hereinafter 'GATS').
8. SPS Agreement, *supra* note 1.
9. Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, 1004, in World Trade Organization, *supra* note 1, at 354.
10. R. Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime', (2002) 96 AJIL 94, 107; J. H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats', (2001) 35 *Journal of World Trade* 191.
11. M. Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance* (2003), 249–50.
12. The view of the WTO as 'a linkage machine', and the related notion that 'centralized, quasi-autonomous institutions may be relatively effective vehicles for the promotion of interstate cooperation between rational, egoistic state actors', is developed in J. E. Alvarez, 'The WTO as Linkage Machine', (2002) 96 AJIL 146.
13. For a discussion of messianism as the central spirit guiding cosmopolitan international lawyers of the twentieth century who assumed 'the fallibility of present society', 'the fallibility of the human beings that inhabit that society and the law that they create out of their narrow vision', see M. Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World', (2003) 35 *New York University Journal of International Law and Politics* 471, 486.

Section 2 of the article begins this exploration through an analysis of the form of law mandated by two WTO agreements – the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the General Agreement on Trade in Services (GATS).[14] These agreements aim at 'harmonization' of existing laws in member states. Those who support these agreements argue that they enshrine rationality, science, objectivity and transparency as the norms governing such decision-making. The agreements, it is argued, oblige member states to exclude passion, secrecy and singularity (or deference to special interests) from the domestic legislative process. However, I will suggest that these agreements can better be understood as requiring national decision-makers to respond to the demands of the market, and thus as incorporating passion, secrecy and singularity at the heart of responsible decision-making. This relationship founds an economy of sacrifice, accompanied by the promise of the reward of the righteous in the future by the Father (God/Market) who sees in secret.[15] WTO agreements ask of most member states that they sacrifice those values they espouse publicly and collectively – democracy, civility, politics, the family of the nation – for the global market, and as the price of inclusion in the community of believers.

Section 3 asks whether an appeal to human rights or democratic participation can offer a means of countering the demands of the market. The human rights tradition, at least as translated into the declarations and covenants of modern law, would seem to challenge the logic of sacrifice to a mysterious God, through its commitment to creating the conditions enabling individuals to participate in the neutral and impartial functions of the liberal democratic state. Indeed, in the *Refah Partisi* case, the European Court of Human Rights held that a party proposing to organize a State and society according to religious or divine rules poses a threat to liberal democracy.[16] Yet the liberal democratic demand for a public realm of empty universalism must be understood in relation to the sacrificial logic of the market. Sacrifice comes before the law.

Section 4 concludes by returning to the question of that which escapes sacrificial substitution. It asks how a critical international legal practice might engage with the place of sacrificial responsibility in international law and governance.

1. Debating trade and human rights

My starting point for this paper is an uneasiness with the literature on the 'linkage' of trade and human rights. I want to begin with a few examples to suggest the nature of this literature. In 2003, Oxford University Press published the Amnesty International Lectures on *Globalizing Rights*. A number of contributors to that volume argue passionately that economic liberalization threatens the future of human rights. For Susan George, if neoliberal globalization continues, 'politics will concern

14. SPS Agreement, *supra* note 1; GATS, *supra* note 7.
15. On the reward of the righteous, see Matthew, 10:34–40 (Revised Standard Version).
16. *Case of Refah Partisi (The Welfare Party) and others v. Turkey*, Applications Nos 41340/98, 41342/98, 41343/98, and 41344/98, ECHR, Judgment, 13 February 2003.

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primarily the deadly serious issue of survival'.[17] The 'bottom-line issue of human rights' will become 'who has a right to live and who does not?'[18] At stake is the price paid by 'loser nations' and 'losers at the individual level', who suffer as a result of homelessness, unemployment, lack of access to health care, starvation and suicide.[19] George argues that human beings can and must challenge this neoliberal model, and ask, 'what obligations, if any, have the fast castes to the slow ones, the best to the rest?'[20] Human rights promise inclusion and participation, offering 'standards for a rights-based society which consciously chooses to respect the dignity of every human being so that no one is left out'.[21] A rights-based system is the opposite of an 'unregulated market free-for-all', and involves the acceptance by business that 'it has responsibilities not just to shareholders but to employees, suppliers, and the communities and nations where it is located'.[22] The challenge is to 'seek to restore power to communities and states while working to institute democratic rules and fair distribution at the international level'.[23]

This argument about the threat posed to democracy by the WTO is well developed in much activist literature, including the influential book by Lori Wallach and Michelle Sforza, entitled *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy*.[24] The book was published by the NGO Public Citizen, just before the ill-fated Seattle Ministerial Meeting of the WTO in 1999. In the Preface, Ralph Nader argues that we now face 'a race against time: How will citizens reverse the expanding globalization agenda while democratic instincts and institutions remain, albeit under attack?'[25] Wallach and Sforza develop this theme further, arguing that the creation of the WTO represents 'an insidious shift in decision-making away from democratic, accountable forums – where citizens have a chance to fight for the public interest – to distant, secretive and unaccountable international bodies, whose rules and operations are dominated by corporate interests'.[26] The WTO's undemocratic processes make it a forum for avoiding responsibility and accountability,[27] while the agreements negotiated under its auspices constrain democratic politics.[28] The WTO thus 'serves as the engine for a comprehensive redesign of international, national and local law, politics, cultures and values'.[29]

The difference in style and tone between this literature and that written by trade lawyers is quite striking. For these 'enthusiasts of globalization through law'

17. S. George, 'Globalizing Rights?', in M. J. Gibney (ed.), *Globalizing Rights* (2003), 15, 23–4.
18. Ibid.
19. Ibid., at 22–3.
20. Ibid., at 24.
21. Ibid., at 17.
22. Ibid., at 32.
23. Ibid.
24. L. Wallach and M. Sforza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy* (1999).
25. R. Nader, 'Preface', in Wallach and Sforza, *supra* note 24, at ix, xii. See also R. Nader and L. Wallach, 'GATT, NAFTA, and the Subversion of the Democratic Process', in J. Mander and E. Goldsmith, *The Case Against the Global Economy and for a Turn Toward the Local* (1996), 92.
26. Wallach and Sforza, *supra* note 24, at 2.
27. Ibid., at 215.
28. Ibid., at 222.
29. Ibid.

seeking 'legally rigorous economic integration',[30] such critiques and the growing phenomenon of anti-globalization protests are best met with bigger doses of liberal rationality and better design proposals. This literature worries about how best to 'micromanage divergent public orders'[31] or manage 'the interface' between 'trade liberalization and the regulatory state',[32] understands the WTO as a 'linkage machine',[33] and engages in endless attempts to allocate tasks to different global actors according to a functional logic – 'what institutions, if any, with the authority to manage linkage – that is, to enable states effectively to negotiate and agree on linkage – will best allow us to achieve our goals'.[34] Unlike earlier economic theorists, those writing about economic globalization tend not to make explicit the cultural forms or political order that underpin their sense of the ideal destination of economic globalization. Yet we do catch glimpses of this destination through their discussions of what international economic law is *for*: 'an engine for prosperity', the achievement of harmony through regulation, economic integration defeating the dark forces of national protectionism.[35] This political vision of economic globalization appears most clearly in the work of its self-identified '"liberal" friends',[36] who suggest that there is nothing to be afraid of in the institutional linking of trade and human rights. For example, Ernst-Ulrich Petersmann sees human rights and markets as having a common telos – as 'organized dialogues about values' they both 'promote peaceful coexistence, tolerance and scientific progress'.[37] Human rights serve 'instrumental functions' – they 'make human beings not only better democratic citizens but also "better economic actors"'.[38] The goal of international economic organizations should be to transform '"market freedoms" into "fundamental rights" which – if directly enforceable by producers, investors, workers, traders and consumers through courts . . . can reinforce and extend the protection of basic human rights (e.g. to liberty, property, food and health)'.[39] Trade-related rights to property or due process could be enhanced through WTO decision-making, thus achieving both 'economic efficiency' and 'democratic legitimacy'.[40] Robert Howse also suggests that democracy-based critiques can usefully be accommodated – 'the law of international economic integration, having survived and/or been reshaped by such critique and contestation, will possess all the more social legitimacy'.[41] And for those

30. See R. Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence', in J. H. H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (2001), 35, 37.
31. K. Bagwell, P. C. Mavroidis, and R. W. Staiger, 'It's a Question of Market Access', (2002) 96 AJIL 56, 75.
32. M. J. Trebilcock and R. Howse, *The Regulation of International Trade* (1995), 500.
33. Alvarez, *supra* note 12.
34. J. P. Trachtman, 'Institutional Linkage: Transcending "Trade and . . . "', (2002) 96 AJIL 77, 88.
35. Remarks by F. M. Abbott, 'Human Rights, Terrorism and Trade', (2002) 96 *American Society of International Law Proceedings* 121, 126.
36. Howse, *supra* note 30, at 69.
37. E.-U. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', (2002) 13 EJIL 621, 627.
38. Ibid., at 626.
39. Ibid., at 629.
40. Ibid., at 624.
41. Howse, *supra* note 30, at 69.

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who are supporters of the American vision of a new world order, 'WTO admission and participation would set up a kind of tutorial in rule-of-law values' and might provide the means to push a human rights violating state 'not only to change its trade and trade-related practices, but also to reform its domestic government, liberalize its political system, expand the rights and opportunities of women and other disadvantaged groups, and so on'.[42] In these quite different ways, human rights or democratic challenges are absorbed into the vision of the future that informs the work of proponents of economic globalization.

For some commentators, this assimilation of human rights within the free trade agenda is a source of frustration. Philip Alston, for example, has been highly critical of attempts by scholars to appropriate human rights to legitimize the free trade regime. Alston argues that there is a marked difference between the rights promoted by the WTO and those promoted by international human rights law:

> [A]ny such rights arising out of WTO agreements are not, and should not be considered to be, analogous to human rights. Their purpose is fundamentally different. Human rights are recognized for all on the basis of the inherent dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are seen as objects rather than as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy but not as political actors in the full sense and nor as holders of a comprehensive and balanced set of individual rights.[43]

For Alston, the suggestion of an existing link between WTO law and human rights law involves 'a form of epistemological misappropriation'.[44] The debate over the proper relationship between trade and human rights must take a new direction,[45] involving a recognition that trade law and human rights law have 'a fundamentally different ideological underpinning'.[46] While I share the sense that a new direction for this debate is needed, I am not so sure that the trade law literature avoids confronting the challenge that human rights pose to the global trade regime. The latter sections of the article explore the possibility that human rights law in its current engagement with international economic institutions may in fact *not* pose a challenge to trade law, and that in order to understand why this is so, it is useful to explore the intimate relationship between the forms of law embodied in the two international regimes.

My uneasy response to the existing conversation about trade and human rights is also produced by the effect of my attempts to speak and write about this conversation. The moment in which my disenchantment with the genre of writing about this topic became impossible to ignore came in the middle of teaching a subject called

42. Remarks of L. Fisler Damrosch, 'Human Rights, Terrorism and Trade', (2002) 96 *American Society of International Law Proceedings* 128, 130.
43. P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', (2002) 13 EJIL 815, 826.
44. Ibid., at 842.
45. Ibid., at 844.
46. Ibid., at 842.

Trade, Human Rights and Development.[47] The subject involves a close analysis of texts in which capitalism and human rights are linked. The discussions in the early part of the subject, which involved readings of classic economic and human rights texts with texts by critical and feminist scholars, was productive, thoughtful and responsive. The students generated insightful analyses of value, waste, democracy, nature, participation, nationality, exchange, gifts, charity and property as these terms functioned in legal and economic narratives.

Later in the subject, we moved to look closely at the work of international economic institutions and trade agreements, using human rights texts and norms to explore the forms of law that these agreements require states to enact. In particular, we talked about whether these trade agreements constrained democratic participation and those civil and political rights designed to enable that participation. At this point, the mood shifted quite dramatically. The critique became sharper, yet a sense of hopelessness also began to grow. As one student said dully, 'But there is no other way, there is no alternative'. I felt that the discussion was deadened the more I talked about the nature of the legal forms mandated by the various agreements and their relation to human rights norms. Instead of engagement and critique, of opening texts out to alternative readings, this discussion seemed to produce an exhausted acceptance of the inevitability or necessity of sacrifice and punishment in order to reach the goals of development or economic integration. Why did the appeal to democracy and human rights when read with capitalism produce this sense of closure? We all know (don't we?) that we don't have to organize ourselves according to this economic vision, that there are all sorts of other worlds out there that look nothing like this fantasy of perfect control and endless profit, docile bodies and redeemed souls. So what was my role in (re)producing this fantasy in my classroom? How might I approach this differently?

In the final session of the subject, I felt I needed to communicate to my students my certainty that there is an outside to these economic narratives, that other ways of being are possible. In doing so, I drew on two texts about writing, economics and value. The first was a piece by J. K. Gibson-Graham, in which she writes:

> [W]hat we have blithely called a capitalist economy in the United States is certainly not wholly or even predominantly a market economy . . . The market, which has existed throughout time and over vast geographies, can hardly be invoked in any but the most general economic characterization. If we pull back this blanket term, it would not be surprising to see a variety of things wriggling beneath it. The question then becomes not whether 'the market' obscures differences but how we might want to characterize the differences under the blanket.[48]

Gibson-Graham uses the household as one of the examples of this claim that we do not inhabit purely market economies. It may be that our relations with the people

47. I am responding here to the argument by Gayatri Chakravorty Spivak that 'the real political model' that underlies any piece of academic writing is 'the educational institution'. See G. Chakravorty Spivak, 'Schmitt and Poststructuralism: A Response', (2000) 21 *Cardozo Law Review* 1723, 1729. For her reading of the politics that secures the opening of texts when you talk about them to 'clusters of alterity – groups of others' (classes, public audiences), see G. Chakravorty Spivak, *Outside in the Teaching Machine* (1993), 142.

48. J. K. Gibson-Graham, *The End of Capitalism (as we knew it)* (1996), 261.

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we live with are not capitalist.[49] They might be feudal (involving 'the appropriation of surplus labour in use value form and relations of fealty and mutual obligation');[50] they might be fascist (governed by the fantasy that all are working in an idealized unity towards a common end),[51] or socialist; we might even give and receive gifts from the people with whom we live. So we discussed this location as one site that might suggest the inadequacy of the capitalist account of the possibilities of social life.

The second set of relations I invoked to my class was those with friends and students in and around the academy. These involve teaching, learning, listening, speaking, reading and writing – scenes I inhabited with these students. Of course the university is in (increasingly large) part governed by capitalist market relations – these relations produce the student body, my students and I are invited to see each other in market terms (me as service provider, them as consumers). My judgments of their work, their judgments of my teaching, are used in our various workplaces as one amongst many markers of value. But also, much of the time for me, and I hope often for my students, there is something that goes on in the space of the classroom or the university office which is not explicable in terms of capitalist exchange relations. I don't experience our creativity and thought as being purely in the service of corporate profit or governed by its forms.[52]

So this paper is also a more sustained attempt to make sense of that moment in my teaching where I became aware of a problematic relationship in my linking of trade and human rights discourse, and also of the gesture I felt was required of me to address that moment – the recollection of an outside to this liberal economic account of the world. I want to think about whether economic law and human rights law somehow are complicit in creating a sense of despair, a sense that there are no political alternatives available, that we really have in some meaningful way reached that much-vaunted end of history. In trying to see whether there is some deep complicity between the two forms of law, I want also to try to hold on to the idea that there is nonetheless something that escapes those forms of law, which might lead critique somewhere.

2. Sacrifice and the secrets of international trade law

2.1. Rationality and mystery

Many of the trade agreements implemented under the auspices of the WTO are concerned with the harmonization of domestic regulatory standards. They achieve this end by mandating or prohibiting particular ways of writing law or particular forms of law. In order to begin this reading of the forms of law embodied in WTO

49. But for a reading that suggests a close relationship between capitalist exchange relations and the modern 'long-term public couple arrangement based on the assumption of sexual fidelity' as an 'economy of intimacy', see L. Kipnis, 'Adultery', in L. Berlant (ed.), *Intimacy* (2000), 9, 10–11.
50. Gibson-Graham, *supra* note 48, at 212.
51. See the discussion of the economic grounds of fascism in J. Flower MacCannell, *The Hysteric's Guide to the Future Female Subject* (2000), 133.
52. E. Kosofsky Sedgwick, *Tendencies* (1994), 19.

agreements, it is useful to compare the WTO with earlier free trade regimes, such as those embodied in the original General Agreement on Tariffs and Trade 1947 (GATT). The barriers to moving goods to market were material (such as quarantine stations where goods were kept for spurious reasons, or customs inspectors who seized goods that were in excess of a designated import quota), or monetary (classically the imposition of tariffs on imported goods that might threaten the market in goods produced domestically). Under GATT, parties agreed to convert quantitative barriers to trade into tariff barriers, to lower tariff barriers over time, and not to discriminate between different trading partners or in favour of domestic over foreign producers of goods.

The GATT also addressed some barriers to trade that were invisible and interior, such as charges imposed internally, and regulations that functioned as disguised barriers to trade, such as taxes that were imposed in a discriminatory fashion internally and effectively functioned as tariffs. However, this move away from a focus on 'border' measures into the interior of the state, and the attempt through trade agreements to control domestic regulations, became uncoupled from the non-discrimination norm during the Uruguay Round of trade negotiations. This was the trade round that resulted in the creation of the WTO, and the new harmonization agreements implemented under its auspices aim at the removal of regulatory barriers that might limit the movement of goods, services and capital. The aim is to harmonize divergent regulatory environments that threaten to constrain commercial activity, whether or not the domestic regulations discriminate between foreign and domestic producers, or between different foreign producers. Such agreements aspire to 'an economic life without friction'.[53] They are unusual in international law terms, in that they are ambitiously prescriptive in terms of legal systems, judicial processes, legislative processes and substance of laws that states must have in place. Underpinning this constraint of legislative activity and this commitment to regulatory standardization, is the end of 'harmonization'.[54] Harmonization moves beyond a concern with discrimination, to draw legal regimes into one integrated system. Difference is conceptualized as discord. The musical metaphor of harmony exerts its pull – nations and their laws become 'closed wholes whose elements call for one another like the syllables of a verse'.[55] That which prevents the achievement of the harmonious whole (unreason, passion, special interests, culture) must be outlawed.

Let me describe the operation of two key agreements to give a sense of this – the SPS Agreement and the GATS.[56] The SPS Agreement sets out obligations and procedures relating to the use of sanitary and phytosanitary measures, including measures relating to human or animal health and safety, and applies to all sanitary and phytosanitary measures which may directly or indirectly affect international

53. D. Kennedy, 'Laws and Developments', in J. Hatchard and A. Perry-Kessaris (eds.), *Law and Development: Facing Complexity in the 21st Century* (2003), 17, 24.
54. SPS Agreement, *supra* note 1, preamble ('*Desiring* to further the use of harmonized sanitary and phytosanitary measure between members . . .) and Art. 3.
55. E. Levinas, 'Reality and its Shadow', in S. Hand (ed.), *supra* note 2, at 132.
56. SPS Agreement, *supra* note 1; GATS, *supra* note 7.

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trade.[57] Members of the WTO are obliged to ensure that any such measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without scientific evidence.[58] In addition, measures must be based on a risk assessment of the risks to human, animal or plant life or health, conducted 'taking into account risk assessment techniques developed by the relevant international organizations'.[59] Under the Agreement, members also agree to base their measures on international standards, guidelines or recommendations where they exist.[60] Members may introduce or maintain standards which result in a higher level of protection than would be achieved by measures based on such international standards, if there is a scientific justification for such increased protection or where the member has engaged in a process of risk assessment as laid down in Article 5 of the Agreement.[61]

The SPS Agreement thus mandates a particular approach to decision-making about issues that include food security, consumer safety, regulation of genetically modified food, sustainable farming practices, animal welfare or the effects of agribusiness on small farmers. This approach has two key features. First, the Agreement obliges members to 'ensure that their sanitary and phytosanitary measures are based on an assessment . . . of risks to human, animal or plant life or health'.[62] Decision-makers must therefore engage in 'risk assessment' and 'risk management' processes.

> Risk assessment requires 'the evaluation of the *likelihood* of entry, establishment or spread of a pest or disease within the territory of an importing member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological or economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs'.[63]

A failure to evaluate or calculate risk breaches the obligations under the SPS Agreement, so that a member may not decide to introduce an SPS measure as a means of dealing with an absence of scientific certainty about the risks posed by a novel technology. '[T]he risk evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is "not the kind of risk which, under Article 5.1, is to be assessed"'.[64]

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57. Key terms including 'sanitary or phytosanitary measure' are defined in SPS, *supra* note 1, Annex A.
58. Ibid., Art. 2. The only exception to the obligation to base such measures upon scientific evidence occurs where relevant scientific evidence is insufficient. In that situation, members can provisionally adopt measures on the basis of pertinent information, but must seek to obtain additional information necessary for a more objective assessment of risk within a reasonable period of time: Art. 5(7).
59. Ibid., Art. 5:1.
60. Ibid., Art. 3(1).
61. Ibid., Art. 3(3).
62. Ibid., Art. 5.1.
63. Ibid., Annex A.
64. *Australia – Measures Affecting Importation of Salmon*,WT/DS18/AB/R, Report of the Appellate Body, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 125 [*Australia – Salmon*].

The second key feature of the approach to regulation mandated by the SPS Agreement is that this assessment and evaluation of risk must be premised on 'science'. 'Science' has been defined by the Appellate Body of the WTO in terms of a method or technique for understanding the relationship between a subject and knowledge. In its 1998 decision in the *EC Measures Concerning Meat and Meat Products (EC – Hormones)* dispute, the Appellate Body sought to articulate the factors to be considered in carrying out a risk assessment in order legitimately to ground a member's health policy.[65] It noted that the list of factors to be taken into account in the assessment of risks as set out in Article 5.2 begins with 'available scientific evidence'.[66] The decision refers to a US statement of administrative action as to the meaning of 'scientific':

> The ordinary meaning of 'scientific', as provided by dictionary definitions, includes 'of, relating to, or used in science', 'broadly, having or appearing to have an exact, objective, factual, systematic or methodological basis', 'of, relating to, or exhibiting the methods or principles of science' and 'of, pertaining to, using, or based on the methodology of science'.

Science provides a method for evaluating 'risk', 'not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.'[67] Thus the absence of certain (extremely expensive) forms of scientific evidence and the failure to conduct risk assessments invalidates laws or regulations that directly or indirectly affect international trade. The process of regulating is presented as mechanical – regulations must be justified according to risk assessment procedures and risk management strategies based on detailed scientific data, and such risk assessment must reasonably support or warrant the regulatory measure adopted in response.[68]

If there is no scientific evidence supporting a particular SPS measure, that measure cannot be adopted without breaching the obligations under the SPS Agreement. The much discussed *EC – Hormones* decision provides an example of this. The measures in dispute were a series of EC directives which operated to ban the importation or sale within the EC of meat from animals treated with any of six specified growth hormones. The Appellate Body of the WTO found that, while the measures in dispute did not result in discrimination between domestic and foreign producers or in a disguised restriction on international trade, the ban on importation of meat treated with hormones was nevertheless in breach of the SPS Agreement. It held that the EC was not entitled to regulate the use of growth hormones as its decision to do so was not based on sufficient scientific evidence. There must be a risk assessment based on detailed scientific data in order for such measures to be in compliance

65. *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, adopted 13 February 1998, DSR 1998: I, 135 [*EC – Hormones*].
66. Ibid., para. 187.
67. Ibid.
68. Even if a challenged measure is based on such a risk assessment, it may be found to be in breach of the SPS Agreement if *all* comparable products are not subject to similar regulatory measures based on equally detailed scientifically based risk assessments: *Australia – Salmon*, *supra* note 64.

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with SPS obligations, even where there is no clear scientific opinion regarding the risks posed by a product. In its argument to the WTO Appellate Body, the EC relied upon scientific opinion that ingestion of the hormones in dispute is potentially carcinogenic. The Appellate Body held that the scientists upon whose opinion the EC was relying had not evaluated the carcinogenic potential of one such hormone when used *specifically* as a growth promoter.[69] In a footnote, the Appellate Body held that even if the scientific evidence concerning the risk to women was correct, only 371 of the women currently living in the member states of the European Union would die from breast cancer as a result of trade in hormone-related beef, while the total population of the member states of the European Union in 1995 was 371 million.[70] By implication, the deaths of this number of women would not justify enacting measures that could constrain the operation of the market or inhibit progress towards economic integration.

In the *Japan – Measures Affecting the Importation of Apples* decision, the Appellate Body again stressed the centrality of science, objectivity and rationality as the grounds for legitimate decision-making under the SPS Agreement.[71] Japan had in place a phytosanitary measure designed to prevent the spread of the disease fire blight through apple fruit imported from the US.[72] These measures included inspection, spraying and chlorine treatment of packaging and containers. The Appellate Body confirmed that a measure is maintained 'without sufficient scientific evidence' in breach of Article 2.2, 'if there is no "rational or objective relationship" between the measure and the relevant scientific evidence'.[73] This includes situations where the measure is considered to be 'clearly disproportionate' to the risk of infection. The Appellate Body rejected Japan's argument that national authorities be given a 'certain degree of discretion' in their approach to the evaluation of the risks established by scientific evidence. Japan argued that it sought to take a prudent and precautionary approach to evaluating the risks posed by importation of even 'mature, symptomless apples', given the fact of 'trans-oceanic expansion of the bacteria', the growth in international trade and 'the fact that the pathways . . . of transmission of the bacteria are still unknown'.[74] However, for the Appellate Body 'total deference to the findings of the national authorities would not ensure an objective assessment',[75] and thus it was not appropriate to defer to 'Japan's approach to scientific evidence and risk'.[76]

A similar approach to the making of law is imposed by the GATS. According to free trade logic, the GATS 'combats domestic standards that are unnecessarily restrictive'.[77] It works by proscribing many forms of regulation in the field of services provision. The agreement relates to measures by members applying to trade in

69. *EC – Hormones*, *supra* note 65, paras. 199–200.
70. Ibid., at n. 182.
71. *Japan – Measures Affecting the Importation of Apples*, Report of the Appellate Body, WT/DS245/AB/R, 26 November 2003.
72. Ibid., para. 14.
73. Ibid., para. 147.
74. Ibid., para. 150.
75. Ibid., para. 165.
76. Ibid., para. 167.
77. S. Charnovitz, 'Triangulating the World Trade Organization', (2002) 96 AJIL 28, 38.

services.[78] 'Services' is not defined in the GATS, although most commentators define services as products that are not tangible commodities. 'Measures' can take 'the form of a law, regulation, rule, procedure, decision, administrative action, or any other form'.[79] Measures 'by Members' extend to measures taken by central, regional or local governments and authorities and by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.[80] The treaty covers 'any service in any sector', so that no service sector is excluded from the outset.[81] 'Trade in services' is defined broadly, to include any means of supplying services internationally.[82] Perhaps most significantly, this includes supply by a service supplier of one member through commercial presence in the territory of another member.[83] This brings foreign direct investment under the GATS. A measure 'affecting' trade in services has been defined by the Appellate Body equally broadly, to include any measure 'that has "an effect on"' trade in services.[84] Thus the constraints on introducing or maintaining laws, regulations, rules, procedures, decisions, or administrative actions are potentially extremely far-reaching.

Two sets of obligations that form part of GATS illustrate this potential effect. Both are conditional or 'bottom-up' in nature, applying only to those service sectors that a member agrees to submit to GATS disciplines by including that sector in its GATS schedule.[85] Once a service sector is included in a schedule, these conditional obligations apply to it unless an exception is also listed with respect to that obligation. The first such obligation that is of relevance here is the National Treatment provision, which obliges members to 'accord to services and service 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'.[86] Treatment 'shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member'. Thus even if such measures formally treat foreign and domestic service suppliers identically, or 'alter the conditions of competition merely as an unintended consequence in the legitimate pursuit of other vital policy goals',[87] they may be in breach of this requirement if they 'modify the conditions of competition in favour of domestic services or service

78. GATS, *supra* note 7, Art. 1.1
79. Ibid., Art. XXVIII.
80. Ibid., Art. I:3(a).
81. Ibid., Art. I:3(b). In particular, this means that governments are bound to non-conditional obligations across all sectors, and that all sectors are subject to the ongoing negotiations mandated in Art. XIX.
82. Ibid., Art. I:2.
83. Ibid., Art. I:2(c).
84. *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997, para. 220.
85. While member states can decide which sectors will be subject to these obligations, most members have already made substantial commitments. Most developed countries have made commitments in 100 or more sectors. This is partly because member governments were under strong pressure to liberalize at the time of the Uruguay Round. The Canadian Council for Policy Alternatives notes that the 'frenetic atmosphere at the conclusion of the UR was not conducive to sober reflection about potentially non-conforming': S. Sinclair and J. Grieshaber-Otto, *Facing the Facts: A Guide to the GATS Debate* (2002), 32. Member governments remain under such pressure. This is built in to the GATS through Art. XIX, which mandates successive rounds of negotiation aimed at 'achieving a progressively higher level of liberalization'.
86. GATS, *supra* note 7, Art. XVII.
87. Sinclair and Grieshaber-Otto, *supra* note 85, at ix.

providers'.[88] Measures that might breach this provision include programmes that favour enterprises owned or controlled by indigenous peoples, or that offer funding to non-profit child or aged care providers in situations where most non-profit providers are local rather than foreign, or that direct research funding to local educational service providers in situations where they are in commercial competition with foreign educational service providers, or that require publicly funded research and development to produce benefits in the local community.[89] While GATS does not require members to privatize public services, if services in sectors covered by a country's GATS commitments *are* privatized, the market for such services must be opened to foreign investors as a result of the National Treatment provision. This makes it far more difficult to reverse failed privatizations and return services to public ownership.[90]

The Market Access obligation in Article XVI is also restrictive in its effects on the measures that a member may have in place. Article XVI provides that members shall not maintain or adopt 'market access' measures in sectors covered by their GATS obligations. Prohibited measures include measures that limit the number of service suppliers, restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service, or limit foreign capital participation. For example, under the prohibition on measures restricting or requiring specific types of legal entity through which a service supplier may supply a service, members are precluded from restricting the private delivery of certain basic or social services, such as child care or water distribution, to non-profit agencies or providers. Members cannot restrict degree-granting in education to educational institutions constituted as non-profit entities. These measures would breach Article XVI even if their effect was non-discriminatory, that is, even if the 'limitation on the types of legal entity permitted in a given sector is applied to both nationals and foreigners'.[91] The prohibition on measures limiting the number of service providers means that members may not restrict the number of beachfront developments in environmentally fragile areas, or fishing licences to conserve resources.[92]

Pursuant to Article XXI, a member may modify or withdraw commitments after three years from the time the commitment is made but must compensate other GATS members for doing so or face retaliatory measures. This idea was imported from the GATT regime relating to bound tariffs on goods, where governments accepted that they would have to pay compensation if they wanted to withdraw from previous commitments. However, unlike the GATT, the 'scope of the GATS is not confined to a well-defined set of government measures such as tariffs'.[93] Instead, it potentially restricts 'an almost unlimited range of measures', so that 'the transposition of the practice of bound commitments from tariffs to a vast new range of public policies and measures diminishes democratic choice'.[94] In this sense, 'GATS is more of a

88. Ibid., at 49.
89. Ibid., at 50.
90. Ibid., at 33–5.
91. Ibid., at 54.
92. Other international trade agreements (such as NAFTA) merely require governments to list such non-discriminatory regulations for transparency purposes – see *ibid.*, at 53.
93. Sinclair and Grieshaber-Otto, *supra* note 85, at 34–5.
94. Ibid.

governance agreement than a trade agreement'.[95] This has an effect on the nature of public policy debate in democratic societies. If a country has a 'domestic multi-partisan consensus' on issues to do with regulation or privatization of services in a particular sector, then it is likely that it can maintain limitations on GATS in that sector. However, where there is ideological division, it requires only one government in power even for a short term to remove limitations or to include a sector, and that will be difficult to reverse for future governments.

2.2. 'Your Father who sees in secret will reward you'[96]

Much initial concern with agreements such as the SPS Agreement and GATS has been framed around the criticism that, in the pursuit of harmonization, the agreements provided no place for uncertainty, caution or even politics in their approach to the writing of laws and regulations. The agreements seemed to adopt a programmatic, and thus deeply irresponsible, approach to knowledge. Responsibility understood in this way involves 'the experience of absolute decisions made outside of knowledge or given norms, made therefore through the very ordeal of the undecidable'.[97] This involves a relationship with the other to whom we respond, to whom we are responsible. This 'form of involvement with the other . . . is a venture into absolute risk, beyond knowledge and certainty'.[98] At first glance, this linking of responsibility with 'the ordeal of the undecidable' seems far from the approach to knowledge set up by SPS, GATS and related agreements. These trade agreements appear to be quite the opposite of this – instead of involving a 'venture into absolute risk' or the realm of the undecidable, the agreements require that political decisions that affect market integration must be based on scientific method, assessment and management. All the language of the agreements is about privileging rationality. Indeed, for those supporting the form of these agreements, it is the focus on reason and science that is the contribution of these agreements to democratic politics. As Robert Howse argues, the provisions of the SPS Agreement:

> . . . can be, and should be, understood not as usurping legitimate democratic choices for stricter regulations, but as enhancing the quality of rational democratic deliberation about risk and its control. There is more to democracy than visceral response to popular prejudice and alarm; democracy's promise is more likely to be fulfilled when citizens, or at least their representatives and agents, have comprehensive and accurate information about risks, and about the costs and benefits associated with alternative strategies for their control.[99]

Yet a closer analysis of the structure of the agreements makes clear that it is only the claim to know better than the market that has to be proved according to these scientific methods. The logic of the agreements is that a member state may not regulate in the name of constraining the activities of the market where the form of that regulation is prohibited (as in GATS) or unless those measures can be justified according

95. Ibid., at 35.
96. Matthew 6:1–4 (Revised Standard Version).
97. J. Derrida, *The Gift of Death* (tr. David Wills) (1995), 5–6. Derrida here develops this relationship of responsibility to risk and uncertainty in his reading of the meaning of the Christian legacy for European politics.
98. Ibid.
99. R. Howse, 'Democracy, Science, and Free Trade', (2000) 98 *Michigan Law Review* 2329, 2330.

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to scientific evidence and risk assessment (as in the case of the SPS Agreement). In other words, these agreements *mandate* 'a venture into absolute risk'. For example, in the case of the SPS Agreement, if a decision to manage or regulate risk cannot be justified according to risk assessment methods based on scientific evidence, this does *not* mean that the risk goes away, or that no decision is made. A decision *is* made – the decision to allow citizens of the state to be made subject to risk in the name of removing barriers to the market and allowing economic integration. There is no requirement that the rationality of this decision *not* to regulate be established, or that the reasoning involved in reaching this decision be made public, supported by adequate documentation, or based on scientific principles. Instead, the SPS Agreement obliges the decision-maker to approach this decision as a venture into absolute risk – to imagine that at the moment of decision he or she is responsible to the market, rather than accountable to members of a shared political community. This is a form of law that publicly champions rationality, while instituting a secret relationship to mystery or the unknown. The language of the trade agreements appears to exclude mystery or secrecy from politics, with the commitment to meticulous standards of scientific evidence and risk assessment as the basis of public decision-making. In this vision, 'responsibility is tied to the public and to the nonsecret, to the possibility and even the necessity of accounting for one's words and actions in front of others, of justifying and owning up to them'.[100] Yet these trade agreements incorporate at their heart that mystery which they claimed to exclude.

I want now to suggest that this form of law, with its secret relationship with mystery, can be understood through the Christian doctrine of sacrifice. Of particular relevance to the theological form of trade agreements is the need to hold universal principles, but also to betray those principles as part of the response to the sacrificial demand of the absolute other. Sacrificial responsibility involves a singular relationship with an unknown other. In the Christian tradition, this other is named God, but in the tradition of economic law we might name this other 'the Market'. This responsibility can be acted upon only in silence, in solitude and in the absence of knowledge. Responsibility in this tradition describes the split relationship of an individual with the public world of universal principles, and with the unknown other to whose demands the individual must respond in secret.

The mapping of this sacrificial tradition of thinking about responsibility has been traced by Jacques Derrida in a reading of the story of Abraham, of whom God demands 'that most cruel, impossible, and untenable gesture: to offer his son Isaac as a sacrifice'.[101] God tells Abraham: 'Take your son, your only son Isaac, whom you love, and go to the land of Moriah, and offer him there as a burnt offering.'[102] In this demand by God, Abraham is confronted by the experience of God as absent and mysterious:

> God doesn't give his reasons, he acts as he intends, he doesn't have to give his reasons or share anything with us: neither his motivations, if he has any, nor his deliberations, nor

100. Derrida, *supra* note 97, at 60.
101. Ibid., at 58. While a version of this story appears in the religions of Judaism, Islam and Christianity, I am interested, with Derrida, in tracing the Christian form of the story, with its strongly economic logic.
102. Genesis 22:2 (Revised Standard Version).

> his decisions. Otherwise he wouldn't be God, we wouldn't be dealing with the Other as God or with God as *wholly other* [*tout autre*].[103]

Christians encounter this demand from a God who does not explain his reasons, and to whom they must respond in his absence, in solitude. This experience of God as the wholly other is rendered more profound in the call to sacrifice, and particularly to sacrifice a beloved son. This 'supposes the putting to death of the unique in terms of its being unique, irreplaceable, and most precious'.[104] It is this sacrifice of 'what is one's own or proper, of the private, of the love and affection of one's kin' that gives meaning to sacrifice as the gift of death.[105] The moment when Abraham obeys God and puts the knife to his son's throat 'is the moment when Abraham gives the sign of absolute sacrifice, namely, by putting to death or giving death to his own, putting to death his absolute love for what is dearest, the only son'.[106]

Abraham does not speak of what he has been called to do. He thus betrays his public commitment to Isaac's mother, Sarah – his decision to sacrifice Isaac is 'a sort of rupture of marriage, an infidelity to Sarah, to whom Abraham says not a word at the moment of taking the life of his son, their son'.[107] Nor does Abraham speak of his decision to Isaac himself. Indeed, when Isaac asks his father where the sacrificial lamb is to be found, Abraham replies that God will provide the lamb for the burnt offering.[108] This is the meaning of responsibility – it 'consists in always being alone, entrenched in one's own singularity at the moment of decision'.[109] To the extent that I am responsible, this 'responsibility remains mine, singularly so, something no one else can perform in my place'.[110] This responsibility that consists in 'being alone . . . at the moment of decision' is taught to us by the silence of Abraham. Abraham must not only act in secret, but also in the absence of knowledge:

> The knight of faith must not hesitate. He accepts his responsibility by heading off towards the absolute request of the other, beyond knowledge. He decides, but his absolute decision is neither guided nor controlled by knowledge.[111]

Abraham's hand is stayed, at the moment when he takes the knife to his son's throat. The angel of God calls to Abraham from heaven: 'Lay not thine hand upon the lad, neither do thou anything unto him: for now I know that thou fearest God, seeing thou hast not withheld thy son, thine only son, from me'.[112] 'I see that you have understood what absolute duty means, namely, how to respond to the absolute other, to his call, request, or command'.[113] The moral of this story concerns the tragic nature of responsibility in the face of the call to sacrifice.

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103. Derrida, *supra* note 97, at 57.
104. Ibid., at 58.
105. Ibid., at 95.
106. Ibid.
107. J. Derrida, '"Le Parjure," *Perhaps*: Storytelling and Lying', in C. Jacobs and H. Sussman (eds.), *Acts of Narrative* (2003), 195, 233.
108. Genesis 22:8 (Revised Standard Version).
109. Derrida, *supra* note 97, at 60.
110. Ibid.
111. Ibid., at 77.
112. Genesis 22:12 (Revised Standard Version).
113. Derrida, *supra* note 97, at 72. The experience of a relationship with God as distant, unknowable, other and mysterious is at the heart of the experience of sacrifice for Derrida. He explores it further through the

> Absolute duty means that one behave in an irresponsible manner (by means of treachery and betrayal), while still recognizing, confirming, and reaffirming the very thing one sacrifices, namely, the order of human ethics and responsibility.[114]

The trade agreements I have described affirm in this way principles of transparency, rationality and universality of application without discrimination.[115] Yet they also require that the subjects of these agreements sacrifice such public virtues in the political realm to meet the demands of responsibility. Like Abraham, the responsible subjects of these agreements must wait, 'sad and dangerous',[116] ready to respond in secret to the call of the unknown other. These agreements ask of most member states that they sacrifice those values they espouse publicly and collectively – democracy, civility, politics, the family of the nation – for the global market, and as the price of inclusion in the community of believers. This double sense of responsibility – involving at once a public espousal of obligations to one's family or community (one's own), and a secret relationship with a singular other which betrays those obligations – underpins the economic agreements I am exploring here.

Of particular relevance to my reading is the economic nature of Christian sacrifice. Sacrifice initially appears in *Genesis* in the form of a gift. Abraham gave his gift of that which is priceless 'outside of any economy . . . without any hope of exchange, reward, circulation, or communication'.[117] Yet God gave back the life of Abraham's beloved son once he was assured that there was this absolute gift.[118] So 'because he renounced calculation', God gave back to Abraham the very thing he had decided to sacrifice.[119] Yet the Christian doctrine established upon this act of sacrifice inaugurates an *economy*. Sacrifice becomes part of a relationship of exchange or substitution, although the Christian cannot know or calculate what will be received as a reward for this sacrifice. Christians are called upon to sacrifice, to love God more than a father, mother, son or daughter, in return for the promise of the 'reward of the righteous'.[120] Christian justice requires giving without knowing what the reward will be – there is a paying back, but it is 'one that creatures cannot calculate and must leave to the appreciation of *the father who sees in secret*'.[121] Through this promise of a reward

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relationship to a mysterious God that is invoked in St Paul's letter to the Philippians: 'Wherefore my beloved, as ye have always obeyed, not as in my presence but now much more in my absence, work out your own salvation with fear and trembling.' See further at 56, citing Philippians 2:12 (King James).

114. Ibid., at 67.
115. See, for example, the obligations set out in the SPS Agreement, *supra* note 1, Art. 2(3) (non-discrimination), Art. 7 (transparency), and in the GATS, *supra* note 7, Art. II (most-favoured-nation treatment), Art. III (transparency), Art. XVII (national treatment).
116. M. Koskenniemi, 'The Silence of Law/The Voice of Justice', in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 488, 510.
117. Derrida, *supra* note 97, at 96.
118. Ibid.
119. Ibid., at 97.
120. Matthew 10:34–40: '*The reward of the righteous.* Do not think that I have come to bring peace on earth; I have not come to bring peace, but a sword. For I have come to set a man against his father, and a daughter against her mother, and a daughter-in-law against her mother-in-law; and a man's foes will be those of his own household. He who loves father or mother more than me is not worthy of me; and he who loves son or daughter more than me is not worthy of me; and he who does not take his cross and follow me is not worthy of me. He who finds his life will lose it, and he who loses his life for my sake will find it.'
121. Derrida, *supra* note 97, at 107.

in the future, 'God the Father re-establishes an economy that was interrupted by the dividing of earth and heaven'.[122] This economy of sacrifice is thus founded on the circulation of risk and reward between fathers (God, Abraham) and sons (Abraham, Isaac). Translated into the language of international economic law, the harmonization agreements require decision-makers to understand themselves as bound to respond to the demands of the market, to sacrifice their own (their citizens, their public obligations) in the expectation of the reward of the righteous in the future by the Father (God/Market) who sees in secret.

Yet something escapes the closed circle of this sacrificial economy. What comes before this moment of decision? What gifts are the condition of this economy; what sacrifices are made but not rewarded in order to inaugurate this story of fathers and sons? To translate this back into the language of international economic law, let me return to the women whose sacrifice was nonchalantly noted in footnote 182 to the *EC – Hormones* decision. The Appellate Body was there providing instruction to member states in how to decide in a way that is responsible to the market in accordance with the dictates of their obligations under WTO agreements. Members of the WTO must sacrifice their own, their citizens, in order to meet this responsibility and receive the reward of the righteous. The responsibility of the decision-maker is not owed to these women of footnote 182, or the others who 'live and work and die' within the jurisdiction or the territory of WTO members. Rather, the WTO agreements structure that responsibility so that the market becomes the singular other whose demand is to be answered by decision-makers. It is the market to whom the decision-maker must be responsible in order to receive the reward of the righteous. Yet it is the women whose sacrifice is recalled in the footnote to the *EC – Hormones* decision, where the Appellate Body inscribes an account of the sacrificial logic underpinning the SPS Agreement, who suggest an outside to this economy of sacrifice. It is to these unrewarded sacrifices that I want now to turn to explore the possibilities they suggest for developing a critique of the global economy that might take us beyond the dead end of my classroom discussion.

2.3. The suspended question of woman's sacrifice

> Would the logic of sacrificial responsibility within the implacable universality of the law, of its law, be altered, inflected, attenuated, or displaced, if a woman were to intervene in some consequential manner? Does the system of this sacrificial responsibility and of the double 'gift of death' imply at its very basis an exclusion or sacrifice of woman? A woman's sacrifice or a sacrifice of woman, according to one sense of the genitive or the other? Let us leave the question in suspense.[123]

This suspended question of the feminine haunts the institutions founded on an economy of sacrifice. The drama of the story of Abraham and Isaac turns on God's call to Abraham: 'Take your son, your only son Isaac, whom you love, and go to the land of Moriah, and offer him there as a burnt offering upon one of the mountains of

122. Ibid., at 99.
123. Derrida, *supra* note 97, at 76.

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which I shall tell you'.[124] The singular and loving relationship between a father and his only son is central to the meaning of sacrifice – as Derrida reminds us, it is not a sacrifice to put to death what one hates.[125] So the object of sacrifice must be the object of one's love, that which one knows intimately, perhaps even one's property – 'those I love in private, my own, my family, my sons'.[126] 'Take your son, your only son', God tells Abraham the father. How then to understand the meaning of paternal ownership as it relates to this founding story of sacrificial responsibility?

Before this sacrificial economy is inaugurated, there exists a set of relations that suggest another beginning. If we start with a different genesis, we might find that the biblical texts open out in ways that disturb the place of paternity and property in the stories of sacrifice. So let me return to Genesis, and to an event that occurs between the birth of Isaac and the testing of Abraham. For Isaac is in fact not self-evidently the 'only son' of Abraham. Indeed, Sarai (later renamed Sarah by God) did not bear children to Abram (later renamed Abraham) for many years. Sarai told Abram that as 'the Lord has prevented me from bearing children', Abram should take her Egyptian maid Hagar as his wife.[127] Hagar bore Abram a son, whom Abram named Ishmael. Then God came to Abram and told him that he would make a covenant with Abram, that he would 'be the father of a multitude of nations' and that his name would be Abraham.[128] God then tells Abraham that his wife shall be named Sarah, and that she will be blessed by God who will give Abraham a son by her. 'I will bless her, and she shall be a mother of nations; kings of peoples shall come from her'.[129] In this story of sons and of naming, we see beginning an account of the economy of words and of rewards circulating between God and Abraham.

God visits Sarah and she conceives and bears Abraham a son – 'Abraham called the name of his son, who was born to him, whom Sarah bore him, Isaac'.[130] Here begin two parallel stories of sons and of the relationship to mother, father and God. In the story that comes first in time, Sarah sees Ishmael and Isaac playing together. She says to Abraham, 'Cast out this slave woman with her son; for the son of this slave woman shall not be heir with my son Isaac'.[131] This is displeasing to Abraham 'on account of his son',[132] whom we understand to be his son Ishmael. God then speaks to Abraham:

> 'Be not displeased because of the lad and because of your slave woman; whatever Sarah says to you, do as she tells you, for through Isaac shall your descendants be named. And I will make a nation of the son of the slave woman also, because he is your offspring.'

124. Genesis 22:2 (Revised Standard Version).
125. Derrida, *supra* note 97, at 64.
126. Ibid., at 69. In his discussion of sacrifice, Georges Bataille suggests that '[w]hen the offered animal enters the circle in which the priest will immolate it, it passes from the world of things which are closed to man and are *nothing* to him, which he knows from the outside – to the world that is immanent to it, *intimate*, known as the wife is known in sexual consumption [*consumation charnelle*].' See G. Bataille, 'Sacrifice, the Festival and the Principles of the Sacred World', in F. Botting and S. Wilson (eds.), *The Bataille Reader* (1997), 210.
127. Genesis 16:1–3 (Revised Standard Version).
128. Genesis 17:4.
129. Genesis 17:15–16.
130. Genesis 21:1–3.
131. Genesis 21:10.
132. Genesis 21:11.

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> So Abraham rose early in the morning, and took bread and a skin of water, and gave it to Hagar, putting it on her shoulder, along with the child, and sent her away. And she departed, and wandered in the wilderness of Beersheba.[133]

Thus Abraham is promised that his descendants shall be named through Isaac – authentic filiation is established through this promise. Yet the story does not end here. In contrast to the more familiar account of the call to sacrifice Isaac, a drama that is played out between God, Abraham and his son, this story does not end with the action of the father. Instead, we follow Hagar and Ishmael into the wilderness. When their water is gone, Hagar casts Ishmael under a bush.

> Then she went, and sat down over against him a good way off, about the distance of a bowshot; for she said, 'Let me not look upon the death of the child'. And as she sat over against him, the child lifted up his voice and wept. And God heard the voice of the lad; and the angel of God called to Hagar from heaven, and said to her, 'What troubles you, Hagar? Fear not; for God has heard the voice of the lad where he is. Arise, lift up the lad, and hold him fast with your hand, for I will make him a great nation'. Then God opened her eyes, and she saw a well of water; and she went, and filled the skin with water, and gave the lad a drink.[134]

The relation of these two stories is essential to making sense of God's command to Abraham that he sacrifice his 'only son'. Isaac's designation as the 'only son' is true in a complicated way. Ishmael is conceived through insemination by Abraham, Isaac is conceived by the Lord doing to Sarah 'as he had promised'.[135] Abraham is the father of Isaac through the promise of God, while Abraham is the father of Ishmael through his sexual encounter with Hagar. In order to experience the morality of this story about the sacrifice of a proper and only son, we must believe in the promise of the Lord as 'the instrument of generation'.[136] Christianity accepts Abraham's understanding of authentic filiation. The story of Ishmael and Abraham, although involving the separation of father and son and the sparing of the son's death by God, is not recounted as a founding fable of Christian doctrine. The differences between the two stories are telling. In the story of Ishmael, the son who is exiled but not sacrificed, the action is not immediately economic. In a much stronger sense than that involved in the story of Isaac, this is a narrative of dissemination or 'that which doesn't come back to the father'. Abraham and the reader expect 'neither response nor reward' from this decision to exile a son and a lover.[137] The mother, Hagar, remains a central player in the story. She intervenes 'in some consequential manner', and as a result 'the implacable universality' of the law of sacrificial responsibility is subtly altered. We feel the distance between Hagar and the son whose coming death she dreads – we hear the cries of the child as he mourns his separation from his mother. The angel of the Lord speaks directly to the mother, and relieves her suffering. We do not forget the memory of the flesh, the intimate relation between mother and child. Nor do we forget the brothers playing together, or the fraught relationship between

133. Genesis 21:2–14.
134. Genesis 21:15–19.
135. Genesis 21:1.
136. J. Grbich, 'The Problem of the Fetish in Law, History and Postcolonial Theory', (2003) 7 *Law Text Culture* 1, 19.
137. For the description of the story of Isaac in these terms, see Derrida, *supra* note 97, at 96.

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their mothers. These other relations, gifts and sacrifices fade away once we focus our attention on the drama of responsibility and rewards at stake in the economy circulating between father and son, the drama of Abraham and Isaac alone with God.

Given that this form of sacrifice is now institutionalized as the foundation of a global economy, it matters that responsibility is limited. It matters what questions are asked of us, how we are rewarded for sacrificing others, and in whose name we sacrifice. If we return to that story of Abraham and Isaac, we can see that in making the decision, in answering the call of the other, we can only ever be responsible to the one who makes the demand. It is always possible that this singular other might be our child, our lover, our brother or sister, that unique, irreplaceable other represented in ethics or aesthetics.[138] However, international economic agreements mandate that the other around whom this understanding of responsibility is organized is the market. Without focusing on the form of law that governs this moment of decision, we cannot address the conditions that lead to this moment of decision-making (such as the constitution of some subjects as the property of others, or the unrewarded sacrifices made by many in order to make it possible for the decision-maker to make the responsible decisions for which he will be rewarded). The question remains – how can decision-makers be responsible (rather than simply 'accountable') to those they sacrifice in such an economy? How might we think about the responsibility of Abraham to Sarah, to his slave-woman, to his sons? Is it possible ever to be responsible to all the (other) others who are excluded from the relationship between decision-maker and those to whom the decision-maker is responsible, those whom we sacrifice when we decide to respond to the demands of the Father who sees in secret? Does human rights law offer any means of intervening in this economy, or of remembering these other gifts of life and death?

3. The place of sacrifice in the democratic polity

3.1. Sacrifice before the law

I have so far suggested that trade agreements are structured by a Christian doctrine of sacrifice. Human rights and democracy are regularly invoked as a response to economic and religious excesses. The democratic rights-bearer of liberal legalism would seem to be the counter to any theological fundamentalism, whether economic or otherwise. Human rights are understood as being granted to all human beings 'on the basis of the inherent dignity of all persons'.[139] Where economics treats individuals as 'objects rather than as holders of rights', able to be sacrificed to achieve some larger purpose, human rights treats individuals 'as political actors in the full sense'.[140] Thus the human rights tradition, at least as translated into the

138. The realm of art or representation has been privileged in some strands of European philosophy as one in which difference or otherness might be experienced. Yet in the second half of the twentieth century, this idealized sense of aesthetics began to face an ethical challenge by those arguing that the other is only ever represented by accommodating or assimilating it to existing economies, languages or practices. For a useful overview of this debate, see the essays collected in D. Glowacka and S. Boos (eds.), *Between Ethics and Aesthetics* (2002).

139. Alston, *supra* note 43, at 846.

140. Ibid.

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declarations and covenants of modern law, would seem to challenge the logic of sacrifice to a mysterious God, through its commitment to creating the conditions enabling individuals to participate in the neutral and impartial functions of the liberal democratic state. The European Court of Human Rights has reaffirmed this sense of the opposition between liberal democracy and theocracy in the *Refah Partisi* case, where it held that a political party proposing to organize a state and society according to religious or divine rules poses a threat to liberal democracy.[141] The Court interpreted statements by the leaders of Refah Partisi referring to 'religious or divine rules as the basis for the political regime which the speakers want to bring into being' as presenting 'a clear picture of a model conceived and proposed by the party of a State and society organised according to religious rules'. The Court supported the banning of this party on the basis that 'Refah's policy of establishing sharia was incompatible with democracy' and expressed support for Turkey's 'form of secularism which confined Islam and other religions to the sphere of private religious practice'.[142]

This decision provides a point at which to begin to think about the limits of this liberal promise, and thus of the capacity of human rights to offer a secular response to the demands of the market. While Alston suggests that human rights are 'recognized for all on the basis of the inherent dignity of all persons', the decision of the Court is that the rights to participation enshrined in the ECHR are not owed to all persons merely by virtue of being human, without further preconditions.[143] Instead, in order to exercise these rights to participation, individuals must first demonstrate the appropriate demeanour or correct posture towards the state – they must present themselves in the public sphere divested of those attachments or practices (here the enjoyment of religion) that they may perform in private. It is this demand that the individual enter into an empty relation with the state that is relevant to the question of whether human rights works to limit or reinforce the sacrificial logic of the market.

This Kantian relationship of the democratic citizen with a law evacuated of moral content founds the democratic, human rights state. The citizen must obey a law 'reduced to the zero point of its significance, which is nevertheless in force as such'.[144]

> Now if we abstract every content, that is, every object of the will (as determining motive) from a law . . . there is nothing left but the simple form of a universal legislation.[145]

To stand before the open door of the law, a law that 'demands nothing of him', a law now abstracted from content, is the condition for the citizen in modernity. This law which is in force without signifying thus excludes any intimate relation between the sovereign and the citizen. The Italian philosopher Giorgio Agamben illustrates

141. *Case of Refah Partisi (The Welfare Party) and others v. Turkey*, Applications Nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR, Judgment, 13 February 2003.
142. Ibid., paras. 122–5.
143. For a critical analysis of the inability of positivism to affirm universality, see G. Noll, 'The Exclusionary Construction of Human Rights in International Law and Political Theory', *Institute for International Integration Studies Discussion Paper No 10*, November 2003, 7.
144. G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (tr. D. Heller-Roazen) (1998), 51.
145. Ibid., citing I. Kant, *Kritik der praktischen Vernunft* (1913), 27.

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this vision of the citizen standing before the law, transfixed by its brilliance and wasting away, by reference to Franz Kafka's short parable 'Before the Law'.[146] This is the story of the man from the country, who journeys to the door of the law and finds it open. The open door is guarded by a gatekeeper, who refuses to let the man enter but stands aside to let the man see through the door. The man from the country wastes away as he waits before the open door of the law, asking regularly whether he might yet be permitted to enter, and even trying to bribe the gatekeeper to allow him through the gate. When, towards the end, he asks why no one else has come to the door, the gatekeeper tells him it was there only for him, and that now he is going to close it. The citizen–subject thus is doomed to stand, dazzled, before the law, awaiting the decision of the gatekeeper to allow him to enter the kingdom of the law-maker/father. He 'is delivered over to the potentiality of law because law demands nothing of him and commands nothing other than its own openness'.[147] The price of obedience is inscribed on his wasted body. There is no economy of desire and reward circulating here between Father and son, sovereign and citizen. Instead, the law holds the man from the country in its ban – 'it includes him in excluding him'.[148] In this way, Agamben argues that the regime of power operating in liberal states does not take the form of a sacrificial law. Instead, the law that governs the relationship of the liberal state to its citizens appears to take the form of 'abandonment'.[149]

Yet, as Kafka's story illustrates, the sovereignty of the nation-state is at the same time grounded on the inclusion of the bodies of its subjects through the management and transformation of human life.[150] The transformation of human life into a task or project for governance marks 'the biopolitical turn of modernity'.[151] It is through assuming life 'as a task' that this life becomes 'explicitly and immediately political'.[152] The kinds of calculation that we see required of decision-makers by the SPS Agreement might thus be understood as symptoms of this grasping of human life as a management task for the state. It is the relation of sacrifice to this regime of

146. F. Kafka, 'Before the Law', in *Metamorphosis and Other Stories* (tr. M. Pasley) (1992), 165–6.
147. Agamben, *supra* note 144, at 50.
148. Ibid.
149. For Agamben's argument that we must not interpret the treatment of those destroyed or abandoned by the modern nation-state within a biblical doctrine of sacrifice, or grant this destruction 'the prestige of the mystical', see G. Agamben, *Remnants of Auschwitz: The Witness and the Archive* (tr. D. Heller-Roazen) (1999), 26–33. For a critical response to Agamben's ethical project of rewriting 'the sacred nature of destruction', see D. Fraser, 'Dead Man Walking: Law and Ethics after Giorgio Agamben's Auschwitz', (2000) 12 *International Journal for the Semiotics of Law* 397.
150. Agamben, *supra* note 144, at 126–43. Agamben here is following Michel Foucault's argument that power operates in liberal states in ways that differ from the juridical or sovereign model. For Foucault, this model has been largely replaced by 'disciplinary' or 'bio-power', a new mechanism that emerged in the seventeenth and eighteenth centuries in Europe. Bio-power designates:

> what brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an agent of transformation of human life. It is not that life has been totally integrated into techniques that govern and administer it; it constantly escapes them . . . But what might be called a society's 'threshold of modernity' has been reached when the life of the species is wagered on its own political strategies. For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question.

M. Foucault, *The History of Sexuality: An Introduction* (tr. R. Hurley) (1980), 143.
151. Agamben, *supra* note 144, at 153.
152. Ibid.

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bio-politics that returns us to the realm of theology. The place of sacrifice is in effect pre-democratic – it grounds the relation premised on the sovereign/citizen waiting before the door of the law for the word of the Father. Citizens may only participate in political life once they have sacrificed that which is cherished to the realm of civil society or the market. This sacrifice constitutes the liberal, democratic state, and shapes its form.

The religious, and indeed Christian, nature of the relationship that exists between these economic and political forms of law has perhaps best been explored by Karl Marx in his essay 'On the Jewish Question'.[153] For Marx, the political community of the liberal democratic state is famously 'a mere means for the preservation of these so-called rights of man', the rights to liberty, private property, equality (in the sense that 'each man shall without discrimination be treated as a self-sufficient monad') and security ('the concept of the police').[154] The democratic state emancipates itself from state religion and from private property, so that neither religious belief nor the ownership of private property are qualifications for participation in elections or for holding private office. Yet the state still allows religion and private property to exist.[155] Indeed, the state 'only feels itself to be a political state and asserts its universality by opposition to these elements'.[156] As a consequence, the subject in such a state is split, becomes both a citizen in the political community or the subject of human rights law, and an individual in what Marx calls civil society, or as we might think of here, the subject of trade law. This leads to a kind of metamorphosis or, as Marx argues, a 'decomposition' of the subject of capitalist democracy: 'The difference between the religious man and the citizen is the difference between the trader and the citizen, between the labourer and the citizen, between the property owner and the citizen, between the living individual and the citizen'.[157] This, then, is already a Christian logic and form of the state. The state is Christian because of this founding dualism between individual life and communal or species-life. While the 'perfect Christian state is the one that recognizes itself as a state and abstracts itself from the religion of its members', the state nonetheless remains recognizably Christian precisely through these acts of recognition and abstraction.[158] It is 'the human foundation of Christianity' rather than Christianity itself that founds this state.[159] It is worth setting out in detail Marx's conclusion on this point:

> Religion is here the spirit of civil society, the expression of separation and distance of man from man . . . The fantasy, dream and postulate of Christianity, the sovereignty of man, but of man as an alien being separate from actual man, is present in democracy as a tangible reality and is its secular motto.[160]

153. K. Marx, 'On the Jewish Question', in J. Waldron (ed.), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987), 137.
154. Ibid., at 146–7.
155. Ibid., at 139–40.
156. Ibid., at 140.
157. Ibid., at 141.
158. Ibid., at 144.
159. Ibid., at 143.
160. Ibid.

In such a state of 'complete democracy', religious consciousness has particular force because its history is forgotten – the force of religion derives from its lack of 'political significance and earthly aims'.[161] It is within such a vision of the relation between politics, economics, religion and the state that Marx's famous dismissal of human rights can then be understood. Responding to the claim by his colleague Bruno Bauer that 'man must sacrifice the "privilege of belief" in order to be able to receive general human rights', Marx argued that this was true only in the sphere of public or communal life – in the economic sphere of civil society man can continue to hold on to his privileges free of interference from his fellow men or the community.[162] With this double movement, the sacrifice of belief becomes the necessary condition for the receipt of human rights communally, while the maintenance of that belief remains as the foundation of the economy. In the words of Marx, while '[r]eligion is no longer the spirit of the state . . . religion has become the spirit of civil society'.[163]

International economic law mandates that the relationship between the market/Father and economic man/son be one of sacrificial responsibility. The subject of international human rights law, the rights-bearing citizen, is produced out of this sacrifice to the God of the market. The split subject shaped by the intimate relation between the two forms of law sees freedom and liberation as its telos, and yet is forever caught within a sacrificial economy. In order to think through the political effects of appealing to democratic participation as a counter to the excesses of economic globalization, it is necessary to analyse these two forms of law together – the form of abandonment and the form of sacrifice. I want now to sketch the political stakes of this insistence on an attention to form.

3.2. Human rights as participation

Many commentators appeal to human rights or democratic participation as a counter to the excesses of economic globalization. For some, a commitment to democratic principles provides a means of increasing the accountability of those exercising power through the new forms of governance made possible by such trade agreements. As Susan Marks argues, 'If a bias in favour of inclusory politics were woven into international law, this might help to signal the urgent need for those new structures of power to be linked to new approaches to participation and new forms of accountability'.[164] For Marks, 'democratic principles are a crucial corrective to technocratic forms of decision-making'. These principles provide a basis 'for challenging elites and enhancing the opportunities for participation by those affected'.[165] Economic globalization leads to technocratic decision-making and the marginalization of some members of the community – this is answered by the turn to democracy, participation and accountability. For Susan George, it is this promise of inclusion

161. Ibid.
162. Ibid., at 144.
163. Ibid., at 142.
164. S. Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (2000), 117.
165. S. Marks, 'Democracy and International Governance', in J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (2001), 47, 66.

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and participation which makes of human rights a challenge to neoliberal globalization.[166] And according to the Office of the UN High Commissioner for Human Rights, 'Human rights is neutral with regard to trade liberalization or trade protectionism'.[167] A human rights approach instead focuses on participation: 'adopting a human rights approach to trade brings individuals and communities squarely into the processes of negotiating and implementing trade law'.[168] Human rights in this vision is about the creation of a public realm directed to formal equality, one that protects the values of transparency, universality, openness, accountability and participation. Thus the High Commissioner's report advocates that in promoting free trade, states respect the principle of non-discrimination, promote popular participation in the development of trade rules, promote accountability in the processes of trade liberalization, ensure the promotion of corporate social responsibility and encourage international assistance to poorer countries.[169]

These appeals to opportunities for equal participation (of states or individuals) would seem to offer to the international economic integration project that which public international law represents on its best days – a culture of political equality between sovereign entities that 'represents the possibility of the universal . . . by remaining "empty"'.[170] At the international level, this culture translates into a vision of international organizations as a 'useful abstraction in which political debate can take place beyond national boundaries'.[171] Robert Howse, for example, has suggested that using public international law as a guide in WTO dispute settlement proceedings will increase the social legitimacy of economic governance, precisely because of this normatively empty quality of international law. WTO interpretation which reflects or refers to other areas of public international law opens the field of trade to 'rules that may reflect or prioritize other values and interests than those of trade liberalization', and also to a culture which is capable of responding to conflicts of values and which is developing in light of an equity-oriented agenda.[172] Here international law is introduced as representing the promise of an empty universalism, one that does not articulate its normative commitments in terms of 'substantive values, interests, or objectives'.[173] The lack of content is a condition of the legitimacy and effectiveness of the role of the international organization in such a vision. As Jan Klabbers explains this, international organizations are ideally 'political arenas

166. George, *supra* note 17.
167. Office of the High Commissioner for Human Rights, *Human Rights and Trade*, 5th WTO Ministerial Conference, Cancún, Mexico, 10–14 September 2003, 4.
168. Ibid., at 4.
169. Ibid., at 5.
170. M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), 504. While Koskenniemi names this a 'culture of formalism', I have avoided this language. His use of 'formalism' to describe a commitment to a public practice of equal participation differs from my use of 'form' as outlined in the opening paragraph of this article, and from the argument I make throughout about the need to focus attention on the politics of particular legal forms.
171. J. Klabbers, 'The changing image of international organizations', in Coicaud and Heiskanen (eds.), *supra* note 165, at 221, 244.
172. R. Howse, 'The legitimacy of the World Trade Organization', in Coicaud and Heiskanen (eds.), *supra* note 165, at 55, 389.
173. M. Koskenniemi, 'What is international law for?', in M. D. Evans (ed.), *International Law* (2003), 89, 111.

where politics can be conducted unimpeded, unconcerned with the bare necessities of survival while being devoted to the modalities of living together'.[174]

Yet while international law promises to maintain 'the possibility of an open area of politics', this cannot provide a counter to the constitution of an economy of sacrifice through WTO agreements. The appeal to notions of equality, inclusion and participation must be understood within the vision of the relationship between liberal democratic politics and the capitalist economy developed above. The culture of international law, introduced or imagined as an empty universalism, and as a commitment to openness and accountability, is conditioned upon a secret relationship to the market. As was the case with Kafka's man from the country, or with the ruling in the *Refah Partisi* decision, it is the sacrifices made before the law that limit the possibilities for democratic relations between legal subjects. States become members of the WTO, and thus equal participants in a formally democratic polity, only *after* they have responded to the demands of the market. For 'developed' country members, these sacrifices take place when the member state ensures that its internal measures conform with its obligations under WTO agreements. For 'developing' and 'least-developed' country members, these demands to sacrifice are much greater – these states in general have already responded to detailed prescriptions requiring an openness to global economic integration and removal of barriers to market access. These demands are imposed as part of conditions for use of funds dispersed by international financial institutions or in order to be entitled to 'preferential' treatment from developed countries as permitted under the GATT.[175] It is in those areas of law that are 'supplementary' to the mainstream or conventional understandings of the field of public international law – and particularly the areas of international economic law and international human rights law – that the promise of openness is broken, the emptiness of universalism filled.[176] Indeed, attention to the history of European international law would suggest that this has always been so – participation in the culture of formalism has long been conditioned upon being produced as a civilized subject of that culture elsewhere.[177] In order to be recognized as a subject entitled to participate in the making of law, difference must present itself in the terms of the language at play in the institutional space. In other words, where once the *conditions* of possibility of the empty universalism of international law were the colonial doctrines governing sovereignty and later the mandate and trusteeship systems, today these conditions include the creation of liberal democratic capitalist states through the strictures of international economic law.[178] Those who are not formed in this image risk remaining outside the coming 'community between different-thinking

174. Klabbers, *supra* note 171, at 245.
175. For a discussion of the circumstances in which the practice of attaching conditions to the granting of preferences to developing countries by developed countries is GATT-consistent, see *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body, WT/DS246/AB/R, 7 April 2004.
176. On the conventional treatment of war, human rights and international organization as outside the mainstream of public international law, see M. Koskenniemi, *From Apology to Utopia* (1989), xxv.
177. A. Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World', (2000) 32 *New York University Journal of International Law and Politics* 243.
178. Ibid.

particularities',[179] subject to invasion or regime change (or perhaps just the reception of a 'poverty reduction strategy paper' by the World Bank).

Contesting the effects of economic globalization by calling for increased democratic participation at the domestic level of the nation-state, or by calling for an increased accountability to citizens on the part of individual decision-makers, also involves working within the logic I have described above. We can get a sense of the limited effect of the turn to participation in the liberal democratic realm alone by looking briefly at the vision of the state and the law which is proposed by development institutions, and the ways in which a call for greater participation reinforces their project of global economic integration. In World Bank documents about participation and governance, the rule of law is envisaged in terms of a law in force without signifying. Thus in a key 1992 World Bank document on the introduction of the rule of law, the Bank defines the rule of law as involving 'the processes of formulating and applying rules'.[180] 'It is not enough for a law to be on the books; it has to applied, it has to be in force in reality.'[181] For the Bank, the basis of 'a good order' is 'a system in place, based on abstract *rules* which are actually applied and . . . functioning *institutions* which ensure the proper application of such rules'.[182] This creates the necessary relation between state and citizen: 'the elements of the rule of law discussed above are an important element of the procedural framework and institutional system which – if adhered to by the governments concerned – encourages stability and predictability . . . and elicits compliance with the rules'.[183] And this political realm of compliance is intimately linked to the realm of economics:

> elements of the rule of law are needed to create a sufficient stable setting for economic actors – entrepreneurs, farmers, and workers – to assess economic opportunities and risks, to make investments of capital and labor, to transact business with each other, and to have reasonable assurance or recourse against arbitrary interference or expropriation.[184]

Calling for increased transparency and openness in democratic governance, without challenging the form of law mandated by international economic agreements, takes us only as far as footnote 182. There, the Appellate Body performs the role of the model, responsible decision-maker: it brings 'life . . . into the realm of explicit calculations',[185] decides that the lives of 371 women can be sacrificed to respond to the demands of market integration, and then declares openly and transparently the nature of this calculation and decision. This is the limit of what can be achieved by calling for participation without challenging the sacrificial economy established by these trade agreements – the decision to sacrifice might be made in public, rather than in secrecy. It is the conditions which make possible the moment of decision (such as the prior constitution of subjects and of relations between them)

179. Koskenniemi, *supra* note 170, at 504.
180. The World Bank, *Governance and Development* (1992), 30.
181. Ibid., at 32.
182. Ibid., at 38.
183. Ibid., at 39.
184. Ibid., at 28.
185. Foucault, *supra* note 150.

that the law has to remember if it has any chance of doing justice to those whose sacrifices go unrewarded.

3.3. Human rights and the responsible subject

This introduction of the rule of law as an empty universalism depends in turn upon the constitution and disciplining of the proper kinds of subject capable of participating responsibly in a liberal capitalist polity. So development institutions are also engaged in providing instruction manuals designed to produce the subjects of economic globalization – both as citizens who subject themselves to the disciplines of the market, and as decision-makers willing and able to enter into calculations about risk and reward.[186] The World Bank, for example, has spelt out in detail the ways in which the system of education developed in communist states must be transformed to ensure that students accept capitalist values.[187] Countries in transition from communism must adapt the bio-politically correct 'education package' and reform curricula and modes of teaching. With disarming frankness, the World Bank authors explain: 'Liberal market economies . . . use education to transmit cultural, political, and national values as well as knowledge and skills.'[188] These values include those of personal responsibility, freedom and problem-solving skills. Certain key concepts and words are also necessary in order to be able to participate as subjects of capitalism.

> The gaps in the curriculum have led to missing concepts and hence to missing words. 'Efficiency,' for example, means something very different to a manager seeking only to comply with a central plan than to one seeking to boost profit and market share in a competitive system.[189]

Curricula must also be redesigned to enable the production of good capitalist citizens: in the communist education system 'subjects such as economics, management sciences, law, and psychology – all of which feature prominently in market economies – were deemed irrelevant and ignored or underemphasized'.[190] The existing 'content' in 'such subjects as economics and history' must be reformed, and new textbooks adopted.[191] At its crudest, this is understood as providing the 'human capital' necessary to reproduce markets. So in its *Governance and Development* report, the World Bank authors note:

> Among the underlying causes of poor development management is the level of economic, human, and institutional development. Lack of an educated and trained work force and weak institutions can substantially reduce the capacity of countries to provide sound development management.[192]

186. For a discussion of development practices as manifesting the disciplinary force of the Christian rule of law, see J. Beard, 'Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology', (2003) 18 *Australian Feminist Law Journal* 27, 43–8.
187. World Bank, *World Development Report 1996: From Plan to Market* (1996), 123–31.
188. Ibid., at 124.
189. Ibid.
190. Ibid.
191. Ibid., at 125.
192. The World Bank, *supra* note 180, at 10.

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Equally, development institutions encourage states to introduce legal property systems and transform existing laws, such as those governing land. According to Hernando de Soto, an enthusiastic advocate of such legal transformation projects, one of the beneficial effects of the introduction of a property system is to make people more accountable.[193] 'By transforming people with property interests into accountable individuals, formal property created individuals from masses.'[194] This property system is recorded in a central registry, and the resulting dispersal of information about individuals in an integrated system means that 'anonymity has practically disappeared in the West, while individual accountability has been reinforced'.[195] The power of legal property 'comes from the accountability it creates, from the constraints it imposes, the rules it spawns, and the sanctions it can apply'.[196] To put this bluntly: 'People with nothing to lose are trapped in the grubby basement of the precapitalist world.'[197]

The World Bank is also intimately involved in reproductive education, developing nutrition and population programmes, providing microfinance programmes to help 'youth development' in Eastern Europe, responding to the 'development problem' of HIV/AIDS, and providing statistics and reports on issues such as nutrition, gender, poverty reduction and communicable diseases. Patricia Stamp comments of the local centres of power-knowledge constituted through this development enterprise:

> There is a certain sleazy intimacy to the posters tacked up in countless village community development offices, with their infantilizing charts and graphics showing how to feed a baby, how to wash yourself, how to plant corn and keep your yard tidy. How did it become routine and acceptable that the mundanities of daily hygiene, personal and family maintenance became poster subjects, fit material for didactic instruction by people from other continents? . . . [I]n the Third World states whole populations are policed, the criterion for selection being whether one's community or demographic group has been targeted for an aid project.[198]

The engagement of human rights law with international economic institutions at the level of domestic governance has been largely through this bio-political ground. So the World Bank sees possibilities for engaging with the human rights community in these areas of health, sanitation, extending safety nets for children and the aging,[199] while human rights commentators in turn see World Bank programmes on child labour, alcohol and drug issues relating to children, HIV/AIDS prevention, judicial reform and press freedom as some areas of potential engagement with human rights approaches.[200] Yet if human rights law reinforces this process of producing the responsible subjects of capitalist economics, it cannot challenge the subjection of Third World populations to bio-political management. Indeed, in a

193. H. de Soto, *The Mystery of Capital* (2000).
194. Ibid., at 54.
195. Ibid., at 55.
196. Ibid.
197. Ibid., at 56.
198. P. Stamp, 'Foucault and the New Imperial Order', (1994) 3 *Arena Journal* 11, 17.
199. World Bank, *Human Rights and Sustainable Development: What Role for the Bank?* (2002), 5.
200. M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (2003), 156–66.

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sense it intensifies that subjection. Bodies become the ground of political control, now exercised globally, and calculations of population control, the measurement of human development, public health policy and the production of human capital are all capable of reformulation as human rights problems.

4. A MEMORY OF THE FLESH

> . . . the most intimate perception of the flesh escapes every sacrificial substitution, every assimilation into discourse, ever surrender to the God . . . this memory of the flesh as the place of approach means ethical fidelity to incarnation. To destroy it is to risk the suppression of alterity, both the God's and the other's.[201]

In concluding, I want to return to the question of that which escapes the economy of sacrificial substitution. Despite the move to grasp life as something to be evaluated and weighed as part of a politics of risk assessment, 'life has [not] been totally integrated into techniques that govern and administer it; it constantly escapes them'.[202] In a short section of his book *Of Grammatology*, entitled 'The Exorbitant. Question of Method', Derrida argues for a critical practice that tries to read for the traces of that which escapes the circle of exchange, the economy of substitution or 'the eternal return of the same'.[203] Derrida proposes that 'the task of reading' is and should be ex-orbitant, following that which is unique, singular or excessive.[204] Such readings 'allow texts to remember and speak what they always knew'.[205] Yet each attempt to read, speak or write the law differently, including my attempt here, imposes a new form. In this rewriting, an other disappears.[206] How to attempt to encounter or repay our debts to those figures whose bodies seem to be the necessary ground of these internationalist texts, and whose sacrifices remain outside the economy that these texts establish?

Where the economy of sacrifice I have explored in this article involves a circulation of gift and reward between fathers and sons, we might read for those moments when this closed circle is under threat of being breached or at least pulled out of shape by other relations. We can't know in advance where we will experience that excess, or find its possibility. For me, in reading these texts about the constitution of sacrificial economies or body politics involving father and son, that which escapes is always the relation between mother and child. Indeed, when I first tried to finish this paper, it was to this relation which I turned as offering the exemplary outside to the circle of sacrificial relations.[207] The mother's sacrifice is not rewarded – her gifts remain the necessary but forgotten ground of the economy of risk and reward

201. L. Irigaray, 'The Fecundity of the Caress: A Reading of Levinas, *Totality and Infinity*, "Phenomenology of Eros"', in *An Ethics of Sexual Difference* (tr. C. Burke and G. C. Gill) (1993), 185, 217.
202. Foucault, *supra* note 150.
203. J. Forrester, *Truth Games: Lies, Money and Psychoanalysis* (1997), 148.
204. See further J. Gallop, *Anecdotal Theory* (2002), 7–8; and for a discussion of a similar use of the figure of the ellipsis in the writing of Sigmund Freud, see S. Felman, *Jacques Lacan and the Adventure of Insight* (1987), 64–7.
205. C. Douzinas, R. Warrington, and S. McVeigh, *Postmodern Jurisprudence: The law of texts in the texts of law* (1991), 124.
206. G. Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (1999), 353.
207. See further A. Orford, 'Trade, Human Rights and the Economy of Sacrifice', *Jean Monnet Working Paper 03/04*, available at http://www.jeanmonnetprogram.org/papers/04/040301.html.

circulating between father and son. Her encounter with the wholly other is a model of closeness rather than distance, of that 'most intimate perception of the flesh' to which Luce Irigaray refers in the quote which opened this section.[208] If we take as our example that later Christian story of paternal sacrifice of a son, Jesus, by his father, we might think of this relationship with divinity through the figure of Mary, the mother. Mary is represented in the gospels as 'Mediatrix between Word and flesh . . . the means by which the (male) One passes into the other'.[209] The sacrifice of her sexual and maternal body is echoed in the crucifixion of Christ.[210] The sacrifice of the generativity of Mary takes place in order to represent her as a '[r]eceptacle that, faithfully, welcomes and reproduces only the will of the Father'.[211] As with the stories of fathers and sons I traced in *Genesis*, this first sacrifice 'is not noticed'.[212] Instead, it is 'forgotten as a condition for the – apparently – singular event of the second'.[213] The passing of Christ through the body of woman and then incarnation is treated as if it were of no matter, as if the flesh were simply to be endured on the journey back to the father. Yet, Irigaray asks, must this narrative 'be univocally understood as a redemptory submission of the flesh to the Word?'[214] What if we turned to Mary as a model for the experience of the divine?

> And what if, for Mary, the divine occurred only near at hand? So near that it thereby becomes unnameable. Which is not to say that it is nothing. But rather the coming of a reality that is alien to any already-existing identity. Relationship within a more mysterious place than any proximity that can be localized. An effusion that goes beyond and stops short of any skin that has been closed back on itself. The deepest depths of the flesh, touched, birthed, and without a wound.[215]

So for me, this figuring of the mother/child relationship suggests an other experience of the divine 'near at hand'. Yet many people who read and listened to that version of the paper did not identify with the position of mother in the way that I did. For them, my writing from that position inscribed or imposed another model.[216] For one friend and student, Juliet Rogers, the moment of excess is figured by the 'trembling' of the one asked to sacrifice that which he loves – the moment at which the body interrupts the certainty of this transaction. Or perhaps we might find it in

208. Irigaray, *supra* note 201.
209. L. Irigaray, 'the crucified one: epistle to the last christians', in *Marine Lover of Friedrich Nietzsche* (tr. G. C. Gill) (1991), 164, 166.
210. Ibid.
211. Ibid.
212. Ibid., at 167.
213. Ibid.
214. Ibid., at 169.
215. Ibid., at 171.
216. 'Still it is necessary that women arrive at the same so that consideration be made, be imposed of the differences that they would elicit there', Luce Irigaray writes in *Speculum of the Other Woman*, and I am still considering the differences elicited in my experiment with writing an economy organized around my experience of the mother's body, negotiating with the place of the mother as passive gift-giver already inscribed in the texts of modern economic law. Yet my discussions with friends suggested that to try to posit the experience of Mary as *the* experience of divinity, as the model, is to replace the word of the Father with the flesh of the mother. So as Jane Gallop writes in answer to Irigaray: 'Woman must demand "the same", "the homo", and then not settle for it, not fall into the trap of thinking a female "homo" is necessarily any closer to a representation of otherness, an opening for the other': J. Gallop, 'The Father's Seduction', in L. E. Boose and B. S. Flowers (eds.), *Daughters & Fathers* (1989), 97, 105.

the possibility that, after all, the demand to sacrifice cannot be met – we may find that we cannot bring ourselves to exchange that which we love, and thus do not in fact possess it.[217] Each time we are asked to make a gift of death, to exchange that which is to us the most singular or unique, there is the danger that at that moment, we might make a different decision.

Let me put this another way. International economic law is in part a call to calculate, to evaluate risk and measure suffering. We might try to respond to this by entering more fully as critics into the world of 'impossible calculations', of 'secret debts', of 'the charges on the suffering of others'.[218] Yet all this calculation involves language, despite the attempt to imagine that models and mathematics and quantitative measurements take us outside the world of politics and value judgements, truth and lies, and into a far more rational world. When a text of law or economics calls for us to engage in calculation, a critical reading might ask where we find in the text that which exceeds this call. The decisions and scholarly articles and books and treaty provisions expressing their faith in arithmetic and risk assessment and the possibility of evaluating and exchanging things that are substitutable one for the other are communicated through language. Language exceeds calculation, and reaches out to that which is singular and unique even in the call for more measurement. As Derrida writes, all our analysis of costs and benefits, our secret calculations and evaluations, 'would have been ignoble, the opposite of love and the gift, if they had not been made in order to give us again the time to touch each other with words'.[219] The being we become when we take up the place of the calculating decision-maker, the analyst of costs and benefits, is still one whose calculations and exchanges involve this touching, this desire to encounter the other. And so counting and writing are not opposites or alternatives between which we can choose. 'What counts then is that it is still up to us to exhaust language.'[220]

217. Gallop, *supra* note 216, at 107. Gallop argues that this is the threat that the 'desire for the feminine' poses to the father in the sacrificial economy: 'If the father were to desire his daughter, he could no longer exchange her, no longer possess her in the economy by which true, masterful possession is the right to exchange. If you cannot give something up for something of like value, if you consider it nonsubstitutable, then you do not possess it any more than it possesses you.'
218. J. Derrida, *The Post Card: From Socrates to Freud and Beyond* (tr. A. Bass) (1987), 56.
219. Ibid.
220. Ibid.