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Turning to Market Democracy: A Tale of Two Architectures

David Kennedy*

I. INTRODUCTION

The past couple of years have been a startling time for international lawyers. Accustomed for a generation to disciplinary stagnation and neglect, to a static legal-political "order" rather than a nouvelle "architecture," and to a formulaic set of disciplinary concerns and argumentative possibilities, we have suddenly felt excitement in the air. We can read the groundswell of enthusiasm in newly bombastic oped pieces, conferences on new architectures for everything from bombs to business, and an avalanche of new books about international law. Many of the most senior figures in the field have recently written new defenses of the discipline, supplementing the field's classic theoretical works, often written by the same people when pragmatic liberalism consolidated its grip on the field in the late 1960s and the early 1970s. The discipline's institutions have taken up the theme—the American Society of International Law has commissioned both studies of the field's decline and a renewal of codification, while the Ford Foundation has opened its coffers to develop a new generation of public international legal academics.

This energetic renewal is certainly an interesting development, and I commend the editors for devoting this symposium to its exploration. I'm not sure if this somewhat programmatic essay responds adequately to the editors' request—or to the challenges of the time. I suspect the thought is that the occasion calls for something grand and philosophical, and I am afraid a look at the Eastward extension of Western economic and legal regimes in Europe might seem a rather mundane contribution to visions of a new "European Architecture," let alone a full-fledged New World Order.

My own temptation in reflecting on all this renewal has been to emphasize its familiarity from the last eighty years of international legal modernism. Indeed, we might well situate contemporary reflections on a "new" international law in a series of such reflections. But while we await the writing of this history, the temptation to grandi-

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loquent irony is almost irresistible. On this score, moreover, we can only be chagrined to find that *Time* magazine has already wrapped the New World Order ("N.W.O." as they call it) in ironic doubt and bemusement.

Still, my turn to policy here is rooted in skepticism about the renewal movement. My hesitations began when I noticed the odd way the renewalist movement combined historical continuity—a self-conscious repetition of well-worn structures, institutions, doctrines—with an equally strident sense of a historical break, repeating the discipline's construction of its history in phases of continuity punctuated by rupture (before 1648, 1648–1815, 1815–1918, since 1918, etc.). This observation led me to consider the contrast between developments that have been treated as novel breaks with modern international law with those that have been treated as continuations or perfections of the modern project.

In the European theater, this has been most striking in the contrast between the European Communities' 1992 program—seen as the completion of an internal market program set in motion by the pragmatic functionalism of the 1950s—and the continent's "architectural" responses to the fall of the Berlin Wall—understood as requiring new institutional and legal forms heralding a new century and a new order for international law. This simple static contrast, once established, made the conclusion that the EC program was somehow chronologically "ahead" of the "emerging" Eastern nations almost inescapable.

It would, of course, be at least equally plausible that the boundary changes signified by the end of the iron curtain are precisely the stuff of traditional international modernism, whether understood as the collapse of belief into reason, of empire into self-determination, of planning into the market, or of feudal centralism into economic democracy. They raise the most traditional sorts of questions about succession, institutional membership, alliance, security, development finance, etc. Moreover, it seems possible that in the new European Communities of the 1992 era we might be able to make out the outline of a new international politics, detached from the nation-state system, in which technocratic imperatives and market administration have displaced enlightenment ideals of national mass democracy.

Nevertheless, since 1992 was stabilized as continuity and 1989 as rupture, it has been part of the background assumptions for renewalist commentary that East and West Europe confront the same systemic imperatives at different chronological stages, that the East "lags" behind the West in the continuous development of modernism. In this way, the boundary between the internal market in the West and the external trade regime with the East has become part of a chronology of development with distinct policy implications: the East should prepare for admission to the West through the shock of catching up.

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In this sense, the policy specifics of Eastern participation in the regimes of international trade and the EC internal market might be linked to the broader structure of international renewalism. We might therefore take the hyperbole of international renewalism more seriously. With all its twists and turns, it situates itself, at least partly, as the arbiter of the in, the out, and the up-to-date.

For contemporary international renewalists, the twentieth-century system of collective security, international institutions, and peace through law has been or might now be, finally, after many false starts, being put into play. In this view, international law's problems have always been the archaic conditions of their implementation. Our hopes have been repeatedly foiled—by American isolationism, nationalism, fascism, war, ideology, nuclear instability, the Cold War, underdevelopment, and so forth. At times, we have even blamed the political scientists for their corrosive commitment to a primitive, if modelled, anarchy.

The fall of the Berlin Wall and the resurgence of U.S. leadership for collective security in the Gulf are thought capable of sparking a disciplinary renewal at least partly precisely because these socio-political-geographical developments were not themselves directly related to international law. After all, the Berlin Wall was only incidentally an international legal creation. The idea has been preserved intact, awaiting satisfactory conditions for its implementation. Indeed, disciplinary continuity and conceptual independence is maintained at least in part by allocating historical, social, and political developments external to the discipline. Now that favorable conditions have fortuitously arrived, we can all breathe the heady new air.

At the same time, renewalists have treated the past few years as a rupture in the unified fabric of international law and society. In this image, the theory and practice of international law have been transformed along with the political and technological conditions for its operations. The end of war, new peace talks on armament and territory, people massed in the streets for new and democratic governments, a new collective war and its aftermath, new problems, solutions, institutions—each reminds us of 1648, 1815, 1848, 1918, and 1945. In this view, the real conditions of history have broken through to alter the forms of legal and international political life.

This rupture permits—even forces—the discipline to throw off the prejudices and commitments of its past and reunite with the forces of history. In this account, the old international law was hopelessly compromised by ideological strife and an overemphasis on state sovereignty and conflict. The new international law will begin where these leave off. Theoretically, that means an end to the preoccupation with naturalism and positivism and a move to a more practical and pragmatic international law that can respond to the new problems

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requiring international cooperation—the environment, health care, and so forth. Doctrinally, this means a move away from sovereignty and doctrines of procedure to a renewal of substantive codification and a revitalization of international institutions.

The conceptual moves from ideology to liberal democratic pluralism, from the conflict of empires to the interdependence of nation states, like the movement to an international laissez-faire market structure, are experienced as responses to new technologies (usually information and communication technologies) and economic imperatives. They signal a move from conflict to cooperation, from the state of nature to civil society, in short, from war to peace.

This is an electrifying combination—historic break permitting both disciplinary continuity and renewal. The story of continuity preserves the discipline's unity and conceptual integrity. In an earlier theoretical phase, this had been naturalism's role. In the phase of pragmatism, this had been the role of idealism and the rhetoric of universal values. Here this role is taken by a historical narrative. At the same time, the story of rupture ensures the discipline's responsiveness to will and power—historically the role of positivism and realism.

The familiarity of these narrative strategies is certainly interesting. The almost religious account of ideas preserved until mankind is ready has characterized international law throughout this century. Whenever law strayed from the path of realism, its utopian excesses were justified in just this way. At the same time, the conditions of political rupture are also familiar. After all, Europeans have been going into the streets in moments of authentic rupture every thirty years for some time.

The narrative of movement to a new international law, propelled by technological, economic, cooperative, and pragmatic imperatives to substantiate the centrality of state sovereignty with a more sociological engagement with the problems of peace and collective security, has been a consistent theme in our discipline for almost a century. We read exactly this story in Wolfgang Friedmann at the high point of post-war pragmatic liberalism, and again unchanged in Alejandro Alvarez at the high point of progressive American enthusiasm between the wars. Indeed, whenever international law has strayed from the path of utopian speculation, its realism has been defended in exactly these terms.

This familiarity certainly casts doubt on the framework of renewal and the rhetoric of the new. The important observation, however, is that the discipline has preserved both its unity and its ability to act as the axis of differentiation between cultural constructs and social forces. In short, it has preserved its sovereignty. And like the sovereignty of states, the discipline's sovereignty is both a territorial and a chronological apparatus—distinguishing those inside and up-to-date in a unified modernism.

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It is in this context that current discussions about the post-Cold War European system take a turn to policy. Contemporary discussions about the post-Cold War European system share an expectation that the old order will give way to something new either through progressive change or conflict. The possibility of conflict is associated with fears of forces that seem archaic—nationalism, anti-Semitism, and anti-modernism. The recurring motif is that a new "common" Europe might be built if only pre-modern tendencies and conflicts could be restrained. The possibility of conflict is thus located both outside and before the system of order.

The aspiration for progress is lodged in a proliferation of new institutions, plans, geometries, architectures, and political alignments for European renewal. The key words are interdependence and cooperation. And essential to this approach is the classic modernist displacement of political struggle by management. An enlightened policy can build a new Europe administratively, legally, and technically. Indeed, it is precisely the fabric of legal, conceptual, and institutional structures, present in the discipline since early in the century and consolidated as a form of international pragmatism over the past twenty years, which is being brought to bear in the new European order.

This way of looking at things stresses the homogeneity of the new European society expressed in phrases such as "common European house" or "one Europe free and whole." Conflict remains outside the house or comes from outmoded ideological commitments. In this vision, international politics provides opportunities for strategic maneuver, miscalculations and competition, but operates within a broad consensus about the conditions of stability. Debate about the content of the new order seems inappropriate—a throwback to the age of ideology, out of step with the new realities, a dangerous flirtation with demagogic power, and so forth. Such a debate may even threaten the unity necessary for the European reordering project to mute the triple political challenge of German reunification, the withdrawal of the Soviet military from Eastern Europe, and the increasingly uncertain changes within the Soviet Union. The international political project is to establish the security arrangements and institutional structures required to permit the development of national democracies and international markets.

The homogeneity of this vision obscures the significance of two quite commonplace differences: between the inside and the outside of the market, and between mature modern and underdeveloped market societies. These two differences of territory and chronology have replaced differences of politics or ideology in contrasting Eastern and Western Europe. From a policy perspective, the resulting project is

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clear: Eastern societies must be brought up to date to enter the Western market.

My intention here is to question this understanding of the policy project by contrasting the two market regimes associated with the EC's internal market and the external trade system. I question both the assumption of a natural chronology of market phases moving toward maturity and the image of a natural boundary between the internal and external markets by focusing on the particular policy choices involved in constructing each for Eastern and Western Europe.

The contrast between the two regimes is this: inside the EC—no longer an international trade grouping—Brussels manages a sophisticated political structure and industrial policy to build an internal market by careful government planning and regulation. At the same time, the EC's external policies, including their initiatives toward Eastern Europe, are governed by the international trade regime, a classic free trade system without a managed public policy. For the EC metropolis, these two regimes complement one another in numerous ways—public policy at home, private freedom abroad. At the periphery, however, the contrast is less harmonious. To be outside is to be subject to the ups and downs of free trade. To be inside is to participate in a highly structured system of planning, wealth stabilization, and transfer payments. For wealthy outsiders, with their own well-developed internal markets and established public politics, the combination may also be advantageous. Switzerland has long since learned to turn the legislative freedom of an outsider in a decentralized trade regime to its own advantage. For the less wealthy, the choice is a less happy one.

In the initial phases, both Brussels and the East rushed to integrate the Eastern nations into the international free trade regime rather than into the Western internal market. In the West, we saw familiar initiatives of trade and foreign aid, programs both modest and detached from the internal mechanisms of EC industrial policy. In the East, we saw a combination of legal reform exercises designed to launch the planned economy on a deregulatory free fall towards private ownership and hard currency investment. Sometimes the difference between a Western market and the international trade system—between the EC and GATT—has simply not been perceived. At the same time, the "internal market" has been uniformly perceived to be far too singular and hegemonic to accommodate partial assimilation; membership in the EC has been thought an all or nothing proposition. In this phase, which focused primarily on the EC's internal market, the strong distinction was territorial, separating members from nonmembers. The objective was to stabilize Eastern Europe in the external trade regime.

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We are now in a second phase, in which many of the new institutional arrangements—among them "association" agreements between the EC and various of the ex-Comecon nations—are being put into place, further domestic legislative reforms are underway in the East, and a wide variety of more nuanced institutional plans are being developed to relate East and West. In this phase, the chronological distinction between East and West has become more crucial. We read more daring comparisons of Eastern Europe to underdeveloped societies of the Third World, and we see a familiar pattern of negotiation between national economic planners and international bankers, investors, and development institutions. In institutional discussions, we hear more about the international trade regime as a reasonable "first step" towards integration into the internal market, and an increase in the general rhetoric of transition, phasing, and stages. This transitional frame replaces the sharp distinction between the territorial internal market and its "trade partners" with a firm distinction between mature and developing market societies, the distinction most characteristic of the international trade regime itself.

Taken together, these two interpretive phases suggest a darker side to the renewal story—a side in which relaxation of Western hesitance about allowing the East "in" seems only possible once the conditions of chronological inequality have been stabilized. By sharpening the contrast between the two regimes with which the East now has established relations, my hope is to strengthen the perception that these arrangements involve choices and political struggles more than natural transitions and the entrenchment of territorial economic boundaries more than "participation" in a universal market.

The difference between the two regimes has established a way to distinguish domestic and external policy—an economic version of territorial sovereignty. It also suggests a unified dynamic process of development which moves from the center to the periphery. These two elements have been common both to those who applaud the new architectures as enlightened pragmatism and those who criticize them as neo-colonialism.

II. INTERNATIONAL TRADE: NORMALCY AND DEVIATION

Broadly conceived, the international trade regime divides traders and trade relations into the normal and the deviant. It is a distinction at once spatial and temporal. As seen from the trade regime, normal trade is open, structured solely by comparative costs and pursued by private actors without governmental intervention. Normal traders are diversified, developed economies with stable currencies that free private enterprises to participate in trade without abnormal state support

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or regulation. Everything else—subsidies, dumping, cartels, dependence, instability, state trading, underdevelopment, undue vulnerability to imports, exchange rate instability, and international price supports—is abnormal.

In normal situations, governments adopt a passive laissez-faire attitude. The regime of "private international law" sustaining normal trade contains rules about property and contract, mechanisms to stabilize jurisdictional conflicts while liberating private actors to choose forums, and ad hoc mechanisms of dispute resolution. The dominant players are private traders, and to a far greater extent than in even the most laissez-faire national system, they legislate the rules that govern their trade through contract. And when governments do participate, they operate "commercially"—as private actors.

The public law international trade regime is supplemental to this private structure, concerned either with reducing or punishing interventionist abnormalities. The basic GATT "most favored nation" principle of "non-discrimination" is intended to remove what are thought to be governmental barriers to trade that disrupt normalcy, such as tariffs and quotas. At the same time, a variety of exceptional curative or protective measures are permitted or encouraged in deviant situations—such as those involving state traders or developing countries. Thus, the international banking regime normally aims only to liberate currency trade and intervenes only to prevent abnormal exchange rate swings. At the same time, because the IMF, as a public arm of the banking regime, also treats stable currency convertibility as normal, it is mandated to provide temporary technical assistance and austerity-directed intervention in abnormal situations.

U.S. trade policy and EC commercial policy have echoed this vision. In normal situations with normal trading partners, tariffs and quantitative restrictions are to be reduced to a minimum. If a trader acts abnormally, its imports may be restricted or subjected to special duties. The most well known examples concern dumping and foreign governmental subsidies. Abnormal traders—the underdeveloped or state trader—are urged and aided to undertake the internal reform necessary to come up to speed with the requirements of a "modern" market.

As it turns out, of course, the international trade regime is mostly composed of exceptional measures designed to overcome perceived abnormalities. For developed societies this means defense against "predatory" foreign deviations from normal trade practice and international arrangements to "normalize" or "stabilize" certain markets. After numerous general reductions, there remain modest tariffs, primarily on manufactured goods produced by OECD countries. Stable

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agricultural prices and trading conditions are broadly supported, at least for the products of developed nations. Most developed economies maintain elaborate regimes permitting outright quotas or exclusions in situations deemed likely to harm domestic production. For other nations it means a combination of special trade preferences and demands for internal reform aimed at creating the "normal" domestic preconditions for trade: stable convertible currency and absence of government subsidies, price supports, or other abnormal intervention.

Inside the normal market society of the West, this image of direct and exceptional public intervention to preserve normal private commerce has become increasingly anachronistic as new forms of property ownership, corporate finance and control, public-private partnerships, commodity future, after and secondary markets have emptied the central categories of private property and public policy of much of their iconic meaning. Modern economies, as everyone who participates in running them knows, resemble this crude ideological image no more than complex modern administrative states resemble the charming Enlightenment models of representative democracy familiar from high school civics classes.

The fact that modern industrial societies have begun to internalize and institutionalize the critiques and ambiguities of modernism has not led to a questioning of the international trade regime's archaic distinctions between the normal and the abnormal. On the contrary, the sense of a modern "sophisticated" industrial legal regime simply confirms the relative primitivism of both trade relations "outside" the internal market and of outsiders who must undertake a long march not only through austerity but through formalism.

As a result, this international trade policy minimalism—like many myths of origin and identity—continues to dominate initiation rituals for newcomers to the system. In structuring admission, two things remain axiomatic. First, if trade is a realm of arm's-length exchange—without the interventions of public policy—among traders who have forsworn governmental intervention, the link between domestic and trade policy is severed, at least for normal traders. International trade is one thing. Domestic industrial policy, microeconomic regulation, and the construction of an "internal market" are something else. Second, the trade regime is chronologically more primitive than its parts and structured by the relationship between those who have transcended its limitations in their internal economic policies and those who must first submit to its primitive logic. As a result, for abnormal traders, the distinction between internal and external policy is far less distinct. In this sense, then, developing societies live more directly in the international system than developed market societies,

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for all their enthusiastic embrace of internationalization and interdependence.

III. INSIDE THE EC: REGULATING THE INTERNAL MARKET

The European Communities have been structured by the interaction between an economic and a political idea. These two ideas come together most dramatically in the institutional and legislative program to complete the internal market by 1992. They have created a complex modernist edifice, an advanced market unfamiliar to the simpler categories of the trade regime. But because much of the novelty of the regime lies in the relative invisibility of its politics, the EC can seem precisely the mature modern laissez-faire normal trader.

The economic idea combines deregulation and technocratic expertise. The internal market will be built primarily by liberating private forces over a larger geographical terrain by dismantling national government, regulatory differences, and tariffs, that is, by sneaking up on sovereignty. At the same time, however, the mechanisms of that integration, the tools to build the internal market, are large-scale legislative and administrative interventions.

The political idea combines centralization with sectoral functionalism. On the one hand, the EC is committed to a project of government building, coordination, harmonization, and unification of legislation. On the other, it has from the start differentiated this government building project from the historical project of nation-building, in part by seeing the legislative and legal structure in Europe as the technical implementation of legally delegated sectoral competences rather than an incipient sovereign state. As a result, the politics of Brussels should not be equated with the territorial mass politics developed in Europe in the late nineteenth century and characteristic of most Third World societies since independence.

The EC's economic idea, after the initial elimination of internal customs duties and the establishment of a common external tariff, developed in a progressive project of integration through the elaboration of "freedoms" and the establishment of "common policies." The objective is deregulation, the means expertise. Broadly speaking, the story of the implementation of the famous internal economic freedoms (free movement of workers, goods, and capital, freedom of establishment, freedom to provide cross-border services) is the movement from liberalization to regulatory harmonization through either the setting of minimum standards plus mutual recognition, or the development of a unified EC-wide regulatory regime. For example, the free move-

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ment of workers means harmonization of social security and vocational training, the free movement of goods means common environmental regulation, the freedom to provide cross-border services means an EC-wide regime for insurance brokers and agents, and the free movement of capital means common banking and securities legislation, tax harmonization, and monetary union.

As for the policies, the EC conducts an independent economic policy in three main areas: agriculture, competition, and social policy/transfer payments. Agricultural policy began as a post-war effort on an EC-wide basis to stabilize markets, increase food productivity, increase farmer income, ensure supply, and regulate prices. It remains the largest EC budgetary item. Competition policy—regulating the activity of firms to ensure fair and continuing competition—has become the most significant arena for pursuing an active industrial policy regarding such general issues as the desirable structure of EC wide pre-1992 mergers or the structure of the air transport and telecommunications industries. Beyond agriculture and competition policy, the EC pursues an aggressive environmental and social policy and oversees the enormous transfer payments from wealthier to less-developed regions of the Community.

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

Nevertheless, the political combination of centralization and sectoral functionalism has rendered the governmental apparatus which will implement this approach less visible than a more conventional national liberal market democracy. For all its interventionist expertise, the Brussels regime has come to seem the epitome of the modern normal trader. Because the Brussels political apparatus is structured to supplement, complement, and sneak up on sovereign states, rather than displace them, the politics of industrial policy and market intervention remain oddly difficult to locate, submerged at both the EC and member state levels in a self-image of formally limited administrative action.

Both in Brussels and in the national capitals, the political regime is able to pose as the mere legal implementation of a politics established elsewhere. The EC is either technical and administrative—or political in the very limited sense that it establishes itself as expertise in service of technical necessity and as a legislative instance which opposes the politics of government. It is, in short, a deregulatory regulatory instance. In economic matters, the Member States, by

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contrast, are either implementing Community legislation or adjusting the imperatives of an internal market to their own, largely executive, sovereignty.

Of course, the Brussels government is not simply an administrative affair of bureaucratic action within formally delegated competences. All of the avatars of classic parliamentary democracy are there: judiciary, parliament, executive, rule of law, and so forth. Just as modern economies have left the crude ideological certainties of property and contract or the simple distinctions between public and private far behind, so also this up-to-date political regime has transcended quaint visions of democratic participation or separation of powers. In this sense, the EC seems the most advanced instantiation of the liberal democratic model among nations.

Those classic images continue to dominate the EC's plan for its deviant neighbors who must "democratize" before being considered for participation. In this, we find an intriguing migration of democratic ideology and a preoccupation with human rights outward from the metropolis to the periphery. The internationalization of democratic rhetoric has accompanied a domestic displacement of democratic politics.

The details of this move are familiar from the perspectives of the United States and Japan. The EC decision-making process has shifted legislative competence from parliaments to the executive as it has moved authority from the regions to the center. The administration has become a more transient and flexible process with significant legislative authority and responsive to the technical political imperatives of expertise. The judiciary has transcended its classic role as keeper of the dogmatics of constitutional limitation, although the Court, rather than the elected Parliament, remains the only institution empowered to control the executive organs. Perhaps most dramatically, the EC has institutionalized the Parliament as a promise, place holder for the democratic aspiration, and a complex practice of advisory co-decision in which the administration and judiciary are its closest allies rather than competitive adversaries. All this transpires with only the most vague commitments to the classic human rights norms of parliamentary democracy.

The result is a broad political culture with a technocratic and legal face, in which politics is treated as having somehow already happened elsewhere—in the Treaty, or the European Summit, or in the Member States, or in the Council, and so forth. The European institutions acknowledge only a politics which responds to two imperatives: technical expertise and "Community building" or "establishing the internal market." The result is the establishment of a political instance freed from the institutions and pressure points of a national mass politics

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and responsive only to the bureaucratic imperatives of managing an industrial policy and the wishes of Member State governments. Politics is either an aspiration for institutional designers or has been transformed into a management problem for updated institutional players.

The democracy-as-management vision is nowhere more startling than in the bizarre Keynesian discussion about the EC's "democracy deficit." Democracy is a policy orientation. On the one hand, in a market-driven governmental structure of delegated powers, institutional reforms will always lag behind increasing competences. On the other, popular perceptions of "legitimacy" may place an unnatural drag on the system's ability to respond flexibly to a changing market. The result is a structural deficit that must be managed by policies directly engaging the "European citizen" (signage changes, coinage of the ECU, education about European rights and culture, etc.) and a continual process of institutional reform.

In one sense, the EC's vision tracks the mature normal democratic market trader of the international trade regime: politics displaced by economics, public by private, etc. By continually aspiring to the democratic, the EC shares something with its less advanced neighbors. Just as the economic model of the internal market, with its deep public-private partnerships contrasted with the austerity shocks and regulatory abstinence demanded of outsiders, however, so also this vision of a technical industrial policy unmoored from more traditional forms of democratic participation contrasts sharply with the institutional reforms urged on the East.

IV. THE EC ENGAGES THE EAST THROUGH INTERNATIONAL TRADE

Initial efforts to integrate the ex-Comecon nations into international market democracy have focused on the international trade regime rather than the internal market. Recent efforts to develop more comprehensive relationships build on the fundamental structuring assumptions put in place in the initial period, allowing only chronological aspiration to territorial inclusion. On both sides, focusing on the international trade regime has meant a set of shared, if unfortunate, assumptions.

The dominant image governing these efforts has been a "return to normalcy," to universal reason, to the West. The 1989 rupture released the East from primitivism, from ideology, from the priority of politics over economics, public over private, belief over reason. As for the deinstitutionalized insane, enlightened thought seeks to treat the East as "normally" as possible. As a result, special treatment is thought unnecessary and probably unwise, with the exception of "transitional"

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assistance. Subsidies, unique technical standards, multiple currency rates, wage protection, incomplete privatization, all remain unfortunate deviations, echoes of a prior addiction.

Eastern countries are expected to return to normalcy one by one, in accordance with their own ability to throw off their residual deviationist practices and carry on normal relations with normal traders. Returning to normal is a matter of fact rather than policy, measured by the confidence of foreign private actors; reform programs are only successful when they have actually attracted foreign capital and trade. In this vision, in a very real sense, there is little a normal government can do. Emerging traders must take their cues from private rather than public actors and private actors will respond to public gestures of self-restraint and movement towards Western normalcy.

Meanwhile, the internal policies of the normal trader are not implicated in the project of assimilation. Assimilation concerns the international trade regime and the internal regimes in the East, but is distinct from the EC's internal market. The EC may need to protect its borders more assiduously from the spillover effects of abnormality and transition—from unwarranted immigration, worker, and capital flows—but need not adjust its own internal market. At the same time, there will be significant structural adjustments in the East toward normalcy, encouraged and mandated by international investment and trade institutions.

Beyond these structuring assumptions, both sides have shared a marked preference for export-led growth stimulated by foreign investment and for a trade orientation towards the Western metropolis. Because East European countries should naturally prefer normal to abnormal trade, they should—and largely do—favor development strategies based on hard-currency investment and Western-oriented export-led growth rather than continued trade with other ex-deviants. Government efforts to restructure domestic economies toward general currency convertibility, to discourage trade with the Soviet Union and encourage hard currency investment are "deregulatory," "normalizing," or "transitional," rather than "interventionist." The Eastern countries will be opened to normal world trade while the EC remains able to resist Eastern products which are "abnormally" produced or marketed. Outward investment from the East is seen to be inhibited primarily by abnormally soft currency rather than policy, so that hard currency earnings are thought only possible through export until normal convertibility is achieved.

If the Eastern economies are viewed as primitive deviants, they are also already seen as potentially normal. The result is something of a paradox: state economies may be deviant but reintegration seems to

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require no special international effort other than capital inflow (through guaranteed loans or guaranteed investments) and "discipline" or "restraint" in the domestic economy. This view may be supported by the perception that the ex-Comecon nations are inherently "European" societies emerging from ideological error rather than "LDC's" emerging from economic underdevelopment. Nevertheless, the regime being established in Europe is all too familiar from relations between the first and third worlds.

Shifting from shared assumptions to policy developed in Brussels, we find three elements: trade normalization, emergency aid, and transitional assistance to attract Western capital. Prior to 1989, contrary to popular perception, the legal arrangements for trade relations with the Comecon countries were not substantially different from those governing trade with other nations. Tariff treatment of goods from the East was not substantially different from that accorded other nations, primarily as a result of substantial progress in general tariff reduction. Of course, some Comecon members remained outside of GATT, some special restrictions applied—primarily to Eastern-bound exports under CoCom—and the atmosphere for settlement of trade disputes could be cold. As to quotas, the EC distinguished between state and market trading partners, but subjected both to a similar institutional regime. Although quantitative restrictions had mostly been eliminated for market economies—and were largely eliminated by GATT—they remained in place despite GATT membership for Czechoslovakia, Hungary, Poland, and Romania.

It is important to remember that the EC was well on its way towards regularizing trade with the East prior to the governmental changes of 1989. It had been negotiating trade agreements with individual Comecon countries since 1980. This process was sped by the governmental changes of 1989, but not substantially changed. These trade agreements generally commit the EC to end most remaining quantitative restrictions (often excluding sensitive products such as textiles, coal, and steel), thereby bringing ex-Comecon nations up to normal GATT treatment, commit the EC to "cooperate" in easing trade relations, and provide a framework for discussion of other outstanding issues, including agricultural trade.

In short, these trade agreements were designed to bring the Eastern countries into the normal framework of international trade, no more, no less. Their goal was to produce the pre-conditions for free exchange of goods. Much was made in the West of the fact that the trade agreements did not address the blocks to Eastern-bound export (export licensing schemes, remaining tariffs, governmental regulations, currency convertibility, etc.) This was to be the work of the IMF and

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guaranteeing banks, and of the pressure exerted by existing Western protections against deviant trade, including subsidy and dumping regimes.

The special programs and initiatives begun in Brussels in 1989 were aimed to speed and complete the normalization already under way. In the trade area, they have sped elimination of quantitative restrictions (putting involved countries such as Hungary on equal footing with GATT members), suspended certain Member State quantitative restrictions for one year (an improvement over GATT treatment for some products such as shoes, toys, automobiles), and given affected countries benefit of the "Generalized System of Preferences" extended to developing countries under GATT. The result: normalization plus special LDC treatment.

On aid, Brussels initially budgeted 300 million ECU annually under the so-called "PHARE" program for Poland and Hungary. Although this figure has been increased several times—in part as other recipients have been added—the goal and structure of the program have not changed. Most of the funds were earmarked for food aid—and would be spent in the EC at market prices, the food being sent East to be sold at local prices to create a local currency fund for infrastructural assistance. Much of the rest was set for training and technical assistance projects either in an established university or vocational exchange programs or in a local project identified by the recipient government, often retraining for joint venture manufacturing.

Access to Western capital is to be governmentally facilitated through loans made by or guaranteed by the East European Development Bank, through extension of existing government insurance schemes for overseas private investment, through local government guarantees of foreign investment, and through local government law reform. Each of these governmental initiatives is expected to ensure that investment projects achieve the efficiency to be expected from a free market, meaning encouraging private ownership and control, convertibility of profits, and governmental de-regulation. All are understood to be part of stimulating a Westward export orientation for the ex-Comecon economies.

If we take these three prongs of trade, aid, and investment together, two things stand out. First, the relationship being established with the ex-Comecon nations resembles that in place with a large number of developing countries. Indeed, the preferential trade regime established for the Lomé countries in 1975 (now extended to sixty-eight LDC's) provides the most accurate parallel. In it we find preferential trade terms combined with minimum financial and technical aid, usually in the export sector for products which are not manufactured in the EC itself.

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Second, initiatives towards the East are being pursued in the context of the EC's trade policy. It is important to remember that the EC's common commercial policy—vis-à-vis the East as elsewhere—is seen as an instrument of the EC's internal integration. The EC pursues an autonomous trade policy on the basis of a common external tariff and no internal tariffs. The policy is managed by the EC, not by the Member States. The rules are made and the treaties negotiated in Brussels, are then "directly applicable" in the legal regimes of the Member States and are usually EC-wide, establishing, for example, what will be treated as goods of "EC origin" or "goods in free circulation." The timing and content of EC relations with the East have been driven by the needs of the internal market program, which has been seen as a distinct and severable project. This separation and priority is witnessed most dramatically in the postponement of any discussion about expansion until the internal market has been "completed" in 1992.

As might be expected, efforts in Eastern Europe to move to market democracy have focused on internal legal restructuring to provide the forms for putatively normal participation in the international trade regime. Broad reforms of both public law (often including new administrative and election laws, constitutional court structures, and penal codes) and private or commercial law (usually including company law, banking law, labor law, property law, exchange regulations, etc.) aim to provide what are thought to be the preconditions for normalcy. Some of these efforts, such as early and insistent development of a stock exchange, seem vaguely beside the point. The most significant have been the privatization programs and the legal incentives aimed at attracting foreign investment.

The East's emphasis on Westward-oriented export can be seen in the choice of deals to guarantee or subsidize, in the incentives for profit repatriation, and in the choice and scale of entities first slated for privatization by sale or investment. Although the impetus for privatization and incentive for foreign investment often comes from the government, and these immense law reform projects have broad reaching political effects, these programs are structured by the desire to deregulate and avoid government planning—to release and ensure private activity. This is evident in the use of auctions and other market devices in privatization, in the hesitance to question private Western assessments of asset value and in the effort to restructure industry into units of investment rather than production.

Eastern European reformers drafting privatization legislation have been quite rightly preoccupied with the practical difficulty of devising programs which work—which will attract foreign investment and establish the basis for a market economy. Their efforts have been

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encouraged by a variety of international advisors, financiers, investors, and bureaucrats urging a pragmatic approach that would speed transfer of ownership and control over economic resources to private hands.

The particular vision of a market economy articulated in the resulting programs is the familiar, if extreme, version of classic deregulated laissez-faire economics more common to Western fantasy than practice. Four elements of the Eastern privatization schemes suggest elements of this vision. First, the idea of a "transaction" as a politically neutral arrangement. The move to privatization is organized as a sale or contract which—however negotiated, shaped, or guaranteed by government forces and existing managerial interests—will seem to respond to price and profit rather than plan. Second, a clear distinction between corporate and administrative form, embodying a sharp distinction between public and private. Privatization means change in the legal form of property ownership rather than, or in addition to and prior to, change in actual control or economic structure. This focus on ownership leads to an apparently natural priority for financial over industrial policy; the government, it seems, is supposed to organize and insure capital rather than labor.

Third, a natural progression from private to public law, in which private legal arrangements are the basic apolitical work of government, and public law the exceptional transitional "intervention." Privatization is first a matter of transferring assets and control to new forms of ownership. Regulation and planning can then be designed to correct for difficulties as they arise in the natural movement of the private market. In this sense, the privatization schemes have largely been deregulatory free falls in which the governments have generally forsworn the sort of industrial policy associated with the EC's 1992 internal market. A telling exception has been the move to establish antitrust authorities.

Fourth, a vision of "liberal" or "progressive" measures as limited political exceptions to an otherwise rational scheme. Pressure for more "social democracy" has been confined to narrow areas such as worker participation, particularly in cases in which worker ownership has been used to transfer control without foreign capital. In this, the Eastern programs share the limited social imagination of the West at its most extreme.

Fealty to the classic market image of the international trade regime has had a more marked impact on the East European reform efforts than on the EC's efforts to create its own internal market. Advisers have differed in their willingness to stress the importance of a "shock" therapy for Eastern Europe. But the shock being considered is the same—the shock of rapid deregulation until the country "finds its level" in the international division of labor. This is a shock to prim-

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itivism, from which a modern market economy might or might not develop. A number of explanations seem possible, ranging from a certain naiveté about the legal cultures of modern market democracies to an insistence on reversing whatever ideological constructs seem to have been associated with the old regime. These tendencies have been reinforced by foreign investors and government officials who see East European reform through the lenses of the international trade regime rather than as participants in a common or shared market.

We might imagine a different sort of shock, the shock of immediate movement to the sort of structured public-private partnerships and mixed economic forms familiar to all modern developed market economies, from which movement to a place in the international division of labor might slowly be accommodated. In this image, the periphery would not move through the stage of rights and forms but would jump directly to the more ambiguous and integrated regimes of late modernity.

V. ALTERNATIVES: IMPROVING THE TERMS OF ENGAGEMENT

East and Central Europe need not see the internal Western market and the international market as separate political and legal cultures, orienting their internal reforms to one and not the other. For other nations, the results of relating to the EC from the outside—whether through EFTA or an association agreement—vary directly with each nation's status as a "normal" trader. For abnormal traders—whether members or not—results vary directly with the ability to participate in the internal market where abnormality is viewed as a structural occasion for policy management rather than as a transitional condition to be addressed through deregulation.

The most accessible alternative models are provided by EC relations with those nations which have become members of the EC (such as Spain, Portugal, Greece) and with the EFTA countries, with whom the EC has sought to negotiate a far more intimate non-membership status. Other countries with EC association agreements (such as Turkey and Israel) have done better or worse as their position has swung between prospective membership and trading partner. Even these models, however, overstate the impermeability of the boundary between the internal and external markets of the EC.

Membership has been the traditional means to integrate neighboring countries into the EC—Britain, Denmark, Ireland, Spain, Portugal, and Greece have been admitted. Membership has been used to integrate neighbors of varying levels of development, and with greater and lesser degrees of political and democratic stability and experience.

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Indeed, for Spain, Greece, and Portugal, membership has been recognized as a tool to strengthen democratic and free market commitments and to bring about economic development. The accession process has proven extremely flexible, accommodating long and complex transitional arrangements, currency conversion restrictions, local aid arrangements, historic insulation from free market forces, and specific sectoral competitive weaknesses. Even after the expiration of the transitional arrangements, members do not find themselves in a unified legislative or political field. Much of the success of the 1992 program in the wake of the Single European Act of 1987 has come as a result of acceptance of a great deal of internal "variable geometry," mutual recognition of differing standards, divergent policy objectives, and integration velocities.

Membership is not about trade and aid. Inclusion in the EC internal market is understood as an *alternative* to a free trade zone. Microeconomic and regulatory processes outrank trade and aid concessions. The key is acceptance of existing Community legislation and the extension of the EC's freedoms and policies to the territory of the Member State. Moreover, a member may receive huge transfer payments as part of either normal EC programs or special "cohesion" initiatives for underdeveloped regions.

The closer neighbors come to membership, the more wary they might rightly become about accession to the political and legal culture of 1992. The costs of membership involve submersion in the technocratic and largely undemocratic decision-making of Brussels, the assertive judicial processes of the EC, and an acceptance of a country-by-country economic integration into the Western market rather than a common Central European strategy. Membership in the EC means a large-scale and largely irreversible transformation of a nation's substantive law, governmental structure, and international status, as well as accession to a sophisticated environment of market intervention and regulation. Although pursuit of a more balanced dossier in relations with the EC may be advisable for the countries of the East, there is little that can be done to avoid the technocratic political vision of the Community legislative structure.

At the same time that the EC has been pursuing country-by-country trade negotiations with the ex-Comecon nations, it has been encouraging the members of its largest trading partner, EFTA, to pursue a different tack. Industrial products already circulate among the eighteen members of the EC and EFTA generally without tariffs or quantitative restrictions. The EFTA countries seem the economic and political peers of the EC Member States. They have not been admitted to membership as a result either of hesitation on their part (Norway turned down an

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offer of EC membership) or reluctance on the part of Brussels, or as a result of bad timing.

The alternative to membership offered the EFTA countries in the European Economic Space (EES) negotiations had two important dimensions. First, the EES negotiations have been conducted on behalf of all members of the two organizations. Brussels prefers to deal with all EFTA members together—partly to stave off individual membership applications, partly to generate a larger and more uniform internal market. Second, the EES negotiations have concerned participation by the EFTA countries in the internal regulatory and legislative processes of the EC—not primarily trade and aid. Establishment of the EES would be designed to extend the five freedoms of the EC Treaty (free movement of goods, capital, and labor, the right of establishment, and the freedom to provide cross-border services) and their reciprocal obligations and regulatory structures to the EFTA countries. The EC and EFTA countries will also likely develop common policies in such areas as competition law, environmental protection, and worker safety. Although no formula has yet been found, the EFTA countries would, in principle, accept EC legislation in exchange for some form of participation in the internal decision-making processes of the EC. Should no such compromise be forthcoming, membership is widely perceived as the only alternative for most EFTA members, and discussions are increasingly moving in that direction, at least for Austria, Sweden, and Norway.

EC Membership will probably not be available for most, if not all, ex-Comecon countries for many years. The EC-EFTA negotiations is likely not a useful model for the more development-oriented EC-Eastern Europe association agreements. Nevertheless, both demonstrate what can be done to integrate a country into the internal market of the EC rather than into its external trade/aid regime. Both suggest the difficulty, even for a group of developed states, to resist the pull simply to apply legislation developed in Brussels. Both suggest the importance of seeing the EC from the inside, as a regulatory regime with an active industrial policy, rather than a free trade association. Both indicate what might be done to avoid consignment to the hinterland of LDC economic dependence and political isolation. Both demonstrate the permeability of the boundary between the internal and external market.

VI. CONCLUSION

East European countries face distinct alternatives in pursuing economic modernization and integration into the institutional and eco-

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nomic structures of Western Europe. Substantively, they confront two models of market democracy, that of the international trade system and that of the EC's internal market. These two models suggest quite different images of market democracy: an idealized system of private property and representative democracy, and a more modern technocratic scheme of public-private policy management. These models are not simply choices. They are arranged spatially and chronologically. Their separation is maintained by their association with the external and internal markets of the EC metropolis. They are unified by an association with natural progress towards maturity. These relations, in turn, are stabilized by the broader rhetoric of international rupture and renewal.

As a result, the policy issues facing Eastern Europe in its relations with the West are part of a broad cultural narrative. They are not simply paired ideological choices (free market or social engineering) or macro-social models (capitalism, socialism, thirdwayism). They are not simply the working out of pragmatic strategies within a zone of "realistic" possibility. They are also loosely organized in broad narratives about the normal and the deviant, the outmoded and the chic, the inside and the outside, and so forth.

As such they are unhappy alternatives. To be oriented to the international trade regime is to entrench Eastern and Central Europe as a new third world, a region of stagnant, often unstable and dependent economies. On the other hand, by acceding to the first world's internal market, the East may find itself stuck in a technocratic, political, and legislative machinery incompatible with aspirations for a more classic democratic governance and market freedom.

These are, however, also alternatives which participate in a wide narrative consensus. The EC and its new partners have all approached their new relations primarily through the lens of the international trade system in opposition or transition to the EC's internal market. This may have fueled talk about a common and interdependent European renewal. In both Brussels and the East, we find a focus on trade, aid, and investment rather than on microeconomic restructuring and legislative or administrative harmonization. Both sides sever the restructuring of East European society from the construction of the Western internal market. Both sides accept an inevitable chronology of macro and microeconomic policy. Ironically perhaps, we find on both sides a continuity with programs and initiatives that predated the revolutionary changes that purportedly inspired them.

We should be clear that this consensus obscures a significant imbalance. Both East and West are advocating a model of government

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and law for the East which Western states do not implement in their own internal market. The new market ideology in the East—with its naive reversals of Marxist rhetoric—shares a great deal with the laissez-faire visions of the international trade regime and very little with the modern technocratic functionalism of the internal market. So long as the distinction between the internal and external markets seems so natural and the trade regime remains structured by visions of normality and abnormality, this sort of imbalance will seem reasonable—even unavoidable.

But these assumptions might be questioned. We might imagine an association strategy oriented towards the image of the internal market rather than that of international trade which would unsettle the apparent solidity of the boundary between the internal and external European markets. Such a strategy might be built on the basis of other existing patterns of relationship in Europe—indeed, on the basis of the EC's own internal policy. Such an approach would confront the shallow consensus now pervading discussions about a common European architecture by focusing on the differences between the implications of that consensus for the regimes of various participating countries. Most importantly, it might open discussions of both international European architectures and Eastern internal reforms to the transformations in our ideas about markets and democracy which have been wrought in the domestic cultures of most modern economies. Such a strategy would challenge the image of Eastern primitivism; both blocs, after all, have participated in the development of technocratic modernism.

It has often seemed that developing countries could address internal market policy issues only after trade and aid schemes have been successful, just as a modern regulatory regime for industrial planning has only been thought likely to seem legitimate after a more traditional liberal political democracy has been established. As a result, international political discussions about new architectures proceed on two tracks. There is a sophisticated track for developed societies, which are understood to need advanced forms of governmental regulatory cooperation to manage their interdependence, and there is a less sophisticated track for determining which participants fall into this category and which do not. The prescriptions for those found abnormal are quite different—they must build a form of government and economy at home and interact with the first world in an international economic and political regime animated by ideas about property and the appropriate distinctions between public and private which have long since been abandoned by the more sophisticated players both at home and in their relations with one another. My suggestion is that

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these tracks be brought together, and that both sides experience the shock of the new.

In short, the East faces alternatives in relating to the EC which raise questions of both substance and timing. That narrative structures framing policy debate about these alternatives locate the East outside and before both the market and the modern. The market often described in the East and characteristic of the international trade regime—a market innocent of regulation, a government responsive to party formations—seems most familiar as a nineteenth-century Western idealization. It has disappeared from the internal market regime inside the European Communities. As a result, there seems some danger that the East will arrive at the station marked "market democracy" just after the train has departed for "post-industrial society."

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