
Corporate Lawyers as an Infant Industry? Legal Market Access and Development Policy

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I. Introduction

In an effort to provide an appropriate tribute to his wonderful career, this study develops a set of themes that have been at the centre of Dave Trubek's work for decades, including development economics and the roles of law in developing countries,¹ the structure and regulation of legal professions,² debates over industrial policy and 'developmental states', old³ and new,⁴ and global governance.⁵ It is enthusiastically Trubekian in frame and aspiration, emphasising, as Dave has done throughout his career, the socio-legal study of the complex interplay between legal institutions, markets and governance.⁶ The subject of the essay, that national governments might offer protection and other kinds of support to their domestic legal professions as 'infant industries', may be a new one, but the work that Dave

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¹ DM Trubek, 'Law, Planning, and the Development of the Brazilian Capital Market: A Study of Law in Economic Change' (1971) *Yale Law School Studies in Law and Modernization*, Bulletin Nos 72–73; DM Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin Law Review* 1062.

² RL Nelson and DM Trubek, 'Arenas of Professionalism: The Professional Ideologies of Lawyers in Context' in RL Nelson, DM Trubek, and R Soloman (eds), *Lawyers Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca, Cornell University Press, 1992); DM Trubek, Y Dezalay, R Buchanan and JR Davies, 'Global Restructuring and the Law: Studies of Legal Fields and the Creation of Transnational Arenas' (1994) 44 *Case Western Law Review* 407, 408–10.

³ DM Trubek, 'Law, Planning, and the Development of the Brazilian Capital Market: A Study of Law in Economic Change' (n 1). Although he classifies Brazil as an intermediate rather than a developmental state, Peter Evans provides a helpful summary of Brazil's past developmentalist initiatives. See P Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton, Princeton University Press, 1995) 60–66.

⁴ David Trubek launched the LANDS research project to explore the changing use of law and regulation as a tool for economic and social policy in 2007. See University of Wisconsin Law School, 'Law and the New Developmental State' (LANDS) available at law.wisc.edu/gls/lands.html, providing a list of related research and publications.

⁵ See generally, DM Trubek and MP Cottrell, 'Robert Hudec and the Theory of International Law: The Law of Global Space' in C Thomas and JP Trachtman (eds), *Developing Countries in the WTO Legal Systems* (Oxford, Oxford University Press, 2009).

⁶ See generally, DM Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) 72 *Wisconsin Law Review* 720.

has been doing for decades provides an excellent framework through which to construct an initial analysis.

Lawyers have a well-rehearsed repertoire of public-interest arguments for limiting the supply of legal services providers in national contexts, usually focusing on the need for professional licensing standards to maintain quality for the protection of consumers and thus to legitimise the self-regulated legal profession.⁷ Sceptics rightly point to the anti-competitive, price-inflating nature of such restrictions, along with the self-serving nature of the lawyers' arguments, and ask whether the benefits of limiting access to the profession really outweigh resulting costs to consumers and society.⁸ The basic thrusts and parries of these arguments will be familiar to anyone who has thought about legal market regulation and access to legal services within national borders. If we transpose these arguments onto the international realm, we find counterparts in battles over access to national legal services markets by foreign lawyers or law firms and over the flow of legal services in international trade. Trade in legal services is a relatively recent addition to the universe of trade flows between nations. Yet as wider economic globalisation has transformed the provision of legal services into a global business, countries that are home to major international law firms have pressured others to open their legal services markets to foreign participants. Lawyers have, not surprisingly, sought to resist such pressure using the rhetoric of consumer protection and the maintenance of provider quality familiar from domestic debates over professional licensing.⁹ Faced with such arguments, proponents of legal market opening can readily invoke familiar critiques of legal market protectionism developed in domestic debates over professional licensing, and so the debates can proceed.

While legal market access battles will no doubt continue to take place on this familiar rhetorical terrain, they can also take place on a terrain grounded in international trade and development theory, the terrain of 'infant industry' industrial policy. Infant industry arguments also seek to use the public interest to justify protectionism, as well as subsidies, or other types of public support, for local market actors. Rather than invoking consumer protection, however, infant industry arguments focus on an importing society's interest in nurturing local providers of goods, or in this case services, that would otherwise be provided by foreigners absent public support. The costs to society of short-term support, the arguments go, will eventually be outweighed by the benefits society will reap from having national providers. A government's decision to engage in infant industry industrial policy thus presents itself as essentially an investment decision, and by its own logic asks to be judged by whether it results in a positive return.¹⁰

⁷ A Blumenthal, 'Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession' (1993) 3 *Kansas Journal of Law & Public Policy* 6, 6, 8.

⁸ See, eg RL Abel, *American Lawyers* (New York, Oxford University Press, 1989) 151–57, 458–59.

⁹ Given the international context, it is not surprising that these arguments are sometimes put in cultural terms. For example, Japan has argued that it needs protection against foreign law firms and lawyers participating in domestic litigation to maintain its traditional reluctance to litigate and to protect its legal culture from becoming overly litigious. ES Lee, 'Trade Barriers in Service/Investment Markets Erected by Korea and Japan' (2007) 32 *North Carolina Journal of International Law and Commercial Regulation* 451, 489.

¹⁰ This would be the case even if global welfare might be increased by the establishment of a new competitor in the global marketplace. Nurturing a permanently uncompetitive national industry solely to increase global competition could not be justified within the traditional infant industry logic, though infant industry policies that fail to produce positive return may in fact have this effect.

Although infant industry arguments may not be entirely new in international legal services debates, they seem to be of growing importance and sophistication. This essay seeks to contribute to that discussion by focusing only on that specific strain of the wider debate over legal market access, and by drawing on the long-standing debates in traditional international trade over the pros and cons, the costs and benefits, of infant industry policies. Following this introduction, Section II provides a basic outline of infant industry arguments in international trade, including the history of the idea, as well as an introduction to the terms of the debate. Section III then evaluates the provision of various types of corporate legal services through the lens of infant industry debates, including the special case of infant industry logic in discussions of ‘capacity building’ to engage in the provision of legal services related to international governance and international dispute settlement, primarily at the World Trade Organization (WTO). The conclusion, contained in Section IV, is that infant industry arguments probably have limited substantive validity in the legal services context, but the move to invoke the infant industry logic, with its explicit grounding in cost–benefit analysis, encourages a commendable level of rationality when compared to more traditional arguments against market opening. Traditional consumer protection arguments should also be based on a weighing of potential social costs against purported benefits,¹¹ but this has been rare in the purely domestic context, at least in the US,¹² and there is no apparent reason why the structure of consumer protection arguments would change just because the threatened competition comes from abroad instead of from home. The greatest virtue of infant industry arguments with respect to lawyers, therefore, may be that in their framing, and perhaps ultimate rejection, they encourage more rigorous analysis and debate.

II. Infant Industry Arguments: Pros, Cons and Caveats

Modern infant industry arguments can be traced to the writings of the economist Friedrich List in the early nineteenth century,¹³ though the term itself reportedly appears as early as the seventeenth century.¹⁴ Developed by List in response to the arguments for free trade in agricultural and manufactured goods put forth by classical economists, especially David Ricardo, infant industry arguments are an early and enduring example of economic development heterodoxy. Rather than leaving a nation’s productive structure to accidents of history and to the exogenous decisions of international market actors, infant industry advocates call on governments to take action restricting imports in, or otherwise supporting, the selected industry. Some infant industry programmes have been tied to inward-focused visions of import substitution industrialisation (ISI), in which the basic objective has been to replace imports with local production. Several possible economic development

¹¹ I thank my colleague Andy Coan for pointing this out.

¹² Abel, *American Lawyers* (n 8) 15–17.

¹³ J Viner, *International Trade and Economic Development* (Glencoe, Free Press, 1952) 58. The standard source for List’s infant industry arguments is his 1841 work, *Das Nationale System der Politischen Ökonomie*. See generally, F List, *The National System of Political Economy* (SS Lloyd (trans) London, Longmans, Green and Company, 1916).

¹⁴ Viner, *International Trade* *ibid*, 58.

justifications have been offered for such policies, including preserving hard currency, building domestic industries that provide upstream or downstream ‘linkages’ with other valued domestic industries,¹⁵ and building domestic industries that improve the country’s level of technological sophistication.¹⁶ Inward-focused infant industry arguments can also have more purely political justifications, such as a perceived need to build domestic capacity in steel production for national defence. Infant industry policies can also be tied to outward-oriented developmental policies designed to strategically alter an economy’s comparative advantage, and in such cases the goal is that the infant industry eventually grows up to become an exporter of its goods, or in the case of lawyers, its legal services. This latter approach is now generally associated with the export-oriented ‘developmental states’ of Northeast Asia,¹⁷ while the former, more autarchic approach is associated with Latin American ISI.¹⁸

The above distinction between autarchic and export-oriented infant industry policies is important when evaluating possible justifications for treating legal services as an infant industry, as the plausibility of attaining these alternative goals may be quite different for different countries’ legal professions. Whether or not it is a good idea, autarchy in legal services would be a much more attainable goal for most countries than the goal of becoming exporters of legal services, given the current dominance of English and the Anglo-American style of lawyering in the international sphere. The dominance of Anglo-American lawyering can be seen in the overwhelming dominance of US and UK law firms in the global legal services market,¹⁹ and in the fact that Common law, English-speaking India has been the first great provider of internationally out-sourced legal services.²⁰

Whether autarchic or export-oriented in aspiration, however, infant industry arguments depend on a belief that short-term costs imposed on local taxpayers, or more typically on local consumers forced to purchase from the protected local industry, will eventually be outweighed by greater benefits to the society once the infant industry has matured. Translated into the world of legal services provision, the costs imposed upon legal services consumers forced to hire protected local firms must be a reasonable price to pay for the greater benefits that society will reap once the local firms have achieved a more competitive status. This highlights the fact that infant industry policies can operate as wealth transfers from one specific group within an economy to another, therefore, one should also ask whether the transferors will ever be made whole, even if society as a whole eventually

¹⁵ AO Hirschman, *The Strategy of Economic Development* (New Haven, Yale University Press, 1958) 98–119.

¹⁶ J Cypher and J Dietz, *The Process of Economic Development* (London, Routledge, 2004) 248–308.

¹⁷ See, eg A Kohli, ‘Where Do High-Growth Political Economies Come From? The Japanese Lineage of Korea’s ‘Developmental State’ in M Woo-Cumings (ed), *The Developmental State* (New York, Cornell University Press, 1999).

¹⁸ See generally, T Lothian, ‘The Democratized Market Economy in Latin America (and Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy’ (1995) 28 *Cornell International Law Journal* 167, 170–75.

¹⁹ For example, in the *American Lawyer* magazine’s 2012 Global 100 ranking of law firms only three of the top 100 firms are not based in Anglo-American jurisdictions. The three that are not Anglo-American rank 73rd, 83rd, and 89th. See ‘The 2012 Global 100: The Complete Report’ *The American Lawyer* (28 September 2012) available at www.americanlawyer.com/PubArticleTAL.jsp?id=1202571230283. The same magazine’s new ranking of law firms by market valuation presents an even starker picture, with only one of the most valuable 97 firms, Loyens & Loeff, in 85th place, being from outside the Anglo-American sphere. *Ibid.*

²⁰ See generally, T Brennan, ‘The Original Outsourcers Head Out’ *The Asian Lawyer* (5 December 2012), discussing the founders of Pangea3 LLC, the Mumbai and New York based pioneer in the ‘legal process outsourcing’ (LPO) industry).

benefits.²¹ If, for example, forcing local businesses to hire them is part of an infant industry policy for domestic law firms, one should consider both the overall impact on society and whether the local businesses would ever be compensated by society for their contribution to the local lawyers.

A full accounting of an infant industry policy for corporate lawyers would be beyond the scope of an exploratory essay like this, and in any case would be unique for every economy. The goal of this brief essay, therefore, is to bring some general ideas about infant industry policies into the discussion of legal services, and given the continuing influence of his Brazilian experiences on Dave's career, it is fitting that the essay turns to 1950s Brazil and the Getulio Vargas Foundation (FGV) for inspiration. In a series of lectures offered at FGV in 1951, Jacob Viner, a leading international trade economist of the day, offered a defence of the classical free-trade position with respect to developing countries.²² In so doing, Viner argued against the newly-emerging heterodox position of Raul Prebisch and others, who had begun to caution developing countries against relying upon agricultural or natural resources exports for development.²³ The work of Prebisch and his contemporary, Hans Singer, provided important support for a broader movement in development economics that included infant industry ISI policies, as well as the heterodox intellectual framework known as 'dependency theory'.²⁴ Although much has been written in the subsequent six decades debating the merits of ISI as compared to more free-market approaches to international trade and development, Viner's 1951 observations are of special interest to this essay because they came early in the modern revival of infant industry thinking. For that reason, they address fundamental issues that should be considered in weighing the extension of infant industry arguments to a field in which the debates have been on quite different terms.²⁵

While very sceptical of Prebisch's larger argument,²⁶ Viner was perhaps surprisingly sympathetic to the infant industry concept *in theory*, proposing that the main objections have been on 'historical and practical grounds'.²⁷ Expressing this caution over the difficulty of putting infant industry ideas into effective practice, Viner identified the following concerns:

- the arbitrary or irrational selection of industries to favour;
- the spreading of infant industry protection to general protectionism;
- that the protected infant industry tends to languish rather than develop in the absence of competition;
- that although the temporary protection should be removed either when the infant industry no longer needs it, or when it has proved incapable of development even with protection, experience shows that protection tends to become permanent; and

²¹ Such horizontal, intra-industry wealth transfers are in addition to the more general role of infant industry policies as investments intended to transfer wealth from the present to the future. I am indebted to my colleague Anuj Desai for this insight.

²² See generally, Viner, *International Trade and Economic Development* (n 13).

²³ *Ibid.*, 60–62; see also J Toye and R Toye, 'The Origins and Interpretation of the Prebisch-Singer Thesis' (2003) 35 *History of Political Economy* 437.

²⁴ See generally, J Cypher and J Dietz, *The Process of Economic Development*, 2nd edn (London, Routledge, 2004) 158–88.

²⁵ See generally, n 1 above.

²⁶ Viner, *International Trade and Economic Development* (n 13) 60–73.

²⁷ *Ibid.*, 58.

- that even temporary protection to rationally-selected industries tends not to outweigh the costs imposed on the rest of society, which is forced to deal with the protected industry.²⁸

Viner also suggested that a society wishing to aid an infant industry would probably be advised to offer the industry a subsidy rather than protection, as the costs of subsidies are more transparent and easier to calculate than the costs of protection, and can also be distributed across society as a whole through taxation and government expenditure, rather than burdening only the domestic consumers forced to trade with the protected infant.²⁹ Finally, Viner cautioned that by suppressing demand, the artificially high prices that result from protection may stifle the growth of the very industry that is in need of development, whereas subsidies would be more likely to encourage growth in the targeted industry.³⁰

III. Legal Services as an Infant Industry

Although Viner expressed his concerns primarily with respect to trade in manufactured goods, the traditional focus of infant industry and other industrial policy advocates,³¹ the concerns equally apply in the context of infant industry protection for domestic lawyers. So far, infant industry arguments in the legal services context have focused on the market for legal services related to international business, which has been, and is likely to remain, the contested ground in legal market access debates. Foreign law firms, whether from developed countries or from other developing countries, have so far not sought to penetrate domestic legal markets to provide general legal services. Infant industry arguments in the legal services market context also seem focused on developing countries and their policies toward local law firms, though the boundaries of developed versus developing in legal services may be fluid, and may not track other indicators of development. Given the current global dominance of Anglo-American firms and law practice style, discussed above, it may actually be a small group of countries who are natural exporters of legal services, and a surprisingly large number of countries in which local firms might be expected to seek infant industry support.

Turning then to the first of Viner's concerns, would rational policy analysis lead a country to identify its business lawyers as a promising infant industry, or should one expect to look elsewhere for the actual motives? Few countries are likely to become successful exporters of legal services, so in most cases the benefit side of the cost-benefit calculus would have to be based on benefits derived from autarchic import substitution. From a purely theoretical standpoint, it would surely be possible to construct scenarios in which the benefits of infant industry support for domestic business lawyers would eventually outweigh the costs. Yet the admittedly brief research conducted for this essay produced no evidence that countries

²⁸ Viner, *International Trade and Economic Development* (n 13) 59.

²⁹ *Ibid.*, 59–60.

³⁰ *Ibid.*, 60.

³¹ Congress of the United States, Congressional Budget Office, *The Industrial Policy Debate* (1983).

have ever, in fact, conducted such analysis.³² This raises the concern that infant industry rationales are being deployed primarily *ex post facto*, to explain and justify policies taken on other grounds. While *ex post facto* rationales are not necessarily invalid, in a world in which trade in services is growing and is the subject of international negotiation over market access, the costs to countries of protecting specific services markets will only grow.³³ Governments considering protection or other infant industry support for local law firms must therefore consider whether the benefits outweigh the costs. In many societies business lawyers will constitute the kind of focused interest group that historically has been able to obtain trade protection or other government support even at the expense of the wider society.

Turning to Viner's second concern, could infant industry protection offered to business lawyers be limited to them alone, or would it tend to support protectionism with respect to other areas, perhaps in professional services such as accounting, insurance, financial services and so on? Infant industry arguments are certainly made by those industries when faced with foreign competition,³⁴ though it is unclear if protection for lawyers plays any role in buttressing infant industry arguments by other service providers. In a world where countries negotiate multi- and bi-laterally over access to many professional services markets,³⁵ a developing country might find a stronger infant industry rationale for supporting a sector other than legal services, in which case it might be rational for it to trade off access to legal services in order to keep the other market closed. Likewise, a government wanting to give up protection of a different services market might find it helpful to have given up protection of legal services, so that the industry resisting liberalisation could not demand the same protection as the lawyers. Such considerations would depend very much on the circumstances faced by individual governments, but it is not unreasonable to accept Viner's underlying point that a decision to provide infant industry support to a sector such as the legal profession could hinder a government's efforts to achieve an optimal trade regime.

With respect to Viner's third objection, that perversely, protection will tend to reduce the impetus to innovate and develop that would be necessary for the infant industry policy to actually work, protection of legal services would seem to raise real dangers. Trubek's research of the European Union's legal market, for example, shows how competition from American law firms in Europe forced European countries to eradicate inefficient legal traditions.³⁶ Because European countries traditionally limited the practice of law to a small academic and social elite, there were not enough specialised lawyers to deal with the legal

³² Unfortunately, this is hardly surprising. A recent *New York Times* investigation of tax incentives granted to private business by state, county and city governments in the US concluded that an accurate accounting of the effectiveness of the incentives was impossible. Many of the government agencies did not know the value of all their awards, and they rarely kept track of the number of jobs created as a result of the public support. See L Story, 'As Companies Seek Tax Deals, Governments Pay High Price' *New York Times* (1 December 2012).

³³ The primary vehicle for trade in services negotiations is the WTO's General Agreement on Trade in Services (GATS), though bilateral trade agreements can also address services. Countries have chosen both approaches to negotiating access to legal services markets.

³⁴ TG Berg, 'Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States' (1987) 28 *Harvard International Law Journal* 1, 17–22.

³⁵ Twelve major categories of services were identified for coverage within the GATS regime, the so-called W/120 list, one of which is 'other services not included elsewhere'. United Nations Department of Economic and Social Affairs Statistics Division, *Manual on Statistics of International Trade in Services* (Series M No 86, 2010) 14.

³⁶ Trubek, Dezalay, Buchanan and Davies, 'Global Restructuring and the Law' (n 2) 429–31, 435–36.

complexities resulting from EU integration, and American law firms outperformed them.³⁷ Europe was forced to loosen its barriers to entry of the legal market to stay competitive,³⁸ and competition with American firms also pushed the creation of the first large multinational European firms.³⁹ Similarly, in Japan, the influx of foreign law firms drove the creation of the first large Japanese law firms, even though traditionally most lawyers were sole practitioners.⁴⁰

These dangers relate to Viner's fourth objection, which is that protection intended to be strategic and temporary tends to become permanent even when it should be ended. In the case of legal services, if the infant industry support comes in the form of excluding foreign firms from the market, it is easy to imagine lawyers finding ways to manipulate the levers of state power, specifically the regulation of their profession, so as to perpetuate the protection. As Viner suggested, this should be expected whether the infant industry support has succeeded and the local law firms no longer need the protection, or whether it has failed and they will need support forever. Likely, the rational cost-benefit analysis at the core of infant industry logic—never lawyers' primary argument for limiting access to the profession—will be overwhelmed by more traditional arguments based on consumer protection and the sanctity of the local legal culture. If local firms actually need protection because they are less efficient providers, then confirming the protection may allow them to continue on their course without reforming. Because the industry has been protected from global competition, it will not develop the skills necessary to compete globally.⁴¹ On the other hand, if local firms do use the protection to improve their performance, as envisioned by infant industry supporters, then the result may be that they have simply increased the rents they obtain from their monopoly, which they will work diligently to maintain.⁴²

Viner's concern that infant industry protections will become permanent and outlive their usefulness is especially problematic in the legal services context because lawyers argue for barriers to the legal market not only to protect the developing local market but also to uphold the quality of legal services. Barriers to legal services markets exist in developed countries as well requiring attorneys to obtain certain qualifications before practising locally. In the infant industry context, these quality of services arguments will compound with the infant industry competition arguments and there is arguably a heightened risk that the protections will persist after they are no longer needed.⁴³

Viner's fifth objection is essentially a simple cost-benefit projection that even if a country manages to avoid the other dangers he raised, the costs incurred in protecting an infant industry are likely to outweigh the benefits. In order to make this analysis more tractable in the context of legal market access, it will be helpful to consider in some detail various

³⁷ Ibid, 429–31.

³⁸ Ibid.

³⁹ Ibid, 435–36.

⁴⁰ R Hamano, 'The Turn Toward Law: The Emergence of Corporate Law Firms in Japan' in WP Alford (ed), *Raising the Bar: The Emerging Legal Profession in East Asia* (Cambridge MA, Harvard University Press, 2007) 171–77.

⁴¹ RL Abel, 'Transnational Law Practice' (1994) 44 *Case Western Law Review* 737, 748.

⁴² The concern that the industrial policy bureaucracy will be captured by the supported industry, and therefore not administer support programmes in an economically-rational way, has long been at the core of industrial policy and 'developmental state' debates.

⁴³ See generally, PD Paton, 'Legal Services and the GATS: Norms as Barriers to Trade' (2003) 9 *New England Journal of International Comparative Law* 361 (discussing the interaction between law as a profession and law as a business in the GATS context).

aspects of global legal practice, and different forms that infant industry protection might take. The following breakdown of practice areas and flows may be helpful for this exercise, as different types of practice seem to face different consequences.

Domestic litigation in the protected market. Domestic litigation may be the most commonly-protected market. Even if domestic law allows foreign law firms to establish local offices, the foreign lawyers they bring with them will not be licensed to litigate locally, and it is a common rule that local lawyers working for foreign firms give up the right to appear in court.⁴⁴ The protection is thus provided through the limitation placed on the local hirers' practices, but who does that protection benefit, and is that protection likely to help the development of the local infant legal industry? That protection will impose costs on all local litigation clients who might benefit from the organisational strengths of international firms in litigation, because while those clients will be able to hire an international firm for litigation support that falls short of the practice of local law, they will also be forced to hire a local firm to appear in court and to otherwise conduct the litigation. While this will clearly benefit the small group of local lawyers who own the domestic firms, it is less clear that it will benefit the local lawyers who are mere employees of those firms. The employee lawyers capable of engaging in international practice would presumably benefit from a fully-competitive hiring market, in which the presence of fully-functioning foreign firms would exert upward pressure on their wages, and in which they could gain valuable experience by fully practising law with international firms. With the domestically-oriented local lawyers largely unaffected by these hiring rules, the real beneficiaries of the protection would seem to be the owner/employer lawyers, whose numbers in any jurisdiction will depend upon how local practices are organised. The key question will then be whether they are likely to invest the rents gained from this protection in ways that will allow them to eventually compete with the international firms on a level playing field, the infant industry ideal. They may decide to do so but they may instead invest such rents in perpetuating the protective system, as Viner had cautioned.

Domestic regulatory work in the protected market. These markets are somewhat harder to define, and therefore to protect, than domestic litigation markets. However, some jurisdictions do define work obtaining regulatory permissions and approvals as the practice of law, and limit that practice to local lawyers employed by local firms.⁴⁵ Local clients might or might not be interested in hiring a foreign firm to assist in such work, but in-bound foreign investors certainly have been. In many jurisdictions foreign investors will, as a matter of course, have retained an international law firm to advise on the local legal and regulatory environment, so requiring those investors to also retain a local law firm to assist with regulatory matters will generally raise the cost of investing. If the local offices of international firms were allowed to hire local lawyers to deliver the regulatory approval and compliance documents, as well as to advise on their terms and perhaps to actually prepare them, then local law firms would feel additional competitive pressure to improve their services and lower their costs, and the regulatory costs to foreign investors would decrease. Leaving the protection in place forces foreign investment projects to be run at least in part through local law firms, and if the infant industry logic holds, at some point the local firms may

⁴⁴ See, eg MA Cohen, 'International Law Firms in China: Market Access and Ethical Risks' (2012) 80 *Fordham Law Review* 2569, 2570.

⁴⁵ This is the case in China, for example.

be able to capture the work entirely. But again, who would benefit from that? The primary beneficiaries might be only the local owner/employer lawyers, as other local lawyers would arguably benefit from an open market in which they would be able to do the same work for either an international or a local firm, whichever offered the most attractive terms. To the extent that countries are in a competition to attract foreign investment, raising the regulatory costs of foreign investments in order to benefit the owners of local law firms would seem to be a questionable choice.

Outgoing work for business clients from the protected market. A third type of practice that should be considered would not involve the practice of law in the protected market, except under a very broad definition, but would involve advice to local clients on legal matters outside the jurisdiction. Countries can try to steer this work to local law firms by preventing international firms from establishing any kind of presence in the jurisdiction, but the more sophisticated local clients will simply deal directly with law firms abroad, if they choose to. They may choose to involve a local firm to help advise on overseas legal matters, but it would be hard to force them to do so as part of an infant industry strategy, especially if they are truly private, rather than state-owned. Perhaps ironically, the best way for the local government to assist domestic law firms to gain expertise in that type of work might be to allow them to affiliate with international firms in ways that would allow them to participate in international transactions engaged in by local clients. Such affiliations seem to attract protectionist criticism, however, as they grant international firms some level of access to local markets at the same time as they allow internationally-oriented local firms access to international markets and international expertise. From an infant industry perspective, however, it might be that encouraging local-international affiliations would be a reasonable strategy, especially with respect to out-bound work for local clients. Local firms would presumably gain access to the technologies of law practice that allow international firms to dominate the global marketplace, while at the same time they would be under some pressure to perform at a high level themselves, as the affiliations would be voluntary, rather than mandatory. On the cost side, local businesses might pay more for legal services obtained from an affiliation, but certainly the costs would be lower than if the government tried to mandate use of local firms only, which, as noted above, might be very difficult to enforce anyway.

Capacity Building for Participation in International Governance. Probably the area of law practice that has received the most sustained attention through the infant industry lens, implicitly if not explicitly, involves the provision of legal services to governments engaged in WTO litigation and other international activities related to trade and investment.⁴⁶ Focusing only on WTO litigation, legal capacity to handle such disputes could be built within the government itself, within local private law firms, or both. For example, a government might decide to hire private counsel to handle WTO litigation on its behalf but still feel that it should invest in the training of its own staff in order to better choose and oversee its outside counsel. If the government did not also privilege local firms when hiring outside counsel, then the government's attempts at capacity-building through investment in training its own officials would not fit the classic understanding of an infant industry policy. True infant industry capacity building would involve the government trying to build

⁴⁶ See generally, GC Shaffer and R Meléndez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge, Cambridge University Press, 2010).

international dispute settlement capacity in local law firms by sending work to them, and while a government trying to grow WTO capacity in local law firms would probably also invest in building its own internal capacity, neither necessarily follows from the other.

Capacity building arguments are sometimes put in terms of building the capacity of local law firms to represent their governments in WTO matters so that those governments can reduce their dependence on foreign firms.⁴⁷ The support for local firms would come in the form of the subsidy provided by non-competitive government procurement, rather than through protectionism imposing costs on local private consumers. In keeping with Viner's preference for subsidies over protection, whatever the economic cost to society of nurturing local law firms in this way, it would be relatively widely-spread across society as it would consist of the higher cost, or decreased performance, that the government would incur in order to build the infant industry.⁴⁸ Brazil's efforts in this regard have received the most scholarly attention,⁴⁹ but efforts by China,⁵⁰ and others are receiving attention as well,⁵¹ so we should soon have a better overall picture.

Perhaps the most interesting virtue of viewing such WTO legal-capacity-building efforts through an infant industry lens has to do with determining what is in the national public interest when trade disputes are involved. Taking WTO disputes over anti-dumping measures as an example, there is a well-developed line of argument suggesting that countries as a whole generally lose when their governments impose anti-dumping duties on imports.⁵² Indeed, it is probably accurate to say that this is the mainstream position within the economics and the trade law academies, based on a view that the benefit to the importing society's consumers from lower-priced imports will generally outweigh the harm to the local producer.⁵³ In this view, national anti-dumping measures are generally bad policy which governments undertake because they are overly responsive to motivated and well-organised minorities, the importers or their employees, and thus subvert the genuine public interest. The same arguments are made against the imposition of countervailing duties on the import of goods produced with the benefit of subsidies from the exporter's government. 'An economist is right to claim that, if foreign governments subsidise their exports, this is simply marvellous for his own country, which then gets cheaper goods and thus should unilaterally maintain a policy of free trade.'⁵⁴ In the context of WTO dispute settlement, this means that the country as a whole loses again if its government 'wins' a WTO challenge to such duties, though the government itself will want to win at the WTO level so that it can continue servicing its special interest constituency.

⁴⁷ See generally, M Papa, 'Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?' (2012) 3 *Journal of International Dispute Settlement* 19–20.

⁴⁸ Providing infant industry support via subsidising local competitors rather than through limiting imports was suggested by Viner, *International Trade and Economic Development* (n 13).

⁴⁹ See generally, GC Shaffer, MR Sanchez and B Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' (2008) 41 *Cornell Law Journal* 383.

⁵⁰ See generally, Manjiao Chi, 'China's Participation in WTO Dispute Settlement Over the Past Decade: Experiences and Impacts' (2012) 15 *Journal of International Economic Law* 29.

⁵¹ Papa, 'Emerging Powers in International Dispute Settlement' (n 47).

⁵² See, eg I Van Bael, 'Lessons for the EEC: More Transparency, Less Discretion, and At Last, a Debate?' in JH Jackson and EA Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor, The University of Michigan Press, 1989) 405–408.

⁵³ See, eg ML Hurabiell, 'Protectionism Versus Free Trade: Implementing the GATT Antidumping Agreement in the United States' (1995) 16 *University of Pennsylvania Journal of International Business* 567, 600–602.

⁵⁴ J Bhagwati, *Protectionism* (Cambridge MA, MIT Press, 1989) 35.

One does not need to accept this critique in its entirety in order to accept that it will sometimes be valid. How, then, should a country evaluate the public interest when investing in international trade law capacity, and where should resources be put? Fully accepting the criticisms of the preceding paragraph might lead one to conclude that nurturing a local private bar of trade remedy lawyers would be a decidedly mixed prospect. Returning to the case of anti-dumping duties, local exporters subject to anti-dumping measures imposed by other countries would probably benefit if there were local firms with global trade law expertise, and those benefits to the local exporters would not seem to be offset by any harm to other segments of society. However, that same local trade remedy bar would also certainly be interested in representing local producers seeking anti-dumping relief from their government, implicating the critique outlined in the preceding paragraph. Turning back to local exporters, additional qualified trade law firms in the market should lead to competition and lower prices, furthering the public interest. With respect to local producers seeking protection, however, more law firms in the market might well contribute to more questionable cases being brought, as prices drop and competition among the firms increases. Along the same lines, to the extent the local trade remedy bar is used by local producers seeking protection, then the more effective those lawyers are, the more the public interest actually suffers.

Moreover, if the goal of WTO legal-capacity-building is to guarantee that WTO dispute resolution benefits developing nations as much as developed nations, protectionist policies in the legal services market will be insufficient. Shaffer argues that the US and EU's distinct advantage also comes from their use of private–public partnerships in bringing their grievances at the WTO.⁵⁵ By collaborating with private actors such as business groups, the US and EU gain access to funds for hiring lawyers, insider market information, and other political resources such as campaign support, lobbying and public information campaigns.⁵⁶ In return, however, these private actors pressure their governments to assert their interests instead of necessarily furthering the nation's broader interests.⁵⁷ The government of India, for example, has struggled to build a culture of private–public relationships with lawyers and private industry in international dispute settlement.⁵⁸ This situation has, however, stifled India's impact at the WTO because private actors such as sophisticated businessmen could compensate where the government lacks capacity.⁵⁹ More importantly, US and EU influence over the WTO means they can directly impact the development of WTO law in their favour.⁶⁰ Perhaps it follows that if legal capacity building could allow developing nations to become more involved in WTO disputes, those countries could also attempt to impact the development of WTO law. Perhaps any economic loss from protectionist trade policies would be outweighed by the potential for more beneficial top-down

⁵⁵ GC Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington DC, Brookings Institution Press, 2003) 5–6.

⁵⁶ *Ibid.*, 13–16.

⁵⁷ *Ibid.*, 150, 155.

⁵⁸ Papa, 'Emerging Powers in International Dispute Settlement' (n 47). See also, M Papa, 'Emerging India in Investment Arbitration: The Role of Lawyers in Regime Participation' (2012), Workshop Discussion Paper, from Globalization, Lawyers, and Emerging Economies, Workshop on India Related Research, Harvard Law School, 13–14 April 2012.

⁵⁹ Papa, 'Emerging Powers in International Dispute Settlement' (n 47).

⁶⁰ Shaffer, *Defending Interests* (n 55) 156–58.

trade policies. At the same time, countries like India might benefit from a competitive push to change their social norms to become more efficient.

Building trade-law capacity within the government itself raises somewhat different issues, but there is a basic symmetry if one thinks of capacity primarily in terms of raising the odds of winning trade disputes. As was discussed above, a very standard view of trade remedy law would hold that 'winning' at the WTO might not actually further the national interest if it meant that one's own anti-dumping duties would remain in place, while winning at the WTO might further the national interest if it meant that a foreign country would remove the protection that it had imposed. Given the standard picture of government over-responsiveness to private interests seeking protection, perhaps the capacity that governments need most is the capacity to effectively screen potential cases so that wins are likely to actually further the public interest.⁶¹ In developing that capacity it may be helpful to the government to have local lawyers work in private practice to gain expertise in trade remedy law and in WTO dispute settlement, but it might be more efficient to have the local lawyers gain that expertise working for foreign firms rather than supporting the development of a local trade remedies bar, with the potential downsides that could entail.

IV. Conclusion

This paper is based on a very simple premise: people are beginning to talk about domestic legal professions as infant industries that governments should support for economic reasons, and it is therefore important to take a careful look at the costs and the benefits, the winners and the losers, that might follow from such policies. In that exercise, the practical concerns about infant industry protectionism raised by Jacob Viner in his lectures at Brazil's FGV six decades ago provide a useful starting point. Addressing those concerns, it appears far from self-evident that protectionism or other infant industry support for local law firms providing internationally-related legal services will be good public policy. Lawyers are service providers, and if infant industry protection forces the consumers of those services to pay more, and/or receive worse service, than they would if markets were open, then it is important to consider those costs in some detail. This would be true not only with respect to private sector consumption, but also when the consumer is the government. On the other hand, while it may be that infant industry support for law firms would not be good public policy, even attempting the called-for analysis would facilitate a higher level of rigour than is usually seen when restrictive regulation is based on the public interest in consumer protection, the traditional measure. Properly conducting that analysis would not be easy, but would require a powerful intellect and boundless energy. This is clearly a job for Dave Trubek.

⁶¹ The aspiration for such state capacity in anti-dumping administration, which would require both expertise and considerable autonomy from local interest groups, is the same aspiration that has been at the core of the 'developmental state' literature for decades. See, J Ohnesorge, 'States, Industrial Policies & Anti-Dumping Enforcement in Japan, South Korea and Taiwan' (1996-97) 3 *Buffalo Journal of International Law* 289.

