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Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?

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Abstract

Increasingly, scholars have articulated the challenge of global economic governance in constitutional terms. The World Trade Organization (WTO) is often painted as an incipient global economic constitution. Its legitimacy would be enhanced, some contend, by transforming the WTO treaty system into a federal construct. But the application of the language of constitutionalism to the WTO is likely to exacerbate the fears of the “discontents” of globalization that the international institutions of economic governance are not democratically accountable to anyone. We argue that the legitimacy of the multilateral trading order requires greater democratic contestability. The notion of global subsidiarity would be a more appropriate model for the WTO than that of a “federal” constitution. This notion incorporates three basic principles: institutional sensitivity, political inclusiveness, and top-down empowerment.

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Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?

Introduction

Increasingly, scholars and even some politicians have articulated the challenge of global economic governance in constitutional terms. While the General Agreement on Tariffs and Trade (GATT) lent itself to being viewed as a structure to facilitate mutually self-interested bargains between sovereign states, its successor, the World Trade Organization (WTO), is often claimed to be performing constitutional functions or to be an incipient global economic constitution. Its legitimacy will be enhanced, some contend, by transforming the WTO treaty system into a federal construct. Descriptively, the proponents of a constitutional understanding of the WTO point to the new dispute settlement mechanism. This binding, juridically rigorous mechanism provides for virtually automatic authorization of countermeasures in the case of noncompliance. Proponents also point to the explicit role that such tribunals play in balancing competing public values (economic efficiency versus health and safety goals, for instance) in the scrutiny of domestic regulation. (Cottier, 2000) Normatively, the proponents of a constitutional understanding of the WTO aspire to greater legal certainty for private economic rights against the risk of depredation of powerful domestic interest groups. There is, however, a minority position that sees the ultimate implication of WTO constitutionalism as the transformation of the WTO into a progressive global economic regulator, bringing into the WTO social rights, environmental and developmental concerns, realizing distributive justice at the global level, so as to make the WTO a transnational economic constitution for *all* the people. (Shell, 1995)

The connection between constitutionalism and legitimacy is a complex one. In the short run, at least, the application of the language of constitutionalism to WTO is likely to exaggerate the hopes of globalization's friends that economic liberalism can acquire the legitimacy of higher law—irreversible, irresistible, and comprehensive. At the same time, it is likely to exacerbate the fears of the “discontents” of globalization that the international institutions of economic

governance have become a supranational Behemoth, not democratically accountable to anyone. (Cottier, 2000)

The proposed adoption of a “constitutional” mode of thinking for the WTO system has important practical or policy implications. The first, and central implication is what is loosely called “direct effect”—constitutional norms are rights, and therefore the WTO system should evolve to a point where individuals rather than states can rely on directly enforceable WTO law. Second, constitutional law is generally regarded as higher law, with a presumption against the change of basic structures. Constitutionalizing discourse tends to serve a “door closing” function against claims that the WTO has gone too far (in areas such as food safety and intellectual property rights, for example) and may need to be scaled back to give greater scope for democracy at the national level. Third, by characterizing the WTO treaty system as a constitution, one transforms its character from that of a complex, messy negotiated bargain of diverse rules, principles, and norms into a single structure. Individual elements become less easily contestable. The WTO becomes reified as something one is either for or against. We argue that the legitimacy of the multilateral trading order requires greater democratic contestability and a more inclusive view of those who are entitled to influence the shape of the system. “Constitutionalization” of the WTO will only exacerbate the legitimacy crisis or constrain appropriate responses to it.

We address several variants of the constitutional view of the WTO. The first is the economic liberalism or (as some would say) libertarian model. The WTO constitutional function is viewed in terms of a pre-commitment by which politicians tie their hands in such a manner as to resist the depredation of economic rights by domestic interest groups that demand rent-conferring interventionist and protectionist government. While it inspires a number of scholars, this model is articulated most explicitly by Ernst-Ulrich Petersmann (Petersmann 1986: 405-39). It is informed by an (economic liberal) reading of European integration according to which activist judicial review, on the basis of broad or expandable treaty commitments to economic mobility, has led to constitutionalization of the European Union, largely irrespective of the development of institutions of governance in the EU. Constitutionalism is viewed as the means of placing law, or the rule of law, above politics. WTO constitutionalism is a solution to the limits of domestic constitutionalism in achieving such a result with respect to *economic* rights – limits that are attributed to the capture of domestic politics. In short, a constitutionalized WTO attempts to

place economic freedom above politics. For us, however, just the reverse is necessary to address the legitimacy crisis of the multilateral trading order. More politics is needed, not less.

The second variant of WTO constitutionalism is more philosophically or ideologically modest. It identifies constitutionalism with the adjudication of competing values in WTO dispute settlement. (Cottier 2000) Trade-offs between, say, freer trade and protection of human health and safety are to be struck in light of the WTO “constitution,” the principles of trade liberalization taken as constitutional norms, rather than in the framework of international law. Economic freedom is understood as the *telos* of the WTO. Competing human values enter into the picture as narrow and carefully policed exceptions or limits to the overall constitutional project of freer trade. Finally, there is a progressive view of WTO constitutionalism that sees the WTO has transforming itself into a socially just global economic government, by assimilating social and environmental governance into its institutions.

Here also, we argue that just the opposite response is needed if the legitimacy of the World Trade Organization is to be preserved and enhanced. We endorse the approach taken by the WTO Appellate Body in the interpretation of WTO rules that engage competing or divergent human values. Instead of presupposing that the treaty text is animated by a constitutional *telos* of freer trade or looking primarily within the WTO for the relevant structural principles, we emphasize the importance of non-WTO institutions and norms in treaty interpretation that represent values other than free or freer trade. Thus we advocate a kind of diffuse externalization of what Thomas Cottier identifies as the constitutional dimension. (Cottier 2000)

The European Union can be an inspiration in this matter if we were to apply, at the global level, a kind of subsidiarity adapted to the structure of the international system. This includes “horizontal” subsidiarity—deference to non-WTO international institutions and norms. The dispute settlement organs of the World Trade Organization must display considerable deference to substantive domestic regulatory choices as well as defer to other international regimes that represent and articulate such values whether with respect to health, labor standards, the environment, or human rights. To the extent this occurs, the WTO need not have the kind of legitimacy that it would require if it were to act as the final authority in the prioritization of diverse human and societal values.

The article is divided into three main parts. The first explains why the traditional conception of the GATT as a mutually self-interested bargain between states has become problematic as a basis for the WTO's legitimacy. The second part critiques "constitutional" approaches to the WTO. These approaches misapply the EU experience and draw the wrong lessons for WTO governance. Finally, we sketch out some alternative, non-constitutional approaches to reviving the multilateral trading system as an interstate bargain. These approaches seek to vindicate the original ideals of the GATT founders in a vastly changed world through three strategies for WTO governance: institutional sensitivity, political inclusiveness, and top-down empowerment. We believe that this is the most promising route to recover the spirit of "embedded liberalism" which characterized the post-war era and underpins the success of European integration.

From Interstate Bargaining to Constitutionalism: Embedded Liberalism in Disrepair

Of all the postwar economic institutions, the multilateral trading order seems to be the one most amenable to explanation and justification in terms of "cooperation under anarchy" (Keohane 1984; Oye 1985; and Axelrod 1980). Other multilateral institutions (the World Bank, the International Monetary Fund, and specialized agencies of the United Nations) appear as projections of the U.S. pro-interventionist, post-New Deal constitutional order (Slaughter 1998). The GATT, however, was born from the failure of an ambitious project for a global trade regulatory agency, the International Trade Organization (ITO). At the start it was little more than a bare-bones structure for progressive negotiated reduction of tariffs on a reciprocal basis among sovereign states—subject to most-favored-nation and national treatment rules. The story of how the GATT evolved beyond its modest beginnings has often been told.

The Underlying Assumptions of Embedded Liberalism

The theory of comparative advantage suggests that unilateral free trade is normally the first-best policy for every country. Yet asymmetric distributive consequences internationally and domestically, combined with the lack of adequate compensatory mechanisms in either sphere,

leads to resistance to liberalization and protectionist pressures by certain types of economic actors. The postwar GATT system can be seen as a set of commitments not to resort to protectionist measures in response to such pressures, which is only sustainable if predicated on the assumption that a wide range of alternative policy responses is available and legitimate. This includes the recognition that adjustment pressures might be such that, at least in the short term, some scope for recourse to trade-restrictive, discriminatory policy instruments might be needed.

Thus there was no requirement in the GATT to eliminate tariffs at any given rate or pace. Allowance was made for temporary, balance-of-payments-based import restrictions (Articles XII-XV), for safeguards in response to the injury to domestic industries from sudden surges of imports (Article XIX), and for negotiated rebalancing of concessions (Article XXVIII). The National Treatment obligation, Article III, was a means of preventing member states from instituting discriminatory domestic policies that would distort competition between domestic and imported products (in other words, cheat on the negotiated bargain), not a mechanism for liberalization *per se*. At the same time, the dispute settlement practice developed out of the general language in Article XXIII of the 1947 GATT. It identified instances of cheating on the trade liberalization bargain, thereby sustaining member states' confidence that defection from the cooperative equilibrium could be clearly and rapidly ascertained and appropriately sanctioned by allowing withdrawal of concessions. Furthermore, even discriminatory domestic policies might be permitted if they did not entail *arbitrary* or *unjustified* discrimination and could be linked, more or less tightly, to superior public policy goals such as the protection of human life or health, the conservation of exhaustible natural resources, or the protection of public morals (Article XX). Such a form of multilateralism molded by domestic requirements, rather than the other way around, resulted in what John Ruggie has aptly called "embedded liberalism."¹

The Embedded Liberalism Bargain under Stress

The embedded liberalism bargain came under sustained stress in the 1970s as the gold standard collapsed and with it the structure for managed macroeconomic adjustment foreseen by the Bretton Woods system. The 1970s' recession (stagflation) and mounting intellectual as well as

practical challenges to the Keynesian consensus led to microeconomic interventions and trade restrictions—“voluntary” export restraints negotiated under threat of unilateral action—of dubious legality under the GATT.² For various reasons, the safety valves for adjustment written explicitly into the agreement did not prove to have the appropriate kind of flexibility to deal with the political economy of adjustment in the 1970s (Treblicock, Chandler and Howse 1990).

As for the domestic microeconomic interventions, especially subsidies but also technical regulations, they challenged the stability of the GATT's nondiscrimination norm as a means of distinguishing normal legitimate domestic policies from cheating on the trade liberalization bargain (Tarullo 1987). By the end of the 1970s it was evident that the postwar multilateral trade liberalization needed fine-tuning in order to sustain a cooperative equilibrium. The problem, at least for the United States, was no longer that the rules of the game did not ensure adequate scope for domestic adjustment. In fact, the normative basis for interventionist adjustment policies was put in question by the moral *laissez-faire* outlook of the ascendant political right, abetted by widely accepted “public choice” accounts of interventionism as the payment of rents to concentrated, entrenched constituencies.

Beyond the Border: Economic Liberal Ideology and the New Negotiating Agenda

The focus then shifted from trade measures to the inherent worth of interventionism and from liberalization bargains under diffuse reciprocity to competition between policy norms. The multilateral rules of the game had enabled Germany and Japan, America's war-time enemies, to compete successfully in the U.S. market for industrial products; they had also enabled the newly industrializing countries to compete successfully in highly labor-intensive industries such as textiles. America faced many barriers worldwide to exploiting its apparent comparative advantage in knowledge-intensive industries and services. Intellectual property was largely unprotected in many countries. Competition in network service industries, such as telecommunications and financial services, was severely restricted; in many industries byzantine and archaic regulatory requirements existed. Often a business presence in the other country was

necessary, and American firms faced severe foreign investment restrictions. These disparate non-tariff barriers had to be eliminated. (Drake and Nicolaidis 1992)

This new agenda became the core of the Uruguay Round Agreements, concluded in 1993, but it would prove a greater threat to the sustainability of the multilateral trading system than any of the adjustment pressures of the 1970s. The new WTO rules, while clearly enhancing market access for some, have much more ambiguous welfare effects, both domestic and global, than the traditional GATT rules constraining tariffs, quotas, and discriminatory domestic regulations. Take the case of intellectual property protection. For developing countries in particular, it is easy to imagine how the gains in terms of incentives to efficient innovation from enhanced patent protection will be far outweighed by the welfare losses to consumers deprived of affordable generic pharmaceuticals. Some countries gain from increased patent protection and some lose; aggregate welfare may increase or decrease. (Deardorff 1990)

The WTO rules in the areas negotiated in the Uruguay Round contain a balance of rights and obligations that, when interpreted carefully, still permit a great deal of regulatory diversity. There is a non-constitutional, or non-constitutionalizing, way of applying these rules: they can be applied within the framework of general international law and not in light of a *telos* of economic liberalism as implied by the constitutional concept of the WTO. However, it is also true that the spirit in which the rules were made at the time reflected over-enthusiasm for economic liberal ideology, not mere free trade, as the basic economic objective of the system. This explains why the new system could easily appear to create higher law rather than simply treaty law.³

The developing countries did, formally, sign on to the new system. Why did they do so, if it was not unquestionably welfare enhancing? First, due to the debt crisis in the 1980s, many of these countries had been required to engage in unilateral trade and microeconomic policy reform as a condition for IMF support for debt rescheduling. Second, there was the notion that while developing countries might “lose” from some of the agreements, they gained from others, such as commitments to agricultural and textiles trade liberalization. Linkage politics in the Uruguay Round may even have convinced their leaders that the overall package was in their interest since there was little way to tell. What if it turns out that gains (say from textiles or agricultural trade liberalization) are proving elusive for certain countries, while costs (say from implementing

obligations under the General Agreement on Trade in Services) are proving greater than expected? The bargain becomes highly unstable.

“Trade and ...”: The Left Strikes Back with its Own Beyond-the-Border Agenda

Two developments in the last decade contributed significantly to the challenge to “embedded liberalism,” as its meaning became subverted to underpin a multilateral order apparently hostile to social non-economic values. At the beginning of the 1990s, GATT dispute settlement panels had to examine certain kinds of measures that did not fit within the normal, postwar model of domestic policy interventionism yet did not resemble old-style protectionism either.⁴ Two GATT panels had to decide the legality of a U.S. trade embargo against tuna fished in a manner that killed dolphins at high rates. Because they extended a domestic scheme to imports, the measures in question did not arguably constitute discrimination against imports. Yet the scope for domestic policy intervention that attached to the post war “embedded liberalism” bargain did not necessarily encompass actions of this nature (actions to influence behavior or at least address various noncommercial consequences of behavior) outside the boundaries of the intervening state. Sorting out how to deal with such measures within the embedded liberalism bargain while preserving the centrality and coherence of the nondiscrimination norm was not an insuperable intellectual challenge.⁵ Unlike the panels in the *Tuna/Dolphin* cases, the Appellate Body of the WTO in *Shrimp/Turtle* case accepted the view that such measures could be justified under Article XX of the GATT, subject to the conditions of the “chapeau” of Article XX, in particular that they not be *applied* in such a way as to constitute arbitrary or unjustified discrimination. But the GATT panels in *Tuna/Dolphin* were not up to the challenge and instead read into the GATT various kinds of limitations on such measures that would exclude them entirely from the legitimate scope for domestic policy intervention. To many, the panels had blown up what they had been trying to preserve—the notion of trade liberalization as consistent with deep regulatory diversity, accommodating a full range of non-economic public values.

A second set of developments—fallout from the debt crisis of the 1980s—also put pressure on the “embedded liberalism” bargain. Many developing countries removed or modified restrictions

on foreign investment and other domestic policies that were disincentives to attracting foreign capital, either because of IMF conditionality or because attracting new equity investment from abroad seemed the only plausible means of financing economic growth. Fears of “social dumping” by developing countries, and, as a consequence, fears of a “race to the bottom” among domestic laws, became prominent in the developed world. The developed countries would not be able to sustain high environmental and labor standards, or rates of taxation needed to finance the redistributive policies of the welfare state, if they had to compete with developing countries for the location of capital investment. The empirical evidence for the “race to the bottom” has been highly contested among economists: yet this did not make such fears go away (Bhagwati and Hudec 1996). Whatever its analytical merits, the “race to the bottom” gave a new, non-protectionist foundation to traditional “level-playing-field” concerns about fair trade. It put in question the sustainability of the legitimate policy interventionism that was the domestic side of the “embedded liberalism” bargain. Furthermore, the “race to the bottom” conjured up images of the kind of beggar-thy-neighbor competition that the international side of the embedded liberalism bargain was aimed at constraining.

In this context, the new social movements protesting in Seattle were not necessarily contradicting themselves when they called for both global standards in certain areas (environment, labor) and the protection of local standards in others (food, culture, intellectual property). Both sets of demands reflected unease at the increasingly “dis-embedded” character of the international liberal order, fears that either lack of international minimum standards or imposition of foreign standards threatened the sustainability of the domestic social contract under conditions of globalization. The stability of the bargain that underpinned the postwar model of embedded liberalism had been subverted by the combination in the last two decades of domestic ideological change, economic forces, and international policy prescriptions. The bargain needed to be revisited.

Responses to the Legitimacy Crisis: The Fallacy of Constitutionalism

To many, the WTO in its present form constrains some domestic policies too tightly while not constraining others tightly enough. As a response to such criticisms, no one has provided a

persuasive overarching rationale to explain the choice for embodying intellectual property rights in a trade agreement but not labor rights, for instance. It is not surprising, under these circumstances, that a constitutional route to the legitimization of WTO rules and institutions would prove attractive. Especially to those well accustomed to the “madhouse” of contemporary trade politics and less accustomed to the complexities of constitutional politics, this option may seem to offer greater stability.

The “Libertarian Constitutional” Alternative

If the World Trade Organization can be understood as a charter of economic rights, conferring enforceable claims on nongovernmental actors, then balancing the welfare effects of its rules on different groups and different countries over time seems unnecessary. The complex welfare effects of beyond-the-border trade rules need not create significant challenges for democratic legitimacy, nor even be the subject of explicit democratic deliberation. Constitutionalism is often said to be about principle not policy, rights not interests. In its libertarian version it is about individual economic rights. Thus according to Ernst-Ulrich Petersmann, “the time has come to recognize that human rights law offers WTO rules moral, constitutional and democratic legitimacy that may be more important for parliamentary ratification of future WTO Agreements than the traditional economic and utilitarian justifications” (Petersmann 2000, p. 12). When a WTO dispute settlement panel invalidates an environmental protection scheme, the panel can be understood, not as replacing the policy balancing of domestic democratic institutions with its own policy balancing (environmental benefits *versus* trade costs and benefits), but rather as enforcing a higher legal norm with which *all* domestic policy balancing must be consistent (Dunoff 1999). WTO members must protect intellectual property rights, for example, not because doing so necessarily maximizes global or domestic welfare (in many cases it may be welfare reducing for a given polity) but because these are private rights with a moral foundation independent of predicted welfare effects. In this view, the WTO, with its binding system of dispute settlement, already provides far more effective protection for individual rights than do the human rights organs of the UN institutions (Petersmann 2000: 16).

Why would states agree to the protection of individual rights at the international level, when in many cases they are not recognized in their own domestic constitutions? Kant saw a transnational constitution as possible only once the members of the juridical union had themselves adopted domestic liberal republican constitutions (Bull 1966; Wight 1987; Hurrell 1990; and Reiss 1970). Petersmann suggests there are forms of hands-tying or pre-commitment that are not possible at the domestic level but can be effective at the international level. A government acting in the public interest may make effective pre-commitments at the international level that tie its hands; these pre-commitments impose a new set of costs (retaliation from trading partners, in particular) on giving in to rent-seeking demands for protection (Petersmann 2000: 8-9). This may seem to beg the question of how the constituencies that will lose once the government ties its hands would permit hands-tying in the first place. Here the nature of international trade negotiations provides an answer: the prospective benefits from reciprocal liberalization bring new constituencies that have an interest in increased access to foreign markets, and the government can depend on these new constituencies to counterbalance the impact of constituencies seeking rents from interventionist government policies. Thus negotiated trade liberalization provides opportunities for the protection of economic rights against interest group deprecation that is not available within the domestic political process.

In our view this approach underestimates the conditions under which hand-tying can be made legitimate in the WTO context. Jon Elster has recently reconsidered the complexities of understanding constitutional arrangements in terms of such pre-commitments since “in politics, people never try to bind themselves, only to bind others” (Elster 2000: ix). What Petersmann characterizes as the pre-commitment of a public-interest-motivated government to tie its own hands in the future is really a commitment to tie the hands of its political opponents and the groups they represent should they win a democratic victory. As Elster describes, at the level of domestic constitution-making, an important hedge against the antidemocratic feature of hands-tying is to require extraordinary levels of democratic consent in the first place to the rules that will tie the hands of future governments. Examples include referenda, super-majority votes, and elected constitutional assemblies. But judging hand-tying through WTO law against this standard puts into high relief the questionable democratic *bona fides* of WTO rules. Domestic deliberation on these rules is often perfunctory and constrained by information and agency costs. This process produces a mass of general and often ambiguous rules. Their effects cannot easily be debated

intelligently *ex ante* in national legislatures, and they must be accepted or rejected as a single package (Benvenisti 1999; and Bronckers 1999: 547-66).

Of course, in the embedded liberalism view, the GATT itself could be understood as hand-tying. But the same democratic difficulties did not arise. The rules could be rightly understood as providing sufficient leeway for adjustment policy, and regulatory diversity generally, so that the domestic policy sphere could address the claims of all constituencies through non-trade measures. Liberals such as Petersmann are consistent: they are confident that economic rights reflect the public interest because they believe legitimate public goals can be achieved adequately and most *efficiently* in a manner that does not violate these rights. If the government intervenes in a protectionist manner or excessively interferes with these rights, this is because of public choice considerations. Ultimately, this is little more than “dis-embedded liberalism” in pseudo-Kantian dress. This approach may have had merit in the crusade against border measures, but it cannot easily be applied to the new rules about intellectual property, food safety, and so forth. Yet, it is above all these new rules that call for a “constitutional” justification.

Furthermore, Petersmann claims that “the dynamic functions of human rights and fundamental citizen rights have prompted many courts (notably in Europe) to adopt functional and teleological interpretations that have progressively extended individual freedoms across frontiers and beyond more narrow interpretations. The jurisprudence of the European Court of Justice, on the free movement of goods, services, persons, capital and payments, illustrates the legal, political and economic importance of individual rights and of their judicial protection for international economic integration” (Petersmann, 2000: 12). But Petersmann fails to draw the right lessons from the experience of the European Union (EU). Economic rights have not been justified on their own merit but framed by the Court as a byproduct of the pursuit of a “common good,” a single market in Europe. If the teleology needs to be collective goals rather than individual wants in the EU context (in order to justify encroachment of trade on competing collective values), on what basis are we led to believe that individual rights would do more for legitimacy at the global level? To the extent that there are inferred individual economic rights in the European Union, history has shown that they cannot occupy the field and benefit from a monopoly on constitutional status. When the European Court of Justice stated that it was balancing individual rights against the interests and policies of governments, it did so in the name of social rights not market access rights.⁶ Constitutionalization was made acceptable in

Europe by characteristics whose functional equivalent cannot be obtained at the WTO level, including the complex relationship between constitutional politics and the legislative politics of the European Parliament.

The European “Federal Vision” Alternative

A progressive internationalist version of WTO constitutionalism is offered by those who call for a shift from current international law to a new global law. Such a law would define and integrate a series of legitimate goals and entrust to the World Trade Organization the task of interpreting and enforcing these goals (Cottier: 2000). This vision appears more consistent with the actual constitutional trajectory of the European Union.⁷ The European example is obviously appealing to WTO constitutionalists. Although some of the founders of the European project, such as Jean Monnet and Robert Schumann, might have discerned at the outset a constitutional *telos*, European constitutionalism appears to have evolved organically. Joseph Weiler observes: “The Community was conceived as a legal order founded by international treaties negotiated by governments of States under international law and giving birth to an international organization. The constitutionalism thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court, a constitutional charter governed by a form of constitutional law” (Weiler 1991). Particularly persuasive to proponents of WTO constitutionalization is the European Court's transformation of the European treaty system into a constitutional order. In the Uruguay Round the membership of the GATT rejected the invitation to re-conceive the WTO system in constitutional terms (that is, as an autonomous level of governance), despite proposals to create regulatory powers in the WTO (Jackson 1990). Law-making in the WTO was to remain consensus-based interstate bargaining. No autonomous or independent law-making or regulating institution was created within the organization. On the other hand, the Uruguay Round produced a dispute settlement of a judicial sort, whose workings were made largely independent of the political choices of the membership. The European example suggests that a conventional treaty

regime, once endowed with a judicial mechanism for interpretation and enforcement, can be converted by degrees to a genuine constitutional order.

The European Union, however, possessed preconditions for these developments that the WTO lacks. The Treaty of Rome conferred upon European Community institutions the explicit power, in the case of regulations, to create law that was directly applicable in the member states (Article 189). Thus, already implicit in the treaty was an idea of *federal* governance. Further, in the European Union the legitimacy of judicial rulings on the application of domestic regulation had been predicated upon the existence and development in Europe of a political and administrative system for "compatibility assessment and enforcement." This includes the institutional foundations for mutual regulatory monitoring, which enabled the legislative and administrative process to take over from the judiciary in sensitive areas of economic integration (Nicolaidis 1996). Thus the ambitious interpretation of direct effect by the European Court of Justice helped establish the credentials of the Council and particularly the Commission as autonomous institutions of governance, encouraging them, at least indirectly, to deliver on the promise of a federal level of governance implicit in the Treaty of Rome. But such a promise does *not* exist in the WTO treaties. If the dispute settlement organs were to create such expectations among the citizens of member states, they would likely undermine the legitimacy of the WTO system as a whole, making it seem to promise something that it does not have the institutional structure to deliver.

Proponents of constitutionalization argue that this is precisely why an institutional structure appropriate to constitutional status needs to be created at the WTO, as trade liberalization "inherently starts to require, rely upon and develop positive integration" (Cottier 2000). WTO law allows for the *constraint* of policies that interfere with the trading rights of members, but there are no institutional arrangements that provide for the creation of new, agreed policies that can rebalance such trading rights with other legitimate policy objectives. Thus, even if not intended, a constitutionalizing reading of trading "rights" by the WTO dispute settlement organs would almost *necessarily* have a libertarian bias in the case of the WTO, while in the EU context it could be taken as a challenge and even a mandate to the Commission and the Council to perform their responsibilities for positive integration. Thus, while much less ideologically explicit and institutionally bold or ambitious than the Petersmann approach, the more modest

approach exemplified by Cottier may amount to much the same thing, with similar legitimacy problems.

It may be argued that other international fora exist for positive integration. Indeed, in the WTO's Sanitary and Phytosanitary Agreement (on food safety measures) and the Technical Barriers to Trade Agreement, there is a formal link between WTO rules and harmonization in some of those forums. However, they do not make up part of the purported constitutional order of the WTO and their existence precisely points to the need for greater openness to other institutions and integration of WTO law into the framework of international law and institutions as a whole, rather than a notion of normative self-sufficiency implied by the constitutional idea.

In response to these objections, constitutionalization driven by the judicial branch of the WTO could be recommended as a strategy for building pressure for treaty amendments (that is, the creation of an explicit level of federal governance at the WTO, with the regulatory powers required for positive integration). But this is unlikely to happen, and legitimacy difficulties would arise if it were to happen. We need only consider developments in the European Union when Europeans became conscious that the Community institutions were behaving as an autonomous federal order of governance, acting directly on the citizens of member states. These developments display the danger of, in Weiler's words, "adopting constitutional practices without any underlying legitimizing constitutionalism" (Alston and Weiler 1999: 298).⁸

In the European Union context, it is arguable that a direct democratic relationship between the federal level of governance and the individual exists through the institution of the European Parliament, or at least could exist if its powers were expanded. By contrast, the option of a directly elected WTO Parliament is far-fetched. Some have suggested that one could nevertheless create some kind of WTO assembly composed of national parliamentarians. One must take seriously, however, the critique that in Europe the European Parliament is not effective in creating a direct democratic relationship between the European level of governance and individual citizens because there is no European *demos* or democratic community whose considered will the Parliament can express. The communitarian Right explains that a democratic community must be constituted on the basis of a *Volk* (in other words, united by sub-political or pre-political bonds such as religion, race, and culture), a condition that does not or cannot hold at the European level. We are skeptical of this view for many reasons but rejecting it does not

dispense with the need to articulate the civic conditions of a democratic community based on a deliberative public sphere.⁹ At a minimum this requires, as Eric Stein recently articulated, “a certain community of a common good and common expectations of the people that bridge the cultural differences” (Stein 1999: 10). While some suggestions as to how to build such a community within Europe could be applied to the WTO—for instance, Weiler’s notion that the deliberations of the European institutions be put on the Internet—the two projects are still incommensurable (Alston and Weiler 1999: 351-52).

Finally, it may also be a condition of a democratic community that it shares equitably the benefits and burdens of the common community project, particularly as deeper integration reveals more sharply the skewed distribution of benefits and burdens. The evolution of the European Union in the 1980s and 1990s showed clearly how every bargain over economic liberalism needed to be accompanied by side payments to regions, groups, and countries in order to be sustainable. Member states of the European Union have become irreversibly committed to a pervasive program of European economic integration whose very success is now confronting national welfare states with the same kind of regulatory competition that had impeded the development of social policies in the American states (Sharpf, 1999). One cannot underestimate the distance between members of the WTO on the appropriate conception of distributive justice, if any, to govern the operations of the multilateral trading system. A large part of the membership is opposed to the WTO having any social agenda. These members also are not seriously seeking to address the issue in other international institutions. Unlike the old GATT or the European Union today, the WTO does not have decision-making structures that easily allow for variable geometry or what the Europeans call “integration at multiple speeds”. The divergence of values and circumstances among WTO members is, however, immensely greater than that among the member states of the European Union.

Non-Constitutional Means of Strengthening the WTO: A Model of Global Subsidiarity

Imposing the constitutionalist spirit on the World Trade Organization is not the answer. Rather, the spirit of embedded liberalism needs to be recovered and reinterpreted under the new conditions of globalization. Again inspiration can come from the European Union, not in its constitutional guise, but by incorporating some of the institutional and political features associated with subsidiarity. A model of global subsidiarity can help take into account the process dynamics and the kinds of conflicts present in the WTO and assumed away by constitutionalism. Such a model can suggest functional equivalents to traditional “safeguards” for the state while acknowledging other legitimate loci of governance than the state. A model of global subsidiarity would incorporate throughout the workings of the WTO three basic principles: institutional sensitivity, political inclusiveness, and top-down empowerment. We now examine each of them in turn.

Institutional Sensitivity

The core of the principle is the most straightforward understanding of subsidiarity, namely, sensitivity to the superior credentials that other institutions of governance may have in addressing the substantive value trade-offs entailed in domestic measures that the WTO dispute settlement organs are, necessarily, required to review from the perspective of WTO rules on trade (Howse 2000). This includes deference to the states themselves. But deference in WTO treaty interpretation needs to be expanded to issue-area regimes, such as international environmental, health, and labor regimes. At the same time, institutional sensitivity is not *mere* deference: it is consistent with strict scrutiny of national compliance with general trade regime norms such as nondiscrimination, and especially procedural norms such as transparency and due process in the formulation and implementation of policies. Here the WTO dispute settlement organs *are* the institutions of superior competence. Institutional sensitivity may also entail deference to the political processes of negotiations on the part of the judiciary, either with regard to bilateral disputes or multilateral rulemaking. An example is the *Kodak/Fuji* ruling. A WTO panel refused to invoke the general “non-violation nullification and impairment” clause in the GATT to stretch the existing regime to include restrictive business practices. This ruling

reflected sensitivity to the fact that extension of WTO rulemaking to the antitrust field is the subject of intense and controversial negotiation among members.

Provisions of the WTO agreements that are not easily understood as a straightforward “win-win” deal for all members need to be interpreted in a manner sensitive to the inadequacy of constitutional sources of legitimacy *within* the WTO system. Already the Appellate Body has substituted for such sources; it has placed WTO law in the framework of general international law –externalizing as it were the constitutional dimension. In the case of hormone-treated beef, it questioned an interpretation by the panel of a requirement that members (in this case the European Union) not take trade restrictive sanitary and phytosanitary measures unless they are “based on” international standards. The Appellate Body, in a more lenient interpretation of the implied obligations, upheld the crucial legitimizing role of the negotiated text, reflecting as it does a “delicate and carefully negotiated balance . . . between these shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.”¹⁰ Reference to interpretative norms of general public international law enhances the legitimacy of the dispute settlement organs in adjudicating competing values; as they are not specific to a regime that has traditionally privileged a single value, that of free trade.¹¹ In the *Shrimp/Turtle* case, assessing the alleged “unjust” or “arbitrary” nature of U.S. measures, the Appellate Body, did not simply invent its own limitation on unilateralism as a means of protecting the environmental commons, as had been done by the *Tuna/Dolphin* panels. Instead, it referred to a baseline in international environmental law that is contained in the Rio Declaration. Principle 12 of the Rio Declaration called for the avoidance of unilateral measures, preferring a solution based on consensus whenever possible. Thus the Appellate Body could find that the failure of the United States to negotiate seriously with the complainants to achieve a consensus-based solution, while having already negotiated successfully with other members, constituted “unjustified” discrimination.

However subtly the dispute settlement organs apply the tools of institutional sensitivity, the most delicate interpretation of such rules will not legitimately resolve the dispute in some cases. The *beef hormone* case is one example. Neither European noncompliance in this case nor U.S. insistence on retaliation signals a wavering commitment to a cooperative equilibrium in international trade. Rather, the trading system has not evolved to the point where all such disagreements can be legitimately resolved above (domestic) politics. In a case like this, the

outcome of noncompliance can be system supporting, avoiding inordinate pressure on rules that do not yet have an institutional context that would confer on them the legitimacy needed for supremacy. However, in order to forestall escalation, the parties, we suggest, should seek “no-fault” alternatives to retaliation, such as negotiated rebalancing of concessions.

Finally, the progress made on the directions for reform discussed earlier should strongly determine the speed with which further economic-liberalism-oriented negotiations are undertaken, whether in competition policy, domestic regulation in services, rules on intellectual property protection, or investment. This might mean a standstill on some significant new disciplines until the legitimating structures “catch up.” Time may bring about the necessary convergence in regulatory perspectives and new, legitimate institutions and norms of global governance. Progressive liberalization of trade need not come to a complete halt. There remain many traditional discriminatory trade barriers, including high tariff barriers in some sectors and various forms of agricultural protection, which would be clearly welfare enhancing to reduce or remove, where the classic model of a multilateral win-win bargain remains applicable. Moreover, states may legitimately choose to embark on exercises of regulatory cooperation and mutual recognition for the purpose of plurilateral liberalization, under the express conditions that they respect procedural obligations of openness and inclusiveness as outlined below.

Political Inclusiveness

The second guiding principle that can serve as a model for global subsidiarity is political inclusiveness. As Robert Keohane and Joseph Nye (2001) explain, international regimes, like the trade regime, were conceived as decomposable hierarchies governing specific issue areas, and they were designed to keep out the public as well as officials from branches of government other than the executive. The undoing of the embedded liberalism bargain suggests that this club paradigm needs to be adapted. At the national level the WTO can encourage greater inclusiveness in trade policymaking, thus strengthening indirect accountability. At the *supranational* level, it has become much harder to pretend that governments adequately represent all relevant interests in a given trade issue. There are epistemic communities,

transnational issue networks, and global advocacy NGOs that do not find any adequate point of entry at the domestic level. But for a long time this kind of inclusiveness is bound to fall short of the direct democratic relationship required for constitutionalization. As long as one understands the non-constitutional role of participatory opportunities in dispute settlement (*amicus* type intervention, right to attend hearings, and so on), one need not view such opportunities as the first step toward private rights of action. Similarly, participatory opportunities in political debates need not be understood as rights of representation. In addition, the WTO could enhance *transnational* inclusiveness in domestic rulemaking processes.¹² To this end, the Uruguay Round created contact points and inquiry points through which information about trade-relevant domestic regulations is disseminated by the WTO. More radically, obligations of inclusiveness could be applied in certain areas to earlier stages of law and regulation making, whereby a notice and comment procedure would be required where regulations have an effect on trading partners. The same applies to bilateral or plurilateral deals where inclusiveness calls for an emphasis on due process elements of WTO rules with regard to rights of access to negotiations conducted between small groups of countries as in the case of mutual recognition agreements (Nicolaidis 2000).

Top-Down Empowerment

Finally, the permissive interpretation of embedded liberalism needs to be supplemented by a proactive interpretation that lays some of the responsibility on the global community to help states fulfill the functions that the original bargain was meant to protect. Globalization has made it more complicated for at least some states to deliver the goods that citizens have come to expect of them, or at least for many states to recast or redesign the domestic social bargain to respond effectively to the new pressures and opportunities of globalization.¹³ It is because the state is still the greatest buffer against the effects of globalization that the more open countries are also the biggest welfare states (Rodrik 1997).

Here again, the WTO may be able to borrow from the EU experience. Fritz Scharpf and others have proposed implementing a “European law of unfair competition” (Scharpf 1999). Why not

create such a law at the global level to curb extreme instances of social or environmental dumping or of tax competition? And why not introduce differentiated applicability of such a law depending on the level of development or the type of actor? It may enhance the legitimacy of the system to require Multinational Corporations to apply minimum social standards across countries before this is required from local producers. Differentiated applicability, opt outs for very poor or underdeveloped countries, will ensure that such a regime does not amount to a surreptitious harmonization of domestic policies or imposition of a paradigm of global distributive equity, both of which require, to be legitimate, federal democratic governance. In other words, we can address the “race to the bottom” concern within the “embedded liberalism” model, whose major function is to provide constraints against beggar-thy-neighbor interstate competition. Some of the poorest countries in the world may not accept being so constrained, and perhaps quite justifiably, but there is little empirical evidence that the importance of such countries in global markets is such as to induce movement downward of regulatory standards elsewhere. On the other hand, a major player in the global marketplace that refused to be so constrained would bear a heavy burden of proof that it was not simply a free-rider (a hold-out from a bargain that would benefit everyone). Thus we could envisage a plurilateral code at the WTO on environmental and social dumping. Adherence to the code would not be a requirement of membership in the WTO. And existing benefits under the WTO system would not be conditioned on joining the code.

When the WTO envisages obligations with real financial consequences, it needs to support state efforts to adjust to those obligations. The European proposal for a WTO-World Bank-IMF institutional entity to examine the social clause issue should be seen in this context as a way of operationalizing the kind of regime linkages called for by political sensitivity. But again, we do not see such an initiative in constitutional terms but as a means of returning to the adjustment focus of the embedded liberalism bargain, while adapting the methods to very different global financial arrangements than those presupposed by the Bretton Woods system. Here, the role of financial assistance should not be viewed as based on conditionality –the imposition of a model of governance on the country concerned– but rather as underpinning the political economy of a world trading system still based for the foreseeable future on mutually beneficial interstate bargains.

Clearly, a principle of top-down empowerment should not amount to the allowance by international economic institutions to bypass local democratic institutions and political

processes. On the contrary, the WTO, in our view, could play a role in enhancing these domestic processes by helping create local political spaces for local actors or NGOs who might have been hitherto dis-empowered in their domestic context (women, children, unions, migrants), biasing in turn the representation of their country at the global level. Top-down empowerment, alongside indirect accountability, could go a long way in addressing the "global democratic deficit."

Conclusion

In this essay, we have addressed the challenge of recovering the spirit of embedded liberalism under conditions radically different from those at its inception. We have criticized the use of the European Union as a model for constitutionalizing the WTO, not to belabor the self-evident point that the two settings are too different to warrant a direct (albeit partial) transfer in mode of governance, but to highlight the critical political assumptions behind constitutionalization. If all of our proposals were fully realized, especially those on inclusiveness and deliberative democracy, we might bring about the very conditions for global democratic federalism that we have been arguing are structurally incompatible with the multilateral trading system. It might further be argued that, with enough subsidiarity of the right kind(s), some of the normative objections to a world state or government, based upon concerns about democratic deficits, the destruction of desirable human diversity and the risk of technocratic tyranny, might no longer have significant weight. Indeed, the guidelines that we have suggested could each in some way ultimately result in creating the conditions for constitutionalism in the long run. Integration of human rights and environment into WTO law as higher norms that shape and limit specific trade liberalization commitments would certainly give it more of the kind of normative structure consistent with constitutional status. There is force in these claims, and certainly we do not wish to foreclose the possibility that the conditions for a legitimate global federal government might eventually emerge. At that point one would need to reassess the whole problem of globalization and the political *sine ire ili studium*. Indeed, in terms of achieving some kind of overlapping consensus about the future direction of the multilateral trading system, this self-limiting feature of our critique of constitutionalization holds an advantage. To those already committed to the

ultimate goal of WTO constitutionalism, we would say that the best means of attaining it are non-constitutional ones—means that have legitimacy on their own terms within a revised understanding of the embedded liberalism bargain.

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Notes

¹ According to Ruggie. "The task of postwar institutional reconstruction . . . was . . . to devise a framework which would safeguard and even aid the quest for domestic stability without, at the same time, triggering mutually destructive external consequences that had plagued the interwar period. This was the essence of the embedded liberalism compromise: unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism. If this was the shared objective of postwar institutional reconstruction for the international economy, there remained enormous differences between countries over precisely what it meant and what sorts of policies and institutional arrangements, domestic and international, the objective necessitated or was compatible with. This was the stuff of the negotiations on the postwar international economic order." (Ruggie 1982)

² See Bhagwati (1988).

³ This is notwithstanding the fact that the texts lend themselves to a wide array of interpretations. See Nicolaidis and Trachtman in Sauvé and Stern (2000).

⁴ Tuna-Dolphin I: 1991. 51pp. DS21/R, Geneva: GATT, Tuna-Dolphin II: 1994. 63 pp. DS29/R, Geneva: GATT.

⁵ See Nicolaidis in Cottier, Mavroidis, and Blatter (2000).

⁶ European Court of Justice, 1989, Wachau.

⁷ We recognize that those advocating the European analogy do not deny the obvious point that the WTO is different from the EU. But their methodological premise relies on two types of arguments: 1) This is an evolutionary process: the WTO is simply at the point of the EU in the early 1960s; 2) Even while the two are different, many of their institutional and procedural features are functionally equivalent. On the first point, we argue that the EU was different at birth and thus cannot be emulated on path dependency grounds. On the second point, we show that such functional equivalence does not obtain.

⁸ Indeed, building on this formula, one could say that what the constitutional enthusiasts for the WTO draw from their reading of the European experience is that one can *create* the underlying legitimizing constitutionalism, which the WTO now needs, given the problems with the embedded liberalism/interstate bargaining model, only if one begins to assert boldly enough constitutional practices at the WTO.

⁹ See Choudhry and Lacorne (2001).

¹⁰ *EC—Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, supra n. 76, paragraph 177.

¹¹ Nichols (1996: 434-35) discusses some of the GATT-specific interpretive canons that evolved before the WTO adoption of customary interpretive rules in public international law: for instance exception to trade liberalizing

obligations is to be interpreted narrowly, and whenever an exception is at issue the party that seeks to invoke it bears the burden of proof that it meets the specific criteria for the exception. Clearly in both these cases, these canons assume the primacy of trade liberalization as a value in treaty interpretation. Perhaps partly in response to our criticisms, at least one member of the constitutionalist school, Thomas Cottier, has attempted to re-articulate WTO constitutional principles, which favor or pre-suppose a constitutional *telos* of trade liberalization, or the primacy of trade liberalization, as derivative from more general norms of international law. Thus, the principle of good faith in treaty interpretation is said to underpin a WTO principle of protection of legitimate expectations, which supports an expansive reading of trade liberalization commitments, but not an expansive reading of exceptions to them. But the modification of good faith in this way clearly shows that what is happening here is not the reading of the WTO Agreements in the light of public international law, but rather the reading of public international law through the 'constitutional' ethos of the trading system. (Cottier and Schefer 2000: 47-70).

¹² For a discussion in the EU context, see Nicolaidis and Howse (2001)..

¹³ See Hirst and Thompson (1999), in particular Chapter 6, "Can the Welfare State Survive Globalization?" which argues that globalization does not necessarily diminish the regulatory and redistributive capacities of the state, but puts pressure on the traditional social bargains that define how those capacities are exercised. Depending on the nature of the polity, it may be very difficult to recast such bargains to make the state effective again, under the new conditions of globalization, although there are some success stories, e.g. The Netherlands, that suggest this won't always be the case.