World Trade Review (2015), 14: 1, 135–153
© Douglas R. Nelson doi:10.1017/S1474745614000391

Prospects for Constitutionalization of the WTO

DOUGLAS R. NELSON*

Murphy Institute and Department of Economics Tulane University

Abstract: This paper seeks to evaluate the prospects for constitutional reform of the WTO by drawing on the broader literature on constitutionalization. In particular, it argues that constitutionalization implies a coherent civil society, linked to the constitutionalized entity via democratic politics. While there may be an emergent global civil society around international trade, there is no framework for democratic politics. Thus, constitutional reform seems problematic.

The creation of the World Trade Organization (WTO) was, in a very real sense, a gamble. The act of creating the WTO was constitutional. Although themselves governments in their own countries, the contracting parties of the GATT were a, narrowly construed, civil society. The narrowness was twofold: first, the membership was entirely made up of governments; and, second, the political order created referred to a single issue-area only (international trade and, even there, primarily border measures). Nonetheless, the governments (as represented by trade officials) were a genuine discursive community. The gamble lay in the fact that the constitution itself was massively incomplete. This is not incompleteness in the sense essential to the economic theory of contracts (i.e. unable to specify all contingencies), but rather a reflection of the political impossibility of specifying details essential to the operation of the institution as a constitutional order. The gamble lay in the hope/belief that the members would be able to fill in these gaps with the passage of time.[1] The risk, of course, was always that the members would

* Email: dnelson@tulane.edu

For many extensive comments prior to the workshop, I would like to thank Mike Finger, Craig Murphy, and Rorden Wilkinson. At the workshop, Steve Charnovitz made extensive insightful comments. The general discussion of the paper at the workshop was at a high level and I would like to thank all of the participants. The fact that this paper still falls short of what it might have been if I had been able to take all of those comments into account is my own fault.

This version of the paper has been edited to meet the space constraints of this special issue. That has involved excision of most footnotes and references. A complete version of the paper can be accessed from my webpage (www.tulane.edu/~dnelson) and from the EUI webpage at http://cadmus.eui.eu/bitstream/handle/1814/31455/RSCAS_2014_63%20(2).pdf?sequence=1

1 The model, in some sense, was the EU. The EU began life as a more narrowly construed economic agreement (the ECSC and the EEC), which accumulated members, responsibilities, and constitutional

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

not be able to cover the promissory note. The holes in the agreement are in places that members could not agree on in the first place. In addition, the manifest successes of the WTO, especially its dispute settlement mechanism, has made this problem even harder. The WTO is now seen as one of the few successes of (proto-) constitutionalism in response to globalization. As a result, it is now seen as a prime site for conflict over the future political order of a globalized world. Of course, this is evidence of the existence of an emergent global civil society.

The main argument of this paper is that the political and economic foundation of the world trading system was transformed by the rapid globalization in the last two decades of the twentieth century and by the creation of the WTO. Specifically, in a world where nation-states were politically and economically sovereign it made perfectly good sense to think of a collection of (the representatives of) those states as being a civil society relative to an issue like international trade. The very success of the post-War Liberal international economic arrangements produced a striking degree of economic integration of national economies, reducing economic sovereignty without producing anything like an equivalent advance in political integration. This took place in the context of domestic political systems in which, for better or worse, governments had accumulated increased obligations to produce such economic goals as stability, equity, and growth (this short list is obviously only illustrative). In this context, the creation of the WTO, in an effort to render the trading system more rule-based and less diplomacy- (or power-) based, could not rely on the same degree of claim to constitutional legitimacy. On the one hand, the same conditions that make multilateralism so important make identifying 'responsibility' for conditions with broad impact difficult (to impossible), and render it unlikely that communities of interest are constrained within national boundaries. That is, the striking degree of economic integration has meant that the relevant civil society is less obviously well-represented by nation-state representatives in a technocratic (rather than political) process. On the other hand, the expansion of membership, as well as the domain of applicability well beyond tariff cutting, with a claim that the rules should be to some non-trivial degree binding on its members, makes a constitutional claim that neither the process nor the resulting structure supports. The programme of filling in the missing constitutional structure in the WTO can be seen as a struggle for the soul of the WTO between the descendants of the eighteenth- and nineteenth-century liberals, who would like to constitutionally restrict governmental intervention in the market (in this case, the world market),

structure with the passage of time. This has led to a non-trivial subliterature specifically analyzing this comparison (see, e.g., the papers in De Búrca and Scott, 2001; Weiler, 2000). The difference is that, at every step, the European integration program was understood to be a political programme; where the GATT/WTO system was understood to be narrowly economic. Functionalist logic might see the latter accumulating members and trade-specific responsibilities, but it was never seen as a base from which a new, broader political order would grow.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

and the modern social democrats, who would like to expand the range of rights constitutionally treated.

This short paper seeks to characterize the challenges of the WTO moving forward through the lens of constitutionalization. I begin by asking about the link between globalization and interest in the WTO; the following section is a bit more explicit about what constitutionalization might mean/imply for the WTO; and the last substantive section considers two models of constitutionalization in the WTO (an 'English' model of court made law without a discrete constitutional moment; and an 'American' model of a constitutional convention).

The WTO and globalization: why do people care about the WTO?

Economic globalization implies tighter linkages between national economies. The relative importance of, to say nothing of the relationship among, international flows of goods and services, people and financial capital in constructing these tighter linkages is not completely clear, but the fact of increased linkage is unambiguous. With the probable exception of international migration, this globalization reflects, at least in part, the striking success of half a century of collective effort by the political representatives of the nation states that make up the international economy. Very broadly speaking (i.e. recognizing that the conclusion to follow requires a variety of well-known qualifications), these tighter linkages should imply greater aggregate welfare. That is, by allowing the allocation of factors and goods to better reflect the global distribution of tastes and incomes, global product should be increased and, at least potentially, so should global welfare. As a result, our usual interpretation, as economists, is to see this as a success of rational decision-making by far-sighted policy-makers acting in the interests of society as a whole.

And yet, the process of institutionalizing globalization is never smooth. The same governments that reflect this far-sighted, welfare-maximizing rationality seem to resist further liberalization at every step. Our usual first line of explanation is domestic distributive politics – the losers from the redistributive impacts of liberalization resist liberalizing policy change. After all, the gains from globalization are distributed unequally across countries and, perhaps more importantly from a practical point of view, within countries. While this is surely part of the explanation, another part has to do with erosion of the domestic policies that support liberalization. It is now widely recognized that stabilization of the national economy at a relatively low level of unemployment, along with relatively generous income support for the unemployed, plays a sizable role in permitting ongoing liberalization. Citizen support for globalization has never (and nowhere) been strong. However, as long as the economy is relatively stable, and the costs of unemployment relatively low, policies supporting liberalization can be depoliticized. Specifically, these policies can be removed from domestic politics as an essential part of, for example, foreign policy. Thus, the creation of the Bretton Woods/GATT international system was seen as supporting the Cold War policies

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

of a succession of post-war governments in the West. The elite consensus that globalization had supported strong macroeconomic performance provided support for continuation of the global liberalization programme even in the aftermath of the Cold War. In particular, the end of the Cold War coincided, loosely speaking, with the fading of the economic 'golden age' (Eichengreen, 2006), and protecting that programme required increasing elite effort. Similarly, as 'natural' rates of unemployment crept up, and government social programs were eroded, anti-globalization began to be seen as a natural language of social protest. Substantial research supports the claim that globalization makes independent macroeconomic policy, redistributive policy, and regulatory policy more difficult. One conclusion that can be drawn from this fact is that governments should simply eschew such policies and pursue increasingly rigorous market conforming policies. Unfortunately, since it is precisely these policies that had created the political support for globalization, an alternative conclusion was that retreat from globalization would produce a return to the golden age. With the onset of the 2007/8 financial crisis, this problem was thrown into high relief.

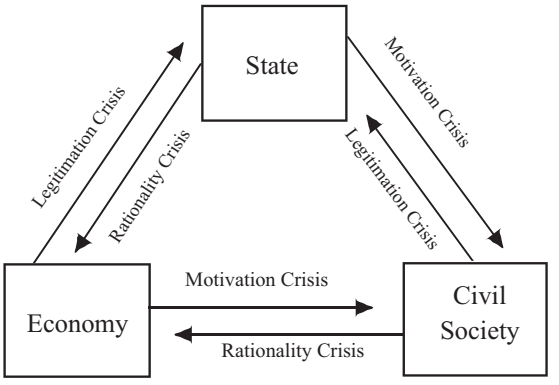
Proponents of constitutionalization of the WTO come from both of these tendencies – those that want to lock in relatively strong forms of liberalization and those that want to introduce increasingly stringent social concerns. In understanding how these positions relate to globalization and the WTO, it proves useful to recall the earlier debates about the relationship between democracy and capitalism. Faced with the global economic crisis of the 1930s, a number of analysts of the right (e.g. Schumpeter, 1942/1975) and the left (e.g. Polanyi, 1944/2001) concluded that capitalism and democracy were inconsistent with one another.[2] Schumpeter (p. 61) concluded that capitalism could not survive, while Polanyi (p. 138) argued that democracies would see oscillation (a 'double movement') between 'economic liberalism' and 'social protection'. The two poles of Polanyi's double movement are the same poles as those occupied by proponents of WTO constitutionalization.

In thinking about the tension between capitalism and democracy, it is useful to conceive of the Liberal political economy as containing three broad components: the state, the economy, and civil society. The first two require very little comment. The economy produces and distributes the material conditions on which the rest of society depends and, ideally, the Liberal economy is a realm of asocial competition among individuals. The state, the holder of a monopoly on the legitimate use of force in society, provides the legal conditions that make the economy possible. The Liberal civil society is a less common notion to economists, though absolutely essential if we are to think systematically about constitutionalization. The notion of

2 For an excellent survey of the large literature on this question, as well as a substantial amount of new research, see Rueschemeyer *et al.* (1992). The conclusion of this work is that, contra Polanyi and Schumpeter, as an empirical matter, capitalism and democracy are strongly co-varying, but that finding a compelling account for this fact is rather difficult.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

Figure 1. After Habermas



civil society has evolved from, at least, classical antiquity, meaning quite dramatically different things at different points in time (Ehrenberg, 1999). Where the economy is an asocial domain, civil society is fundamentally social. It is where the members of society work out, in public (through a variety forms of discourse), who they are as a group. Just as with the economy, the state provides the legal conditions that permit civil society to function, but civil society provides the moral (broadly construed) conditions under which the state operates. Similarly, the economy provides the material basis of civil society; but without the set of shared understandings that give meaning to people's lives, the economy would not function. When each of these is in equilibrium internally and each with the others, society is stable.

A distinctive aspect of capitalism as a social system (arguably *the* distinctive aspect) is the disembedding of the economy from civil society. That is, prior to the emergence of capitalism as a distinctive social system, there was no conception of economic relations as distinct from other social relations. The evolution of the economy as a domain of social life wherein abstract (i.e. separate from broader social and political commitments), individually rational calculation determines the behavior of individuals permitted a historically unprecedented explosion of creativity and wealth creation. However, to maintain a stable social order, this dynamic domain needed, somehow, to be balanced by the social integration occurring in the family and in civil society. As the economy became decreasingly embedded in the day-to-day social relations of society, the risk of social crisis rose.

Social breakdowns can occur as a result of disequilibrium/crisis in any of the three systems, for reasons completely internal to that system. Competition among state elites can produce a political crisis; the evolution of alternative views of personal identity can undermine social identity (e.g. struggles over racial and/or gender rights); and, of course, internal economic dynamics can produce economy-wide crisis. For the purposes of this paper, however, we are interested, instead, in crises that emerge as a result of the links between the three sub-systems. Loosely following Habermas (1975), we can identify such crises as in Figure 1. For

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

example, if either the state or civil society fails to provide the background conditions for effective functioning of the market, the economy will function less efficiently. A sufficiently great deterioration will produce an economic crisis. We will call this a 'rationality crisis' to reflect the fact that the source of the crisis is 'infection' of individualist/rational economic norms by broader social norms and political programs. Similarly, politicization of conflicts emerging from the economy or civil society, that were previously contained within the specified sub-system, which are sufficiently great to create a political crisis will be called a legitimation crisis. This reflects the fact that, if such conflicts cannot be contained, they call into question the capacity of a given government to govern. Finally, if state intervention, or the spillover of individualist norms, impoverishes the social construction of social identity, which gives meaning to day-to-day life to such a degree that people feel isolated (i.e. not members of a community), we have a motivation crisis. The label derives from the fact that sociologists and social psychologists refer to the condition of such social alienation as anomie.[3]

The evolution of the modern, democratic, capitalist political economy can be described in general, and in national specificity, in terms of the evolution of such crises and the institutional responses to them. The tension between democracy and capitalism emerges from the fact that where the former empowers the average ('median' in spatial voting theory) citizen, the latter, as well as producing aggregate wealth, produces substantial inequality. In particular, autonomous nationalization of markets, along with the attendant expansion of politicization of struggles between firms, and between factors of production, led governments increasingly to intervene in an attempt to restabilize the political economy. In the early stages of this history, the primary axis was the link between economy and the state. There was no widespread notion that the state had redistributive obligations, or even any responsibility for macroeconomic performance (especially unemployment). Depending on the state of pre-capitalist legal, political, and economic structures, and the particular forms of early capitalist crises, states adopted nationally distinctive responses to early capitalist economic crises – e.g. some emphasized stabilization through cartelization, others stabilization through antitrust. By the middle part of the twentieth century, however, mass mobilization for war had produced a dramatically more mobilized and politicized civil society. In addition, a sort of common sense Keynesianism implied that the demand for a governmental response to economic downturn, and the threat of unemployment, could be met by appropriate policy response. By the early 1960s, this version of 'modern capitalism' (Shonfield,

3 In addition to Tönnies' (1988) classic *Community and Society*, Robert Putnam's work on the link between social capital and democracy (Putnam *et al.*, 1993) and on the degradation of civil society (Putnam, 2000) is concerned with these issues. Putnam's work, especially *Bowling Alone*, can be seen as an archetypal example of economic norms infecting civil society, with the consequence being a motivation crisis. That is, citizens become decreasingly able to see themselves as a community and, thus, to engage in the discourses that provide context to economic and political life.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

1965) was widely believed to have beaten the problem of an inconsistency between capitalism and democracy. At a modest cost in inefficiency, a combination of counter-cyclical macroeconomic policy with a redistributive welfare state could reap the benefits of capitalist dynamism without the destabilization that comes from skewed income distribution and high unemployment risk. Embedded liberalism (Ruggie, 1982) was believed to have produced a 'golden age' (Eichengreen, 2006; Frieden, 2006). As Ruggie, Eichengreen, and Frieden all argue, there was a concerted attempt to create a Liberal international economic order consistent with the domestic order of embedded liberalism. This involved movement toward free trade, fixed exchange rates, and, initially, restrictions on international capital flows.

The stagflation of the 1970s, along with an alternative theory of the relationship between the state and the market in the form of monetarism, led to a reassessment of, first, the macroeconomic component of embedded liberalism, and then a more systematic attack on large-scale government intervention in the economy. The successes of deregulation and the Great Moderation further entrenched the political response to government intervention, while rapid globalization, especially of financial markets, put additional pressure on monetary, fiscal, and redistributive policy. Both supporters and opponents of this trend saw globalization as playing an important role in promoting liberalization of the domestic political economy.

Even before the 2007/8 crisis, for the first time since before the Great Depression, trade was becoming a focus of public politics. On the whole, this was episodic – e.g. the role of NAFTA in the 1992 presidential campaign of Ross Perot and the 1999 protests at the Seattle WTO ministerial meeting – and has still not generated sustained public politics on trade, but given the absence of any public trade politics of significance since the Reciprocal Trade Agreements Act of 1934, these sorts of events take on greater significance. In particular, even though opposition to international trade liberalization may not have developed a sustained popular following as a public political issue, it has become sufficiently risky that even strong supporters of domestic liberalization are finding the issue sufficiently risky that it can no longer be assumed that it can be treated as a technical issue, delinked from domestic politics. This is the context in which we need to consider constitutionalization of the WTO.

From the start, trade was very much part of the post-War Liberal order. Freeing international trade was seen to be a key element in reconstruction, at least as much because it was part of a capitalist order in a Cold War world as that it would be a handmaiden of growth (Gaddis, 2005). Domestically, however, proponents of trade needed to deal with active suspicion of trade liberalization on the part of citizens. Thus, the success of multilateral trade liberalization has relied primarily on depoliticization (Nelson, 1989). Associating trade policy with Cold War foreign policy protected the liberalization process during the key years of building the GATT. Especially with the passing of the Cold War, as long as trade was seen as a second-order issue in the context of a stable domestic economy, liberalization

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

could proceed as a technical, foreign policy issue. In addition to the broader macroeconomic and redistributive policies we have already mentioned, institutionalization of the 'no serious injury norm' via the administered protection mechanisms provided an additional layer of political protection to the multilateral liberalization process.

It is arguable that multilateral trade liberalization has been the most successful collective effort in international economic cooperation.[4] Over seven Rounds, the GATT process produced sizable drops in protection, began to impose discipline on antidumping and other non-tariff measures. Over this same period, world trade has consistently grown faster than world income, meaning that the share of trade in world income has risen. This success was crowned with the creation of the WTO in the 8th (Uruguay) Round. The executive function (the Secretariat) was already well-established, but by then had a more secure institutional foundation. The ministerial conference serves a quasi-(proto-) legislative function. It does not sit in continuous session and its rules (essentially unanimity for any business of significance) constrain it from actually doing much in the way of legislating. Even though the Round that created the WTO took nearly nine years and produced its (admittedly extraordinary) outcome only through serial brinksmanship, there was no agreement to produce a more functional legislative function. The big innovation was the creation of a proto-judicial function which was more than an adjunct to an essentially diplomatic process.[5] Furthermore, in terms of caseload determination and compliance, this mechanism is widely seen as a success (see e.g. Bown, 2009; Hartigan, 2009).[6]

Against a background, especially since the 1980s, of rapid globalization and apparent pressure on the core policy supports of embedded liberalism (seen to be at least partly a function of that globalization), the WTO stands out as both effective and, in some loosely constructed way, governmental. As a result, proponents of global (and, usually, national) liberalization and opponents of global (and, usually, national) liberalization have come to see the WTO as an important arena for contesting the future of globalization and democracy. Similar sorts of concerns are directed at the World Bank and the IMF, but those institutions are less obviously (proto-) governmental. The UN may be (proto-) governmental, but is not obviously

4 One could reasonably argue for the European integration project, but the sheer numbers and heterogeneity of the GATT, and then the WTO, are utterly different from the EEC/EU.

5 This should not be taken to imply an absence of political/negotiating elements. The process can be suspended at any point at the request of the complainant; panel results and appellate body results are ultimately adopted by the Dispute Settlement Body (the General Council sitting as the DSB); and enforcement is via suspension of concessions. Nonetheless, the process is considerably more 'judicial' than under GATT 1947.

6 As the previous footnote partially suggests, the General Council sits at the center, providing political guidance and coordination to the (assume 'proto-' and/or 'quasi-' in front of each of the following) legislative, executive, and judicial functions.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

effective. Faced with increasing domestic resistance to globalization and, given the effectiveness of the WTO in restricting the use of the standard border measures of protection, proponents of global liberalization would like to more strongly lock in existing disciplines on border measures and extend those disciplines to behind the border measures (the Singapore issues). Similarly, opponents of global liberalization would like to extend the objectives of global regulation beyond efficiency, reinterpret existing disciplines, and extend the reach of such reinterpreted disciplines to core non-trade concerns (especially environment and labor rights). Both groups see something called 'constitutionalization' as a route to achieve these goals – though, obviously, the routes are rather dramatically different from one another.

The WTO and constitutionalization: why worry?

There is a surprisingly large literature on international constitutions and constitutionalization (e.g. Dunoff and Trachtman, 2009; Klabbers *et al.*, 2009; Petersmann, 2012), and a sizable quantity of this work deals specifically with trade (Cass, 2005; Joerges and Petersmann, 2011) most of which is done by legal scholars. In this section, we want to define our core concept – international constitutionalization – and ask how we might identify constitutionalization in the case of trade. It will turn out that a key concept is the notion of a relevant international civil society, so we will take that concept up in a manner parallel to our discussion in the preceding section. Given the above definitions, we will (briefly) ask whether we might say that the WTO constitutes a stage in global constitutionalization in general, or in constitutionalization of the international trade system in particular.

Broadly speaking, I will construe constitutions and constitutionalization in two (clearly related) ways: as a superior form of legal norms; or as a set of institutions and practices deriving from such norms (Besson, 2009; Klabbers, 2009). In either case, this can be rooted in a specific document (like the US Constitution) or be the product of evolution via legal tradition (like the English constitution). These are unproblematic when applied to existing constitutional orders, but, for our purposes (i.e. constitutionalization of the WTO), such a definition faces two serious problems: fragmentation of the constitutional order; and the political basis of such an order. The former is straightforward to express: if a constitutional order refers to the existence of a superior form of legal norm, is it meaningful to talk about a 'trade constitution'? While one might have argued that trade constituted an autonomous legal domain during the years of the GATT, the attempt to extend the reach of the WTO either to behind the border measures or to 'trade and …' issues undermines any current application of this claim. Thus, the relationship of a 'trade constitution' to various national constitutions and/or to other partial global orders (e.g. human rights, environmental law, etc.) is a genuinely difficult problem (Walker, 2002). While important for any complete analysis of constitutionalization of the trade regime, this is not a central issue for this paper.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

The other issue, by contrast, is absolutely essential to any discussion of constitutionalization. That is, the fact of a constitutional order cannot really be separated from whatever legitimates that order. It is hard to think of how we might even begin such a discussion without some sense of political foundations.

> When people think of constitutionalization, or constitutionalism, or any suchlike conjugation, the association is not only with something that is constituted in a technical sense, but also, and predominantly, with something that is constituted in a politically legitimate sense: a constitutional order is a legitimate order, deriving its legitimacy (in part at least) precisely from its constitutional nature. (Klabbers, 2009: 7)

This returns us to the issue of civil society and its relationship to the putative constitutional order and the process of its production and reproduction. While procedural correctness is a major support of legitimacy, this is far from necessary or sufficient. Ultimately, legitimacy is granted by, or earned from, civil society. That is where any fundamental explanation must start. Unfortunately, the meaning of 'international civil society' is highly contested. Nonetheless, this issue is precisely what makes the issue of constitutionalization interesting. To answer this question, we cannot fall back on the sorts of models that have been found convenient for answering many less fundamental issues in the operation of the WTO. The identity of 'persons', or 'citizens', when we are talking about globalization cannot be resolved by assumption. And, for this purpose, the convenient assumption that countries have the essential moral properties of persons is particularly problematic.[7] By the same token, adopting the self-description 'civil society group' does not provide any obvious standing either.[8]

7 At the pole of power (Wolfers, 1951), this assumption has long been understood to be empirically sensible. In addition, the assumption that countries can be treated as persons seems to be a sensible first-order approximation for the analysis of trade bargaining, as with the fundamental early work of Mayer (1981) and the extensive development of that logic by Bagwell and Staiger (2002) and their many followers. The issue is considerably more problematic when the assumption of stable preferences matter – as, for example, in Trachtman's (2008) export of Coasean logic to the international level. We need to be able to characterize participants in Coasean bargains as forward-looking rational, but governments, especially democratic governments, expect to change identity regularly (see, e.g., Grieco *et al.*, 2009). This tends to undermine the normative value of bargains struck at one point in time relative to their validity as a reflection of the agent's interest at another point in time. This latter problem becomes more severe when we want to treat countries (or their representatives) as moral agents engaged in discourse as members of civil society. There are, of course, technical fixes for this – especially the assumption of quasi-linear preferences (with the same linear good) for all agents. Interestingly, this is also the assumption necessary to make the Coase 'theorem' an actual theorem (Hurwicz, 1995, 1999; McKelvey and Page, 1999).

8 I see no value added to adopting 'civil society' as a modifier in this analysis. A 'civil society group' is no more, and no less, than a group – or what political scientists call a 'pressure group' or 'lobbying group' – relative to the politics of trade. In this context, Schattschneider's (1960) distinction between the pressure system and democratic politics is relevant here. The latter, the discursive politics of democratic constitution, is the domain of civil society. A pressure group, or at least its members/representatives, certainly can, and often do, participate in civil society, but when they engage in lobbying (of, say, the WTO) they are a pressure group *simpliciter*.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

So how might we think about civil society in the case of the WTO? One approach would be to treat the set of states with full membership in the organization as the relevant civil society. First, as I noted in the introduction, the representatives of states certainly can function as a discursive community, and did so in the creation of the post-War international trade order revolving around the GATT. As we have already noted, the umbrella of Cold War politics permitted early GATT conferees to treat trade as a narrowly technical, diplomatic issue. In this context, it is not unreasonable to view the representatives of the various contracting parties as unitary, rational individuals. Although representing different states, and even different interests within a given state, the ongoing process of cooperation on international trade liberalization produced a community of politicians, bureaucrats, lawyers, and economists with shared understandings of the economics and politics of trade that permitted a clear and coherent discourse. The manifest success of the early Rounds tended to legitimate the efforts. This legitimacy contributed to the political foundation that permitted the GATT to expand its domain in the Kennedy and Tokyo Rounds, ultimately permitting the creation of the WTO in the Uruguay Round. However, the end of the Cold War, the increasingly heterogeneous membership, the increasing scope of the Agreement, and the globalization-related dynamics discussed in the previous section, have rendered this understanding of the relevant civil society increasingly problematic. Domestically, the increasing politicization of globalization means that partisan change in government can imply change in the essential identity of the agents representing a given state. Perhaps more importantly, to the extent that globalization implies the creation of communities of interest not represented by a given state, the specific claim that nation state representatives represent the full range of interests is undermined. That is, the relevant discursive community, i.e. civil society, is no longer represented.

A more serious problem for the states-as-civil-society position emerges as a result of the creation of the WTO as a formal organization – especially an organization with a state-like structure. John Jackson's (e.g. 1998, 2000, 2006) analysis of the constitutionalization of the WTO revolves primarily around institutionalization. In his emphasis on rules versus politics, Jackson's use of concepts like 'trade constitution' and 'constitutionalization' have more in common with work by political scientists on 'legalization' (Goldstein *et al.*, 2001) than the legal literature on constitutionalization of the WTO. That is, Jackson emphasizes the emergence of a practical legal order over a limited domain of application. The agreements contained in the Uruguay Round agreements constitute a superior form of law in the practical sense that they actually constrain the behavior even of the most powerful members of the system. The creation of a formal set of institutions, replacing the limbo-like GATT institutions, is an essential element of this legalization process. While these institutions inherit the legitimacy that flows from the process by which they were created, the historical successes of the GATT and the more contemporary successes of the dispute settlement mechanism seem to create the possibility that the WTO might be the basis for a more substantial response to the problems of

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

globalization. In particular, the WTO came to be seen as both potentially governmental and potentially democratic. Such an understanding, however, involves an explicit move beyond what political scientists call the Westphalia system of sovereignty – that is, an understanding of the global political system that contemplates no carrier of sovereignty and political legitimacy other than the nation state.

As long as strictly national economic policy was sufficient to manage the domestic politics of trade policy, and assuming that the main members of the WTO are democratic, it was not unreasonable to treat a broadly open process among legitimate national governments in much the same way as we view representative democracy. However, as we have already noted, much of the concern with globalization proceeds from a concern that this is no longer the case. This clearly expands the relevant civil society in ways not contemplated in the creation of the GATT or the WTO. The increasing linkage of people via new and old media surely plays a role in making this civil society increasingly self-conscious and lowers the cost considerably of a truly global political discourse. Unfortunately, the public discourse is only part of the story of democratic legitimacy. There must be some mechanism that links such a discourse to the policy-making machinery. That is, there must be a cost of ignoring the public discourse. However, once we move beyond a broadly Westphalian order (i.e. one with nation-states as the essential actors), it is hard to know where/how the democratic check will operate.

It would seem that a minimal condition for any Liberal order is that, one way or another, civil society is defined in terms of, and democratic legitimacy ultimately flows from, natural persons (Peters, 2009). The notion that there is a global (or 'transnational', or something) discourse that is relevant to global trade policy-making seems unproblematic. This discourse certainly involves the academic discourses of economists, political scientists, and lawyers. It equally certainly involves the discourses of more amorphous global communities linked via the internet. Given the discussion in the previous section, it should be clear that firms are not members of civil society (i.e. they are not natural persons), but they surely are an essential part of the broader political economy of international trade.[9] Both firms and organized elements of civil society have legitimate standing to lobby governments in well-ordered national political systems. Such lobbying would seem to play an essential role in democratic political systems (without actually being democratic politics).[10] While economists tend to see lobbying only as essentially corrupt (e.g. 'protection for sale'), political scientists have long recognized

9 Legal personhood is an essential element of a capitalist economy but, contrary to the bizarre *Citizens United* decision, nothing in legal personhood implies citizenship, which is surely a property only of natural persons (possibly clones or sentient robots in the future, but not, as far as we know, now).

10 I take this useful distinction from Schattschneider (1960), who notes that all political systems have lobbying and that the politics of lobbying are asymmetric in all political systems. What sets democratic political systems apart is the presence of a free public discourse (i.e. the presence of a free civil society) and a broad electoral check.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

that lobbying provides a flow of (often biased) information to the political system. The right of a free people to approach their government should never be reduced to 'rent seeking'. If we are to think of the WTO in constitutional terms, we need to think of lobbying as an essential element. However, we should not confuse lobbying with civil society.[11]

None of this solves the problem of the democratic check on global government. Part of the reason so many people argue for more extensive access to lobbying groups is as a substitute for a genuine democratic check. This strikes me as confused. There is no reason to believe that global lobbying is/will be any more representative than domestic lobbying, and there are many reasons to believe that it is/will be dramatically less representative. If this is correct, expanding the variety of voices lobbying the WTO does not solve the democratic deficit. Unfortunately, without a solution to this problem, talk about constitutionalization seems deeply problematic. One might reasonably argue for the virtues of legalization on broadly utilitarian grounds, but that would be a very different kind of claim. This is, for example, the foundation of Jackson's (1989, 1998, 2000, 2006) argument for a rules-based order.

Routes to constitutionalization

The previous section argues, implicitly, that a strong form of constitutionalization of the WTO is unlikely over a foreseeable time horizon. While a global civil society might well be emerging, the institutions necessary to link such a civil society to emergent state-like institutions are completely lacking (as is, I think, any notion of self-consciousness of such a civil society). That said, it is hard to deny that a reasonably well-institutionalized, and surprisingly effective, political order over the domain of trade is in place. We might reasonably ask how this order might be strengthened and extended, and the constitutional experience of countries is a reasonable place to look for inspiration.[12] As a practical matter, the legal and historical literature suggests that there are two places one might look to decide whether constitutionalism is occurring: the creation of formal institutional structures adopted by a community and a body of law giving systematic meaning to those structures, and a body of judicial interpretation creating an evolutionary constitutional structure. The WTO has shown elements of both of these approaches.

11 Because lobbying *can* be corrupt (and certainly sometimes is corrupt), national governments have anti-corruption laws, as well as rules regarding transparency, registration, etc. Presumably, were the WTO to move toward a more constitutional governmental model, such rules would be a necessary complement to a more open approach to lobbying.

12 As we have already noted, the experience of the EU might well be a particularly useful source of such inspiration. I do not pursue the parallels here.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

The emergence of a constitution from some sort of constitutional convention is the most obvious form of constitutionalization (certainly to scholars from the US). Cass (2005), in her overview and analysis of research on the constitutionalization of world trade, characterizes constitutionalization in terms of the following six elements (p. 19):

> A set of social practices to constrain economic and political behavior.
> [The presence of] a political community to authorize its making and to ensure that community's interests are represented.
> A process of deliberative law-making necessary for a constitutionalized entity to emerge and for the members of the community to be constituted as the authors of its law.
> [The presence of] a level of social acceptance, or legitimacy, of the process itself.
> A new foundational device or *Grundnorm* such that what was once merely a set of rules is transformed into a coherent and unified body of rules with the appearance of a new system of law.
> [The presence of] some realignment of the relationship between the sub-entities and the central, putatively constitutional entity.

The first four conditions are consistent with our analysis to this point: the first identifies a constitution as a superior form of law, while the second through fourth emphasize legitimation and democracy. The final two elements clearly imply an explicit break with the past. The fifth suggests that this break takes the form, at least in part, of an explicit act of law/institution-making. I think of this as the US model of constitutionalization, and, especially in the aftermath of the collapse of the Soviet Union, this was taken as the standard model of constitutionalization.

Part of the attraction of the WTO as a focus for global state-making and constitutionalization is that one could interpret the Uruguay Round as a sort of constitutional convention and the product of that Round as constitutional of a trade order. The legitimacy that flows from both the broadly democratic form of its creation and the manifest success of the dispute settlement mechanism is precisely what emboldened both Liberals (who seek to extend market protections beyond trade in goods) and, for want of a better term, progressives (who want to introduce a broader range of concerns into trade and other domains) to interpret the WTO in constitutional terms.

The problem with this interpretation moving forward is that the original 'constitution' created no mechanism for amendment of that 'constitution'. Thus, the only such mechanism currently in place would seem to be a new constitutional convention. Unfortunately, this is precisely how many have come to see the current and future Rounds of WTO negotiations. This is 'unfortunate' for two reasons. First, although there is widespread dissatisfaction with the current 'constitution', there are no formal rules of amendment and there seems to be no consensus (at all) on an acceptable form for a new constitution. In the absence of such a mechanism and consensus, it is hard to see how the WTO can develop new structures in the

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

face of changes in the economic and political environment in which it operates. Second, this appears to roll together the normal 'legislative' business of the ministerial conference (tariff negotiation, admission of new members, etc.) and the business of re-writing the constitution. Progress on the current Round is currently hostage to constitutional issues (e.g. rebalancing, Singapore issues, other 'trade and…' issues, etc.). It is clear that separating normal legislative business from constitutional amendment would be a good thing; however, such an act would itself be constitutional and it is hard to imagine that those countries that prioritize amendment over marginal adjustments in market access will acquiesce in an explicit separation of these tasks.

Overall, the prospects for a new constitutional convention on trade seem poor. Major constitutional change usually takes place in the context of an event (or series of events) that creates the community that seeks to formalize itself. For the US, it was the revolutionary break with Great Britain (and even then the framers had to fudge the issue of slavery); for the Eastern European countries in transition, it was the collapse of the Soviet Union. Economic globalization may well create a trade environment that links most of the countries in the world, but it does not create a sense of community.

By contrast, the British route to a constitution does not involve a decisive break with the past nor does it require a single, decisive act of legislation. Instead, the 'English constitution' emerges from an evolutionary process (Bagehot, 1867; Bogdanor, 1996, 2009: Chapters 1 and 2; Dicey, 1885). While the primacy of Parliament is the fundamental principle of the English constitution, the role of the courts is enshrined in the common law tradition of court made law.[13] This evolutionary approach, and the flexibility of the common law, seems to suggest that this is a route to WTO constitutionalization that need not run through a constitutional convention, and thus can avoid the problems that deadlock that process. The idea here is that the dispute resolution mechanism can generate a body of decisions that fills in the gaps in the 'constitution' written in the Uruguay Round (see, e.g., Cass, 2001; Howse, 2001; Schloemann and Ohlhoff, 1999; Stone Sweet, 1999; von Bogdandy, 2001; Weiler, 2001). There are two problems with this. The first is that the *dispute settlement mechanism* is not intended to produce a cumulative body of law (i.e. individual decisions are not supposed to generate precedents). A decision would have to be made to change this, and that, of course, would be constitutional – with all the problems the previous discussion suggests. The Shrimp-Turtle case is often discussed as an example of an emergent common law approach. However, this seems to be a controversial position. For example,

13 There is a certain irony that many of the same people that laud the common law tradition for its flexibility in the face of a changing environment also emphasize the virtues of strict construction in interpretation of the constitution. While, much like the rest of this essay, it surely reflects lack of socialization in academic law, the concept 'constitutional common law' has always struck me as oxymoronic.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

Dunoff (2009) argues that this decision was so controversial that it might be taken as evidence against the common law interpretation. At a broader level, this argument is problematic because it implicitly assumes an institutional background that the WTO manifestly lacks. The English constitution (even as far back as Magna Carta) applied in the context of established, efficient, and broadly legitimate (though not, at that time, democratic) governance structures. This might arguably apply to the EU (e.g. Weiler, 1999), but it certainly does not apply to the WTO. In the modern context, such a common law approach would need to be anchored in some kind of broadly democratic structure linking civil society to authoritative decisions. Again, no such claim can be made for the WTO.

Whether we think of taking the US route or the English route, we end up back at civil society. If a constitution (even over a relatively narrowly defined domain) is to be a superior form of law, in that it trumps domestic law (over that domain), and if that law does not face some kind of relatively straightforward democratic constraint, then the international technocratic/political process just becomes a way of short-circuiting the domestic political process.[14] While some proponents of both the Liberal and progressive tendencies seem to see this as a feature (i.e. not a bug), any reasonable reading of political history over the last couple of centuries suggests that this is a deeply problematic foundation for a political order.

Conclusion

Overall, then, and fully recognizing the constitutionalizing actions that created both the GATT and the WTO, under current economic and political conditions the WTO seems to be far from a constitutional order, even applied narrowly to international trade. As a practical matter, WTO agreements do seem to constrain the trade policy of members. However, this is not because WTO 'law' has direct application in national legal systems, but because national governments believe that, very broadly speaking, the benefits from that system, even when it constrains national policy, exceed those (expectationally) associated with system breakdown. Thus, while the WTO does replace power with law, it does not create a constitutionally superior form of law. Similarly, while the Uruguay Round agreements did create a series of institutions with (loosely) executive, legislative, and, especially, judicial functions, there was no explicit division of authority (in fact, the Ministerial Conference is both the ultimate legislative and judicial [when sitting as the Dispute Settlement Body] authority) and there is no mechanism for amending the 'constitution' except another constitutional convention.

14 There is a substantial literature on the relationship between international and domestic law. My reading of this literature is that most scholars, at least as a practical matter, find the combination of superiority and direct effect a particularly poisonous combination (Dunoff, 2008; Jackson, 1992; Trachtman, 1999; von Bogdandy, 2008).

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

The virtue of thinking about the WTO in constitutional terms is to throw into high relief the central importance of civil society. Unfortunately, as we suggest above, this concept is far from clear in the global context and, even if it were clear, the complete lack of a mechanism through which civil society can check the operation of the WTO renders such discussion problematic.

Alternatively, it might be useful to treat 'constitutionalism' as a metaphor and use it to think about routes to a more restricted form of legal constraint – 'legalization' in the language used by some political scientists (Goldstein *et al.*, 2001). Here we considered the US route and the English route, but found both problematic. As a practical matter, of course, the WTO will continue to (attempt to) sponsor Rounds and to resolve trade-related conflicts. These will evolve in response to specific events and, unless overwhelmed by some political crisis, may well evolve into a more constitutional order. The early functionalists' hope for Europe ran through precisely such hopes, and those hopes seem to have been surprisingly well fulfilled.[15]

References

Bagehot, W. (1867), *The English Constitution*, London: Chapman & Hall.

Bagwell, K. and R. W. Staiger (2002), *The Economics of the World Trading System*, Cambridge, MA: MIT Press.

Besson, S. (2009), 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy', in J. L. Dunoff and J. P. Trachtman (eds.), *Law and Global Governance*, Cambridge: Cambridge University Press, pp. 381–408.

Bogdanor, V. (1996), *Politics and the Constitution: Essays on British Government*, Aldershot: Dartmouth.

—— (2009), *The New British Constitution*, Oxford: Hart Publishing.

Bown, C. P. (2009), *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement*, Washington, DC: Brookings Institution Press.

Cass, D. Z. (2001), 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', *European Journal of International Law*, **12**(1): 39–75.

—— (2005), *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System*, Oxford: Oxford University Press.

De Búrca, G. and J. Scott (eds.) (2001), *The EU and the WTO: Legal and Constitutional Issues*, Oxford: Hart Publishing.

Dicey, A. V. (1885), *An Introduction to the Study of the Law of the Constitution*, London: Macmillan.

Dunoff, J. L. (2008), 'Less Than Zero: The Effects of Giving Domestic Effect to WTO Law', *Loyola University Chicago International Law Review*, **6**(1): 279–310.

—— (2009), 'The Politics of International Constitutions: The Curious Case of the World Trade Organization', in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World: Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press.

15 It should be noted, however, that as the EU membership has widened, its ability to deepen its constitutional order appears to have weakened. If this is correct, it does not bode well for further constitutionalization of a community that includes 160 members that are widely varying in economic, political and social dimensions.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

Dunoff, J. L. and J. P. Trachtman (eds.) (2009), *Ruling the World?: Constitutionalism, International Law, and Global Governance*, Cambridge and New York: Cambridge University Press.
Ehrenberg, J. (1999), *Civil Society: The Critical History of an Idea*, New York: New York University Press.
Eichengreen, B. (2006), *The European Economy since 1945: Coordinated Capitalism and Beyond*, Princeton, NJ: Princeton University Press.
Frieden, J. A. (2006), *Global Capitalism: Its Fall and Rise in the Twentieth Century*, New York: W.W. Norton & Co.
Gaddis, J. L. (2005), *Strategies of Containment: A Critical Appraisal of American National Security Policy During the Cold War*, New York: Oxford University Press.
Goldstein, J., M. Kahler, R. O. Keohane, and A.-M. Slaughter (eds.) (2001), *Legalization and World Politics*, Cambridge, MA: MIT Press.
Grieco, J. M., C. F. Gelpi, and T. C. Warren (2009), 'When Preferences and Commitments Collide: The Effect of Relative Partisan Shifts on International Treaty Compliance', *International Organization*, **63**(2): 341–355.
Habermas, J. (1975), *Legitimation Crisis*, Boston: Beacon Press.
Hartigan, J. C. (ed.) (2009), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment*, Bingley, UK: Emerald.
Howse, R. (2001), 'The Legitimacy of the World Trade Organization', in J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations*, New York: United Nations Press, pp. 355–407.
Hurwicz, Leonid (1995), 'What Is the Coase Theorem?', *Japan and the World Economy*, **7**(1): 49–74.
—— (1999), 'Revisiting Externalities', *Journal of Public Economic Theory*, **1**(2): 225–245.
Jackson, J. H. (1989), *The World Trading System: Law and Policy of International Economic Relations*, Cambridge, MA: MIT Press.
—— (1992), 'Status of Treaties in Domestic Legal Systems: A Policy Analysis'. *The American Journal of International Law*, **86**(2): 310–340.
—— (1998), *The World Trade Organization: Constitution and Jurisprudence*, London: Royal Institute of International Affairs.
—— (2000), *The Jurisprudence of Gatt and the WTO: Insights on Treaty Law and Economic Relations*, Cambridge, UK: Cambridge University Press.
—— (2006), *Sovereignty, the WTO and Changing Fundamentals of International Law*, Cambridge: Cambridge University Press.
Joerges, C. and E.-U. Petersmann (eds.) (2011), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, Oxford: Hart Publishing.
Klabbers, J. (2009), 'Setting the Scene', in J. Klabbers, A. Peters, and G. Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford: Oxford University Press, pp. 1–44.
Klabbers, J., A. Peters and G. Ulfstein (eds.) (2009), *The Constitutionalization of International Law*, Oxford: Oxford University Press.
Mayer, W. (1981), 'Theoretical Considerations on Negotiated Tariff Adjustments', *Oxford Economic Papers*, **33**(1): 135–153.
McKelvey, R. D. and T. Page (1999), 'Taking the Coase Theorem Seriously', *Economics and Philosophy*, **15**(2): 235–247.
Nelson, D. R. (1989), 'The Domestic Political Preconditions of US Trade Policy: Liberal Structure and Protectionist Dynamics', *Journal of Public Policy*, **9**(1): 83–108.
Peters, A. (2009), 'Membership in the Global Constitutional Community', in J. Klabbers, A. Peters, and G. Ulfstein (eds.), *The Consitutionalization of International Law*, Oxford: Oxford University Press, pp. 153–261.
Petersmann, E.-U. (2012), *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Oxford: Hart Publishing.
Polanyi, K. (1944/2001), *The Great Transformation: The Political and Economic Origins of Our Time*, Boston, MA: Beacon Press.
Putnam, R. D. (2000), *Bowling Alone: The Collapse and Revival of American Community*, New York: Simon & Schuster.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press

Putnam, R. D., R. Leonardi, and R. Nanetti (1993), *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton, NJ: Princeton University Press.
Rueschemeyer, D., E. Huber, and J. D. Stephens (1992), *Capitalist Development and Democracy*, Chicago: University of Chicago Press.
Ruggie, J. G. (1982), 'International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order', *International Organization*, **36**(2): 379–415.
Schattschneider, E. E. (1960), *The Semisovereign People: A Realist's View of Democracy in America*, New York: Holt.
Schloemann, H. L. and S. Ohlhoff (1999), '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence', *The American Journal of International Law*, **93**(2): 424–451.
Schumpeter, J. A. (1942/1975), *Capitalism, Socialism, and Democracy*, New York: Harper & Row.
Shonfield, A. (1965), *Modern Capitalism: The Changing Balance of Public and Private Power*, London: Oxford University Press.
Stone Sweet, A. (1999), 'Judicialization and the Construction of Governance', *Comparative Political Studies*, **32**(2): 147–184.
Tönnies, F. (1988), *Community and Society*, New Brunswick: Transaction Books.
Trachtman, J. P. (1999), 'Bananas, Direct Effect and Compliance', *European Journal of International Law*, **10**(4): 655–678.
—— (2008), *The Economic Structure of International Law*, Cambridge, MA: Harvard University Press.
von Bogdandy, A. (2001), 'Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship', *Max Planck Yearbook of United Nations Law*, **5**: 609–674.
—— (2008), 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', *International Journal of Constitutional Law*, **6**(3–4): 397–413.
Walker, N. (2002), 'The Idea of Constitutional Pluralism', *The Modern Law Review*, **65**(3): 317–359.
Weiler, J. H. H. (1999), *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration*, Cambridge and New York: Cambridge University Press.
—— (2001), 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlements', *Journal of World Trade*, **35**(2): 191–207.
Weiler, J. H. H. (ed.) (2000), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade*, Oxford: Oxford University Press.
Wolfers, A. (1951), 'The Pole of Power and the Pole of Indifference', *World Politics*, **4**(1): 39–63.

https://doi.org/10.1017/S1474745614000391 Published online by Cambridge University Press