CHAPTER 19

Legitimacy through "Higher Law"? Why Constitutionalizing the WTO Is a Step Too Far

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Increasingly, fundamental societal choices are being shaped at the global level in the name of trade liberalization. And the question becomes all the more relevant: by whom and on what grounds? One response gaining currency among scholars and even politicians has been to articulate the challenge of global economic governance in constitutional terms. This view typically has both descriptive and normative elements.

Descriptively, its proponents point out that while the 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 already performing constitutional functions, *as if* an incipient global economic constitution. They point to the new binding, juridical rigorous dispute settlement mechanism, which provides for virtually automatic authorization of countermeasures in the case of non-compliance; they also point to the explicit role such tribunals play in balancing competing public values, economic efficiency vs. health and safety goals for instance, in the scrutiny of domestic regulation.[1] In terms of the brutal, Schmittean understanding of sovereignty—the sovereign is he who decides—the point of ultimate decision about the balance of public values in a wide range of areas now appears to lie with the WTO and its dispute settlement tribunals.

Normatively, the proponents of a constitutional understanding of the WTO believe that its legitimacy will be enhanced by building on these characteristics and turning the Treaty into a full blown constitutionalized construct. They typically aspire to greater legal certainty for private economic rights, against the depredation of powerful domestic interest groups. Furthermore, there is a minority position that sees the ultimate

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implication of WTO constitutionalism as the transformation of the WTO into a progressive economic regulator for the world, 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.[2]

The argument must be analyzed against the backdrop of the broader debate over the legitimacy of international institutions. The connection between constitutionalism and legitimacy is a complex one. Constitutionalization emerges in part as a response to concerns about legitimacy, while the prospect of constitutionalization itself contributes in giving rise to such concerns in the first place. In the short run, at least, the application of the language of constitutionalism to WTO is likely to exacerbate 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. There is thus a real risk that importing constitutional language and concepts into the current debate about the WTO and its legitimacy will increasingly polarize the system's advocates and its critics. This risk exists to a lesser extent with modest or cautious proposals for a constitutional understanding.[3]

The proposed adoption of "constitutional" discourse and understandings as a legitimizing tool 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. Moreover, and this is a fundamental point, they would be able to do so not only before WTO dispute settlement Panels or Appellate Bodies, but before domestic courts. Second, constitutional law is generally regarded as higher law, with a presumption against the change of basic structures. Constitutionalization tends to serve a "door-closing" function against claims that in areas such as food safety and intellectual property rights, the WTO has gone too far 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, messily 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, making it harder to broker compromise and adjustment to change in the institution.[4]

The "constitutionalizing" view about the WTO merits careful analysis and critical scrutiny. The present essay is intended as a contribution along

these lines. In our view, the question is whether and how the post-war bargain characterized by the political scientist John Ruggie as "embedded liberalism" (trade liberalization constrained by domestic welfare requirements)[5] can be salvaged in the globalization era. We begin by exploring the reasons why the original model has appeared to become increasingly problematic as a means of understanding the WTO. We then examine the claims for the WTO as a constitutional order on the basis of two variants of the constitutional view of the WTO. Both these variants take their inspiration from the evolving debate over whether the European Union has become, is becoming, or should become a transnational constitutional order. To a significant extent, the example of the EU, which began as little more than a trade treaty, and now not only constitutes a new level of governance in Europe but also has permeated *all* levels of governance, has influenced constitutional hopes for the WTO.[6]

The first variant, liberal in the libertarian sense, sees the WTO's constitutional function in terms of pre-commitment by which politicians tie their hands in such a manner as to resist the depredation of economic rights by domestic interest groups, who demand rent-conferring interventionist/protectionist government. This is the model of WTO constitutionalism articulated explicitly by Ernst-Ulrich Petersmann.[7] While Petersmann is the most intellectually forthright and serious of those who accept such a model, explicitly admitting and even endorsing economic freedom as the *telos* and guiding norm of the WTO constitution, this idea is expressed in a wide variety of contemporary scholarship on the WTO. It is inspired by a minimalist reading of European integration as driven and constructed by judicial review of expansive Treaty commitments. The conception of constitutionalism at operation here is one that understands constitutionalism as a means, indeed 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. While this variety of constitutionalism aims at using a constitutionalized WTO to place economic freedom above politics, we argue that just the reverse is necessary to address the legitimacy crisis of the multilateral trading order—more politics, not less. As we will argue, the evolution of the EU itself is a case in point.

The second variant of WTO constitutionalism is not pre-occupied like the first with pre-commitment and property rights, but builds on the internal EU debate about the Union's status as a polity, and its future. It also, however, is based on an inaccurate assessment of the EU's own constitutionalizing path and its underlying federal model. This variant recovers the function of constitutions as formalizing the distribution of power among governmental institutions while establishing a permanent link

between these institutions and societies; and, at least in federal contexts, as establishing the basis for the division of power among and the relationship between levels of government. It is nevertheless philosophically more modest in that it identifies WTO constitutionalization with the adjudication of competing values in WTO dispute settlement.[8] The largely unspoken premise in describing such a function as constitutional or constitutionalizing is that these trade-offs (say between freer trade and protection of human health and safety) are made, not so much in the framework of international law generally, but in light of the WTO "constitution," the principles of trade liberalization taken as constitutional norms, and with a view to the *telos* of the WTO itself—economic freedom. Thus, competing human values enter into the picture as narrow, and carefully policed exceptions or limits, to the overall constitutional project of freer trade. (To be sure, there can be a progressive view of WTO constitutionalism—one which is more ambitious as to the requisite degree of institutionalization—that sees the WTO as transforming itself into a socially just global economic government, by assimilating social and environmental governance under its remit. Such a view is consistent nevertheless with the second variant, in the role attributed to Courts in the process of integration and in the belief that tensions between conflicting values at the global level can be resolved short of political give and take.)

This second variant of constitutionalization is largely based on a belief in the transferability of the EU model to the global level, not so much in its pragmatic innovative features but its most ambitious constitutional *telos.* But does it really take on board the full implications of such a logic? In the EU model, constitutionalism is increasingly seen as closely connected to democratic self-determination, the autopoesis of a citizenship which has not only economic, but also political and social dimensions. There has been intense debate as to whether European law and regulation is a sufficiently direct expression of democratic will to possess a legitimately constitutional status, whether European institutions need to have for their foundation a European *demos,* whether a demos is possible at all beyond the confines of a community defined in terms of sub-political ties such as race, language, or cultural heritage; and to what extent a shared constitution requires shared social responsibility, including functioning redistributive mechanisms. Whatever the responses given, there is no avoiding the fact that intense polity-building has and will continue to take place in the EU as a pre-condition to its formal constitutionalization.

So neither the first nor the second variant of constitutionalization seems to provide an adequate or realistic response to the WTO legitimacy conumdrum. As we elaborate in the final section of the paper, we believe that just the opposite response is needed if the legitimacy of the WTO is to be preserved and enhanced. The EU itself, we argue, can remain an inspiration

in this matter, since the spirit of embedded liberalism can be recovered by applying at the international level a kind of "global subsidiarity" adapted to the structure of the international system. At the global as well as the regional level, we need to *bring politics back in,* not seek to transcend it. This means first that WTO judges show *political sensitivity* and deference to views defended outside the WTO, a kind of "horizontal subsidiarity". In this, we endorse the approach taken—at least at times—by the WTO Appellate Body in interpreting 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, which represent values other than free or freer trade. The WTO dispute settlement organs must display considerable deference to substantive domestic regulatory choices as well as draw on and defer to other international regimes whose rules, policies, and institutions represent and articulate such values, whether in respect of health, labor standards, environment, or human rights. Thus, we advocate a kind of diffuse externalization of what Cottier identifies as the constitutional dimension.

In addition, the WTO ought to promote the principle of *political inclusiveness* at the national, transnational, and supranational levels. It should emphasize procedural obligations rather than normative constraints on the conduct of lower level policies, and support mechanisms for the participation of actors inside and outside states' jurisdiction. Inclusiveness also implies moving beyond notions of representative democracy at the supranational level. Although the notion of a global *demos* seems implausible, there are elements of democracy that can be realized, at least partially, at the global level, by facilitating greater access to WTO processes for non-governmental actors and more transparency and deliberation within those processes—not so much with view to creating eventually a world democracy, but rather to enhancing the connection between WTO decision-making and domestic processes of accountability.

Finally, a renewed spirit of embedded liberalism may require that global institutions not only *let* the state go about its protective business, but also *empower* the state (and sub-national units) to do so, in a manner compatible with its international obligations. Such an approach may, in the long term, create the conditions for federalism at the world level, but one which, as Kant envisaged, builds on the sustained legitimacy of its constituent units.

To the extent that its Member States and Courts are ready to act in the spirit of global subsidiarity, 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. Nevertheless, by aiming for such a less ambitious role, it is likely, paradoxically, to serve the cause of free trade better than by following a constitutionalizing logic.

1. From Interstate Bargaining to the Demand for Constitutionalism: "Embedded Liberalism" in Disrepair

Of all the post-war economic institutions, the multilateral trading order would seem to be the one most amenable to explanation and justification in terms of "cooperation under anarchy."[9] While many other multilateral institutions (the World Bank, the International Monetary Fund or specialized agencies of the United Nations) could appear as projections of the U.S. post-New Deal constitutional order,[10] the GATT was born from the failure of an ambitious project for a global trade regulatory agency (the International Trade Organization), and was little more than a bare-bones structure for progressive negotiated reduction of tariffs on a reciprocal basis among sovereign states—subject to the MFN and national treatment rules. The story of how it evolved beyond its modest beginnings has often been told.

The Underlying Assumptions of "Embedded Liberalism"

Based on the notion of comparative advantage, standard economic theory of trade supports unilateral trade liberalization as an optimal policy for all countries, in most circumstances, i.e., regardless of whether others liberalize trade. Why would states, if they are rational, have to bargain to get others to do what economic theory says is in their interest to do anyway? And what would they seek to achieve through cooperation? Realists argue that states might be deterred from liberalizing trade, either unilaterally or through cooperation, even when doing so yields absolute gains, if the result were that this openness resulted in greater, i.e., relative gains for *other* countries.[11] Even if one recognizes that relative gains may matter in certain circumstances (e.g., positional goods), we need a more differentiated account of the puzzle of reciprocal negotiated trade liberalization and how the characteristics of the trade regime sought to address the configuration of incentives that gives rise to this puzzle.

First, states will behave strategically, in order to *maximize* absolute gains over time.[12] When they assess that the distribution of the surplus generated by free trade is too skewed, they may withhold liberalization now in the hope of a greater share of the pie later. The GATT was conceived as a system based on diffuse reciprocity and expectations of iterated negotiated rounds which allow for liberalization in the face of such strategic posturing.

Secondly, even though unilateral free trade would normally be the first best policy for every country from the perspective of wealth maximization, asymmetric distributional consequences internationally and domestically, combined with the lack of adequate compensatory mechanisms in either sphere lead to pressures to employ protectionism as a response to the needs of certain economic actors, or in order to sustain the existing social contract

under changed or crisis economic conditions. In this light, the GATT can be seen as a set of commitments that limit protectionist responses to such pressures, which is only sustainable if predicated on the assumption that a wide range of alternative policy responses to social demands is available and legitimate. This includes the recognition that adjustment pressures might be such that, at least in the short term and under commonly agreed conditions, some scope for recourse to trade-restrictive, discriminatory policy instruments might be needed. Thus, while the GATT contained no requirement to eliminate tariffs at any given rate or pace, allowance was made for temporary balance-of-payments-based import restrictions (Arts. XII-XV), for safeguards in response to the injury to domestic industries from sudden surges of imports (Art. XIX), and for negotiated rebalancing of concessions (Art. XXVIII).

Thirdly, even given these reasons for coordinated liberalization, cooperation may be hindered by mutual fears of cheating on liberalization bargains. For one, quantitative restrictions on trade were largely prohibited, while tariffs were subject to successive rounds of binding reductions. On this basis, the rules of the GATT could be largely explained as sustaining negotiated commitments to tariff binding; thus, the National Treatment obligation (Art. III) was a means of preventing Member States from instituting discriminatory domestic policies that would distort competition between domestic and imported products in a manner similar to the effects of tariffs or other discriminatory border measures (i.e., from cheating on the negotiated bargain), not an instrument for liberalization *per se.* At the same time, the dispute settlement practices that developed out of the general language in Art. XXIII of the 1947 GATT was means of identifying 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.

Last but not least, unilateral or coordinated liberalization might be withheld because it might conflict with other policy goals. To address this concern, ample room was made for policy autonomy. States were constrained by the distinction under GATT between permitted and prohibited forms of domestic intervention on discrimination grounds. The flip side of National Treatment as "cheating prevention" was that it seemed to cover as legal most non-discriminatory policies. Actually, even discriminatory domestic policies might be permitted, provided that 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 (Art. XX).

This core bargain to allow for a kind of multilateralism molded by domestic requirements rather than the other way around is what John Ruggie has aptly called "embedded liberalism."[13]

2. 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 and the mounting intellectual as well as practical (stagflation) challenges to the Keynesian consensus, led to increasing emphasis on microeconomic interventions of various sorts for adjustment purposes, as well as to new kinds of trade restrictions—"voluntary" export restraints negotiated under threat of unilateral action—of dubious legality under the GATT.[14] For various reasons, the safety valves for adjustment written explicitly into the GATT did not prove to have the appropriate kind of flexibility to deal with the political economy of adjustment in the 1970s.[15]

As for the domestic microeconomic interventions, especially subsidies but also technical regulations, they challenged the stability of the GATT's non-discrimination norm as a means of distinguishing normal legitimate domestic policies from cheating on the trade liberalization bargain.[16]

Domestic technical regulations raised claims that even facially neutral regulatory requirements constituted disguised protectionism, with regulations creating obstacles to trade by forcing foreign producers to adapt to distinctive requirements of the importing country not obviously justified by non-protectionist regulatory objectives.[17] By the end of the 1970s, it was evident that the post-war multilateral trade liberalization system needed fine-tuning in order to sustain a cooperative equilibrium. The Reagan Revolution brought a radically different outlook on the problems at hand, and their solution. The problem, at least for the United States, was no longer that the rules of the game did not ensure adequate scope for America to adjust, consistent with the adjustment of other major industrialized powers. In fact, the normative basis for interventionist adjustment policies was put in question by a 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.

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

By the 1980s, the focus of the policy community in the U.S. and eventually in Europe thus shifted from trade measures *per se* to the inherent worth of such interventionism itself and from cooperation based on liberalization

bargains under diffuse reciprocity to the management of competition between policy norms. As perceived, the multilateral rules of the game had enabled Germany and Japan, the United States' wartime enemies, to compete successfully in the U.S. market for industrial products; they had also enabled the newly industrializing developing countries to compete successfully in highly labor-intensive industries such as textiles. On the other hand, the U.S. faced many barriers worldwide to exploiting *its* apparent comparative advantage in knowledge-intensive industries and services. Intellectual property was largely unprotected. Competition in network service industries, such as telecoms and financial services, was severely restricted. In many industries, Byzantine and archaic regulatory requirements existed. And often, while a business presence in the other country was necessary, American firms faced severe foreign investment restrictions. These disparate non-tariff barriers had to be eliminated.[18]

This new agenda became the core of the Uruguay Round concluded in 1993, and, whatever its merits, would, in many ways, prove a greater threat to the sustainability of the multilateral trading system than any of the adjustment pressures of the 1970s. Unlike the traditional GATT rules constraining tariffs, quotas, and discriminatory domestic regulations,[19] the new WTO rules, while clearly enhancing market access, have much more ambiguous welfare effects, both domestic and global. 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. To be sure, countries like India or Brazil are slowly becoming players on both sides of the fence—selling as well as buying patents. But the developing world as a whole and even these countries for the foreseeable future are no doubt net debtors in this realm. In short, trade liberalization is no longer a positive sum game *across* countries with the need to compensate losers *within* countries. Some countries gain from increased patent protection and some lose; aggregate welfare may increase or decrease.[20] The picture is even starker if one includes certain types of cultural, regulatory or policy diversity in one's concept of welfare.

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 anyway as a condition for IMF support for debt rescheduling. Secondly, 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. The Uruguay Round was a grand bargain like other previous trade rounds. But this is a kind of reciprocity quite different

from that under the previous multilateral trading order where, assuming appropriate scope for domestic adjustment policies, all countries stood to gain from *every* liberalization measure. Reciprocal liberalization served to sell the deal at home much more than to get efficiency gains. Linkage politics in the Uruguay Round may even have convinced developing country leaders that the overall package was in their interest since there was little way to tell. But more than ever before, the potential costs and benefits of the various agreements were obviously indeterminate. What if it were to turn out that for certain countries gains (say from textiles or agricultural trade liberalization) were to prove elusive, while costs (say of implementing TRIPs or GATS obligations) were proving, if anything, greater than expected? The bargain itself would become highly unstable.

Similarly, we can also ask why a great majority of free trade advocates so easily bought into this agenda to use trade rules to narrow regulatory diversity in the area of goods and services standards, given their hostility to such an agenda in the environmental and labor areas, as we will come to below. Surely, in both realms, regulatory convergence would stem protectionist pressures motivated by perceived "unacceptable differences" between national systems, rules or standards; and regulatory diversity in the former can be accommodated more easily than in the latter through proportionality requirements. There is, of course, a simple—if not simplistic—conceptual response to this puzzle. Addressing the former does not directly impinge on the "territorial principle" of classical jurisdictional attribution. Home standards need to converge but the products in question actually *penetrate* on the host country's territory; they need not, however, be disturbed when the processes they address never take place outside the home country's boundaries. But this is, at best, an overly legalistic argument that does not do justice to the intertwining of production processes and product characteristics in the modern information economy. A more powerful reason for this asymmetry is that many free traders were independently attracted to what might be crudely described as the "reinventing government" revolution. Given the intellectual trends predominant in the 1980s, it seemed fairly obvious that improved protection for property rights, deregulation and privatization of network industries, and the use of risk assessment and cost-benefit analysis in regulatory choice, would in and of themselves improve domestic welfare in the countries changing their policies, thus preserving the win-win nature of the linked domestic and international bargains. The enthusiasm for promoting the adoption of these policy prescriptions *on their own merit* led to considerable blindness as to the implications for the multilateral trading order of making the promotion of free trade depend upon adoption of such policy prescriptions *universally.* And such blindness was fueled by elation at the death of communism, as the world seemed to be converging on a single legitimate model of liberal capitalism. Fukuyama's

"end of history" may not have been synonymous with the end of all conflicts around the globe, but it surely confirmed the "technocratization" of world politics, which meant that diplomats were now engaged in the sacred mission of engineering globalization through homogenizing the characteristics of all that moved across borders.

In fact, aside from salient cultural and ideological differences which persist, the technical economics of regulatory choice is messier and more complex than suggested by the enthusiasts of the regulatory reform revolution.[21]

To be sure, the WTO rules in the areas negotiated in the Uruguay Round contain a balance of rights and obligations that still permit a great deal of regulatory diversity. There is a non-constitutional 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 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. In fact, the new WTO rules are such, whether under SPS, IPRs or GATS, that they lend themselves to a range of interpretation, from classic national treatment to "enhanced policed regulation" incorporating tests of dis-proportionality, necessity, equivalence, and balancing into WTO law.[22] This "creative ambiguity" may have been a covert way for pushing the domestic liberal agenda onto WTO without taking on counter-arguments upfront. But as with all such ambiguities, they merely served to delay confronting hard questions. Similarly, the switch from positive to negative consensus for adopting Panel findings served an important functional need to avoid deadlocks and national vetoes motivated by blatant protectionist concerns. But at the same time, the other functional need addressed by the post-war system—to provide political safety valves—is still with us (and, as we will argue below, could be fulfilled by the DSU if wisely used). Such safeguards would prove crucial for the second factor contributing to the legitimacy challenge facing the World Trade Organization.

"Trade and . . .": The Left Strikes Back with Its Own Beyond the Border Agenda

The adoption of the Uruguay Round package would probably have been enough to create intense interest in finding a constitutional basis for WTO law—a basis that would prove more solid, given the new scope and structure of WTO law, than the notion of mutually self-interested interstate bargains. However, 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.

First, at the beginning of the 1990s, GATT dispute settlement Panels had to examine certain kinds of measures that did not fit within the normal, post-war model of domestic policy interventionism, yet did not resemble old-style protectionism, either. These measures were to be scrutinized against the non-discrimination norm crucial to "embedded liberalism" without clearly fitting extant interpretations of this norm. Thus, in the *Tuna/Dolphin* dispute, 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. As 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 which was attached to the post-war "embedded liberalism" bargain did not necessarily encompass actions of this nature, aimed at influencing behavior, or at least addressing various non-commercial consequences of behavior, outside the boundaries of the intervening state. Free traders were quick to label the action as an instance of "regulatory imperialism" where the U.S. bully sought to impose its way of life onto the rest of the world. Defenders of the ban retorted that U.S. consumers did not want to tell consumers in other countries what preconditions they should adopt for buying tuna in their own market. Only they themselves did not want to contribute to the depletion of dolphins through their own consumption pattern. Unilateral application of the importing country's norms, in this case, was aimed at altering the very nature of the object consumed (e.g., the quality of dolphin-friendly tuna) rather than—as the unconditional free trade advocates would argue—at altering competitive conditions that might have presumably favored Mexican fishermen.

Sorting out how to deal with such measures within the explicit "embedded liberalism" bargain, while preserving the centrality and coherence of the non-discrimination norm, is not an insuperable intellectual challenge,[23] as became evident in a similar instance, the *Shrimp/Turtle* case, where what was at issue were measures prohibiting methods of fishing shrimp which killed sea turtle. In this case, and unlike the Panels in the *Tuna/Dolphin* cases, the Appellate Body of the WTO accepted the view that such measures could be justified under Art. XX of the GATT, subject to the conditions of the chapeau of Art 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 it, 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. The Panels might have thought that they were merely preserving as best they could the implicit parameters of the post-war "embedded liberalism" bargain—since they were upholding the sovereign lawmaking rights of the exporting country. But

because they denied consumer-citizens their collective pro-conservation choice, and on the technical front, because of the lack of textual foundation for the rulings, and the apparent flouting of the explicit hierarchy of norms in Art. XX (which allows even explicitly discriminatory policies on the part of the importing country for conservation purposes), the Panels were understood to be making a choice that trade liberalization should trump environmental values. 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 in the last decade also put pressure on the "embedded liberalism" bargain. In the wake of the debt crisis, a range of developing countries removed or modified restrictions on foreign investment and other domestic policies that constituted disincentives to attracting foreign capital, either because of IMF conditionality or because, with access to debt markets now limited, attracting equity investment from abroad seemed the only plausible means of financing economic growth. As a result, fears of "social dumping" and, as a consequence, fears of a "race to the bottom" between domestic laws became prominent in the developed world. Developed countries, the reasoning went, 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. To be sure, there are wide disagreements among economists about the causal link between footloose industries and social standards, and between trade and the immiseration of the working class in developed countries.[24] And, to this date, the "race to the bottom" argument remains unsubstantiated, except with regards to high differentials in corporate taxation.

Whatever the limits of the empirical evidence, the "race to the bottom" gave a new, non-protectionist normative foundation to traditional "level-playing-field" concerns about fair trade. First, because it put in question the sustainability of "legitimate" policy interventionism which was the domestic side of the "embedded liberalism" bargain. Second, because 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 fact, matters were much more complex, since given their levels of development, and even taking into account appropriate discount rates for the costs to future generations and transboundary externalities in the case of the environment, it was far from clear that for many developing countries, the "bottom" was not an optimal place to be. The trading system was, to a large extent, being made to take the rap for the effects of liberalizing capital movements. Yet, by making investment liberalization part of the official multilateral trade agenda, the free traders could, to some extent, have been said to have thrown in their chips with what Susan Strange

has called the casino of free global capital markets. It did not help that free trade was being lumped together with all the other liberalization measures being sold to developing and transitional countries by Bretton Woods institutions as a formula for economic success.

In this context, the new social movements protesting in Seattle were not necessarily contradicting each other when they called for both global standards in certain areas (environment, labor) and for the protection of local standards in others (food, culture, intellectual property). Both sets of demands reflected considerable unease at the increasingly "disembedded" character of the international liberal order, and 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 post-war model of "embedded liberalism" had been subverted by the combination of domestic ideological change, economic forces and international policy prescriptions. The bargain needed to be revisited.

4. Responses to the Legitimacy Crisis: The Fallacy of Constitutionalism

How then can the "embedded liberalism" bargain be sustained? To many, the WTO in its present form appears to constrain some domestic policies too tightly, while not constraining others tightly enough. In a world of ad-hoc sequential or linked bargains, no one seems able to provide an overarching rationale to explain these apparent inconsistencies. 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 trade and contemporary trade politics and less accustomed to the complexities of constitutional politics, this option may seem to offer greater stability. Why?

Constitutionalization means different things to different people. In traditional terms it refers to a constitutional moment which defines the founding or refounding of coherent polities or nations. This is not what advocates of WTO constitutionalism have in mind. Instead, some simply seek the constitutionalization of market access rights, while others seek to redefine the regulative functions and the organizational structures of the WTO itself as a global quasi-federal system. To be sure, those explicitly affirming a belief in the appropriateness of constitutionalism for WTO, in either guise, only represent the top of the iceberg. This belief is actually shared by a broad spectrum of the trade "epistemic community" and reflected in their evolving conception of the role of the judge and how adjudication ought to be conducted in WTO and of the relationship between the respective role of law and politics in the international trading system. It is not only the former's

proclaimed agenda but also the latter's implicit assumption that we have in mind in our discussion below.

The Libertarian "Constitutional" Alternative

Libertarians have their Utopia. If the WTO can be understood as a charter of economic rights, conferring enforceable claims on non-governmental 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 (intellectual property, etc.) 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, about rights, not interests. In its libertarian version, it is about individual economic rights. Thus, according to Ernst-Ulrich Petersmann, one of the leading advocates for constitutionalizing the WTO: "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."[25] When a WTO dispute settlement Panel invalidates an environmental protection scheme (which affects imports albeit indiscriminately), this can be understood not as replacing the policy balancing of domestic democratic institutions with its own policy balancing[26] (of environmental vs. trade costs and benefits), but rather as enforcing a higher legal norm, with which *all* domestic policy balancing must be consistent. 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 and with its persuasive compliance mechanisms, already provides a far more effective protection for individual rights than do the human rights organs of the UN institutions.[27]

Why would states agree to the protection of such individual rights at the international level, when in many cases they are not recognized in their own domestic constitutions? And even if they did—due to various kinds of positive and negative incentives—how would these rights be enforceable in their own jurisdiction? Indeed, Kant saw a transnational constitution as possible only once the members of the juridical union had themselves adopted domestic liberal republican constitutions.[28] And one does not need to agree with the Virginia school of (domestic) libertarian "constitutional economics" to recognize that constitutions are commitments about incomplete contracts that lead to impossible dilemmas in democratic contexts, as constitutional courts for equally good reasons should and should

not follow the legislative "last word" on any given topic. In response, Petersmann suggests that there are forms of hands-tying or precommitment that can be effective internationally even while not possible domestically. A government acting in the public interest may make effective precommitments at the international level that tie its hands because these international precommitments impose a new set of costs (retaliation from trading partners, in particular) associated with giving in to rent-seeking demands for protection.[29] If advocating such a process seems 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, the nature of international trade negotiations provides an answer: the prospective benefits from reciprocal liberalization bring new constituencies to the fore 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, the logic of negotiated trade liberalization provides opportunities for the protection of economic rights against interest group depredation that are not available within the domestic political process.

In our view, this approach is problematic, first because it underestimates the conditions under which hands-tying can be made legitimate in the WTO context. Mechanisms of hands-tying are relevant to all situations whereby individuals or collectivities create conditions that will help them resist temptations to act in a manner that they regard as contrary to their longer-term self-interest, but would otherwise appear irresistible in the short term. Jon Elster has recently reconsidered the complexities of understanding constitutional arrangements in terms of such precommitment since "in politics, people never try to bind themselves, only to bind others."[30] Clearly, what Petersmann characterizes as the precommitment of a public-interest-motivated government to tie *its own* hands in the future in dealing with interest groups, is really a commitment to tie the hands of its political opponents and the groups they represent, should they win a democratic victory. Indeed, this realization has been the ground of much of the criticism of constitutionalism at the national level from Locke to Paine who thought that the only concern that legitimates any form of government is the consent of the living. But, of course, national constitutions provide grand narratives which are both the product of and made possible by extant political communities.

Wherever one may fall on constitutional debates at the national level, it is fair to argue that hands-tying is much more problematic internationally. 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—such as referenda, super-majority

votes, elected constitutional assemblies. But judging hands-tying through WTO law against this standard only puts into high relief the questionable democratic *bona fides* of WTO rules. Domestic deliberation of these rules is perfunctory and constrained by information and agency costs. This process produces a mass of general and often ambiguous rules, whose effects cannot easily be debated intelligently *ex ante* in national legislatures, and which must be accepted or rejected as a single package.[31]

To be sure, in the "embedded liberalism" view, the GATT itself could be understood as hands-tying. But the same democratic difficulties did not arise to the extent that 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 and balance the claim of all constituencies through non-trade measures. Libertarians like Petersmann are consistent: they are confident that economic rights can best reflect the public interest *because* they believe it is possible to achieve legitimate public goals 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. Politics must be sacrificed on the altar of the "general interest"—albeit a certain conception of the general interest. Ultimately such a vision is little more than "disembedded 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, labor standards and so forth. Yet, it is these new rules that call for a "constitutional" justification.

The tension is more fundamental, however, if one disagrees with economic libertarians about the range of legitimate policy objectives, and the capacities of different policy instruments to achieve such objectives. Then one would not share the conclusion that the level and manner of intervention in the market characteristic of domestic polities is due solely to interest-group rent-seeking, and one would not draw the implication that economic rights require protection through hands-tying at the international level.

Beyond the problematic advantages of hands-tying, we also believe that libertarian liberalism is flawed in its implicit assumptions on the traditional sources of economic rights in voluntaristic political constructs. 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 narrower interpretations. The jurisprudence of the EC Court of Justice on the free movement of goods, services, persons, capital, and payments, and the judicial protection of these freedoms addressed to states as *individual rights* of the 380 million EC citizens, illustrates the legal, political, and economic importance of individual

rights and of their judicial protection for international economic integration."[32]

Does Petersmann really draw the right lessons from the EU experience? For one, and to the extent that the European bargain can be seen as a legitimate one, this is due in the first instance to a mutual hands-tying between social democratic and Christian democratic traditions based on a unique combination of ideological convergence and concessions after the war; a configuration that can hardly be replicated at the global level. The Member States' tolerance for elements of supranational governance—from ECJ rulings to the partial delegation of authority to the Commission, to the Coreper and to non-consensual intergovernmental decision making—are expressions of this continued compatibility.

Furthermore, the EU Treaties contain no enumeration of fundamental rights, economic or otherwise. Instead, such rights had to be inferred by the Court from the general obligations of free movement included in the Treaties and derived through a progressive transfer to the EU of the principle of proportionality. To be sure, such piecemeal constitutionalization is what most trade lawyers advocating an expansive interpretation of WTO articles have in mind rather than a "constitutional moment." However, is it irrelevant that, in the EU context, economic rights have not been justified on their own merit, but framed by the Court as a by-product of the pursuit of a "common good," a single market in Europe? If the teleology served as the justification for encroachment of trade on competing collective values to be collective goals rather than individual wants in the EU context, 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 EU, history has shown that they cannot stand alone and benefit from a monopoly on constitutionality. When the ECJ stated in *Wachau* (ECJ 1989) that it was balancing individual rights against the interests and policies of governments, it did so in the name of social rights, not of market access rights. Even if this minimalist vision of European integration was correct, we would argue that constitutionalization (as the inference of market access rights by the ECJ) was made acceptable in Europe by characteristics whose functional equivalent does not obtain today at the WTO level.

In the end, the first phase of EU development did not suffer from acute legitimacy problems because it was successful in balancing the need for stability in its constitutional rules with the need for flexible adjustment in the system. Successful federal arrangements develop forms of flexible governance to allow the federal balance to shift with various social, economic, ideological trends. The question is how to best develop an institutional commitment to flexibility and adaptability under constraints of democratic legitimacy. One major basis for such flexibility is the complex relationship between constitutional politics and legislative politics in the EU.

The very reason why the EU process of constitutionalization progressively turned from the first to the second model discussed below is because constitutionalism based solely on economic libertarianism did not provide the kind of democratically grounded flexibility that allows for cycles of centralization and decentralization in the regulation of free trade.

The European "Federal Vision" Alternative

At least as influential as the idea of libertarian precommitment in most discussions of the WTO constitutional trajectory, is an idea akin to evolutionary federalism advocated 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 the WTO with the task to enforce them.[33] This progressive internationalist version of WTO constitutionalization is more consistent with the standard conception of the actual constitutional trajectory of the European Union.[34]

The European example is obviously appealing to WTO constitutionalists in that while 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: "[T]he Treaties have been 'constitutionalized' and the Community has become an entity whose closest structural model is no longer an international organization but a denser, yet nonunitary polity, principally the federal state. Put differently, the Community's 'operating system' is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles."[35]

Particularly persuasive to proponents of WTO constitutionalization is the European Court's transformation of the European treaty system into a constitutional order. This account is of special interest since, in the Uruguay Round, the membership of the GATT rejected the invitation to reconceive the global trade system in constitutional terms, that is, as an autonomous level of governance, despite proposals to create regulatory powers in the WTO.[36] Law*making* in the WTO was to remain consensus-based interstate bargaining and no autonomous or independent lawmaking 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 preferences 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 the prerequisites for these developments that the WTO lacks. The Treaty of Rome, from the outset,

conferred upon 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, transcending the confederal notion of a pact among sovereigns (to merely pool, or limit, exercises of sovereignty as among each other) and creating a direct relationship between the individual and the orders of governance established by the treaty. The logic of applying the ideal of the rule of law to that direct relationship was a doctrine of direct effect that was then extended by the ECJ beyond the limited, special case of regulations.

Yet in the case of the WTO, there is *no* basis in the treaties for finding such direct effect. As a WTO Panel recently noted, the fact that WTO law *indirectly* protects the economic opportunities of individual traders, and that many of the benefits from the treaties flow from such protection, cannot be bootstrapped into the notion that WTO obligations are owed directly to such traders. As the Panel suggested: "Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals."[37] In a cautious footnote to this passage, the Panel rightly did not dismiss the possibility that in some instances the only way of effectively *implementing* a WTO obligation to other *Members* might be to create court-enforceable rights for individuals within the domestic legal system in question; but it equally rightly appears to have perceived that, even if this were the case, the individuals in question would have these rights, not by virtue of a direct relationship to an autonomous WTO legal order, but merely as a consequence of what would be required to implement obligations as between Member states.

In contrast, analysts have shown how the so-called constitutionalization of the EU treaties would not have been possible without the continuous stream of referrals from national courts on the basis of article 177 and the ensuing cooptation of national systems and actors. The characteristics of the legal community in Europe contributed to legitimizing the ECJ approach from the bottom up and embedded it in deeper national level evolutions. National constitutional courts, albeit reluctantly, were eventually sucked into this process. National and supranational judges together participated in the construct of a new system of higher law that was compatible with their mutual understanding of their roles. It is hard to see how such a congruence of interests could work at the global level. Admittedly, advocates of WTO constitutionalization would argue that institutionalizing direct effect in the WTO would contribute to, and not only be, the result of creating such a congruence of interest. But such an argument relies on heroic assumptions regarding the relevance of the EU's historical dynamics to the WTO context.

Indeed, the flip side of the role of the ECJ in European constitutionalization is the complex connection that has existed between judicial developments and political dynamics in the process of integration. Often enough, the Court actually refrained from deploying the full measure of direct effect, laying out instead a roadmap for others to follow. In the EU, "the progressive elaboration of constitutional rules generated an expansionary dynamic tending to recast policy processes and outcomes."[38] Moreover, the legitimacy of judicial rulings against the application of domestic regulation was predicated upon the existence and development in Europe of a political and administrative system for "compatibility assessment and enforcement"—including 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.[39] ECJ rulings often provoked policy reforms—from the liberalization of the telecommunication regime to the invalidation of price fixing—through a combination of argumentation and threat of future censure. The Court even envisioned a social policy in Europe through its rulings on non-discrimination which drove the conversion of article 119 on equal pay for equal work into the 1970s directives on equal pay, equal treatment (1976), and social security (1979), and the conversion in turn of these directives into expansive new social rights for European citizens. Member States, as it were, constituted themselves as a constituent assembly to these decisions of the court by amending the so-called "Barber protocol"—on the question of entitlement to pensions—to the Maastricht Treaty. In this case, the Member States clearly selected among one of the possible options suggested by the Court thus being informed but not bound by its rulings.

In short, the ambitious interpretation of direct effect by the Court helped establish the credentials of the Council of Ministers and 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 since such a promise does *not* exist in the WTO treaties, and if the dispute settlement organs were to create such expectations among the citizens of contracting members through the creation of a doctrine of direct effect, 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 the promise needs to be introduced and an institutional structure appropriate to constitutional status needs to be created at WTO level, since trade liberalization "inherently starts to require, rely upon and develop positive integration."[40] Indeed, because the WTO treaties do not create any institutional mechanisms for positive integration, there is no means of balancing a court-ruling against a certain type of regulation through

harmonization or some version of managed mutual recognition which includes working out the conditions for safeguards at the domestic level. These routes may be taken by subset of actors acting in conformity with the WTO but not directly under its umbrella.[41] While WTO law allows for the *constraint* of policies that interfere with the trading rights of members, it does not provide a mechanism for the creation of new, agreed policies that can rebalance such trading rights with other legitimate policy objectives. Thus, even if not intended (unlike the libertarian approach), a constitutionalizing reading of trading "rights" by the WTO dispute settlement organs, inspired by the teleological interpretation of the European Court would necessarily have a libertarian bias in the case of the WTO, whereas in the EU context it could be taken as a challenge and even a mandate to the Commission and the Council to perform their positive integration responsibilities. To the extent that proponents of WTO constitutionalization do not advocate an EU-like regulatory state at world level, their approach, even if less ideologically explicit than the libertarian one, would likely lead to the same legitimacy problems.

It may be argued that other international fora exist for positive integration, and indeed in the WTO 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 fora. However, they do not make up part of the purported constitutional order of the WTO; their relevance to how WTO law is interpreted simply points to the need for greater openness to other institutions and integration of WTO law in the broader framework of international law and institutions as a whole, rather than a notion of normative self-sufficiency implied by the constitutional idea. In short, the institutional incompleteness that some decry with regard to the WTO cannot be easily perfected from the inside, and points instead to the need for greater openness to other institutions and fora on the outside.

Of course and alternatively, if we take the constitutionalization argument seriously, the question is whether such constitutionalization driven by the judicial branch of the WTO could be recommended as a strategy of building pressure for formal institutional change (that is the creation of an explicit level of federal governance at the WTO, with the regulatory powers required for positive integration). Why this is unlikely to happen, or more precisely why legitimacy difficulties would arise if it *were* to happen, is illuminated by developments in the European Union once Europeans became widely conscious that the Community institutions were indeed 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."[42]

In short, even in the European Union context, profound legitimacy problems have arisen from the so-called "democratic deficit." Pinder ably describes the problem:

> The system of representative government locates legislative authority in an assembly of representatives chosen in regular free election. This is not how laws are made in the Community. Community laws are enacted by the Council, to which each member government delegates "one of its members" according to the subject being dealt with at that particular Council meeting . . . The Council does, indeed, when legislating, behave like an executive body rather than an elected assembly. It negotiates behind closed doors and approves without debate many of the texts prepared by officials . . .[43]

A direct relationship between the federal level of governance and the individual implies a direct *democratic* relationship which even in the EU is lacking. At least in the European Union, there is an institution that could plausibly establish that relationship—the European Parliament—if given the appropriate powers and capacities. By contrast, the option of a directly elected WTO Parliament is far-fetched. The current Director-General of the WTO has suggested that one could nevertheless create some kind of WTO assembly composed of national parliamentarians. One must take seriously, however, the critique that 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 corresponding EU-wide political space which could feed into and in turn be fed by its own deliberations—or, as the German Constitutional Court first articulated, 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,* united by prepolitical bonds such as religion, race, and culture, a condition that does not or cannot hold at the European level (except through the most ominous kind of development—the construction of a "European" *Volk* in distinction or opposition to the "non-European"). 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.[44] As a minimum, this arguably requires, as Eric Stein has recently articulated, "a certain community of a common good and common expectations of the people that bridge the cultural differences."[45] We will come back below to some suggestions as to how such a community within Europe can be built and how these suggestions could well be applied to the WTO, thus enhancing its democratic legitimacy *without* going down the road of constitutionalization. Nevertheless, the very consideration of what constitutes

a political community and how institutions may and should reflect its characteristics make it amply clear that the regional and global scale of democracy are indeed incommensurable.

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 a distribution of such benefits and burdens. The evolution of the EU in the 1980s and 1990s has shown clearly enough how every bargain over economic liberalism needed to be accompanied by side payments to regions, groups, and countries in order to be sustainable. Moreover, it has become increasingly clear that democratic legitimacy cannot be ensured under conditions of regulatory competition short of a proactive engagement on the part of the federal level to allow states to deliver on their welfare function. 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.[46] National problem-solving capacities seem to be most severely affected by the economic and legal constraints of economic integration and conflict between states with regard to precisely those instruments of market-correcting policy that have been of critical importance for the legitimization of the welfare state. In Europe, the fact that effective control of economic outcomes at the national level has not been compensated by a concurrent shift of resources at the federal level means that other compensating mechanisms need to be found. And indeed, there are ways in Europe to address such problem-solving gaps, albeit imperfectly, that could not be plausibly introduced in WTO—from coordinated policy reform and "shaming" methods to the monitoring by the Commission of "unfair regulatory competition" or the introduction of minimal social standards.

In sum, the conditions for constitutional legitimacy in the EU accepted even by those on the pro-European constitutionalist side of this debate, to say nothing of those on the nationalist side, include integrative institutions that can be accountable for the policy and value tradeoffs that they make; a commitment to flexible structures and procedures that can respond to ideological, technological or economic shifts by allowing reallocation of power through bargaining or other agreed-upon procedures short of constitutional "revolution" and mechanisms for co-opting and compensating potential losers.

If we examine these conditions it becomes apparent that the WTO lacks, and will lack in the foreseeable future, the sources of legitimacy that would need to underpin a "constitutional" status. Most obviously, one must not 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 resists the idea of the WTO having any social agenda at all; neither are these members seriously seeking to address the issue in other international institutions. Part of the problem here is that the decision-making structures of the WTO do not easily allow a flexible approach to cooperation, the kind of integration *à deux ou à multiples vitesses* which played such a key role in sustaining the forward movement of EU integration. The old GATT was arguably more accommodating of such approaches, with its plurilateral codes which some contracting parties signed and others did not, but which were not a condition of membership and thus did not require full consensus in order to work. There are still some plurilateral elements in the WTO system, and it is not entirely inconceivable that a social charter could evolve in the WTO on a plurilateral basis. However, the divergence of values and circumstances among Members of the WTO is immensely greater than that among the Member States of the EU. The WTO commitment to universalism does not square easily with requiring, as a condition of WTO membership, not merely the recognition of a set of common values, but a high threshold of reflecting those values in the domestic legal system of all members.

In sum, constitutionalism—if it is to solve rather than exacerbate the legitimacy difficulties of the WTO—would require *constitutional* sources of legitimacy. Admittedly the rule of law is one of these sources and WTO dispute settlement displays now important rule of law features.[47] But as the European experience illustrates, the rule of law as a source of legitimacy is not self-sufficient or self-sustaining outside a framework of public institutions of governance that are a direct expression of democratic self-determination, in other words, outside democratic federalism. In short, to get legitimacy through the constitutional route would require something like a world democratic state, and this in turn would require the end of politics as we know it. We have shown how deep structural features of the multilateral trading order create constraints that make the satisfaction of such demands close to impossible. In fact, we merely seek to provide a reminder of the crucial role of politics in constitutional legitimacy, and to show that one cannot and should not lightly adopt the discourse of constitutionalism, without thinking through the nature and fate of the political at the international level.[48]

5. Non-Constitutional Means of Strengthening the Legitimacy of the WTO System: Adjudication and Politics within a Model of Global Subsidiarity

Imposing the constitutionalist spirit on the World Trade Organization is not the answer to its current crisis of legitimacy. Policymakers do not need to settle the question of the desirability of Hegel's "universal and homogenous

state," before addressing the apparent obsolescence of the original "embedded liberalism" bargain. The solution is unlikely to come "from above"—from a new normative super*structure*. Rather, the spirit of "embedded liberalism" needs to be recovered and reinterpreted "from below," under the new conditions of globalization. This can be done again in part through inspiration from the EU, not in its constitutional guise but by incorporating some of the institutional and political features associated with the thinking on 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 provide a framework for revisiting the politics of "embedded liberalism" by suggesting 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.[49]

Institutional Sensitivity

Subsidiarity, in its most straightforward sense, calls for ensuring that debates and decisions take place at levels and within fora of governance that are most likely to reflect in a balanced fashion the interests, aspirations, and opinions of all actors concerned. It thus calls for balancing the centralizing bias inherent in the need to deal with "global public goods" with a decentralizing bias inherent in the demands of "democratic proximity." To be sure, such a balancing act may still end up pointing to the superiority of global governance mechanisms, if only because many actors are best represented at the global rather than national or local level. But even then, the question remains: which global forum? which global norm?

In the case of WTO, we believe that *global subsidiarity* requires accepting the logic and development of a plural, decentralized, and multi-centered system of global socio-economic governance of which the trade organization would be but one of many nodes. This, in turn, requires that WTO political agreements and judicial rulings display appropriate sensitivity to the superior credentials that other institutions of governance may have in deciding the substantive trade-offs entailed in domestic policies that the WTO dispute settlement organs are, necessarily, required to review from the perspective of WTO rules on trade.[50] This includes, but need not start with, a presumption of deference to the states themselves. The WTO dispute settlement machinery cannot substitute itself for domestic democratic processes which have often painstakingly shaped fundamental trade-offs between economic, social, political cost-benefit considerations and values.

To be sure, institutional sensitivity should not amount to mere or unconditional deference. Such sensitivity is not only consistent with, but positively calls for, 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 trade-related policies. When it comes to ensuring domestic due process, the WTO dispute settlement organs *are* the institutions of superior competence. We will discuss below the broader political corollary to this legal principle.

Deference to the states in their collective as opposed to simply individual expression is the second aspect of institutional sensitivities. Within the WTO, the judges need, more often than not, to defer judgment to the politicians either with regard to bilateral disputes or with regard to multilateral rule-making. This may mean that in crucial cases, courts simply provide roadmaps for future political settlements rather than rulings that are directly preemptive or prescriptive of policy. As a corollary, the states themselves can less afford to rely on general standards (as opposed to specific rules) when they make law internationally rather than domestically.[51] In the end, conflicts of interpretation which involve primary conflicts of values (in the Kojevian sense) ought to be solved through political negotiations, whether bilaterally, to resolve a dispute, or multilaterally, to create a new base line for resolving future disputes. In the same vein, institutional sensitivity implies favoring transnational or bilateral solutions to supranational solutions when conflicts of jurisdiction arise.

Third, deference on the part of WTO law enforcers needs to be expanded to other issue-area regimes such as environmental, health or labor regimes. There does not exist at the global level any alternative means of making trade-offs between values and priorities which is the essence of politics domestically, and even to some (still limited) extent in the EU. Institutionalized linkages between segmented regimes must play the role of the Cabinet at the national level or the Coreper (Committee of Permanent Representatives) in the EU. Inter-institutional linkage must be "institutionalized" at the global level where there is not, nor should be, an integrative government-like institution. But there is no reason why this linkage should happen solely under the terms spelled out by WTO. Short of building a functioning democratic community, all institutional externalities cannot and should not be internalized. Checks and balances need to remain and be fine-tuned *between* as well as *within* institutions. We illustrate these general points through a discussion of recent case law under the WTO dispute settlement system.

The first step requires no changes of the WTO law. It is to interpret those provisions of the WTO agreements that are not easily understood as a straightforward "win-win" deal for all Members in a manner sensitive to the

inadequacy of constitutional sources of legitimacy *within* the WTO system itself. For one, while the treaty text requires the dispute settlement organs necessarily to adjudicate between conflicting values, there needs to be *prima facie* recognition of outcomes from more democratically legitimate political and regulatory institutions. In *Hormones,* the Appellate Body displayed considerable sensitivity along these lines, for example, when it stated:

> [A] Panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance of a particular measure may, of course, and should bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g., life-terminating, damage to human health are concerned.

Furthermore, the Appellate Body has substituted such lacking sources of legitimacy by placing WTO law in the framework of general international law—externalizing, as it were, the constitutional dimension. Thus, in the *Hormones* case, it questioned an interpretation by the Panel of a requirement that Members (in this case the EU) not take trade-restrictive sanitary and phytosanitary measures unless they are "based on" international standards. The Panel had said that such measures needed to conform with the international standards, thus assuming a strict meaning. In a more lenient interpretation of the implied obligations—allowing for diversity of domestic standards—the Appellate Body noted the crucial importance of weighing all the details of the negotiated political 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."[52] Thus, the Appellate Body opposed the tendency of the Panels to *assume* a certain purpose prior to careful textual interpretation, in order to prevent the interpreter from having to "test" their view of purpose against the exact words used in the treaty, a necessary safeguard against the importation of a single purpose into a legal text crafted to balance diverse and possibly competing values.[53]

Should there be much doubt that following these general public international law interpretative norms ought to enhance the legitimacy of the dispute settlement organs in adjudicating competing values? Crucially, these norms are common to international law generally, including regimes that give priority to very different values, and are not specific to a regime that has traditionally privileged a single value, that of free trade.[54]

Another interpretive issue in the *Hormones* case highlights this significance. In the traditional GATT-specific canon of interpretation where a provision of the treaty allows for an exception to a trade-liberalizing obligation, the burden of proof falls on the party invoking the exception—an

approach that clearly privileges free trade over other, competing values, assuming that the latter, embodied in the exception, cannot easily dislodge the former, regardless of the nature of the matter in dispute. Such an asymmetry, however, was compensated by the relatively narrow scope of GATT free trade obligations. Significantly, when in *Hormones,* the Panel applied this traditional GATT-specific approach to a provision of the Sanitary and Phytosanitary Agreement, the Appellate Body reversed its finding on burden of proof. It emphasized instead that "merely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of the provisions than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in light of the treaty's object and purpose . . ." (para. 104).

Moving one step further on the "sensitivity scale," the *Vienna Convention* calls for the consideration of *non*-WTO international legal rules in the interpretation of WTO treaties—rules that may reflect other values and interests than those of trade liberalization.[55] Signaling its willingness to abide by this norm, the Appellate Body referred to international environmental law in the *Shrimp/Turtles* case when interpreting the provisions of Article XX of the GATT (the article refers *inter alia* to the possibility of justifying otherwise GATT-inconsistent trade measures aimed at protecting endangered species). Assessing the alleged "unjust" or "arbitrary" nature of U.S. measures, and thus their possible character as "disguised restriction on international trade," 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 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 towards a consensus-based solution, while having already negotiated successfully with other members, constituted "unjustified" discrimination (paras. 168–172). Deference to the substance of U.S. law was hence compensated both by strict procedural requirements and horizontal subsidiarity or deference to a non-WTO regime.

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 all cases. The *Beef Hormone* case is an example whereby the parties may simply need to agree to disagree, as the U.S. and the EU have, without escalating into a more general trade war. Neither European non-compliance 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 institutionally

or structurally to the point where all such disagreements can be legitimately resolved above the level of domestic politics. In a case like this, the outcome of non-compliance 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. Here, however, in order to forestall risk of escalation, the parties, we suggest, should seek alternatives to withdrawal of concessions by the winning party (such as negotiated rebalancing of concessions). While withdrawal of concessions is an obviously logical response to non-compliance, compensation (the losing party offering *additional* concessions in some other area) is a more optimal approach to dealing with unsolvable conflicts. It serves consumers on one side and opens markets on the other. And by not engaging in a tit-for-tat approach it signals a recognition that it is not defection that is being addressed by the very limits of the system. However, there is little doubt that the political economy of such an approach is tricky, if only because of the new import-competing groups that come to be affected in the process. Moreover, from the perspective of international law, we do not believe that compensation could be seen as adequate to discharge the duty of good-faith implementation of the treaty. Thus, a rather different mechanism might be required, one that allows a legal rebalancing of concessions, which is what was already provided in Art. XXVIII of GATT, at least with respect to tariffs on goods.

Finally, the progress made on the discussions for reform discussed above 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 across polities in regulatory perspectives, scientific assessment, public demands for regulations or lack thereof, and attitudes towards risks. This may make it possible in turn to develop new, legitimate institutions and norms of global governance. In the meantime, what is needed is a system for the peaceful management of policy and political differences, which need not entail a complete halt to progressive liberalization of trade. Moreover, states may legitimately choose to embark in 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. Classic “embedded liberalism” was predicated on the assumption that democracy happened inside, while bargains happened

outside between national representatives who were the sole representation of these domestic processes. How and to what end state-society relations were to be conducted were the sole prerogative of the sovereign state. This view mirrored the sharp distinction between inside and outside and the role of the border in the territorially-based conceptions of trade law. While the economic and, to some extent, legal reality has moved on with the interpenetration of domestic systems of production, laws, and regulation, indirect representation is still the basis of the politics of WTO and its claim to legitimacy. It is time to unbundle traditional concepts of territoriality, as Ruggie has called for.[56] Or, as Robert Keohane and Joseph Nye have discussed, 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.[57] The undoing of the "embedded liberalism" bargain suggests that this club paradigm needs to be adapted.

First, at the *national* level, the WTO can encourage greater inclusiveness in trade-policy-making. After all, indirect accountability remains the first requisite for improving democracy beyond the nation-state, and perhaps the most straightforward way of dealing with the problem of a democratic deficit at the global level.[58] National citizens, groups, or parliaments can more truly and meaningfully participate in trade policy decision-making under obligations of domestic consultation. We could imagine that WTO Member States commit to "political codes of conducts" reflecting general principles of democratic accountability in the conduct of trade-related policies without imposing specific means of implementing them.[59]

Second, 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. The irony of the Seattle Ministerial is that it revealed the beginnings of a global civil society with regard to trade matters, as both a product and a reaction against globalization.

In the judicial and political spheres, limited progress has already been made. The Appellate Body has made clear that *amicus curiae* briefs by non-governmental actors may be considered in WTO dispute settlement cases and rulings are made widely available on the Web immediately after their release. A process of consultation regarding trade and environment has been going on for the last five years. But this is not enough. It is also necessary to underpin greater inclusiveness by amending dispute settlement rules, which currently provide for secrecy in WTO dispute settlement proceedings themselves, both in the written pleadings and oral argument. It is also important to explore ways of giving greater voice to non-governmental actors during political negotiations. This is justified normatively since corporatist notions of

democratic legitimacy may be warranted beyond the nation-state, given economies of scale of organization and the fact that some groups may be given access previously denied to them at the national level.[60]

But for a long time this kind of inclusiveness is bound to fall short of the direct democratic relationship required for constitutionalization. And, given the persuasive arguments about the lack of representativeness of NGOs and the like (as compared to democratic governments), there is something to be said for caution. NGOs and civil society can play a crucial role by publicizing and opening the process—more than they can by pretending to represent a significant stake in the final outcome. Countless useless debates would be avoided if decision-makers were to recognize that their inclusion is justified on grounds of deliberative democracy, even if it does not fit with the classic model of representative democracy.[61] Here, inclusiveness—more inclusive public participation in shaping the system—should also be contrasted with the constitutional idea of private litigants' rights in the WTO, with private parties being able to sue on WTO treaty provisions on the understanding that these provisions create "rights" as with the libertarian constitutional model. As long as one understands the non-constitutional role of participatory opportunities in dispute settlement (amicus-type intervention, right to attend hearings, etc.), such opportunities need not and should not be viewed as the first step towards private rights of action. Similarly, participatory opportunities in political debates need not be understood as rights of representation. In this area, the use of the Web could be greatly enhanced along the lines suggested by Joseph Weiler for the EU—for instance, that all deliberations of the European institutions be put on the Internet.[62]

In addition, the WTO could help enhance obligations of *transnational* inclusiveness in domestic rule-making processes. While we have argued that WTO Panels should refrain from interfering with substantive choices between values at the domestic level, there might be less pressure for this type of interference if people felt that they had had their say at the input stage of decision-making in other countries—to the extent that the decisions in question concern them. This puts a greater onus on the WTO to design and enforce procedural constraints on the exercise of their prerogatives on the part of states. A first step in this direction was taken in the Uruguay round with the creation of contact points and enquiry points through which information about trade-relevant domestic regulations is disseminated by the WTO. The approach needs to be generalized through more stringent and direct obligations of transparency borne by the contracting parties themselves. 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 could be required in areas of extraterritorial effect. The EU has pioneered this to some extent in the field of environmental law. On the judicial front, *inclusiveness* calls for a focus on *due process*

elements of WTO rules, including participation and transparency as opposed to substantive balancing. As de Burca and Scott argue, and as we mentioned above this is an important feature of the *Shrimp/Turtle* ruling. Instead of engaging in some sort of scrutiny of the trade off between free trade and environmental protection embodied in the U.S. scheme, once the Appellate Body had assured itself that there was a *bona fide* non-protectionist rationale for the scheme, i.e., that it was "in relation" to the protection of exhaustible natural resources, they went on to examine whether its application was consistent with various due process values of transparency, fairness, non-arbitrariness, and prior negotiation/deliberation with all affected interests.

Another aspect of transnational inclusiveness is the role the WTO must play in ensuring fair access by non-OECD countries to both formal and informal negotiations by the OECD, or between OECD countries, in particular in negotiations or applications of Mutual Recognition Agreements (MRA). Admittedly, inclusiveness has become more complicated than unconditional MFN and automatic non-discrimination since an increasing amount of liberalization has become conditional (on regulatory compatibility) without being discriminatory.[63] Emphasis on due process rather than on substantive assessment of "equivalence" ought to characterize judicial review in assessing compliance with "procedural MFN."[64] These constraints can be requirements, for instance, to give third parties to an MRA a chance to prove their case, and even reversing the burden of proof of regulatory compatibility in their favor.

This proceduralist focus on the interpretation of WTO rules necessarily involves some review of delicate domestic policy choices, and complements the notion of institutional sensitivity. A crude rule of deference could be destabilizing if it led to excessive tolerance of cheating. In addition, any such general rule would risk being in tension with general international law principles, such as effectiveness in treaty interpretation. Institutional sensitivity in reviewing substantive policy trade-offs, combined with a strong or relatively strict approach to due process and obligations of inclusiveness, both enhances the democratic pedigree of policies, rendering them more contestable in domestic and international discourse, and preserves the confidence that protectionist cheating will be disciplined.

Top-Down Empowerment

Finally, the *permissive* interpretation of "embedded liberalism" needs to be progressively 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 harder, 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 so as to respond effectively to the new pressures and opportunities of globalization. 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.[65] The WTO can not simply allow or restrict states in their rights and obligations to their respective citizens. In this vein, global subsidiarity does not need to be interpreted as shifting functions away from the center but instead as conceiving of those functions as means of empowerment of the sub-units including, but not exclusively, the state.

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."[66] Why not create a version of 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 of the country concerned, for instance, or on the type of economic actors? 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, including opt-out for very poor countries, will ensure that such a regime focuses on curbing welfare-reducing or beggar-thy-neighbor regulatory competition and 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. Thus, countries for whom a standard lower than the "bottom" to which others might legitimately wish to commit is optimal from the perspective of domestic welfare, would not have to be tied to such commitments. 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, nor would existing benefits under the WTO system be conditioned on joining the code.

There is, however, an important condition for such an approach to actually result in empowering not only states but also the peoples within it. 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 joint WTO-World Bank-IMF approach with regard to the

social clause should be seen in this context, while operationalizing the kind of regime linkages called for by political sensitivity. Trade conditionality can be made easier and more legitimate if backed up by a real "agenda of empowerment" in the aid and project finance field. If child labor is to be progressively banned from the production processes of exported products—starting with those made by MNCs—then local communities and families need to be assisted in these efforts through combined schooling-training programs. To be sure, the best remedies in this vein may be those already implemented from the bottom-up such as micro-financing, but there is no reason why the resources of the international community should not be brought to bear more systematically in this context. Again, however, we do not see such an initiative in constitutional terms as a form of federal global governance, but as a means of returning to the adjustment focus of the "embedded liberalism" model, while adapting it to global monetary and financial arrangements very different from those presupposed by the adjustment features of the original Bretton Woods arrangements. Here, the role of financial assistance should not be viewed as based on the kind of aid conditionality premised in the so-called Washington consensus—the imposition of a governance model on the countries concerned—nor as premised on a global conception of distributive justice, but rather as underpinning the political economy of a world trading system still based, for the foreseeable future, on mutually beneficial interstate bargains.

Clearly, such an approach to top-down empowerment should not be conceived or perceived as an allowance for international economic institutions to supersede local democratic processes and bypass domestic institutions. On the contrary, the WTO, in our case, ought to play a role in enhancing these domestic processes by helping strengthen indirect democracy and accountability and by supporting the creation of political spaces for local actors who might have been hitherto disempowered in their respective domestic contexts (women, children, minorities, consumers, unions, migrants). In this, requirements of political inclusiveness and empowerment converge and complement each other. If governments need to be accountable for what they decide collectively at the international level, then national actors and groups in civil society need to be empowered to exercise indirect control. Local democracy is the ultimate key to our model of global subsidiarity.

6. Conclusion

In this essay, we have analyzed the conceptualization of the judicial role in the WTO in the broader context of the overall challenge of reshaping global economic governance. We have argued that constitutionalization is not the right answer to the WTO's legitimacy crisis, and that the practice of the WTO

Appellate Body can be best understood in non-constitutional terms. We based our analysis of the current situation on the fate of "embedded liberalism" in the GATT and then WTO in the last fifty years, and the difficulty of balancing over time progressive trade liberalization and the notion that when in doubt, the imperatives of domestic welfare should trump the requirements of laissez-faire. The challenge today is to recover the spirit of embedded liberalism under conditions radically different from those at its inception. In doing so, we argue that we need to *recover* rather than seek to *transcend* the primacy of politics and recognize that, at least at the global level, no single authority or principle can legitimately adjudicate between conflicting local values. When rational discourse, persuasive argumentation, generalized deliberation or peer pressure are not enough, human society needs recourse to political mechanisms of interaction to deal with the inherent tensions entailed with living together and interacting in pursuit of the individual as well as collective good.

In our critique of the use of the European Union as a model for constitutionalizing the WTO, we do not belabor the self-evident point that the two settings are too different to warrant a direct transfer in mode of governance. Nor do we lose sight of the fact that constitutionalization in the EU has been a long incremental process which is still in the making and indeed still highly contested. Instead, we have sought to highlight the critical political assumptions behind either formal or informal constitutionalization and to point to the qualitatively different nature of the global system and the balance between diversity and convergence that it implies. Our prescription is to retain some but not all of the lessons provided by the EU through the use by WTO judges and diplomats of a "global subsidiarity" model as guidance for their action.

It might be objected that, if all the proposals that we make were fully realized, especially those on inclusiveness, empowerment, and deliberative democracy, we might indeed 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* global subsidiarity of the right kind(s), some of the normative objections to a world state or government, based upon concerns about democratic deficits, about the destruction of desirable human diversity and the risk of technocratic tyranny, might no longer have significant weight. Indeed, the prescriptive guidelines that we have suggested could ultimately result in creating some conditions for constitutionalism in the long run—because integration of human rights and environment into WTO law as higher norms that shape and limit specific trade liberalization commitments would 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.* 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 bears an advantage—for we would say even to those who are already committed to the ultimate goal of WTO constitutionalism that the best means of bringing about those conditions are non-constitutional ones, which have coherence and legitimacy on their own terms within a revised understanding of the "embedded liberalism" bargain. The problem with the constitutionalists, however radical or moderate their proposals, is that, when understood properly, their trajectory presupposes the very conditions of legitimacy that they want to create. But constitutionalization of non-constitutional structures cannot itself create the conditions of constitutional legitimacy; rather, legitimate constitutionalism depends on those conditions, both conceptually and temporally.

NOTES

1. Thomas Cottier, Limits to International Trade: The Constitutional Challenge, in: *The American Society of International Law, Proceedings of the 94th Annual Meeting, April 5-8, 2000, Washington, DC*, Washington, DC 2000, pp. 200-22.

2. G. R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization", 44 *Duke Law Journal*, pp. 829–927.

3. Thomas Cottier, n. 1.

4. Dan Tarullo uses the expression "constitutional" to refer to or denote issues or doctrines that are "fundamental to the nature of the WTO." See D. Tarullo, "The Relationship of WTO Obligations to Other International Arrangements", in M. Bronckers and R. Quick, eds., *New Directions in International Economic Law* (Kluwer Law International: The Hague, 2000), pp. 155–56. Understood purely descriptively, such usage appears to be innocuous. However, it can also be used (or abused) normatively to resist change and transformation, by ruling out certain options and certain kinds of claims as incompatible with the "nature" of the WTO, the idea being if you want a WTO at all, there are certain structures that you have to accept. But if we look, for instance, to what on any account are, and which we ourselves would call, fundamental characteristics of the GATT, such as MFN, these have always been accompanied by exceptions, limitations, and balancing rights and obligations. *Dépeçage* of WTO rules and structures into those that are fundamental or constitutional and those that are not may well be based on an assumption that what is fundamental are the pro-free trade principles and rules and what are peripheral or less fundamental are the exceptions, limitations, etc.

5. J. Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order", 36 *International Organization* (1982), p. 379.

6. "Constitutional" talk about the WTO has spilled out beyond these two variants, which represent serious understandings of the WTO, its telos and future, into trivial or intellectually sloppy use of the terms constitutional or constitutionalism. For example, Deborah Cass has chosen to speak of the constitutionalization of the WTO because WTO jurisprudence is

developing some rules and principles that share characteristics with those in constitutional law. However, the rules and principles are mostly characteristic of traditional public international law; only ignorance of the latter could lead someone to think that notions such as proportionality or of delimited competences or powers are peculiar or specific to constitutional bodies of law. See D. Cass, The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade, 12 *European Journal of International Law* (2001), p. 39. Many of the characteristics of WTO law that lead scholars such as Cass to cry "constitution" are, in fact, as David Palmeter points out in an excellent article, merely characteristics that we think of as belonging to a legal system as such. See D. Palmeter, "The WTO as a Legal System", 24 *Fordham International Law Journal* (2000), p. 444.

7. Ernst-Ulrich Petersmann, Trade Policy as a Constitutional Problem: On the Domestic Policy Functions of International Rules, 41 *Aussenwirtschaft*, pp. 405–39.

8. Thomas Cottier, n. 1.

9. Robert Keohane, *After Hegemony: Cooperation and Discord in the Modern World Economy* (Princeton University Press, 1984). Kenneth Oye, ed., *Cooperation Under Anarchy* (Princeton University Press, 1985). Robert Axelrod, *The Evolution of Cooperation* (Basic Books, 1980).

10. A.-M. Slaughter, "Regulating the World: Multilateralism, Internationalism and the Projection of the New Deal Regulatory State", in Robert Howse, ed., *The World Trading System: Critical Perspectives on the World Economy* (Routledge, 1998).

11. Stephen Krasner, "State Power and the Structure of International Trade", 28 *World Politics* (1976).

12. M.J. Trebilcock, M.A. Chandler, and R. Howse, *Trade and Transitions: A Comparative Analysis of Industrial Policies* (Routledge, 1990).

13. 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." J.G. Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism and the Post-War Economic Regimes", 36 *International Organization* (1982).

14. See Jagdish Bhagwati, *Protectionism* (Cambridge University Press, 1988).

15. M.J. Trebilcock, M.A. Chandler, and R. Howse, *Trade and Transitions: A Comparative Analysis of Industrial Policies* (Routledge, 1990).

16. Daniel Tarullo, "Beyond Normalcy in the Regulation of International Trade", 100 *Harvard Law Review* (1987), pp. 546ff.

17. See Alan Sykes, *Product Standards for Internationally Integrated Goods Markets* (Brookings, 1995); Kalypso Nicolaïdis, "Mutual Recognition of Regulatory Regimes: Some

Lessons and Prospects", *Regulatory Reform and International Market Openness* (OECD Publications, 1996).

18. William Drake and Kalypso Nicolaïdis, Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round, 46 *International Organization*, no. 1 (Winter 1992), 17–100.

19. Alan Sykes, "Regulatory Protectionism", 66 *University of Chicago Law Review* (1999).

20. Alan Deardorff, "Should Patent Protection be Extended to all Developing Countries?", 13 *World Economy* (1990), pp. 497 ff.

21. See generally Steven Vogel, *Freer Markets, More Rules* (Cornell University Press, 1996).

22. Kalypso Nicolaïdis and Joel P. Trachtman, "From Policed Regulation to Managed Recognition: Mapping the Boundary in GATS", in Pierre Sauve and Robert Stern, eds., *Services 2000: New Directions in Services Trade Liberalization* (Brookings Press, 2000).

23. See Kalypso Nicolaïdis, "Non-Discriminatory Mutual Recognition: An Oxymoron in the New WTO Lexicon?", in T. Cottier, P. Mavroidis, P. Blatter, eds., *Regulatory Barriers and the Principle of Non-Discrimination of World Trade Law: Past, Present and Future* (Michigan University Press, 2000).

24. Jagdish Bhagwati and Robert Hudec, *Fair Trade and Harmonization* (MIT Press, 1996).

25. E.-U. Petersmann, From "Negative" to "Positive Integration" in the WTO: Time For "Mainstreaming Human Rights" into WTO Law?, *Common Market Law Review*, Vol. 37 (2000), No. 6, p. 1377.

26. J. Dunoff, "The Death of the Trade Regime", 10 *European Journal of International Law* (1999), pp. 733–62.

27. Petersmann, n. 25, p. 1370 *et passim.*

28. Hedley Bull, "Society and Anarchy in International Relations", in Butterfield and Wight, eds, *Diplomatic Investigations* (1966). M. Wight, "An Anatomy of International Thought", *Review of International Studies* (1987). A. Hurrell, "Kant and the Kantian paradigm in international relations", *Review of International Studies* 16 (1990), pp. 183–05. H. Reiss, *Kant's Political Writings* (Cambridge University Press, 1970).

29. Petersmann, n. 25, p. 1369.

30. J. Elster, *Ulysses Unbound* (Cambridge University Press, 2000), p. ix.

31. See E. Benvenisti, "Exit and Voice in the Age of Globalization," *Michigan Law Review* (2000). Marco Bronckers, "Better rules for a new Millennium: A warning against undemocratic developments in the WTO", *Journal of International Economic Law* (1999).

32. Petersmann, n. 25, p. 1376.

33. Thomas Cottier, n. 1.

34. 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.

35. J.H.H. Weiler, "The Transformation of Europe", Yale Law Journal Vol. 100 (1991), No. 8, p. 2407.

36. John H. Jackson, *Restructuring the GATT System* (RIIA, 1990).

37. *United States—Sections 301–310 of the Trade Act of 1974,* Report of the Panel, 1999, para. 7.72).

38. A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000), p. 189.

39. Kalypso Nicolaïdis, "Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects", *Regulatory Reform and International Market Openness* (OECD Publications, 1996).

40. Thomas Cottier, n. 1.

41. Kalypso Nicolaïdis, "Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects," *Regulatory Reform and International Market Openness* (OECD Publications, 1996). Kalypso Nicolaïdis, "Non-Discriminatory Mutual Recognition: An Oxymoron in the New WTO Lexicon?", in T. Cottier, P. Mavroidis, P. Blatter, eds., *Regulatory Barriers and the Principle of Non-Discrimination of World Trade Law: Past, Present and Future* (Michigan University Press, 2000). Kalypso Nicolaïdis, "Regulatory Cooperation and Managed Mutual Recognition: Developing a Strategic Model", in George Bermann et al., eds, *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press, 2001).

42. J.H.H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press 1999), p. 298. 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 described above, only if one begins to assert boldly enough *constitutional practices* at the WTO.

43. J. Pinder, "The European Community, the Rule of Law and Representative Government: The Significance of the Intergovernmental Conferences", *Government and Opposition* (1991), p. 204.

44. For a discussion on this point and other dimensions of the EU debates, see Kalypso Nicolaïdis and Robert Howse, eds. *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001).

45. E. Stein, "Panel Statement on Democracy without a "People," *European Studies Association Meeting*, Pittsburgh, June 1999, p. 10.

46. F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

47. See J.H.H. Weiler, *EU, WTO and NAFTA: Towards a Common Law of Economic Integration?* (Oxford University Press, 2000).

48. Alexandre Kojeve, Frost and Howse, trs., *Outline for a Phenomenology of Right* (Rowan and Littlefield, 2000).

49. The formulation of this model of global subsidiarity is inspired by our analysis of some of the existing or incipient characteristics of the EU developed in Kalypso Nicolaïdis and Robert Howse, eds. *The Federal Vision, op.cit.*

50. Robert Howse, "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence", in J.H.H. Weiler, *EU, WTO and NAFTA: Towards a Common Law of Economic Integration?* (Oxford University Press, 2000).

51. M. Bronckers, "Better rules for a new Millennium: A warning against undemocratic developments in the WTO", *Journal of International Economic Law* (1999). See also Kalypso Nicolaïdis and Joel P. Trachtman, "From Policed Regulation to Managed Recognition: Mapping the Boundary in GATS", in Pierre Sauve and Robert Stern, eds., *Services 2000: New Directions in Services Trade Liberalization* (Brookings Press, 2000).

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

53. As Cass Sunstein notes in the context of domestic public law adjudication, "Statutory terms—not legislative history, nor legislative purpose, nor legislative 'intent'—have gone through the constitutionally specified procedures for the enactment of law. Largely for this reason, the words of a statute provide the foundation for interpretation, and those words, together with widely shared conventions about how they should be understood, often lead to uniquely right answers, or at least sharply constrain the territory of legitimate disagreement. Resort to the text also promotes goals associated with the rule of law: the statutory words are available to affected citizens, and it is in response to those words that they can most readily order their affairs. An emphasis on the primacy of the text also serves as a salutary warning about the risks of judicial use of statutory purpose and of legislative history, both of which are, as we will see, subject to interpretive abuse." Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990), p. 114.

54. Nichols discusses some of the GATT-specific interpretive canons that evolved before the WTO adoption of customary interpretive rules in public international law: for instance, on 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 so 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. "GATT Doctrine", 36 *Virginia Journal of International Law* 379 (1996), supra n. 73, pp. 434–35.

55. See Article 31(3)(c) of the *Vienna Convention,* which provides that "any relevant rules of international law applicable in the relations between parties" shall be brought to bear on the interpretation of a treaty.

56. John G. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations", 46 *International Organization* (1993).

57. See Robert Keohane and Joseph Nye, in Roger Porter, Pierre Sauvé, Arvind Subramanian and Americo Zampetti, eds, *Equity, Efficiency and Legitimacy: The Multilateral System at the Millennium,* Washington DC: Brookings Institution Press, 2001

58. Robert Howse, "Transatlantic Regulatory Cooperation and the Problem of Democracy", in G. Bermann et al., eds., supra n. 41.

59. We would like to thank Leonardo Martinez for an enlightening discussion on this issue.

60. Ibid.

61. However, as one of us has argued, these groups can serve as monitors of the agency costs of representative democracy, ensuring that the negotiating behavior of the people's agents or agents of agents (diplomatic bargainers, for instance) represents the interests of principals rather than those of the agents themselves as a special epistemic community (the trade policy elite). R Howse, "Transatlantic Regulatory Cooperation and the Problem of Democracy", in G. Bermann et al., eds., supra n. 41).

62. J.H.H. Weiler, note 42, p. 351.

63. See Kalypso Nicolaïdis, Non-Discriminatory Mutual Recognition, op. cit., fn 22.

64. Kalypso Nicolaïdis, Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects, *Regulatory Reform and International Market Openness* (OECD Publications, 1996). Kalypso Nicolaïdis and Joel P. Trachtman, "From Policed Regulation to Managed Recognition: Mapping the Boundary in GATT", in Pierre Sauvé and Robert Stern, eds., *Services 2000: New Directions in Services Trade Liberalization* (Brookings Press, 2000).

65. Dani Rodrik, *Has Globalization Gone Too Far?* (Institute for International Economics, 1997).

66. F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).