
The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade

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Abstract

International trade is undergoing a transformation commonly referred to as ‘constitutionalization’. Despite the ubiquity of the phrase, its meaning remains ambiguous and its significance underexplored. The purpose of this article is to suggest that one plausible interpretation of ‘constitutionalization’ in the international trade law context is that it refers to the generation of a set of constitutional-type norms and structures by judicial decision-making in the Appellate Body of the World Trade Organization. Unlike the work of John Jackson, Ernst-Ulrich Petersmann and Joseph Weiler (emphasizing institutions, rights and metaphysics respectively), this article will focus on judicial constitutionalization. Four trends will illustrate this: constitutional doctrine amalgamation, system constitution, subject matter incorporation, and constitutional value association. The identification of these trends reveals the underlying structure of the constitutionalization debate. Visible through the tribunal’s carefully crafted formulations of rules and justifications are the mainstay principles of constitutional reasoning (democracy and governance, constitutional design, fairness, and allocation of policy responsibility). Ultimately the arguments presented here convert the discussion from a debate about whether the WTO is a constitution into a set of speculations on the nature of international trade, and on the valency of the idea of constitutionalization.

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1 Introduction: What Does it Mean to Say International Trade Law is ‘Constitutionalizing’?

What is the constitutionalization of international trade law all about? For some time now, leading trade scholars have been saying that international trade law is ‘constitutionalizing’,¹ even though the term’s associations with government have rendered it controversial. In public lectures, John Jackson recalls the time when his use of the term among trade policy officials caused some consternation and criticism.² Despite this, constitutionalization, as a term of art, has continued to be fashionable with a small but influential subset of international trade law commentators. Moreover, its currency has persisted even after it became apparent that the claim was considered provocative not only by the trade law establishment, but also by developing countries and non-governmental organizations with interests ranging from business regulation through environmental standards, to labour reform. Much of the hostility of the protest at the WTO Ministerial Conference in Seattle in December 1999 was inflamed by images of the WTO as an elite, non-national, unelected and unrepresentative body, which had gone beyond its free trade mandate and was illegitimately influencing the democratic decisions of national governments.

What is immediately striking in the academic discussions (and the general protests) is the ambiguity of the term.³ Some WTO scholars use it to mean the establishment of a set of institutions, rules and practices to administer, implement and operate the

¹ See e.g. John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (1998); and Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System* (1997).

² John H. Jackson, Lecture, John F. Kennedy School of Government, Boston, 3 November 1999.

³ It is clear that the content and uses of the term ‘constitutionalization’ vary according to: disciplinary perspective, legal orientation, cultural background and analytical objective. For example, in relation to disciplinary perspective, early international relations scholars saw the transformation of the WTO as a classic example of regime formation: see the discussion in Levy, Young and Zurn, ‘The Study of International Regimes’, 1 *European Journal of International Relations* (1995) 267, at 288. More recent international relations studies associate the changes with the construction of a system of governance: Sweet, ‘Judicialization and the Construction of Governance’, 32 (1999) *Comparative Political Studies* 149. By contrast, for international lawyers, what is occurring at the appellate review level might be a simple case of treaty interpretation with a strong dispute resolution mechanism. Even within the fields of international trade law and of constitutionalism, constitutionalization means a number of things. Joseph Weiler’s classic body of writings, collected in *The Constitution of Europe* (1999), adopts a kaleidoscopic range of meanings from the abolition of monarchy (*ibid.*, at 3), through a ‘mutation in public ethos’ (*ibid.*, at 3), to ‘an operating system’ of governance (*ibid.*, at 12). Constitutionalization might mean the fact of legal entrenchment of some sets of rules over others and the creation of a hierarchy of norms: Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans., 1961). It might refer to greater integration between separate legal systems linked in some inter-state arrangement. It might suggest that some issues of international trade law are becoming more deeply embedded in national legal systems: Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System* (1997). Scholars of the European Community have associated the term with a progression from institutions to oversee inter-state relations in specific fields, to the development by a central adjudicatory body of legal principles akin to those which operate in federal constitutional systems such as direct effect, supremacy and judicial review: J. H. H. Weiler, ‘The Transformation of Europe’, 100 (1991) *Yale Law Journal* 2403. Alternatively, the normative dimension of constitutionalization might suggest a process of deeper democratization and therefore questions of legitimacy would be at the core of any study of the phenomenon: Robert Howse, ‘The Legitimacy of the World Trade Organization’ (1999, unpublished manuscript, on file with author).

multilateral trading system.⁴ Others include within the term not only institutions, rules and practices, but also, importantly, rights, including a right to trade, which ultimately could be relied upon by individuals within states.⁵ Still others read constitutionalization (in other supranational trading contexts) to include a kind of 'spirit' without which there can be no durable social contract within the emergent constitutional community.⁶ Although it is not my goal to attempt the task of defining exactly what is a constitution, some starting point is required. Common to all commentaries on the topic is an assumption that constitutionalization includes a set of social practices, defined as law, and associated with Western industrialized democracies, which structure the division of public power within a given community. So legal rules, principles, procedures, practices and institutions establishing the community, determining who has public power within it, and defining the scope of that power constitute the bulk of these practices of constitutionalization. Beyond that provisional definition, a range of variations are possible. But, whether constitutions be institutional, rights-based or metaphysical in nature,⁷ it is clear that the ambiguity in the term is also its very strength. It is this fuzziness of definition that allows authors to use 'constitutionalization' as a framework to analyze changes in international trade law at an institutional level, and at a broader structural level, *and* to explore the deeper symbolic and political resonances of the term. However, this same malleability of meaning has a drawback: it makes it difficult to identify exactly what is meant by the claim that international trade law is constitutionalizing, and it blurs any distinction between the descriptive and normative aspects of the claim.⁸

This article is an attempt to clarify the use of the term. My argument here is that one meaning which can be ascribed to constitutionalization in the international trade law context is the traditional characterization of constitution-making by judicial

Moreover, constitutionalization takes a variety of forms. It could evolve as an organic set of principles akin to custom from the base up: Gordon, 'Organic Constitutions', in American Society of International Law, *Proceedings of the 92nd Annual Meeting* (1998) 93. It can be written, as most modern constitutions are; it can contain a bill of rights following the US model; it might rest heavily on convention to fill gaps in the text, as does the UK version.

⁴ Jackson, *supra* note 1.

⁵ Petersmann, *supra* note 1, at 53.

⁶ J. H. H. Weiler, 'To Be a European Citizen: Eros and Civilization', in J. H. H. Weiler, *The Constitution of Europe* (1999) 324.

⁷ The tripartite characterization of international trade law constitutionalization as 'institutional', 'rights-based' and 'metaphysical' is part of my wider research project about the meaning of the term.

⁸ The desirability of constitutionalization remains a moot point. It is clear that not all scholars think that constitutionalization is a good thing. Thomas Cottier, for example, has argued that factors associated with constitutionalization, including the adoption by the AB of full *de novo* review of panel decisions, the high rate of appeals, the slowness of any 'legislative' response to AB decisions, and the lack of facility for the AB to remand cases back to panels, will ultimately lead to a 'classical' judicial model which in international law and international relations has proved to have limited effect: Cottier, 'The WTO Dispute Settlement System: New Horizons', in American Society of International Law, *Proceedings of the 92nd Annual Meeting* (1998) 86, at 91. Others are concerned about the legitimacy of any process: Howse, *supra* note 3. Assuming, however, for present purposes that constitutionalization is, at the very least, a development which warrants attention, this article asks how the phenomenon manifests itself in recent case law.

interpretation.⁹ According to this definition, the WTO appellate review tribunal, the Appellate Body, is the dynamic force behind constitution-building by virtue of its capacity to generate constitutional norms and structures during dispute resolution.

This characterization of constitutionalization as judicial norm-generation requires clarification. There are three possible responses to it. Some might argue that constitutionalization is only possible in a national legal system and therefore the WTO system cannot possibly constitutionalize. A second response might suggest that adjudication at the WTO is no different from adjudication in international law generally, and that therefore the WTO does not represent a special case of constitutionalization. A third response might be that parts of international law, specifically the 1969 Vienna Convention on the Law of Treaties, provide a constitutional framework for international trade law and that this factor is the key to the constitutionalization of international trade law.

First, as to the national law argument, it is implicit in my argument that the body of international trade case law being produced by the Appellate Body shares sufficiently similar characteristics with national constitutional law to characterize it as a form of quasi-constitutional decision-making and hence to warrant the description of the system as a whole as one undergoing constitutionalization.¹⁰ But the term ‘constitutionalization’ as it is used here does not mean to imply that the tribunal is creating a constitution in the form of a national constitution. Obvious obstacles would lie in the way of that argument, including the lack of a state to embody the constitutional desires of any such constitution; the lack of a polity to authorize any constitution-making and to legitimize its continual remaking; and the absence of appropriate institutional entities between whom constitutional power would be divided. Instead, I am using the term in a broader sense to argue that the case law of the WTO is beginning to display some characteristics ordinarily associated with constitutional case law of national and supranational constitutional systems. So, the jurisprudence of the WTO exhibits an explicit concern with the delineation of power between member states and the centralized dispute settlement mechanism; in some cases, it borrows constitutional doctrines and techniques, such as proportionality; in other cases, it has extended its scope into subject matters, such as health, once considered exclusively national constitutional matters. As a result, a hybrid form of law is emerging bearing sufficient resemblance to national and supranational constitutional law to refer to it by the descriptor ‘constitutionalization’.

The second response to the constitutionalization claim is that the WTO system is no different from international law generally, so that one does not need to look to judicial

⁹ There is little doubt of the widespread agreement among scholars of US constitutional law, for example, that the process of judicial interpretation of the Constitution is constitutive as well as determinative of that body of law. For a comparative overview of the role of judicial interpretation in the constitutionalizing process, see e.g. Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (1999). Similarly, one of the seminal arguments about European Community law documented the emergence of a quasi-constitutional framework from the body of judgments of the European Court of Justice: Weiler, ‘Transformation’, *supra* note 3.

¹⁰ See *supra* notes 3 to 9.

norm-generation to find a basis for constitutionalization. Note that this response is not a rejection of the constitutionalization hypothesis (as is the case with the national law argument) but a presentation of an alternative basis for constitutionalization. Here, the argument is that general international law itself could become a type of constitutional system¹¹ of which international trade law is merely a part.

After all, international law is concerned with many of the same factors which I will claim below indicate that constitutionalization is occurring in the WTO.¹² Like WTO law, general international law is concerned with the delineation of state power; it balances competences between states and the international law system; it uses constitutional techniques; it borrows from municipal law; international law has a centralized dispute settlement mechanism; it yearns for the legitimacy of national law.

In my view, this approach is not correct, because the constitutionalization of trade law by norm-generation is qualitatively and quantitatively different from any constitutionalization of international law. In what sense, then, are the two systems unlike? The answer lies in the constitutional *content* of the jurisprudence of international trade, its *structure*, and the *legal community* which is forming around those elements.

International trade law has a closer affinity with a constitutionalized system than does international law because the content of its case law shows greater reliance upon the techniques which I outline in section 3.B below. And, in drawing upon these techniques, the Appellate Body is beginning to create, wittingly or not, a constitutional structure for international trade law. The architecture of the system is beginning to bear a stronger resemblance to a constitutional structure than does international law. Also, the Appellate Body's interpretations of the instruments of international trade law emphasize the existence of an international trade legal community in a manner which is absent when, for example, the International Court of Justice interprets a treaty on non-proliferation. In short, a more specific, localized process of constitutional interpretation and constitution-making is occurring within the international trade sphere than that occurring in general international law, and it is this set of changes to the content, structure and community of international trade law which warrants the label 'constitutionalization'.

I turn now to a third possible response to this idea of constitutionalization as judicial norm-generation. This is the suggestion that, while international law may not be constitutionalizing generally, parts of it, namely, the 1969 Vienna Convention on the Law of Treaties, nevertheless provide a constitutional framework for international

¹¹ Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the UN Dispute Settlement System?', 31 *New York Journal of Law and Policy* (1999) 753; and Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?', 20 *Michigan Journal of International Law* (1998) 1.

¹² See *infra* Parts 3 and 4.

trade.¹³ This view emphasizes the Vienna Convention specifically as the motor for constitutionalization, rather than the Appellate Body's general development of a body of constitutional case law. I do not subscribe to this view either, because, as Joel Trachtman has noted, the only customary rules of international law incorporated into WTO law are the Vienna Convention's rules of interpretation and do not include any 'substantive non-WTO international law'.¹⁴ Unless constitutionalization is conceived of as a purely procedural matter, then the use of the Vienna Convention cannot be the key indicator or engine of constitutionalization. So, although the Vienna Convention might provide some of the scaffolding for a constitutional structure for international trade, the key feature is, in my view, the Appellate Body's construction of a broader body of constitutional-type case law.

In short, constitutionalization as judicial norm-generation assumes: (a) that international trade law can be described as constitutionalizing despite it not being identical to the national law process; (b) that what is occurring is different from international law generally; and (c) that the process is not dependent upon the use of international treaty interpretation as a background frame for international trade.

Before moving on, however, it is important to note that it is not my aim to compile here a checklist of constitutionalization or to indicate at which exact moment a system meets that description; the term 'constitutionalization' is not amenable to metrics of that kind.¹⁵ My goal is a more limited one. I will read international trade law decisions as constitutional and demonstrate the ways in which the Appellate Body has been, consciously or not, instrumental in building a constitutional structure within the WTO system. Moreover, I will begin to explore the difficulties associated with that constitutionalization process.

First, though, a final introductory word about the consequences of labelling the current phenomenon as constitutionalization; this concerns the system's legitimacy. By what right does the international trade law system claim to be constitutionalizing? Lack of representation of citizens in the process of international trade law decision-making, an absence of local political participation, the existence of only rudimentary structures of constitutionalism, the difficulty of defining a community to authorize

¹³ Pursuant to Article 3(2) of the Dispute Settlement Understanding, which requires clarification of the covered agreements to take account of 'customary rules of interpretation of public international law', panels must follow the general rule of interpretation codified in Article 31 of the Vienna Convention: *United States — Standards for Reformulated and Conventional Gasoline*, complaints by Venezuela WT/DS2, and Brazil WT/DS4, Report of the Appellate Body adopted 20 May 1996, DSR 1996:I 15–16. The general rule requires panels to discern the ordinary meaning of a text in the light of its context, including the object and purpose of the treaty. In a subsequent case, *Japan — Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 1 November 1996, the AB again referred to the Vienna Convention when it stressed the importance of the effectiveness principle of treaty interpretation (*ibid.*, at 104–106), and found that prior adopted panel reports were part of the 'GATT *acquis*' and hence created 'legitimate expectations' that they would be taken into account in future disputes (*ibid.*, at 108).

¹⁴ Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harvard International Law Journal* (1999) 333, at 343.

¹⁵ See *supra* notes 3–9.

any constitutional structure, and the inability of individuals to rely directly upon WTO law — these are just a few of the issues raised by this phenomenon.

At the same time, legitimacy is a notoriously difficult concept to measure, as illustrated by the fact that recent literature has sought to avoid the difficulties of substantive measurement by reliance on procedural alternatives. Effectiveness has been proposed as one measure of supranational adjudicatory legitimacy by some commentators;¹⁶ the tools of principal and agency relations by another;¹⁷ and the management of overlapping allegiances to government by other constitutional means such as subsidiarity, delegation and cost-sharing arrangements by another.¹⁸ Ultimately, none of these formulations takes us much closer to the central problem of defining what is a legitimate form for non-national legal organization. Indeed, one reading of the current international trade law dilemma is that the Appellate Body has relied on international law to provide a framework for international trade in order to overcome the problem of just such democratic lacunae. But, as it is not my view that international law provides the constitution for international trade, neither is it my view that international law necessarily fulfils a legitimacy function for the field.

Woven through the discussion, therefore, is a cluster of issues that emanate from the system's legitimacy dilemma. Even if the term constitutionalization is *descriptively* appropriate,¹⁹ what is striking about its use by academics and others alike is the absence of agreement about what is at stake both in the debate and in the act of labelling the phenomenon as such. So, apart from wanting to describe more

¹⁶ Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273, at 310 (arguing for a 'checklist' of effectiveness of supranational adjudication including factors such as the composition of the tribunal (*ibid.*, at 300), the awareness of the audience (*ibid.*, at 308) and the nature of the violations (*ibid.*, at 329)).

¹⁷ Cary Coglianese and Kalypso Nicolaidis, 'Securing Subsidiarity: Legitimacy and the Allocation of Governing Authority' (paper prepared for symposium on 'Rethinking Federalism in the EU and US: The Challenge of Legitimacy', Kennedy School of Government, Boston, 19 April 1999, www.ksg.harvard.edu/visions/federalism.htm).

¹⁸ Robert Howse, 'Association Identity and Federal Community' (paper prepared for symposium on 'Rethinking Federalism in the EU and US: The Challenge of Legitimacy', Kennedy School of Government, Boston, 19 April 1999, www.ksg.harvard.edu/visions/howse.doc).

¹⁹ Note, no consensus exists amongst either the AB or trade law commentators that the issues described herein are particularly constitutional in nature. Some commentators (who happen also to be members of the WTO AB Secretariat), for example, have described some of the matters under discussion here under the heading of 'practice and procedure' of the AB; the word 'constitution' does not rate a mention: Steger and Van den Bossche, 'WTO Dispute Settlement: Emerging Practice and Procedure', in American Society of International Law, *Proceedings of the 92nd Annual Meeting* (1998) 79. Also, the AB does not necessarily mention that these matters have implications beyond that of simply being useful judicial techniques to help decide the cases before them. I do not dispute that the features I have identified are simple questions of practice and procedure, or that they arise from the mundane reality of having to resolve a particular trade dispute. But what I do want to suggest is that, whatever else they are, they are also constitutional. Questions concerning how a system of law is being constituted, the limits which exist on its power, jurisdictional competence, and standing are the 'bread and butter', so to speak, of constitutional law. What these issues have in common, then, is that they all operate ordinarily within a body of doctrine referred to as constitutional. So, however practical or procedural they may be, they are also constitutional and their appearance in the case law of the WTO will be taken as one indication that international trade law is constitutionalizing.

accurately what is constitutionalization, I want also to plot some of the normative issues underlying the debate. To this end, I will also suggest that the practice of using the term in the way defined here — as the generation of constitutional norms and structures by judicial interpretation — is itself freighted with a range of contested claims many of which are relevant to the system's legitimacy. The naming of the phenomenon as constitutionalization raises critical questions, for example, about how the international trade law constitution is being designed; how democratic it is; what effect it has on national and international governance; whether we can accurately say a new legal system has emerged; and whether, from the point of view of national policy-makers, the new system is shaping their national economic policy options. An intricate web of controversies about trade liberalization, legal construction, democracy and governance will be made visible through the lens of constitutional transformations in the WTO.²⁰

The article is divided into five parts. Part 1, the introduction, briefly described the problem of the ambiguity of the meaning of constitutionalization, sketched the working definition that will be used throughout, and signalled why the label is important. In Part 2, I will explore the problem of the ambiguous use of constitutionalization in more depth. In Part 3, I will elaborate my argument that constitutionalization can be understood to refer to the creation of a set of constitutional norms and a constitutional structure by judicial decisions of the Appellate Body. In this Part, I will suggest that four techniques of judicial interpretation exemplify the Appellate Body's dynamic approach to constitution-building: *amalgamation* of constitutional rules from domestic systems; the *constitution* of a new legal system by decisions about practice and procedure; the *incorporation* within its jurisdiction of national constitutional matters; and the *association* of underlying constitutional values with decisions on particular legal disputes. Part 4 consists of a series of close textual readings of three cases and comprises the evidence for the argument in Part 3. Here, I show that constitutional doctrines and structures are emerging from the Appellate Body's jurisprudence. These include doctrines relating to jurisdictional competence, inquisitorial fact-finding, and negotiation of the relationship between international trade and other legal regimes. Proportionality, rational relationship testing, and substantive discrimination are also present. With the case illustrations in hand, Part 5 revisits the normative implications of constitutionalization and argues that constitutionalization in the form of judicial norm-creation encapsulates controversies about trade liberalization, legal construction, legitimacy, democracy and governance. It concludes that any discussion about constitutionalization, which fails to articulate clearly a meaning for the label *and* a function, will, by definition, be incomplete. The maturation of an enforceable and

²⁰ The constitutional lens is only one of many perspectives. Other equally plausible analytical tools exist, including law and economics. See e.g. Dunoff and Trachtman, 'Economic Analysis of International Law', 24 *Yale Journal of International Law* (1999) 1 (arguing that law-and-economics has been underused in international law and showing how concepts of price theory, transaction costs and game theory could be applied to international law, including the international trading system).

effective international trade law system must confront both the descriptive and normative purchase of the popular label of constitutionalization.

2 The Problem of Ambiguity

Before putting forward my argument about constitutionalization as judicial norm-generation, I want to illustrate in more detail the difficulties associated with invoking 'constitutionalization' to explain transformations in WTO law, without adequately defining its particular meaning and function. A recent issue of the *American Journal of International Law* contains an article by Hannes L. Schloemann and Stefan Ohlhoff entitled "'Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence'.²¹ Schloemann and Ohlhoff argue that the WTO has authority to *interpret* the national security exception contained in Article XXI of the GATT,²² but member states retain authority to *define* important elements of the exception including 'national security', 'necessity' and 'essential interests'.²³ The backdrop to the entire discussion is the term 'constitutionalization'. What is disconcerting about the Schloemann and Ohlhoff article, however, is the ambiguity of the term. Schloemann and Ohlhoff present a complex and nuanced interpretation of Article XXI, drawing extensively on previous GATT practice, history and text. However, despite a desire to 'use [the] term with care',²⁴ the same precision is not as noticeable in relation to the key principle underlying the discussion. Instead, constitutionalization seems to play a number of different functions and the link between it and the main thesis is not entirely clear. Starting from the premise that '[c]onstitutional structures are developing much faster in international trade law than in any other area of international law',²⁵ the authors begin by equating constitutionalization with the limits of the dispute settlement mechanism. In other words, their definition of constitutionalization suggests that it will be largely institutional in nature; it will describe the way the dispute settlement mechanism divides competences between national parties and the WTO. This impression is reinforced by the claim that the only limits on this function arise from the relationship between WTO law and other regimes, member state determinations of national security, and judicial hierarchies.²⁶

But in all-important footnote 1, the equation of constitutionalization with binding dispute settlement over competences is abandoned for a much broader set of meanings. The authors differentiate constitutionalization from mere "'juridicization",

²¹ Schloemann and Ohlhoff, "'Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence', 93 *American Journal of International Law* (1999) 242.

²² General Agreement on Tariffs and Trade 1947 (hereinafter GATT 1947) in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, *Legal Instruments — Results of the Uruguay Round* vol. 1 (1994), 33 ILM (1994) 1125, at 1143.

²³ Schloemann and Ohlhoff, *supra* note 21, at 426–427.

²⁴ *Ibid.*, at note 1.

²⁵ *Ibid.*, at 424.

²⁶ *Ibid.*, at 424–425.

“legalism” and “rule orientation””.²⁷ Instead, they propose two more expansive meanings both of which look to contain a normative component. First is an argument about the overall structure of the system which resembles a claim that a new rule of customary international law has emerged, stipulating that international trade law is a kind of a constitution. Without using the usual labels of custom, the authors argue that ‘overwhelming acceptance’ (*opinio juris*) and ‘use of the dispute settlement mechanism’ (state practice) have ‘pushed the multilateral trade system to develop into a proto-supranational structure’.²⁸ Constitutionalization here resembles a new system structure and that structure itself has become a rule of custom. Secondly, international trade law can be said to have ‘constitutionalized’ because it has achieved a new ‘independent third party’ status within the international community, which amounts to ‘a new social contract’.²⁹ On this view, ‘constitutionalization’ has a symbolic and political value not necessarily assumed in the former readings.

To this point, it might be suggested that Schloemann and Ohlhoff have used the term effectively because they have deftly exploited the ambiguity of constitutionalization as a term of art by suggesting that three quite different forms of change can be encompassed within its meaning: institutional (rules and adjudication), structural (supranationalism) and symbolic and political (social contract). And this flexibility is indeed the term’s strength, especially as the very definition of constitutionalization will necessarily be elusive.³⁰

But it would be difficult to maintain that the purpose of the authors was to use the term in a flexible but defined number of ways because they do not sufficiently articulate exactly how and when those uses occur. Instead, constitutionalization appears as a kind of *leitmotif* of the argument rather than as a functional analytical tool. References to the ‘constitutional role, structure and character’ of international trade,³¹ to allowing for ‘future development of constitutionalization’,³² and the ‘drive towards constitutionalization’³³ do little to enhance the reader’s understanding of what phenomenon the authors mean to assume. Some references are more enlightening, although still a little puzzling. The authors suggest that the interpretation of Article XXI of the GATT is a function of the degree of constitutionalization of the system³⁴ and that the way in which the Appellate Body limits the prerogative of national states’ defining of national security will ‘take into account . . . constitutional aspects’.³⁵ Here, they seem to confirm that ‘constitutionalization’ is about the judicial determination of the division of legislative competence — the institutional face of the phenomenon. But how the Appellate Body will take into account constitutional

²⁷ *Ibid.*, at note 1.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ See *supra* note 3.

³¹ Schloemann and Ohlhoff, *supra* note 21, at 426.

³² *Ibid.*, at 427.

³³ *Ibid.*, at note 12.

³⁴ *Ibid.*, at 448.

³⁵ *Ibid.*, at 450.

aspects, which constitutional aspects will be taken into account, and why that converts an interpretative question into a constitutional one, are not fully explained.

The tantalizing and yet unrealized potential of the term is heightened by the concluding paragraphs in which constitutionalization takes on a broader significance again. Constitutionalization of the world economic order is represented as a sort of advance guard of progress towards the 'international society's peacetime order'.³⁶ The WTO is, somewhat reluctantly, at the helm of this march, due to the 'increased popularity'³⁷ of its dispute settlement mechanisms.

The WTO panels can no longer avoid, as they did in the old GATT days, confronting the problem of the kind and degree of constitutionalization of which the WTO is both a cause and an effect.³⁸

Ultimately the article is slightly frustrating in the way in which it defines and articulates its key concept. Although our expectations are raised by its title, by an early footnote, and by the suggestion that it will attempt to explain closely enough how constitutionalization is occurring through a concrete case study on national security, they are only partially fulfilled. Instead, constitutionalization functions as a slightly mysterious, partially visible principle, frequently invoked, intriguingly defined but then insufficiently explained or integrated in the main body of the argument.

3 A Proposal: 'Constitutionalization' as the Generation of Constitutional Norms and Structures by Judicial Dispute Resolution

A Constitution-building by Judicial Norm-generation

My purpose therefore is to avoid the ambiguities of such analyses by beginning to construct a body of argument about what might be one function of the meaning of constitutionalization, whilst at the same time acknowledging that the particular evocation made here is not definitive. So I begin, then, from the premise that the increasing invocation of the idea of constitutionalization and trade makes it timely to tease out the contours of the debate about its definition. What is meant by the term? How does it manifest itself in international trade law? Why is it significant? In this article, I will demonstrate that the judicialized dispute resolution process has been instrumental in creating a quasi-constitutional structure for the multilateral trade system. I will do this by focusing on a sample of recent WTO cases and by showing how these cases have generated a series of norms and structures associated with constitutional systems.³⁹

To reiterate, what is being created is not 'constitutional' in the traditional national

³⁶ *Ibid.*, at 451.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ For a similar argument about the use of legal reasoning to entrench a system of law, see Behboodi, 'Legal Reasoning and the International Law of Trade', 32 *Journal of World Trade* (1998) 55.

sense, though it bears some resemblance. Moreover, it is sufficiently different from developments in general international law to describe it as constitutionalization above and beyond international law adjudication. Although international law may be deepening in its effect on internal law systems,⁴⁰ international law remains nevertheless a more diffuse system of law, which does not closely resemble the more densely structured, local form of legal community which is known as international trade law.

The starting point of our analysis must be the establishment of a standing appellate tribunal with increased powers to make binding decisions of law. The story begins in 1995 with the formation of an international trade law body, the World Trade Organization, after a protracted gestation of almost half a century. From the time the Havana Charter was drafted in 1947–1948 until the signing of the Marrakesh Declaration in 1994 establishing the WTO, the creation of an international regime for the setting of trade standards and the resolution of trade disputes, despite its seductive appeal, had proved unattainable.⁴¹ With the establishment of the WTO⁴² and, with it, detailed procedures for dispute resolution,⁴³ international trade law entered a new period — a period in which trade decisions were no longer primarily a matter of bargaining by powerful players, a period marked by the creation of a rules-based regime.⁴⁴

Many scholars have commented upon the importance of creating an institution for judicialized dispute resolution in the evolution of a constitutionalization process. John Jackson,⁴⁵ Thomas Cottier,⁴⁶ Ernst-Ulrich Petersmann,⁴⁷ to name a few, have used the word ‘constitutional’ in relation to the new institutional arrangements of multilateral trade. To this extent, the project, of which this article is a part, is merely a fragment of a wider body of literature which fuses disparate legal events and ‘baptize[s]’ them as constitutional in the service of an argument that ‘the whole is greater than the sum of the parts’.⁴⁸

⁴⁰ See Helfer and Slaughter, *supra* note 16, for a discussion of the effectiveness of supranational adjudication.

⁴¹ For summaries of the history, see Jackson, *supra* note 1; and Ragavan, ‘A New Trade Order in a World of Disorder?’, in Jo Marie Griesgraber and Bernhard G. Gunter (eds), *World Trade: Toward Fair and Free Trade in the Twenty First Century* (1997) 1.

⁴² Marrakesh Agreement Establishing the World Trade Organization, GATT Doc. No. MTN/FA, 33 ILM (1994) 1125.

⁴³ Understanding on Rules and Procedures Governing the Settlement of Disputes (1994).

⁴⁴ John H. Jackson, *The World Trading System* (1989) 85–88.

⁴⁵ Jackson, *supra* note 1.

⁴⁶ Cottier, *supra* note 8.

⁴⁷ Petersmann, *supra* note 1.

⁴⁸ This characterization is borrowed from Joseph Weiler’s discussion of similar trends in European Community literature: Weiler, ‘Introduction: The Reformation of European Constitutionalism’, in J.H.H. Weiler, *The Constitution of Europe* (1999) 221, at 225.

But this article differs from conventional treatments.⁴⁹ Whereas other treatments of WTO constitutionalization as judicial dispute resolution emphasize the *institutional* and political aspects of judicial dispute resolution, I will focus primarily on the actual decisions emanating from the institution. I will suggest that one of the most interesting developments of the new dispute resolution process has been the emergence from the jurisprudence of the tribunal of a particular body of constitutional-type rules and principles. So I am interested in examining the *norm-generating* function of judicial dispute resolution rather than its institutional function.⁵⁰ To that end, I will adopt an explicitly common law, constitutional methodology in order to demonstrate the ways in which the jurisprudence of the WTO Appellate Body (AB) is creating a constitutional structure for international trade law.⁵¹ I will suggest that the tribunal is the constitutional force or engine, so to speak, behind the constitutionalization process. And I will argue that the body of law it produces is both constitutional in nature and constitutive, in the sense of making a system of law.

B Judicial Techniques: Constitutional Doctrine Amalgamation, System Constitution, Subject-matter Incorporation, Constitutional Value Association

The ways in which this constructive process has occurred are fourfold. First, there is *constitutional doctrine amalgamation*. Constitutional law rules, principles and doctrines are being borrowed from other constitutional domains and are being amalgamated into the tribunal's case law, thereby leading to a closer resemblance between international trade law and constitutional law. Proportionality and jurisdictional competence are two notable examples. Secondly, there is *system constitution*. The decisions of the tribunal are constitutive of a new system of law. The adoption of an inquisitorial fact-finding method, inaugurating a type of legal system which is broadly

⁴⁹ The wider project will differ in other respects as well. First, following Hans Kelsen, it will suggest that the phase marks something not much short of a 'revolution' in the international trade law legal system. Hans Kelsen, *General Theory of Law and State* (Russell and Russell eds, 1961) (1944) 117. Secondly, I will show that the legal norms of the new system owe their legitimacy not to the old GATT system, but to a new basic norm. Kelsen, *ibid.*, at 118. Kelsen argued that the thing that constituted the unity of a legal order was the *grundnorm*. It was this presupposition or hypothesis upon which the validity of the constitution and the legal norms created under it rested. Kelsen, *ibid.*, at 115–116; Hans Kelsen, *Pure Theory of Law* (Max Knight trans.) 46, at 201–202. For contemporary discussions of the role of basic norm, see e.g. Harris, 'When and Why Does the Grundnorm Change?', 29 *Cambridge Law Journal* (1971) 103; and Schauer, 'Amending the Presuppositions of a Constitution', in Sanford Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995) 145, at 149. Finally, I will suggest that the new basic norm that is developing in respect of international trade law involves a distinctive relationship between the concepts of validity, legitimacy, effectiveness and compliance.

⁵⁰ In political science, a similar approach is taken with respect to the WTO by Sweet, *supra* note 3.

⁵¹ Following Weiler, discussing the European Union, I am of the view that 'in the beginning there was doctrine'. He continues, doctrine is the first 'substratum' of the 'geology' of constitutionalism; it is 'concrete', 'foundational' and it is ultimately the 'gold seam' without which the process cannot occur. J.H.H. Weiler, *The Constitution of Europe* (1999) 221, at 224–225.

inquisitorial in nature, illustrates the point. Thirdly, there is *subject matter incorporation*. Matters traditionally viewed as being within national constitutional competence, such as public health, are emerging for decision on the judicial agenda of international trade law and are gradually being incorporated within its jurisdiction. Fourthly, there is *constitutional value association*. The tribunal's jurisprudence not only draws upon constitutional rules, but associates itself with deeper constitutional values. Visible through the tribunal's carefully crafted formulations of rules and justifications are the mainstay background associations of constitutional reasoning: issues of democracy and governance, about how to design a fair system of law, of how to design a system in the first place, and of how policy responsibility will be divided.

So the term 'constitutionalization', when used as a metaphor for a certain type of judicial dispute resolution displaying the four techniques described above, can be understood to mean not just the establishment of an institution for making binding decisions of law, but also the building of a constitutional system by judicial interpretations emanating from the judicial dispute resolution institution. These interpretations are changing the international trade law system and leading to a greater resemblance between it and a constitutional system. This is occurring through the *amalgamation* of particular constitutional rules; the *constitution* of a new system of law, the *incorporation* of national constitutional subject matters within the scope of jurisdiction of the system; and the *association* within the jurisprudence of underlying constitutional values. To the extent that a body of constitutional-like doctrine emerges from a centralized dispute resolution body and to the extent that that doctrine is, in turn, constitutive in nature, the claim that the international trade law system is gradually 'constitutionalizing' can be better understood.

At this stage in the scholarship of international trade law constitutionalization, the description is not therefore especially coherent; there is nothing definitive or magical about these features. A legitimate constitutional system may exhibit more or fewer of them. Or, alternatively, it may be institutionally or politically constitutional in the senses referred to by Schloemann and Ohlhoff. My argument, then, is not that bodies of law that exhibit in their jurisprudence the features described in this article are necessarily constitutional bodies; that the WTO is developing into a constitutional structure equivalent to a domestic constitution. It is only the much weaker claim that the scholarship of constitutionalization can be understood as referring to the ways in which the emerging jurisprudence of the WTO is beginning to develop a set of rules and principles which share some of the characteristics of constitutional law; and that this in turn is what contributes to the constitutionalization of international trade law. A rudimentary notion of international trade constitutionalization as judicial norm-generation is emerging. And, to restate, this process can be distinguished from general international law judicial interpretation not because it draws upon any imagined international constitutional framework but because it draws upon constitutional doctrines, subject matters, system mechanisms and values thereby creating an architecture reminiscent of a constitutional system.

4 Three Case Studies: *Hormones*, *Bananas* and *Shrimp-Turtle*

A Method

Now a brief word about case-method. In this article, I will examine three WTO cases, the *Shrimp-Turtle* case,⁵² the *Hormones* case⁵³ and the *Bananas* case,⁵⁴ describing those aspects of the decisions that reflect the move to judicial norm-generated constitutionalization. In relation to the first aspect, I will describe the constitutional features of the cases using a two-tier analysis that distinguishes between what I will call first-order constitutional features, and second-order constitutional features. First-order constitutional features are those that address the general question of the *type of legal system* that is emerging from the jurisprudence of the WTO. Here, I will consider issues of jurisdictional competence, fact-finding method, the relationship between WTO and non-WTO law, and national legislative authority over standard-setting. Second-order constitutional features are concerned less with matters of overarching structure and process and more with *specific doctrinal rules*,⁵⁵ and these then subdivide again into procedural and substantive rules. So specific procedural rules would include those dealing with standing or proportionality; while substantive rules address content matters such as the meaning of non-discrimination. And, as is usual in any scheme of organization, some features straddle both categories. So, jurisdictional competence is both about the overarching structure of the system of law, and the more specific doctrine of what standard of review it is appropriate for first-instance panel decision-makers to use.

Also woven through the analysis are matters that might be called 'pre-constitutional assumptions'. Types of assumptions included here are those involving matters of justice and efficiency. These are dealt with at a very general level in the WTO jurisprudence without the production of particular normative structures or doctrinal rules. Other candidates are ideas about trade liberalization generally, or transparency and multilateralism. Similarly, ideas concerning increases in standard of living, or sustainable development, based upon the preamble to the GATT 1994, might also qualify. But, in defining them as 'assumptions' rather than philosophical concepts underlying the international law system, I hope to avoid their relegation to the world of 'mere theory'. I hope instead to indicate that they have a practical

⁵² *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of Appellate Body, adopted 6 November 1998 (hereinafter *Shrimp-Turtle*).

⁵³ *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, Reports of the Appellate Body, adopted 13 February 1998 (hereinafter *Hormones*).

⁵⁴ *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB, Report of the Appellate Body, adopted 25 September 1997 (hereinafter *Bananas*).

⁵⁵ Clearly, the distinction between first-order matters of structure and process, and second-order matters of specific doctrine is somewhat arbitrary and can be critiqued on the basis that 'nested' within seemingly narrow legal questions — in this case my second category — are the same arguments of value and policy which inform broader legal questions — in this case my first category. See e.g. Duncan Kennedy, *A Critique of Adjudication* (1997) 174–175.

relevance to the doctrine being developed by the AB and hence to the constitutional 'shape', and expansion, of the entire system.

It will be seen throughout the discussion that the four methodologies noted above — doctrinal amalgamation, system constitution, subject matter incorporation, and value association — are in constant use, leading to the result that constitutionalization by judicial norm-generation is occurring.

B First-order Constitutional Features: What Kind of Legal System is the WTO Regime?

Before any decision-maker can decide specific applications of law to particular facts, the decision-maker must understand (and sometimes decide) the boundaries of his or her own power.⁵⁶ These questions are therefore of a first-order nature, in the sense that the parameters of the system must be determined before particular disputes are brought within it. The resolution of these first-order questions is constitutional because it affects, in a literal sense, the constitution or the making of the system at hand. They raise critical problems of constitutional design. It goes without saying therefore that they also encapsulate critical problems of legitimacy and governance because the way in which a system is designed will affect the level of governmental authority exercised by each of the governments in the system, and the authority of the international institution embodied by it.

The processes of deciding the limits of institutional power and of deciding the particular disputes at hand are separate, conceptually at least.⁵⁷ So, although they may often fold back upon themselves in interesting ways, it is nevertheless still possible and certainly desirable to consider a set of first-order constitutional features in isolation. This section will discuss the emergence in the AB case law of a series of such features: jurisdictional competence; fact-finding; national legislative competence over standard-setting; and the negotiation of the relationship between WTO law and public international law.

⁵⁶ The question of whether a body has the competence to decide its own competences is a complex one and may depend, in the first instance, on whether it is characterized as an international or constitutional regime. The conventional position, at international law, as described by Weiler, is that states cannot determine the competence of a central, international adjudicatory body created under treaty. However, Weiler argues that the issue is less clear in the case of a neo-constitutional body such as Europe. Here, suggests Weiler, a type of non-hierarchical conversation should occur between the central organ and the states, about the scope of competence of the central adjudicatory body. J.H.H. Weiler, 'The Autonomy of the Community Legal Order', in J.H.H. Weiler, *The Constitution of Europe* (1999) 286, at 303, 292 and 322. So, one example of the sort of conversation about competence envisaged by Weiler might be the European mechanism by which national courts can refer matters to the ECJ for a preliminary ruling. For a discussion of this process, see e.g. Helfer and Slaughter, *supra* note 16, at 310 (arguing that the relation between the courts developed into a 'partnership').

⁵⁷ A law-and-economics analysis conceptualizes these processes as part of a transactional process whereby states and international organizations negotiate the limits of their authority by trading assets (power): Dunoff and Trachtman, *supra* note 20, at 13.

1 Jurisdictional Competence

The first feature I will discuss concerns the jurisdiction of states in the WTO system to determine certain matters that come within the WTO agreements. Before doing so, it might be useful to consider the analogous situation within a national system. The way in which decisional power is divided in any non-unitary⁵⁸ legal system is a function of the system's constitution. Conventionally, constitutional law has a battery of doctrinal devices to do the job. The principles of judicial review (the vesting of power in a central court to decide the constitutionality of legislation), federalism (the vertical distribution of legislative power) and the separation of powers doctrine (the horizontal distribution of legislative, executive and judicial power) are the prime means by which constitutional law negotiates power division within states.⁵⁹ At the international level, the picture is more malleable and lacks the guidance of clear principles. In general, states commit themselves to whatever divisions are politically palatable and are necessary to obtain agreement to the treaty in question.

In the WTO context, the potential role of these constitutional principles of power division needs careful qualification. States which are signatory to the WTO agreements are not part of any federal system. There is no central executive other than a very rough approximation in the Ministerial Council⁶⁰ (consisting of all the member states) with the administrative arm of that executive being the WTO Secretariat.⁶¹ Without a clear delineation of branches of government, there are no entities to which the separation of powers doctrine could apply, and a mix of functions are, in any case, exercised in one body.⁶² Moreover, no WTO legislature exists, in the traditional sense. Again, the only body with a vague resemblance, the Ministerial Council, meets only every two years, and is not representative in the sense of being elected by an international trade constituency to fulfil the function of representing

⁵⁸ The term 'non-unitary' is borrowed from Weiler's study of European Community law because of its relative neutrality in describing a system which is neither federal, nor unitary, but which nevertheless is concerned with adjudicative power distribution: Weiler, 'Transformation', *supra* note 3.

⁵⁹ The cases on federalism and separation of powers are legion in the case law of most legal systems. In the United States, foundational cases on the application of federal principles are *McCulloch v. Maryland*, 17 US (4 Wheat) 36; on judicial review, see *Marbury v. Madison*, 5 US (1 Cranch) 137, 1803; and on the separation of executive power from legislative and judicial power, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 479. In Australia, judicial review is established under Chapter III of the Constitution of Australia Act; federalism is represented in cases such as *Commonwealth v. Cigamic Pty Ltd* (1962) 108 CLR 372; and the separation of powers in *R. v. Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁶⁰ The Ministerial Council is established under Article IV(1) of the Marrakesh Agreement Establishing the World Trade Organization.

⁶¹ Marrakesh Agreement Establishing the World Trade Organization, Article VI.

⁶² For example, the membership of the WTO functions both as a legislative-type body when it decides to extend the scope of the agreements to a new issue, and as a judicial-type body when it acts as the Dispute Settlement Body with the authority to adopt reports of the panels and Appellate Body.

that constituency on trade matters.⁶³ Moreover, its authority is not plenary in the conventional constitutional sense.⁶⁴ No division of legislative power analogous to a federal power distribution (either domestic or supranational such as Europe) has taken place within international trade law. No regulatory powers have been transferred to any central body.⁶⁵ Strictly speaking, the only power possessed by the central body is the power of treaty interpretation vested in the WTO central adjudicatory system. In the classic picture, then, the WTO system is clearly neither constitutional in any conventional sense, nor can it raise any questions about governance, legitimacy or democracy.

Nevertheless, the issue of legitimacy is clearly present. Decisional power is divided in the WTO system, both between states and between the state and international level. Does this mean, necessarily, that the WTO has a constitution? What do scholars mean by claiming a constitutionalization process is occurring? Who authorizes that process and from where does it derive its legitimacy? One of the ways in which we can begin to understand the claim is to look at the way in which the WTO Appellate Body is dealing with the problem of power division. We shall see that an image of the WTO as representing some rudimentary form of constitutional system is emerging as the Appellate Body begins to confront inevitable questions about the scope of its own and the state parties' decisional authority. We shall see that it is the existence of a system of judicial review that has inaugurated this inevitability. Moreover, we will study both the overt and covert emergence of the question of power division; sometimes the Appellate Body will talk about 'jurisdictional competence', explicitly raising a constitutional issue. At other times, it might discuss a technical question which seems to have no constitutional implications. But by reading international trade law as constitutional law, we shall see that, despite the surface appearance in the WTO of pure intergovernmentalism, the jurisprudence emerging from the Appellate Body suggests a subtle, but significant change in the classic picture.

The *Hormones* case contains a fascinating discussion of the problems of power delineation in an inter-state regime. In so doing, it introduces a major pre-occupation of constitutional law into the case law of the WTO, and, indirectly therefore, signals a concern with the system's legitimacy. The discussion occurs at two levels, one of

⁶³ Member states' representatives to the Ministerial Council are, of course, elected within their national domains. But a distinction could be drawn with the European Parliament, the representatives of which are elected by a European constituency for the purpose of representing that constituency on European matters.

⁶⁴ Although the Ministerial Council is the highest law-making body within the trade structure for matters within its domain, that domain is, necessarily, limited by the extent to which national governments are prepared to grant it authority over matters traditionally within national control: Marrakesh Agreement Establishing the World Trade Organization, Article IV(1).

⁶⁵ The argument is, however, made that the multilateral agreements extend the reach of the WTO system into national regulatory choice: Michael Trebillock and Robert Howes, *The Regulation of International Trade* (1999) 54, at 56 and 58 (arguing that national regulatory choice is constrained by parts of the TRIPS and the TBT Agreements which go beyond a basic requirement of non-discrimination and prescribe actual standards of non-discrimination which national authorities must meet).

which concerns what specific rule the panels are to apply in reviewing member state acts. The other level concerns the justification for the rule. First to the rule context.

(a) The rule: the standard of review by panels of national state decisions should be 'objective assessment'

In the *Hormones* case, at first instance a panel found that the EC ban upon the importation of meat produced with growth hormones violated provisions of the Sanitary and Phyto-Sanitary Agreement (the SPS Agreement).⁶⁶ On appeal, the EC argued, *inter alia*, that the panel had applied an incorrect standard of review to the EC's decision. Essentially, it argued that the panel should have deferred to the decision of the member state about whether or not the ban was warranted on scientific grounds. The EC claimed the panel should not have applied full *de novo* review, but instead it should have deferred to the EC judgment, a standard often referred to in constitutional law as deferential or reasonableness review.⁶⁷

On appeal, the AB rejected the EC's argument. The AB noted that, although the SPS Agreement was silent on the issue of the standard of review, Article 11 of the Dispute Settlement Understanding (DSU) stated that, in relation to factual questions, the panel should make an 'objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. Relying initially then on the text, the AB found that the standard required of a panel was neither *de novo* nor deferential review but 'objective assessment'⁶⁸ (in relation to review of legal questions, the AB referred to rules of customary international law interpretation, which again pointed to Article 11).⁶⁹ It indicated that the WTO will adopt a standard that steers a middle course between full review on the merits, and the far less intrusive standard of procedural or reasonableness review. Nevertheless, a member state cannot simply assert that it has satisfied the requirements of the SPS Agreement without being prepared to justify that decision before an inter-state adjudicatory body with the power to make an objective assessment of it.

This aspect of the decision signals that the scope of national bodies to make factual decisions with trade effects will not be left entirely to the state. So, although no legislative or executive power has been transferred to the WTO and the classic all-encompassing autonomy of national jurisdiction remains intact, a subtle change has been effected. Through a process of judicial interpretation, national authorities can no longer make decisions without those decisions being subject to international judicial oversight by WTO panels. Deference is not the order of the day, so, however one views it, even if the actual scope of national power remains the same, its exercise is forever affected. Grafted onto the national systems of member states of the WTO is a limit, however minimal, which qualifies their previous full complement of constitutional authority.

⁶⁶ Articles 3(3) and 5(1).

⁶⁷ *Hormones*, *supra* note 53, at para. 111.

⁶⁸ *Ibid.*, at para. 117.

⁶⁹ *Ibid.*, at para. 118.

The rule struck by the AB (about the review standard) is one illustration of the constitutionalization process. By amalgamating constitutional-type techniques regarding the difference between deferential and *de novo* review, the AB has lent to international trade some of the structures of a constitutional system. Moreover, it provides a lens through which to see the constitutional issue at the foundation of the dispute, namely, which body — national government or international tribunal — has the authority to decide matters critical to trade policy. In an unobtrusive manner the tribunal finesses a conflict between national and international institutional authority, although it is done through the relatively genteel language of standards of review. Any audience interested in constitutional disputation would recognize the fragile hostilities underneath. They would know that in national systems the term ‘deference’ signals that a judicial body should defer to the opinion of a legislative or executive one, and ‘reasonableness’ means that the reviewing tribunal should not review the merits of a legislative or executive decision but only ask whether the decision was made in a reasonable fashion. Once the debate moves out of the confines of a national setting, and the actors are a review tribunal established under international treaty, and executive bodies of national states, then the question of the standard of review moves out of the domain of legal procedure and becomes imbued with constitutional meaning.

(b) The justification: the division of power

The deeper constitutional significance of the decision is made explicit when one moves from the level of rule articulation to rule justification. Here, the AB uses the method defined above as constitutional value association when it links the problem of what is the appropriate level of review to a constitutional value expressed as ‘balance’ within a non-unitary legal system. It is clear that the AB thinks that standards of review are not mere technicalities because it frames the question as one concerning the jurisdictional competence of the WTO and of its members.⁷⁰

The standard of review appropriately applicable in proceedings under the SPS Agreement, of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.⁷¹

This statement is recognition that, nested within questions of review, which may appear somewhat bland on their surface, are critical indicators about the way power is to be divided within the WTO structure. As noted above, these are the foundations of constitutionalization, as questions of power definition and distribution determine the way the legal communities in a particular system are governed, even what level of integration they embrace. If the AB had settled upon full *de novo* review by panels of members’ decisions (and assuming that future panels follow such a ruling, although not technically precedent-bound), then the WTO agreements would have represented

⁷⁰ *Ibid.*, at para. 115.

⁷¹ *Ibid.*, at para. 114.

a much deeper level of integration between member states than many had formerly expected. *De novo* review of member decisions might suggest also that the role of the AB does not conform to settled expectations; that it is more similar (though still different) from the role of the European Court of Justice which has an extremely powerful function in assessing member state action. In the event, however, the AB instead adopted a less intrusive approach to the question of jurisdictional competence.

Moreover, the language the AB uses suggests that it was acutely aware of the sensitivities involved in the decision. It was aware, for example, that matters of national and inter-state governance were in question. In portraying the question as one of balance, and in effectively discounting the suggestion that panels might review national authorities' decisions for substance as well as for process, the AB indicated that the panels' constitutional role is one of oversight review rather than full-blooded review. And, although the objectivity standard leaves some issues incomplete,⁷² the AB has indicated that it will not be drawn into a choice between two extreme standards of review, one of which threatens members' decision-making authority and the other of which their assessments are questioned only for process. Instead, the WTO opted for the relative security, although ambiguity, of 'objective assessment'. Given the lack of clarity of the present formulation, it is likely that this matter will be revisited.

Implicit in this result are a number of conclusions. First, it suggests that, even in the exercise of mere treaty interpretation by the central tribunal, changes can occur in the scope of the *legislative power* of the member states. By the use of techniques such as constitutional doctrine amalgamation and constitutional value association the structure of international trade law is changing. Robust treaty interpretation, combined with strong judicial review incorporating such techniques, creates the possibility of subtly altering the legislative decision-making power by states, without an explicit transfer of power occurring. Again, the legitimacy of such a trend needs further consideration. Even taking account of the important qualification that states have not transferred regulatory power to any centralized body, an alteration in the

⁷² What the decision leaves open is the question of what exactly is entailed by the middle-course standard. The text of the provision does not provide a clear test and the AB's interpretation does not add much clarification; the nature of 'objective assessment' is left undefined. Some assistance may be gleaned from the words subsequent to the description which indicate that objective assessment should be applied not only to the facts in question but also to their 'applicability and conformity with the relevant covered agreements'. However, this latter phrase adds very little to the notion itself. All that it is possible to discern is that the panel must satisfy itself that the relevant measure or act was in conformity with the agreements, and it will not automatically defer to the claim of the member state in deciding that matter. So, by explicitly rejecting the conventional categories of review, the AB indicated that it would develop its own standard, taking the term 'objective assessment' as its foundation. The constitutional significance of this seemingly practical issue is obvious. Because legal outcomes turn, at least in part, on factual assessments, the sort of review power possessed by a tribunal is most important. And the review power of the tribunal will, in turn, affect the scope and manner of national (or, in this case, supranational) decision-making. A body like the EU cannot afford to make scientific assessments that fail to prove objective to the satisfaction of the AB's objective assessment standard. The AB's answer to the EC's challenge in *Hormones* prefigures a long process whereby the AB will have to negotiate the difficult constitutional waters of international judicial deference to member state decisions.

national/international relationship has occurred, and largely by way of judicial interpretation. The implications for governance of states are clear. If national legislative bodies can ‘lose’⁷³ a proportion of their power, or even have the exercise of that power conditioned in some significant ways, it would indicate two things. First, the judicial body has constituted a different relationship of power between the national and the international from the one which previously existed; and, secondly, the judicial body has begun to *act as though* the legal systems within its jurisdiction were not only singular systems of law but formed a part of a broader system of law. The *Hormones* case illustrates both these propositions.

2 Fact-finding

The second example of the way the tribunal’s decisions herald a constitutionalization process arises from the choice of fact-finding method it uses. The choice is constitutive of a type of system because, when a distinction is made between fact-finding by adversarial and inquisitorial technique, the distinction often blends into a broader characterization of the system in one or other of those forms. A system of law which uses a fact-finding technique under which greater latitude is given to the decision-making tribunal to positively seek out information is characterized as an inquisitorial system of law, while a system in which it is up to the parties themselves to present the more passive tribunal with the necessary facts is described as adversarial. Again, what is at base a simple evidentiary question carries with it other connotations; fact-finding rules can code for one form of system characterization.

Because the WTO system brings together states representing many different types of systems of law, the question of what sort of method of fact-finding panels can use was always likely to be controversial. In recent decisions, the AB seems to favour a procedurally relatively informal system whereby information can be elicited from a variety of sources, and the tribunal is not hemmed in by any strict rules of evidence and procedure. It would suggest that the system bears a closer relationship with an inquisitorial method of fact-finding than an adversarial procedure. And, in reaching that decision, the AB has constituted a particular type of system of law. Again, the illustration begins with *Hormones*.

In *Hormones*, the AB decided that the first-instance panel had not violated any provisions of the DSU when it selected and used its own experts rather than establishing an experts review group. It said that the DSU enabled a panel to ‘seek information and advice as it deem[ed] appropriate in a particular case’.⁷⁴ Moreover, the United States and Canada, who were separate complainants in the action, were entitled to exchange information.⁷⁵ And the panel itself could rely on its own arguments in making its decision, although it could not raise new claims.⁷⁶

This loosely inquisitorial-type method of the AB was confirmed and elaborated in

⁷³ For discussion, in the European context, of the phenomenon of ‘lost’ sovereignty, see MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’, 1 *European Law Journal* (1995) 259.

⁷⁴ *Hormones*, *supra* note 53, at para. 147.

⁷⁵ *Ibid.*, at paras 152–154.

⁷⁶ *Ibid.*, at para. 156.

Shrimp-Turtle when the AB described the panel as having a broad discretionary authority to accept information from a range of sources including non-parties⁷⁷ (at least when attached to a party submission). Contrary to the panel's finding, therefore, the panel was entitled to receive submissions from environmental organizations on the specific questions before it.

This is particularly interesting because in relation to standing the AB has stated clearly that only members of the WTO (e.g. states) have a sufficient legal interest in the matters before a panel to be accorded standing.⁷⁸ However, here the AB said that the panel had a broad authority to accept information related to the facts under dispute from non-members. Adopting the position taken in *Hormones* that a panel had a wide scope to seek any information it deemed appropriate,⁷⁹ the AB in *Shrimp-Turtle* said that the panel at first instance had erred in limiting its authority to receive unsolicited information from non-members, in this case environmental organizations.⁸⁰ The AB explained that, while the panel was not obliged to receive such information, it certainly possessed the discretionary authority to seek further information, including information from non-members' environmental groups.

At two levels, these results lend credence to the constitutionalization claim and have significance from a democratic and constitutional design perspective. First, as noted above, the choice of fact-finding method is critical to the characterization of legal system. The choice of the AB to lean towards an inquisitorial system of decision-making constitutes the system as a particular type of system. It suggests that the panels will be active rather than passive in fact-finding, and that facts will be defined not by the parties alone, but with the decision-maker's influence.

Secondly, as the legitimacy of the system will, in part, rest upon public acceptance of the AB's decision-making power, the result is noteworthy. It potentially increases the level of participation in the international trade law system of entities other than member states. It expands both the range of sources of information that can be relied upon by tribunals, and the range of organizations from whom they may receive that information. It implies that the tribunal can take judicial notice of information provided by non-WTO members. Moreover, the nice distinction between obligation and authorization gives the panels a broad mandate to seek and receive information relevant to its determinations from a wide range of sources: government and non-government, private and public, commercial and non-commercial. One can envisage a wide range of groups becoming involved in the decision-making process from corporations and unions to environmental and health organizations. Despite strict rules of standing, the development of flexible rules regulating fact-gathering opens up international trade to a variety of non-traditional sources of influence. In view of the importance of facts in conditioning legal rules, this expansion could shape the types of rules that are ultimately formulated.

⁷⁷ *Shrimp-Turtle*, *supra* note 52, at para. 102.

⁷⁸ *Ibid*, at para. 101.

⁷⁹ *Hormones*, *supra* note 53, at para. 147.

⁸⁰ *Shrimp-Turtle*, *supra* note 52, at para. 110.

Moreover, this unusual result in a domain in which access to international fora is normally quite restricted may have the further effect of enhancing the legitimacy of the international trade law decision-making process, a feature which has not always been visible in all incarnations of the regime. Arguably, it introduces some sort of ‘fairness’ notwithstanding the lack of formal standing for non-state entities,⁸¹ improves the participation of non-trade interests and lends a credibility and authority to the decision-making process.

3 *National Legislative Competence in Relation to Non-trade Standard Setting*

One of the vexing issues for legal system analysis is the continuing scope of national authorities to set standards for issues which fall within traditional state sovereignty and yet have an impact upon free trade; issues at the border of international trade law and national law. Health and environmental standards are two prominent examples. The *Hormones* decision suggests that the WTO appellate tribunal will tread lightly upon national legislative competence in relation to non-trade-related standard-setting (this is to be contrasted with the AB’s approach in relation to standard implementation that is discussed in section 4.C.1 below under ‘proportionality’).

(a) The rule: national health measures do not have to precisely correspond with international standards in order to be in conformity with international trade disciplines

The SPS Agreement sets down a range of rules and principles which seek to discipline the use of sanitary and phyto-sanitary measures as disguised restrictions upon trade. In the *Hormones* decision, the AB rejected the US claim that, in order for a national standard to be ‘based on’ international standards, as required by Article 3 of the SPS Agreement, the national standard had to correspond precisely with the international standard. Following the ordinary rules of statutory construction, the AB said that the ordinary meaning of the words ‘based on’ was different from the ordinary meaning of the words ‘conforming to’; thus a national measure did not have to be exactly the same as the international standard in order to be consistent with the Agreement.⁸² The words ‘based on’ did not suggest uniformity of standards but harmonization.⁸³ Countries may continue to set health standards that are different to the prevailing international standard, without violating the SPS Agreement, as long as those different standards are set in accordance with other provisions of the Agreement. For example, Article 3 of the Agreement requires standards set higher than the international level to be scientifically justified, and this scientific justification must take place through a risk assessment conducted in accordance with Article 5(1).

For our purposes, the significance of this rule is threefold. First, judicial interpretation of the international trade law instrument has confirmed that health, a subject matter of national constitutional authority, is firmly on the international trade

⁸¹ For an argument about the relationship between procedural fairness and justice to the legitimacy of international institutions, see Thomas Franck, *Fairness in International Law and Institutions* (1995).

⁸² *Hormones*, *supra* note 53, at para. 163.

⁸³ *Ibid.*, at para. 165.

agenda. Secondly, the tribunal has shown an awareness of the national sensitivities of the decision by the adoption of a construction of the text which emphasizes national authority. This is achieved by a combination of the methods identified above: the association of the interpretative question with the value of state sovereignty; and the amalgamation of constitutional techniques such as judicial economy.

(b) The justifications: state sovereignty, obligations and non-obligations, judicial prudence

The reluctance of the tribunal to step on national constitutional authority is evident in its set of justifications. According to the AB, states do not lightly relinquish their control over issues of health policy, and hence the AB:

cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance* with such standards guidelines and recommendations.⁸⁴

In support of this conclusion, the tribunal relies upon two other arguments: first, it states that a distinction exists between provisions in international agreements which are obligatory and those which are not, and the wording of Article indicates it is clearly not; and, secondly, the tribunal says it must be careful not to assume more than is absolutely necessary in order to give effect to the Agreement, indirectly invoking principles of effectiveness in treaty interpretation and judicial prudence.

So, once again, underlying a simple question of treaty interpretation of the two phrases 'based on' and 'conform to' nest a host of deeper concerns. First, all three justifications relied upon by the tribunal have echoes in the constitutional jurisprudence of national and supranational constitutionalism. The invocation of sovereignty reflects other international tribunals' attempts to traverse the tricky divide between intergovernmentalism and supranationalism;⁸⁵ the obligation/non-obligation distinction is a recurring theme of domestic constitutional law;⁸⁶ and notions of judicial economy or prudence are staple tools of constitutional interpretation.⁸⁷

Secondly, the very fact that the AB considers itself competent to decide the question of who has the authority to make such decisions indicates a shift in relations between

⁸⁴ Emphasis in the original.

⁸⁵ The sovereignty rationale has resonance in ECJ jurisprudence, although with different results. The ECJ used the inverse of the argument relied upon by the AB to deepen European integration when it said that signature to the EC Treaty, being an exercise of state sovereignty which transferred regulatory power to the centre, was an act that should not be taken lightly: *Costa v. Enel* [1964] ECR 585. This argument founded a range of doctrinal devices which weakened a strong form of sovereignty, although at the same time member states retained regulatory control in the legislative/executive body of the Community, the Council: Weiler, 'Transformation', *supra* note 3.

⁸⁶ For an example, see the Australian case of *Victoria v. Commonwealth* (1996) 187 CLR 416, at 486.

⁸⁷ The AB's prudence recalls Weiler's argument that the ECJ's introduction of review of national measures for violation of fundamental human rights had the 'hallmarks of deepest jurists' prudence' with the result that member states were more receptive to profound changes wrought by direct effect and supremacy: Weiler, 'Transformation', *supra* note 3, at 2417. Notions of judicial economy permeate domestic constitutional theory. For a recent example, see Cass Sunstein's argument for judicial 'minimalism' in Cass R. Sunstein, *One Case at a Time: Judicial Minimalism at the Supreme Court* (1999).

states and the international trade law system. Things formerly deemed constitutional because they automatically fell within national legislative jurisdiction are now appearing upon the international trade judicial agenda, even if only to consider whether they belong there. Constitutionalization in this context means the consideration by the international trade mechanisms of matters within state jurisdiction.

Thirdly, underlying the interpretation is perhaps the key concern of constitutional governance, namely, the level of integration between constituent parts of a legal system as indicated by the level of legislative authority those parts retain over legal standards. Various levels of economic integration are possible, ranging from, at the lowest level, complete diversity of laws, through mutual recognition of laws, harmonization, to unification of laws. Each level represents a different level of constitutional integration of a legal system. At the lowest level, the separate parts of a system, or parts of different systems have complete independence to decide how to regulate. At the highest level of unification, that independence has gone and has been transferred to the central decision-making body, and, at the various points in between, there are variations of regulatory competence. Hence, it is clear that, when the AB interpreted these provisions of the SPS Agreement as requiring harmonization but not uniformity, it is also signalling the level of legal system integration the WTO embodies. According to that interpretation, parties retain a substantial measure of national legislative competence over trade-related health issues, but must be mindful of their international obligations. In the result, some commentators were disappointed by the result because they believe it weakens not only the SPS Agreement but also the WTO itself.⁸⁸

This same constitutional controversy is inherent in any non-unitary legal system, whether it is federal such as Australia or the United States, or supranational such as the European Union. My point is not that the WTO legal regime is an emerging federal system or even a supranational system in the sense of the EU. Indeed, the international trade law system is undoubtedly *sui generis* with its strange mix of international, supranational and domestic features. Rather, I suggest that the same sorts of issues, issues that are constitutional in nature, can and have arisen in all these contexts: the national, the supranational and the international trade law regime.

Moreover, just as one can be alert to their implications at the national and supranational level, so might international trade law benefit from their study. If the AB had *not* overruled the panel on this issue and health standards were to be integrated uniformly in the manner suggested by the panel, then other problems for international trade law would have arisen. For example, consideration would need to be given to the method of identification of the appropriate international standards; the determination of a body to oversee unification; and the mechanisms of compliance. Instead, by specifying harmonization and not uniformity of laws as the goal of the

⁸⁸ Dale McNeil, 'The First Case under the Sanitary Phyto-Sanitary Agreement: EU Hormone Ban', 39 *Virginia Journal of International Law* (1998) 89 (arguing that interpreting the Agreement as only mandating the harmonization of standards weakens the Agreement and the WTO).

Agreement, the AB has, temporarily at least, avoided confronting these difficult questions of governance.

4 *Relationship between International Trade Law and Other Legal Regimes*

Amongst the functions of constitutional law are the mediation of conflicts between laws within its jurisdiction, and the constitutions of the law of the system itself, sometimes from laws external to it. So, for example, in the Australian and US federal systems the Supreme Courts decide on the rules to govern conflicts of laws within their respective constitutional systems. And both central tribunals, again interpreting their constitution, decide the rules within their constitutional system, using law external to the system. Both functions are currently being played out in recent WTO case law. International trade law is deciding the boundaries between itself and other legal regimes such as environmental law, and between itself as treaty law and other customary systems; and it is drawing upon other legal systems such as public international law in constituting the conflict rules for its own system. Rules that bear a resemblance to constitutional rules about conflicts are emerging, and the tribunal is constituting the system of law under which it operates with the aid of pre-existing rules of international law.

In the *Hormones* decision, the AB was asked to consider the relationship between the environmental precautionary principle⁸⁹ and the SPS Agreement. Here, the tribunal adopted the traditional international law position that a rule of customary international law could not override a specific obligation under treaty law.⁹⁰ In this case, the AB said that, regardless of whether or not the precautionary principle had achieved the status of a customary rule of international environmental law (and on this matter the tribunal did not express a view), such a rule would not override a specific treaty obligation which obliged states to carry out risk assessments and to justify scientifically any trade-restrictive measure.

In a later case, the tribunal said that the two spheres, of public international law and international trade law, were not entirely separate. To the contrary, non-trade international standards such as those drawn from environmental law may affect WTO interpretations especially where the treaty itself anticipates their influence. In the *Shrimp-Turtle* case, the AB held that Article XX exceptions to general trade disciplines ought to be interpreted in the light of contemporary standards of international environmental law especially since the preamble of the new GATT 1994 explicitly recognized a change in the relationship between international trade and international environmental law. The removal from the 1947 preamble of the objective of trade to use the 'full resources of the world' and their substitution in 1994 with the words 'optimal use of the world's resources in accordance with the objective of sustainable development' indicated that the contracting parties intended the trade

⁸⁹ The precautionary principle was interpreted to mean that, in the absence of conclusive scientific evidence about the public health implications of certain practices, states are entitled to regulate in a precautionary manner.

⁹⁰ *Hormones*, *supra* note 53, at para. 124.

agreements to be interpreted ‘in the light of contemporary concerns of the community of nations about the protection and conservation of the environment’.⁹¹

Finally, in making decisions about the relationship between environmental and trade law, the tribunal relies upon principles of interpretation in customary international law. The Appellate Body has interpreted the relevant provision⁹² of the DSU as requiring it to consider those rules of international treaty construction as codified in the Vienna Convention on the Law of Treaties. Hence, international trade law is increasingly linked to the broader jurisdiction of international law, although only to the extent, it has been suggested, of its procedural rules.⁹³

Many questions remain open for the AB in drawing the parameters of these relationships. For example, it remains to be seen what is the relationship between the trade agreements and fields not specifically contemplated by the actual instruments. If, for example, developments in a field we might designate ‘international health law’ were potentially to affect the interpretation of international trade, should they be relevant given their absence from the GATT 1994 preamble? How important to the *Turtles* opinion is the fact that an interrelationship between international trade and international environmental law was within the intention of the contracting parties? Is the international trade law regime hermetically sealed from outside legal regime influence; is it within the power of international trade to decide when and how other bodies of law will impinge upon its legal territory?

Further, how will other international law/international trade treaty conflicts be resolved? Although the *Hormones* decision disposes of a conflict between custom and treaty, it does not address the problem of competing interpretations of the supposedly ‘higher’ rules of international law or rules of *jus cogens*⁹⁴ and international trade law. For example, if the international law regime were specifically to include a rule of *jus cogens*, which designated that states had permanent sovereignty over their natural resources,⁹⁵ how would this interact with treaty rules concerning foreign investment? In the constitution of a system of international trade law, conflicts with pre-existing customary norms, some of which may be non-derogable, may arise. This is essentially the same question which arises in a non-trade context but it has added piquancy here partly because the particular treaty provisions in question are being enforced with greater enthusiasm than is the case in some other treaty regimes.

C *Second-order Constitutional Features: Procedural and Substantive*

1 *Rational Relationship Testing, Proportionality, Less Restrictive Means*

Another sign of the deepening constitutionalization of the international trade law system is the increasing use of decisional techniques borrowed from other consti-

⁹¹ *Shrimp-Turtle*, *supra* note 52, at paras 153 and 129.

⁹² Article 3(2).

⁹³ Trachtman, *supra* note 14.

⁹⁴ *Oppenheim’s International Law*, extracted in Henkin, Pugh, Schachter and Smith, *International Law* (3rd ed., 1993) 91.

⁹⁵ GA Res. 1803 (XVII), 1962.

tutional systems' general interpretation methods. Included amongst these techniques is the language of rational relationship, proportionality and less restrictive means. The resemblance between international trade law and a constitutional system is thus enhanced.

For example, a panel assessing the consistency of a national measure with the WTO Agreements has used rational relationship testing. The test follows the classic formulation in invoking a two-step process in which, first, the aim or purpose of the measure is assessed for legitimacy, and then the means to achieve that end are judged for their rational relationship with the end.

An illustration of the application of a rational relationship-type test can be found in the *Hormones* case. In this case, the AB decided that EU restrictions upon the importation of US beef were inconsistent with GATT disciplines on the basis of the second limb of the test. In order to reach that conclusion, the tribunal began by finding that public health concerns existed with regard to the possibility of growth hormones causing cancer and thus the purpose of the measures was, to this extent, legitimate. Moreover, the tribunal implied that protectionism was not the aim of the prohibition: it was not 'really designed' to 'keep out US beef'.⁹⁶ Accordingly, the adoption, by the EU, of different levels of sanitary protection for meat produced with added artificial hormones and meat with naturally occurring hormones or therapeutically administered hormones, was not arbitrary.

The problem for the EU, however, was that, despite the legitimacy of its public health concern, its non-discriminatory purpose, and the absence of arbitrary differential regulation, there was no rational relationship between the purpose of the measure and the means used to achieve it. Articles 5(1) and 3(3) of the SPS Agreement required national standards to be based on a risk assessment supported by scientific justification. In rejecting the EU's argument that its risk assessment was scientifically justified, the AB agreed with the panel at first instance, which had concluded that 'the scientific reports ... do not rationally support the EC import prohibition'.⁹⁷ The studies which did show the existence of a risk were addressed more to the use of hormones in general, and not to the use of the specific growth hormones in question, and the studies were not conducted on meat products specifically.⁹⁸ So, despite the legitimacy of the purpose, the measures violated the SPS Agreement because there was no rational relationship between the risk assessment and the means adopted to achieve that purpose.

This fine-tuning of national legislative competence over non-trade measures has been further affected by the decision in the *Shrimp-Turtle* case which amalgamates into international trade jurisprudence constitutional techniques such as proportionality and less restrictive means. In this case, although the US enactment to restrict the importation of shrimp caught in turtle-unsafe nets passed the rational

⁹⁶ *Hormones*, *supra* note 53, at para. 245.

⁹⁷ *Ibid.*, at para. 197.

⁹⁸ *Ibid.*, at para. 199.

relationship test, the tribunal nevertheless decided it was inconsistent with GATT Article XX, relying on a test which resembled proportionality.

Before reaching the point, the AB said that Article XX general exception interpretation involved a two-stage process. In order to fall within the protection of the exception, a party must first show that the measure was provisionally within one of the exceptional paragraphs, and, secondly, that the measure is consistent with the chapeau's requirements of non-discrimination. So, in the first stage, it is a test of rational relationship that was invoked: legitimate purpose, and a rational fit between means and ends.⁹⁹ Here, the tribunal was satisfied, as a first step, that the measure was provisionally valid because it accepted US arguments that the purpose behind the measure was the conservation of natural resources, and it accepted an import ban on shrimp caught in turtle-dangerous nets was directed towards that end. However, the AB ultimately found the measure inconsistent with the chapeau of Article XX.

It was on the basis of a proportionality-type test that the measure failed. The existence of a less restrictive means for achieving a (legitimate) goal indicated that the means were disproportionate to that end. In this respect, the AB stated that instead of the blanket import prohibition the US could have used multilateral procedures which provided a specific mechanism to resolve such disputes. It could have met the relevant parties and reached an agreement about appropriate fishing technology. A complete prohibition was disproportionate to the environmental purpose. '[An] alternative course of action was reasonably open to the US to secure a legitimate policy goal.'¹⁰⁰

Both cases illustrate that the AB is developing a complex jurisprudence replete with constitutional devices such as rational relationship testing, proportionality, and less restrictive means. To the extent that interpretation using constitutional tools borrowed from other jurisdictions is both a sign of the constitutionalization of a system, and contributes to the constitution of the system in a formal sense, then the incorporation of such devices indicates that the AB is doing more than simply interpreting a treaty. First, it is amalgamating constitutional methods directly into the practice and procedure of the international trade law system leading to a stronger resemblance between international trade law interpretation and ordinary constitutional interpretation. Secondly, in another sense the decision is constitutional in that it contributes to the constitution of a new system in which national regulatory power is closely monitored. Under this system, any *prima facie* legitimate non-trade measure with trade effects must be carefully tailored to its particular purpose, and must be based upon clear, virtually undisputed, and specifically targeted scientific studies. Thirdly, the amalgamation of techniques and subsequent changed design of relationships between national states and the WTO suggests an alteration in relationships of governance between the actors involved. So, while parties have lost no legislative authority to the Agreements, their authority has been conditioned by the introduction of constitutional techniques such that, from the point of view of national governance, they no longer possess *absolute* autonomy to decide on measures

⁹⁹ *Shrimp-Turtle*, *supra* note 52, at paras 135 and 137.

¹⁰⁰ *Ibid.*, at para. 171.

with trade consequences. The increased use of such devices constrains the ability of states to argue that non-trade-related measures, *prima facie* permissible under international trade law, will necessarily be valid. To the extent that the incorporation of finely tuned constitutional devices are a sign of a maturing international trade law system, international trade law has clearly moved beyond the early developmental stage.

2 Substantive Discrimination

One of the more interesting developments in recent WTO case law is its consolidation of a substantive approach to the interpretation of the principle of non-discrimination in trade. According to this substantive approach, the WTO tribunal will examine actual outcomes, effects or results of a measure, as applied, to ensure no discrimination between parties has occurred and will necessarily investigate behind a state's claim of *prima facie* or formal equality of treatment.

In *Bananas IV*, an arbitration concerning the EU's revised banana import regime, the arbitrators adopted a definition of discrimination that took into account the ongoing effects of past disadvantage upon the present arrangements for the allocation of quotas under GATT Article XIII and licensing under the GATS. Implicitly, this approach is one associated in constitutional doctrine with the idea of substantive over formal equality.

GATT Article XIII prohibits quantitative restrictions on trade except under certain conditions, one of which is the requirement that, in the absence of agreement between exporters and the state imposing the quotas, tariff quotas are allocated in accordance with trade in a previous representative period. In relation to GATS Article XIII(2), the AB held that the previous representative period upon which the allocations are based must not itself have been distorted by discriminatory restrictions, otherwise the purpose of the Article would be defeated.¹⁰¹ In view of the fact that the EU had based its revised tariff quota regimes upon a previous period (1994–1996) in which distortions had occurred, the revised regime was not consistent with the GATT.¹⁰²

In relation to the revised licensing allocation procedures, the outcome was similar. The AB decided that the basis of the licence allocations continued a previous discrimination because the reference quantities upon which the allocations were based referred to amounts imported between 1994 and 1996 by traditional operators who had to import a certain minimum quantity during the period. The AB puts the question this way: does the revised regime prolong the allocation of licences on the basis of those aspects of the previous licensing system found inconsistent in *Bananas III*? Four steps are important here in answering the question affirmatively. First, as a matter of textual construction, the AB notes that *de facto* as well as *de jure* discrimination is a violation of the GATS. Secondly, the AB notes that the EU's choices about how to allocate its licences may be restricted by what it has done in the past. Where '*de facto* discrimination has been found in the past, and where reliance on

¹⁰¹ *Bananas*, *supra* note 54 at para. 5.26.

¹⁰² *Ibid.*, at para. 5.32.

licence usage may result in a prolongation of the results of a violation of GATS rules', it is only logical that the EU's current choices may be limited. Thirdly, the AB suggests that even an increase in non-EU licence allocations may not level the field, because they may simply redress the most egregiously discriminatory aspects of the previous regime. Fourthly, any continuing competitive disadvantage suffered by non-EU operators will clearly signal a discriminatory regime.¹⁰³ For evidence, the AB refers to a European Commission document which claims that the new allocations will 'freeze' past allocations, and to the fact that the previous representative period is one in which allocations were inconsistent with the GATS. In short, a finding of discrimination is made based on text, history, an effects-based interpretation of the term, and evidence of continuing disadvantage.

Similar conclusions are reached in relation to aspects of the licensing regime dealing with 'single pot' allocations and with allocations for newcomers. In relation to single pot allocations, although the AB accepts the theoretical possibility that treating all operators similarly could achieve a level of equality, it finds that this would be of a merely formal nature. It says:

when a single pot solution relies on a skewed reference period . . . the *de facto* less favourable conditions of competition for US service suppliers are aggravated through the carry-on effects of the previous regime.¹⁰⁴

Newcomers faced obstacles also. For example, they had to show an ongoing relationship with EC trade based on being established in the relevant period in which it was harder for them to obtain licences and they needed to prove expertise in fruit importation which referred to EC fruit importation to which they had less access.

There are a number of observations to make here. First, discrimination will be assessed historically, and in context. Secondly, *prima facie* non-discriminatory measures may, upon historical and contextual examination, prove to be discriminatory. Thirdly, mere equalization of opportunities may be insufficient to overcome past discrimination, and what may be required is a form of positive discrimination favouring those who have previously been discriminated against. What is required is not a mere equalization of opportunities so that EU and non-EU licence operators are both subject to the same criteria, but a new system whereby different criteria are introduced to achieve what Professor Franck might refer to as 'broadly conceived equity', that is not simple corrections of past inequity but the displacement of formal rules of law with equitable rules.¹⁰⁵ In sum, the AB's interpretation appears acutely aware of the ways in which *prima facie* neutral measures can nevertheless have discriminatory effects in practice. This nuanced interpretation of the principle of non-discrimination has the hallmarks of a mature constitutional system.

A similar emphasis characterizes the *Shrimp-Turtle* decision in which provisions, which were *prima facie* valid, were, in their application, regarded as discriminatory. So, despite a holding that it was not discriminatory for the US to ban the importation of

¹⁰³ *Ibid.*, at para. 5.70.

¹⁰⁴ *Ibid.*, at para. 5.88.

¹⁰⁵ Franck, *supra* note 81, at 66–75.

shrimps caught with fishing technology that could harm turtles,¹⁰⁶ these measures, *as applied*, constituted unjustifiable or arbitrary discrimination on trade.¹⁰⁷ Certification to fish was available only to countries using technology identical to the US despite the existence of comparably protective techniques;¹⁰⁸ countries whose technology had not been certified lacked information about the process of certification;¹⁰⁹ countries with whom the US had not concluded bilateral agreements were subject to tighter time periods than others;¹¹⁰ and the US had not made use of multilateral channels to achieve an accommodation of the trade and environment conflict involved here.¹¹¹ Moreover, the discrimination was unjust because the policy was unilaterally shaped without the participation of the shrimp exporters.¹¹²

Both cases are illustrative of constitutionalization in two ways. First, they reflect the growing resemblance between international trade and constitutional interpretation. Although it is of course true that substantive non-discrimination is associated not only with constitutional doctrine, it has been largely developed in that particular context.¹¹³ In another sense also, a substantive approach to discrimination grafts onto the trading system some of the deeper associations of constitutionalism. Professor Franck has argued that international law is no longer obsessed with the question of whether it is law and has graduated to a focus upon the question of how fair that law is. Fairness is, in domestic law, closely associated with ideas of constitutionalism. The appearance of such a strongly substantive approach fits squarely with Professor Franck's thesis that international law is increasingly informed by notions of fairness, which are not only procedural but also equitable in nature,¹¹⁴ and it reflects the incorporation of constitutional associations into international trade.

5 Conclusion

We began from the premise that the inherent ambiguity of the term 'constitutionalization' has facilitated analysis of a broad range of institutional, structural

¹⁰⁶ *Shrimp-Turtle*, *supra* note 52, at para. 141.

¹⁰⁷ Another way of conceiving of this approach is to present it simply as an example of the rule of statutory construction which requires a decision-maker to consider not only the purpose or intention of a text but also its effects. This does not preclude interpreting the case as an example of the principle of substantive non-discrimination.

¹⁰⁸ *Shrimp-Turtle*, *supra* note 52, at paras 162, 163, 165.

¹⁰⁹ *Ibid*, at paras 173–175 and 181.

¹¹⁰ *Ibid*, at para. 172.

¹¹¹ *Ibid*, at paras 166–171.

¹¹² *Ibid*, at para. 72.

¹¹³ For some examples from national constitutional systems, see, in the Australian context, the different approaches in *James v. Commonwealth* (1928) 41 CLR 442 (formal), and *Street v. Queensland Bar Association* (1989) 163 CLR 461 (substantive).

¹¹⁴ Franck, *supra* note 81, at 7, 8 and 9. For a counterpoint to Franck's argument (and yet an example of its usage) in the trade context, see the discussion of the balance of concepts of justice and efficiency reached by the Appellate Body in relation to colonial preferences for banana-producing ex-colonies by the European Union: Bhala, 'Preference for its Former Colonies', *Legal Times*, 8 February 1999 discussing *Bananas*, *supra* note 54, at para. 5.32.

and symbolic/political changes within the multilateral trading system, but that in so doing important questions had become buried in the scholarship. Looking through the lens of a series of WTO cases, this article has embarked upon a process of unscrambling some of the many practices, which might be understood as constitutionalization. It has shown that one way in which constitutionalization operates in international trade law is as the generation of constitutional norms and structures by judicial decision-making. This definition emphasizes judicial dispute resolution not merely as an institution of a new constitutional structure, but also as an engine of constitutional creation. By amalgamating constitutional techniques derived from other constitutional systems; by constituting a new system of law; incorporating issues formerly within national constitutional domains; and including deeper constitutional associations within the international trade case law, the Appellate Body is contributing to constitutionalization of the system. The argument is not that international trade law is a state system, but only that it shares some of the characteristics of national constitutional law. The argument does not rely on the increasing interdependency between international law and international trade law through the Vienna Convention, nor is it dependent upon any constitutionalization of general international law. Instead, I have suggested that it is only by looking at international trade law through the prism of constitutional thinking that the full depth of the constitutionalization process is revealed. In addition to questions about standards of review, we find questions about the division of powers; beneath national standard-setting we find state sovereignty. And when these features are stripped of their technical apparel, even more basic tenets of constitutional debate are disclosed: about how a legal system is constituted, its overall validity, its democratic contours, its very legitimacy.

But the point of this project is not simply excavatory; it is also to think about the implications of the transformations of the system. I have suggested that the type of constitutionalization practice described here — that is ‘constitutionalization’ by judicial norm and structure generation — contains within it some difficult debates about trade liberalization and globalization, about legitimacy, democracy and international order, about how legal systems are made, and by whom.

A Constitutional Design

First, as noted above,¹¹⁵ in view of the fact that the term ‘constitution’ is notoriously resistant to strict definition, any constitutionalization process raises questions about *constitutional design*. Any attempt to pin down the essence of a constitution is bound to end in a series of mirages. So, at its very base, this article is part of a project about constitutions and their meaning, and their relationship to other similar phenomena such as treaty interpretation arrangements and regimes. It is part of a study of the various images of ‘constitution’ in a variety of fields. The transformation of the WTO, and its naming as constitutionalization, presents a rare opportunity to study and to think about the very basic questions of constitutional formation — what is a

¹¹⁵ See *supra* notes 3–9 and text.

constitution? Where does it come from? Who authorizes it? How does it change? Why is it different, if it is, from an ordinary international law treaty, or from what international relations scholars call a 'regime'? International trade scholars must come to terms with these basic questions if they are to contribute productively to the discussion about constitutionalization.

B Legitimacy and Governance

Second, implicitly, constitutionalization is about *governance*, of a national and international nature. The very reason that constitutionalization is important is because normally the word 'Constitution', at least when it has a capital 'C', is reserved for, or is synonymous with, 'government'. We rarely talk about it unless we assume a public authority with the right and responsibility to make decisions determining the organization and structure of political and legal power; and the distribution of goods and opportunities in society. If international trade is constitutionalizing, does this mean that international trade law has become a structure of governance? Does it signal the much-vaunted decline of state sovereignty? Do all constitutions begin as free trade arrangements? Will the WTO necessarily acquire the sort of power associated with government, namely, the power to decide how legal power is divided, about how public goods are distributed. Or is there some other type of more limited trade constitution that has a plausible meaning?

C Democracy

Third, and related, are the *democratic implications* of any supposed constitutionalization. With the growth of a strong public authority with power to affect the trade policies of states, and hence the lives of citizens, and public and private entities within those states, another set of questions are raised. What is the source of legitimacy for the decision-making processes? What level of participation of non-state actors in the creation and application of international trade law rules should be expected?

The democratic concerns continue. Does the use of the term constitutionalization connote any of the other associations often made with the terms *constitutionalism* or *constitutional*? For example, does it mean that measures should comply not only with the text of the actual instrument of the Constitution, but also with a notion of basic fairness, procedural and/or substantive?

D Legal System-making

Fourth, for those interested in constitutive questions of *legal system making or jurisprudence*, and compliance, the phenomenon is profoundly important. The constitutionalization of international trade presents an ideal moment to study a system in transition. It places a lens over a subtle but dramatic shift from a body of mixed law and diplomacy concerned largely with trying to find mutually acceptable solutions to disputes between states, to a system of law in which states subject themselves to the binding power of a central tribunal. A range of inquiries might

follow: will states find this transition acceptable? Will they feel bound by its processes? How will the Appellate Body monitor and enforce its decisions?

E National Policy-making

Finally, and most obvious of all, constitutionalization has the potential to shape the *national policies of states*, in a variety of fields beginning with trade policy, moving through industrial policy, to labour market reform, and even to those policy areas traditionally guarded as within the domestic domain such as health, education and culture. As Brian Langille has convincingly argued, logically, in principle, there is nothing to prevent states from arguing that almost any regulatory measure (such as the provision or absence of another state's maternity leave policies) are an impediment to export and thus a potentially discriminatory trade barrier.¹¹⁶ Moreover, even if we take a limited view of the role of judicialization and equated it to rule-application and not rule-making, it is clear that decisions emanating from the Appellate Body will have distributive effects.¹¹⁷ A decision may favour producer interests over consumers, consumers over workers, importers over exporters, exporters over government. The use of the various techniques of constitutional law mentioned herein will tame and shape the way in which these distributive decisions are made. In sum, the constitutionalization of international trade law, as judicial decision-making, has implications for constitutional understanding and design, for ideas about governance, democracy, jurisprudence and policy. And it is these implications which will form the most fruitful research agenda for those interested in the system and its development.

These five arguments, which are woven through the body of the work, explain the reasons underlying the ongoing controversy about constitutionalization and the labelling of the phenomenon as constitutionalization. The effectiveness and enforceability of the system will rest, in part, upon how these questions are resolved.¹¹⁸ In

¹¹⁶ Langille, 'Fair Trade is Free Trade's Destiny', in Jagdish Bhagwati and Robert Hudec, *Free Trade and Harmonization* (1996).

¹¹⁷ Dunoff and Trachtman point out that the design of rules of prescriptive jurisdiction in international trade will affect any assignment of property rights: Dunoff and Trachtman, *supra* note 20, at 23.

¹¹⁸ The range of issues, which will effect effectiveness and enforcement, are not exhausted by this Conclusion. A further set of questions relating to the nature of any freedoms protected by the trading system are provoked by the use of the term 'constitutionalization'. What sort of freedoms does the international trading system protect and in what sense could these freedoms be described as 'constitutional'? Apart from the freedom of non-discrimination in trade, does it imply a freedom for individuals to purchase goods and services beyond state borders and does this give rise to a sense of freedom ordinarily encapsulated by the notion of a constitutional freedom? For example, in relation to the EU, Weiler has argued for an extension of what he calls a 'Saatchi and Saatchi' concept of citizenship favoured by the Commission to something deeper which is capable of binding a community into a *demos* necessary to legitimize a constitution: see Weiler, 'Transformation', *supra* note 3; and Weiler, *supra* note 6, at 332–335. What is the relationship between advances in the technology of communication and trade liberalization — is the expansion of trading rights ephemeral in comparison with technological advances? What are the 'borders' of the new constitutional arrangements of the WTO? Who is within, and without, those borders? Arguments about the rise of transnational collective interests might be relevant here: see Harold Koh, 'Transnational Legal Process', 75 *Nebraska Law Review* (1996) 181. Anthony Giddens' work on state formation might also suggest questions for international trade, see e.g.

suggesting these arguments, I have necessarily made assumptions and inferences about what is going on in the field. But, in bringing this evaluative dimension to the fore, I hope to give expression to some of the impulses and motivations behind both the constitutionalization process, and its naming, which, to this point, have remained somewhat obscure. This article can therefore be read as a set of hunches about the underlying concerns of the constitutionalization debate, not all of which are apparent on the surface of the case law or the commentaries. In essence, this article has tried to convert the debate about constitutionalization from a purely descriptive project about specific trade disputes and institutions into a set of speculations on the nature of international trade, and on the valency of the idea of constitutionalization. It has sought to begin to understand whether the field of international trade law, infused with notions of constitutionalization, might be gradually developing from a simple trade treaty into a new kind of legal/constitutional apparatus for broader matters of governance.

Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (1991). For example, has the recognition of an international right to non-discrimination in trade, coupled with a contraction of national legislative authority (to legislate environmentally, to boycott goods on health and safety grounds), given rise to a 'dialectic', in Giddens' terms, reflected in the resistance to international trade seen at Seattle? Is it possible that this process will lead to the emergence of a sense of international identity or citizenship which could legitimize a new set of international trade rules?