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# The Constitutions of the WTO

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## Abstract

*Constitutions have many dimensions. These dimensions include at least the following: an economic constitution in the sense of a set of rules for transactions in and institutionalization of authority; an interfunctional constitution that allows for the integration of various social values; a political constitution that reflects the cultural and democratic integrity of a group of people; a legal and judicial constitution that provides rules for the making of other rules, and for determining supremacy and the scope of judicial application of rules; a human rights constitution that limits the sphere of governmental authority, and a redistributive constitution founded on social solidarity. The WTO 'constitution' has already grown along some of these dimensions. As we assess the constitutional development of the WTO, we must first analyse these dimensions separately. Second, we must examine how these dimensions relate to one another. Third, we must examine how these dimensions of the WTO 'constitution' relate to the general international legal system's constitution and to the constitutions of other international organizations. Fourth, we must examine how these dimensions of the WTO 'constitution' relate to the domestic constitutions of the WTO's member states. Finally, we must examine the 'tertiary' rules that relate these different constitutions to one another.*

## 1 Introduction

Constitutional discourse may foreclose possibilities, or it may expand possibilities. This paper focuses on the ways in which constitutional discourse may enable us to see possibilities at the WTO, and more broadly in international society, that might not otherwise be apparent. However, it must be recognized that constitutional discourse has a dark side: the possibility of false necessity and false rigidity that may come of assertions that certain legal rules are constitutional and therefore are above politics. There is also a false rigidity that comes from assertions that there is nothing 'constitutional'

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about a particular international legal institution. As Hayek suggested, our ability to observe reality is limited by the scope of our theory of reality, so both denying ourselves a constitutional model and insisting on a particular constitutional model limit our vision. Professor Dunoff, in his insightful article included in this issue,<sup>1</sup> properly decries one type of limit, while insisting on the other.

A constitution is like the fabled elephant at the hands of six blind men.<sup>2</sup> Each imagines a different animal based on his encounter with a different part of the elephant. To grapple with the constitutional structure of the WTO, it is necessary to recognize the different parts of the elephant, and then to try to envision the entire animal. Each part is important in itself, but cannot be assessed separately from the whole. Thus, the evaluative process presented in this paper is analytic and then synthetic.

There are those who encounter a constitution, and only perceive one of the following:

1. an economic constitution in the Buchanan sense: a set of rules for transactions in, and institutionalization of, authority;
2. an interfunctional constitution that allows for the integration of various social values;
3. a political constitution that reflects the cultural and democratic integrity of a group of people;
4. a legal and judicial constitution that provides rules for the making of other rules, and for determining supremacy and the scope of judicial application of rules;
5. a human rights constitution that limits the sphere of governmental authority, and
6. a redistributive constitution founded on social solidarity.

In fact, like the organs of an animal, each of these components is inextricably intertwined and interdependent with the others. It is this essay's goal to begin to suggest the outlines of the whole animal. It is hoped to suggest some of the sinews and systems that link the different parts. We must recognize that while the WTO is a young animal that needs all of its organs to survive, some will grow with age. This is complicated enough.

Yet we must also recognize that the WTO constitution is itself but a part of a broader structure for the global system. Not only are there several elephants in our picture, but these elephants live in symbiosis, sharing organs with one another. Thus, we would again be missing the whole picture if we focused exclusively on even all six elements of the WTO constitution. Rather, it is necessary to examine the WTO constitution in the context of the general public international law system, and in relation to the other components of that system. Indeed, the general public international law system, including its subsystems, must be evaluated in constitutional terms.

<sup>1</sup> Dunoff, 'Constitutional Concepts: The WTO's "Constitution" and the Discipline of International Law', this issue, at 647.

<sup>2</sup> For the fable, see <http://www.cs.princeton.edu/~rywang/berkeley/258/parable.html>.

The WTO constitution is a semi-autonomous system within the broader international legal system.<sup>3</sup> But due to its dependence on and interaction with the broader international legal system, it is not possible to analyse the WTO constitution fully without analysing the broader structure.<sup>4</sup> This would be as incomplete as analysing the constitution of Massachusetts without examining the US federal constitution, although it is not precisely analogous. A complete analysis would include the relationship between the WTO legal system and the broader international legal system.

Furthermore, the WTO interacts with, draws support from, constrains and is constrained by domestic constitutional orders. So we must examine the WTO constitution not only in relation to the broader international legal system, but also in relation to the domestic constitutional structures of the member states of the WTO. Again, it is incorrect to criticize the WTO for constitutional weaknesses or excesses where these are addressed by constitutional structures at the member state level. But we must also examine the extent to which WTO law may inhibit constitutional structures at the member state level, and consequently examine whether this inhibition should be stopped, or whether it may be better to effect the relevant constitutional function at the WTO level. Thus, 'negative' constitutional integration – inhibition of domestic constitutional functions – must be countered with 'positive' constitutional integration: establishment of constitutional structures at the WTO level. For example, some argue that the WTO needs a human rights component precisely because they see certain features of the WTO constraining domestic protections of human rights.

Finally, while comparison between the WTO 'constitution' and domestic constitutions is useful for this very reason, it must be approached with great caution, as these constitutions exist in sharply different social contexts, with sharply different functions. But the fact that there are substantial differences in degree of implication of certain constitutional features does not mean, as Dunoff suggests, that both cannot be understood descriptively in terms of these features. Dunoff demands that there be a 'constitutional court', a 'constitutional convention', a 'constitutional drafting process', and a 'readily identifiable constitutional moment'.<sup>5</sup> Yet, these are only labels. Dunoff takes description in constitutional terms for constitutionalism, for advocacy of increased constitutionalization – something I explicitly abjure.

So, we have a minimum of three intertwined 'elephants'. And frankly, there are often different sets of analysts groping blindly at each individual elephant, without recognizing that it is intertwined with the others. However, the constitutional structures at each of the domestic, WTO and general international legal system levels

<sup>3</sup> This feature distinguishes the WTO constitution in an important sense from national constitutions. National constitutions do not depend, necessarily, on the international legal system for their formal binding force. But see, *US v. Curtiss-Wright Export Corp.*, 299 US (1936) 304 ('the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution').

<sup>4</sup> See, e.g., Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Colum. J. Transnat'l L.* (1998) 529; White, 'The United Nations System: Conference, Contract or Constitutional Order', 4 *Sing. J. Int'l & Comp. L.* (2000) 281.

<sup>5</sup> Dunoff, *supra* note 1, at 650 (para. following fn. 7)

relate to one another.<sup>6</sup> The question of the relationship among the state, the WTO and the general international legal system constitutions may be understood as one of subsidiarity: at what level are particular constitutional functions best effected? We can begin to perceive a principle of constitutional subsidiarity. This is different from the normal principle of subsidiarity, which may be understood as a principle of allocation of authority, thereby addressing only one element of constitutionalization. The principle of constitutional subsidiarity deals not with primary rules, but with secondary rules, and asks at which level, and in which functional setting, constitutional functions should be effected.

While the state and the WTO might be understood as existing in a vertical relationship, we might understand the WTO and the general international legal system as existing in either a vertical or a horizontal relationship.<sup>7</sup> But the allocations are not static. They are dynamic in a variety of ways, both formal and informal. So in order to understand each individual structure, and in order to understand the contingent nature of each individual structure, it is necessary to analyse the dynamic basis for allocation of authority among these subsystems.

One might well ask, at the conclusion of this analytical and synthetic process, is there anything essential about any of these animals? Perhaps an elephant has an essence, but does a constitution? Is this where the elephant analogy thankfully stops? To press it one step further, this essay suggests that, in evolutionary terms, the constitutional elephant evolves for the benefit of its cells: the individual constituents. The point is that the constitution does not exist as some essential form in itself, but rather evolves as an instrument for the benefit of individual constituents. Thus, this essay rejects corporatist or other approaches that suggest that constitutionalization has intrinsic value, and embraces the contingency and plasticity of constitutions.

## 2 The Language of the WTO Constitution Debate

Defining terms can enhance debate. And few legal terms engender more misunderstanding than ‘constitution’. It is difficult to say what is the core meaning of ‘constitution’, and what is a trope. Anthropologists say that we only see what we know, and in this sense we are all partially blind as we approach a constitution. In discussions of constitutions, each analyst arrives with a culturally-rooted image that obscures the full structure. Therefore, it is not only unacceptable, but impossible, to speak about a WTO ‘constitution’, either with compatriots or with foreigners.<sup>8</sup> Yet in two important ways, it is necessary to try to do so.

<sup>6</sup> See Walker, ‘The EU and the WTO: Constitutionalism in a New Key’, in G. de Burca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001); Walker, ‘The Idea of Constitutional Pluralism’, 65 *Modern L. Rev.* (2002) 317; Pierce, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?’, 36 *CMLR* (1999) 703, at 709.

<sup>7</sup> See Trachtman, ‘Institutional Linkage: Transcending “Trade and . . .”’, 96 *AJIL* 77 (2002).

<sup>8</sup> See Howse and Nicolaidis, ‘Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity’, 16 *Governance* (2003) 73 (criticizing a particular variety of constitutional approach to the WTO).

First, the WTO already has a constitution – in the same sense that the EU had a constitution before the recent constitutional convention and just as the US Articles of Confederation that governed from 1781 to 1789 were, indeed, a constitution. There is no doubt that the WTO has a constitution in this technical sense. Yet viewing the WTO in constitutional terms is especially difficult for United States citizens, as the US Constitution is constitutive of a particular domestic society, and, more than any other constitution, has attained iconic, even deified, significance. We also have difficulty accepting multiple overlapping constitutions, as we in the US associate our own constitution with a kind of exclusive allegiance, and sovereignty. Yet reality requires recognition of multiple sovereignties, multiple allegiances and multiple constitutions. Indeed, we in the US, like those in the EU, should be more prepared than others to accept the ambiguities involved in multiple constitutions.<sup>9</sup>

In the US and EU systems of dual constitutions, at the local and at the central levels, a third type of rule has developed in the H. L. A. Hart hierarchy.<sup>10</sup> Primary rules are normal legislation. Secondary rules are more in the nature of constitutional rules, determining authority to legislate, interpret and determine conflicts between primary rules. But there can also be conflicts between secondary rules. A special type of secondary rule, or perhaps one would call it a 'tertiary rule', determines the allocation of authority between constitutions.<sup>11</sup> The principle of constitutional subsidiarity, suggested above, might be understood as a kind of tertiary rule. But there may be others, and they may be more specific. Even in systems like the US, where it is now generally recognized that the central constitution is supreme, there is an inter-constitutional dialogue, carried on by both courts and legislatures, that in a nuanced manner allocates authority between state constitutions and the federal constitution. This type of dialogue has been extensive and explicit in the EU.<sup>12</sup> There is also a nascent dialogue between the US Constitution and the international legal 'constitution'.<sup>13</sup>

Implicit in this concept of 'tertiary rules' is the non-exclusivity of constitutionalization. That is, it is possible to have multiple levels and locations at which constitutionalization takes place. The nation-state holds no monopoly. The principle of exclusive sovereignty has never been true.<sup>14</sup> This non-exclusivity may be associated with the non-exclusivity of levels and locations in which people relate to one another: with subsidiarity. It is in this sense that the non-exclusivity of constitutionalization seems congruent with the non-exclusivity of political relations.

Second, the WTO will increasingly need to draw on constitutional functions along all of the parameters assessed here. This is because the relationships that the WTO

<sup>9</sup> Walker, 'The Idea of Constitutional Pluralism', *supra* note 6.

<sup>10</sup> H. L. A. Hart, *The Concept of Law* (1961). Hart wrote of three types of secondary rule: rules of recognition, rules of change, and rules of adjudication.

<sup>11</sup> For a similar suggestion, see Buckley, 'Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction, and Legal History', 24 *Hous. L. Rev.* (1987) 875, at 903–906.

<sup>12</sup> See, e.g., Solange I (BVerfGE 37, 271); Solange II (BVerfGE 73, 339), Maastricht (BVerfGE 89, 155).

<sup>13</sup> See, e.g., Aleinikoff, 'Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution', 82 *Tex. L. Rev.* (2004) 1989.

<sup>14</sup> S. D. Krasner, *Sovereignty: Organized Hypocrisy* (1999).

addresses will increase in scope, complexity and importance, and will therefore drive and benefit from constitutional growth.<sup>15</sup> These constitutional functions will become necessary despite the concern that many citizens and diplomats have about constitutionalization of the WTO. However, once we analyse the term ‘constitution’, it will be seen that there is less to fear than if we imagine the kind of iconic or mystical constitution that many believe can only occur at the level of the state. Renato Ruggiero, former Director-General of the WTO, was famously criticized for using the term ‘constitution’ in reference to the WTO.<sup>16</sup>

Third, it is not a contradiction to say that when the WTO needs constitutional functions, those functions may be effected elsewhere. As we imagine the WTO constitution, we must recognize that it is a component of a broader global ‘constitution’. The broader global constitution is in most respects an unwritten constitution – consisting largely of customary international law – but it consists of those rules of secondary international law that may be understood as ‘constitutional’. These include, but are not limited to, ‘secondary’ rules that determine how primary rules are made, including the rules of custom and the rules of treaty. Much analytical detail would be lost in imagining the WTO as a wholly separate system. Rather, accurate analysis requires, in most cases, consideration of the WTO within its broader context. It is ignorant to decry the gaps in the WTO ‘constitution’ without examining to what extent these gaps may be filled by the global ‘constitution’.

By referring to all these phenomena as ‘constitutional’, do we risk losing analytical focus or normative content? Perhaps others would argue that one or another of the facets of constitutionalization described here is the ‘real’ constitutionalization, and that the ‘real’ constitutionalization is diluted by inclusion of other facets. However, the analysis here suggests that none of these facets may be considered alone, and this essay’s theoretical perspective rejects the kind of peremptory value ascribed by some authors to human rights generally, to the integrity of a ‘people’ or even to political legitimacy *per se*. It finds the facet often emphasized in legal literature – direct effect, supremacy and judicial review – to be rather narrow. It also recognizes the merely instrumental value of the allocation of legislative and judicial authority.

More importantly, by ascribing constitutional significance to features of the WTO, do we risk diminishing the state as an existing ‘constitutional’ community? If the present essay can demystify the components of constitutionalization, perhaps it can allay fears that something essential (but unidentifiable) will be lost by ascribing constitutional significance to some features of the WTO. It will be seen that the WTO does not necessarily compete with the state for loyalty; rather it will and should coexist

<sup>15</sup> This proposition assumes increasing globalization, and increasing global regulatory concerns. On the former, see Bordo, Eichengreen, and Irwin, ‘Is Globalization Today Really Different from Globalization a Hundred Years Ago?’, in S. M. Collins and R. Z. Lawrence (eds), *Brookings Trade Forum, 1999* (2000) 1. From a different perspective, see Wendt, ‘Why a World State is Inevitable’, 9 *Eur. J. Int’l Rel.* (2003) 491.

<sup>16</sup> Ruggiero, ‘The Multilateral Trading System at Fifty’. Address to the Royal Institute of International Affairs in London, United Kingdom, 16 Jan. 1998, available at [http://www.wto.org/english/news\\_e/sprrr\\_e/london\\_e.htm](http://www.wto.org/english/news_e/sprrr_e/london_e.htm). For a reference to the criticism, see Saletan, ‘The Trade War’, posted 3 Dec. 1999, available at <http://slate.msn.com/id/57076/>.

with the state. Importantly, if the WTO and the state were true to the theoretical structure set out here, the WTO would do no more than support the state in carrying out the state's mandate to better the lot of individual constituents.<sup>17</sup>

This essay is intended to add to the existing literature regarding the WTO 'constitution'<sup>18</sup> by broadening the discussion to include issues beyond human rights, federalism and inter-judicial relations, and, more importantly, to begin to draw the relationship among the different facets of the WTO constitution. This paper seeks to ground its understanding of these developments in the theory of constitutional economics.<sup>19</sup>

### 3 Constitutions, Constitutionalism, Constitutionalization and Metrics

Of course, constitutions have different roles and meanings in different social settings. Moreover, as societies change, the type of constitution that may have been optimal at one point in time may no longer be desirable.<sup>20</sup>

<sup>17</sup> To use a domestic analogy, the state will for some time remain the individual's primary caregiver, entitled to the loyalty that a parent deserves. However, the WTO might be understood as analogous to the child's teacher or religious leader – a 'person' involved in providing care to the child, but not as essential as the parent.

<sup>18</sup> D. Z. Cass, *The Constitutionalization of the World Trade Organization* (2005); E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991); Dunoff, *supra* note 1; T. Cottier and M. Hertig, *The Prospects of 21st Century Constitutionalism* (2004); Cho, 'A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of the Trade Constitution', 7 *JIEL* (2004) 219; Helfer, 'Constitutional Analogies in the International Legal System', 37 *Loy. L.A. L. Rev.* (2003) 193; Howse and Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far', in R. B. Porter *et al.* (eds), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (2001) 227; Walker, 'The EU and the WTO: Constitutionalism in a New Key', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001); Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', 12 *EJIL* (2001) 39; McGinnis and Movsesian, 'The World Trade Constitution', 114 *Harv. L. Rev.* (2000) 511; Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited', 4 *JIEL* (2001) 67; Petersmann, 'The WTO Constitution and Human Rights', 3 *JIEL* (2000) 19; Petersmann, 'The WTO Constitution and the Millennium Round', in M. Bronckers and R. Quick (eds), *New Directions in International Economic Law: Essays in Honor of John H. Jackson* (2000) 111, at 130; G. E. Evans, *Lawmaking Under the Trade Constitution: A Study in Legislating by the World Trade Organization* (2000); Jackson, 'Emerging Problems of the WTO Constitution: Dispute Settlement and Decision Making in the Jurisprudence of the WTO', in P. Ruttley *et al.* (eds), *Liberalisation and Protectionism in the World Trading System* (1999) 25, at 31; Petersmann, 'Constitutionalism and International Organizations', 17 *Nw. J. Int'l L. & Bus.* (1997) 398, at 431; Reich, 'From Diplomacy to Law: The Juridicization of International Trade Relations', 17 *Northw. J. Int'l L. & Bus.* (1997) 775.

<sup>19</sup> J. M. Buchanan and G. Brennan, *The Reason of Rules* (1985); J. M. Buchanan, *Constitutional Economics* (1991); R. Coooter, *The Strategic Constitution* (2000). See also Trachtman, 'The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis', 17 *Northw. J. Int'l L. & Bus.* (1997) 470.

<sup>20</sup> For an argument about the pace and structure of constitutional change in the US system, see Vermeule, 'Constitutional Amendments and the Constitutional Common Law', working paper dated 14 September 2004, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=590341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=590341).

‘Constitutionalism’ refers to a position advocating more or greater constitutional structure: advocating constitutionalization. However, in order to define the goal of constitutionalism, we need a metric of constitutionalization. How would we know when constitutional structure is increased or reduced? If, as this essay suggests, there are multiple dimensions of constitutionalization, how do we relate these different dimensions to one another in measuring constitutionalization? Perhaps even more importantly, is it possible to know when constitutionalization is normatively attractive – whether constitutionalism is normatively sound?

Methodological individualism would recognize that the central feature of constitutionalization is sharing power. So, we may develop a metric for constitutionalization in terms of the degree to which constitutional arrangements result in shared authority. Yet sharing power is by no means always good. Normative individualism answers the normative questions by reference to the individual and his or her preferences. Thus, constitutionalization is attractive where it enhances the ability of individuals to achieve their preferences. These preferences must include altruistic and aesthetic preferences. Where constitutionalization does not enhance the ability of individuals to achieve their preferences, it is not normatively attractive. Constitutionalization is not intrinsically good, but is instrumental to the achievement of other values.

However, as we will see below, there are many parameters of constitutionalization to consider, and in a particular setting, institutional intensification – constitutionalization – might be appropriate in respect of one parameter, but not in respect of others. So, one question for the institutional designer – for the constitutional draftsman – is how to constitutionalize in some areas but not in others. This question is especially thorny where the boundaries between subject matter areas are difficult to draw. Where does ‘commerce’ end and ‘human rights’ begin? Thus, constitutions like the US Constitution and the Treaty of Rome allocate power to regulate interstate and international commerce to the centre, but the definition of ‘regulation of commerce’, and of ‘commerce’ itself, is elastic under pressure. This elasticity results in a variable allocation of authority that is adjustable over time, providing the potential for a kind of dynamic subsidiarity. What is the relationship between allocation of legislative authority to the centre, and judicial review at the centre?<sup>21</sup> What is the relationship between allocation of legislative authority to the centre and centralized capacity for redistribution?

Finally, constitutionalization must be understood in at least two, and perhaps three, dimensions. In the international setting, this concept has a ‘levels’ problem. In a domestic setting, one central hallmark of constitutionalization is the restraint of the state – setting limits on the legislative capacity of the state. Of course, in this limited sense, all international law may be viewed in terms of constitutionalization: the central vocation of international law is to set limits on the legislative capacity of the state. Therefore, when we speak of constitutionalization at the WTO, we must be referring to something other than restraint of the state. One feature may be to set limits on the

<sup>21</sup> See Trachtman, ‘The Theory of the Firm’, *supra* note 19.



legislative capacity of the WTO. But therein lies a fundamental contradiction. By setting limits on the legislative capacity of the WTO, we would implicitly be reducing the scope to set limits on the legislative capacity of the state. In this potential meaning of constitutionalization, constitutionalization at one level is inconsistent with constitutionalization at the other level. We can break out of this conundrum by developing a more nuanced understanding of constitutionalization. This more nuanced understanding is not so much concerned with limits, but with capacities. To what extent are the essential tasks that we assign to 'constitutions' effected satisfactorily? At the international level, to what extent are constitutional features useful to achieve the goals of constituents? The six features of constitutionalization advanced in this paper should be understood in this sense.

#### 4 Economic Constitutions and Constitutional Moments

Constitutional economics brings a positive analytical perspective to constitutions. Under this approach, constitutions are simply instruments of human interaction: mechanisms by which to share authority in order to facilitate the establishment of rules. Constitutional rules are not natural law; instead, they are political settlements designed to maximize the achievement of individual citizens' preferences. In a transaction cost or strategic model, constitutions are designed to overcome transaction costs or strategic barriers to Pareto superior outcomes.

Thus, from this perspective, if there were no potential value to be obtained from cooperation, constitutions would be unimportant, and would not exist. Constitutions exist to resolve transaction costs and strategic problems that would otherwise prevent the achievement of efficient exchanges of authority. Where there is value to be obtained by agreement, constitutions may be used to facilitate the realization of this value by reducing transaction costs and strategic costs, such as the problem of states holding out or defecting from their commitments.

For example, one of the central features of the WTO constitution relates to rules for the suppression of protectionism. These rules are thought of as constitutional when, like the Commerce Clause of the United States Constitution, they discipline domestic regulation that may create excessive barriers to trade. In a sense, these rules against protectionism are specialized rules of dynamic subsidiarity. They contingently remove power from the state under a specified range of circumstances.

And yet, these types of adjudicative standards, though constitutional in stature, compete with legislative solutions to the same problems. Legislative solutions – known in this context as 'positive integration' – might develop regimes of harmonization or recognition, or blended regimes of harmonization and recognition, as in the EU 'essential harmonization' programme.<sup>22</sup> These legislative solutions could enjoy greater political support than judicial decisions addressing the same issues.

<sup>22</sup> See Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harv. Int'l L. J.* (1999) 333.

It is in this regard that negative integration devices, such as those in the WTO that may be used to strike down domestic regulatory regimes, may create demand for positive integration devices, such as those associated with majority voting. Deregulation through negative integration may create demand for re-regulation at the central level through majority-voting-based legislative capacity. Here we see an important tendon connecting economic constitutions with political constitutions. Majority voting among states might give rise to demands for greater democratic legitimacy. Pascal Lamy has called for a WTO parliamentary consultative assembly for just this reason.<sup>23</sup>

So the causal chain might appear as follows:

Perceived protectionism → stronger adjudication → perceived imbalance →  
stronger legislation → perceived democratic deficit → parliamentary control

This conjectural causal chain shows a link between two governance components within the economic constitutional category: adjudication and legislation. In this model, the check of legislative capacity is needed to balance the power of adjudicative negative integration. This chain also shows a link between the legislative component and the political constitutions category discussed below. The possibility of centralized legislation is obviously linked to the need for centralized democratic accountability. This diagram elides much nuance, but it is intended to provide a suggestion of how the commencement of economic integration may set off a cascade of governance demands along a predictable path.

Furthermore, a constitution may produce its own demand: once established, by reducing transaction costs and strategic costs of international arrangements, constitutions would be expected to make attractive a host of arrangements that were otherwise unattractive. There may be a path dependency characteristic to constitutional development, with tipping points that result in lumpy movement or punctuated equilibria. Thus, once a centralized legislative and parliamentary feature are established for one purpose, it may make it easier to use them for other purposes.

Constitutional economics recognizes the possibility of constitutional moments. A ‘constitutional moment’ in the Buchanan and Tullock<sup>24</sup> sense is a historical moment at which a Harsanyian ‘veil of uncertainty’ allows individuals, or in our case states, to agree on constitutional change even though they are uncertain of the possible future

<sup>23</sup> [http://europa.eu.int/comm/archives/commission\\_1999\\_2004/lamy/speeches\\_articles/spla55\\_en.htm](http://europa.eu.int/comm/archives/commission_1999_2004/lamy/speeches_articles/spla55_en.htm). See also Gregory Shaffer, ‘Parliamentary Oversight of International Rule-Making: The Political and Normative Context’, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=434420](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=434420); Falk and Strauss, ‘On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty’, 36 *Stan. J. Int’l L.* (2000) 191; Howse, ‘How to Begin to Think about the Democratic Deficit at the WTO’, in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* (2003).

<sup>24</sup> J. M. Buchanan and G. Tullock, *The Calculus of Consent, Logical Foundations of Constitutional Democracy* (1962).

implications. In fact, it is the uncertainty that facilitates agreement. Constitutional moments generally result from a shift in the concerns, or perception of concerns, of constituents. This perspective explains agreement to secondary rules: rules such as majority voting regimes, or allocations of authority, that determine the ability to make primary rules that actually govern behaviour. In this theoretical perspective, states would agree on new secondary rules where they are certain enough that they will be benefited in the aggregate, but uncertain about how much of the benefit they may capture.

Constitutional change would be expected to occur when there are shifts in state preferences, shifts in the technological or institutional means to achieve those preferences, or shifts in states' perceptions of these things. What types of shifts might result in a future constitutional moment at the WTO? It is difficult to say, but issues such as increasing public awareness and concern about the WTO, pressures from other global interests including environmental protection, human rights and health, increasing concern regarding global poverty and the role of trade, and fear of terrorism could contribute to a tectonic movement at the WTO.

In the context of the Uruguay Round of trade negotiations, which produced the WTO in 1994, we may imagine that the move to stronger dispute settlement resulted from a constitutional moment, in which two kinds of trade-offs were made.

First, the US stipulated that it would not give up unilateralism under Section 301 of the Trade Act of 1974 unless stronger dispute settlement were established in the WTO. This stipulation was intended to end discussion of Section 301, but the US's principal trade partners met the challenge. In the ensuing negotiations, the US gave up the right to take unilateral action to enforce its rights under WTO law, in exchange for strengthened dispute settlement.

Second, it was expected that stronger dispute settlement would make commitments stronger. As the commitments are generally consistent with liberalization, this would result in greater liberalization. In 1994, the parties did not know which states would benefit most from stronger dispute settlement. However, they may plausibly have believed that all would benefit to some degree, and been willing to accept the possibility that others would benefit more.

We return to the constitutional economics theoretical framework throughout this essay. This theoretical framework, both in normative and positive terms, allows us in the first instance to draw together the different components of constitutionalization described herein. We will also refer to more specific connections among the components that can make it difficult to constitutionalize along one parameter without constitutionalizing along others.

To summarize, constitutional economics sees constitutions as devices to enhance achievement of preferences. The task of framers of constitutions, and of analysts, is to engage in comparative institutional analysis<sup>25</sup> – even if the reference is historical or hypothetical – in order to determine which institutional features will maximize the

<sup>25</sup> N. Komesar, *Imperfect Alternatives* (1995); Trachtman, 'The Theory of the Firm', *supra* note 19.

net achievement of preferences. So, each of the other components of constitutionalization is harnessed to this same task.

## 5 Interfunctional Constitutions

Of course, one of the signal problems of the WTO today is its relationship with other organizations, other sources of international law, and non-trade values.<sup>26</sup> In the Hart sense, we need rules for the allocation of authority not among individuals, or states, but among functional agents of states. To the limited extent that the WTO is merely the avatar of trade, while for example the ILO is the avatar of labour rights and the UNHCHR is the avatar of human rights, we need rules that allocate authority among these agents.

The relationship between trade values (growth or prosperity) and other values, like environmental protection, consumer protection, competition law, bank regulation or labour rights (not to mention human rights, discussed separately below), is a critical challenge to the WTO. And the 1994 advance in dispute settlement at the WTO has raised concerns about how the WTO deals with multilateral environmental treaties, international labour standards and human rights treaties, which often do not have access to mandatory dispute settlement.

Thus, another facet of constitutionalization addresses the extent to which broad social values are integrated with one another, and more specifically, the way in which market concerns are integrated with non-market concerns. It is striking that both the US and the EC began with emphases on commercial relations, and developed broader capacities over time. It is also striking that each domestic government has the institutional capacity to deal with inter-functional trade-offs.

It is in this sense that constitutionalization is concerned with capacities: here the capacity to integrate diverse values. Functional subsidiarity counsels against aggregating all multilateral power to the WTO, while increasing functional linkage makes some kinds of intersectoral coherence useful.<sup>27</sup> In order to assess the degree of coherence, we must look both within and without the WTO.

Within the WTO, we can see the development of a modest approach to intersectoral coherence in the WTO's reference to standards promulgated by international standards organizations. We can also see it in the Appellate Body's *Shrimp-Turtle* decision, which referred to an international environmental agreement in order to assist in interpreting some of the exceptional provisions of the WTO Agreements. But the international community may need to develop more complete and predictable mechanisms to promote coherence between trade policy and other policies. These will not necessarily result in uniform enforceability of all international law. States need

<sup>26</sup> See Perez, 'The Many Faces of the Trade-Environment Conflict: Some Lessons for the Constitutionalisation Project', in C. Joerges, I.-J. Sand and G. Teubner (eds) *Transnational Governance and Constitutionalism* (2004).

<sup>27</sup> See Trachtman, *supra* note 7. Howse and Nicolaidis, *supra* note 8, refer to the same concept as 'horizontal subsidiarity'.

flexibility to create both harder and softer international law. This counsels against blanket calls for direct effect of WTO law in domestic legal orders,<sup>28</sup> and for the enforcement of other international law in WTO dispute settlement.<sup>29</sup>

Developing countries have been reluctant to bring human rights, labour rights, or environmental protection inside the WTO more directly, for fear that social clauses will be used as bases for protectionism. In order to advance coherent policy-making in these areas, at levels that will satisfy the wealthier states, it will be necessary to establish mechanisms to guard against protectionism. It may also be necessary to provide compensation to poorer states in exchange for their willingness to accept standards that may otherwise be inappropriate, or simply too costly, for their society or level of development. Compensation could be provided through trade liberalization or even through direct monetary settlements. Compensation in this context provides a link between interfunctional constitutions and redistributive constitutions.

Outside the WTO, the broader international system responds to the problem of coherence, but perhaps in too limited a fashion. The broader international system is characterized by decentralized global lawmaking, and decentralized global adjudication. This decentralized system does not satisfactorily respond to the need, under circumstances of varying and shifting legislative sources, to resolve conflicts between rules.

Conflicts between rules are the legal face of conflicts between different values. The core issue is a choice of law problem, not between states in a horizontal legal order, nor between component political entities and a central government. Rather, it is an inter-functional choice of law problem, between law that arises in different sectors of the international legal system, from different functional and institutional contexts. These contexts overlap like tectonic plates, and sometimes collide with one another, causing discontinuity and disruption.

The current structure of the international legal system for dealing with diverse legal rules from diverse sources is certainly troublesome, utilizing formal last-in-time rules or perhaps a *lex specialis* rule to address some of the most important normative issues faced by international society. Over the next 50 years, we may expect to see more negotiations in an effort to develop more nuanced means to integrate different global values, such as trade, environment, and human rights. These negotiations will result in nuanced rules and institutional development. They will no doubt reduce the indeterminacy arising from wide variation in the arrangements for adjudication in different subject areas – from functionally decentralized international adjudication. But they will not eliminate it. After all, states need the flexibility to create norms of varying binding force. Thus, we can expect development of the interfunctional constitution both within and without the WTO legal system.

<sup>28</sup> Trachtman and Moremen, 'Whose Right is it Anyway? Private Parties in EC-U.S. Dispute Settlement at the WTO', 44 *Harv. Int'l L.J.* (2003) 221.

<sup>29</sup> The WTO Appellate Body has rejected calls to determine rights and obligations under other international law in WTO dispute settlement. See Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (6 March 2006).

Interfunctional constitutions can also be understood in terms of constitutional economics. Interfunctional constitutions facilitate intersectoral tradeoffs among different categories of preferences. In terms of the theory of the firm, they bring within a single institution the different categories of preferences that otherwise would intersect in the market of the general international legal system. This theoretical perspective provides a ready understanding that there will be some functional areas that should be addressed together within a single international organization, and others that will be better addressed separately.<sup>30</sup>

## 6 Constitutions of Politics, Democracy, Legitimacy and Subsidiarity

It is obvious but nonetheless important to acknowledge that the WTO will never look like a state. Fortunately, there will never be WTO anthems or a pledge of allegiance to the WTO, even in economics classrooms. Constitutions are associated by some with nationhood, or better, peoplehood. Joseph Weiler points out that the European Union itself lacks a ‘constitutional demos’, and so is not rooted in a central federal-type power.<sup>31</sup> The WTO has much less of a constitutional demos. Could a pretence of this type of constitution at the WTO level result in a hollowing of the real constitutional politics of the state?

Notwithstanding this shared concern for maintaining local identity and coherence, many cosmopolitans wish for a sense of global solidarity and social justice. The WTO represents for them a welcome rejection of irredentism, and the establishment of a global community of trade that ignores ethnic and historical divisions. Protectionism has its strongest roots in irredentism. Which comes first, the constitutional governance structures or the social feeling in which the governance structures must be rooted? They clearly have a dialectical relationship, but the force is not always centripetal.

In the US, the Commerce Clause of the Constitution serves a dual negative integration and positive integration role. The ‘negative’ or dormant Commerce Clause is used by courts to strike down state legislation that interferes inappropriately with interstate commerce. The ‘positive’ Commerce Clause authorizes federal legislative power to regulate interstate commerce. Interestingly, in this context of the same textual provision, the positive power has, through judicial acceptance, far outstripped the negative discipline. That is, the federal government’s power to legislate, limited only by the identification of a plausible interstate commerce relationship or effect, is far broader than the scope of state measures that will be found to violate the negative Commerce Clause. The EC also combines negative integration power with positive

<sup>30</sup> For arguments regarding the scope of issues that might be addressed within the WTO, see Guzman, *Global Governance and the WTO*, 45 *Harv. Int’l L.J.* (2004) 303.

<sup>31</sup> Weiler, ‘Federalism and Constitutionalism: Europe’s *Sonderweg*’, Jean Monnet Paper No. 10/00, available at <http://www.jeanmonnetprogram.org/papers/00/001001.html>; See also Habermas, ‘So, Why Does Europe Need a Constitution?’, 11 *New Left Review*, September–October 2001.

integration power, although the positive integration power is somewhat narrower than that which exists in the US.

The WTO, on the other hand, generally requires consensus or unanimity, depending on the context and the informal modifications of the formal rules, in order to engage in positive integration. In this sense, it might be said that the WTO has substantial negative integration power, but lacks substantial positive integration power. It is not a 'member organization' when it comes to negative integration, but certainly is when it comes to positive integration.

As suggested above, if the imbalance between adjudicative power and legislative power, and between trade values and other values, were addressed by enhanced legislative power at the WTO, another concern would be exacerbated: the concern for democratic accountability at the WTO.<sup>32</sup> Increased legislative power could take the form of majority, or supermajority, voting at the WTO.

The democracy deficit in international organizations is in substance a combined question of the degree of distance from parliamentary accountability, and subsidiarity. From a constitutional economics perspective, democracy plays an important instrumental role in enhancing the revelation of preferences expressed through the democratic process, and in enhancing the fidelity of governmental operatives as agents of citizens. Thus, the WTO's own democracy deficit could be addressed by enhancing parliamentary accountability at the WTO, either by making domestic arrangements for greater domestic parliamentary involvement in WTO legislation, or through a WTO parliamentary body.

Here, it is necessary to link the WTO's constitution to its member states' constitutions. To the extent that the WTO is truly a 'member organization' – an international as opposed to transnational organization – perhaps the democracy deficit critique is misguided, and the real question is one of member state democracy. Or if some member states lack influence in the WTO, perhaps the democracy deficit would be addressed through national empowerment, rather than the addition of parliamentary control at the WTO level. Furthermore, the WTO's democracy deficit is caused by the scope of subject matters that the WTO addresses: this democracy deficit could be addressed by reducing the scope of WTO action. But even with more democracy at the WTO, the question would still remain whether the WTO is the right place to address particular issues. This is the question of subsidiarity.

Voting arrangements may be analysed through the lens of constitutional economics. Voting arrangements are initially understood as mechanisms of accountability; ensuring that the governmental agent is accountable to its constituents. But how do we explain majority voting? As suggested above, majority voting arises in contexts of veils of uncertainty, where the parties are unable to determine *ex ante* whether agreeing to majority voting will harm them or hurt them, or whether surplus created by a move to majority voting will be distributed largely to them or largely to other constituents.

<sup>32</sup> See Atik, 'Democratizing the WTO', 33 *Geo. Wash. Int'l L. Rev.* (2001) 451, at 458; Shaffer, 'The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters', 25 *Harv. Envtl. L. Rev.* (2001) 1, at 84–90.

Broader groups of issues under a single majority voting umbrella may enhance the possibility of constructive uncertainty. This suggests that interfunctional constitutions may provide *ex ante* uncertainty as to the likely outcome of majority voting, possibly making a move to majority voting more likely.

## 7 Legal Constitutions

Legal constitutions have two components: assignment of legislative capacity, and judicial review. Secondary legal rules – constitutional rules – are the handmaidens of the economic, political and social forces that form the substance of social interaction. However, legal rules are both products and producers of constitutional change. For example, certain kinds of constitutional development may lead to demand for more constitutional development. The surprising 1994 advance in binding dispute settlement has created a perceived imbalance between dispute settlement and treaty-making: between adjudication and legislation. Treaty-making is difficult, because as a practical matter it requires unanimity to amend the WTO treaties, or to make new treaties.

Some of the gaps in agreements are filled by adjudication. Some of these gaps seem to have constitutional dimensions, such as the role of judicial review in balance of payments cases, or the ability to incorporate into WTO law standards produced at Codex Alimentarius by majority voting.<sup>33</sup> While the WTO Appellate Body has been prudent and has avoided extensive ‘judicial legislation’,<sup>34</sup> or judicial centralism, it has been required to decide the cases presented to it, and many of these cases have involved matters that the negotiators never considered, or matters they considered and failed to resolve.

It would be politically impossible, and patently undesirable, to accord to the WTO broad majority voting-based legislative power similar to that held by domestic legislatures. However, it might be possible to accord narrower legislative, or quasi-legislative, power to the WTO, especially in some of the contexts where the alternative to international legislation is international adjudication.

The WTO agreements contain nuances that show the beginning of narrow legislative capacity, not within the WTO itself, but incorporated into the WTO from other international bodies. One of the most important examples is the reference in WTO law to international standards, such as those produced by Codex Alimentarius, or the International Standards Organization, in the WTO agreements. In the WTO Agreement on Sanitary and Phytosanitary (human, animal and plant health) Measures, and in the WTO Agreement on Technical Barriers to Trade, domestic product standards are required, with certain important exceptions, to be based on international standards, and domestic measures that conform to international standards are

<sup>33</sup> Codex Alimentarius was created in 1963 by the Food and Agricultural Organization and the World Health Organization to develop food standards.

<sup>34</sup> See Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’, 98 *AJIL* (2004) 247.



provided substantial protection from scrutiny as potential illegal trade barriers. In the *Sardines* case decided by the WTO Appellate Body under the Agreement on Technical Barriers to Trade, even Codex Alimentarius rules produced by majority vote had this effect.<sup>35</sup>

These types of quasi-legislation, delegated by the WTO to these other bodies, present important questions about democratic accountability, and about the capacity of developing states to participate. However, as more circumstances arise where it seems useful in trade terms to develop some quasi-legislative capacity in order to balance adjudicative capacity, to promote intersectoral coherence or to advance free trade, we may see some constitutional moments – small or large – that will develop greater legislative capacity at the WTO.

The US and the EU have the internal experience of judicial constitutionalization. The European Court of Justice (ECJ) developed doctrines of supremacy, pre-emption, direct effect and judicial review in a way that gave impetus to political integration and, eventually, constitutional amendment.<sup>36</sup> Both the US Supreme Court and the European Court of Justice showed themselves to be keenly aware of the relative need and political appetite for constitutionalization of this type. They have grasped constitutional moments. The WTO Appellate Body has had only limited experience, but has demonstrated a similar sensitivity in such decisions as *India – Quantitative Restrictions*, regarding the balance between political and judicial decision-making.

One of the signal features of legal constitutionalization is understood by many to be direct effect. Direct effect, of course, is not necessarily a relevant feature in domestic constitutionalization, but it may have significance in an international setting, and was an important feature of the development of the EC constitution. Direct effect actually involves the integration of levels: the utilization by international legal rules of the more binding dispute settlement available in domestic law. By finding that EC law had direct effect in the courts of member states, the ECJ both gave EC law greater binding effect and gave individuals greater control over the development of EC law.<sup>37</sup>

The selection of areas and rules for incorporation in the WTO legal system entails a kind of dynamic subsidiarity. That is, through specific adjudication and legislative action, there is a dynamic division of authority between states and the WTO itself.<sup>38</sup> This division can adjust to changing needs, technologies and social structures over time. The WTO constitution includes additional dynamic features, such as the relationship between horizontal and vertical federalism, and the institutional balance between dispute settlement and adjudication.

Legal constitutions allocate authority, including legislative power, and may be assumed to do so in a manner that increases opportunities for preference-maximizing

<sup>35</sup> *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 Oct. 2002.

<sup>36</sup> Weiler, 'The Transformation of Europe', 100 *Yale L.J.* (1991) 1; Reich, 'From Diplomacy to Law: The Juridicization of International Trade Relations', 17 *Northw. J. Int'l. L. & Bus.* (1997) 775.

<sup>37</sup> See Trachtman and Moremen, *supra* note 28 (describing the bases for evaluating the utility of 'direct effect' of WTO law).

<sup>38</sup> See Trachtman, 'Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity', 9 *EJIL* (1998) 32.

arrangements through majority voting or other legislative techniques. Legal constitutions may also assist functional constitutions by referring quasi-legislative authority, such as that accorded the Codex Alimentarius by the SPS Agreement, to external functional organizations. Legal constitutions may further assist functional constitutionalization through judicial referral of issues, either directly or through interpretation, to external functional organizations or other external sources of functional law. Allocation of discretion to judges provides implicit authorization for this type of referral.<sup>39</sup>

Judicial constitutionalization is also explicable in terms of constitutional economics. In these terms, it is not surprising that states would explicitly or implicitly delegate authority to judges, either to interpret or develop law, or to apply their normative outlook to particular contexts as they may arise.<sup>40</sup>

Finally, while the WTO may internally have a constitutional structure, the broader international legal system has one as well. Moreover, other functional entities, such as the EU, the IMF, UNEP, etc., also have constitutional structures. We might consider in this context a special kind of secondary rule, or a tertiary rule, that allocates authority among constitutional structures. Indeed, we might observe a kind of global functional federalism, in which the centre is the general international legal system and the periphery is the functional organization. It is not clear where ultimate power lies. So, as in the EU, a nuanced constitutional dialogue between the centre and the periphery may emerge.

## 8 Human Rights Constitutions

The WTO will not soon, and may never, embody the kind of human rights order that individuals hope for in our domestic societies. But it may be that it does not need to do so. The critical issue here regards the vocation of the WTO, and its advantage compared to states themselves, human rights treaties, the United Nations and other bodies.

In domestic societies, constitutionalism entails a normative commitment to the rule of law, minority rights, and other human rights. Subsidiarity would suggest that many aspects of these values can normally be decided and provided well at the level of the state. A kind of functional subsidiarity would suggest that even where the state is inadequate to protect human rights, the WTO may not be the multilateral place to house human rights efforts.<sup>41</sup> However, the WTO or other multilateral organizations may become involved in linkages or conditionality relating to these types of issues.

Just as the EU's constitutional evolution has required the delicately negotiated insertion of human rights sensibilities and norms, so too will the WTO's evolution require human rights-type constraints. Some argue that this has already occurred by

<sup>39</sup> See Trachtman, *supra* note 22.

<sup>40</sup> But see Kaplow and Shavell, *Fairness versus Welfare* (2002) (assuming that judges are not agents appointed to apply their normative perspective).

<sup>41</sup> See von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', 37 *CMLR* (2000) 1307, at 1337 (suggesting that not all organizations need to be imbued with human rights competence). See also Trachtman, *supra* note 7.

virtue of the fact that WTO law is part of the general international legal system.<sup>42</sup> However, while states are not generally relieved by WTO law of their human rights obligations, the internal WTO dispute settlement system does not provide for the general application of human rights law to modify WTO law. In order to provide for a more nuanced integration between WTO law and human rights law within WTO dispute settlement, constitutional changes in WTO law would be required. In effect, the WTO dispute settlement system, created to put to an end the regime of auto-interpretation in connection with WTO law, would require a broader mandate than the one that presently exists.<sup>43</sup>

Here again, it is necessary to consider the big picture. That is, the WTO constitution exists within the broader international legal system, and therefore benefits from the human rights system that exists. And within the broader international legal system, there is a significant human rights dimension. This human rights dimension of the broader global constitution complements and supports the WTO constitution. We must also recognize the role played by domestic constitutions in supplying the human rights dimension.

Human rights constitutions can be explained in the language of constitutional economics. Modelling constitutions as entered into under Harsanyiian veils of uncertainty, certain human rights provisions may make sense to protect individuals, who may *ex post* find themselves in the minority, from abuse by the majority. Human rights may also be understood in distributive terms, as redistributive claims. This is easiest to see in connection with certain economic and social rights, such as the right to development or the right to health. But it is also true with respect to certain other kinds of rights in the sense, and to the extent, that these rights may be exchanged for wealth or other values.

## 9 Redistribution

We must also recognize that constitutions have distributive effects and may serve redistributive functions. For example, constitutions may produce the kind of solidarity that can serve as the basis for redistribution. Even the rights established by domestic constitutions may be understood as claims for redistribution. The WTO is an engine for creating global wealth. It has not yet confronted directly questions regarding the global distribution of its benefits, although the demarche of cotton-producing countries Benin, Burkina-Faso, Chad, and Mali that began at the 2003 Cancun Ministerial may be seen as the opening move in direct confrontation. And of course, such demands are powerfully expressed in the broader international legal system.

<sup>42</sup> See J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003). But see Trachtman, 'Book Review: Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law. By Joost Pauwelyn', 98 *AJIL* (2004) 855.

<sup>43</sup> Appellate Body Report, *supra* note 29 (WTO panels lack a mandate to adjudicate defences to WTO obligations based on other international law).

Every society needs a mechanism by which to express solidarity with those who are in need, especially those whose need results from the structure of society itself. This is the teaching of Polanyi and Ruggie: the political need for a liberalism that is embedded in a redistributive regulatory structure.<sup>44</sup>

The WTO is both a result and a cause of greater global interdependence, and of the development of global society. To avoid disruption of this global society, by demarches in trade, economic catastrophes or violent upheavals in member states, or terrorism, it is morally and politically necessary to develop mechanisms to enhance the position of the poor.<sup>45</sup>

Constitutional reforms may be a necessary part of a redistributive settlement at the WTO. These constitutional reforms may include a modification of decision-making that would provide more power to the poor, or the establishment of rights that effect redistribution to the poor. At the WTO, the main focus for the poor in the near future will be on mechanisms to produce greater liberalization in sectors in which the poor could compete. While this type of broadening of the scope of competition is central to the WTO project, it has been frustrated in the past by differentials in power and engagement.

## 10 Constructing the Elephants

Let us begin to place some connective tissue on these components of constitutionalization. The main source of analytical connective tissue, already described above, is constitutional economics, based on methodological and normative individualism. Each type of constitution described above is seen through this lens as a means of achieving individual preferences.

Constitutional economics is, of course, not limited to economic constitutions. Rather, it is an analytical technique that may encompass any type of preference, including human rights, environmental preservation, nationalism and political accountability and redistribution. So, constitutional economics examines each type of constitution through the same lens: maximizing individual preferences. This does not mean that the constitutional economics analysis is simple. To the contrary, a constitutional economics analysis allows us to place in context each of the values – whether they are process-based or substantive values – in order to determine how they might be integrated with one another, and in order to evaluate them.

Constitutional economics, like economics in general, is agnostic as to the types of preferences that will be articulated, or the way that individuals will value each preference.

<sup>44</sup> Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', 36 *Int'l Org.* (1982) 379. Ruggie modernizes and adapts a perspective earlier elucidated by K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944). Dani Rodrik has considered the application of this perspective to modern global markets. D. Rodrik, *Has Globalization Gone Too Far?* (1999), at 7. See also Howse, 'From Politics To Technocracy – and Back Again: The Fate of the Multilateral Trading Regime', 96 *AJIL* (2002) 94.

<sup>45</sup> Trachtman, 'Legal Aspects of a Poverty Agenda at the WTO: Trade Law and "Global Apartheid"', 6 *JIEL* (2003) 3.

It assumes only that each individual has different preferences and enters society in order to maximize these preferences. Dunoff suggests that legitimacy is a better metric by which to assess constitutional structures than the normative individualist focus on individual preferences of constitutional economics. Yet, I even see the concept of legitimacy through a preference metric. Legitimacy, if it is to be understood in rational terms, is no more than the satisfaction of preferences or, again in constitutional economic terms, the acceptance of reduced satisfaction of preferences pursuant to a structure that was agreed *ex ante* because of the anticipation of maximization of preferences. This is the Harsanyiian, and Rawlsian, concept of stochastic symmetry. In other words, legitimacy is no more than the acceptance *ex post* of the results of a mechanism that was designed, *ex ante*, to maximize aggregate preferences. I might add that each of us labours under bounded rationality, and so legitimacy may also include the extent to which we are made aware that our preferences are maximized in the way I have described. This is the public relations, or marketing, function that is so important in practice.

Therefore, constitutional economics does not accept pre-emptive values such as human rights, environmental protection, or wealth maximization. It would accept that some of these preferences are valued more greatly than others. For example, it may understand core human rights as preferences that are so highly valued that they rarely are trumped by other values.

We recognize that there are good reasons for international trade agreements, and that these agreements may have constitutional dimensions. In constitutional economic terms, at the outset, it may be valuable to allocate some legislative power, and judicial review-type power, to a centralized institution.

One critical constitutional feature is a mechanism for dynamic subsidiarity that may allow shifts in allocations of power over time, or that may allow for contingent allocations that only arise under specified conditions. We can see modest and nuanced legislative capacity within the WTO, and shared between the WTO and other functional organizations. The WTO already has significant 'judicial review' functions with respect to member state measures, although again it is important to recognize that the scope of this judicial review is determined, and limited, by the substantive legal norm applied: national treatment, least trade restrictive alternative, requirement for scientific basis, or otherwise.

Economic constitutions in this sense collide with interfunctional constitutions and human rights constitutions. The scope for WTO-based legislation, and adjudication, both legally and politically, is constrained by other values that are articulated elsewhere, or that are articulated within WTO law or WTO negotiations. After all, the WTO is a member organization and states would not be expected to agree at the WTO to do something that they reject elsewhere.

The degree of 'coherence' between other values and those expressed more directly in WTO law depends on the specificity of arrangements for legislative or judicial integration of values. These arrangements may be made within the WTO or in the broader international legal system. To the extent that these arrangements are made through dispute settlement, it must be recognized that judges will be accorded

authority to make important trade-offs between values. While this may take place without incident in some domestic systems, it may be a challenge to the legitimacy of the WTO judicial function.<sup>46</sup>

Challenges to the judicial function may be alleviated by allocation of greater competence to the legislative function in international society. While the general international legal system has, in a sense, plenary legislative authority – there are no fields which seem outside the jurisdiction of international law, provided that states consent – its legislative capacity is limited by the general requirement of individual state consent. So, it may be that greater adjudicative attempts to deal with the problem of coherence may lead to greater demands for majority voting or other means to overcome strategic problems raised by the requirement of individual state consent. Of course, with greater legislative capacity will come a greater need for democratic accountability. Here, the question that must be asked is whether and to what extent centralized parliamentary structures can and should be established to provide centralized accountability.

Interfunctional constitutions may also contribute to the making, and the enforcement, of economic constitutions. They may provide the possibility of a wider scope for treaty-making bargaining and may thereby increase the scope of possible arrangements. Furthermore, a wider scope of coverage may result in greater enforceability of the relevant treaty.<sup>47</sup> It is also necessary to recognize that human rights and redistribution are special forms of interfunctional constitutional arrangements. According to the theory of embedded liberalism, these, and perhaps other regulatory structures, are necessary features of stable economic constitutions. Furthermore, we might understand some of these interfunctional issues as relating to the concept of ‘collective preferences’ recently popularized by the European Union. In a sense, all preferences expressed through governmental action should be collective preferences: shared preferences that are appropriately expressed through government, rather than through the market.

We might say that claims for human rights and claims for redistribution are similar in some respects to other kinds of non-trade values. Some claims for human rights might even be understood as implicit claims for redistribution. However, in a constitutional economics framework, some claims for human rights must be understood as pre-emptive in their value and force – while they are theoretically subject to trade-offs, they are so highly valued as to be unlikely to be sacrificed in any particular case.

Redistribution is of a different order. From an embedded liberalism standpoint, we might find that the price of an economic constitution is the establishment of a redistributive constitution. From a Rawlsian perspective, we might find that the establishment of economic and other forms of constitution form the community basis for the operation of the difference principle, validating claims for redistribution.<sup>48</sup>

<sup>46</sup> Trachtman, *supra* note 22.

<sup>47</sup> See Norman and Trachtman, ‘The Customary International Law Game’, 99 *AJIL* (2005) 541.

<sup>48</sup> Trachtman, *supra* note 45.

## 11 The Responsible Organization: Justifying the WTO Constitution Project

The WTO's constitution is malleable. We must steer between the Scylla of failure of imagination assumed by those who say the WTO can never have a constitution, and the Charybdis of false limitation asserted by those who would use constitutional discourse artificially to constrain political claims, and ask instead what are the socially desirable areas of development and how do these areas of development relate to one another.<sup>49</sup> The goal of this essay has been to begin to describe some of the bases and dynamics of change, and to promote a dialogue of imagination and possibility.

To the extent that the WTO is understood as a 'member organization', we must look to member states as the parties responsible for continuing problems. However, these member states experience difficult collective action problems under regimes of unanimous approval of new treaties or treaty amendments. In order to resolve these problems and move forward to create arrangements that benefit individual WTO constituents, it may become desirable for states to extend the constitution of the WTO, and its responsibility.

It is clear that the six constitutional dimensions of the WTO presented above – economic, human rights, functional, legal, political and redistributive – interact with one another. They both impose constraints on one another and call for advances in one another – they are part of a larger system, an integrated organism. Of course, the WTO will never be a state, but it will change along these dimensions, in response to the changing needs of society.

Yet the WTO competes, along vertical and horizontal dimensions. It competes on a vertical dimension with the state and with the general international legal order. It competes along a horizontal dimension with other functional organizations.<sup>50</sup> This competition may be beneficial from a constitutional economics perspective, to the extent that it may result in a nuanced institutional structure that maximizes achievement of individual preferences.

Constitutional design of the WTO will respond to constitutional moments: to moments in which it becomes apparent to states that they can benefit broadly from institutional change, without necessarily a clear understanding of the precise distributive consequences of the change. This essay suggests that constitutional change may proceed along a number of dimensions, and in a number of different institutional settings. It has begun to suggest some of the relationships among these different dimensions and settings, not to advance a particular constitutional structure or agenda, but to suggest the complexity of the analytical project.

Finally, I want to emphasize the contrast between Professor Dunoff's intellectual history of constitutionalism in relation to the WTO, and my rather ahistorical

<sup>49</sup> See Dunoff, *supra* note 1.

<sup>50</sup> Trachtman, *supra* note 7.

analytical perspective. Dunoff's article provides a useful constructivist analysis of the rise of constitutional discourse about the WTO. On the other hand, I provide a normative individualist framework for evaluating the components and structure of constitutionalization. Perhaps the reader will find both analytical techniques useful: ideas have power, but we hope that they are most powerful when they make people's lives better.