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COMMENT BY

Steve Charnovitz

Robert Howse and Kalypso Nicolaïdis analyze the constitutional discourse regarding the World Trade Organization, rejecting it in favor of a nonconstitutional perspective. Whether or not the WTO is thought of as a constitution, four key relationships need to be considered: (1) the WTO and the laws of its member states, including issues of federalism and deference, (2) separation of powers inside the WTO, (3) the WTO and other international law, including conflicts of law, and (4) the WTO and the individual. The authors explore these relationships, and I would like to build on their points.

Constitutional Models

To attain a better model for understanding the WTO, commentators are engaging more in constitutional discourse. Howse and Nicolaïdis examine two such models of WTO constitutionalism. The first they call libertarian constitutionalism. The second they call the European federal vision. They conclude that both are inadequate.

In libertarian constitutionalism, politicians see the WTO as a way of tying their hands to resist domestic interest groups that demand rent-seeking, protectionist behavior by the government. Thus the WTO pact is as much vertical as it is horizontal.

The authors raise several problems with the libertarian constitutional model. One is that it seems antidemocratic. Another is that the underlying value judgments may not be right. The authors also object to the way that WTO constitutionalists use the European Union as a model. The WTO constitutionalists see the constraints in EU law but miss the social community that enables those constraints.

The other model critiqued is the European federal vision, in which the WTO gradually evolves into a constitutional system. The authors pose doubts about this path for the WTO. For unlike the European Community, the WTO has no provision for domestic effect of regulations and no interaction between national courts and WTO tribunals.

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The Global Subsidiarity Alternative

The final section of the chapter presents the authors' answer for recovering the spirit of "embedded liberalism." They propose a model called global subsidiarity, which has three main principles. First, the WTO should manifest institutional sensitivity to national regulatory choices and to other international regimes. Second, the WTO should promote the principle of political inclusiveness at the national and international levels. Third, the WTO should empower global subunits, including states, by fulfilling the conditions necessary for governments to carry out their international obligations. My assessment begins with a general comment on the entire exercise and then discusses the four WTO relationships just noted.

WTO Exceptionalism

Analysts should be cautious about formulating any theory of the WTO that is detached from other international organizations.[1] The WTO has made many advances from the General Agreement on Tariffs and Trade (GATT), but it is not fundamentally a different species from other treaty-based organizations. In thinking through international constitutionalism, it is helpful to do so in a comparative manner. As Ray Vernon taught us:

> With economic interactions between national economies growing at a breathtaking pace, it is apparent that international cooperation among national governments will be essential in a wide range of activities, from controlling the environment to maintaining the probity of securities markets. There is a race between constructing the international regimes that can master some of the consequences of the dizzying growth in international linkages, and coming to terms with interests within the United States that have the power to thwart any constructive response.[2]

This passage points to two key realities. One is that a range of international regimes will be essential to achieve needed international cooperation. The other is that there will be tension between each regime and domestic interests at the national level. Thus, in trying to solve the problems of the trading system, we should look to other regimes for useful insights.

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Deference to National Decisionmaking

Howse and Nicolaïdis argue that "WTO dispute settlement organs must display considerable deference to substantive domestic regulatory choices." Let me mention two concerns that I have with this analysis. First, it is not clear why WTO tribunals should show deference. Most people do not favor such deference in other international regimes. For example, when the International Labor Organization found that Myanmar had violated the Convention on Forced Labor, no one said to be deferential to Myanmar's regulatory choices. Similarly, when the parties to the Convention on International Trade in Endangered Species found that Burundi was flouting the convention's rules on ivory, no one recommended deference to Burundi's choices. So why should WTO rules be more softly applied? Once a specific discipline becomes a treaty obligation, there may not be much space for deference.

Second, the authors focus only on the WTO judiciary but do not consider sensitivity to states in relation to the WTO executive. Director-General Mike Moore has been an activist executive in his first year on the job. To give one example, Moore visited the United States in May 2000—at a time when a controversial congressional vote was pending on the normalization of trade relations with China—and spoke in favor of approving the legislation.[3] For an international civil servant to intervene in domestic politics is unusual. But Moore weighed in on the important issue in dispute. At the time the legal implication of a negative vote was hotly contested; the legislators opposed to normal relations were arguing that a long-standing U.S. trade agreement with China would guarantee that China's commitments in the accession negotiations would apply to the United States. Yet the director-general lent the weight of his office to the pro-normalization side of the debate by averring that "American business and workers will only get these [trade] benefits if Congress votes for permanent trade relations with China."

Separation of Powers

Constitutions typically provide for a separation of powers between the executive, legislative, and judicial branches. The authors encourage deference by the WTO judiciary to the political processes of negotiations. A

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healthy constitution requires the engagement of all three branches of government. Otherwise, the roles of the branches will overgrow and interfere with one another. As John Jackson has noted, the weak legislative capacity of the WTO puts a great deal of strain on the Appellate Body.[4]

WTO and Other International Law

Howse and Nicolaïdis suggest that the WTO draw on and defer to other international regimes and be sensitive to the "superior credentials" that other institutions of governance may have. They also point to the need for "institutionalized linkages between segmented regimes."

In my view this relationship is the key challenge for the trade regime and one it is failing to meet. After six years in operation, the WTO General Council has not granted observer status to the UN Environment Programme. Similarly, the Secretariat of the Biodiversity Convention has not received observer status in the WTO Council dealing with patenting.

The WTO and the Individual

Howse and Nicolaïdis make two distinct recommendations with respect to political inclusiveness. The first is that the WTO "play a role in enhancing obligations of transnational inclusiveness in domestic rulemaking processes." They point to an example of this in the WTO requirements for enquiry points.

They can strengthen their thesis by noting the numerous provisions in the WTO that require national governments to give private economic actors an opportunity to participate in domestic decisionmaking.[5] For example, the Agreement on Subsidies and Countervailing Measures requires governments to inform interested parties (such as an exporter or trade association) before making countervailing duty determinations; the intent is to give time for such parties to "defend their interests."[6] The champions of the WTO missed an opportunity to show how it can push governments to guarantee procedural rights to individuals.

The second recommendation is that governments should facilitate greater access to WTO processes for nongovernmental organizations (NGOs). I agree with this recommendation and with the authors' statement that such opportunities "need not be understood as rights of repre-

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sentation." The rationale for NGO participation is not that NGOs represent constituents in the same way that elected officials do. Instead, NGOs should be able to participate to enrich the debate and to help authoritative decisionmakers reach the best conclusions.[7]

In allowing NGOs to offer amicus briefs, the Appellate Body has moved the WTO ahead of other international courts that often reject amicus briefs. This development is particularly interesting because the WTO governments would not have taken this step on their own. It occurred as a judicial decision reminiscent of the way that the European Court of Justice provided for procedural rights.

The crude version of WTO constitutionalism promotes the wrong prescription in seeking to tie the hands of politicians so that they will not succumb to bad ideas from interest groups. Yet the right way to defeat bad ideas is with better ideas. Just as national democracy entails participation and debate at the domestic level, so too democratic global governance entails opportunities for participation by national and transnational NGOs. Politicians should act and decide as a result of listening to a vigorous, competitive debate. It is illusionary to think that good economic policy can be ensured by having the decisionmakers of today tie the hands of (or lock in policies for) the decisionmakers of the future. Sustainable policies require renewed political support.

The recent WTO Section 301 panel, perhaps recognizing the hollowness in conventional images of the WTO, called our attention to the needs of individual traders. According to the panel, the multilateral trading system is "composed not only of States but also, indeed mostly, of individual economic operators."[8] One might doubt that the panel accurately states the international economic law of today, but I predict that it foresees the international law of tomorrow.

Notes

1. For examples of analysts who view the WTO as conceptually different from other international treaties and organizations, see John O. McGinnis, "The Political Economy of Global Multilateralism," *Chicago Journal of International Law,* vol. 1 (2000), pp. 381–99; William H. Lash III and Daniel T. Griswold, "WTO Report Card II," briefing paper, Cato Institute, May 2000.

2. Raymond Vernon, "The U.S. Government at Bretton Woods and After," in Orin Kirshner, ed., *The Bretton Woods–GATT System: Retrospect and Prospect after Fifty Years* (Armonk, N.Y.: M. E. Sharpe, 1996), pp. 52–67.

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3. Mike Moore, "The WTO and the New Economy," speech to the National Foreign Trade Council, New York, May 22, 2000; "WTO DG Moore Urges Passage of PNTR for China" (www.wto.org/english/news).

4. John H. Jackson, "International Economic Law in Times That Are Interesting," *Journal of International Economic Law,* vol. 3 (March 2000), pp. 3, 8.

5. See Steve Charnovitz, "The WTO and the Rights of the Individual," *Intereconomics,* vol. 36 (March–April, 2001), p. 98.

6. Agreement on Subsidies and Countervailing Measures, art. 12.8. Another provision states that governments shall permit "representative consumer organizations" to provide relevant information (art. 12.10).

7. See Steve Charnovitz, "Opening the WTO to Nongovernmental Interests," *Fordham International Law Journal,* vol. 24 (November–December 2000), p. 173.

8. World Trade Organization, "United States—Sections 301–10 of the Trade Act of 1974, December 22, 1999," WT/DS/152/R, paragraph 7.76. See also paragraphs 7.73, 7.86, 7.90.

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