

## SOME THOUGHTS ON THE AXIOLOGY AND CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION

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### INTRODUCTION

The World Trade Organization is one of the most powerful and influential intergovernmental organizations of the world. After a vigorous beginning of its functioning 16 years ago, it seems now to have slowed down, plunging into crisis. This article WTO is an attempt to define the concept of the *constitutionalization* of the and to identify its theoretical foundations, the ideological tensions within and challenges to its legitimacy. It discusses not only legal, but also political and social aspects of those issues.

### I. THE NON-TRADE OBJECTIVES OF THE WTO

Ever since the domination of Western civilization in the global economy (the USA and EU) in the second half of the 20th century free trade has been regarded as unconditionally beneficial. This seems less obvious in international relations, especially considering the cultural and even legal differences of trading partners. Nothing should therefore be taken for granted and the question should be asked of whether we need the WTO and if so, on what terms.

The obvious rationale for the existence of the WTO is trade liberalization. However, the analysis should not stop here, since broader and deeper insight is required. A broader look may uncover other (secondary) objectives of the WTO, which may originate in different fields than economic. A deeper survey, on the other hand, must answer the question, why trade liberalization is desirable and whether it is possible to create a trading system beneficial to all its participants.

The Preamble to the Marrakesh Agreement Establishing the World Trade Organization<sup>1</sup> emphasizes the recognition of the need to raise living

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standards and ensure full employment, optimal use of world resources and protection and preservation of the environment. According to article III of the Agreement, the functions of the WTO encompass facilitation of implementation, administration and operation of WTO agreements, providing a forum for negotiations, dispute settlements etc. Article IV adds that the WTO shall cooperate with other intergovernmental organizations, but only those with responsibilities related to those of the WTO. The WTO Agreement remains silent on objectives other than economic.

The WTO is the successor to the GATT (General Agreement on Tariffs and Trade)<sup>2</sup> and this cannot be overlooked in determining its objectives. The GATT, the predecessor of the WTO and now a part of it, was signed in 1947, shortly after the attempts to establish the International Trade Organization (ITL) had failed. Even though the GATT was designed to be merely an agreement and not an organization, it received its mission on practical grounds there was a demand. In the period following World War II the international community was focused on founding a stable system, which would provide peace and prevent wars. The ITL, along with the Bretton Woods Institutions (the International Monetary Fund or IMF, and the International Bank for Reconstruction and Development or IBRD) and of course the United Nations, was supposed to contribute to this new global order. Since the GATT took the place of the ITL, it took a part of that burden also. The rationale for this concept was the idea that business foes are unlikely to remain political allies.<sup>3</sup> Peacekeeping is therefore one of the aims of the WTO.

## II. THE INTELLECTUAL HERITAGE

If we take for granted the idea that the freedom to participate in markets is desirable, then we must appreciate the contribution of the WTO to development and its support of civil rights. Well-functioning markets provide necessary resources and a high degree of personal autonomy. Anderson and Wager demonstrate an interesting intellectual evolution leading to the establishment of a modern liberal economy.<sup>4</sup> They mostly credit the Scottish Enlightenment as a milestone on the road to trade liberalization.<sup>5</sup> The central figure was Adam Smith, yet he built his theories on foundations laid by Hume,<sup>6</sup> Kames<sup>7</sup> and Hutcheson<sup>8</sup>. It is believed that

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<sup>1</sup> Signed in Marrakesh, Morocco, on April 15, 1994, at the conclusion of the Uruguay Round of Multilateral Trade Negotiations.

<sup>2</sup> Signed in Geneva, Switzerland, on October 30, 1947.

<sup>3</sup> JH Jackson, *World Trade and the Law of GATT* (Indianapolis 1969) 38.

<sup>4</sup> RD Anderson, H Wager, 'Human Rights, Development, and the WTO: the Cases of Intellectual Property and Competition Policy' (2006) 9(3) *Journal of International Economic Law* 707, 713-714.

<sup>5</sup> See also Arthur Herman, *How the Scots Invented the Modern World* (New York 2002).

<sup>6</sup> *A Treatise of Human Nature* (1739).

<sup>7</sup> *Historical Law Tracts* (1758).

<sup>8</sup> *Essay on the Nature and Conduct of the Passions and Affections, with Illustrations of the Moral Sense* (1928).

they also inspired Thomas Jefferson to develop his concepts of *the pursuit of happiness* and *inalienable right* when writing the Declaration of Independence.<sup>9</sup> Kant was also influenced by Smith as he included international commerce among factors contributing to perpetual peace.<sup>10</sup>

The contribution made by Smith to the liberal economy is the greatest, therefore some of his thoughts shall be briefly presented here. He claimed that the main objective of the government should be protection of the market without unnecessary interference, in order that market powers are able freely to interact. All state actions with regard to industry or foreign affairs were considered harmful. Liberalism was the best ideology while monopolies and duties disrupted the natural course of things.<sup>11</sup> According to Smith, state intervention was justified if its purpose was to restore order or if it served as a response to a request for help from individuals.<sup>12</sup> Beyond the economy, the government should be responsible for justice, public administration and defense. The costs of those activities should be kept low, since government ought to be *cheap*.<sup>13</sup>

The economic doctrine put by Smith is coherent. On the one hand the state should restrain from interference with free competition. On the other the spirit of enterprise of individuals stimulates the economic development of the whole of society. All the state has to do is keep its citizens safe and protect private property. This philosophy was an example of bourgeois liberalism and became a foundation of capitalism.

From another perspective Petersmann warns the WTO against taking on the philosophy of another thinker, Niccolo Machiavelli.<sup>14</sup> The Italian writer claimed that the success of a leader depends on four factors: *necessity, occasion, fortune and virtue*. *Fortune* represented *luck* and *virtue* was a specific concept of personality. Machiavelli disregarded morality and justice in order to advance the interests of the state.<sup>15</sup> The WTO is often accused of focusing solely on trade without due regard to other social interests such as human rights, democracy and constitutional restraints on all government powers.<sup>16</sup> As Plato stated, freedom without rules has an inherent tendency to destroy itself through abuses of private and public powers. This refers to unlimited freedom of trade too.<sup>17</sup>

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<sup>9</sup> Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (New York 2002) 248-55.

<sup>10</sup> *To Perpetual Peace: A Philosophical Sketch* (1795).

<sup>11</sup> Jerzy Chodorowski, *Adam Smith* (Wrocław 1980) 40.

<sup>12</sup> H Olszewski, M Zmierzak, *Historia Doktryn Politycznych i Prawnych* (Poznań 1994) 166.

<sup>13</sup> Wacław Stankiewicz, *Historia myśli ekonomicznej* (Warszawa 1983) 170.

<sup>14</sup> E-U Petersmann, 'Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO. Introduction and Summary' (2004) 7(3) *Journal of International Economic Law* 585, 587.

<sup>15</sup> *The Prince* (1513).

<sup>16</sup> Petersmann (n 14) 587.

<sup>17</sup> See E-U Petersmann, 'The WTO Constitution and Human Rights' (2000) 3(1) *Journal of International Economic Law* 19, 24.

### III. THE *THEORY OF COMPARATIVE ADVANTAGE*

As noted above, economic growth remains the primary objective of the WTO. The concept behind the functioning of the WTO is the idea that liberalization of trade is mutually profitable to both (or multiple) trading partners. This idea is based on the division of labor and differences in production costs and it asserts that every state should focus on production and export of those goods with the lowest production costs. This seems reasonable and mutually advantageous so long as none of the trading partners produces all goods cheaper than another. The question is one of whether the trade is beneficial also in the opposite situation.

The answer to this problem is provided by the *theory of comparative advantage*. It was first described by a British economist, Robert Torrens,<sup>18</sup> who surveyed the barter of industrial and agricultural goods between England and Poland. Scientific analysis and its popularization is credited to David Ricardo and his *Principles of Political Economy and Taxation*, written in 1817. Ricardo is considered to be one of the most influential of the classical economists and theorists of international economic relations. It is worth mentioning that Ricardo based his concept on the assumptions of Adam Smith, published in *An Inquiry into the Nature and Causes of the Wealth of Nations* of 1776, although he elaborated on it. Some name Ricardo, and not Smith, the founder of classical trade theory.<sup>19</sup>

The *theory of comparative advantage* is also called the *theory of relative costs* or *Ricardo's theory*.<sup>20</sup> Ricardo wrote his work four decades after Smith and therefore included experiences of industrial revolution and the world economic dominance held by Great Britain. He tackled the problem of whether it makes sense for states to trade where one has higher production costs of all goods. Ricardo started his analysis with a critical approach to the *theory of absolute advantage*.

The *theory of absolute advantage* assumes that if state A produces good X cheaper than state B and state B produces good Y cheaper than state A, then state A should produce only good X for both domestic market and export and state B only good Y for the same reasons. Production effectiveness is maximized and both goods are as cheap and achievable as possible. However if the state A produces both good X and good Y cheaper than state B, then the trade between these states should not exist as it is unprofitable for at least one party. In this case the economy of state A would *ceteris paribus* develop faster than that of state B.

Ricardo did not agree with this part of the *theory of absolute advantage*.<sup>21</sup> He assumed that the division of work, specialization and free trade result in cost reduction and increased benefits worldwide even when state A produces everything cheaper than state B.<sup>22</sup> Ricardo supported his thesis with an example of trade between Great Britain and Portugal. The model he designed clearly possessed certain flaws caused by simplification.

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<sup>18</sup> *An Essay on the External Corn Trade* (1780).

<sup>19</sup> T. Rynarzewski, A. Zielińska-Głębocka, *Międzynarodowe stosunki gospodarcze* (Warszawa 2006) 59.

<sup>20</sup> Adam Budnikowski, *Międzynarodowe stosunki gospodarcze* (Warszawa 2003) 42.

<sup>21</sup> *ibid.*

<sup>22</sup> Urszula Zagóra-Jonszta, *Wykłady z historii myśli ekonomicznej* (Katowice 1998) 71.

For instance it included only one production factor (work), was limited to only two states and assumed perfect competition, full employment and other factors being unchanging.<sup>23</sup>

The following table shows the costs of two products in both states.

state / good	Great Britain	Portugal
cloth	80	30
wine	100	20

As can easily be observed, Portugal produces both goods cheaper than the Great Britain. However, cloth is relatively more expensive ( $30/80=37\%$  of the British price) than wine ( $20/100 = 20\%$  of the British price). If we apply here the *theory of absolute advantage* each state will have to produce everything for the domestic market and nothing for export. Portugal would have no motivation to trade and Great Britain nothing to offer.

	Great Britain			Portugal		
	cost of unit	number of units	total cost	cost of unit	number of units	total cost
cloth	80	5	400	30	5	150
wine	100	5	500	20	5	100
		10	900		10	250

Due to a lack of trade, both states must produce both products. As can be observed the total production cost in Great Britain is 900 and in Portugal 250. Yet if the states begin to trade regardless, Portugal produces both goods cheaper, and *Ricardo's theory* would then apply. The *comparative advantage* is the production cost of one good expressed in units of another good.<sup>24</sup>

	Great Britain			Portugal		
	cost of unit	number of units	total cost	cost of unit	number of units	total cost
cloth	10	80	800	30	0	0
wine	0	120	0	20	10	200
		10	800		10	200

In this case Great Britain produces only cloth, since the production cost of cloth in this state is lower than the production cost of wine. It produces cloth for itself (5 units) and for Portugal (another 5 units) for a total of 10 units. In Portugal it is the other way round, this country producing only wine. As the table shows, both states are fully supplied with both goods while the total production costs drop from 900 to 800 in Great Britain and from 250 to 200 in Portugal. This model proves that even

<sup>23</sup> *ibid.*

<sup>24</sup> Budnikowski (n 20) 66.

though Portugal produces both goods more cheaply, international trade is mutually beneficial.

In conclusion, the absolute cost of production is irrelevant, since the costs spared by not producing other goods make the difference. It must be kept in mind, however, that Ricardo's theory may be applied only to situations in which there are relative differences in production costs. If Portugal produced both goods exactly 10% more cheaply than Great Britain, the trade would not be mutually beneficial. Naturally Ricardo was aware that the trade may be disturbed by wages and exchange rates.<sup>25</sup>

*Ricardo's theory* has been empirically verified more than once. In 1951 McDougall published the results of his survey, which confirmed the accuracy of the ideas put by Ricardo.<sup>26</sup> Similar conclusions were drawn by Stern<sup>27</sup> and Balassa<sup>28</sup>. It should be added that the WTO agreements nowhere mention the *theory of comparative advantage*. However, scholars often refer to it while discussing the mission of the WTO.<sup>29</sup> One of the Ministerial Declarations confirmed it as well.<sup>30</sup>

#### IV. THE IMBALANCE BETWEEN MARKET PARTICIPANTS

Without questioning the correctness of the beneficial consequences of trade liberalization the imbalance between market participants should be borne in mind. WTO law primarily serves the lobby of the producers and exporting entrepreneurs.<sup>31</sup> Agreements such as the GATT and the GATS (General Agreement on Trade in Services)<sup>32</sup> clearly concentrate on lifting barriers to trade rather than on constitutional guarantees. The most obvious examples of this are the SCM (Agreement on Subsidies and Countervailing Measures)<sup>33</sup> and TRIPS (Trade-Related Aspects of Intellectual Property Rights)<sup>34</sup> which have a one-sided approach to regulation subjects.<sup>35</sup> Consumer protection is not addressed by the WTO and there is no direct effect of WTO law, therefore those subjects chiefly affected by the WTO

<sup>25</sup> *ibid* 53.

<sup>26</sup> See GDA MacDougall, 'British and American Exports: A Study Suggested by the Theory of Comparative Cost' (1951) 61 *Economic Journal* 697.

<sup>27</sup> RM Stern, 'British and American Productivity and Comparative Costs in International Trade' (1962) 14 *Oxford Economic Papers* 275.

<sup>28</sup> Bela Balassa, 'An Empirical Determination of Classical Comparative Cost Theory' (1963) 45(3) *Review of Economics and Statistics* 231.

<sup>29</sup> Thomas Cottier, 'Trade and Human Rights: A Relationship to Discover' (2002) 5(1) *Journal of International Economic Law* 111, 115; JH Jackson 'The WTO *Constitution* and Proposed Reforms: Seven *Mantras* Revisited' (2001) 4(1) *Journal of International Economic Law* 67, 68; Gudrun Zagel, 'The WTO and Trade-related Human Rights Measures: Trade Sanctions vs. Trade Incentives' <http://www.ipfw.edu/hri/WTO/Zagel%20-%20ARIEL.pdf> accessed 10 March 2011, 7.

<sup>30</sup> Singapore Ministerial Declaration adopted on 13 December 1996, WTO document WT/MIN(96)/DEC, par. 4.

<sup>31</sup> Petersmann, 'Challenges...' (n 14) 594.

<sup>32</sup> Annex 1B to the WTO Agreement.

<sup>33</sup> Part of Annex 1A to the WTO Agreement.

<sup>34</sup> Annex 1C to the WTO Agreement.

<sup>35</sup> E-U Petersmann, 'European and International Constitutional Law: Time for Promoting *Cosmopolitan Democracy* in the WTO' in G de Burca, J Scott (eds), *The EU and the WTO. Legal and Constitutional Issues* (Oxford - Portland Oregon 2003) 101.

regulations cannot invoke them in courts. Treating citizens (entrepreneurs) merely as the objects and not the subjects of the international trade is impossible to reconcile with personal freedom.

Free trade contributes to individual freedom not only in the economic field, but also in the political. Yet at the same time it threatens other values of a democratic society. Allowing the WTO much discretion in issues pertaining to human rights is a consequence of the authoritative powers of governments in foreign policy.<sup>36</sup>

Returning to the idea of free trade, *Ricardo's theory* is clearly a simplification of reality. Free trade alone is not enough to provide economic development. The income obtained may be concentrated in the hands of a few individuals and the capital may be consumed abroad.<sup>37</sup> This problem has been addressed in the WTO Agreement Preamble, which states that *there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development*. At the same time WTO law contains regulations mostly providing for negative integration measures. For instance Article 15:2 of the Agreement on Agriculture grants a 10-years reduction commitments waiver to the developing countries and frees the least-developed countries of this obligation. GATT Article XII:2 lists exceptions from prohibitions and restrictions other than duties, taxes and other charges. As a consequence some economists claim that the WTO system did not significantly improve free trade in the poorest countries.<sup>38</sup>

Another doctrinal conflict in trade organizations in general is the competition between forces supporting *free trade* and those supporting *fair trade*. The first notion originates from liberal economic doctrines, while the other places weight on distribution of revenue from trade (a social/socialistic trade aspect) and protection of non-trade values. Different social groups and even states opt for different points of balance between these values.<sup>39</sup> Supporters of free trade argue that domestic social policy may not limit international trade. Supporters of fair trade state that free trade is accepted in as much as it does not conflict with the sovereign rights of states to adopt the preferred social model. Free trade favors effective allocation of resources, broader consumer choice and lower prices, yet it brings the danger of lowering standards of production and end products. Relations between trade and social standards may be regulated in multiple ways. One method is leaving this problem to the free market without any state intervention whatsoever. Another is demanding respect for certain social standards before granting free trade privileges. A third alternative is establishing common social standards in the WTO system or requiring the

<sup>36</sup> See E-U Petersmann, 'Constitutionalism and International Organizations' (1996) 17 Northwestern Journal of International Law and Business 398, 415.

<sup>37</sup> Steve Charnovitz, 'World Trade Organization in 2020' (2004-2005) 1(1-2) Journal of International Law & International Relations 167, 177.

<sup>38</sup> A Mattoo, A Subramanian, 'The WTO and the Poorest Countries: the Stark Reality' (2004) World Trade Review 3, 385, 393, see also Petersmann, 'Challenges...' (n 14) 602.

<sup>39</sup> MP Maduro, 'Is there such thing as free or fair trade?' in G de Burca, J Scott (eds) (n 35) 258.

ratification of ILO standards by WTO Members.<sup>40</sup> Social standards pertaining to trade may be divided into two categories: incorporated (pertaining to product) and unincorporated (pertaining to production process). The first category refers to packaging, labeling and content, the second to working conditions, taxation and environmental pollution.<sup>41</sup> In the first case the states can enforce their social standards, so long as they do not discriminate against other states. In the second case the enforcement of social standards is very difficult.

## V. THE INSTITUTIONAL HURDLES

The WTO is currently one of the central institutions of international economic relations and international law. The transition from the GATT to the WTO was a remarkable achievement and a step forward. The WTO is based on regularly held negotiations (so-called *rounds*) and formalized *quasi-judicial* procedures.<sup>42</sup> This solution makes the WTO susceptible to tensions between politics and law. The WTO is trying to be simultaneously a *member-driven* and *rule-based* organization.<sup>43</sup>

The greatest improvement of the WTO in comparison to the GATT is its dispute settlement system, mostly for the two instances jurisdiction, which has no equal among worldwide international organizations.<sup>44</sup> Dispute settlement is highly regarded due to the effectiveness of enforcement.<sup>45</sup> Contrary to the International Court of Justice, the jurisdiction of the WTO is compulsory and its decisions adopted automatically.<sup>46</sup> Many cases are decided within a year, which is extraordinarily short for international jurisdiction.<sup>47</sup>

However, there is a dark side to the dispute settlement system of the WTO. Excessive reliance on judicial power may be deceptive. Imbalance between paralyzed legislation (since the establishment of the WTO no WTO agreement amendment has come to force) and efficient dispute settlement bodies leads to abuses of the latter. Some tasks are *de facto* taken over by those bodies, even though *de iure* they belong to the Member States. The clearest example of this tendency is the matter of the interpretation of WTO law. According to Article IX:2 of the WTO Agreement, the Ministerial Conference and General Council have the exclusive authority to adopt interpretations of WTO law. Thus far these bodies have not exercised this

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<sup>40</sup> *ibid* 274.

<sup>41</sup> *ibid* 262.

<sup>42</sup> Charnovitz, 'The World Trade...' (n 37) 168.

<sup>43</sup> *ibid* 169.

<sup>44</sup> See for example Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387, 438; CM Vazques, 'Trade Sanctions and Human Rights – Past, Present and Future' (2003) 6(4) *Journal of International Economic Law* 797, 803.

<sup>45</sup> See for example GC Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington 2003) 2-3; J Cameron, KR Gray, 'Principles of International Law in the WTO Dispute Settlement Body' (2001) *International and Comparative Law Quarterly* 50, 248, 250. There are also minority opposing views, eg RCh Wolf, *Trade, Aid, and Arbitrate: The Globalization of Western Law* (Aldershot 2004) 196.

<sup>46</sup> Charnovitz, 'The World Trade...' (n 37) 173.

<sup>47</sup> *ibid*.



competence even once.<sup>48</sup> On the other hand the Appellate Body and panel did apply their creative interpretations in multiple disputes. For instance, they set forth the *weighing and balancing test* of trade and non-trade values and defined *likeness* with regard to Article XX of the GATT. The WTO has in place more and less formalized limitations of discretionary judicial powers, such as the possibility of blocking by powerful Members of certain candidates to sit on panels, or amending of the DSU.<sup>49</sup> In general, however, judicial power encroaches on legislative power.

The WTO has a real impact on internal regulations of states and eventually on their industries and labor markets. Even the names of some organs, such as the Working Party on Domestic Regulations or the Committee on Trade in Financial Services, demonstrate this clearly.<sup>50</sup> It is relevant that internal law, even constitutional, cannot constitute a justification for the failure of a Member to perform WTO Agreements.<sup>51</sup> This is a well-known rule of the law of treaties.<sup>52</sup> As was stated in the so called Fitzmaurice compromise, states must wisely accept obligations in both internal and international law, so as not to cause conflicts between them.<sup>53</sup>

## VI. THE *CONSTITUTIONALIZATION* OF THE WTO

According to Klabbers *constitutionalization* is a concept of modern constitutional law. It is a broad notion, encompasses a variety of internal and international subjects based on specific criteria and is subject to constant evolution.<sup>54</sup> It is a philosophy of aspiration for some forms of political legitimacy, characterized by conformity with constitutions. Clearly it originates from constitutional thought and is a response to fragmentarization, verticalization, pluralism and globalization of international law by the provision of unity and world order.<sup>55</sup> Common values may serve as an international community constitution,<sup>56</sup> since *constitutionalization* has never been reserved for municipal law.<sup>57</sup> In a way, international trade law is a continuation of municipal constitutional law, since it is based on the same foundations.<sup>58</sup>

This can be characterized as an idea of attributing values and aims and consequently features of democratic states, yet this definition is far from

<sup>48</sup> DP Steger, 'The Future of the WTO: The Case for Institutional Reform' (2009) 12(4) Journal of International Economic Law 803, 809-810.

<sup>49</sup> See RH Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 American Journal of International Law 247, 274.

<sup>50</sup> Charnovitz, 'The World Trade...' (n 37) 170.

<sup>51</sup> Exceptions to this rule are provided by Article VI:2 b GATS, Article 42 and 46 TRIPS, Article 16:3 SCM, Article 4.2 Anti-dumping.

<sup>52</sup> Vienna Convention on the Law of Treaties, Article 27.

<sup>53</sup> See RMM Wallace, *International Law* (London 2002) 35.

<sup>54</sup> J Klabbers, A Peters, G Ulfstein (eds), *The Constitutionalization of International Law* (Oxford 2009) 6-7.

<sup>55</sup> *ibid* 10-18.

<sup>56</sup> *ibid* 25.

<sup>57</sup> *ibid* 344.

<sup>58</sup> Maduro (n 39) 272.

being clear.<sup>59</sup> The process of *constitutionalization* in international law does not center on the establishment of any kind of world government, but on democratic governance. It should also serve as compensation for loss of power by national governments in favor of inter- and supranational entities.<sup>60</sup> The concept was fueled by the progresses made by the European Communities and European Union.<sup>61</sup> Nowadays it is undisputed that some global organizations, including the WTO are subject to this process. According to Petersmann, the WTO already serves constitutional functions such as non-discrimination, a compulsory dispute settlement system and the rule of law.<sup>62</sup>

There is no agreement on the definition of *constitutionalization*, much less on its attributes. According to Walker *constitutionalization* of an international organization consists of the following elements: 1. a self-conscious discourse of constitutionalism (discursive maturity), 2. a discourse of constitutional conceptualization and imagination (autonomy and sovereignty), 3. jurisdictional scope, 4. interpretive autonomy, 5. institutional capacity, 6. citizenship (rights of individuals) and 7. representation (democracy).<sup>63</sup> According to Trachtman constitutionalization should include the following aspects: 1. economic constitution, 2. interfunctional constitution, 3. political constitution, 4. legal and judicial constitution, 5. human rights constitution and 6. redistributive constitution.<sup>64</sup> Petersmann distinguishes: 1. the rule of law, 2. checks and balances, 3. democratic self-governance, 4. a primacy of constitution among sources of law, 5. human rights, 6. constitutionalism in external relations, 7. social justice 8. cosmopolitan constitutional law (human rights in international private law) and 9. a coherent variety of constitutional architectures.<sup>65</sup>

According to Trachtman in a technical sense the WTO already possesses a constitution, which is the Agreement establishing the World Trade Organization.<sup>66</sup> Mik supports this view.<sup>67</sup> Trachtman emphasizes the meaning of a constitution of coordination of the WTO, to determine the relations between economic and non-economic values.<sup>68</sup> He is searching for the border between trade and human rights, emphasizing the obligation of the wealthy states to provide aid to poorer countries.<sup>69</sup> This coordination is one of the greatest challenges of the WTO. If this issue is not resolved among the Members, it will depend on the panelists, who in the absence of

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<sup>59</sup> *ibid* 345.

<sup>60</sup> *ibid* 346-347.

<sup>61</sup> Neil Walker, 'The EU and the WTO: Constitutionalism in a New Key' in G de Burca, J Scott (eds) (n 35) 31.

<sup>62</sup> Petersmann, 'The WTO Constitution...' (n 17) 20.

<sup>63</sup> Walker (n 61) 35.

<sup>64</sup> JP Trachtman, 'The Constitutions of the WTO', (2006) 17(3) *European Journal of International Law* 623.

<sup>65</sup> Petersmann, 'European and International...' (n 35) 85-89.

<sup>66</sup> Trachtman (n 64) 627.

<sup>67</sup> Cezary Mik, 'Prawo Światowej Organizacji Handlu (WTO) a prawo Wspólnot Europejskich', in J Kolasa, A Kozłowski (eds) *Prawo międzynarodowe publiczne a prawo europejskie* (Wrocław 2003) 80.

<sup>68</sup> Trachtman (n 64) 634.

<sup>69</sup> *ibid* 630.

legal regulations will be forced to make judgments based on their political beliefs, which would undermine the legitimacy of the WTO.<sup>70</sup>

The greatest achievements of the WTO according to Petersmann are free trade, prohibition of discrimination between states (and consequently between entrepreneurs), rules of law and the dispute settlement system.<sup>71</sup> He claims that the transition of the GATT into the WTO is to date the greatest success of *constitutionalization* of a global organization.<sup>72</sup> Cottier adds that the changing structure of international law and need for coherence requires the process of *constitutionalization*.<sup>73</sup>

One of the most important conditions of proper *constitutionalization* of both international law in general and international organizations is a consideration of all of the aims and values of the international community. A focus on only one aspect of globalization, even the most significant, is irrational. Failure to consider areas of regulation other than economic may lead to conflicts between them and would certainly break the unity of the system. Clearly finding a proper balance between different policies is not easy even in municipal law, and much less so in international law.<sup>74</sup>

Jackson paid special attention to WTO constitutions after the mass demonstrations in Seattle in 1999, when anti-globalists managed to interrupt the Ministerial Conference. He noticed the institutional incompetence of the WTO, which may lead to a situation in which that states would rather seek protection in other international forums such as the OECD (Organisation for Economic Co-operation and Development). We now know that this did not happen, yet the debate on WTO institutional reform is ongoing. Jackson identified seven axioms constantly repeated during those discussions, which in his view are false and harmful, at least where understood as absolute.<sup>75</sup> These include: 1. consensus is the only proper manner of decision making (while in fact it causes impasses); 2. The WTO is an organization only between states (individuals and NGOs not considered); 3. The WTO should never and in no way compete with the sovereignty of Member states (while sovereignty as Hegel understood it died a long time ago), 4; the WTO should be governed exclusively by Member states (so that WTO bodies have no authority); 5. The WTO should remain a single undertaking (which excludes flexibility); 6. the prohibition of discrimination is absolute (which may lead to a race to the bottom, i.e. standards lowering); 7. negotiations should be fragmentarized instead of adopting all policies at the same time (which leads to temporary businesses being forced instead of long terms strategies)

A different and very critical view was presented by Dunoff.<sup>76</sup> He understands the concept of *constitutionalization* in international trade law as one of three processes. The first refers to institutional architecture. As

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<sup>70</sup> *ibid* 642-644, see also Peter Holmes, 'The WTO and the EU: Some Constitutional Comparisons' in G de Burca, J Scott (eds) (n 35) 63.

<sup>71</sup> Petersmann 'European and International ...' (n 35) 97.

<sup>72</sup> *ibid*.

<sup>73</sup> Cottier (n 29) 114.

<sup>74</sup> *ibid* 129.

<sup>75</sup> Jackson (n 29) 71-72.

<sup>76</sup> JL Dunoff, 'Constitutional Conceits: the WTO's *Constitution* and the Discipline of International Law' (2006) 17(3) *European Journal of International Law* 647, 647-676.

Jackson explained it, international economic institutions are to give measured scope for legitimate national policy goals while preventing the use of these goals to promote particular interests at the expense of the greater common welfare.<sup>77</sup> The second is related to normative commitments. In this view the process of *constitutionalization* stands for adoption of a set of values and norms. This trend was presented by Walker, Trachtman and especially Petersmann, as was noted above. The third understanding of constitutionalization would be judicial mediation. In this view the WTO Dispute Settlement Understanding plays the central role. It is patterned on the European Union and the participation of European Court of Justice jurisprudence in introducing the doctrines of direct effect and supremacy.

Dunoff claims that no other institution of international law shows such great aspirations to be considered a constitutional entity as the WTO. Further Dunoff considers possible explanations for this situation. He argues that this is due to the expansionist attitude of international trade law scholars, who consider this organization as *first among equals*. They believe that the WTO holds greater and broader responsibility than it may seem and that it is therefore particularly relevant that it considers a variety of values. Another reason is the hope of creating constitutional traditions in the trade regime in order to transform the WTO into a constitutional entity. In this case the discussion of the *constitutionalization* of the WTO is more an instrument to bring it into being than a comment on what has actually happened. The final possible cause considered by Dunoff is a crisis of the discipline of international (trade) law as inefficient and no longer supported by public opinion. The *constitutionalization* in this case could serve as a cure for this problem.

In conclusion, according to Dunoff, WTO Agreements and practice both fail to support its constitutional character. What is more, he contests the idea of a *constitutionalization* of international law in general as purely academic and impractical.

Although ideas as to the *constitutionalization* of the WTO vary significantly, the process itself cannot be denied. Even in its characteristics common factors can be identified. As the examples above show, every approach to the concept of the *constitutionalization* of the WTO includes protection of individuals in some form, or simply human rights. Trade law and human rights are not contradictory in nature. They actually share common aims and values and can support one another. Free trade is a natural factor in the strengthening of civil and political rights<sup>78</sup> If the assumption that free trade contributes to economic development is accepted, it should be appreciated that the wealthier a society is, the more bravely it stands up for its rights.<sup>79</sup> Regarding economic and social rights, in industrialized states free trade is perhaps the main factor in their development. If the question was reversed and it was asked whether human rights influence trade law, the arguments would be similar. Protection of

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<sup>77</sup> JH Jackson, *World Trade and the Law of GATT* (Indianapolis 1968) 788.

<sup>78</sup> Cottier (n 29) 124.

<sup>79</sup> AO Sykes, 'International Trade and Human Rights – an Economic Perspective' in FM Abbott, Ch Breining-Kaufmann, T Cottier (eds), *International Trade and Human Rights: Foundation and Conceptual Issues* (2005) 5 World Trade Forum, University of Michigan Press chapter 4.

individuals brings, for example, prohibition of discrimination and therefore equal access to a market. Protection of economic and social rights includes more or less directly the right to trade. It should also not be forgotten that the benefits of international trade are not only economic but also cultural in nature.<sup>80</sup>

The *constitutionalization* of the WTO (if it exists) is clearly irregular. Owing to the efficiency of the dispute settlement system it was burdened with weighing of different economic and non-economic values. On the other hand the legislative is powerless mostly due to the consensus rule. This observation relates not only to the WTO, but to international law in general. *Global governance* suffers from a deficit of democracy and courts which are overly powerful. The *constitutionalization* of the WTO was therefore fueled by judicial power, even though the establishment of an international constitutional court is still as unrealistic as it can be.<sup>81</sup>

For now the issue of *constitutionalization* in international law is a field of interest only for scholars.<sup>82</sup> This is so due to its rather abstract and theoretical nature. Distinct but not so distant from *constitutionalization* is the concept of *self-contained régime*. This indicates an international organization governed by its own rules, which differ from general international law. *Constitutionalization*, as noted above, sees the convergence of international organization with democratic state. *Self-contained régime* means that the legal system of an international organization is significantly different not from domestic but from international law. According to Mik,<sup>83</sup> the WTO does not constitute a *self-contained régime*, in that its bodies are obligated to cooperate with other international organizations,<sup>84</sup> and the system itself invokes external international agreements in both legal texts<sup>85</sup> and jurisdiction<sup>86</sup>. More cautious are Professors Palmetier and Mavroidis. In their view the WTO is mostly, but not entirely, a *self-contained régime*, in that its internal sources of law are prevailing.<sup>87</sup> Marceau agrees with them, emphasising that the WTO provides its members with specific rights and obligations, specific claims and causes of action, specific violations, specific enforcement mechanisms and specific remedies in case of such violations.<sup>88</sup> Her argument seems persuasive.

Beyond the sources of law of the WTO, the organization is obliged, as was mentioned above, to cooperate with other international organizations. Two of these were specifically named: according to Article III:5 of the WTO Agreement the WTO should cooperate with the International

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<sup>80</sup> See P Krugman, M Obstfeld, *International Economics: Theory and Practice* (Addison Wesley 2005).

<sup>81</sup> See Klabbers (n 54) 350.

<sup>82</sup> *ibid* 343.

<sup>83</sup> Mik (n 67) 94.

<sup>84</sup> Article V:1 of the WTO Agreement.

<sup>85</sup> For example Article 1:3 TRIPS.

<sup>86</sup> Eg the United Nations Convention on the Law of the Sea in panel report WT/DS58/R.

<sup>87</sup> D Palmetier, P Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92(3) *American Journal of International Law* 398, 413.

<sup>88</sup> G Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 *European Journal of International Law* 753, 755.

Monetary Fund and International Bank for Reconstruction and Development and its affiliated agencies with a view to achieving greater coherence in global economic policy-making. The WTO also cooperates on a regular basis with the International Organization for Standardization, World Customs Organization, Food and Agricultural Organization, World Intellectual Property Organization, International Office for Epizootics and International Telecommunications Union.<sup>89</sup>

## VII. THE CONTRIBUTION OF THE WTO TO *GLOBAL GOVERNANCE*

*Global governance*, which is obviously not a legal term,<sup>90</sup> represents interactions between politics in international relations in order to solve problems. It can be called *governance without government*, in that participants in international relations seek to govern the world without electing a world governing body. The greatest challenges of *global governance* are reconciling the opposing interests of subjects of international law and avoiding overlapping institutions.<sup>91</sup> Division of labor is therefore desirable also in this dimension.

Globalization presses states to search for new operational governance methods, in order that the direction of the evolution of social and economic relations may be both steered and controlled. Following World War II a new model for international organizations was introduced, the so called “club” formula.<sup>92</sup> The GATT was based on this formula. It provided for a limited number of the most developed states to decide on and control the operation of an organization.<sup>93</sup> This changed partially with the establishment of the WTO due to the following factors: state openness to concessions, increasing demand from developing states to participate in rule-making, the increasing influence of non-state actors and the spread of democracy.<sup>94</sup>

The WTO is in crisis. Sixteen years after the successful transition from the GATT, the organization seems to be completely inefficient legislatively and incapable of reforming itself. The last negotiation round (the Doha Round) has so far not brought consensus and adoption of

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<sup>89</sup> Konrad Czernichowski, ‘Współpraca z innymi organizacjami międzynarodowymi: cele i formy współpracy – studium przypadku’, in J Rymarczyk, M Wróblewski (eds), *10 lat WTO* (Wrocław 2005) 192-193.

<sup>90</sup> For more details see JN Rosenau, EO Czempiel (eds), *Governance without Government. Order and Change in World Politics* (Cambridge 1992); see also JN Rosenau, ‘Toward an Ontology for global Governance’ in M Hewson, TJ Sinclair, *Approaches to Global Governance* (New York 1999).

<sup>91</sup> VK Aggarwal, ‘Reconciling Institutions: Nested, Horizontal, Overlapping, and Independent Institutions’, <http://www.princeton.edu/~smeunier/Aggarwal%20memo.pdf> accessed 01.03.2011.

<sup>92</sup> Małgorzata Grącik, ‘Światowa Organizacja Handlu jako przykład otwartej koordynacji międzynarodowego systemu handlowego’ in Katarzyna Żukrowska (ed), *Otwarta koordynacji stosunkach międzynarodowych* (Warszawa 2007) 20.

<sup>93</sup> For details see RO Keohane, JS Ney, ‘The club model of multilateral cooperation and problems of democratic legitimacy’ in RO Keohane, JS Ney (eds), *Power and Governance in a Partially Globalized World* (Routledge, London 2002).

<sup>94</sup> Grącik (n 92) 31-33.

decisions on key issues.<sup>95</sup> The impasse is caused by the conflicting approaches of developed and developing states to agriculture and other policies. The development of the international trading system slowed and it is no simple matter to point to the explanation. It can be suggested that the problem is a democratic deficit and the weak legitimacy of the WTO. The Organization has traditionally been accused of a lack of transparency in decision-making, keeping non-governmental representatives outside and low accountability. WTO legitimacy depends mostly on its efficiency and its undemocratic governance may be holding the organization back.<sup>96</sup>

There is another theory, however. The structural problem may be not a democratic deficit, but rather too much democracy in the WTO. The process of *constitutionalization*, mentioned above, brought a number of democratic solutions to the Organization. Yet introducing non-trade values has weakened the hitherto prevailing aim of trade liberalization.<sup>97</sup> While the *club* model is gone forever, the new model has apparently not yet fully materialized.

## CONCLUSION

The WTO is one of the major world economic organizations. The rationale for its existence is the assumption that international trade is beneficial to all parties. The theoretical justification for this assumption is the theory of comparative advantage. According to this theory, trade may be mutually advantageous even when one trading partner has lower production costs for all goods. The WTO may also be credited with a contribution to peacekeeping and has strong doctrinal and philosophical foundations.

The WTO is often accused of a bias towards exporters and failure to provide appropriate protection to other market participants. Other conflicting powers within the Organization are the supporters of *free trade* and *fair trade*. The first group stresses that the WTO should not try to follow non-trade aims, while the second puts in doubt the legitimacy of the Organization for not doing so. The third tension is between the legislative and judicial powers. The Ministerial Conferences are more often unable to make decisions and reform the WTO. At the same time a very effective dispute settlement mechanism is beginning to fill the gaps in legal texts.

The WTO is often presented as an example of the ongoing process of *constitutionalization* of international law. The concept is difficult to define and each scholar distinguishes different characteristics. It cannot be denied, however, that it must share common values with democratic states and include the protection of human rights.

It is disputable whether and to what extent the WTO is a *self-contained régime*. On the one hand it cooperates with other international organizations and allows for external sources of law, but on the other the internal sources enjoy supremacy. The WTO as a global and influential

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<sup>95</sup> See Petersmann, 'Challenges...' (n 14) 597.

<sup>96</sup> Pascal Lamy, *Europe and the Future of Economic Governance* (2004) 42 (1) Journal of Market Studies 9.

<sup>97</sup> See Grącik (n 92) 33.

organization plays a role in global governance. However, since the fall of the “club” formula known since the GATT, it has lost at least partly its ability to act.