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**RECONSTRUING WTO LEGITIMACY DEBATES**

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**ABSTRACT**

*There is an emerging consensus that the WTO is in grave need of institutional redesign. For the last fifteen years, questions of WTO institutional reform have been framed as a matter of improving the WTO's legitimacy. This Article suggests that thinking about WTO redesign as a matter of improving its legitimacy limits our ability to fundamentally appreciate what the WTO's function and purpose is and conceptualize what it should be. It would be more useful to know what is exactly at stake and what have been the social, political, and economic implications of the legitimacy debate thus far.*

*The legitimacy debate appears in discussions regarding constitutionalization, the dispute settlement system, and non-state actor participation and institutional transparency. The divisions between arguments in the legitimacy debate are usually understood to be between rule-based constitutionalization versus economic rights constitutionalization, sympathy versus skepticism regarding non-state actor participation, and support for a more legalized dispute-settlement system versus a more politicized dispute-settlement system.*

*By reconstruing the legitimacy debate, the Article uncovers how what at first seem to be incongruent positions appear to be more related. Constitutional discourse draws from a desire to reduce politics in international trade and is a way of subordinating the state to markets or international institutions. Dispute settlement debates are a way to negotiate the relationship between the WTO and the state. Participation and transparency arguments derive from a shared empirical assumption that the WTO's power to govern globally is pervading everyday life and the state's power is waning.*

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## INTRODUCTION

Since its inception in 1994, the World Trade Organization's (WTO) legitimacy has always been at issue. Scholars and policy-makers often refer to the 1999 Seattle street protests during the WTO Ministerial Conference as the foremost moment when the WTO's legitimacy was challenged.<sup>1</sup> The protests in Seattle 1999 were not only about the WTO—they involved overlapping networks of protestors challenging certain theories and assumptions regarding “globalization.” This included the protest against the Asia-Pacific Economic Cooperation summit in Vancouver in 1997, the campaign against the Multilateral Agreement on Investment during 1997-1998, and protests against the Free Trade of Area of the Americas in Quebec City in 2002.<sup>2</sup>

Even though the WTO protests in Seattle were part of a broad-based global movement, from 1999 to the late-2000s, scholars, policymakers, and trade diplomats have spent a great amount of energy and resources responding to the specific question of how to make the WTO more legitimate. Indeed, the opening article for the inaugural issue of the WTO-commissioned journal was entitled, *The World Trade Organization's Legitimacy Crisis*, and explicitly responded to the street protests such as those in Seattle.<sup>3</sup> Some took this moment as an opportunity to reflect upon how and why this so-called “crisis” meant that the WTO was in a moment of transition.<sup>4</sup>

Policy proposals ensued after academic reflection—several official and semi-official reports examined what changes should be made to enhance the WTO's legitimacy. The “Sutherland Report” was commissioned by the then WTO Director-General, Supachai Panitchpakdi, and authored by a group of eminent experts.<sup>5</sup> The Warwick Commission was chaired by former Canadian Trade Minister Pierre Pettigrew, and drew from consultations with over 250

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<sup>1</sup> See, e.g., Michael Trebilcock, *Post-Seattle Reflections: A Qualified Defense of the WTO and an Unqualified Defense of the International Rule of Law*, in DEMOCRACY AND THE RULE OF LAW 319 (Norman Dorsen & Prosser Gifford eds., 2001); John S. Odell, *The Seattle Impasse and Its Implications for the World Trade Organization*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 400–02 (Daniel L.M. Kennedy & James D. Southwick eds., 2002) [hereinafter POLITICAL ECONOMY].

<sup>2</sup> See generally THE BATTLE OF SEATTLE: THE NEW CHALLENGE TO CAPITALIST GLOBALIZATION (Eddie Yuen, Daniel Burton Rose & George Katsiaficas eds., 2002) (giving a sense of the different perspectives from the protestors' view); ALEXANDER COCKBURN & JEFFREY ST. CLAIR, FIVE DAYS THAT SHOOK THE WORLD: SEATTLE AND BEYOND (2000) (giving a more particular view as to the strengths and weaknesses of the protests).

<sup>3</sup> Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 7 (2002) [hereinafter *Legitimacy Crisis*]; see generally Daniel C. Esty, *Rejoinder*, 1 WORLD TRADE REV. 297 (2002). But see David Henderson, *WTO 2002: Imaginary Crisis, Real Problems*, 1 WORLD TRADE REV. 277 (2002).

<sup>4</sup> See, e.g., Jeffrey L. Dunoff, *The WTO in Transition: Of Constituents, Competence and Coherence*, 33 GEO. WASH. INT'L L. REV. 979 (2001).

<sup>5</sup> PETER SUTHERLAND ET AL., THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM (2004), available at [http://www.ipu.org/splz-e/wto-symp05/future\\_WTO.pdf](http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf) (last visited Nov. 1, 2011), [hereinafter “Sutherland Report”].

trade experts.<sup>6</sup> These reports proposed changes that could be implemented within the existing WTO rules and regulations.<sup>7</sup> Recently, Debra Steger edited an impressive collection of essays aimed at redesigning the WTO.<sup>8</sup> To Steger, the question is clear that the WTO is in grave need of institutional reform. Nevertheless, the problem is that “[t]he mandate of the WTO is no longer clear . . . .”<sup>9</sup> She identifies two dominant and competing conceptions regarding the WTO’s purpose: there are those that believe that the WTO’s fundamental mandate is focused on trade liberalization and there are those that think it should be focused on broader international economic regulation.<sup>10</sup>

Extrapolating from Steger’s account, the way that these two mandates are presented suggests that scholars will measure the WTO’s legitimacy against some pre-existing conceptual construction of the WTO’s function and purpose.<sup>11</sup> That is, if one’s working assumption is that the WTO’s purpose is to liberalize trade, then the WTO’s legitimacy is measured against this premise; and likewise, if one’s assumption is that the WTO’s purpose is broader international economic regulation, then legitimacy is measured against this purpose. The preconception of the WTO is thereby reinforced through the way the WTO is examined.<sup>12</sup>

Indeed, this reflects how the WTO has been discussed thus far in the WTO legitimacy debates of the past decade. Scholars will usually enter the debate informed by a pre-existing conceptual construction of the WTO’s function and purpose. The pattern of the debate is often that the WTO is assumed to have a particular purpose and to have institutionalized a particular notion of trade. It will then be argued that the WTO should increase its legitimacy by better adhering to this assumed function and purpose. Or, also based on these assumptions regarding the WTO’s function and purpose, its legitimacy is criticized for prioritizing trade as a value to the exclusion of other values.

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<sup>6</sup> THE WARWICK COMMISSION, *THE MULTILATERAL TRADE REGIME: WHICH WAY FORWARD?*, (2007), available at [http://www.bmw-stiftung.de/de/asset/index/mid/16/lang/x/file/o\\_document\\_de\\_19.pdf](http://www.bmw-stiftung.de/de/asset/index/mid/16/lang/x/file/o_document_de_19.pdf) (last visited Nov. 1, 2011).

<sup>7</sup> Debra P. Steger, *The Future of the WTO: The Case for Institutional Reform*, 12 J. INT’L ECON. L. 803, 804 (2009); see also Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO*, 8 J. INT’L ECON. L. 329 (2005).

<sup>8</sup> REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY (Debra Steger ed., 2010), available at <http://idl-bnc.idrc.ca/dspace/bitstream/10625/40859/1/128972.pdf> (last visited Nov. 1, 2011).

<sup>9</sup> See Steger, *supra* note 7, at 808.

<sup>10</sup> See *id.* at 805.

<sup>11</sup> See *id.* at 807.

<sup>12</sup> See Patrizia Nanz, *Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND INTERNATIONAL ECONOMIC LAW 59, 62 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2011) [hereinafter MULTILEVEL TRADE].

While the results of the debate over the WTO's purpose is important in order to structure future reform, this paper takes this moment of conceptual dissonance regarding the WTO as an opportunity to reflect upon *how* legal scholars argue over competing understandings of the WTO. There is more at stake than simply two different proposals regarding the WTO's mandate. How legal scholars debate the WTO's legitimacy, and the conceptual or cognitive constructions they deploy, in effect, contribute to how we perceive and understand the WTO.<sup>13</sup>

The problem is that allowing pre-conceived legitimacy criteria to affect understandings of the WTO makes it difficult for legal scholars to effectively determine how the WTO functions and clearly argue what its purpose should be. I suggest that legal debates have obscured different conceptions regarding the WTO because they have been framed in response to answering the question: "how can the WTO be made more legitimate?"

In an effort to encourage sharper legal discourse, I flip the orthodox approach on its head and examine the legitimacy debate in order to excavate the different pre-existing conceptual constructions of the WTO. My purpose is to reframe legal debates over the WTO's function and purpose. I propose that we should reconstrue legitimacy debates not to be solely about answering the question of improving the WTO's legitimacy, but rather to interpret them as very specific ways of reinforcing and reinterpreting normative assumptions regarding the WTO's function and purpose. In other words, we can imagine legitimacy debates not only to be about trying to make the WTO better, but also about defining what the WTO is.

One important debate regarding the WTO's legitimacy not interrogated by this paper is the trade-linkage debate, also known as the "trade and . . ." debate, in which trade scholars and policymakers have tried to reconcile the WTO's relationship with other international legal regimes such as human rights, environmental, or labor law. Andrew Lang has already critically examined this debate and has also shifted the emphasis towards developing a clearer way of discussing and debating what the WTO (and free trade) can and should be about.<sup>14</sup> To Lang, there is a significant danger of not being able to transform the WTO without opening up new "rhetorical and imaginative space . . . to re-conceptualise the nature and purpose of the liberal trade project, in ways which respond to contemporary political priorities, and align that project with the contemporary ideational landscape."<sup>15</sup>

If we then take the stalemate of the Doha Round, which was an attempt to renegotiate the WTO in a way to make it more conducive to development, the stakes are even more acute.<sup>16</sup> There is an increasing demand to examine the

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<sup>13</sup> See *id.*; Andrew T. F. Lang, *Reflecting on 'Linkage': Cognitive and Institutional Change in the International Trading System*, 70 MOD. L. REV. 523, 529 (2007).

<sup>14</sup> See Lang, *supra* note 13.

<sup>15</sup> *Id.* at 529.

<sup>16</sup> See Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT'L L.J. 573, 583 (2010).

WTO's effects upon marginalized communities,<sup>17</sup> determine how to change the WTO in a way that reduces poverty,<sup>18</sup> and question how to reconfigure the WTO in order to "reclaim" development in the world trading system.<sup>19</sup> With this in mind, one premise of this paper is that before we know how to transform the WTO in a way more conducive to development and poverty reduction, we must first understand what our preconceptions of the WTO are and what is it exactly that we are trying to transform.

This article also responds to the broader concern regarding the dearth of examinations of international institutions that are at once legal, theoretical, and descriptive.<sup>20</sup> The WTO debate, much like debates regarding international institutions in general, thus far, has been primarily prescriptive and under-theorized.<sup>21</sup> Nevertheless, an increasing number of scholars from diverse perspectives are taking on theoretical questions regarding how and why WTO law operates the way it does.<sup>22</sup>

As already mentioned, jurists have usually focused on arguing as to what conditions are necessary to enhance the WTO's legitimacy against a presupposed mandate. This stems from the assumption that the WTO as a project is a good thing, and therefore its legitimacy must be improved.

This paper, however, is a descriptive assessment of the legal discourse surrounding the legitimacy debate. I detail how certain legal arguments involve an imagined social, political, and economic role for the WTO in relation to markets, states, and non-state actors. This builds upon the working premise that how we think and talk about the WTO affects how and why WTO law operates the way it does.<sup>23</sup>

Finally, the questions and methods examined in this paper represent a portion of a larger dialogue regarding the conceptual role of legitimacy in

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<sup>17</sup> See B.S. Chimni, *The World Trade Organization, Democracy and Development: A View from the South*, 40 J. WORLD TRADE 5 (2006).

<sup>18</sup> See Chantal Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT'L L. REV. 1399 (2003); Joel P. Trachtman, *Legal Aspects of a Poverty Agenda at the WTO: Trade Law and 'Global Apartheid'*, 6 J. INT'L ECON. L. 3 (2003).

<sup>19</sup> See YONG-SHIK LEE, *RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM* (2006); Asif H. Qureshi, *International Trade for Development: The WTO as a Development Institution?* 43 J. WORLD TRADE 173 (2009).

<sup>20</sup> See generally JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 32–35 (2d ed. 2009); JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 586 (2005). But see B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004) (a notable exception).

<sup>21</sup> See generally Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 EUR. J. INT'L REL. 249, 253 (2003); RONNIE R.F. YEARWOOD, *THE INTERACTION BETWEEN WORLD TRADE ORGANISATION LAW AND EXTERNAL INTERNATIONAL LAW: THE CONSTRAINED OPENNESS OF WTO LAW (A PROLOGUE TO A THEORY)* 10 (2011).

<sup>22</sup> See, e.g., David Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L.J. 444 (2000); David M. Driesen, *What is Free Trade?: The Real Issue Lurking Behind the Trade and Environmental Debate*, 41 VA. J. INT'L L. 279 (2001); Chios Carmody, *A Theory of WTO Law*, 11 J. INT'L ECON. L. 527, 528 (2008); YEARWOOD, *supra* note 21.

<sup>23</sup> See Lang, *supra* note 13.

international law.<sup>24</sup> It is common for the WTO legitimacy debates to be referenced within global discussions of legitimacy and international law.<sup>25</sup> We are well-warned, however, against the limitations of treating legitimacy as a question of trying to measure international law against some sort of normative benchmark—it may be more illuminating to unpack how legitimacy is part of a process that constructs and justifies particular substantive results and inequalities.<sup>26</sup>

I therefore reconstrue the WTO legitimacy debate in the following way: I identify the implicit institutional theory of the WTO's function and purpose; I examine how these legitimacy debates answer the question of how the WTO interacts with the state, law, and the market within the global economy; furthermore, I highlight how certain conceptions of the WTO's function and purpose privilege certain social actors as agents of change and marginalize others.

To be sure, scholars still query how to make the WTO more legitimate. This question, though, is no longer just a response to the 1999 Seattle protests. They now write against the backdrop of one of the official or semi-official reports,<sup>27</sup> or within the broader context of development discourse and the failing Doha Round.<sup>28</sup> The question that used to drive the legitimacy debate focused on making the WTO more legitimate. Since the writing of the several official and semi-official reports; however, recent discussions regarding the WTO have shifted in emphasis. Some prominent trade scholars are starting to think that more important questions that have been inadequately addressed

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<sup>24</sup> See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Daniel M. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596 (1999); THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001); FAULT LINES OF INTERNATIONAL LEGITIMACY (Hilary Charlesworth & Jean-Marc Coicaud eds., 2010); Tetsuo Sato, *Legitimacy of International Organizations and Their Decisions—Challenges that International Organizations Face in the 21st Century*, 37 HITOTSUBASHI J. L. & POL. 11 (2009).

<sup>25</sup> See, e.g., Jean d'Aspremont & Eric De Brabandere, *The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, 34 FORDHAM INT'L L. J. 190 (2011).

<sup>26</sup> Hilary Charlesworth, *Conclusion: The Legitimacies of International Law*, in FAULT LINES OF INTERNATIONAL LEGITIMACY 389, 398 (Hilary Charlesworth & Jean-Marc Coicaud eds., 2010).

<sup>27</sup> See, e.g., Steger, *supra* note 7, at 804; Sungjoon Cho, *A Quest for WTO's Legitimacy*, 4 WORLD TRADE REV. 391 (2005); Gary P. Sampson, *The Future of the WTO in World Economic Affairs*, 4 WORLD TRADE REV. 419 (2005); Ann Capling & Richard Higgott, *Introduction: The Future of the Multilateral Trade System—What Role for the World Trade Organization?*, 15 GLOBAL GOVERNANCE 313 (2009).

<sup>28</sup> See, e.g., Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT'L L. 221 (2006); Rahul Singh, *The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democratic Deficit*, 42 J. WORLD TRADE 347 (2008).

include: “how [does] the WTO matter[]”?<sup>29</sup> and “[d]o we still need the WTO”?<sup>30</sup>

In order to rigorously answer these questions it is useful to have a better sense of what is exactly at stake and what have been the social, political, and economic implications of the legitimacy debate thus far. The legitimacy debate appears in discussions regarding constitutionalization, the dispute settlement system, and non-state actor participation and institutional transparency. The divisions between arguments in the legitimacy debate are usually understood to be between rule-based constitutionalization versus economic rights constitutionalization, support for a more legalized dispute-settlement system versus a more politicized dispute-settlement system, and sympathy versus skepticism regarding non-state actor participation.

By reconstruing the legitimacy debate, I uncover how what at first seem to be incongruent positions appear to be more related. Constitutional discourse draws from a desire to reduce politics in international trade and is a way of subordinating the state to markets or international institutions. Dispute settlement debates are a way to negotiate the relationship between the WTO and the state. Participation and transparency arguments derive from a shared empirical assumption that the WTO’s power to govern globally is pervading everyday life and the state’s power is waning.

Part II details what is meant by reconstruing the legitimacy debate. The paper then investigates and reconstrues three forms of the legitimacy debate: constitutionalization (Part III), dispute settlement (Part IV), and participation and transparency (Part V). Part VI concludes the paper.

## I. WHAT IT MEANS TO RECONSTRUE THE LEGITIMACY DEBATE – STYLES OF FUNCTIONALISM

To reconstrue the debates regarding legitimacy towards more substantive ways of understanding the WTO, we can consider the WTO legitimacy debate to be comprised by different styles of functionalism. Functionalism, especially in discussions of governance, law and development, and administrative law, focuses on the purpose that legal institutions serve and the objects of regulation in economic and political life.<sup>31</sup> In fact, functionalism has dominated how international institutions in general are examined.<sup>32</sup> When debating the WTO’s legitimacy, differences arise through varied conceptions

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<sup>29</sup> Manfred Elsig, *The World Trade Organization’s Legitimacy Crisis: What does the Beast Look Like?*, 41 J. WORLD TRADE 75, 90 (2007).

<sup>30</sup> Joost Pauwelyn, *New Trade Politics for the 21<sup>st</sup> Century*, 11 J. INT’L ECON. L. 559, 564 (2008).

<sup>31</sup> See Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55 U. TORONTO L.J. 853, 855 (2005); see also Peer Zumbansen, *Law after the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008).

<sup>32</sup> See ALVAREZ, *supra* note 20, at 17–29.

of the WTO's function and purpose and objects of regulation in global economic and political life.

Broadly, there are two approaches to conceiving the function and purpose of the WTO that inform the legitimacy debate. What I call the "*institutional functionalist approach*," usually takes for granted that free trade generates welfare gains and focuses on improving technical and policy cooperation between Member States within the WTO by making the rules more clear and coherent. The WTO's legitimacy is increased by improving the WTO's internal regulatory coherence and/or by aligning the WTO regulations with other norms of international law.

What I call the "*economic functionalist approach*" focuses on the economic benefits of the WTO. This approach suggests that the WTO's legitimacy is increased the more the WTO's structure and resulting state action best reflect a particular trade theory. The assumption is that the purpose of the WTO is to discipline countries to liberalize trade by lowering tariffs, quotas, and so-called non-tariff barriers, which efficiently generates welfare. The different forms of welfare generated by liberal trade include increases in economic growth, market competition, and/or personal liberty. The more the WTO reflects the appropriate theory, the more opportunity there will be for increased welfare (however defined), thereby increasing the WTO's legitimacy.

Since I have presented the different conceptions as stylized representations, and for the sake of space constraints, I do not provide exhaustive references. Sometimes I use one particular author to exemplify a certain approach; I do so as a reference to an influential part of a scholar's work even though one author may exhibit different approaches within the body of their work. Showing the limitations and tensions of economic and institutional functionalist arguments is not intended to be a critical *fait accompli*, but rather it is a way to craft analytical tools that can start to sharpen legal discourse in such a way that can clarify understandings of the WTO's function and purpose.<sup>33</sup>

## II. CONSTITUTIONALIZATION: SKEPTICISM TOWARDS THE STATE

### A. Introduction

At the heart of WTO legitimacy debates are arguments over whether the WTO does and should reflect a constitutional order.<sup>34</sup> The constitutionalization of the WTO is not only a trade issue, but is also a popular

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<sup>33</sup> In this article, I leave it open as to the merits of a functionalist approach.

<sup>34</sup> In fact, at times the WTO constitutionalization and legitimacy debate creates a degree of acrimony between scholars. See, e.g., Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and 'Constitutional Justice'*, 19 EUR. J. INT'L L. 769 (2008); Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 EUR. J. INT'L L. 945 (2008); Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and Constitutional Justice: A Rejoinder*, 19 EUR. J. INT'L L. 955 (2008).



example within studies of the constitutionalization of international law.<sup>35</sup> Thus, WTO constitutionalization is part of a larger discussion regarding which perspective—constitutionalism, global administrative law, or legal pluralism—is best to understand global governance.<sup>36</sup> This section, however, leaves aside this broader debate of global governance and constitutionalism in international law.<sup>37</sup> Instead, I examine popular conceptions of a constitutionalized WTO within the context of the legitimacy debate and then reconstrue these conceptions.

John H. Jackson<sup>38</sup> and Ernst-Ulrich Petersmann<sup>39</sup> make the two most prominent arguments suggesting that the WTO should be understood as a constitution. These notions will be discussed more fully below, but in summary Jackson considers the “constitution” of international trade law to mean the institutional reflection of however the world trading system actually operates in practice. The world trade constitution is whatever emerges from international trade institutions, and as such, WTO law embodies the current trade constitution. To Petersmann, free trade enhances individual autonomy and liberty by unrestricting economic activity and protecting individual action from government interference—therefore free trade is a human right. This right to trade is a priority because it is the primary right that ensures individual liberty and autonomy. According to this view, since the WTO embodies this dedication to free trade, it represents the global constitutional notion of the right to trade.

Much of WTO constitutional scholarship falls upon the question of: is the WTO constitutionalizing? Or put another way: Is WTO law through practice and interpretation becoming more like a constitution in relation to the domestic laws of Member States? Cass has argued that this is an extremely

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<sup>35</sup> Jan Klabbers, *Setting the Scene*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 1, 20 (Jan Klabbers et al. eds., 2009) [hereinafter CONSTITUTIONALIZATION].

<sup>36</sup> Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 15-24 (2007); see also Jeffrey Dunoff & Joel Trachtman, *A Functional Approach to International Constitutionalization*, in RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 3, 33-34 (Jeffrey L. Dunoff & Joel Trachtman eds., 2009) [hereinafter RULING THE WORLD]. The literature in each of these areas is growing quickly. For global administrative law see *Global Administrative Law: A Bibliography*, INST. FOR INT’L L. & JUST., available at <http://www.iilj.org/gal/bibliography/default.asp>. For legal pluralism see, e.g., NICO KIRSCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2011); David Kennedy, *One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 3 NYU REV. L. & SOC. CHANGE 641 (2007). This is not to suggest that constitutionalism, global administrative law, and legal pluralism are hermeneutically separate approaches. Nor do I mean to suggest that within each mode there is only one, monolithic version.

<sup>37</sup> See, e.g., WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005); CONSTITUTIONALIZATION, *supra* note 35; RULING THE WORLD, *supra* note 36.

<sup>38</sup> See *infra* notes 52-57.

<sup>39</sup> See *infra* notes 83-84.

restrictive question because it reifies the WTO as something that someone is either for or against and that:

It says that it is not possible to answer either the ‘is-or-is-not’, or the ‘should-or-should-not’ question, because the terms of the discussion already presuppose the existence of the phenomenon. This makes it virtually impossible to escape from the terms of the assumption in order to try to answer the constitutionalizing question.<sup>40</sup>

Other critiques of constitutional discourse, with respect to the WTO and trade, have been that it privileges specific notions of legal forms such as judicial norm-generation,<sup>41</sup> that it prioritizes economic freedom over political freedom,<sup>42</sup> that it misleads because it places the concepts of the market and trade outside of the social,<sup>43</sup> and that it takes for granted the social and economic benefits of liberalized trade.<sup>44</sup>

One survey of trade constitutionalism has determined that as employed thus far it has been a “turn away from politics.”<sup>45</sup> Most recently, some have directly responded to criticism that constitutional discourse may be a scholarly attempt to minimize trade politics; they have conceptualized constitutionalism as a way to encourage political contestation and enrich normative debates.<sup>46</sup> The question, therefore, is no longer whether constitutionalism inhibits or encourages politics. Rather, one must ask what sort of politics it encourages.

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<sup>40</sup> DEBORAH CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* 208 (2005); see also Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 *GOVERNANCE* 73, 74 (2003).

<sup>41</sup> Ruth Buchanan, *Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches*, 57 *N. IR. LEGAL Q.* 654, 662 (2006).

<sup>42</sup> Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 *GOVERNANCE* 73, 74 (2003).

<sup>43</sup> James Thuo Gathii, *Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis*, 7 *WIDENER L. SYMP. J.* 137 (2001).

<sup>44</sup> See CASS, *supra* note 40, at 69.

<sup>45</sup> Jeffrey Dunoff, *Constitutional Concepts: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 *EUR. J. INT’L L.* 647, 663 (2006). Some see potential opportunity and value in a certain type of new constitutional discourse, which is more explicitly political. See, e.g., Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 31 (Gráinne De Búrca & Joanne Scott eds., 2001) (post-national or post-constitutive constitutionalism); Jeffrey L. Dunoff, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in *RULING THE WORLD*, *supra* note 36, at 178 (suggesting that constitutional discourse thus far has closed down political debate, but that a new wave of post-national constitutionalism may prove promising); see also Joel P. Trachtman, *Constitutional Economics of the World Trade Organization*, in *RULING THE WORLD*, *supra* note 36, at 206 (constitutional economics).

<sup>46</sup> See Klaus Armingeon *et al.*, *The Constitutionalisation of International Trade Law*, in *THE PROSPECTS OF INTERNATIONAL TRADE REGULATION: FROM FRAGMENTATION TO COHERENCE* 69, 72–75 (Thomas Cottier & Panagiotis Delimatsis eds., 2011).

As such, what remains underexplored are the distributional implications of constitutional discourse, which may thereby answer the question: “Who is advantaged and who disadvantaged, who empowered and who disempowered, under different constitutional conceptions.”<sup>47</sup> What also remains unclear is how different constitutional conceptions contain within them certain assumptions regarding the function and purpose of the WTO within a globalized political, economic, and social framework.<sup>48</sup> Thus, this section outlines how constitutionalization encourages a social, political, and economic life that is skeptical of the state.

## B. Institutional Functionalism

### 1. *The Constitutional Debate*

John H. Jackson’s understanding of the WTO as a trade constitution is exemplary of an institutional functionalist approach. He has self-described his own work as “functionalist.”<sup>49</sup> And to Cass, Jackson’s approach uses the concepts of institutions and constitutions almost interchangeably.<sup>50</sup> As will be described below, this particular use of the term “constitution” focuses on describing and improving the WTO’s institutional structure. This approach also takes for granted the benefits of liberalized trade and the ability of international economic law to increase economic welfare.<sup>51</sup>

Jackson was one of the first—if not *the* first—to use the term “constitution” when discussing the international economic system.<sup>52</sup> Early on, Jackson refers to the “constitutional law of GATT” to mean the institutional history and structure of the GATT.<sup>53</sup> In more recent scholarship Jackson has explained that he uses “constitution,” borrowing from the British tradition of an “unwritten constitution,” as a moniker describing the institutional structure of the “world trading system as it actually operates, including informal mechanisms and ‘practice.’”<sup>54</sup> In other words, the world trade “constitution” is

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<sup>47</sup> Dunoff, *RULING THE WORLD*, *supra* note 45, at 203; *see also* CASS, *supra* note 40, at 242.

<sup>48</sup> *Cf.* Gathii, *supra* note 43.

<sup>49</sup> JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 7 (1st ed., 1989) [hereinafter *THE WORLD TRADING SYSTEM*, 1st ed.]; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 27 (2d ed., 1997) [hereinafter *THE WORLD TRADING SYSTEM*, 2d ed.]. I reference both editions to note the consistency of certain ideas despite institutional structure of multilateral trade law expanding and changing from the GATT to the WTO.

<sup>50</sup> *See* CASS, *supra* note 40, at 28–57, 59.

<sup>51</sup> *Id.* at 78–79.

<sup>52</sup> *See* JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 31(1969) (explaining how the author will discuss the basic groundwork or “constitutional” law of GATT).

<sup>53</sup> *See id.* at 33–190.

<sup>54</sup> John H. Jackson, *The WTO ‘Constitution’ and Proposed Reforms: Seven ‘Mantras’ Revisited*, 4 *J. INT’L ECON. L.* 67, at 70–71 (2001) [hereinafter *Seven Mantras*]; *see also* JOHN

whatever norms and practice emerge from international trade institutions. This “constitutional structure” of the world trading system is composed of the international structure, national institutions, and compliance with results of dispute resolution.<sup>55</sup> And in this complex constitutional structure, Jackson considers international treaties to be the main component of this constitutional structure.<sup>56</sup>

Jackson’s concept of a trade constitution is flexible and adaptable to the changes in the international trade institution. Over time, Jackson shifted in his scholarship from talking about the different laws that make up the world trade system constitution to talking about the “WTO constitution” implying that in contemporary practice the world trade constitution primarily consists of the WTO.<sup>57</sup>

## 2. *Social, Political, and Economic Implications*

This notion of constitutionalism is not only a way of describing the institutional structure and practice of world trade. To Jackson, the rule-oriented (constitutional) structure of the GATT—and later the WTO—is the trade system’s greatest strength. According to this view, a rule-oriented system is preferred over a power-oriented system because it is more predictable and because it overcomes politics and government short-sightedness. To Jackson, this has the effect of redressing unfair power imbalances between nations and prevents escalating international tensions.<sup>58</sup>

Packed into the institutional functionalist understanding of the WTO as a trade constitution, however, is a broader social, political, and economic framework. In order to gain a clearer understanding of this framework, I examine how Jackson describes the WTO’s relationship to globalization. First, I suggest that an institutional functionalist definition of constitutionalism obscures its own non-legal normative implications. Within this conception, institutions such as the WTO are a central feature of global markets. But it is unclear what role the WTO plays in generating deep global integration of markets. This has the effect of making the WTO seem inevitable and necessary but does not provide analytical tools to understand what the WTO’s role is in global governance of political, economic, and social life. Second, I highlight the normative assumptions informing the institutional functionalist definition of constitutionalism thereby sketching its political, economic, and social framework.

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H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 49–53, 55 (2006) [hereinafter CHANGING FUNDAMENTALS] (Jackson has extended the use of “constitution” to public international law to describe “international institutional law”).

<sup>55</sup> See THE WORLD TRADING SYSTEM, 1st ed., *supra* note 49, at 7.

<sup>56</sup> See *id.* at 23; THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 27.

<sup>57</sup> See THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 339–41; JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 103 (1998) [hereinafter CONSTITUTION AND JURISPRUDENCE].

<sup>58</sup> See THE WORLD TRADING SYSTEM, 1st ed., *supra* note 49, at 4–5; THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 8–9.

To Jackson, globalization is an inescapable, pervasive phenomenon. He acknowledges the ambiguity of the term “globalization” and states that it denotes the interdependence generated by developments since World War II in technology, communication, and transportation that effectively integrate all markets into a global market.<sup>59</sup>

Jackson’s work, however, is not clear as to whether the WTO is a response to or a creator of global market integration.<sup>60</sup> Indeed, it is common in most of today’s discussions regarding globalization to treat law either as an epiphenomenon of global markets or to ignore law altogether.<sup>61</sup> In one regard, the presumption is that the forces of global market integration are extraneous to international institutions; therefore, the role of the WTO is to manage these forces.<sup>62</sup> This suggests that the WTO is necessary to ensure that the benefits of globalization are secured and the harmful effects are mitigated. In another regard, the WTO is “part of the world’s institutional structure that is essential for the satisfactory operation of the world markets, which experience and theory have shown can be so important to world welfare. Thus, the ‘constitution’ of the WTO will clearly shape world economics . . . .”<sup>63</sup> This suggests that the WTO constitutes globalization.

The reason this ambiguity regarding the WTO’s relation to globalization matters is that it makes the WTO seem inevitable. And this sense of inevitability makes it difficult to theorize what exactly is the WTO. Globalization is presented as a given, almost like a force of nature. Thus, if the WTO is both the product of and generator of this inescapable process of global economic integration, it makes it difficult to unpack exactly how the WTO contributes to globalization.

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<sup>59</sup> See THE WORLD TRADING SYSTEM, 1st ed., *supra* note 49, at 1–3; THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 5–7. Jackson has commented about this global interdependence during his early writing. Recently, he has adopted a definition and perception of globalization that is highly influenced by Thomas Friedman, see CHANGING FUNDAMENTALS, *supra* note 54, at 3.

<sup>60</sup> See *Seven Mantras*, *supra* note 54, at 68 (Jackson describes one of the policy objectives that “motivates” the contemporary world trading system as “managing economic interdependence, or what some people call ‘globalization’”); see also CHANGING FUNDAMENTALS, *supra* note 54, at 19 (explaining that “the World Trade Organization is the central illustration of legal and jurisprudential developments influenced by phenomena of our contemporary world (e.g. globalization)”). But see John H. Jackson, *International Economic Law in Times That are Interesting*, 3 J. OF INT’L ECON. L. 3, 7 (2000) [hereinafter *Times That Are Interesting*]. Here Jackson states that the WTO has had “a profound impact on world economic relations.”

<sup>61</sup> Robert Howse, *The End Of The Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528 (2008).

<sup>62</sup> See, e.g., CHANGING FUNDAMENTALS, *supra* note 54, at 122 (stating that “[t]he WTO has a very difficult role to play, because it must address issues that are being generated in the world, with particular reference to economic issues, which constantly change and involve problems over which governments and the international organization have relatively little control”).

<sup>63</sup> See CONSTITUTION AND JURISPRUDENCE, *supra* note 57, at 102.

Despite this ambiguity regarding the role of the WTO in global markets, upon closer reading, we discern how institutional functionalism specifically imagines the WTO's economic and political role in relation to markets, states, and non-state actors. First, by drawing out institutional functionalism's theory of WTO law, we see an inherent mistrust of government's role in the market. Jackson lauds the WTO as an exemplar of the rules-based approach to international economic relations rather than a power-based approach.<sup>64</sup> In such an approach, law's benefit is that it leaves as little as possible to the power dynamics of politics. A rule-based system reduces the influence of different scales of political dynamics: power imbalances between nations, national legislatures being beheld by domestic constituents and the influences of domestic politics, and national executive bodies making decisions driven by their own personal goals.<sup>65</sup> Law "manages" international interdependence and competing policy goals.<sup>66</sup> Law's predictability also reduces anticipated risks of global economic transactions.<sup>67</sup>

Jackson suggests we must understand that the "over-arching" principle of the rules has to do with economic affairs.<sup>68</sup> He treats economic thought as a matter of established consensus. International trade law is therefore simply a matter of implementing the "factual baseline" provided by general economic theory.<sup>69</sup> Thus, if law is intended to avoid politics and put into effect economic policy, then we must determine what specific economic policies are informing an institutional functionalist definition of the WTO as a constitution. Jackson relies on economic theories that dictate that international economic system[s] should embody the idea of "liberal trade," which is defined as the trade policy whose "goal is to minimize the amount of interference of governments in trade flows that cross national borders."<sup>70</sup> Jackson notes that this is based on David Ricardo and Adam Smith's theory of comparative advantage.<sup>71</sup> Additionally, he acknowledges that there is no definitive empirical evidence necessarily confirming the theory of comparative advantage but considers that it has an intuitive appeal because the result is that consumers get an increased choice of products at better prices.<sup>72</sup>

Jackson notes that there have been challenges to the theory of comparative advantage. He concludes, however, that economists have shown

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<sup>64</sup> See *id.* at 89; THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 350–51; see also *Times That are Interesting*, *supra* note 60, at 5.

<sup>65</sup> *Times That are Interesting*, *supra* note 60, at 5.

<sup>66</sup> THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 8.

<sup>67</sup> See, e.g., John H. Jackson, *Fragmentation or Unification Among International Institutions: The World Trade Organization*, 31 N.Y.U. J. INT'L L. & POL. 823, 825 (1999) [hereinafter *Fragmentation*]; see also *Seven Mantras*, *supra* note 54, at 69–70.

<sup>68</sup> *Fragmentation*, *supra* note 67, at 824.

<sup>69</sup> David Kennedy, *The International Style In Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. INT'L L. & REV. 671, 679 (1994).

<sup>70</sup> THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 11.

<sup>71</sup> *Id.* at 11–18.

<sup>72</sup> *Id.* at 16–17. Jackson explicitly leaves Adam Smith's proposition that what is good for the family is good for the nation as an open question.

these criticisms are unfounded and that modern models of the theory show “it supports the value of liberal trade in surprisingly general cases.”<sup>73</sup> Jackson still acknowledges the darker side of economic trade theory: “Economists instruct us, that there are both winners and losers in this process [of reducing trade barriers]. The basic concept of decades ago was that the advantages create a rising tide that lifts all boats. We now realize that not *all* boats are lifted, for one reason or another.”<sup>74</sup>

Yet, Jackson does not examine how international trade institutions can be involved in distributive issues and only considers how international institutions shape and guide the market.<sup>75</sup> Perhaps this is because, for him, distribution is a political or “non-economic” issue and international trade law’s main purpose is to enact economic policy and avoid politics. When outlining that there are winners and losers that emerge from a liberal trade policy, he leaves it as an issue that can be ameliorated through domestic responses such as safeguards and adjustments and not through re-examining international legal structures—despite not being too confident as to whether safeguards and adjustments are economically effective or politically feasible.<sup>76</sup>

In light of the discussion above, the broader normative framework of an institutional functionalist conception of a constitutionalizing WTO, can be summarized as follows: There is currently a global market integration that interconnects through developments in technology, transportation, and communication; international economic institutions such as the WTO are necessary to manage the interaction of cultural and institutional diversity that arises from this interconnectedness; international economic institutions are also necessary to create the coherent and cohesive legal rules that ensure the global economy functions efficiently; these rules enacted through international treaties ensure national governments remain adherent to economic principles that outline how the market should properly function rather than make choices driven by personal interest or special interest groups; national governments negotiate international treaties that create international institutions, which in turn act as a disciplinary mechanism upon governments to ensure that they cooperate amongst each other and adhere to economic policies of liberal trade; within this hierarchy of ideas, economists establish the normative frameworks, diplomats negotiate policies and lawyers craft the technical and institutional details.

With this framework highlighted, it is now possible to point out some biases in forming this conception of the WTO. To be clear, every normative

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<sup>73</sup> *Id.* at 19.

<sup>74</sup> *Seven Mantras*, *supra* note 54, at 69 (emphasis added); *see also* THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 20 (showing an example of where Jackson also considered this in his earlier work.).

<sup>75</sup> He often refers to the works of Douglass North, Ronald Coase and more recently Joseph Stiglitz to argue that human institutions guide and shape markets. *See, e.g.*, CHANGING FUNDAMENTALS, *supra* note 54, at 86–87; CONSTITUTION AND JURISPRUDENCE, *supra* note 57, at 101–102; *Seven Mantras*, *supra* note 54, at 70.

<sup>76</sup> *See* THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 175–79, 199–200.

position has some sort of inherent bias, but it is not always clear what those biases are. This is especially the case for the institutional functionalist conception of trade constitutionalism, which focuses on ensuring that trade rules are “well formulated and effective” and “should cause certain kinds of behaviors and inhibit other kinds of behavior.”<sup>77</sup> It is also important to draw out the normative impulse informing this particular focus on rules.

Jackson’s treatment of questions of distribution highlights which social actors are privileged by this institutional functionalist conception of the WTO. Jackson notes that domestic transformations created by international legal disciplining will create “losers.” He considers those who consider themselves as “losers” in liberal trading systems as at times driven by irrationality or emotion.<sup>78</sup> Nevertheless, the losers’ concerns are to be addressed through domestic politics. Jackson does note that different leaders in business, labor, and industry may very well lose political and economic power because of a liberal trade regime like the WTO. He also explains that domestic (probably U.S.) agricultural producers gain power through the WTO.<sup>79</sup> He ends, however on the following question that future studies in international economic law may want to consider: “[D]o the nimble, well managed multinational corporations find their effective power enhanced by these international economic trends?”<sup>80</sup> This subtly privileges the interests of corporations by highlighting their interests and needs.

This may very well be too close a reading of an understated point. Nevertheless, what this line of thinking more prominently emphasizes is that problems of distribution, poverty, and development are domestic and not international questions. It makes it more difficult to ask how problems of distribution, development, and poverty are caused by both domestic *and* international legal structures, and discern how domestic and international structures are interrelated. This point is important and the stakes are even clearer if we consider that many reacted against the New International Economic Order because it characterized questions of distribution as principally an *international* and not domestic problem.<sup>81</sup> That is to say, historically to raise questions of international distribution of wealth and power made one a radical.

Finally, by emphasizing that international trade law is primarily made up of treaties negotiated among states, that the WTO (created by international treaty) is the principal institution that makes up the world trade constitution, and that the WTO is generally a commendable result, Jackson shows some deference to states represented by trade diplomats and experts.<sup>82</sup> More

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<sup>77</sup> *Seven Mantras*, *supra* note 54, at 69.

<sup>78</sup> See THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 24; see also *Seven Mantras*, *supra* note 49, at 69.

<sup>79</sup> THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 24.

<sup>80</sup> *Id.* at 24–25.

<sup>81</sup> See JENS STEFFEK, EMBEDDED LIBERALISM AND ITS CRITICS: JUSTIFYING GLOBAL GOVERNANCE IN THE AMERICAN CENTURY 81–103 (2006).

<sup>82</sup> See THE WORLD TRADING SYSTEM, 2d ed., *supra* note 49, at 122.



specifically, with the emphasis on rules, the greatest trust is placed in the hands of trade lawyers. Thus, the state is thought to be politically necessary to construct the WTO. Yet, the state as represented by other social actors is not presented in as much as an agreeable light. The state as legislature and executive is necessary to ameliorate dislocation caused by international trade, but there is little confidence in the policy tools available to them. Moreover, according to this view, the state represented by the legislature and executive is not to be left to its own political devices and develop international economic policy.

### C. Economic Functionalism

#### 1. *The Constitutional Debate*

Perhaps the most rigorous and contested proponent of the constitutional approach to understanding the WTO has been Ernst-Ulrich Petersmann. He has written extensively in this area.<sup>83</sup> I will focus on some of his recent writings in which he shifts from referencing “rights” to “human rights.”<sup>84</sup>

Petersmann’s argument draws from concepts of human rights and international law, and can be summarized as such: there are universal and inalienable human rights reflected by the fact that general international law and a plethora of national constitutions, regional agreements, multilateral agreements, and intergovernmental declarations reaffirm these rights.<sup>85</sup> “Human rights” include liberty, non-discrimination, rule of law, social welfare, freedom of information, freedom of the press, property rights, and freedom of contract.<sup>86</sup> These human rights protecting individual autonomy and liberty constitute a “freedom of trade.”<sup>87</sup> The WTO embodies an international

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<sup>83</sup> See ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (Detlev Chr. Dicke ed., 1991); see also ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT (1997) [hereinafter DISPUTE SETTLEMENT SYSTEM]; see also INTERNATIONAL TRADE LAW AND GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann ed., 1997) [hereinafter INTERNATIONAL TRADE LAW].

<sup>84</sup> Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT’L L. 621 (2002) [hereinafter *Integrating Human Rights*]; Ernst-Ulrich Petersmann, *The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is It Relevant for WTO Law and Policy?* in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 357 (Ernst-Ulrich Petersmann ed., 2005) [hereinafter *The Human Rights Approach*]; Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism* [hereinafter *Multilevel Constitutionalism*], in MULTILEVEL TRADE, *supra* note 12, at 5.

<sup>85</sup> See *The Human Rights Approach*, *supra* note 84, at 357–360, 370.

<sup>86</sup> See *Integrating Human Rights*, *supra* note 84, at 622, 626; see also *The Human Rights Approach*, *supra* note 84, at 359.

<sup>87</sup> See *Multilevel Constitutionalism*, *supra* note 84, at 33, 45.

dedication to this freedom of trade.<sup>88</sup> Therefore, (drawing from the EU experience) to ensure the WTO's legitimacy it must be interpreted in the broader human rights context and be considered as a constitution (the "world trade constitution") amongst the other international and domestic constitutions (he calls this "multilevel constitutionalism").<sup>89</sup>

To summarize, Petersmann's primary concern is to protect individual liberty against the intrusive actions of the state. He considers the market to be the paramount sphere in which individual liberty is protected. As such, international trade in a global free market is the driving vehicle for global human rights. To Petersmann, the world trade constitution is therefore a human rights instrument that individuals should use to ensure the state is kept in check against invading individual liberty and autonomy. Petersmann is simultaneously arguing that the WTO should be constitutionalized in order to further the freedom of trade. Additionally, he argues that the WTO is already constitutionalizing and therefore must be interpreted within the context of human rights.<sup>90</sup>

The normative critique is that Petersmann prioritizes economic liberty and attempts to solidify its position via constitutional discourse.<sup>91</sup> The methodological critique of Petersmann is that he slips between a normative and descriptive argument and is vague in his terminology.<sup>92</sup> The human rights critique against Petersmann is that his understanding of human rights is a particular one yet it is presented as universal.<sup>93</sup> Petersmann draws his definition of human rights primarily from Adam Smith, Immanuel Kant, and Friedrich Hayek in a manner that assumes that these thinkers form a coherent theory of human rights, and that the theory is unquestionable, and any disagreement is inaccurate.<sup>94</sup> He has also been critiqued for buttressing his argument by the "fact" that international human rights, as reflected in the plethora of treaties, support his vision, and ignoring the high level of contestation (politically, diplomatically, and academically) within human rights discourse of the relationship between economic, social, civil and

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<sup>88</sup> This is implicit in Petersmann's arguments. *See, e.g., The Human Rights Approach*, *supra* note 84, at 374–76 (arguing that 1994 Agreement establishing the WTO provides that it is intended, amongst other things, to protect individual freedom, non-discrimination, and rule of law).

<sup>89</sup> *See Multilevel Constitutionalism*, *supra* note 84; *See also* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 512 (2000) (makes similar economic arguments as Petersmann but uncritically draws from US constitutional discourse).

<sup>90</sup> *Supra* notes 83–89.

<sup>91</sup> Howse & Nicolaidis, *supra* note 42 at 74–75; Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT'L. L. 651 (2002).

<sup>92</sup> Howse & Nicolaidis, *supra* note 42, at 74–75; CASS, *supra* note 40, at 162–67; Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann* 13 EUR. J. INT'L. L. 815, 818–20 (2002).

<sup>93</sup> *See* Alston, *supra* note 92, at 819.

<sup>94</sup> *Id.*

political rights thereby privileging economic liberty.<sup>95</sup> Additionally, Petersmann ignores one of the core debates in human rights discourse surrounding whether and how human rights are universal. He assumes that human rights are universal and normatively good.<sup>96</sup>

## 2. *Social, Political, and Economic Implications*

Petersmann considers the WTO as the embodiment of ideal values and therefore looks to further legitimize it through constitutional and human rights discourse. His priority is to enhance individual liberty and autonomy and considers the market the ideal mechanism to achieve this liberty. Petersmann considers the WTO as the institution structuring the global market and therefore wants to protect and further strengthen the WTO's power and prominence against governments captured by rent-seeking groups.<sup>97</sup> The WTO as a constitution will discipline and rule over governments.

Petersmann wants to empower the individual to overcome the government because he assumes government will necessarily infringe upon the individual's interest.<sup>98</sup> It is the trade policy elite, with specialized knowledge and dedication to a liberal trade regime, who will structure the WTO in ways to optimally affect international and domestic law.<sup>99</sup> An individual can, in turn, pressure her own government towards economic liberty by invoking the constitutionalized WTO through domestic courts.

Petersmann's framework outlines particular politics within the discourse of a rights-based constitutionalism that demands that domestic states and institutions transform in adherence to a set of ideals that Petersmann considers desirable and universal. The market is considered the paramount institution, not principally for economic reasons of efficiency and growth (like Jackson's argument), but rather because it is the sphere that best ensures personal autonomy and liberty.

The WTO constitution provides the main tool for individuals to use to agitate against the intrusiveness of the state. Thus, the trade policy elite and WTO adjudicators are acting as principal decision-makers in regards to matters concerning the individual's relationship to the state. If the WTO were to be the main site of decision-making, then this would shift decision-making and

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<sup>95</sup> *See id.* at 821–22.

<sup>96</sup> This debate in human rights that regularly reoccurs revolves around questioning whether there is, can be, or should be a universal human rights. Current human rights discourse has taken a turn towards the self-reflexive. *See, e.g.,* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201 (2001); *see generally* DAVID KENNEDY, *THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004); *see generally* BROOKE ACKERLY, *UNIVERSAL HUMAN RIGHTS IN A WORLD OF DIFFERENCE* (2007).

<sup>97</sup> *See Multilevel Constitutionalism, supra* note 84, at 44; INTERNATIONAL TRADE LAW, *supra* note 83, at 114–15.

<sup>98</sup> *See Multilevel Constitutionalism, supra* note 84, at 26.

<sup>99</sup> *See id.* at 35.

institutional power away from government towards the trade policy elite. As such, the main actors for social change in Petersmann's framework are the trade elite who structure the global market and individuals who ensure the national governments do not interfere with individual liberty. How a liberal trade regime affects economic growth and distribution has only a secondary role in Petersmann's framework since the liberalization of trade is an end goal in and of itself as a human rights value.

The assumed role of law and legal institutions is to limit government action through individual action. This economic functionalist approach therefore presupposes the state already has domestic legal institutions in place (courts, administrative tribunals, etc.) of which an individual can effectively use to reduce the regulatory role of the government. As a normative framework, this approach does not provide an answer as to how people with competing values may interact amongst each other.<sup>100</sup> Instead, it assumes that most individuals desire a state with a reduced regulatory role.

#### D. Conclusion

Jackson's conception of the WTO as a constitution, considers the market to be the normatively paramount social institution based on the premise that the market offers consumers an increased choice of products at better prices, thereby efficiently allocating resources. Petersmann's trade constitution prioritizes the market because it considers the market to be the sphere that best ensures personal autonomy and liberty. Jackson leaves it to domestic institutions to ameliorate the detrimental effects of free trade and yet has little confidence in the ability of domestic institutions in achieving this goal. Petersmann relies on domestic institutions as necessary to limit the role of government, and imagines domestic institutions buttressed by the WTO.

Despite certain differences, commonalities remain in these two constitutional concepts. Implicit in both is a framework that delineates an "economic sphere" that is separate from a "political sphere." The "economic sphere" is considered to be a place where actors, shaped by the market, achieve the best welfare (however defined) for society and consider the "political sphere," mainly to be found in the state, as a place best avoided or limited. Both approaches, and as such popular trade constitutional discourse, in effect, privilege the decision-making capacity of private actors and trade policy elite over national government actors.

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<sup>100</sup> See Cf. Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE L. 161, 181 (2001) (highlighting how Petersmann's constitutional theory does not provide a way to balance individual and collective policies).

### III. DISPUTE SETTLEMENT: NAVIGATING BETWEEN THE WTO AND THE STATE

#### A. Introduction

Quantitative studies that measure use and/or adherence to the dispute resolution system have become increasingly common.<sup>101</sup> These studies are often conducted in the context of addressing the following questions: “Why do countries take some of their complaints to GATT/WTO and prosecute others unilaterally, ‘out of court’? Why are some disputes settled with liberalization by the defendant, while the status quo prevails in others? And has greater legalization of the system made dispute settlement more efficacious?”<sup>102</sup>

Such quantitative studies, however, do not detail what sort of legal system the WTO creates. Thus, by leaving out a theory of WTO law, these studies are not clear as to what sort of law state actors are actually engaging or disengaging with, and the competing conceptions of efficacy that may be at play. A theory of WTO law would be helpful to better understand how and why state actors may or may not use the dispute resolution system.

One common assumption informing some of these quantitative studies is that the more countries participate and adhere to the dispute resolution system, the more the trading system becomes more legitimate.<sup>103</sup> Indeed, the dispute settlement system is a central concern in the broader WTO legitimacy discussions. Members of the WTO Appellate Body (AB) itself have considered the issue of legitimacy;<sup>104</sup> some suggest that concern with WTO legitimacy may influence how dispute-settlement decisions are made.<sup>105</sup>

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<sup>101</sup> See, e.g., Asif H. Qureshi, *Participation of the Developing Countries In The WTO Dispute Settlement System*, in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003*, 475 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004); Nohyoung Park, *Statistical Analysis of the WTO Dispute Settlement System (1995-2000)*, in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003*, 531 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004); Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in *POLITICAL ECONOMY*, *supra* note 1, at 457; William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 *J. INT’L ECON. L.* 17; Simon Lester & Kara Leitner, *WTO Disputes Settlement 1995-2009: A Statistical Analysis Annual Statistical Analysis, Surveys, and Indexes*, 13 *J. INT’L ECON. L.* 205 (2010).

<sup>102</sup> Busch & Reinhardt, *supra* note 101, at 457.

<sup>103</sup> See, e.g., Qureshi, *supra* note 101, at 495–498; Busch & Reinhardt, *supra* note 101, at 477–478; Davey, *supra* note 101, at 49–50. See also Debra P. Steger, *The Challenges to the Legitimacy of the WTO*, in *LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO 220* (Steve Charnovitz et al. eds., 2005).

<sup>104</sup> In reading the number of essays written by former AB members, WTO legal staff, and private counsel that appear before the WTO often published in law journals and scholarly books, there is an implicit purpose of needing to legitimate the dispute settlement system. See, e.g., Giorgio Sacerdoti, *Appeal and Judicial Review in International Arbitration and Adjudication: the Case of the WTO Appellate Review*, in *INTERNATIONAL TRADE LAW*, *supra* note 80, at 247; Claus-Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court”*: *Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003*, 499 (Federico Ortino &

The legitimacy of the WTO's dispute settlement system has primarily been measured against metrics of efficiency, efficacy, and legality. Examinations of efficiency and efficacy are often made together and take-up a considerable amount of legal scholarship. Efficiency is measured by the least wasteful use of time and resources. Jurists will argue to reform the WTO dispute settlement system in order to increase the ability to settle disputes in a cost and time efficient fashion.<sup>106</sup>

Efficacy is measured by whether states comply with WTO rules or whether the WTO liberalizes trade. Compliance arguments propose ways in which member states can be pushed to adhere to WTO rules and the dispute settlement results.<sup>107</sup> Trade-liberalization arguments suggest ways to use the dispute settlement mechanism to ensure that member states adopt appropriate economic policies.<sup>108</sup>

Legality is measured by determining whether the law produced by the dispute settlement bodies is coherent and cohesive. The WTO dispute settlement system is commonly understood to be a judicial entity despite formal monikers of "reports" and "appellate body" instead of decisions and courts.<sup>109</sup> As outlined below, the dispute settlement system and the AB, in particular, generate debates familiar to readers of legal scholarship, and especially to those who follow legitimacy debates concerning domestic courts.<sup>110</sup> In this light, the Dispute Settlement Body is considered to be attempting to generate different legal doctrines to give itself, and therefore the WTO, increased legitimacy.<sup>111</sup>

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Ernst-Ulrich Petersmann eds., 2004); LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO (Steve Charnovitz et al. eds., 2005); KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS (Rufus Yerxa and Bruce Wilson eds., 2005); THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES (Merit E. Janow et al. eds., 2008).

<sup>105</sup> See, e.g., *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test* (1998), in ROBERT E. HUDEC, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 359, 375–76 (1999).

<sup>106</sup> See, e.g., William J. Davey, *A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?*, in POLITICAL ECONOMY *supra* note 1 at 496; Marc L. Busch & Krzysztof J. Pelc, *Does the WTO Need a Permanent Body of Panelists?*, 12 J. INT'L ECON. L. 579 (2009).

<sup>107</sup> See, e.g., Brendan P. McGivern, *Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives*, 36 INT'L LAW. 141 (2002); Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order*, 17 EUR. J. INT'L L. 969, 976–77 (2006).

<sup>108</sup> See, e.g., DISPUTE SETTLEMENT SYSTEM, *supra* note 83, at 36–37.

<sup>109</sup> See Christiane Gerstetter, *The Appellate Body's 'Response' to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation*, in MULTILEVEL TRADE, *supra* note 12, at 111.

<sup>110</sup> See, e.g., Sidney W. Richards, *Survey Article: The Legitimacy of Supreme Courts in the Context of Globalization*, 4 UTRECHT L. REV. 104 (2008).

<sup>111</sup> For an argument that the WTO is creating and should further develop legal principles to resolve disputes, see generally ANDREW D. MITCHELL, *LEGAL PRINCIPLES IN WTO DISPUTES* (James Crawford et al. eds., 2008).

The different methods of examining WTO dispute settlement legality include theories of domestic public law litigation using the language of administrative law;<sup>112</sup> arguing for internal coherence of WTO legal doctrine;<sup>113</sup> and, arguing for external coherence or sensitivity to broader public international law norms.<sup>114</sup> To trade jurists, a principal concern is WTO adjudicators' relationship to the WTO text and member states.<sup>115</sup> General issues include the role of the AB with regards to: balancing competing rights and norms,<sup>116</sup> approaches to textual interpretation,<sup>117</sup> generating procedural

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<sup>112</sup> See, e.g., Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in *THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* 42–43 (J.H.H. Weiler ed., 2001) (makes references to “democratic theory”, and “natural justice” as understood in liberal democracies as concepts to measure the adjudicative actions of the WTO); Frieder Roessler, *Are the Judicial Organs of the World Trade Organization Overburdened?*, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 308 (Roger Porter et al. eds., 2001) (considering the structure of the WTO to be composed of executive, judicial, and legislative organs and is concerned that the legislative organ cannot effectively keep the judicial restrained as in domestic democracies) [hereinafter *EFFICIENCY*]; Steve Charnovitz, *Judicial Independence in the World Trade Organization*, in *INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS* 219 (Laurence Boisson de Chazournes, et al. eds., 2002) (examines judicial independence and pressures upon it within a framework of “separation of powers”); Donald McRae, *What is the Future of WTO Dispute Settlement?*, 7 *J. INT’L ECON. L.* 3, 8–10 (2004) (considers the dispute settlement system to be a hybrid of common law and civil law, and focuses on its common law characteristics); Sungjoon Cho, *Of the World Trade Court’s Burden*, 20 *EUR. J. INT’L L.* 675 (2009); Daniel C. Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, 10 *J. INT’L ECON. L.* 509 (2007).

<sup>113</sup> See Howse, *supra* note 112, at 51–61; Gabrielle Marceau, *Balance and Coherence by the WTO Appellate Body: Who Could Do Better*, in *THE WTO AT TEN: THE CONTRIBUTIONS OF THE DISPUTE SETTLEMENT SYSTEM* 326 (Giorgio Sacredoti, Alan Yanovich & Jan Bohanes eds., 2006).

<sup>114</sup> See, e.g., Lamy, *supra* note 107, at 976–77; Howse, *supra* note 102, at 61–68; Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 *EUR. J. INT’L L.* 753 (2002); JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 440–486 (James Crawford et al. eds., 2003); Peter Van Den Bossche, *The Making of the “World Trade Court”: The Origins and Development of the Appellate Body of the World Trade Organization*, in *THE WTO AT TEN: CONTRIBUTIONS OF THE DISPUTE SETTLEMENT SYSTEM* 72–73 (Giorgio Sacredoti & Alan Yanovitch eds., 2006).

<sup>115</sup> For an exemplary collection of essays on different approaches to this, see generally *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO* (Thomas Cottier & Petros C. Mavroidis eds., 2003).

<sup>116</sup> See, e.g., Howse, *supra* note 112 at 39 (the WTO is involved in adjudicating competing values much like in domestic courts); Van Den Bossche, *supra* note 114, at 77–79 (the AB to date has been successful in balancing free trade and other societal values ensuring fairness and effectiveness of WTO dispute settlement system); Christiane Gerstetter, *The Appellate Body’s ‘Response’ to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation*, in *MULTILEVEL TRADE*, *supra* note 12, at 111 (the AB seems to be explicitly using balancing between rights and norms but is doing so in style that gives the sense that the AB finds these rights/norms in the agreements and is merely involved in textual interpretation); James McCall Smith, *WTO Dispute Settlement: the Politics of Procedure in Appellate Body Rulings*, 2 *WORLD TRADE REV.* 65 (2003) (the AB has responded to the need

norms,<sup>118</sup> and generating law.<sup>119</sup> The role of legal doctrine to increase the WTO's legitimacy involves examinations of how the AB is attempting different legal doctrines to give itself, and therefore the WTO, increased legitimacy in light of the tension between legal consistency and member state adherence. Discussions focus on procedure, rule of law, and how explicitly normative decisions should be.<sup>120</sup>

## B. Tension Between the State and WTO

Underlying all three measures of legitimacy is a concern with trying to resolve disputes in a manner that is legally consistent and coherent while maintaining the cooperation of participating countries.<sup>121</sup> This tension has been characterized as one between the law of the WTO (the need to resolve disputes in a coherent and cogent manner) and the politics of state negotiation and

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to balance coherence and compliance; and enacted procedural reforms that encourage consensus rulings, improve its access to information, and expand its judicial discretion); Piet Eeckhout, *The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch*, 13 J. INT'L ECON. L. 3 (2010).

<sup>117</sup> See, e.g., Gerstetter, *supra* note 109; Dongsheng Zang, *Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate*, 33 SYRACUSE J. INT'L L. & COM. 393 (2006) (arguing that the AB relies on textualist and “ordinary meaning” interpretation which hides substantive or strategic policy issues and choices); Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US - Gambling: A Critique*, 9 J. INT'L ECON. L. 117 (2006) (arguing for a more holistic approach).

<sup>118</sup> See, e.g., Sol Picciotto, *The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance*, 18 GOVERNANCE 477 (2005); Alberto Alvarez-Jiménez, *The WTO Appellate Body's Exercise of Judicial Economy*, 12 J. INT'L ECON. L. 393 (2009).

<sup>119</sup> See, e.g., Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873 (2001) (arguing that the Appellate Body is not just acting like a court but like an American court with a doctrine of *stare decisis* which is rarely admitted in our thinking about the Appellate Body); John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT'L ECON. L. 113 (2003) (arguing that the AB has exceeded its interpretive function and is generating law).

<sup>120</sup> See, e.g., J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 204 (2001) (“[t]he legitimacy of courts which is meant to transcend specific results and to enjoy long endurance will depend on both the integrity of process but, in addition and uniquely, on the quality both substantive and communicative of its reasoning”). *But see* Jeffrey L. Dunoff, *The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution*, 13 AM. REV. INT'L ARB. 197, 206 (2002) (“I wonder whether panels should be less like courts—or at least the idealized version of courts that law professors frequently invoke—and employ a bit more political savvy . . .”).

<sup>121</sup> See John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, 1 J. INT'L ECON. L. 329, 345 (1998); Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999); Debra P. Steger, *The Appellate Body and its Contribution to WTO Dispute Settlement*, in POLITICAL ECONOMY, *supra* note 1, at 482; Rufus Yerxa, *The Power of the WTO Dispute Settlement System*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 3 (Rufus Yerxa & Bruce Wilson eds., 2005).



institutional adherence (the need for states to want to participate within and adhere to the WTO).<sup>122</sup> Some suggest this tension is acute enough to contribute to the WTO's legitimacy crisis.<sup>123</sup>

Some argue that if the panels and AB do not take into account the political ramifications of their decisions, states will ignore or discount the dispute settlement rulings, which would weaken the WTO's legitimacy.<sup>124</sup> Others argue that a rigorous legal analysis is more important because it establishes legitimacy by ensuring that the coherent structure of the WTO is maintained.<sup>125</sup>

Indeed, some suggest that the relationship between international institutions and their member states is the central tension for all international institutions that has been theoretically unresolved for decades.<sup>126</sup> Rather than attempting to find the hypothetical golden mean between law and politics, a more informative way to appreciate arguments regarding the function and purpose of the dispute settlement system, the role of adjudicators, and method of interpretation would be to reconstrue the dispute settlement debate as a disagreement over the relationship between the WTO and the state.

What distinguishes institutional and economic functionalist arguments are the different ways in which the legitimacy metrics—efficiency, trade-liberalization efficacy, compliance efficacy, and legality—are configured and used to overcome the perceived tension between law and politics. Institutional functionalist arguments emphasize the legality and institutional structure of the WTO by looking to theories of legitimacy that encourage the dispute settlement system to produce coherent legal doctrine alongside the need to ensure that states comply with WTO rules (efficiency, compliance efficacy, and legality). Economic functionalist arguments emphasize the economic benefits of the WTO and often use notions of legitimacy that focus on the ability of the dispute settlement system to discipline states to liberalize trade (efficiency, compliance efficacy, and trade-liberalization efficacy).

Institutional functionalists will either call for more political considerations to inform dispute resolution or argue for the WTO adjudicator to find the balance between legal consistency and member state adherence. Accordingly, the role of the judge is central to the institution-building of the WTO since her job is assumed to concern navigating the law in a legally coherent and cogent way, ensuring state compliance and not just to “apply the law.” Since states' needs are a mix of the economic, social, political, etc., the

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<sup>122</sup> Claus-Dieter Ehlermann, *Tensions Between The Dispute Settlement Process And The Diplomatic and Treaty-Making Activities of the WTO*, 1 WORLD TRADE REV. 301 (2002).

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., Robert E. Hudec, *International Economic Law: The Political Theater Dimension*, 17 U. PA. J. INT'L ECON. L. 9 (1996); McRae, *supra* note 112 at 18–20; William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority: A Consideration of Deference Shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques*, 4 J. INT'L ECON. L. 79 (2001).

<sup>125</sup> See, e.g., Lamy, *supra* note 107; Marceau, *supra* note 113.

<sup>126</sup> Klabbers, *supra* note 20, at 1–13.

judge is to find the right balance between all of these needs, but within the confines of the WTO framework. Under this approach, dispute settlement in trade law is argued to be more effective where more countries participate and comply.<sup>594</sup> All this stems from an assumption that the WTO's role is to help manage the relationship between states on trade-related matters. Regardless of whether the argument is more for politics or for balancing, this characterization of the WTO considers the role of the judge as a primary vehicle to mediate between law and politics through interpretation.

Economic functionalists assume that the purpose of the WTO is to discipline governments to adhere to free trade principles. In this characterization of the WTO, governments know that in “tying their hands to the mast” (like Ulysses when he approached the island of the Sirens), reciprocal international pre-commitments [like the WTO] help them to resist the siren-like temptations from ‘rent-seeking’ interest groups at home.”<sup>595</sup> The WTO embodies a conception of a particular trade theory and its legitimacy is derived from the inherent benefits articulated by this theory. The judge derives her legal doctrine from this normative economic theory; her role is to sharpen the doctrine towards achieving the benefits from this theory. Though country participation in the dispute system and the WTO is necessary, ultimate efficacy is measured in terms of how well the WTO acts to discipline governments towards liberal trade policies.

The institutional functionalist emphasizes the role of the adjudicator as mediator and primarily determines legitimacy by measuring state participation. The economic functionalist emphasizes the role of the adjudicator as the implementer of WTO rules and determines legitimacy by measuring trade liberalization. This means that the economic functionalist places the WTO rules and institution as paramount over the state, whereas the institutional functionalist considers the WTO rules and state interest as something to be balanced.

Institutional Functionalist	Economic Functionalist
WTO Law → ← Dispute Settlement Body → ← State	WTO Law ↓ Dispute Settlement Body ↓ State

Figure 4.1: Different Conceptions Regarding the Role of Law and Adjudication in WTO Disputes

The different normative frameworks can be further discerned from the different theories of law. The institutional functionalist's core concern, regardless of whether the argument is to ensure state adherence or legal

<sup>594</sup> See, e.g., Steger, *The Challenges to the Legitimacy of the WTO*, *supra* note 103, at 202.

<sup>595</sup> DISPUTE SETTLEMENT SYSTEM, *supra* note 83, at 36–37.

coherence, is to preserve the WTO's institutional structure. The main focus is on the role of the adjudicators' ability to "balance" between the WTO trade rules (law) and the states' intents (politics). Or to put it another way, institutional functionalists assume law influences the behavior of state actors. To them, the debate revolves around how central a role trade law should play. When institutional functionalists think that the dispute settlement system is too isolated from politics or that adjudicators are too legalistic they will argue that the system should be better informed of the political implications leading up to the dispute and ensuing results. When institutional functionalists are worried that the politics of the day may make the WTO unworkable or that adjudicators are too out-come oriented, arguments for balancing political needs and legal coherence are made to ensure the WTO's institutional integrity.

According to economic functionalists, states created the WTO and comply with WTO law because of the expected welfare gains. States need the pressure of the dispute settlement system to overcome domestic obstacles blocking liberal trade policies. WTO adjudicators must thereby draw from a specialized knowledge of economics and use law as an instrument to implement the appropriate normative theory. To economic functionalists, the perceived tension between WTO law and state politics is resolved by the expected welfare gains of liberal trade theory. Because economic functionalism inherently mistrusts the state's capacity to determine and implement appropriate economic policy, it grants policy-making power to an elite group of decision-makers acting in an adjudicative capacity.

### C. Conclusion

Even though debates regarding the WTO dispute settlement system have often been framed as determining the appropriate relationship between law and politics, it is not entirely clear that we can do away with the tension between law and politics.<sup>129</sup> Instead of trying to avoid or encourage politics, it may be more helpful to outline how various conceptions of the WTO dispute resolution system entail different notions as to who makes political decisions and how they make them. Of course, how both institutional and economic functionalisms configure the relationship between law and politics is determined by their respective theories of law and definitions of politics. They are also structured by different assumptions regarding the relationship between the WTO and the state.

We see that institutional functionalism is a way to debate whether trade law should play a role in international economic life. It is informed by a political theory that imagines the WTO as an institution that should be in balance with state politics—politics is understood to be the negotiation of interests between different states. Institutional functionalism is defined by a perpetual negotiation between WTO law and inter-state politics, and debates

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<sup>129</sup> Martti Koskeniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L L. 7 (2009).

trying to find to find the right balance between the two. An institutional functionalism that argues for a more legalized system in effect privileges the WTO as a site of global politics. Whereas an institutional functionalism that wants to ensure that politics plays a role in how disputes are resolved is also reasoning that the state will always be a viable place for global politics. What holds institutional functionalism together in all its variances is a legal theory that assumes that international trade law has the power to influence politics between states in some way (for better or for worse). Economic functionalism assumes that trade law should be central in international economic life. It is suspicious of states' political capacity—politics is understood to be about ensuring welfare gains. As such, economic functionalism provides WTO adjudicators more power to make legal and economic decisions that affect state policy. It is undergirded by a legal theory that imagines international trade law as a system of rules that, when implemented correctly, rationally achieves specific welfare goals.

#### IV. PARTICIPATION AND TRANSPARENCY: RESPONDING TO THE PERVERSIVE EFFECTS OF THE WTO<sup>130</sup>

##### A. Introduction

The question regarding non-state actors' relationship with the WTO has been a perennial concern of WTO legitimacy debates.<sup>131</sup> The query is whether non-state actors should participate in WTO policy formation or dispute resolution.<sup>132</sup> I use the term "non-state actors" because commentators use different expressions and reference different social actors such as individuals, corporations, non-governmental organizations (NGOs), civil society, or social movements. When examining public participation, it is also common to discuss how the WTO could be more transparent.<sup>133</sup> More recently, participation and transparency has become a principal concern of WTO jurisprudence.<sup>134</sup>

These participation and transparency debates, like the dispute-settlement debate, can be understood to be about the relationship between the

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<sup>130</sup> The literature in this area is extensive. For a recent symposium on the topic see 11:4 J. INT'L ECON. L. (2008).

<sup>131</sup> Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues*, 11 J. INT'L ECON. L. 751, 760–64 (2008).

<sup>132</sup> See, e.g., Jens Steffek & Claudia Kissling, *Why Co-operate? Civil Society Participation at the WTO*, in MULTILATERAL TRADE, *supra* note 12, at 149–53; Yuka Fukunaga, *Civil Society and the Legitimacy of the WTO Dispute Settlement System*, 34 BROOK. J. INT'L L. 85 (2008). There is, however, some call to acknowledge that non-state actors have always played an important and complex role in relation to the WTO; see Seema Sapra, *The WTO System of Trade Governance: the Stale NGO Debate and the Appropriate Role for Non-state Actors*, 11 OR. REV. INT'L L. 71 (2009).

<sup>133</sup> Debra P. Steger, *Introduction to the Mini-Symposium on Transparency in the WTO*, 11 J. INT'L ECON. L. 705, 709 (2008).

<sup>134</sup> Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. INT'L ECON. L. 779, 780 (2008).

WTO and the state. Within the context of the dispute settlement system, it is a matter of argument as to the hierarchy between the WTO and the state. In the context of participation and transparency discussions; however, the starting assumption is that the WTO in fact dominates the state's policy-making capacity. The question is thereby framed as whether to encourage or ameliorate the effects of this supposed fact.

In this section, I first summarize how the terms of participation and transparency debate—when understood as a legitimacy debate—can be broadly divided into two groups. *State-centric* arguments of global governance focus on the legitimacy and capacity of the state to decide matters that have global effect. These arguments include different normative positions and may be committed to or are skeptical of the state as a site of global governance. *Institutional-centric* arguments of global governance focus on the legitimacy and capacity of the WTO to decide matters that have global effect; these also include different normative positions in regards to the WTO as a site of global governance. I then show that state-centric arguments correlate with an economic functionalist conception of the WTO and institutional-centric arguments correlate with an institutional functionalist conception.

However, framing the debate as a question of the WTO's legitimacy and simply identifying which argument for participation and transparency correlates to which conception of the WTO does not explain *why* a certain argument is made. Determining whether someone is in favor or against more participation and transparency tells us very little about the different reasons why someone may promote participation and transparency as a good thing. Thus, I identify the broader implications of participation and transparency arguments. I do this by noting how from 1994 to roughly after 1999 the terms of the debate changed. In examining this change, I discover that there is no necessary correlation between an argument regarding participation and transparency and a particular normative framework. A call for increased non-state actor participation and more WTO transparency may be hostile, ambivalent, or supportive of the state. Reluctance towards promoting non-state actor participation within the WTO may actually stem from a desire to maintain and increase the WTO's legitimacy. Moreover, arguments in support of more participation and transparency can be putting forward very different conceptions of the WTO's function and purpose.

## **B. Legitimacy Debate**

### *1. Pre-1999*

From the advent of the WTO, commentators debated the relationship between non-state actors and the WTO. Most discussions regarding participation before 1999 did not consider the participation of non-state actors as potentially radical interventions questioning the legitimacy of the WTO. Rather, the starting premise was usually that the WTO was unquestionably a

good thing, leaving the debate regarding non-state actor participation to be about whether their inclusion would undermine the function and purpose of the WTO.

The central question was: where should decisions that have global effect, matters of “global governance,” be decided? Scholars were generally divided between those that were more state-centric and primarily concerned with strengthening the role of the state, wanting to leave all discussions of governance to domestic forums,<sup>135</sup> versus those that were institutional-centric, confident in the legal personality, integrity, and robustness of the WTO to deal with global issues.<sup>136</sup>

State-centric arguments characterized institutional-centric arguments as undermining state sovereignty and WTO functionality. The primary reasons for excluding non-state actors from the workings of the WTO were:

- 1) Opening up the WTO will distort the decision-making process and may lead to special interest capture. The purpose of achieving free trade will be undermined;
- 2) Non-state actors are not representative or electorally accountable. The appropriate democratic forum for these actors is their respective domestic government;
- 3) Northern non-state actors and issues will dominate Southern non-state actors and issues; and
- 4) The WTO would be undermined due to the “cacophony of voices” muddling discussions between governments. Moreover, the WTO cannot fairly determine which non-state actors should be in and which should be out.<sup>137</sup>

Here the assumed function and purpose of the WTO was to ensure that international trade remained free according to economic theory—an economic functionalist understanding of the WTO.

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<sup>135</sup> See, e.g., Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT’L ECON. L. 295 (1996).

<sup>136</sup> See, e.g., Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT. ECON. LAW 123 (1998); Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Participants*, 17 U. PA. J. INT’L ECON. L. 359 (1996); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT’L ECON. L. 331 (1996). But see Jeffrey L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 J. INT’L ECON. L. 433 (1998) (Dunoff is sympathetic to inclusion of NGOs, but takes a step back to examine the debate of the time. He argues that the debate is misguided for NGOs, primarily business entities, who already play a dominant role in the WTO dispute settlement process).

<sup>137</sup> Nichols, *supra* note 135.

Institutional-centric arguments characterized a state-centric approach as “anachronistic” in light of the interdependency of issues that can only be addressed on a global scale via international institutions.<sup>138</sup> The institutional-centric scholars’ confidence in the WTO stemmed from beliefs that the WTO was necessary because global questions required global, multilateral solutions. The WTO was also considered to be able to make domestic governments more democratic, and able to effectively address global issues.<sup>139</sup> This position, with its emphasis on making the WTO more cohesive and coherent, stemmed from an institutional functionalist understanding of the WTO.

## 2. *Post-1999*

After 1999, the ideas and interests underlying the debate shifted and the arguments expanded to suggest that the WTO needed to be more transparent in order to allow for the participation of non-state actors. In fact, the issue of transparency was often linked with participation without any sharp distinctions between the two concepts.<sup>140</sup>

To be sure, the types of transparency prescribed differ. They included: *external transparency* (how well do citizens and civil society have access to seeing how the WTO functions); *internal transparency* (are smaller and developing countries able to participate in the WTO and have access to negotiations and information); and *regulatory transparency* (how well does the WTO ensure that national governments incorporate mechanisms of transparency as a central feature of domestic legal systems).<sup>141</sup>

At this point in time, scholars were no longer responding so much to state-centric critiques against non-state actor participation.<sup>142</sup> They were, instead, primarily reacting against the notion that in the days of the GATT, the trade regime operated like a club of a small number of like-minded relatively rich countries who negotiated in seclusion and made all the global trading rules.<sup>143</sup> There was a general consensus that the “club model” was inherently illegitimate for its secrecy and elitism.<sup>144</sup> Propositions therefore centered on doing away with the club model through mechanisms of transparency and participation, which were expected to further legitimize the WTO.<sup>145</sup>

After 1999, even with some consensus that participation and transparency would increase the WTO’s legitimacy, there remained a

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<sup>138</sup> See *supra* note 136.

<sup>139</sup> *Id.*

<sup>140</sup> See Steger, *supra* note 133, at 709.

<sup>141</sup> I borrow these terms from Robert Wolfe, *Regulatory Transparency, Developing Countries and the WTO*, 2 *World Trade Rev.* 157, 158 (2003).

<sup>142</sup> Of course, after 1999, arguments sometimes still included responses to state-centric critiques against non-state actor participation.

<sup>143</sup> Robert O. Keohane & Joseph S. Nye Jr., *The Club Model of Multilateral Cooperation*, in *EFFICIENCY*, *supra* note 112, at 264.

<sup>144</sup> Brian Hocking, *Changing the Terms of Trade: From the ‘Club’ to the ‘Multistakeholder’ Model*, 3 *WORLD TRADE REV.* 3 (2004).

<sup>145</sup> *Id.*

disagreement as to what this actually meant. Some scholars envisioned non-state actors substantively altering the WTO.<sup>146</sup> Arguments for inclusion of non-state actors, however, did not necessarily imply a desire to allow non-state actors to have any transformative or substantive influence on the function and purpose of the WTO.<sup>147</sup> Some scholars suggested that their role was to educate the public about the benefits of free trade.<sup>148</sup> Others imagined the role of non-state actors to remain within the confines of the state and suggested that their principal purpose was to pressure governments for increased WTO transparency.<sup>149</sup>

Much like before 1999, this partly stemmed from different conceptions of the WTO. State-centric arguments that drew from an economic functionalist conception of the WTO were still distinguishable from institutional-centric arguments that drew from an institutional functionalist conception.

The state-centric view argued for non-state actors to get involved in order to discipline state action. The state was the object of concern because it was assumed to play a detrimental role in economic life. This view considered the WTO to be inherently good since it imagined it to be the embodiment of free trade theory. The need to make the WTO more legitimate was then a matter of effectively reflecting the principles of trade theory.

According to this view, the principal role of non-state actors was to educate those who misunderstood the benefits of free trade,<sup>150</sup> assist nations with technical know-how in order to fully benefit from the trade regime, or pressure domestic governments to adhere to the WTO.<sup>151</sup> There was an inherent trust in the “enlightened” non-state actor who understood, like the WTO technocracy, and unlike many government actors, the benefits of liberalized trade.<sup>152</sup> Thus, non-state actors were expected to contribute to the ideational and political foundation necessary to ensure that the WTO is able to direct governments to follow the precepts of free trade theory. As such, arguments for transparency were either for external transparency so that the non-state actors had access to the WTO in order to pressure the state or regulatory transparency so that it was clear how domestic legal systems incorporated WTO law.

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<sup>146</sup> See, e.g., James Thuo Gathii, *Process and Substance in WTO Reform*, 56 RUTGERS L. REV. 885 (2004).

<sup>147</sup> Cf. Jeffrey L. Dunoff, *Civil Society at the WTO: The Illusion of Inclusion?*, 7 ILSA J. INT’L & COMP. L. 275 (2001).

<sup>148</sup> See, e.g., Cho, *The Demise of Development in the Doha Round Negotiations*, *supra* note 16.

<sup>149</sup> See, e.g., Sylvia Ostry, *WTO: Institutional Design For Better Governance*, in EFFICIENCY, *supra* note 102, at 361; SYLVIA OSTRY, *THE WORLD TRADE ORGANIZATION: NGOS, NEW BARGAINING COALITIONS, AND A SYSTEM UNDER STRESS* (2006) [hereinafter *NEW BARGAINING COALITIONS*].

<sup>150</sup> See, e.g., *Legitimacy Crisis*, *supra* note 3, at 9–12; Cho, *A Quest for WTO’s Legitimacy*, *supra* note 28, at 394–98.

<sup>151</sup> See, e.g., EFFICIENCY, *supra* note 112, at 370–73.

<sup>152</sup> Cho, *A Quest for WTO’s Legitimacy*, *supra* note 28, at 396; *NEW BARGAINING COALITIONS*, *supra* note 149, at 21; Esty, *supra* note 3.



The institutional-centric view argued for non-state actors to get involved in order to influence and change the WTO.<sup>153</sup> Some scholars argued for increased transparency and non-state actor participation in order to increase the consideration of social issues and developing countries.<sup>154</sup> Others wanted to make the WTO more democratically accountable and increase the exchange of ideas.<sup>155</sup>

The WTO's legitimacy was thought to increase when it responded in process and substance to the concerns of non-state actors. Individual and collective action was considered to be prominent mechanisms for policy and institutional reform; the state was thought to be still necessary in some capacity to daily life alongside, if not deferential to, the WTO. As such, arguments for transparency were either for external transparency so that the non-state actors had access to the WTO in order to have in-roads to influence the WTO or internal transparency so that weaker and developing countries had some influence upon WTO law and policy.

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<sup>153</sup> See, e.g., Steve Charnovitz, *WTO Cosmopolitics*, 299 N.Y.U. J. INT'L L. & POL. 299, 323 (2002); Peter Van den Bosche, *NGO Involvement in the WTO: A Comparative Perspective*, 11 J. INT'L ECON. L. 717 (2008).

<sup>154</sup> See Gathii, *supra* note 146, at 889–907; James Gathii, *The High Stakes of WTO Reform*, 104 MICH. L. REV. 1361 (2006); Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and Around the International Trade Regime*, 14 EUR. J. INT'L L. 35, 73–80 (2003); Chimni, *The World Trade Organization, Democracy and Development: A View from the South*, *supra* note 17.

<sup>155</sup> Robert Howse, *How to Begin to Think About the 'Democratic Deficit' at the WTO*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER 79 (Stefan Griller ed., 2003); Robert Howse, *For A Citizen's Task Force on the Future of the World Trade Organization*, 56 RUTGERS L. REV. 877 (2004); Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167 (2001); Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927, 943, 948–53, 958 (2004); Julio A. Lacarte, *Transparency, Public Debate, and Participation by NGOs in the WTO: a WTO Perspective*, in REFORMING THE WORLD TRADE SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 447, 448, 450–51 (Ernst-Ulrich Petersmann ed., 2005); Christophe Belleman & Richard Gerster, *Accountability in the World Trade Organization*, 30J. WORLD TRADE 32, 50–55 (1996).

### C. Shift From Desire to Apprehension

Table 5.1 summarizes the pre- and post-1999 arguments regarding non-state actor participation and WTO transparency.

<b>Pre-1999</b>	<b>Post-1999</b>
<p><u>State-Centric Arguments</u></p> <ul style="list-style-type: none"> <li>- Concerned with making the state a more capable and legitimate site of global governance</li> <li>- Economic functionalist conception of WTO</li> <li>- Non-state actors' role is to be limited to the state and not disrupt the WTO's functioning</li> </ul>	<p><u>State-Centric Arguments</u></p> <ul style="list-style-type: none"> <li>- Concerned with the state's inherent incapacity as a site of global governance via international trade policy</li> <li>- Economic functionalist conception of WTO</li> <li>- Focus on external or regulatory transparency</li> <li>- Reason for transparency and non-state actor participation is to work in tandem with the WTO to ensure the state is disciplined towards the "correct" economic theory</li> </ul>
<p><u>Institutional-Centric Arguments</u></p> <ul style="list-style-type: none"> <li>- Concerned with making the WTO a more capable and legitimate site of global governance</li> <li>- Institutional functionalist conception of the WTO</li> <li>- Non-state actors' role is to be involved within WTO to affect matters of global governance</li> </ul>	<p><u>Institutional-Centric Arguments</u></p> <ul style="list-style-type: none"> <li>- Concerned with the detrimental effects of WTO as a site of global governance</li> <li>- Institutional functionalist conception of the WTO</li> <li>- Focus on external or internal transparency</li> <li>- Reason for transparency and non-state actor participation is to work against or ameliorate the WTO's detrimental effects</li> </ul>

*Table 5.1: Summary of participation and transparency arguments*

What remained consistent before and after 1999 is that arguments, centered on the state's governance capacity, derive from an economic functionalist conception of the WTO's function and purpose, and arguments centered on the WTO's governance capacity derive from an institutional functionalist conception. What changed over time, however, were the political and social implications of the state-centric/economic functionalist conception and institutional-centric/institutional functionalist conception.

The first shift was in why commentators focus on the state. Before 1999, the concern stemmed from a desire to make the state a strong site of global governance. A pre-1999 state-centric argument placed non-state actors primarily in the domestic forum assuming that they can best support the WTO by not interfering with its operation. After 1999, the state-centric concern was built upon the assumption that the state is inherently a weak site of global governance. Post-1999, non-state actors were called upon to support the WTO, whether domestically or internationally, in disciplining the state. Regardless of the shifts in state-centric arguments, what remained consistent was the assumed purpose regarding non-state actors—that they were to encourage the liberalization of trade. What differed were arguments as to where and how to achieve this goal.

Similarly, there was also a shift in why commentators focused on the WTO. The concern begins as a desire to make the WTO a strong institution of global governance. After 1999, the concern with the WTO becomes a response to the assumption that the WTO can at times be detrimental to some people's daily lives. The consistent dynamic underlying the shift is supposing that the WTO is an institution that has global effect and that non-state actors must therefore get involved to engage with this institution. What differs is whether the outlook towards the WTO's effects is optimistic or pessimistic. Before 1999 there is an ambiguity regarding the role of the state in global governance—the call for a more legitimate WTO can incorporate either support for or skepticism towards the state. After 1999, the assumption is that the state should and does influence everyday life, and in light of the effects of WTO upon the state, we must reconsider how the state matters.

An even more subtle dynamic can be discerned if we look more closely at Table 5.1. There is an ironic turn from pre- to post-1999 arguments revealing that the assumed function of non-state actors does not necessarily stem from the same theory of the WTO. A call for increased non-state actor participation and WTO transparency can stem from any of the following:

- 1) An institutional functionalist conception celebrating the WTO as a site of global governance and that is ambivalent about the role of the state (pre-1999 institutional-centric);
- 2) An institutional functionalist conception that is cautious of the WTO as a site of global governance and that is concerned about the

- state's diminishing role in global governance (post-1999 institutional-centric); or
- 3) An economic functionalist conception of the WTO that is skeptical of the state's role in matters of global governance (post-1999 state-centric).

Also, the assumption that non-state actor participation will transform the WTO can stem from either:

- 1) An institutional functionalist conception that is worried about some of the WTO's effects, thereby supporting non-state actor participation (post-1999 institutional centric); or
- 2) An economic functionalist conception of the WTO that is confident in its economic benefits and wary that non-state actor participation may derail the WTO from its intended purpose (pre-1999 state-centric).

#### **D. Conclusion**

Buchanan warns us that simply agitating to improve the WTO does not necessarily affect current global systems of inequality because the relationship between “transparency, legitimacy, and accountability of multilateral institutions and the structure of the global economy” is not obvious.<sup>156</sup> What should now be clearer is how arguments in favor of increased participation and transparency have a variety of normative implications, each informed by its own particular assumption of how the world economy is governed by the WTO. Rather than asking how the WTO should be more transparent or whether reforms are necessary to allow for increased participation, we may instead frame these discussions within broader, substantive questions of determining the WTO's actual role in global governance and debating whether it should play any role at all.

#### **CONCLUSION**

The unfortunate effect of the contestations and justifications of the WTO's legitimacy has been the obscuring of normative assumptions regarding conceptions of the WTO's function and purpose. One suspects that the more the discourse continues in this tug-of-war of legitimacy, the more entangled our understanding of the WTO will be. Rather than debate how to improve the WTO's legitimacy based on predicated conceptions of the WTO, this article

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<sup>156</sup> Ruth Buchanan, *Perpetual Peace or Perpetual Process: Global Civil Society and Cosmopolitan Legality at the World Trade Organization*, 16 LEIDEN J. INT'L L. 673, 675 (2003).

has reconstrued the question and asked what is at stake when debating different aspects of the WTO.

Constitutionalization is about subordinating the state; differences arise as to whether the WTO or the market should preside over the state's policy-making ability. Dispute settlement debates are a way of configuring a hierarchical relationship between WTO law and state politics. In the context of participation and transparency discussions; however, the starting assumption is that the WTO in fact dictates state law and policy, and the main concern is determining how to respond to the state's weakening role in matters of global governance.

Constitutional discourse privileges the trade policy elite and dispute settlement debates privilege the WTO adjudicator. Participation and transparency debates; however, do not provide a clear principal social actor; instead, the working assumption is that social actors interact, negotiate and resist (for better or for worse) within and in relation to the WTO.

If jurists remain within the discourse of legitimacy, their main role will be to design the scaffolding of institutional reform built upon a foundation of preconceptions regarding the WTO's mandate. This would leave social, political, and economic questions outside the purview of international trade law debates. However, legal thinking can also be a powerful way to determine the WTO's function, re-imagine the WTO's purpose, and argue whether the WTO is even desirable.