LESSONS FOR THE WTO FROM CONSTITUTIONAL DEVELOPMENTS IN THE EUROPEAN UNION: CHALLENGES OF LEGITIMACY AND THE CONCEPTUALIZATION OF AUTHORITY

MICHAEL LONGO*

The World Trade Organization (WTO) finds itself at the centre of the globalization debate. The WTO's authority, particularly in relation to its dispute settlement provisions, has been the subject of criticism. The legitimacy of WTO decision-making is often called into question. Claims of illegitimacy of international decision-making and rules-based systems such as the WTO threaten the authority of international rule making, and therefore its effectiveness. Effectiveness is contingent upon acceptance of proper authority, compliance and enforcement. The legitimacy discourse is therefore central to the imperative of creating an effective international organization. This article is directed towards advancing the debate on whether damaging claims of illegitimacy are capable of being neutralized by recourse to relevant European Union (EU) experience. The article explores from comparative perspectives the degree to which the concepts of 'pooled sovereignty', 'subsidiarity', 'supremacy' and 'direct effect' – with which the EU lawyer is especially familiar – might provide useful points of reference in a wider debate about understanding and dealing with some of the dilemmas and criticisms surrounding the functions and activities of the WTO.

I INTRODUCTION

There is a growing body of literature addressing the evolving World Trade Organization (WTO) system and the applicability of its rulings within domestic legal orders.[1] This issue may be couched in constitutional terms, placing the international level of governance

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* Dr Michael Longo, Senior Lecturer, School of Law, Victoria University.

1 See, eg, G de Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001); D Palmeter, *The WTO as a Legal System* (2003); M Pryles, J Waincymer and M Davies, *International Trade Law: Commentary and Materials* (2003); C Saunders and G Triggs (eds), *Trade and Cooperation with the European Union in the New Millennium* (2002) and the recent edited volume C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006).

within the constitutional/power framework. While the constitutional approach has attracted support, some legal analysts have also shown a preparedness to engage in comparative analysis, detecting 'a degree of convergence' or at least 'some degree of mutual influence' between the WTO and the European Union (EU). This is perhaps not surprising given that both organizations were 'established primarily to promote trade between states'.[2] The election of former EU Commissioner for Trade, Pascal Lamy, as Director-General of the WTO reinforces the perception of synergy or at least an appreciation of, and openness to, the European experience of economic integration. Though it is important not to overstate the similarities, greater convergence between the two organizations is envisaged as the WTO appellate body 'begins to develop its jurisprudence through the disputes coming before it'.[3] With the increasing impact of WTO jurisprudence on the lives of the citizens of its member states, it may be expected that the legitimacy of WTO structures and output will come under increasing scrutiny. The purpose of this article is to promote dialogue and contribute to the academic debate on whether European constitutional experience may provide lessons for a WTO in the process of constitutionalization, a process which transcends simple treaty interpretation and application and approximates the rule of law.

The course of EU constitutional development may prove instructive in the recognition and examination of symmetries, if not in the prescriptions for overcoming the legitimacy challenges of supranational law. To this end, the article will explore similarities and differences of the EU and the WTO with a view to evaluating the usefulness of general principles of EU law to the development of the WTO legal regime. In particular, specific principles of EU governance – 'pooled sovereignty', 'subsidiarity', 'supremacy' and 'direct effect' – may provide useful points of reference for understanding and dealing with some of the dilemmas and criticisms surrounding the functions and activities of the WTO. By presenting

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2 G de Búrca and J Scott, 'The Impact of the WTO on EU Decision-making' in G de Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001) 3.

3 Ibid 2.

the intersections and similarities (as well as asymmetries) between the WTO and the EU from a comparative constitutional perspective, it will be possible to identify the trajectory of an emerging WTO legitimacy discourse and expose some of the impediments, potential and real, to the effective regulation of international trade through the WTO. While this new system is clearly distinguishable from the EU constitutional system, there are parallels that may render comparisons worthwhile. It is hoped that the issues and perspectives canvassed in this article will contribute to an appreciation of the constitutional orientation of the WTO system and invite closer examination of existing and emerging challenges – namely, the entrenchment of an international rule of law and the legitimacy of multi-level trade governance – of a rapidly developing WTO.

II A COMPARATIVE CONSTITUTIONAL APPROACH: THE CENTRALITY OF THE RULE OF LAW

It has become fashionable in recent times to discuss structural and intrinsic aspects of the WTO in constitutional terms. There is a body of literature that seeks to characterize the WTO within an essentially constitutional framework – a system of governance – while eschewing exclusive analysis under classical international law.[4] International law, or the law of nations, with its weak implementation of the rule of law, does not present a persuasive explanation for the WTO's strong dispute settlement mechanisms among other features. Walker suggests that:

> we must recognise constitutional law, or some functionally equivalent label, as necessary to and constitutive of the legal normative order of contemporary non-state and post-state polities

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4 See, eg, M Dani, 'Economic Constitutionalism(s) in a Time of Uneasiness – Comparative Study on the Economic Constitutional Identities of Italy, the WTO and the EU' (Jean Monnet Working Paper 08/05, New York University, School of Law, 2005); E-U Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006); N Walker, 'The EU and the WTO: Constitutionalism in a New Key' in G de Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001).

> just as it is necessary to and constitutive of the legal normative order of state polities.[5]

Constitutionalism is traditionally defined in terms of the exercise of governmental power which is restrained by the checks and balances imported primarily by the rule of law, the separation of powers and democracy. If constitutionalization refers to the 'legal entrenchment of some sets of rules over others and the creation of a hierarchy of norms'[6] then the WTO, with its rules conferring rights and imposing binding obligations on governments, is amenable to this description. Cass, in an early foray on the topic, observed that constitutionalization refers, among other things, to the 'consideration by the international trade mechanisms of matters within state jurisdiction'[7] and, ultimately, 'the building of a constitutional system by judicial interpretations emanating from the judicial dispute resolution institution'.[8] While analysts who regard constitutional discourse as pertaining exclusively to state polities are prone to resist a constitutional understanding of the WTO, current realities concerning the exercise of public power effectively run counter to this interpretation. Dani notes:

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5 Walker, above n 4, 31.

6 H Kelsen, *General Theory of Law and State*, cited in D Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-generation as the Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39, 40 n 3. Kelsen's 'pure theory' of law was predicated on a belief that a theory of law should validate and give order to law itself. This purity of method would show up the essential nature of the legal system as a hierarchy of norms in which every proposition was dependent on another proposition for its validity. Through this self-supporting process of norms springing from other norms, the *Grundnorm* or basic norm is ultimately reached.

7 Cass, above n 6, 64. Cass calls this 'subject matter incorporation' and describes it in the following terms: '[m]atters traditionally viewed as being within national constitutional competence, such as public health, are emerging for decision on the judicial agenda of international trade law and gradually being incorporated within its jurisdiction': at 52.

8 Ibid 52. Cass' strong advocacy of judicial constitutionalization of WTO law has been superseded by recent work in which she asserts that the WTO is not constitutionalized: D Cass, *The Constitutionalization of the World Trade Organization* (2005) 207-37. See also Petersmann's reply to the 'anti-constitutionalization critique' (Cass at 208) in Petersmann, above n 4, esp 5-6, 32-9 and notes 1, 4, 33, 78, and 81.

> It used to be within states, indeed, that the main functions of government were carried out and, therefore, it used to be from states that the most serious threats to fundamental rights could come... [T]his reality undergoes considerable modifications. Public powers and important policy areas are allotted to non-state units where, in some cases, legal orders flourish to the extent that claims for emancipation from the sole paradigm of state constitutionalism arise.[9]

To those familiar with the EU constitutional discourse, the contestation of the traditional approach, which places constitutional discourse exclusively within a nation state paradigm,[10] rings true. The state-centric approach to characterizing the EU has been criticized on the obvious ground that the EU is not a state[11] and does not aspire to becoming a state. Paradoxically, the concept of 'stateness' is employed as the primary focus for the study of a 'non-state' polity,[12] irrespective of the appropriateness of this perspective. This criticism is no less applicable to the WTO. While 'international constitutionalism' (as Petersmann calls it) is itself contested,[13] often on the ground that the WTO does not have a constitutional demos

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9 Dani, above n 4, 10.

10 Petersmann states that 'European integration law, as well as WTO law, refutes the "realist claim" that constitutionalisation of power is possible only inside nation states. EU and WTO law suggest that Immanuel Kant's moral claim – that an effective legal protection of equal freedoms across frontiers requires constitutional safeguards on all three levels of human interactions: national, international and transnational … – is politically and legally practicable': E-U Petersmann, 'Introduction and Overview' in Joerges and Petersmann (eds), above n 1, xxxvii.

11 J Shaw and A Wiener, 'The Paradox of the "European Polity" ' (Jean Monnet Working Paper 10/99, New York University, School of Law, 1999) 5 (later published in MG Cowles and M Smith (eds), *State of the European Union, Volume 5: Risks, Reform, Resistance and Revival* (2000)).

12 Ibid 1-2. See generally, L Hooghe and G Marks, 'The Making of a Polity: The Struggle Over European Integration' (1997) *European Integration Online Papers* 1, 4; B Laffan, R O'Donnell and M Smith, *Europe's Experimental Union Rethinking Integration* (2000).

13 Petersmann, above n 4, 14. Refer in particular to Petersmann's explanation which outlines the divergence between an Anglo-Saxon focus on the process-based *national constitutionalism*, as postulated by Cass, and the EU constitutional lawyer's acceptance of *international constitutionalism* inspired by rights-based constitutionalism: at 15-16 n 33.

(as do nation states), a clearer understanding of the WTO as a constitutional construct may be gained by employing the theoretically diverse constitutional approaches to constitutionalism[14] as well as the complementary perspectives of international law, international relations and political theory within a comparative framework. Essentially, as constitutionalism concerns the pursuit of fundamental objectives through the conferral of political powers to institutions with norm-creating powers, the WTO, like the EU, can broadly be described as a constitutional construct. Indeed, key vocabulary employed with regard to both the EU and the WTO is strikingly similar: deficits of democracy, legitimacy, accountability, and sovereignty. These concepts are unmistakably constitutional in content and orientation.

Judicial interpretation by the WTO appellate review tribunal generates constitutional norms and thereby constitutes the system.[15] Again, recourse to EU constitutional discourse generally, and judicial adjudication in particular, may be justified. The process of adjudication by the European Court of Justice (ECJ) and its judgments have 'created a hierarchy of norms' which has seen the emergence of a constitutional framework in the EU. This renders otiose the threshold question of whether the EU needs a Constitution (without diminishing the significance of this question) in the sense that the EU already functions under arrangements that can, and are, described as constitutional.[16] The *Treaty Establishing a Constitution for Europe* ('*Constitutional Treaty*'), rejected by France and the Netherlands in May and June 2005 respectively, is, at least partially, an attempt to formalize the constitutional edifice established by the ECJ and other institutional actors. A failure to ratify the *Constitutional Treaty* would not signify that the EU is devoid of a constitutional structure. In this regard, we are compelled to consider

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[14] The 'inter-related systems of national, international and transnational constitutionalism' identified by Kant, and discussed in Petersmann, above n 4, 17-18.

[15] See Cass, above n 6, 52.

[16] See J Weiler, 'The Transformation of Europe' (1990-91) 100 *Yale Law Journal* 2403; J Weiler, *The Constitution of Europe – "Do the New Clothes have an Emperor?" and other Essays on European Integration* (1999); J Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40(4) *Journal of Common Market Studies* 563; M Longo, *Constitutionalising Europe: Processes and Practices* (2006), 11-87.

substance as well as form. Thus, on this front too the trajectories of EU constitutional development may inform an emerging WTO constitutional order constituted by treaty provisions, rules and rulings by quasi-judicial tribunals, which define the legally binding obligations of its member states.

National sovereignty remains an enduring obstacle to the entrenchment of an international rule of law, whose attributes have been identified in the following terms:

> The rule of law in international affairs involves the existence of a comprehensive system of law, certainty as to what the rules are, predictability as to the legal consequences of conduct, equality before the law, the absence of arbitrary power, and effective and impartial application of the law.[17]

It is apparent that the same *constitutional* values that underlie the idea of the rule of law in the national sphere also characterize the international rule of law,[18] although it would be premature to assert that the international rule of law has achieved anything like the standing of its counterpart in national public law. However, this is not expected to remain indefinitely, as Sampford points out:

> sovereignty is breaking down. Separation of constitutional law and international law is breaking down. Once that happens, there can be no doubting that traditional public law concepts (most notably the rule of law) will gain a new lease of life in international law.[19]

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17 A Watt, 'The Importance of International Law' in M Byers (ed), *The Role of Law in International Politics* (2002) 7.

18 While acknowledging the diverse, ideologically driven conceptions of the rule of law, this paper adopts the liberal, elemental definition that government should be in accordance with rules. Given the general tenet of this paper that governance and constitutionalism are not the sole domain of nation states, a definition of the rule of law that gives recognition to its capacity to exist in a range of political systems, in connection with other values such as democracy, is preferred.

19 C Sampford, 'Reconceiving the rule of law' in S Zifcak (ed), *Globalisation and the Rule of Law* (2005) 24.

So why is the emergence of an international rule of law thought to be so important and what benefits does it bring to international trade law? Petersmann for one presents a compelling case for integrating social and liberty rights into WTO law 'so as to render [both] human rights and … WTO law more effective',[20] though his prescriptions have not been universally accepted.[21] He poses the question:

> can international courts ignore the worldwide experience in all states that protection of human rights risks to remain ineffective without respect for complementary due process guarantees and other 'constitutional principles' of rule of law, democratic government and judicial review?[22]

Petersmann states:

> Reciprocal international guarantees of freedom, non-discrimination, rule of law, transparent policy-making, social safeguard measures and wealth creation through a mutually beneficial division of labor… aim at extending basic human rights values across frontiers. In this respect, they can be understood as serving 'constitutional functions' for the legal protection of human rights values at home and abroad.[23]

He concludes that:

> National constitutional law and human rights cannot achieve their objectives unless they are supplemented by international constitutional law and by effective protection of human rights in the economy no less than in the polity.[24]

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20 E-U Petersmann, 'Time for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration Law for Global Integration Law' (Jean Monnet Working Paper 7/01, New York University, School of Law, 2001) 2.

21 See, eg, R Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann', *Trade and Human Rights: An Exchange* (Jean Monnet Working Paper 12/02, New York University, School of Law, 2002); P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', *Trade and Human Rights: An Exchange* (Jean Monnet Working Paper 12/02, New York University, School of Law, 2002).

22 Petersmann, above n 20, 12.

23 Ibid 16-17.

24 Ibid 45.

Others have highlighted the cogent commercial reasons for the emergence of an international rule of law, as developing countries work towards establishing appropriate legal institutions and 'the rule of law' at the insistence of the World Bank and other financial institutions. Sir Anthony Mason explains:

> there is now a strong emphasis on the need to ensure that nations seeking foreign investment have in place appropriate legal institutions and a sound legal system (sometimes called 'the rule of law') as a secure foundation for the protection of the foreign investor… Unless a sound legal system is in place in the jurisdiction in which the investment is made, the investor cannot be assured that its contractual rights will be protected and that it will have adequate recourse to legal remedies.[25]

Nonetheless, the justification for an international rule of law remains inchoate without proper regard to the overarching value of *legitimacy*. Simply put, international decision-making, like all other expressions of institutional authority, must be legitimate. Legitimacy, however, is a complex and multidimensional concept.[26] In its normative orientation to *legality* and its empirical orientation to *acceptance* the term legitimacy embraces aspects of related values such as accountability, transparency, commitment to equality and to fundamental human rights – core values of the rule of law and, simultaneously, *markers* of legitimate action. Absent one or more of these core values, citizens may well not deem decision-making legitimate. Increasingly, citizen endorsement of institutional arrangements and the conferral of legitimacy are viewed as one and the same thing. Drawing together the threads of political power, constitution and legitimacy, John Rawls echoes current public sentiment in the statement:

25 A Mason, 'The rule of law and international economic transactions' in S Zifcak (ed), *Globalisation and the Rule of Law* (2005) 125.

26 See P Nanz, 'Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory' in C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006) esp 61-8.

> Political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason.[27]

This article will therefore canvass the core, all-embracing value of legitimacy in its relationship to WTO decision-making.

III THE LEGITIMACY CHALLENGE

Legitimacy[28] has appropriately been conceptualized as 'a diffuse and complex [notion]… combining the aspects of (formal) *legality*, (normative) *acceptability* and (empirical) *acceptance* of a system of government.'[29] The term is best understood within a multi-dimensional conceptual framework, which highlights the co-existence of diverse theories, principles and patterns of legitimacy. Legitimate, according to legal/normative ideas of legitimacy, are 'structures of governance which have been established in accordance with certain rules and principles', which in the contemporary world are mostly (but not exclusively)[30] democratic principles.[31] The

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27 J Rawls, *Justice as Fairness: a restatement* (2001) 41.

28 It is beyond the scope of this article to address in detail the myriad aspects of legitimacy, including the much-discussed 'democratic deficit' of the EU, which generally leads to a diagnosis of illegitimacy. The author's views and some of the relevant literature are canvassed in M Longo, 'The European Union's Legitimacy' in Longo, above n 16, 171-204. There is a vast literature covering the difficulties of legitimacy and the democratic deficit from empirical and normative frames of reference. See G Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4(1) *European Law Journal* 5; and, in particular, the discussion in P Craig and G de Búrca, *EU Law, Text Cases and Materials* (3rd ed 2003) 167-77.

29 See H Abromeit, 'Kompatibilität und Akzeptanz – Anforderungen an eine integrierte Politie', in Grande and Jachtenfuchs (eds), *Wie problemlösungsfähig ist die EU? Regieren im europäischen Mehrebenensystem* (2000) 59-75, 60-61 cited in H Abromeit and S Wolf, 'Will the Constitutional Treaty Contribute to the Legitimacy of the European Union?' (2005) 9(11) *European Integration Online Papers* 3.

30 Non-democratic decision-making takes place (for example pursuant to judicial review, decisions of reserve banks and administrative boards, commissions and tribunals) and is deemed legitimate. In particular, judicial review may play a central role in underpinning legitimacy, clearly not from a 'representative' or democratic perspective, but rather from the standpoint of 'rational justification' that commonly underscores international governance as legitimate. This position has particular resonance in

emergence of empirical social science in the 20th century enables legitimacy to be viewed from the Weberian perspective that a social order enjoys 'the prestige of being considered binding.'[32] In the international sphere it is often defined by 'the quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being with right process'[33] as well as a claim to the 'substantive justice of outcomes'.[34] Substantive legitimacy denotes that legitimacy is based on judgments on the substantive merits of a decision or outcome rather than simply the process through which the decision or outcome was reached.[35] To the extent that states have ratified international agreements, the norms of international law are legitimised through the consent of the states. Legitimacy is therefore attributable to the legitimacy generating quality of the rule of law, which contributes to justifying the legal regime. It follows from this brief discussion that there are distinct sources and objects of legitimacy. The latter are achievable through a range of mechanisms including democracy, the rule of law, right process and the substantive justice of outcomes.

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common law jurisdictions, where judges have the capacity to 'make' law. Case law is usually thought to be legitimate within these systems for various reasons, among which the much-lauded reputation of common law judges for judicial probity. Despite this, or perhaps because of it, common law countries are among the most vociferous critics of international/supranational law. They often lament its intrusion into the domestic system.

31 T Banchoff and M P Smith, 'Conclusion' in T Banchoff and M P Smith (eds), *Legitimacy and the European Union: The contested polity* (1999) 215.

32 J Steffek, 'The Power of Rational Discourse and the Legitimacy of International Governance' (EUI Working Papers 2000/46, 2000) 25. See also Longo, above n 16, 174-85.

33 See T M Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705, 706. See also T M Franck, 'The emerging right to democratic governance' (1992) 86 *American Journal of International Law* 46, 51 where the author refers to the four indicators of legitimacy: 'pedigree, determinacy, coherence and adherence'. He states that 'pedigree refers to the depth of the rule's roots in a historical process; determinacy refers to the rule's ability to communicate content; coherence refers to the rule's internal consistency and lateral connectedness to the principles underlying other rules; and adherence refers to the rule's vertical connectedness to a normative hierarchy, culminating in an ultimate rule of recognition, which embodies the principled purposes and values that define the community of states'.

34 Steffek, above n 32, 25.

35 Nanz , above n 26, 63-4.

There is a tension between legal/normative and empirically oriented legitimacy, mirrored in the dichotomy between formal and social legitimacy of WTO law, as observed by Howse:

> From a formal or positivistic perspective on legitimacy… the law of the WTO poses no problem inasmuch as that law has been ratified according to the internal constitutional arrangements of the Member countries – to the extent that these are democratic, the WTO law itself can be understood as the result of democratic choice within national polities… Yet… formal legitimacy of this kind rarely provides closure on the issue of whether those affected by a decision can fully accept it as a legitimate outcome – as Joseph Weiler argues, in the context of the European Union, 'social legitimacy' is distinct from, and certainly not exhausted by, formal legitimacy.[36]

The pursuit of social legitimacy requires a shift in legitimation requirements towards a social sanctioning of the institutions and activities of the international legal order. This does not assume the dominance of social over formal/legal legitimacy, only that deficits in formal (normative) legitimacy of a legal order can have adverse consequences in respect of their social acceptance. Citizens will withhold consent through the democratic process if they perceive a legitimacy deficit, however this may arise.

There are implications for supranational institutions established by treaties between national governments to regulate policy areas that had previously been subject to national determination or 'sovereignty'. The so-called 'permissive consensus'[37] that has until recently legitimized this form of elite decision-making, threatens to

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[36] R Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' in J Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* 37. In his article, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2466-77, Weiler observed that '[m]ost popular revolutions since the French revolution occurred in polities whose governments retained formal legitimacy but lost social legitimacy': at 2469.

[37] M Franklin, M Marsh and L MacLaren, 'Uncorking the bottle: popular opposition to European unification in the wake of Maastricht' (1994) 32(4) *Journal of Common Market Studies*, 455-72.

turn to rigid dissent as a coalition of disenchanted individuals and interest groups protest against what they see as the inevitable effects of globalization, namely the further marginalization of the poor, growing inequality between rich and poor, the opening up of markets to cheap imported goods and labour, increased environmental degradation, loss of cultural heritage, the subjection of national institutions to supranational ones and, hence, the further erosion of national sovereignty. This is said to be most evident, be it right or wrong, in the reduced capacity of national governments to protect domestic interests and determine policy direction. Sir Anthony Mason has put it succinctly: '[g]lobalization reduces the capacity of the nation state to respond to democratic pressure, thereby constraining the power of the citizens to control their own economic lives.'[38]

The negative outcome of recent referendums on the *Constitutional Treaty* in France and the Netherlands may be explained in terms of legitimacy. Mechanisms such as referendums are supposed to generate legitimacy by public participation and consent through deliberation, usually associated with social legitimacy. If legitimacy 'designates the relationship between a people governed and a political order or parts of it'[39] it is open to draw the conclusion that the people have not sanctioned the elite attempt to legitimate the EU political order through endorsement of a Constitution. From this perspective the 'no' vote may lead to a number of conclusions. A possible conclusion is that when democratic sanctioning is sought for institutions, structures and processes that are in the main already in place, from citizens whose preferences have been either assumed or ignored, there is a chance that those citizens will choose to answer a web of interrelated questions by their vote, and not only the one that is being put to them. The risk is exacerbated when publics have not been adequately informed about the way the supranational institutions function or when national elites use the supranational

38 Citing J H Mittelman, *The Globalization Syndrome: transformation and resistance* (2000) 135. Mason, above n 25, 125.

39 Nanz, above n 26, 61.

institutions as a scapegoat for the problems of the day.[40] Equally, individuals and interest groups continue to demonstrate interest in the WTO, expressing their opinions on it – mostly negative – wherever and whenever meetings are convened. Such public manifestations are partly the consequence of a perception of the WTO as a body disposed against transparent, participatory decision-making and partly a response to the exercise of power by a supranational organization lacking public endorsement. Elite decision-making taken without democratic debate and deliberation clearly has a negative bearing on legitimation.[41]

With the challenge of public rejection of elite prescriptions for supranational organization afoot, there is an urgent need in the EU (and possibly only marginally less so in the WTO) to achieve some consensus as to the sources and consequences of legitimacy underpinning the supranational regime in order to avoid a scenario of 'analytical failure', whereby public approval for further development is demanded yet the conditions for informed public deliberation are withheld. Howse notes that:

> even from an internal perspective of effective 'regime management', there is an urgency to seek a new basis for the 'social legitimacy' of dispute settlement outcomes, a basis sensitive to the concern of critics or sceptics concerning the project of global economic liberalism that the whole undertaking of international trade is tilted towards the privileging of free trade against other competing, relevant values of equal or greater legitimacy in themselves.[42]

Indeed, the challenge of legitimacy in the EU has been complicated by a failure to fully grasp the legitimacy claims of the EU, which as a hybrid system conforms neither wholeheartedly to the legitimacy patterns of an international organization nor to the requirements of a

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40 National politicians in the EU have been known to agree to a EU measure in Brussels only to lament at home the very same measure to cash-in on anti-EU sentiment. This approach serves the domestic political market. Eventually, this perception takes hold. Authority and legitimacy may thereby be threatened.

41 See Longo, above n 16, 167-70, 171-204.

42 Howse, above n 36, 40.

nation state.[43] While the legitimation of the WTO may proceed on a different basis to that of the EU (the WTO currently has much more limited policy competence but a wider, more heterogeneous membership), resort to the 'legitimating' principle of justice (ie 'the substantive justice of outcomes') may assist both a WTO and a EU in pursuit of social legitimacy. In an important contribution to this debate, Petersmann posits:

> In order to remain politically acceptable, global integration law (eg in the WTO) must pursue not only 'economic efficiency' but also 'democratic legitimacy' and 'social justice' as defined by human rights. Citizens will rightly challenge the democratic and social legitimacy of integration law if it pursues economic welfare without regard to social human rights, for example the *human right to education* of the 130 million children (aged from 6 to 12) who do not attend primary school; the *human right to basic health care* of the 25 million Africans living with Aids, or of the about 35,000 children dying each day from curable diseases; and the *human right to food and an adequate standard of living* for the 1.2 billion people living on less than a dollar a day.[44]

IV THE EU AND THE WTO: CRISS-CROSSING PATHS?

Hostility towards the WTO has largely mirrored hostility towards the EU. In an account that may well have summed up negative sentiment towards the EU, Cass remarks that:

> Much of the hostility of the protest at the WTO Ministerial Conference in Seattle in December 1999 was inflamed by images of the WTO as an elite, non-national, unelected and unrepresented body, which had gone beyond its free trade mandate and was illegitimately influencing the democratic decisions of national governments.[45]

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43 See Longo, above n 16, 171-204.

44 Petersmann, above n 20, 3 (italic emphasis in the original).

45 Cass, above n 6, 40.

Similar criticisms have long been made of the European Commission. Indeed, the WTO and the EU have often been compared and contrasted:

> To some extent, its [the WTO's] structure seems to have been based on that of the EU. Certainly, the idea of pooling sovereignty is similar to the EU, as was the idea of locking in agreements on a range of topics. But, membership of WTO does not involve the same general conjunction of economic and geopolitical interests as binds the members of the EU. So WTO may not make the same onward progress as the EU.[46]

As in the EU, the need to legitimize WTO structures and decision-making is of high priority. The lives of ordinary people across the globe are being affected by the adjudicative decisions of the WTO panels, the consequence of pooled sovereignty. There is therefore a need to explain and sharpen the legitimacy of the WTO decision-making processes and procedures in order to achieve more politically acceptable outcomes. This requirement gives rise to a related dilemma. On the one hand, the legitimacy of supranational institutions may be enhanced by outcomes, which, in the pursuit of ideals of global justice and fundamental rights, improve the lot of individuals in ways that national institutions are incapable of doing. On the other, there appears to be a decline in legitimacy if supranational interventions are perceived as encroaching upon areas traditionally within national sovereignty. In this regard there is no substantial distinction between attitudes of citizens towards the EU and the WTO, attitudes characterized by conflicting values.

Howse states that '[f]air procedures can play an important role in the legitimation of adjudicative decisions, especially where conflicting public values are at issue.'[47] Such procedures include: 'requirements that deliberation occur before decision; opportunities for opposing sides or parties to be heard and to attempt to persuade one another; and some means of participation for those affected by the

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[46] Mason, above n 25, 128.

[47] Howse, above n 36, 42.

decision…' as well as the constraints of natural justice.[48] The WTO Dispute Settlement Understanding does not entirely conform to this procedural standard. Panel deliberations remain secret (art 14), as do the proceedings of the Appellate Body.[49] There is no mechanism for participation of affected non-governmental actors in the proceedings.[50]

Thus, improvements may be achieved within the existing WTO framework in numerous, legitimacy-enhancing ways: primarily by improving transparency and accountability and enabling public participation in WTO processes in the form of access to decision-making processes by interest groups and citizens who advocate the incorporation of goals such as sustainable development in WTO decision-making processes.

Furthermore, on the perennial dilemmas of sovereignty and compliance, the EU experience may prove particularly instructive, both for the norms and principles that underpin the division of power between supranational and national institutions and the application of EU law within domestic legal orders. The following subsections will identify and discuss those norms and principles which may inform the development of wider supranational organization.

A *Mediating powers between supranational and national institutions: subsidiarity*

The principle of subsidiarity involves the allocation of roles and responsibilities among several levels of government. Its philosophical underpinning is the sovereignty of the individual, according to which the higher level of social organization has a subsidiary function, taking up only those challenges that are beyond the individual's capacity to meet.[51] With its rhetoric of closeness to

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48 Ibid.

49 In the case of Appellate Body proceedings, which deal with legal interpretations rather than facts, the case for secrecy is further diminished.

50 Howse, above n 36, 44.

51 Subsidiarity may be seen to represent 'a bottom-up approach, always empowering the respective lowest competent level' while 'higher levels are subsidiary or auxiliary to the lower level': K Gretschmann, 'The Subsidiarity Principle: Who Is to Do What in

the citizen, subsidiarity mandates government as close as possible to the people. By authorizing local or regional actors to act whenever they can do better than the higher levels of authority, subsidiarity contemplates diversity in decision-making and a tailored response to policy and legislative competence. With its upward or downward allocation of functions, subsidiarity relies upon the effective co-ordination of the implementation of decisions and on arrangements that minimize the duplication of functions while promoting accountability and participation. Often contradictory and fraught with difficulty,[52] the concept has achieved some prominence in the EU, acquiring the status of a constitutional principle that regulates the exercise of power between supranational, national, regional and local levels of governance.

While the concept of allocating governmental responsibilities according to the concept of subsidiarity finds primary expression in the EU – a quasi-federal regime – it may also be usefully employed wherever different levels of government compete for power. Thus, subsidiarity may also prove effective in countering claims of illegitimate exercise of power by supranational institutions and consequent loss of national sovereignty, by providing a justification for supranational decision-making where this is the appropriate level for action to be taken.

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an Integrated Europe?' in *Subsidiarity: The Challenge of Change* (Proceedings of the Jacques Delors Colloquium, Maastricht, European Institute of Public Administration, 21-22 March 1991) 47.

52 Emiliou has emphasised subsidiarity's dual potential for 'guaranteeing' the liberty of the new European citizen as well as preventing the 'over-extension' of the Community system: N Emiliou, 'Subsidiarity: An Effective Barrier Against the Enterprises of Ambition?' (1992) 17 *European Law Review* 383, 407. Moreover, discussion of a so-called 'democratic subsidiarity' in the context of democratic federalism (reflected in art 1 of the *Treaty on European Union* [1992] OJ C 321E, 29 December 2006) expresses the subsidiarity idea as a mechanism for the protection of citizens' rights, while conversely the notion of 'executive subsidiarity', as it appears in art 5 of the *Treaty Establishing the European Community* [1957] OJ C 321E, 29 December 2006 ('*EC Treaty*') text, invokes an interpretation protective of executive prerogatives whereby Member States' powers are apparently protected against Community expansionism. See G de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam' (Jean Monnet Working Paper 7/99, New York University, School of Law, 1999).

Hence, subsidiarity is potentially relevant to trans-national organizations such as the WTO. The allocation of power between different levels of governmental organization is a constitutional discourse as is the mediation of power between trans-national and national institutions. Even if the question of which level of governmental authority is best able to achieve the optimal outcome is contentious, important literature[53] proceeds from the premise that effective regulation of international trade demands the pooling of sovereignty in an international organization such as the WTO because the nation state is incapable of dealing with international trade on its own.

B *Implementation of WTO rules*

Some members of the WTO have a constitutional structure (dualist) that precludes the automatic implementation of the WTO Agreement (and decisions of the bodies established by the Agreement) within domestic law. In such a case, further domestic legislation or administrative action is required in order for the rules to apply. This national intervention may be perceived as a domestic check against the intrusion of international law within the domestic legal space – the assertion of national sovereignty – though equally, it may be viewed as an unnecessary intercession by national governments, the effect of which is to threaten compliance with international obligations. It should be recalled that a failure at the national level to comply with WTO provisions and decisions does not excuse the member from its international obligation to comply.[54] This risk to 'good faith compliance' may be attenuated by two distinct constitutional approaches. First, national governments may consider institutional changes in executive-legislative relationships to obviate the need for domestic implementing legislation. This approach is

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53 See, eg, Petersmann, above n 4, 35.

54 The WTO is subject to customary rules of public international law, as expressed in the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*Vienna Convention*'), regarding the interpretation of treaties. The fundamental principle of the law of treaties, found in art 26 of the *Vienna Convention* is that treaties are binding upon the parties to it and must be performed in good faith.

currently untenable given the political heterogeneity within the international community and the general desire to preserve national sovereignty. Perhaps only marginally more applicable, but nevertheless worthy of debate, are the emblematic principles of EU jurisprudence – the doctrines of 'direct applicability' and 'direct effect' – which may suggest a fresh approach to the questions of compliance and enforcement.

C *The EU legal order*

The ECJ has deliberately and methodically constructed an effective constitutional order through seminal rulings on the supremacy of EU law over conflicting national law[55] and direct effect. The Court ruled in *Van Gend en Loos*[56] that provisions of the *Treaty Establishing the European Community* ('*EC Treaty*') can be directly effective, that is, they can apply in the member states and be invoked by individuals as a matter of EU law before a national court, without the intervention of national legislatures or governments.[57] This is consistent with the monist constitutional tradition, according to which direct effect is possible. The consequence, from the ECJ's point of view, is that EU law rather than the constitutional law of each of the member states determines the question. The Court in *Van Duyn v Home Office*,[58] decided that directives may also be directly effective. By its rulings on direct effect, indirect effect,[59] and State

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55 *Costa v Enel* (C-6/64) [1964] ECR 585.

56 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (C-26/62) [1963] ECR 1.

57 Direct effect was, in *Van Gend en Loos*, taken to mean that Community law (assuming it fulfils certain conditions) gives rights to individuals who are then entitled to invoke such rights before the national courts of the member states. The ECJ has not drawn a clear distinction between direct effect and direct applicability (ie that the provision of EU law is incorporated into national law without the need for national legislation) which was also contemplated in *Van Gend en Loos*. Thus, both the manner in which EU law is received in the Member States and the individual rights which arise from such laws are encapsulated within the ECJ's broad construction of direct effect.

58 (C-41/74) [1974] ECR 1337.

59 Even where a directive does not have direct effect, national courts are still required to interpret their national law adopted to implement the directive in conformity with the wording and purpose of the directive. Thus the ECJ has developed the concept of 'indirect effect' to ensure the better implementation of directives not having direct

liability in damages,[60] by which individuals are able to enforce EU law within their national courts, the ECJ has added to the underdeveloped enforcement mechanisms provided for under the *EC Treaty*. Consequently, the extent to which EU law infiltrates domestic law is quite exceptional, as is the degree of enforcement. Petersmann correctly states that:

> The single European market could never have been realized without private enforcement of [the] economic liberties by EC citizens and without their judicial protection by national courts and by the EC Court vis-à-vis governmental and private restrictions and discrimination.[61]

The ECJ's empowerment of the individual through its interpretation of direct effect has significant legitimating potential. Such empowerment operates to legitimate the EU on different levels. Recognition and constitutional entrenchment of individual rights as the overarching principle of political organization in a polity transcends state-based claims for democratic control as the dominant source of legitimacy. The recognition of the EU as a producer of 'just' outcomes (not in competition with or in place of national and international institutions, but alongside them) can legitimate its activity in this sphere. While the subjects of international trade law are exclusively its member states, effectively distinguishing the WTO from the EU in this important respect, it may not be difficult to envisage development of international trade law in a manner that treats individuals as subjects of international law. This approach is already apparent in public international law.[62] Also apparent in international law is the shift in the meaning of sovereignty from 'state-based sovereignty' to a 'human rights-based conception of

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effect. See *Von Colson and Kamann v Land Nordrhein-Westfalen* (C-14/83) [1984] ECR 1891.

60 (C-6/90 and C-9/90) *Francovich and Bonifaci v Italy* [1991] ECR 1-5357.

61 Petersmann, above n 20, 29.

62 For example, this trend is illustrated by the establishment of an International Criminal Court to try persons charged with genocide, or other crimes of similar gravity against humanity.

popular sovereignty'.[63] The need to develop a 'people-oriented' WTO thus acquires greater cogency.

D *The doctrine of direct effect, not specific rulings of the ECJ*

It is not argued in this article that the ECJ's specific rulings on the direct effect of international treaties are of potential interest to students of the WTO, but rather the direct effect approach itself. Indeed, specific rulings of the ECJ on the direct effect of international agreements have demonstrated a functional, uneven approach that does little to advance the enforceability of international law within the EC legal order. The ECJ has jurisdiction under art 234 [ex art 177] *EC Treaty* to interpret international agreements binding on the EU. In theory, it is possible for international agreements to which the EU is bound (and decisions of bodies established by such agreements) to be directly effective both in the EU legal system and the systems of the member states. The test for direct effect here is the same as that for the Community Treaties. However, the ECJ has held that neither the old General Agreement on Tariffs and Trade ('GATT') nor the WTO Agreement is directly effective.[64] In deciding that the WTO Agreement is not directly effective, the ECJ in *Portugal v Council*[65] referred to the preamble to Council Decision 94/800/EC,[66] which states that 'by its nature, the Agreement establishing the World Trade Organization… is not susceptible to being directly invoked in Community or Member State courts.' Perhaps, as Hartley notes, the rationale for the Court's decision is to be found in paragraph 46 of the judgment: ie direct effect would 'deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their

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63 W M Reisman, 'Sovereignty and Human Rights in Contemporary International Law' in G H Fox and B R Roth (eds), *Democratic Governance and International Law* (2000) 244.

64 In *International Fruit Company v Produktschap (Third International Fruit Case) (GATT Judgment)* (C-21-24/72) [1972] ECR 1219, the ECJ concluded that the General Agreement on Tariffs and Trade was not directly effective, a point reiterated in *Germany v Council (Bananas Case)* (C-280/93) [1994] ECR 1-4973.

65 (C-149/96) [1999] ECR 1-8395.

66 OJ L 336 of 23 December 1994 1-2.

counterparts in the Community's trading partners.' In other words, the Community would want to retain the right (as has the USA) to break the Agreement 'when it thought this would be advantageous'.[67] This deduction bears out the main problem associated with international agreements – they are regularly flouted in the absence of direct effect. It also demonstrates the orientation of international decision-making to pragmatism or expediency.

V Challenges to WTO Authority: Possible Responses

In the light of the above observations this article will now outline a number of interrelated problems affecting the legitimacy of the WTO regime, which also resonate within the EU constitutional discourse. While stopping short of claims as to the transportability of EU prescriptions, it is argued that recourse to developments in the EU may inform constitutional insights on the WTO.

A blend of 'conciliation, negotiation and litigation',[68] the WTO dispute resolution procedures are subject to a number of deficiencies as outlined below.

A *A lack of transparency*

There is a lack of transparency in proceedings, as panel and appellate hearings are conducted in camera. The lack of openness impacts on the value of accountability, however, as Stiglitz suggests, a more open process would itself generate change:

> The deliberations of the WTO panels that rule on whether there has been a violation of WTO agreements occur in secret. It is perhaps not surprising that the trade lawyers and ex-trade officials who often comprise such panels pay, for instance, little attention to the environment; but by bringing the deliberations more out into the open public scrutiny would either make the panels more

67 T C Hartley, *European Union Law in a Global Context* (2004) 251.

68 S Zifcak, 'Globalizing the rule of law' in S Zifcak (ed), *Globalisation and the Rule of Law* (2005) 49. Furthermore, Mo states that 'in broad terms, the dispute settlement procedures are: consultations, good offices, conciliation or mediation, and panel proceedings' (J Mo, *International Commercial Law* (2003) 585-86).

sensitive to public concerns or force a reform in the adjudication process.[69]

Article 31 of the *Statute of the Court of Justice of the European Economic Community*,[70] specifies that hearings in Court 'shall be public' unless 'the court… decides otherwise for serious reasons.' Indeed, a commitment to openness found early expression in *EC Treaty* provisions concerning the legal process of the ECJ and now in provisions governing political participation. EU constitutional evolution bears witness to systemic change through openness and legal integration which aids legitimation.

The EU political institutions have played a critical role in the constitutional process, often in response to the ECJ's jurisprudence.[71] Law serves various functions, including a declaratory function. A judicial ruling, by 'stating the law' is invested with a 'unique authority'.[72] In response to certain judgments of the ECJ, the member states have shifted their expectations and reformulated their interests, giving credence to a social constructivist account of European Integration.[73] An insight

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69 J Stiglitz, *Globalization and its Discontents* (2002) 227-8 cited in Zifcak, 'Globalizing the rule of law', above n 68, 49. The USA has long championed increased transparency of dispute settlement hearings. There are signs that hearings will be more accessible to the public where the parties agree, however the opening up of hearings needs to be systemic.

70 Protocol on the Statute of the Court of Justice annexed to the Treaty on European Union, to the Treaty establishing the European Community and to the Treaty establishing the European Atomic Energy Community, in accordance with Article 7 of the Treaty of Nice, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice on 26 February 2001 (OJ C 80 of 10 March 2001), as amended by decisions of the Council of 15 July 2003 (OJ L 188 of 26 July 2003, 1) and 19 April 2004 (OJ L 132 of 29 April 2004, 1 and 5).

71 See Longo, above n 16, 103-109.

72 R Dehouse, *The European Court of Justice: The Politics of Judicial Integration* (1998) 88.

73 Social constructivism explains the transformative effects that institutions have, through interaction, on the processes of preference and identity formation in the EU. According to this approach institutions are understood in the light of their capacity to socialize and constitute actors, predominantly through ideas, formal and informal norm-making and deliberative processes.

may be gained into the EU's ideational and normative development towards democratization by examining the process of normative transformation, particularly the norms that guide the practices and processes of decision-making or governance.[74]

On the political plane, the EU appears committed to strengthening the direct mechanisms of participatory democracy to counter accusations of illegitimacy. In its 2001 White Paper on Governance, the Commission identified the emerging norms of governance, derived from a liberal conception of democracy and democratic accountability – openness, participation, accountability, effectiveness and coherence – as markers of legitimate action.[75] Indeed, the EU discourse is replete with references to accountability and transparency; the demands for transparency now couched in the language of a participatory model of representative democracy in art 1-46 of the Draft *Constitutional Treaty*. With its emphasis on 'open decision-taking as close as possible to the citizens', the 'formation of a European political awareness', the 'will of the citizens' and 'transparency', art 1-46 seeks to open the lines of communication and accountability and to encourage citizens to better engage with EU political processes.

These developments are partly the consequence of ongoing demands for democratization of the EU in the face of expanding capabilities of the EU supranational institutions. The demand for democratization cannot be separated from the legitimacy debate. That the WTO may be differentiated from the EU in the degree to which democratization is thought necessary to its legitimation hardly bares mentioning. Nonetheless, the secrecy and lack of openness to public scrutiny of WTO adjudicative processes are inimical to basic requirements of transparency and accountability and send a clear message that the WTO is insensitive to public concerns. Given the increasing salience of WTO rulings on citizens, and the increasing propensity and capacity of citizens to mobilize against supranational organizations, there is a strong case for policy makers to take the public *or democratization* dimension into consideration.

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74 Longo, above n 16.

75 *European Governance A White Paper* [2001] COM (2001) 428 final, 10.

B *A closed system*

The WTO is a relatively closed system. Petersmann has argued that there should be greater symbiosis between trade and human rights.[76] The EU system already demonstrates a convergence of market integration and human rights protection through a Community approach that features constitutional protection of economic and social rights[77] as well as strong enforcement mechanisms, and thus provides a possible model. In recent times the EU has sought to strengthen its credentials in human rights protection.[78] Referring to the WTO, Zifcak suggests that

> [t]he sources of law that can be taken into consideration by dispute resolution panels and the Appellate Body should be expanded to include the general principles of international law, including… [those] contained in both the major human rights covenants.[79]

He suggests that human rights impact statements should in every case precede the adoption of major treaties, policies and decisions, while accredited NGOs with an interest in the WTO's activities should have standing before its panels.[80] Accreditation of such NGOs would better institutionalize the WTO's relationship with

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76 Petersmann, above n 20.

77 Ibid 28.

78 Fundamental human rights were first recognised as a general principle of Community law in *Stauder v Ulm* (C-29/69) [1969] ECR 419. In *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratssttelle für Getreide und Futtermittel* (C-11/70) [1970] ECR 1125, the ECJ held that '…respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The other general principles of law are equality, proportionality and legitimate expectations. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community (para 4 Judgment).' The position was subsequently strengthened by the *Treaty on European Union* which states in art 6 that the EU is founded on respect for human rights (as guaranteed by the *European Convention on Human Rights*, opened for signature 4 November 1950, European Treaty Series 5 (entered into force 3 September 1953)) as a general principle of law. The *Charter of Fundamental Rights of the European Union* was proclaimed on 7 December 2000 and, though not yet binding, constitutes Part II of the *Constitutional Treaty* (not in force).

79 Zifcak, above n 68, 52.

80 Ibid.

civil society,[81] thereby enhancing participation and responding to anti-globalisation sentiment. That NGOs are unelected does not diminish the need for their participation in WTO proceedings. The most powerful justification for supranational decision-making is that it stands above national interests. As the legitimacy of supranational law depends significantly upon the 'substantive justice' of its outcomes, measures aimed at improving procedures and outcomes for citizens will have a legitimacy-affirming effect. Without suggesting that the transformation from economic to comprehensive rights protection is complete, EU evolution in the human rights area to date presents a compelling case study.

C *Restrictive standing*

Standing to appear before the WTO panels is currently restricted to member states. Relaxing the rules of standing to allow access to the dispute resolution procedures by non-state organizations would enhance confidence in the WTO procedures and improve its legitimacy. Improving access to dispute resolution mechanisms by individuals or organizations whose interests may be affected by the proceedings would effectively endow such organizations or individuals with an enforcement role under the WTO system and, thus, enhance its effectiveness. A long line of cases commencing with *Van Gend en Loos* suggests that the effectiveness of a legal regime is enhanced by granting legal rights to individuals whose interests are affected by non-compliance of the national state with EU law. The vast literature on the direct effect of EU law may be instructive. While challenges by individuals are a potent means of securing compliance with legal instruments, the restrictive effect of art 230 of the *EC Treaty* must be noted.[82] Nonetheless, direct effect,

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81 Ibid.

82 Pursuant to this provision, the individual's right to challenge a 'decision' of the Community is restricted. A citizen's recourse to the jurisdiction of the ECJ when the decision contested is a decision of the Commission or the Council is dependent upon the institution of proceedings within two months of publication of the measure or its notification to the plaintiff, and furthermore the decision must be of 'direct and individual concern' to the person addressed. Whereas the member states are subject to the supervision of the Commission (art 226 *EC Treaty*), other member states (art 227

entrusting, as it does, the supervision of the EU legal system to individuals, may inform future development of the WTO. Direct effect invites discussion on how the individual's interests might be reconceptualized, protected or enhanced within a global framework.

D *Domestic reinterpretation of rules*

Some member states of the WTO have a dualist constitutional structure that precludes a WTO rule from automatically becoming part of the domestic law. While failure to implement the rule by domestic legislation (or administrative action) does not excuse that state from complying with its international obligations, the intervention by national legislatures may invite reinterpretation of the rule at the domestic level or be subject to domestic pressures for the adoption of special protectionist measures. In consequence, the WTO rule is potentially subverted and the effectiveness of the system jeopardized. The EU approach to this issue, as represented by the ECJ's decisions in *Van Gend en Loos* and *Costa v Enel* – pursuant to which the Court adopted the device of a new legal order to distinguish the *EC Treaty* from ordinary international law in terms of direct applicability – offers better prospects for implementation of EU law than the mechanisms available under international law.[83] Pursuant to this approach (whose rationale is, incidentally, not entirely accepted by EU member states themselves),[84] national constitutional law no longer determines the interactions between supranational and national law. Without doubt, the EU approach on this question would hold little if any interest in a legally, politically and culturally heterogeneous WTO, where ECJ-inspired arguments in favour of direct applicability would have little resonance. The

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EC Treaty) and, importantly, individuals (in so far as the member state's compliance with Community law is concerned), the decisions of EU institutions are not subject to the same degree of scrutiny.

83 These arguments and the nature and scope of direct effect are elaborated in Longo, above n 16, 60-73.

84 See, eg, *Internationale Handelsgesellschaft mbH v Einfuhr – Und Vorratsstelle fur Getreide und Futtermittel* [1974] 2 CMLR 540; *Re the Application of Wünsche Handelsgesellschaft* [1987] 3 CMLR 225; *Brunner v The European Union Treaty (Maastricht judgment)* [1994] 1 CMLR 57; *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372.

implications for sovereignty and, indeed, for constitutional law presently ensure that the approach remains *academic* in the global sphere.

The need for non-state actors, including supranational institutions, to participate in the regulation of policy areas that were once the predominant or sole concern of nation states has been examined from a number of disciplines and perspectives.[85] If we accept that this intervention is both necessary and justified, then some of the legal mechanisms by which states have traditionally implemented those policies should, with necessary modifications, be available to supranational institutions to ensure the proper fulfilment of the regulatory function. However, the relevance of doctrines such as direct applicability must not be assumed, nor should WTO reforms be implemented without widespread debate and acceptance. WTO reform of any order may not be contemplated in isolation from broader reforms to strengthen the rule of law. Ultimately, the reform issue is about values. Enforcement cannot be dissociated from the sometimes-competing demands of justice and the recognition of pluralism. Current constitutional uneasiness within the EU suggests that there are dangers in constitutionalizing an international regime in the absence of public debate and deliberation. Thus, there are possible lessons from the EU on a range of issues and levels – proposals to consider and problems to avoid.

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85 J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003); Palmeter, above n 1; Joerges and Petersmann (eds), above n 1; de Burca and Scott (eds), above n 1; M Th Greven and L W Pauly (eds) *Democracy beyond the State? The European Dilemma and the Emerging Global Order* (2000); D Archibugi, D Held and M Köhler (eds) *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (1998); A Slaughter, A Tulmello and S Wood, 'International Law and International Relations: A New Generation of Interdisciplinary Scholarship' (1998) 92 *American Journal of International Law* 367; M Pryles, J Waincymer and M Davies, *International Trade Law: Commentary and Materials* (2003); Saunders and Triggs (eds), above n 1.

VI Conclusion

International trade law is increasingly about transnational or supranational relations, rather than being simply about intergovernmental forms of interaction. This brings the international trade regime within a constitutional framework, with all the complexities this imports. Thus, international trade law is subject to constitutionalization, which effectively sees the emergence of a constitutional system and an international rule of law.

Greater interdependence between states has, ostensibly, lead to increased international governance, as nation states are encouraged to give up further sovereignty on matters that are best dealt with at the international level.[86] In the 21st century it is generally accepted by nation states that international trade is within the legitimate scope of international governance, the existence and large membership of the WTO providing evidence of this fact. While the WTO represents a dramatic advance in multilateralism, its continued effectiveness may potentially be threatened by inadequate domestic implementation and enforcement mechanisms, by misunderstanding of the concept of national sovereignty, by persistent claims of illegitimacy as well as public disquiet in the face of expanding supranational and decreasing national capabilities. On all these fronts, the familiar threads of the EU constitutional discourse may be edifying. Thus:

1. Direct effect may offer new possibilities for effective implementation and enforcement of WTO trade law.
2. The emergence of the constitutional principle of subsidiarity, mediating the division and distribution of powers between supranational and national institutions, may counter claims of illegitimate exercise of power by the former.
3. The transfer of national sovereignty to international or supranational institutions – in which sovereignty is pooled –

[86] Petersmann remarks that '[t]he "de-nationalisation" resulting from the increasing international interdependence and the universal recognition of human rights entail that national constitutions… cannot effectively protect human rights and "public goods" across frontiers without complementary, multilevel constitutionalism': Petersmann, above n 10, xxxvi-xxxvii.

may provide justification where trans-national decision-making is called for.

4. Supranational law may be seen to stand above national interests and may be legitimated by recourse to the 'substantive justice of outcomes'.
5. The empowerment of WTO institutions invites discussion on the extent of participation in its deliberations by representatives of civil society, while any further enabling could instigate calls for democratization of institutional structures and processes, though there is uncertainty as to the nature and proper scope of democratic action in the WTO.[87]
6. Public discussion and awareness of the WTO's foundational objectives and the defining characteristics of its legal framework may assist in generating debate and the conditions conducive to acceptance (or otherwise).

Comparative study of the WTO may be profitably conducted against a constitutional backdrop, with the EU the primary point of reference. While the EU may not yet have found lasting, satisfactory solutions to the dilemmas and challenges of legitimacy, or to the problems of coexistence between governing institutions, it is nevertheless at the forefront of these investigations; its very existence testimony to a spirit of innovation and endeavour.

Even if EU experience is not easily able to be transplanted, there are certain constitutional ideas, principles and problems associated with its evolution that can inform the development of a global trading system similarly concerned with enhancing the legitimacy of supranational institutions and decision-making. The passage of time, further research, modelling or simulation may confirm (or not) the necessity for interchange between the respective legal systems. For the time being, current developments and trends of international organization suggest that EU constitutional experience is 'less EU-

[87] See, eg, A Kellow, 'The Constitution of International Civil Society' in C Sampford and T Round (eds) *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 68.

specific'[88] than often presumed, with positive and negative lessons for an emerging WTO.

88 K E Jørgensen, 'Europe: Regional Laboratory for the Global Polity' European Forum Weekly Seminar Discussion Paper (presented at the European University Institute, Florence, 23 November 2000) 7.