

weight of constitutional practice still concedes considerable latitude to the executive in making such decisions" (p. 300). Finally, Michael Glennon is openly skeptical of the supposed parliamentary trend with respect to the United States. "If anything," he argues, "the trend in the United States has been toward less accountability of the executive to the legislature, not more" (p. 344).

It is also necessary to remark that the country reports suffer from an unfortunate omission that is mandated by the project's focus on a few democratic countries. I accept the limits of space and coherence that bedevil any such comparative project. But the incredible utility of the nine surveys collected in *Democratic Accountability* pleads for the addition of others. Especially considering the present geopolitical climate, it would have been of great interest to know what domestic legal and political processes operate in the decision to use force in, inter alia, Brazil, China, Egypt, Ethiopia, Israel, Jordan, Pakistan, Poland, South Africa, and Uruguay. With the exception of Israel, these countries are top-twenty troop contributors to UN peacekeeping missions. Brazil, Israel, Poland, and South Africa are diverse and well-established democracies, presenting distinct systemic and contextual issues of certain comparative interest.

There is also a compelling argument to be made that efforts devoted to the study of accountability regarding the decision to deploy soldiers are better focused on nondemocratic states. In such countries, including the many African ones that contribute to the use of force under international auspices (including missions of the United Nations and regional organizations), the risk of illegitimate uses of force and their accompanying consequences for the human rights of those countries' citizen-soldiers is exponentially greater than in the democracies considered in the book; the citizens of those countries lack the ability to check use-of-force decisions via the democratic process.

Democratic Accountability acquits itself nobly, most significantly by presenting the comparative law community with its remarkable country reports. I take some exception to the way that the editors conceptualize the constituent elements of their thesis and particularly would have preferred

a more thorough and creative treatment of democracy. Tragically, time has not borne out the book's broadest claim. Rather than seeing more democratic and parliamentary authority over the use of force, the few short years since the book's publication have been ones of marked decline. I say "tragically" because I share the conviction that use-of-force decisions increasingly must come to be legitimated by democratic processes. Certainly, it is not the editors' fault that history seems to have set back that agenda. To their credit, with *Democratic Accountability* we have the impressive mandate as scholars and policymakers to press forward with the effort to achieve that goal.

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The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System. By Deborah Z. Cass. Oxford, New York: Oxford University Press, 2005. Pp. xxvi, 266. Index. \$115, £60, cloth; \$39.95, £20, paper.

Nonlawyers must surely be surprised to see how we lawyers get all worked up when the words "constitution" or "constitutionalization" are mentioned. To use, or not to use, the C-word was at the heart of many legal discussions on the recently rejected constitution for Europe (or, more correctly, *Treaty Establishing a Constitution for Europe*). In the context of that other, global project of economic integration—the World Trade Organization (WTO)—similar debates are raging, albeit at an earlier stage of development.¹ As Miguel Maduro points out, in the European context we have moved from talking about a "process of constitutionalization," to questioning whether such a process represents a European "constitution" (does Europe *have* a constitution?), and then on to discussing whether Europe requires a formal constitution (does Europe *need* a constitution?).² In the WTO, in contrast, we are, for the

¹ For the most recent sample, see Symposium: *WTO 'Constitutionalism,'* 3 EUR. J. INT'L L. 623 (2006) (with articles by Jeffrey Dunoff and Joel Trachtman).

² Miguel Poiares Maduro, *The Importance of Being Called a Constitution: Constitutional Authority and the*

most part, still at the first stage of asking whether there really is a process of constitutionalization happening and, if so, whether this is even a good thing in the first place. The very title of Deborah Cass's book, *The Constitutionalization of the WTO*, confirms that as regards world trade we are still talking about process (constitutionalization) rather than deliberate action (constitution).

At the core of Cass's book—she is a reader in law at the London School of Economics—is a somewhat circular descriptive exercise: In a three-step analysis that takes up six of her eight chapters, she concludes that the WTO is currently *not* constitutionalized. In a first step, Cass gives us what she calls the “received account” of constitutionalization, an account grounded in national constitutional thinking. In her view this “conventional” definition requires six core elements: (1) the emergence of constraints on social, political, and economic behavior; (2) a new *Grundnorm*, or rule of recognition; (3) political community; (4) deliberative process; (5) realignment of relationships within that community; and (6) social legitimacy. In a second step, Cass describes the three traditional claims according to which the WTO is constitutionalized: (1) institutional managerialism (that is, John Jackson's approach of institution as constitution);³ (2) rights-based constitutionalism (namely, Ernst-Ulrich Petersmann's approach of free trade as individual rights);⁴ and (3) judicial norm-generation, which is essentially Joseph Weiler's idea of European constitutionalization through constitutional norms and structures created by the European Court of Justice⁵ (an approach that Cass herself adopted in previous work in respect of the WTO Appellate Body, but now criticizes). In a third and final step, Cass tells us that none of these three claims of WTO con-

stitutionalization meets the “received account” of constitutionalization, largely because none fulfills (or sufficiently fulfills) the requirements of political community, deliberation, and social legitimacy. Ergo: the WTO is currently *not* constitutionalized.

The circularity of this three-step analysis is, of course, apparent (and Cass readily admits that much). It is, after all, relatively easy to first pick your own definition of constitutionalization and then to test that definition against prevailing accounts of WTO constitutionalization so as to come to the conclusion that, according to your definition, the WTO is *not* constitutionalized. Put differently, Jackson, Petersmann, and Weiler never claimed that the WTO (or, for that matter, the European Union) is constitutionalized in the way that we understand constitutionalization in domestic legal systems. For Cass to discover that claims of WTO constitutionalization do not meet the standard definition of nation-state constitutionalization is therefore not that revealing. At the same time, it is worth remembering that constitutionalization, however we define it, operates differently internationally as opposed to within domestic polities. The big question, of course, is what constitutionalization can or should look like beyond the nation-state.

In the last two chapters of her book, Cass briefly addresses this bigger question.⁶ In chapter 7, she moves to what she calls a normative critique of constitutionalization, describing what she regards as weak, moderate, and strong anti-constitutionalism. This analysis requires a major shift in gears: after just being told that the WTO is *not* constitutionalized, we are then presented with the critiques of *ongoing* WTO constitutionalization: weak anti-constitutionalists who consider that the WTO has taken too many powers away from WTO members; moderate anti-constitutionalists who “decry the failure of deliberative process in the WTO and claim that constitutionalization, in its current form, provides inadequate guarantees

Authority of Constitutionalism, 3 INT'L J. CONST. L. 332, 332 (2005).

³ See, e.g., JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998).

⁴ See, e.g., ERNST-ULRICH PETERSMANN, *CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW* (1991).

⁵ See, e.g., J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

⁶ For a more extensive analysis, see EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J. H. H. Weiler & Marlene Wind eds., 2003).

of transparency, participation, and accountability" (p. 209). But rather than setting forth normative positions against constitutionalization as such, these so-called weak and moderate forms of anti-constitutionalism present critiques of the current WTO system *tout court* (irrespective of constitutionalization) or, at best, analyses of how the WTO is wrongly or not sufficiently constitutionalized. Only what Cass calls strong anti-constitutionalists⁷ object to the very idea that the WTO has become constitutionalized, and it is only this group that normatively objects to any constitutionalization, specifically because in the WTO context, constitutional language appears to give that organization a normative aura and legitimacy that it does not actually have or deserve.⁸

Although Cass does not explicitly adopt any of these three anti-constitutionalist critiques, from the outset she makes it clear that "the WTO is not constitutionalized, and nor, according to any current meanings of the term, *should it be*" (p. x, emphasis added). It is therefore somewhat surprising to read the last chapter of her book, which, instead of maintaining an anti-constitutionalist stance, seems to opt for what many might regard as constitutionalization on steroids. Combining (1) the mismatch she found earlier in the book between the received (national) account of constitutionalization and the traditional claims that the WTO is currently constitutionalized and (2) the triple critique against constitutionalization (discussed above) as it now plays out in the WTO, chapter 8 of the book (less than nine pages long) calls for "a radical rethinking of the language and structures of constitutionalization." Cass refers,

⁷ Best represented by Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227 (Roger B. Porter, Pierre Sauve, Arvind Subramanian, & Americo Beviglia Zampetti eds., 2001).

⁸ See, more recently, Jeffrey Dunoff, *Constitutional Concepts: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 647 (2006) ("Might international lawyers use constitutional discourse as a rhetorical strategy designed to invest international law with the power and authority that domestic constitutional structures and norms possess? If so, this strategy may be self-defeating.").

more specifically, to "[t]ransnational constitutionalization" or a "transformed constitutionalization which challenges our current perceptions of that phenomenon" (p. 208).

Based on earlier work by Thomas Cottier (in the WTO context) and Neil Walker (in the EU context), Cass promotes the now commonly proposed idea of constitutionalization as a five-story house, "with each storey representing one of the layers of governance from sub-local to international, through local, national, and regional" (p. 240).⁹ Struggling not with the term *constitutionalization*, but the equally contested notion of *sovereignty*, the core message of John Jackson's latest book is similar. He speaks of "slicing" the concept of sovereignty and explains that "most of the allocation [of power] problems are not black or white, but involve some gradation of 'ceding of sovereignty' as a matter of degree, not kind."¹⁰ So far, so good. What makes me use the expression constitutionalization on steroids, however, is that Cass's proposal for transformed constitutionalization goes well beyond this structural view of what is often referred to as multilayered governance (to avoid the terms constitutionalization and sovereignty). Indeed, what she calls for is to marry this approach "with a more substantive, thicker, notion of trading democracy as economic development . . . [:] [a] procedurally transformed, substantively democratic, argumentative form of WTO constitutionalization" (p. 5). For Cass, "Putting trading democracy, emphasizing development, at the heart of the WTO is necessary . . . in order to reflect the authentic desires of the putative international trade community" (p. 243). These are, of course, strong words and very ambitious goals: WTO-wide democracy, both procedurally and substantive; development and elements of redistribution as the primary goal of the WTO; and development of a trade community (WTO polity?). The question, of course, is whether the WTO can—and, according to many,

⁹ See also Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623, 625 (2006) (speaking of "three intertwined elephants": the domestic, WTO, and general international law levels).

¹⁰ JOHN H. JACKSON, *SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* 215 (2006).

ever should—achieve these ambitious goals. Just as important is the question whether, if one sets this grand agenda for the WTO, one is not destined to disappoint. If a truly democratic, deliberative European community has turned out to be extremely difficult to achieve, if not illusory, how can we expect the global WTO to perform?

When it comes to the WTO, I propose to avoid the word constitutionalization as much as we can or, at least, to move beyond the semantics and definitional questions of constitution or no constitution. I do not mean to deny that, at the WTO level, constitutionalization is occurring. Of course, it is, even at the international level. If one understands constitutionalization in its objective dimension as a fundamental scheme wherein powers are divided, then surely the WTO is constitutionalized. When I explain to my students the 1994 Marrakesh Agreement Establishing the WTO, with its sixteen articles on the WTO's scope, functions, structure, budget, decision making, and membership, I do often call it the WTO "Constitution." Indeed, from this objective, structural perspective, the Marrakesh Agreement is no less of a constitution than the UN Charter, the (officially termed) Constitution of the International Labour Organization (ILO) or, for that matter, the constitution of your local golf or bowling club. Unlike the constitution of a bowling club, however, the WTO treaty also fulfills what many regard as the constitutional function of tying the hands of governments to economically sound free trade policies, enabling them to resist special interest groups clamoring for welfare-reducing protectionism.¹¹ To so elevate particular objectives (in the case of the WTO, liberal trade and principles of nondiscrimination) above the day-to-day logrolling of politics is a staple feature of all domestic constitutions. For example, to

avoid majoritarian abuse of minorities (remember, Hitler was democratically elected), most national constitutions guarantee nondiscrimination and other fundamental rights. Finally, if one understands constitutionalization as involving normative constraints on behavior and also the balancing of fundamental interests, there can be no doubt that these elements can be seen in WTO rules and WTO Appellate Body rulings—which aim at restricting the economic conduct of WTO members and, in the process, must balance free trade principles against other goals, such as health, the environment, and the protection of public morals.

In all of these ways, the WTO is unquestionably constitutionalized. But then again, in so many other ways, the WTO is absolutely *not* constitutionalized. There is no question of a WTO polity or of a closely knit community of individuals that has mandated power to the WTO (the way, for example, that the U.S. or French people mandated power through the U.S. or French constitution). Unlike EU bodies (such as the European Commission and the European Council), WTO organs do not even have legislative capacity of their own. Nor does the WTO offer any individual rights to citizens against their, or another, government. The WTO is and remains a treaty between states. As the recent failure of the Doha Round sharply reminded us, this treaty was made, and can only be amended with, the consent of all WTO members. The WTO is, in other words, a political bargain between governments. It is largely from and through those governments that WTO deliberation and legitimacy flows. In that sense, the WTO is an intergovernmental institution, not a supranational constitution. In addition, the WTO is and remains a trade agreement. At best, it serves a functional community centered on the activity and consequences of trade. Finally, unlike EU law, which has supremacy and direct effect in member states, WTO members are free to decide what effect they give to WTO rules in their own legal system, and they do not need to give supremacy to WTO provisions. Even when the Appellate Body condemns government policies, there are the temporary escape valves of compensation and of simply suffering retaliation. In

¹¹ This view was held not only by Neo-Kantians such as Petersmann, but also by American conservatives, even those generally concerned with preserving U.S. sovereignty. See, e.g., John O. McGinnis & Mark L. Movsesian, *World Trade Constitution*, 114 HARV. L. REV. 511, 515 (2000) (arguing that since protectionism inherently harms the majority, WTO agreements tying the hands of domestic politicians to the mast of free trade "act to restrain protectionist interest groups, thereby promoting both free trade and democracy").

addition, countries can renegotiate and unilaterally change their tariffs and specific services commitments (subject to compensation or retaliation), and effectively reimpose trade restrictions through safeguards and antidumping duties. From that perspective, the WTO is more like a Swiss cheese than a free trade constitution written in stone.

In sum, *is* the WTO constitutionalized? Yes, in many ways it is (especially in its objective, structural dimension), but in many other ways it is not (especially in the subjective, community dimension of constitutionalization). Within a normative context—*should* the WTO be (further?) constitutionalized?—constitutional discourse is even more ambiguous. As a result, it may be better to avoid the term altogether, but not because constitutionalization is alien to the WTO or because international affairs do not or should not raise constitutional questions. The WTO is obviously, at least to some extent, constitutionalized already, and international law itself raises crucial questions of a constitutional nature.¹² It is for a reason that despite the absence of any reference in the WTO treaty to a WTO constitution, WTO constitutionalization has become such a debate: what the WTO does, matters (it affects all of us) and is for real (its rules are effectively enforced). The same reason explains why, notwithstanding the official presence of an ILO Constitution, few are worried or writing about ILO constitutionalization. Rather, in the WTO context I would avoid the terms constitution and constitutionalization altogether because of their inherently contested nature and the subjective baggage that they carry with them.

Thinking only of the divide between Europe and the United States (and thus making light of even greater diversities among WTO members such as China, Saudi Arabia, and, soon, Russia), Jed Rubenfeld has recently described what he sees as profoundly different constitutional traditions in Europe as opposed to the United States.¹³ In Europe, Rubenfeld finds what he calls “ interna-

tional constitutionalism,” and in the United States, “democratic constitutionalism.” For him, the latter, American approach “sees constitutional law as the foundational law a particular polity has given itself through a special act of popular law-making”—a constitution based on “deliberation and consent” that ultimately remains subject to the flexibility of politics. In contrast, for Rubenfeld, the former, European approach “sees constitutional law not as an act of democratic self-governance but as a check or restraint on democracy deriving its authority from its expression of universal rights and principles that transcend national boundaries”—a constitution based on “reflection and choice” whose commitments stand above politics and can therefore be readily internationalized.¹⁴ If Rubenfeld is correct, this difference surely does not bode well for selling any type of WTO or international constitution to the United States, if only because of how the United States understands and has lived the term constitution at home. For Europeans, who are by now somewhat used to multilayered constitutionalism, using constitutional language in an organization where the United States plays a prominent role (be it the WTO or the United Nations) may therefore be counterproductive. The term or terminology alone might sink what is otherwise a sensible proposal.

A more productive exercise is to accept and respect the special features of cooperation at the WTO—which Joseph Weiler in the European context has referred to as Europe’s *Sonderweg*¹⁵—and to move beyond constitutional semantics, in search of solutions to specific problems of power sharing, competence delimitation, legitimization, and accountability. At the end of the day, the core question is not whether to constitutionalize or not, but how to find a balance between international commitment (law) and domestic demands for

¹⁴ *Id.* at 1971.

¹⁵ J. H. H. Weiler, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, *supra* note 6, at 7. The term *Sonderweg* was traditionally used to describe the “special path” that Germany followed—that is, Germany’s own, unique course (including National Socialism and the Holocaust) as determined by its own evolution and history.

¹² For an overview, see Erika de Wet, *The International Constitutional Order*, 55 INT’L & COMP. L.Q. 51 (2006).

¹³ Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004) 1971.

flexibility (politics), and between efficiency (in case of the WTO, through liberalized trade) and legitimacy, contestation, and participation.¹⁶ As Cass herself points out, “the language of constitutionalization is likely to obfuscate the debate, diminish the more quotidian achievements of the WTO, and deflect scholarly attention from other, less glamorous aspects of its functioning” (p. 23). Would it not therefore be better to shelve the C-word and to move to mapping out the specifics of the WTO’s own *Sonderweg*?

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The World Trade Organization: Law, Practice and Policy. 2d ed. By Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis. Oxford, New York: Oxford University Press, 2006. Pp. cvii, 989. Index. \$235.00, £140, cloth; \$79.50, £40, paper.

The much expanded second edition of *The World Trade Organization: Law, Practice and Policy* by Mitsuo Matsushita, Thomas Schoenbaum, and Petros Mavroidis is a welcome addition to the growing collection of treatises, textbooks, and handbooks on WTO law and trade regulation generally. The authors of this handbook (and I will say more about the term shortly) are accomplished trade scholars with vast experience in both academic and policy settings, including within the WTO (Matsushita, for example, is a member of the WTO Appellate Body). They are uniquely qualified to present this exposition of WTO law and policy.

This book fits well into the small, but bright, constellation of reference works on international trade and the WTO system. The book is more systematic and up-to-date than John Jackson’s 1997 “reference monograph,” *The World Trading System*, while sharing the latter’s predominantly doctrinal approach and comfortable blend of law and policy. The book is similar in topical coverage to Michael Trebilcock and Robert Howse’s *The Reg-*

ulation of International Trade, but differs in that it lacks the latter’s sustained intellectual argument (a “law and economics” approach to trade policy), unless one considers the book’s implicit pragmatism to be an indicator of the authors’ intellectual position, which it well might be. Peter Van den Bossche’s admirable treatise, *The Law and Policy of the World Trade Organization*, is by nature more of a textbook—which highlights the current work’s value as what I would term a handbook-style reference: it is quicker to use and refreshingly direct in presentation. If one feels constrained by the necessary brevity of a handbook-style approach to such a complex topic, one can always supplement it by consulting, for example, Raj Bhala’s excellent *Modern GATT Law*, which is narrower but deeper.

Turning to the substance of this newly published second edition, the authors’ stated goal is to offer an updated overview of WTO law, including recent developments in dispute settlement as well as the increasingly important agriculture and government procurement areas. In this context, the book is a spectacular success. The range of topics is comprehensive without being ponderous, the prose is quite lucid, and the discussion well-organized. I found it a wonderful and refreshing review course, despite my having taught trade law for thirteen years.

Contrary to standard practice, I suggest that one begin by reading the book’s final chapter, on future challenges facing the WTO. Three of the four fundamental challenges listed by the authors are carried over from the first edition (published in 2003, only three years earlier): institutional reform, particularly on the norm-creating side; managing the global social issues linked to trade; and integrating developing countries. The fourth challenge, added in the second edition, involves the recent surge of regional and bilateral free trade agreements. I agree wholeheartedly with this list; indeed, I think it would only have improved the book if the authors had incorporated these challenges into the organization of the entire treatise. In my view they are not merely “future” challenges, but present, systemic issues affecting the WTO’s legitimacy and effectiveness on a daily

¹⁶ For a full discussion, see Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005).