

THE WORLD TRADE ORGANIZATION AS A STRUCTURE OF LIBERTY

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The World Trade Organization (“WTO”) can become a force for limited government in our day, just as the Framers’ Constitution was in theirs. First, the WTO has structural similarities to the original Constitution of the United States. The WTO enlarges the polity for trade purposes and thereby weakens protectionism around the world by mobilizing exporter groups to battle protectionist interest groups in each country. It therefore sets certain factions against each other in the same way that James Madison suggested in his theory of the large republic.¹ In that respect the WTO actually improves democratic choice, since otherwise democratic nations would be hobbled by protectionist interest groups with undue power.²

Second, the WTO helps promote a structure of limited government like that espoused in the U.S. Constitution because it replicates the idea of federalism on the international level. Federalism, in turn, creates a market for governance, and thereby creates incentives for government to provide public goods and appropriate regulation that will attract investment. Today, the WTO and allied agreements on open capital markets allow for the free movement of goods and capital while maintaining a fairly thin structure of government. Inside that structure, nation states make independent decisions about social policy. Just as the Constitution was a great charter for economic growth in the United States by promoting a beneficial regulatory competition among states, so the WTO can be a great charter for

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1. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

2. Interest groups are groups of individuals, corporations, or other organizations that can acquire resources for themselves at the expense of the public through their substantial influence over the political process. Protectionist interest groups are the subset of interest groups that acquire such resources by securing tariffs or other laws that impede competition from foreign products. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 523–25 (2000). This definition of interest groups does not include those groups, like environmental organizations, that do not seek resources for themselves through the political process, but instead seek to change government policy by persuading the public that their distinctive values should guide society. *Id.* at 529–30.

international economic growth by promoting beneficial jurisdictional competition among nation states.

I. THE BASIC STRUCTURE OF THE WTO AND FACTIONAL COMPETITION

The WTO agreements on trade facilitate private transactions and therefore generate economic growth. Trade is ultimately about mutually beneficial contracts among different parties; in the WTO context, the parties happen to be in different countries. The reasons the international community needs the WTO are not entirely economic. Despite the fact that economic theory promotes unilateral free trade as ideal, throughout human history xenophobia and interest groups have conspired to prevent this ideal from being realized. Today, the WTO is a mechanism that attempts to counteract these political tendencies to bring greater prosperity to the world and succor to the world's poorest.

Even though free trade policies in general are wealth maximizing, special interest groups often try to prevent these types of policies. While competition from overseas goods is beneficial to the consumer because competition lowers prices, overseas competition can hurt local industries and unions. Furthermore, because they are concentrated groups, industries and unions have substantial power in the political process and incentives to lobby the government for favorable policies and to provide campaign contributions and election support to candidates that support protectionist measures.³ Diffuse groups, such as consumers, have less concentrated power in the political process.⁴ While every consumer benefits in some sense from free trade policies, they each benefit to a relatively small degree. Very substantial free rider problems inhibit consumer influence on trade

3. Interest groups participate in and influence the political process in a variety of ways. First, they are able to monitor what transpires in the political process; for example, what legislation is considered and how it affects their interests. See, e.g., Michael A. Andrews, *Tax Simplification*, 47 SMU L. REV. 37, 42 (1993). Second, because of their greater resources, interest groups are able to conduct coordinated and coherent media campaigns to publicize their position. See J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 623 (1982) (noting studies showing that "massive spending and sophisticated media campaigns by special interest groups have swamped referenda that were initially favored by a majority of the voters"). Finally, interest groups may exercise great leverage over legislators through campaign contributions or independent political expenditures. See Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 826-28 (1985).

4. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 144 (1965) (contrasting the political clout of unorganized consumers with that of well-organized trade associations).

policy. If one consumer contributes to a consumer lobby, other consumers who have not contributed will still benefit from the lobby's actions. In contrast, industries and unions are already organized for other purposes: to manufacture and sell goods and to bargain with management. As a result, consumers have fewer incentives to join organizations aimed at lobbying for free trade.

Another obstacle that consumers face is rational ignorance—an important truth about modern democracies that should be central to all political discussions of the proper structure of government.⁵ Rational ignorance describes the systematic tendency of citizens to pay little attention to political information. The phenomenon occurs because acquiring information about politics is both costly and unproductive. It is costly because, to acquire such information, individuals must invest time that they could be using in other more lucrative or pleasurable enterprises. It is unproductive because, although the principal instrumental use of such information is to guide voting, the vote of any one individual is unlikely to influence the outcome of an election. Because of the effect of rational ignorance and the free rider problem, mechanisms should be devised that will counteract domestic protectionist interest groups that create obstacles to free trade policies.

The WTO tries to counteract these interest group pressures through reciprocal agreements intended to reduce tariffs and other barriers to trade. The success of the General Agreement on Tariffs and Trade and now the WTO lies in the mutuality of tariff reductions. These agreements create pressure for free trade in each country as producers that enjoy a comparative advantage in the production of a certain item stand to gain new markets for their product in other countries.⁶ This prospect provides producers with incentives to lobby for lower tariffs in their own country because this will open up the markets of other countries.⁷ In the United States, industries that produce goods for export, such as the farming industry, are willing to lobby against industries seeking protective tariffs, such as the steel industry.

5. See Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"?* *The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1179 (1998). For further discussion of the roots of rational ignorance and its pervasive effects on informational inputs in a democracy, see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 125–26 (1996).

6. According to the well-established theory of comparative advantage, nations prosper when they specialize in the goods and services they can produce most efficiently. See McGinnis & Movsesian, *supra* note 2, at 521; TODD G. BUCHHOLZ, *NEW IDEAS FROM DEAD ECONOMISTS* 67–73 (1990).

7. See McGinnis & Movsesian, *supra* note 2, at 545–46 (describing the WTO reciprocity regime).

Consequently, the incentive of new markets mobilizes concentrated industries to lobby on behalf of free trade.

This idea is analogous to the United States' use of a larger republic to limit the power of factions. On trade issues, the WTO makes lower tariffs abroad dependent upon exporter interest groups in each country. With the prospect of lower tariffs, the energized exporter groups become more engaged in the political process. Restraining protectionist groups and allowing the average citizen to make a better determination of trade policy positively affects democracy.

II. THE WTO DISPUTE RESOLUTION MECHANISM AS A BARRIER TO PROTECTIONIST INTEREST GROUPS

Once a country reduces tariffs, protectionist interest groups will inevitably seek out other barriers to frustrate international trade.⁸ To combat this, the WTO establishes a set of rules that prevents nations from imposing regulations or taxes that effectively discriminate against the products of other nations. These rules work much like the Supreme Court's dormant Commerce Clause jurisprudence and are needed to prevent both protectionist regulations and backsliding from tariff reduction.⁹ Because these rules have to be enforced, the dispute resolution mechanism of the WTO is crucial to the success of WTO agreements.¹⁰

In international law it is often difficult to determine how countries will actually enforce agreements. The WTO dispute resolution system works as a policing mechanism to bring effective pressure on nations to comply with WTO agreements. In this system, when a member deems that another nation has violated some provision of the WTO, that member can take the claim to a dispute resolution panel.¹¹ The panel then issues its findings, and if a violation is found, the members

8. For a general discussion of the manner in which concentrated interest groups will attempt to substitute one kind of rent-seeking for another kind that is blocked by the political system, see John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 428-29 (1999).

9. See Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEM. L. REV. 1315, 1323-24 (1995) (observing that the essential function of the dormant Commerce Clause is to guarantee a free trade zone among the states); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 17 (1987) (suggesting that the dormant Commerce Clause created a "charter of free trade"); see generally Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (discussing the history of the dormant Commerce Clause jurisprudence).

10. For a more detailed description of the WTO dispute resolution mechanism, see McGinnis & Movsesian, *supra* note 2, at 531-32.

11. General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1125, 1226.

harmful by the violation are authorized to impose sanctions on the other nation by imposing tariffs. This is an effective mechanism since the tariffs are often imposed against important exporter groups that have the ability to pressure the government into compliance.¹²

Recently, the United States was threatened with sanctions when President Bush raised tariffs on various steel imports. The WTO appellate body found the tariffs to be in violation of WTO provisions and President Bush relented, in part because of the billions of dollars worth of tariffs that would have been applied against key U.S. exports in retaliation.¹³ It is no accident that Europe and other members that were harmed drew up a list of tariffs that would have fallen on exporter groups in states key to President Bush's reelection.

Thus, the WTO can effectively enforce its rulings even though it lacks the authority to issue direct orders to offending nations. In this way the WTO's enforcement structure preserves the global structure of freedom without the usual markers of central authority—the deployment of force or even direct orders.

III. THE WTO AND INTERNATIONAL FEDERALISM

The WTO, to a degree, replicates the principles of the original Constitution of the United States in today's globalized world through the creation of a system of international federalism.¹⁴ In the original Constitution, the essential domestic function of the national government was to prevent protectionism. A free trade zone among the states was created by dismantling customs duties and other barriers that would frustrate the exchange of goods and services.¹⁵ On almost every other issue, however, the states were able to make their own policy choices. While there was a risk that the states would become repositories of a large degree of power, the free movement of goods and capital among them restrained state politicians' ability to exact rents from its citizens. If the exactions were too great, capital

12. In *The World Trade Constitution*, Professor Movsesian and I argue that this mobilization of producer interest groups also has benefits to the domestic political structure of democracies. See McGinnis & Movsesian, *supra* note 2, at 544–48.

13. See Claude Barfield, *US Steel Tariffs Gave Safeguards a Bad Name*, FIN. TIMES, Dec. 8, 2003, at 13 (U.S. ed.).

14. See John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 916 (1996).

15. See U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”); *id.* at § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”).

could move elsewhere, creating jurisdictional competition.¹⁶ Thus, the threat of exit reduced the leverage of interest groups to use the state as a fount of resources at the expense of the public.

Today, the WTO reproduces that system on the international level. There is a relatively thin international governance structure with the authority to make centralized decisions regarding the policing of tariff reductions to ensure that nations do not put up discriminatory barriers. Nation states still have the power to make domestic regulations that depend on their respective levels of development and the values and preferences of their citizens. Yet the open trading systems and capital markets facilitated by the WTO and international finance agreements restrain these nation states from using their powers unwisely.¹⁷

Wealth destroying regulations and interest groups are restrained by jurisdictional competition: bad decisions drive investment elsewhere. Jurisdictional competition is not perfect; it can fail in cases where there is strong spillover among nations, like certain kinds of pollution.¹⁸ In general, though, the world benefits from the market for governance that the WTO creates and that open global capital structures facilitate.¹⁹

The open market created by the WTO is especially important for advancing the interests of the poor.²⁰ Indeed, in addition to the general efficiency arguments, a compelling moral case can be made for the WTO because it provides substantial benefits to the world's poor.²¹ Economists have shown that an open market for trade benefits the poor to the same extent that it does the wealthy.²² For the people who eke out a living in Madagascar or in the high plateaus of the

16. See John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 203-04 (1997).

17. See McGinnis & Movsesian, *supra* note 2, at 572-89 (discussing "A Jurisprudence of Covert Protectionism" which concerns possible WTO approaches to differentiating between genuine domestic regulatory measures and those that are merely pretext).

18. See McGinnis & Movsesian, *supra* note 2, at 561-62.

19. The advantages of jurisdictional competition over centralized regulation are discussed at much greater length in *The World Trade Constitution*. See McGinnis & Movsesian, *supra* note 2, at 552-61.

20. See John O. McGinnis, *World Trade Agreements: Advancing the Interests of the Poorest of the Poor*, 34 IND. L. REV. 1361 (2001).

21. See, e.g., L. Alan Winters, *Trade and Poverty: Is There a Connection?*, in 5 WORLD TRADE ORGANIZATION SPECIAL STUDIES: TRADE, INCOME DISPARITY AND POVERTY 43 (1999), at http://www.wto.org/english/news_e/pres00_e/pov3_e.pdf (last visited Nov. 5, 2004); David Dollar & Aart Kraay, *Growth Is Good for the Poor* (Mar. 2000), at <http://www.worldbank.org/research/growth/pdffiles/growthgoodforpoor.pdf> (last visited Nov. 5, 2004) (describing a World Bank study that, using data from eighty countries over four decades, confirms that openness to trade boosts economic growth and that the incomes of the poor rise proportionately with overall growth).

22. See Dollar & Kraay, *supra* note 21, at 21-22.

South American Andes, the ability to sell their textiles in the world market would be a great boon. Thus, in advancing the interests of the world's poorest, the WTO should continue to move towards eliminating barriers to efficient transactions.

IV. THREATS TO THE WTO

There are two possible threats to the WTO today. One danger, coming largely from the left, is the idea that the WTO should have the general power to make substantive regulatory decisions on labor and the environment.²³ This would be a mistake because different nations have different preferences, values, and levels of development, and it would reintroduce the problem of undue influence from interest groups.

An organization devoted to global regulation would facilitate agreements that empower interest groups. Political economy suggests that interest groups would have substantial power over regulation at the international level. Indeed, one would expect interest groups to wield even more power over groups at the international than the state level. The average citizen finds international processes even more opaque than domestic processes, and thus they would have even more difficulty monitoring those charged with carrying out regulatory policy.²⁴ Moreover, the global scale of regulation would allow even greater exactions of rents and advantages for those interest groups. For instance, if a business group can gain international intervention in its favor through a regulatory process in Geneva, it can disable numerous foreign competitors at once. This type of attack by interest groups on the principles of decentralized government is reminiscent of the New Deal era. During that time the United States' system of constitutional federalism was largely eviscerated and replaced by a more centralized federal government. It is important that the WTO not suffer the same fate.

The second danger to the WTO, coming largely from the right, is the idea that the WTO is a threat to sovereignty and should be dissolved.²⁵ However, a constrained WTO, as outlined here, is no

23. See McGinnis & Movsesian, *supra* note 2, at 552–55 (providing a more detailed discussion regarding the threat of the WTO as a regulatory body).

24. See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 *NW. J. INT'L L. & BUS.* 681, 699 (1997) (suggesting that it is possible that citizens face higher costs in monitoring international rules than domestic rules).

25. See Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons From the History of Supreme Court Review*, 20 *MICH. J. INT'L L.* 775, 779 & n.19, 793–94 (1999); McGinnis & Movsesian, *supra* note 2, at 533–34. In

threat to sovereignty. The WTO does not directly enforce its decisions on the United States or any nation; it simply permits other nations to take sovereign actions of their own to apply pressure to protectionist policies that violate treaty strictures. Even more fundamentally, it is wrong to reify sovereignty, just as it would be wrong to reify states' rights. The autonomy and rights of states play a useful function in the United States system of federalism because the overall system distributes powers to states in the aid of a vision of jurisdictional competition and governmental accountability. States' rights are thus not an end in themselves, but a structure justified by the benefits those rights afford citizens.

Sovereignty should also be defined in the context of a system of jurisdictional competition among nation states. Sovereignty should be a break against centralized international regulation, but it should not prevent agreements, like the WTO, that promote the free flow of goods and capital among nations. Those agreements create a world in which sovereignty works for human welfare.

V. CONCLUSION

We are currently in the midst of a new round of trade negotiations that can work towards deepening the federalist vision of international trade. These negotiations should focus on removing current barriers to trade. The United States and other industrialized nations should eliminate industrial tariffs and agricultural subsidies in return for developing nations' agreement to open up markets in services and to cut tariffs on goods where developed nations have a comparative advantage. This represents the surest international path, not only to economic prosperity, but also to actual improvements in regulatory, environmental, and labor conditions in developing nations.

addition, some argue that beneficial jurisdictional competitions are actually detrimental races to the bottom. *See, e.g.*, Sebastian Mallaby, Remarks at American Enterprise Institute's Conference on Trends in Global Governance (Apr. 5, 2000) (transcript on file with Chicago Journal of International Law).