

International Trade and Constitutionalism: Friends or Enemies?

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The processes of legal and economic integration at a regional and global scale have created powerful legal and economic dilemmas. They challenge the paradigms of constitutionalism, including the State's monopoly of constitutionalism, the autonomy of national political communities and the traditional forms of participation and representation. They also require profound changes in the way in which we think and teach the law. The phenomenon of globalisation has promoted the inter-dependence of national political communities and destroyed the artificial boundaries upon which national constitutional democracies are found and from which derive their legitimacy. Many argue for the need to regulate such process of globalization and subject the forces that command it to some form of democratic control. Some conceive the developing forms of regional integration as new forms of governance which attempt to provide a regulatory and constitutional forum capable of controlling and legitimising the process of economic integration and globalisation. They can even be conceived as intermediary steps on the way to a global polity that may take the constitutional form tested in these regional systems. There are also those who propose far reaching models of democratisation of the global community to be undertaken, for example, through profound short and long-term reforms of the UN system. Finally, there are those who conceive the process of globalisation itself as an instrument of constitutional development and trust to principles such as free trade and non-discrimination the leading role in developing such global or international constitutionalism.

International trade law has taken a pivotal role in the discussions surrounding the legal and political form of the international society and in expressing the challenges brought by globalization to the State and its constitutionalism. Economic integration and free trade generate competition between the different national economic and legal systems. There are different economic and legal analyses praising or criticising such strategy of trade liberalization and its accompanying regulatory competition. There are also those that defend that the concept of competition among states itself is highly overstated and does not really fits with the reality of international trade and its impact on national economies. I will not be reviewing these different analyses in detail. I will assume, in any case, the free trade is generating forms of inter-dependence that, as I will explain, affect the constitutional autonomy of the different political communities and, at the same time, promotes the emergence of

a global political arena. There may be no doubt that, overall, free trade promotes efficiency and wealth maximisation. But, it is also not clear that all steps favouring free trade will produce more efficient or equitable solutions on the basis of existing alternatives. My assumption, at this point, is that whatever the final balance between regulatory and deregulatory approaches for international trade, global economic integration will develop inter-actions among the different national political communities and individuals leading to some forms of constitutional challenges on their degree of political self-determination. But, at the same time, this will generate claims of inter-dependence and shared social decisions. In other words, whatever the final framework for international trade it will be decided in an emerging global political arena. One of the aims of this essay is to identify this political arena, who governs it, and according to which rules. A second aim will be to highlight the constitutional nature of the challenge brought by international trade to the different national political communities. It is also worth noting that the development of international trade and economic integration will raise claims for some form of global distributive justice to complement the wealth maximisation arising from free trade. The gradual outcome will be the developing of global forms of political discourse and law making challenging State constitutionalism and requiring some of the instruments and theories of constitutionalism.

1 – THE INTERNATIONAL TRADE CHALLENGE TO CONSTITUTIONAL SELF-DETERMINATION

The best way to identify the challenge of international trade to the constitutional self-determination of national political communities is by reconstructing the well known debate between free trade and fair trade that is highlighted by the well known rhetoric of trade and human rights and, notably, trade and social rights. The starting point of the free trade vs. fair trade debate is the existence of different domestic social policies. Free trade advocates argue that such social policy differences cannot be used to restrict free trade. Fair trade advocates argue that free trade should only take place if those different social policies do not distort trade competition, therefore guaranteeing that free trade will not restrict the freedom of the different political communities to adopt different social

policies. In a context of free trade, the free circulation of companies, capital, products and services generates a process of regulatory competition among different polities: companies will move to where the regulatory environment is more favourable to their objectives (deregulation, lower taxes, financial incentives etc.); consumers, in turn, can choose among goods and services conforming to different regulations. As a consequence, regulations themselves will also be competing in the market. As stated before, there are many different economic and legal analyses praising or criticising such strategy of trade liberalization and its accompanying regulatory competition. Free trade advocates stress the efficiency gains derived from a better allocation of resources and the higher freedom of choice and lower prices available for consumers. Fair trade advocates point to the threat to the welfare State and the risks of a regulatory “race to the bottom”: companies will move to States with lower environmental, social, health or consumer standards and still benefit from the free trade of their products and services. They argue that either the different political communities should be authorised to restrict free trade if necessary to protect their social standards or there should be a level playing field whereby all parties participating in free trade will comply with a basic set of social rights. Free trade advocates, in turn, will argue that to authorise some countries to exclude trade from other countries on the basis of non-compliance with the former social policies corresponds, in effect, to authorise that country to impose its social policies on its trading partners and, in many instances, to use those social policies as a cover for economic protectionism. Furthermore, free trade economists normally argue that the best harmonisation of social standards will be that arising ex-post from the regulatory competition among the different social policies.

This summary of the predominant views of free trade and fair trade advocates already highlights two main types of arguments present on both sides of the debate: the first type of argument is based on the restriction imposed by either free trade or fair trade proposals on the freedom of some political communities to choose their own social policies (what I call social self-determination); the second type of argument is based upon the idea of fair competition which each side claims the other undermines.

In reality both of these levels of friction arising from divergent social policies in a context of free trade can be subsumed under the fear by the different political communities of losing the constitutional autonomy of

self-determining their social policies. The argument of unfair competition is either instrumental to the problem of social self-determination or requires, as the basis for the framing and discussion of free trade policy, common global values and a degree of social solidarity which could only exist in the context of a global political community. As things now stand there is no basis for a political contract at the global level and, as a consequence, the debate must focus on the best way to safeguard the constitutional self-determination of the different political communities. Fair traders say that free trade without a common level playing field forces some political communities to lower their social standards in order for their products and services to be competitive in the world market. Free traders will argue that fair traders are simply trying to impose their social standards on other countries by denying these countries access to market competition if they do not conform to those social standards. Both perspectives of unfair competition can therefore be reconstructed as focusing on the challenges to the constitutional autonomy of different political communities to exercise social self-determination and freely choose their domestic policies.

Trade liberalisation and the expansion of the global market means that more and more products and services from more and more States are competing in the same market. That competition indirectly affects the different regulatory frameworks to which those products are subject in their country of origin. Free trade generates competition between the different political communities' economic and legal systems subject to the goal of efficiency. Even if this economic competition is often highly over-stated the reality is that their simple perception constrains the normative autonomy of the different political communities. The extent to which the WTO case-law already embodies a notion of free trade rights as protecting the freedom of economic actors to choose among different regulatory systems can be disputed. But, even if legally an obligation is not imposed on countries to lower their social, environmental and consumer standards, economic competition opens their regulatory systems to competition and efficiency criteria, *de facto* subjecting normative ideals to economic competition. This affects their political autonomy in determining their social policies.

The debate on the social clause in the WTO context provides a good example. Fair trade advocates have been arguing in the academic and political debates in favour of some form of authorisation of non-discrimi-

minatory restrictions on trade with respect to social standards or, in the alternative, to establish minimum social standards to be complied with by all contracting parties of the WTO in order to benefit from free trade. However, all proposals favouring the establishment of a social clause in the WTO legal framework have so far proved to be unacceptable for an important number of States, mainly those whose comparative advantages result in great part from their lower social standards. For these contracting parties, the setting of a “level playing field” in the social sphere or the requirement to comply with different non-discriminatory social standards in order to be granted market access are seen as disguised forms of protectionism once they either lead to prohibit the entrance into a national market of products produced in accordance with different social standards or deprive those products from their competitive advantage. Therefore, those States would be forced to change their domestic social policies in order to gain access to the market of States with different social policies. In this way, fair trade policies can also be accused of affecting the constitutional self-determination of some political communities.

Fair trade advocates are right in noting that free trade challenges the autonomy of their political communities to determine their domestic policies. The problem is that the solutions they propose also challenge the autonomy of other political communities to determine their own policies. To be truthful, social activists and fair trade advocates present other arguments in favour of the conditionality of free trade upon certain social rights and policies. These are arguments derived from the independent value of social rights, which ought to be universally protected. The most critical views of trade liberalization and globalization oppose what they foresee as the subjection of regulatory ideals and human rights values to the market forces. The paradox is that defenders of trade liberalization and globalization see on this same process a tool for the promotion of human rights and will argue that there is no natural incompatibility between free trade and social rights. On the contrary, the economic growth, freedom and inter-dependence generated by free trade may be the more appropriate ground for the promotion of social rights. The key to unveil the reasons for such paradox lies in the fact that the notion of human rights is not enforceable in itself and requires a definition of the content of those rights. Where free trade advocates and free trade opponents disagree is on the definition of who should define what those rights are or, in alternative, on which definition of human rights should prevail.

The social rights rhetoric of fair trade advocates can only sustain itself if fair trade advocates are able to justify why their understanding of social rights should prevail over the different understanding of other political communities. The usual explanation is circular but apparently effective: such social rights are conceived as universal rights to be valid on all political communities. Therefore, they do not correspond to the imposition of the values of one political community over another but to values whose claim of legitimacy arises from a universal source, independent of all national and regional political communities. Such values and the rights flowing from them would be found in a trans-national link between the members of the different sub-global political communities. This trans-national solidarity would entail a criterion of distributive justice and fairness capable of legitimating uniform social rights. One may even partially accept some form of political relation between the citizens of the different sub-global political communities. However, such a theory of legitimacy faces serious problems when used to justify the conditionality of free trade upon the compliance by all countries with certain social standards. The establishment of global social standards which surpass the judgements of local political communities (State and regional such as the EU) can only be properly legitimised if the independent universal claim of legitimacy upon which they are based satisfies the conditions of a political community with a certain degree of solidarity that can be opposed to that of national or regional political communities. Many of the social rights advocated by fair traders have costs which would have to be shared by that global political community. If there is no global political community willing to share such costs and to figure out a criterion of distributive justice capable of supporting the application of those global social rights, then there is no reason why one perception of what social rights are should prevail over another. The same reasoning however does not apply to rights with no such costs and which can be constructed as necessary to the protection of constitutional self-determination.

At this point, what is clear is that what both sides of the free trade vs fair trade debate assume is that their judgment on the best balance between free trade and social rights ought to prevail. Since each side of the debate does not accept the requirements of a broader political community (including an agreement on a distributive justice criterion) the solution of this conflict cannot be legitimately subject to some form of universal criterion or global values (since there is no underlying global political

community capable of legitimating it). Instead, the different balances between free trade and social rights reflect themselves in different social policies of the different political communities, all of which present an *a priori* higher claim of legitimacy than that which can be provided by the rhetoric of either free trade or social rights without an underlying political community. It is on the conflicting judgments and claims of legitimacy of the different political communities that the debate on free trade vs fair trade must focus. Therein lies the real reason for the dispute.

Therefore, the problem of free trade and social policy is not about the rhetoric or the values that ought to dominate globalisation and trade liberalisation. There may actually be a world consensus on the protection of social rights and the promotion of free trade but there is no overarching consensus on the content of those rights and the rules of international trade that ought to control the choice among different conceptions of the social good. The real question to be faced concerns the choice of the process or institution which will balance the legitimate claims of different political communities to have their own judgments on the social good protected and the extent to which this constitutional self-determination of the different political communities ought and can be protected. It will be more useful if, instead of focusing on a largely inoperative rhetoric of human rights and globalisation, the debate would focus on the normative constitutional criteria that ought to be followed in making those difficult institutional choices.

2 – THE INTERNATIONAL TRADE CHALLENGE TO THE FORMS OF NATIONAL CONSTITUTIONALISM

A meaningful debate on international trade must depart from a analysis of the way in which free trade affects the constitutional definition of our political communities and the extent to which States and other polities (such as the EU) remain the primary form of expressing our individuals interests and participating both in domestic and international decision-making affecting social policies. Such analysis will highlight the constitutional character of the challenges brought about by economic integration which, in turn, will determine the criterion of legitimacy and the architecture of the legal framework which will regulate the developments promoted by economic integration and the nature of the

relation between trans-national, regional and national decision-making processes. The constitutional relevance of international trade can be seen in the impact it has on the constitutional self-determination of classical political communities (mainly States). But it can also be conceived, in a broader light, as giving rise to a change in the overall patterns of participation and representation in social decision-making. In this sense, it challenges not only the exercise of constitutionalism at the State level but also the conditions of constitutionalism in general.

Free trade gives raises to several constitutional phenomena, all of which affect the traditional mechanisms of representation and participation and the definition of the relevant political communities for constitutional self-determination, giving rise to what we could call a constitutional transformation of domestic political communities and discourse:

a) The New Political Fora of Policy-Making

Traditionally, international organizations could not be conceived as affecting the conditions for the domestic political definition of policy-making. International organizations were mainly set up to reduce information and transaction costs and to provide the necessary framework for viable cooperation among States since this would be difficult to achieve without the institutionalised processes provided for by those international organizations. The application of this classical conception of international organizations is highly problematic to organisations such as the WTO or, even, the ILO. The legal norms and political process which rule over the WTO end up attributing to it an independent normative authority. Once international organizations are perceived by the different social actors as emerging forms of independent power, they will attempt to profit from these organizations to pursue their different agendas. As a result, international organizations will tend to develop political and social goals that may diverge from those of its initial masters (the States). There is a circular dynamic between the spill-over of the power initially attributed to the WTO, which raises the interest of social actors for political action in this institution, and the reinforcement of the institution's power precisely by virtue of the political dynamic promoted by the action of those social actors. This cycling dynamic promotes the overall power of the WTO and its role as a global political arena. In the process, the

control of social decision-making by traditional political processes decreases. The WTO and the ILO are the best examples of international institutions which, more than simply coordinating States policies, promote independent political and social goals which are determined by a constituency of social actors which goes beyond the States and participates in manners different from those occurring in domestic political processes. The consequence, of constitutional relevance for social policy, is that the actors that participate and dominate in this emerging global political arena are not necessarily the same that have participated in the drafting of public policies at the national and European level.

b) Changing the Domestic Patterns of Representation and Participation in Social Policies

Even if we continue to link the determination of public policies at the global level to an agreement among the more traditional participants in the international community (States), the fact that the State's decisions will be decided in the framework of a different State policy sphere means that representation and participation in the drafting of those policies will change. The co-determination of domestic policies at the international level means that many of the State determinations of those policies are, at least in part, brought into the realm of foreign or commercial policy. Once we accept that the State does not have an homogeneous national interest and that there are different mechanisms and forms of participation involved in different areas of policy-making, one of the consequences of the partial transfer of some policies into the realms of foreign and commercial policies is that the relevant participants in the framing of those policies change. Furthermore, international trade reduces the power of the political processes by challenging their political monopoly on the definition of the social good. This is so because the emerging decision-making processes of international trade law can be used by a group which lost a domestic political battle to challenge the domestic political outcome. In effect, international trade and economic integration, can be said to offer to some citizens the option of exit with regard to the decisions of their political community and in this sense challenge that political community allocation of representation and participation.

c) *The Transfer of Power to the Market*

One of the consequences of the legal and economic processes of regulatory competition arising from international trade is a reduction in the political control over the economic sphere. Liberalisation of trade generates competition among products and services of different polities which, in turns, leads to a competition between the different regulatory frameworks to which those products and services are subject. Political communities have to determine their policies not only on the basis of their internal preferences but also taking into account the need for their products and services to be competitive in the global market. The consequence is a transfer of power from political processes to the global market. It is the market that will choose between competing regulatory policies and, in this light, it becomes crucial to assess the “constitutional quality” of representation and participation in the market.

d) *Technocratic Forms of Global Regulation*

A similar process of transfer of power will occur if, instead of trusting the regulation of international trade to the market, we decide to subject it to international standards set by international technocratic bodies. Both the markets and these technocratic bodies have an inherent rationality and a set of normative values which is not subject to a traditional form of political discourse or, to put it differently, they “decide” on the basis of a community of participation and representation that is different from that of political processes.

Once we establish that international trade challenges both the constitutional self-determination of the traditional political communities and the variables of representation and participation in the traditional constitutional framing of decision-making at the national level, the impact of international trade on constitutionalism becomes clearer. As a consequence, the relevant question becomes the forms of participation and representation now available in the framing of social decision-making and how to continue to secure the civic solidarity and constitutional self-determination necessary for different political communities to survive. The transfer of power generated by international trade to new forms of decision making such as the market, international standard-setting institutions and supra-national judicial bodies brings forward new problems of representation and partici-

pation which highlight the remaining virtues of the State and other traditional polities and the primordial role that they must continue to play as the default form of representation and participation.

3 – INTERNATIONAL TRADE LAW AS AN EMERGING FORM OF CONSTITUTIONALISM

From what has been said so far a question arises: when the powers of international law challenge the conditions of participation and representation at the constitutional level should that challenge not be subject to constitutional regulation? It is here that the notion of a trans-national political connection emerges. In my view, where international processes interfere in the constitutional self-determination of sub-global political communities they must do so under a claim of legitimacy to be found in constitutionalism itself. This justifies the creation of an international constitutional framework to assess the constitutional erosion of the traditional political communities and manage the increased conflicts between those different political communities constitutional claims. It is this constitutional framework that will provide us with the imperfect solution of our conundrum: how to protect the constitutional self-determination of competing political communities in the absence of a broader global political community.

The emerging constitutional representations of international trade law attempt to address this problem but they appear to underestimate the value of traditional political communities and to ignore the importance of the constitutional transformations brought by the new forms of participation and representation which are available through the current global processes of social decision-making. Many argue for the need to subject these global processes to some form of democratic control. In this light, there are those who propose far reaching models of democratisation of the global community to be undertaken, for example, through profound short and long-term reforms of the UN system. There are also those which, in a more limited manner, defend the creation of new institutional frameworks for the framing of global standards which could reintroduce the previous balance of representation and participation in domestic policies. These are arguments which depart from the need to move beyond local political communities

in the framing of public policies. In this view, the only way to re-establish equality of power and representation in the deliberation of those policies is by establishing institutional forms of political dialogue at the international level.

There are also those who conceive the process of globalisation itself as an instrument of constitutional development and trust to principles such as free trade and non-discrimination the leading role in developing such global or international constitutionalism. The World Trade Organization and the agreements derived from the Uruguay Round would be the primary tool of this perceived global constitutionalism. The role of international trade law is that of guaranteeing the freedom of individuals in the international arena so that they can fully enjoy their personal autonomy. The way to promote global constitutionalism would be by extending the scope and application of international trade law, human rights documents and dispute-settlement mechanisms. These will be the “avant-garde” of global constitutionalism. The focus is then on a minimal notion of constitutionalism: non-discrimination, individual rights (mainly economic rights) and dispute-settlement mechanisms. The expectation is that these instances will develop into a set of individual constitutional rights protected from any form of power. The dynamics of international trade will fuel the development of an international rule of law through these economic rights and dispute-settlement mechanisms. Such dynamics will result however in a particular form of constitutionalism. The conception underlying such a constitutional construction of international trade law will attribute to the latter the role of protecting economic freedom in the global market and therefore will limit the capacity of the different political processes to interfere with that freedom even when pursuing what is perceived by those political processes as legitimate social goals. Freedom in the global market would be expected to generally be the best instrument for the promotion of constitutional values. By founding both international trade law and domestic constitutional law on the ideals of freedom and non-discrimination one makes compatible the impact of international trade law on domestic constitutional systems. In a way, international trade law is simply an extension of national constitutional law. As we have seen, however, this compatibility is hard to establish, since it implies a consensual definition of what social rights are and how they are best to be

balanced with free trade. It either conflicts with the existence of different constitutional self-determinations by different political communities or requires the global market to be raised to the status of a global political community without an underlying political contract supporting this criterion of legitimacy.

The set of rights which international trade law protects, its emerging Rule of Law, the role which individuals and other Non-State actors may be called to play in its development and its impact on the domestic policies of States and other polities such as the EU, all require international trade law to assume constitutional characteristics. In my view, however, it is too early to talk of a global constitution or to assume the existence of a global political community that could justify the definition of social values beyond the independent social self-determinations of different political communities. It is more appropriate to talk of emerging elements of constitutionalism in the international arena that must command the constitutional effects taking place therein. There is no consensus on a social contract capable of supporting a global form of constitutionalism. And there is no political community to which one could make recourse to supplement that lack of consensus. At the global level, the aim should be that of securing equality of representation and participation in the exercise of the different political communities constitutional self-determination. Therefore, in my view, there are no global political conditions capable of legitimising the exercise of such constitutional self-determination at the global level. On the other hand, as we have seen, the exercise of the different political communities' constitutional self-determination is now clearly influenced by the forces of global economic integration. This requires the setting up of constitutional modes of disciplining such forces at the global level but only with the aim to secure the conditions of representation and participation necessary to a legitimate the exercise of constitutional self-determination at the level of the local political communities (States or others, such as the EU).

There is no need and no possibility as yet of a global constitution but there is a need of a constitutionalism that can embrace international law in addressing the constitutional challenges generated by international trade and, in the process, help correct current constitutional malfunctions of the State. The departing point must still be the constitutional self-determination of the traditional political communities but the new

forms of international law must develop normative criteria of participation and representation and apply such criteria to the institutional choices facing it. I want to end by challenging international lawyers to adopt such constitutional perspective and take seriously the institutional choices facing them.