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Reconstructing the World Trade Organization for the 21st Century – An Institutional Approach

Kent Jones

Reviewed by Henrik Andersen

Subject: World Trade Organization, Regional Trade Agreements, WTO Governance, Multilateral Trade Negotiations

I am very honoured to be asked to make a review of Professor Kent Jones' monograph "Reconstructing the World Trade Organization for the 21st Century – An Institutional Approach".[1] One can ask whether it is fair that a scholar who approaches the WTO from a legal and constitutional perspective should review a book by a distinguished professor of economics who offers an institutional analysis from a constructivist perspective with its focus on both formal and informal rules. It is my belief that a review by a legal and constitutional scholar is justified. If one takes an open mind towards other disciplines and accepts that each discipline is confined within its own assumptions, new learning and understanding of the shared subject; here the WTO, will appear. Through interdisciplinary approaches we learn more about our own disciplines in a wider context. I find the book by Professor Jones most welcoming. It is interesting, thought-provoking and inspiring, and it triggers some interdisciplinary questions which I will address later in this review.

The book offers a reconstruction of the WTO in light of the failure of the Doha Round. The author starts with the fundamental question in the introduction; "Why isn't there more trade?".[2] The outset for the analysis is that the WTO has institutional problems which have caused the failure of the Doha Round. Professor Jones compares the initial ambitious Doha plan and the single undertaking agenda with the outcome of the Doha Round to establish "failure".

Professor Jones makes a clear delimitation. It is an institutionalist approach, not legal, political, economic or sociological. By institutionalist analysis the author considers "why the WTO exists as an organization, and the process by which its members collectively agree on pursuing its goals. It seeks to clarify both formal and informal rules regarding the rights and obligations of members, negotiations, and decision-making. It identifies what policy areas are allowable for bargaining, how the process of consensus starts, and how it ends."[3] The assumption is that there are gains to be achieved from trade, and that the WTO fundamentally aims at increasing global trade. If there is lack of trade, it is because of institutional failures.

The book is divided into an introduction and 8 chapters. The introduction largely links trade with institutions and explains the basic premise that lack of trade is a result of shortcomings in institutions. The introduction also briefly explains that the Doha Round aimed at expanding global trade and market access.

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[1] Kent Jones, *Reconstructing the World Trade Organization for the 21st Century – An Institutional Approach*, (Oxford, New York: Oxford University Press, 2015).
[2] P. xv.
[3] P. 8.

Chapter 1 is the "Doha Round – What Went Wrong and What is at Stake?". As the title suggests, Professor Jones provides an overview of the factors contributing to the failures of the Doha Round. That is later elaborated on in the book. Those factors are categorized into 5 overlapping institutional problems; 1) conflict with the limits of policy sovereignty; 2) the single undertaking principle; 3) special and differential treatment for developing countries without clear outline of the reciprocity in trade negotiations; 4) change in the balance of powers between OECD and non-OECD countries; and 5) dispute settlement reforms with stronger judicialization increased the stakes of liberalization commitments. Chapter 1 then provides the structure of the book before discussing what is at stake if the institutional setting is not improved. Professor Jones gives some examples of trade barriers that should be overcome in order to explore the new gains from trade before Professor Jones gives some examples of increased protectionist policies by the WTO Members during the financial crisis where WTO Members to some extent found loopholes in the WTO system. Professor Jones suggests the importance of further trade liberalization and introduction of new disciplines and rules.

Chapter 2, "Institutional Foundations of the GATT/WTO System" examines "the GATT/WTO system as an international institution: a set of rules and processes established by its members to regulate trade relations and trade liberalization with each other."[4] Professor Jones takes a constructivist approach where he in particular relies on the work by John R. Searle[5] who emphasises "a systematic set of relationships between collective intentionality, the assignment of function, the assignment of status functions, constitutive rules, institutional facts, and deontic powers",[6] and that society has a logical structure. Professor Jones will later provide a short critique of the spontaneous order suggested by Friedrich A. Hayek in *Road to Serfdom.*[7] Professor Jones explains the historical evolvement of trade policy as an institution where trade provides mutually beneficial gains for parties involved and with reference to Douglas North, Professor Jones establishes his measurement for the success of GATT/WTO; "the desired goal of institutions as providing a framework to reduce transaction costs and increase total economic efficiency and welfare".[8] The collective intentionality of GATT/WTO is the aim of reducing transaction costs of trade liberalization and respecting participants' economic autonomy. That aim is validated by a shared belief of the participants and it will altogether provide the institutional equilibrium if the participants move together towards that aim in their activities. That institutional equilibrium seems to be achieved in the GATT era with multilateral trade liberalization, monitoring of the trade rules, and dispute settlement.

Chapter 3, "The GATT to WTO Transition and Institutional Crisis in the Doha Round", concerns disruption of the institutional equilibrium. The chapter addresses the institutional challenges with the move to the WTO and with the Doha Round. More specifically, Professor Jones identifies the single undertaking rule; the introduction of TRIPS, the increased judicialization of the Dispute Settlement; China as new member; changed bargaining power, in particular with stronger bargaining power of developing countries; and regional integration

[4] P. 22.
[5] John R. Searle, "What is an Institution?", 1 (1) (2005) *Journal of Institutional Economics*, 1-22.
[6] Ibid, at 22.
[7] P. 227. Professor Jones refers to Friedrich A. Hayek, *Road to Serfdom*, (Chicago: University of Chicago Press, 1944), pp. 219-240.
[8] P. 29. Professor Jones refers to Douglas North, Institutions, *Institutional Change and Economic Performance*, (Cambridge and New York: Cambridge University Press, 1990) and Douglas North, *Understanding the Process of Economic Change*, (Princeton: Princeton University Press, 2005).

as institutional shocks which have caused disruption in the institutional equilibrium. Chapter 3 also provides some overall suggestions for solutions to overcome the institutional problems.

Chapters 4-8 focus in more depth on the institutional problems identified in chapter 3 and provide possible remedies. Chapter 4, "Impediments to Doha Round Consensus and the Search for WTO Solutions" concerns both the formal and informal decision-making structures of the WTO with focus on problems in the negotiating environment and asymmetric bargaining power in the consensus based organization. Chapter 5, "WTO Governance and Committee Chair Representations" focuses on the institutional structure of decision-making in WTO Committees with focus on appointments of committee chairs and their influence on agendas. Chapter 6, "Regional vs. Multilateral Trade Liberalization" addresses regional trade agreements (RTA) and the question asked is whether they "play a useful role in moving global trade talks forward, and even toward multilateral agreement".[9] As the Doha Round has not delivered, RTAs are trade liberalization alternatives which many states are involved with. Some RTAs, like the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership, may potentially play a role in reviving multilateralism at WTO level although they have limits as they do not include some major global players, like China and India. Chapter 7, "Trade, Embedded Liberalism, and Development" focuses on the political balance between states favouring expanded trade opportunities and states favouring stability and particular national economic goals. Professor Jones discusses the concept "embedded liberalism" and how it can be renewed in order to make it relevant for both developed and developing countries. Chapter 8, "Pathways Back to Geneva" is the final chapter where Professor Jones compares WTO multilateral trade negotiation with a high-stake poker game to illustrate the problem when all players have to gain from it and at the same time make consensus. As those problems are illustrated in the Doha Round, Professor Jones provides some alternative institutional models, including RTAs. However, Professor Jones provides a number of arguments why the multilateral trading system still is preferable. For example, the increase of RTAs may increase fragmentation. Professor Jones also recommends that leadership should be taken. Not only by the traditional GATT leaders, but also by some of the new strong actors like China, India and Brazil, and they must seek some consensus together with the US and Europe. The Bali Agreement was a small achievement of the Doha Agenda but also exposed the constraints on the WTO in its current state for negotiating future multilateral agreements. Professor Jones offers here some different pathways which can take the participants back to WTO multilateralism. Professor Jones concludes by addressing his opening question and answers; "Why there isn't more trade".[10] He briefly provides recommendations; WTO Members must keep their WTO engagement active; stick to trade issues, and not environmental, human rights, and labour standards, for the sake of collective intentionality apart from those already existing in for example GATT exceptions;[11] improve the WTO decision-making procedures; use RTAs to eventually move over to WTO multilateral level; and improve domestic adjustment policies and business engagement.

The book gives this legal scholar, who mostly will focus on formal rules of international law; i.e. treaties, customary law, and principles of law, a much broader perspective on the WTO and an understanding that there is an important and very powerful world of informal rules and

[9] P. 157.
[10] P. 239.
[11] See Art. XX of GATT 1994.

structures which are decisive in the governance of the WTO. For example, it triggers a number of constitutional questions concerning the roles of the Director General, The Councils, the Ministerial Conference, The Dispute Settlement Body and various Committees and questions concerning the relationship between those actors as well as the WTO as a whole and the scope of sovereignty of the WTO Members in their relationship with the WTO as well as the constitutional and legal relationship between RTAs and the WTO. The separation between formal and informal rules are not necessarily easy to make, and a too narrow, legalistic approach may turn into a utopian framework detached from an institutional reality. On the other hand, the legal and constitutional approach opens up for some questions to the institutional approach. For example, Professor Jones suggests that the multilateral trading system should be sticking to the old trade issues but rightly observes that there are links between trade and non-trade values.[12] The question is whether WTO Dispute Settlement can keep a narrow trade focus as they must interpret the WTO treaties by using customary rules of interpretation of public international law. It can be asked the role human rights, environment, labour protection etc. have – or should have – in the interpretation of WTO treaties as the WTO treaties cannot be seen in a vacuum but must be understood in light of public international law.[13] If a state has obligations under public international law, the multilateral trade agreements cannot override those other obligations. Thus it is important for negotiators of multilateral trade agreements to have in mind those other obligations their respective states have beyond the trade obligations when they negotiate new trade agreements or amendments to the existing ones. It could be interesting if Professor Jones at one point would take the institutional approach towards some of the other international organizations and discuss whether there is room for institutional improvement in their interrelationship and whether a "collective intentionality" can be sought among them, like between the WTO and the International Labour Organization and their respective organs and their members. Public international law offers sadly only limited guidance here and perhaps the institutional approach to it could provide an interesting platform for discussion when the legal and constitutional dimensions in this puzzle of international organizations – although all bound under the UN Charter – is debated and attempted to be established by lawyers.

I will highly recommend this book. Both as inspiration for potential changes to the existing institutional framework of the WTO as well as basis for discussion of not only economists but also for lawyers, political scientists and trade negotiators from the respective WTO Members.

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[12] P. 240.

[13] Art. 3.2 of the Dispute Settlement Understanding. I have elsewhere dealt with trade and non-trade values in the WTO Dispute Settlement and claimed that the Appellate Body only to a limited extent grasps the opportunity to apply treaties outside the WTO system. However, I have furthermore claimed that the Appellate Body in some situations uses economic language to protect non-trade values, cf. Henrik Andersen, "Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions", 18 (2) (2015) *Journal of International Economic Law*, 383-405