Social Constitutions in International Economic Law: power differentiation as a construct for resistance in the making of law

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The umbrella of International Economic Law seems to have broadened to encompass subjects as diverse as trade, finance, investment, development, and intellectual property to name a few. The increasing specialisation of sectors within international economic relations gives rise to questions about the social constitutions underlying the development of International Economic Law. Social constitutions emerge as groups or regimes with the capacity to organise themselves according to their own rationality. These social constitutions may act as counterforces to other constitutional regimes, therefore competing for positions of power and social influence. The impact of social constitutions in the development of International Economic Law raises concerns about the nature of such constitutions and their power, as well as the implications this has for social justice. This article will explore the emergence of social constitutions in International Economic Law through the lens of social constitutionalism. The article argues that the differentiation of society into functionally differentiated subsystems and of International Economic Law into highly specialised sectors requires addressing the emergence of social constitutions upon the differentiation of power. The article will examine the differentiation of power as a potential construct for resistance, in which social constitutions arise as structural as opposed to spontaneous participants in the construction of International Economic Law. By using Elsig’s facets of power – structural, procedural and ideational, the article sheds light on a more inclusive and just International Economic Law, where social constitutions of resistance emerge as empowered actors in the international economic system.
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Cecilia J. Flores Elizondo*

I. Introduction

The expansion of International Economic Law has been the subject of much debate. Areas as diverse as inter alia trade, labour, finance, investment and intellectual property have been ascribed to the field of International Economic Law, the concept and boundaries of which remain contested. The proliferation of highly specialised, and often conflicting, sectors of the international economic system has given rise to questions about the interests guiding international economic relations, and ultimately, the construction of International Economic Law. This article addresses these questions based upon the theory of social constitutionalism, which posits the constitutional question beyond the limit of the nation-state in transnational politics, therefore expanding to the diversity of sectors in society. Rather than a unitary constitution in International Economic Law, the highly specialised fragments of the international economic system engage in the production of constitutional norms with the potential of becoming sectorial constitutions in society. International Economic Law, and international economic institutions, have undoubtedly developed sophisticated law-making and adjudicating processes, making references to political and judicial organs. The World Trade Organisation’s (WTO) decision settlement mechanism is a case in point. However, the capacity to establish constitutional norms, and inclusively rights, is not limited to the state or intergovernmental organisations. Social constitutions are capable of emerging from diverse sectors of society, outside institutionalised politics, within the private sectors. As such, the emergence of social constitutions entails an evolutionary process under which functionally differentiated sectors of society develop their constitutional norms according to their rationality, whilst also establishing limitative constitutional norms that act as a limitation to other subsystems and themselves.

This article will explore the emergence of social constitutions in International Economic Law. Teubner exemplifies social constitutions in transnational enterprises, where the ‘real constitutional authority’

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4 Ibid. at 216-20.
6 Gunther Teubner, supra note 3.
7 Ibid.
lies in the global economy due to the transfer of power from the public to corporations. The issue at stake is whether social constitutions are capable of emerging not only from multinational corporations, but also from other sectors of society such as indigenous peoples, non-governmental organisations (NGOs) and social movements. The emergence of social constitutions in International Economic Law raises concerns about the nature of such constitutions and their power, as well as the implications this may have for social justice. The rationale being that social constitutions may act as counterforces to other constitutional regimes, therefore competing for positions of power and social influence. The article argues that the differentiation of society into functionally differentiated subsystems (law, politics and the economy), and of International Economic Law into highly specialised sectors (trade, investment, competition and finance), requires addressing the emergence of social constitutions upon the differentiation of power. As such, power can be political, economic and social. Beyond these differentiations, political, economic and social power should further go through an internal transformation in order to address the potential configurations of power in the international economic system. The differentiation of power enables the assessment of social constitutions as a potential construct for resistance, where social constitutions other than economic ones arise as structural as opposed to spontaneous actors in the construction of International Economic Law. In this context, the article draws on Elsig’s facets of power – structural, procedural and ideational, as an analytical tool to assess the differentiation of power, i.e. the kinds of power that social constitutions use in particular situations. Once power is differentiated, there is scope for a more inclusive International Economic Law, where social constitutions of resistance emerge as empowered actors in the international economic system.

Following the introduction, the article is divided into four sections. Section II provides a brief account of the theory of societal constitutionalism and explores the elements attributed to social constitutions. Section III contextualises the emergence of social constitutions in International Economic Law. In so doing, the section delves into the conflicts arising between the rationalities of diverse social constitutions and the implications this may have for social justice. Section IV explores the differentiation of power as a construct for resistance. Following Elsig’s facets of power, the section expounds on how the application of the facets of power to the internal transformation of social, economic and political power enables the emergence of social constitutions of resistance as empowered actors in the international economic system. Section V provides some final remarks.

II. Social Constitutionalism: the Emergence of Social Constitutions

The theory of societal constitutionalism was initially conceived by David Sciulli, who proposed to transform the direction of social change through institutions of external procedural restraint, in order to counteract authoritarianism under modern conditions, as well as to contribute to the social integration


of ‘heterogeneous actors’ and competing groups’. For Sciulli, external procedural restraints are institutionalised through ‘collegial formations’ in civil society, i.e. professional associations, public and private research institutions, universities, intellectual networks and the research division of corporations. Social integration therefore depends on the respect given to the procedural threshold of interpretability – that is, the recognition and understanding of laws and shared social duties by ‘heterogeneous actors’ and competing groups’, which remain consistent with the procedural threshold. Thus, breaches of the threshold lead to social control rather than social integration. Drawing on Sciulli’s idea of evolutionary drift, Teubner foregrounds social constitutionalism on the multiplicity of functional differentiations developing in society that counteract ‘swamping tendencies’. As such, the constitution of world society develops not only within organisations of international politics or institutionalised politics, but it increasingly emerges from a diversity of functional subsystems in society, more specifically, from private sectors.

According to Teubner, the process of constitutionalisation of social subsystems begins with functional differentiation, but it is not limited to it. Subsystems – be they the economy, the media or technology – develop their own rationality without regard to other subsystems developing in society, therefore producing conflicts between subsystems. Conflicts arising as a consequence of the expansionist tendencies in the political system give rise to the institutionalisation of fundamental rights, which act as counter-institutions. For Teubner, the establishment of internal norms by a subsystem does not lead per se to a social constitution. The establishment of constitutional norms derives from an evolutionary process of juridification, under which the development of autonomous social sectors necessarily entails the production of autonomous forms of law, away from institutionalised politics. Moreover, secondary norms are essential not only to determine valid law, but also the legitimate actors and the law-making procedures. Therefore, social constitutions are ascribed with institutional capacity and legal autonomy. The issue at stake is how to limit the expansionist tendency of social systems and their emergence as social constitutions beyond the state. Teubner emphasises that social constitutions have both a constitutive and a limitative function – that is, the capacity to create their own laws according to

13 Ibid. at 80-1.
14 Ibid. at 64-5.
17 Gunther Teubner, supra 3.
19 Gunther Teubner, supra 15 at 9.
20 Ibid at 13.
21 Ibid. at 19.
22 Gavin Anderson, supra 10 at 889.
their rationality is restricted by the existence of countervailing structures. Therefore, social constitutions would be limited through the exertion of external pressures which will produce the self-limitation of a subsystem. For Teubner, this understanding of social constitutions requires ‘hybrid regulation’, where the self-limitation of social constitutions is produced through ‘state power, the enforcement of legal rules’ and the pressures produced by public spheres of society, i.e. intellectuals, social movements, NGOs, etc.

The world society comprises a multiplicity of laws emerging from private and public institutions, as well as from vertical and horizontal relationships, or even ‘hybrid law’. The recognition of the capacity of social sectors of society to become constitutionalised, as well as their interactions with the state, represent the diversity of normative sources in the international economic system. However, Anderson asserts that for both Sciulli and Teubner institutionalisation is a pre-requisite for the development of social constitutions, therefore restricting the establishment of social constitutions to only some non-state sectors of society. Considering that social constitutionalisation aims to act as a legal restraint to politics, the pre-requisite of institutionalisation seems to overlook the capacity of non-institutional social actors, such as social movements, to be politically engaged. This begs the question about which social sectors have the capacity to produce constitutional norms. Anderson argues that a broader understanding of politics (not limited to the authority of the state) seems to enable the recognition of non-institutionalised social actors as part of the transformation of society.

The relationship between law, power and social subsystems has been the subject of much debate. Teubner emphasises a distinction between institutionalised politics (the world society of states) and the existence of autonomous political dynamics within other subsystems. Social subsystems reflexively establish their constitutional principles without being prescribed by politics; yet, social systems are political actors themselves. Teubner therefore separates social constitutions from power politics. As such, the state produces ‘constitutional irritations’ for the development of social constitutions. According to Teubner, the constitutionalisation of social subsystems depends on law, which in turn relies on the ‘physical monopoly that politics has over power’. In this regard, Thornhill argues that the analysis of social constitutions requires assessing the changes ‘that occur within political power as an autonomous medium of social exchange’.

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23 Gunther, Teubner, supra 3 at 224-25.
24 Ibid.
25 Ibid.
26 Gavin Anderson, supra 10.
27 Ibid. at 889-891.
28 Ibid. at 890-92. For Anderson, the institutional dimension exists even in non-institutionalised social actors because through them institutions are transformed. In the context of social movements, Anderson argues that the institutional needs to be understood in its inseparable relationship with the non-institutional.
31 Ibid.
33 Ibid.
of communication’ is essential for the establishment of social constitutions, but Teubner does not limit such formalizations to power.\textsuperscript{35} In this sense, the formalization of power would occur through reflexivity – that is, the application of power to power.\textsuperscript{36} Thornhill states that social constitutions and constitutional rights could derive from diverse ‘articulations of law and power that are generated – sociologically – within power’, which act as ‘a medium for the societal circulation of power’.\textsuperscript{37} In this regard, the emergence of social constitutions would have to be considered in relation to the internal transformation of power, as well as from the contours of power in society.\textsuperscript{38} Following this logic, power as an ‘autonomous medium of social exchange’ would represent temporary and evolving configurations of society through power, and the potential of power to adapt to new configurations.\textsuperscript{39} For Thornhill, constitutions are ‘functional articulations of inner-societal processes, and preconditions ‘for the positive abstraction of power’.\textsuperscript{40} Constitutions are also ‘preconditions of institutions using power’.\textsuperscript{41} Thornhill focuses on the transformation of political power and on the constitution as a precondition for the establishment of the state. However, the differentiation of power should not be limited to distinctions of power concerning the establishment of the constitutional state as the legitimate expression of political power. States are continuously interacting with diverse social actors who possess, and make use of, power. These social actors have the capacity to emerge as social constitutions, as well as to establish configurations of power in society. Power hence is manifested in myriad ways – for instance, political, economic and social power. An analysis of the social constitutions emerging in the international economic system cannot overlook the role of power in the interactions amongst these social constitutions and the state. In this regard, Thornhill’s understanding of the internal differentiation of power is useful to address the different kinds of power in society and their evolution through time. The internal differentiation of power enables the analysis of the varieties of configurations of power arising from power’s internal transformation through which social constitutions emerge, as well as of the interactions amongst social constitutions, the state and intergovernmental organisations who make use of diverse forms of (asymmetrical) power in their interrelations. Nevertheless, the differentiation of power gives rise to questions about the nature of social constitutions in the international economic system, their configurations of power and the implications for International Economic Law.

\textbf{III. Social Constitutions in International Economic Law}

The fragmentation of the international economic system is epitomised not only in the existence of highly specialised international economic institutions, but also in a vast number of inter alia multinational corporations, professional and industrial associations and non-governmental organisations (NGOs), who have become significant players in the international economic system. Public and private organisations interact both vertically and horizontally, producing collisions between the diverse rationalities in the international economic system.\textsuperscript{42} But, if these public and private organisations emerge as social constitutions, questions arise on whether, and if so how, these social constitutions interact and compete for prevalence and recognition. Following Teubner’s rationale, the existence of social constitutions (and preferably a vast number of them) should not be seen as a threat to the

\textsuperscript{35} Gunther Teubner, supra 15 at 14.
\textsuperscript{36} Ibid.
\textsuperscript{37} Chris Thornhill, supra 34 at 247.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{41} Ibid.
international economic system. For Teubner, social constitutions and their interrelations with both the state and other sections of society, generate external pressures for their self-limitation and the prevention of ‘catastrophe’, i.e. devastating effects on society. Christodoulidis contends that the limitative function of social constitutions does not necessarily prevent ‘catastrophe’, highlighting that the system is resilient to shocks, and even produces those catastrophes, an example of which is the 2008 financial crisis. Two issues arise: a) the nature of the social actors or sectors of society that emerge as social constitutions; and, b) whether the emergence of social constitutions can act as a limitation to the international economic system.

According to Teubner, a ‘regime constitution’ entails a conglomerate of formal and informal organisations, institutions and actors, characterised by formal organisations at the centre, interacting with myriad organisations, institutions and actors at the periphery. The periphery comprises a number of highly specialised subsystems, capable of constitutionalising themselves. Social constitutions at the periphery externalise their rationality, and through their interactions with the formal organisations at the centre, these social constitutions create ‘dynamic interactions’ between official and soft laws. Following this logic, the construction of International Economic Law evolves through the interactions between highly specialised organisations which are located at the centre (the WTO, the International Monetary Fund (IMF), the World Bank, etc.) and highly specialised institutions, organisations and actors with the capacity to establish their own constitutions at the periphery (e.g. multinational corporations and international standardisation bodies). A clear example of these interactions is the use of international standards in the WTO – for example, the international standards, guidelines and recommendations stipulated in the Codex Alimentarius. Even though the standards, guidelines and recommendations from the Codex Alimentarius are voluntary, the referral to these international standards in the Sanitary and Phytosanitary (SPS) Agreement of the WTO has given the Codex Alimentarius a new dimension of applicability, most significantly, in the WTO dispute settlement mechanism. In this regard, the highly developed organisation at the periphery (Codex Alimentarius) creates a dependant relationship with the centre (the WTO), from which International Economic Law derives. The question is which social constitutions engage in these dependency relationships with the international economic institutions at the centre?

Teubner argues that the economic constitutions are found for example in the corporate sector, which has emerged as the ‘real constitutional authority’ as a consequence of the transfer of power from the

43 Gunther Teubner, supra 3.
44 Ibid.
47 Ibid.
public to private corporations. Teubner asserts that as the result of the ‘collisions between different production regimes in the varieties of capitalism’, international organisations can only produce corporate codes with guidelines and principles (soft law). Private corporate codes therefore emerge as ‘hard law’ under which corporations implement their own obligations. In this regard, civil society has a significant role in bringing those codes into life through their protests against corporations, as well as in monitoring their compliance. Teubner’s account of corporations as an economic constitution seems to recognise civil society (universities, research institutes, social movements, NGOs, etc.) only as ‘spontaneous’ counterforces to the expansion of corporations as economic constitutions through protests, indignation and unrest. However, some (non-economic) sectors of civil society may also have the capacity to constitutionalise themselves and become structurally as opposed to spontaneous actors in the international economic system.

One would argue that the recognition of social values arising from diverse organisations, institutions and groups is already taking place in International Economic Law. In the EC – Seal Products Case, animal welfare, specifically the trade in seal products, was recognised as a public moral concern for European citizens. As Anderson has rightly noted, despite pharmaceutical corporations succeeding to get protection for patented medicines in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the campaign to produce affordable anti-retroviral drugs in South Africa occurred through the organisation of diverse groups, which consequently acquired recognition at the international level. Why would pharmaceuticals be considered a social (economic) constitution whilst some NGOs are only counterforces exerting pressures on both international organisations and pharmaceuticals? Without doubt, civil society has brought changes to the international economic system through protests in order to raise awareness. But, some social sectors of society have gone through an evolutionary process by means of which they have emerged as highly differentiated sectors. These social sectors have established their own norms and forms of organisations, as well as representing a configuration of societal power in a particular time and place. Indigenous Peoples, for example, are highly differentiated groups which have established their own norms (usage and customs) and decision-making processes. The international peasant movement, the Via Campesina, has developed the principles of food sovereignty, the impact of which has been such that it has become an actor in food and agricultural debates. Some of these social organisations have emerged as a structural part of the development of International Economic Law. Their emergence as potential social constitutions represents a counterforce to the construction of International Economic Law. It can be argued that such counterforces are not merely ‘spontaneous’ protests or unrest. Rather, these counterforces derive from social constitutions who have become significant actors in the international economic system with the potential to internalise their rationality in the making of law.

50 Teubner argues that the corporate sector has emerged as the real constitutional authority because corporations create codes in which they unilaterally make declarations about their own obligations. These codes have expanded to include public interests such as environmental protection and fair trade. Gunther Teubner, supra 8.
51 Production regimes represent the conditions under which economic activity develops. Ibid.
53 Teubner argues that the implementation of the codes can also take place through courts when public interests are involved, even though corporations usually insist that their codes are voluntary and therefore, non-binding. Ibid.
54 Ibid.
56 Gavin Anderson, supra 10 at 905.
Hence, social sectors of society encompassing social values such as health, indigenous rights and the protection of the environment could have the capacity to emerge as social constitutions in the international economic system. These social constitutions would engage in interactions with other social constitutions comprising purely economic rationalities, for instance, corporations. However, the diversity of social constitutions in the international economic system both of economic and non-economic nature would entail the prevalence of one rationality over another one in the construction of International Economic Law. Indeed, collisions could arise not only between economic and non-economic rationalities, but also amongst various social (non-economic) interests. The EC – Seal Products Case is a case in point, where the public moral concerns of European citizens regarding animal welfare conflicted with the indigenous rights of Inuit communities to pursue their traditional means of subsistence. The prevalence of one rationality (public moral concerns) over another one (indigenous rights) would have implications for social justice. The issue at stake is how social justice would be ensured in an international economic system where so many social constitutions (and rationalities) converge.

Social Constitutions and Social Justice

The fragmentation of the international economic system has led to conflicts between the specialised areas of International Economic Law, as well as between economic and non-economic sectors in society. As the EC – Seal Products Case exemplifies, conflicts are not exclusive between economic and non-economic rationalities. The diversity of social norms (rationalities) emerging from social constitutions – health, indigenous rights, human rights – may also clash in their struggle for prevalence and recognition. Moving into a ‘conflict of laws’ or ‘balance of interests’ raises questions about the collisions between social constitutions in the international economic system and the consequences these collisions would have for justice. The prevalence of the interests (rationality) of one social constitution over another one, would not necessarily bring justice to International Economic Law. According to Teubner, the coexistence of a diversity of social constitutions would entail the fragmentation of justice. As such, justice can only be attributed to a particular social constitution. This means that the actions of a social constitution, which are executed in accordance with its rationality, may breach the values of another one, therefore producing injustice. Pharmaceuticals, for example, might have a legitimate claim for intellectual property rights. The application of such a right against other sectors of society may infringe the right to health of individuals, whose rights are certainly legitimate too. When two legitimate rights collide, the question is: how will the international economic system provide justice?

In this context, the search for justice is initiated through conflict. Only when injustice is invoked within a fragment of the international economic system, i.e. international economic institutions (the WTO, the World Intellectual Property Organisation (WIPO) or the IMF), does the system respond in order to eliminate such injustice. In so doing, justice should provide consistency with the internal logic
of the international economic institution in question, as well as be responsive to the external demands from divergent social constitutions. Therefore, justice would be granted through the internalisation of the external values into the rationality of International Economic Law. But, this internalisation should not represent merely conflicts between the fundamental rights of individuals against those of corporations. Rather, conflict entails the ‘collision of institutionalised rationalities’, i.e. the contradictions between the norms of diverse social constitutions. In this regard, justice in International Economic Law involves the internalisation of the social constitutional rights established in diverse fragments of society as a limitation to the construction of International Economic Law. Hence, such internalisation will potentially enable the reconstruction of social (non-economic) values as intrinsic to International Economic Law.

The conflicts arising as a consequence of the collisions between fragments of the international economic system cannot be resolved by giving prevalence to business rationalities over human rights, or vice-versa. Teubner argues that contradictions between social constitutions can only be resolved by developing ‘abstract and general rules on incompatibilities’ between rationalities, for which international economic institutions would have to internalise the rationalities developing in myriad social constitutions (inclusive of non-economic ones) into International Economic Law. One of the criticisms to the EC – Seal Products Case was the lack of guidance and reasoning the Appellate Body provided for the interpretation of public moral concerns under Article XX of the General Agreement on Tariffs and Trade 1994. Failure to provide clear guidelines for the incompatibilities between public moral concerns and the obligations under the WTO Agreements may result in future conflicts between diverse social constitutions – both economic and non-economic in nature. Indeed, in the WTO, the relationship between intellectual property rights and health concerns is currently under discussion in the controversial dispute settlement on tobacco plain packaging. The question remains whether the Panel, and if applicable, the Appellate Body, will establish clear guidelines on the kind of policies that governments can, and most importantly, are expected to adopt in accordance with WTO law. The provision of such guidelines in any case should internalise the health concerns that have driven such policies at the national level. But, would this internalisation suffice to provide justice?

Teubner argues that justice requires spontaneous ‘indignation, unrest and protest’ as these would create conflicts which will initiate the reconstruction of the law – that is, when external pressures provoke internal changes to social constitutions. In Teubner’s view, this logic applies not only to international economic institutions such as the WTO, but most significantly, to the social constitutions in the private sphere. Hence, transnational corporations not only establish their own codes and engage in their implementation, but are also subjected to ‘self-binding restrictions’ in order to establish public

62 Ibid.
63 For the internalisation process, see: Ibid; Flores Elizondo, supra 60.
64 Gunther Teubner, supra 18 at 330, 339.
65 Gunther Teubner, supra 59; Flores Elizondo, supra 60.
66 Ibid.
67 Gunther Teubner, supra 59 at 345.
68 Gregory Shaffer and David Pabian, supra 58.
69 Australia – Certain Measures Concerning Trademarks, Geographical Indicators and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, DS435 (Honduras), DS441 (Dominican Republic), DS458 (Cuba) and DS467 (Indonesia). The Panel decision has been recently extended again, so the Panel decision is not expected before the end of 2016.
70 Lester raises this question with regard to the boundaries of International Economic Law, see: Simon Lester, supra 1 at 3.
71 Gunther Teubner, supra 18.
72 Gunther Teubner, supra 8 at 246.
interests. Self-binding restrictions’ derive from the external pressures exerted by civil society that enable the horizontal implementation of rights in the private sphere. Whilst transnational organisations may be ‘forced’ to implement public interests through social pressures, this is not always the case. Certainly, transnational corporations are powerful organisations which are capable of establishing themselves as social constitutions. Yet, such capacities should also be recognised in other social (non-economic) sectors, not only as spontaneous pressure groups, but as social constitutions with a rationality of their own. Such recognition will enable not only counteracting transnational corporations through protests and unrest. Rather, it will also provide social constitutions the opportunity to raise questions of justice in International Economic Law.

The international economic system comprises a complex multiplicity of highly specialised fragments – trade, finance, investment, intellectual property – interacting with each other, as well as with the social constitutions emerging in the international economic system. If as Gunther Teubner illustrates, there is a centre comprising formal organisations establishing loose connections with each other as well as with the autonomous subsystems at the periphery, there is a need to assess how such interactions develop. Following Teubner, the internalisation of the rationalities developing in social constitutions would enable the removal of injustice and the provision of guidelines to deal with the contradictions between the diversity of social constitutions with which international economic institutions have connections.

The problem is that in order to initiate the internalisation of external rationalities, social constitutions need to exert a considerable amount of external pressure. Social constitutions, when interrelating with other social constitutions (horizontally) and with international economic institutions (vertically), will most likely have different strengths. One could argue that only those social constitutions which are capable of exerting strong pressures due to their position, power or particular historical context, will be able to be internalised into International Economic Law. If the internalisation of the rationalities developing in social constitutions depends on (asymmetric) power, this restriction would most likely inhibit the construction of International Economic Law that is responsive to the environment. Pharmaceuticals, tobacco groups and food and drink corporations are only a few of the multinational corporations which have emerged as powerful social constitutions due to their degree of development. The question remains whether under these conditions social constitutions establishing indigenous rights or environmental rights would have sufficient strength to be recognised, and their values to be reconstructed, in International Economic Law. Despite being critical of power politics, Teubner concedes that power has been transferred from public organisations to private corporations and that social constitutions are political actors themselves (albeit outside institutionalised politics). Therefore, the role of power should not be overlook. The following section will delve into the role of power in the interactions amongst specialised fragments of International Economic Law and social constitutions.

73 Ibid.
74 Ibid.
75 Gunther Teubner, supra 3.
76 Gunther Teubner, supra 59.
77 Gunther Teubner, supra 8.
78 Gunther Teunber supra 30.
IV. Power Differentiation as a Construct for Resistance

According to Schachter, international law is a manifestation of the ‘existing distribution of power’.\(^\text{79}\) In this context, power is understood in terms of the political power of states. However, Schachter recognises that international law and international institutions are also impacted by the diverse configurations of power developing in non-governmental organisations, even more so in transnational activities.\(^\text{80}\) The coexistence of a transnational normative order and public international law affects both the construction of norms and of treaties.\(^\text{81}\) Attention to transnational normative orders has generally focused on the power emerging from non-governmental economic organisations. However, new identities have been formed, for instance, through environment and human rights supporters, whose power has affected international intergovernmental organisations.\(^\text{82}\) Schachter’s appraisal of power was foregrounded more broadly in international law, yet his observations are applicable to International Economic Law and international economic institutions. In this context, the new configurations of power emerging from a multiplicity of sectors, and their potential constitutionalisation, certainly have implications for the construction of International Economic Law.

The differentiation of law into diverse specialised sectors is noticeable in International Economic Law through the coexistence of trade law, investment law and intellectual property law to name a few. Some of these specialised areas of law are dealt with at different international economic institutions – for example, intellectual property is the subject matter of WIPO but it is also included in the WTO by means of the TRIPs Agreement.\(^\text{83}\) However, the fragmentation of society has also given rise to a number of functionally differentiated sectors of society that have produced their own social norms and organisation, i.e. they have established social constitutions. The emergence of social constitutions has caused debates on the role of power in social constitutionalism.\(^\text{84}\) An international economic system comprising diverse social constitutions cannot understand power (and power relations) in the tradition of political power between states. Nevertheless, without doubt these social constitutions are political actors, whose power may produce conflicts with other social constitutions or with the international economic system. Teubner has inclusively conceded that the public sphere has transferred power to the private sector.\(^\text{85}\) In this regard, conflicts can arise between a) specialised areas developing in two or more international economic institutions; b) social constitutions and international economic institutions; and, c) diverse social constitutions. The myriad interactions that these conflicts produce require assessing the power each of these social constitutions bear in the international economic system. The rationale being that there is a perception that only some functional sectors of society (mostly economic sectors) have sufficient power to introduce their rationalities into the construction of International Economic Law. Yet, social constitutions in other areas of social life (non-economic) can emerge as significant actors in the international economic system. In order to recognise the emergence of social constitutions not merely in strong economic sectors of society, a different approach to power is needed. The differentiation taking place at the level of society and of law requires understanding power as being differentiated too. Power is not absolute. In this regard, power can be political, economic or social. Beyond these differentiations, there are a number of interactions between the political, economic and social power of social constitutions. Through these interactions, social constitutions engage in struggles to limit the impact which other social constitutions might have on them and on the international


\(^{80}\) Ibid.

\(^{81}\) Ibid.

\(^{82}\) Ibid.

\(^{83}\) WTO Agreements Legal Texts supra 49.

\(^{84}\) Gunther Teubner et al supra 29.

\(^{85}\) Gunther Teubner, supra 8.
economic system. These interactions cannot be dismissed, and most importantly, an analysis of social constitutions requires addressing further the internal transformations of power (political, economic and social) in the interrelations between social constitutions, the state and international economic institutions.

**Differentiating Power: Elsig’s Facets of Power**

The role of power in the construction of law has been continuously highlighted as an essential factor in international relations, even though the way in which power works remains unclear.\(^86\) Elsig argues that investigations should focus on the different facets of power and the interactions amongst them, i.e. an assessment about what kind of power is used according to the particularities of a situation.\(^87\) Power should not be seen as unitary. Rather, power comprises an admixture of resources that provide the power holder with distinct potentialities. In addition to this, the recipients’ interpretation of power should also be taken into account, as well as the recipients’ actions to limit such power.\(^88\) In this vein, power, and more specifically the use of power, may produce a number of casual links and configurations of power.

Elsig’s taxonomy of power entails three facets: structural, procedural and ideational.\(^89\) As such, structural power is the ‘baseline for influence’ comprising both capacities and positional strength. In this regard, capacities are found for example in economic power or voting rights. Positional strength comprises negotiation power in terms of providing a ‘best alternative to a negotiated agreement’.\(^90\) This positional strength therefore depends on myriad interest groups and options that enable the negotiator to shape an agreement.\(^91\) Procedural power involves bargaining skills and the negotiator’s resources – that is, formation of coalitions, the use of knowledge and taking advantage of information asymmetries.\(^92\) Lastly, ideational power entails the introduction of ideas into international law through focal points and framing.\(^93\) Elsig draws from rationalist and sociological institutionalist understandings of ideational power in order to elaborate on the concepts of focal points and framing.\(^94\) Focal points can represent either a ‘road map’, where the lack of strong preferences or the existence of guiding principles could lead to a decision, or a ‘mental map’, in which confirmatory information can be introduced in a negotiation. Framing involves the manner in which information is transformed into knowledge through the use of representations that might be utilised in order to produce or suggest certain actions.\(^95\) For Elsig, the construction of International Economic Law necessarily entails addressing questions about the competing interests underlying such processes. Thus, the tools of power (or the different facets of power) are key in understanding the construction of International Economic Law.\(^96\) Elsig elucidates the facets of power in the context of the WTO decision-making. Elsig’s analysis centres on political power in the interactions and negotiations amongst states, specifically in the negotiation of the Doha Development Round.\(^97\) Nevertheless, Elsig’s taxonomy of power, and his analysis of the interrelations between the different facets of power, provide a useful analytical instrument to engage in discussions.

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\(^{86}\) Manfred Elsig, supra 11.
\(^{87}\) Ibid.
\(^{88}\) Ibid.
\(^{89}\) Ibid.
\(^{90}\) Ibid at 4, 11-2.
\(^{91}\) Ibid.
\(^{92}\) Ibid at 5.
\(^{93}\) Ibid. a 5-7.
\(^{94}\) Ibid.
\(^{95}\) Ibid.
\(^{96}\) Ibid. at 7-8.
\(^{97}\) Ibid.
about the differentiation of power and its implications in the construction of International Economic Law.

Power Differentiation and Social Constitutions of Resistance

According to Thornhill, social constitutions, and constitutional rights, emerge from the relationships between law and power that are generated within power, the transmission of which occurs through power communications. For such purposes, the ‘constitutional framing of power’ should be seen as a consequence of the internal differentiation of power, representing temporary and evolutionary manifestations of society with power. Thornhill focuses on the transformation of political power and how this is legitimised through constitutional formations, for which constitutional norms represent changing social and political realities. As such, Thornhill foregrounds constitutionalism as the legitimate expression of political power through the constitutional state. However, political power is only one of the forms of differentiated power that coexist in the interactions between social constitutions, the state and international economic institutions. A broader understanding of power enables the identification of social constitutions in the variety of configurations of power in society, where groups establish their norms and communicate them through the language of power. In this context, power is non-static and emerges and evolves in different forms. The evolution of these configurations of power from which social constitutions develop requires looking further into the internal transformation of power.

The differentiation of power entails the coexistence of political, social and economic power. Yet, as it has been previously stated, political, social and economic power can also face internal transformations – that is, there are a number of interactions and linkages taking place in the configurations of power in society. Elsig’s facets of power provide an analytical tool to identify the transformations of power in society. By adapting Elsig’s facets of power, an analysis of social constitutions as political actors would entail understanding the kinds of power available to social constitutions, as well as how and when social constitutions use these kinds of power. If structural power is the ‘baseline for influence’, there is a need to assess which social constitutions possess capacity and positional strength, in order to create external pressures to initiate the process of internalisation of external rationalities into International Economic Law. Moreover, there is a need to explore the responses to structural power from other social constitutions and from international economic institutions. The use of the capacities and positional strength (structural power) of a social constitution could give rise to configurations of power, in which procedural and/or ideational power counteract the structural power of another social constitution. For example, through the application of the facets of power to the Doha Development Round, Elsig found the following: structural power is certainly the ‘baseline for influence’. However, the bargaining skills to form coalitions had scope to counteract the structural power of stronger states. Ideational power was not successful in counteracting structural power insofar as frames were inconsistent.

98 Chris Thornhill, supra 34 at 247.
99 Ibid.
100 Chris Thornhill, supra 40 at 372.
102 Manfred Elsig, supra 11 at 17.
103 Ibid.
104 Ibid.
rationale being that in the Doha Round, the concept of development was framed in diverse and contrasting ways, thus affecting the ideational and procedural power of developing countries.105

In international economic institutions, structural power is associated with powerful states or regional blocs – the United States, the European Union and Japan.106 In addition to this, some economic constitutions are also strong players in the international economic system. Structural power can be found in multinational corporations and some lobbying associations, which have the capacity (economic power) and positional strength (negotiation advantage) to bring their interests into international economic institutions. Tobacco companies, pharmaceuticals and food and drink associations are a case in point. The differentiation of power into structural, procedural and ideational power gives scope for speculation that social constitutions are capable of emerging from diverse sectors of society, including those that are generally considered weaker players in international economic relations. In the EC – Seals Products Case, animal welfare was framed as a public moral concern, a result for which NGOs played an important role. The emergence of indigenous groups as social constitutions, for instance, may borrow bargaining power from NGO’s in order to frame indigenous rights as a limitation to International Economic Law. The interaction between indigenous communities and NGO’s would entail a configuration of power in a particular time and place. This configuration of power could counteract the expansionist tendencies of multinational corporations (structural power) in the construction of International Economic Law. But in so doing, these social constitutions would emerge as structural as opposed to spontaneous participants in International Economic Law.

In this context, configurations of power could arise through a conglomerate of organisations that establish social norms and forms of organisation to pursue a common goal. For example, the principles of food sovereignty were framed by the Via Campesina, which comprises inter alia indigenous groups, farmers associations and peasant movements.107 The Via Campesina provides a clear example of how organisations can borrow power through their interactions, as well as strengthen their position through the clear framing of their interests. The differentiation of power would enable the recognition of the Via Campesina as a social constitution contesting the structural power of multinational organisations. Indeed, the Via Campesina has gained much power – albeit not yet structural – as it has become a significant actor in food and agricultural discussions at the international level, including in the Food and Agriculture Organisation of the United Nations Human Rights Council. In this sense, the Via Campesina holds both social and political power. Moreover, by differentiating social and political power into the structural, procedural and ideational facets, there is scope to understand not only the kinds of power available to the Via Campesina, but also how this power is used in order to have access to institutions. This access would enable the Via Campesina to bring their rationality and interests into international economic institutions. Indeed, counter-framing will take place because other social constitutions will also emerge as configurations of power with the capacity of using different kinds of power to limit the influence of the Via Campesina. Yet, as Elsig’ analysis shows, structural power can be counteracted through procedural and ideational power if the necessary conditions exist. Once power is differentiated, groups that otherwise would not be considered influential in the international economic system, could emerge as social constitutions of resistance. The rationale being that their configurations of power would make them capable of exerting sufficient pressures for the internalisation of their rationalities into the construction of International Economic Law.

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105 Ibid. at 28.
106 Ibid.
The differentiation of power provides an analytical framework to address the diversity of configurations of power, and to show how this is conducive to the establishment of social constitutions of resistance. The differentiation of power, for instance, would allow one to follow the transformation of social actors into fully organised social constitutions of resistance through the communication of their diverse forms of power. Once power is differentiated, the internal transformations within power enable the identification of social constitutions with a strengthened position in the international economic system. This is because through both their procedural and ideational power social constitutions would be able to frame their interests as inherent to International Economic Law. Hence, social constitutions other than economic ones would have the potential to counteract the structural power of strong actors in the international economic system. Social constitutions therefore act as self-limitation to the power of international economic institutions and other social constitutions. As such, the emergence of social constitutions of resistance give scope for a bottom-up and inclusive approach to the making of law, in which social values are taken into account in the construction of International Economic Law. In this regard, social justice would depend on the extent to which International Economic Law internalises the rationalities of social constitutions. Justice will therefore reflect the internalisation of a diversity of rationalities in society, including those of social (non-economic) constitutions. The recognition of public moral concerns in trade should be seen as a step forward in such internalisations in the making of law, although the relationship between trade and indigenous rights remains unclear. The question remains whether International Economic Law would provide justice to a diversity of rationalities, or whether justice would be granted only to one ‘constitutional fragment’. International Economic Law will most likely encounter conflicting rationalities more often in the future, a consequence of the fragmentation of society. Nevertheless, conflict provides an opportunity to construct International Economic Law taking into account the myriad rationalities in society. Thus, inclusivity and internalisation are key in the attainment of social justice. In this context, the differentiation of power broadens the scope for a more inclusive and just International Economic Law because such differentiation puts forward social constitutions of resistance as structural and empowered actors in the international economic system.

V. Conclusion

Rather than the constitutionalisation of society, societal constitutionalism foregrounds the emergence of social constitutions in society. As such, the capacity to establish constitutional norms and constitutional rights is not limited to the state, to international economic institutions or to a few economic sectors of society. The coexistence of states, international economic institutions and social constitutions has raised concerns about the kind of interactions developing amongst them, as well as their competition for prevalence and recognition. Teubner is critical of power politics in his societal constitutionalism. Yet, social constitutions are political actors who hold and make use of power. The emergence of social constitutions therefore requires looking into power. The article argues that along with the differentiation of society into functionally differentiated subsystems and of International Economic Law, there is a need to further differentiate power into social, economic and political. Political power therefore is merely one of the forms of power that coexist in the interactions amongst social constitutions, the state and international economic institutions. However, power is non-static and evolves in different forms. Power (political, social or economic) should go further through an internal transformation in order to assess the potential configurations of power emerging from the international economic system. In so doing, the author follows Elsig’s facets of power – structural, procedural and ideational power. Structural power is the ‘baseline for influence’ in international economic relations comprising capacities (economic power) and positional strength (negotiation leverage). Procedural power involves both bargaining skills and the negotiator’s resources, i.e. knowledge, skills and information. Ideational power provides the opportunity to introduce ideas into International Economic Law through focal points or framing. Elsig’s facets of power provide a useful analytical tool to assess
the interactions amongst diverse players in the international economic system, as well as the linkages emerging from the diverse configurations of power in society. By differentiating power, the article assesses how social constitutions could use different kinds of power to strengthen their position in the international economic system. The use of procedural and ideational power could counteract the capacities and positional strength (structural power) of strong economic actors in the construction of International Economic Law. The EC – Seal Products Case provides an example of how framing animal welfare as a public moral concern has enabled the recognition of these concerns in trade. Social constitutions with structural power would also be able to counter-frame their interest for their prevalence. Yet, once power is differentiated, institutions, organisations and groups which are normally considered non-influential in the international economic system, would have the potential to emerge as social constitutions of resistance. In so doing, these social constitutions will arise as structural as opposed to spontaneous participant in International Economic Law. This potential derives from their configurations of power, which will provide them with the capacity to exert sufficient pressures to internalise their rationalities as inherent to International Economic Law.

The emergence of social constitutions should not be seen as a threat to the international economic system. Rather, social constitutions will act as a limitation to international economic institutions and other economic actors. This limitation will not derive merely from ‘spontaneous’ protests, but most importantly, by raising questions of justice in International Economic Law. Justice in the context of International Economic Law will depend on the extent to which the diversity of rationalities in the international economic system are internalised by international economic institutions. Whilst concerns about the power exerted by some economic players remain, the differentiation of power gives scope for the strengthened position of non-economic social constitutions such as indigenous groups, public health organisations and environmental associations. In International Economic Law, the internalisation of rationalities would occur as a consequence of conflicts. We can expect more conflict in the future. Conflict however should be seen as an opportunity insofar as International Economic Law refrains from merely deciding between the social constitutional rights of one social constitution over another. Such an approach would lead to fragmented justice, where justice is provided only to one social constitution. The internalisation of the diverse social values developing in society will give scope for a bottom-up and more inclusive International Economic Law. As such, inclusivity and internalisation are essential to provide social justice in International Economic Law. In this regard, the differentiation of power provides an opportunity to construct a more inclusive and just International Economic Law, where social constitutions of resistance emerge as structural and empowered actors in the international economic system.
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