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The Establishment of a GATT Office of Legal Affairs
and the Limits of 'Public Reason' in the GATT/WTO
Dispute Settlement System

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Abstract:

The article offers an 'insider story' of the establishment of the Office of Legal Affairs in the General Agreement on Tariffs and Trade (GATT 1947) in 1982/83 and of its increasing involvement in assisting GATT dispute settlement panels and the Uruguay Round negotiations on a new World Trade Organization with compulsory jurisdiction for the settlement of trade disputes (Sections I and II). The transformation, within only one decade, of the anti-legal pragmatism in GATT 1947 into the compulsory WTO dispute settlement system amounted to a 'revolution' in international law. But the 'public reason' governing the GATT/WTO dispute settlement system remains limited, notably by (1) the domination of GATT/WTO decision-making by governments interested in limiting their own legal, democratic and judicial accountability vis-à-vis citizens for their often welfare-reducing trade restrictions and distortions; (2) the deliberate neglect for the customary law requirements of interpreting treaties and settling related disputes 'in conformity with principles of justice and international law', including 'human rights and fundamental freedoms for all'; (3) the treatment of citizens as mere objects of GATT/WTO law and institutions rather than as 'democratic principals' of all governance institutions, 'agents of justice' and main economic actors; and (4) the deliberate neglect for the GATT/WTO legal obligations of 'consistent interpretation', 'judicial comity' and 'access to justice' in domestic courts in the 'dispute settlement system of the WTO' (Sections III and IV).

Keywords:

DSU; GATT; public reason; trade law; WTO.

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THE ESTABLISHMENT OF A GATT OFFICE OF LEGAL AFFAIRS AND THE LIMITS OF ‘PUBLIC REASON’ IN THE GATT/WTO DISPUTE SETTLEMENT SYSTEM

*Ernst-Ulrich Petersmann**

Introduction: From ‘Rule by Law’ to ‘Rule of Law’ in the World Trading System?

Since constitutional republicanism in ancient Greece, legal systems continue to evolve in response to ‘struggles for justice’ and civil society claims that law and governance must be justifiable in terms of justice and individual rights, including rights of producers, investors, traders and consumers engaging in mutually beneficial economic cooperation. The spread of republicanism (e.g. from Greece to Italy and to the ‘Hanseatic League’ in Northern Europe) promoted transnational commercial law throughout Europe based on freedom of contract, private property rights, convertibility of currencies, transnational banking and commercial arbitration. The *lex mercatoria* was not only a private law merchant; it remained embedded into national and transnational regulation and trade agreements that evolved into a multilevel legal system since the European system of bilateral trade agreements following the Cobden-Chevallier trade agreement (1860) between England and France.¹ The transformation of free trade areas and customs unions into cosmopolitan constitutional systems – first among German states during the 19th century (e.g. the German Zollverein 1834-1919) and, since the 1950s, among the today 31 member states of the European Economic Area (EEA) – illustrated the potential significance of transnational economic cooperation for constructing ‘cosmopolitan peace’ through ‘cosmopolitan constitutional law’, as predicted in I. Kant’s blueprint for ‘*Perpetual Peace*’ (1795). It is from this ‘constitutional perspective’ that - having served as first ‘legal officer’ hired by the Secretariat of the General Agreement on Tariffs and Trade (GATT 1947) in 1981 and as legal secretary of the Uruguay Round Negotiating Group elaborating the ‘Dispute Settlement Understanding’ (DSU) of the World Trade Organization (WTO) - this author interprets and evaluates the creation of an Office of Legal Affairs in 1982/83 inside the GATT Secretariat as a turning point for the emergence of a ‘rule of law’ system in worldwide trade relations aimed at strengthening the ‘legalization’ of world trade (e.g. resulting from the 1979 Tokyo Round Agreements) so as to further ‘depoliticize’ intergovernmental trade politics, reduce transaction costs and provide ‘security and predictability to the multilateral trading system’, as required by Article 3 of the DSU (cf. Sections I to II).

Upon my arrival and first contacts inside the GATT Secretariat, many colleagues told me that – in their view – the Secretariat should never have an Office of Legal Affairs; lawyers should not participate in GATT dispute settlement proceedings, and – as repeatedly stated by the EU Commissioner for Trade Policy - GATT should never become a tribunal. When accepting the job offer from the GATT Secretariat (and declining a financially more attractive job offer from the World Bank’s Office of Legal Affairs with then more than 100 lawyers), I had hoped that my appointment as a ‘legal officer’ was a sign of the rediscovery by diplomats of the role of law in international trade,

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¹ Cf. E.U.Petersmann, Principles of World Trade, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment No. 8 (1985), 530 – 539.

similar to my own discovery – during my studies of international law at the University of Geneva – that, in the words of the *genius loci Jean-Jacques Rousseau*, ‘it is to law alone, that men owe justice and liberty’ (*Discourse on Political Economy*, 1750). The fact that all GATT contracting parties had adopted national constitutions (written or unwritten) seemed to prove their ‘constitutional insight’ that people can constrain their rational egoism (*cf. Thomas Hobbes: homo homini lupus est*) only through self-commitment to constitutional rules and institutional ‘checks and balances’ (like independent courts of justice) transforming private interests into public interests by empowering citizens to act as ‘agents of justice’ for the common good (like promotion of general consumer welfare through rules-based competition and trade). Just as economic law had played a leading role in the long processes of constitutionalizing national societies, the postwar system of multilateral trade agreements establishing the European Communities (EC) offered obvious historical evidence of how the creative tensions between individualism, nationalism, international law and competition enable international trade law to induce international transformations (like compulsory jurisdiction for peaceful adjudication of disputes, the emergence of a new ‘international common law’ of multilevel trade governance) that elude policymakers in most other areas of international relations. Yet, the ‘public reason’ of social institutions remains shaped by the ‘private reason’, rational self-interests and unconscious instincts of its agents and ‘principals’, including the desires of many rulers to free their power politics of legal constraints and institutional ‘checks and balances’ (as illustrated by Dick the Butcher’s advice - in Shakespeare’s *Henry the Sixth* - to ‘kill all the lawyers’). The deliberate decision *not* to establish an Office of Legal Affairs prior to 1982/83 reflected 35 years of anti-legal ‘diplomatic management ideology’ prevailing among GATT diplomats (as described by Frieder Roessler in his contribution to this volume), which had been a response also to the non-ratification of GATT 1947 by national parliaments and to the only ‘provisional application’ of GATT rules subject to ‘existing legislation reservations’. As the rational self-interests of trade diplomats and rent-seeking interest groups - for instance in avoiding legal, democratic and judicial accountability for their often non-transparent and welfare-reducing trade protectionism redistributing domestic income for the benefit of powerful producer interests (e.g. cotton, textiles and agricultural producers in Europe and North-America) – continued to dominate many GATT policy and dispute settlement decisions during the 1980s, I decided to resume my academic career as of October 1989; at the request of Director-General A. Dunkel, I continued to service the Uruguay Round Negotiating Group elaborating the ‘Dispute Settlement Understanding’ (DSU) of the World Trade Organization (WTO) as legal secretary only on the basis of a consultant contract.

The ‘political miracle’ of the successful conclusion of the Uruguay Round negotiations in April 1994 entailed a ‘legal revolution’ in international relations, as illustrated by the fact that the DSU established – for the first time in human history – a worldwide, multilevel, compulsory dispute settlement jurisdiction (e.g. at the level of WTO panels, the WTO Appellate Body and WTO arbitration) and ‘dispute settlement system of the WTO’ (Article 3 DSU) providing also for individual ‘access to justice’ inside domestic jurisdictions and to transnational commercial arbitration inside the WTO.² Yet, my personal experiences as secretary in the Uruguay Round negotiations on the DSU, as secretary, member or chairman of numerous GATT/WTO dispute settlement panels, and as legal consultant advising less-developed countries in WTO dispute settlement proceedings (pursuant to Article 27 DSU) prompted me to increasingly criticize, already since the 1980s, two systemic failures of the GATT/WTO dispute settlement practices, as recalled in the concluding *Sections III and IV: First*, due to the self-interests and ‘legal ignorance’ of many trade diplomats (eg regarding the customary rules of treaty interpretation, state responsibility, and adjudication), most GATT dispute settlement panels during the 1980s continued to neglect the customary law requirement of interpreting the often indeterminate GATT rules and principles not only on the basis of their text, context, objective and purpose, but also ‘in conformity with the principles of justice and international law’,

² Cf. E.U.Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (London: Kluwer, 1997), chapter 5.

including 'human rights and fundamental freedoms for all', as recalled in the 1969 Vienna Convention on the Law of Treaties (cf its Preamble and Article 31) as well as in numerous UN treaties (eg Article 1 UN Charter). Discussions among GATT dispute settlement panelists and GATT Secretariat staff assisting them were often influenced by political rather than legal considerations, for instance

- in the case of the three panel reports on EEC subsidies for wheat flour (1983), pasta (1983) and canned fruit (1985), which were never adopted in view of their unconvincing legal reasoning (eg that EEC subsidies for wheat flour had 'caused undue disturbance to normal commercial interests' of the USA in terms of GATT Article XVI:2 without resulting in the EEC 'having more than an equitable share of world export trade in that product' in terms of Article XVI:3 GATT as interpreted by the 1979 Tokyo Round Agreement on Subsidies);³
- in the case of the – likewise un-adopted - panel report on EEC citrus preferences (1985), where the panel clarified neither the 'uncertain legal status' of these preferential arrangements under Article XXIV GATT nor the legal basis for its 'non-violation' finding that the EEC had to compensate for the trade losses caused by 'trade diversion';⁴ or
- when the GATT Secretariat division in charge of administering the GATT Agreement on Antidumping refused to discuss whether the general international law rules on state responsibility justify a panel recommendation of reimbursing illegal antidumping duties, in conformity with the jurisprudence in many domestic legal and dispute settlement systems, and lawyers of the GATT Office of Legal Affairs were later excluded from GATT dispute settlement proceedings challenging antidumping measures⁵;
- or if other requests for more effective legal remedies were rejected – without reference to the customary rules on state responsibility, for instance on the ground that 'recommendations of this nature had not been within customary practice in dispute settlement under the GATT system'.⁶
- The resignation of the chairperson of the '*pasta panel*' on the ground that he had been exposed to undue pressures from a French diplomat, and jokes about the close relationship of the French Director of the GATT division on agriculture to his former colleagues inside the EEC Commission, illustrated the politicized atmosphere of GATT panel proceedings during the 1980s challenging the EEC's agricultural policies.

Following the regular participation of the Office of Legal Affairs in GATT panel proceedings since 1984, the 'anti-legal dispute settlement traditions' of some operational GATT divisions gave rise to a few tensions, ushering in later decision by GATT Director-General Dunkel to exclude the Office of Legal Affairs from GATT dispute settlement proceedings involving antidumping and countervailing duty measures. As long as trade diplomats and their legal advocates in national Ministries insisted on power-oriented pursuit of 'national interests' in terms of 'political realism'⁷ by exercising the WTO monitoring, rulemaking and dispute settlement functions without protecting justice for citizens - in blatant disregard for the customary rules on treaty interpretation, state responsibility and adjudication - , the WTO objective of 'providing security and predictability to the multilateral trading system' (Article 3 DSU) cannot be realized. The path-dependent, intergovernmental treatment of citizens in GATT/WTO politics as mere objects of GATT/WTO rules runs counter to the customary law requirements of interpreting treaties and settling related disputes 'in conformity with principles of

³ For a critical discussion of these panel reports (SCM/42, 43, L/5778) see: R.Hudec, *Enforcing International Trade Law. The Evolution of the Modern GATT Legal System* (Butterworth 1993), at 147-157.

⁴ Cf. GATT document L/5776 and Hudec (note 3), at 157 ff.

⁵ Cf. Petersmann (note 2), at 79 f, 90 f, 224 ff.

⁶ 'Trondheim panel report', GPR.DS2/R, at para. 4.17; cf Petersmann (note 2), at 230 ff.

⁷ For an overview of five different conceptions of foreign policies (realist theories, neoliberal 'regime theories', functionalism, public choice theories, constitutional theories) and their impact on the design of international trade law and institutions see: Petersmann (note 2), at 10 ff, 14 ff.

justice' and 'human rights and fundamental freedoms for all', as codified in the VCLT as well as in the law of ever more international organizations committed to the human rights obligations of all states (cf Articles 2 and 3 Lisbon Treaty on European Union). Having lectured constitutional law before practicing international economic law (IEL) as a legal advisor in national and international institutions, my arguments – since the 1980s – in favor of citizen-oriented 'constitutional interpretations' of GATT rules and dispute settlement procedures from the perspective of reasonable citizens ('methodological individualism') - *i.e.* focusing on the normative task of clarifying, justifying and developing IEL 'in conformity with principles of justice' so as to reconcile conflicts among public and private interests through 'public reason' consistent with 'human rights and fundamental freedoms for all' – remain relevant to date, notwithstanding their rejection as 'politically naïve' by power-oriented trade politicians and their 'Westphalian advocates' pointing to the disagreement on theories of IEL.⁸ Fortunately, civil society and human rights advocates continue challenging welfare-reducing abuses of trade policy discretion neglecting consumer welfare, human rights and other 'principles of justice' that are nowhere explicitly mentioned in GATT/WTO law.

Second, as GATT/WTO law regulates the 'dispute settlement system of the WTO' (Article 3 DSU) in terms of *multilevel* legal obligations to protect equal freedoms, non-discriminatory competition and rule of law at international as well as domestic levels of trade regulation, it remains to be hoped that – as discussed in the concluding *Section IV* - future lawyers and courts of justice will take more seriously the 'consistent interpretation' and 'judicial comity' requirements of national and international legal systems (cf. Article 31 VCLT, Article XVI:4 WTO Agreement) requiring national, regional and WTO governance institutions and dispute settlement bodies to cooperate in their common task of 'providing security and predictability to the multilateral trading system' (Article 3 DSU) in transnational trade transactions among citizens. The history of rights-based constitutionalism confirms the Kantian insight that humanity is capable of transforming power politics through 'constitutionalizing' authoritarian 'rule-by-law' and institutionalizing 'rule-of-law' for the benefit of citizens not only inside, but also across nations. Hence, I have argued since the 1980s⁹ that national, regional and GATT dispute settlement bodies should follow the example of 'multilevel judicial cooperation' in European economic law, international investment, commercial and human rights law by interpreting and developing the GATT/WTO dispute settlement system for the benefit of citizens in order to provide 'security and stability to the multilateral trading system' (Article 3 DSU), as illustrated by the WTO Appellate Body interpretations of the WTO legal requirements of 'fair price comparisons' in antidumping 'zeroing practices' for the benefit of adversely affected traders rather than at the whim of trade bureaucracies.¹⁰ In the 21st century, multilevel governance of transnational public goods – like a rules-based world trading system protecting consumer welfare and rule of law, rather than the power of the rulers to tax citizens and redistribute domestic income through welfare-reducing, discriminatory trade restrictions – must be justified and legally designed on the basis of 'cosmopolitan constitutionalism' recognizing citizens as ultimate sources of value, bearers of constitutional rights and 'democratic owners' ('principals') of all governance institutions. The

⁸ On the lack of a coherent theory of IEL see already: E.U.Petersmann, *International Economic Theory and International Economic Law - On the need for a legal theory of international economic order*, in: R.Macdonald/Johnston (eds), *The Structure and Process of International Law* (London: Kluwer, 1983) 227 – 261. On justifying international legal guarantees of equal freedoms, non-discriminatory conditions of competition and transnational rule of law (e.g. in IMF and GATT law) by their 'constitutional functions' for protecting equal freedoms and human welfare of citizens as protected in national constitutions see: E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law and Policy in the United States, the European Community and Switzerland* (Fribourg: Fribourg University Press/Boulder Publishers, 1991).

⁹ Cf. E.U.Petersmann, *Application of GATT by the Court of Justice of the European Communities*, in: *Common Market Law Review* 20 (1983), 397 – 437.

¹⁰ On the, by now, almost 20 WTO dispute settlement proceedings challenging the 'zeroing methodology' in antidumping calculations see: S.Cho, *Global Constitutional Lawmaking*, in: *University of Pennsylvania Journal of International Law* 31(2010), 621-678.

'sustainable development' and rule-of-law objectives of WTO law, like the limited powers of WTO institutions as 'agents' of citizens as their 'democratic principals', call for stronger constitutional restraints, judicial remedies and multilevel 'accountability mechanisms' limiting abuses of power by 'principles of justice' and 'human rights and fundamental freedoms for all', as prescribed by the customary rules of international treaty interpretation and related adjudication.

I. The Establishment of a GATT Office of Legal Affairs in 1982/1983: A Constitutional Lawyer's Perspective

In 1980, following the replacement of Olivier Long by Arthur Dunkel as Director-General of the General Agreement on Tariffs and Trade (GATT 1947), the GATT Secretariat published – for the first time in the history of GATT – a vacancy notice for employing an 'assistant legal officer'. After having been selected among more than 200 candidates and having taken up my duties on 1 March 1981, my boss - Mr. Hielke von Tuinen, assistant GATT Director-General who had just accepted a newly created Secretariat position as Legal Advisor to the Director-General from 1981 until his retirement in 1982 – told me that my selection had been due to my practice-oriented, legal education which fitted the pragmatic GATT legal practices:

- The Selection Committee had noted my doctor degree in international law and my publications on international and European law, including also legal analyses of GATT, UNCTAD and other fields of IEL.
- But more important had been my practical legal experiences in civil, commercial and administrative law courts, as assistant of two international judges from the International Court of Justice (ICJ) and from the European Court of Human Rights, as legal advisor in the German Ministry of Economic Affairs and German representative in EC, OECD, UN and NATO institutions, which reflected 'hands-on experiences' in economic regulation that were essential for GATT's 'diplomats jurisprudence' (R.Hudec).

The two selection criteria – legal reasonableness and pragmatic handling of legal practices – remain at the center of the dialectic evolution of international and constitutional law systems aimed at reconciling utility-maximizing pursuit of rational self-interests (by the homo economicus) with the sociological evidence that voluntary rule-compliance by people depends on their acceptance of law as being justifiable by 'principles of justice' and 'human rights and fundamental freedoms for all' (homo ordinans, zoon autokrator). Inside the GATT Secretariat, Prof. Jan Tumlir – director of GATT's Research Division during the 1980s – was one of the few GATT officials who, in many of his publications, shared my convictions for the need for 'constitutional economics analyses' of trade policies and for stronger constitutional guarantees of non-discriminatory competition and protection of consumer welfare.¹¹ As legal advisor in the German Ministry of Economic Affairs and representative of Germany in the EC, I had been able to observe how Germany's 'legal strategy' of supporting requests by European citizens for 'constitutional interpretations' and judicial enforcement of the customs union rules of EC law – which the drafters of the EC Treaty had copied from the corresponding GATT obligations of all EC member states¹² - had enhanced the social and democratic acceptance and decentralized application of European common market law as a cosmopolitan legal system based not only on rights and duties of governments, but also on rights of citizens and 'public reasons' which people could share and support. As all UN member states had accepted commitments to respect, protect and fulfill human rights demanded by their citizens and to interpret international treaties in conformity with their human rights obligations (cf. Article 31 VCLT), constitutional theory

¹¹ Cf. J. Tumlir, *Contribution of Economics to International Disorder* (1981); *idem*, *Economic Policy as a Constitutional Problem* (1984).

¹² Cf. the Introduction by P.Pescatore to: M.Hilf/F.Jacobs/E.U.Petersmann (eds.), *The European Community and GATT* (London: Kluwer, 1986).

supported my hope that the establishment of a new GATT Office of Legal Affairs could contribute to limiting intergovernmental power politics by justifying GATT rules also in terms of freedoms and other rights of citizens, as illustrated by the GATT provisions on individual access to justice (cf. Article X:3 GATT) and by ‘constitutional economics’ justifying international trade in terms of empowering citizens to benefit from mutually beneficial economic cooperation protected by constitutional and non-discriminatory trade and competition rules, as in EC common market and US antitrust law. It seemed obvious for a constitutional lawyer that the customary law requirement of interpreting treaties ‘in conformity with the principles of justice and international law’ was important for clarifying many vaguely drafted GATT provisions through ‘due process of law’, for instance the GATT provisions on ‘violation complaints’, ‘non-violation complaints’ and ‘situation complaints’ among GATT contracting parties (cf. GATT Article XXIII) as well as on individual access to justice (cf. Article X:3 GATT), which reflected the ancient legal distinctions between principles of distributive, corrective, commutative justice and equity as discussed already in Aristotelian philosophy.

Upon my arrival in March 1981, working inside the GATT Secretariat as ‘legal officer’ provoked many GATT colleagues to tell me that – as the GATT Secretariat had never formally established an Office of Legal Affairs up to 1981 - ‘GATT should never have a legal office’ so as to avoid undue ‘legalization’ of pragmatic GATT negotiations. The proverbial ‘GATT pragmatism’ cultivated inside the GATT Secretariat aimed at avoiding ‘legal formalism’, for instance by allowing trade ministers and ambassadors to sign GATT legal instruments without providing ‘full powers’ delegated by the Minister of Foreign Affairs (which, at least in one instance, led to a subsequent legal challenge of such a Tokyo Round Agreement signature by a Latin-American Minister of Commerce). In GATT dispute settlement proceedings, GATT secretariat officials and trade diplomats serving as ‘panelists’ frequently rejected my propositions of justifying GATT interpretations and GATT dispute settlement findings by referring to the customary methods of treaty interpretation. Even though I carried out my legal analytical work (e.g. elaborating the *GATT-Status of Legal Instruments* and two completely new loose-leaf editions of the *GATT Analytical Index. Notes on the Drafting, Interpretation and Application of the General Agreement on Tariffs and Trade*, GATT, 1985/1989, 900 pp) and legal administrative work (e.g. concerning the function of the GATT Director-General as depository of all GATT legal instruments, their notification to the UN Legal Services, the formal ‘derestriction’ of confidential GATT documents) under the supervision of Mr. van Tuinen, my post had been formally assigned to the GATT Session and Council Affairs Division directed by Mr. Stuart Robinson. One reason for this dual assignment was that I also had to participate in servicing GATT conferences (e.g. drafting the minutes of meetings of the annual Sessions of the GATT Contracting Parties and of the monthly meetings of the GATT Council), cooperating with other GATT Divisions, publishing numerous GATT documents (e.g. the annual *GATT Basic Instruments and Selected Documents*), and to contribute to missions of the Director-General (eg accompanying the DG to meetings with German ministers, contributing to the drafting of speeches by the DG). Yet, more important reasons for my assignment to GATT’s Conference Division included the only ‘virtual existence’ - without any formal visibility - of an Office of Legal Affairs inside the GATT Secretariat in 1981/82; the delicate nature of my work on a new ‘GATT Analytical Index’ referring also to inconsistencies between GATT’s diplomatic jurisprudence and the ‘law in the books’; the ‘anti-legal prejudices’ cultivated by many trade diplomats intent on avoiding ‘legal accountability’ inside and beyond the GATT Secretariat; and the pragmatic attitude of Mr. van Tuinen as the Director-General’s personal legal advisor towards the ‘law in practice’ (e.g. GATT panel interpretations of GATT provisions without reference to the customary methods of treaty interpretation). My second boss, Stewart Robinson, advised me that – in my work as ‘legal officer’ – I better follow the example of an ‘U boat’ by doing my legal research (e.g. on the *GATT Analytical Index* compiling GATT legal instruments regarding the interpretation and application of GATT Articles) focusing on my practical work inside GATT’s Conference Division - with ‘low visibility’ and avoiding legal conflicts, for instance regarding legal advice given by the operational GATT divisions that continued to handle GATT dispute settlement proceedings, or

regarding the contested legality of the then widespread 'voluntary export restraints' and other 'grey area trade restrictions' practiced by trade diplomats to the detriment of the consumer welfare and democratic rights of their citizens.

Even though Mr. van Tuinen did not formally participate in GATT dispute settlement panels serviced by the respective operational GATT Divisions in charge of the respective subject matters, some operational GATT divisions began asking my legal advice on specific legal issues (e.g. regarding GATT panel discussions on the difference between a 'treaty reservation' and a 'declaration of interpretation'). In response to the criticism of a number of GATT panel findings since the late 1970s¹³, GATT Director-General Dunkel decided in 1982 to establish a GATT Office of Legal Affairs on a permanent basis. Although Mr. van Tuinen was formally described as 'Director, Office of Legal Affairs' in the GATT phone directory since September 1982 until his retirement at the end of 1982, it was only after the appointment of Mr. A.Lindén as Director of a new Office of Legal Affairs in 1983 that two additional lawyers - i.e. Frieder Roessler and myself - were formally assigned to the new Office of Legal Affairs. GATT's phone directory continued to list the 'Session and Council Affairs Division' of S. Robinson as part of the Office of Legal Affairs until the appointment of F. Roessler as Director of a new Legal Affairs Division established in 1989, when the Session and Council Affairs Division became a formally separate Division in view of the ever increasing workload of the few lawyers working in the Legal Affairs Division mainly on legal GATT documents, dispute settlement proceedings, the Uruguay Round negotiations regarding a new 'Dispute Settlement Understanding', and the new legal-institutional framework of the WTO. After resuming my academic career in October 1989, I accepted the requests of successive GATT Director-Generals to serve two Uruguay Round negotiating groups (on dispute settlement and institutions) as legal consultant and to participate in GATT dispute settlement practices as member or chairman of GATT/WTO dispute settlement panels and consultant legal advisor for less-developed countries.

II. From 'Conciliation' to 'Due Process of Law' and 'Third Party Adjudication' in GATT Dispute Settlement Practices during the 1980s

The drafters of the 1948 Havana Charter for an International Trade Organization (ITO) had provided for third-party adjudication of international trade and economic disputes through legal rulings by the ITO Executive Board, with the possibility of an appeal to the plenary Conference of the ITO and a right to seek an Advisory Opinion by the ICJ. As GATT 1947 was negotiated on the basis of a limited negotiating authority of the US delegation and 'provisionally applied' since 1 January 1948 as a temporary contract for reciprocal tariff liberalization until its future incorporation into the ITO Charter, its dispute settlement provisions (notably GATT Articles XXII, XXIII) remained vague and less ambitious than those of the draft ITO Charter. Following the refusal by the US Congress to ratify the ITO Charter and the abandonment of the ITO in 1950, the GATT CONTRACTING PARTIES - i.e. the plenary meeting of the initially 23 signatory governments of GATT 1947 - progressively exercised and developed their dispute settlement authority under GATT Article XXIII, for instance by approving dispute settlement rulings by the Chairman of the CONTRACTING PARTIES, by GATT Working Parties (including the parties to the dispute as well as other contracting parties with direct interests in the dispute) and, since 1952, by GATT dispute settlement panels composed of three of five neutral panelists (usually trade diplomats) from third countries. In these diverse dispute settlement procedures, the GATT Secretariat assisted trade diplomats in the drafting of their legal findings and in the progressive codification of GATT dispute settlement practices. From 1963 to 1970, the participation of the EC and of an ever larger number of less-developed GATT contracting parties sparked an 'anti-legalist movement within GATT' (Hudec) emphasizing the need for negotiations (e.g.

13 Cf. R.E.Hudec, The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure, in: J.Bhagwati/M.Hirsch (eds), *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Heidelberg: Springer, 1998), 101-120.

during the Kennedy Round of multilateral trade negotiations 1964-1967) and for ‘pragmatic solutions’ of legal challenges of the EC’s common agricultural and preferential trade policies as well as of illegal trade barriers impeding developing country access to developed countries.¹⁴ Since 1970, the number of GATT dispute settlement reports steadily increased. The Tokyo Round Agreements of 1979 included an ‘Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance’ codifying and developing GATT dispute settlement practices under Articles XXII and XXIII GATT.¹⁵ Yet, since the four 1976 GATT panel reports on income tax practices in Belgium, France, the Netherlands and the USA, the 1978 panel report on minimum import prices administered by the EEC, two GATT panels reports of 1979 and 1980 on EEC export subsidies for sugar, the 1980 GATT panel report on EEC restrictions on imports of apples, and the 1981 panel report on Spanish import restrictions on soya bean oil, the inadequate legal reasoning of GATT panel findings was increasingly criticized by governments and lawyers and risked undermining the legitimacy and effectiveness of the GATT dispute settlement system.

In a GATT Ministerial Decision adopted on 29 November 1982, the GATT CONTRACTING PARTIES gave the GATT Secretariat formal responsibility of assisting the dispute settlement panels, especially on the legal, historical and procedural aspects of the matters dealt with. In order to demonstrate his support for the Office of Legal Affairs, Director-General Dunkel decided to locate the new Legal Office next to his own office inside the Centre William Rappard. Since 1983, Messrs Lindén, Roessler and myself progressively participated in GATT panel proceedings until the Director-General formally decided that the servicing by the Secretariat of GATT dispute settlement panels was the joint responsibility of the operational division in charge of the subject-matter (usually drafting the factual parts of the panel report) as well as of the Office of Legal Affairs (usually drafting the legal findings in the panel report). Only exceptionally, if there was no operational GATT division with special expertise (e.g. on tax legislation), would a GATT dispute settlement panel be served exclusively by the Office of Legal Affairs.¹⁶ In the GATT ‘Basic Instruments and Selected Documents’, GATT dispute settlement reports continued to be published under the heading ‘conciliation’. But the increasing influence of GATT lawyers on the legal findings prompted GATT dispute settlement panels to progressively apply and cite the customary methods of treaty interpretation (as codified in the VCLT) and other rules and principles of international law. Working inside GATT’s Office of Legal Affairs allowed me to take numerous initiatives, such as arranging official meetings with judges from the European Court of Justice and inviting retired judges to serve as GATT panelists. The legal arguments submitted by lawyers from the GATT Secretariat to GATT panelists occasionally provoked counter-pressures. For instance, when a former judge from the EC Court of Justice chaired a GATT dispute settlement panel and disagreed with the legal advice from the GATT Secretariat, he convened legal deliberations by the 3 GATT panelists without presence of lawyers from the GATT Secretariat and drafted himself the legal findings of the panel. But his insistence on presenting himself his final panel report to the GATT Council prompted GATT Director-General Dunkel to tell me that this kind of ‘legalist lecture’ to GATT ambassadors merited no repeating. The increasing number of GATT panel findings against antidumping and countervailing duties imposed by the USA prompted the USA to block the adoption of a large number of panel reports under the 1979 Tokyo Round Agreements on Antidumping and Subsidies ushering in a decision by Director-General Dunkel – following a request from US Trade Representative Carla Hills pointing to the political risks of adverse panel findings for approval by the US Congress of future Uruguay Round Agreements - to limit the participation of lawyers from GATT’s Office of Legal

¹⁴ Cf. Hudec (note 13), at 109 ff, and the chronological listing of all GATT dispute settlement proceedings under GATT Article XXIII in: Petersmann (note 2), at 248 ff.

¹⁵ Cf. *The Tokyo Round Agreements* (GATT 1986), at 200 ff.

¹⁶ An example was the panel report on *Japan-Alcoholic Beverages I*, adopted on 10 November 1987, which was drafted almost single-handedly by myself and approved without hardly any changes by the three GATT diplomats serving as panelists.

Affairs in the often politicized disputes over antidumping and countervailing duties administered by the GATT Secretariat Division specialized in antidumping, countervailing duties and subsidies.¹⁷

Until the beginning of the Uruguay Round negotiations in 1987, almost all panel reports submitted to the GATT Council under Article XXIII:2 GATT had been adopted and, in most cases, also implemented. Only in respect of a few panel reports, the GATT Council either adopted the reports subject to an 'understanding' that amounted to a partial revision of the relevant legal findings¹⁸, or refrained from adopting the panel report. But also in the case of the four GATT panel reports not adopted under Article XXIII during the 38 years of GATT 1947¹⁹ until its termination in 1995, the disputing parties settled their dispute on the basis of the panel report. Thus, the 'legal filtering' and non-adoption by the GATT Council of these reports reflected an attempt at avoiding legally wrong interpretations (e.g. in the Soyabeans and Citrus panel findings) or at keeping open interpretative issues (e.g. in the Canned Fruit and Gold Coins cases) which the defendants continued to challenge; arguably, the dispute settlement process under GATT Article XXIII had not broken down. In his annual report to the GATT Council in 1989, the GATT Director-General emphasized with regard to the general GATT dispute settlement procedure: 'Overall, the experience with the adoption of panel reports continues to be good. There has so far been no instance in which a panel report was neither adopted nor implemented merely because the party complained against refused to accept the panel's recommendations'.²⁰ Yet, even though the Uruguay Round negotiations remained dominated by diplomats interested in protecting their self-interests (such as limiting their legal accountability vis-à-vis citizens²¹), the DSU reforms of the GATT dispute settlement system reflected widespread dissatisfaction with GATT's 'diplomats jurisprudence'. If the GATT dispute settlement system is evaluated from a broader 'constitutional perspective' as reflected in the customary rules of treaty interpretation, two 'systemic failures' remain outstanding, as summarized in the concluding *Sections III and IV*.

III. Lack of 'Democratic Public Reason' in GATT/WTO 'Diplomats Jurisprudence'? Need for Taking the Customary Rules of Treaty Interpretation More Seriously

Compared with GATT 1947 and the 1979 Tokyo Round Agreements, the 1994 WTO Agreement and the compulsory 'dispute settlement system of the WTO' (Article 3 DSU) have strengthened the systemic character of GATT/WTO law in terms of both its 'primary rules of conduct' and its 'secondary rules of recognition, change and adjudication'.²² According to Article 3 of the DSU, the

'dispute settlement of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreement in accordance with customary rules of interpretation of public international law' (para.2).

¹⁷ Cf. E.U.Petersmann (note 2), at 90 f.

¹⁸ Examples include the 'DISC' cases (BISD 28S/114 ff) and the 'Spring Assemblies Panel Report' (BISD 30 S/107, C/M/168), both of which were rightly criticized for their unconvincing legal findings.

¹⁹ These were the Spanish Soyabeans panel report (L/5142), the EEC Canned Fruit panel report (L/5778), the EEC citrus preferences panel report (L/5776) and the Gold Coins panel report (L/5863).

²⁰ Cf. Petersmann (note 2), at 88. On the problems under the special dispute settlement procedures provided in the 1979 Tokyo Round Agreements see: *idem*, at 90 f, 223 ff.

²¹ As illustrated by the explicit exclusion – for instance, in the EU and US legislation implementing the WTO legal obligations in their domestic legal systems - of 'direct applicability' of WTO rules in domestic courts; cf. Petersmann (note 2), at 18 ff.

²² On the characteristics of 'legal systems' see H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 1994), chapter V.

The explicit reference to the customary rules of treaty interpretation was inserted into the DSU so as to terminate, once and for all, the frequent neglect - by GATT diplomats, GATT panelists and GATT officials without legal training - for general international law as relevant legal context for interpreting GATT rules. Yet, WTO dispute settlement bodies continue neglecting that the customary rules of treaty interpretation and adjudication require interpreting treaties and settling related disputes not only on the basis of the text, context, objective and purpose of the applicable rules; as explicitly recalled in the Preamble and Article 31 VCLT, treaty interpretation and adjudication must also remain 'in conformity with the principles of justice and international law', including 'human rights and fundamental freedoms for all' (cf. Preamble and Article 31 VCLT), as confirmed in numerous UN legal instruments. As Article 23 DSU on the 'Strengthening of the Multilateral System' requires all WTO Members to settle disputes 'consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding', impartial and independent adjudication has become of constitutional importance for rule-clarification and dispute settlement under WTO law, especially in times of global economic and poverty crises and political disagreement on consensus-based rule-making and 'authoritative interpretations' by the political WTO bodies. As citizens and governments with often conflicting worldviews are unlikely to ever agree on any comprehensive theory of justice, they must focus on 'an overlapping consensus' (J.Rawls) limited to 'principles of justice' that must be consistent with 'human rights and fundamental freedoms for all', as recalled in the VCLT. By clarifying from impartial and independent perspectives how international treaties ratified by parliaments for the benefit of citizens have to be construed 'in conformity with principles of justice' and the universal human rights obligations of UN member states, courts of justice must justify their legal findings in terms of 'principles of justice' that can be supported and shared as legitimate '*opinio juris*' by governments and citizens without prejudice to their often diverse worldviews. As recalled by the ICJ and numerous other international courts:

'Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable.'²³Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it.'²⁴

One unique feature of the 'dispute settlement system of the WTO' is that the discussion and, so far, approval of all panel and Appellate Body reports by the Dispute Settlement Body (DSB) enables all WTO governments to voice any disagreements with dispute settlement interpretations in order to inform and guide future WTO jurisprudence. Yet, the exclusive composition of the DSB by diplomats – without any 'voice' for the often millions of producers, traders, investors, consumers, companies, civil society institutions and parliaments affected by WTO dispute settlement rulings – also limits the democratic legitimacy and 'public reason' of DSB decisions on WTO dispute settlement reports.

How to Justify GATT/WTO Rules vis-à-vis Citizens as 'Agents of Justice'?

Justice is essentially about the human right of citizens to justification of law and governance vis-à-vis citizens with due respect for their human rights.²⁵ As subjects of inalienable human rights, citizens are 'democratic principals' and 'agents of justice' of modern international law and can assess the demands of justice only through 'deliberative' and 'participatory democracy' institutionalizing their 'public reason'. The systemic exclusion of citizens and national parliaments from intergovernmental rulemaking in the WTO entails 'discourse failures' (such as the systemic omission of human rights and consumer welfare from WTO rules and WTO discourse) that undermine the legitimacy of WTO governance and its contribution to protecting human rights. Some UN treaty 'constitutions' (*sic*) – for instance, the constitutions (*sic*) establishing the International Labor Organization (ILO), the World

²³ North Sea Continental Shelf Judgment ICJ Reports 1969, pp. 48-49, para. 88.

²⁴ Continental Shelf (Tunisia v Libyan Arab Jamahiriya, Judgment ICJ Reports 1982, p.60, para. 71.

²⁵ Cf. R.Forst, The Right to Justification: Elements of a Constructivist Theory of Justice (New York: Columbia University, 2011).

Health Organization (WHO), the Food and Agriculture Organization (FAO) and the UN Educational, Scientific and Cultural Organization (UNESCO) – explicitly justify their functionally limited treaty regimes for the protection of international public goods demanded by citizens in terms of protection of labor rights and social justice (through ILO law), the human right to health (through WHO law), freedom from hunger (through FAO law) and human rights to education, democratic self-government and rule of law (through UNESCO conventions). UN human rights law acknowledges and justifies ever more ‘inalienable’ human rights by respect for the reasonableness, dignity, morality (‘conscience’), human autonomy and basic needs of individuals who are recognized as being entitled not only to individual and democratic self-determination, but also to ‘a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’ (Article 28 of the 1948 Universal Declaration of Human Rights = UDHR). Yet, the more globalization transforms *national public goods* into *transnational ‘aggregate public goods’* (like a rules based trading system), the more national (big C) Constitutions turn out to be ‘partial constitutions’ that can no longer protect many public goods without international law and institutions. As UN member states have increasingly confirmed human rights to ‘sustainable development’ and the need for collective supply of international public goods through international law and multilevel governance institutions²⁶, human rights law requires interpreting international law – including WTO treaty objectives like ‘sustainable development’ (WTO Preamble) and ‘providing security and predictability to the multilateral trading system’ (Article 3 DSU) - from democratic perspectives enabling citizens to understand themselves as co-authors of international law, democratic owners (‘principals’) of all governance institutions (as ‘agents’ with constitutionally limited powers), and as ‘agents of justice’ and main legal subjects of legal systems. This is particularly true for IEL regulating mutually beneficial trade transactions among citizens. The explicit commitments of WTO law to the customary law requirements of interpreting and clarifying the often indeterminate WTO rules (e.g. on ‘national treatment’, ‘non-violation complaints’) ‘in conformity with principles of justice’ and ‘human rights and fundamental freedoms for all’ justify legal presumptions that national parliaments have ratified the WTO guarantees of economic freedoms, non-discriminatory conditions of competition, rule of law and governmental protection of non-economic public interests (like ‘public order’, human health) so as to protect corresponding interests and rights of citizens rather than only rights and duties of governments. Just as national and international courts construe European economic law, international investment law, intellectual property law and human rights law as justifying cosmopolitan rights of citizens (e.g. investor rights derived from international investment treaties, human rights recognized by UN human rights conventions), the citizen-oriented functions of trade law justify ‘inclusive, constitutional interpretations’ for the benefit of citizens as main economic actors and legal subjects of democratic legal systems.²⁷

How to Interpret GATT/WTO Rules for the Benefit of Citizens?

Utilitarian trade and power politics aimed at maximizing ‘Kaldor-Hicks efficiency’ (i.e. regardless of the distribution of the gains from trade) risks being inconsistent with the human rights obligations of governance institutions to respect, protect and fulfill the fundamental rights of every individual. Ronald Dworkin’s distinction of the following ‘*four stages of legal theory*’ illustrates how much doctrinal concepts of the GATT/WTO legal and dispute settlement system depend on judicial clarification of ‘principles of justice’:

²⁶ Cf. E.U. Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford: Hart, 2012).

²⁷ On the ‘constitutional functions’ of many international economic rules to protect ‘constitutional values’ – like legal certainty, non-discrimination, rule of law, economic freedoms, property rights, transparent policy-making and access to justice - recognized in domestic constitutional law systems see Petersmann (note 8).

- at the ‘*semantic stage*’, legal terms (like justice, human rights, liberty, non-discrimination, ‘trade under fully competitive conditions’, rule of law, a ‘fair comparison’ of the export price with ‘the normal value’ of imported goods) tend to be ‘interpretive concepts’ which people share even if they disagree about the criteria for identifying injustice and for applying such ‘interpretive concepts’; hence, a ‘useful theory of an interpretive concept must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures’²⁸, with due regard to the legitimate interests of all affected persons;
- at the ‘*jurisprudential stage*’, the legal interpreter must search for the values that supply the best interpretation of the aspirational values of legal concepts like rule of law, including the ‘ideal of political integrity’ as a requirement of governing ‘through a coherent set of political principles whose benefits extend to all citizens’ and legitimize coercive power of states;²⁹
- at the ‘*doctrinal stage*’, the ‘truth conditions of propositions of law’ must be constructed ‘in the light of the values identified at the jurisprudential stage’ so that legal justifications fit the practice as well as the values that the practice serves (e.g. the constitutional and procedural practices in which legal claims are embedded);³⁰
- at the ‘*adjudicative stage*’, courts of justice deploying the monopoly of coercive power must impartially and independently review whether the enforcement of the law in particular cases by political officials is legally justified by ‘the best interpretation of legal practice overall’;³¹ according to Dworkin’s ‘adjudicative principle of integrity’, judges should interpret law - in conformity with its objectives of legality, rule-of-law and its underlying constitutional principles of justice - as expressing ‘a coherent conception of justice and fairness’: ‘Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.’³²

The customary rules of treaty interpretation confirm that ‘principles of justice’ and ‘human rights and fundamental freedoms for all’ – rather than foreign policy discretion to tax and restrict domestic citizens in welfare-reducing ways (e.g. through tariffs and non-tariff trade barriers) and to engage in allegedly ‘efficient breaches’ of international treaties ratified by parliaments for the benefit of citizens – are the relevant principles for interpreting and justifying GATT/WTO rules. Similar to Dworkin’s distinction between ‘four stages of legal theory’, John Rawls explains why independent and impartial courts can operate as ‘exemplars of public reason’ defending human rights and other constitutional ‘principles of justice’ against majority politics and related abuses of public and private power.³³ Law – in contrast to natural sciences - is not about discovering ‘objective truth out there’; it is rather about ‘institutionalizing public reason’ through constitutional, legislative, administrative, judicial rulemaking, participatory rule-clarification (eg through judicial remedies of individuals) and ‘deliberative democracy’ in response to civil society challenges of the ubiquity of abuses of public and private powers. Diplomatic monopolization of intergovernmental rulemaking (eg in secretive GATT/WTO negotiations) without effective parliamentary and democratic control risks undermining general consumer welfare and human rights, which diplomats deliberately refrained from mentioning

²⁸ R.Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006), at 12.

²⁹ *Idem*, at 13.

³⁰ On the two tests of ‘fit’ and ‘value’ as ‘different aspects of a single overall judgment of political morality’ and ‘best justification’ of legal practices see *idem*, 15-17.

³¹ *Idem*, at 18, 25.

³² R. Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986), at 225, 243.

³³ On ‘constitutional’ and ‘democratic functions’ of national and international courts of justice and of their ‘principle-oriented public reasoning’ see also E.U.Petersmann, The Judicial Task of Administering Justice in Trade and Investment Law and Adjudication, in: *Journal of International Dispute Settlement IV* (2013), at 5 ff.

anywhere explicitly in GATT/WTO law. The 'public choice hypothesis' – i.e. that all power risks being abused by the rational self-interests of the rulers – is confirmed by the empirical fact that IEL systems with stronger multilevel 'constitutional checks and balances' – like European economic law and international investment law – tend to be construed by national and international courts as protecting also rights of citizens even if the international rules were addressed to states without explicitly providing for cosmopolitan rights:

'the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 *Defrenne v Sabena* [1976] ECR 455, par. 31). Such consideration must, *a fortiori*, be applicable to Article 48 of the Treaty, which ... is designed to ensure that there is no discrimination on the labour market'.³⁴

The institutionalized independence and more impartial reasoning of the WTO Appellate Body have weakened the dependence of many ad hoc WTO panels on the diplomatic reasoning of non-lawyers serving as WTO panelists as well as on the assistance from operational WTO Secretariat divisions involved in WTO negotiations (and tempted to use their drafting of WTO panel reports for advancing political negotiation positions favored by them). For instance, in the almost 20 WTO dispute settlement proceedings challenging the protectionist 'zeroing practices' of EC and US antidumping authorities in their calculations of antidumping duties, the WTO Appellate Body has rightly interpreted the WTO requirement of 'fair price comparisons' from the perspective of the reasonable interests of economic actors rather than – as advocated by the WTO panels in conformity with the advice given to them by the WTO's 'Rules Division' (dealing with antidumping, countervailing duty and subsidy practices) – from the perspective of EC and US antidumping bureaucracies claiming that they had not intended to limit their 'sovereign right to apply zeroing methodologies' by concluding the WTO Agreement on Antidumping.³⁵ Yet, most WTO dispute settlement reports fail to balance private and public interests in terms of 'principles of justice' and 'human rights and fundamental freedoms for all', contrary to the customary methods of treaty interpretation.

The 'Diplomatic Capture' of UN and WTO Institutions Serves the Self-Interests of the Rulers

Professor Hudec's analysis of *The GATT Legal System: A Diplomat's Jurisprudence*³⁶ explained the GATT dispute settlement practices as primarily the work of diplomats and of GATT Secretariat officials rather than of lawyers. 'Public choice' theory explains why such '*public choices*' (e.g. of not establishing a GATT Office of Legal Affairs from 1948 up to 1983) in 'political markets' tend to be no less influenced by individual self-interests of rational actors than '*private choices*' in economic markets.³⁷ Most UN and GATT/WTO diplomats favor 'Westphalian conceptions' of international law and worldwide institutions based on power-oriented, intergovernmental claims

- to limit international law to rights and obligations of states without regard to the legitimacy of governments in the many non-democratic UN member states and to whether national 'gains from trade' are used for protecting human rights and popular self-determination or the self-interests of the rulers;
- to focus on 'national interests' as defined by national interest groups rather than on protection of human rights and general consumer welfare that are not mentioned in most worldwide economic and environmental agreements;

³⁴ Cf. Case C-281/98, *Angonese* [2000] ECR I-4139.

³⁵ On this 'zeroing jurisprudence' see: Cho (note 10).

³⁶ R.Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, in: *Journal of World Trade* 4 (1970) 615-665.

³⁷ See the 'public choice analyses' of trade policies in Part V of M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law* (London: Kluwer, 1993).

- to separate national and international legal systems and exclude legal, judicial and democratic remedies of citizens against welfare-reducing violations of international treaty obligations; and
- to treat citizens as mere objects of international law – rather than as democratic ‘principals’ of all governance institutions – so as to avoid legal and democratic challenges of welfare-reducing, intergovernmental power politics and undersupply of international public goods resulting in unnecessary poverty of more than 1 billion people living on 1\$ or less per day.

During the 1980s, trade diplomats engaged in hundreds of bilateral export restraint agreements and other ‘grey area trade restrictions’ redistributing domestic income from consumers to rent-seeking industries in exchange for political support – often without parliamentary authorization, democratic accountability and judicial control.³⁸ As trade policy-making in GATT was driven by power politics and alleged ‘state interests’ (e.g. to restrict imports of cotton and textiles from less-developed countries), also GATT Secretariat officials participating in GATT dispute settlement proceedings often responded to the political pressures ‘pragmatically’ in order to reconcile GATT rules and dispute settlement practices with the ‘political realities’ in multilevel governance of international trade. The political opposition to the establishment of a GATT Office of Legal Affairs prior to 1982 came mainly from EC trade diplomats concerned about legal challenges of their discriminatory trade restrictions favoring import competing producers (e.g. of agricultural and textiles products inside the EC) and preferential trade with former European colonies. Trade diplomats tend to be agnostic of ‘legal systems’, and are inclined to interpret the ‘object and purpose’ of trade rules for the benefit of the rulers (e.g. in terms of ‘Kaldor-Hicks efficiency’ rather than consumer welfare) and of their foreign policy discretion to negotiate ‘political bargains’ redistributing the ‘gains from trade’ and circumventing the rules ratified by national parliaments for the benefit of citizens. The ‘anti-legalism’ cultivated in GATT diplomacy was designed to avoid legal, democratic and judicial accountability of diplomats for the welfare-reducing effects of their trade protectionism in collaboration with rent-seeking industries. My publications emphasized since the 1980s that – from the different point of view of reasonable citizens benefitting from a mutually beneficial division of labor based on transnational rule of law – GATT legal guarantees of economic freedom, non-discrimination, rule of law and sovereign rights to protect non-economic public goods (e.g. pursuant to Article XX GATT) could serve ‘constitutional functions’ for protecting human rights, economic freedoms, non-discriminatory conditions of competition and transnational rule of law for the benefit of citizens and economic actors participating in the global division of labor; as such ‘constitutional interpretations’ were – rightly – perceived as a political threat by trade diplomats requesting national and European courts to refrain from reviewing their persistent violations of GATT law to the detriment of consumer welfare, rule-of-law, democracy and equal rights of citizens³⁹, I remain grateful to GATT Director-General Dunkel for having rejected requests from GATT diplomats to exclude from the GATT Secretariat officials daring to criticize – in private, academic publications subject to ‘disclaimers’ - the economic inefficiency and illegality of certain antidumping and other ‘grey area trade practices’.

³⁸ Cf. E.U.Petersmann (note 8), at 104 ff.

³⁹ Cf. Petersmann (note 9).

IV. Diplomatic Failures to Protect the 'Multilateral Trading System' and 'Dispute Settlement System of the WTO' as Cosmopolitan Legal Systems

Constitutional democracies and European law protect mutually beneficial trade and economic cooperation among citizens inside domestic jurisdictions as 'cosmopolitan legal orders' with constitutional and judicial guarantees not only of civil and political, but also of economic and social rights of citizens (eg as protected under domestic constitutional, competition and social laws).⁴⁰ Also international investment, intellectual property and human rights conventions among states, and some free trade agreements, are construed by national and international courts as protecting not only rights of governments, but also of their citizens. Hence, during my more than 30 years work in GATT and the WTO, I consistently argued for interpreting precise and unconditional GATT/WTO guarantees of economic freedoms, non-discrimination, rule of law and 'access to justice' as protecting also individual rights,⁴¹ to the dismay of trade diplomats considering 'justice', 'human rights' and 'constitutional discourse' as potential threats to their 'pragmatic management' of trade politics.

Access to Justice in GATT/WTO Law?

The more globalization transforms *national public goods* demanded by citizens into *international 'aggregate public goods'* that national Constitutions can protect only together with international law and multilevel governance institutions, the more important become multilevel guarantees of 'access to justice' extending legal and judicial remedies beyond civil and political rights of citizens. For instance:

- Some national Constitutions have responded to systemic governance failures by providing for broad legal and judicial remedies whenever 'rights are violated by public authority' (Article 19:4 German Basic Law).
- Some regional economic agreements (like the Lisbon Treaty) are explicitly committed to facilitating 'access to justice' (Article 67:4 TFEU), 'rule of law' (Article 2 TEU) and a 'right to an effective remedy and to a fair trial' whenever 'rights and freedoms guaranteed by the law of the Union are violated' (Article 47 EU Charter of Fundamental Rights).
- The GATT and the WTO Agreements include a large number of requirements to make available judicial, arbitral or administrative tribunals and independent review procedures not only at international governance levels among WTO members, but also in domestic legal systems in the field of GATT (cf Article X), the WTO Antidumping Agreement (cf Article 13), the WTO Agreement on Customs Valuation (cf Article 11), the Agreement on Pre-shipment Inspection (cf. Article 4), the Agreement on Subsidies and Countervailing Measures (cf Article 23), the General Agreement on Trade in Services (cf Article VI GATS), the Agreement on Trade-Related Intellectual Property Rights (cf Articles 41-50, 59 TRIPS) and the Agreement on Government Procurement (cf Article XX).
- In international investment law, the legal guarantees of access to justice at national and international levels (eg in the ICJ) have become supplemented by more than 2'800 bilateral and regional treaty guarantees of individual access to transnational arbitration.

⁴⁰ Cf. Petersmann (note 26), chapter III, and A. Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, in: *Global Constitutionalism* 1 (2012), 53-90, who defines a 'cosmopolitan legal order' as 'a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship' (p. 53). Constitutional protection of economic freedoms is more widespread in European countries protecting broadly defined equal freedoms as 'first principle of justice' (e.g. as justified by Kantian and Rawlsian theories of justice); cf. Hilf/Petersmann (note 37).

⁴¹ See, e.g., Petersmann (note 2), at 194 ff, 233 ff.

- Some environmental conventions – like the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - protect individual ‘access to a review procedure before a court of law or another independent and impartial body established by law’ (Article 9) in transnational environmental regulation.
- UN and regional human rights covenants (eg Article 34 ECHR, the Optional Protocol to the UN Covenant on Economic, Social and Cultural Rights) increasingly extend protection of individual access to legal and (quasi)judicial remedies in case of violation of economic and social rights beyond national courts subject to prior exhaustion of local remedies.

The terms ‘effective remedy’ and ‘access to justice’ are often used interchangeably for protecting

- individual rights to effective access to a dispute resolution body;
- rights to fair proceedings;
- rights to timely resolution of disputes;
- rights to adequate redress; and
- the principle of efficiency and effectiveness of legal remedies.⁴²

In view of the global economic, environmental and poverty crises and the failures of many UN member states to respect, protect and fulfill their human rights obligations inside and beyond national jurisdictions, citizens and courts of justice increasingly insist on ‘constitutional’ and ‘human rights approaches’ to transnational economic regulation, for instance by claiming that - similar to multilevel human rights law, international criminal law, European economic integration law, international investment and commercial law and arbitration - also international trade law should be interpreted, developed and protected by national and international courts as a rights-based, participatory system of multilevel governance protecting individual access to justice and rule of law more effectively by holding governments accountable for their welfare-reducing violations of IEL to the detriment of rule-of-law and non-discriminatory, mutually beneficial cooperation among citizens across national frontiers. Just as multilevel economic regulation inside the EU protects market freedoms and social rights as fundamental rights, the human right to ‘a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’ (Article 28 UDHR) calls for linking IEL to the human rights obligations of all governments, as already proposed by US President Roosevelt in his ‘Four Freedoms’ speech of 1941 explaining the need for ‘a world founded upon four essential human freedoms’ (ie of speech, belief, freedom from fear and from want). Globalization confirms that human rights – notwithstanding their protection also of diverse individual as well as *collective identities* (such as national, religious, class, racial, gender identities and communities with diverse civilizations) – remain the common ‘foundation of freedom, peace and justice in the world’ (Preamble UDHR) and universally recognized ‘conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’ (Preamble UN Charter).

The Lack of ‘Cosmopolitan Public Reason’ Undermines the Legitimacy, Effectiveness and Decentralized Coordination of the Rules-Based World Trading System

The fact that WTO governance institutions do not protect justice vis-à-vis individuals, and that WTO diplomats - also in constitutional democracies like the EU and the USA - continue to request domestic courts to refrain from reviewing compliance by governments with their WTO obligations in order to allow diplomats ‘freedom of maneuver’ without legal accountability⁴³, undermines not only the

⁴² Cf. Access to Justice in Europe: An Overview of Challenges and Opportunities (European Union Agency for Fundamental Rights: Vienna, 2011).

⁴³ Cf. E.U.Petersmann, ‘Can the EU’s Disregard for “Strict Observance of International Law” (Article 3 TEU) Be Constitutionally Justified?’ in: M.Bronckers/V.Hauspiel/R.Quick (eds), *Liber Amicorum for J. Bourgeois* (Cheltenham:

democratic legitimacy of WTO law. It also weakens the coherence of the multilevel trading system with its decentralized implementation and enforcement by private economic actors, national legislators, governments, regulatory agencies and courts of justice in the 159 WTO members. A multilevel legal and trading system depends on a shared system of reasoning promoting decentralized coordination, transnational rule of law and an 'overlapping consensus' on 'principles of justice' supported by citizens, governments and non-governmental economic actors in spite of their often diverse self-interests and democratic preferences for diverse national Constitutions.⁴⁴ Like citizens in a pluralistic, democratic society, also economic actors participating in the global division of labor share practical and moral coordination problems requiring reciprocal commitments to constituting, limiting, regulating and justifying multilevel governance institutions for the benefit of citizens, their human rights and rational self-interests in mutually beneficial economic and social cooperation.⁴⁵ As the global division of labor is driven by demand and supply among private producers, investors, traders and consumers benefitting from rules-based cooperation and interested in the decentralized enforcement of just rules, transnational IEL requires justification by cosmopolitan rights, rule of law, democratic empowerment and self-governance among free and equal citizens no less than economic law inside constitutional democracies. Multilevel legal and judicial guarantees of transnational rule of law for the benefit of citizens can resolve the 'mutual assurance problem' that rational and reasonable actors will support 'rule of law' only if it is based on fair terms for social cooperation giving the assurance that others will likewise do so. By offering 'public reasons' for resolving conflicts over rights and questions of justice on the basis of rule of law, public adjudication assures citizens of the fairness of law and of rules-based social cooperation: 'Public reasons are the building blocks of an autonomous public political morality' and for 'a shared logic of cooperation that is independent of each one's personal conception of the good'.⁴⁶ Just as theories of justice emphasize that 'principles of justice' must be mutually agreed by citizens (as agents of justice) behind a 'veil of uncertainty' (J.Rawls) promoting impartiality and reasonableness vis-à-vis all citizens (similar to impartial judicial administration of justice), economists (like A. Sen) and political philosophers (like M.Nussbaum) likewise emphasize that - 'if the demands of justice can be assessed only with the help of public reasoning, and if public reasoning is constitutively related to the idea of democracy - there is an intimate connection between justice and democracy'⁴⁷; legitimate trade and economic policies must

(Contd.)

Elgar, 2011), 214-225. The term 'freedom of maneuver' continues to be used by both the political EU institutions and the CJEU (e.g. in Joined cases C-120 and C-121/06 P, FIAMM [2008] ECR I-6513, para. 119) as the main justification for their disregard of legally binding WTO rules and WTO dispute settlement rulings.

⁴⁴ On this need for reconciling utility-maximizing models of rational pursuit of self-interests with multilevel constitutionalism protecting the reasonable interests of all citizens beyond state borders, see: Petersmann (note 26), chapter III; P.Clements, *Rawlsian Political Analysis. Rethinking the Microfoundations of Social Science* (University of Notre Dame Press, 2011).

⁴⁵ On the importance for people to agree on shared reasons for just laws coordinating a 'stable equilibrium' in the decentralized application and enforcement of rules by individual agents that will support the institutions and interactions required by a political conception of justice only if they can be reasonably assured that they will benefit as a result, see: G.K.Hadfield/S.Macedo, Rational Reasonableness: Toward a Positive Theory of Public Reason, in: *University of Southern California Law and Economics Working Paper Series: Working Paper 127* (2011).

⁴⁶ Hadfield/Macedo (note 45), at 7, who define 'public reason' as a 'system of reasons that all can participate in' as an essential, reciprocal 'coordinating device' in societies that depend on decentralized support of rules and their justification by 'principles of justice' for the stability and legitimacy of legal regimes. In view of the permanent fact of 'reasonable disagreement' among citizens over their respective conceptions of a 'good life' and over comprehensive theories of political justice, public reason must be limited to an 'overlapping consensus' (J.Rawls) among people with often conflicting moral and political worldviews. For instance, GATT/WTO law focuses on voluntary market access commitments subject to 'general exceptions' reserving sovereign rights to unilaterally adopt trade restrictions necessary for protecting non-economic public goods which people may legitimately define differently in different jurisdictions.

⁴⁷ Cf. A.Sen, *The Idea of Justice* (Cambridge: Harvard University Press, 2009), at p. 326. On the diversity of theories of justice justifying international economic regulation see: Petersmann (note 24), chapter VI.

focus on promotion of ‘human capacities’ and reduction of injustices⁴⁸ rather than on trade policy discretion to distribute ‘protection rents’ to rent-seeking interest groups in exchange for political support.

The ‘Dispute Settlement System of the WTO’ Requires Multilevel Judicial Protection of Transnational Rule of Law for the Benefit of Citizens

Independent and impartial, national as well as international courts of justice have legitimate constitutional reasons for using their constitutional powers for ‘adminstrating justice’ by protecting cosmopolitan rights of citizens and transnational rule of law in mutually beneficial trade transactions among citizens across national frontiers. As WTO law protects ‘access to justice’ at national levels (e.g. in domestic courts seized by citizens in order to review illegal trade restrictions), at transnational levels (e.g. in commercial arbitration in the WTO at the request of exporters challenging trade restrictions imposed by preshipment inspection companies pursuant to the WTO Agreement on Preshipment Inspection) and international levels, the ‘consistent interpretation’ and ‘judicial comity’ requirements underlying national and international legal systems (cf. Article 31 VCLT) require multilevel trade adjudication bodies to cooperate in their common task of ‘providing security and predictability to the multilateral trading system’ (Article 3 DSU). If the purpose of democratically legitimate law is to ‘institutionalize public reason’ through constitutional, legislative, administrative, judicial and international rulemaking and adjudication for the benefit of citizens, then the GATT legal and dispute settlement system should be interpreted not only as protecting rights and obligations of governments, but also human rights, transnational rule of law, constitutional and legislative rights of citizens and ‘principles of justice’, as explicitly recognized in national and international legal systems.⁴⁹ Even though the GATT/WTO provisions on access to justice at national, transnational and international levels of dispute settlement do not provide for uniform standards of judicial review, the explicit legal commitment to ‘the dispute settlement system of the WTO (as) a central element in providing security and predictability to the multilateral trading system’ (Article 3 DSU) justifies interpreting the multilevel GATT/WTO legal and dispute settlement provisions in mutually coherent ways for the benefit of citizens in order to reduce transaction costs and legal insecurity of private economic actors. Just as inside constitutional democracies (e.g. in US antitrust law) and regional economic integration law (e.g. of the EU and EEA) individual plaintiffs invoking and enforcing competition and trade rules in domestic courts have been likened to ‘attorney generals’ pursuing individual as well as ‘community interests’⁵⁰, the customary law requirement of interpreting WTO rules ‘in conformity with the principles of justice and international law’ require impartial courts of justice to promote ‘consistent interpretations’ of multilevel trade regulation protecting also cosmopolitan rights of traders, producers, investors and consumers participating in the mutually

⁴⁸ On the necessary limitation of economic ‘gross domestic product’ approaches by human rights approaches and complementary ‘capabilities’ and ‘human development approaches’ to international economic regulation see: M.C.Nussbaum, *Creating Capabilities. The Human Development Approach* (Cambridge: Harvard University Press, 2011). The liberal egalitarian theory of justice of John Rawls supports only weak international duties of assistance in view of the primarily domestic causes of poverty inside states. By contrast, human rights law and cosmopolitan theories of justice recognize more comprehensive extraterritorial obligations aimed at respecting, protecting and fulfilling human rights - and limiting majoritarian domination and ‘harmful externalities’ of the existing ‘basic structures’ of international relations - also in transnational cooperation among citizens and in foreign jurisdictions. A.Sen (note 47) rightly emphasizes that a ‘theory of justice that can serve as the basis of practical reasoning must include ways of judging how to reduce injustice and advance justice, rather than aiming only at the characterization of perfectly just societies’ (p. ix).

⁴⁹ On the multilevel GATT legal and dispute settlement system see Petersmann (note 2), at 233 ff; on the ‘constitutional functions’ of certain IMF and GATT economic rules see Petersmann (note 8), at 210 ff.

⁵⁰ This conception was emphasized by the CJEU in its *Van Gend en Loos* judgment (Case 26/62, ECR 1963, 1), where the CJEU stated that ‘the vigilance of the individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by (ex) Articles 169 and 170 to the diligence of the Commission and the Member States’.

beneficial, global division of labor.⁵¹ The 'consistent interpretation' and 'judicial comity' principles offer sufficiently flexible methods of respecting legitimate 'constitutional pluralism' and the diverse conceptions of international economic law, for instance perceiving

- **WTO law as a part of public international law** regulating the international economy on the basis of 'sovereign equality of states';
- **WTO law as global administrative law** aimed at limiting also abuses of power through multilevel administrative law principles underlying the law of international organizations and of constitutional democracies, such as principles of transparency, legal accountability, limited delegation of powers, due process of law and judicial remedies; or
- **WTO law as multilevel economic regulation** prescribing the use of efficient trade policy instruments (e.g. non-discriminatory regulation, tariffs and subsidies rather than discriminatory non-tariff trade barriers) with due respect for 'constitutional pluralism' inside national jurisdictions.⁵²

Reasonableness vs. Rationality: Cosmopolitan Conceptions of International Law Require 'Struggles for Justice' also in International Trade Law

As first explained by Kantian legal theory, state-centered 'multilevel constitutionalism' cannot effectively protect human rights and other international public goods (like a rules-based world trading system) without additional multilevel constitutional safeguards of cosmopolitan rights institutionalizing 'public reason' and limiting the rational pursuit of self-interests in all human interactions at national, transnational and international levels.⁵³ The historical evolution of rights-based, transnational commercial law, human rights law, constitutional democracies, regional economic integration law and international investment law confirms the insight of the German jurist R.Jhering who noted, almost a century ago, that the 'life of the law' often depends on citizens struggling for their rights; such 'struggle for his rights' may be a 'duty of the person whose rights have been violated' as well as a 'duty to society'.⁵⁴ Trade policies - like many other policy areas - remain subject to constant conflicts of interests and struggles for power, for instance between consumers benefiting from liberal trade and import-competing producers benefiting from trade protection. In 1983, the former GATT Director-General O.Long invited Mr. Lindén and myself to a series of 'working lunches' in order to review the legal dimensions of his draft lecture at the Hague Academy of International Law on *La Place du Droit et Ses Limites dans le Système Commercial Multilatéral du GATT*.⁵⁵ Mr. Long emphasized the limits of law in GATT negotiations and diplomacy and concluded:

'Au stade actuel, le droit du GATT, comme, d'une façon générale, le droit économique international, est profondément marqué de pragmatisme. Il doit s'adapter, dans ses règles de fond comme dans ses procédures, aux réalités de la politique commerciale. Il semble se prêter mal à des considérations de nature doctrinale. Nous nous sommes efforcé de le décrire tel qu'il est, sans enjolivures.'⁵⁶

⁵¹ For a discussion of the diverse methodological approaches to adjudication in international economic law see: E.U.Petersmann, Judging Judges: From 'Principal-Agent Theory' to 'Constitutional Justice' in Multilevel Judicial Governance of Economic Cooperation among Citizens, in: *JIEL* 11 (2008) 827-884.

⁵² For a discussion of five competing conceptions of international economic law see Petersmann (note 26), chapter I.

⁵³ Cf. Petersmann (note 26), chapters II and III.

⁵⁴ R. Jhering, *The Struggle for Law* (Chicago: Callaghan, 1915), chapters II to IV. Arguably, Jhering transformed Kant's 'moral categorical imperative' to act on the basis of reasonable 'universalizable principles' into a 'legal imperative' to struggle for human rights.

⁵⁵ O. Long, *La Place du Droit et Ses Limites dans le Système Commercial Multilatéral du GATT*, Recueil des Cours. Collected Courses of the Hague Academy of International Law 1983 IV 182 (The Hague: 1984), 9-142.

⁵⁶ Long (note 55), at 132.

This contribution has emphasized, by contrast, the normative task of law in the 21st century to institutionalize ‘cosmopolitan public reason’ in order to constitute, limit, regulate and justify more legitimate multilevel trade governance for the benefit of citizens in conformity with the customary law requirements of protecting ‘principles of justice’ and human rights in the interpretation of international law and in the adjudication of related disputes. The two ‘systemic failures’ of the GATT/WTO dispute settlement system identified in Sections III and IV – i.e. its inadequate institutionalization of ‘democratic public reason’ holding WTO governance institutions more accountable for their failure to protect international public goods more effectively (Section III), and the unreasonable interpretation of the multilevel ‘dispute settlement system of the WTO’ in terms of rights of governments without cosmopolitan rights and effective ‘access to justice’ of private and corporate economic actors (Section IV) – are due to ‘diplomatic interpretations’ of WTO rules. As long as WTO institutions remain dominated by trade diplomats avoiding human rights discourse and using their foreign policy discretion in order to limit their legal, judicial and democratic accountability vis-à-vis citizens, promotion of ‘cosmopolitan justice’ depends on struggles by citizens for their cosmopolitan rights and on their judicial protection by national and international courts of justice (eg through judicial comity among national and international trade courts pursuant to the ‘consistent interpretation’ requirements of national and international legal systems, by protecting more inclusive and more transparent WTO dispute settlement proceedings through allowing *amicus curiae* interventions by non-governmental civil society institutions). In order to promote more effective democratic control of the ‘dispute settlement system of the WTO’, the review by the WTO Dispute Settlement Body of all WTO panel, appellate and arbitral reports needs to be supplemented by additional public reviews by the legal profession in order to enable civil society to evaluate WTO jurisprudence more independently.⁵⁷

Justifying WTO Law in Terms of Cosmopolitan Justice Could Enable ‘Piecemeal Reforms’ also through Domestic Courts as ‘Community Courts’

International institutions have to respect their limited jurisdictions and the ‘reasonable disagreements’ among peoples on how international human rights and other ‘principles of justice’ should be implemented in IEL and inside national jurisdictions.⁵⁸ There is no evidence so far that the more than 100 WTO Appellate Body reports have violated human rights of citizens. Yet, the disregard for WTO law and WTO dispute settlement rulings in most national and regional jurisdictions unnecessarily weakens respect for transnational rule of law to the detriment of economic actors relying on compliance with WTO law and the related reduction of transaction costs. Just as domestic courts in European economic law and international commercial, investment and human rights law acts as ‘community courts’ protecting fundamental rights of citizens, the multilevel ‘dispute settlement system of the WTO’ should be protected through multilevel judicial cooperation for the benefit of citizens. A ‘constitutional approach’ could promote legal ‘balancing’ of public and private interests in GATT/WTO jurisprudence, ‘consistent interpretations’ of multilevel trade regulation, ‘judicial comity’ among national and international trade jurisdictions and the legitimacy of WTO jurisprudence by justifying interpretations of WTO rules with due respect for the diverse constitutional and human rights of citizens and peoples. Yet, in view of the GATT/WTO provisions reserving sovereign rights (eg in GATT Article XX) to restrict international trade in order to protect non-economic public goods and the legitimate diversity of national constitutional systems (eg regulating the ‘domestic law effects’

⁵⁷ Such regular reviews of WTO jurisprudence were begun by members of the International Trade Law Committee of the International Law Association; cf. E.U.Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (London: Kluwer, 1997); F.Ortino/ E.U.Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (London: Kluwer 2004). They are continued in the annual *American Law Institute Reporters’ Studies* on the WTO case law edited by P. Mavroidis (e.g. C.P.Bown/P.C.Mavroidis (eds), *The WTO Case Law of 2011*, Cambridge: CUP, 2013).

⁵⁸ Cf. E.U.Petersmann, Methodological Pluralism and its Critics in International Economic Law Research, in: *JIEL* 15 (2012), 921-970.

of international law), 'constitutional interpretations' of WTO rules in multilevel trade adjudication would not radically change the interpretation of rights and obligations among WTO members. The unique WTO legal system of discussing and approving WTO dispute settlement reports in the intergovernmental WTO Dispute Settlement Body, the power of WTO members to adopt authoritative interpretations of WTO law, and the sovereign rights of WTO members to decide on their own methods of implementing WTO obligations in their domestic legal systems would ensure that governments would continue to control 'constitutional reasoning' and the legitimate 'constitutional pluralism' governing domestic polities. Even if WTO members remain unlikely to ever agree on any comprehensive theory of justice, justifying WTO rules in terms of principles of distributive, corrective, commutative justice and equity could also help clarifying the legitimate scope of violation complaints, non-violation complaints and 'situation complaints' in GATT/WTO law and strengthen transnational rule of law for the benefit of citizens.

After 12 years of Doha Round negotiations on trade liberalization and regulation inside the WTO, governments and economic actors increasingly emphasize the advantages of negotiating regional and plurilateral trade agreements outside the WTO. A 'constitutional approach' argues for interpreting such multilevel trade regulation and trade adjudication as integral parts of the 'multilateral trading system' as defined in WTO law (e.g. Article XXIV GATT). Rather than alienating citizens and national parliaments by excluding them from WTO governance, non-governmental economic actors and 'WTO citizens' should be recognized as legal subjects of WTO law entitled to rely on multilevel legal protection of WTO law in multilevel trade governance. The WTO objective of 'sustainable development' – if construed in conformity with the UN resolutions on 'sustainable development' as a human right of individuals and of people – could support the argument of this contribution that the customary law requirements of treaty interpretation justify cosmopolitan interpretations of the WTO legal and dispute settlement system offering citizens incentives for decentralized support and enforcement of WTO rules through domestic courts of justice. The 'rational choice model' underlying the WTO's one-sided focus on power-oriented utility maximization must be replaced by the 'reasonable choice models' of constitutional theories of justice, impartial adjudication and rule-of-law balancing individual pursuit of interests with the reasonable interests of all other citizens. The same 'principles of justice' that citizens support inside constitutional democracies as necessary constitutional restraints on rational egoism (such as human rights, rule of law, democratic self-governance) must guide the necessary cosmopolitan reforms of international law and institutions for the collective supply of international public goods demanded by citizens. Contrary to the statement by former GATT Director-General O. Long 30 years ago⁵⁹, the time has come for justifying WTO law and adjudication by 'principles of justice' that citizens, parliaments and governments can share in spite of their legitimately diverse conceptions of social justice.

⁵⁹ Cf. note 56 above and the related statement by O. Long.

