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HUMAN RIGHTS AND INTERNATIONAL ECONOMIC LAW:
COMMON CONSTITUTIONAL CHALLENGES
AND CHANGING STRUCTURES

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Abstract

This contribution is based on my lecture at the SIDI XVI annual meeting of the Italian Society of International Law in June 2011 at Catania. Section I of this contribution recalls that – due to the 'dual' and 'incomplete nature' of human rights as positive law and moral rights - the legal protection of 'inalienable' human rights risks always remaining contested, especially in international economic law (IEL). In both UN human rights law (HRL) as well as in IEL, the worldwide recognition of 'duties to protect' calls for stronger protection of human rights in international economic regulation (II). Human rights, 'constitutional justice' and IEL increasingly limit the 'rules of recognition' in HRL as well as in IEL (III). The need for 'institutionalizing public reason' and the necessary legal 'balancing' of civil, political, economic, social and cultural rights call for 'constitutional' and 'cosmopolitan reforms' of IEL (IV). As in 'human rights revolutions', citizens have to 'struggle for justice' also in IEL, notably for judicial protection of transnational rule of law with due respect for HRL (V). HRL protects 'margins of appreciation' in the domestic implementation of international obligations and requires respect for 'reasonable disagreement' on the diverse conceptions of IEL (VI). The increasing recognition of the 'indivisible' and 'inalienable' nature of human rights, and the worldwide recognition of collective 'third generation human rights', reflect the increasing importance of cosmopolitan rights for supplying international public goods more effectively (VII). The 'collective action problems' require additional institutional innovation and multilevel constitutional restraints of economic regulation (VIII). Multilevel governance of human rights and of IEL must be coordinated through multilevel 'constitutional bottom-up pluralism' and through multilevel judicial protection of transnational rule of law for the benefit of citizens (IX).

Keywords

Collective action problems; constitutional pluralism; cosmopolitanism; human rights; international economic law; multilevel governance; public goods.

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HUMAN RIGHTS AND INTERNATIONAL ECONOMIC LAW: COMMON CONSTITUTIONAL CHALLENGES AND CHANGING STRUCTURES

Prof. Dr. Ernst-Ulrich Petersmann

Introduction

As illustrated by Mohammed Bouazizi, the young Tunisian street vendor whose protests against arbitrary market restrictions triggered Tunisia's human rights revolution in 2011, arbitrary political oppression of individual economic freedom may justify a human rights revolution. According to Mohammed's younger brother, the identification of millions of disempowered Arab people during the 'Arab revolutionary spring 2011' with the self-immolation of Bouazizi reflected a common suffering: 'that the poor also have the right to buy and sell'[1]. Modern economics and theories of justice confirm that social welfare depends on reasonable rules and institutions protecting economic freedoms, property rights and non-discriminatory conditions of competition of citizens to engage in mutually beneficial division of labour, subject to legal constraints of 'market failures' as well as 'governance failures'. Just as the arbitrary confiscation of the merchandise and other means of trade owned by Bouazizi destroyed his private business and prospects of autonomous self-development, millions of protesters in the 'Arab spring' are challenging authoritarian, welfare-reducing government restrictions impeding individual and democratic self-development and emancipation of the poor. The 'constitutional challenges' identified in this paper are common to both HRL and IEL and respond to citizen demands for stronger protection of cosmopolitan rights, non-discriminatory market competition and constitutional limitations of abuses of power, also in the power-oriented 'Westphalian structures' of UN HRL and IEL.

I. Need for Justifying IEL in Terms of Human Rights and Justice

Many national constitutions, regional human rights conventions and all UN human rights instruments derive human rights from respect for the human dignity of all human beings who – as stated in the Universal Declaration of Human Rights (UDHR) - 'are endowed with reason and conscience and should act towards one another in a spirit of brotherhood' (Article 1). National and international courts often agree on only a few 'core elements' of human dignity[2], like the requirements that (1) every human being possesses an intrinsic worth and moral entitlement to human rights, merely by being human; (2) this moral worth and entitlement must be recognized and respected by others; (3) also the state must be seen to exist for the sake of the individual human being, and not *vice versa*. Beyond these core elements, the transformation of moral principles of 'dignity' and human rights into positive law may legitimately vary among jurisdictions according to their respective traditions, resources and democratic preferences (e.g. on how to prioritize and protect legal rights under conditions of scarce resources). Arguably, just as the interpretation of the US Constitution may be influenced by its commitments to 'establish justice' (Preamble) and protect rights 'retained by the people' (as stated in the Ninth Amendment), so must IEL be interpreted in the 21st century in conformity with the legal obligations of all 193 UN member states to respect, protect and fulfil human rights, as explicitly required by the customary methods of treaty interpretation codified in the Vienna Convention on the

[1] Quoted from: H. de Soto, *The free-market secret of the Arab revolutions*, in: Financial Times 9 November 2011, at 9.

[2] Cf. C. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, in: *EJIL* 19 (2008), 655-724.

Law of Treaties (Preamble and Article 31 VCLT) and emphasized by the UN High Commissioner for Human Rights.[3]

The 1966 UN Covenant on Economic, Social and Cultural Rights (ICESCR) focuses on 'the right to work' (Article 6), the 'right of everyone to the enjoyment of just and favourable conditions of work' (Article 7), labour rights and trade union rights (Article 8), the 'right of everybody to social security' (Article 9), protection of the family, mothers and children (Article 10), the 'right of everyone to an adequate standard of living' (Article 11), and the human rights to health (Article 12) and to education (Article 13). Yet, apart from a brief reference to 'safeguarding fundamental political and economic freedoms to the individual' (Article 6.2), the ICESCR does not refer to the economic freedoms of profession, trade and private property which are recognized as fundamental rights in many European constitutions, in the 2009 Lisbon Treaty and in its EU Charter of Fundamental Rights in conformity with the constitutional traditions in EU member states. The disagreement on economic liberties reflects, *inter alia*, the tradition in many common law countries of protecting freedom of contract, freedom of profession and other economic freedoms as common law guarantees rather than as constitutional and human rights, and of conceiving democracy in terms of 'parliamentary freedom' rather than equal constitutional rights of citizens. The 'dual nature' of human rights as positive law and moral rights, and the 'incomplete nature' of positive HRL and IEL compared with cosmopolitan ideals of moral rights, may justify claims for 'additional human rights' - like 'freedoms of the internet' and the 'right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights', as recognized in UN General Assembly Resolution A/64/L.63 of 28 July 2010 as well as in Resolution A/HRC/Res/15/9 of 30 September 2010 of the UN Human Rights Council (deriving this right from 'the right to an adequate standard of living'). The recognition of 'new human rights' may influence the interpretation of IEL rules, for instance in case of disputes to what extent restrictions of 'essential services' are consistent with market access commitments under the law of the World Trade Organization (WTO).

Ten years ago, I published a series of articles calling for 'mainstreaming human rights into the law of worldwide organizations' in order to strengthen the 'constitutional functions' of IEL to contribute to poverty reduction and to protecting, respecting and fulfilling human rights of citizens.[4] The two constitutional principles underlying this proposition – i.e. (1) the customary law requirement of interpreting international treaties 'in conformity with principles of justice' and human rights, and (2) the need for 'constitutionalizing IEL' through a '4-stage-sequence' of constitutional, legislative, executive and judicial 'institutionalization of public reason' (J.Rawls) in order to protect human rights effectively – had been presented in numerous conferences in Europe without much controversy in view of the successful 'merger' of HRL, IEL and constitutional law in European law.[5] The violent rejection of my proposal in 2002 by a few Anglo-Saxon lawyers (like P.Alston and R.Howse) – arguing for keeping HRL and IEL separate in view of the lack of human rights expertise of economic organizations, and rejecting 'judicial balancing' of human, economic and social rights as practised by courts throughout Europe – illustrated that the 'constitutional conceptions' underlying the European Convention on Human Rights (ECHR), European Union (EU) law and European Economic Area (EEA) law are not shared in many countries outside Europe, notably in non-democratic countries and 'majoritarian democracies' that reject the idea of 'constitutionally limited democracy' with active

[3] Cf. E.U.Petersmann, International Trade Law, Human Rights and the Customary International Law Rules on Treaty Interpretation, in: S.Joseph/D.Kinley/J.Waincymer (eds), *The WTO and Human Rights* (Cheltenham: Edward Elgar, 2009), 69-90.

[4] Cf. E.U. Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, in: *EJIL* 13 (2002) 621-650.

[5] Cf. E.U.Petersmann, Constitutional Functions of Public International Economic Law, in: V. Van Themaat (ed), *Restructuring the International Economic Order. The Role of Law and Lawyers* (Colloquium on the occasion of the 350th anniversary of the University of Utrecht, Kluwer 1987), p. 49 – 75; *idem*, National Constitutions and International Economic Law, in: M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law* (The Hague: Kluwer 1993), p. 3 – 52.

judicial protection of constitutional rights against the potential tyranny of democratic majority politics.[6] Over the past years, the need for promoting synergies between HRL and trade by interpreting IEL in conformity with human rights has been recognized by ever more international economic organizations (e.g. in speeches by WTO Director-General P. Lamy) and courts as well as by ever more NGOs, including also the worldwide 'International Law Association'.[7] The 'judicial balancing' of human and economic rights in all European courts is now cited and emulated also in regional economic courts outside Europe.[8] Even investor-state arbitral tribunals acknowledge the need for interpreting IEL in conformity with human rights.[9] UN human rights bodies admit ever more the need for strengthening human rights in IEL, as illustrated by the UN Human Rights Council's endorsement on 16 June 2011 of the 'Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework' proposed by the UN Special Representative J. Ruggie[10], or by the 'Human Rights Impact Assessments for Trade and Investment Agreements' elaborated by the UN Special Rapporteur for the Right to Food in cooperation with UN bodies and NGOs.[11] UN human rights bodies increasingly recognize the crucial role of trade and IEL for poverty reduction; they no longer discredit the WTO, as in a report for the UN Commission on Human Rights of 2001, as 'a veritable nightmare' for developing countries and women.[12] 'Westphalian interpretations' of UN HRL and IEL, i.e. the traditionally one-sided focus on rights and obligations of states without acknowledging citizens as 'primary subjects' and sources of legitimacy also in international law, are increasingly challenged (e.g. by civil society, human rights courts and economic courts) by invoking human rights and other 'principles of justice' as justifications and 'relevant context' for 'cosmopolitan interpretations' of international law rules for the benefit of citizens. If human dignity, reasonableness, autonomy (including 'human capacities') and human rights of citizens to justification of all governance restrictions and to their judicial challenges are recognized as ultimate legal values, both IEL and HRL can be seen as *instruments* to realize these human rights principles.

[6] E.U.Petersmann, Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston, in: *EJIL* 13 (2002) 845-851.

[7] Cf. Petersmann (note 3).

[8] See, e.g., the MERCOSUR arbitral award of 6 September 2006 in the 'Bridges case' between Argentina and Uruguay (cf. L.Lixinski, Human Rights in MERCOSUR, in : M.T.F.Filho/L.Lixinski/ M.B.O.Giupponi (eds), *The Law of MERCOSUR* (Oxford : Hart Publishing, 2010), at 351 ff.

[9] See, e.g., the UNCITRAL Arbitral Decision on Liability of 30 July 2010 in *AWG v Argentina* (i.e. one of the more than 40 arbitration proceedings against Argentina's restrictions in response to its financial crisis in 2001), at para. 262: 'In the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive'.

[10] Cf. UN document A/HRC/RES/17/4 of 6 July 2011.

[11] O. de Schutter, *Draft Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements* (1 July 2011), accessible under http://www.srfood.org.

[12] *Globalization and its impact on the full enjoyment of human rights*, ECOSOC document E/CN.4/Sub.2/2000/12 of 15 June 2000, at paragraph 15. Apart from a reference to patents and their possibly adverse effects on pharmaceutical prices (depending on the competition, patent and social laws of the countries concerned), the report nowhere identifies conflicts between WTO rules and human rights.

II. Duties to Protect Human Rights and to 'Constitutionalize' IEL

UN and regional human rights bodies emphasize that human rights entail corresponding duties of governments to respect, protect and fulfil human rights.[13] 'Global responsibilities to protect' are increasingly limiting 'state sovereignty' and other 'Westphalian rights and obligations';[14] they are also reflected in the customary law requirement of interpreting international treaties 'in conformity with principles of justice' and with the human rights obligations of states, and reflect a broader constitutional insight as emphasized by J.Rawls' *Theory of Justice* and modern economics: The welfare of citizens and their adequate access to essential goods and services depend on 'reasonable rules and institutions' rather than on domestic natural resources; human beings and their capacity to 'institutionalize public reason' are the true wealth of nations. Hence, the World Development Report 2011 rightly identifies the 'absence of legitimate institutions that provide citizens security, justice and jobs' as the main cause of mass violence and unnecessary poverty in so many countries. If protection and fulfilment of human rights depend on 'responsible sovereignty', then constitutional and cosmopolitan rights are a precondition for empowering citizens to govern themselves (e.g. by engaging in mutually beneficial trade) and ensure the accountability of all delegated governance powers. Constitutional democracies and European international law recognize that the legal task of 'institutionalizing public reason' depends – also in IEL - on a 'four-stage sequence' of constitutional, legislative, administrative and judicial safeguards of constitutional and cosmopolitan rights with due respect for 'reasonable disagreement' about particular conceptions for a good life. Civil society increasingly challenges the obvious failures of both UN HRL and worldwide IEL – which are confronted with ever more crises in international monetary, trade, financial, environmental relations and poverty reduction – to institutionalize 'public reason' in international relations. 'Westphalian intergovernmentalism' reflects 'constitutional failures' and 'discourse failures' due to authoritarian treatment of citizens as mere objects of international law and neglect of human rights to reasonable justification of all governance restrictions. Hence, my publications have argued long since that the common 'constitutional problem' of the crises in HRL and IEL is that regulatory discretion and 'rent-seeking' by powerful interest groups are inadequately 'constitutionally constrained' by constitutional rights, 'checks and balances' (e.g. judicial remedies) and democratic 'public reason'.

IEL and international HRL evolved as separate regimes until their successful 'merger' in European international law. In contrast to the hierarchical nature of domestic constitutional systems, UN HRL remains essentially a horizontal legal system respecting sovereign rights to apply *higher* standards in national and regional HRL compared with UN HRL. This respect for legitimate 'constitutional pluralism' entails that the content, legal protection and 'balancing' of civil, political, economic, social and cultural human rights, and their contextual relevance for IEL, often remain contested and vary among countries depending on their diverse constitutional systems. The unnecessary poverty and inadequate access to water, food, health protection, education and rule of law of 1-2 billion people illustrate that neither UN HRL nor worldwide IEL have succeeded in realizing the declared objective of states 'that human rights should be protected by the rule of law' so as to promote 'universal respect for and observance of human rights and fundamental freedoms for all' (Preamble of the 1948 UDHR). As human rights do not enforce themselves and the lack of any references to human rights in the IMF, World Bank, GATT and WTO agreements impedes protection of human rights in IEL, 'mainstreaming human rights' into IEL remains the central challenge of HRL and IEL in the 21st century. The increasing legal and judicial protection of cosmopolitan rights empowering citizens to challenge welfare-reducing abuses of public and private power – for instance, by invoking 'access to justice' and

[13] On this tripartite typology of human rights obligations, and on the additional requirements of availability, accessibility, acceptability and adaptability (e.g. of essential services like education), see: O. de Schutter, *International Human Rights Law* (Cambridge: CUP, 2010), at 242 ff.

[14] See the contributions to the new journal *Global Responsibility to Protect* published by Martinus Nijhoff since 2009.

other human rights, trading rights, investor rights, intellectual property rights, environmental, labour and social rights and corresponding obligations of governments – contributes to promoting structural changes in IEL. As human rights say little about the optimal constitutional, legislative, administrative, international and judicial design of economic regulation, comparative analyses are of crucial importance – albeit often neglected.

III. 'Constitutional Justice' and the Changing Nature of the 'Rules of Recognition' in HRL and IEL

Since 1945, all UN member states have regularly reaffirmed their 'commitment towards the full realization of all human rights for all, which are universal, indivisible, interrelated, interdependent and mutually reinforcing.'[15] The statement in the Preamble of the UDHR - 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law' – confirms the moral entitlement of every individual to 'struggles for rights', as illustrated by the Arab human rights revolutions in North Africa in 2011 and by increasing civil society calls for better protection of human rights (like access to essential food, medicines and health services) in IEL so as to fulfil everyone's 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). As explained by J.Rawls and confirmed by the history of constitutionalism since the ancient Constitution of Athens more than 2'400 years ago, effective protection of rights of citizens depends on constitutional, legislative, administrative and judicial safeguards institutionalizing 'public reason' protecting equal rights of citizens.

Protection of human rights by international organizations (like the EU) and 'courts of justice' may delegitimize authoritarian claims that governments (as 'agents' with limited powers) have not conceded such rights to their citizens as the 'democratic principals' of national and international law in the 21st century. Human rights advocates increasingly claim that, from a human rights perspective, also IEL should be conceived as an *instrument* for protecting, respecting and fulfilling human rights. Comparative legal and institutional research suggests that – just as the effectiveness of democratic self-government and of regional human rights conventions depends on constitutional and judicial protection of human rights – constitutional and judicial protection of 'cosmopolitan conceptions' of IEL (e.g. in transnational commercial and investment law, European economic integration law) empowering citizens to challenge and influence 'public reason' has proven to be more effective and more legitimate than state-centred 'Westphalian conceptions' of IEL treating citizens as mere objects of intergovernmental regulation.[16]

Legal positivists tend to define 'law' not only by 'primary rules of conduct' but also by legal practices recognizing, developing and enforcing rules in conformity with 'secondary rules' of recognition, change and adjudication. The universal recognition of inalienable human rights by all UN member states has contributed also to the universal recognition of 'principles of justice' (e.g. in the UN Charter, human rights conventions and national constitutions) as integral parts of national and international legal systems. The ancient symbol of the independent, impartial judge administering justice by 'weighing' the arguments of both sides (*justitia* holding the scales) and enforcing the existing law (*justitia* holding the sword), like the common linguistic core of the legal terms *jus, judex* and *justitia* (or *justice* and the designation of judges as *Lord Justice*), recall much older traditions of recognizing justice as the main objective of law. Arguably, the legitimacy of law, governance and adjudication derives from 'constitutional justice' (e.g. as illustrated by the ancient Virtue of Justice

[15] See UN Resolution 63/116 on the 60th Anniversary of the UDHR adopted on 10 December 2008.

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

protecting due process of law) and from human rights of 'access to justice' requiring governments to protect judicial independence and transparency of courts no less than from 'democracy'. J.Rawls' theories of justice and of 'public reason'[17] explain why – in constitutional democracies with constitutional adjudication – courts of justice may be more principled 'exemplars of public reason' than political institutions based on majority decisions favouring organized interest groups. Hence, many lawyers and judges define law by 'the prophecies of what courts will do in fact' (US Supreme Court justice O.W.Holmes) and by how courts of justice will apply legal rules (e.g. 'general principles of law' in terms of Article 38 ICJ Statute). Economic courts in Europe[18] and also investor-state arbitral awards[19] increasingly recognize that rules violating human rights may not be a valid part of positive law. As human rights recognize (e.g. in the UDHR) the need for limiting 'rule by law' through 'rule of law', the human right of 'access to justice' and judicial protection of 'rule of law' are of constitutional importance for both HRL and IEL.

The constitutional guarantees of democratic participation, individual 'access to justice' and judicial protection of 'rule of law' enable citizens, their democratic representatives and 'courts of justice' to increasingly challenge power-oriented, intergovernmental economic regulation, even in case of EU regulations implementing legally binding sanctions approved by the UN Security Council.[20] Arguably, the emerging 'multilevel human rights constitution' changes the 'rules of recognition' of international law by constitutionally limiting 'Westphalian monopolies' of diplomats to interpret and define the scope of international rules, 'general principles of law' and human rights. HRL may justify legal claims by citizens, their representative institutions and 'courts of justice' that human rights (e.g. of access to water and essential medicines) universally recognized in UN Resolutions may be relevant context for interpreting IEL 'in conformity with principles of justice' and the human rights obligations of governments. Also in less-developed countries (e.g. like India and South-Africa), 'courts of justice' – as the most independent guardians of the constitutional rights of citizens which, unlike political bodies, have to justify judicial decisions on the basis of constitutional principles – increasingly insist on their 'constitutional mandate' of interpreting and applying economic law in conformity with human rights so as to protect citizens against abuses of public and private power.[21] The 'changing structures' of human rights law, transnational commercial, trade, investment and European economic integration law are illustrated by the fact that multilevel judicial interpretation and clarification of rules through thousands of dispute settlement findings by national and international courts and other dispute settlement bodies have become no less important for the progressive development of law and protection of individual rights than intergovernmental agreements. Arguably, the cosmopolitan rights and multilevel judicial remedies protected by EU law, EEA law, the ECHR and, increasingly also beyond Europe (e.g. in transnational commercial and investment law) offer empirical evidence that 'cosmopolitan conceptions' of IEL and multilevel judicial protection of cosmopolitan rights are more

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[17] J. Rawls, *Political Liberalism* (Cambridge: Harvard University Press, 1993).

[18] In Cases C-402/05P and C-415/05P, *Kadi*, ECR 2008 I-6351, the EU Court confirmed its jurisprudence that respect for human rights is a condition of the lawfulness of EU measures: 'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that the Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review.' Even though 'the European Community must respect international law in the exercise of its powers', including 'observance of the undertakings given in the context of the United Nations', it is 'not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded.'

[19] Cf., e.g., *Phoenix Action Ltd v Czech Republic*, ICSID Arbitration Award of 15 April 2009 (Case No ARB/06/5), para. 78 (finding that investment protection 'should not be granted to investments made in violation of the most fundamental rules of protection of human rights').

[20] Cf. Cases C-402/05P and C-415/05P, *Kadi* (note 18).

[21] See Ernst-Ulrich Petersmann, Human Rights, International Economic Law and 'Constitutional Justice' (2008) 19 *EJIL* 769-798.

effective safeguards of human rights and transnational rule of law for the benefit of citizens than 'Westphalian conceptions' focusing on rights and obligations of states.

Table 1: From 'Westphalian IEL' to Regionally or Functionally Limited 'Cosmopolitan IEL'

Westphalian IEL	focuses on reciprocal rights/obligations among 'sovereign states' and separation of international from national legal systems, usually (e.g. in UN law) without compulsory jurisdiction for peaceful settlement of disputes; the treatment of citizens as mere objects, the lack of effective protection of 'transnational rule of law' and of human rights, and ineffective parliamentary and democratic control of UN law in many states undermine the moral and democratic legitimacy of 'Westphalian international law'.
Cosmopolitan IEL	focuses on rights and obligations of individuals and their multilevel legal and judicial protection across national frontiers (e.g. in transnational investment law); it protects transnational rule of law and strengthens the 'constitutional limits' of state sovereignty, popular sovereignty and 'constitutional justice', for instance in regional EU law, EEA law and the ECHR.
EU law	integrates international and national, legal and judicial guarantees of common market freedoms, transnational rule of law, human rights and other cosmopolitan rights on the basis of multilevel constitutional principles (e.g. of legal primacy, direct effect and direct applicability of EU legal rules) and EU institutions.
EEA law	integrates international and national, legal and judicial guarantees of common market freedoms, transnational rule of law, human rights and other cosmopolitan rights on the basis of more deferential constitutional principles (e.g. of quasi-primacy and quasi-'direct applicability' of EEA rules after their incorporation into domestic law) and EEA institutions.
ECHR law	has evolved into a multilevel legal and judicial system protecting human rights and access to justice in the legal and judicial systems of the 47 member states for the benefit of more than 800 million citizens.
Law merchant (*lex mercatoria*)	continues to evolve into cosmopolitan commercial, investment and arbitration law with multilevel judicial protection of individual freedoms (e.g. of contract), property rights and transnational rule of law empowering citizens.

IV. Need for Cosmopolitan Reforms of IEL: Legal and 'Judicial Balancing' as the 'Ultimate Rule of Law' (Beatty)

Law as an instrument of governance needs justification. Economists tend to justify economic rules in terms of promoting economic efficiency, 'individual utility', consumer welfare or 'total welfare'. Yet, mere promotion of 'market equilibrium' through supply and demand, or 'price-setting' by monopolist suppliers (e.g. of tap water and patented medicines), may be inconsistent with human rights and corresponding government obligations to fulfil basic needs of everybody (e.g. in terms of human rights of access to water, food and essential medicines at affordable prices). Utilitarian focus on 'output legitimacy' cannot avoid questions of 'input legitimacy', for example regarding the frequent 'producer-bias' in IEL resulting from inadequate regulation of 'market failures' and 'private-public partnerships' favouring special producer interests over general consumer welfare. Similarly, positivist legal claims (based on authoritative issuance of rules and their social efficacy) justifying 'rule of men' and their 'rule by law' continue being challenged, since antiquity, by invoking 'principles of justice' as legal conditions of the validity of rules and of 'rule of law'. Whereas 'conservative' conceptions of justice emphasize the need for rule-following and upholding 'legality', 'reformative' conceptions of justice acknowledge the additional function of law and 'courts of justice' to ensure 'equity' with due regard to the particular circumstances of disputes and the inevitably 'incomplete nature' of rule-making. Hence, there are longstanding traditions of complementing universal conceptions of 'formal justice' (e.g. as defined by equal human rights and 'sovereign equality of states') by particular conceptions of 'substantive justice' (e.g. in terms of 'equity' and 'difference principles' justifying rectification of formally equal treatment so as to 'render to every man his due'). As long as constitutional and legal protection of economic and social rights remains so weak in so many countries (notably outside Europe), effective protection of 'freedom from poverty'[22] and of transnational rule of law for the benefit of citizens requires overcoming the utilitarian and mercantilist traditions of separating HRL and IEL. As inside constitutional democracies and in European economic law, the constitutional task of 'institutionalizing public justice' requires – as explained by Kantian and Rawlsian constitutional theories[23] - multilevel constitutional, legislative, administrative and judicial protection of constitutional rights and other 'principles of justice' within a framework of institutional 'checks and balances' protecting market access, general consumer welfare, non-discriminatory conditions of competition, human rights and other reasonable long-term self-interests of all citizens.

Similar to Article 1 of the UN Charter, customary law requires that 'disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law' (Preamble VCLT). The WTO Agreement, like many other international economic treaties, recognizes 'basic principles and objectives […] underlying this multilateral trading system'. Some of these principles are specified in WTO provisions, for instance in the General Agreement on Tariffs and Trade (GATT) and other WTO agreements on trade in goods, services and trade-related intellectual property rights. Other principles are incorporated into WTO law by reference to other international law rules, for example in the WTO Dispute Settlement Understanding (DSU) which requires interpreting WTO law 'in accordance with customary rules of interpretation of public international law' (Article 3). These customary rules include rules and principles for textual, contextual and teleological interpretation of treaties aimed at mutually coherent interpretations on the basis of legal presumptions of lawful conduct of states, of the systemic character of international law, and the mutual coherence of international rules and principles. The customary law requirement of interpreting treaties 'in conformity with principles of justice', including 'universal respect for, and observance of, human rights and fundamental freedoms for all' (Preamble VCLT),

[22] Cf. T. Pogge, *Freedom from Poverty as a Human Right: Who Owes What to Whom?* (Oxford University Press, 2007).

[23] Cf. Petersmann (note 16), Chapters II and III.

calls for clarifying both *procedural principles of justice* (like due process of law in judicial proceedings) as well as the *substantive principles of justice* underlying IEL, like freedom, non-discrimination, rule of law, independent third-party adjudication and preferential treatment of LDCs. For, rules and adjudication that are not perceived as just by governments, citizens and 'courts of justice', are unlikely to be effective over time.[24]

Hence, IEL must not only be justified and evaluated in terms of 'justice' and human rights even if human rights are not specifically incorporated into the law of worldwide economic organizations. Legal and judicial interpretation of IEL must also aim at coherence with other international legal obligations of the countries concerned, as recognized in the 1994 Ministerial Decision on the mutual coherence of trade and environmental policies and the 1996 WTO Ministerial Declaration rejecting 'the use of labour standards for protectionist purposes' and calling for cooperation with the International Labour Organization as 'the competent body to set and deal with [labour] standards'. Respect for the 'consistent interpretation principle' recognized in national and international legal systems (like the Preamble and Article 31 of the VCLT) may also be more appropriate for promoting legal coherence among IEL and HRL in worldwide governance institutions than incorporating UN human rights obligations into WTO law following the model of the incorporation of intellectual property treaty obligations into the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS).[25] The need for reconciling civil, political, economic, social and cultural human rights, like the need for reconciling legal market access commitments (e.g. under GATT and GATS) with sovereign rights to protect non-economic public interests (e.g. pursuant to Articles XIX-XXI GATT, XIV GATS), requires legal and judicial 'balancing' so as to 'optimize' legal and judicial protection of competing rights and obligations.

Outside Europe, many governments continue to disregard that – due to the 'globalization' of ever more public goods like rule of law, protection of human rights and efficient trade, financial and environment protection systems – national constitutions have become 'partial constitutions' that can protect interdependent public goods only in cooperation with international law and institutions. The necessary 'de-mystification of the state' and international legal limitation of welfare-reducing 'legal nationalism' require new cosmopolitan and constitutional conceptions of international law as an ever more indispensable instrument for limiting governance failures at home and abroad for the benefit of citizens. As in European economic and legal integration, independent and impartial 'courts of justice', and their multilevel judicial protection of constitutional and human rights across frontiers on the basis of 'judicial comity' and 'proportionality balancing' as the 'ultimate rule of law'[26], must often take the lead in protecting citizens and their human rights in the worldwide division of labour. While judicial review of whether a restriction is 'suitable' and 'necessary' for realizing specific public policy interests focuses on the rationality and efficiency between the means and the end, the *proportionality stricto sensu* test reviews the reasonableness of the governmental balancing of competing values. In contrast to R. Dworkin's claim that - in 'hard cases' involving conflicts between constitutional rights and other public interests – individual rights should 'trump' public policies, 'proportionality balancing' by European courts tends to perceive constitutional rights and public policies as possibly both reflecting constitutional principles subject to weighting in order to promote their mutual coherence case-by-

[24] Cf. E.U. Petersmann, Constitutional Theories of International Economic Adjudication and Investor-State Arbitration, in: P.M.Dupuy/F.Francioni/ E.U.Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP, 2009), 137-194.

[25] Cf. C. Thomas, The WTO and labor rights: strategies of linkage, in: Joseph/Kinley/Waincymer (note 3), 257 ff.

[26] According to D.M. Beatty, *The Ultimate Rule of Law* (Oxford: OUP, 2004), the constitutional ideal of a 'government by law and not by men' has become replaced in European constitutional law (e.g. governing the EU, the EEA, the ECHR and the domestic implementation of these treaty regimes) by judicial proportionality review securing a more substantial version of the 'rule of law' for the benefit of citizens and their constitutional rights. Also ever more courts outside Europe make use of the three distinct tests of 'suitability' (rationality), 'necessity' (least restrictive means) and 'proportionality stricto sensu' (reasonableness) of legislative and administrative restrictions for realizing public interests.

case.[27] By double-checking legislative and administrative 'balancing' and clarifying 'public reason' and 'principles of justice', judicial proportionality review of restrictions of fundamental rights contributes to 'participatory' and 'deliberative democracy' across frontiers as a necessary compensation of the deficits of parliamentary democracy and other forms of national majority politics in a globally integrating world. Human rights and their multilevel judicial protection are of crucial importance also in IEL for protecting citizens as the 'democratic principals' against abuses of power by government agents and corporations in multilevel economic regulation undermining, all too often, general consumer welfare and constitutional rights of citizens.

V. 'Constitutionalization' of IEL May Require 'Struggles for Justice'

I. Kant was the first legal philosopher explaining why the 'moral imperative' of legal and judicial protection of maximum equal freedoms can become a reality only through antagonistic struggles for 'public justice' and multilevel constitutional protection of equal freedoms in all human interactions at national, transnational and international levels. Reducing the unnecessary poverty of some 2 billion people living on 2 dollars or less per day is not only a 'moral imperative', but also a legal requirement of modern human rights law. As stated already in the Preamble to the UDHR, 'it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights be protected by the rule of law.' The successful judicial transformation of European economic law confirms the important emphasis in UN human rights law on 'access to justice' and the need for international cooperation and assistance for protecting human rights across frontiers; also national and international judges should cooperate in interpreting law, including citizen-driven IEL, in conformity with its rule-of-law objectives and underlying constitutional principles of justice (e.g. as defined by human rights) as expressing rights-based conceptions of justice and transnational rule of law.

Interpreting economic treaties in conformity with 'principles of justice' will inevitably remain contested among citizens and governments with often conflicting self-interests and value preferences. For instance:

- Regional 'market freedoms' (as protected in free trade areas), 'trading rights' (as protected in WTO law) and worldwide liberalization of market access for movements of goods, services, persons, capital and related payments may be justified not only on utilitarian grounds[28], but also as imperfect, cosmopolitan extensions of Rawls' 'first principle of justice', to be defined in terms of equal rights of citizens to 'the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'.[29]
- Worldwide and regional rules on preferential treatment of less-developed countries (e.g. by means of non-reciprocal tariff preferences, financial and technical assistance, 'trade facilitation' and capacity-building) and certain social rights can be interpreted as an international extension of Rawls' 'second principle of justice' calling for differential treatment beneficial for the poor.
- The 'general exceptions' and numerous safeguard clauses in worldwide and regional economic agreements can be construed as reflecting the Rawlsian claim that, as national welfare depends more on a country's social institutions than on its natural resources, each people can and should agree on social and constitutional arrangements that provide its citizens with the natural and

[27] Cf. Petersmann (note 16), Chapter VIII.

[28] On utilitarian Anglo-Saxon theories of 'justice as efficiency' see: R. Posner, *Economic Analysis of Law* (Boston: Little Brown, 2nd ed., 1977), at 10: 'Efficiency means exploiting resources in such a way that "value" – human satisfaction as measured by aggregate consumer willingness to pay – is maximized'.

[29] J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), at 250.

social goods essential for satisfying basic needs.[30] Such a 'democratic, social responsibility principle' also supports the human rights claim that respect for human dignity (e.g. in the sense of individual autonomy and responsibility) requires empowering citizens by rights-based regulation of international economic cooperation among citizens.

- The ever more comprehensive compulsory jurisdiction of national and international courts for protecting rule of law in international economic cooperation, and the customary law requirement of interpreting international treaties and settling related disputes 'in conformity with principles of justice' and the human rights obligations of states, can be seen as protecting 'constitutional justice' (e.g. in the sense of access to independent 'courts of justice') as one of the oldest paradigms of legal systems.

The universal recognition of human rights and the increasing dependence of citizens' welfare on globalization and collective supply of international 'public goods' challenge traditional claims that national law and international law must remain based on categorically different kinds of public reason (e.g. citizen-oriented democratic legislation vs inter-state rules).[31] Transnational protection of human rights and of many 'global public goods' requires cosmopolitan conceptions of international law. Whereas international trade liberalization can be justified in terms of welfare economics and protection of human rights to equal freedoms to engage in mutually beneficial exchanges enhancing human self-development[32], the longstanding traditions of trade protection and other kinds of discrimination against foreign goods, services, 'foreigners' and less-developed countries are often driven by non-transparent forms of power politics for the benefit of 'rent-seeking interest group' at the expense of general consumer welfare. The European common market rules, for example their replacement of protectionist anti-dumping laws by welfare-maximizing competition rules among the 30 member countries of the EEA, confirm an important constitutional insight: within a reasonable framework of rules and institutions, power politics can be legally transformed for the benefit of citizens not only inside states, but also in international relations among states which, for centuries, had engaged in wars and mutually harmful protectionism.

[30] See J.Rawls, *Law of Peoples* (Cambridge: Harvard University Press, 1999), at 37-38, 106-120 ('the crucial element in how a country fares is its political culture – its members' political and civic virtues – and not the level of its resources', at 117).

[31] Rawls' moral justification of the different 'public reason' underlying national and international law is rightly challenged by human rights advocates emphasizing the transnational legal obligations of modern HRL. Even though former UN Secretary-General K. Annan convincingly claimed that 'the poor are poor not because of too much globalization, but because of too little' (UN doc. SG/SM/7411 of 22 May 2000), the prevailing 'public reason' in many LDCs does not (yet) support global economic integration in view of the ubiquity of 'governance failures'.

[32] Cf. A. Sen, *Development as Freedom* (New York: A. Knopf, 2000). For comparative studies of protection of freedom of trade as a fundamental right in national and European constitutional laws see Hilf/Petersmann (note 5).

VI. Respect for 'Margins of Appreciation' and for 'Reasonable Disagreements' on Multilevel Regulation of IEL

International human rights conventions recognize that human rights 'shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.[33] Yet, human rights and democracy also protect individual and democratic diversity and 'reasonable disagreement' reflecting legitimately diverse democratic preferences, for instance on the 'politically optimal level of legal regulation' of human rights that may be protected by means of constitutional, legislative, administrative or judicial safeguards at national and international levels. Hence, human rights courts and also economic courts tend to recognize governmental 'margins of appreciation' concerning domestic implementation and legitimate 'balancing' of human rights obligations and fundamental freedoms. The intergovernmental recognition by UN bodies of 'derived human rights' like the human right of access to water, and the diverse legal methods of protecting this human right inside national legal systems by means of constitutional, legislative, administrative and/or judicial rights (often derived from diverse human rights like the rights to life, health and/or an adequate standard of living)[34], illustrate such legitimate 'margins of appreciation' regarding optimal legal design and protection of human rights. Depending on the respective 'constitutional context' (e.g. the constitutional provisions on judicial review), 'legislative' and 'judicial interpretations' and legal clarifications may lead to 'institutionalized public dialogues' progressively developing 'public reason' supported by citizens. For instance:

- The adoption by the UN Human Rights Committee, in July 2011, of 'General Comment No. 34' on Article 19 ICCPR (freedom of opinion and expression) replaces the previous 'General Comment No 10' and considerably extends the 'obligation to respect freedoms of opinion and expression (as) binding on every State party as a whole' and on '(a)ll branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level'. The new Comment clarifies, *inter alia*, the scope of freedom of opinion and expression (e.g. by explicitly including commercial advertising and 'all forms of audio-visual as well as electronic and internet-based modes of expression', protecting a 'right of access to information held by public bodies') and limits the admissible restrictions (e.g. by permitting only content-specific restrictions of, and prohibiting 'generic bans' on, the operation of certain websites and internet-based information dissemination systems).[35]
- Economic courts and dispute settlement bodies confronting disputes over market access commitments for the electronic supply of services (e.g. in the WTO disputes over *US-Gambling restrictions* and *China-Restrictions on publications and audiovisual products*) and over sovereign rights to protect 'public morals' and 'public order' (e.g. pursuant to Articles VI, XIV GATS) may have to decide whether, and to what extent, human rights, and their 'dynamic interpretations' by human rights bodies, may be 'relevant context' for interpreting economic rules (e.g. on market freedoms and related 'commercial freedom of expression').[36] Yet, they may also have to respect that the state parties to a dispute – as in the *China-Restrictions on*

[33] Cf. Article 9 ECHR. For different limitation clauses see, e.g., Articles 8, 10 or 11 ECHR. Some human rights guarantees (like the prohibition of torture in Article 3 ECHR) do not provide for any governmental limitation.

[34] Cf.: P.Thielbörger, *The Right(s) to Water*, EUI doctoral thesis defended in December 2010 (Florence: European University Institute, 2011).

[35] Cf. UN document CCPR/C/GC/34 of 21 July 2011.

[36] On these WTO disputes, and the deliberate abstention by the parties to the dispute as well as by WTO judges from referring to human rights, see: P.Delimatsis, Protecting Public Morals in a digital Age : Revisiting Public Morals in a Digital Age: Revisiting the WTO Rulings on *US-Gambling* and *China-Publications* and *Audiovisual Products*, in : *JIEL* 14 (2011), 257-293.

audiovisual products case – may deliberately refrain from invoking human rights and from contesting China's right to engage in 'content control' of internet services.

- WTO dispute settlement bodies have so far hardly ever referred to human rights in view of the usual abstention of WTO complainants and defendants to invoke human rights in WTO dispute settlement proceedings. Yet, the various studies by the UN High Commissioner for Human Rights on the consistency of international trade and investment law with human rights[37] - like the ever larger number of academic case-studies on the human rights dimensions of IEL[38] - have so far produced no evidence for inherent conflicts between worldwide economic treaties and HRL. As international treaties must be interpreted and applied in conformity with the human rights obligations of states, state practice and dispute settlement practices continue to progressively clarify the often controversial human rights dimensions of IEL, often without specifically referring to human rights. For instance, in the *EC-Tariff Preferences* dispute, the WTO Panel interpreted the non-discrimination requirement in the WTO's Enabling Clause as requiring that identical tariff preferences under Generalized Systems of Preferences (GSP) be provided to all LDCs without differentiation; the Appellate Body reversed this finding and concluded that 'the term "non-discriminatory" … does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential treatment, however, preference-granting countries are required, by virtue of the term 'non-discriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond.'[39] In response to the various disputes over compulsory licensing of medicines, WTO Members adopted a 'waiver' in August 2003, as well as a subsequent amendment of Article 31*bis* of the TRIPS Agreement, authorizing compulsory licensing of medicines for export to countries with insufficient or no production capacity in the pharmaceutical sector. Yet, the fact that Canada's license for exports to Rwanda has remained the single compulsory license to date and only Zambia among Sub-Saharan African countries ratified the TRIPS Amendment, supports the view that access to essential medicines may be secured also by interpreting the TRIPS Agreement in conformity with the human rights obligations of WTO Members.[40]

Similar to the story of the blind men touching different parts of an elephant and describing the same animal in contradictory ways, private and public, national and international lawyers tend to describe and analyze IEL from very diverse perspectives, for instance as (1) public international law, (2) 'global administrative law', (3) 'conflicts law', (4) multilevel constitutional regulation or (5) multilevel economic regulation of the economy.[41] Arguably, like the interdependencies between private and public autonomy in legal protection of human rights, the private law and public law dimensions of the regulation of trade and investments are often inseparable. Just as human rights protect both private and public autonomy, most economic transactions among citizens take place from a *private law perspective* of traders, producers, investors and consumers and derive their value from respect for 'normative individualism'. Also investment law has both *public* and *private law*

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[37] Cf. J. Harrison, *The Human Rights Impact of the WTO* (Oxford: Hart Publishing, 2007).

[38] Cf. T.Cottier/J.Pauwelyn/E.Bürgi (eds), *Human Rights and International Trade* (Oxford: OUP, 2005); F.Abbott/C.Breining-Kaufmann/T.Cottier, *International Trade and Human Rights* (Ann Arbor: Michigan University Press, 2006); Joseph/Kinley/Waincymer (note 3).

[39] WT/DS246/AB/R, para. 173 (adopted April 2004). The argument that the EC's 'drug preferences' were justifiable in order to help Pakistan to combat drug abuses and their harmful effects on human health, were not reviewed by the WTO dispute settlement bodies in terms of human rights.

[40] Cf. H. Hestermeyer, *Human Rights and the WTO. The Case of Patents and Access to Medicines* (Oxford: OUP, 2007).

[41] Cf. the discussion of the various conceptions of IEL in: Petersmann (note 16), Chapter II.

dimensions; their dialectic evolution through more than 2'700 Bilateral Investment Treaties (BITs) and hundreds of investment arbitral awards may be viewed positively (e.g. as progressive 'multilateralization' of bilaterally agreed standards in BITs) or negatively (e.g. as power struggles for imposing private investor interests on less-developed countries). Also in commercial arbitration, the constitutional limits of private party autonomy and of the freedom of arbitrators must be determined in conformity with human rights and public order. The ever increasing interdependencies between national and international 'public goods' and the importance of multilevel judicial protection of transnational rule of law for the benefit of citizens argue for 'integrating' the multilevel conceptions of IEL and the multilevel legal frameworks of HRL for the benefit of citizens so as to limit the ubiquity of abuses of 'Westphalian power politics'.

VII. HRL Offers an Inadequate Framework for More Effective Protection of Interdependent 'Public Goods'

The indivisibility of human dignity and human liberty is recognized in numerous human rights instruments like the 1993 Vienna Declaration adopted by the UN World Conference on Human Rights: 'All human rights are universal, indivisible and interdependent and interrelated'.[42] Even though some UN human rights conventions separate civil and political human rights (as protected in the 1966 UN Convention on Civil and Political Rights) from economic and social human rights (as protected in the separate ICESCR), the holistic conception of the 'indivisibility' of human rights continues to be acknowledged in numerous human rights instruments since its first affirmation in the UDHR of 1948.[43] The EU Court of Justice has acknowledged that respect for human rights – including a 'human right to respect of human dignity' - is a condition of the lawfulness of acts of the EU institutions, even if EU acts implement UN Security Council decisions asserting legal primacy (Article 103 UN Charter).[44] The European Court of Human Rights has likewise recognized in a series of judgments that the human rights guarantees of the ECHR also apply when states implement intergovernmental rules adopted in international organizations.[45] Such court judgments confirm the increasing recognition that national and international human rights also limit *foreign policy* powers even if they are exercised collectively in intergovernmental organizations.

Disagreements over the 'indivisibility' of human rights often reflect diverse conceptions of human and constitutional rights to liberty. For instance, Anglo-Saxon jurisdictions tend to interpret the human right to liberty (Article 3 UDHR) narrowly in terms of freedom of bodily movement. Some other constitutional democracies protect equal freedoms as 'first principle of justice' (in terms of Kantian and Ralwsian legal philosophy) not only through specific liberty rights, but also through a general constitutional right to liberty (as recognized in Article 2:1 of the German Basic Law) in order to offer

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[42] Paragraph 5 of the Declaration, reproduced in: *The UN and Human Rights 1945-1995* (UN: New York, 1995), at 450.

[43] See, e.g., note 15 above and the 'integrated' protection of civil, political, economic and social rights in the 1989 UN Convention on the Rights of the Child.

[44] See note 18 above.

[45] See Case *Bosphorus v Ireland*, Application no. 45036/98, ECtHR Grand chamber judgment of 30 June 2005: 'a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations' (para.153). 'In … establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such transfer would be incompatible with the purpose and object of the Convention'… (para.154). 'State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides' (para.155).

additional constitutional and judicial protection to the legal autonomy of citizens against arbitrary restrictions, for instance in terms of human rights to justification and judicial review of governmental restrictions of freedom. This includes also protection against restrictions resulting from *multilevel* governance, for instance if *intergovernmental* restrictions adopted in distant international organizations lack sufficient justification in the national legal system.[46] The multilevel constitutional guarantees of 'free movement of persons, services, goods and capital, and freedom of establishment' as 'fundamental freedoms' across the 30 member countries of the European Economic Area (EEA) are explicitly based on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (cf. Article 2 TEU). There is also increasing recognition that constitutional commitment to respect for human dignity and 'market freedoms' (e.g. free movement of workers and their families) may require legal protection of 'positive liberties' by means of social rights (e.g. to education, health protection) in order to effectively empower individuals to develop their 'human capacities' autonomously.[47] The diversity of provisions and institutional safeguards for social rights in national and regional laws, UN and ILO conventions reflects not only diverse legal conceptions for designing social rights as 'indivisible parts' of human rights. Constitutional agreement on how to reconcile and 'institutionalize' civil, political, economic and social rights is also inevitably influenced by democratic preferences and the scarcity of resources for effective protection of social rights. Legal and judicial remedies for enforcing civil, political, economic and social rights continue to differ enormously among countries and jurisdictions. Constitutional and judicial protection of a general right to liberty and of 'common market freedoms' can strengthen the reasonableness of IEL, for instance by offering judicial review of the 'necessity' (rationality) and 'proportionality' (reasonableness) of governmental restrictions on the basis of equal constitutional rights and judicial 'administration of justice.'

In common law countries, the common law tends to protect specific liberties without constitutional protection of a general right to liberty.[48] As a major function of constitutional guarantees of maximum equal freedoms is to protect rights to justification and to judicial remedies vis-à-vis governmental restrictions, judicial review of economic regulation tends to be less comprehensive in common law countries than in European economic law. For instance, since the judicial abandonment of 'substantive due process' review of economic legislation in the 1930s, US constitutional law protects individual economic freedom and a common market mainly by democratic legislation based on constitutional requirements of a '*rational basis*' for governmental restrictions of economic liberty.[49] In view of the judicial deference by US courts vis-à-vis economic legislation by the US Congress and the traditions of 'majoritarian democracy' in many Anglo-Saxon countries, many Anglo-Saxon lawyers see no need

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[46] On constitutional protection in Germany of a general right to liberty, complemented by specific constitutional liberty rights and other civil, political, economic, social and cultural rights, see R.Alexy, *A Theory of Fundamental Rights* (Oxford: OUP, 2002), notably chapter 7.

[47] On the 'capabilities approach' in human rights law and philosophy see, e.g., M.C. Nussbaum, *Frontiers of Justice. Disability, Nationality, Species Membership* (Cambridge, MA: Belknap Press of Harvard University Press, 2006), at 69 ff. The German Constitutional Court, for example, recognizes a human right to respect and protection of human dignity based 'on an understanding of the human being as an intellectual and moral creature capable of freely determining and developing itself. The Basic Law conceives of this freedom not as that of an isolated and autonomous individual, but as that of an individual related and bound to society' (BVerfGE Vol. 45, 187, at 227). The Constitutional Court derives from the human right to dignity individual social rights of access to the resources necessary for a life in dignity, cf. D. Merten/H.J. Papier (eds), *Handbuch der Grundrechte Vol. II* (Heidelberg: Müller Verlag, 2006), § 40 ('Leistungsrechte'), §44 ('Schutzplichten').

[48] Cf. T.T.S. Allan, *Law, Liberty and Justice* (Oxford: OUP, 1993), at 135-143. D.Z. Cass, *The Constitutionalization of the WTO* (Oxford: OUP, 2005) claims that in 'mature constitutional systems, for example in the United States, Canada and Australia', neither individual economic freedom nor other individual rights are 'a matter considered essential to constitutionalization in the received tradition of constitutionalization' (at 168, 176, 191); yet, Cass ignores comparative constitutional law beyond common law countries as well as the constitutional problems of international public goods.

[49] Cf., e.g., F.L. Morrison/R.E. Hudec, Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States, in: Hilf/Petersmann (note 5), 91-133, at 92 f.

for 'strict judicial scrutiny' of governmental restrictions of economic freedoms as it is practiced by European courts, WTO dispute settlement bodies and investor-state arbitral tribunals in order to protect transnational rule of law and public goods beyond state borders. Judicial protection of cosmopolitan rights and transnational rule of law in the international division of labour promote mutually beneficial trade transactions (e.g. by reducing transaction costs) providing *private goods* and services demanded by citizens.

Public goods differ from private goods by their 'non-excludable' and/or non-rival consumption entailing 'market failures' and collective action problems: 'pure public goods' (like street signs, peace and security) whose benefits are available for all and whose use by one person does not diminish their availability for others, must be produced by public regulation because private producers lack incentives for their production (e.g. due to the lack of private property rights and market prices) and consumers can 'free-ride'; 'impure public goods', which are either non-excludable but rival in consumption (like the atmosphere) or non-rival but excludable (like patented pharmaceutical knowledge), also tend to be confronted with 'market failures' and 'collective action problems' requiring public regulation, notably in case of 'aggregate efforts public goods' or 'weakest link public goods'.[50] The under-supply of ever more *global public goods* – like monetary and financial stability, a liberal (i.e. liberty-based) worldwide trading system, transnational rule of law protecting human and cosmopolitan rights, prevention of climate change – reflects also 'governance failures' which increasingly undermine effective protection of interdependent *national* and *regional public goods*.[51] Economic public goods theories acknowledge the diversity of public goods and the lack of a 'one-size-fits all' strategy for dealing with the multiplicity of collective action problems (like 'free-riding' and the need for 'common but differentiated responsibilities'). The history and theory of constitutionalism suggests that – just as supply of national public goods necessary for protection and fulfilment of human rights depends on protection of constitutional rights and institutional 'checks and balances' limiting abuses of public and private power – supply of transnational public goods likewise depends on multilevel legal and judicial protection of cosmopolitan rights. Since the recognition - in Article 28 UDHR – of a human right 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized', *individual* civil, political, economic, social and cultural human rights are ever more complemented by *collective* human rights at national and international levels, such as rights to democratic governance, popular self-determination, the 'right to development', collective labour rights, and rights to transnational rule of law and protection of the environment. Yet, many individual and collective human rights are not effectively protected at national and international levels due to inadequate constitutional restraints and institutions.

As explained in Sections I to IV, multilevel abuses of public and private power (e.g. in the private banking, financial and public 'sovereign debt' crises since 2008) undermining the collective supply of public goods may be counteracted most effectively by stronger constitutional 'checks and balances' and 'countervailing rights' (e.g. under constitutional, competition, social and environmental law) empowering citizens, civil society institutions, courts of justice and independent supervisory bodies to challenge abuses of power, as illustrated by the successful 'judicial transformation' of European economic law for the benefit of citizens and their human rights. Such 'constitutional reforms' of IEL can be promoted by reinforcing the functional interrelationships between multilevel legal protection of interdependent *national*, *regional* and *global public goods*; for instance, the GATT/WTO guarantees of economic freedoms and non-discriminatory conditions of competition have served 'constitutional functions' for protecting a mutually beneficial common market among the 30 EEA/WTO member

[50] On the distinction of 'single best efforts public goods' that can be supplied unilaterally or minilaterally (like medicine against a pandemic), 'aggregate efforts public goods' depending on the combined efforts of all states, and 'weakest link public goods' that risk being undermined by the state that contributes the least, see: Cf. S.Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (Oxford: OUP, 2007).

[51] Cf. E.U. Petersmann, International Economic Law, Public Reason and Multilevel Governance of Interdependent Public Goods, in: *JIEL* 14 (2011), 23-76.

states and, increasingly, also for the economic reunification of the 4 Chinese customs territories of Hong Kong, Macao, the Peoples' Republic of China and Taiwan. Just as the EU's customs union (cf. Arts. 30-32 TFEU) continues to be based on GATT/WTO rules and their multilevel constitutional protection inside the EU, so do GATT/WTO rules promote progressive, peaceful economic integration of the four independent Chinese customs territories. Had China - rather than withdrawing from GATT in 1949 - complied with GATT rules since 1948, the impoverishment of hundreds of millions of Chinese citizens could have been avoided.

VIII. Human Rights, 'Public Reason' and the Competing Conceptions of IEL: Need for Institutional Innovation

This contribution has argued for additional cosmopolitan and 'constitutional reforms' of IEL based on the following five propositions: (1) The prevailing conceptions outside Europe of 'legal nationalism' and 'international law among sovereign states' fail to protect human rights and other international public goods effectively in transnational relations; due to the overlapping nature of many interdependent public goods (like rule of law, an efficient trade and financial system, protection of the environment), they risk undermining the reasonable self-interests of citizens and states. (2) The international governance failures are largely due to inadequate regulation of the 'collective action problems' in the multilevel governance of international public goods, such as the 'jurisdiction gap', the 'governance gap', the 'incentive gap', the 'participation gap' and the 'rule of law gap'.[52] (3) The 'collective action problems' differ among policy areas and require sector-specific, multilevel regulation avoiding the utopia of unitary 'global governance'; for instance, citizen-driven markets and environmental pollution require multilevel regulation and judicial protection of rights and responsibilities not only of states, but also of citizens, with due respect for the legitimate diversity of constitutional conceptions of how human rights must be protected in the worldwide division of labour. (4) The competing conceptions of IEL as 'international law among sovereign states', 'Global Administrative Law', multilevel economic regulation (e.g. in NAFTA) and international 'conflicts law' (e.g. in commercial arbitration) must be integrated into a more coherent, multilevel governance based on common constitutional 'principles of justice' (e.g. as defined by human rights and national constitutions), multilevel constitutional restraints of abuses of power and multilevel, judicial protection of cosmopolitan rights.[53] The needed 'institutional innovation' must be based on the 'principle of subsidiarity', e.g. by strengthening the involvement of national parliaments, courts and self-interested citizens in reviewing and enforcing international rules protecting human rights and public goods. The 2009 US Supreme Court finding in *Massachusetts v Environmental Protection Agency* that six key greenhouse gases (such as carbon dioxide) are 'air pollutants' endangering public health in terms of the US Clean Air Act, illustrates the potentially systemic, constitutional implications of citizen-oriented interpretations of economic and environmental rules for jurisdictional competences in collective protection of public goods (like public health and climate change prevention).[54] (5) The inevitable 'legal fragmentation' among national and functionally limited, transnational legal regimes must be mitigated by multilevel legal and judicial cooperation in protecting transnational rule of law

[52] These five major collective action problems are explained in: Petersmann (note 46).

[53] These five competing conceptions of IEL are discussed by E.U.Petersmann, The Future of International Economic Law: A Research Agenda, in: C.Joerges/E.U.Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford: Hart Publishing, 2011), 533-575.

[54] *Massachusetts v Environmental Protection Agency*, 549 U.S. 497. As, following the rejection by the US Senate of the American Clean Energy and Security Act of 2009, the US failed to adopt federal legislation on climate change prevention and the various 'Regional Greenhouse Gas Initiatives' adopted at state levels failed to effectively reduce greenhouse gas emissions, the judicial confirmation of EPA's regulatory competences is of potential constitutional importance for protecting public health and welfare of citizens.

and cosmopolitan rights of citizens, as required also by the human rights obligations of all UN member states and the customary law requirement of interpreting international treaties, and settling international disputes, 'in conformity with principles of justice' and the human rights obligations of governments.

Sections I and II argued that - just as European economic law is explicitly 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (Article 2 TEU) - worldwide IEL should likewise be interpreted and further developed in the 21st century in conformity with the legal obligations of all UN member states to respect, protect and fulfil human rights, as explicitly required by the customary methods of treaty interpretation and emphasized by the UN High Commissioner for Human Rights. The needed limitation of the 'animal spirits' and rational egoism of economic 'market competitors' by means of institutionalizing 'public reason' in the international division of labour must be based on stronger constitutional, legislative, administrative and judicial protection of cosmopolitan rights empowering self-interested citizens and 'public-private partnerships' to defend equal rights vis-à-vis abuses of public and private power also in transnational economic cooperation. Human rights and constitutional principles say little about the optimal design of legal institutions (such as independent regulatory agencies). HRL must – as inside constitutional democracies and in European economic law – become the 'constitutional foundation' for the design of multilevel economic governance for the benefit of citizens. As discussed in Sections III to IV, comparative institutional analysis confirms that rights-based 'cosmopolitan regimes' in transnational commercial, trade, investment and regional economic and environmental law have proven to be more effective and more legitimate than state-centred 'Westphalian regimes'. Yet, as illustrated by the current banking, financial and 'sovereign debt' crises in the EU and the USA, limitation of 'market failures' as well as of 'governance failures' remains a perennial task in IEL due to the rivalry and self-interests of economic as well as 'political competitors'. Bottom-up strengthening of constitutional and cosmopolitan safeguards is ever more necessary for protecting the common reasonable interests of citizens and their democratic representatives against abuses of intergovernmental 'Westphalian governance' and against the rational egoism and 'prisoner dilemmas' of selfish private economic actors. Human rights and their moral value premises (normative individualism) require designing national and international governance as an integrated, multilevel constitutional framework for the protection of citizen rights, democratic self-government and cooperation among free citizens across frontiers.[55] Multilevel *international constitutionalism* is a functionally limited, but necessary complement to *national constitutionalism* that, only together, can protect human rights, democratic self-government and global public goods more effectively across frontiers.

[55] On the 'constitutional functions' of international organizations as a 'fourth branch of government' see: E.U.Petersmann, Constitutionalism and International Organizations, in: (1996) 17 *Northwestern Journal of International Law & Business*, at 398, 415 et seq. On this view, both states and international organizations should be conceived as agents for the benefit of citizens, with constitutionally limited, delegated powers similar to government agencies inside constitutional democracies.

IX. Multilevel HRL and IEL Must Be Coordinated through Multilevel 'Constitutional Bottom-Up Pluralism'

The failures of the Doha Round negotiations in the WTO since 2001, like the failures of the UN negotiations on a new 'Kyoto II Climate Change Agreement' and the inadequate remedies in many UN human rights conventions, illustrate that 'waiting for global consensus' on protecting global public goods (like a liberal trading system, prevention of climate change, human rights) is an unreasonable governance strategy; bilateral and regional agreements (e.g. on carbon emission reductions) and unilateral safeguard measures (such as border tax adjustments) are usually necessary 'building blocks' for worldwide consensus-building. Proposals for coordinating the hundreds of fragmented, international and national legal regimes by using the formal 'conflict rules' codified in the VCLT (such as *lex specialis*, *lex posterior*, *lex superior*) are based on 'Westphalian principles' (like 'sovereign equality of states') that may neglect effective protection of human rights, for instance if corrupt rulers abuse their 'lending privilege' and 'resource privilege' for appropriating and transferring wealth abroad to the detriment of domestic citizens. The diverse forms of European international law in the EU, the EEA and ECHR illustrate how – by interpreting state sovereignty, popular sovereignty and 'individual sovereignty' in mutually coherent ways and subjecting multilevel economic governance to multilevel constitutional restraints (e.g. by multilevel judicial protection of transnational rule of law) – IEL can be transformed 'bottom-up' into an instrument for promoting consumer welfare, rule of law and human rights across frontiers.[56] 'Constitutional pluralism', as applied by national and international courts throughout Europe, argues that interdependent national and international legal regimes need to be interpreted in mutually coherent ways on the basis of 'universalizable' principles of justice and human rights; the plurality of legitimate, yet potentially conflicting claims based on diverse, national and international constitutional systems must be reconciled by legal and judicial 'balancing' of competing constitutional principles, human rights and 'deliberative democracy', especially in mutually beneficial cooperation among citizens across frontiers.

Similar to the private and public, national and international regulation of international economic cooperation, human rights are regulated and protected at local, national and international levels. Like economic and social rights, human rights can be interpreted as fundamental freedoms protecting legal autonomy and 'human capacities' to institutionalize 'public reason' protecting human rights and reducing unnecessary poverty. As UN HRL tends to prescribe only *minimum standards* of protection with due respect for national 'margins of appreciation' for regulating, prioritizing and mutually 'balancing' civil, political, economic, social and cultural rights, human rights require respecting legitimate 'constitutional pluralism' in multilevel protection of human rights and of international economic cooperation among citizens. The UN High Commissioner for Human Rights has argued for a 'human rights approach' to multilevel economic regulation so as to limit the often one-sided focus on producer interests by promoting synergies between economic regulation and human rights. The UNHCHR differentiates between obligations to respect human rights (e.g. by refraining from interfering in the enjoyment of such rights), to protect human rights (e.g. by preventing violations of such rights by third parties), and to fulfil human rights (e.g. by taking appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights). As recourse to trade sanctions for promoting respect for human rights abroad can aggravate the problems of people adversely affected by trade sanctions, the UNHCHR reports emphasize both potential synergies as well as potential conflicts between human rights and economic rules in the context of trade liberalization, trade restrictions and other economic regulation. Arguably, modern HRL requires going beyond the prevailing 'Rawlsian conception of international law among sovereign peoples' and

[56] Cf. E.U.Petersmann, State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law? in: W.Shan/P.Simons/D.Singh (eds), *Redefining Sovereignty in International Economic Law* (Oxford: Hart Publishing, 2008), 27-60.

requires respecting, protecting and fulfilling human rights and other cosmopolitan rights across frontiers as 'the foundation of freedom, justice and peace in the world' (Preamble UDHR).

The Rawlsian argument – that it is 'the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body' which requires that the democratic exercise of coercive power over one another can be recognized as being democratically legitimate only when 'political power […] is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason'[57] – applies also to multilevel regulation of mutually beneficial economic cooperation among citizens in the worldwide division of labour. The less national parliaments control intergovernmental rulemaking, the more must the deficit in parliamentary and deliberative democracy be compensated by rights-based constitutionalism and multilevel judicial protection of constitutional rights, 'participatory democracy' and other 'principles of justice' across frontiers. As explained by Rawls, 'in a constitutional regime with judicial review, public reason is the reason of its supreme court'; transparent, rules-based and impartial judicial reasoning, subject to procedural guarantees of due process of law, makes independent courts less politicized '*fora* of principle' that are of constitutional importance for an 'overlapping, constitutional consensus' necessary for legally stable and just relations among free, equal and rational citizens who tend to remain deeply divided by conflicting moral, religious and philosophical doctrines. Just as the EU Courts, the European Court of Human Rights, the EFTA Court and national courts have successfully transformed the international EC and EEA treaties and the ECHR into constitutional orders founded on respect for human rights, so can incremental 'judicial constitutionalization' of international trade, investment and environmental treaty regimes contribute to making IEL more consistent with HRL for the benefit of citizens. As explained by I. Kant's theory of multilevel constitutional guarantees of equal freedoms (as 'first principle of justice') in all human interactions at national, transnational and international levels, multilevel constitutionalism is not based on naïve assumptions about individuals' moral capacities; it is necessary for institutionalizing 'public reason' so that - also in a 'society of devils' (I.Kant) - human interactions remain constitutionally restrained.[58] The diverse forms of multilevel constitutionalism in the EU, the EEA and the ECHR, like the multilevel judicial protection of cosmopolitan rights in international commercial, trade, investment, regional integration and human rights law outside Europe illustrate that 'multilevel constitutionalism' has become a politically feasible and realistic conception of 'constitutional justice' and is no longer only a 'cosmopolitan dream'. The legitimacy of 'cosmopolitan IEL' and of the necessary, additional 'multilevel constitutional restraints' of worldwide economic organizations derives from protecting human rights, other 'principles of justice' and national democracies' promise of self-governance of citizens limited by rule of law.

[57] J.Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press 2001), at 41.

[58] Cf. Petersmann (note 16), chapter II.

X. Conclusion: Need for Promoting 'Cosmopolitan IEL'

Worldwide HR treaties and IEL treaties continue to evolve as separate legal regimes without explicit coordination, as illustrated by the lack of any references to human rights in the IMF, World Bank, GATT and WTO Agreements. The 'intuitive, unconscious fast thinking'[59] of most human rights lawyers, economic lawyers and diplomats remains that the complexity of IEL should not be further complicated by linking IEL to the complexities and different legal culture of HRL. This contribution has emphasized the need 'slow constitutional thinking' challenging 'legal fragmentation': market economies, democratic politics and IEL as an ever more important instrument for reducing unnecessary poverty need to be justified and 'constitutionalized' in terms of human rights and other 'principles of justice'. Just as human rights do not enforce themselves inside national legal systems, so do the UN Charter, HRL and the customary methods of treaty interpretation rightly acknowledge the need for legal and judicial protection of human rights in all areas of transnational relations as "the foundation of freedom, justice and peace in the world" (UDHR, Preamble). At national levels, these interrelationships between justice, rule of law, democratic peace, human rights and social welfare have been confirmed both empirically as well as theoretically in virtually all constitutional democracies. The UN Charter - notwithstanding its treaty obligations for "promoting respect for human rights and for fundamental freedoms for all" (Articles 1, 55, 56) – has failed to effectively integrate UN human rights law into the legal practices of UN organizations and UN member states; arguably, this failure is also the main reason for the failure of UN institutions and many UN member states to protect rule of law, democratic peace and prevent unnecessary poverty. The common 'constitutional problem' of the crises in HRL and IEL is that legislative and executive foreign policy discretion at national levels remains inadequately 'constitutionally constrained' by constitutional rights and institutional 'checks and balances' (e.g. judicial remedies).

HRL and IEL differ from other areas of 'Westphalian international law among states' by their citizen-driven 'bottom-up' evolution in response to 'struggles for rights', as illustrated by the American and French human rights revolutions in the 18th century and by the establishment of the ILO in response to trade union pressures following World War I. The modern emergence of 'cosmopolitan IEL' protecting individual trading rights, investor rights, intellectual property rights, environmental rights, labor rights and other fundamental rights such as access to justice likewise responds to civil society claims and their judicial protection. European economic law confirms that overcoming the selfish resistance by governments and self-interested bureaucracies against 'the rule of law and respect for human rights' (Article 2 TEU) in IEL, including 'strict observance of international law' (Article 3 TEU), depends on judicial protection of constitutional rights. Yet, in contrast to the comprehensive constitutional protection of market freedoms, social rights and 'the freedom to conduct a business in accordance with Union law' (Article 16 EU Charter of Fundamental Rights), most Anglo-Saxon ountries continue their different Anglo-Saxon traditions of prioritizing civil and political over economic and social rights. Constitutional and judicial protection of economic freedoms and social rights remains contested in many countries outside Europe as well as in the prevailing 'Rawlsian conceptions' of an 'international law among sovereign peoples'.

International trade, investment, intellectual property, competition, environmental and regional economic integration law confirm that rights-based 'constitutional conceptions of IEL' – in contrast to utilitarian, communitarian and one-sidedly libertarian conceptions of IEL – depend on individual 'access to justice' and the willingness of 'courts of justice' to 'administer justice' in conformity with the customary law requirement of interpreting treaties and settling disputes 'in conformity with

[59] On the distinction - as two dialectic thinking processes characteristic of human rationality - of 'unconscious, intuitive fast thinking' from 'conscious slow thinking' based on deductive reasoning double-checking the cognitive biases of expert intuition, see: D. Kahneman, *Thinking, Fast and Slow* (New York: Allen Lane, 2011).

principles of justice' and human rights (cf. the Preamble and Article 31 VCLT, Article 1 UN Charter). The success of the increasing challenges by civil society of the prevailing 'Westphalian conceptions' of IEL (as an ever more important part of 'international law among sovereign states') by 'constitutional approaches' (e.g. in the EU and EEA), 'global administrative law approaches' (e.g. in UN Specialized Agencies), 'multilevel economic regulation approaches' (e.g. in NAFTA), cosmopolitan approaches (e.g. in ILO and investment law) and transnational commercial law approaches (e.g. based on ICC, UNCITRAL and WIPO arbitration, private self-regulation and non-governmental standard-setting organizations) likewise depends on 'struggles for justice' and their judicial support. The customary methods of treaty interpretation and the inherent powers of 'courts of justice' offer sufficient flexibility for preventing or resolving 'conflicts of norms' and 'conflicts of jurisdiction' between HRL and IEL by consistent interpretation (cf. Article 31 VCLT) and cooperation among different jurisdictions (e.g. judicial comity and deference towards 'margins of appreciation'). Just as 'intra-regime conflicts' inside HRL have to be resolved by transparent 'balancing' of all rights involved, so does respect for legitimate 'constitutional pluralism' (e.g. for constitutional guarantees of economic freedoms as an integral part of the 'first principle of justice' in terms of Kantian and Rawlsian theories of justice) justify the preference of most economic courts for the 'consistent interpretation paradigm' over claims to 'human rights-based hierarchies' as a means for resolving 'inter-regime conflicts' among HRL and IEL. Human rights courts, by contrast, often insist on the priority of human rights (e.g. property rights of indigenous communities) over economic rights (e.g. of foreign investors).

The comprehensive legal and judicial remedies in regional human rights and economic agreements confirm that HRL and IEL share common 'constitutional functions' of empowering, protecting and limiting citizens in their mutually beneficial cooperation across frontiers so as to enable individual and democratic self-development, rule of law and a public conception of justice. Rights-based constitutional theories explain why the effectiveness of both HRL and IEL depends on recognizing citizens as primary subjects of HRL and IEL and on protecting their equal freedoms and other human rights by constitutional, legislative, administrative and judicial safeguards. As justice depends on citizens' support for 'public reason', human rights require 'constitutionalizing' IEL by transforming authoritarian 'rule by law' conceptions into 'cosmopolitan rule of law' conceptions of IEL based on an 'overlapping consensus' on multilevel judicial protection of constitutional freedoms and other human rights. In order to promote the rational and reasonable self-interests of citizens in a cosmopolitan IEL based on voluntary compliance with – and decentralized enforcement of - legal and judicial protection of cosmopolitan rights and duties, multilevel, constitutional and judicial safeguards of cosmopolitan rights must be strengthened in both HRL and IEL, as explained by Kantian 'cosmopolitan constitutionalism' and successfully illustrated by European integration law. Even though international guarantees of economic freedoms, property rights and social rights often go far beyond national economic law, the constitutional legitimacy and political effectiveness of IEL – like that of HRL - depend on 'bottom-up support' by citizens based on cosmopolitan theories of justice and 'public reason' promoting synergies and mutual coherence between HRL and IEL. Lawyers and 'courts of justice' have crucial responsibilities in helping citizens in their 'struggles for rights', rule of law and 'public reason'. The need for integrating HRL and IEL is empirically and theoretically confirmed not only by European integration law which has evolved into the most effective 'democratic peace treaty' of all times. Also the Arab human rights revolutions in 2011 – like the 'Occupy Wall Street' demonstrations in ever more cities worldwide – call for making market regulation consistent with human rights and 'corporate social responsibilities' as emphasized by the UN's 'Global Compact' with more than 8'000 transnational corporations. As the supranational features of European economic law make it an unlikely model for worldwide IEL, citizens have good reasons to insist on decentralized, constitutional safeguards and judicial remedies for holding governments and corporation accountable in terms of human rights and related responsibilities of governments and non-governmental actors.


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