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## INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: NEED FOR STRONGER 'DEMOCRATIC OWNERSHIP' AND COSMOPOLITAN REFORMS

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# *International Economic Law in the 21st Century: Need for Stronger 'Democratic Ownership' and Cosmopolitan Reforms*

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## Abstract

This article, accepted for publication in the 2012 Polish Yearbook of International Law, argues that – in order to make international economic law (IEL) a more effective instrument for protecting human rights and other public goods – citizens and courts of justice must insist on interpreting and developing IEL 'in conformity with principles of justice' and human rights, as required by the customary methods of treaty interpretation (I). By empowering citizens through legal and judicial remedies, cosmopolitan rights can strengthen the legal and democratic accountability of governments for their 'duties to protect' public goods (II). The 'dual nature' of modern legal systems resulting from their incorporation of 'inalienable' human rights requires justifying IEL in terms of 'normative individualism' and reasonable interests of all citizens (III). Human rights and democratic constitutionalism entail not only changes of the 'rules of recognition' (IV) and require 'judicial balancing' as the 'ultimate rule of law' (V). They also protect individual and democratic diversity and 'reasonable disagreement' (VI). The article discusses ten areas of increasing synergies between IEL and human rights law (VII- IX). Arguably, the normative proposition of justifying and designing IEL in terms of constitutional principles of justice and cosmopolitan rights is confirmed by the empirical fact that cosmopolitan legal systems (e.g. in European commercial, trade, investment and human rights law) tend to realize their declared objectives more effectively than state-centred 'Westphalian legal regimes' (X-XII).

## Keywords

constitutionalism; cosmopolitan reforms; democracy; EU; human rights; international economic law; investment law; judicial review; justice; WTO.

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# INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: NEED FOR STRONGER 'DEMOCRATIC OWNERSHIP' AND COSMOPOLITAN REFORMS

*Prof. Dr. Ernst-Ulrich Petersmann*[*]

Law and governance need justification. Modern theories of justice (e.g. by J.Rawls) proceed from the economic insight that the social welfare of a community depends on its democratic responsibility and political capability of institutionalizing reasonable rules and just institutions enabling citizens to increase their individual welfare through rules-based social cooperation and division of labour. As the potential economic benefits of division of labour depend on the scope of the market and on 'human capital' rather than on natural resources, even poor countries with few natural resources (like Switzerland in the 19th century) have succeeded in becoming rich by integrating into the worldwide division of labour, liberalizing welfare-reducing border discrimination, and protecting constitutional rights and rule of law at home and in transnational cooperation across frontiers. International agreements constituting, limiting, regulating and justifying international institutions for mutually beneficial governance of interrelated, national and international public goods (like efficient monetary, trading, financial and related rule-of-law systems) can serve 'constitutional functions' for protecting producers, investors, traders, consumers and other citizens engaged in mutually beneficial cooperation across frontiers against welfare-reducing border discrimination and other harmful abuses of discretionary foreign policy powers.[1] But the increasing transformation of *national* into *international public goods* with 'horizontal' as well as 'vertical interdependencies' (e.g. among national and international markets for goods, services, persons and capital movements) also entails new private and public powers (e.g. of private actors in global financial markets, international organizations) that risk being abused in the absence of adequate constitutional and democratic restraints, as illustrated by the under-regulation of international financial markets, the financial crises since 2008, the lack of effective parliamentary, judicial and democratic control over intergovernmental rule-making in worldwide organizations, as well as by domestic non-compliance with many internationally agreed disciplines (e.g. the Lisbon Treaty's budget and debt disciplines and their persistent violation in most of the 17 Eurozone member countries).[2]

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 international economic law (IEL) to contribute to reducing the unnecessary poverty of more than 1 billion people living on 1$ or less per day and to protecting, respecting and fulfilling human rights of citizens.[3] Law - in contrast to the natural sciences - is not about discovering 'scientific truth out there', but rather about 'institutionalizing public reason' (J.Rawls) enabling individuals to peacefully cooperate in order to realize their individual and democratic self-development. Hence, my articles argued that - from a human rights perspective recognizing human dignity, reasonableness, autonomy (including 'human capacities') and human rights of citizens to justification of all governance restrictions - both IEL and

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[1] E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: Fribourg University Press and Boulder Press, 1991).

[2] On the 'collective action problems' of interdependent public goods see : E.U.Petersmann (ed), *Multilevel Governance of Interdependent Public Goods. Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century* (EUI Global Governance Program Working Paper 2012).

[3] 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.

human rights law (HRL) can be seen as *instruments* to realize the human rights to self-development. Without stronger 'democratic ownership' and cosmopolitan rights empowering citizens to rely on transnational rule of law, IEL cannot effectively fulfil its 'constitutional functions' to empower and protect domestic citizens benefitting from the worldwide division of labour. Yet, as human rights say little about the optimal constitutional, legislative, administrative, international and judicial design of economic regulation and constitutional traditions legitimately differ among states, comparative analyses of national and international economic regulation are of crucial importance – albeit often neglected outside Europe - for evaluating the relative efficiency and legitimacy of IEL.

The two constitutional principles underlying my proposition – i.e. (1) the customary law requirement of interpreting international treaties 'in conformity with principles of justice' and the human rights obligations of all UN member states, as explicitly codified in the Preamble of the 1969 Vienna Convention on the Law of Treaties (VCLT); and (2) the need for a '4-stage-sequence' of constitutional, legislative, executive and judicial 'institutionalization of public reason'[4] in order to protect human rights effectively – had been presented by myself in numerous conferences in Europe since the 1980s without causing much controversy in view of the successful 'merger' of human rights law, economic law and constitutional law in European international law.[5] Hence, 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 - took me by surprise.[6] Till today, proposals from Anglo-Saxon countries for responding to the increasing crises in IEL (e.g. for 'fighting the private and public debt crises' by additional 'monetary financing' from the European Central Bank) are often based on value-premises (like majoritarian conceptions of democracy in terms of 'parliamentary freedom', laissez-faire conceptions of private self-regulation and 'common law freedoms') that differ fundamentally from those of constitutional democracies prioritizing the constitutional rights of citizens and the constitutional limits of majority politics also in economic regulation. Understanding this impact of diverse national conceptions of constitutional democracy, majoritarian democracy, non-liberal democracy and authoritarian governance systems on intergovernmental rule-making and adjudication is often crucial for understanding the 'collective action problems' impeding effective protection of international public goods. The purpose of this article is two-fold:

- Sections I to X identify and discuss 10 areas of IEL where the 'trade and human rights linkages' have become increasingly recognized over the past ten years.
- Sections XI and XII ask whether the dynamic evolution of international investment law (XI) and of the European monetary union (XII) over the past years offer lessons for constitutional and cosmopolitan reforms of IEL. The article concludes that 'cosmopolitan international public goods' – like citizen-driven trading, financial, development, environmental and related rule-of-law systems aimed at protecting consumer welfare – require stronger legal and judicial protection of cosmopolitan and democratic rights in order to limit the ubiquity of 'market failures', 'governance failures' and related abuses of public and private power.

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[4] On the 'four-stage sequence' of legitimate rulemaking inside constitutional democracies like the USA see: J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), at 195 ff.

[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: The Hague, Kluwer, 1987), 49 – 75; *idem*, Trade Policy as a Constitutional Problem. On the 'Domestic Policy Functions' of International Trade Rules, in: *Aussenwirtschaft* 41 (1986), 405-439; *idem*, National Constitutions and International Economic Law, in: M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law* (The Hague: Kluwer, 1993), 3-52.

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

## I. Respect for the Customary Methods of International Treaty Interpretation Promoting Synergies of HRL and IEL

Article 1 of the UN Charter, the customary methods of treaty interpretation as codified in the VCLT, and the statutes and procedures of 'courts of justice' require that – as stated in the Preamble of the VCLT - 'disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law'. The Preamble of the VCLT refers, *inter alia*, to

> 'principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all'.[7]

Arguably, the same principle of 'constitutional interpretation' of international treaties also follows from the customary rule codified in Article 31:3 VCLT, which requires taking into account - in the interpretation of treaties - 'any relevant rules of international law applicable in the relations between the parties.' All UN member states have obligations under the UN Charter, UN human rights conventions and under general international law to respect and protect human rights with due regard to 'sovereign equality of states'; many UN and regional conventions also explicitly require compliance with 'principles of justice'. Yet, there are hardly any legal analyses so far of the role of 'principles of justice' for dispute prevention and dispute settlement in IEL and in multilevel economic adjudication.[8] As the positive law requirements of 'constitutional interpretation' and dispute settlement 'in conformity with principles of justice' tend to be neglected in many bilateral, regional and worldwide procedures for the settlement of economic disputes, exploring the legal and contextual relevance of HRL for interpreting IEL remains of constitutional importance for protecting human rights and consumer welfare.

Over the past ten years, the need for promoting synergies between human rights 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 non-governmental organizations, including also the International Law Association at its 2008 Conference at Toronto.[9] The 'judicial balancing' of human and economic rights in all European courts is now also cited and emulated in regional economic courts outside Europe.[10] And even investor-state arbitral tribunals acknowledge the need for interpreting IEL in conformity with human rights.[11] UN human rights bodies admit ever more the need for strengthening human rights in IEL, as

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[7] Arguably, this Preamble text refers not only to the preceding sub-paragraph on 'conditions under which justice and respect for the obligations arising from treaties can be maintained'; it also refers to 'principles of justice and international law', in conformity with the recognition in numerous legal systems that human rights constitute not only individual rights, but also corresponding obligations of governments and 'principles of law' to be taken into account in legislation, administration, adjudication and international treaty interpretation pursuant to Article 31 VCLT.

[8] Cf. E.U.Petersmann, Administration of Justice in the WTO: Did the WTO Appellate Body Commit 'Grave Injustice'? in: *The Law and Practice of International Courts and Tribunals* 8 (2009) 329-373.

[9] 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.

[10] 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.

[11] 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

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[12], 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.[13] 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.[14] The acknowledgment - in the practices of ever more UN Specialized Agencies (like the World Bank, the World Health Organization, the Food and Agricultural Organization, the World Intellectual Property Organization) and more recently also of the WTO - of connections between human rights (e.g. of access to food and essential medicines, rights to private property, human rights of access to justice and to rule of law) and development is likely to enhance the legitimacy not only of promoting international public goods through international institutions; also human rights law may benefit from the discourse among economic institutions and, e.g., UN human rights rapporteurs requesting international organizations to 'respect, protect and fulfil' human rights and adjust economic rules (e.g. WTO rules on liberalization of agricultural trade).[15] 'Westphalian interpretations' of UN HRL and IEL, i.e. the traditionally one-sided focus on rights and obligations of states without acknowledgment of 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 certain international law rules for the benefit of citizens.

*(Contd.)*

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'.

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

[13] 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.

[14] *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.

[15] Cf. the 2011 report by O. de Schutter, UN Human Rights Council's Special Rapporteur on the Right to Food, on *The WTO and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Food System* (published on the website of the UN Office for the High Commissioner for Human Rights) and the criticism of its protectionist recommendations in an open letter by WTO Director-General P.Lamy posted on the WTO website on 14 December 2011 (referring also to written comments by the WTO Secretariat on an earlier draft of the report).

## II. Increasing Recognition of 'Cosmopolitan Rights' making 'Duties to Protect' More Effective in HRL and IEL

The customary law requirement of interpreting international treaties 'in conformity with principles of justice' and with the human rights obligations of states reflects 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 economic resources; countries rich in economic resources (like Nigeria) often fail to protect the welfare of their citizens. 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 depends on 'responsible sovereignty', then 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 human rights with due respect for 'reasonable disagreement' about particular conceptions for a good life.[16] 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 '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. 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, institutional '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 of 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. 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 treaties 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). Human rights do not enforce themselves; as 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. Arguably, the increasing legal and judicial protection of cosmopolitan rights empowering citizens to challenge welfare-reducing abuses of public and private power by invoking 'access to justice' and other human rights, trading rights, investor rights, intellectual property rights, environmental, labour and social rights and corresponding obligations of governments is among the most important changes in IEL over the past years.

[16] See note 4 above.

## III. Acknowledgment of the 'Dual' and 'Incomplete Nature' of HRL and of the 'Cosmopolitan Functions' also of IEL

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 - 'are endowed with reason and conscience and should act towards one another in a spirit of brotherhood' (Article 1 UDHR). 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.'[17] 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 justification of the entitlement of every individual to 'inalienable' human rights' and 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 rights to 'a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 UDHR). Today, the 'dual nature' of human rights as *moral rights* and integral parts of *positive national and international law* is universally recognized by all 193 UN member states and prompts citizens, some governments and courts to increasingly insist on stronger protection of human rights.[18]

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, 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 related disagreement on HRL and on its multilevel implementation in IEL 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').

Protection of human rights by UN bodies and 'courts of justice' delegitimizes 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, IEL should be conceived as an instrument for protecting, respecting and fulfilling human rights. Comparative legal and institutional research

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

[18] On the moral foundations of HRL and their impact on legal methodology see : E.U.Petersmann, Human Rights and International Economic Law, in : J.Linarelli (ed), *Research Handbook on Global Justice and International Economic Law* (to be published in 2012), chapter 2.

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.[19]

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

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

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 protecting procedural human rights, modern theories of constitutional justice and 'public reason') no less than from 'democracy' (e.g. as illustrated by the historical transformation of 'Renaissance rites of judgment' into democratic and human rights of 'access to justice' requiring governments to protect judicial independence and transparency of courts and of their 'due process of law'). J.Rawls' theories of justice and of 'public reason' 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 dominated by 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[20] as well as in LDCs[21], and also investor-state arbitral awards[22], increasingly recognize that rules (including IEL) violating human rights may not be a valid part of positive law. As human rights law recognizes (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.[23] 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

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[20] 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.'

[21] Cf. V.Gauri/D.M.Brinks (eds), *Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: CUP, 2008).

[22] 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').

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

claims 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'. Also in less-developed countries (e.g. LDCs 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.[24] The 'changing structures' of human rights law, transnational commercial, trade, investment law 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.

[24] See Gauri/Brinks (note 21) and E.U. Petersmann, Human Rights, International Economic Law and "Constitutional Justice" (2008) 19 *EJIL* 769-798.

## V. 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 rent-seeking 'interest group politics', inadequate regulation of 'market failures' and 'private-public partnerships' favouring special producer interests over general consumer welfare. Similarly, positivist legal claims justifying 'rule of men' and their 'rule by law' by their social efficacy (based on authoritative issuance of rules) continue being challenged, since antiquity, by invoking 'principles of justice' as legal conditions of the legitimacy and validity of rules and of 'rule of law'. 'Conservative' conceptions of justice emphasize the need for rule-following (path-dependence) 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'[25] and of transnational rule of law for the benefit of citizens requires overcoming the utilitarian and mercantilist traditions of separating HRL and IEL. Constitutional theory explains why national and intergovernmental power politics in IEL can be 'constitutionalized' most effectively by legal and judicial protection of 'countervailing rights' protecting 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 prescribes 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 Agreement establishing the World Trade Organization, like many other international economic treaties, recognizes 'basic principles and objectives […] underlying this multilateral trading system' (cf. the Preamble of the WTO Agreement). 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. Arguably, 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), also calls for 'constitutional interpretation' clarifying the *procedural* as well as *substantive principles of justice* underlying IEL, like 'due process of law' based on equal treatment, freedom, non-

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

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.[26]

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 WTO rules in conformity with human rights, similar to 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', 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).[27] 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, most 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 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'[28], must often take the lead in protecting citizens and their human rights in the worldwide division of labour among citizens. 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. Influenced by the comparatively narrower scope of constitutional protection of liberty rights (notably economic liberties) in Anglo-Saxon democracies, many Anglo-Saxon lawyers (like R. Dworkin) claim that - in 'hard cases' involving conflicts between constitutional rights and other public interests – individual rights should 'trump' public policies[29]; 'proportionality balancing' by European courts, by contrast, tends to perceive constitutional rights and public policies as possibly

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[26] 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.

[27] Cf. C. Thomas, The WTO and labor rights: strategies of linkage, in: Joseph/Kinley/Waincymer (note 9), 257 ff.

[28] 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 – commonly broken down into three distinct tests of 'suitability' (rationality), 'necessity' (least restrictive means) and 'proportionality *stricto sensu*' (reasonableness) of the legality of legislative and administrative restrictions – securing a more substantial version of the rule of law for the benefit of citizens and their constitutional rights.

[29] On the higher levels of constitutional and judicial protection of 'negative' and 'positive liberties' in European constitutional and economic law compared with Anglo-Saxon common law and constitutional law traditions see Petersmann (note 19), chapter II, sections 11 and 12.

both reflecting constitutional principles subject to weighting in order to promote their mutual coherence case-by-case. 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 national parliamentary democracy and other forms of 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.

## VI. Respect for 'Margins of Appreciation' and for 'Reasonable Disagreements' on the Optimal 'Level of Regulation'

Human rights and democracy also protect individual and democratic diversity and 'reasonable disagreement' reflecting legitimately diverse democratic preferences (e.g. on the 'politically optimal level of legal regulation'). 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'.[30] 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. Intergovernmental recognition by UN bodies of 'derived human rights', like the diverse legal methods of protecting the human right to water 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)[31], may be protected by 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', e.g. by clarifying 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 by limiting their 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).[32]
- 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').[33] Yet, they may also have to respect that the state parties to a dispute – as in the *China-Restrictions on audiovisual products* case – may deliberately refrain from invoking human rights and from contesting China's right to engage in 'content control' of internet services.

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[30] 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.

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

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

[33] On these WTO disputes, and the deliberate abstention by the parties to the dispute as well as by WTO judges from refering 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.

- 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[34] - like the ever larger number of academic case-studies on the human rights dimensions of IEL[35] - 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.'[36] 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, support 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.[37]

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

[35] 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 9).

[36] 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.

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

## VII. Increasing Insistence on the 'Indivisibility' of Human Rights

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'.[38] Even though some UN human rights conventions separate civil and political human rights (as protected in the ICCPR) 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.[39] The European Court of Justice (ECJ) 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 that assert legal primacy (Article 103 UN Charter).[40] The European Court of Human Rights has likewise recognized in a series of judgments that the human rights guarantees of the ECHR also apply whenever states implement intergovernmental rules adopted in international organizations.[41] Such court judgments confirm the increasing recognition that national and international human rights also limit *foreign policy* powers even if they are being 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. European constitutional democracies often protect equal freedoms as 'first principle of justice' (in terms of Kantian and Rawlsian 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 additional constitutional and judicial protection to the legal autonomy of citizens against arbitrary, public and private interference into their liberties. This includes also protection against restriction of individual freedom of action resulting from *multilevel* governance, for instance if *intergovernmental* restrictions adopted in distant international organizations lack a constitutional foundation or sufficient justification in the national legal system.[42] 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

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

[39] See, e.g., note 17 above and the 'integrated' protection of civil, political, economic and social rights in the 1989 UN Convention on the Rights of the Child.

[40] See note 20 above.

[41] 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).

[42] 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.

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, etc) in order to effectively empower individuals to develop their 'human capacities' autonomously.[43] 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, by contrast, the common law tends to protect specific liberties without constitutional protection of a general right to liberty.[44] 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.[45] Since US courts do not protect economic and social freedoms (e.g. of workers and trade unions) as constitutionally protected under US federal law and acknowledge deference vis-à-vis economic legislation by the US Congress, most lawyers see no need for US courts to engage in the kind of 'strict judicial scrutiny' of governmental restrictions of economic freedom as it is practiced by German courts, European courts, WTO dispute settlement bodies and investor-state arbitral tribunals. Even though national constitutional traditions legitimately differ from country to country, there are additional arguments for basing legal and judicial remedies in multilevel, transnational economic governance against abuses of powers on the cosmopolitan principle that multilevel governance restrictions of individual freedom require constitutional justification and judicial remedies.

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[43] 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').

[44] 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.

[45] 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.

## VIII. Increasing Importance of 'Third Generation' Human Rights and 'Duties to Protect' for 'International Public Goods'

The under-supply of ever more interdependent *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 economic and political 'market failures' as well as 'governance failures' at national and international levels; due to globalization, failures to protect *national public goods* (e.g. an efficient market economy and tax system in Greece) increasingly undermine also protection of related *international public goods* (like financial stability and rule of law in the Eurozone).[46] The history and theory of constitutionalism suggests that – just as supply of national public goods necessary for protecting human rights depends on protection of constitutional rights limiting abuses of public and private power – supply of transnational public goods likewise depends on multilevel legal and judicial protection of cosmopolitan rights.[47] Since the UDHR (e.g. its Article 28), 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 popular self-determination, the 'right to development', collective labour rights, and rights to democratic governance, transnational rule of law and protection of the environment. Such 'third generation human rights', similar to the recognition of 'common concerns' in multilateral environmental agreements', may justify conceptions of 'responsible sovereignty' and 'duties to protect' common concerns beyond national jurisdictions, as in the example of the EU's extension of its carbon-trading regime to the greenhouse gas emissions caused by foreign airlines on their flights to and from Europe.

As explained above in Section II, 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. Promoting such 'constitutional reforms' of IEL requires understanding the interrelationships between multilevel governance and multilevel legal protection of interdependent *national*, *regional* and *global public goods*; for instance, the multilevel GATT/WTO guarantees of economic freedoms and non-discriminatory conditions of competition can serve 'constitutional functions' for protecting a mutually beneficial common market among the 27 EU/WTO member states as well as among 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 (e.g. the EU's constitutional requirement of 'strict observance of international law' in Article 3 TEU), so do GATT/WTO rules promote progressive, peaceful 'reunification' of the four independent Chinese customs territories. Had China - rather than withdrawing from GATT in 1949 - complied with GATT rules since its GATT membership in 1948, the impoverishment of hundreds of millions of Chinese citizens could have been avoided.

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

[47] This argument is developed in: E.U.Petersmann, Cosmopolitan 'Aggregate Public Goods' Must be Protected by Cosmopolitan Access Rights and Judicial Remedies, in: E.U.Petersmann (note 2).

## IX. 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'.[48]
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' 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) and multilevel constitutional restraints of multilevel governance protecting legitimately diverse constitutional rights of citizens.[49] 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).[50]
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 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

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

[49] 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.

[50] *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.

> international treaties, and settling international disputes, 'in conformity with principles of justice' and the human rights obligations of governments.

National and international courts continue to agree on only a few 'core elements' of human dignity[51], 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 and cosmopolitan rights 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 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), so must worldwide IEL 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 actors by means of institutionalizing 'public reason' in the worldwide 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 their rights vis-à-vis abuses of public and private power also in transnational economic cooperation. Even though human rights and constitutional principles say little about the optimal design of legal institutions (such as independent regulatory agencies), comparative institutional analysis suggests 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' (cf. *Table 1*). 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. Even though national governance systems will continue to legitimately differ depending on the respective constitutional traditions of people, protecting international public goods requires 'bottom-up strengthening' of constitutional and cosmopolitan safeguards of constitutional and cosmopolitan rights of citizens and their democratic representatives against abuses of intergovernmental 'Westphalian governance' and against the rational egoism by selfish private economic actors.

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

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

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|---|---|
| **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. |

## X. 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, extending 'public goods regimes' (like the EU carbon emission trading system) to 'free-riders' (e.g. foreign airlines flying to the EU) based on principles of 'common concerns' to be protected by 'responsible sovereignty', 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.[52] '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 'human capacities' and legal autonomy. 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 the 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.[53] 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 fulfill human rights (e.g. by taking appropriate

[52] 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.

[53] Cf. E.U.Petersmann, The Human Rights Approach to International Trade Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy? in: E.U.Petersmann (ed), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford: OUP, 2005), at 357-380.

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 requires respecting, protecting and fulfilling human rights also 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'[54] – 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 and 'participatory democracy' 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 neither based on naïve assumptions about individuals' moral capacities nor on utopian calls for a 'global Constitution'; it is necessary for institutionalizing 'public reason' with due respect for the legitimate reality of 'constitutional pluralism' so that - even in a 'society of devils' (I.Kant) - human interactions remain constitutionally restrained.[55] 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, further illustrate that 'multilevel constitutionalism' has become a politically feasible and realistic conception of 'constitutional justice'; it 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.

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

[55] On Kantian 'multilevel constitutionalism' and its justification of multilevel constitutional safeguards of equal liberty rights see: Petersmann (note 19), chapter II.

## XI. Lessons from International Investment Law for Cosmopolitan Reforms of IEL?

Sections I to X have explained why effective protection of human rights calls for multilevel constitutional and judicial protection of cosmopolitan rights so as to protect interdependent 'cosmopolitan public goods' – like citizen-driven markets and trading systems aimed at promoting consumer welfare – more effectively in conformity with the 'subsidiarity principle', i.e. 'as openly as possible and as closely as possible to the citizens' (cf. Articles 1, 5 TEU). It was further shown that – in areas such as human rights law, EU law, EEA law, the ECHR and the transnational 'law merchant' – multilevel legal and judicial protection of cosmopolitan rights has succeeded in limiting discriminatory abuses of foreign policy powers for the benefit of citizens (cf. *Table 1*). But how can 'Westphalian legal regimes' focusing on reciprocal rights and obligations among sovereign states – like UN law, the 1944 Bretton Woods Agreements, GATT 1947, the WTO Agreement and multilateral environmental agreements among states – be transformed into cosmopolitan legal regimes focusing on protection of human rights and other cosmopolitan rights of citizens as 'democratic principals' of governments as 'agents' with limited, delegated powers? Section XI asks whether the dynamic transformation of international investment law into a 'cosmopolitan legal system' based on multilevel legal protection of investor rights offers lessons for future 'cosmopolitan IEL'. Section XII concludes with a brief look at the emergence of European economic law and its lessons for IEL beyond Europe.

Until the judgment by the International Court of Justice (ICJ) in the *ELSI* dispute[56], most international investment disputes were decided either by recourse to domestic courts or by diplomatic protection of the foreign investor by the home state which, occasionally, submitted the dispute to international courts like the ICJ or its predecessor, the Permanent Court of International Justice. Yet, as illustrated by the *ELSI* judgment delivered by the ICJ more than 20 years after the dispute between the US investor and the local authorities in Sicily arose, most foreign investors perceive the prior exhaustion of local remedies in national courts and 'politicized', lengthy procedures of diplomatic protection and disputes among states in international courts as offering inadequate legal and judicial safeguards of investor rights. The transformation of international investment law from a 'Westphalian' into a more 'cosmopolitan system' evolved since the 1960s in essentially five phases:

- Since the conclusion of the first bilateral investment treaty (BIT) between Germany and Pakistan in 1959, the number of BITs has dynamically increased to now almost 3'000 agreements. Yet, the 'first generation BITs' did not yet provide for direct access of the foreign investor to independent international arbitration.
- The 1965 World Bank Convention establishing the International Center for the Settlement of Investment Disputes (ICSID), which entered into force already in 1966 (following 20 ratifications), offered a multilateral legal framework for institutionalized, transnational arbitration of investment disputes based on consent between the states and investors involved. The first ICSID disputes were based on investor-state contracts[57] or on national legislation providing for direct access of foreign investors to international arbitration.[58]
- Treaty-based investor-state arbitration was provided for only in the 'second generation BITs' concluded since about the 1970s; in view of its many advantages for private investors (e.g. in terms of direct access to independent international arbitration usually without prior exhaustion of local remedies, direct control of the procedures without dependence on 'diplomatic protection',

[56] *United States v Italy*, *ELSI* case, ICJ Reports 1989, 15.

[57] The first ICSID dispute based on an investor-state contract was *Holliday Inns v Morocco*, ICSID Case No. ARB/72/1.

[58] The first ICSID dispute based on national legislation was *SPP v Egypt*, ICSID Case No. ARB/84/3.

availability of institutionalized ICSID procedures), most modern BITs provide for treaty-based investor-state arbitration.[59]

- In contrast to the less than 400 BITs concluded prior to 1989, the number of new BITs increased dramatically since the 1990s and approaches now 3'000 BITs or corresponding treaty provisions in free trade agreements (like NAFTA Chapter XI) and other sectorial agreements (like the Energy Charter Treaty which entered into force in 1998), including increasingly also BITs among LDCs.
- Since the 1990s, also the number of treaty-based ICSID disputes, or investor-state disputes based on UNCITRAL or other commercial arbitration procedures, and the emergence of case-law referring to the today almost 400 known investor-state arbitral awards and related 'annulment decisions' or national court decisions as relevant precedents, increased dramatically.

Does this revolutionary transformation of international investment law – within only a few decades – offer lessons for the normatively desirable, potential transformation of other fields of 'IEL among sovereign states' into a rights-based 'cosmopolitan IEL' for the benefit of citizens?[60] Foreign direct investments offer obvious economic advantages (e.g. in terms of transfer of capital and know-how) to the host state justifying legal 'investment incentives' compensating for the less secure legal status and potential discrimination of foreigners in the domestic legal system of host states. The 'political economy' for the regulation of transnational movements of other natural and legal persons (like foreign workers, traders, portfolio investors, tourists, refugees) offers, unfortunately, less incentives for host states to commit to multilevel guarantees of cosmopolitan and judicial remedies in transnational legal systems. Even most regional human rights courts offer individual access only after prior exhaustion of local judicial remedies. With only few exceptions (like the 'domain name dispute settlement system' established in the context of the arbitration centre of the World Intellectual Property Organization), 'cosmopolitan dispute settlement institutions' similar to institutionalized ICSID arbitration and its quasi-automatic enforceability in domestic legal systems (e.g. due to the ICSID Convention and, in case of commercial arbitration, the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards) do not (yet) exist in most other fields of IEL. Nor are most UN member states politically willing to submit to compulsory international jurisdiction for the protection of other cosmopolitan rights of citizens. Yet, this current reluctance of states to limit their 'Westphalian privileges' (e.g. in terms of limited legal and judicial accountability vis-à-vis foreigners) by additional legal and judicial guarantees of cosmopolitan rights may change, for instance by the gradual recognition of individual legal and judicial remedies in international double taxation agreements and the ever larger number of multilevel legal and judicial safeguards of cosmopolitan rights in regional economic integration agreements and human rights agreements.

[59] The first ICSID dispute based on a BIT clause was *AAPL v Srik Lanka*, ICSID Report IV, at 250.

[60] Cf. J.Griebel, Lehren aus der Erfolgsgeschichte des Internationalen Investitionsrechts? in: *Kölner Schriften zum Internationalen Wirtschaftsrecht* 2 (2011), 99-104.

## XII. Lessons from European Economic Law for Cosmopolitan Reforms of IEL?

European economic integration law was most successful in those areas (like the common market) where EU citizens could directly invoke and judicially enforce EU rules (such as the common market and competition rules) against discriminatory restrictions by EU member states or EU institutions. The multilevel legal and judicial protection of civil, political, economic, social and cultural rights of the 500 million EU citizens as well as of citizens in other European states was often initiated and developed by multilevel judicial cooperation among national and European courts (like the ECJ, the EFTA Court, the European Court of Human Rights) before national governments and European political institutions accepted and supported the 'direct applicability' in domestic courts of international treaty guarantees for the benefit of citizens (e.g. the 'market freedoms' protected by the EC, EU and EEA treaties).[61] In those areas where national and European courts did not exercise leadership in multilevel judicial protection of cosmopolitan rights, the political EU institutions often defended their political self-interests in avoiding legal and judicial accountability vis-à-vis EU citizens for non-compliance with the EU law requirements of 'the rule of law' (Article 2 TEU) and 'strict observance of international law' (Article 3 TEU). For instance:

- Even though many GATT and WTO legal and judicial guarantees of economic freedom, non-discriminatory conditions of competition and rule of law are precise and unconditional enough for being construed as protecting corresponding freedoms and legal security of EU citizens in their transnational economic cooperation, the political EU institutions and governments have asserted 'freedom of maneuver'[62] - in the sense of 'freedom to violate WTO law' – without legal and judicial accountability vis-à-vis EU citizens adversely affected by the EU's numerous violations of its WTO legal and dispute settlement obligations.[63]
- The *Intertanko* judgment64 of the ECJ suggests that - contrary to the constitutional mandate of Article 21 TEU that the 'Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world', as convincingly defended in the *Kadi*-judgments65 - the EU Court has decided to grant legal and judicial immunity to violations by the EU also of its obligations under the UN Convention on the Law of the Sea, without offering adversely affected EU citizens and EU member states effective judicial remedies.
- In accordance with the EU Commission's declared strategy for negotiating a 'new generation' of free trade agreements focusing on reciprocal trade liberalization[66], the 2010 EU Council

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[61] Cf. Petersmann (note 24).

[62] This term continues to be used by both the political EU institutions and the EU Court of Justice (e.g. in Joined cases C-120 and C-121/06 P, *FIAMM* [2008] ECR I-6513, para. 119) as the main justification for their disregard of legally binding WTO rules and WTO dispute settlement rulings.

[63] For an overview of the case-law of the EU Court of Justice denying EU citizens rights to invoke and enforce WTO obligations in national and European courts and request compensation for injury caused by persistent violations of the EU's WTO obligations see: E.U.Petersmann, Can the EU's Disregard for 'Strict Observance of International Law' (Article 3 TEU) Be Constitutionally Justified? in: M.Bronckers/V.Hauspiel/R.Quick (eds), *Liber Amicorum for J. Bourgeois* (Cheltenham: Elgar, 2011), 214-225.

[64] Case C-308/06, *Intertanko*, [2008] ECR I-4057.

[65] Joined cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351.

[66] Cf. *Trade, Growth and World Affairs – Trade Policy as a Core Component of the EU's 2020 Strategy*, Document COM (2010) 612, Brussels 9 November 2010. On the EU's negotiations of free trade agreements with, *inter alia*, Canada, the MERCOSUR member states, China, India and Korea see: European Commission, *Report on Progress Achieved on the Global Europe Strategy 2006-2010*, SEC (2010) 1268/2 (Brussels 9 November 2010).

Decision approving the EU-Korea Free Trade Agreement explicitly states that the 'Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals'.[67] As similar provisions are envisaged for the 'new generation' of EU free trade agreements (e.g. with Canada), the EU Court's case-law excluding legal and judicial remedies of EU citizens against EU violations of WTO law is likely to be extended to all international trade agreements by the EU, thereby further undermining the EU law principles of 'strict observance of international law' (Article 3 TEU), of judicial remedies 'to ensure effective legal protection' (Article 19 TEU, Article 47 EU Charter of Fundamental Rights), and of 'consistent interpretation' of EU law (e.g. of the 'freedom to conduct a business in accordance with Union law' as protected in Article 16 EU Charter of Fundamental Rights) in conformity with the international legal obligations of the EU.[68]

- The EU Commission's claim, following the entry into force of the Lisbon Treaty, to terminate the about 190 BITs concluded among EU member states – without offering investors equivalent legal and judicial remedies under EU law against governmental restrictions of their investor rights – continues to be resisted by many governments on the ground that these treaty-based safeguards of investor rights and judicial remedies complement and go beyond those of EU law.[69] The ECJ has held arbitration to be consistent with EU law provided arbitral awards comply with EU law[70]; as investor-state arbitral awards tend to interpret BITs as protecting not only rights of states but also of investors[71], the selfish tendency of the political EU institutions to curtail - rather than strengthen - individual economic rights and judicial remedies is politically regrettable and legally not justifiable.[72]

Arguably, the 'governance failures' to protect international public goods – like mutually beneficial liberalization and regulation of international markets in the WTO and financial institutions, prevention of greenhouse gas emissions leading to climate change – are also largely due to nationalist 'interest group politics' in parliaments.[73] European integration law increasingly limits 'democratic majority politics' by multilevel constitutional restraints for the benefit of EU citizens and their multilevel constitutional rights. Yet, the persistent violations of the EU treaty disciplines for national fiscal and debt policies (e.g. as prescribed in Article 126 TFEU and Protocol No.12 on the excessive deficit procedure) by most of the 17 Eurozone member states, and the inadequate supervision and protection of rule of law in the Eurozone by EU institutions and national parliaments, have entailed the so far biggest 'rule of law crisis' in the EU challenging the legitimacy of multilevel financial governance in the Eurozone. The new EU Regulations, Directives and treaties among Eurozone members aim at

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[67] Cf. Article 8 of the Council Decision of 16 September 2010 (2011/265/EU) OJ 2011 L127/1. Similar draft provisions are included into other free trade agreements (e.g. Article 14.15 of the Draft EU-Canada Comprehensive Economic and Trade Agreement).

[68] The 'consistent interpretation principle' has been applied by the EU Court in numerous judgments interpreting EU legal provisions in conformity with EU treaty obligations since Case C 286/90, *Poulsen*, ECR 1992, 6019, but is often ignored in disputes challenging EU regulations violating WTO law.

[69] Cf. N.Lavranos, *Member States' BITs: Lost in Transition?* (29 September 2011), available at SSRN: http://ssm.com/abstract=1935625.

[70] Cf. Case C-126/97, *Eco Swiss*, ECR 1999, I-3055.

[71] See, e.g., *Plama Consortium Ltd v Bulgaria*, Decision on Jurisdiction of 8 February 2005, ICSID Case No. ARB/03/24, para. 141.

[72] In this sense also: Lavranos (note 69) and C.Tietje, Bilateral Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts, in: *Kölner Schriften zum Wirtschaftsrecht* 2 (2011), 128-135.

[73] On the enhanced politicization of EU trade and investment policies resulting from the European Parliament's involvement in the co-decision-making procedures see the empirical evidence and theoretical explanations by, e.g.: D.Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, in: *Aussenwirtschaft* 66 (2011), 211-257.

strengthening fiscal, debt and economic governance[74] through stronger EU 'top-down surveillance' based on complex reporting, consultation and supervision requirements. Yet, they do not change the basic existing constitutional principles underlying the Eurozone, including the EU's 'bail-out prohibitions' (Articles 123-125 TFEU) based on the 'principle of subsidiarity' (Article 5 TEU) reserving for member states the primary responsibility for complying with the agreed monetary, fiscal, debt and financial disciplines, for granting 'financial stability support' (e.g. through the newly established 'Financial Stability Mechanism'), and for promoting economic growth through 'an open market economy with free competition' (Articles 119-121 TFEU). As illustrated by the regular strikes and citizen protests in Greece, realizing the explicit aim of these EU Regulations to ensure 'stronger national ownership of commonly agreed rules and policies' will ultimately depend on EU citizens assuming their democratic responsibilities (e.g. to ensure that national tax legislation in Greece is not systematically undermined by fraud and tax evasion) and insisting on stronger 'democratic ownership' of rule-of-law so as to prevent private and public debt defaults and other breaches of the law in Eurozone member states.

Arguably, the current 'rule of law crisis' inside the Eurozone entails a broader historical lesson for the future of European integration: Without empowering EU citizens to hold national governments and EU institutions accountable for 'rule of law and respect for human rights' (Article 2 TEU), the EU risks losing not only its democratic legitimacy but also its rules-based capacity of stimulating the economic growth and peaceful adjustments necessary for financing the uniquely successful 'European model' of protecting cosmopolitan rights, democratic peace and social welfare for the benefit of 500 million EU citizens. At *national levels*, the diverse traditions of constitutional democracy, majoritarian democracy, non-liberal democracies and authoritarian forms of governance are likely to continue in the 21st century. At the ever-more important *transnational level* of multilevel governance of interdependent public goods, however, protection of international public goods for the benefit of citizens requires multilevel constitutional restraints on national 'majority politics' and on rent-seeking interest group politics based on stronger constitutional rights of citizens, parliamentary supervision and judicial remedies against arbitrary violations of transnational rule of law. More effective protection of international public goods in the 21st century – like the realization of the 'Durban agreement' of December 2011 to conclude, by 2015, a legally binding worldwide agreement on climate change prevention with carbon-emission reduction commitments by developed and developing countries – requires more 'cosmopolitan public reason' based on 'responsible sovereignty' and 'duties to protect' internationally recognized public goods and 'common concerns' across frontiers for the benefit of citizens and their cosmopolitan rights.

[74] Cf. the five Regulations and the Council Directive of November 2011 (OJ EU L 306 of 23 November 2011) on the strengthening of budgetary and economic surveillance in the Euro area, which explicitly aim at 'stronger national ownership of commonly agreed rules and policies' so as to render national compliance with EU law more effective. The 2012 draft 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' likewise aims at rendering the existing EU legal disciplines more effective in the domestic legal systems of Eurozone member states.


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