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Constitutionalism and the Regulation of
International Markets: How to Define the
'Development Objectives' of the World
Trading System?

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Abstract

The latin adage '*ubi commercium, ibi jus*' reflects the insight that the efficiency of markets and trade depend on legal guarantees of market freedoms (such as freedom of contract, property rights), legal security (e.g. as incentive for investments and division of labour) and on legal limitations of 'market failures' as well as of 'government failures'. Since Adam Smith, economists increasingly acknowledge these interdependencies between economic, legal and social order, for example between the economic objective of promoting consumer welfare through legal guarantees of consumer-driven competition and open markets, and the democratic objective of protecting individual self-government and peaceful cooperation among citizens through constitutional guarantees of equal freedoms and social justice. The lawyers, economists and politicians belonging to the post-war German schools of '*ordo-liberalism*' (including German chancellor L.Erhard and his secretaries of state W.Hallstein and A.Müller-Armack who represented Germany in the EEC Treaty negotiations) succeeded in basing the German and EC 'economic constitution' on constitutional guarantees of market freedoms, competition rules and a 'social market economy' committed to respect for human rights. Yet, the EC initiatives for 'constitutionalizing' the world trading system – for example, by correcting 'international market failures' by means of new WTO competition, environmental, investment and development rules, and for limiting the WTO's 'governance failures' by democratic and judicial reforms – appear to have foundered after more than 5 years of negotiations in the 'Doha Development Round.' This contribution discusses 'constitutional problems' of national and intergovernmental economic governance from the perspective of constitutional theory and constitutional economics by using the example of the disagreement among the 151 WTO Members on defining the 'development objectives' of the WTO's 'Development Round.' Constitutional theory suggests to define development as individual freedom, consumer-driven competition and autonomous development of human capacities protected by constitutional rights that limit abuses of power at national, transnational and international levels of human interactions

Keywords

Constitutional change – economic law – GATT – globalization – governance – international agreements – international trade – policy coordination – WTO

***Constitutionalism and the Regulation of International Markets:
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Ernst-Ulrich Petersmann

**Introduction:
Economic and Democratic Constitutionalism as ‘Categorical Imperatives’?**

Scientific conceptions – for instance, of international economic law – often operate as intellectual barriers to alternative, possibly more realistic conceptions. Just as a fly inside a bottle may see neither the glass barrier nor the way out, so can power-oriented conceptions of international law impede mutually beneficial cooperation among free citizens across national frontiers.¹ The economic theory of markets, human rights and democratic constitutionalism are European inventions *par excellence* that have spread over the entire world. Yet, the normative foundations underlying these European institutions are not universally shared. Just as the welfare of Florence during the Renaissance was closely linked to its Republican constitutions and to its open economy, so are the linkages between constitutions, open markets and economic welfare in the EU obvious to Europeans. For example, not only are all 27 member states of the European Community (EC), just as all 46 member states of the Council of Europe, committed to the need for “European constitutional law”, as acknowledged in the judicial interpretation of the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR), and of the EC Treaty by the EC Court of Justice (ECJ), as “constitutional charters” protecting fundamental freedoms and constitutional democracy. All European states also participate in the worldwide negotiations on far-reaching legal reforms of the law of the World Trade Organization (WTO) as the international legal order and “economic constitution” of a liberal (i.e. liberty-based) world trading system.² Yet, interdisciplinary discourse about international markets, their legal regulation and political governance remains difficult because - unlike in other areas of law (such as constitutional law aiming at “constitutional justice”, tort law aiming at “corrective justice”, social law aiming at “distributive justice”) - economists,

¹ Cf. WITTGENSTEIN (1953), who defined the aim of his philosophy as “showing the fly the way out of the bottle” (para. 309).

² Cf. PETERSMANN, Multilevel Trade Governance Requires Multilevel Constitutionalism, in: JOERGES/PETERSMANN (2006), 5-57; PETERSMANN, WTO Negotiators and Academics Analyze the Doha Development Round: Overview and Introduction, in: PETERSMANN (2005), 3-36.

lawyers, political scientists and governments do not agree on how to define the objectives of international cooperation.

More than 200 years ago, in his essay on *The Contest of Faculties* (1798), the philosopher Immanuel Kant explained why the constitutional reforms resulting from the democratic British, American and French revolutions offered objective evidence of progress in the history of human civilization and of the development of human 'faculties.' Even though Kant admitted the uncertain future of the constitutional reforms introduced by the revolutions in France and the United States, he perceived the public enthusiasm about the constitutional limitations of abuses of monarchical powers as empirical evidence of the progressive nature of these reforms.³ Today, the widespread citizen support for the "common market freedoms" and other "fundamental freedoms" guaranteed by European constitutional law can be viewed in a similar way as empirical proof of the moral and rational powers of peoples to struggle for more effective protection of their human rights to liberty and self-government. According to Kant, human beings have moral obligations to transform power-oriented into rules-based cooperation across frontiers based on constitutional guarantees of individual freedom, liberal trade and social justice. This 'categorical imperative' is reflected in the 2004 Treaty Establishing a Constitution for Europe and in its Charter of Fundamental Rights; yet, it remains far from being realized in worldwide economic relations and international law, which are rightly criticized for their 'constitutional failures' to protect more effectively consumer welfare, open markets, citizen rights and social justice. The purpose of this contribution is not only to help practitioners to review the theoretical assumptions of their power-oriented, international economic governance. Also the often too separated economic, legal and political 'faculties' need to cooperate more in clarifying the complex interrelationships between global markets, democratic constitutions and international legal limitations of 'market failures' so as to protect more effectively individual and democratic self-development and rule of law across national frontiers.

I. 'Constitutional Economics' and Democratic Constitutionalism: Development as Freedom, Consumer-driven Competition and Protection of Human Rights

Philosophers, lawyers and economists emphasize long since that liberty, markets and democracy risk destroying themselves unless they are protected by constitutional restraints on abuses of power. In order to overcome this 'paradox of liberty' and avoid conflicts between our rational long-term interests and emotional short-term temptations, individual decisions (e.g. by *Ulysses* when approaching the island of the *sirens*) as well as collective decisions (e.g. by a democratic majority that wants to hand over the power to a dictator, as in Germany in 1933) need to be restrained by self-imposed rules ('hands-tying') of a higher legal rank.⁴ History confirms that, without such constitutional rules, economic markets for the supply of private goods - just as political markets for the collective supply of public goods - risk entailing restraints of

³ KANT (1790), 176 ff.

⁴ On this paradoxical dependence of liberty on psychological pre-commitments and constitutional restraints see e.g. J. ELSTER (2000).

competition, monopolization and other abuses of market power. Individual and collective liberty and the proper functioning of markets thus depend, paradoxically, on legal restraints of individual and collective powers through national and international rules of a higher ('constitutional') rank.⁵

Economists distinguish two basic governance mechanisms for the correction of 'market failures' as well as of 'government failures', whose different structures and dynamics require careful coordination⁶: hierarchical organizations (such as firms, states, international organizations) and decentralized market competition (e.g. price competition as spontaneous information mechanism, allocation-, coordination-, and sanctioning-mechanisms forcing suppliers to become sensitive to preferences of consumers). Organizations pursue agreed objectives through hierarchical rules, decision-making procedures and institutions that differ fundamentally from market mechanisms (e.g. for the decentralized coordination of international movements of goods, services and capital among billions of self-interested individuals). In our modern world of global integration, almost half of the people in less-developed countries (LDCs) continue to live on less than 2 dollars per day and remain confronted with unnecessary poverty. Even though market competition tends to become ever more intense and to offer more opportunities, worldwide economic cooperation lacks effective constitutional safeguards protecting consumer welfare, non-discriminatory competition, poverty reduction and respect for human rights.

Markets are characterized by rivalry among autonomous actors and, due to the tensions between *global* economic integration and *national* polities, give rise to ever more complex 'market governance problems' (e.g. collective action problems regarding global public goods and transnational externalities that cannot be unilaterally 'internalized' by national policies). Efficient market competition is no gift of nature but depends on rules and government interventions constituting open markets, defining rights and obligations of market actors, correcting market failures and supplying public goods. Constitutional economics⁷ has convincingly criticized the 'constitutional ignorance' of neoclassical welfare economics and trade theory, for instance their often unrealistic assumptions of perfect knowledge and competition, factor mobility, 'optimal' government corrections of market failures, and authoritarian definitions of 'social welfare functions' by aggregating diverse individual preferences; like public choice theory, constitutional economics asserts that – just as democracies are not sustainable over time without 'constitutional democracy' – market economies cannot properly function without respect for human rights (normative individualism) and 'economic constitutions' protecting consumer-driven, non-discriminatory competition, citizen rights and social justice against the inherent tendencies of self-interested competitors and governments to distort competition by abuses of private and public power.⁸ Hence, inside constitutional democracies, there tends to be broad agreement among economists and constitutional lawyers that trade and trade law are mere *instruments* for promoting individual and social welfare as defined in national

⁵ See e.g. BARNETT (2000) and PETERSMANN (1991).

⁶ Cf. e.g. HAYEK (1973), at 46.

⁷ Cf. McKENZIE (1984); BUCHANAN (1987).

⁸ Cf. VANBERG (2001); GERKEN (1999); PETERSMANN (2006).

constitutions. Yet, there exists no corresponding consensus for answering the question: what are *international trade* and *international trade law* for?

1. From Welfare Economics to Ordo-Liberalism: Promotion of Consumer Welfare Requires Legal Order

Economists refer to markets as processes and geographical spaces where goods and services compete and in which the market forces of demand and supply tend to bring about equilibrium prices. Neo-classical welfare economics often assumes perfect competition and omniscient, omnipotent and benevolent governments maximizing social welfare through optimal interventions (e.g. strategic trade policy). Even if market failures are admitted (e.g. in case of abuses of market power, external effects, asymmetries in information, non-supply of public goods like social justice), welfare economists often ignore the legal preconditions of efficient competition and the authoritarian premises of their assumptions, for instance if 'economic welfare' is defined as 'total welfare' (rather than general consumer welfare) and discretionary rights of the rulers to redistribute income among domestic citizens by legally limiting the rights of consumers for the benefit of powerful producer lobbies.

Modern 'law and economics' literature⁹ and 'institutional economics'¹⁰ examine the manifold interrelationships between legal rules and economic welfare (e.g. in terms of transaction costs), for instance the contribution of contract law, corporate law and property rights to the efficient functioning of markets, or of liability rules, individual access to courts, litigation rules and law enforcement procedures as legal incentives for decentralized internalization of external effects and for spontaneous protection of market participants against other market failures. They emphasize that what are traded in markets are not physical resources but *legal rights* to have, use, or transfer scarce resources. *Ordo-liberalism*¹¹ focuses on the interdependence of economic, legal and political orders, and of related (economic, political and legal) theories about social order, so as to better protect competitive markets by means of a coherent legal protection of the 'constituent principles' and 'regulative principles' without which undistorted competition cannot unfold and general consumer welfare cannot be effectively protected.¹² Whereas welfare economics proceeds from competition within a given set of rules, *ordo-liberal* economists also review the legal and political rules according to which economic and political 'games of competition' must be played in order to promote general consumer welfare rather than particular, mutually conflicting producer interests (e.g. in protecting rents at the expense of consumer welfare).¹³ Central themes of *ordo-liberal* economists and lawyers are the search not only for an economically efficient legal and political order but also for a socially just market economy: which welfare-increasing *choices among the basic legal rules* of the game may enable more efficient *choices within rules* without endangering the social

⁹ See e.g. KAPLOW and SHAVELL (1999).

¹⁰ See e.g. NORTH (1990).

¹¹ See e.g. VANBERG (1998).

¹² Cf. e.g. PETERSMANN (1991) at 63-68.

¹³ The game metaphor was used by HAYEK (1960, at 229) in order to emphasize the dependence of competition on rules and the unpredictability of particular outcomes of competition.

consensus necessary for economic and democratic liberalization processes? The *ordo-liberal* approach attempted to translate the philosophy of the classical economists into the language of the law in order to define and create the legal framework necessary for decentralized coordination of individual supply and demand through a properly-functioning price system and undistorted competition. Yet, the *ordo-liberal* focus on the need for *non-discriminatory* trade and competition rules remained confronted with the diverging constitutional traditions of discrimination, such as national sovereignty to maintain discriminatory border restrictions and legislative discretion to regulate different economic sectors in different ways so as to maintain and favour political majorities.

2. From Public Choice Theory to Constitutional Economics: Promotion of General Citizen Welfare Requires Citizen Rights and Constitutional Order

Empirical evidence shows that there is often a wide discrepancy between economic theories (e.g. on maximizing consumer welfare, ‘productive efficiency’ and ‘allocative efficiency’) and the reality of economic policies. Public choice theory¹⁴ questions whether government institutions have the power, information and motivation for correcting the manifold market imperfections, for instance because individuals are likely to pursue their self-interests in political markets no less than in economic markets; hence, government regulations are often ‘captured’ by rent-seeking interests in redistributing income for the benefit of the regulated industries in exchange for political support of the regulators.¹⁵ In response to such ‘public choice’ concerns, modern *constitutional economics* emphasizes the need for limiting and regulating government powers (e.g. monetary, taxing, spending and regulatory powers) through agreed constitutional rules so as to constrain legislative, administrative and other government failures by designing a ‘constitution of liberty’ that maximizes general citizen welfare.¹⁶ Likewise, economic law emphasizes that the ‘private law society’ (F. Böhm) and private law as the ‘science of liberty’ (C. von Savigny) depend on constitutional controls of private and public power and on constitutional rights which, as in the EC’s common market law and in EC competition law, empower individuals to defend their market freedoms and non-discriminatory competition as citizen-driven coordination- and discovery processes in national and international courts.

Constitutional economists emphasize not only (like *institutional economists*) the functional dependence of efficient market competition on liberty rights (e.g. freedom of profession, freedom of contract, freedom of consumer choice), property rights (e.g. in savings, investments and traded goods), non-discriminatory market access rights (e.g. as in EC law), and on legal security (e.g. *pacta sunt servanda*, due process of law, access to courts) as legal preconditions for efficient agreements on market transactions and reduction of transaction costs. They also argue that people can realize mutual gains not only from voluntary contracts in economic markets but also from *constitutional contracts* in political markets enabling citizens to escape from prisoners’ dilemmas.

¹⁴ Cf. MUELLER (1988).

¹⁵ On the redistributive nature and “politicization” of government regulations of the economy, and the inseparable unity of the economy and the polity, see e.g. LEE and MCKENZIE (1987).

¹⁶ See e.g. MCKENZIE (1984); BUCHANAN (1987). For a recent survey of the literature see e.g. VANBERG (2001).

Constitutional theories of justice (from Immanuel Kant up to John Rawls) explain why rational citizens should protect their basic liberties and other human rights through long-term constitutional rules limiting post-constitutional legislative, administrative and other decision-making processes by ‘constitutional principles of justice’, which should protect peaceful cooperation among citizens also *across* national frontiers.¹⁷ Only *general* citizen interests (e.g. in equal human rights) and *general* consumer interests (e.g. in non-discriminatory competition), but not protectionist self-interests of producers are in the rational self-interest of *all* citizens; hence, constitutional consensus on special interest rules remains unlikely because it would be neither efficient nor in the rational long-term interests of consumers, for instance if citizens have to choose among the long-term rules constituting competition, fairness and social justice (e.g. in the 2004 Treaty Establishing a Constitution for Europe) behind a ‘veil of uncertainty’ about their individual future positions (e.g. as winners or losers in competition, as beneficiaries of special privileges, or as taxpayers financing protection rents and legal guarantees of social justice).

Both political markets (democracy) and economic markets are confronted with the same basic constitutional problem, i.e. how markets can be constrained by agreed legal rules to be responsive to general citizen interests. Just as voluntarily agreed market transactions and non-discriminatory market competition can promote general consumer welfare, so can mutually agreed constitutional rules and democratic procedures promote general citizen welfare. Constitutional economists have elaborated additional techniques facilitating ‘rational choices’ and agreement on ‘social contracts’ necessary for protecting consumer sovereignty and citizen sovereignty, such as negotiations ‘behind a veil of uncertainty’ and ‘competition among jurisdictions’ enhancing the capacity of democratic governments to serve the common interests of their constituents by limiting the scope for rent-seeking.¹⁸ By placing constitutional liberties and other agreed core values beyond the power of majoritarian politics, and by protecting a decentralized ‘private law society’ enabling voluntary cooperation, constitutional citizen rights and open markets facilitate individual consent to the basic constitutional rules. The constitutional recognition of the ‘indivisibility’ of human rights reflects the economic recognition of the remarkable empirical connections and mutually reinforcing character of economic, legal and political freedoms.¹⁹ Such constitutional perceptions of economic law are in line with the empirical evidence in many OECD countries that high constitutional, labour and social standards can reinforce rather than undermine successful trade performance and capital inflows.²⁰

The high decision-making costs of consensus requirements make democratic majority decisions inevitable. As majority decisions are replete with opportunities for special interests to exploit the rest of the population, majoritarian democracy remains sustainable only as *constitutional democracy* limiting abuses of majority decisions, e.g. by means of equal human rights and other constitutional guarantees for institutional “checks and balances” and non-discriminatory open markets. International integration law, such as the EC and WTO limitations on discriminatory border restrictions and on discriminatory internal restrictions, has increasingly assumed constitutional functions

¹⁷ Cf. PETERSMANN (2003).

¹⁸ Cf. VANBERG (2000).

¹⁹ SEN (2000), at 6, 11 (“Freedoms of different kinds can strengthen one another”).

²⁰ Cf. OECD (1996), at 111-112.

for limiting constitutional failures at national levels, for instance by protecting the individual market freedoms inside the EC (for free movements of goods, services, persons, freedom of establishment, capital movements and related payments) against welfare-reducing, national border restrictions. Just as constitutional rights are necessary inside democracies for protecting citizens vis-à-vis abuses of power by their own governments, so are constitutional citizen rights necessary also for limiting the perennial abuses of foreign policy powers and of intergovernmental collusion in restricting mutually beneficial cooperation among free citizens across national frontiers.

3. From Constitutional Nationalism to Functionally Limited Multilevel Constitutionalism

Most lawyers, politicians and governments outside Europe continue to favour ‘constitutional nationalism’ in view of the power-oriented nature of international relations. Hence, international economic relations and international economic law continue to be shaped by power politics (e.g. on reciprocal market access for agricultural and industrial goods from developed countries); likewise, most international theories of justice (e.g. by J.Rawls) focus on social justice *inside* constitutional democracies rather than in the anarchic *international* relations. It is mainly among the 27 EC member states and the 46 member states of the ECHR that functionally limited guarantees of European constitutional law are increasingly limiting abuses of national government powers and other ‘constitutional failures’ inside nation states (such as their welfare-reducing border discrimination against foreign goods and foreign citizens). Since the Constitutions (*sic*) establishing the International Labour Organization (ILO) and UN Specialized Agencies committed to the promotion of human rights (like the World Health Organization, the Food and Agricultural Organization, the UN Educational, Scientific and Cultural Organization), there are also an increasing number of international ‘constitutional rules’ legally committing governments to respect for human rights and constituting international rule-making, executive and judicial governance mechanisms protecting mutually beneficial cooperation among citizens across frontiers.²¹ Multilateral trade negotiations in the WTO, for instance, are no longer only ‘member-driven’ by states, but also strongly influenced by the expertise and advice of the WTO Secretariat, the already more than 220 dispute settlement reports of WTO dispute settlement bodies interpreting and progressively developing WTO rules, by regional actors (like the EC), the regular inter-parliamentarian meetings during WTO ministerial conferences, and by civil society and ever more non-governmental organizations.

4. From Market Integration to Policy Integration: Does Democratic Legitimacy Require Anchoring “International Market Governance” in Human Rights?

The increasing move from ‘negative’ to ‘positive integration’ in the EU and WTO illustrates the functional need and political pressures to reduce the adjustment costs of market integration through policy coordination aimed at reducing transaction costs, discriminatory market access barriers, regulatory competition, and sharing of adjustment costs. International governance – for instance, by rule-making, rule-

²¹ See PETERSMANN (2006, b).

implementation and adjudication at the international level – raises legitimacy problems and constitutional problems which often cannot be solved by transferring the constitutional methods applied inside constitutional democracies to the international level of functionally limited international organizations. Some organizations – like the World Bank, the OECD and the EU Commission – have committed themselves to ‘principles of good governance’ (such as transparency, democratic participation, accountability, effectiveness, coherence) so as to legitimize their international governance and integration law.²² Yet, such functional and technocratic justifications have been criticized as being insufficient for protecting human rights and constitutional democracy from being undermined through intergovernmental collusion and international organizations far away from most citizens and from their parliamentary representatives.²³ UN human rights bodies and the ILO have, therefore, endorsed civil society calls for developing human rights approaches to the interpretation and application of international economic law, taking into account the human rights obligations of all UN member states under the UN Charter as well as under general international law to respect, protect and fulfil human rights at home and abroad.²⁴

Many economists, since Adam Smith, rightly emphasize that economic efficiency requires rule of law and respect for justice (*ubi commercium, ibi jus*).²⁵ Markets and human rights proceed from the same value premise that individual autonomy (human dignity) must be respected; that values can be derived only from the individual and his consent (normative individualism); and that both economic markets as well as political markets serve the same human rights function of promoting personal self-development. The information-, coordination- and “sanctioning functions” of market mechanisms are ultimately based on decentralized dialogues among citizens about the value, production and distribution of scarce goods and services.²⁶ An increasing number of empirical studies confirm that the economic welfare of most countries, and the consumer welfare of their citizens, are related to their constitutional guarantees of freedom, property rights and of decentralized dialogues about ‘supply and demand’²⁷: ‘individual rights are a cause of prosperity’.²⁸ Since economic welfare can be increased by ‘successful struggle for rights of which the right to property is the most fundamental’²⁹, ‘almost all of the

²² See e.g. WORLD BANK (1995); OECD (1995); EUROPEAN COMMISSION (2001).

²³ Cf. RADAELLI (1999); JOERGES, MÉNY and WEILER (2002).

²⁴ Cf. PETERSMANN (2004).

²⁵ The founding father of economics, Adam Smith, justified his ‘system of natural liberty’ on considerations of both economic welfare and justice: ‘Justice is the main pillar that upholds the whole edifice. If it is removed, the immense fabric of human society ... must in a moment crumble into atoms’ (A. Smith, *The Theory of Moral Sentiments* (1790/1976), at 167).

²⁶ Cf. PETERSMANN (2006).

²⁷ See e.g. the annual reports on ‘Economic Freedom in the World’ published by the Fraser Institute in Vancouver, which emphasize the empirical correlation between economic freedom, economic welfare, relatively higher average income of poor people and, with a few exceptions (such as Hong Kong), political freedom. Already ADAM SMITH’s inquiry into the *Nature and Causes of the Wealth of Nations* (1776) concluded that the economic welfare of England was essentially due to its legal guarantees of economic freedom, property rights and legal security for investors, producers, traders and consumers.

²⁸ OLSON (2000) p. 43.

²⁹ See PIPES (1999) p. 291.

countries that have enjoyed good economic performance across generations are countries that have stable democratic governments³⁰.

This focus of constitutional economics on empowerment of individuals is in line with the long-standing emphasis by many economists – from *Adam Smith* via *Friedrich Hayek* up to Nobel Prize-winning economist *Amartya Sen* – that market economies and economic welfare are mere instruments for enabling and promoting individual freedom as the ultimate goal of economic life and the most efficient means of realizing general welfare.³¹ ‘Economic considerations are merely those by which we reconcile and adjust our different purposes, none of which, in the last resort, are economic (except those of the miser or the man for whom making money has become an end in itself).’³² Modern theories of justice increasingly postulate that ‘basic equal freedoms’ as ‘first principle of justice’, and constitutional ‘difference principles’ as ‘secondary principles of justice’ justifying preferential treatment of disadvantaged individuals whose personal self-development requires special, social assistance, should be applied not only inside nation states (as postulated by J.Rawls) but also in ‘international democracies’ (like the EC) and for the benefit of poor people in third countries.³³ International human rights law only provides for minimum standards based on the recognition that, depending on society’s resources and democratic preferences, the constitutional protection of ‘negative freedom’ (e.g. from arbitrary government interference) and ‘positive freedom’ (e.g. in terms of real individual capacity to live the life one has reason to value) may legitimately vary among countries, as reflected in their often differing catalogues of human rights and other constitutional rights.

5. Constitutional Economics, Human Rights and Constitutional Pluralism: A New Research Agenda

Constitutional democracies recognize ‘inalienable’ human rights as birthrights of every human being deriving from respect for human dignity, liberty and for the basic needs for personal self-development, including economic freedoms (such as profession and property rights) as legal preconditions for producing goods and services that can be exchanged for other goods and services necessary for individual survival and social cooperation among free citizens. This moral and constitutional foundation of modern human rights law is not inconsistent with economic theories explaining the historical bottom-up struggles of citizens for human rights (e.g. in the English, American and French Revolutions during the 17th and 18th centuries) as rational responses to market failures and to government failures so as to internalize external effects of arbitrary governmental restraints of economic and political competition. Just as economics

³⁰ OLSON (2000) p. 187.

³¹ See SEN (2002), e.g. chapter 17 on ‘markets and freedoms’. Sen conceptualizes freedom similar to the budget of a utility-maximizing individual: The more individual freedom, the larger is individual welfare. Such constitutional definitions of “Pareto-efficiency” complement the moral and legal Kantian “categorical imperative” of maximizing equal freedoms of individuals in national, transnational and international relations. On legal protection of “market freedoms” in national and European constitutional law, see: PETERSMANN, Human Rights and International Trade Law, in: COTTIER/PAUWELYN/BURGI BONANOMI (2005), 29-94.

³² HAYEK (1960), at 35.

³³ PETERSMANN (2003).

emphasizes that the legitimacy of economic markets derives from satisfying general consumer interests (rather than protectionist self-interests of producers), so do human rights emphasize that the democratic legitimacy of political markets derives from serving general citizen interests as defined by human rights (rather than the self-interests of political entrepreneurs claiming to produce collective public goods). Hence, consumers in economic markets as well as citizens in political markets have rational self-interests in defining more precisely the ‘limiting constitution’ needed for protecting equal freedoms and non-discriminatory competition against abuses of power, as well as the ‘enabling constitution’ needed for promoting efficient supply of private and public goods meeting the individual and democratic demand of free citizens.

The numerous parallels and interrelationships between the voluntary exchange paradigms (‘consumer sovereignty’) of market theories, the constitutional contract paradigm (‘citizen sovereignty’) of democratic theories, and modern conceptions of inalienable human rights have given rise to an increasing number of research on the similar value premises, similar constitutional problems and complementary functions of human rights and non-discriminatory market competition.³⁴ As social traditions, democratic preferences and national constitutions legitimately differ among countries, international law must respect ‘constitutional pluralism’, including the sovereign right of constitutional democracies to disregard, for legitimate constitutional reasons, their ‘primary obligations’ under international law subject to the ‘secondary’ international law rules on state responsibility. The European Court of Justice, in its judicial interpretation of the intergovernmental EC Treaty guarantees of free movements of goods, services, persons, capital and payments as ‘fundamental individual freedoms’ of EC citizens, increasingly balances and delimits the EC’s market freedoms with other human rights and constitutional rights of citizens as protected by national constitutions and by the ECtHR.³⁵ The ECtHR has, likewise, recognized that citizens must be constitutionally protected by fundamental rights not only in their *individual* economic activities (e.g. as owners and sellers of private property rights), but also in their *collective*, private economic activities (e.g. in economic companies and trade unions) producing and consuming scarce resources.³⁶ The 1969 Vienna Convention on the Law

³⁴ Cf. COTTIER/PAUWELYN/BUERGI (2005); ABBOTT/BREINING-KAUFMANN/COTTIER (2006).

³⁵ The scope of judicial protection of the EC Treaty’s economic freedoms dynamically evolved in response to their judicial balancing with non-economic rights and national sovereignty, as illustrated by the explicit revision by the EC Court of its judicial interpretation of Arts. 28ff EC Treaty in 1993 (judgments in the *Keck/Mithouard cases*) which limited the scope of these prohibitions of quantitative trade restrictions to product-related measures (i.e. no longer covering non-discriminatory national sales modalities). It remains controversial to what extent ‘market freedoms’ should be construed as liberty rights protecting market access and prohibiting disproportionate national restrictions (e.g. for goods), or only as rights to non-discriminatory treatment across frontiers (e.g. for access of workers to national social systems, freedom of investments subject to non-discriminatory, national regulations).

³⁶ Cf. EMBERLAND (2006). Only few provisions of the ECHR explicitly protect also rights of ‘legal persons’ (e.g. Article 10 ECHR: freedom of expression, Article 1 of Protocol 1: private possessions and property rights) and complaints ‘from any person’ (Article 34 ECHR). Yet, the ECtHR has construed many rights protected by the ECHR (such as Article 6: right to a fair trial, Article 8: right to protection of one’s home, Article 11: freedom of assembly, Article 13: right to effective remedies, Article 41: right to request compensation for non-material damage), as well as corresponding obligations of governments (e.g. under Article 1 to secure the fundamental rights “to everyone within

of Treaties stipulates explicitly (e.g. in its Preamble and Article 31) that international treaties must be interpreted ‘in conformity with the principles of justice and international law’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all.’ Hence, also UN human rights bodies, other worldwide organizations and international courts emphasize that - as inside the EC - international economic law and market freedoms (e.g. as protected by the WTO legal and dispute settlement system) must remain consistent with universal human rights obligations of all UN member states and with their often diverse constitutions and democratically agreed principles of justice.

II. Multilevel Market Governance Requires Multilevel Constitutionalism

Economic and political markets emerge wherever personal autonomy and diversity of individual capacities and preferences of citizens (e.g. investors, producers, traders, consumers) are respected and legally protected by rules. Since Aristotle’s comparative analysis (in his *Politeia*) of constitutional systems and (in his *Nicomachean Ethics*) of universal and particular principles of justice (such as reciprocal, corrective and distributive justice), constitutionalism and theories of justice emphasize that rules risk remaining ineffective over time unless they are perceived as just. Modern theories of justice (e.g. by John Rawls) explain why constitutional agreements on basic equal liberties (as ‘first principle of justice’ deriving from human rights) cannot remain stable without complementary, constitutional ‘difference principles’ (as ‘second principle of justice’) justifying rewards for services contributing to the common good as well as differential treatment of disadvantaged members of society.³⁷ The universal recognition by all 192 UN member states of national and international legal obligations (e.g. under the UN Charter, other UN, regional and national human rights instruments) to respect, protect and promote ‘inalienable’, ‘indivisible’ human rights requires evaluating international law and the international economic order in terms of their contributions to the enjoyment of human rights. From such human rights perspectives, the state-centred system of ‘international law among states’ is increasingly criticized for its lack of democratic legitimacy, its failure to protect human rights effectively in many UN member states, as well as for its authoritarian treatment of private producers, investors, traders and consumers as mere objects of intergovernmental regulation rather than as legal subjects and democratic owners of the world trading system.

their jurisdiction”, including economic actors and companies from outside Europe), as protecting also rights of companies.

³⁷ RAWLS (1999). In addition to these two “principles of justice”, Rawls also acknowledges the need for a property-owning democracy empowering citizens to manage their own affairs by taking part in decentralized social cooperation, as well as the need for a welfare state assisting those who lose out through accident or misfortune. For international relations, however, Rawls proposed only an international law among sovereign states, based on tolerance vis-à-vis non-democratic but decent people, that appears to remain far behind today’s universal recognition of human rights.

1. 'Constitutional Failures' and 'Governance Failures' in the World Trading System

The 'Westphalian system of international law among states' evolved as an 'international law of coexistence' protecting state sovereignty, as well as an 'international law of cooperation' based on intergovernmental agreements and organizations, without regard to the democratic legitimacy of governments and without effective safeguards of human rights. As emphasized by Kofi Annan in his final address as UN Secretary-General to world leaders assembled in the UN General Assembly on 19 September 2006, this state-centred international legal system has proven to be 'unjust, discriminatory and irresponsible' because it has failed to effectively respond to the three global challenges to the United Nations: 'to ensure that globalization would benefit the entire human race; to heal the disorder of the post-Cold War world, replacing it with a genuinely new world order of peace and freedom; and to protect the rights and dignity of individuals, particularly women, which were so widely trampled underfoot.' According to Kofi Annan, these three challenges – 'an unjust world economy, world disorder and widespread contempt for human rights and the rule of law' – entail divisions that 'threaten the very notion of an international community, upon which the UN stands.'³⁸ As individual and social welfare depends ever more on a rules-based, worldwide division of labour, citizens and parliaments must hold 'member-driven governance' accountable for these obvious 'government failures' in the collective supply of international public goods, just as consumer-driven economic competition is necessary for forcing private producers of goods to respond efficiently to consumer preferences.

Rational individuals commit themselves to 'constitutional principles' in order to reduce conflicts inside their own minds (e.g. between human passions and rationality) and in their social relations. All UN member states have adopted national constitutions and have committed governments to 'universal respect for, and observance of, human rights and fundamental freedoms for all' (Article 55 UN Charter). Yet, just as UN law does not provide for effective legal and judicial remedies against the widespread violations of human rights, so does WTO law fail to effectively protect consumer welfare and the rights of private producers, investors, traders and consumers as the main actors in international trade and the worldwide division of labour. The more state-centred rules and 'member-driven governance' fail to empower and protect citizens and their human rights effectively, the stronger becomes the need for 'constitutionalizing' foreign policy-making in the WTO, similar to the rights-based constitutional restraints in European economic law protecting citizens against abuses of trade and economic policy powers by their own governments.³⁹ Constitutional democracies have responded to the obvious 'constitutional failures' in international relations by reinforcing *national* constitutions (section 5.1 below) and *European constitutionalism* (section 5.2 below) without effectively limiting intergovernmental power politics by worldwide *international constitutionalism* (section 5.3)

³⁸ The speech of Kofi Annan is reproduced in UN document GA/105000 of 19 September 2006.

³⁹ Cf: JOERGES/PETERSMANN (2006).

2. The Prevailing Post-War Paradigm of Constitutional Nationalism and ‘Embedded International Liberalism’

Many constitutional democracies, like most non-democratic states, emphasize the limited mandate of intergovernmental organizations and distrust intergovernmental rule-making in non-transparent organization. The US Congress, for example, has a long tradition of refusing to ratify multilateral treaties, to incorporate intergovernmental rules into domestic legal systems, and to allow domestic citizens to invoke and enforce such rules in domestic courts. In most democracies, the Lockean paradigm of rights-based democracy for *domestic policies* has never been fully applied to the domain of *foreign policies*; politicians justify the ‘Lockean dilemma’ of broad discretionary foreign policy powers by the power-oriented character of international relations and by the need for defending ‘national interests’ against the self-interests of other international actors. Yet, this ‘national interest perspective’ may conflict not only with the collective supply of ‘global public goods’; many foreign policy powers also operate by taxing and restricting *domestic* citizens in welfare-reducing ways (e.g. by imposing tariffs and welfare-reducing non-tariff barriers on thousands of consumer goods); hence, inadequate constitutional restraints on discretionary foreign policy powers risk undermining *domestic constitutional restraints* (e.g. if administrative import protection is used as a substitute for distributing ‘protection rents’ without parliamentary approval of such subsidization).

Building on the centuries-old English and American common law tradition of protecting equal freedoms of traders, competitors and consumers against ‘unreasonable restraint of trade’ and ‘coercion’, all constitutional democracies in Europe and North America have introduced comprehensive national and European competition rules based on common core principles, reflecting the European and American historical experience that abuses of private power may be no less dangerous and welfare-reducing than abuses of public power.⁴⁰ As emphasized by the US Supreme Court, ‘antitrust laws [...] are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms.’⁴¹ Yet, notwithstanding this emergence of an ‘economic constitution’ protecting common markets, non-discriminatory competition and consumer welfare against abuses of *private* economic power inside the EC and the United States, most countries lack an equivalent ‘economic constitution’ limiting abuses also of *foreign economic policy powers* (e.g. in the trade policy area). The foreign policies of most countries continue to be based on the post-war paradigm of intergovernmental, reciprocal tariff liberalization and domestic regulatory autonomy, without effective protection of non-discriminatory *international* competition and citizen rights against private and public restraints of *international* competition and discrimination against *foreign* goods, services, persons and investments.⁴²

⁴⁰ On this common dilemma of market economies and democracy, and on the replacement of the rights-based common law criteria by efficiency-based economic criteria (such as absence of output and price restrictions) in modern US antitrust law, see: AMATO (1997); GERBER (1998).

⁴¹ United States v. Topco Assoc. Inc., 405 U.S. 596, 610 (1972).

⁴² On this post-war paradigm of "embedded international liberalism" see: J. Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism in the Post-war Economic Order", in: KRASNER (1983), at 195-231.

3. The Successful European Experiment in Multilevel Constitutionalism

All the 46 member states of the Council of Europe have accepted the judicial transformation of the ECHR into a ‘constitutional instrument of European public order’⁴³, just as all 27 EC member states and their association partners in Europe have accepted the judicial transformation of EC law into a supranational European constitutional law protected by the EC Court of Justice as a constitutional, administrative and economic court.⁴⁴ Inside Europe, national constitutionalism is increasingly supplemented by European constitutional guarantees among states as well as of cosmopolitan citizen rights vis-à-vis national and foreign governance powers: EC law constitutes legislative, executive and judicial EC governance mechanisms and constitutionally limits multilevel economic governance inside the EC and in its 27 member states. EC competition law is an integral part of EC constitutional law guaranteeing ‘an open market economy with free competition’ (Articles 4, 98, 105, 157 EC Treaty) based on ‘a system ensuring that competition in the internal market is not distorted’ (Article 3g); the EC Court explicitly recognizes that EC competition law protects not only economic efficiency and consumer welfare, but also individual freedom as a constitutional “principle of freedom” (Article 6 EU).⁴⁵ Free movements of goods, services, persons, capital and related payments, non-discriminatory conditions of competition, as well as social and other rights are constitutionally protected in EC law as ‘fundamental rights’⁴⁶ and integral parts of the EC’s economic constitution. The single European market would never have become a reality without this legal empowerment of ‘market citizens’ and without their direct access to national and EC courts enabling the private enforcement of the EC’s common market rules vis-à-vis governmental and private restrictions and discrimination.

4. The World Trading System as Power Politics in Disguise: Need for Constitutional Reforms of 'Member-driven Governance'?

On the worldwide level, UN law continues to operate as an intergovernmental legal system that has so far failed to effectively realize its declared objectives of promoting and protecting human rights, democratic peace, worldwide economic welfare and social justice. The Preamble to the WTO Agreement defines its objectives mainly in economic terms. Idealists therefore view the WTO as an instrument for promoting economic welfare through trade, non-discriminatory conditions of competition and efficient use of policy instruments. Realists counter that GATT and WTO rules and negotiations are no less used for justifying trade protection, trade discrimination and the redistribution of

⁴³ This concept continues to be used in many judgments of the European Court of Human Rights since the Court’s decision in *Loizidou v Turkey (preliminary objections)*, Series A No 310 (1995) 20 EHRR 99 § 75(2).

⁴⁴ Cf. VON BOGDANDY/BAST (2006).

⁴⁵ Cf. MONTI (2002).

⁴⁶ See e.g. Case 240/83, *ADBHU*, ECR 1985 531, para. 9: “the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.” Especially the freedom of movements of workers and other persons, access to employment, and the right of establishment have been described by the EC Court as “fundamental freedoms” (Case C-55/94, *Gebhard*, ECR 1995, I 4165, para. 37) or as “a fundamental right which the Treaty confers individually on each worker in the Community” (Case 22/86, *Heylens*, ECR 1987, 4097, para. 14).

income for the benefit of rent-seeking interest groups. The 45 years of GATT and WTO cotton, textiles and agricultural agreements discriminating against exports from less-developed countries (LDCs), and the lack of economic rationality of many WTO rules (e.g. on discriminatory anti-dumping measures, agricultural export subsidies), illustrate the ambivalence of the economic functions and political exceptions of GATT/WTO rules.

The reciprocity principle underlying the WTO objective of ‘reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade’ (Preamble WTO Agreement) is based more on political than on economic rationales. In the Doha Round negotiations, realists blame the lack of reciprocity (e.g. between the EU offer for agricultural market access, the US offer for agricultural domestic support, the offers by the 22 LDCs cooperating in the “G20” for industrial goods and services) as the major stumbling block preventing a ‘grand bargain.’ Economists counter that the ‘balance of concessions’ may exist only in the eyes of the negotiators; in terms of consumer welfare, the alleged ‘reciprocity advantages’ may be smaller than the opportunity costs of delaying and risking the successful conclusion of the Doha negotiations. Some objectives in the Preamble of the WTO Agreement – such as recognition of the ‘need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development’ – reflect principles of distributive justice and solidarity. Similar objectives had already been accepted in Article XXXVI of GATT 1947, for example ‘that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries’ (Art. XXXVI:1,d). The still marginal share of the least-developed among the LDC’s (LLDCs) in world trade, and the widespread poverty of almost half the people living in LDCs on less than 2 dollars per day, confirm that ‘member-driven trade governance’ has failed, in far too many countries, to effectively protect consumer welfare, poverty reduction and other citizen interests.

The role of WTO *law* suffers from the same ambivalence as WTO *politics*. Idealists claim that ‘member-driven governance’ serves the ‘public interest’, and that ‘global governance’ can be effectively controlled by ‘global administrative law’ and constitutional nationalism.⁴⁷ Realists counter that consumer welfare, human rights and other constitutional safeguards of citizen interests are neither mentioned nor effectively protected in WTO law. WTO negotiations are driven by producer interests, bureaucratic and political interests; citizens, their human rights and consumer welfare are treated as marginal objects of benevolent governance, resulting in widespread alienation of citizens and democratic distrust vis-à-vis intergovernmental power politics in the WTO. When I joined the GATT Secretariat in 1981 as the first ‘legal officer’ ever employed by GATT, most GATT officials and trade diplomats claimed that GATT should continue to operate ‘pragmatically’ without a Legal Office and without participation of legal officers in GATT negotiations and dispute settlement proceedings. It was only in 1983 that the EC agreed to the establishment of a GATT Legal Office on the condition that its first director could only be an experienced trade diplomat without thorough legal training. As several GATT panel proceedings had found against the EC’s agricultural

⁴⁷ Cf. KRISCH/KINGSBURY (2006).

subsidies and restrictions in the late 1970s and early 1980s, EC Trade Commissioner Willy de Clerq continued to claim that ‘GATT must never become a court.’ GATT Director-General Arthur Dunkel, recognizing the power-struggles by economists and diplomats opposed to sharing their powers with lawyers in GATT negotiations and dispute settlement proceedings, kept the GATT Legal Office under his direct supervision and directly located next to the Director-General’s office inside the GATT Secretariat. Yet, following several GATT dispute settlement findings against US antidumping measures during the Uruguay Round, Dunkel gave in to the request by US Trade Representative Carla Hills to transfer responsibility for dispute settlement challenges of antidumping, countervailing duty and safeguard restrictions from GATT’s Legal Office to a “Rules Division” directed by bureaucrats eager to prevent independent legal advice. The continuing distrust vis-à-vis rule of law in international trade, as illustrated by the insistence of EC and US governments that domestic courts must not directly apply WTO law, illustrates that “member-driven” trade governance remains dominated by political, bureaucratic and protectionist self-interests without adequate safeguards for rule of law among private economic actors, general citizen interests and consumer welfare.

III. Can the WTO Deliver a ‘Development Round’? Intergovernmental Neglect of Consumer Welfare, General Citizen Interests and Non-Discriminatory Competition

Since LDCs became the majority of the contracting parties to the General Agreement on Tariffs and Trade (GATT) in the 1960s, they have insisted in all ‘GATT Rounds’ of multilateral trade negotiations on their ‘special and differential treatment’ (S&D) as being “essential to further the development of the economies of the less-developed countries” (Article XXXVI GATT). The 2001 Doha Declaration launching the ‘Development Round’ of multilateral trade negotiations in the WTO listed more than 20 different objectives of these ongoing negotiations, including the elaboration of multilateral competition, investment and environmental rules aimed at limiting market failures as well as government failures distorting the world trading system. At the 2003 WTO Ministerial Conference at Cancun, some of these ambitious objectives (such as trade-related competition and investment rules) had to be abandoned in response to objections from LDCs.⁴⁸ The more than 60 regional trade agreements (RTAs) concluded since 2003 illustrate that RTAs are increasingly perceived not only as alternative *fora* for trade *liberalization*, but also for trade *regulation* and non-economic integration. The initiatives for transforming RTAs into, for instance, an ASEAN Community, a Southern African Community, Andean, Central and South American Economic Communities reflect the European experience that the success of regional trade liberalization and economic integration may depend on embedding it into a broader constitutional framework of ‘just rules’, ‘fair procedures’ and ‘integration law’ supported by citizens, business and other non-governmental constituencies.

⁴⁸ Cf. PETERSMANN (2005).

The evolution of the international economic order into a ‘layered legal system’ raises questions as to the relationships between the different private and public, national, regional and worldwide levels of law. Inside the EC's common market, national governments were forced – by citizens, parliaments and courts – to integrate the different layers of private and public, national and intergovernmental economic law into a mutually coherent constitutional system ‘founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’ (Article 6 EU). In contrast to this citizen-oriented focus of European economic law, the WTO Agreement and WTO bodies treat citizens and non-governmental organizations as mere objects of benevolent trade governance, without individual rights to hold their own governments accountable for their frequent violations of WTO rules. Also parliaments in most WTO member countries and in the EC do not effectively control intergovernmental negotiations and rule-making in the WTO.⁴⁹ Hence, the influence of rent-seeking interest groups on periodically elected politicians (e.g. in the US Congress, the EC and many WTO member states) is disproportionately stronger than the legal and democratic accountability of trade diplomats for promoting general consumer welfare and protecting individual rights of private participants in international trade.

The universal recognition of *ius cogens* and of ‘inalienable’ human rights as *erga omnes* obligations has made individuals legal subjects of international law with an ‘inalienable core’ of human rights. Notably in Europe, the intergovernmental structures of international economic law are increasingly limited by human rights obligations and by supranational powers of international courts and institutions. WTO law has, likewise, hierarchical structures that assert legal supremacy not only vis-à-vis domestic laws (cf. Article XVI:4 WTO Agreement); they introduce vertical legal hierarchies and constitutional ‘checks and balances’ also among the institutions and different levels of primary and secondary law of international organizations (cf. Articles IX, XVI:3 WTO Agreement). They increasingly limit regional agreements (cf. Articles XXIV GATT, V GATS), bilateral agreements (cf. Article 11 of the WTO Safeguards Agreement, the WTO Agreement on Textiles and Clothing) and unilateralism through multilateral legal and institutional restraints (e.g. in Articles 16, 17 and 23 DSU) with citizen-oriented functions for the protection of freedom, non-discrimination, rule of law and welfare-increasing cooperation among producers, investors, traders and consumers across national frontiers. Yet, as long as citizens have no effective legal and judicial remedies against the frequent violations of WTO obligations by their own governments, protectionist collusion all too often prevails. Citizens increasingly challenge the democratic legitimacy of this intergovernmental exclusion of citizen rights and the intergovernmental neglect of consumer welfare and other general citizen interests in the WTO.

Representatives of international organizations, like the EC Commission and WTO Director-General Pascal Lamy, emphasize the political advantages of empowering self-interested citizens and ‘cosmopolitan constituencies’ (Pascal Lamy) in support of the

⁴⁹ On this lack of effective parliamentary control of WTO politics inside most WTO member countries (with the exception of the US Congress and the Swiss Parliament) as well as in the EC, see BARON CRESPO (2006) and the recent comparative study: *The Role of Parliaments in Scrutinising and Influencing Trade Policy. A Comparative Analysis prepared for the European Parliament* (European Parliament December 2005).

collective supply of international ‘public goods’ (like an efficient world economy) that cannot be unilaterally produced by national governments. Citizens and lawyers increasingly reject the non-democratic view that UN law should be interpreted exclusively from the perspective of ‘sovereign equality of states’ (Article 2 UN Charter) without equal regard to the legally binding UN commitments to ‘principles of justice’ and ‘respect for human rights and for fundamental freedoms for all’ (Articles 1, 55). Sociological and constitutional approaches to international law have emphasized long since that all legal rules and governmental organizations, including international law and intergovernmental organizations, derive their legitimacy from their instrumental function to protect individual rights and citizen interests. The ‘policy approach’ to international law, as advocated also by the president of the International Court of Justice Rosalyn Higgins and the former president of the WTO Appellate Body Florentino Feliciano, rightly perceives international law not only as a system of intergovernmental rules, but also as legal decision-making processes in which individuals, non-governmental organizations and parliaments must increasingly participate (e.g. by submitting ‘amicus curiae’ submissions to WTO dispute settlement panels, convening regular inter-parliamentary conferences at WTO ministerial meetings since 1999).⁵⁰

The more individuals have rights and duties under international human rights and humanitarian, economic and social law, the more it becomes anachronistic for trade diplomats to alienate and exclude citizens – as the main actors in international trade and “democratic owners” of the WTO – from participation in the WTO legal system. Constitutional economics confirms that empowering self-interested citizens (like producers, investors, traders, consumers) by individual rights and obligations is the most effective incentive for mutually beneficial cooperation among citizens and for the decentralized limitation of ‘market failures’, in the economy no less than in the polity.⁵¹ Institutional economists likewise claim that open-access societies have proven to be preconditions for maintaining democracy: ‘sustaining competitive democracy is possible only in the presence of economic competition.’⁵² As virtually all WTO member states have adopted national constitutions and international obligations committing their respective governments to the protection of human rights and citizen interests, diplomats have no mandate to abuse their foreign policy powers by disenfranchising their own citizens through intergovernmental collusion. The UN Charter (e.g. Article 1) and the Vienna Convention on the Law of Treaties (e.g. its Preamble) require interpreting treaties and settling disputes ‘in conformity with the principles of justice and international law’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’. As WTO rules must be interpreted ‘in accordance with customary rules of interpretation of public international law’ (Article 3 DSU), lawyers and judges may reasonably argue that ‘the basic principles ... underlying this multilateral trading system’ (in terms of the Preamble to the WTO Agreement and numerous other WTO provisions) include the universal human rights obligations of all

⁵⁰ See, e.g., R.Higgins, *Conceptual Thinking About the Individual in International Law*, in: *New York Law School Review* 24 (1978), 11-29; W.M.Reisman, *A judge’s judge: Justice Florentino P.Feliciano’s philosophy of the judicial function*, in: *CHARNOVITZ/STEGGER/VAN DEN BOSSCHE* (2005), at 3-10.

⁵¹ Cf. PETERSMANN (2006)

⁵² NORTH (1990), and his recent NBER working paper *A Conceptual Framework for Interpreting Recorded Human History* (2006).

WTO Members, as emphasized by UN human rights bodies (see Section III below). This contribution argues (in Section IV) that the human rights obligations of all WTO members should also guide the preferential treatment of LDCs in future 'Doha Round' agreements and their domestic implementation, notably in the more than one hundred less-developed WTO member countries where large parts of the population suffer from unnecessary poverty. The WTO development objectives should be defined in terms of 'human development' and individual rights, and the rights and obligations of WTO Members should be differentiated in accordance with 'principles of justice'. This does *not* mean transforming the WTO into a human rights organization. Yet, WTO bodies should respond constructively to the increasing challenges by human rights bodies, citizens and their representative institutions of 'diplomatic trade governance', secretive rule-making, disregard for human rights in WTO deliberations, exclusion of citizens as legal subjects of WTO law, and bureaucratic distribution of 'protection rents' without effective parliamentary control. For instance, WTO Members and WTO bodies could acknowledge their existing human rights obligations and pledge to cooperate with citizens and their representative institutions as the democratic owners of the WTO and the main actors in international trade relations.

IV. The 'Human Rights Approach' to International Trade Advocated by the UN High Commissioner for Human Rights and the ILO

All WTO Members have obligations to respect, protect and promote human rights under international law (e.g. the UN Charter, UN and regional human rights conventions) and other human rights instruments (e.g. in national laws). The UN Declarations on the 'right to development'⁵³ define development in terms of enjoyment of human rights:

- 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized' (Article 1).
- 'The human person is the central subject of development and should be the active participant and beneficiary of the right to development' (Article 2).
- 'All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights' (Article 6:2).
- 'States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights' (Article 6:3).

The fulfilment of most human rights (e.g. to food, health, education) depends on access to scarce goods and services (e.g. drinking water, cheap medicines, health and educational services). Also enjoyment of civil and political human rights (e.g. personal

⁵³ See: *The United Nations and Human Rights 1945-1995* (UN 1995), at 322-324.

freedom, rule of law, access to justice, democratic self-government) requires economic resources (e.g. for financing democratic and law-enforcement institutions). The widespread, yet unnecessary poverty, health problems and legal insecurity (e.g. among the more than 1 billion people living on 1 dollar a day or less) bear witness to the fact that many UN member states and UN law have so far failed to realize the UN objective of ‘universal respect for, and observance of, human rights and fundamental freedoms for all’ and ‘creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations’ (Article 55 UN Charter). Even though international trade is essential for increasing the availability and quality of scarce resources, UN human rights bodies have, until recently, neglected international trade law or, as in a report for the UN Commission on Human Rights of 2001, discredited the WTO as ‘a veritable nightmare’ for developing countries and women.⁵⁴

1. Human Rights Dimensions of WTO Law: The Reports by the UN High Commissioner of Human Rights

In response to the widespread criticism of the anti-market bias of such ‘nightmare reports’, the UN High Commissioner for Human Rights (UNHCHR) has published more differentiated reports⁵⁵ analyzing human rights dimensions of the WTO Agreements on Trade-Related Intellectual Property Rights (TRIPS), the Agreement on Agriculture, the General Agreement on Trade in Services (GATS), international investment agreements, non-discrimination in the context of globalization, and on the impact of trade rules on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The reports call for a ‘human rights approach to trade’ which

- ‘(i) sets the promotion and protection of human rights as objectives of trade liberalization, not exceptions;
- (ii) examines the effect of trade liberalization on individuals and seeks to devise trade law and policy to take into account the rights of all individuals, in particular vulnerable individuals and groups;
- (iii) emphasizes the role of the State in the process of liberalization – not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer of human rights;
- (iv) seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
- (v) requires a constant examination of the impact of trade liberalization on the enjoyment of human rights;
- (vi) promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization.’

⁵⁴ *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.

⁵⁵ For a discussion of these reports (with references for the following quotations) see: PETERSMANN (2004).

The UNHCHR emphasizes that, because every WTO Member has ratified one or more UN human rights conventions and has human rights obligations also under general international law, human rights may be 'relevant context' for the interpretation and application of WTO rules. According to the UNHCHR, the needed human rights approach to international trade must recognize as 'entitlements the basic needs necessary to lead a life in dignity and ensure their protection in the processes of economic liberalization'; these entitlements cannot be 'left subject to the whims of the market.' The UNHCHR differentiates between obligations to respect human rights (e.g. by refraining from interfering in the enjoyment of such rights), to protect human rights (e.g. by preventing violations of such rights by third parties), and to fulfil human rights (e.g. by taking appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights). As recourse to trade sanctions for promoting respect for human rights abroad can aggravate the problems of the people concerned, the UNHCHR reports analyze the human rights dimensions of trade liberalization, trade restrictions and other trade regulations in a broader perspective, emphasizing both potential synergies as well as potential conflicts between human rights and trade rules.

As enjoyment of human rights depends on availability, accessibility, acceptability and quality of traded goods and services, the relevance of WTO rules for the collective supply of public goods (like access to low-priced goods and services), for limitations of 'market failures' (e.g. inadequate supply of public goods like essential medicines for poor people), and for protection and fulfilment of human rights is acknowledged and discussed. The reports underline that, what are referred to - in numerous WTO provisions - as *rights* of WTO Members to regulate, may be *duties* to regulate under human rights law (e.g. so as to protect and fulfill human rights of access to water, food, essential medicines, basic health care and education services at affordable prices). The UNHCHR suggests, *inter alia*,

- to recognize the promotion of human rights as an objective of the WTO;
- to encourage interpretations of WTO rules that are compatible with international human rights as progressively clarified e.g. in the "General Comments" adopted by UN human rights bodies;
- to carry out 'human rights assessments' of WTO rules; and
- to strengthen intergovernmental protection of human rights so that trade rules and policies promote the human rights and basic needs of all.

2. The 1998 ILO Declaration on Fundamental Principles and Rights at Work: The Expanding Scope of an 'Inalienable Core' of Basic Rights

Human rights are increasingly acknowledged today in national constitutions as well as in the law of worldwide organizations (like the UN, the FAO, WHO, UNESCO) and regional economic integration agreements (like the EC Treaty, the 2000 Cotonou Agreement, the 2001 Quebec Ministerial Declaration on a Free Trade Area of the Americas) as international *erga omnes* obligations of states and intergovernmental organizations with an 'inalienable' and 'indivisible' *jus cogens* core. The 1996 WTO Declaration on core labour standards helped to reach consensus in the International

Labour Organization (ILO) to adopt, on 18 June 1998, the Declaration on Fundamental Principles and Rights at Work which recognizes

‘that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation’.⁵⁶

The ILO Declaration and other modern human rights instruments⁵⁷ confirm that - in addition to the longstanding prohibitions of genocide, slavery, apartheid and torture - there is an increasing core of additional human rights which must be respected as *erga omnes* obligations. Since the end of the cold war, this international *jus cogens* continues to expand, as recognized by international courts⁵⁸, notwithstanding divergent views on the precise scope and definition of such ‘inalienable human rights.’ Human rights law evolves from a national and European into a worldwide ‘constitutional public order’ limiting all governance powers and requiring to interpret international and national laws as a functional unity for promoting and protecting ‘human self-development’ as defined by human rights.

Human rights instruments recognize that human rights need to be mutually balanced and implemented by democratic legislation which may legitimately vary from country to country. International courts have elaborated legal ‘balancing principles’ (like non-discrimination, necessity and proportionality of governmental limitations of freedom and other human rights); courts emphasize the need to respect the “margin of appreciation” which national parliaments may enjoy in their domestic legislation protecting and promoting human rights. As human rights also protect individual and democratic diversity, views on the interpretation of government obligations to respect, protect and fulfil human rights may legitimately differ among countries. In view of the limited mandate of international organizations, there are also diverging views on whether, and to what extent, international organizations should not only *respect* human rights, but also *protect* and *fulfil* human rights. Yet, such differences of view over the interpretation and legal protection of human rights do not change the fact that citizens have become subjects of international law and should no longer be treated by trade diplomats as mere objects of their trade management.

⁵⁶ ILO Declaration on Fundamental Principles and Rights at Work (ILO 1998), at 7.

⁵⁷ E.g. the 1989 UN Convention on the Rights of the Child (ratified by more than 190 states) and the 1993 Vienna Declaration of the UN World Conference on Human Rights, in which more than 170 UN member states recognized that “the universal nature of (human) rights and freedoms is beyond question” (para.1).

⁵⁸ See the broad interpretation of UN human rights as international *ius cogens*, and as constitutional limitation of intergovernmental powers also of UN bodies, by the EC Court of First Instance in Cases T-315/01 (*Kadi v Council and Commission*) and T-306/01 (*Yusuf v Council and Commission*), judgments of 21 September 2005, in: *Common Market Law Reports 2005*, at 1334.

3. Liberal Trade Rules, like Human Rights, Should Focus on Human Self-Development

The reports by the UNHCHR identify potential synergies between trade rules and human rights: ‘trade liberalization is generally a positive contributor to poverty alleviation - it allows people to exploit their productive potential, assists economic growth, curtails arbitrary policy interventions and helps to insulate against shocks’.⁵⁹ Also intellectual property rights may act as incentives for innovation in the pharmaceutical industry and for the transfer of technology to less-developed countries. Yet, the UNHCHR emphasizes the potential conflicts between ‘existential’ human rights and ‘instrumental’ WTO rules (e.g. on protection of intellectual property rights and investor rights), for example if trade rules lead to higher prices (e.g. of food, seeds, pharmaceutical products), cause unemployment, or entail ‘market failures’ in the supply of essential medicines for tropical diseases. According to the High Commissioner, the needed ‘human rights assessments’ of trade rules and trade policies must focus on the rights and basic needs of vulnerable individuals and of the most disadvantaged communities whose human rights risk to be adversely affected most in the process of trade liberalization.

The macroeconomic objectives and state-centred rules of WTO law nowhere refer to human rights. The High Commissioner, therefore, emphasizes the need for using WTO rules (e.g. on S&D for LDCs), WTO safeguard clauses and WTO “exceptions” for actively promoting mutually coherent interpretations of WTO law and human rights so as to enhance ‘human development.’ The UNHCHR criticizes the lack of guidance and of monitoring mechanisms in WTO law for ensuring the taking into account of human rights. The reports do, however, not identify concrete conflicts between human rights and WTO law. In view of the citizen-oriented functions of WTO rules for enabling citizens to increase their welfare through mutually beneficial trade transactions, for enhancing the domestic use of efficient (e.g. non-discriminatory) policy instruments, and for protecting the priority of non-economic values (as reflected in the numerous ‘public interest clauses’ in WTO law), conflicts between the flexible WTO rules and human rights appear unlikely on the level of international principles.

Even if the WTO objective of “sustainable development” and the numerous WTO ‘exceptions’ appear to offer enough policy space for taking into account human rights obligations of WTO Members, WTO law in no way ensures that human rights obligations are actually taken into account in the legislative and administrative implementation of WTO rules and in their judicial protection. WTO diplomats and WTO judges have a longstanding preference for avoiding human rights discourse in WTO bodies. More than 35 WTO Members (including the USA) have not ratified the UN Covenant on Economic, Social and Cultural Rights. In view of the narrow limitation of the ‘terms of reference’ of WTO dispute settlement bodies to the ‘covered WTO agreements’, it remains controversial in WTO law whether – in WTO dispute settlement proceedings – the parties to the dispute may invoke human rights law not only as relevant context for the interpretation of WTO rules, but also directly for justifying departures from their WTO obligations (e.g. in the case of US trade sanctions in response to human rights violations in Myanmar).

⁵⁹ UN document E/CN.4/2002/54, para. 33.

V. Constitutionalism and Theories of Justice: Are they Relevant for Clarifying the Development and Human Rights Dimensions of WTO Principles and Rules?

As international human rights prescribe only minimum standards for legal protection of individual and democratic self-development, many judges of international human rights courts (like the ECtHR and the Inter-American Court of Human Rights) are reluctant to describe their judicial function as ‘constitutional’; they rather emphasize the need for respect, by international judges, of the ‘margin of appreciation’ of national constitutional democracies regarding their respective ‘balancing’ of human rights and other constitutional rules and democratic legislation. For, in most constitutional democracies as well as in the EU, constitutional law provides for more comprehensive guarantees of ‘fundamental rights’ and democratic governance than they are provided for in worldwide UN human rights instruments.

By contrast, the WTO guarantees of freedom, rule of law and non-discriminatory conditions of competition tend to go far beyond national legal guarantees of economic self-governance of free citizens on the basis of private law and national market economies. While WTO Members define WTO law from the perspective of the rulers as being ‘Member-driven’, the universal human rights obligations of all WTO Members argue for emphasizing the citizen-oriented ‘constitutional functions’ of many WTO guarantees of freedom, non-discrimination and rule of law, including ‘the dispute settlement system of the WTO (as) a central element in providing security and predictability to the multilateral trading system’ (Article 3 WTO Dispute Settlement Understanding = DSU). Of course, none of the supporters of “international constitutionalism” claims that international “treaty constitutions” constituting and limiting international rule-making, executive and judicial powers for the collective supply of international public goods (like a rules-based world market) are, or should become, constitutions in the same sense as national constitutions. In line with the diverse national constitutional traditions, constitutional approaches to multilevel governance differ inevitably. For instance, the notion of a ‘WTO constitution’ is increasingly used in view of

- (a) the comprehensive rule-making, executive and (quasi-) judicial powers of WTO institutions;⁶⁰
- (b) the “constitutionalization” of WTO law resulting from the jurisprudence of the WTO dispute settlement bodies;⁶¹
- (c) the domestic “constitutional functions” of GATT/WTO rules, for example, for protecting constitutional principles (like freedom, non-discrimination, rule of law, proportionality of government restrictions) and domestic democracy (for example, by limiting the power of protectionist interest groups) for the benefit of transnational cooperation among free citizens;⁶²

⁶⁰ JACKSON (1998).

⁶¹ CASS (2005).

⁶² PETERSMANN (1991); MCGINNIS & MOVSESIAN (2000); GERHART, (2003), 1-75, contrasts the ‘inward-looking, economic vision of the WTO’ in helping member countries addressing internal

- (d) the international ‘constitutional functions’ of WTO rules, for example, for the promotion of ‘international participatory democracy’ (e.g., by holding governments internationally accountable for the ‘external effects’ of their national trade policies, by enabling countries to participate in the policy-making of other countries)⁶³ and of the enhancement of ‘jurisdictional competition among nation states’⁶⁴ and ‘the allocation of authority between constitutions’;⁶⁵ or
- (e) in view of the necessity of ‘constitutional approaches’ for a proper understanding of the law of comprehensive international organizations which use the term ‘constitution’, as well as constitutional methods and principles, for more than 80 years (see, e.g., the ‘Constitutions’ – *sic* - establishing the ILO, WHO, FAO and UNESCO).⁶⁶

All these constitutional approaches agree that the WTO should not be simply viewed in narrow *economic* terms (for example, as an institution promoting economic welfare through trade liberalization). WTO rules and policies also pursue *political* as well as *legal* objectives that are no less important than the economic benefits from liberal trade, as illustrated by the guarantees of private ‘rights to import and export’, of private access to independent courts and rule of law in the 2001 WTO Protocol on the accession of China and the 2006 WTO Protocol on the accession of Vietnam. The introduction of rule of law in China and of a system of independent trade courts (supervised by a chamber of the Chinese Supreme Court specialized in WTO law) illustrates that the WTO Agreement is one of the most revolutionary ‘transformation agreements’ in the history of international law. What is the relevance of such ‘constitutional dimensions’ of WTO law for defining the development objectives of national and international economic law and jurisprudence?

The American legal philosopher R. Dworkin begins his recent book on *Justice in Robes* with the story of United States' (US) Supreme Court Justice Oliver Wendell Holmes who, on his way to the court, was greeted by another lawyer: ‘Do justice, Justice!’ Holmes replied: ‘That’s not my job.’⁶⁷ Similarly, WTO Members emphasize the limited terms of reference of WTO dispute settlement panels ‘to examine, in the light of the relevant provisions in (... the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)’ (Article 7 DSU). As WTO law includes no explicit reference to justice and human rights: Should WTO Members, WTO judges and domestic courts apply WTO law without regard to justice, just as economists perceive trade law as a mere instrument for promoting economic welfare? Does the separation of the judicial power from the legislative and executive powers require that, as postulated by Montesquieu,

political failures with the ‘external, participatory vision of the WTO’ helping WTO members to address concerns raised by policy decisions in other countries.

⁶³ See, for example, GERHART (2004).

⁶⁴ See MCGINNIS (2004).

⁶⁵ TRACHTMAN (2006).

⁶⁶ See, for example, E.U.Petersmann, Multilevel Trade Governance Requires Multilevel Constitutionalism, in: JOERGES/PETERSMANN (2006).

⁶⁷ DWORKIN (2006), chapter 1.

decisions of international and national courts must always conform to the exact letter of the law as understood by the legislator? Does the frequent emphasis by governments on the ‘member-driven’ character of WTO law, and the frequent recourse to the *Oxford English Dictionary* in the case-law of WTO dispute settlement panels and the Appellate Body, confirm the view that, also in WTO law, judges must apply the positive law literally without regard to whether the applicable rules lead to a just resolution of the dispute?

1. WTO Law Must be Interpreted in Conformity with ‘Principles of Justice’

Law, according to Lon Fuller, orders social life not only by ‘subjecting human conduct to the governance of rules’; law also aims at establishing a *just* order and procedures for the *fair* resolution of disputes.⁶⁸ This understanding of law as a struggle for just rules and fair procedures goes back to legal philosophy in Greek antiquity. Its application to international relations remains contested by power-oriented, ‘realist’ politicians and lobbyists benefiting from foreign policy discretion under state-centred rules of international law. Yet, all UN member states have committed themselves in the UN Charter ‘to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’ (Preamble). They have defined the purpose of the UN as, *inter alia*, ‘to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace’ (Article 1, para.1 UN Charter). All UN member states have also accepted membership in the International Court of Justice (ICJ) as ‘the principal judicial organ’ of the UN for the peaceful settlement of international disputes (Article 92 UN Charter). Just as individual rights of ‘access to justice’ (e.g. in terms of access to courts, fair trial, effective remedies, legal aid to the needy) are recognized in many constitutional and human rights instruments, so have international courts progressively developed procedural and substantive principles of justice in their judicial interpretation and application of international law rules.⁶⁹

In the Vienna Convention on the Law of Treaties (VCLT), most WTO Members have explicitly affirmed ‘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’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’ (Preamble VCLT). WTO law and its Dispute Settlement Understanding (DSU) regulate ‘the dispute settlement system of the WTO’ (Article 3) as a multilevel system with compulsory jurisdiction for (quasi)judicial settlement of disputes at intergovernmental and domestic levels. Yet, hardly any of the more than 220 WTO dispute settlement reports has referred to ‘principles of justice’; most domestic courts, also in the EC and the United States, tend to ignore WTO obligations and WTO dispute settlement rulings. This incoherence in the multilevel ‘judicial governance’ of international trade disputes runs counter not only to the basic idea of rule of law and of rules-based, democratic governance, but also to the underlying economic rationale of the WTO objective of ‘providing security and predictability to the multilateral trading

⁶⁸ FULLER (1969), at 96.

⁶⁹ Cf. FRANCK (1995).

system' (Article 3 DSU): For, the *economic value* of investments, trade transactions and consumer welfare risks being reduced if producers, investors, traders and consumers can no longer rely on legal security. Since Adam Smith's explanation of the *Wealth of Nations* as being dependent on their respective laws and institutions, lack of rule of law is widely recognized as one of the principal causes of corruption and waste of scarce resources; the Latin-American economist de Soto, for example, explains much of the economic poverty in Latin America by inadequate protection of property rights, which operates as disincentive for borrowing, investments and enjoyment of human rights.⁷⁰ The WTO's neglect of the legal protection of individual rights (other than intellectual property rights and the "rights to trade" protected in the 2001 WTO Protocol on the Accession of China) reflects the inefficient and non-democratic nature of "member-driven WTO governance" focusing on discretionary trade policy powers of governments rather than on legal empowerment of private producers, investors, traders and consumers.

2. Public Discourse about the Justice of WTO Rules May Contribute to Rendering WTO Rules More Effective and More Democratic

Rules that are not perceived as just are unlikely to remain effective over time. The rhetoric of protectionist lobbies calling for import protection against 'unfair trade', the power politics driving reciprocal bargaining in the WTO, and the pervasive poverty in many less-developed WTO countries have contributed to widespread doubts about the justice of WTO rules.⁷¹ Constitutional democracies and the 2004 Treaty Establishing a Constitution for Europe emphasize the need for supplementing 'representative democracy' by 'participatory democracy' and 'deliberative democracy' so as to promote self-government based on rules to which rational citizens can consent. The WTO Agreement explicitly recognizes, in its Preamble, 'basic principles and objectives ... underlying this multilateral trading system.' Some of these principles are specified in WTO provisions, for instance in the GATT (e.g. Articles III.2, VII.1, X.3, XIII.5, XX(j), XXIX.6, XXXVI.9) and other WTO agreements on trade in goods (e.g. Article 7.1 Agreement on Customs Valuation, Article 9 Agreement on Rules of Origin), services (e.g. Article X GATS) and trade-related intellectual property rights (e.g. in the Preamble of the TRIPS Agreement, Articles 8 and 62.4). The WTO requirement of interpreting WTO law "in accordance with customary rules of interpretation of public international law" (Article 3.2 DSU) refers not only to *formal* interpretative principles (such as *lex specialis*, *lex posterior*, *lex superior*) aimed at mutually coherent interpretations, based on legal presumptions of lawful conduct of states, the systemic character of international law, and the mutual coherence of international rules and principles. The customary law requirement (as recognized in the Preamble to the Vienna Convention on the Law of Treaties) of interpreting treaties 'in conformity with principles of justice' also call for clarifying the *substantive principles of justice* underlying WTO law, like freedom, non-discrimination, rule of law, independent third-party adjudication and preferential treatment of LDCs. The basic WTO principle of progressive liberalization and legal protection of liberal trade can be justified by all 'liberal' (i.e. liberty-based) theories of justice, such as

⁷⁰ H.DE SOTO (2000).

⁷¹ Cf. BEVIGLIA-ZAMPETTI (2006).

- utilitarian theories defining justice in terms of maximum satisfaction of individual preferences and consumer welfare;
- libertarian theories focusing on protection of individual liberty and property rights;
- egalitarian concepts defining justice more broadly in terms of equal human rights and democratic consent; and
- international theories of justice based on sovereign equality and effective empowerment of states to increase their national welfare through liberal trade.⁷²

Hence, the diversity of libertarian, egalitarian or utilitarian value preferences should not affect recognition that the WTO guarantees of freedom, non-discrimination and rule of law – by enhancing individual liberty, non-discriminatory treatment, economic welfare and poverty reduction across frontiers - reflect, albeit imperfectly, basic principles of justice. In terms of the Aristotelian distinction between ‘general principles of justice’ (like liberty, equality, fair procedures, promotion of general consumer welfare) and particular principles of justice requiring adjustments depending on particular circumstances⁷³, WTO rule-making and WTO dispute settlement procedures can also contribute to ‘corrective justice’ and ‘reciprocal justice’, just as the special, differential and non-reciprocal treatment of less-developed WTO Members in numerous WTO provisions may contribute to ‘distributive justice.’ Engaging in public discourse on the justice of WTO rules and rule-making will reduce public distrust in the WTO and contribute to clarifying the “principles underlying this trading system.”

3. Universal Human Rights as ‘Principles of Justice’ and ‘Balancing Principles’?

As every WTO Member has accepted obligations under international law to protect and promote human rights, the WTO system, like any domestic legal and political system, will be increasingly evaluated (e.g. by civil society) from the perspective of respect for human rights. It seems unlikely that the intergovernmental WTO Councils and the WTO Secretariat will respond to the UN proposals to adopt a ‘human rights approach to trade.’ In view of the insertion of human rights clauses into ever more regional trade agreements among WTO Members, it may, however, only be a matter of time until WTO dispute settlement bodies will be requested by complainants or defendants to interpret WTO rules with due regard to the human rights obligations of the WTO Members concerned. Such human rights clauses have rarely been invoked, so far, and call for *non-discriminatory* regulations (e.g. of health risks, supply of public services) rather than for discriminatory trade restrictions. The case-law of the European courts confirms that concerns of trade diplomats – that human rights arguments may render trade disputes less predictable – are unwarranted. Over the past 50 years, there have been only less than a dozen of EC Court judgments reviewing trade restrictions in the light of human rights and, generally, deciding in favour of interpretations of trade rules in conformity with the human rights obligations under national constitutions and the ECHR. The universal recognition of human rights illustrates that every legal system rests not only on rules but also on general principles promoting the overall coherence of

⁷² For overviews of these theories see: GARCIA (2003); PETERSMANN (2003); KAPSTEIN (2006).

⁷³ Cf. ARISTOTLE, *Nicomachean Ethics* (ed. by M.Ostwald, 1999), book five.

rules. In examining the potential impact of human rights as “relevant context” for interpreting WTO rules, WTO dispute settlement bodies should distinguish the following three different kinds of trade regulations:⁷⁴

- International trade measures for promotion of human rights *abroad* must respect the ‘sovereign equality of states’, the legitimate diversity of their national human rights laws, and the often harmful effects of trade restrictions on citizen welfare and the enjoyment of human rights. The increasing recourse to UN human rights law as ‘objective standard’ for differentiating trade preferences for LDCs may entail future WTO disputes on whether such trade differentiation can be justified in terms of human rights.
- WTO disputes over import restrictions for protection of human rights *at home* - for instance, over the EC’s import restrictions on hormone-fed beef, asbestos and the US restrictions on gambling services - illustrate that WTO rules grant importing countries broad regulatory discretion regarding restrictions of imported goods with potential risks for human welfare and human rights. As UN human rights conventions prescribe minimum standards that do not prevent WTO Members from accepting higher human rights standards in regional and national human rights laws, the WTO-consistency of import restrictions designed to protect the human rights of domestic citizens may be legitimately influenced by arguments based on *regional* and *national* human rights rather than only UN human rights law. WTO law recognizes that ‘public morality’ and ‘public order’ may legitimately vary from one community to the other.⁷⁵ Hence, WTO dispute settlement bodies have to respect the legitimate ‘margin of appreciation’ of the national authorities concerned to define ‘public morality’, ‘public order’ and human rights in conformity with national and regional democratic preferences.
- Non-discriminatory WTO rules regulating intellectual property rights, technical and health standards, competition, environmental and investment rules, public services, private access to financial assistance in the context of trade-facilitation, and the administration of a WTO Register for private geographical indications may give rise to legal challenges whether such WTO rules are themselves consistent with national constitutional rights. WTO rules and WTO dispute settlement proceedings should respect the legitimate diversity of ‘balancing principles’ which national and international courts (like the EC Court and the ECtHR) apply in examining whether the regulation of economic freedoms and other economic rights are consistent with human rights. The balancing principles may differ in case of WTO obligations protecting *private rights* of market participants, such as ‘rights to trade’, procedural rights, property rights and judicial remedies.

⁷⁴ For a detailed explanation see: E.U.Petersmann, WTO Dispute Settlement Practice 1995-2005: Lessons from the Past and Future Challenges, in: Y.Taniguchi *et alii* (eds), *The WTO at Ten: Dispute Settlement, Multilateral Negotiations and Regional Integration* (2006), at 38-94.

⁷⁵ See e.g. the footnote to GATS Article XIV(a) which states: ‘The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.’

VI. A ‘Human Rights Approach’ to the Doha Development Round Agreements?

From constitutional and economic perspectives, the main causes of the unnecessary poverty in so many WTO member countries lie at the *national* level of government policies and economic regulation. The state-centred focus of international law and the lack of effective safeguards for the protection of human rights contribute to the fact that so many governments abuse trade policy powers for their protectionist self-interests rather than for the promotion of consumer welfare, general citizen interests and poverty reduction. The ‘member-driven’ Doha Round negotiations focus more on harmful trade policy practices in developed countries (like agricultural and cotton subsidies) than on limiting ‘policy space’ in LDCs. A human rights approach should design trade liberalization agreements as instruments for promoting consumer welfare and protecting economic and social rights, notably in non-democratic and poor countries without effective human rights guarantees; for, governments calling for distributive justice in the WTO should prove their own commitment to justice as defined by human rights.

1. Democratic Trade Governance Must Serve the Interest of All Citizens and their Human Rights

The human right to democratic self-government requires, *inter alia*, that governments should publicly explain to their citizens the contribution of their economic policies to the promotion of human welfare and human rights. If LDCs claim preferential treatment in the WTO, they should meet their burden of proving (e.g. in their periodical reports for the WTO ‘Trade Policy Review Mechanism’) how their trade restrictions and other trade policy measures contribute to the human development of their citizens. Development and human rights bodies should assist in such ‘human rights assessments’ and democratic review of national trade policy measures. Such promotion of ‘deliberative democracy’ could contribute to reviewing welfare-reducing trade restrictions and the alternative use of more efficient policy instruments, including development-oriented reforms of WTO rules empowering not only producers, traders and investors but also consumers and workers exposed to the adjustment costs of import competition. As all future WTO negotiations depend on consensus by LDCs and by democratic parliaments, the necessary ‘development focus’ of future agreements is more likely to be approved if ‘development commitments’ focus more credibly on trade-related adjustment problems and protection of citizen interests and human rights in LDCs.

2. Reciprocal Justice Must Take into Account Social Adjustment Capacities in LDCs

Trade liberalization tends to promote the quantity, quality and diversity of goods and services, competition and the efficient use of scarce resources. A general exemption of LDCs from the WTO’s reciprocity principle could therefore impede economic development in LDCs. Non-reciprocity should depend on the adjustment problems and adjustment capabilities in LDCs. As the UN defines the 49 LLDCs by their low GDP, their ‘human resource weakness’ and ‘economic vulnerability’, the 32 WTO Members with LLDC-status deserve exemption from reciprocal liberalization commitments. The

EC's offer of a 'Round for Free' for 58 additional LDCs from Africa, the Caribbean and the Pacific was justified on similar grounds (e.g. their 'small, weak and vulnerable economies'). The 'upper income developing countries' cooperating in the 'G20' group have made their market access commitments subject to various conditions aimed at enhancing their adjustment capabilities, such as additional export opportunities in agriculture, protection of food security and rural development in LDCs, and liberalization of international movements of natural services suppliers. Since more than 70% of poor people in LDCs live in rural areas, LDCs legitimately insist that their farmers must be protected against the trade distortions caused by the high agricultural protectionism in developed countries.

3. Distributive Justice Requires Special and Differential Treatment (SDT) and 'Aid for Trade'

Many of the 'small, weak and vulnerable' WTO Members cooperating in the 'G90' group emphasize the need for SDT for dealing with their special development challenges such as preference erosion, dependence on commodities and food imports, rural development, food security and supply side limitations. Increasing their export capabilities through 'aid for trade' and non-reciprocal liberalization of import barriers (e.g. for cotton) in developed countries has been recognized as a crucial component of a future 'Doha bargain.'⁷⁶ The 2001 Doha Declaration further recognizes that 'technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system', and 'sustainably financed technical assistance and capacity building programmes have important roles to play.'⁷⁷ The WTO General Council's 'Framework Agreement' of July 2004 called more specifically for 'developing countries and in particular least developed countries to be provided with enhanced Trade-Related Technical Assistance and capacity building to increase their effective participation in the negotiations, to facilitate their implementation of WTO rules and to enable them to adjust and diversify their economies.'⁷⁸ Yet, many of the 88 proposals by LDCs for making SDT provisions in the WTO Agreements more "precise, mandatory and operational" have remained controversial because their focus on 'policy space' left their contribution to promotion of human development, human rights and welfare-increasing trade for the benefit of citizens in LDCs doubtful.

4. Corrective Justice Calls for Empowering and Protecting LDCs and their Citizens in the WTO Dispute Settlement System

The compulsory WTO dispute settlement system has transformed the 'GATT 1947 bicycle', driven by bi-level trade negotiations at home as well as at intergovernmental levels, into a 'WTO tricycle' driven also by the additional wheel of ever more WTO dispute settlement rulings clarifying and progressively developing WTO rights and obligations. Over the past years, LDCs have become the main users of the WTO dispute settlement system. Notably in the area of agricultural subsidies (such as EC subsidies

⁷⁶ Cf. ABC of Aid for Trade (Cuts International, 2007).

⁷⁷ WT/MIN801/DEC/W/1, paras. 2, 38.

⁷⁸ WT/L/579.

for sugar, US subsidies for cotton), they have successfully used the WTO dispute settlement system not only for enforcing their rights, but also for improving their bargaining position in the Doha Round negotiations.⁷⁹

Just as protection of human rights depends on procedural guarantees of ‘access to justice’ (in terms of both access to courts and effective remedies, including legal aid for the needy), so does the contribution of WTO law to ‘sustainable development’ in LDCs also depend on effective access of LDCs to the WTO dispute settlement system. WTO law promotes this access by two different kinds of SDT provisions: Provisions specifying how generally applicable principles should be implemented in cases involving LDCs (e.g. WTO provisions on composition of dispute settlement panels, determination of a ‘reasonable period’ for implementing dispute settlement findings), like WTO provisions compensating the lack of financial and legal resources of LDCs in WTO dispute settlement proceedings (e.g. Article 27.2 DSU, the Advisory Center for WTO Law), have proven effective and need to be further extended. However, procedural privileges exclusively available for LDCs only (cf. Articles 3.12, 21.2, 21.7 and 8 DSU) have been invoked only reluctantly and with limited success.⁸⁰

Effective use of the WTO dispute settlement system by LDCs is closely linked to effective legal and judicial remedies at national levels, as illustrated by the private rights to initiate WTO dispute settlement proceedings pursuant to Section 301 of the US Trade Act and the corresponding EC Trade Barriers Regulation, which have enhanced “private-public partnerships” and available “legal resources” in WTO litigation. Proposals for introducing special WTO remedies for LDCs (such as financial damages and attorney’s fee awards) remain controversial. The still limited number of LDCs actively using the dispute settlement panel, appellate and arbitration procedures of the WTO illustrates the need for additional financial, technical and legal assistance and “capacity building” for the benefit of LDCs, which often lack a citizen-driven, transparent rule-of-law system limiting domestic and foreign power politics.

Conclusion:

‘Sustainable Development’ as Individual Empowerment and Protection of Human Rights

Similar to the focus of human rights on empowering individuals and people and protecting their rights against domestic abuses by their own governments, WTO law should focus on empowering private economic actors and consumers by protecting their rights against welfare-reducing abuses of trade policy powers at national and international levels. In the 2001 Doha Declaration, WTO Members ‘recognize(d) the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates.’ This contribution has suggested that

⁷⁹ See: Petersmann, Strategic Use of WTO Dispute Settlement Proceedings for Advancing WTO Negotiations on Agriculture, in: PETERSMANN (2005).

⁸⁰ See: F.Roessler, Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System, in: ORTINO/PETERSMANN (2004).

these citizen interests - in order to reduce poverty and the welfare-reducing protectionism of governments more effectively - must be legally protected more effectively by defining the WTO objective of 'sustainable development' in terms of human rights and by empowering 'WTO citizens' as legal subjects and democratic owners of the WTO legal system. This focus on empowerment of individuals is in line with the long emphasis by economists – from *Adam Smith* via *Friedrich Hayek* up to Nobel Prize-winning economist *Amartya Sen* – that market economies and economic welfare are mere instruments for enabling and promoting individual freedom as the ultimate goal of economic life and the most efficient means of realizing general welfare. It also reflects the universal recognition - in UN human rights conventions - of 'the inherent dignity and of the equal and inalienable rights of all members of the human family (as) the foundation of freedom, justice and peace in the world'. As emphasized by moral and constitutional theories of justice, national and international law are mere instruments for promoting human freedom as 'first principle of justice' and moral 'golden rule.'⁸¹ As governments and WTO dispute settlement bodies are legally required to interpret international treaties 'in conformity with principles of justice' as defined also by universal human rights, WTO Members should recognize for the world trading system what the World Bank has long since recognized for its development assistance: 'Sustainable development is impossible without human rights', just as 'advancement of an interconnected set of human rights is impossible without development'⁸² and without a mutually beneficial world trading system protecting individual rights to produce, invest, trade and consume on the basis of rule of law and respect for human rights. This does not mean transforming economic organizations into human rights organizations. Yet, European economic integration demonstrates that open markets and 'integration law' can, and should, reinforce promotion of freedom, rule of law and peaceful international cooperation for the benefit of citizens.

⁸¹ On KANT's moral "categorical imperatives" for acting in accordance with universal laws ('Act only in accordance with that maxim through which you can at the same time will that it become a universal law'), for respecting human dignity by treating individuals and humanity as ends in themselves ('So act that you use humanity, whether in your own person or that of another, always at the same time as an end, never merely as a means'), and for respecting individual autonomy ('the idea of the will of every rational being as a will giving universal law') and individual right ('Any action is right if it can coexist with everyone's freedom according to a universal law'), and on KANT's theory of the antagonistic human nature promoting market competition and national and international constitutional guarantees of equal freedoms, see e.g. WOOD (1999); PETERSMANN (1999a).

⁸² Development and Human Rights. The Role of the World Bank (World Bank 1998), at 2.

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