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International dispute settlement and the position of
individuals under EU and international law

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**INTERNATIONAL DISPUTE SETTLEMENT AND THE POSITION OF
INDIVIDUALS UNDER EU AND INTERNATIONAL LAW**

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Abstract

This contribution argues that the EU's 'cosmopolitan foreign policy constitution' (e.g. based on Articles 2,3 and 21 TEU and the EU Charter of Fundamental Rights) and the universal recognition of human rights require re-interpreting the 'rules of recognition' of EU and international law by 'balancing' *state-centered* rules and principles with the human and constitutional rights of EU citizens and the *person-centered* 'principles of justice' underlying EU constitutional law and multilevel human rights law. As EU law recognizes citizens as 'agents of justice', constituent powers and 'democratic principals' entitled to constitutional rights and 'strict observance of international law' (Article 3 TEU) also in the EU external relations, the transnational constitutional rights and multilevel judicial remedies protected by EU law must be construed as entitling citizens to transnational rule of law and corresponding duties of EU institutions to protect citizens and their rights also in international dispute settlement procedures (e.g. under UN, WTO, regional trade and investment agreements). The EU constitutional principles of conferral, subsidiarity, proportionality and access to justice for multilevel judicial protection of equal freedoms and 'strict observance of international law' are relevant context for interpreting EU obligations under UN, WTO and other treaty and dispute settlement systems for the benefit of EU citizens that must hold the limited 'constituted powers' of multilevel governance institutions more legally, democratically and judicially accountable in order to protect transnational public goods and rule of law inside the EU.

Keywords

cosmopolitan rights; human rights; multilevel governance; public goods; republican constitutionalism.

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Introduction: individuals and international dispute settlement

According to Article 2 TEU, the ‘Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’. Hence, national and EU citizens are recognized in the EU as legal subjects, constituent powers and ‘democratic principals’ vis-à-vis all constituted, limited government powers. Also ‘in its relations with the wider world, the Union shall uphold and promote its values... and contribute to the protection of its citizens’ through, *inter alia*, ‘strict observance and the development of international law’ in order to protect international public goods (PGs) as specified in Article 3 TEU. This emphasis on ‘freedom’ and multilevel protection of ‘rule of law’ reflects the insight that equal freedoms of citizens - as ‘first principle of justice’ according to Kantian and Rawlsian constitutional theories - cannot remain effective inside democracies without multilevel constitutional protection of equal freedoms also in transnational and international human interactions; for instance, discriminatory import restrictions in violation of WTO rules are bound to discriminate also between domestic importers and consumers by distorting market access, prices and market shares. Hence, it is because ‘(t)he problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved’¹, that the ‘Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity’ (Article 21 TEU). Common market freedoms and the ‘liberty rights’ protected in the EU Charter of Fundamental Rights (EUCFR) permeate not only internal EU law. The EU’s customs union obligations under WTO law (e.g. Article XXIV) and EU law (Articles 30 ff TFEU), the corresponding transnational rights of citizens (e.g. the ‘freedom to conduct a business in accordance with Union law’ pursuant to Article 16 EUCFR), and the constitutional commitments to ‘protection of its citizens’ and ‘free and fair trade’ in external relations (Articles 3 TEU) also protect freedom of EU citizens beyond EU borders, for instance by prohibiting discriminatory non-tariff trade barriers violating GATT/WTO obligations of the EU and its member states.

Empirical evidence confirms that the successful internal development of the EU (e.g. its common market law) was largely due to its multilevel judicial protection of fundamental freedoms, rule of law and democratic governance. Also the EU’s ‘foreign policy constitution’ – as laid down, *inter alia*, in Articles 2, 3, 21 TEU and in the EUCFR - requires multilevel judicial protection of equal freedoms, ‘strict observance of international law’ and democratic governance so as to realize the explicit EU objective ‘to advance in the wider world: democracy, the rule of law ... and ... human rights and fundamental freedoms’.² Just as constitutional theories of justice and EU law recognize citizens as ‘agents of justice’ whose ‘inalienable rights’ and ‘constitutional contracts’ constitute limited government powers based on principles of ‘conferral’, ‘subsidiarity’ and ‘proportionality’ (as recognized in Article 5 TEU), the universal recognition of human rights by all UN member states likewise requires interpreting international treaties and settling related disputes ‘in conformity with the principles of justice’, including also ‘human rights and fundamental freedoms for all’, as explicitly recognized in the 1969 Vienna Convention on the Law of Treaties (cf. its Preamble and Article 31 VCLT).

¹ I.Kant, Idea for a Universal History with a Cosmopolitan Purpose, in: *I. Kant’s Political Writings* (ed. by H. Reiss, CUP 1991), 41, at 47.

² Cf. E.U.Petersmann, The Foreign Policy Constitution of the European Union: A Kantian Perspective, in: Ulrich Immenga *et alii* (eds), *Festschrift für Ernst-Joachim Mestmäcker* (Baden-Baden: Nomos, 1996), 433 – 447; *idem*, Integrating Human Rights into EU Trade Relations – The EU as a Global Role Model? in: T.Takacs/A.Ott/A.Dimopoulos (eds), *Linking Trade and Non-Commercial Interests: The EU as a Global Role Model?* (CLEER Working Papers 2013/4), 15-26.

The EU participates in international dispute settlement proceedings mainly in the context of UN agreements (e.g. the International Tribunal for the Law of the Sea), WTO agreements (the WTO dispute settlement system) and EU trade and investment agreements (e.g. third party intervention by the EU in investor-state arbitration). All these UN, WTO, trade and investment agreements are approved by national and European parliaments so as to protect transnational transactions (e.g. trade, investments, shipping) of EU citizens, for instance by providing ‘security and predictability to the multilateral trading system’ (Article 3 DSU), reducing private transaction costs, and protecting individual rights and market access in the global division of labor. The EU Trade Barriers Regulation offers legal procedures empowering EU citizens to request diplomatic and legal protection by the EU vis-à-vis ‘illicit trade barriers’ by third countries. A large part of the more than 600 complaints submitted by GATT/WTO members continues to be triggered indirectly by requests from industries on the basis of domestic legal safeguards, as reflected in the names of many GATT/WTO disputes (e.g. ‘Kodak/Fuji’, ‘Havana Club’, ‘EU bananas’, ‘Boeing/Airbus aircraft disputes’, ‘GMO disputes’). More importantly, the ‘dispute settlement system of the WTO’ (Article 3 DSU) prescribes and protects judicial remedies also for individuals and non-governmental actors in domestic legal systems, for instance in the field of GATT (Article X), the WTO Antidumping Agreement (Article 13), the WTO Agreement on Customs Valuation (Article 11), the Agreement on Pre-shipment Inspection (Article 4), the Agreement on Subsidies and Countervailing Measures (Article 23), the General Agreement on Trade in Services (Article VI GATS), the Agreement on Trade-Related Intellectual Property Rights (Articles 41-50, 59 TRIPS) and the Agreement on Government Procurement (Article XX). Violations of international trade, investment, transport and communication rules often affect the equal freedoms and welfare of EU citizens – for instance, their ‘freedom to conduct a business in accordance with Union law and national laws’ (Article 16 EUCFR) and their ‘right to own, use, dispose of and bequeath his or her lawfully acquired possessions’ (Article 17 EUCFR). Hence, judicial protection of ‘consistent interpretations’ of multilevel economic regulations and individual rights to invoke in domestic courts international rules protecting equal freedoms, non-discrimination and rule of law have been among the most successful EU principles for promoting rule of law inside and beyond the EU. Inside the European Economic Area (EEA) and in other EU free trade agreements (FTAs), the ‘direct applicability’ of free trade rules entailed that *international* trade disputes among states have rarely arisen in the EU Court of Justice (CJEU) and EFTA Court due to their avoidance through decentralized, de-politicized rule-enforcement by self-interested citizens. ‘Direct applicability’ of WTO rules in domestic legal systems (as required by Article XX of the WTO Agreement on Government Procurement), ‘consistent interpretation’ of WTO rules, or their ‘indirect applicability’ by domestic courts (as required by the above-mentioned WTO guarantees of judicial remedies and by Article XIV:4 WTO Agreement on good faith-implementation of WTO obligations) could similarly promote decentralized implementation of WTO rules by economic operators and domestic institutions, thereby preventing and de-politicizing power-oriented dispute settlement proceeding with third WTO members.³ More importantly, rights-based participation of citizens in providing PGs also promotes ‘participatory’ and ‘deliberative democracy’ and ‘republican virtues’; by empowering citizens to challenge abuses of public and private powers, it helps to ‘constitutionalize’ and ‘socialize’ law, e.g. by empowering citizens as ‘republican guardians’ to transform the ‘constitutional law in the books’ into ‘law in action’ and social reality.

If Articles 2, 3, 21 TEU and the EUCFR justify legal presumptions that EU citizens are entitled to protection of their equal freedoms through ‘strict observance of international law’, including international dispute settlement (= IDS) obligations of the EU and judicial remedies of ‘everyone’ (Article 47 EUCFR) against violations of individual rights: Can it be justified that EU institutions assert freedoms to violate international treaty and dispute settlement obligations which national and European parliaments approved for the benefit of EU citizens without conferring any powers on EU institutions to ignore ‘strict observance of international law’? The more UN and WTO institutions cooperate with

³ Cf. E.U.Petersmann, *The GATT/WTO Dispute Settlement System*, London: Kluwer 1997, at 233 ff; C.Heidfeld, *Die dezentrale Durchsetzung des WTO-Rechts in der EU*, Baden-Baden: Nomos 2012.

non-governmental organizations (NGOs), national parliamentarians, business, the media and civil society in multilevel governance of PGs because UN and WTO ‘decisions affect the lives of ordinary men and women all over the world’⁴ and collective protection of global PGs depends on ‘public-private partnerships’ and on governmental cooperation with ‘intermediaries’ (e.g. based on limited delegation of powers, co-optation and ‘orchestration’ of joint projects): Can it be justified that EU trade politicians, since 2006, systematically exclude individual rights and effective judicial remedies of citizens also in FTAs concluded by the EU?

Why does the EU fail to protect individual rights in the multilevel WTO dispute settlement system?

The illegal EU import restrictions on bananas from 1992-2012 - in spite of 15 GATT and WTO dispute settlement findings confirming their inconsistency with the GATT/WTO legal obligations of the EU -, like the continuing EU import restrictions on biotech products and hormone-fed beef in violation of repeated WTO dispute settlement findings, illustrate the political weakness of EU institutions violating their international and EU obligations of 'strict observance of international law' in response to interest-group pressures for illegal 'protection rents' (e.g. annually about 5 billion dollars due to price increases for bananas) and for disregard for science-based risk-assessment obligations (e.g. for GMOs and growth hormones for beef). The EU's return to WTO-consistent banana trading policies by the end of 2012 further confirmed that such trade-distorting, illegal restrictions of EU traders and consumers were neither consistent with 'the principle of proportionality' (Article 5 TEU) nor 'necessary ... to protect the rights and freedoms of others' (Article 52 EUCFR). In the more than 60 complaints by adversely affected EU traders seeking judicial remedies in national courts and in the EU Court (CJEU) against the illegal banana trade restrictions and their redistribution of market shares and 'protection rents' for the benefit of EU importers of bananas from former colonies of some EU member states, the CJEU accepted the EU Commission's claim of 'freedom of maneuver'⁵ to violate international treaty obligations; the CJEU also denies judicial remedies for third EU citizens if they were adversely affected by lawful reprisals from WTO trading partners and requested compensation for the injury caused to EU 'violation victims' and 'retaliation victims' in response to arbitrary EU violations of WTO obligations.⁶ The CJEU extended its refusal to review the legality of EU acts in the light of the EU's WTO obligations also to other multilateral treaty and dispute settlement obligations of the EU (e.g. under the Law of the Sea Convention and the International Civil Aviation Organization), thereby confirming the increasing reluctance by the CJEU vis-à-vis accepting the jurisdiction of other international courts as legal limitation on the jurisprudence of the CJEU.⁷

⁴ WTO Director-General M. Moore in his opening speech to the first ‘Public Forum’ inside the WTO, which continues to be annually organized in the WTO since 2001 with participation of thousands of civil society representatives and NGOs; cf. *The WTO at 20: Challenges and Achievements*, WTO Geneva : 2015, at 81.

⁵ The term ‘freedom of manoeuvre’ continues to be used by both the political EU institutions and the CJEU (e.g. in Joined cases C-120 and C-121/06 P, FIAMM, ECR 2008 I-6513, para. 119) as the main justification for their disregard of legally binding UN conventions, WTO rules and WTO dispute settlement rulings. The most recent CJEU judgment (Case C-21/14 P Rusal, judgment of 16 July 2015) justifies ‘the settled case-law of the Court that, given their nature and purpose, those (WTO) agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the EU institutions’ also by the ‘lack of reciprocity’ by the EU’s most important trading partners (paras. 38-39).

⁶ On the CJEU jurisprudence (e.g. in the FIAMM case, note 5) denying individual rights (e.g. of ‘violation victims’) to invoke WTO rules in national and EU courts subject to the limited ‘Nakajima/ Fediol exceptions’ (based on the ‘implementation principle’) that have only very rarely been applied, and on the judicial denial of claims (e.g. by ‘retaliation victims’) to compensation even in case of severe damage caused by EU breaches of WTO obligations, see: A.Thies, *International Trade Disputes and EU Liability* (CUP 2013).

⁷ Cf. B. de Witte, *A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union*, in : M.Cremona/A.Thies (eds), *The European Court of Justice and External Relations Law. Constitutional Challenges*, Oxford : Hart 2014, 33-46.

Past arguments invented by EU politicians for justifying their non-compliance with GATT/WTO legal and dispute settlement obligations and for preventing citizens from invoking GATT/WTO rules in domestic courts - such as the alleged indeterminacy of GATT obligations, the existence of GATT safeguard clauses, the reciprocity of trade liberalization in GATT, and the political possibility of avoiding trade sanctions by third countries through voluntarily agreed compensation – lacked any convincing legal reasoning⁸; they have been progressively abandoned in favor of political claims by EU institutions that the ‘nature and purpose of WTO law’ justify ‘freedom of maneuver’ to violate WTO rules. Yet, such claims are inconsistent with

- the unconditional GATT/WTO obligations to terminate illegal measures (e.g. as specified in the customary rules on state responsibility and enforced through the WTO Dispute Settlement Understanding = DSU);
- the lack of conferral of EU powers to engage in welfare-reducing violations of WTO rules which all national parliaments and the European Parliament approved for the benefit of EU citizens so as to protect rule of law inside and beyond the EU;
- the legal primacy of international agreements concluded by the EU - as 'integral' and 'integrating parts'⁹ of the EU legal system - over other 'secondary EU law';
- the often precise and unconditional nature of WTO guarantees of freedom of trade, non-discrimination and rule of law; and
- the multilevel ‘nature and purpose’ of the GATT/WTO dispute settlement system, as illustrated by the explicit GATT/WTO legal obligations to protect legal and judicial remedies against GATT/WTO violations also in *domestic jurisdictions* in order to provide ‘security and predictability’ for traders.¹⁰

The GATT/WTO jurisprudence of the CJEU further disregards

- the ‘constitutional mandate’ of EU courts (e.g. as specified in Articles 19, 21 TEU) to ‘ensure that in the implementation and application of the Treaties the law is observed’ so as to ‘ensure effective legal protection’ in the EU’s participation in multilevel governance of international PGs like a rules-based world trading system; and
- the ‘democratic’ and ‘republican functions’ of international ‘PGs treaties’, which – the more globalization transforms *national* into *global PGs* that can be collectively supplied only through international treaties and their coherent domestic implementation – take over some of the functions of democratic legislation so as to protect 'aggregate PGs' for the benefit of citizens, e.g. by requiring '(e)ach Member (to) ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements' (Article XVI:4 WTO Agreement).

As, according to the settled case-law of the CJEU, ‘the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives’¹¹, EU compliance with WTO guarantees of equal freedoms, non-discriminatory trade conditions and 'strict observance of international law' in mutually beneficial trade transactions offers more efficient, lawful policy

⁸ Cf. E.U.Petersmann, Application of GATT by the Court of Justice of the European Communities, in: *CMLR* 20 (1983), 397 – 437.

⁹ This legal term for the 'domestic law effects' of international agreements concluded by the then European Community was coined by the CJEU in its Case 181/73, *Haegeman v Belgium*, ECR 1974, 449.

¹⁰ Cf. Cf. E.U.Petersmann, Why Do the EU and its Court of Justice Fail to Protect the ‘Strict Observance of International Law’ (Article 3 TEU) in the World Trading System and in other Areas of Multilevel Governance of International Public Goods? in: *European Yearbook of International Economic Law – Liber Amicorum for Horst G. Krenzler*, Heidelberg: Springer 2015, 145-189.

¹¹ Cf. *Kokopelli*, C-59/11, EU:C:2012, 447, and the case-law cited in para. 38.

instruments than discriminatory, welfare-reducing and illegal EU trade distortions in violation of WTO rules. At least in the trade policy area, EU constitutional law and the large 'policy space' reserved to the EU and EU member states by their WTO obligations exclude 'political question justifications' of EU violations of WTO law that undermine the international 'aggregate PG' of a rules-based world trading and dispute settlement system to the detriment of EU citizens.

The fact that, since 2006, the political EU institutions systematically aim at limiting rights and judicial remedies of EU citizens also under FTAs¹² confirms the broader political agenda behind the 'legal disempowerment' of EU citizens in EU external relations. The additional fact that the European Parliament apparently never discussed this systemic exclusion of rights and judicial remedies of EU citizens under FTAs and other 'PGs treaties' illustrates the ineffectiveness of parliamentary control and defense of citizen interests in the trade policy area. Contrary to the claims by EU institutions, the 'nature and purpose' of WTO rules requires 'providing security and predictability to the multilateral trading system' (Article 3 DSU) and individual access to justice for private economic actors that are adversely affected by illegal EU disregard for WTO law and dispute settlement rulings. When the GATT Secretariat hired me in 1981 as the first 'legal officer' ever employed by GATT, I was told that the GATT Director-Generals had so far not dared to establish a 'GATT Office of Legal Affairs' due to the opposition from the EC and its preference for political (i.e. power-oriented) rather than judicial settlement of the many GATT challenges of EC restrictions/distortions in agricultural trade. In the early 1980s, lawyers from the EC Legal Services were not allowed to participate in GATT panel procedures; and EC Trade Commissioner Willy de Clercq continued to give speeches that 'GATT must never be transformed into a trade court'. Even after the successful conclusion of the Uruguay Round negotiations on the WTO and its DSU establishing a worldwide, compulsory jurisdiction for the settlement of WTO disputes, the EC Council Decision of 22 December 1994 on the conclusion of the WTO agreements claimed that 'by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.¹³ Just as, during the 1980s, EU trade politicians responded to industry pressures by concluding dozens of secretive 'voluntary export restraint agreements' in violation of GATT and EU law, the 20 years (1991-2012) of illegal EU import restrictions on bananas reflected unwillingness of EU trade politicians – as inside a 'banana republic' - to defend the rule-of-law vis-à-vis rent-seeking pressure groups. Other persistent violations of EU law - e.g. of the budget and debt disciplines imposed by Article 126 TFEU for the European Economic and Monetary Union, or of the 'Schengen procedures' for foreign asylum seekers and economic migrants – reveal systemic rule-of-law problems of periodically elected politicians inside the EU: the more the EU 'law in the books' is persistently violated, the weaker political institutions become (e.g. due to their 'capture' by rent-seeking interest groups they have to satisfy to secure majority support), and the more EU citizens complain about the 'democratic deficit' of illegal EU actions that ignore the rules adopted by national and European parliaments for the benefit of citizens.¹⁴

¹² Cf. A.Semertzi, The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements, in: *CMLRev* 51 (2014), 1125-1158.

¹³ Cf. Petersmann (note 2), at 21.

¹⁴ Cf. J.Zalc, Overcoming Democratic Breakdown in the EU, Fondation Robert Schuman, *European Issues* No 333 of 18 November 2014, at 1: according to the 'Euro-barometer' statistics, confidence of EU citizens in the EU was at its lowest ebb in 2014, the distance between EU institutions and EU citizens having continuously widened, as illustrated by the low turnout and participation by citizens in the 2014 elections of the European Parliament: 'citizens believe that their voices are not taken into account by the EU, which they consider to be removed from their concerns and lacking in transparency'.

Why does the EU not comply with its constitutional requirement to protect citizens in IDS?

Similar to the definition of 'constitutional democracies' by their protection of human and fundamental rights, rule of law and democratic governance, the explicit extension of this 'constitutional *trias*' to the EU's external actions (e.g. in Articles 3 and 21 TEU, the EUCFR) can be construed as a 'foreign policy constitution' of the EU that is supplemented by additional constitutional limitations of EU foreign policy powers, for instance

- in the national and EU legal systems (e.g. the principles of conferral, subsidiarity, proportionality, human rights and 'the constitutional traditions common to the Member States' as 'general principles of the Union's law' pursuant to Articles 5 and 6 TEU); and also
- in international law in view of the EU obligations under UN, WTO and regional law to protect equal freedoms, rule of law and other international PGs beyond states, with legal primacy of such international law obligations - as 'integral part' of the EU legal system - over unilateral EU secondary legislation.

The deliberate non-conferral of EU powers to violate international treaties protecting international PGs reflects the insight that 'strict observance of international law' (Article 3 TEU) is a necessary policy objective for protecting 'aggregate PGs' inside and beyond the EU.¹⁵ The lack of an EU mandate to violate EU agreements (e.g. the WTO Agreement) ratified by national and EU parliaments for the benefit of citizens also follows from the principle of proportionality, according to which 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties' (Article 5:4 TEU). Just as

- the EU's multilevel *legal protection of human rights* in its external relations (e.g. by including 'human rights clauses' into more than 130 trade and co-operation agreements with third countries) strengthens civil society struggles for human rights and rule of law in transnational relations, and
- the multilevel *judicial protection of human rights and rule of law* - e.g. by means of the *Kadi*-jurisprudence of the CJEU and the '*solange*-jurisprudence' of national constitutional courts and of the European Court of Human Rights (ECtHR) - limits power politics by '*cosmopolitan constitutionalism*',
- so can multilevel judicial co-operation in IDS protect equal rights of EU citizens to 'strict observance of international law' within a framework of '*republican constitutionalism*' limiting EU violations of international treaties protecting PGs demanded by citizens and their democratic intuitions.

EU constitutional safeguards of individual freedoms do not depend on reciprocity

EU constitutional guarantees to 'everyone' of 'an effective remedy before a tribunal' are not conditioned on reciprocity (cf. Article 47 EUCFR). Human rights law (HRL) and European constitutional law provide that '(a)ny limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms' subject to constitutional safeguards of 'necessity' and 'proportionality' (Article 52 EUCFR). This constitutional justification must be respected by national and EU institutions also in the external relations law of the EU whenever individual freedoms - like the economic freedoms 'to choose an occupation' (Article 15), 'to conduct a business in accordance with Union law' (Article 16), and to own and use private property (Article 17 EUCFR) - are protected by EU constitutional law across national and EU frontiers. In a multilevel rule of law community with constitutionally limited powers committed to 'protection of its citizens' and 'strict

¹⁵ Cf. note 1 and the related text and Article 5:2 TEU: 'under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the member States'.

observance of international law' also in the EU's external relations (Article 3 TEU), the 'consistent interpretation' requirements of EU law and international law require national and EU courts to protect transnational rights of citizens with due regard to IDS rulings binding on the EU and its member states, as recognized in the jurisprudence of national Constitutional Courts requiring interpretation of fundamental rights with due regard to their interpretation and protection by the CJEU and by the ECtHR.¹⁶ The shared legal obligations and 'constitutional functions' of national, EU and international dispute settlement bodies to interpret treaties and settle related disputes 'in conformity with the principles of justice and international law', including also 'universal respect for human rights and fundamental freedoms for all' (Preamble and Article 31 VCLT), require multilevel judicial comity in their common mission of administering justice, including 'individual justice' for citizens participating in mutually beneficial transnational cooperation and protection of PGs. EU law requires balancing *state*-centered and *person*-oriented 'principles of justice' with due respect for 'due process of law' guarantees and judicial remedies also in the EU's external relations so as to 'support democracy, the rule of law, human rights' and 'consistency' between its internal and external actions, as required by Article 21 TEU and by its call to protect civil society cooperation and democratic self-government among free and equal citizens beyond national frontiers, notably in the global division of labor and in related 'compliance communities' benefitting from transnational rule of law. As

- EU citizens and national 'peoples' remain the 'constituent powers' and 'democratic principals' in the EU,
- the European Parliament exercises only limited legislative, budgetary and political powers (cf. Article 14 TEU), and
- 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity', 'the principles of democracy and the rule of law', and 'places the individual at the heart of its activities' (Preamble EUCFR),

'constitutional' and 'cosmopolitan interpretations' of EU law 'fit better' its multilevel constitutional structures than statist, power-oriented paradigms of foreign politics. The policy argument by EU trade diplomats - i.e. that they exclude individual rights to invoke FTA provisions and WTO legal obligations in domestic courts in view of the similar practices in the EU's trading partners like Canada, Singapore and the USA - are inconsistent with the EU's 'foreign policy constitution', just as EU denial of protection of human rights and labor rights in the context of FTAs cannot be justified on the ground that foreign trading partners (like the USA) have not ratified many UN human rights and ILO labor rights conventions that were ratified by EU member states.

The EU must protect equal freedoms, rule of law and effective judicial remedies also in IDS

Article 2 TEU and the EUCFR prioritize human dignity and equal freedoms as foundational values of the EU. EU constitutional law – and also its rule-of-law requirements - can be construed in conformity with liberal constitutional theories (e.g. from Kant to Rawls) as protecting equal freedoms as 'first principle of justice'; limitations of the rights to dignity, freedom, equality, solidarity, citizen rights and rights to access to justice protected by the EUCFR 'may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others' (Article 52 EUCFR). Hence, '(e)veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal' (Article 47 EUCFR). Also the institutional guarantees in Article 19 TEU – i.e. the 'Court of Justice of the European Union ...shall ensure that in the interpretation and application of the Treaties the law is observed... Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' – must serve the equal freedoms and other rights of citizens as the 'democratic principals' of all EU institutions. Citizens – not EU trade diplomats - are 'agents of justice' and 'democratic

¹⁶ Cf. the judgment by the German Constitutional Court in *Görgülü v Germany* (2004) 2 BvR 1481/04.

principals' of EU law and the main economic actors and beneficiaries of the WTO trading and legal system; they should be recognized by EU institutions also as being entitled to 'strict observance of international law' and of IDS rulings protecting transnational rule of law in the collective supply of PGs for the benefit of citizens. The republican history of European democracies teaches that PGs (*res publica*) depend on empowerment of citizens to participate in the collective supply of PGs, for instance by holding government agents accountable for illegal interferences into 'negative' and 'positive freedoms' of citizens so as to prevent arbitrary domination.

Article 3 TEU – by stating that the 'Union's aim is to promote peace, its values and the well-being of its peoples' and specifying these objectives by a list of PGs (like the internal market, the 'area of freedom, security and justice', a 'highly competitive social market economy', an economic and monetary Union) – reflects the republican nature of EU law, i.e. the conferral by citizens and peoples of limited powers to EU institutions in order to protect PGs beneficial for all EU citizens. Articles 3 and 21 TEU explicitly commit the EU to 'republican constitutionalism' (e.g. 'democracy, the rule of law, human rights and fundamental freedoms' and other specific PGs) also in its external relations. Similarly, the EU's specific foreign policy mandates emphasize the need for respecting 'uniform principles' (Article 207 TFEU) and define agreed PGs like 'progressive abolition of restrictions on international trade and on foreign investments' (Article 206 TFEU) in the context of the EU's common commercial policy, or 'reduction and ... eradication of poverty' as 'primary objective' of the EU's development cooperation policy (Article 208 TFEU). As international agreements concluded by the EU (e.g. the WTO Agreement) are approved by parliaments for the benefit of citizens in order to protect international PGs, political and academic claims - e.g. that 'the EU's external objectives lack a *telos*' and 'the EU's external policy objectives are non-teleological, non-prioritised, open-ended, and concerned more with policy orientation than goal-setting'¹⁷ – are inconsistent with the text, context and declared objectives of EU constitutional law. The more the EU engages in 'Hobbesian power politics', the more even EU lawyers doubt whether its 'cosmopolitan foreign policy constitution' reflects 'unrealistic idealism'.¹⁸ Similarly, some political scientists argue that the EU has evolved into a 'civilian normative power' that is progressively transforming the 'Westphalian system' of 'international law among sovereign states' for the benefit of more than 500 million EU citizens cooperating in the common market and in a transnational rule of law system protecting human rights, democratic peace, a 'social market economy' and other PGs; yet, other observers describe the reality of the EU's external policies as 'power politics in disguise'.¹⁹

Increasing dis-empowerment of EU citizens in the EU's external relations and IDS?

Empirical evidence suggests that inadequate protection of rule of law inside some EU member states (like Bulgaria, Greece and Romania), in some areas of EU integration (like the Euro-zone, illegal financial disbursements by EU institutions as annually documented by the EU Court of Auditors), and in some external EU policies (e.g. persistent disregard for some WTO legal obligations and for the 'Schengen rules' regarding treatment of foreign immigrants and asylum seekers) undermines trust of EU citizens in the democratic legitimacy of EU law. Persistent EU violations of IDS rulings against the EU (e.g. in the GATT/WTO 'banana disputes' 1992-2012) and EU denial of effective judicial remedies of citizens reflect the prevailing 'political realism' advocated by EU politicians in order to limit their own accountability. This contribution has argued that - as such welfare-reducing treaty violations are neither 'necessary' nor 'proportionate' instruments for realizing legitimate EU policy objectives - citizens

¹⁷ Cf. M.Cremona, A Reticent Court? Policy Objectives and the Court of Justice, in: M.Cremona/ A.Thies (note 6), at 29, 31.

¹⁸ Cf. B. de Witte, Too Much Constitutional Law in the EU's Foreign Relations? in: M.Cremona/B. de Witte (eds), *EU Foreign Relations Law - Constitutional Fundamentals* (Oxford: Hart, 2008), at 3 ff.

¹⁹ Cf. T.Forsberg, Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type, in: *JCMS* 49 (2011), at 1183 ff; E.U.Petersmann, How to Evaluate the EU as a Normative Power in Multilevel Governance of Public Goods? in: C.Kaddous (ed), *The EU in International Organizations and Global Governance*, Oxford: Hart 2015, 237-262.

and courts of justice must continue to challenge the widening gap between the 'EU law in the books' and EU legal practices so as to enhance the EU's 'democratic capabilities' to comply with the rule of law. 'Democratic capabilities' depend on the 'public reason' prevailing in political institutions. Rights-based empowerment of citizens is not only a matter of justice and of promoting 'republican virtues' and 'democratic vigilance' against abuses of governance powers. 'Countervailing rights' of adversely affected citizens are also the most efficient, decentralized instrument for counteracting rule violations which EU institutions ignore. Constitutional rules cannot become effective unless they are transformed into democratic legislation, effective administration and judicial protection of individual rights of citizens. Just as persistent violations of the budget and debt disciplines in Article 126 TFEU undermined the EU's 'monetary constitution' and persistent violations of the 'Schengen procedures' continue to erode the EU's 'area of freedom, security and justice', so undermine persistent EU violations of IDS obligations (notably under WTO law) the 'foreign policy constitution' of the EU and, thereby, also the related international PGs (e.g. a non-discriminatory world trading, legal and dispute settlement system protecting individual access to justice and compliance with WTO law).

The extension of 'EU power politics' (i.e. top-down restrictions of equal freedoms of citizens without constitutional justification and without effective judicial remedies) to the dispute settlement systems of UN agreements (e.g. the Law of the Sea Convention, the International Air Transport Agreement) and to newly negotiated FTAs reveals a 'systemic disregard for EU citizens'. For instance, after 5 years of secretive FTA negotiations with Canada, EU citizens could discover on page 470 of this 'Comprehensive Economic and Trade Agreement' (CETA) published on 26 September 2014 that, according to Article 14.16, 'nothing in this Agreement shall be construed as conferring rights ... on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.' Such 'anti-citizen clauses' – to be included also into the Transatlantic Trade and Investment Partnership (TTIP) with the USA - deny citizens any effective legal and judicial remedies in domestic courts against treaty violations adversely affecting citizens. Judicial challenges of illegal import restrictions – which enabled citizens to protect transnational rule of law inside the EU and the EEA – will be excluded in CETA and TTIP, notwithstanding the rights of citizens 'to an effective remedy and to a fair trial' as protected in Article 47 EUCFR. The intention by the EU Commission to afford only foreign investors 'judicial privileges' in the form of investor-state arbitration or alternative, international investment tribunals illustrates the risks of 'negative discrimination' of EU citizens and of 're-feudalization' of the EU's commercial and investment policies, thereby undermining transnational rule of law and judicial remedies for adversely affected EU citizens. As CETA regulates also specific product, production and consumer protection standards, the lack of effective judicial accountability and remedies risks to distort trade and competition and harm important consumer interests.

In response to questions of why, since 2006, EU FTAs exclude private rights of citizens and 'direct applicability' of FTA provisions, EU trade diplomats admit their self-interest in following the power-oriented trade policy traditions of third states so as to avoid legal, judicial and democratic accountability of EU trade diplomats vis-à-vis EU citizens.²⁰ Yet, such EU power politics is inconsistent with Articles 2, 3 and 21 TEU and with the 'principal-agent-relationship' underlying EU constitutional law aimed at protecting rights of citizens, including their modern entitlement 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 of the 1948 Universal Declaration of Human Rights = UDHR). References to foreign power politics by the EU's trading partners (e.g. the USA) do not justify denying constitutional rights of EU citizens in the different context of multilevel EU governance of PGs. In contrast to the EU's trading partners outside Europe, national Constitutions in EU member states are increasingly transformed into 'cosmopolitan Constitutions' recognizing and protecting transnational rights of citizens and of democratic parliaments

²⁰ Cf. E.U. Petersmann, Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens? in: *JIEL* 18 (2015), 579 ff.

in their transnational cooperation in European integration.²¹ The functionally limited, multilevel foreign policy constitution of the EU - as an international organization with limited powers - differs from that of foreign countries in three important ways:

- The external relations powers of the EU are constitutionally restrained to collective supply of enumerated PGs (e.g. in Articles 2, 3 and 21 TEU). While ‘parliamentary sovereignty’ and monarchical governance remain possible inside nation states (like the UK), the EU is functionally limited to ‘*multilevel, republican governance*’ for the benefit of EU citizens as ‘democratic principals’ also in external EU relations.
- EU law rightly recognizes that collective supply of international PGs (e.g. those listed in Article 21 TEU) protecting the equal rights of EU citizens depends on ‘strict observance of international law’ and EU participation in international agreements that ‘are binding upon the institutions of the Union and on its Member States’ (Article 216 TFEU).
- The EU is constitutionally committed – also in the exercise of its foreign relations powers and in IDS – to ‘the protection of its citizens’ and ‘protection of human rights’ (Article 3 TEU); this *cosmopolitan constitutionalism* reflects Europe's long-standing, constitutional experience that collective protection of PGs depends on republican rights of citizens to hold government agents legally, democratically and judicially accountable.²²

From *international to multilevel dispute settlement* in the EU’s external relations law?

Sections I and II concluded that the cosmopolitan functions of EU external relations law and its constitutional limitation to ‘strict observance of international law’ (Article 3 TEU) require limiting path-dependent, *state-centered IDS* conceptions by *multilevel, person-oriented dispute settlement* protecting the constitutional rights of EU citizens. In citizen-driven areas of transnational economic, democratic and civil society cooperation, the EU’s subsidiarity requirement – *i.e.* ‘to ensure that decisions are taken as closely as possible to the citizens of the Union’ (cf. Article 1 and the TEU Protocol on the Application of the Principles of Subsidiarity and Proportionality) – reflects the historical lessons from centuries of civil society struggles for republican constitutionalism, *i.e.* that multilevel judicial cooperation in human rights, commercial, common market and criminal law adjudication can protect equal rights of citizens, judicial remedies and transnational rule of law more effectively across national frontiers than intergovernmental power politics. The customary law requirement to interpret treaties, and settle related disputes, ‘in conformity with the principles of justice and international law’, including also ‘human rights and fundamental freedoms for all’ (cf. Preamble and Article 31:3 VCLT), requires interpreting the foreign relations law of the EU consistently with the fact that ‘human rights and fundamental freedoms for all’ (e.g. individual access to justice), rule of law, democratic governance and ‘consistent interpretation’ requirements have become integral principles of national, EU and UN legal obligations of EU member states; even if third UN/WTO member states do not effectively protect such ‘principles of justice’ inside their domestic legal systems, the EU’s unique multilevel constitutionalism requires ‘strict observance of international law’ for the benefit of EU citizens. Articles 3, 21 TEU call on EU institutions to exercise leadership for mutually coherent, multilevel ‘rule of law policies’, including EU respect for the GATT/WTO legal requirements of multilevel, legal and judicial protection of economic freedoms, non-discrimination, rule of law and access to justice at both international and national levels

²¹ For a survey see: J. Larik, *Worldly Ambitions. Foreign Policy Objectives in European Constitutional Law*, Florence: EUI doctoral thesis 2013, chapter II; A. Somek, *The Cosmopolitan Constitution*, OUP 2014.

²² On the diverse legal traditions of republicanism and of its core values – such as liberty (non-domination), republican virtues of active citizenry finding self-realization in political participation and collective supply of PGs, communitarianism, political equality, deliberative democracy - see: S. Besson/J. Luis Marti (eds), *Legal Republicanism: National and International Perspectives*, OUP 2009.

of governance.²³ As national and EU parliaments ratify UN and WTO agreements as representatives of EU citizens entitled to rules-based, democratic protection of PGs, the coherence- and ‘consistent interpretation’-requirements of national, EU and also UN/WTO legal systems should be construed in the EU external relations law for the benefit of EU citizens, for instance as empowering and protecting EU citizens in their ‘cosmopolitan roles’ as producers, workers, investors, traders and consumers cooperating in the global division of labor and benefitting from non-discriminatory conditions of competition promoting consumer welfare. For the reasons explained by the CJEU (e.g. in the *Kupferberg* and *Kadi*-cases), EU compliance with welfare-increasing trade and human rights obligations protecting equal freedoms as ‘first principle of justice’ should not be made conditional on whether third countries offer the same judicial remedies inside third countries. Such judicial protection of domestic citizens does not affect the EU powers under international law (e.g. WTO law) to suspend treaty obligations in response to treaty violations by third states.²⁴

Need for person- rather than state-centered ‘proportionality balancing’ in IDS

The universal recognition of human rights and ‘democratic constitutionalism’ prompt ever more national and international courts to limit ‘power-oriented conceptions’ of ‘international law among states’ by person-oriented ‘proportionality balancing’ protecting rights of citizens. Examples include, *inter alia*:

- the ICJ jurisprudence on interpreting Article 36 of the Vienna Convention on Consular Relations as conferring on individuals the right to receive consular assistance and justifying legally binding ‘provisional measures’ by the ICJ in order to protect human rights pending the ICJ decision on the merits;²⁵
- the annulment of investment arbitral awards interpreting treaty provisions on ‘necessity’ in the light of the restrictive customary rules on state responsibility by ICSID annulment committees on the ground that ‘proportionality balancing’ - as a ‘general principle of law’ - offers a more appropriate legal methodology for balancing all public and private interests involved on the basis of ‘suitability’, ‘necessity’ and ‘proportionality *stricto sensu*’, as practiced by ever more national and international courts throughout the world;²⁶
- the WTO jurisprudence balancing rights of governments with rights of exporters to ‘fair price comparisons’ in the calculation of antidumping duties²⁷ and, more generally, to ‘basic fairness and due process’ in the administration of trade regulations;²⁸ and
- the jurisprudence of regional economic and human rights courts (like the CJEU, the EFTA Court, the European Court of Human Rights) reviewing economic restrictions in the light of human rights and fundamental freedoms of adversely affected citizens.²⁹

²³ Cf. Petersmann (note 2), at 194 ff, 233 ff. The recent CJEU judgment in Case C-21/14 (note 5 above) confirmed that the ‘Fediol’- and ‘Nakajima’-exceptions of applying precise and unconditional WTO obligations - provided the EU legislator has specifically transformed them into EU law or ordered their internal applicability - continue to be construed very restrictively by EU courts. Most European lawyers ignore the multilevel nature of the WTO dispute settlement system and the customary law requirement of interpreting treaties ‘in conformity with principles of justice’.

²⁴ Cf. Regulation (EU) No 654/2014 of 15 May 2014 concerning the exercise of the Union’s rights for the application and enforcement of international trade rules, OJEU L 189/50 of 27 June 2014.

²⁵ Cf., e.g. *LaGrand*, Germany v USA, Judgment of 27 June 2001, ICJ Reports 2001, at 466 ff.

²⁶ Cf. A.Stone Sweet/G. della Cananea, Proportionality, General Principles of Law, and Investor-State Arbitration : A Response to José Alvarez, in : *New York University Journal of International Law and Politics* 46 (2014), 911-954.

²⁷ On the ‘zeroing jurisprudence’ of the WTO Appellate Body see: WT/DS294/AB/R, adopted on 9 May 2006; WT/DS322/AB/R, adopted 23 January 2007.

²⁸ *US-Shrimps*, WT/DS58/AB/R, adopted on 6 November 1998.

²⁹ See the overview of case-law in: E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Oxford: Hart 2012, chapter VIII.

The increasing cooperation between national and international courts – for instance, in the context of preliminary ruling procedures (e.g. in the EU), preliminary advisory opinion procedures (e.g. in the EEA and MERCOSUR), recognition and enforcement of arbitral awards, related judicial dialogues, comity and judicial restraint – responds to this need for protecting individual rights in IDS by judicial ‘balancing’ of state-centered and person-centered interpretations of multilevel regulation of PGs with due regard to the constitutional requirement of interpreting treaties and settling related disputes ‘in conformity with the principles of justice’, including ‘human rights and fundamental freedoms for all.’ Even if citizens and governments often disagree on how to define procedural and substantive ‘principles of justice’, independent and impartial courts of justice – as exemplars of transparent and principle-oriented ‘public reasoning’ – must promote ‘public reason’ by reviewing power-oriented ‘intergovernmentalism’ and majority politics, including through ‘judicial dialogues’ and justification of judgments vis-à-vis citizens in terms of ‘principles of justice’ explaining the impact of human rights on multilevel governance of international PGs and related IDS.

Promoting 'republican compliance communities' through 'cosmopolitan constitutionalism'

Perhaps the most important political and legal lessons from the 2500 years of civil society struggles since the ancient Athenian democracy and Roman republic remains that democratic participation in ‘republican constitutionalism’ promotes not only the ‘input-legitimacy’ of the ‘law in the books’, but also the ‘output-legitimacy’ and effectiveness of the ‘law in action’ and protection of PGs. Also in international commercial, trade and investment law, criminal and maritime law, HRL and intellectual property law and adjudication, the increasing number of international courts and of their case-load³⁰ were responses to demands from civil society and related ‘legal communities’ for limiting ‘governance failures’ through international courts, whose protection of legal remedies of citizens enhanced transnational rule of law and other ‘principles of justice’. Empowering citizens to participate in transnational supply of ‘aggregate PGs’ (e.g. as producers, traders, investors, consumers, Internet users, human rights and regional integration advocates) and to enforce their private and public rights (e.g. citizenship rights to participate in the election and work of national and regional parliaments, individual access to international courts of justice) has proven to be the most important driving-force for ‘constitutionalizing’ legal systems by transforming constitutional and legislative rules and principles into multilevel administrative and judicial cooperation (e.g. among national courts, the CJEU, the EFTA Court, the ECtHR and transnational arbitration) and collective protection of transnational PGs.³¹ As violations of the law create adverse ‘externalities’, countervailing rights and judicial remedies of adversely affected citizens tend to be the most efficient legal methods for preventing and ‘internalizing’ such adverse effects, promoting legal accountability and ‘republican values’ like rule of law protecting equal freedoms of citizens. Linking IDS in the external relations of the EU to regional and domestic legal and judicial remedies of citizens is – as rightly prescribed in Article 3 TEU – the most effective constitutional approach to protecting rule of law in multilevel governance of PGs. By invoking their

³⁰ Cf. G.De Baere/J.Wouters (eds), *The Contribution of International and Supranational Courts to the Rule of Law*, Cheltenham: Elgar 2015; K.Alter, *The New Terrain of International Law: International Courts in International Politics*, Princeton UP 2013.

³¹ On the increasing recognition of transnational economic, labour, social and political citizenship rights (e.g. in the EU, the EEA, the Andean Community, MERCOSUR, the Central American Common Market, the Economic Community of West-African States, the Gulf Cooperation Council) and of regional parliamentary institutions see: C.Closa/D.Vintila, *Supranational citizenship: rights in regional integration organizations* (unpublished conference paper, EUI Florence 2015). EU citizenship, free movement of persons beyond state borders (e.g. due to liberalization of services), multilevel parliamentarianism, and recognition of transnational rights of migrants (e.g. to take up employment and receive social security benefits while residing in another common market member country) are no longer ‘unique European experiments’ in rights-based integration law. Their ‘enabling’, ‘legitimizing’, ‘enforcement’ and ‘republican functions’ (e.g. as decentralized means for limiting implementation deficits of PGs regimes) are increasingly recognized in African, Latin American and Central American integration regimes.

rights of ‘access to justice’³², to justification of governmental restrictions of equal freedoms³³, and to mutually consistent interpretation and multilevel protection of ‘PGs agreements’ ratified by parliaments, citizens and courts of justice can limit majoritarian power politics and engage in impartial and independent judicial dialogues about how to protect transnational PGs in multilevel governance of PGs.

Conclusion: the EU’s ‘cosmopolitan foreign policy constitution’ requires ‘protection of its citizens’ in IDS

In its Opinion 2/13 on EU accession to the ECHR, the CJEU emphasized the need for protecting ‘the autonomy of EU law in the interpretation and application of fundamental rights’: ‘fundamental rights, as recognized in particular in the Charter, must be interpreted and applied within the EU in accordance with the constitutional framework’ of EU law.³⁴ This contribution has argued that the EU’s rights-based ‘foreign policy constitution’ also requires autonomous ‘protection of its citizens’ (Article 3 TEU) through interpreting IDS in multilevel governance of transnational ‘aggregate PGs’ as protecting individual rights in conformity with the multilevel guarantees of individual ‘access to justice’ in EU law, WTO law and UN law even if third states do not reciprocate due to state-centered conceptions of IDS. As discussed in *section III*, courts of justice increasingly acknowledge that the universal recognition of human rights, constitutionalism (e.g. ‘proportionality principles’) and duties to protect international PGs justify ‘constitutional interpretations’ of treaty rules as protecting also rights of citizens in IDS:

‘the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down.’³⁵

Just as collective protection of transnational PGs inside the EU has depended on multilevel judicial protection of rule of law and fundamental rights of citizens, the transformation of ever more *national* and *regional PGs* into *global ‘aggregate PGs’* (like a rules-based, liberal world trading system) requires extending ‘republican’ and ‘cosmopolitan constitutionalism’ to multilevel governance of PGs, including judicial protection of transnational rule of law and of constitutional rights of citizens through IDS. The EU’s ‘cosmopolitan foreign policy constitution’ recognizes these constitutional needs, yet without preventing EU politicians and government executives to pursue rational self-interests in limiting their legal, democratic and judicial accountability vis-à-vis citizens in the foreign policy area. Also EU lawyers and courts of justice unduly neglect the customary law requirement of limiting state-centered ‘principles of justice’ by protection of constitutional and cosmopolitan rights of citizens in mutually beneficial, international cooperation.³⁶ The more international PGs and related rights of citizens can be protected only through international agreements ‘binding upon the institutions of the Union and on its Member States’ (Article 216 TFEU), the stronger becomes the need for limiting ‘collective action problems’ by corresponding rights of citizens to judicial protection of transnational rule of law in conformity with ‘PGs treaties’ approved by parliaments in order to extend principles of equal freedoms,

³² Cf. R. Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice*, New York: Columbia UP, 2012; A.A. Cançado Trindade, *The Access of Individuals to International Justice*, OUP 2011.

³³ See Article 52 EUCFR and, similarly, Article 29:2 UDHR: ‘In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society’.

³⁴ Opinion 2/13 of the Court of 18 December 2014, paras. 177-178.

³⁵ Cf. Case 43/75 *Defrenne v Sabena* [1976] ECR 455, par. 31; Case C-281/98, *Angonese* [2000] ECR I-4139.

³⁶ Cf. note 2 and, e.g., H.Ruiz Fabri, *Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?* in: New York: *Jean Monnet Working Paper* 9/2014 (discussing ‘direct effect’ of WTO rules without regard to EU law, the WTO guarantees of individual access to justice and the customary rules of treaty interpretation).

non-discrimination and judicial protection of rule of law to mutually beneficial, transnational cooperation among citizens (like the WTO Agreement protecting a rules-based global division of labor). Article 21 TEU and other external relations provisions acknowledge that collective supply of global ‘aggregate PGs’ depends on multilevel respect for ‘intermediate PGs’ like ‘democracy, the rule of law, human rights and the principles of international law’ (Articles 2, 21 TEU) in order to coherently protect the EU’s ‘values, fundamental interests, security, independence and integrity’ (Article 21). These values include multilevel legal and judicial protection of cosmopolitan rights of EU citizens, as recognized in the individual ‘freedom to conduct a business in accordance with Union law’ (Article 16 EUCFR) and everyone’s ‘right to an effective remedy’ (Article 47 EUCFR). Hence - similar to the multilevel, legal and judicial protection of ‘market freedoms’ inside federal states and for the benefit of ‘market citizens’ inside the EU and EEA -, HRL and EU law require protecting EU citizens and their cosmopolitan rights also in multilevel governance of ‘aggregate PGs’ beyond Europe.³⁷

Apologetic ‘Hobbesian claims’ – e.g. that authoritarian top-down governance is justified by the incapacity of human beings to maintain peaceful, democratic order (*homo homini lupus est*), like claims by ‘radical pluralists’ that ‘law is incapable of providing convincing justifications to the solution of normative problems’³⁸ – are inconsistent with EU law and HRL, both of which have refuted Koskenniemi’s assertion that ‘no coherent normative practice arises from the assumptions on which we identify international law’.³⁹ The ‘new strategy’ advocated by EU trade commissioner Malmström in response to the EU citizen protests against the secretive TTIP negotiations confirms, once again, that struggles for justice by EU citizens may contribute to transforming an ‘international community of states’ (Article 53 VCLT) into a cosmopolitan community of citizens, peoples and democratic governments respecting their legal duties to ‘uphold and promote’ the EU’s internal values and ‘contribute to the protection of its citizens’ (Article 3:5 TEU) also in multilevel governance of global PGs. European integration law reflects the unique experience that democratic protection of *national* and *European PGs* was most successful if it combined constitutional, representative, participatory and deliberative democracy in ways holding legislative, administrative and judicial government institutions democratically, legally and judicially accountable vis-à-vis citizens as ‘agents of justice’ and democratic holders of ‘constituent powers’. Also UN institutions now acknowledge that human rights must be part of the rule of law inside and among UN member states so that all persons and multilevel governance institutions are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated.⁴⁰ UN, WTO and EU diplomats justifying their ‘disconnected intergovernmentalism’ by the need to treat citizens as mere objects of international law should read the ‘French Declaration of the Rights of Man and the Citizen’ of 1789, as subsequently confirmed by the Constitutions of the 4th and 5th French Republics: ‘ignorance, forgetfulness, or contempt of human rights are the sole causes of public misfortune and government depravity’ (Preamble); ‘statute law is entitled to forbid only actions harmful to society’ (section 5). In order to enable citizens to defend their reasonable self-interests,

³⁷ Cf. E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law and Policy in the United States, the European Community and Switzerland* (Fribourg UP/Boulder Publishers 1991); this book explained why the constitutional legitimacy of multilevel guarantees of equal freedoms, non-discrimination, rule of law and access to justice in national, regional and worldwide economic law was enhanced by their mutually consistent protection as rights of citizens. Connecting multilevel legal principles by acknowledging their complementary ‘constitutional functions’ (or what Anne Peters calls ‘compensatory constitutionalism’) – e.g. for protecting equal freedoms and transnational rule of law – can transform the ‘disconnected UN/WTO governance’ without preventing legitimately diverse ‘constitutional interpretations’ at national levels (e.g. due to the reality that German and EU constitutional law protects ‘equal freedoms’ more comprehensively than ‘common law freedoms’ in Anglo-Saxon democracies based on ‘parliamentary sovereignty’).

³⁸ Cf. M.Koskenniemi, *From Apologia to Utopia: The Structure of International Legal Argument* (CUP 2005), at 69.

³⁹ Koskenniemi (note 38).

⁴⁰ Cf. the UN General Assembly Resolution on ‘The Rule of Law at the National and International Levels’ (A/RES/67/97, 2012), and the report by the UN Secretary-General on ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (UN Doc. S/2004/616).

multilevel dispute settlement systems (e.g. in UN, WTO and free trade agreements of the EU) must be legally presumed to protect equal rights and 'access to justice' for the benefit of EU citizens at all levels of multilevel governance so that EU citizens can hold multilevel governance institutions legally, democratically and judicially more accountable and protect their cosmopolitan rights, transnational rule of law and other PGs more effectively.

