



Multi-Level Judicial Trade Governance without
Justice? On the Role of Domestic Courts in the WTO
Legal and Dispute Settlement System

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Abstract

The fragmented nature of national and international legal and dispute settlement regimes, and the formalistic nature of the customary international law rules on treaty interpretation and conflicts of laws, offer little guidance on how national and international judges should respond to the proliferation of competing jurisdictions and the resultant incentives for forum shopping and rule shopping by governments and non-governmental actors in international economic law. Due to their different jurisdictions, procedures and different rules of applicable laws, national and international judges often interpret international trade law from different (inter)national, (inter)governmental, constitutional and judicial perspectives. This paper explores the judicial functions of national and international judges to reach justified decisions based on positive law, on the basis of transparent, predictable and fair procedures, and to interpret international treaties “in conformity with principles of justice.” Chapters I to III explain some of the “principles of justice” underlying international trade law and argue that international rules for a mutually beneficial division of labour among private citizens should be construed with due regard to the human rights obligations of governments. Chapters III and IV propose to strengthen international cooperation among national and international courts, for instance by negotiating additional WTO commitments to interpret domestic trade laws in conformity with the WTO obligations of the countries concerned and to settle WTO disputes over private rights primarily in domestic courts, without transforming essentially private disputes into disputes among governments.

Keywords

WTO; governance; international trade; international agreements; economic integration; European law; European Court of Justice; fundamental/human rights.

MULTI-LEVEL JUDICIAL TRADE GOVERNANCE WITHOUT JUSTICE? On the Role of Domestic Courts in the WTO Legal and Dispute Settlement System

Prof. Dr. Ernst-Ulrich Petersmann*

"[WTO decisions are] not binding on the US, much less this court"
US Court of Appeals for the Federal Circuit¹

Law, according to L. Fuller, orders social life not only by “subjecting human conduct to the governance of rules”²; law also aims at establishing a *just* order and procedures for the *fair* resolution of disputes.³ The understanding of law as a struggle for just rules and fair procedures goes back to legal philosophy in Greek antiquity.⁴ Its application to international relations remains contested by power-oriented, “realist” politicians, political scientists and lobbyists.⁵ All member states of the United Nations (UN) have

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¹ US Court of Appeals for the Federal Circuit, judgment of 21 January 2005 (Corus Staal), available at <http://www.fedcir.gov/opinions/04-1107.pdf>). In the *Corus Staal* dispute, the US Supreme Court denied petition for certiorari on 9 January 2006 (<http://www.supremecourtus.gov/docket/05-364.htm>), notwithstanding an amicus curiae brief filed by the EC Commission supporting this petition (“We argue that the Federal Circuit went too far by construing the Uruguay Round Agreements Act to make considerations of compliance with international obligations completely irrelevant in construing a Department of Commerce anti-dumping determination, and further argue that the Department’s “zeroing” methodology – held invalid by both a WTO Appellate Body and a NAFTA Binational Panel – is not entitled to *Chevron* deference because it would bring the United States into noncompliance with treaty obligations.” (available at <http://www.robbinsrussell.com/pdf/265.pdf>).

² L.L.Fuller, *The Morality of Law* (1969), at 96.

³ For Fuller’s criticism of positivist conceptions of law see L.L.Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, in *Harvard Law Review* 71 (1958) 630.

⁴ On the ancient Greek concept of “law as participation in the idea of justice” see C.J.Friedrich, *The Philosophy of Law in Historical Perspective* (1963), chapter II. The Greek and Roman words for “law” (dikaio, jus) and “justice” (dikaiosyni, justitia) have an identical core.

⁵ On the pursuit of “order” rather than “justice” in international political relations see: R. Foot/J.L. Gaddis/ A. Hurrell (eds), *Order and Justice in International Relations* (2003); J. Thomson, *Justice and World Order* (1992).

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 not only 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). The “principles of justice” recognized in UN law thus include access to legal and judicial remedies, notwithstanding acceptance of the ICJ’s compulsory jurisdiction (pursuant to Article 36 of the ICJ Statute) by only about one third of the 191 UN member states. Individual rights of access to justice, subject to procedural and substantive conditions, are also recognized in UN and regional human rights instruments as well as in other international agreements.

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” (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 judicial settlement of disputes at intergovernmental and domestic levels. Yet, the more than 200 dispute settlement panel, Appellate Body and arbitration reports have, so far, not explicitly referred to “principles of justice” in interpreting and applying WTO rules. Also the academic literature on WTO law and policies rarely asks the question whether “principles of justice” are relevant for interpreting WTO rules, for instance regarding the requirement of a “fair comparison ... between the export price and the normal value” in the calculation of the existence of “margins of dumping” (Article 2.4 Agreement on the Implementation of Article VI of the GATT 1994), or the requirement to promote “stable, equitable and remunerative prices for exports” of “primary products of particular interest to less-developed contracting parties” (Article XXXVIII.2 GATT 1994). Should review of the fairness and equity of trading practices take into account “principles of justice” universally recognized in UN law?

This contribution argues that the widespread disregard of WTO law by domestic courts reflects power-oriented prejudices and democratic distrust vis-à-vis international law that run counter to the citizen-oriented functions of WTO rules to protect freedom, non-discriminatory conditions of competition, rule of law and welfare-increasing cooperation for the benefit of citizens across frontiers. The increasing number of mutually incoherent judgments by international and domestic courts on the interpretation and application of WTO rules (e.g. concerning EC import restrictions for bananas, US import restrictions for lumber) undermines the obligation of WTO members (e.g. under UN law) to respect “principles of justice” in the interpretation and application of international treaty law (Section I). Section II argues that international guarantees of individual freedom and of individual rights across frontiers may justify interpretations different from those appropriate for state-centered rules of international law. As “principles of justice” are an integral part of “the basic principles and ... objectives underlying this multilateral trading system”, to which the WTO Agreement

refers in its Preamble as well as in numerous other WTO provisions, WTO members should strengthen the domestic implementation of citizen-oriented WTO guarantees of freedom, non-discrimination and rule of law by means of, *inter alia*, WTO-consistent interpretation of domestic laws, cooperation among international and domestic courts, and more legal coherence in the implementation of WTO rulings in the multilevel “dispute settlement system of the WTO”. Section III recalls the basic principles governing the domestic implementation of WTO rules and dispute settlement rulings in WTO member countries and the EC. Section IV concludes with proposals for additional WTO commitments to interpret domestic laws in conformity with precise and unconditional WTO obligations and to grant citizens more effective legal and judicial remedies against welfare-reducing violations of WTO commitments in mutually agreed areas of WTO law. Domestic courts could play an important role in the prevention of WTO disputes as well as in the decentralized enforcement of precise and unconditional WTO obligations, including legally binding WTO dispute settlement findings on the protection of private rights once the “reasonable period” for the domestic implementation of WTO rulings has expired.

I. International justice? It’s international law, stupid

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.”⁶ Similarly, WTO Members, WTO lawyers and members of WTO dispute settlement bodies 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: Should WTO judges, WTO Members and domestic courts apply WTO law without regard to justice, just as economists perceive trade law as a mere instrument for promoting economic welfare and for justifying trade protection? Does the separation of the judicial power from the legislative and executive powers require that, as postulated by Montesquieu, 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 panels and the Appellate Body, confirm the view that, also in WTO law, judges must apply the positive law literally without regard to the normative question of whether the applicable rules lead to a just resolution of the dispute? Does justice require respect for the rule of international law also by domestic judges, notably interpreting domestic laws in conformity with self-imposed international treaties approved by parliaments and legally binding on all state organs?

⁶ R.Dworkin, *Justice in Robes* (2006), chapter 1. For a discussion of this *dictum* by Justice Holmes see also : T.Sowell, *The Quest for Cosmic Justice* (1999), at 169.

Bill Clinton fought the 1992 presidential election on the slogan “It’s the economy, stupid.” The question of why WTO legal guarantees of freedom, non-discriminatory treatment, rule of law and ‘due process’ in the administration of domestic trade laws are widely ignored by domestic courts in the US, the EC and, following the protectionist examples of these leading democracies and trading powers, also in most other WTO member countries, can be answered similarly: It’s WTO law, stupid. Trade politicians, pressured by rent-seeking lobbies, all too often reduce domestic consumer welfare on the basis of erroneous, mercantilist doctrines (“imports are bad, exports are good”, “foreign import restrictions reduce welfare, domestic protection and export subsidies increase welfare”). Similarly, their legal advisers often preach “legal mercantilism” in order to prevent domestic courts from reviewing their own violations of WTO law. For instance, both the EC and the US permit only their *export* industries to petition WTO dispute settlement proceedings against *foreign* governments (e.g. pursuant to Section 301 of the US Trade Act and the corresponding ‘Trade Barriers Regulation’ of the EC), without allowing their domestic industries and state governments to challenge violations of WTO rules in domestic courts.⁷ WTO Director-General Pascal Lamy’s public criticism of the breakdown of the Doha Round negotiations in July 2006 – “the pity in all of this is that what is on the table now constitutes greater progress in rolling back farm subsidies and tariffs than anything seen before in global negotiations”⁸ – illustrates that, in the international and domestic “bi-level negotiations” on reciprocal trade liberalization at home and abroad, short-term protectionist interests at home all too often prevail over the common long-term interests in reciprocal international trade liberalization, trade regulation and international rule of law.

The widespread disregard of WTO obligations and WTO dispute settlement rulings by domestic courts are part of a broader skepticism vis-à-vis international law, notably in countries with dualist legal traditions which (like the US) emphasize the constitutional rights of domestic legislatures and courts to disregard international treaty commitments. International law has evolved as an “international law of coexistence” focusing on state sovereignty and as an “international law of cooperation” aimed at promoting international cooperation among governments in worldwide and regional, intergovernmental organizations.⁹ 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 power-oriented international legal system is widely perceived as “unjust, discriminatory and irresponsible” and 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,

⁷ At the request of the political EC institutions (whose legal advisers claim that “it is difficult to point out one specific moment at which it can be established beyond doubt that WTO rules have been breached, even after a decision of a panel or report of the Appellate Body”, and “that it is rarely or never possible to speak of a sufficiently serious breach of WTO law” by the political EC institutions justifying the EC’s non-contractual liability for damages pursuant to Article 288 EC Treaty, cf. P.J.Kuiper, *WTO Law in the European Court of Justice*, 42 *Common Market Law Review* (2005), 1313, at 1334), the EC Court has refrained long since from reviewing the legality of EC acts in the light of the EC’s GATT and WTO obligations. Similarly, US legislation prevents US courts from challenging the WTO-consistency of US federal measures.

⁸ See: Pascal Lamy: *What now, trade ministers?* in: *International Herald Tribune*, July 27, 2006.

⁹ On the distinction between ‘international law of coexistence’ and ‘international law of cooperation’ see: W.Friedmann, *The Changing Structures of International Law* (1964).

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.”¹⁰

The post-war international legal order was essentially designed on the basis of drafts elaborated by the US for the 1944 Bretton Woods Agreements, the 1945 UN Charter, GATT 1947, the 1948 Havana Charter for an International Trade Organization, and the 1948 Universal Declaration of Human Rights. The US continues to emphasize its commitment to using international law as a transformation policy for promoting freedom and international rule of law. Yet, the hegemonic US penchant for unilateralism and exceptionalism in UN bodies reflects the widespread view inside the US that “the internationalism and multilateralism we promoted were for the rest of the world, not for us”.¹¹ Many GATT/WTO Members successfully used GATT/WTO law as an instrument for reforming *domestic* laws, for example for creating a customs union among EC member states, or for committing China, in its 2001 WTO Accession Protocol, to introduce guarantees of rule of law, independent courts, judicial review and private “rights to trade” inside China. The US government and US Congress, however, tend to reject such use of international law inside the US as being inconsistent with the American ideal of democratic national constitutionalism.¹²

My earlier comparative, constitutional studies of *Constitutional Functions and Constitutional Problems of International Economic Law*¹³ - written during my work as legal adviser in the GATT Secretariat and in the Uruguay Round Negotiating Groups

¹⁰ The speech of Kofi Annan is reproduced in UN document GA/105000 of 19 September 2006.

¹¹ J.Rubinfeld, *The Two World Orders*, in: G.Nolte (ed), *European and US Constitutionalism*, Council of Europe 2005, at 233, 235.

¹² On American ‘constitutional nationalism’ and European ‘multilevel constitutionalism’ see E.U.Petersmann, *Multilevel Trade Governance Requires Multilevel Constitutionalism*, in: C.Joerges/E.U.Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2006, chapter 1; J.Rifkin, *The European Dream: How Europe's Vision of the Future is Quietly Eclipsing the American Dream*, 2004. Most Europeans agree with the US view that popular sovereignty inside democratic nation states remains a precondition for legitimate transnational governance (cf. J.A.Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States*, 2005). The different constitutional conceptions relate to the European willingness to accept more far-reaching constitutional and international legal restraints on national foreign policy discretion in order to promote “international public goods” (e.g. as defined by EU and WTO law) rather than purely national interests (as advocated by “realist” and “neo-conservative” US defenders of hegemonic national foreign policies). The EC’s “Area of Freedom, Security and Justice” (Articles 61 ff EC Treaty) illustrates the successful EC’s experience with transforming economic liberalization (e.g. of free movement of workers and other persons inside the EC) into a common security policy based on “civilian power” rather than military power. European constitutionalism refutes the claim by “realists” that rule of law and “democratic peace” are possible only inside nation states.

¹³ E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland* (1991). Complementary comparisons of the constitutional and trade laws of the major GATT member countries were published in: M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law* (1993).

that elaborated the DSU and the institutional structures of the WTO – argued for constitutional reforms of international law from the *domestic perspective* of the constitutional regulation of economic liberties, trade and social justice in the 18th century Constitution of the US, the 19th century Constitution of Switzerland, the post-war Basic Law of Germany of 1949, and the Treaty Constitution of the EC. Such ‘bottom-up proposals’ for constitutional reforms of international economic law, to be initiated by the leading constitutional democracies and trading nations for the benefit of their citizens and for a more rules-based international order, remain confronted with important counter-arguments:

- First, as long as the basic structures of international law continue to be shaped by the power-oriented “international law of coexistence” - focusing on state sovereignty, border discrimination, reciprocal treaties and unilateral self-help -, it is widely believed that the “international law of cooperation” in the context of the UN and GATT must focus on *intergovernmental* structures and reciprocity principles, with due regard to power-realities and to the need to respond to foreign power politics by recourse to unilateral remedies (like allegedly "efficient breaches" of WTO obligations).
- Second, even though all GATT Contracting Parties have adopted constitutions limiting their national policy powers, many policymakers believe that the diversity among the national constitutional principles and traditions renders proposals for ‘constitutionalizing’ multilevel trade governance - beyond the ‘embedded liberalism’ underlying the post-war multilateral trading system – politically unrealistic.

The following chapters explain why such power-oriented, intergovernmental approaches to WTO law should be challenged by national and international judges on the ground that the universal recognition of human rights and of constitutional limitations of governmental trade policy discretion in national and international law may justify judicial and constitutional interpretations of intergovernmental guarantees of freedom, non-discriminatory conditions of competition, rule of law and “public order/morality” exceptions (e.g. in Article XIV GATS) that focus not only on rights of governments but take into account also the WTO objective of “providing security and predictability to the multilateral trading system” (Article 3 DSU) for the benefit of citizens and their individual rights. As long as WTO jurisprudence interprets the citizen-oriented WTO guarantees for mutually beneficial cooperation among citizens across frontiers only in terms of rights and obligations of governments, domestic judges in constitutional democracies are likely to continue distrusting WTO law and WTO dispute settlement findings as intergovernmental collusion that risks undermining domestic “principles of justice” and constitutional rights of citizens.

II. International integration law and ‘principles of justice’ call for judicial protection of individual rights

The ever larger number of more than 250 regional free trade areas, customs union and other integration agreements concluded all over the world, and the increasing focus in

international economic, environmental and human rights law on the protection of *individual* rights and of *private* international economic transactions, reflect the emergence of a dynamically evolving regional and worldwide 'integration law'.¹⁴ The more than 60 regional trade agreements (RTAs) concluded after the failure of the 2003 WTO Ministerial Conference to advance the worldwide 'Doha Development Round negotiations' illustrate that RTAs are increasingly perceived as alternative *fora* not only for trade liberalization, but also for trade regulation and non-economic integration. The recent initiatives of transforming regional free trade areas into broader integration agreements - for instance, into an ASEAN Community, Eastern and Southern African Communities, MERCOSUR, Andean and Central 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 legal, institutional, social and political framework supported by citizens, business and other non-governmental constituencies. One defining element of many of these integration agreements at bilateral levels (e.g. the more than 2500 bilateral investment treaties = BITs), regional levels (e.g. European integration law, NAFTA, MERCOSUR and Andean Common Market law) and worldwide levels (WTO, World Bank Convention establishing the International Centre for the Settlement of Investment Disputes = ICSID, WIPO Arbitration Centre, Law of the Sea Convention) is the promotion of legal security in private international economic transactions by means of (quasi)judicial dispute settlement procedures, often providing for compulsory jurisdiction (e.g. of WTO dispute settlement panels, the WTO Appellate Body, the EC Court of Justice, the EFTA Court, the International Tribunal for the Law of the Sea = ITLOS) and private access to national and international courts (e.g. the ECJ, the European Court of Human Rights, ICSID arbitration, Chapters 11 and 19 NAFTA panels, the Seabed Chamber of ITLOS). Enforcement of international trade rules and court rulings (e.g. by the EC Court of Justice, the EFTA Court, the European Court of Human Rights) by domestic courts has become recognized in European integration law¹⁵ and in international arbitration, but remains exceptional in case of other worldwide and regional economic rules and dispute settlement proceedings.¹⁶

¹⁴ Cf. E.U.Petersmann, From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System, in: *Journal of International Economic Law* (JIEL) 2 (1998), 175-198.

¹⁵ See: C.Baudenbacher, The Implementation of Decisions of the ECJ and of the EFTA Court in Member States' Domestic Legal Orders, in: 40 *Texas International Law Journal* 2005, 383-417.

¹⁶ Most WTO agreements include requirements (e.g. in Article X GATT) to make available judicial remedies in domestic courts. Only exceptionally, however, do they *require* domestic courts (e.g. in Article XX of the WTO Agreement on Government Procurement) to apply relevant WTO rules. Similarly, trade-related UN agreements – like the payments and exchange regulations of the International Monetary Fund (IMF) and the labour rights guaranteed in the conventions of the International Labour Organization – only rarely provide for the enforceability of citizen-oriented rules by domestic courts. Article VIII, section 2(b) of the IMF Agreement prescribes only the non-enforceability of IMF-inconsistent exchange restrictions: "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement, shall be unenforceable in the territories of any member." Most of the more than 2500 BITs provide for substantive as well as procedural guarantees of the rights of private foreign investors. Included amongst these are private access to international investor-state arbitration (e.g. under the auspices of ICSID or under the supervision of the International Chamber of Commerce); such arbitral awards tend to be enforceable in domestic courts based on various international agreements on the mutual recognition and domestic enforcement of national and arbitral judgments. Likewise, an increasing number of regional trade and investment

Implications for treaty interpretation

In European integration law, the different layers of private and public, national and international economic law were progressively integrated into a mutually coherent, legal 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), providing for legal and judicial remedies not only for EC member states but also for private citizens. In contrast to this citizen-oriented focus of European economic law, UN law and the WTO Agreement continue to be perceived as intergovernmental rights and obligations among states protecting freedom and non-discrimination in international economic relations without corresponding individual rights. Yet, the WTO Agreement and the compulsory jurisdiction of the WTO dispute settlement system have transformed the power-oriented "member-driven trade governance" under GATT 1947 into a legally and judicially more limited "multilevel trade governance."¹⁷ The customary rules of international treaty interpretation acknowledge that the "object and purpose" of a treaty (cf. Article 31 VCLT), the context of treaty provisions (cf., for example, Article 5 VCLT on treaties constituting international organizations or adopted within an international organization), their consistency with "respect for, and observance of, human rights and fundamental freedoms for all" (cf. the Preamble to the VCLT), or with peremptory norms of international law (cf. Articles 53, 64 VCLT), must be taken into account in the interpretation of treaty rules. For instance, GATT and WTO dispute settlement practice have recognized that the "contractual dimensions" of international agreements (e.g. the GATT and GATS schedules of reciprocal commitments) may require interpretative approaches (e.g. judicial protection of "non-violation complaints" aimed at maintaining the reciprocal "balance of concessions") that may not be warranted for interpreting the "constitutional dimensions" of GATT/WTO prohibitions of discrimination and non-tariff trade barriers. Hence, I have argued long since that WTO rules protecting individual rights may warrant additional legal and judicial remedies (as recognized, for instance, in Article 4 of the WTO Agreement on Preshipment Inspection, Article XX Agreement on Government Procurement, and in various TRIPS guarantees of legal and judicial remedies of private holders of intellectual property rights).

In interpreting international and domestic economic law, courts should distinguish rules aimed at protecting state sovereignty and intergovernmental rights and obligations from other treaty rules designed to protect private rights and private economic transactions. The customary methods of international treaty interpretation (as codified in Article 31.3.c VCLT) also require courts to take into account that the power-oriented, intergovernmental structures of international economic law are increasingly limited by *ius cogens* and *erga omnes* human rights obligations of all UN- and WTO-Members, by supranational powers of UN bodies (like the UN Security Council and ICJ) as well as by other international courts and institutions, including the WTO Dispute Settlement Body. The hierarchical structures of the law of international organizations assert legal

agreements provide for private legal and judicial remedies, including private access to international dispute settlement bodies (e.g. pursuant to Chapters 11 and 19 of NAFTA).

¹⁷ See: E.U.Petersmann, From 'member-driven governance' to constitutionally limited 'multi-level trade governance' in the WTO, in: G.Sacerdoti/A.Yanovich/J.Bohanes (eds), *The WTO at Ten. The Contribution of the Dispute Settlement System* (2006), at 86-110.

supremacy not only vis-à-vis domestic laws (cf. Article XVI:4 WTO Agreement); they also introduce vertical legal hierarchies and constitutional “checks and balances” among the institutions and different levels of primary and secondary law of international organizations (cf. Articles IX, XVI:3 WTO Agreement), and 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 far-reaching legal and institutional restraints (e.g. in Articles 16, 17 and 23 DSU) aimed at protecting freedom for international economic transactions, non-discrimination, rule of law and welfare-increasing cooperation among citizens across national frontiers.¹⁸

Implications for the principles underlying the WTO legal system

The intergovernmental WTO provisions protect private rights only in indirect ways by requiring WTO members to protect, for example, private rights to trade (including “rights to import and export” as guaranteed in the 2001 WTO Protocol on the Accession of China), intellectual property rights protected by the TRIPS Agreement, private rights of due process in administrative proceedings (e.g. on customs valuation, antidumping and safeguard measures, government procurement), private rights of access to domestic courts (e.g. pursuant to Articles X GATT, 13 Antidumping Agreement, 23 Subsidies Agreement, Articles 32, 41-50 TRIPS Agreement, XX Government Procurement Agreement) or, exceptionally (e.g. pursuant to Article 4 of the WTO Agreement on Preshipment Inspection) to international arbitration. WTO dispute settlement proceedings (e.g. over private intellectual property rights, the admissibility of *amicus curiae* submissions) and WTO politics (e.g. regarding the, since 1999, regular inter-parliamentary WTO conferences during WTO Ministerial meetings) continue to be reluctant to admit that the purpose of WTO provisions may go beyond intergovernmental rights and obligations by protecting also democratic decision-making, private transactions, other private interests and legitimate expectations of private rights holders. The UN High Commissioner for Human Rights has emphasized - in a series of reports on the human rights dimensions of WTO law and the human rights obligations of each WTO Member - that the *rights* of WTO Members under the numerous WTO “exceptions” (e.g. to protect public morals and public order) may be limited by *obligations* under UN human rights law (e.g. to protect human rights to food and of access to essential medicines, educational and other public services).¹⁹ The universal recognition of human rights illustrates that every legal system rests not only on rules but also on general principles essential for the overall coherence of rules.²⁰ The

¹⁸ On this emerging “international constitutional law” see: Petersmann (note 12).

¹⁹ Cf. E.U.Petersmann, The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy?” in: JIEL 7 (2004), at 605-628.

²⁰ On the today general recognition that every legal system consists not only of rules but also of more general principles, see R.Dworkin, *Taking Rights Seriously* (1978). On the dual functions of human rights and other constitutional rights as rules, as well as principles for optimizing rules depending on what is factually and legally possible in the particular circumstances, see R.Alexy, *A Theory of Constitutional Rights* (2002), chapter 3. Whereas rules apply to specific situations based on a ‘if-then-structure’, principles are more open norms, applicable to many more situations and requiring the

universal recognition of human rights and of national constitutions has increased the importance of “general principles of law” (Article 38 Statute of the ICJ) as a source of international law that is increasingly limiting governance powers. As all international agreements are “incomplete” and build on other principles of law (like good faith, *pacta sunt servanda*), international courts – and also WTO dispute settlement bodies - have recognized that

“(e)very international convention must be deemed tacitly to refer to general principles of international law for all the questions which it does not itself resolve in express terms and in a different way.”²¹

The WTO Agreement explicitly recognizes, in its Preamble, “basic principles and objectives ... underlying this multilateral trading system.” Some of these principles are explicitly specified in a large number of 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). Also the WTO requirement of interpreting WTO law “in accordance with customary rules of interpretation of public international law” (Article 3.2 DSU) refers to 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.²²

Implications for judicial governance in the WTO

WTO dispute settlement practice continues to identify an ever increasing number of general *legal principles* underlying the

- *procedural* WTO rules (like good faith interpretation, due process of law, transparency, prohibition of abuse of rights, “necessity”, balancing of rights and obligations, 'judicial economy');

'balancing' of diverse principles in order to concretise their legal relevance for the interpretation or supplementation of rules.

²¹ *Georges Pinson* case (France v United Mexican States), Award of 13 April 1928, UNRIAA Vol. V, 422. The same principle has also been applied in many arbitral awards to transnational investor-state contracts: “It is obvious that no contract can exist *in vacuo*, without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the parties. It is necessarily related to some positive law which gives legal effect to the reciprocal and concordant manifestations of intent made by the parties” (*Saudi Arabia v ARAMCO*, ILR Vol. 27 (1963), at 165). In the WTO Panel Report on *Korea – Government Procurement* (WT/DS163/R, adopted in June 2000), the Panel noted similarly as *obiter dictum*: “Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO agreements do not ‘contract out’ from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO” (para. 7.96).

²² Cf. C.McLachlan, The Principle of Systemic Integration and Article 31 (3)(c) of the Vienna Convention, in: *International and Comparative Law Quarterly* 54 (2005), at 279-320.

- *substantive* WTO rules (like rule of law, legal security, most-favored-nation treatment, and national treatment);
- and other 'relevant rules of international law applicable in the relations between the parties' to the WTO Agreement (like 'sovereign equality' of states, the duty to cooperate).²³

Similar to the controversies in the United States over whether the US Supreme Court must construe the Constitution according to the historical intentions of its framers in the distant past, or whether the Court's constitutional power and legal expertise justify the judicial clarification of generally worded, constitutional provisions in accordance with the requirements of present-day "constitutional self-government"²⁴, the delimitation of political and judicial powers in international legal regimes remains contested between government representatives insisting on their "member-driven governance", judges defending the independence and legitimacy of the judicial function, and citizens, parliaments and human rights bodies calling for "democratic self-government."²⁵ Most multilateral agreements are elaborated without an official "legislative history" and, in order to bridge the often diverse legislative intentions and preferences of individual countries and their negotiators, make use of "constructive ambiguity" for reaching agreement on general treaty provisions. If the agreement also provides, as in the case of the WTO Agreement, that disputes over the interpretation of treaty rights and obligations shall be decided by independent dispute settlement bodies, then such delegation of judicial power "to clarify the existing provisions of those agreements" (Article 3 DSU) seems to run counter to the conception of judges as passive agents applying substantive rules, enacted by the law-maker, to the particular circumstances of a dispute in predictable, secure and legitimate procedures. In the absence of a single "international legislator", the European Court of Justice and the European Court of Human Rights often focus on a coherent balancing of rights, rather than merely on textual interpretations, in their judicial examination of whether, for example, restrictions of rights "are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".²⁶ This increasing use, also in the case-law of the WTO Appellate Body and in international investment arbitration, of judicial "balancing" and "principles" for justifying interpretive choices is in line with modern constitutional theories of adjudication, such as Dworkin's "adjudicative principle of integrity" which requires judges to regard law as expressing "a coherent conception of justice and fairness":

²³ On the recognition of almost 40 different 'principles' in WTO law and WTO dispute settlement practices see : Götz J. Götsche, *Die Anwendung von Rechtsprinzipien in der Spruchpraxis der WTO-Rechtsmittelinstanz* (2005).

²⁴ Cf. C.L.Eisgruber, *Constitutional Self-Government* (2001), who argues that democratic legislatures and elections provide only an incomplete representation of the people, and that the judicial interpretation and application of the Constitution by the courts are integral parts of constitutional self-government.

²⁵ See Petersmann (note 13), at 459 ff, arguing for embedding international market integration law into a "self-enforcing constitution" based on individual rights, their judicial protection, government corrections of "market failures" and the collective supply of "public goods" based on the rule of law.

²⁶ This "necessity clause" appears in numerous Articles of the European Convention on Human Rights and reflects similar "necessity clauses" in EC law, WTO law and many other international treaties and national constitutions.

“Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.”²⁷

III. How to improve the domestic implementation of WTO rules and dispute settlement rulings? Basic principles

Sections I and II have argued that the multilevel legal and dispute settlement system of the WTO, as defined in WTO law in order to provide “security and predictability to the multilateral trading system” at intergovernmental and domestic levels, cannot fully realize its citizen-oriented objectives without additional legal reforms promoting more coherence in multilevel trade governance, including more coherent “judicial governance” by WTO and domestic dispute settlement bodies.²⁸ Moreover, the universal obligations of all WTO members (e.g. under the UN Charter) to promote “principles of justice” (Article 1), “universal respect for, and observance of, human rights and fundamental freedoms for all” (Article 55), and “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained” (Preamble of the UN Charter), increase the importance of the general principles underlying the WTO legal system.

WTO law is founded on basic principles of justice

From the perspective of citizens and their human rights, governments, international law and international trade are mere instruments for promoting the rights, welfare and self-government of citizens. The universal recognition of human rights requires evaluating international law, including WTO law and policies, in terms of their contribution to the enjoyment of human rights and to economic citizen welfare. Regardless of one’s individual value preferences for libertarian, egalitarian or utilitarian theories of justice, the WTO guarantees of freedom, non-discrimination and rule of law have considerably enhanced individual liberty, non-discriminatory treatment, economic welfare and poverty reduction across frontiers, i.e. they reflect, albeit imperfectly in many ways, basic principles of justice.²⁹ In terms of the Aristotelian distinction between ‘general principles of justice’ (like liberty, equality, promotion of general consumer welfare) and

²⁷ R.Dworkin, *Law’s Empire* (1986), at 225, 243.

²⁸ On the notion of ‘judicial governance’ and the legal and democratic functions of courts see, e.g., A.Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (2000). For instance, it is claimed (at p. 137) that constitutional courts perform four basic functions: (1) they operate as a ‘counterweight’ to majority rule; (2) they ‘pacify’ politics; (3) they legitimize public policy; and (4) they protect human rights.

²⁹ For overviews of theories of justice and of the justification of WTO rules by “principles of justice” see: F.J.Garcia, *Trade, Inequality and Justice : Toward a Liberal Theory of Just Trade* (2003); E.U.Petersmann, Theories of Justice, Human Rights and the Constitution of International Markets, in: Symposium on the Emerging Transnational Constitution, 37 *Loyola Law Review* 2004, 407-460; E.B.Kapstein, *Economic Justice in an Unfair World* (2006).

particular principles of justice requiring adjustments depending on particular circumstances³⁰, the WTO dispute settlement procedures 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.” This potential contribution of GATT/WTO rules to the promotion of freedom, non-discrimination, rule of law and justice in international trade justifies speaking of “constitutional functions” of GATT and WTO law.³¹ Yet, such “principles of justice” can become effective only to the extent that WTO rules and dispute settlement rulings are adopted not only in intergovernmental relations among states, but are also actually implemented in domestic laws and policies for the benefit of citizens. The democratic legitimacy of WTO rules depends more on their domestic effectiveness for the benefit of citizens than on their intergovernmental structures and approval by governments.

The WTO Dispute Settlement System faces no "compliance crisis"

During the first decade of the WTO dispute settlement system, all WTO panel and Appellate Body reports were adopted by the DSB. The WTO members found in violation of WTO obligations always committed to bring themselves in compliance. And in more than 80 per cent of all WTO dispute settlement rulings on the more than 180 panel and Appellate Body reports, as well as in respect of most arbitration awards pursuant to Articles 21, 22 and 25 of the DSU, WTO members actually complied. Due to the focus on compliance, compensation was never granted. Retaliation was requested and authorized in only six out of more than one hundred cases. Pursuant to Article 21.6 DSU, the DSB keeps the implementation of adopted rulings and recommendations under surveillance, and WTO members provide the DSB with "status reports" on their progress in the implementation of dispute settlement rulings and recommendations. Notwithstanding the inadequate “dispute prevention functions” of the DSU (e.g. vis-à-vis temporary, illegal safeguard measures) and the occasionally delayed compliance or non-compliance with WTO dispute settlement rulings (notably if changes in domestic *legislation* were required, and in case of highly politicized “wrong cases”), the WTO dispute settlement and compliance record appears to be better than that of other worldwide dispute settlement systems (e.g. in UN conventions). For legal and economic reasons (such as cost/benefit analysis), most WTO members appear to observe most of their WTO obligations most of the time. The fact that, up to Spring 2006, the US (30) and the EC (14) had more adverse WTO dispute settlement findings than all less-developed countries (= LDCs) together (29), does not justify a presumption that less-developed WTO members have complied more with WTO rules than developed WTO members. For, less than 30 per cent of the 149 WTO members were the object of adverse WTO dispute settlement findings, and trade restrictions in less-developed WTO Members were often not challenged in WTO dispute settlement proceedings even if they had been criticized in the respective ‘Trade Policy Reviews’ of the countries concerned.

³⁰ Cf. Aristotle, *Nicomachean Ethics* (ed. by M.Ostwald, 1999), book five.

³¹ See Petersmann (note 13), chapter VII.

There are few Doha Round proposals on the implementation of WTO rulings

In the Doha Round negotiations, there appear to be only few proposals by WTO Members on further improving the implementation of WTO dispute settlement rulings. The negotiations on improvements and clarifications of the DSU currently focus on a limited number of proposed amendments to the DSU (concerning post-retaliation, sequencing, remand, third party rights, open meetings, possible time-saving, preventive measures) and proposed actions by the DSB or other WTO bodies (regarding open meetings, panel composition, additional guidance to WTO adjudicative bodies).³² None of these proposals seems to address specifically the implementation of WTO rulings. Earlier proposals in the DSB Special Sessions for strengthening the legal remedies (e.g. LDC proposals for making compensation a more viable alternative to retaliation, for collective retaliation and "tradable remedies", for amending Article 21.8 DSU so as to provide for DSB recommendations of monetary compensation of injury suffered by less-developed WTO Members), for clarifying the 'compliance panel' proceedings and the termination of an authorization to retaliate once compliance is achieved, remain on the negotiating table. In the Negotiating Group on Rules, proposals have been made for amending the dispute settlement provisions in the Antidumping and Subsidy Agreements so as to provide for the suspension of antidumping and countervailing measures immediately after having been ruled by the DSB to be WTO-inconsistent, as well as for the refunding of excess anti-dumping and countervailing duties collected pursuant to WTO-inconsistent measure.

Legal and judicial remedies against violations of WTO rules remain inadequate

The absence of an intergovernmental "compliance crisis"³³, the only few proposals by WTO Members on further strengthening the implementation of WTO rulings, and the lack of Doha Round proposals specifically addressing the implementation of WTO rulings by domestic legislatures and courts reflect the relative satisfaction of *governments* with the intergovernmental operation of the DSU. From a *citizen perspective*, however, the legal and judicial remedies against the frequent violations of WTO rules remain inadequate for several reasons. For instance, as long as WTO members do not more clearly specify the available legal remedies in WTO dispute settlement proceedings, WTO dispute settlement findings on WTO obligations to "withdraw" illegal measures may remain controversial (e.g. whenever GATT/WTO dispute settlement bodies suggested repayment of illegal subsidies, anti-dumping or countervailing duties).³⁴ Similarly, the WTO dispute settlement practice regarding "suspension of concessions" and other countermeasures has remained contested as long as WTO Members fail to specify whether the purpose of such measures is only to "re-

³² For comprehensive analyses of the WTO negotiations on improvements of the DSU see: F.Ortino/E.U.Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (2004), Part I.

³³ Cf. J.Magnus, Compliance with WTO dispute settlement decisions: Is there a crisis? in: R.Yerxa/B.Wilson (eds), *Key Issues in WTO Dispute Settlement. The First Ten Years*, 2005, 242.

³⁴ On these legal controversies see, e.g., D.Palmeter/P.Mavrodís, *Dispute Settlement in the WTO. Practice and Procedure* (2nd ed. 2004) at 295 ff. In a pending dispute before the EC Court of Justice (Case 351/2004, *IKEA*), the EC Court is requested to give a preliminary ruling on whether antidumping duties collected in violation of WTO rules, as confirmed by WTO jurisprudence (in the *EC Bed Linen* case), have to be reimbursed.

balance" reciprocal rights and obligations, or also to "induce compliance."³⁵ The availability of other general international law remedies in WTO dispute settlement proceedings also remains contested unless WTO Members – for instance, in disputes involving intellectual property rights protected by the TRIPS Agreement (like the *Irish music case* between the EC and the US) – request “arbitration within the WTO as an alternative means of dispute settlement”, as provided for in Article 25 DSU, and explicitly request the arbitrators to decide on financial compensation of the private rights holders based on general international law rules.

From the perspective of rational citizens and the economic theory of optimal intervention³⁶, many intergovernmental dispute settlement proceedings over violations of WTO obligations are sub-optimal, wasteful policy instruments: they treat private producers, investors, traders and consumers adversely affected by such welfare-reducing trade restrictions as mere objects of authoritarian government discretion to violate the rule of law without granting adversely affected citizens effective legal and judicial remedies to protect themselves against protectionist abuses of government powers. The only three EC Court judgments on disputes among EC member states since the establishment of the Court in 1952 illustrate that most trade disputes among states and governments can be avoided by

- leaving the interpretation, application and enforcement of international trade rules to domestic courts;
- and by granting effective legal and judicial remedies to self-interested citizens to challenge administrative and legislative violations of international prohibitions of tariffs and non-tariff trade barriers in domestic courts as decentralized enforcement agents in multilevel trade governance.

Primary and secondary WTO obligations to comply with WTO rules

In addition to the “primary” international legal obligations of each WTO Member to implement its WTO obligations in good faith and “ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements” (Article XVI.4 WTO Agreement), the adoption of WTO panel and Appellate Body findings by the DSB entails “secondary” obligations

- to "secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements" (Article 3 DSU), either “immediately” or within “a reasonable period of time” (cf Article 21.3 DSU) depending, *inter alia*, on whether compliance with WTO law requires legislative, administrative or judicial measures;³⁷
- if WTO treaty benefits continue to be nullified after the end of the implementation period, to accept either “a mutually satisfactory adjustment”

³⁵ Cf. Palmetier/Mavroidis (note 32), at 300 ff; J.Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law* (2003), at 219 ff.

³⁶ See Petersmann (note 13), at 57 ff.

³⁷ On the misunderstandings by some Anglo-Saxon lawyers and trade politicians of the international law and WTO obligations to terminate illegal measures see J.H.Jackson, *International Law Status of WTO Dispute Settlement Reports : Obligations to Comply or Options to ‘Buy Out’*, 98 AJIL (2004), 109 ff.

(Article 26.1 DSU), including voluntary compensation as a "temporary measure" pending "full implementation of a recommendation to bring a measure into conformity with the covered agreements" (Article 22.1 DSU), or "suspension of concessions or other obligations" as a remedy aimed at rebalancing reciprocal WTO rights and obligations and inducing compliance with WTO law.³⁸

WTO rules and dispute settlement rulings could be implemented more effectively by stronger *domestic legal and judicial remedies* against violations of WTO rules, for instance if domestic legal remedies were made available not only for *export* industries (e.g. under Section 301 of the US Trade Act and the EC's Trade Barriers Regulation) against violations of WTO rules by *foreign* governments, but also for *domestic* importers and consumers against violations of WTO rules by their own government, on internationally agreed terms and conditions (e.g. only after the expiry of the "reasonable period of time" for the domestic implementation of dispute settlement rulings, only in respect of administrative measures, only in case of manifest disregard for procedural WTO requirements for customs valuation, antidumping calculations, tendering procedures in government procurement, technical barriers to trade, risk assessments and approval procedures for sanitary measures).³⁹ As WTO dispute settlement rulings are based on *existing* WTO obligations and are subject to numerous safeguards of due process of law (such as appellate review, "reasonable periods" for the implementation of dispute settlement rulings in domestic legal systems), the proposed, additional WTO legal and judicial remedies for decentralized enforcement of certain categories of legally binding WTO dispute settlement rulings would not change the nature of the existing WTO obligations nor that of constitutionally limited trade governance and administration inside democracies. Like WTO dispute settlement rulings, their decentralized enforcement could promote important economic values (e.g. consumer welfare, non-discriminatory conditions of competition) as well as legal and political values (e.g. individual freedom, rule of law, transparent policymaking, quasi-judicial settlement of disputes) based on the existing WTO requirements (e.g. in Article XVI.4 WTO Agreement) to ensure the conformity of domestic laws, regulations and administrative procedures with WTO obligations approved by national governments and law-makers. Enforcement of WTO rules and of certain WTO dispute settlement rulings could thus be de-politicized and rendered more effective by enlisting domestic courts and individuals as self-interested agents for the decentralized enforcement of *administrative* implementing measures.

³⁸ On the voluntary nature of trade compensation under the WTO, and the prevailing view that DSU rules and practices exclude general international law obligations of reparation of injury caused by violations of WTO rules (e.g. financial compensation), see: M.Bronckers/N. van den Broek, Financial Compensation in the WTO. Improving the Remedies of WTO Dispute Settlement, 8 JIEL (2005), 101 ff.

³⁹ For a detailed explanation of this argument see E.U.Petersmann, Prevention and Settlement of Transatlantic Economic Disputes, in: E.U.Petersmann/M.Pollack (eds), *Transatlantic Economic Disputes: The EU, the US and the WTO* (2003), chapter 1.

Beyond legal formalism: Democratic legitimacy of judicial governance

Lawyers and international judges legitimize international legal obligations in terms of consent by sovereign states and their national parliaments, rule of law, judicial review and customary methods of treaty interpretation for clarifying the words and objective meaning of agreed treaty rules. The Appellate Body's focus on textual interpretation and on customary methods of treaty interpretation reflects this concern for "legal legitimacy." Civil society, human rights bodies and academics emphasize the need for going beyond "legal formalism"⁴⁰ by reviewing the legitimacy of WTO rules and WTO dispute settlement rulings more comprehensively. As WTO law mentions neither consumer welfare nor the human rights obligations of all WTO members, WTO rule-making and dispute settlement require democratic "checks and balances" protecting general citizen interests. It is therefore to be welcomed that, in recent WTO dispute settlement practice, WTO panels have decided to open certain panel proceedings to the public. The criticism by local politicians of international adjudication as "undemocratic" appears unwarranted if, as in the case of the WTO, the applicable international rules and dispute settlement procedures have been ratified by domestic parliaments and protect individual freedom, non-discriminatory conditions of competition, rule of law and domestic consumer welfare far beyond national laws. The WTO legal and dispute settlement system extends and protects compliance with democratically approved rules across frontiers.⁴¹ As WTO dispute settlement rulings are the result of quasi-judicial proceedings subject to legal and political safeguards that go beyond those in other international dispute settlement proceedings (such as WTO appellate review, extensive third party rights, admissibility of *amicus curiae* submissions), WTO dispute settlement rulings can assert a relatively broad degree of legal and democratic legitimacy – notwithstanding the numerous imperfections of WTO dispute settlement proceedings when compared with *domestic*, rather than with other *intergovernmental* dispute settlement procedures. It is also important to recall the non-economic "transformation functions" of the WTO guarantees of freedom, non-discriminatory competition and rule of law: Just as the EC's GATT membership helped to establish a customs union and harmonize trade law inside the EC and transform the EC Treaty into the most effective peace treaty in Europe, WTO rules (such as the WTO Accession Protocol for China and its legal guarantees for private "rights to trade" and judicial review by independent tribunals) are of strategic importance for transforming formerly closed countries into open societies based on respect for rule of law and non-discriminatory competition.

Apart from the "input-legitimacy" of WTO dispute settlement rulings deriving from the intergovernmental and parliamentary approval of WTO law and the quasi-judicial nature of WTO dispute settlement procedures, WTO rules and WTO dispute settlement

⁴⁰ S.Picciotto, The WTO's Appellate Body : Legal Formalism as a Legitimation of Global Governance, in : *Governance : An International Journal of Policy, Administration and Institutions* 18 (2005), 477 ff.

⁴¹ For example, the DSU only "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" (Article 3.2 DSU). WTO dispute settlement panels, the Appellate Body and WTO arbitrators apply *existing* WTO rights and obligations to concrete disputes and "cannot add to or diminish the rights and obligations provided in the covered agreements" (Articles 3.2, 19.2 DSU).

rulings can also assert “output-legitimacy” from their promotion of individual liberty (e.g. of producers, investors, traders and consumers), non-discriminatory conditions of competition, international rule of law and welfare-increasing trade and competition. The WTO rules on the admissibility of non-discriminatory regulations (e.g. Articles III GATT, VI GATS, 8 TRIPS Agreement) and the numerous WTO exception clauses protect the sovereign rights of each WTO Member to correct “market failures” (e.g. by non-discriminatory competition, environmental and social rules) and to give priority to non-economic “public goods” (e.g. by national measures pursuant to Articles III, XV-XXIV GATT, V-X GATS, 6-8, 30-32 TRIPS Agreement). Violations of WTO obligations can therefore be presumed to lack legal and economic legitimacy (e.g. in terms of reducing consumer welfare, violating self-imposed international legal obligations, discriminatory departures from non-discriminatory conditions of competition). Numerous DSU provisions reflect this presumption of “nullification or impairment of benefits” (cf. Article 3.8 DSU) and the rational self-interest of WTO Members “in providing security and predictability to the multilateral trading system” and securing “the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements” (Article 3 DSU).

WTO law commits all domestic government bodies

The international obligations of WTO Members apply to all their relevant government bodies and require legislative, administrative and judicial implementing measures at domestic levels. The legal obligation of each WTO 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) respects the sovereign right to decide whether to incorporate WTO law directly into the domestic legal system (“monism”) or to implement WTO obligations only indirectly through additional domestic laws and regulations (“dualism”). Likewise, the WTO obligations to make available judicial remedies inside WTO Members only exceptionally prescribe (e.g. in Article XX of WTO Agreement on Government Procurement) that domestic courts must apply WTO rules as applicable law. The domestic regulation of the interrelationships between WTO rules and domestic trade rules differs considerably among WTO members, thereby reducing legal “security and predictability” of WTO rules in the multilateral trading system. Just as WTO rules and the DSU promote legal security and reduce transaction costs at the international level, so could additional WTO rules on domestic implementation of WTO obligations enhance protection of liberty, non-discriminatory conditions of competition and rule of law inside WTO members.

Proposals for further strengthening the domestic implementation of WTO dispute settlement rulings are often resisted by governments, for example on the ground that

- WTO dispute settlement rulings recognize “the well-established principle that ‘choosing the means of implementation is, and should be, the prerogative of the implementing Member’”;⁴²

⁴² US-Offset Act/Byrd Amendment Arbitration (WT/DS217/14, WT/DS234/22, para.52).

- in many countries, WTO rules have no "direct effect", and national legislatures have constitutional powers to enact legislation inconsistent with international obligations;
- respect for constitutional democracy requires leaving the elaboration of domestic implementing legislation to domestic legislatures.

Of course, the WTO must respect the fact that attitudes of national parliaments *vis-à-vis* international law, and the role of national legislatures in the domestic implementation of WTO rules, legitimately differ among WTO Members.

"Fast-track legislation" for implementing WTO rulings appears unwarranted

In the US, the intergovernmental negotiation of trade agreements and their parliamentary ratification and implementing legislation are governed by Congressional "fast track legislation" based on US Secretary of State Cordell Hull's "constitutional insight" that granting limited "trade promotion authority" to trade negotiators, and limiting Congressional trade policy powers (e.g. to repeat the "logrolling dynamics" of the protectionist Smoot-Hawley tariff legislation of 1930), can promote welfare-increasing trade liberalization and non-discriminatory trade legislation in the national interest.⁴³ The idea of a reciprocal WTO commitment for the domestic implementation of WTO dispute settlement rulings by "fast-track legislation" appears, however, inconsistent with the need to respect the democratic autonomy of national parliaments. While WTO dispute settlement rulings requiring termination of discriminatory *administrative* trade restrictions are regularly implemented inside the US and other WTO Members, the implementation of WTO rulings requiring domestic *legislation* requires parliamentary majority support that may change over time and may, inevitably, remain difficult to secure in democracies.

The European Parliament's proposals for setting-up a WTO parliamentary body for more effective parliamentary control of WTO activities could promote better first-hand information of members of parliaments and reduce the "information asymmetries" and "democratic distrust" *vis-à-vis* intergovernmental rule-making in worldwide institutions far away from domestic citizens and parliamentary constituencies.⁴⁴ Yet, US Congressmen remain reluctant to cooperate in inter-parliamentary meetings abroad which risk being criticized by local political constituencies as lacking democratic legitimacy, undermining the trade negotiating authority of the US government, and wasting tax payers' money.⁴⁵ In the Doha Round negotiations, WTO members have not submitted proposals for additional WTO rules promoting the implementation of WTO dispute settlement rulings by domestic parliamentary legislation. Occasional difficulties

⁴³ Cf. K.W.Dam, Cordell Hull, the Reciprocal Trade Agreements Act and the WTO, in: E.U.Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance* (2005), chapter 3.

⁴⁴ See the contribution by the Member of the European Parliament E. Mann, A Parliamentary Dimension to the WTO: More than Just a Vision? in: Petersmann (note 43), chapter 21.

⁴⁵ See the contributions by former US Congressmen D.E.Skaggs and J.Bacchus to Petersmann (note 43), chapters 19 and 22.

in mustering parliamentary support for domestic legislation implementing WTO dispute settlement rulings are the inevitable costs of respect for democratic decision-making.

IV. Preventing, decentralizing and depoliticizing WTO disputes by using domestic courts and citizens for enforcing WTO rules

Many WTO disputes arise only because WTO Members (including the US and the EC) prevent their domestic courts from applying WTO rules. The unofficial names of WTO disputes (such as "Kodak/Fuji", "Havana Club") reflect the fact that many intergovernmental WTO disputes are initiated by private complainants (e.g. invoking Section 301 of the US Trade Act or the corresponding EC Trade Barriers Regulation) in order to protect *private rights* or other private interests (e.g. of service suppliers, investors, government procurement suppliers, holders of intellectual property rights).⁴⁶

WTO disputes over private rights should primarily be settled in domestic courts

WTO dispute settlement proceedings at *intergovernmental* levels are often sub-optimal, inefficient methods for the settlement of disputes over *private* rights and obligations (e.g. to pay customs duties).⁴⁷ Such WTO disputes could often be prevented if *domestic courts* were offering effective private remedies against violations of WTO rules.⁴⁸ Reciprocal WTO commitments to decentralize and depoliticize certain trade disputes over private rights and obligations - by enlisting domestic courts and the vigilance of self-interested citizens to interpret and apply justiciable WTO rules in domestic legal systems where traders rely on these rules - would reduce transaction costs, enhance rule of law and promote "democratic ownership" of world trade law. As long as the EU and the US cling to their mercantilist power politics of permitting only their *export* industries to petition WTO dispute settlement proceedings against *foreign* governments, without allowing their domestic industries to challenge the same WTO-inconsistent domestic practices in domestic courts, the proposed decentralization and depoliticization of such WTO disputes appear politically feasible only through additional, reciprocal WTO commitments

⁴⁶ Whereas the WTO Protocol on the accession of China (WT/L/432) and the domestic laws of some WTO Members with civil-law traditions (like the EC) guarantee "private rights to trade", including "rights to import and export goods" (WT/L/432, Part I.5.1), WTO members with common law traditions (like the US) protect freedom of trade more through objective guarantees than through individual rights.

⁴⁷ For a practical illustration of this argument see the case study of the "Havana Club" dispute in the WTO, in which two wealthy French and US companies succeeded in transforming their private dispute over private trade mark rights into an intergovernmental dispute between the EU and the US, entailing threats of transatlantic trade war, cf. F.Abbott/T.Cottier, in: Petersmann/Pollack (note 39), chapter 16.

⁴⁸ See Petersmann (note 39), at 41 ff.

- requiring domestic courts to *interpret* domestic trade rules (e.g. on customs valuation, antidumping, intellectual property rights) in conformity with the WTO obligations of the country concerned;⁴⁹ and
- empowering domestic courts to *apply* specifically agreed, precise and unconditional WTO rules (as provided for in Article XX of the WTO Agreement on Government Procurement) at the request of private plaintiffs vis-à-vis *administrative* trade restrictions inconsistent with WTO law.

Just as self-interested citizens and their private access to domestic courts are recognized as the most important guardians of rule of law inside constitutional democracies and in European integration law, so should rational, democratic governments leave the settlement of international trade disputes over private rights primarily to their domestic courts, and resort to intergovernmental WTO procedures for the settlement of private disputes only as subsidiary means if WTO Members failed to grant effective judicial review⁵⁰, or if national courts ignore or misinterpret WTO rules. The proposed reciprocal WTO commitments could be of crucial importance for promoting rule of law and judicial protection of WTO rules in the large number of less-developed WTO countries (like China) without effective rule-of-law traditions. Also in free trade areas and customs unions like the EC which has incorporated WTO law as an “integral part of the Community legal system” in order to secure compliance by all national and EC organs with their WTO obligations (cf. Article 300:7 EC Treaty), domestic courts offer the most effective remedy for resolving the ever larger number of complaints inside the EC over national and EC violations of WTO rules (note that Article 292 EC prevents EC member states from submitting such disputes to the WTO).⁵¹ The EC Court recognizes the “direct applicability” of precise and unconditional international law obligations of the EC for almost all areas of international law and for most of the EC's international agreements except WTO law, for which the political and judicial EC bodies emulate the dualist approach of the “non-self executing” provisions in the US Uruguay Round Agreement Act of 1994 and deny “direct applicability” of WTO rules

⁴⁹ Even though this principle of WTO-consistent interpretation is recognized in many jurisdictions (e.g. pursuant to the “Charming Betsy doctrine” in the US), it is only rarely applied by domestic courts in many WTO Members, cf. J.A.Restani/I.Bloom, *Interpreting International Trade Statutes: Is The Charming Betsy Sinking?*, in: *24 Fordham Int'l L.J. 1533*. The European Court of Justice has a long history of ignoring GATT and WTO rules at the request of political EC bodies which have often misinformed the EC Court on the meaning of GATT/WTO rules and dispute settlement reports (e.g. in Case 112/80, *Dürbeck*, ECR 1981, 1095, the Commission misinformed the EC Court on an unpublished GATT dispute settlement finding against the EC, and the Court relied on this information without verifying the obviously wrong information of the Commission).

⁵⁰ See, for example, the WTO obligations regarding “judicial review” in Section I.2 (D) of China's Protocol on Accession to the WTO, WT/L/432, at 4: “China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.”

⁵¹ The legal situation is different in NAFTA which has incorporated several WTO provisions and offers member states a choice between NAFTA and WTO dispute settlement proceedings.

on political grounds.⁵² Just as WTO obligations of the US are judicially enforceable only at the request of the federal government vis-à-vis state actions, so are the EC's WTO obligations judicially enforceable inside the EC only against member states, but not against the EC institutions.⁵³ Similarly, the EC Court emphasizes the legal obligation of national courts to interpret EC law in conformity with the WTO-obligations of the EC⁵⁴, but often disregards relevant WTO obligations in its own case-law. Such double standards and "judicial protectionism" risk being emulated by courts in other WTO countries and weaken WTO commitments to protect private rights and legal security for the benefit of citizens by making WTO rules less policy-relevant in domestic decision-making processes.

Certain final WTO dispute settlement rulings on WTO-inconsistent administrative discrimination should be rendered enforceable by domestic courts

Intergovernmental dispute settlement proceedings tend to be optimal only for disputes over conflicting *national interests*⁵⁵, for example disputes over whether non-discriminatory public interest legislation is unnecessarily trade-restrictive (e.g. approval procedures for sanitary measures and genetically modified organisms), or disputes concerning technical production and product regulations (like asbestos) and trade restrictions for non-economic purposes (e.g. prohibition of gambling services, protection of the environment). Disputes over discriminatory, *administrative* trade restrictions violating private rights should, primarily, be settled by *domestic* legal and judicial remedies. WTO members should introduce additional WTO commitments to the effect that, if domestic courts disregard the WTO obligations of the country concerned in their judicial review of certain categories of administrative trade restrictions, then final WTO dispute settlement rulings (e.g. on private intellectual

⁵² Cf. e.g. Case C-245/02, *Anheuser-Busch Inc. v B.Budvar*, Judgment of 16 November 2004 (nyr), para 54: "The Court has already held that, having regard to their nature and structure, the provisions of the TRIPs Agreement do not have direct effect. Those provisions are not, in principle, among the rules in the light of which the Court is to review the legality of measures of the Community institutions under the first paragraph of Article 230 EC and are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law." The exceptional judicial recognition of "direct applicability" of WTO rules pursuant to the EC Court's "Nakajima" and "Fediol" exceptions has hardly ever been applied by the EC Court. The EC Court's arguments against "direct applicability" rely on obvious misinterpretations of WTO rules (cf. Case T-69/00, *FIAMM*, December 2005: "applicants are wrong in inferring from Articles 21 and 22 of the DSU an obligation on the WTO Member to comply, within a specified period, with the recommendations and rulings of the WTO bodies") as well as on political arguments (like lack of international reciprocity, need to protect the "scope of manoeuvre" of the political EC bodies) which had been rejected by the EC Court itself in its 1982 *Kupferberg* judgment (Case 104/81, ECR 1982, 3659). Unsurprisingly, Machiavelli-minded advocates of the political EC institutions criticize the 'Kupferberg-reasoning' as "richly naïve" and request the Court to respect the political discretion of EC bodies to violate WTO rules (Kuijper, note 7, at 1320-1323), without regard to the EC's constitutional commitment to "strict observance of international law" (Articles 300:7 EC, I-3 2004 Treaty Establishing a Constitution for Europe) and without regard for EC citizen interests in rule of law.

⁵³ For a criticism of this case-law of the EC Court by various EC Advocates-General and academics see: E.U.Petersmann, On Reinforcing WTO Rules in Domestic Laws, in: J.J.Barcelo III/H.Corbett (eds), *Rethinking the World Trading System* (2006), chapter 11.

⁵⁴ Cf. e.g. Case C-245/02 (note 53), paras. 54-57.

⁵⁵ For a detailed explanation of this argument see Petersmann (note 39), at 34 ff.

property rights, WTO-inconsistent customs valuation decisions, discrimination in government procurement) confirming such WTO violations should be mutually recognized as enforceable in domestic courts under mutually agreed conditions (e.g. expiry of the “reasonable implementation period”). More comprehensive domestic judicial remedies (e.g. including financial compensation in case of infringements of intellectual property rights) could set incentives for recourse to domestic legal remedies and for decentralized enforcement of WTO obligations through domestic courts rather than through intergovernmental, welfare-reducing sanctions.⁵⁶

Several EC Advocates-General have rightly emphasized that “in a ‘Community governed by law’ DSB decisions must be considered as a criterion of the legality of Community measures and that the Court consequently should not, on grounds of doubtful legal merit, give clear approval to legal arguments that would lead to the opposite conclusion.”⁵⁷ The lack of judicial remedies of EC member states and EC citizens against violations of WTO obligations by EC institutions reveals a serious deficit in the rule-of-law system of the EC. Just as the EC Court has declined to enforce WTO obligations vis-à-vis the political EC institutions, so has the Court also refused to enforce WTO dispute settlement rulings (e.g. on the illegality of the EC’s import restrictions on bananas), even if the implementation period had expired several years ago and the EC institutions and EC implementing measures had explicitly committed themselves to compliance with the WTO dispute settlement rulings.⁵⁸ The Court has rejected the EC’s non-contractual liability (Article 288 EC) for compensation of the damages caused by the sanctions against the EC’s non-compliance with WTO dispute settlement rulings.⁵⁹ In another pending dispute, the EC Commission has asked the EC Court to reconsider and replace its “Nakajima exception” by a more flexible “consistent interpretation principle”⁶⁰ so as to obviate the practice of the political EC institutions to avoid references to WTO law in the EC implementing regulations as a means of limiting their judicial accountability.⁶¹ I have criticized, for more than 25 years⁶², that the EC Court refuses - on misconceived grounds of GATT law - taking into account precise and unconditional GATT obligations of the EC and of all EC member states to protect legal freedom, non-discrimination and rule of law, rather than e.g. justifying its

⁵⁶ On the lack of financial compensation in WTO dispute settlement proceedings see: M.Bronckers/N.van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, in: *JIEL* 8 (2005) 101 ff. On the exceptional agreement on arbitration pursuant to Article 25 DSU over monetary compensation for US infringements of copyrights see: B.O’Connor/M.Djordjevic, *Practical Aspects of Monetary Compensation: The US-Copyright Case*, in: *JIEL* 8 (2005), 127 ff. On the many disadvantages of trade sanctions in the WTO see: R.Z.Lawrence, *Crimes & Punishments? Retaliation under the WTO* (2003).

⁵⁷ Opinion by Advocate-General Alber in Case C-93/02, *Biret*, CMLR 2006, 435.

⁵⁸ Case T-19/2001, *Chiquita*, judgment of February 2005 (nyr). The Court invokes Articles 21 and 22 DSU as justification for its refusal to grant effective judicial remedies.

⁵⁹ Case T-69/00 (note 52), para. 205: The possibility “of tariff concessions being suspended as provided for by the WTO agreements is among the vicissitudes inherent in the current system of international trade. Accordingly, the risk of this vicissitude has to be borne by every operator who decides to sell his products on the market of one of the WTO members”.

⁶⁰ Case 313/2004, *Franz Egenberger*, pending.

⁶¹ For Machiavellian justifications see Kuijper (note 7, e.g. at 1332-34), who argues for focusing on the political “law in action” rather than the WTO “law in the books”.

⁶² Cf. E.U.Petersmann, *Application of GATT by the Court of Justice of the European Communities*, in: *Common Market Law Review* 20 (1983), 397 – 437.

judicial restraint on grounds on EC constitutional law. Yet, while EC constitutional law may offer convincing reasons for judicial self-restraint regarding citizen requests to unilateral, judicial enforcement of GATT obligations in domestic courts, the EC's constitutional principle of "strict observance of international law" (cf. Article I-3 of the 2004 Treaty Establishing a Constitution for Europe) renders it difficult to argue that EC member states should lack legal and judicial remedies against EC violations of WTO rules if WTO law offers such legal and (quasi)judicial remedies to every WTO member country.

Conclusion

WTO law remains of crucial importance for a mutually beneficial division of labor, international rule of law and the integration of less-developed countries into a rules-based, worldwide division of labour. The frequent EC and US double standards of promoting WTO rules and WTO dispute settlement rulings abroad (for the benefit of export industries), and resisting judicial protection of the "rule of WTO law" at home (for the benefit of rent-seeking lobbies), render additional WTO commitments for more effective domestic implementation of WTO dispute settlement rulings unlikely. As a civilian power based on a "Community of law", the EC should take the lead for further strengthening the many deficiencies of the WTO dispute settlement system and for preventing, decentralizing and depoliticizing intergovernmental trade disputes by stronger domestic legal and judicial remedies. Realist US foreign policies should support the strategic potential of the WTO legal and dispute settlement system for transforming formerly closed states without judicial rule-of-law traditions (like China, Russia, Islamic and developing countries) into rules-based, open economies. As long as EC and US politicians pride themselves on their power to ignore WTO obligations and pressure their domestic courts to ignore WTO dispute settlement rulings⁶³, respect for WTO rules and the domestic enforcement of WTO dispute settlement rulings will remain contested also in other WTO Members, and the "Charming Betsy"⁶⁴ is likely to sink further into oblivion.-

⁶³ From 1995 up to spring 2006, the US had 30, and the EC had 14 adverse WTO dispute settlement findings of violations of their respective WTO obligations. Both have tended to comply in cases concerning administrative measures and to amend legislation inconsistent with WTO law. Yet, several "compliance panels" (pursuant to Article 21.5 DSU) found that some of these administrative and legislative remedial measures continued to violate WTO obligations (e.g. concerning US antidumping and subsidy practices, EC import restrictions on bananas). In a few cases, the US Congress had not yet passed remedial legislation.

⁶⁴ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").