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Individual Sovereignty: from Constitutional
Nationalism to Multilevel Constitutionalism
in International Economic Law?

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Abstract

This paper discusses the basic constitutional problem of modern international law since the UN Charter: How can the power-oriented international legal system based on “sovereign equality of states” be reconciled with the universal recognition of “inalienable” human rights deriving from respect for human dignity and popular sovereignty? State representatives, intergovernmental organizations, international judges and non-governmental organizations often express different views on how far the universal recognition of human rights has changed the subjects, structures, general principles, interpretative methods and “object and purpose” of international law (e.g. by the emergence of *erga omnes* obligations and *jus cogens* limiting state sovereignty to renounce human rights treaties, to refuse diplomatic protection of individuals abroad, or domestic implementation of international obligations for the benefit of domestic citizens). The paper explains why effective protection of human rights at home and abroad requires multilevel constitutional protection of individual rights as well as multilevel constitutional restraints of national, regional and worldwide governance powers and procedures. While all European states have accepted that the European Convention on Human Rights and EC law have evolved into international constitutional law, the prevailing paradigm for most states outside Europe remains “constitutional nationalism” rather than “multilevel constitutional pluralism.” Consequently, European proposals for reforms of international economic law often aim at “constitutional reforms” (e.g. of worldwide governance institutions) rather than only “administrative reforms”, as they are frequently favoured by non-European governments defending state sovereignty and popular sovereignty within a more power-oriented “international law among states.”

Keywords

WTO; Council of Europe; European Court of Justice; law; fundamental/human rights; international trade; international relations; intergovernmental conferences.

STATE SOVEREIGNTY, POPULAR SOVEREIGNTY AND INDIVIDUAL SOVEREIGNTY: FROM CONSTITUTIONAL NATIONALISM TO MULTILEVEL CONSTITUTIONALISM IN INTERNATIONAL ECONOMIC LAW?

Prof. Dr. Ernst-Ulrich Petersmann^{*}

Introduction and Summary: Need for Redesigning Sovereignty for the Benefit of Citizens and their Constitutional Rights

Over the past centuries, claims to supreme political and legal power over people (sovereignty) by rulers (e.g. the pope, emperors, monarchs, colonial powers), states and international organizations have become increasingly contested. The Westphalian system of international law among sovereign states - based on internal sovereignty (as defined by constitutional law) and external sovereignty (as defined by state-centered international law) - was power-oriented and lacked democratic legitimacy, as illustrated by colonialism and imperial wars. Also the UN Charter (e.g., Chapter V regulating the Security Council) remains based on power-oriented structures lacking input-legitimacy (e.g., in terms of respect for human rights and democracy) as well as output-legitimacy (e.g., in terms of protection of 'democratic peace'). Even though proclaimed on behalf of "We the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights" (Preamble of the UN Charter), the intergovernmental structures of UN law have proven to be incapable of realizing the human rights objectives of UN law. The ineffectiveness of so many UN guarantees of human rights in so many countries undermine also the democratic legitimacy and effectiveness of UN law.¹

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¹ See E.U.Petersmann, Constitutionalism, International Law and 'We the Peoples of the United Nations', in: H.J.Cremer *et alii* (eds), *Tradition und Weltoffenheit des Rechts. Festschrift für H.Steinberger* (Berlin: Springer Publishers, 2002), 291 ff.

The claims by rulers to supreme ordering power (“political sovereignty”) must be distinguished from democratic constitutional law as the legal source of sovereign powers (“constitutional sovereignty”), as well as from “democratic sovereignty” and “individual sovereignty” in the sense of the actual capacity of a democratic polity and of individual citizens to self-government. Modern globalization is characterized by increasing economic, political, legal and other limitations of political sovereignty and by the re-allocation of government powers to democratic people, indigenous people, international organizations and individual human beings as legal subjects of inalienable human rights. This dynamic transformation of international relations and of international law entails tensions between the “sovereign equality” of UN member states as one of the constitutional principles of the UN Charter (Art.2), the “right to self-determination of all peoples” as universally recognized in the UN human rights covenants of 1966 (Article 1), and the universal recognition, in numerous UN human rights instruments, of “the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world” (Preamble of the 1966 UN Covenant on Economic, Social and Cultural Rights). Human rights law, like most democratic constitutions, proceeds from the two premises that (1) human rights are not granted, but only recognized by governments; and (2) citizens constitute governments with limited powers that must be exercised for the protection of the human rights and public interests of their citizens.² The UN Human Rights Committee has rightly emphasized (e.g. in its General Comments 24 and 26 on the UN Covenant on Civil and Political Rights) that - even if human rights treaties are concluded among states – unilateral reservations and denunciations may be legally invalid and cannot take away “inalienable” human rights of citizens³, just as democratic governments may lack powers to unilaterally abrogate constitutional rights of their citizens. This contribution argues for a “constitutional approach” to international law based on the following principles:

- (1) Equal individual freedom as first principle of justice: The universal recognition of inalienable human rights requires construing state sovereignty, popular sovereignty and “individual sovereignty” in a mutually coherent manner so as to protect more effectively equal freedoms of individuals and other “principles of justice” across frontiers (below Sections I and IV).
- (2) Human rights require multilevel constitutional protection: Historical experience confirms the constitutional claim that legal guarantees of equal freedoms among individuals and among republican states cannot remain effective over time without multilevel constitutionalism constituting, limiting and legitimizing governance powers and protecting human rights at national, international and transnational levels of human interactions in a mutually coherent manner (below Section II).

² These constitutional premises prompted me to argue (e.g. in E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, Fribourg: University Press Fribourg, 1991) that precise and unconditional, intergovernmental guarantees of freedom, non-discrimination and rule of law (e.g. in GATT Articles II, III, XI:1) can serve “constitutional functions” enlarging corresponding, constitutional freedoms and other rights of citizens.

³ Cf. *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, UN doc. HRI/GEN/1, Rev.7 (2004).

- (3) Human rights require the “constitutionalization” of international law: Constitutional approaches to international law have practical consequences for the interpretation and progressive development also of international economic law. For instance, respect for individual and democratic freedom entails diversity and regulatory competition – among individuals as well as among private and public, national, regional and worldwide organizations (e.g., competing worldwide and regional trade liberalization and trade regulation) - which must be respected and promoted by “cosmopolitan principles”, including human rights, “participatory” and “deliberative democracy” so as to promote inclusive decision-making, as well as other “legitimizing principles” (such as subsidiarity) and “prioritizing commitments” (such as avoidance of serious harm, satisfaction of urgent needs, cf. Section III).
- (4) The needed international “social market economy” must be based on “cosmopolitan democracy”: The more remote regional and worldwide governance institutions operate from their citizens, the less effective *procedural* citizen rights for democratic participation, representation and parliamentary control risk becoming; and the more important are *substantive*, constitutional rights and their judicial protection through interrelated networks of national and international rule-making, administration and courts. Rights-based multilevel constitutionalism requires more comprehensive processes of weighing and balancing rights and obligations of governments and of individuals in the interpretation and application of international economic law by governments and courts (Section IV).
- (5) The “transformation power” of economic constitutionalism depends on “struggles for human rights”: The increasing complexity of globalization makes decentralized rules and adjustments protecting individual freedom, democracy and state sovereignty ever more important. Constitutional democracies have strong economic, political and legal reasons for extending rights-based constitutionalism to multilevel economic governance so as to safeguard constitutional democracy and set incentives for the peaceful transformation of non-democratic and less-developed countries. The difference between American and European approaches lies *not* in the European recourse to “normative”, “soft” and “civilian power” (which are also used in US foreign policies), but in the European preference for *multilevel constitutional restraints* on multilevel economic governance rather than for the focus by the US, as well as by other continental nation states, on constitutional nationalism (Section V).

I. International Law among States, among Peoples and among Individuals? Limitation of State Sovereignty by Constitutional, Popular and Individual Sovereignty

The Westphalian system of international law among sovereign states conceived international law as reciprocal limitations on state power aimed at protecting international order rather than human rights and justice.⁴ Also the state-centred UN legal system protects neither human rights nor democratic peace effectively. Even constitutional democracies (like the US) view compliance with international law often as a national policy choice depending more on the respective costs and benefits than on rule of international law and its culture of legal formalism.⁵ The universal recognition of human rights and of supranational organizations entails a progressive broadening of the international community to individuals and other non-state actors. Traditional principles of international law (such as sovereign equality of states, non-intervention into domestic affairs, consensus-based rule-making) are increasingly qualified in the law of worldwide and regional organizations. Also civil societies, parliaments and democracies increasingly challenge the legitimacy of power-oriented rules of international law (e.g. the sovereignty of failed states that tolerate genocide and international terrorism); democratic governments insist on their constitutional powers to adopt policy measures even if they are inconsistent with power-oriented international law rules.⁶ If law is perceived as a struggle for individual constitutional rights and human rights, such challenges to power politics disguised as international law are to be welcomed. Without stronger constitutional safeguards for individual freedom as “first principle of justice” as well as of constitutional protection of other human rights and democratic peace, UN law is bound to remain ineffective in many areas.⁷

The more the human rights obligations of every UN member state evolve into *ius cogens*, the more it becomes necessary to construe the “sovereign equality” of states, the limited powers of intergovernmental organizations and the “right to self-determination of all peoples” in conformity with the human rights of their citizens.⁸ The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) emphasize that human rights constitutionally restrain also the limited powers of

⁴ On the pursuit of “order” rather than “justice” in international relations see: R. Foot, J.L. Gaddis & A. Hurrell (eds), *Order and Justice in International Relations*, (Oxford: OUP, 2003); J. Thomson, *Justice and World Order*, (Tokyo: United Nations Press, 1992).

⁵ Cf. J. Goldsmith/E.A. Posner, *The Limits of International Law* (Oxford University Press, 2005). On the “formalism” of the general international law rules coordinating the fragmented bilateral, regional and worldwide treaty systems see Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN document A/CN.4/L.682 of 4 April 2006.

⁶ See M. Ignatieff, *American Exceptionalism and Human Rights*, (Cambridge MA: Harvard UP, 2005); J. Rubinfeld, “The Two World Orders”, in: G. Nolte (ed), *European and US Constitutionalism*, (Cambridge: CUP, 2005), at 280-296.

⁷ On the different conceptions and principles of universal justice (e.g. human rights), and of corrective and distributive justice in particular cases (e.g. preferential treatment of poor countries), see: E.U. Petersmann, “Theories of Justice, Human Rights and the Constitution of International Markets, in: Symposium: The Emerging Transnational Constitution”, (2003) 37 *Loyola Law Review* 407-460.

⁸ See the broad interpretation of UN human rights as international *ius cogens* and constitutional limitation of intergovernmental powers by the EC Court of First Instance in Cases T-315/01 (*Kadi v Council and Commission*) and T-306/01 (*Yusuf v Council and Commission*), judgments of 21 September 2005, in: *Common Market Law Reports 2005*, at 1334.

intergovernmental organizations; they interpret and enforce the fundamental rights guarantees of the European Convention on Human Rights (ECHR) as a “constitutional instrument of European public order”.⁹ The emerging “multilevel human rights constitution”, based on national, regional and worldwide guarantees of human rights and of democratic self-determination of peoples, calls for construing state sovereignty, popular sovereignty and “individual sovereignty” in a mutually coherent manner so as to protect maximum human liberty and other human rights as basic principles of justice.

From such a human rights perspective, the international legal system – including international economic law - must serve human rights and democratic self-government as the proper basis of sovereignty.¹⁰ Citizens and democratic people must be recognized and legally protected as subjects of international law. Just as decolonization and democracy resulted from struggles for the liberation of suppressed people, so will the needed democratization of the power-oriented international legal system not come about without bottom-up struggles for the defense of cosmopolitan human rights against power politics, including border discrimination reducing domestic consumer welfare and impeding a mutually beneficial division of labor among citizens across frontiers. The UN High Commissioner for Human Rights has, in a number of reports on the human rights dimensions of the law of the World Trade Organization (WTO), endorsed a human rights approach to international trade law.¹¹ Similarly, WTO Director-General P. Lamy has called for “cosmopolitics” and “cosmopolitan constituencies” in support of global public goods such as a liberal trading system.¹² Yet, UN human rights law does not protect freedom of profession, private property, open markets, freedom of trade and other legal preconditions for a mutually welfare-enhancing, international division of

⁹ On the ECJ jurisprudence that respect for fundamental rights is a “condition of the legality of Community acts”, see ECJ Opinion 2/92 on accession by the EC to the ECHR, ECR 1996 I-1759; Case C-84/95, *Bosphorus* ECR 1996 I-3953. On the constitutional functions of the ECHR see the judgment of the ECtHR of 30 June 2005 (Application No 6422/2002, *Bosphorus v Ireland*) which confirmed, *inter alia*, “that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations” (para. 153).

¹⁰ See E.-U. Petersmann, “Constitutionalism and WTO Law – From a State-Centred Approach towards a Human Rights Approach in International Economic Law”, in: D.L.M. Kennedy & J.D. Southwick (eds), *The Political Economy of International Trade Law* (Cambridge: CUP, 2002), at 32-67; *idem*, E.U.Petersmann, Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution, in: F.M. Abbott, C. Breining-Kaufmann & T. Cottier (eds), *International Trade and Human Rights. Foundations and Conceptual Issues*, (Ann Arbor: Michigan UP, 2006), 29-68. More generally see: Allen Buchanan, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (Oxford University Press 2004).

¹¹ See E.-U. Petersmann, “The Human Rights Approach to International Trade Advocated by the UN High Commissioner for Human Rights: Is it Relevant for WTO Law and Policy?” in: *Journal of International Economic Law* (JIEL) 2004, 605-628.

¹² Cf. S.Charnovitz, The WTO and Cosmopolitics, in: E.U.Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance* (Oxford University Press 2005), 437-446 ; P. Lamy, *Towards World Democracy* (London : Policy Network, 2005). According to David Held, “cosmopolitanism can be taken as the moral and political outlook that offers the best prospects of overcoming the problems and limits of classic and liberal sovereignty”, D.Held, Law of States, Law of Peoples: Three Models of Sovereignty, in: *Legal Theory* 8 (2002), 1-44, at 24.

labor.¹³ Nor has the UN Conference on Trade and Development (UNCTAD) acted as a leader for a liberal (i.e. liberty-based) international trade order committed to the protection of human rights.

The worldwide liberalization and regulation of welfare-reducing trade barriers continues to be based on the General Agreement on Tariffs and Trade (GATT) and WTO law. The 149 WTO Members emphasize that the WTO rules and policies must remain “member-driven” and outside the UN system. WTO Members have not responded to the UN proposals for a “human rights approach to international trade”; they continue to leave the clarification of the interrelationships between UN law, WTO law and human rights to the WTO dispute settlement system. The “member-driven” character of the WTO entails that WTO rules and policies tend to be “producer-driven” for the benefit of powerful “rent-seeking interest groups” (such as textiles, agricultural and steel lobbies, periodically elected trade politicians) to the detriment of general consumer welfare and citizen rights. As WTO law does not refer to human rights, democratic self-government and social justice, WTO rules remain contested inside constitutional democracies and by civil society.

II. Multilevel Economic Governance Requires Multilevel Constitutionalism Protecting Individual Rights and Democratic Governance

Modern globalisation and the universal recognition of human rights are transforming the intergovernmental “society of states” into a cosmopolitan community of citizens with complex layers and networks of private and public, national and international governance and legal regulation.

Diverse Forms of Multilevel Economic Governance

Five basic types of international economic regulation (e.g. of exchange rates, investments, production, trade, competition, consumption, goods, services, social and environmental standards, transnational movements of capital, persons and communications) can be distinguished¹⁴ and interact in manifold ways that often lack transparency:

- (1) international treaties and intergovernmental organizations at worldwide or regional levels (such as the WTO and the more than 250 regional trade agreements), which increasingly protect also private rights (e.g. in the EC) and

¹³ See the criticism of UN human rights law and policies by E.-U. Petersmann, “Human Rights and International Trade Law – Defining and Connecting the Two Fields”, in: T. Cottier, J. Pauwelyn & E. Bürgi (eds), *Human Rights and International Trade*, (Oxford: OUP, 2005), at 29-94.

¹⁴ Cf. B.Kingsbury, N.Krisch & R.Stewart, *The Emergence of Global Administrative Law*, in: *Law and Contemporary Problems* 68 (2005), at 15 ff; C.Joerges/E.U.Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart Publishing, 2006).

- private judicial remedies (e.g. in the World Bank's International Center for the Settlement of Investment Disputes);
- (2) informal intergovernmental networks among domestic regulatory agencies (such as the Basel Committee of national bank regulators, the International Competition Network among national competition authorities);
 - (3) national authorities implementing international economic rules and policies subject to international regulation and constitutional restraints;
 - (4) hybrid public-private "regulatory partnerships", such as the worldwide administration of website addresses by the private Internet Corporation for Assigned Names and Numbers (ICANN), which is subject to the regulatory supervision by the United States and closely cooperates with the World Intellectual Property Organization (e.g. concerning the peaceful settlement of domain name disputes by the WIPO arbitration procedures); and
 - (5) private regulatory bodies such as the International Standardisation Organisation (ISO) for the international harmonisation of standards that are also used as a legal basis for intergovernmental trade regulation (e.g. in the WTO Agreement on Technical Barriers to Trade), or the International Chamber of Commerce (ICC) whose private rules and commercial arbitration are closely connected with national and intergovernmental regulatory systems (see, for instance, the private "Independent Review Procedures" administered jointly by the ICC and the WTO in order to determine the compliance by public and private parties with the WTO Agreement on Preshipment Inspection).

Synergies of National and International Constitutionalism in the Control of Multilevel Governance

Most states have adopted constitutions that constitute polities and government powers, subject governments to constitutional restraints, and commit government policies to the promotion of human rights and other constitutional objectives. Globalization demonstrates that national constitutions alone can neither protect human rights across frontiers nor secure the collective supply of global public goods (like international peace, rule of law and a healthy environment). National constitutions turn out to be "incomplete constitutional safeguards"; in a globally interdependent world where ever more citizens pursue their happiness by consuming foreign goods and services or travelling abroad, national constitutions can no longer realize many of their objectives without complementary "international constitutional safeguards" protecting constitutional rights, and limiting abuses of power, in transnational and international relations.¹⁵

¹⁵ See, for example, E.U.Petersmann, Multilevel Trade Governance Requires Multilevel Constitutionalism, in: C.Joerges/E.U.Petersmann (note 14), chpt. 1; D.M.Johnston, World Constitutionalism in the Theory of International Law, in: R.S.J.Macdonald/D.M.Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (Leiden: Nijhoff Publishers, 2005), 3-30; Robert Uerpmann-Witzack, The Constitutional Role of Multilateral

The more governments cooperate internationally for the collective supply of ‘international public goods’, the more multilevel governance in international organizations is leading to multilevel legal restraints on national policy powers. Since the Constitution (*sic*) Establishing the ILO of 1919, also many other constituent agreements of international organizations - such as the World Health Organization (WHO) and the UN Educational, Scientific and Cultural Organization (UNESCO) - are named ‘constitutions’ in view of the fact that, *e.g.*, they:

- (1) constitute a new legal order with legal primacy over that of the member states;
- (2) create new legal subjects and hierarchically structured institutions with limited governance powers;
- (3) provide for institutional checks and balances (*e.g.* among rule-making, administrative and dispute settlement bodies in the WTO);
- (4) legally limit the rights of member states (*e.g.* regarding withdrawal, amendment procedures, dispute settlement procedures);
- (5) provide for the collective supply of ‘public goods’ that – as in the case of the above-mentioned treaty constitutions (of the ILO, WHO and UNESCO) – are partly defined in terms of human rights (such as core labour rights, the human rights to health and education); and often
- (6) operate as ‘living constitutions’ whose functions – albeit limited in scope and membership – increasingly evolve in response to changing needs for international cooperation.

The worldwide ‘treaty constitutions’ differ fundamentally from national constitutions by their limited policy functions and less effective constitutional restraints (*e.g.* on intergovernmental and national policy powers). State-centered international lawyers therefore prefer to speak of ‘international institutional law’¹⁶ or of an intergovernmental ‘constitutionalism lite’.¹⁷ From citizen-oriented economic and constitutional perspectives, however, international organizations are becoming no less necessary for the collective supply of public goods than national organizations. Human rights and their moral value premises (normative individualism) require designing national and international governance as an integrated, multilevel constitutional framework for the protection of citizen rights, democratic self-government and cooperation among free citizens across frontiers.¹⁸ *International constitutionalism* is a functionally limited, but necessary complement to *national constitutionalism* which, only together, can protect

Treaty Systems, in: A. von Bogdandy & J. Bast (eds), *Principles of European Constitutional Law*, (Oxford: Hart Publishers, 2006), 147-181.

¹⁶ Cf. N. Blokker and H. G. Schermers, *International Institutional Law*, 4th ed (Boston, Mass: Martinus Nijhoff, 2003).

¹⁷ Cf. J. Klabbers, ‘Constitutionalism Lite’ (2004) 1 IOLR 31, at 45. On the general recognition of multilevel constitutionalism in Europe see C. Joerges and E. U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart, 2006).

¹⁸ On the “constitutional functions” of international organizations as a “fourth branch of government” see E.U.Petersmann, ‘Constitutionalism and International Organizations’, in: (1996) 17 *Northwestern Journal of International Law & Business*, at 398, 415 *et seq.*

human rights and democratic self-government more effectively across frontiers in a globally integrating world.

Constitutional Functions of WTO Law

None of the supporters of “international constitutionalism” claims that international “treaty constitutions” constituting and limiting international rule-making, executive and judicial powers for the collective supply of international public goods are, or should become, constitutions in the same sense as national constitutions. In line with the diverse national constitutional traditions, constitutional approaches to multilevel governance differ inevitably. For instance, the notion of a “WTO constitution” is increasingly being used in view of

- (a) the comprehensive rule-making, executive and (quasi-) judicial powers of WTO institutions;¹⁹
- (b) the “constitutionalization” of WTO law resulting from the jurisprudence of the WTO dispute settlement bodies;²⁰
- (c) the *domestic* “constitutional functions” of GATT/WTO rules, for example for protecting constitutional principles (like freedom, non-discrimination, rule of law, proportionality of government restrictions) and domestic democracy (for instance, by limiting the power of protectionist interest groups) for the benefit of transnational cooperation among free citizens;²¹
- (d) the *international* “constitutional functions” of WTO rules, for example, for the promotion of “international participatory democracy” (e.g., by holding governments internationally accountable for the “external effects” of their national trade policies, by enabling countries to participate in the policy-making of other countries)²² and of the enhancement of “jurisdictional competition among nation states”²³ and “the allocation of authority between constitutions”;²⁴
- (e) in view of the necessity of “constitutional approaches” for a proper understanding of the law of comprehensive international organizations that use

¹⁹ See J.H. Jackson, *The World Trade Organisation: Constitution and Jurisprudence*, (London: Royal Institute of International Affairs, 1998).

²⁰ See D.Z. Cass, ‘The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutionalization’, in: *European Journal of International Law* 2001, at 39-75.

²¹ See E.U. Petersmann (n 2); J.O. McGinnis & M.L. Movsesian, “The World Trade Constitution”, in: (2000) 114 *Harvard Law Review* 511-605; P.M. Gerhart, ‘The Two Constitutional Visions of the World Trade Organisation’, in: (2003) 24 *University of Pennsylvania Journal of International Economic Law* 1-75, contrasts the “inward-looking, economic vision of the WTO” in helping member countries addressing internal political failures with the “external, participatory vision of the WTO” helping WTO members to address concerns raised by policy decisions in other countries.

²² See, for example, P.M. Gerhart, “The WTO and Participatory Democracy: The Historical Evidence”, in: (2004) 37 *Vanderbilt Journal of Transnational Law* 897-934.

²³ See J.O. McGinnis, ‘The WTO as a Structure of Liberty’, in: (2004) 28 *Harvard Journal of Law and Public Policy* 81-88.

²⁴ J. Trachtman, *The WTO Constitution: Toward Tertiary Rules*, in *European Journal of International Law* 2006.

constitutional terms, methods and principles for more than 50 years (see, e.g., the “Constitutions” of the ILO, WHO, FAO, EU);²⁵ or

- (f) in view of the need to interface and coordinate different levels of governance on the national and international level.²⁶

All these constitutional approaches agree that the WTO should not be simply viewed in narrow *economic* terms (for example, as an institution promoting economic welfare through trade liberalization). WTO rules and policies also pursue *political* as well as *legal* objectives that are no less important than the economic benefits from liberal trade; a recent illustration of this are the guarantees of private rights to trade and intellectual property rights, including “rights to import and export”, of private access to independent courts and rule of law in the 2001 WTO Protocol on the accession of China.²⁷ The introduction of open markets and rule of law in China, including a system of independent trade courts (supervised by a chamber of the Chinese Supreme Court specialized in WTO law), illustrates that the WTO Agreement is one of the most revolutionary “transformation agreements” in the history of international law.

Constitutional Nationalism vs Multilevel Constitutionalism

The progressive transformation of the intergovernmental EC Treaty rules into constitutional and judicial guarantees of individual rights was largely the result of the struggle of citizens and courts (including the ECJ and the ECtHR) against welfare-reducing abuses of foreign policy powers. In Europe, this struggle for individual freedom and democratic self-government across frontiers has led to the legal and judicial protection of ever more ‘new’ fundamental rights (as codified in the 2000 EU Charter of Fundamental Rights) and ‘constitutional principles’ of EU law (as codified in Part I of the 2004 Treaty Establishing a Constitution for Europe = TCE).²⁸ Their underlying value premises of *normative individualism* and rule of international law (cf. Article I-2 TCE on the ‘Union’s values’) remain, however, contested by many politicians and their legal advocates – not only outside Europe in treaty regimes dominated by hegemonic countries (like the North American Free Trade Area) but also in the EU’s external relations.²⁹ Most Europeans agree with the US view that popular

²⁵ See, for example, E.U.Petersmann, (note 13); N. Walker, ‘The EU and the WTO: Constitutionalism in a New Key’, in: G. de Búrca & J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues*, 2001.

²⁶ T. Cottier & M. Hertig, *The Prospects of 21st Century Constitutionalism*, 7 *Max Planck Yearbook of United Nations Law* (2003), at 261.

²⁷ See WTO document WT/L/432 of 23 November 2001, Part I, Section 2.

²⁸ See Bogdandy & Bast (note 15). Even though the process of ratification of the TCE ((2004) 47 Official Journal of the EU C 310) has been blocked by two negative *referenda* in France and the Netherlands, it appears realistic to assume that the basic constitutional principles codified in the TCE will continue to prevail in EU constitutional law.

²⁹ See the power-oriented justifications by members of the EC legal services of the frequent EC violations of WTO law (e.g., P.J.Kuijper, *WTO Law in the European Court of Justice*, in *Common Market Law Review* 42 (2005), 1313-1341, who criticizes the rule-oriented ‘Kupferberg jurisprudence’ of the ECJ as politically ‘naïve’, at 1320); Kuijper claims, at 1334, 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

sovereignty inside democratic nation states remains a precondition for legitimate transnational governance.³⁰ Yet, the rights-based, cosmopolitan European constitutionalism differs fundamentally from the constitutional nationalism in most democracies outside Europe³¹, especially from the current US focus on *national constitutionalism* and *hegemonic, power-oriented foreign policies*.³² Even though the US Constitution confirms the federal insight that sovereignty is divisible, many North-American lawyers remain reluctant to conceive international legal constraints on legislative and executive powers as constitutional rules, for instance because such international rules “do not establish the power they restrain and cannot be understood as emanations of a *pouvoir constituant*.”³³

Constitutional Limits of Judicial Governance

WTO Members tend to construe the limitation of the jurisdiction of WTO dispute settlement bodies to “the covered agreements” (Article 7 WTO Dispute Settlement Understanding = DSU) narrowly as permitting only legal claims and defences based on WTO rules. International lawyers and WTO dispute settlement bodies, however, emphasise that the customary methods of treaty interpretation require interpreting WTO rules as part of the international legal system in conformity with general international law rules unless WTO law has excluded recourse to other rules of international law.³⁴

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.

³⁰ Cf. J.A.Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, 2005).

³¹ For some Anglo-Saxon communitarian lawyers, even Europe cannot be properly described as ‘constitutionalized’ until it embodies a European polity and *demos* legitimizing its community (cf. J. Weiler, *The Constitution of Europe* (Cambridge: CUP, 1999)). Other Anglo-Saxon lawyers challenge the recognition of “market freedoms” in European constitutional law on the ground that neither individual economic freedom nor other individual rights are ‘a matter considered essential to constitutionalisation in the received tradition’ of ‘mature constitutional systems, for example in the United States, Canada and Australia’ (D. Z. Cass, *The Constitutionalization of the WTO* (Oxford: OUP, 2005, at 168, 176, 191). For a criticism of “constitutional nationalism” see my review of the book by Cass in: CMLR 43 (2006), at 890-892, and E.U.Petersmann, Introduction and Summary, in: Joerges/Petersmann (above n. 14).

³² On the US penchant for imperial, unilateral foreign policies, notwithstanding US-leadership in promoting multilateral legal disciplines for other countries after World Wars I and II, see: I. Daalder and J. Lindsay, *America Unbound: The Bush Revolution in Foreign Policy* (Washington D.C.; Brookings Institution, 2004). On the often skeptical US attitude *vis-à-vis* international law see: J. F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: CUP, 2004).

³³ Cf. A. von Bogdandy, Constitutionalism in International Law: Comment on a Proposal from Germany, in: *Harvard International Law Journal* 47 (2006), 223-242, at 240.

³⁴ See. J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, (Cambridge: CUP, 2003), at 37-38. According to Pauwelyn, “it is for the party claiming that a treaty has ‘contracted out’ of general international law to prove it” (at 213). Many WTO members and WTO lawyers proceed from the contrary presumption that the limitation of the jurisdiction of WTO dispute settlement bodies to “the covered agreements” entail an agreed presumption in favor of exhaustive WTO regulation and confirms that “(i)n international law, every tribunal is a self-contained system (unless otherwise provided)”, as stated by the International Criminal Tribunal for Yugoslavia in its *Tadic* judgment, International Legal Materials 35 (1996), 32, at para. 11. For an explanation of this narrow perception of the WTO as – in principle – a self-

WTO dispute settlement practice continues to identify an increasing number of general principles of law (for example, on burden of proof, good faith, abuse of rights, due process of law, legal security) and more specific treaty principles for the mutual balancing of rights and obligations under WTO law (for example, principles of legal security, transparency, non-discrimination, necessity, and proportionality).³⁵ Some of these principles (for example, on burden of proof) are applied as general principles of law, whereas others (such as the non-discrimination and necessity principles of WTO law) appear to be construed as WTO-specific “principles underlying this multilateral trading system”, as they have been explicitly acknowledged in the Preamble and in other provisions of the WTO Agreement.

The perspective of *international* judges focusing on the customary methods of international treaty interpretation may differ fundamentally from the perspective of domestic judges confronted with WTO law arguments (focusing, for example, on national and EU constitutional law rather than on WTO obligations of the EC). In the EC and in some other WTO members, the domestic constitutional perspective has occasionally prompted national judges and EC judges to interpret domestic trade rules (for example, the customs union rules in the EC Treaty) as protecting private rights even if the respective trade rules were drafted as intergovernmental rights and obligations and implemented GATT/WTO obligations of the EC (for example, the EC customs union rules implementing GATT Article XXIV). From the European perspective of a common market without a common state, such “empowering functions” of liberal trade rules for the benefit of the private market participants, and their incorporation as an “integral part of the Community legal system” in order to limit governmental trade policy discretion, have prompted me to support such “constitutional interpretations” by EU judges of intergovernmental trade rules for the benefit of EU citizens, and to suggest that EU judges should interpret national and international trade rules as a functional unity inside the EC for the benefit of citizens.³⁶

Yet, such “constitutional interpretations” are not permissible for the international WTO judge who must interpret the intergovernmental WTO rules “in accordance with customary rules of interpretation of public international law”, as prescribed in Article 3.2 DSU.³⁷ The WTO panel report on Sections 301-310 of the US Trade Act emphasised, for example, that “(n)either the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect”, *i.e.*,

contained legal regime see, for example, J. Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen: Konflikte des materiellen Rechts und Konkurrenzen der Streibeilegung*, (Berlin: Duncker & Humblot, 2002).

³⁵ On general principles of international law as part of the WTO legal system, and the need for a principle-oriented WTO jurisprudence balancing WTO rights, WTO obligations as well as the numerous WTO exceptions protecting policy autonomy for non-economic regulation, see E.U. Petersmann, WTO dispute settlement practice 1995-2005: Lessons from the past and future problems, in: Y. Taniguchi *et alii* (eds), *The WTO at Ten: Dispute Settlement, Multilateral Negotiations, Regional Integration* (Cambridge: CUP 2006).

³⁶ See Petersmann, ‘Application of GATT by the Court of Justice of the EC’, in: (1983) 20 *Common Market Law Review* 409.

³⁷ On the “constitutional limits” of WTO jurisprudence see the various contributions (e.g., by R. Howse, W. Davey and E.-U. Petersmann) in: T. Cottier & P. Mavroidis (eds), *The Role of the Judge in International Trade Regulation. Experience and Lessons for the WTO*, (Ann Arbor: Michigan UP, 2003), at 43-90.

creating rights and obligations not only for WTO member states but also direct individual rights for traders, producers and consumers.³⁸ International law and WTO rules limit, however, also the *legislative discretion* of national legislatures. The WTO panel report on Mexico's measures affecting telecommunications services, for instance, concluded that private price-fixing practices remained "anti-competitive practices" prohibited under Mexico's obligations under the General Agreement on Trade in Services (GATS) even if Mexican legislation required such uniform pricing practices.³⁹ Due to the different jurisdiction, applicable laws and judicial competences of national and international courts, their "constitutional interpretations" may differ at national and international levels. "Constitutionalisation" by means of jurisprudence must respect constitutional limits which may not apply to "constitutionalisation" by national and intergovernmental rule-making. Yet, as the WTO guarantees of freedom, non-discrimination and rule of international law go far beyond the autonomous guarantees in the domestic laws of most states, the legitimacy of WTO jurisprudence derives not only from "legal formalism"⁴⁰ but also from protecting individual freedom, non-discriminatory conditions of competition and rule of law across national frontiers for the benefit of welfare-increasing cooperation among citizens.

III. Practical Policy Relevance of Constitutional Approaches

Compared with traditionally power-oriented foreign policy approaches (e.g. in the context of GATT 1947), multilevel constitutionalism may require different policy approaches and judicial approaches, for example in the following areas of multilevel trade governance.

Constitutional Interpretation

The interpretation of the constituent agreements of international organizations, and of international guarantees of private freedoms and rule of law (such as the 'market freedoms' guaranteed in the EC Treaty), may justify "constitutional" and "dynamic-evolutionary interpretations" different from those of the more "static interpretation" of

³⁸ See: United States – Sections 301-310 of the Trade Act of 1974, panel report adopted on 27 January 2000, WT/DS152/R, at para.7.72. The Panel makes the following important reservation: "The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that, in the legal system of any given member state, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudice any decisions by national courts on this issue."

³⁹ Mexico – Measures Affecting Telecommunications Services, Panel report (WT/DS204/R of 2 April 2004) adopted in June 2004, at paras. 7.244-245.

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.

other contractual elements of international treaties.⁴¹ For instance, the customary rules of international treaty interpretation and WTO jurisprudence admit that the “contractual” dimensions of WTO law may require different interpretative approaches (e.g. for interpreting GATT and GATS schedules of commitments, WTO “non-violation complaints” aimed at maintaining the “balance” of reciprocal tariff commitments) than their “constitutional” dimensions (e.g. in case of judicial clarification of the inherent powers of WTO dispute settlement bodies, or of the powers of WTO Members under the WTO exceptions protecting “public morals” and “public order”). The universal recognition of human rights entails “constitutional principles” and *ius cogens* rules that may require rights-based interpretations going beyond the original meaning of treaty terms at the time of the conclusion of intergovernmental treaties.

Constitutional Rules for Conflict Resolution

The fragmented, decentralized nature of international relations among 200 sovereign states makes normative conflicts between national, bilateral, regional and worldwide rules inevitable. The Vienna Convention on the Law of Treaties (VCLT) and other general international law rules offer formal legal principles for preventing and resolving such conflicts (e.g. on the basis of *lex specialis*, *lex posterior*, rules on *inter-se* agreements, *ius cogens*, *erga omnes* obligations). Constitutionalism requires respecting individual and democratic diversity and viewing regulatory diversity, regulatory competition and regulatory conflicts positively.⁴² For instance, the WTO negotiations on stricter substantive WTO disciplines for regional trade agreements (RTAs) are bound to fail as long as RTAs (such as the more than 60 RTAs concluded after the failure on the 2003 WTO Ministerial Conference to advance the Doha Round negotiations in the WTO) are favored not only as “competing trade liberalization”, but also as competing *fora* for regional trade regulation that does not appear acceptable in the consensus-based, worldwide WTO negotiations.⁴³

Constitutional Functions of WTO Rules

Liberal international trade rules differ from most other areas of international law insofar as their international guarantees of freedom, non-discrimination and rule of law tend to go beyond the autonomous guarantees of freedom and non-discrimination in national and regional laws. International treaties constituting and limiting multilevel governance are a necessary precondition for the collective supply of global public goods (like a liberal, rules-based world trading system) which cannot be secured through power-

⁴¹ On the problems of “constitutional interpretation” see J.E.Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005), chapter 2.

⁴² Cf. E.U.Petersmann, Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade, in: *University of Pennsylvania Journal of International Economic Law* 27 (2006), 273-367.

⁴³ Cf. E.U.Petersmann, The WTO and Regional Trade Agreements as Competing Fora for Constitutional Reforms, in: L.Bartels/F.Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006), chapter 11.

oriented foreign policies focusing only on *national* interests. The inherent tendencies of freedom and competition to destroy themselves (“paradox of freedom”) require internationally agreed “constitutional restraints” on abuses of foreign policy powers in order to secure rule of law in international relations (e.g. by means of the WTO dispute settlement system), open markets (e.g. by means of WTO guarantees of non-discriminatory conditions of competition), respect for human rights and social justice (as reflected and protected in the numerous “exceptions” from WTO rules). Constitutionalism offers criteria for designing the law of international organizations (e.g. the necessary “checks and balances” between rule-making, executive and adjudicative powers).

Human Rights Approaches to International Economic Law

From a rights-based constitutional perspective (as, e.g., in EU constitutional law), national and international constitutionalism should be perceived as complementary instruments for the protection of the constitutional rights and human rights of citizens. Just as economists (from Adam Smith to Amartya Sen) perceive market economies and economic growth as instruments for enabling and promoting individual freedom as the ultimate goal of economic life and the most efficient means of realizing human welfare, so should national and international law (e.g. the WTO objective of “sustainable development”) be seen as instruments for the protection of human rights and democratic self-government of peoples.⁴⁴ The rights-based premises of constitutionalism require empowering individuals and civil society (e.g. non-governmental organizations) as legal subjects of international economic law. Multilevel constitutionalism can promote welfare-enhancing synergies between national and international constitutionalism; power-oriented foreign policies and border discrimination tend to undermine such synergies (e.g. by preventing EC and US courts from applying and enforcing self-imposed WTO guarantees of freedom and rule of law in domestic courts).

Individual Empowerment and Responsibility

Human rights call for promoting individual rights and accountability in the transnational division of labour among producers, investors, traders and consumers. According to the Universal Declaration of Human Rights (Article 1 UDHR), “(a)ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. UN human rights conventions recognise in their Preambles “that these rights derive from the inherent dignity of the human person”. Respect for human dignity and human

⁴⁴ On ‘development as freedom’ and substantive ‘opportunity to achieve’, see A. Sen, *Rationality and Freedom* (Cambridge, MA: HUP, 2002), ch 17 on ‘markets and freedoms’; E. U. Petersmann (ed), *Developing Countries in the Doha Round*, (Florence: EUI, 2005), 3-18. See also, F. A. Hayek, *The Constitution of Liberty* (Chicago, IL: University of Chicago Press, 1960), 35: ‘Economic considerations are merely those by which we reconcile and adjust our different purposes, none of which, in the last resort, are economic (except those of the miser or the man for whom making money has become an end in itself).’

rights, *i.e.*, *normative individualism* - and not just state sovereignty, “the will of the people” (Article 21 of the UDHR) and their “right of self-determination” (Article 1 of the 1966 UN human rights covenants) – are of particular importance for empowering individuals in the international division of labour. The references, in Article 1 UDHR, to “reason and conscience” lend support to the view that the protection of human dignity as the basic objective of all human rights requires respect for “individual sovereignty” (for example, in the sense of moral, rational, personal, and legal autonomy), responsibility and a real capacity for personal self-development.⁴⁵ Human dignity as a moral “right to have rights” requires individuals to be treated as legal subjects rather than as the mere objects of authoritarian government policies, especially in the regulation of transnational economic activities of private citizens. The authoritarian state-centred practices of treating citizens as mere objects even in those fields of international law which regulate mutually beneficial private co-operation across frontiers (such as WTO law), need to be challenged in the light of the human rights objective of empowering citizens and protecting human rights across national borders. From a human rights perspective, the legitimacy of intergovernmental organisations (such as the WTO) depends less on “output legitimacy” (for example, in terms of the promotion of economic growth) than on “input legitimacy” in terms of respect for human rights, fundamental freedoms, democratic procedures and rule of law for the benefit of citizens, even if the statutory law of the organisation does not explicitly refer to the universal human rights obligations of all states today. Just as democratic polities must be legally constituted by human rights and a political constitution, so must a social world economy be based on and protected by human rights and a citizen-based “economic constitution.”

Deliberative Cosmopolitan Democracy

Whereas national democracies are constitutionally defined by, and on behalf of, “the people”, the influence of popular and parliamentary democracy on the law and policies of intergovernmental organizations remains inevitably limited. Respect for human rights, private and democratic self-government and social justice require more transparent, participatory and deliberative forms of transnational “cosmopolitan democracy” so that citizens can better comprehend, influence and scrutinise multilevel governance for their mutual benefit.⁴⁶ The purely intergovernmental structures of the

⁴⁵ See the contributions by K. Dicke & J. Frowein in: D. Kretzmer & E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse*, (The Hague: Kluwer, 2002), at 111 *et seq.*; E.-U. Petersmann, *Human Rights, Markets and Economic Welfare* (note 10), at 30 ff. On “individual sovereignty” see also UN Secretary-General Kofi Annan, ‘Two Concepts of Sovereignty’, *The Economist*, 18 September 1999, and E.U. Petersmann, ‘From State Sovereignty to the Sovereignty of Citizens’ in the International Relations Law of the EU?’, in: N. Walker (ed), *Sovereignty in Transition*, (Oxford: Hart, 2003), at 145-166.

⁴⁶ See J. Habermas, *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy*, (Cambridge MA: MIT Press, 1996), at 315-328, arguing that democratic self-government requires that only those rules may claim democratic legitimacy that can meet with the assent of all rational citizens in a discursive process equally open to all possibly affected persons. Public discourse and collaborative reasoning will enhance problem-solving and mutual learning. On the relationships between democracy and rule of law, see also E.-U. Petersmann, ‘European and International Constitutional Law: Time for Promoting Cosmopolitan Democracy in the WTO’, in: G. de Búrca & J. Scott (eds), *The EU and the WTO*, (Oxford: Hart Publishing, 2001), at 81-110.

WTO and of many other international organizations do not adequately empower, inform and include citizens and their representative institutions in their collective decision-making procedures so as to ensure “cosmopolitics” for the benefit of all citizens and their individual and democratic self-determination. Cosmopolitanism requires decentralizing decision-making and promoting mutually beneficial cooperation across frontiers based on

- (1) equal individual rights (subject to democratic diversity) so as to enhance the real capacity of informed, individual and democratic self-determination;
- (2) stronger, institutionalized accountability mechanisms for the consequences of individual and social actions;
- (3) inclusive decision-making taking account of each person’s equal rights, arguments and interests as closely as possible to the citizens concerned;
- (4) protection of “exit” and alternative choices at subsidiary levels of decision-making (e.g. RTAs as alternatives to consensus-based WTO agreements); and
- (5) avoidance of serious harm and prioritizing of scarce resources on the amelioration of urgent need.⁴⁷

Social Market Economy and Social Justice

Contrary to the views of the American legal philosopher John Rawls and to the prevailing “Washington consensus”, individual rights to distributive and social justice and corresponding government obligations should be recognized not only *inside* constitutional democracies but also in international law and transnational relations, albeit subject to limitations and conditionality.⁴⁸ For instance, the emerging “Geneva consensus” (Pascal Lamy) in the Doha Development Round negotiations acknowledges that market access commitments by less-developed countries may need to be complemented by international adjustment and capacity-building assistance in order to avoid serious harm, promote the social acceptability of trade competition and help to meet the adjustment costs and human rights obligations in less-developed countries.

IV. Cosmopolitan Democracy Depends on Multilevel Constitutional and Judicial Safeguards of Human Rights

In a globally interdependent world, constitutional democracy cannot remain effective unless local and national constitutional rights and institutions are supplemented by international constitutional guarantees protecting the diversity of democratic polities

⁴⁷ For a similar list of “constitutive”, “legitimizing” and “prioritizing cosmopolitan principles” see Held (note 12), at 24 ff.

⁴⁸ Cf. Petersmann, Theories of Justice (note 7).

and mutually beneficial cooperation of free citizens across frontiers. Proposals for stronger, multilevel constitutional restraints on *foreign policies* for the protection of equal citizen rights aim at *strengthening* constitutional democracies by enabling citizens, civil society, parliaments and governments to cooperate more effectively in the collective supply of international public goods. In Europe, such international guarantees of human rights and of liberal trade have proven of crucial importance for peaceful economic and legal integration of all 46 member states of the Council of Europe based on common constitutional rules.

Inside constitutional democracies and regional integration law, the legal protection of human rights – including economic, social and cultural (ESC) rights - legitimately differs depending on the diverse constitutional traditions, development experiences and priorities of the countries concerned. On the worldwide level, the ratification of the 1966 UN Covenant on ESC Rights by more than 120 countries has – in the words of the chairperson of the UN Committee on ESC Rights – so far failed to change the widely held perception of “violations of ESC rights... as inevitabilities, as a ‘normal’ state of affairs in an unfair world where goods, resources and power are divided in a grossly inequitable manner.”⁴⁹ Also UN

Secretary-General Kofi Annan, in his final address to world leaders assembled in the UN General Assembly on 19 September 2006, admitted that the intergovernmental structures of UN law do not effectively empower individuals to protect themselves against abuses of government powers and to create the economic resources needed for the enjoyment of human rights; the 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 – “an unjust world economy, world disorder and widespread contempt for human rights and the rule of law” –, resulting in divisions that “threaten the very notion of an international community, upon which the UN stands.”⁵⁰

European law remains unique in granting effective legal and judicial remedies empowering individuals against national rulers and intergovernmental organizations. The UN Covenant on ESC rights, for instance, does not protect freedom of profession, private property, open markets, freedom of trade and other legal preconditions for empowering individuals to create the economic welfare – including a mutually beneficial, international division of labour - needed for the enjoyment of human rights. UN human rights bodies have no powers to prevent or effectively sanction the widespread violations of human rights by UN member states. Most UN agencies and the WTO do *not* pursue effective rights-based development strategies. Empowerment of individuals to use law for securing their ESC rights must be anchored in *national* constitutional laws in order to offer effective remedies at the local levels where people work and live. Liberal (i.e. liberty-based) constitutional theory offers the most important moral and legal foundation for empowering people across frontiers.

⁴⁹ Virginia B.Dandan, Foreword to : S.Leckie/Anne Gallagher (eds), *Economic, Social and Cultural Rights. A Legal Resource Guide* (Philadelphia : University of Pennsylvania Press, 2006), at ix.

⁵⁰ The speech of Kofi Annan is reproduced in UN document GA/105000 of 19 September 2006.

A clarification of the constitutional foundation of human rights is the necessary first step in challenging the persistent neglect of ESC rights by many governments and most international organizations. Even inside Europe, the interaction between constitutional law and human rights legitimately differs among countries and among the regional organizations in Europe (such as the EC, the European Free Trade Area, the Council of Europe). The elaboration of the European Charter of Fundamental Rights and of the Treaty Establishing a Constitution for Europe (TCE) confirms that social and intergovernmental agreement on multilevel constitutional safeguards of human rights depends on clarifying the underlying value premises, such as the need to reconcile state sovereignty, popular sovereignty and individual sovereignty through multilevel constitutionalism (discussed above in Sections I to III). The following section addresses three propositions for extending rights-based, multilevel constitutionalism to an international “social market economy” and “cosmopolitan democracy”:

- *First*, the synergies between constitutional rights and human rights need to be strengthened by grounding both on respect for human dignity and human liberty rights in conformity with modern theories of justice.
- *Second*, the more distant regional and worldwide governance institutions operate from their citizens, the less effective *procedural* citizen rights for democratic participation, representation and control risk becoming in multilevel economic governance. A social international market economy, and a complementary cosmopolitan democracy, must be founded on stronger *substantive*, constitutional rights empowering citizens to engage in mutually beneficial private cooperation across frontiers and regulating the international division of labour through integrated networks of national and international rule-making, administration and courts.
- *Third*, rights-based multilevel constitutionalism must be progressively extended bottom-up and requires more comprehensive processes of weighing and balancing rights and obligations of governments and of individuals in the interpretation and application of international economic law by governments and courts at national and international levels.

Rights-Based Constitutionalism: The *ius cogens* core of human rights

Human rights and other constitutional rights serve complementary functions: they empower individuals by actionable rights and serve as “balancing principles” for “optimizing” rights and obligations depending on the particular circumstances.⁵¹ Rights-based constitutionalism, and the human rights guarantees in democratic constitutions, differ from republicanism (e.g. in ancient Greece, classical Rome, the

⁵¹ On these 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 Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), chapter 3. Article I-9, para.3 of the TCE acknowledges these dual functions in the following terms: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

Italian Renaissance republics) by their *contractual* justification (rather than e.g. Aristotelian justifications) of democratic polities and of constitutional constraints on government powers in order to secure man's freedom. Modern theories of justice (from I.Kant to J.Rawls) recognize maximum equal legal freedom of all human beings as the "first principle of justice".⁵² Human rights theories and rights-based, modern constitutional theories - notably since the American and French revolutions in the 18th century and the post-war, rights-based constitutional law in Europe – are rooted much more in *normative individualism* than it is the case in many other countries, whose constitutional traditions remain influenced by historical power struggles for "mixed constitutions" and by constitutional privileges of monarchs, Houses of Lords, churches or of other previous rulers (e.g. communist parties) limiting equal individual rights.

My own publications have construed the recognition – in German and European constitutional law and UN human rights instruments - of human dignity as the source of inalienable human rights in accordance with the Kantian concept of human dignity (e.g. as the moral and rational capacity of human beings of exercising one's freedom of choice in a "just" manner respecting the equal autonomy and maximum equal freedom of all others).⁵³ According to Kant, respect for human dignity and justice require treating human beings as ends in themselves, respecting their moral choices, and protecting maximum equal freedom of individuals through ever more precise, national, international and cosmopolitan constitutional rules.⁵⁴ As everybody "may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone

⁵² On differences between Kantian and Rawlsian principles of justice see Petersmann (note 7 above).

⁵³ According to Immanuel Kant, "freedom constitutes man's worth", and "freedom (independence from the constraints of another's will) insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the sole and original right that belongs to each human being by virtue of his humanity" (cf. I.Kant, *The Metaphysics of Morals*, in: I.Kant, *Political Writings* (ed. by H.Reiss), 1977, at 136). According to Kant, equality and all other human rights derive from this universal birthright of freedom. Justice requires, according to Kant, exercising one's freedom in accordance with the moral "categorical imperative" that individuals and a just constitution must allow the "greatest freedom" for each individual along with "the most precise specification and preservation of the limits of this freedom so that it can coexist with the freedom of others". Kant defines law ("Recht") as "the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom"; Kant follows from his moral "categorical imperative" that "every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is *right*" (Kant, at 133).

⁵⁴ On Kant's moral "categorical imperatives" for acting in accordance with universal laws ("Act only in accordance with that maxim through which you can at the same time will that it become a universal law"), for respecting human dignity by treating individuals and humanity as ends in themselves ("So act that you use humanity, whether in your own person or that of another, always at the same time as an end, never merely as a means"), and for respecting individual autonomy ("the idea of the will of every rational being as a will giving universal law") and individual right ("Any action is right if it can coexist with everyone's freedom according to a universal law"), see also A.W.Wood, *Kant's Ethical Thought*, (Cambridge University Press, 1999). On Kant's social and historical theories of the antagonistic human nature promoting market competition and constitutional "rules of justice", and on Kant's moral imperative of transforming the "lawless freedom" in the state of nature into lawful freedom through ever more precise national, international and cosmopolitan constitutional rules see also: E.U. Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, in: *Michigan Journal of International Law* 20 (1999), 1-30.

else within a workable general law”⁵⁵, treating a person as an end-in-herself and respecting her freely chosen objectives require legal protection of a human right to maximum equal freedom in the economic area no less than in other areas of human cooperation. For only the individual himself can know, and decide on, his own ends and personal self-development. Hence, human dignity and human liberty are indivisible, as recognized in the 1993 Vienna Declaration adopted by the World Conference on Human Rights: “All human rights are universal, indivisible and interdependent and interrelated.”⁵⁶ The ECJ has acknowledged that respect for human rights is a condition of the lawfulness of EC acts.⁵⁷ The ECtHR has likewise recognized in a series of judgments that the human rights guarantees of the ECHR also apply whenever states implement intergovernmental rules adopted in international organizations.⁵⁸ National and international human rights increasingly limit foreign policy powers even if they are being exercised collectively in intergovernmental organizations. Yet, contrary to the reasoning of the EC Court of First Instance in the *Kadi* and *Yusuf* judgments which declined jurisdiction to review UN Security Council resolutions in the light of European human rights, judicial protection of the broader constitutional and human rights guarantees in European constitutional law should not be abandoned in favour of the more limited *ius cogens* core of UN human rights limiting the powers of the UN Security Council.⁵⁹

⁵⁵ Kant, On the Common Saying: This May be True in Theory, but it does not Apply in Practice (note 53, at 74).

⁵⁶ Paragraph 5 of the Declaration, reproduced in: *The UN and Human Rights 1945-1995* (New York: UN 1995), at 450.

⁵⁷ See above note 9.

⁵⁸ See Case *Bosphorus v Ireland*, ECtHR Grand chamber judgment of 30 June 2005 (note 9): “a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations”...(para.153). “In ... establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such transfer would be incompatible with the purpose and object of the Convention”... (para.154). “State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides” (para.155).

⁵⁹ Article 53 of the VCLT defines a “peremptory norm of general international law” as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” The *ius cogens* core of UN human rights is smaller than that of European human rights and constitutional law. In the *Kadi* and *Yusuf* cases (note 8), the Court of First Instance examined the consistency of sanctions imposed by the UN Security Council and EC implementing regulations only with regard to the *ius cogens* core of UN human rights to make use of one’s property, the right to a fair hearing and the right to an effective judicial remedy; the Court claimed that it had no jurisdiction to examine whether the EC implementation of the UN sanctions was also consistent with the broader guarantees of fundamental rights in European Community law. The legal consistency of the listing of alleged terrorist groups with European human rights law was also challenged in the ECtHR which elaborated a concept of presumed compliance of the EC with the ECHR: “the Court finds that the protection of fundamental rights by EC law can be considered to be... “equivalent”... to that of the Convention system” (ECtHR decision of 23 May 2002 on Application No 6422/2002, para. 165); judge Ress rightly emphasized in his concurring opinion that the “concept of a presumption of convention compliance should not be interpreted as excluding a

Constitutional Protection against Arbitrary Interference in Individual Freedom:
A General Right to Liberty?

A general constitutional right to liberty (as recognized in Article 2:1 of the German Basic Law) protects the legal autonomy of citizens by means of individual rights and legal protection against arbitrary interference in “negative liberties” (i.e. legal freedom of action), including against restriction of individual freedom resulting from *multilevel* governance and from *international* rules adopted in distant intergovernmental organizations.⁶⁰ The constitutional commitment to respect for human dignity (e.g. as recognized in the German Basic Law, the EU Charter of Fundamental Rights, UN human rights instruments), and the constitutional guarantees of civil, political, economic, social and cultural human rights, recognize that negative liberty is a necessary but insufficient condition of human dignity; it must be complemented by specific “positive liberties” in order to effectively empower individuals and their personal self-development.⁶¹ Comprehensive constitutional guarantees of individual access to courts (as e.g. in German law) protect individual liberty against arbitrary legislative and administrative restrictions by offering judicial review based on principles of proportionality and balancing of all constitutional rights and principles.⁶²

Of course, constitutional guarantees of a general right to liberty and of fundamental “market freedoms” (as protected in EC law) are not recognized in many constitutional democracies which never suffered from dictatorship (as in Germany) and never secured international democratic peace by multilevel constitutional law (as among the 25 EC member states), including legal and judicial guarantees of international “free movement of persons, services, goods and capital, and freedom of establishment” as “fundamental freedoms” (Article I-4 of the 2004 TCE). It has been argued, for example, that the common law, while protecting specific liberties, does not give any weight to liberty in general;⁶³ and that in “mature constitutional systems, for example in the United States, Canada and Australia”, neither individual economic freedom nor other individual rights are “a matter considered essential to constitutionalization in the received tradition of

case-by-case review by this Court of whether there was really a breach of the Convention” (para.2 of the Opinion).

⁶⁰ On the constitutional protection in Germany of a general right to liberty, complemented by specific constitutional liberty rights and other civil, political, economic, social and cultural rights, see Alexy (note 51), notably chapter 7. On the constitutional protection of human rights against multilevel governance interferences in the EC see, e.g., the *Yusuf case* (note 8 above) concerning decisions of the UN Security Council freezing the bank accounts of alleged terrorists.

⁶¹ The German Constitutional Court recognizes a human right to respect and protection of human dignity and focuses “on an understanding of the human being as an intellectual and moral creature capable of freely determining and developing itself. The Basic Law conceives of this freedom not as that of an isolated and autonomous individual, but as that of an individual related and bound to society” (Bundesverfassungsgericht Entscheidungen Vol. 45, 187, at 227). This reconciliation of the principle of negative liberty with the social interdependence of the individual is explained by the Court in the following terms: “the individual must submit himself to those limits on his freedom of action which the legislature sets in order to maintain and support social co-existence within the limits of what is generally acceptable according to the relevant subject-matter, and so long as the independence of the person remains guaranteed” (Bundesverfassungsgericht Entscheidungen Vol. 4, 7, at 16).

⁶² See: Alexy (note 51), chapter 7.

⁶³ Cf. T.T.S.Allan, *Law, Liberty and Justice* (Oxford : Clarendon Press, 1993), at 135-143.

constitutionalization.”⁶⁴ US constitutional law protects individual economic freedom and a common market, *inter alia*, by constitutional requirements of a legal basis for governmental restrictions of individual liberty, rather than by a general individual right to liberty.⁶⁵ As US constitutional, antitrust and economic law effectively protect a common market inside the US, most US lawyers see no need for the kind of judicial review by US courts of national governmental restrictions of economic freedom as it is practiced, e.g., by the German Constitutional Court, the EC Court and by the WTO Appellate Body.

From the perspective of citizens, constitutional protection of a general right to liberty may offer more effective legal and judicial remedies vis-à-vis multilevel governance in distant international organizations. For instance, it extends the substantive scope of constitutional rights protection and requires the justification of all governmental restrictions of individual liberty. As human and constitutional rights also express objective, constitutional principles that must be taken into account in the whole legal order, a general right to liberty may influence the burden of proof in the balancing of competing constitutional rights, obligations and principles.⁶⁶ Even though national constitutional traditions may legitimately differ from country to country, there are important arguments for basing legal and judicial remedies against abuses of multilevel governance powers on the principle that multilevel governance restrictions of individual freedom require constitutional justification and judicial remedies.

The WTO dispute settlement rules and practices – such as that WTO Members have a right to complain under the WTO dispute settlement system without proving a “legal interest”⁶⁷, and that violations of WTO rules are presumed to “nullify” treaty benefits (e.g. reasonable expectations of non-discriminatory conditions of trade competition)⁶⁸ – are based on principles similar to those of constitutional protection of a right to liberty. The progressive evolution of the core of inalienable human rights into *ius cogens*, and the increasing recognition of the dual nature of human rights – i.e. as *individual constitutional rights* as well as *objective constitutional principles* for the mutual balancing and “optimizing” of other constitutional rights and obligations (e.g. by means

⁶⁴ Deborah Z. Cass (note 31), at 168, 176, 191.

⁶⁵ Cf. F.L.Morrison/R.E.Hudec, Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States, in: M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law* (Deventer: Kluwer 1993), 91-133, at 92 f.

⁶⁶ For a discussion of the German Constitutional Court case-law on the general right to liberty as protecting “human freedom of action in the widest sense”, subject to the broad constitutional limitation clause, see Alexy (note 51), chapter 7. In view of Article 93:1 German Basic Law on “constitutional complaints, which can be raised by anyone on the grounds that their constitutional rights ... have been infringed by a public authority”, the German Constitutional Court has held: “Everyone can allege by way of constitutional complaint that a law limiting his freedom of action does not belong to the constitutional order because it infringes (either procedurally or substantively) individual provisions of the Constitution or general constitutional principles and thus that it infringes his constitutional right under Article 2:1 Basic Law” (Bundesverfassungsgericht Entscheidungen Vol.6, 32, at 41).

⁶⁷ In the WTO dispute over the European Communities import restrictions on bananas, the European Communities claimed that the United States had no ‘legal right or interest’ to sue as it did not export any bananas (Panel Report, *EC – Bananas III*, WT/DS27/R/USA, para. II.21). The Appellate Body confirmed the finding by the Panel that the DSU did not require a ‘legal interest to sue’ (Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, para. 132).

⁶⁸ Cf. E.U.Petersmann, *The GATT/WTO Dispute Settlement System* (Deventer: Kluwer 1997), 142 ff.

of proportionality requirements) - support the claim that intergovernmental guarantees of private freedom might constitute not only *intergovernmental rights*, but may also justify legal and judicial protection of *private freedoms* based on domestic constitutional rights to liberty and constitutional requirements to exercise governance powers in “strict observance of international law” (Article I-3, para.4 TCE). Such interpretations of constitutional rights to freedom (e.g. in German and EC constitutional law) in conformity with self-imposed *international* guarantees of freedom (such as GATT’s customs union rules and their incorporation into the EC Treaty) have nothing to do with the proposition of a human right to free trade.⁶⁹

Procedural and Participatory Citizen Rights vis-à-vis Multilevel Governance

From a human rights perspective, individuals and their elected representatives constitute not only “peoples” and democratic states, but – through the intermediary of their state agents – also intergovernmental organisations as a necessary “fourth branch of governance”.⁷⁰ None of these various forms of collective governance institutions has a constitutional mandate to disregard or violate human rights. The legitimacy of international organisations (such as the UN, the WTO and the EU) depends on respect for, and promotion of human rights. Yet, at international levels - far away from the local communities in which citizens live and co-operate, and far away also from national parliaments - intergovernmental rules and procedures inevitably suffer from “democratic deficits” compared to local and national democratic processes and parliamentary decision-making. It remains an important task to strengthen the democratic accountability of multilevel governance as well as legal and judicial remedies against abuses of foreign policy powers.

UN human rights instruments recognize that human rights need to be protected and mutually balanced through democratic legislation, and that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives” (Article 21:1 UDHR); “(t)he will of the people shall be the basis of the authority of governments; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures” (Article 21:3 UDHR). These core guarantees of a

⁶⁹ P.Alston and D.Cass have imputed to me the absurd views “that the WTO agreements consist of a series of human rights” (Cass, note 31, at 146); “that the WTO has direct effect” (at 147); that “any state attempts to deny that possibility are not legally binding” (at 148); and that my support for a “human rights approach to international trade” is “fixated on only one category of human rights, namely individual economic rights” (at172). Alston and Cass overlook that my arguments for protecting freedom of trade are based on constitutional rights to liberty (e.g. in German and EC law) and on the EC legal obligations to respect the GATT and WTO guarantees of freedom of trade. My proposal to interpret – inside the EC - the “human right to liberty” (e.g. in Article II-66 EU Charter of Fundamental Rights, Article 3 UDHR) more broadly than it is done in common law countries follows from my Kantian definition of the “first principle of justice” (cf. Petersmann, note 7); it aims at avoiding gaps in human rights law (e.g. the lack of UN human rights provisions protecting freedom of profession and freedom of contract). I have opposed a “human right to free trade” as running counter to the “indivisibility” of human rights and to the necessary balancing of liberty rights with all other human rights and constitutional rights.

⁷⁰ See Petersmann (note 18).

human right to democratic governance⁷¹ focus on national rather than international governance; but UN human rights instruments also recognize a human right “to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised” (Article 28 UDHR). Just as European constitutional law commits EU member states to respect for “representative democracy” (Article I-46 TCE) and “participatory democracy” (Article I-47 TCE) at national and European levels, so does the realization of UN human rights require stronger safeguards for participatory, representative and deliberative democracy in multilevel trade governance.

Democratic control by citizens and by national parliaments of international bureaucratic bargaining in distant, intergovernmental organisations is – for numerous reasons - far more difficult than in domestic political processes.⁷² For example, national parliaments and civil society groups often complain of the “information asymmetries” which result from intergovernmental rule-making by bureaucratic networks in non-transparent, intergovernmental organisations without effective parliamentary participation and effective democratic control by public opinion and civil society (for example, insufficiently “inclusive” decision-making without participatory and/or consultative rights of non-governmental groups that may be affected by intergovernmental decisions). Such democratic concerns increase if intergovernmental negotiations (for example, in the WTO) are strongly influenced by powerful interest groups (for example, agricultural, textile and steel lobbies); take place behind closed doors without adequate “deliberative democracy”; do not refer to human rights in the international negotiations and balancing processes; and may lead to comprehensive “package deals” (like the 1994 WTO Agreement) which can hardly be re-opened at the request of a single national parliament, or at the request of a few WTO members in the consensus-based WTO decision-making processes, once the international negotiations have been closed.

Substantive Citizen Rights in Multilevel Economic Governance

Human rights and democratic procedures can be combined in many ways which legitimately differ among countries. Yet, the more remote governance institutions operate far away from the citizens affected by intergovernmental regulation (e.g. in the EU, UN and the WTO), the less effective procedural citizen rights for democratic participation and representation risk becoming, and the more important are the legal and judicial protection of substantive rights (like the “market freedoms” and other fundamental rights protected by the EC Court). It is therefore to be welcomed that, even

⁷¹ On the emerging “human right to democratic governance”, see, for example, T.M. Franck, *The Emerging Right to Democratic Governance*, (1992) 86 *American Journal of International Law* (AJIL), 46-91; G.H. Fox & B.R. Roth (eds), *Democratic Governance and International Law*, (Oxford: OUP, 2000); E. Stein, ‘International Integration and Democracy: No Love at First Sight’, (2001) 95 *AJIL* 489-532. On the recognition and promotion of human rights by international organizations, see: “Interdependence between democracy and human rights”, Report of the Office of the High Commissioner for Human Rights, E/CN.4/2004/54 of 17 February 2004.

⁷² See the comparative study of the control of trade policies by 11 parliaments in: *The Role of Parliaments in Scrutinising and Influencing Trade Policy*, European Parliament (PE 370-166v01-00) December 2005 (the study suggests that, with the exception of the Swiss Parliament and US Congress, most parliaments do not appear to control trade policy and WTO rule-making effectively).

though the EC and EU Treaties continue to be drafted primarily in terms of rights and obligations of governments, the Union is explicitly

- “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”, without reference to sovereignty;⁷³ and
- the EU Charter of Fundamental Rights protects general and specific dignity rights (Title I), liberty rights (Title II), equality rights (Title III), solidarity rights (Title IV), citizen rights (Title V) and “rights to justice” (Title VI) that go beyond those in national constitutions and in UN law.⁷⁴

As it was to be expected from the perspective of rights-based constitutional theory, European integration law and multilevel governance in the EU have proven to be most successful in those areas (like European competition law and common market law) where individual citizens and national courts were empowered to act as self-interested guardians of the rule of law and could directly enforce the legal obligations of EC institutions and national governments through domestic courts. *Vice versa*, those areas of Community law where EC citizens and national courts were prevented from directly enforcing the international obligations of the EC and of EC governments (like multilevel trade governance in the WTO) have remained characterized by frequent violations of the rule of law to the detriment of consumer welfare and the individual rights of EC citizens. Due to the pressures by the political EC organs and the judicial self-restraint by the ECJ, there has been only one single judgment by the EC Court establishing a violation by the EC of its international legal obligations since 1958⁷⁵, compared with more than 35 GATT and WTO dispute settlement findings of violations of GATT and WTO obligations by the EC and EC member states. The legal advocates of the EC Commission justify the frequent violations of the EC’s WTO guarantees of freedom - even if EC violations of WTO rules had been formally established in legally binding WTO dispute settlement rulings and the “reasonable period of time” for implementing such rulings had long expired - by power-oriented, Machiavellian arguments that judicial protection by the ECJ of the EC citizens’ reliance on respect for the rule of international law would be “naïve.”⁷⁶

⁷³ Article I-2 Treaty TCE (above note 27), which corresponds to Article 2 of the EU Treaty.

⁷⁴ The text of this Charter, first proclaimed by the European Parliament, the EU Commission and the EU Council in December 2000 (Official Journal of the EC, C 364/1-22 of 18 December 2000), has become Part II of the TCE (note 28).

⁷⁵ Case T-115/94, *Opel Austria*, C.M.L.R. 1997, 733.

⁷⁶ See Kuijper (note 29 above). At the request of the political EC institutions, the EC Court has refrained from reviewing the legality of EC acts in the light of GATT law for more than 30 years, even if the EC violations had been formally established in legally binding GATT and WTO dispute settlement rulings. Notwithstanding the longstanding EC jurisprudence that GATT and WTO obligations form an “integral part of the Community legal system” binding on all EC institutions and judicially enforceable vis-à-vis EC member states, the Court consistently denies “direct effects” of GATT and WTO rules as well as judicial protection of EC citizens and EC member states against violations of WTO rules by EC institutions. The EC Court’s arguments against “direct applicability” rely on obvious misinterpretations of WTO rules (cf. Case T-69/00, *FIAMM*, December 2005, nyr: “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

In the field of the EU's common foreign and security policy, legal and judicial remedies are even more limited in the EU (cf. Article 46 EU Treaty) as well as in worldwide governance institutions. The more trade and foreign policies operate by "internal" restrictions of EU citizens (such as their freedom to buy foreign bananas, beef, genetically modified food), and the more European courts exercise judicial deference and – as in the recent *Kadi* and *Yusuf* cases – abdicate their judicial task of reviewing EC restrictions of individual freedom for their compliance with all EC obligations⁷⁷, the less rule of law can be maintained inside the EU. Without rule of law, also democracy becomes illusory in the EU's multilevel governance.⁷⁸ The legally incoherent UN and WTO jurisprudence of the ECJ amounts to a "political question doctrine" which arbitrarily disregards the EC's WTO obligations and WTO dispute settlement rulings but gives legal primacy to UN resolutions as "supreme law, a supreme law offering virtually no guarantees of judicial review, at any level"⁷⁹, without subjecting the domestic implementation of such UN resolutions and WTO obligations to effective judicial review inside the EC.

Conclusion: Need for More Comprehensive 'Balancing' and Judicial Protection of Public and Private Rights and Obligations

As more and more countries adopt democratic constitutions and (inter)national legal and judicial guarantees limiting the powers of the rulers, the need for legislative, administrative and judicial "balancing" of rights and obligations, as well as of public and private interests, on the basis of "fair procedures" and "constitutional principles" (such as non-discrimination, necessity, proportionality) is increasingly recognized. This is particularly so in constitutional systems (like German and EC law) with broad liberty rights and constitutional requirements that restrictions of liberty must be constitutionally justifiable. National constitutional courts as well as international human rights courts acknowledge that human rights and other "fundamental rights" constitute *rules* as well as *principles* for reconciling ("optimizing") competing principles and rules

"scope of manoeuvre" of the political EC bodies) that had been rejected as legally irrelevant by the EC Court in its *Kupferberg* judgment (Case 104/81, ECR 1982, 3659). The EC legal services support this judicial self-restraint vis-à-vis WTO law and welcome that also "the *Nakajima* doctrine has never really been applied ... because this doctrine ... (is) untenable on grounds of legal logic" (Kuijper, at 1340). In the *Kadi* and *Yusuf* judgments, the Court of First Instance claimed that UN Charter obligations prevail not only over other international legal obligations (cf. Article 103 UN Charter) but also over EU human rights law; this submission to UN law has been rightly criticized as amounting to "judicial abdication", cf. P.Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations* (Leuven: Europa Law Publishing, 2005): "The judicial abdication by the CFI means that, insofar as the resolutions are implemented by EC regulations, there can be no review by either the EU Courts or national courts" ... "Community law ... becomes an instrument for turning UN resolutions into supreme law, a supreme law offering virtually no guarantees of judicial review, at any level".

⁷⁷ Cf. Kuijper (note 29) who claims that the ECJ should focus on the political "law in action" rather than the WTO "law in the books" (e.g. at 1332-34). In the *Kadi* and *Yusuf* judgments, the Court of First Instance held that the Court of First Instance has no jurisdiction to review the legal consistency of UN Security Council decisions freezing the bank accounts of alleged terrorists with EU fundamental rights guarantees (cf. Case T-306/01 (note 8 above), para. 272).

⁷⁸ Cf. P.Eeckhout (note 77), at 20: "In CFSP matters there is both a democratic and judicial deficit".

⁷⁹ Eeckhout (note 77), at 26.

relative to what is legally and factually possible in particular circumstances. Similarly, international economic courts (like the ECJ and the WTO Appellate Body) emphasize the need for “holistic” treaty interpretation balancing intergovernmental rights and obligations with broader constitutional principles; the requirement, in Article 31 VCLT, that “a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, constitutes “one holistic rule”⁸⁰, whose different elements (text, context, object and purpose) may be difficult to separate. The comprehensive UN reports analysing interrelationships and potential conflicts between human rights and international trade law suggest that human rights law and international and European trade law appear to be flexible enough in order to be interpreted and applied in mutually coherent ways.⁸¹

V. Struggles for Human Rights: American Constitutional Nationalism versus European Multilevel Constitutionalism

The moral and democratic importance of complementing constitutional nationalism by multilevel constitutionalism for limiting abuses of foreign policy powers and protecting human rights more effectively in international law can be appreciated best by recalling the Kantian origins of multilevel constitutionalism. According to Kantian legal philosophy, the moral ‘categorical imperative’ of protecting human dignity and maximum equal freedoms of individuals through a ‘universal law of freedom’ requires *national*, *international* as well as *cosmopolitan* constitutional rights protecting individual freedom against abuses of power in all human relations (i.e. inside states, in intergovernmental relations, as well as in cosmopolitan relations among individuals and foreign governments).⁸² The inevitable struggles for progressively extending such constitutional liberty rights also depend on democratic discourse in a communicating public that must transcend intergovernmental diplomacy and may eventually turn into a “cosmopolitan constituency” for the collective supply of global public goods (including multilevel constitutional guarantees of human rights).⁸³ From a Kantian and European perspective, international law must be evaluated from the standpoint of human rights and must be transformed into an instrument for the constitutional protection of broadly

⁸⁰ This term was used already in the Panel report on US-Section 301 (WT/DS152/R), para.7.22. The Appellate Body has recently confirmed in *EC-Chicken Cuts*: “Interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components” (WT/DS269,286/AB/R, para. 176, adopted in September 2005).

⁸¹ See above notes 8-11 and 13 and related text.

⁸² For a discussion of Kant’s constitutional and cosmopolitan legal theories, and for a criticism of the lack of constitutional theory in public international law doctrine, see Petersmann (note 54).

⁸³ Such struggles inevitably entail social antagonism (which Kant described as the ‘unsocial sociability’ of rational individuals) and ‘an uncomfortable condition of permanent revolution’ (cf. A. W. Wood, *Kant’s Ethical Thought* (Cambridge: CUP, 1999), at 333) for the progressive extension of rights-based constitutionalism.

defined human rights. The perspective of non-European countries, however, is often very different.

American Constitutional Nationalism Distrusts International Law

The post-war US leadership for a liberal international economic order was based on hegemonic US leadership and national constitutionalism (e.g. strong distrust of the US Congress and US courts vis-à-vis international law, congressional insistence on powers to adopt measures in violation of international law). Many Anglo-Saxon lawyers and “realist” politicians argue “against constitutionalization” of international relations and claim, for example, “that the WTO is not constitutionalized, and nor, according to any current meanings of the term, should it be.”⁸⁴ The European openness to international law is criticized as a democratic deficiency by some US lawyers who praise the US’ unilateralism and resistance against international influences as living up to the ideal of democratic self-determination; the post-war US support for internationalism and multilateralism was “for the rest of the world, not for us”, even though America’s commitment to internationalism in economic affairs is recognized as serving US interests.⁸⁵ The widespread criticism by American, Australian and Canadian lawyers (like P. Alston, D.Z.Cass, R.Howse) of multilevel constitutionalism often reflects process-based (rather than rights-based) conceptions of parliamentary democracy and communitarian (rather than cosmopolitan) traditions. Many developing countries, even if they criticize the North-American focus on civil and political rather than economic and social human rights and argue in favour of development-oriented reforms of international law, likewise emphasize the classical international law principle of state sovereignty rather than the need for multilevel constitutional restraints of national policy powers.

Multilevel European Constitutionalism is Committed to “Strict Observance of International Law” (Article I-3 TCE)

Europeans are more inclined to infer from the European integration experience that multilevel governance requires rights-based, multilevel constitutionalism for adjusting and preserving individual and democratic self-government in an interdependent world. Just as the EU remains democratically legitimate only as a legal community with limited powers committed to “strict observance of international law” (Art. I-3 TCE), so must international law overcome its obvious “constitutional deficits” by constitutional

⁸⁴ Cass (note 31), at x; see notably Part III of her book (“Against Constitutionalization”) which agrees with the “anti-constitutionalization critique”, for instance that the “WTO undermines decisions of democratically authorized national constituencies” (at 212). Notwithstanding seven chapters favoring *national over multilevel* constitutionalism, her Chapter 8 concludes that “trading democracy, not merely trading constitutionalization, should be the key to WTO constitutionalization in this century” (at 242). For Europeans familiar with the reality of European constitutional law and other “international treaty constitutions”, it appears anachronistic to deny the emerging international constitutional law. The most important insight of Cass’ book remains, as admitted at the end, that her “received account” of Anglo-Saxon constitutionalism has, indeed, “been revealed as neither descriptively adequate nor normatively appealing” (p.240).

⁸⁵ Cf. Rubinfeld (note 6), at 283, 293.

reforms. Whereas Americans tend to view international courts as a potential threat to national democracy, such “counter-majoritarian difficulties” are less perceived in the European context where “judicial governance” by the EC Court and the European Court of Human Rights inevitably affects European democracies and their changing, democratic majorities. This contribution has defended the European views that:

- Globalization demonstrates that ever more constitutional objectives can no longer be achieved without multilevel governance and multilevel constitutionalism promoting the collective supply of international public goods.
- In order to remain legitimate and effective, multilevel governance - such as intergovernmental rule-making, administration and judicial governance in worldwide institutions (such as the WTO and UN agencies) and in regional regimes – must respect and protect human rights and remain democratically accountable; this cannot be achieved without stronger multilevel constitutional restraints. European integration illustrates that international law and international organisations for the collective supply of international public goods can also *enlarge* citizen rights, *enhance* the legitimacy of multi-level governance, *limit* abuses of multi-level governance, and *facilitate* parliamentary accountability of foreign policies beyond what is possible through national constitutionalism.
- Human rights and democratic self-government require redesigning “constitutional sovereignty” in a manner reconciling state sovereignty, popular sovereignty and individual sovereignty based on respect for human dignity and human rights. The existing forms of worldwide governance and constitutional nationalism remain highly ineffective in terms of protection and promotion of universal human rights, international rule of law, democratic peace and a healthy environment.

Multilevel Constitutionalism as a ‘Transformation Policy’ and ‘Struggle for Human Rights’

The more than 2’400 years of historical experiences with republicanism confirm that rights-based constitutionalism offers the most effective safeguards for protecting the public interests of citizens. The differences between American and European approaches to multilevel governance lie *not* in the European recourse to “normative”, “soft” and “civilian power” (which are also used in US foreign policies), but in the European preference for *multilevel constitutional restraints* on multilevel economic governance rather than for state-centred approaches to international law and constitutional nationalism. The American and European approaches compete in worldwide treaty negotiations (e.g. US rejection of the UN Convention on the International Criminal Court, the UNESCO Convention on Cultural Diversity, the UN Biodiversity Convention) as well as in the competing recourse to regionalism, bilateralism and unilateralism as policy alternatives whenever international public goods cannot be supplied effectively at worldwide levels (e.g. in the Doha Round negotiations in the WTO).

At the regional level, the EU has succeeded in using its normative and economic “power of attraction” for extending its multilevel constitutionalism to 25 EU member states; the rights-based free trade rules and basic human rights commitments of EC law have been further extended to more than 20 additional countries in Europe and the Mediterranean. This peaceful transformation of ever more countries in Europe – based on EU accession, association and cooperation agreements – was made possible by the constitutional and economic benefits of EU law rather than by unilateral “power” of the EU to make other countries do what they would not otherwise do.⁸⁶ With regard to countries outside Europe, the EC’s cooperation agreements (e.g. with Russia and the African, Caribbean and Pacific countries) and “human rights conditionality”⁸⁷ have been much less successful in promoting multilevel constitutionalism. The more than 200 regional trade agreements concluded in the Americas, Africa and Asia were often more influenced by the national interests of “regional hegemon” (such as the US in North America, Argentina and Brazil in MERCOSUR, South Africa in the Southern African integration agreements, China in Asia) and tend to avoid multilevel constitutionalism (such as supranational regulatory agencies and courts).⁸⁸ “Continental hegemon” (like Brazil, China, India, Russia, South Africa) are likely to follow more the state-centred foreign policy approaches of the US than Europe’s multilevel constitutionalism. The future legal and constitutional structures of international economic law remain uncertain. The history of constitutionalism suggests that the needed “constitutionalization” of international economic law depends on “struggles for human rights” by citizens, civil society, parliaments and courts against the never-ending abuses of private and public power by self-interested rulers.-

⁸⁶ Cf. H.Sjursen, What kind of power? in: *Journal of European Public Policy* 13 (2006), 169-181.

⁸⁷ Since the 1990s, it became official European Union (EU) policy to include ‘human rights clauses’ in all new trade and cooperation agreements with third countries, cf. L. Bartels, *Human Rights Conditionality in the European Union’s International Agreements* (Oxford: OUP, 2005).

⁸⁸ Yet, also in Africa and in the Americas, an increasing number of RTAs explicitly refer to human rights as an objective or fundamental principle of economic integration, or implicitly limit membership to countries committed to protection of human rights; cf. the contributions by S. F. Musungu, ‘International Trade and Human Rights in Africa: A Comment on Conceptual Linkages’, and by F. J. Garcia, Integrating Trade and Human Rights in the Americas, to F. M. Abbott, C. Breining-Kaufmann and T. Cottier (note 10), chpts. 15 and 16.