

# **International and Regional Trade Law: The Law of the World Trade Organization**



**J.H.H. Weiler**

**University Professor, NYU  
Joseph Straus Professor of Law and European Union Jean Monnet Chair  
NYU School of Law**

AND

**Sungjoon Cho**

**Associate Professor and Norman and Edna Freehling Scholar  
Chicago-Kent College of Law  
Illinois Institute of Technology**

AND

**Isabel Feichtner**

**Junior Professor of Law and Economics  
Goethe University  
Frankfurt**

## **Unit I: The Syntax and Grammar of International Trade Law**

# International and Regional Trade Law: The Law of the World Trade Organization

## Unit I: The Syntax and Grammar of International Trade Law

### Table of Contents

1. Introductory Note.....	3
1-1. General Remark on the Teaching Materials.....	3
1-2. Supplementary Reading.....	3
1-3. Useful Links .....	4
2. The Economics of International Trade.....	5
2-1. Comparative Advantage .....	5
2-2. Paul R. Krugman, <i>What Do Undergrads Need To Know About Trade?</i> .....	7
3. International Trade Law and the WTO .....	12
3-1. Stages of Economic Integration.....	12
3-2. Introduction to the WTO .....	14
3-3. Telos of the WTO.....	41
Legal Texts.....	41
Case Law.....	44
3-4. Globalized Trade and its Discontents.....	53
Trade and Environment.....	54
Trade and Human Rights.....	59
Gender Issues and International Trade.....	65
Trade and Development .....	69
Optional Readings .....	71
D. Griswold, <i>A Tale of Two Nanos</i> .....	71
Trade and Human Rights: An Exchange (Jean Monnet Working Paper Series)..	73

## 1. Introductory Note

### 1-1. GENERAL REMARK ON THE TEACHING MATERIALS

The focus of these teaching materials is on primary sources – mainly the relevant legal texts and Appellate Body and panel reports. This is explained by our method to teach WTO law through the careful reading and analysis of cases. Because your reading time is limited, this teaching method entails that we cannot aim at comprehensiveness in the teaching materials, that we cannot note and comment on each development in the law. Rather it is our aim to teach you how to teach yourself the law of international trade. Therefore we will try to guide your reading throughout the materials – more so in the beginning and less in further units. While the mandatory part of the teaching materials tries to cover all important aspects of the WTO and its law, the optional reading will point to further developments in the law and, in addition, shall be an aid to contextualize the issues that are raised in the mandatory reading. In the section “Optional Reading” we therefore include case notes and reproduce or point to significant scholarly contributions.

When preparing for class and when in class it is important that you always have the Primary Sources at hand. The texts of all WTO Agreements can be found on the WTO’s website under [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm); all WTO panel and Appellate Body reports can be found under [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

With respect to WTO texts from the WTO’s official website we would like to add a note of caution. When reading these texts keep in mind that they represent a certain view put forward by the organization, they are the WTO’s ‘propaganda’ if you want.

If you discover any dead links or mistakes in these teaching materials, and also if you have suggestions for their improvement, please let us know.

### 1-2. SUPPLEMENTARY READING

For (optional) supplementary reading that will give you a more complete overview of the state of the law we recommend the following treatises:

*Peter van den Bossche, The Law and Policy of the World Trade Organization, 2005.*

*Raj Bhala, Modern GATT Law. A Treatise on the General Agreement on Tariffs and Trade, 2005.*

*Michael J. Trebilcock & Robert Howse, The Regulation of International Trade, 3rd ed. 2005.*

*John H. Jackson, William J. Davey, Alan O. Sykes, Legal Problems of International Economic Relation, 4th ed. 2002.*

*John H. Jackson, The World Trading System, 2nd ed. 1997.*

At the beginning of each unit we will point you to the relevant sections of these books. If you wish you can read them in conjunction with the teaching materials to get a complete overview over the state of the law.

For **Unit I** we suggest the following sections for supplementary reading:

*Peter van den Bossche, Chapter 1, pp. 1-75.*

*Michael J. Trebilcock & Robert Howse, pp. 1-48.*

*John H. Jackson, William J. Davey, Alan O. Sykes, Chapter 1, pp. 1-44.*

*John H. Jackson, Chapters 1 and 2, pp. 1-78.*

### 1-3. USEFUL LINKS

You might find the following websites useful to find primary sources and also secondary literature:

[www.wto.org](http://www.wto.org)

On the official website of the WTO you find *i.a.* the official documents of the WTO, the official documents issued under the GATT 1947, news about the organization and publications of the WTO, including the WTO Analytical Index, an article by article commentary on the agreements.

[www.worldtradelaw.net](http://www.worldtradelaw.net)

On this website – which is in part publicly accessible and in part only accessible for subscribers -- you find *i.a.* the case law of the WTO, case commentaries, scholarly articles and a discussion board.

<http://www.law.nyu.edu/library/wtguide.html>

This WTO and GATT Research Guide of the NYU law library is a good starting point for research on international trade law.

[http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=10](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=10)

The American Law Institute publishes on this website joint studies by legal experts and economists that analyze WTO Appellate Body and panel reports.

## 2. The Economics of International Trade

### 2-1. COMPARATIVE ADVANTAGE

*From The Economics A-Z*

[HTTP://WWW.ECONOMIST.COM/RESEARCH/ECONOMICS/ALPHABETIC.CFM?TERM=COMPARATIVEADVANTAGE#COMPARATIVEADVANTAGE](http://www.economist.com/research/economics/alphabetic.cfm?term=comparativeadvantage#comparativeadvantage)

Paul Samuelson, one of the 20th century's greatest economists, once remarked that the principle of comparative advantage was the only big idea that **ECONOMICS** had produced that was both true and surprising. It is also one of the oldest theories in economics, usually ascribed to **DAVID RICARDO**. The theory underpins the economic case for **FREE TRADE**. But it is often misunderstood or misrepresented by opponents of free trade. It shows how countries can gain from trading with each other even if one of them is more efficient – it has an **ABSOLUTE ADVANTAGE** – in every sort of economic activity. Comparative advantage is about identifying which activities a country (or firm or individual) is most efficient at doing.

To see how this theory works imagine two countries, Alpha and Omega. Each country has 1,000 workers and can make two goods, computers and cars. Alpha's economy is far more productive than Omega's. To make a car, Alpha needs two workers, compared with Omega's four. To make a computer, Alpha uses 10 workers, compared with Omega's 100. If there is no trade, and in each country half the workers are in each industry, Alpha produces 250 cars and 50 computers and Omega produces 125 cars and 5 computers.

What if the two countries specialise? Although Alpha makes both cars and computers more efficiently than Omega (it has an absolute advantage), it has a bigger edge in computer making. So it now devotes most of its resources to that industry, employing 700 workers to make computers and only 300 to make cars. This raises computer output to 70 and cuts car production to 150. Omega switches entirely to cars, turning out 250.

World output of both goods has risen. Both countries can consume more of both if they trade, but at what **PRICE**? Neither will want to import what it could make more cheaply at home. So Alpha will want at least 5 cars per computer, and Omega will not give up more than 25 cars per computer. Suppose the terms of trade are fixed at 12 cars per computer and 120 cars are exchanged for 10 computers. Then Alpha ends up with 270 cars and 60 computers, and Omega with 130 cars and 10 computers. Both are better off than they would be if they did not trade.

This is true even though Alpha has an absolute advantage in making both computers and cars. The reason is that each country has a different comparative advantage. Alpha's edge is greater in computers than in cars. Omega, although a costlier producer in both industries, is a less expensive maker of cars. If each country specialises in products in which it has a comparative advantage, both will gain from trade.

In essence, the theory of comparative advantage says that it pays countries to trade because they are different. It is impossible for a country to have no comparative advantage in anything. It may be the least efficient at everything, but it will still have a comparative advantage in the industry in which it is relatively least bad.

There is no reason to assume that a country's comparative advantage will be static. If a country does what it has a comparative advantage in and sees its **INCOME** grow as a result, it can afford better education and **INFRASTRUCTURE**. These, in turn, may give it a comparative advantage in other economic activities in future.

## 2-2. PAUL R. KRUGMAN, *WHAT DO UNDERGRADS NEED TO KNOW ABOUT TRADE?*

83 Am. Econ. Rev. No. 2, 23, 23-26 (1993)

Few of the undergraduates who take an introductory course in economics will go on to graduate study in the field, and indeed most will not even take any higher-level economics courses. So what they learn about economics will be what they get in that first course. It is now more important than ever before that their basic training include a solid grounding in the principles of international trade.

I could justify this assertion by pointing out that international trade is now more important to the U.S. economy than it used to be. But there is another reason, which I think is even more important: the increased *perception* among the general public that international trade is a vital subject. We live in a time in which Americans are obsessed with international competition, in which Lester Thurow's *Head to Head* is the non-fiction best-seller and Michael Crichton's *Rising Sun* tops the fiction list. The news media and the business literature are saturated with discussions of America's role in the world economy.

The problem is that most of what a student is likely to read or hear about international economics is *nonsense*. What I want to argue in this paper is that the most important thing to teach our undergrads about trade is how to detect that nonsense. That is, our primary mission should be to vaccinate the minds of our undergraduates against the misconceptions that are so predominant in what passes for educated discussion about international trade.

### **I. The Rhetoric of Pop Internationalism**

As a starting point, I would like to quote a typical statement about international economics. (Please ignore the numbers for a moment.) Here it is: "We need a new economic paradigm, because today America is part of a truly global economy (1). To maintain its standard of living, America now has to learn to compete in an ever tougher world marketplace (2). That's why high productivity and product quality have become essential. (3). We need to move the American economy into the high-value sectors. (4) that will generate jobs (5) for the future. And the only way we can be competitive in the new global economy is if we forge a new partnership between government and business (6)."

OK, I confess: it's not a real quotation. I made it up as a sort of compendium of popular misconceptions about international trade. But it certainly sounds like the sort of thing one reads or hears all the time- it is very close in content and style to the still-influential manifesto by Ira Magaziner and Robert Reich (1982), or for that matter to the presentation made by Apple Computer's John Sculley at President-elect Clinton's Economic Conference last December. People who say things like this believe themselves to be smart, sophisticated, and forward-looking. They do not know that they are repeating a set of misleading cliches that I will dub "pop internationalism."

It is fairly easy to understand why pop internationalism has so much popular appeal. In effect, it portrays America as being like a corporation that used to have a lot of monopoly power,

and could therefore earn comfortable profits in spite of sloppy business practices, but is now facing an onslaught from new competitors. A lot of companies are in that position these days (though the new competitors are not necessarily foreign), and so the image rings true.

Unfortunately, it's a grossly misleading image, because a national economy bears very little resemblance to a corporation. And the ground-level view of businessmen is [24] deeply uninformative about the inherently general-equilibrium issues of international economics.

So what do undergrads need to know about trade? They need to know that pop internationalism is nonsense- and they need to know *why* it is nonsense.

## II. Common Misconceptions

I inserted numbers into my imaginary quotation to mark six currently popular misconceptions that can and should be dispelled in an introductory economics course.

1. — "We need a new paradigm..." Pop internationalism proclaims that everything is different now that the United States is an open economy. Probably the most important single insight that an introductory course can convey about international economics is that it does not change the basics: trade is just another economic activity, subject to the same principles as anything else.

James Ingram's (1983) textbook on international trade contains a lovely parable. He imagines that an entrepreneur starts a new business that uses a secret technology to convert U.S. wheat, lumber, and so on into cheap high-quality consumer goods. The entrepreneur is hailed as an industrial hero; although some of his domestic competitors are hurt, everyone accepts that occasional dislocations are the price of a free-market economy. But then an investigative reporter discovers that what he is really doing is shipping the wheat and lumber to Asia and using the proceeds to buy manufactured goods-whereupon he is denounced as a fraud who is destroying American jobs. The point, of course, is that international trade is an economic activity like any other and can indeed usefully be thought of as a kind of production process that transforms exports into imports.

It might, incidentally, also be a good thing if undergrads got a more realistic quantitative sense than the pop internationalists seem to have of the limited extent to which the United States actually has become a part of a global economy. The fact is that imports and exports are still only about one-eighth of output, and at least two-thirds of our value-added consists of non-tradable goods and services. Moreover, one should have some historical perspective with which to counter the silly claims that our current situation is completely unprecedented: the United States is not now and may never be as open to trade as the United Kingdom has been since the reign of Queen Victoria.

2.-"Competing in the world marketplace": One of the most popular, enduring misconceptions of practical men is that countries are in competition with each other in the same way that companies in the same business are in competition. Ricardo already knew better in 1817. An introductory economics course should drive home to students the point that international trade is not about competition, it is about mutually beneficial exchange. Even more fundamentally, we should be able to teach students that imports, not exports, are the purpose of trade. That is, what a country gains from trade is the ability to import things it wants. Exports



are not an objective in and of themselves: the need to export is a burden that a country must bear because its import suppliers are crass enough to demand payment.

One of the distressing things about the tyranny of pop internationalism is that there has been a kind of Gresham's Law in which bad concepts drive out good. Lester Thurow is a trained economist, who understands comparative advantage. Yet his recent book has been a best-seller largely because it vigorously propounds concepts that unintentionally (one hopes) pander to the *cliches* of pop internationalism: "Niche competition is win-win. Everyone has a place where he or she can excel; no one is going to be driven out of business. Head-to-head competition is win-lose." (Thurow, 1992 p. 30). We should try to instill in undergrads a visceral negative reaction to statements like this.

3.-"Productivity": Students should learn that high productivity is beneficial, not because it helps a country to compete with [25] other countries, but because it lets a country produce and therefore consume more. This would be true in a closed economy; it is no more and no less true in an open economy; but that is not what pop internationalists believe.

I have found it useful to offer students the following thought experiment. First, imagine a world in which productivity rises by 1 percent annually in all countries. What will be the trend in the U.S. standard of living? Students have no trouble agreeing that it will rise by 1 percent per year. Now, however, suppose that while the United States continues to raise its productivity by only 1 percent per year, the rest of the world manages to achieve 3-percent productivity growth. What is the trend in our living standard?

The correct answer is that the trend is still 1 percent, except possibly for some subtle effects via our terms of trade; and as an empirical matter changes in the U.S. terms of trade have had virtually no impact on the trend in our living standards over the past few decades. But very few students reach that conclusion-which is not surprising, since virtually everything they read or hear outside of class conveys the image of international trade as a competitive sport.

An anecdote: when I published an op-ed piece in the *New York Times* last year, I emphasized the importance of rising productivity. The editorial assistant I dealt with insisted that I should "explain" that we need to be productive "to compete in the global economy." He was reluctant to publish the piece unless I added the phrase- he said it was necessary so that readers could understand why productivity is important. We need to try to turn out a generation of students who not only don't need that kind of explanation, but understand why it's wrong.

4.-"High-value sectors": Pop internationalists believe that international competition is a struggle over who gets the "high-value" sectors. "Our country's real income can rise only if (1) its labor and capital increasingly flow toward businesses that add greater value per employee and (2) we maintain a position in these businesses that is superior to that of our international competitors" (Magaziner and Reich, 1982 p. 4).

I think it should be possible to teach students why this is a silly concept. Take, for example, a simple two-good Ricardian model in which one country is more productive in both industries than the other. (I have in mind the one used in Krugman and Maurice Obstfeld [1991 pp. 20- 1].) The more productive country will, of course, have a higher wage rate, and therefore whatever sector that country specializes in will be "high value," that is, will have higher value-added per worker. Does this mean that the country's high living standard is the result of being in the right sector, or that the poorer country would be richer if it tried to emulate the other's pattern of specialization? Of course not.

5.-"Jobs": One thing that both friends and foes of free trade seem to agree on is that the central issue is employment. George Bush declared the objective of his ill-starred trip to Japan to be "jobs, jobs, jobs"; both sides in the debate over the North American Free Trade Agreement try to make their case in terms of job creation. And an astonishing number of free-traders think that the reason protectionism is bad is that it causes depressions.

It should be possible to emphasize to students that the level of employment is a macroeconomic issue, depending in the short run on aggregate demand and depending in the long run on the natural rate of unemployment, with macroeconomic policies like tariffs having little net effect. Trade policy should be debated in terms of its impact on efficiency, not in terms of phony numbers about jobs created or lost.

6.-"A new partnership": The bottom line for many pop internationalists is that since U.S. firms are competing with foreigners instead of each other, the U.S. government should turn from its alleged adversarial position to one of supporting our firms against their foreign rivals. A more sophisticated pop internationalist like Robert Reich (1991) realizes that the interests of U.S. *firms* are not the same as those of U.S. *workers* (you may find it hard to believe that anyone needed to point this out, but among pop internationalists this was viewed as a deep and controversial insight), but still accepts the basic premise that the U.S. government should help our industries compete.

What we should be able to teach our students is that the main competition going on is one of U.S. industries against *each other*, over which sector is going to get the scarce resources of capital, skill, and, yes, labor. Government support of an industry may help that industry compete against foreigners, but it also draws resources away from other domestic industries. That is, the increased importance of international trade does not change the fact the government cannot favor one domestic industry except at the expense of others.

Now there are reasons, such as external economics, why a preference for some industries over others may be justified. But this would be true in a closed economy, too. Students need to understand that the growth of world trade provides no additional support for the proposition that our government should become an active friend to domestic industry.

### **III. What We Should Teach**

By now the thrust of my discussion should be clear. For the bulk of our economics students, our objective should be to equip them to respond intelligently to popular discussion of economic issues. A lot of that discussion will be about international trade, so international trade should be an important part of the curriculum.

What is crucial, however, is to understand that the level of public discussion is extremely primitive. Indeed, it has sunk so low that people who repeat silly clichés often imagine themselves to be sophisticated. That means that our courses need to drive home as clearly as possible the basics. Offer curves and Rybczynski effects are lovely things. What most students need to be prepared for, however, is a world in which TV "experts," best-selling authors, and \$30,000-a-day consultants do not understand budget constraints, let alone comparative advantage.

The last 15 years have been a golden age of innovation in international economics. I must somewhat depressingly conclude, however, that this innovative stuff is not a priority for

today's undergraduates. In the last decade of the 20th century, the essential things to teach students are still the insights of Hume and Ricardo. That is, we need to teach them that trade deficits are self-correcting and that the benefits of trade do not depend on a country having an absolute advantage over its rivals. If we can teach undergrads to wince when they hear someone talk about "competitiveness," we will have done our nation a great service.

#### **REFERENCES**

Crichton, Michael, *Rising Sun*, New York: Knopf, 1992.

Ingram, James, *International Economics*, New York: Wiley, 1983.

Krugman, Paul and Obstfeld, Maurice, *International Economics: Theory and Policy*, New York: Harper Collins, 1991.

Magaziner, Ira and Reich, Robert, *Minding America's Business*, New York: Random House, 1982.

Reich, Robert, *The Work of Nations*, New York: Knopf, 1991.

Thurow, Lester, *Head to Head*, New York: William Morrow, 1992.

### 3. International Trade Law and the WTO

#### 3-1. STAGES OF ECONOMIC INTEGRATION

**Bela Balassa (1928 – 1991), *The Theory of Economic Integration*, 1961, pp. 1-3**

##### **The Concept and Forms of Integration**

In everyday usage the word “integration” denotes the bringing together of parts into a whole. In the economic literature the term “economic integration” does not have such a clear-cut meaning. Some authors include social integration in the concept, others subsume different forms of international cooperation under this heading, and the argument has also been advanced that the mere existence of trade relations between independent national economies is a sign of integration.<sup>1</sup> We propose to define economic integration as a process and as a state of affairs. Regarded as a process, it encompasses measures designed to abolish discrimination between economic units belonging to different national states; viewed as a state of affairs, it can be represented by the absence of various forms of discrimination between national economies.<sup>2</sup>

[2] In interpreting our definition, distinction should be made between integration and cooperation. The difference is qualitative as well as quantitative. Whereas cooperation includes actions aimed at lessening discrimination, the process of economic integration comprises measures that entail the suppression of some forms of discrimination. For example, international agreements on trade policies belong to the area of international cooperation, while the removal of trade barriers is an act of economic integration. Distinguishing between cooperation and integration, we put the main characteristics of the latter – the abolition of discrimination within an area – into clearer focus and give the concept definite meaning without unnecessarily diluting it by the inclusion of diverse actions in the field of international cooperation.

Economic integration, as defined here, can take several forms that represent varying degrees of integration. These are a free-trade area, a customs union, a common market, an economic union, and complete economic integration. In a free-trade area, tariffs (and quantitative restrictions) between the participating countries are abolished, but each country retains its own tariffs against nonmembers. Establishing a customs union involves, besides the suppression of discrimination in the field of commodity movements within the union, the equalization of tariffs in trade with nonmember countries. A higher form of economic integration is attained in a common market, where not only trade restrictions but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies, in order to remove discrimination that was due to disparities in these policies. Finally, total economic integration presupposes the unification of monetary, fiscal, social, and countercyclical policies and requires the setting-up of a supra-national authority whose decisions are binding for the member states.<sup>3</sup>

---

<sup>1</sup> For a critical survey of these definitions and references, see Bela Balassa, “Towards a Theory of Economic Integration,” *Kyklos*, No. 1 (1961), pp. 1-5.

<sup>2</sup> It should be noted that this definition is based on the implicit assumption that discrimination actually affected economic intercourse. The suppression of tariff barriers between Iceland and New Zealand, for example, will not integrate the two economies in the absence of a substantial amount of foreign trade, since without trade relations there was no effective discrimination anyway.

<sup>3</sup> Social integration can also be mentioned as a further precondition of total economic integration. Nevertheless, social integration has not been included in our definition, since – although it increases the

Adopting the definition given above, the theory of economic integration will be concerned with the economic effects of integration [3] in its various forms and with problems that arise from divergences in national monetary, fiscal, and other policies. The theory of economic integration can be regarded as a part of international economics, but it also enlarges the field of international trade theory by exploring the impact of a fusion of national markets on growth and examining the need for the coordination of economic policies in a union. Finally, the theory of economic integration should incorporate elements of location theory, too. The integration of adjacent countries amounts to the removal of artificial barriers that obstruct continuous economic activities through national frontiers, and the ensuing relocation of production and regional agglomerative and deglomerative tendencies cannot be adequately discussed without making use of the tools of location analysis.<sup>4</sup>

---

*effectiveness* of economic integration – it is not necessary for the lower forms of integration. The removal of trade barriers in a free-trade area, for example, is an act of economic integration even in the absence of developments in the social field.

<sup>4</sup> On the interrelationship of location theory and the theory of economic integration, see my “Towards a Theory of Economic Integration,” pp. 6-8.

### 3-2. INTRODUCTION TO THE WTO

On the following pages you will find excerpts from the WTO publication “Understanding the WTO” (last revised February 2007) which is available on the WTO’s website under [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/tif\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm).

These excerpts shall give you an overview over the organization, its history, institutional structure and the subject matters covered by the WTO Agreements.

When reading these pages you should keep in mind their origin and the institutional bias they might consequently express.

## ABBREVIATIONS

Some of the abbreviations and acronyms used in the WTO:

ACP	African, Caribbean and Pacific Group (Lomé Convention and Cotonu Agreement)	ITC	International Trade Centre
AD, A-D	Anti-dumping measures	ITO	International Trade Organization
AFTA	ASEAN Free Trade Area	MEA	Multilateral environmental agreement
AMS	Aggregate measurement of support (agriculture)	MERCOSUR	Southern Common Market
APEC	Asia-Pacific Economic Cooperation	MFA	Multifibre Arrangement (replaced by ATC)
ASEAN	Association of Southeast Asian Nations	MFN	Most-favoured-nation
ATC	Agreement on Textiles and Clothing	MTN	Multilateral trade negotiations
CBD	Convention on Biological Diversity	NAFTA	North American Free Trade Agreement
CCC	(former) Customs Co-operation Council (now WCO)	PSE	Producer subsidy equivalent (agriculture)
CER	[Australia New Zealand] Closer Economic Relations [Trade Agreement] (also ANCERTA)	PSI	Pre-shipment inspection
COMESA	Common Market for Eastern and Southern Africa	S&D, SDT	Special and differential treatment (for developing countries)
CTD	Committee on Trade and Development	SAARC	South Asian Association for Regional Cooperation
CTE	Committee on Trade and Environment	SDR	Special Drawing Rights (IMF)
CVD	Countervailing duty (subsidies)	SELA	Latin American Economic System
DDA	Doha Development Agenda	SPS	Sanitary and phytosanitary measures
DSB	Dispute Settlement Body	TBT	Technical barriers to trade
DSU	Dispute Settlement Understanding	TMB	Textiles Monitoring Body
EC	European Communities	TNC	Trade Negotiations Committee
EFTA	European Free Trade Association	TPRB	Trade Policy Review Body
EU	European Union (officially European Communities in WTO)	TPRM	Trade Policy Review Mechanism
FAO	Food and Agriculture Organization	TRIMs	Trade-related investment measures
GATS	General Agreement on Trade in Services	TRIPS	Trade-related aspects of intellectual property rights
GATT	General Agreement on Tariffs and Trade	UN	United Nations
GSP	Generalized System of Preferences	UNCTAD	UN Conference on Trade and Development
HS	Harmonized Commodity Description and Coding System	UNDP	UN Development Programme
ICITO	Interim Commission for the International Trade Organization	UNEP	UN Environment Programme
ILO	International Labour Organization	UPOV	International Union for the Protection of New Varieties of Plants
IMF	International Monetary Fund	UR	Uruguay Round
		VER	Voluntary export restraint
		VRA	Voluntary restraint agreement
		WCO	World Customs Organization
		WIPO	World Intellectual Property Organization
		WTO	World Trade Organization

For a comprehensive list of abbreviations and glossary of terms used in international trade, see, for example: Walter Goode, *Dictionary of Trade Policy Terms*, 4th edition, WTO/Cambridge University Press, 2003.

This and many other publications on the WTO and trade are available from:

WTO Publications, World Trade Organization, Centre William Rappard, Rue de Lausanne 154, CH-1211 Geneva, Switzerland.  
Tel (+41-22) 739 5208/5308. Fax: (+41-22) 739 5792. E-mail: [publications@wto.org](mailto:publications@wto.org)

The WTO was born out of negotiations;  
everything the WTO does is the result of negotiations

## 1. What is the World Trade Organization?

Simply put: the World Trade Organization (WTO) deals with the rules of trade between nations at a global or near-global level. But there is more to it than that.

### Is it a bird, is it a plane?

There are a number of ways of looking at the WTO. It's an organization for liberalizing trade. It's a forum for governments to negotiate trade agreements. It's a place for them to settle trade disputes. It operates a system of trade rules. (But it's not Superman, just in case anyone thought it could solve — or cause — all the world's problems!)

**Above all, it's a negotiating forum ...** Essentially, the WTO is a place where member governments go, to try to sort out the trade problems they face with each other. The first step is to talk. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations. The bulk of the WTO's current work comes from the 1986–94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT). The WTO is currently the host to new negotiations, under the “Doha Development Agenda” launched in 2001.

Where countries have faced trade barriers and wanted them lowered, the negotiations have helped to liberalize trade. But the WTO is not just about liberalizing trade, and in some circumstances its rules support maintaining trade barriers — for example to protect consumers or prevent the spread of disease.

**It's a set of rules ...** At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives.



### ... OR IS IT A TABLE?

Participants in a recent radio discussion on the WTO were full of ideas. The WTO should do this, the WTO should do that, they said.

One of them finally interjected: “Wait a minute. The WTO is a table. People sit round the table and negotiate. What do you expect the table to do?”





'Multilateral' trading system ...

... i.e. the system operated by the WTO. Most nations — including almost all the main trading nations — are members of the system. But some are not, so "multilateral" is used to describe the system instead of "global" or "world".

In WTO affairs, "multilateral" also contrasts with actions taken regionally or by other smaller groups of countries. (This is different from the word's use in other areas of international relations where, for example, a "multilateral" security arrangement can be regional.)

### The principles

The trading system should be ...

- without discrimination — a country should not discriminate between its trading partners (giving them equally "most-favoured-nation" or MFN status); and it should not discriminate between its own and foreign products, services or nationals (giving them "national treatment");
- freer — barriers coming down through negotiation;
- predictable — foreign companies, investors and governments should be confident that trade barriers (including tariffs and non-tariff barriers) should not be raised arbitrarily; tariff rates and market-opening commitments are "bound" in the WTO;
- more competitive — discouraging "unfair" practices such as export subsidies and dumping products at below cost to gain market share;
- more beneficial for less developed countries — giving them more time to adjust, greater flexibility, and special privileges.

The system's overriding purpose is to help trade flow as freely as possible — so long as there are no undesirable side-effects — because this is important for economic development and well-being. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be "transparent" and predictable.

**And it helps to settle disputes ...** This is a third important side to the WTO's work. Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements.

### Born in 1995, but not so young

The WTO began life on 1 January 1995, but its trading system is half a century older. Since 1948, the General Agreement on Tariffs and Trade (GATT) had provided the rules for the system. (The second WTO ministerial meeting, held in Geneva in May 1998, included a celebration of the 50th anniversary of the system.)

It did not take long for the General Agreement to give birth to an unofficial, de facto international organization, also known informally as GATT. Over the years GATT evolved through several rounds of negotiations.

The last and largest GATT round, was the Uruguay Round which lasted from 1986 to 1994 and led to the WTO's creation. Whereas GATT had mainly dealt with trade in goods, the WTO and its agreements now cover trade in services, and in traded inventions, creations and designs (intellectual property).

## 2. Principles of the trading system

The WTO agreements are lengthy and complex because they are legal texts covering a wide range of activities. They deal with: agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial standards and product safety, food sanitation regulations, intellectual property, and much more. But a number of simple, fundamental principles run throughout all of these documents. These principles are the foundation of the multilateral trading system.

A closer look at these principles:

### Trade without discrimination

**1. Most-favoured-nation (MFN): treating other people equally** Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.

This principle is known as most-favoured-nation (MFN) treatment (*see box*). It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

Some exceptions are allowed. For example, countries can set up a free trade agreement that applies only to goods traded within the group — discriminating against goods from outside. Or they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. And in services, countries are allowed, in limited circumstances, to discriminate. But the agreements only permit these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners — whether rich or poor, weak or strong.

**2. National treatment: Treating foreigners and locals equally** Imported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of “national treatment” (giving others the same treatment as one’s own nationals) is also found in all the three main WTO agreements (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS), although once again the principle is handled slightly differently in each of these.

National treatment only applies once a product, service or item of intellectual property has entered the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax.

### **Freer trade: gradually, through negotiation**

Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively. From time to time other issues such as red tape and exchange rate policies have also been discussed.

Since GATT’s creation in 1947–48 there have been eight rounds of trade negotiations. A ninth round, under the Doha Development Agenda, is now underway. At first these focused on lowering tariffs (customs duties) on imported goods. As a result of the negotiations, by the mid-1990s industrial countries’ tariff rates on industrial goods had fallen steadily to less than 4%

But by the 1980s, the negotiations had expanded to cover non-tariff barriers on goods, and to the new areas such as services and intellectual property.

Opening markets can be beneficial, but it also requires adjustment. The WTO agreements allow countries to introduce changes gradually, through “progressive liberalization”. Developing countries are usually given longer to fulfil their obligations.

### **Predictability: through binding and transparency**

Sometimes, promising not to raise a trade barrier can be as important as lowering one, because the promise gives businesses a clearer view of their future opportunities. With stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition — choice and lower prices. The multilateral trading system is an attempt by governments to make the business environment stable and predictable.

#### **Why ‘most-favoured’?**

This sounds like a contradiction. It suggests special treatment, but in the WTO it actually means non-discrimination — treating virtually everyone equally.

This is what happens. Each member treats all the other members equally as “most-favoured” trading partners. If a country improves the benefits that it gives to one trading partner, it has to give the same “best” treatment to all the other WTO members so that they all remain “most-favoured”.

Most-favoured nation (MFN) status did not always mean equal treatment. The first bilateral MFN treaties set up exclusive clubs among a country’s “most-favoured” trading partners. Under GATT and now the WTO, the MFN club is no longer exclusive. The MFN principle ensures that each country treats its over-140 fellow-members equally.

But there are some exceptions ...

### The Uruguay Round increased bindings

Percentages of tariffs bound before and after the 1986–94 talks

	Before	After
Developed countries	78	99
Developing countries	21	73
Transition economies	73	98

(These are tariff lines, so percentages are not weighted according to trade volume or value)

In the WTO, when countries agree to open their markets for goods or services, they “bind” their commitments. For goods, these bindings amount to ceilings on customs tariff rates. Sometimes countries tax imports at rates that are lower than the bound rates. Frequently this is the case in developing countries. In developed countries the rates actually charged and the bound rates tend to be the same.

A country can change its bindings, but only after negotiating with its trading partners, which could mean compensating them for loss of trade. One of the achievements of the Uruguay Round of multilateral trade talks was to increase the amount of trade under binding commitments (*see table*). In agriculture, 100% of products now have bound tariffs. The result of all this: a substantially higher degree of market security for traders and investors.

The system tries to improve predictability and stability in other ways as well. One way is to discourage the use of quotas and other measures used to set limits on quantities of imports — administering quotas can lead to more red-tape and accusations of unfair play. Another is to make countries’ trade rules as clear and public (“transparent”) as possible. Many WTO agreements require governments to disclose their policies and practices publicly within the country or by notifying the WTO. The regular surveillance of national trade policies through the Trade Policy Review Mechanism provides a further means of encouraging transparency both domestically and at the multilateral level.

### Promoting fair competition

The WTO is sometimes described as a “free trade” institution, but that is not entirely accurate. The system does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair and undistorted competition.

The rules on non-discrimination — MFN and national treatment — are designed to secure fair conditions of trade. So too are those on dumping (exporting at below cost to gain market share) and subsidies. The issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade.

Many of the other WTO agreements aim to support fair competition: in agriculture, intellectual property, services, for example. The agreement on government procurement (a “plurilateral” agreement because it is signed by only a few WTO members) extends competition rules to purchases by thousands of government entities in many countries. And so on.

### Encouraging development and economic reform

The WTO system contributes to development. On the other hand, developing countries need flexibility in the time they take to implement the system’s agreements. And the agreements themselves inherit the earlier provisions of GATT that allow for special assistance and trade concessions for developing countries.

Over three quarters of WTO members are developing countries and countries in transition to market economies. During the seven and a half years of the Uruguay Round, over 60 of these countries implemented trade liberalization programmes autonomously. At the same time, developing countries and transition economies were much more active and influential in the Uruguay Round negotiations than in any previous round, and they are even more so in the current Doha Development Agenda.

At the end of the Uruguay Round, developing countries were prepared to take on most of the obligations that are required of developed countries. But the agreements did give them transition periods to adjust to the more unfamiliar and, perhaps, difficult WTO provisions — particularly so for the poorest, “least-developed” countries. A ministerial decision adopted at the end of the round says better-off countries should accelerate implementing market access commitments on goods exported by the least-developed countries, and it seeks increased technical assistance for them. More recently, developed countries have started to allow duty-free and quota-free imports for almost all products from least-developed countries. On all of this, the WTO and its members are still going through a learning process. The current Doha Development Agenda includes developing countries’ concerns about the difficulties they face in implementing the Uruguay Round agreements.

### 3. The case for open trade

The economic case for an open trading system based on multilaterally agreed rules is simple enough and rests largely on commercial common sense. But it is also supported by evidence: the experience of world trade and economic growth since the Second World War. Tariffs on industrial products have fallen steeply and now average less than 5% in industrial countries. During the first 25 years after the war, world economic growth averaged about 5% per year, a high rate that was partly the result of lower trade barriers. World trade grew even faster, averaging about 8% during the period.

The data show a definite statistical link between freer trade and economic growth. Economic theory points to strong reasons for the link. All countries, including the poorest, have assets — human, industrial, natural, financial — which they can employ to produce goods and services for their domestic markets or to compete overseas. Economics tells us that we can benefit when these goods and services are traded. Simply put, the principle of “comparative advantage” says that countries prosper first by taking advantage of their assets in order to concentrate on what they can produce best, and then by trading these products for products that other countries produce best.

In other words, liberal trade policies — policies that allow the unrestricted flow of goods and services — sharpen competition, motivate innovation and breed success. They multiply the rewards that result from producing the best products, with the best design, at the best price.

But success in trade is not static. The ability to compete well in particular products can shift from company to company when the market changes or new technologies make cheaper and better products possible. Producers are encouraged to adapt gradually and in a relatively painless way. They can focus on new products, find a new “niche” in their current area or expand into new areas.

Experience shows that competitiveness can also shift between whole countries. A country that may have enjoyed an advantage because of lower labour costs or because it had good supplies of some natural resources, could also become uncompetitive in some goods or services as its economy develops. However, with the stimulus of an open economy, the country can move on to become competitive in some other goods or services. This is normally a gradual process.

#### TRUE AND NON-TRIVIAL?

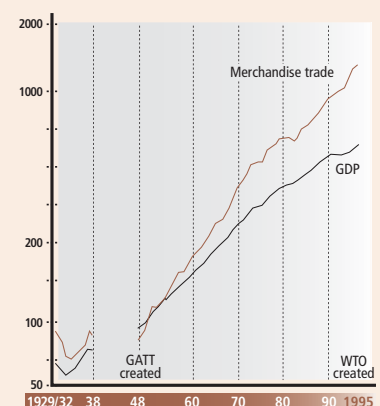
Nobel laureate Paul Samuelson was once challenged by the mathematician Stanislaw Ulam to “name me one proposition in all of the social sciences which is both true and non-trivial.”

Samuelson’s answer? Comparative advantage.

“That it is logically true need not be argued before a mathematician; that it is not trivial is attested by the thousands of important and intelligent men who have never been able to grasp the doctrine for themselves or to believe it after it was explained to them.”

#### World trade and production have accelerated

Both trade and GDP fell in the late 1920s, before bottoming out in 1932. After World War II, both have risen exponentially, most of the time with trade outpacing GDP. (1950 = 100. Trade and GDP: log scale)



MORE ON THE WEBSITE:



[www.wto.org](http://www.wto.org) > resources >  
WTO research and analysis

Nevertheless, the temptation to ward off the challenge of competitive imports is always present. And richer governments are more likely to yield to the siren call of protectionism, for short term political gain — through subsidies, complicated red tape, and hiding behind legitimate policy objectives such as environmental preservation or consumer protection as an excuse to protect producers.

Protection ultimately leads to bloated, inefficient producers supplying consumers with outdated, unattractive products. In the end, factories close and jobs are lost despite the protection and subsidies. If other governments around the world pursue the same policies, markets contract and world economic activity is reduced. One of the objectives that governments bring to WTO negotiations is to prevent such a self-defeating and destructive drift into protectionism.

### Comparative advantage

This is arguably the single most powerful insight into economics.

Suppose country A is better than country B at making automobiles, and country B is better than country A at making bread. It is obvious (the academics would say “trivial”) that both would benefit if A specialized in automobiles, B specialized in bread and they traded their products. That is a case of **absolute advantage**.

But what if a country is bad at making everything? Will trade drive all producers out of business? The answer, according to Ricardo, is no. The reason is the principle of **comparative advantage**.

It says, countries A and B still stand to benefit from trading with each other even if A is better than B at making everything. If A is much more superior at making automobiles and only slightly

superior at making bread, then A should still invest resources in what it does best — producing automobiles — and export the product to B. B should still invest in what it does best — making bread — and export that product to A, even if it is not as efficient as A. Both would still benefit from the trade. A country does not have to be best at anything to gain from trade. That is comparative advantage.

The theory dates back to classical economist David Ricardo. It is one of the most widely accepted among economists. It is also one of the most misunderstood among non-economists because it is confused with absolute advantage.

It is often claimed, for example, that some countries have no comparative advantage in anything. That is virtually impossible.

Think about it ...

## 4. The GATT years: from Havana to Marrakesh

The WTO's creation on 1 January 1995 marked the biggest reform of international trade since after the Second World War. It also brought to reality — in an updated form — the failed attempt in 1948 to create an International Trade Organization.

Much of the history of those 47 years was written in Geneva. But it also traces a journey that spanned the continents, from that hesitant start in 1948 in Havana (Cuba), via Annecy (France), Torquay (UK), Tokyo (Japan), Punta del Este (Uruguay), Montreal (Canada), Brussels (Belgium) and finally to Marrakesh (Morocco) in 1994. During that period, the trading system came under GATT, salvaged from the aborted attempt to create the ITO. GATT helped establish a strong and prosperous multilateral trading system that became more and more liberal through rounds of trade negotiations. But by the 1980s the system needed a thorough overhaul. This led to the Uruguay Round, and ultimately to the WTO.

### GATT: 'provisional' for almost half a century

From 1948 to 1994, the General Agreement on Tariffs and Trade (GATT) provided the rules for much of world trade and presided over periods that saw some of the highest growth rates in international commerce. It seemed well-established, but throughout those 47 years, it was a provisional agreement and organization.

The original intention was to create a third institution to handle the trade side of international economic cooperation, joining the two "Bretton Woods" institutions, the World Bank and the International Monetary Fund. Over 50 countries participated in negotiations to create an International Trade Organization (ITO) as a specialized agency of the United Nations. The draft ITO Charter was ambitious. It extended beyond world trade disciplines, to include rules on employment, commodity agreements, restrictive business practices, international investment, and services. The aim was to create the ITO at a UN Conference on Trade and Employment in Havana, Cuba in 1947.

Meanwhile, 15 countries had begun talks in December 1945 to reduce and bind customs tariffs. With the Second World War only recently ended, they wanted to give an early boost to trade liberalization, and to begin to correct the legacy of protectionist measures which remained in place from the early 1930s.

This first round of negotiations resulted in a package of trade rules and 45,000 tariff concessions affecting \$10 billion of trade, about one fifth of the world's total. The group had expanded to 23 by the time the deal was signed on 30 October 1947. The tariff concessions came into effect by 30 June 1948 through a "Protocol of Provisional Application". And so the new General Agreement on Tariffs and Trade was born, with 23 founding members (officially "contracting parties").

The 23 were also part of the larger group negotiating the ITO Charter. One of the provisions of GATT says that they should accept some of the trade rules of the draft. This, they believed, should be done swiftly and "provisionally" in order to protect the value of the tariff concessions they had negotiated. They spelt out how they envisaged the relationship between GATT and the ITO Charter, but they also allowed for the possibility that the ITO might not be created. They were right.

### The trade chiefs

The directors-general of GATT and WTO

- Sir Eric Wyndham White (UK) 1948–68
- Olivier Long (Switzerland) 1968–80
- Arthur Dunkel (Switzerland) 1980–93
- Peter Sutherland (Ireland)  
GATT 1993–94; WTO 1995
- Renato Ruggiero (Italy) 1995–1999
- Mike Moore (New Zealand) 1999–2002
- Supachai Panitchpakdi (Thailand)  
2002–2005
- Pascal Lamy (France) 2005–

The Havana conference began on 21 November 1947, less than a month after GATT was signed. The ITO Charter was finally agreed in Havana in March 1948, but ratification in some national legislatures proved impossible. The most serious opposition was in the US Congress, even though the US government had been one of the driving forces. In 1950, the United States government announced that it would not seek Congressional ratification of the Havana Charter, and the ITO was effectively dead. So, the GATT became the only multilateral instrument governing international trade from 1948 until the WTO was established in 1995.

For almost half a century, the GATT's basic legal principles remained much as they were in 1948. There were additions in the form of a section on development added in the 1960s and "plurilateral" agreements (i.e. with voluntary membership) in the 1970s, and efforts to reduce tariffs further continued. Much of this was achieved through a series of multilateral negotiations known as "trade rounds" — the biggest leaps forward in international trade liberalization have come through these rounds which were held under GATT's auspices.

In the early years, the GATT trade rounds concentrated on further reducing tariffs. Then, the Kennedy Round in the mid-sixties brought about a GATT Anti-Dumping Agreement and a section on development. The Tokyo Round during the seventies was the first major attempt to tackle trade barriers that do not take the form of tariffs, and to improve the system. The eighth, the Uruguay Round of 1986–94, was the last and most extensive of all. It led to the WTO and a new set of agreements.

### The GATT trade rounds

Year	Place/ name	Subjects covered	Countries
1947	Geneva	Tariffs	23
1949	Annecey	Tariffs	13
1951	Torquay	Tariffs	38
1956	Geneva	Tariffs	26
1960–1961	Geneva (Dillon Round)	Tariffs	26
1964–1967	Geneva (Kennedy Round)	Tariffs and anti-dumping measures	62
1973–1979	Geneva (Tokyo Round)	Tariffs, non-tariff measures, "framework" agreements	102
1986–1994	Geneva (Uruguay Round)	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc	123

#### The Tokyo Round 'codes'

- Subsidies and countervailing measures — interpreting Articles 6, 16 and 23 of GATT
- Technical barriers to trade — sometimes called the Standards Code
- Import licensing procedures
- Government procurement
- Customs valuation — interpreting Article 7
- Anti-dumping — interpreting Article 6, replacing the Kennedy Round code
- Bovine Meat Arrangement
- International Dairy Arrangement
- Trade in Civil Aircraft

#### The Tokyo Round: a first try to reform the system

The Tokyo Round lasted from 1973 to 1979, with 102 countries participating. It continued GATT's efforts to progressively reduce tariffs. The results included an average one-third cut in customs duties in the world's nine major industrial markets, bringing the average tariff on industrial products down to 4.7%. The tariff reductions, phased in over a period of eight years, involved an element of "harmonization" — the higher the tariff, the larger the cut, proportionally.

In other issues, the Tokyo Round had mixed results. It failed to come to grips with the fundamental problems affecting farm trade and also stopped short of providing a modified agreement on "safeguards" (emergency import measures). Nevertheless, a series of agreements on non-tariff barriers did emerge from the negotiations, in some cases interpreting existing GATT rules, in others breaking entirely new ground. In most cases, only a relatively small number of (mainly industrialized) GATT members subscribed to these agreements and arrangements. Because they were not accepted by the full GATT membership, they were often informally called "codes".



They were not multilateral, but they were a beginning. Several codes were eventually amended in the Uruguay Round and turned into multilateral commitments accepted by all WTO members. Only four remained “plurilateral” — those on government procurement, bovine meat, civil aircraft and dairy products. In 1997 WTO members agreed to terminate the bovine meat and dairy agreements, leaving only two.

### Did GATT succeed?

GATT was provisional with a limited field of action, but its success over 47 years in promoting and securing the liberalization of much of world trade is incontestable. Continual reductions in tariffs alone helped spur very high rates of world trade growth during the 1950s and 1960s — around 8% a year on average. And the momentum of trade liberalization helped ensure that trade growth consistently out-paced production growth throughout the GATT era, a measure of countries’ increasing ability to trade with each other and to reap the benefits of trade. The rush of new members during the Uruguay Round demonstrated that the multilateral trading system was recognized as an anchor for development and an instrument of economic and trade reform.

But all was not well. As time passed new problems arose. The Tokyo Round in the 1970s was an attempt to tackle some of these but its achievements were limited. This was a sign of difficult times to come.

GATT’s success in reducing tariffs to such a low level, combined with a series of economic recessions in the 1970s and early 1980s, drove governments to devise other forms of protection for sectors facing increased foreign competition. High rates of unemployment and constant factory closures led governments in Western Europe and North America to seek bilateral market-sharing arrangements with competitors and to embark on a subsidies race to maintain their holds on agricultural trade. Both these changes undermined GATT’s credibility and effectiveness.

The problem was not just a deteriorating trade policy environment. By the early 1980s the General Agreement was clearly no longer as relevant to the realities of world trade as it had been in the 1940s. For a start, world trade had become far more complex and important than 40 years before: the globalization of the world economy was underway, trade in services — not covered by GATT rules — was of major interest to more and more countries, and international investment had expanded. The expansion of services trade was also closely tied to further increases in world merchandise trade. In other respects, GATT had been found wanting. For instance, in agriculture, loopholes in the multilateral system were heavily exploited, and efforts at liberalizing agricultural trade met with little success. In the textiles and clothing sector, an exception to GATT’s normal disciplines was negotiated in the 1960s and early 1970s, leading to the Multifibre Arrangement. Even GATT’s institutional structure and its dispute settlement system were causing concern.

These and other factors convinced GATT members that a new effort to reinforce and extend the multilateral system should be attempted. That effort resulted in the Uruguay Round, the Marrakesh Declaration, and the creation of the WTO.

### Trade rounds: progress by package

They are often lengthy — the Uruguay Round took seven and a half years — but trade rounds can have an advantage. They offer a package approach to trade negotiations that can sometimes be more fruitful than negotiations on a single issue.

- The size of the package can mean more benefits because participants can seek and secure advantages across a wide range of issues.

- Agreement can be easier to reach, through trade-offs — somewhere in the package there should be something for everyone.

This has political as well as economic implications. A government may want to make a concession, perhaps in one sector, because of the economic benefits. But politically, it could find the concession difficult to defend. A package would contain politically and economically attractive benefits in other sectors that could be used as compensation.

So, reform in politically-sensitive sectors of world trade can be more feasible as part of a global package — a good example is the agreement to reform agricultural trade in the Uruguay Round.

- Developing countries and other less powerful participants have a greater chance of influencing the multilateral system in a trade round than in bilateral relationships with major trading nations.

But the size of a trade round can be both a strength and a weakness. From time to time, the question is asked: wouldn’t it be simpler to concentrate negotiations on a single sector? Recent history is inconclusive. At some stages, the Uruguay Round seemed so cumbersome that it seemed impossible that all participants could agree on every subject. Then the round did end successfully in 1993–94. This was followed by two years of failure to reach agreement in the single-sector talks on maritime transport.

Did this mean that trade rounds were the only route to success? No. In 1997, single-sector talks were concluded successfully in basic telecommunications, information technology equipment and financial services.

The debate continues. Whatever the answer, the reasons are not straightforward. Perhaps success depends on using the right type of negotiation for the particular time and context.



### The 1986 agenda

The 15 original Uruguay Round subjects

- Tariffs
- Non-tariff barriers
- Natural resource products
- Textiles and clothing
- Agriculture
- Tropical products
- GATT articles
- Tokyo Round codes
- Anti-dumping
- Subsidies
- Intellectual property
- Investment measures
- Dispute settlement
- The GATT system
- Services

## 5. The Uruguay Round

It took seven and a half years, almost twice the original schedule. By the end, 123 countries were taking part. It covered almost all trade, from toothbrushes to pleasure boats, from banking to telecommunications, from the genes of wild rice to AIDS treatments. It was quite simply the largest trade negotiation ever, and most probably the largest negotiation of any kind in history.

At times it seemed doomed to fail. But in the end, the Uruguay Round brought about the biggest reform of the world's trading system since GATT was created at the end of the Second World War. And yet, despite its troubled progress, the Uruguay Round did see some early results. Within only two years, participants had agreed on a package of cuts in import duties on tropical products — which are mainly exported by developing countries. They had also revised the rules for settling disputes, with some measures implemented on the spot. And they called for regular reports on GATT members' trade policies, a move considered important for making trade regimes transparent around the world.

### The Uruguay Round — Key dates

- Sep 86** Punta del Este: launch
- Dec 88** Montreal: ministerial mid-term review
- Apr 89** Geneva: mid-term review completed
- Dec 90** Brussels: "closing" ministerial meeting ends in deadlock
- Dec 91** Geneva: first draft of Final Act completed
- Nov 92** Washington: US and EC achieve "Blair House" breakthrough on agriculture
- Jul 93** Tokyo: Quad achieve market access breakthrough at G7 summit
- Dec 93** Geneva: most negotiations end (some market access talks remain)
- Apr 94** Marrakesh: agreements signed
- Jan 95** Geneva: WTO created, agreements take effect

### A round to end all rounds?

The seeds of the Uruguay Round were sown in November 1982 at a ministerial meeting of GATT members in Geneva. Although the ministers intended to launch a major new negotiation, the conference stalled on agriculture and was widely regarded as a failure. In fact, the work programme that the ministers agreed formed the basis for what was to become the Uruguay Round negotiating agenda.

Nevertheless, it took four more years of exploring, clarifying issues and painstaking consensus-building, before ministers agreed to launch the new round. They did so in September 1986, in Punta del Este, Uruguay. They eventually accepted a negotiating agenda that covered virtually every outstanding trade policy issue. The talks were going to extend the trading system into several new areas, notably trade in services and intellectual property, and to reform trade in the sensitive sectors of agriculture and textiles. All the original GATT articles were up for review. It was the biggest negotiating mandate on trade ever agreed, and the ministers gave themselves four years to complete it.

Two years later, in December 1988, ministers met again in Montreal, Canada, for what was supposed to be an assessment of progress at the round's half-way point. The purpose was to clarify the agenda for the remaining two years, but the talks ended in a deadlock that was not resolved until officials met more quietly in Geneva the following April.

Despite the difficulty, during the Montreal meeting, ministers did agree a package of early results. These included some concessions on market access for tropical products — aimed at assisting developing countries — as well as a streamlined dispute settlement system, and the Trade Policy Review Mechanism which provided for the first comprehensive, systematic and regular reviews of national trade policies and practices of GATT members. The round was supposed to end when ministers met once more in Brussels, in December 1990. But they disagreed on how to reform agricultural trade and decided to extend the talks. The Uruguay Round entered its bleakest period.

Despite the poor political outlook, a considerable amount of technical work continued, leading to the first draft of a final legal agreement. This draft “Final Act” was compiled by the then GATT director-general, Arthur Dunkel, who chaired the negotiations at officials’ level. It was put on the table in Geneva in December 1991. The text fulfilled every part of the Punta del Este mandate, with one exception — it did not contain the participating countries’ lists of commitments for cutting import duties and opening their services markets. The draft became the basis for the final agreement.

Over the following two years, the negotiations lurched between impending failure, to predictions of imminent success. Several deadlines came and went. New points of major conflict emerged to join agriculture: services, market access, anti-dumping rules, and the proposed creation of a new institution. Differences between the United States and European Union became central to hopes for a final, successful conclusion.

In November 1992, the US and EU settled most of their differences on agriculture in a deal known informally as the “Blair House accord”. By July 1993 the “Quad” (US, EU, Japan and Canada) announced significant progress in negotiations on tariffs and related subjects (“market access”). It took until 15 December 1993 for every issue to be finally resolved and for negotiations on market access for goods and services to be concluded (although some final touches were completed in talks on market access a few weeks later). On 15 April 1994, the deal was signed by ministers from most of the 123 participating governments at a meeting in Marrakesh, Morocco.

The delay had some merits. It allowed some negotiations to progress further than would have been possible in 1990: for example some aspects of services and intellectual property, and the creation of the WTO itself. But the task had been immense, and negotiation-fatigue was felt in trade bureaucracies around the world. The difficulty of reaching agreement on a complete package containing almost the entire range of current trade issues led some to conclude that a negotiation on this scale would never again be possible. Yet, the Uruguay Round agreements contain timetables for new negotiations on a number of topics. And by 1996, some countries were openly calling for a new round early in the next century. The response was mixed; but the Marrakesh agreement did already include commitments to reopen negotiations on agriculture and services at the turn of the century. These began in early 2000 and were incorporated into the Doha Development Agenda in late 2001.

### **What happened to GATT?**

The WTO replaced GATT as an international organization, but the General Agreement still exists as the WTO’s umbrella treaty for trade in goods, updated as a result of the Uruguay Round negotiations. Trade lawyers distinguish between GATT 1994, the updated parts of GATT, and GATT 1947, the original agreement which is still the heart of GATT 1994. Confusing? For most of us, it’s enough to refer simply to “GATT”.



### **The post-Uruguay Round built-in agenda**

Many of the Uruguay Round agreements set timetables for future work. Part of this “built-in agenda” started almost immediately. In some areas, it included new or further negotiations. In other areas, it included assessments or reviews of the situation at specified times. Some negotiations were quickly completed, notably in basic telecommunications, financial services. (Member governments also swiftly agreed a deal for freer trade in information technology products, an issue outside the “built-in agenda”.)

The agenda originally built into the Uruguay Round agreements has seen additions and modifications. A number of items are now part of the Doha Agenda, some of them updated.

There were well over 30 items in the original built-in agenda.

This is a selection of highlights:

#### **1996**

- Maritime services: market access negotiations to end (30 June 1996, suspended to 2000, now part of Doha Development Agenda)
- Services and environment: deadline for working party report (ministerial conference, December 1996)
- Government procurement of services: negotiations start

#### **1997**

- Basic telecoms: negotiations end (15 February)
- Financial services: negotiations end (30 December)
- Intellectual property, creating a multilateral system of notification and registration of geographical indications for wines: negotiations start, now part of Doha Development Agenda

**1998**

- Textiles and clothing: new phase begins 1 January
- Services (emergency safeguards): results of negotiations on emergency safeguards to take effect (by 1 January 1998, deadline now March 2004)
- Rules of origin: Work programme on harmonization of rules of origin to be completed (20 July 1998)
- Government procurement: further negotiations start, for improving rules and procedures (by end of 1998)
- Dispute settlement: full review of rules and procedures (to start by end of 1998)

**1999**

- Intellectual property: certain exceptions to patentability and protection of plant varieties: review starts

**2000**

- Agriculture: negotiations start, now part of Doha Development Agenda
- Services: new round of negotiations start, now part of Doha Development Agenda
- Tariff bindings: review of definition of “principle supplier” having negotiating rights under GATT Art 28 on modifying bindings
- Intellectual property: first of two-yearly reviews of the implementation of the agreement

**2002**

- Textiles and clothing: new phase begins 1 January

**2005**

- Textiles and clothing: full integration into GATT and agreement expires 1 January

## The WTO is 'rules-based'; its rules are negotiated agreements

### 1. Overview: a navigational guide

The WTO agreements cover goods, services and intellectual property. They spell out the principles of liberalization, and the permitted exceptions. They include individual countries' commitments to lower customs tariffs and other trade barriers, and to open and keep open services markets. They set procedures for settling disputes. They prescribe special treatment for developing countries. They require governments to make their trade policies transparent by notifying the WTO about laws in force and measures adopted, and through regular reports by the secretariat on countries' trade policies.

These agreements are often called the WTO's trade rules, and the WTO is often described as "rules-based", a system based on rules. But it's important to remember that the rules are actually agreements that governments negotiated.

This chapter focuses on the Uruguay Round agreements, which are the basis of the present WTO system. Additional work is also now underway in the WTO. This is the result of decisions taken at Ministerial Conferences, in particular the meeting in Doha, November 2001, when new negotiations and other work were launched. (More on the Doha Agenda, later.)

#### Six-part broad outline

The table of contents of "The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts" is a daunting list of about 60 agreements, annexes, decisions and understandings. In fact, the agreements fall into a simple structure with six main parts: an umbrella agreement (the Agreement Establishing the WTO); agreements for each of the three broad areas of trade that the WTO covers (goods, services and intellectual property); dispute settlement; and reviews of governments' trade policies.

The agreements for the two largest areas — goods and services — share a common three-part outline, even though the detail is sometimes quite different.

- They start with **broad principles**: the General Agreement on Tariffs and trade (GATT) (for goods), and the General Agreement on Trade in Services (GATS) (The third area, Trade-Related Aspects of Intellectual Property Rights (TRIPS), also falls into this category although at present it has no additional parts.)
- Then come **extra agreements and annexes** dealing with the special requirements of specific sectors or issues.
- Finally, there are the detailed and lengthy **schedules (or lists) of commitments** made by individual countries allowing specific foreign products or service-providers access to their markets. For GATT, these take the form of binding commitments on tariffs for goods in general, and combinations of tariffs and quotas for some agricultural goods. For GATS, the commitments state how much access foreign service providers are allowed for specific sectors, and they include lists of types of services where individual countries say they are not applying the "most-favoured-nation" principle of non-discrimination.

#### The 'additional details'

These agreements and annexes deal with the following specific sectors or issues:

For **goods** (under GATT)

- Agriculture
- Health regulations for farm products (SPS)
- Textiles and clothing
- Product standards (TBT)
- Investment measures
- Anti-dumping measures
- Customs valuation methods
- Preshipment inspection
- Rules of origin
- Import licensing
- Subsidies and counter-measures
- Safeguards

For **services** (the GATS annexes)

- Movement of natural persons
- Air transport
- Financial services
- Shipping
- Telecommunications

Underpinning these are dispute settlement, which is based on the agreements and commitments, and trade policy reviews, an exercise in transparency.

Much of the Uruguay Round dealt with the first two parts: general principles and principles for specific sectors. At the same time, market access negotiations were possible for industrial goods. Once the principles had been worked out, negotiations could proceed on the commitments for sectors such as agriculture and services.

### Additional agreements

Another group of agreements not included in the diagram is also important: the two “plurilateral” agreements not signed by all members: civil aircraft and government procurement.

### Further changes on the horizon, the Doha Agenda

These agreements are not static; they are renegotiated from time to time and new agreements can be added to the package. Many are now being negotiated under the Doha Development Agenda, launched by WTO trade ministers in Doha, Qatar, in November 2001.

<b>In a nutshell</b>			
The basic structure of the WTO agreements: how the six main areas fit together — the umbrella WTO Agreement, goods, services, intellectual property, disputes and trade policy reviews.			
<i>Umbrella</i>	<b>AGREEMENT ESTABLISHING WTO</b>		
	Goods	Services	Intellectual property
<i>Basic principles</i>	<b>GATT</b>	<b>GATS</b>	<b>TRIPS</b>
<i>Additional details</i>	Other goods agreements and annexes	Services annexes	
<i>Market access commitments</i>	Countries' schedules of commitments	Countries' schedules of commitments (and MFN exemptions)	
<i>Dispute settlement</i>	<b>DISPUTE SETTLEMENT</b>		
<i>Transparency</i>	<b>TRADE POLICY REVIEWS</b>		

## 2. Tariffs: more bindings and closer to zero

The bulkiest results of Uruguay Round are the 22,500 pages listing individual countries' commitments on specific categories of goods and services. These include commitments to cut and "bind" their customs duty rates on imports of goods. In some cases, tariffs are being cut to zero. There is also a significant increase in the number of "bound" tariffs — duty rates that are committed in the WTO and are difficult to raise.

### ON THE WEBSITE:



[www.wto.org](http://www.wto.org) > trade topics > goods > goods schedules  
[www.wto.org](http://www.wto.org) > trade topics > services > services schedules

### Tariff cuts

Developed countries' tariff cuts were for the most part phased in over five years from 1 January 1995. The result is a 40% cut in their tariffs on industrial products, from an average of 6.3% to 3.8%. The value of imported industrial products that receive duty-free treatment in developed countries will jump from 20% to 44%.

There will also be fewer products charged high duty rates. The proportion of imports into developed countries from all sources facing tariffs rates of more than 15% will decline from 7% to 5%. The proportion of developing country exports facing tariffs above 15% in industrial countries will fall from 9% to 5%.

The Uruguay Round package has been improved. On 26 March 1997, 40 countries accounting for more than 92% of world trade in information technology products, agreed to eliminate import duties and other charges on these products by 2000 (by 2005 in a handful of cases). As with other tariff commitments, each participating country is applying its commitments equally to exports from all WTO members (i.e. on a most-favoured-nation basis), even from members that did not make commitments.



*What is this agreement called? There is no legally binding agreement that sets out the targets for tariff reductions (e.g. by what percentage they were to be cut as a result of the Uruguay Round).*

*Instead, individual countries listed their commitments in schedules annexed to Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994. This is the legally binding agreement for the reduced tariff rates. Since then, additional commitments were made under the 1997 Information Technology Agreement.*

### More bindings

Developed countries increased the number of imports whose tariff rates are "bound" (committed and difficult to increase) from 78% of product lines to 99%. For developing countries, the increase was considerable: from 21% to 73%. Economies in transition from central planning increased their bindings from 73% to 98%. This all means a substantially higher degree of market security for traders and investors.

### ON THE WEBSITE:

[www.wto.org](http://www.wto.org) > trade topics > market access



> See also Doha Agenda negotiations

### Binding' tariffs

The market access schedules are not simply announcements of tariff rates. They represent commitments not to increase tariffs above the listed rates — the rates are "bound". For developed countries, the bound rates are generally the rates actually charged. Most developing countries have bound the rates somewhat higher than the actual rates charged, so the bound rates serve as ceilings.

Countries can break a commitment (i.e. raise a tariff above the bound rate), but only with difficulty. To do so they have to negotiate with the countries most concerned and that could result in compensation for trading partners' loss of trade.

### And agriculture ...

Tariffs on all agricultural products are now bound. Almost all import restrictions that did not take the form of tariffs, such as quotas, have been converted to tariffs — a process known as “tariffication”. This has made markets substantially more predictable for agriculture. Previously more than 30% of agricultural produce had faced quotas or import restrictions. The first step in “tariffication” was to replace these restrictions with tariffs that represented about the same level of protection. Then, over six years from 1995–2000, these tariffs were gradually reduced (the reduction period for developing countries ends in 2005). The market access commitments on agriculture also eliminate previous import bans on certain products. In addition, the lists include countries’ commitments to reduce domestic support and export subsidies for agricultural products. (See section on agriculture.)

> See also **Doha Agenda** chapter

### 3. Agriculture: fairer markets for farmers

The original GATT did apply to agricultural trade, but it contained loopholes. For example, it allowed countries to use some non-tariff measures such as import quotas, and to subsidize. Agricultural trade became highly distorted, especially with the use of export subsidies which would not normally have been allowed for industrial products. The Uruguay Round produced the first multilateral agreement dedicated to the sector. It was a significant first step towards order, fair competition and a less distorted sector. It was implemented over a six-year period (and is still being implemented by developing countries under their 10-year period), that began in 1995. The Uruguay Round agreement included a commitment to continue the reform through new negotiations. These were launched in 2000, as required by the Agriculture Agreement.

> See also **Doha Agenda negotiations**

#### What is ‘distortion’?

This is a key issue. Trade is distorted if prices are higher or lower than normal, and if quantities produced, bought, and sold are also higher or lower than normal — i.e. than the levels that would usually exist in a competitive market.

For example, import barriers and domestic subsidies can make crops more expensive on a country’s internal market. The higher prices can encourage over-production. If the surplus is to be sold on world markets, where prices are lower, then export subsidies are needed. As a result, the subsidizing countries can be producing and exporting considerably more than they normally would.

Governments usually give three reasons for supporting and protecting their farmers, even if this distorts agricultural trade:

- to make sure that enough food is produced to meet the country’s needs
- to shield farmers from the effects of the weather and swings in world prices
- to preserve rural society.

But the policies have often been expensive, and they have created gluts leading to export subsidy wars. Countries with less money for subsidies have suffered.

The debate in the negotiations is whether these objectives can be met without distorting trade.





## The priority is to settle disputes, not to pass judgement

### 1. A unique contribution

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.

However, the point is not to pass judgement. The priority is to settle disputes, through consultations if possible. By July 2005, only about 130 of the 332 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase — some since 1995.

#### Principles: equitable, fast, effective, mutually acceptable

Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgements.

A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy some rights.

A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured



*What is this agreement called?  
Understanding on Rules and Procedures  
Governing the Settlement of Disputes*

#### Panels

Panels are like tribunals. But unlike in a normal tribunal, the panellists are usually chosen in consultation with the countries in dispute. Only if the two sides cannot agree does the WTO director-general appoint them.

Panels consist of three (possibly five) experts from different countries who examine the evidence and decide who is right and who is wrong. The panel's report is passed to the Dispute Settlement Body, which can only reject the report by consensus.

Panellists for each case can be chosen from a permanent list of well-qualified candidates, or from elsewhere. They serve in their individual capacities. They cannot receive instructions from any government.



### More cases can be good news

If the courts find themselves handling an increasing number of criminal cases, does that mean law and order is breaking down? Not necessarily. Sometimes it means that people have more faith in the courts and the rule of law. They are turning to the courts instead of taking the law into their own hands.

For the most part, that is what is happening in the WTO. No one likes to see countries quarrel. But if there are going to be trade disputes anyway, it is healthier that the cases are handled according to internationally agreed rules. There are strong grounds for arguing that the increasing number of disputes is simply the result of expanding world trade and the stricter rules negotiated in the Uruguay Round; and that the fact that more are coming to the WTO reflects a growing faith in the system.

process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), it is accelerated as much as possible.

The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

Although much of the procedure does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation are still always possible.

### How are disputes settled?

Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. The Dispute Settlement Body has the sole authority to establish “panels” of experts to consider the case, and to accept or reject the panels’ findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

- **First stage: consultation** (up to **60 days**). Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.
- **Second stage: the panel** (up to **45 days** for a panel to be appointed, plus **6 months** for the panel to conclude). If consultations fail, the complaining country can ask for a panel to be appointed. The country “in the dock” can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel).

Officially, the panel is helping the Dispute Settlement Body make rulings or recommendations. But because the panel’s report can only be rejected by consensus in the Dispute Settlement Body, its conclusions are difficult to overturn. The panel’s findings have to be based on the agreements cited.

The panel’s final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months.

The agreement describes in some detail how the panels are to work. The main stages are:

- **Before the first hearing:** each side in the dispute presents its case in writing to the panel.
- **First hearing: the case for the complaining country and defence:** the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.
- **Rebuttals:** the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.
- **Experts:** if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.
- **First draft:** the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.
- **Interim report:** The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.
- **Review:** The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.
- **Final report:** A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done.
- **The report becomes a ruling:** The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

## Appeals

Either side can appeal a panel's ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new issues.

Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.

The Dispute Settlement Body has to accept or reject the appeals report within 30 days — and rejection is only possible by consensus.

### How long to settle a dispute?

These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
<b>Total = 1 year</b>	<b>(without appeal)</b>
60–90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
<b>Total = 1y 3m</b>	<b>(with appeal)</b>

### **The case has been decided: what next?**

Go directly to jail. Do not pass Go, do not collect ... Well, not exactly. But the sentiments apply. If a country has done something wrong, it should swiftly correct its fault. And if it continues to break an agreement, it should offer compensation or suffer a suitable penalty that has some bite.

Even once the case has been decided, there is more to do before trade sanctions (the conventional form of penalty) are imposed. The priority at this stage is for the losing “defendant” to bring its policy into line with the ruling or recommendations. The dispute settlement agreement stresses that “prompt compliance with recommendations or rulings of the DSB [Dispute Settlement Body] is essential in order to ensure effective resolution of disputes to the benefit of all Members”.

If the country that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeal report. It must state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report’s adoption. If complying with the recommendation immediately proves impractical, the member will be given a “reasonable period of time” to do so. If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining side may ask the Dispute Settlement Body for permission to impose limited trade sanctions (“suspend concessions or obligations”) against the other side. The Dispute Settlement Body must grant this authorization within 30 days of the expiry of the “reasonable period of time” unless there is a consensus against the request.

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective.

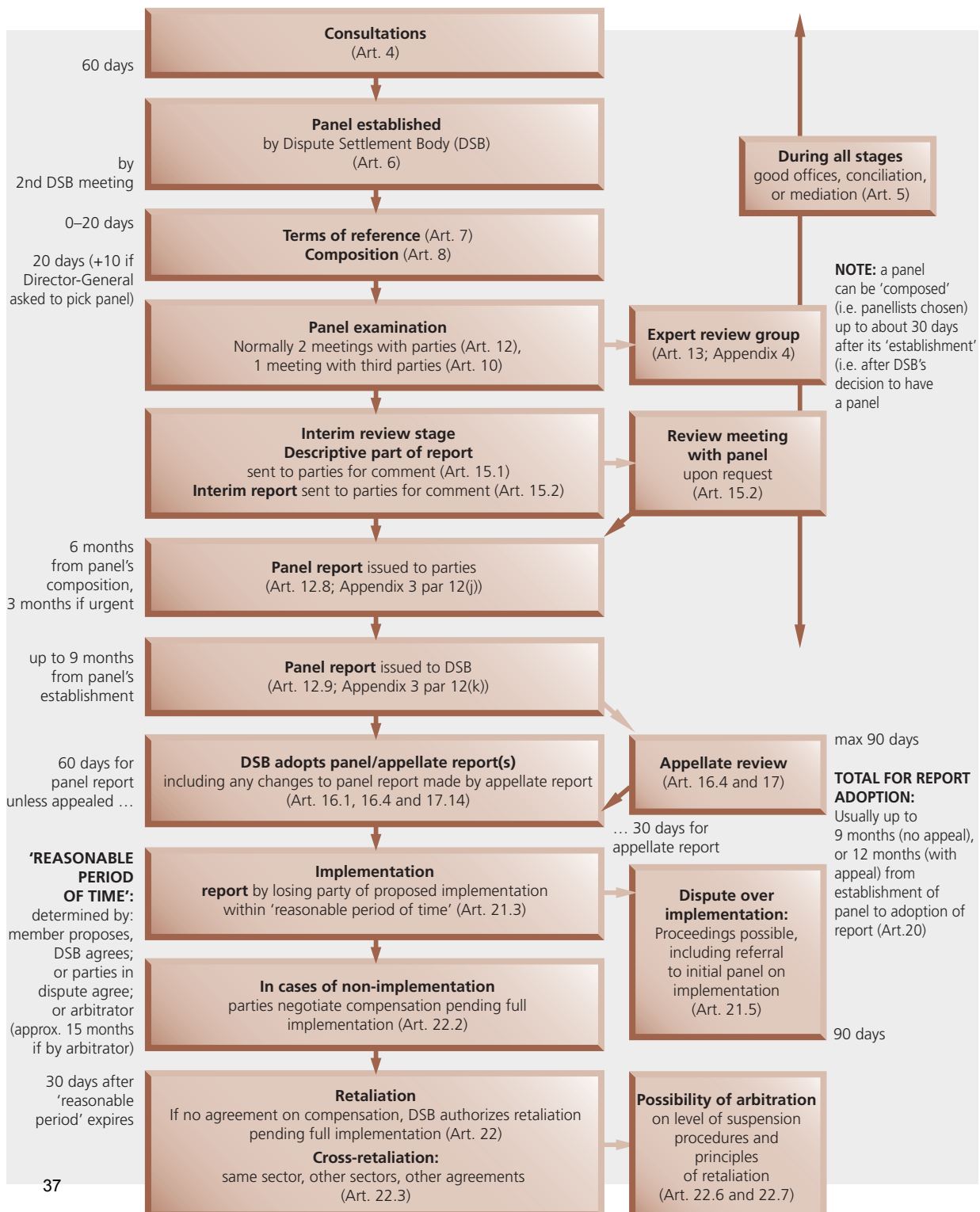
In any case, the Dispute Settlement Body monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

> See also **Doha Agenda negotiations**

## 2. The panel process

The various stages a dispute can go through in the WTO. At all stages, countries in dispute are encouraged to consult each other in order to settle “out of court”. At all stages, the WTO director-general is available to offer his good offices, to mediate or to help achieve a conciliation.

**Note:** some specified times are maximums, some are minimums, some binding, some not



The work programme lists 21 subjects. The original deadline of 1 January 2005 was missed. So was the next unofficial target of the end of 2006

At the Fourth Ministerial Conference in Doha, Qatar, in November 2001 WTO member governments agreed to launch new negotiations. They also agreed to work on other issues, in particular the implementation of the present agreements. The entire package is called the **Doha Development Agenda (DDA)**.

The negotiations take place in the **Trade Negotiations Committee** and its subsidiaries, which are usually, either regular councils and committees meeting in “**special sessions**”, or specially-created **negotiating groups**. Other work under the work programme takes place in other WTO councils and committees.

The **Fifth Ministerial Conference in Cancún**, Mexico, in September 2003, was intended as a stock-taking meeting where members would agree on how to complete the rest of the negotiations. But the meeting was soured by discord on agricultural issues, including cotton, and ended in deadlock on the “Singapore issues” (*see below*). Real progress on the Singapore issues and agriculture was not evident until the early hours of 1 August 2004 with a set of decisions in the General Council (sometimes called the July 2004 package). The original **1 January 2005 deadline** was missed. After that, members unofficially aimed to finish the negotiations **by the end of 2006**, again unsuccessfully. Further progress in narrowing members’ differences was made at the Hong Kong Ministerial Conference in December 2005, but some gaps remained unbridgeable and Director-General Pascal Lamy suspended the negotiations in July 2006. Efforts then focused on trying to achieve a breakthrough in early 2007.

There are 19–21 subjects listed in the Doha Declaration, depending on whether to count the “rules” subjects as one or three. Most of them involve negotiations; other work includes actions under “implementation”, analysis and monitoring. This is an unofficial explanation of what the declaration mandates (listed with the declaration’s paragraphs that refer to them):

### ~~Implementation related issues and concerns (par 12)~~

~~“Implementation” is short hand for developing countries’ problems in implementing the current WTO Agreements, i.e. the agreements arising from the Uruguay Round negotiations.~~

~~No area of WTO work received more attention or generated more controversy during nearly three years of hard bargaining before the Doha Ministerial Conference. Around 100 issues were raised during that period. The result was a two-pronged approach:~~

- ~~• More than 40 items under 12 headings were settled at or before the Doha conference for immediate delivery.~~
- ~~• The vast majority of the remaining items immediately became the subject of negotiations.~~

~~This was spelt out in a separate ministerial decision on implementation, combined with paragraph 12 of the main Doha Declaration.~~

~~The implementation decision includes the following (detailed explanations can be seen on the WTO website):~~

#### ~~General Agreement on Tariffs and Trade (GATT)~~

- ~~• Balance of payments exception: clarifying less stringent conditions in GATT for developing countries if they restrict imports in order to protect their balance of payments.~~
- ~~• Market access commitments: clarifying eligibility to negotiate or be consulted on quota allocation.~~

ON THE WEBSITE:

[www.wto.org](http://www.wto.org)

> trade topics > Doha Development Agenda

[www.wto.org](http://www.wto.org) >

the WTO > General Council

[www.wto.org](http://www.wto.org) >

trade topics > Doha Development Agenda

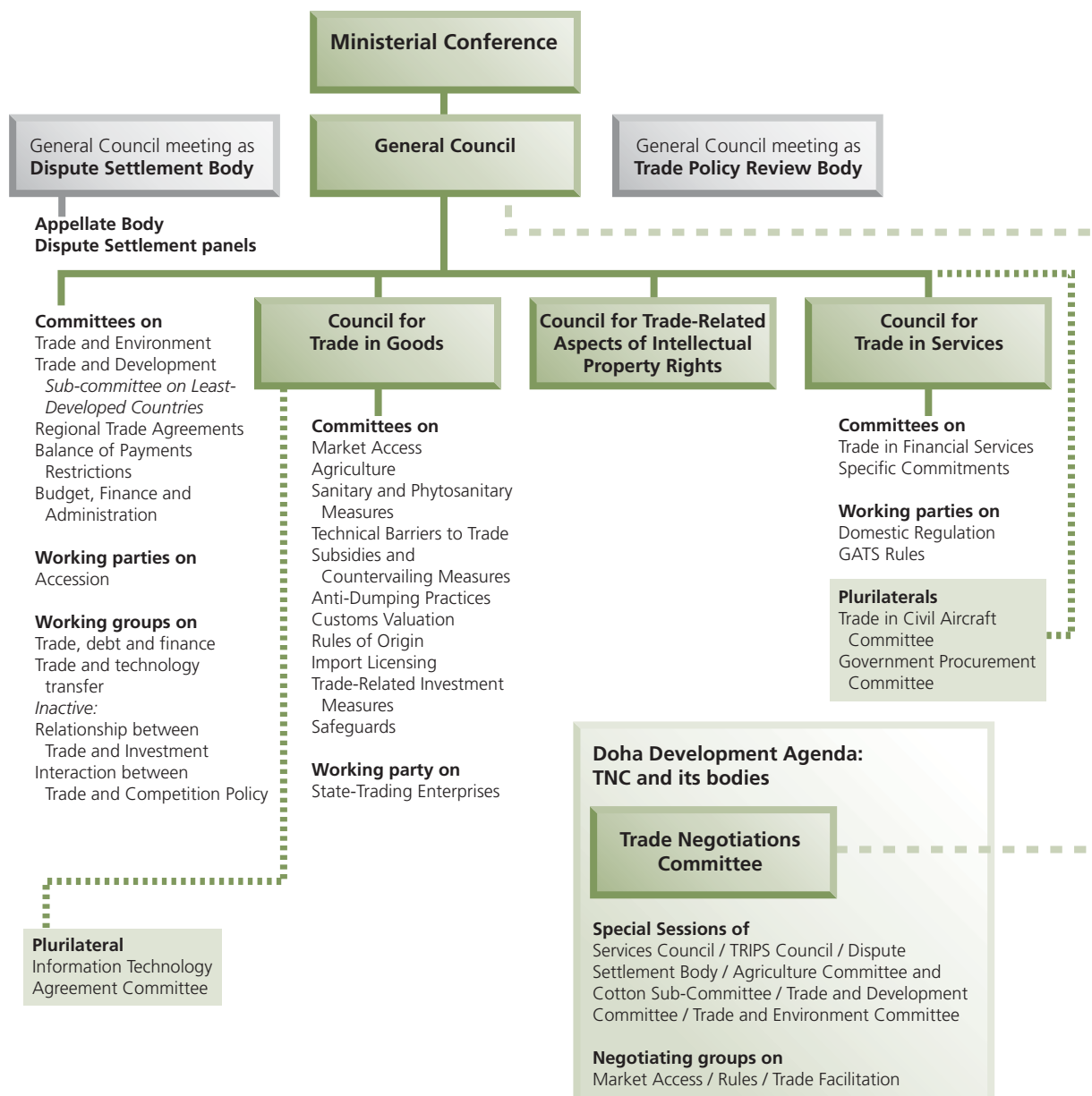
> Trade Negotiations Committee





## WTO structure

All WTO members may participate in all councils, committees, etc, except Appellate Body, Dispute Settlement panels, Textiles Monitoring Body, and plurilateral committees.



- Key**
- Reporting to General Council (or a subsidiary)
  - Reporting to Dispute Settlement Body
  - ..... Plurilateral committees inform the General Council or Goods Council of their activities, although these agreements are not signed by all WTO members
  - - - Trade Negotiations Committee reports to General Council

The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body

## Current WTO members

**150** governments, since January 2007, with date of membership (“**g**” = the 51 original GATT members who joined after 1 January 1995; “**n**” = new members joining the WTO through a working party negotiation):

<b>Albania</b> 8 September 2000 (n)	<b>Gambia</b> 23 October 1996 (g)	<b>Niger</b> 13 December 1996 (g)
<b>Angola</b> 1 December 1996 (g)	<b>Georgia</b> 14 June 2000 (n)	<b>Nigeria</b> 1 January 1995
<b>Antigua and Barbuda</b> 1 January 1995	<b>Germany</b> 1 January 1995	<b>Norway</b> 1 January 1995
<b>Argentina</b> 1 January 1995	<b>Ghana</b> 1 January 1995	<b>Oman</b> 9 November 2000 (n)
<b>Armenia</b> 5 February 2003 (n)	<b>Greece</b> 1 January 1995	<b>Pakistan</b> 1 January 1995
<b>Australia</b> 1 January 1995	<b>Grenada</b> 22 February 1996 (g)	<b>Panama</b> 6 September 1997 (n)
<b>Austria</b> 1 January 1995	<b>Guatemala</b> 21 July 1995 (g)	<b>Papua New Guinea</b> 9 June 1996 (g)
<b>Bahrain</b> 1 January 1995	<b>Guinea Bissau</b> 31 May 1995 (g)	<b>Paraguay</b> 1 January 1995
<b>Bangladesh</b> 1 January 1995	<b>Guinea</b> 25 October 1995 (g)	<b>Peru</b> 1 January 1995
<b>Barbados</b> 1 January 1995	<b>Guyana</b> 1 January 1995	<b>Philippines</b> 1 January 1995
<b>Belgium</b> 1 January 1995	<b>Haiti</b> 30 January 1996 (g)	<b>Poland</b> 1 July 1995 (g)
<b>Belize</b> 1 January 1995	<b>Honduras</b> 1 January 1995	<b>Portugal</b> 1 January 1995
<b>Benin</b> 22 February 1996 (g)	<b>Hong Kong, China</b> 1 January 1995	<b>Qatar</b> 13 January 1996 (g)
<b>Bolivia</b> 13 September 1995 (g)	<b>Hungary</b> 1 January 1995	<b>Romania</b> 1 January 1995
<b>Botswana</b> 31 May 1995 (g)	<b>Iceland</b> 1 January 1995	<b>Rwanda</b> 22 May 1996 (g)
<b>Brazil</b> 1 January 1995	<b>India</b> 1 January 1995	<b>Saint Kitts and Nevis</b> 21 February 1996 (n)
<b>Brunei Darussalam</b> 1 January 1995	<b>Indonesia</b> 1 January 1995	<b>Saint Lucia</b> 1 January 1995
<b>Bulgaria</b> 1 December 1996 (n)	<b>Ireland</b> 1 January 1995	<b>Saint Vincent &amp; the Grenadines</b> 1 January 1995
<b>Burkina Faso</b> 3 June 1995 (g)	<b>Israel</b> 21 April 1995 (g)	<b>Saudi Arabia</b> 11 December 2005
<b>Burundi</b> 23 July 1995 (g)	<b>Italy</b> 1 January 1995	<b>Senegal</b> 1 January 1995
<b>Cambodia</b> 13 October 2004 (n)	<b>Jamaica</b> 9 March 1995 (g)	<b>Sierra Leone</b> 23 July 1995 (g)
<b>Cameroon</b> 13 December 1995 (g)	<b>Japan</b> 1 January 1995	<b>Singapore</b> 1 January 1995
<b>Canada</b> 1 January 1995	<b>Jordan</b> 11 April 2000 (n)	<b>Slovak Republic</b> 1 January 1995
<b>Central African Republic</b> 31 May 1995 (g)	<b>Kenya</b> 1 January 1995	<b>Slovenia</b> 30 July 1995 (g)
<b>Chad</b> 19 October 1996 (g)	<b>Korea</b> 1 January 1995	<b>Solomon Islands</b> 26 July 1996 (g)
<b>Chile</b> 1 January 1995	<b>Kuwait</b> 1 January 1995	<b>South Africa</b> 1 January 1995
<b>China</b> 11 December 2001 (n)	<b>Kyrgyz Republic</b> 20 December 1998 (n)	<b>Spain</b> 1 January 1995
<b>Colombia</b> 30 April 1995 (g)	<b>Latvia</b> 10 February 1999 (n)	<b>Sri Lanka</b> 1 January 1995
<b>Congo</b> 27 March 1997 (g)	<b>Lesotho</b> 31 May 1995 (g)	<b>Suriname</b> 1 January 1995
<b>Costa Rica</b> 1 January 1995	<b>Liechtenstein</b> 1 September 1995 (g)	<b>Swaziland</b> 1 January 1995
<b>Côte d'Ivoire</b> 1 January 1995	<b>Lithuania</b> 31 May 2001 (n)	<b>Sweden</b> 1 January 1995
<b>Croatia</b> 30 November 2000 (n)	<b>Luxembourg</b> 1 January 1995	<b>Switzerland</b> 1 July 1995 (g)
<b>Cuba</b> 20 April 1995 (g)	<b>Macao, China</b> 1 January 1995	<b>Chinese Taipei</b> 1 January 2002 (n)
<b>Cyprus</b> 30 July 1995 (g)	<b>Madagascar</b> 17 November 1995 (g)	<b>Tanzania</b> 1 January 1995
<b>Czech Republic</b> 1 January 1995	<b>Malawi</b> 31 May 1995 (g)	<b>Thailand</b> 1 January 1995
<b>Democratic Republic of the Congo</b> 1 January 1997 (g)	<b>Malaysia</b> 1 January 1995	<b>Togo</b> 31 May 1995 (g)
<b>Denmark</b> 1 January 1995	<b>Maldives</b> 31 May 1995 (g)	<b>Trinidad and Tobago</b> 1 March 1995 (g)
<b>Djibouti</b> 31 May 1995 (g)	<b>Mali</b> 31 May 1995 (g)	<b>Tunisia</b> 29 March 1995 (g)
<b>Dominica</b> 1 January 1995	<b>Malta</b> 1 January 1995	<b>Turkey</b> 26 March 1995 (g)
<b>Dominican Republic</b> 9 March 1995 (g)	<b>Mauritania</b> 31 May 1995 (g)	<b>Uganda</b> 1 January 1995
<b>Ecuador</b> 21 January 1996 (n)	<b>Mauritius</b> 1 January 1995	<b>United Arab Emirates</b> 10 April 1996 (g)
<b>Egypt</b> 30 June 1995 (g)	<b>Mexico</b> 1 January 1995	<b>United Kingdom</b> 1 January 1995
<b>El Salvador</b> 7 May 1995 (g)	<b>Moldova</b> 26 July 2001 (n)	<b>United States</b> 1 January 1995
<b>Estonia</b> 13 November 1999 (n)	<b>Mongolia</b> 29 January 1997 (n)	<b>Uruguay</b> 1 January 1995
<b>European Communities</b> 1 January 1995	<b>Morocco</b> 1 January 1995	<b>Venezuela</b> 1 January 1995
<b>Fiji</b> 14 January 1996 (g)	<b>Mozambique</b> 26 August 1995 (g)	<b>Viet Nam</b> 11 January 2007
<b>Finland</b> 1 January 1995	<b>Myanmar</b> 1 January 1995	<b>Zambia</b> 1 January 1995
<b>Former Yugoslav Republic of Macedonia</b> 4 April 2003 (n)	<b>Namibia</b> 1 January 1995	<b>Zimbabwe</b> 3 March 1995 (g)
<b>France</b> 1 January 1995	<b>Netherlands</b> — including <b>Netherlands Antilles</b> 1 January 1995	
<b>Gabon</b> 1 January 1995	<b>Nepal</b> 23 April 2004 (n)	
	<b>New Zealand</b> 1 January 1995	
	<b>Nicaragua</b> 3 September 1995 (g)	

### Observers

Afghanistan	Holy See (Vatican)	Serbia
Algeria	Iran	Seychelles
Andorra	Iraq	Sudan
Azerbaijan	Kazakhstan	Tajikistan
Bahamas	Lao People's Democratic Republic	Tonga
Belarus	Lebanese Republic	Ukraine
Bhutan	Libya	Uzbekistan
Bosnia and Herzegovina	Montenegro	Vanuatu
Cape Verde	Russian Federation	Yemen
Equatorial Guinea	Samoa	
Ethiopia	Sao Tome and Principe	

**Note:** With the exception of the Holy See, observers must start accession negotiations within five years of becoming observers.



### 3-3. TELOS OF THE WTO

#### **Legal Texts**

*The International Trade Organization -- which never came into force -- GATT 1947, the WTO and NAFTA all commit, at some level, to free trade. Take a look at the respective formulations of their objectives and compare how they intend to balance the economic, social and political.*

#### **Havana Charter Art. 1**

RECOGNIZING the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations,

THE PARTIES to this Charter undertake in the fields of trade and employment to co-operate with one another and with the United Nations

For the Purpose of

REALIZING the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter.

TO THIS END they pledge themselves, individually and collectively, to promote national and international action designed to attain the following objectives:

1. To assure a large and steadily growing volume of real income and effective demand, to increase the production, consumption and exchange of goods, and thus to contribute to a balanced and expanding world economy.
2. To foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment.
3. To further the enjoyment by all countries, on equal terms, of access to the markets, products and productive facilities which are needed for their economic prosperity and development.
4. To promote on a reciprocal and mutually advantageous basis the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce.
5. To enable countries, by increasing the opportunities for their trade and economic development, to abstain from measures which would disrupt world commerce, reduce productive employment or retard economic progress.
6. To facilitate through the promotion of mutual understanding, consultation and co-operation the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices and commodity policy.

ACCORDINGLY they hereby establish the INTERNATIONAL TRADE ORGANIZATION

through which they shall co-operate an Members to achieve the purpose and the objectives set forth in this Article.

### **Preamble GATT 1947**

The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce,

Have through their Representatives agreed as follows:

### **Preamble WTO Agreement**

The *Parties* to this Agreement,

*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

*Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

*Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

*Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

*Determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system,

*Agree as follows:*

### **NAFTA Preamble**

The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:

STRENGTHEN the special bonds of friendship and cooperation among their nations;

CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;

CREATE an expanded and secure market for the goods and services produced in their territories;

REDUCE distortions to trade;

ESTABLISH clear and mutually advantageous rules governing their trade;

ENSURE a predictable commercial framework for business planning and investment;

BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;

ENHANCE the competitiveness of their firms in global markets;

FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;

CREATE new employment opportunities and improve working conditions and living standards in their respective territories;

UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;

PRESERVE their flexibility to safeguard the public welfare;

PROMOTE sustainable development;

STRENGTHEN the development and enforcement of environmental laws and regulations; and

PROTECT, enhance and enforce basic workers' rights;

HAVE AGREED as follows:

## Case Law

### United States – Sections 301-310 of the Trade Act of 1974

*This case interests us since it explicitly raises the question as to the overall objectives of the WTO. When you read this report you should ask yourself why the panel engaged in an examination of the overall objectives of the WTO.*

#### Summary of facts

*Excerpt from Dispute Settlement Commentary of Section 301 on the subscriber page of [www.worldtradelaw.net](http://www.worldtradelaw.net).*

This dispute concerns U.S. legislation that authorizes certain actions by the United States Trade Representative ("USTR") in response to trade barriers imposed by other countries. While this legislation is known commonly as "Section 301," the entire measure at issue actually spans Sections 301-310 of the Trade Act of 1974 (codified at 19 U.S.C. §2411 *et seq.*).

The operation of the Section 301 provisions is as follows. First, Section 302 authorizes the USTR to initiate investigations of acts, policies or practices of other countries that are "unreasonable or discriminatory" and burden or restrict U.S. commerce. It also requires the USTR to request consultations with the country concerned. Section 303 then requires that if no mutually acceptable resolution is reached within a certain time period, the USTR must request proceedings under the formal dispute settlement procedures of the trade agreement at issue.

In turn, Section 304(a) requires that the USTR make a determination under the trade agreement at issue as to whether U.S. rights are being denied on or before the earlier of "(i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or (ii) the date that is 18 months after the date on which the investigation is initiated." Moreover, it requires that if the USTR's determination is affirmative (*i.e.*, if the USTR determines that U.S. rights are being denied), the USTR must, at the same time, determine what action it will take under Section 301, which authorizes the USTR to take remedial action, including the suspension or withdrawal of concessions or the imposition of duties or other import restrictions. However, with regard to investigations involving alleged violations of the WTO Agreement, the following rules apply. If the DSB adopts rulings favorable to the United States on a measure that was originally investigated under these Section 301 provisions, then, under Section 304(a), where the responding Member agrees to implement the DSB's ruling within a reasonable time, the USTR can determine that U.S. rights are being denied, but that "satisfactory measures" are being taken that justify the termination of the Section 301 investigation.

Section 306(a) then requires the USTR to "monitor" the implementation of measures undertaken by a foreign government to provide a satisfactory resolution of a matter subject to dispute settlement. Under Section 306(b), if, on the basis of that monitoring, the USTR "considers" that a foreign country is not satisfactorily implementing the measure undertaken to reach a satisfactory resolution, then the USTR is required to reach a determination under Section 304(a) as to what further action it will take under Section 301(a). In this situation, Section 305(a)(1) requires that, subject to the specific direction by the President of the United States, the USTR must implement the action it determines necessary under Section 304(a) "by no later than ... 30 days after the date on which such determination is made." Section 305(a)(2)(A), however, permits the USTR to delay, by no more than 180 days, any action under Section 301 if the USTR determines "that substantial progress is being made, or that a delay is necessary or desirable to obtain U.S. rights

or satisfactory solution with respect to the acts, policies, or practices that are the subject of the action." (Paras. 2.1-2.20)

The European Communities argued that Sections 304(a)(2)(A) and 306(b) are inconsistent with DSU Article 23.2(a), and that Sections 306(b) and 305(a) are inconsistent with DSU Article 23.2(c). Moreover, it claimed that Section 306(b) violates GATT Articles I, II, III, VIII and XI.

**Panel Report, WT/DS152/R, 22 December 1999**

Panel: Hawes, Johannessen, Weiler

[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds152\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm)

(...)

**VII. Findings**

(...)

**(a) The dual nature of obligations under Article 23 of the DSU**

7.35. Article 23 of the DSU deals, as its title indicates, with the "Strengthening of the Multilateral System". Its overall design is to prevent WTO Members from unilaterally resolving their disputes in respect of WTO rights and obligations. It does so by obligating Members to follow the multilateral rules and procedures of the DSU.

7.36. Article 23.1 provides as follows:

*"Strengthening of the Multilateral System*

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, *they shall have recourse to, and abide by*, the rules and procedures of this Understanding" (emphasis added).

7.37. Article 23.2 specifies three elements that need to be respected as part of the multilateral DSU dispute settlement process. It provides as follows:

"In such cases [referred to in Article 23.1, i.e. when Members seek the redress of WTO inconsistencies], Members shall:

- (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
- (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

- (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time".

(...)

- (c) **"... the ordinary meaning ... in the light of [the treaty's] object and purpose"**

7.71. What are the objects and purposes of the DSU, and the WTO more generally, that are relevant to a construction of Article 23? The most relevant in our view are those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system.

7.72. Under the doctrine of direct effect, which has been found to exist most notably in the legal order of the EC but also in certain free trade area agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect.<sup>661</sup> Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.

7.73. However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.

7.74. The very first Preamble to the WTO Agreement states that Members recognise

"that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services".<sup>662</sup>

---

<sup>661</sup> We make this statement as a matter of fact, without implying any judgment on the issue. We note that whether there are circumstances where obligations in any of the WTO agreements addressed to Members would create rights for individuals which national courts must protect, remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute (see Eeckhout, P., *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, Common Market Law Review, 1997, p. 11; Berkey, J., *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, European Journal of International Law, 1998, p. 626). 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, 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.

<sup>662</sup> See also similar language in the second preambles to GATT 1947 and GATS. The TRIPS Agreement addresses even more explicitly the interests of individual operators, obligating WTO Members to protect the intellectual property rights of nationals of all other WTO Members. Creating market conditions so that

7.75. Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in the DSU itself. Article 3.2 of the DSU provides:

"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements ...".<sup>663</sup>

7.76. The security and predictability in question are of "the multilateral trading system". The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.

7.77. Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it. Sections 301-310 themselves recognize this nexus. One of the principal triggers for US action to vindicate US rights under covered agreements is the impact alleged breaches have had on, and the complaint emanating from, individual economic operators.

7.78. It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.

---

the activity of economic operators can flourish is also reflected in the object of many WTO agreements, for example, in the non-discrimination principles in GATT, GATS and TRIPS and the market access provisions in both GATT and GATS.

<sup>663</sup> The importance of security and predictability as an object and purpose of the WTO has been recognized as well in many panel and Appellate Body reports. See the Appellate Body report on *Japan – Alcoholic Beverages*, op. cit., p. 31 ("WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system"). It has also been referred to under the TRIPS Agreement. In the Appellate Body Report on *India – Patents (US)*, op. cit., it was found, at para. 58, that "India is obliged, by Article 70.8(a), to provide a legal mechanism for the filing of mailbox applications that provides a *sound legal basis* to preserve both the novelty of the inventions and the priority of the applications as of the relevant filing and priority dates" (italics added). See also the WTO Panel Report on *Argentina – Textiles and Apparel (US)*, op. cit., para. 6.29 and the GATT Panel Reports on *United States Manufacturing Clause*, adopted 15/16 May 1984, BISD 31S/74, para. 39; *Japan – Measures on Imports of Leather* ("*Japan – Leather*"), adopted 15/16 May 1984, BISD 31S/94, para. 55; *EEC – Imports of Newsprint*, adopted November 20 1984, BISD 31S/114, para. 52; *Norway – Restrictions on Imports of Apples and Pears*, adopted 22 June 1989, BISD 36S/306, para. 5.6.

7.79. Apart from this name-of-convenience, there is nothing novel or radical in our analysis. We have already seen that it is rooted in the language of the WTO itself. It also represents a GATT/WTO orthodoxy confirmed in a variety of ways over the years including panel and Appellate Body reports as well as the practice of Members.

7.80 Consider, first, the overall obligation of Members concerning their internal legislation. Under traditional public international law a State cannot rely on its domestic law as a justification for non-performance.<sup>664</sup> Equally, however, under traditional public international law, legislation under which an eventual violation could, or even would, subsequently take place, does not normally in and of itself engage State responsibility. If, say, a State undertakes not to expropriate property of foreign nationals without appropriate compensation, its State responsibility would normally be engaged only at the moment foreign property had actually been expropriated in a given instance. And yet, even in the GATT, prior to the enactment of Article XVI:4 of the WTO Agreement explicitly referring to measures of a general nature, legislation as such independent from its application in specific instances was considered to constitute a violation. This is confirmed by numerous adopted GATT panel reports and is also agreed upon by both parties to this dispute. Why is it, then, that legislation as such was found to be inconsistent with GATT rules? If no specific application is at issue – if, for example, no specific discrimination has yet been made – what is it that constitutes the violation?

7.81 Indirect impact on individuals is, surely, one of the principal reasons. In treaties which concern only the relations between States, State responsibility is incurred only when an actual violation takes place. By contrast, in a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable "chilling effect" on the economic activities of individuals.

7.82 Thus, Article III:2 of GATT 1947, for example, would not, on its face, seem to prohibit legislation independently from its application to specific products. However, in light of the object and purpose of the GATT, it was read in GATT jurisprudence as a promise by contracting parties not only that they would abstain from actually imposing discriminatory taxes, but also that they would not enact legislation with that effect.

7.83 It is commonplace that domestic law in force imposing discriminatory taxation on imported products would, in and of itself, violate Article III irrespective of proof of actual discrimination in a specific case.<sup>665</sup> Furthermore, a domestic law which exposed imported products to future discrimination was recognized by some GATT panels to constitute, by itself, a violation of Article III, even before the law came into force.<sup>666</sup> Finally, and most tellingly, even where there was no certainty but only a risk under the domestic law that the tax would be discriminatory, certain GATT panels found that the law violated the obligation in Article III.<sup>667</sup> A similar

---

<sup>664</sup> See Article 27 of the Vienna Convention.

<sup>665</sup> A change in the relative competitive opportunities caused by a measure of general application as such, to the detriment of imported products and in favour of domestically produced products, is the decisive criterion.

<sup>666</sup> In the Panel Report on *US – Superfund* (op. cit., paras. 5.2.1 and 5.2.2) tax legislation as such was found to violate GATT obligations even though the legislation had not yet entered into effect. See also the Panel Report on *US - Malt Beverages* (op. cit., paras. 5.39, 5.57, 5.60 and 5.69) where the legislation imposing the tax discrimination was, for example, not being enforced by the authorities.

<sup>667</sup> See Panel Report on *US – Tobacco*, op. cit., para. 96:

"The Panel noted that an internal regulation which merely exposed imported products to a



approach was followed in respect of Article II of GATT 1994 by the WTO panel on *Argentina – Textiles and Apparel (US)* when it found that the very change in system from *ad valorem* to specific duties was a breach of Argentina's *ad valorem* tariff binding even though such change only brought about the potential of the tariff binding being exceeded depending on the price of the imported product.<sup>668</sup>

7.84 The rationale in all types of cases has always been the negative effect on economic operators created by such domestic laws. An individual would simply shift his or her trading patterns – buy domestic products, for example, instead of imports – so as to avoid the would-be taxes announced in the legislation or even the mere risk of discriminatory taxation. Such risk or threat, when real, was found to affect the relative competitive opportunities between imported and domestic products because it could, in and of itself, bring about a shift in consumption from imported to domestic products: This shift would be caused by, for example, an increase in the cost of imported products and a negative impact on economic planning and investment to the detriment

---

risk of discrimination had previously been recognized by a GATT panel to constitute, by itself, a form of discrimination, and therefore less favourable treatment within the meaning of Article III. The Panel agreed with this analysis of risk of discrimination as enunciated by this earlier panel".

A footnote to this paragraph refers to the Panel Report on *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Protein*, adopted 25 January 1990, BISD 37S/86, para. 141, which reads as follows:

"Having made this finding the Panel examined whether a purchase regulation which does not necessarily discriminate against imported products but is capable of doing so is consistent with Article III:4. The Panel noted that the exposure of a particular imported product to a *risk* of discrimination constitutes, by itself, a form of discrimination. The Panel therefore concluded that purchase regulations creating such a risk must be considered to be according less favourable treatment within the meaning of Article III:4. The Panel found for these reasons that the payments to processors of Community oilseeds are inconsistent with Article III:4".

<sup>668</sup> Op. cit., paras. 6.45-6.47, in particular para. 6.46: "In the present dispute we consider that the competitive relationship of the parties was changed unilaterally by Argentina because its mandatory measure clearly has *the potential to violate its bindings, thus undermining the security and the predictability of the WTO system*" (emphasis added). This was confirmed by the Appellate Body (op. cit., para. 53):

"In the light of this analysis, we may generalize that under the Argentine system, whether the amount of the DIEM [a regime of Minimum Specific Import Duties] is determined by applying 35 per cent, or a rate less than 35 per cent, to the representative international price, there will remain the possibility of a price that is sufficiently low to produce an *ad valorem* equivalent of the DIEM that is greater than 35 per cent. In other words, the structure and design of the Argentine system is such that for any DIEM, no matter what *ad valorem* rate is used as the multiplier of the representative international price, the possibility remains that there is a "break-even" price below which the *ad valorem* equivalent of the customs duty collected is in excess of the bound *ad valorem* rate of 35 per cent".

On that basis, the Appellate Body found that the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994. In this respect, see also the Panel Report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996, WT/DS2/R, para. 6.10.

of those products. This rationale was paraphrased in the *Superfund* case as follows:

"to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles [GATT Articles III and XI] are not only to protect current trade but also to create the predictability needed to plan future trade".<sup>669</sup>

Doing so, the panel in *Superfund* referred to the reasoning in the *Japanese Measures on Imports of Leather* case. There the panel found that an import quota constituted a violation of Article XI of GATT even though the quota had not been filled. It did so on the following grounds:

"the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons e.g. it would lead to increased transaction costs and would create uncertainties which could affect investment plans".<sup>670</sup>

7.85 In this sense, Article III:2 is not only a promise not to discriminate in a specific case, but is also designed to give certain guarantees to the market place and the operators within it that discriminatory taxes will not be imposed. For the reasons given above, any ambivalence in GATT panel jurisprudence as to whether a risk of discrimination can constitute a violation should, in our view, be resolved in favour of our reading.<sup>671</sup>

7.86. Similarly, Article 23 too has to be interpreted in the light of these principles which encapsulate such a central object and purpose of the WTO. It may have been plausible if one considered a strict Member-Member matrix to insist that the obligations in Article 23 do not apply to legislation that threatens unilateral determinations but does not actually mandate them. It is not, however, plausible to construe Article 23 in this way if one interprets it in the light of the

---

<sup>669</sup> Op. cit., para. 5.2.2.

<sup>670</sup> Panel Report on *Japan – Leather*, op. cit., para. 55. In this respect, see also Panel Report on *US – Malt Beverages* (op. cit., para. 5.60), where legislation was found to constitute a GATT violation even though it was not being enforced, for the following reason:

"Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, *the measure continues to be mandatory legislation which may influence the decisions of economic operators*. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply" (emphasis added).

<sup>671</sup> As a result, we do not consider that the general statements made in certain GATT panels are correct in respect of all WTO obligations and in all circumstances, for example, the statement in Panel Report on *EEC – Parts and Components* (op. cit., para. 5.25) that "[u]nder the provisions of the [GATT] which Japan claims have been violated by the EEC contracting parties are to avoid certain measures; but these provisions do not establish the obligation to avoid legislation under which the executive authorities may possibly impose such measures" and in Panel Report on *Thai – Cigarettes* (op. cit., para. 84), the statement that "legislation merely giving the executive the possibility to act inconsistently with Article III:2 [of GATT] could not, by itself, constitute a violation of that provision". In respect of this ambivalence in GATT jurisprudence, see Chua, A., *Precedent and Principles of WTO Panel Jurisprudence*, Berkeley Journal of International Law, 1998, p. 171, in particular at p. 193.

indirect effect such legislation has on individuals and the market-place, the protection of which is one of the principal objects and purposes of the WTO.

7.87 To be sure, in the cases referred to above, whether the risk materialised or not depended on certain market factors such as fluctuating reference prices on which the taxation of the imported product was based by virtue of the domestic legislation. In this case, whether the risk materializes depends on a decision of a government agency. From the perspective of the individual economic operator, however, this makes little difference. Indeed, it may be more difficult to predict the outcome of discretionary government action than to predict market conditions, thereby exacerbating the negative economic impact of the type of domestic law under examination here.

7.88. When a Member imposes unilateral measures in violation of Article 23 in a specific dispute, serious damage is created both to other Members and the market-place. However, in our view, the creation of damage is not confined to actual conduct in specific cases. A law reserving the right for unilateral measures to be taken contrary to DSU rules and procedures, may – as is the case here – constitute an ongoing threat and produce a "chilling effect" causing serious damage in a variety of ways.

7.89. First, there is the damage caused directly to another Member. Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat, even before DSU procedures have been activated. To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick. The threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members. It would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures.<sup>672</sup>

7.90. Second, there is the damage caused to the market-place itself. The mere fact of having legislation the statutory language of which permits conduct which is WTO prohibited – namely, the imposition of unilateral measures against other Members with which it is locked in a trade dispute – may in and of itself prompt economic operators to change their commercial behaviour in a way that distorts trade. Economic operators may be afraid, say, to continue ongoing trade with, or investment in, the industries or products threatened by unilateral measures. Existing trade may also be distorted because economic operators may feel a need to take out extra insurance to allow for the illegal possibility that the legislation contemplates, thus reducing the relative competitive opportunity of their products on the market. Other operators may be deterred from trading with such a Member altogether, distorting potential trade. The damage thus caused to the market-place may actually increase when national legislation empowers individual economic operators to trigger unilateral State action, as is the case in the US which allows individual petitioners to request the USTR to initiate an investigation under Sections 301-310. This in itself is not illegal. But the ability conferred upon economic operators to threaten their foreign competitors with the triggering of a State procedure which includes the possibility of illegal unilateral action is another matter. It may affect their competitive economic relationship and deny certain commercial advantages that foreign competitors would otherwise have. The threat of unilateral action can be as damaging on the market-place as the action itself.

7.91. In conclusion, the risk of discrimination was found in GATT jurisprudence to constitute a violation of Article III of GATT – because of the "chilling effect" it has on economic operators. The risk of a unilateral determination of inconsistency as found in the statutory language of

---

<sup>672</sup> In this respect, see the statements made by third parties to this dispute in Section V of our Report.

Section 304 itself has an equally apparent "chilling effect" on both Members and the market-place even if it is not quite certain that such a determination would be made. The point is that neither other Members nor, in particular, individuals can be reasonably certain that it will not be made.

Whereas States which are part of the international legal system may expect their treaty partners to assume good faith fulfillment of treaty obligations on their behalf, the same assumption cannot be made as regards individuals.

7.92. It is a circumspect use of the teleological method to choose that interpretation of Article 23 of the DSU that provides this certainty and eliminates the undesired "chilling effects" which run against the object and purpose of the WTO Agreement.

(...)

### 3-4. GLOBALIZED TRADE AND ITS DISCONTENTS

*Free trade and the international trading system are frequently challenged and you will encounter such challenges throughout the course. You should aim at conceptualizing such challenges. The distinction between two types of criticisms will be helpful. Firstly there are challenges to the international trading system which can be situated within free trade theory. Such challenges include e.g. demands for an international competition policy or the claim that developing countries should be permitted to employ trade measures and policies such as tariffs, regulation of foreign investment, permissive intellectual property laws in order to level the economic playing field between developing and industrialized countries. Secondly, there is the ideological critique of liberalized trade which itself takes many different forms. One such challenge is that trade liberalization and the ensuing international competition are destructive of cultural phenomena. E.g. it is argued that small farms are a cultural characteristic of many European countries, however that they would not be competitive and thus could not be maintained if trade in agricultural goods was fully liberalized.*

*When reading the texts in this section you should ask yourself whether there exists a “domain of free trade” which can be separated from social and political issues. Try to identify the socio-political dimensions of trade and trade regulation and the discontents with globalized trade.*

## Trade and Environment

### **Trade Liberalisation and the Environment: Are There Legitimate Worries**

Simon Upton, BRIDGES Monthly Review Year 7 (September-October 2003), Number 7, pp. 5-7

One of the features of the debates leading up to the WTO's Cancun Ministerial meeting was the prominence given by some parties to linkages between trade liberalisation and the environment, particularly as they apply to agriculture. These concerns were made formally a part of the negotiating agenda in Doha. The linkages were given particular prominence as a result of the European Union's decision to embark on a major reform of its Common Agricultural Policy (CAP) and in doing so seek to make its agricultural support policies more trade friendly.

As a result, Europe has invited a more thorough-going debate on the sorts of environmental concerns that might give rise to policy interventions, and the extent to which they might support trade-restrictive measures. This is not the case with other parties to the negotiations. The United States, for instance, has tended to accept without serious challenge that its subsidies are little more than the outcome of blatant pork-barrel politics. No-one pretends that any future reductions might be crafted to garner significant environmental gains. Farm subsidies in the United States will disappear the day politicians feel emboldened to ignore the lobby groups circling around the Capitol.<sup>1</sup> We may be in for some wait.

But Europeans have mounted a more sophisticated defence. They have acknowledged the trade-distorting effects of their billowing subsidies but have equally drawn attention to the environmental consequences of liberalisation and subsidy removal, not all of them positive. And in noting this they invite an altogether more complex response than the United States. It is this argument I should like to expand on.

Classical trade theory suggests that any level of liberalisation – no matter how partial – is advantageous. This flows from the uncontested claim that comparative advantage will bring benefits to all participants even if not in equal measure. It is not a zero-sum game.<sup>2</sup> Where the environmental consequences of changed patterns of trade and production are concerned, however, there is no such guarantee. Environmental outcomes are dependent on a huge array of bio-physical and regulatory environments. They may or may not be exacerbated depending on the regulatory environment in countries to which production shifts in response to changing comparative advantage. But even (implausibly) assuming a seamless regulatory climate between economies, physical and social factors can mean quite different outcomes in the face of changing patterns of trade.

The questions that demand sharp focus revolve around what environmental concerns are legitimately the business of trade negotiators and, assuming these concerns are held in good faith, how might they be addressed?

In the first place those who advance these concerns need to be very precise about what is worrying them. That's because for some, the greening of subsidies and the maintenance of protective barriers *is* merely a useful means of making publicly acceptable what amounts, in fact, to a capitulation to vested interests. Listening to the way some European politicians seek to assure their farming constituents of their loyalties doesn't give one huge confidence that this is all driven by an unimpeachable desire to save the planet.

Even at the level of the European Commission, where Commissioners struggle manfully to hold the line against some stiff, vested, national producer interests, the case has not been adequately made. Pascal Lamy, for instance, has recently explained the European position on agriculture in *Le Monde* in these terms:

“The European Union has made a political choice to support agriculture because it cannot just be regarded as an economic activity like any other. It fills many other roles than simply that of production. It contributes to the protection of the environment, food safety, animal welfare, etc.”<sup>3</sup>

It is the “etc.” that worries me as much as anything. Because the failure to specify the problem leaves us in a warm – and potentially limitless – zone of comfort that defies tough-minded analysis. Is agriculture so different? The chemical industry impinges equally on environmental protection, food safety and animal welfare not to mention a vast array of human welfare-related issues. In a world in which people wish to speak increasingly of sustainable development, it is surely hard to draw such tidy distinctions between the impacts of different types of economic activity?

I can identify three sorts of legitimate environmental concerns. Properly described we can then decide whether and how those concerns might be addressed.

### **Environmental Impacts in the Liberalising Country**

This concern often focuses on cultural and heritage values imprinted on the rural landscape. These are real worries in many cases. They are also exclusively the domestic concern of the country in which they are found. At least conceptually, they should pose no problems for negotiators; to the extent that they involve the provision of public goods that would not otherwise be provided, they can be transparently purchased from taxes. Needless to say, the boundary between landscape values and the desirability of having real, live, close-to-nature artisans not just tilling those Brueghelian fields but living in those exquisite villages is not easy to draw. But social subsidies can be equally transparent. To some extent the mooted CAP reforms – scheduled only to bite some years from now – mark a step in this direction.<sup>4</sup> The key reform to the CAP will be the expanded ‘decoupling’ of support to EU farmers from production and moving this support to non-production related activities.

[6]

Of one thing we can be certain: this concern cannot credibly be extended to fields as far as the eye can see broken only by silos, large tractors, irrigators and factory farms. Neither, at least on economic grounds, can the argument that similar agricultural products from countries abroad should be kept out because they would compete unfairly. If the objective is to maintain landscapes and the people who inhabit them, that can be achieved while still delivering, through liberalisation, lower prices to consumers in the same country – consumers who are, after all, paying the taxes that purchase the public goods. The annual welfare gains to Western Europe from full liberalisation are estimated to exceed €15 billion.<sup>5</sup>

### **Impacts in Countries Benefiting from Liberalisation**

The concern here, again a real one, is that the opening of markets will lead to significant new production beyond the liberalizing country’s borders with negative environmental impacts. The fear is that whatever environmental damage may be mitigated at home as a result of reduced production in response to lowered subsidies and/or tariffs, will simply be transferred to another

country, and particularly to developing countries that may not be able to support such rigorous environmental standards. The net result may not be a simple transfer of harm but an overall increase in environmental damage at the global level. While the concern is a real one, it does not follow that subsidies should be maintained on the basis that this represents some lesser of two evils. The local responses by producers in a developing country represent tradeoffs which they have jealously guarded the right to make – see Principle 2 of the *Rio Declaration*.<sup>6</sup> No developing country is going to limit its freedom to develop as developed countries have before them. Developed world living standards are built on the conversion (for which read, destruction) of natural resources into intellectual and human resources. This ‘substitution of natural capital with human capital’ (as economists characterise it) is a trade-off that every country regards as its own sovereign choice.

But that does not leave developed countries without the means to respond. A co-ordinated refocusing of technical and development assistance aimed at alleviating such problems could go a long way to helping both development and the environment. Here’s a real world example involving cotton subsidies.

OECD member subsidies to cotton farmers lower world prices by some 25 percent. A reduction in cotton subsidies would certainly mean improved market access for a number of developing countries. But what would it mean for the environment?

One country with significant cotton interests is Uzbekistan. Improved world prices for Uzbek cotton as a consequence of reductions in cotton subsidies would certainly have positive implications for poverty reduction and economic growth in this central Asian economy. However, the increased output is likely to have negative implications for water use and the Aral Sea in Uzbekistan. The water supply of Uzbek cotton farmers is already a dwindling resource. Currently, more than 40 percent of the water taken from the severely stressed Aral Sea to irrigate the cotton fields evaporates before it even reaches those fields because Uzbek farmers use open channels, not closed pipes, for irrigation. Further pressure on the Aral Sea water resource would have significant negative spill-overs to other parts of the Uzbek economy. What can be done about this?

If countries concerned about the environmental impact of liberalisation beyond their shores are really worried about these sorts of consequences, they can look to technical and development assistance to plug the gaps. So if improved market access for Uzbek cotton as a consequence of subsidy reductions threatened local environmental harm, developed country policy-makers should be able to fund flanking measures to mitigate them (such as enhanced technical assistance for improved irrigation techniques).<sup>7</sup>

### **Global Environmental Impacts from Liberalisation and Subsidy Removal**

Finally, there may be concerns that the economic welfare gains from subsidy removal will accentuate a variety of non-local environmental externalities as a result of higher consumption.<sup>8</sup> Greenhouse gas emissions come to mind. Again, this is a valid concern (although I must confess I haven’t heard it argued by a government). But the solution for such problems lies, by definition, with the negotiation of multi-lateral environmental agreements. Whatever our difficulties in elaborating them, it would be hard to argue that maintaining subsidies was a legitimate alternative.

I have elaborated these three possible concerns because it seems to me that, in varying degrees, they are legitimate and should be raised. Of course, before proposing expensive solutions or negotiating new multilateral environmental agreements (MEAs), one would first want to take into



account the very significant environmental benefits that are likely to flow from the elimination of agricultural subsidies. I say this with some feeling coming from a country, New Zealand, which allowed production-based subsidies to become an engine for the destruction of primeval temperate rain forests on a large scale. The consequences for soil, water and biodiversity were alarming. The complete removal of those subsidies has seen huge areas of land undergo changes to less destructive uses than grazing, and in some cases begin the process of reversion to native forest. The on-going degradation of water quality has been arrested.

That is not to say that there are no remaining environmental problems. Those sectors that have prospered and expanded from a newly self-sustaining economic base, are imposing new pressures. They are in turn the subject of new regulatory interventions and, in some cases, some very limited payment of public moneys to secure particular public goods. It is true that such pay-  
[7]ments press close to the boundary of subsidies. But it should be possible to distinguish on the one hand between payments that do confer a private benefit while securing a significant public benefit (i.e. something that is characterised by non-rival consumption and non-excludability) and, on the other hand, payments which largely confer only private benefits. This will be a matter of degree, but surely not one that defies differentiation.

The removal of subsidies in New Zealand was not an easy business. In fact it was incredibly painful. That was in part because New Zealand (well down the OECD league table) wasn't rich enough to pay for a soft landing. But then again, it was only because it wasn't very rich that it acted in the first place. Which of course is not the case with either the United States or Europe. These two economic colossi are stupendously wealthy. And agricultural support payments are minor when set alongside their other budgetary concerns. So one should not hope for subsidy reform as a result of economic necessity. In reality, electoral necessities point the other way.

### **Making the Demands Defensible**

What then can those concerned about the environmental consequences of subsidies demand in the context of the present negotiations? For my part I would advocate a large injection of candour into the debate. This cuts both ways. As Konrad von Moltke has noted, those who support the abolition of subsidies as a strategy for environmental improvement have to acknowledge that, within the current negotiating structure, they are in effect seeking to add "yet another layer of uncertainty to what is already a frighteningly complex system of environmental management."<sup>9</sup>

On the other hand, those who defend subsidies, or worry about the unintended environmental consequences of their removal, should be placed on notice that these arguments will be rigorously searched for unworthy motives. Here I find myself in something of a dilemma. On the one hand, there is something almost attractive about the disarmingly frank way in which the United States manages to pour money into rural vote retention schemes. There's no secret about why they do it. We can merely rail at the consequences.

But it would be too simple to leave it there. There are environmental consequences of subsidy removal. Those countries which have raised them – bravely in my view – must be challenged to make their arguments defensible. This will be the real test for those charged with seeing through the transformation of the CAP.

In the final analysis, let's be blunt, agricultural subsidies as we have come to know them are largely the result of a failure or an unwillingness to confront tricky social and economic dislocations. The resulting distortions have made the potential dislocations even bigger – like huge potential capital losses in land values if the rules of the game change. These dislocations are

quantifiable. People can be bought out or compensated. If doing it in a way that purchases some clearly recognisable public good makes that easier, so be it. But nothing can justify keeping everyone poorer – off-shore producers and domestic consumers – by preserving the status quo. Doing so in the name of the environment would be the final straw.

*Rt Hon Simon Upton is the Chairman of the Round Table on Sustainable Development at the OECD. The views expressed in this paper are those of the author alone and should not be construed as representing the views of the OECD or its member countries.*

#### ENDNOTES

1 That said, conservation-related arguments were a minor feature of President Bush's justification for the Farm Bill.

2 See in particular: V Vitalis (2003) *The Development Impact of Developed-World Policies on Developing Countries: The Case of Trade*, chapter in *The Effect of Rich Countries' Policies on Poor Countries*, forthcoming

3 *Le Monde* (2003) 5 September

4 For an outline of the EU's reform package see: [http://europa.eu.int/comm/agriculture/mtr/index\\_en.htm](http://europa.eu.int/comm/agriculture/mtr/index_en.htm)

5 J. Beghin, D. Roland-Holst, and D. van der Mensbrugge (2002), *Global Agricultural Trade and the Doha Round, What are the Implications for North and South?* Paper presented to the OECD/World Bank Global Forum on Agriculture, May 23-24, Paris. 6 According to Principle 2 of the Rio Declaration, "States have [...] the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

7 See also Vitalis (ibid) for further details.

8 For more detail on this and other aspects of the environment and the agriculture sector see OECD (2001) *Improving the Environmental Performance of Agriculture: Policy Options and Market Approaches*, OECD, Paris

9 K. von Moltke (2003) *Negotiating Subsidy Reduction in the World Trade Organisation*, IISD September.

## Trade and Human Rights

**UN ECOSOC, The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the Full Enjoyment of Human Rights. Preliminary Report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8, E/CN.4/Sub.2/2000/13 (15 June 2000)**

(...)

### A. The case of the World Trade Organization (WTO)

13. Despite being a relatively young international organization - having come into existence only in 1994 - the World Trade Organization (WTO) has attracted considerable intellectual and media attention. Following the Seattle protests at the meeting of world trade ministers, no other organization has been more closely associated with the phenomenon of globalization. Central to the ethos and practice of WTO is a set of principles that have provided the basic foundation for most contemporary developments associated with globalization. Among those principles we can cite free trade, open markets and tariff reductions. At the same time, the creation of WTO represented a veritable revolution not only in the scope of issues that were given attention under the trade regime created after Marrakech, but also with regard to the ramifications of failure to conform to that regime through its binding dispute-settlement mechanisms. (27)

14. The General Agreement on Tariffs and Trade (GATT), which the WTO succeeded, was provisional and only applied to goods, with the focus of the Agreement for most of its existence largely being border measures. (28) Among the new issues that came aboard following the Uruguay Round of talks in 1994 were services, (29) intellectual property rights (IPRs), (30) government procurement, (31) and investment measures. (32) In bringing these issues within the purview of the international trade-enforcement regime, not only did WTO assume tremendous powers, but it also raised several new issues vis-à-vis the relationship between the organization and individual States, (33) the broad questions of human rights, and the North/South geopolitical divide. For example, many developing countries take the demand to open their markets as a clear manifestation of Northern double standards, since the latter have consistently failed to open their own. In the trite observation of former World Bank Chief Economist Joseph Stiglitz, such exhortations often ring hollow:

"As developing countries take steps to open their economies and expand their exports, they find themselves confronting significant trade barriers - leaving them, in effect, with neither aid nor trade. They quickly run up against dumping duties (when no economist would say they are really engaged in dumping), or they face protected or restricted markets in their areas of natural comparative advantage, such as agriculture or textiles." (34)

The truth is in fact much more acute. Indeed, the assumptions on which the rules of WTO are based are grossly unfair and even prejudiced. Those rules also reflect an agenda that serves only to promote dominant corporatist interests that already monopolize the arena of international trade. (35) The rules assume an equality of bargaining power between all the countries that engage in trade. They are also designed on the basis of a premise that ignores the fact that the greater

percentage of global trade is controlled by powerful multinational enterprises. Within such a context, the notion of free trade on which the rules are constructed is a fallacy.

15. WTO has been described as the "practical manifestation of globalization in its trade and commercial aspects". (36) A closer examination of the organization will reveal that while trade and commerce are indeed its principle focus, the organization has extended its purview to encompass additional areas beyond what could justifiably be described as within its mandate. Furthermore, even its purely trade and commerce activities have serious human rights implications. This is compounded by the fact that the founding instruments of WTO make scant (indeed only oblique) reference to the principles of human rights. (37) The net result is that for certain sectors of humanity - particularly the developing countries of the South - the WTO is a veritable nightmare. (38) The fact that women were largely excluded from the WTO decision-making structures, and that the rules evolved by WTO are largely gender-insensitive, means that women as a group stand to gain little from this organization. (39)

16. As is the case with other international institutions that deal with the international economy, WTO is afflicted by both processual and substantive problems. Superficially, WTO can be described as a democratic institution; because it adopts the principle of one member, one vote, its decisions are ostensibly based on consensus, and together these allow for more equitable outcomes. (40) Such superficial equality nevertheless masks a serious inequality in both the appearance and the reality of power in the institution. According to a recent International Federation of Human Rights (FIDH) report:

"whether one considers the dispute settlement procedures, the mechanisms for implementing agreements or the areas selected for negotiations, one comes to realize that the WTO structure is heavily tilted in favour of developed countries, such that developing countries are, de facto, kept away from decision-making mechanisms and from policy-making; similarly, their own specific problems are not sufficiently taken into account." (41)

In the deliberations and negotiations over further goals of trade liberalization, WTO has demonstrated a particular opacity in the face of the demand for transparency. At Seattle, despite warnings from developing country representatives (and the chants of protesters outside the conference hall), (42) representatives from the Northern countries persisted in developing a position in a process that excluded the majority of delegates. Unsurprisingly, the talks ended in deadlock and frustration. (43) The pattern continues, and is compounded by the fact that because of a lack of resources and personnel with the requisite expertise, developing countries are forever condemned to a marginal negotiating position within the WTO framework. (44)

17. Among the several issues that have caused concern for many developing countries is the attempt to forge a link between issues concerning trade, human rights, labour standards and the environment - particularly when they are couched in the terms of conditionality. The Havana Declaration of the Group of 77 that followed the South Summit held from 10 to 14 April 2000 was unequivocal in this respect, stating that it rejected "all attempts to use these issues for resisting market access or aid and technology flows to developing countries". (45) The tying of trade to human rights in the fashion in which it has so far been done is problematic for a number of reasons. In the first instance, it too easily succumbs to the charge by developing countries of neo-colonialism. (46) Secondly, the commitment of Northern countries to a genuinely democratic and human rights-sensitive international regime is rendered suspect both by an extremely superficial rendering of the meaning of human rights, (47) and by the numerous double standards that are daily observed in the relations between countries of the North and those of the South.

Thus, "human rights" conditionality when applied in contexts such as trade depends on a range of largely subjective elements extrapolated from the much broader human rights regime. (48) In other words, human rights are merely used as an opportunistic fulcrum to achieve the objective of liberalized markets. For example, why is there almost always never any linkage between the demands being made and the observation and respect for economic, social and cultural rights? The short answer is because many of the measures being pursued actually undermine the progressive realization of this category of rights. However, even when the linkage is made to civil and political rights, it is fraught with inconsistencies and national subjective interests predominate.

18. Many of the measures adopted by WTO have implications well beyond the question of international trade. Among the most controversial of those that WTO has thrown into the debate relates to the issue of patenting, especially of plant varieties and life forms. (49) According to Vandana Shiva:

"The granting of patents covering all genetically engineered varieties of a species, irrespective of the genes concerned or how they were transferred, puts in the hands of a single inventor the possibility to control what we grow on our farms and in our gardens. At a stroke of a pen the research of countless farmers and scientists has potentially been negated in a single, legal act of economic hijack." (50)

The implications of such a measure are serious for the issue of food security, and its consequent relationship to the right to food. Furthermore, it represents outright piracy and appropriation of nature's bounty which has been designated for the whole of humanity and not for a privileged and technologically advanced few. (51)

19. At a minimum, the WTO needs to reform its processual mechanisms of deliberation so as to be more inclusive, and to allow for discordant (especially civil society) voices to be heard. More fundamentally, however, it needs to review its approach to the substantive issue that it is supposed to tackle: the question of free trade. Again Prof. Stiglitz provides the most lucid examination of what would comprise a genuine regime of trade liberalization:

"But trade liberalization must be balanced in its agenda, process and outcomes, and it must reflect the concerns of the developing world. It must take in not only those sectors in which developed countries have a comparative advantage, like financial services, but also those in which developing countries have a special interest, like agriculture and construction services. It must not only include intellectual property protections of interest to the developed countries, but also address issues of current or potential concern for developing countries, such as property rights for knowledge embedded in traditional medicines, or the pricing of pharmaceuticals in developing country markets." (52)

It is the above which WTO failed to do at Seattle, and has since failed to do in its aftermath. Following the Seattle Ministerial conference, the impression created by the WTO leadership, as well as by the countries of the North which had been the prime movers of the basic elements in the new WTO trade regime, was that there would be attempts made at reform. However, as one observer has pointed out, deliberations and pronouncements by the organization since Seattle do not appear to indicate much of a change of heart. (53) Thus, the problems of WTO are much larger than simply its approach to the substantive elements of its mandate. As in the case of OECD and MAI, WTO must radically review its mechanisms of operation, the role and place of both developing country participation and that of non-State actors such as NGOs, and its

relationship to the United Nations system as a whole. In other words, what is required is nothing less than a radical review of the whole system of trade liberalization and a critical consideration of the extent to which it is genuinely equitable and geared towards shared benefits for rich and poor countries alike. WTO must take on board the many suggestions that have been made with respect to improving access and transparency at the organization, not only for the purposes of improving internal democracy, but also for the good of constructing a more equitable and genuinely beneficial international trading system. (54)

(...)

27. See Yash Tandon, Globalization and Africa's Options, International South Group Network, Harare, 1999, at p. 11.

28. See, Jackson, op. cit., at note 3, pp. 824-825.

29. The General Agreement on Trade in Services (GATS), 15 April 1994. Reprinted in International Legal Materials, vol. 33, at p. 67.

30. The Agreement on Trade Related Intellectual Property Rights (TRIPS), 15 April 1994, Annex 1C to the Marrakech Agreement. Reprinted in International Legal Materials, vol. 33, at p. 81.

31. The Agreement on Government Procurement (AGP).

32. The Agreement on Trade Related Investment Measures (TRIMS), 15 April 1994 in Law and Practice of the World Trade Organization, Treaties Booklet 1, Release 95-1, at 161 (Joseph F. Denin, ed.), 1995.

33. See Jackson op. cit., at note 3, p. 825.

34. Joseph F. Stiglitz, "Trade and the Developing World: A New Agenda", Current History (November 1999), at p. 387.

35. See Barry Coates, "Why Free Trade is A Myth", The Independent, London, 10 October 1999.

36. Ahmed Mohiddin, "Partnership: A new buzz-word or realistic relationship?" Development, vol. 41, No. 4 (1997) at p. 7.

37. As Robert Howse and Makau Mutua have pointed out, the preamble to the WTO Agreement only refers to the raising of "standards of living" and not explicitly to human rights. See, Robert Howse and Makau Mutua, Trading in Human Rights: The Human Rights Obligations of the World Trade Organization, ICHRRD (April 2000), at p. 13.

38. For a good analysis, see Yash Tandon, "The World Trade Organization and Africa's Marginalization", Australian Journal of International Affairs, vol. 53, No. 1 (1999), at pp. 83-94.

39. Myriam Vander Stichelle, Trade Policy, the WTO and Gender (Information Paper of the Informal Working Group on Gender and Trade, November 1998), esp. pp. 16-20.

40. Gerry Helleiner and Ademola Oyejide, "Global Economic Governance, Global Negotiations and the Developing Countries", in UNDP, Globalization with a Human Face: Background Papers to the Human Development Report 1999, at p. 112.

41. Anne-Christine Hubbard and Marie Guirand, The WTO and Human Rights; FIDH Position Paper (November 1999); accessed on 14 May 2000.

42. The Organization for African Unity (OAU) issued a statement that mainly condemned the processual aspects of the meeting, using words such as a "lack of transparency" and the "marginalization" of African countries: "We are particularly concerned over the stated intentions to produce a ministerial text at any cost including at the cost of procedures designed to secure participation and consensus". See, "Africa Rejects WTO Deal" (AFP), reported in the The New Vision, Kampala, 4 December 1999, at p. 31.

43. "WTO Talks End in Failure" (AFP), reported in The New Vision, Kampala, 6 December 1999, at p. 61.

44. As Baker Wairama points out, a country like Uganda has only a single trade representative at the WTO headquarters in Geneva compared to an average of seven from each OECD country, supported by a coterie

of aides. Baker G. Wairama, "Impact of the World Trade Organization (WTO) on Uganda", paper presented to a Uganda Law Society conference on International Trade Law and Uganda: Closing the Gaps, Kampala, April 2000, at p. 4.

45. Havana Declaration of the G-77 South Summit, 14 April 2000 (accessed on 6 May 2000 at: <http://www.g77.org/>).

46. This was implicit in a veiled attack made by World Bank President James Wolfenson on the conditionality strategies applied by the Fund. See, Stephany Griffith-Jones and José Antonio-Ocampo, The Poorest Countries and the Emerging International Financial Infrastructure, Almquist and Wiksell International, Stockholm, 1999, at p. 56.

47. At Seattle, Secretary-General Kofi Annan issued the same message to the trade ministers, stating:

" globalization must not be used as a scapegoat for domestic policy failures. The industrialized world must not try to solve its own problems at the expense of the poor. It seldom makes sense to use trade restrictions to tackle problems whose origins lie not in international policy. By aggravating poverty and obstructing development, such restrictions often make the problems they are trying to solve even worse."

Kofi Annan, "Globalization - No Excuse for Domestic Failures", The East African, 6-12 December 1999, at p. 12.

48. One such area is the issue of labour rights which the International Confederation of Free Trade Unions (ICFTU) and the American Confederation of Labour - Congress of Industrial Organization (AFL-CIO) are pushing to have included in WTO. However, as Walden Bello has argued, such a strategy is deeply flawed for a number of reasons:

"First, by pursuing this objective through the WTO the IFCTU is conferring legitimacy on an international economic system which - at every other turn -squeezes and exploits workers. Second, it disregards the fact that many of the WTO agreements prohibit or restrict the power of national governments to implement policies which would improve the conditions for the mass of workers, especially those in the agricultural sector who comprise 59 per cent of the workforce in the Third World. Finally, and critically, it completely ignores the decisive role of footloose capital in keeping wages low and pitting worker against worker."

Nicola Bullard, "It's time for 'uncivil' society to act", Focus on Trade, No. 47 (March 2000, accessed at: <http://www.focusweb.org/>).

49. See Krysti Justine Guest, "Exploitation Under Erasure: Economic, Social and Cultural Rights Engage Economic Globalization", Adelaide Law Review, vol. 19, No. 1 (1997), at p. 81.

50. Vandana Shiva, "Intellectual Property Rights and Bioethics", paper presented at El Taller: International Conference and General Assembly on "The New Millennium: Globalization and its Challenges", Tunis, 12-16 November 1998 (on file with author).

51. There are numerous other problems associated with the issue of intellectual property in WTO, including the potential impact on agriculture and health services. See the report by Dagi Kimani, "Intellectual Property Bill Faces Opposition", The East African, 29 May-4 June 2000, at p. 7.

52. Stiglitz, op. cit. at note 34, p. 387.

53. International Centre for Trade and Sustainable Development (ICSTD), "Quad Offers Weak Starting Point for Confidence-building Package", in Bridges: Between Trade and Sustainable Development, Year 4, No. 3 (April 2000), at p. 2.

54. See, Andrew L. Strauss, "From GATTzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization", University of Pennsylvania Journal of International Economic Law, vol. 19, No. 3 (1998), p. 729.

(...)

*For a thorough exploration of the relationship between the WTO and Human Rights see the exchange on this matter between Ernst-Ulrich Petersmann, Robert Howse and Philip Alston which is reproduced in the Optional Reading section of this unit.*



## Gender Issues and International Trade

<http://www.cid.harvard.edu/cidtrade/site/gender.html>

*Center for International Development at Harvard University*

Over the past few decades there has been increasing attention paid to the gender dimensions of poverty and development. More recently - essentially the last five to 10 years - academics, NGOs and international organizations have begun to pay close attention to the gender dimensions of international trade regimes, liberalization, and the impact of trade regulations and WTO decisions.

More often than not, consideration of the gender dimensions of trade and other development issues means focusing on the impact on women. As Amartya Sen, Martha Nussbaum and others have emphasized, women tend to be disproportionately poor and disadvantaged in developing countries.[1] In addition, their ownership, control, and access to economic resources, assets and markets are often limited by social norms. Moreover, they also tend to work in specific sectors of the economy - e.g., textiles, the informal sector, and agriculture. Many of the trade issues discussed by the WTO today, therefore, have differential gender impacts through the sectors of the economy they affect. Indeed, some have referred to some countries' export-led growth successes as female-led, as most of the workers in export-processing zones tend to be female.

For instance, existing research indicates that "...on average, greater trade openness is associated with increases in women's share of paid employment." [3] However, authors are quick to emphasize that women's share of unpaid work in the home and elsewhere may remain unchanged, and that they may still experience discrimination in the workplace and in hiring.[4] Other authors are concerned that reduced social service expenditure due to reduced tariff revenues may place increased care-giving and other social burdens on women.[5]

Given that trade regulations can impact the economy at both a macro- and micro-level, there are many possible avenues through which their effects might be felt, most of which are only beginning to be studied. The study of the gender impact of trade is still in its infancy, not least because statistics are often not collected by gender.[6]

A principal objection is that for women in general "...improved social indicators do not automatically open the doors of power and improve participation and representation. Development interventions also often have narrow perspectives; even interventions that may have had positive outcomes for some women in terms of economic empowerment have neither translated into collective gains nor into sustained political power." [7] Practically speaking, gender analysis also increases the analytical burden for policymakers, by adding to the data that needs to be collected, the questions that need to be asked, and the nature of the research performed. From a trade perspective, this can provide useful insights. The World Bank has found that greater gender equality can promote growth by increasing female productivity, which in turn increases the productive capacity of the economy as a whole.[8]

The WTO is increasingly becoming a source of interest for those interested in the gender dimensions of trade. One women's group notes that of 159 trade policy experts on the WTO roster of dispute, a body which settles many disagreements, only 12 were women.[9] Slowly, however,

gender issues are making their way on to the WTO's agenda, as evidenced by a recent seminar on "Women as Economic Players in Sustainable Development" at the WTO's public symposium in June 2003. [10] Activist groups such as the International Gender and Trade Network (IGTN) are also carefully considering how gender issues should be addressed at the WTO, or 'mainstreamed' The IGTN, for instance, does 8] not support the establishment of a women's committee at the WTO, for fear that it would allow women's issue to be separated from rather than integrated into most discussions, or used as a public relations tool and little more.[11]

Still, there exists the normative question of whether gender issues should be explicitly on the WTO's agenda. Insofar as the goal of trade liberalization is the raising of living standards for all, then it follows that gender impacts be evaluated explicitly, just as the impacts of trade measures on rural versus urban and poor versus rich populations often are.

However, women's rights as codified in the Universal Declaration of Human Rights and other UN bodies and declarations have on occasion met with fierce resistance from member countries. If some countries object to specific gender or women's agendas under the UN's mission, they may well object more to the WTO taking on gender issues if they view it primarily as an organization to address economic rather than social issues. Yet, in UN members - and by implication, WTO members - made the declared in at the Fourth UN World Conference on Women in Beijing that they would "ensure that national policies related to international and regional trade agreements do not have an adverse impact on women's new and traditional economic activities." [12] Time will tell whether and how they choose to live up to this commitment.

### **Links**

[The Association for Women's Rights in Development \(AWID\)](#)

[Development Alternatives with Women in a New Era \(DAWN\)](#)

[European Women's Lobby](#)

[International Gender and Trade Network](#)

[United Nations Development Fund for Women \(UNIFEM\)](#)

[World Bank GenderNet](#)

### **Publications**

Carr, Marilyn and Martha Alter Chen. "[Globalization and the Informal Economy: How Global Trade and Investment Impact on the Working Poor.](#)" May 2001.

Evers, Barbara, "[Gender, International Trade and the Trade Policy Review Mechanism: Conceptual Reference Points For UNCTAD,](#)" January 23, 2002.

Epstein, Gerald. University of Massachusetts, Amherst. [Economics 797 Syllabus: Gender, Macro and International Economics.](#)

European Women's Lobby. "[Engendering International Trade: Gender Equality in a Global World.](#)"

Grown, Caren, Diane Elson, and Nilufer Cagatay. "Introduction." [World Development](#). Vol 28, No. 7 (July 2000), pp. 1145-1156.

Kapur, Akash. "[Humane Development.](#)" *The Atlantic Monthly*. 15 December 1999.

UNCTAD. "[Mainstreaming Gender to Promote Opportunities Through the Increased Contribution of Women to Competitiveness.](#)" Note by the Secretariat. December 31, 2001.

UNCTAD. "[Report of the Pre-LDC III Workshop on LDCs: Building Capacities for Mainstreaming Gender in the Development Strategies.](#)" March 21-23, 2001.

UNIFEM. "[Trade Liberalization and Women.](#)"

UNIFEM. "[Gender and the Financing for Development Agenda.](#)"

[Voices of the Poor](#) series published for the World Bank.

World Bank. [Engendering Development](#). Washington, DC: World Bank, 2001.

---

[1] For some brief commentary by Amartya Sen on aspects of the study of women and development, refer to Kapur, Akash, "Humane Development," *The Atlantic Monthly*, 15 December 1999 [online: web] URL: <http://www.theatlantic.com/unbound/interviews/ba991215.htm>.

[2] "Gender and Trade: A Conceptual Note," UNCTAD, 15 July 2003 [online: web] URL: [www.unctad.org](http://www.unctad.org).

[3] Grown, Caren, Diane Elson, and Nilufer Cagatay. "Introduction." *World Development*. Vol 28, No. 7 (July 2000), p. 1147. [online: web] URL: <http://www-unix.oit.umass.edu/~gepstein/econ797/updates/Week%20VII%20Gender/papers/grown.etal.2000.pdf>

[4] *Ibid.*

[5] Palmer, Ingrid, "Public Finance from a Gender Perspective," *World Development*, Vol. 23, No. 11 (December 1995) and Elson, D., B. Evers and J. Gideon, *Gender-Aware Country Economic Reports: Concepts and Sources*, Working Paper No. 1, Genecon Unit, Graduate School of Social Sciences, University of Manchester, cited in Evers, Barbara, "Gender, International Trade and the Trade Policy Review Mechanism: Conceptual Reference Points For UNCTAD," January 23, 2002, p. 8 [online: web] URL: <http://www.gapresearch.org/governance/BE%20evers%20unctad%20paper1.pdf>.

[6] For an emerging database, see the World Bank's GenderStats at: <http://genderstats.worldbank.org/home.asp>.

[7] Development Alternatives for a New Era (DAWN), "Marketisation of Governance," 2000, p. 23. [online: web] URL: <http://www.dawn.org.fj/publications/docs/platformdoc/ch2.pdf>.

[8] World Bank, Integrating Gender into the World Bank's Work: A Strategy for Action, 2002, p. 5, cited in Gibb, Heather, Ann Weston, Chantal Blouin, "Gender, Trade and the WTO," [Speaking Notes for the WTO Public Symposium](#), Challenges Ahead on the Road to Cancun, June 16, 2003, Geneva, p. 2.

[9] "The Continuing Absence of Women in International Financial Institutions," WIN News, Summer 2002 [online: web] URL: [http://www.findarticles.com/cf\\_0/m2872/3\\_28/90219952/p1/article.jhtml](http://www.findarticles.com/cf_0/m2872/3_28/90219952/p1/article.jhtml)

[10] For more information and the programme for the symposium, refer to: [http://www.wto.org/english/tratop\\_e/dda\\_e/symp\\_devagenda\\_03\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/symp_devagenda_03_e.htm).

[11] Riley, Maria, "Gender in the Multilateral Trading System; The Ongoing Debate," IGTN Monthly Bulletin, October-November 2003, Vol. 3, No. 8 [online: web] URL: [www.igtn.org](http://www.igtn.org).

[12] Cited in "The World Trade Organization, Gender Equality, and Trade," The North-South Institute [online: web] URL: <http://www.nsi-ins.ca/ensi/publications/wto.html>.

---

## Trade and Development

### Arrested Development

By Joseph Stiglitz\*

[\*Guardian\*](#), August 10, 2006

Hopes for a development round in world trade - opening up opportunities for developing countries to grow, and for reducing poverty - now seem dashed. Though crocodile tears may be shed all around, the extent of disappointment needs to be calibrated: Pascal Lamy, the head of the World Trade Organization, had long worked to diminish expectations, so much so that it was clear that whatever emerged would bring, at most, limited benefits to poor countries.

The failure hardly comes as a surprise: the United States and the European Union had long ago reneged on the promises they made in 2001 at Doha to rectify the imbalances of the last round of trade negotiations - a round so unfair that the world's poorest countries were actually made worse off. Once again, America's lack of commitment to multilateralism, its obstinacy, and its willingness to put political expediency above principles - and even its own national interests - has triumphed. With elections looming in November, President George W Bush could not "sacrifice" the 25,000 wealthy cotton farmers or the 10,000 prosperous rice farmers and their campaign contributions. Seldom have so many had to give up so much to protect the interests of so few.

The talks bogged down over agriculture, where subsidies and trade restrictions remain so much higher than in manufacturing. With 70% or so of people in developing countries depending directly or indirectly on agriculture, they are the losers under the current regime. But the focus on agriculture diverted attention from a far broader agenda that could have been pursued in ways that would have benefited both the north and the south. For example, so-called "escalating tariffs," which tax processed goods at a far higher rate than unprocessed products mean that manufacturing tariffs discourage developing countries from undertaking the higher value-added activities that create jobs and boost incomes.

Perhaps the most outrageous example is America's \$0.54 (28p) per gallon import tariff on ethanol, whereas there is no tariff on oil, and only a \$0.50 per gallon tax on gasoline. This contrasts with the \$0.51 per gallon subsidy that US companies (a huge portion of which goes to a single firm) receive on ethanol. Thus, foreign producers can't compete unless their costs are \$1.05 per gallon lower than those of American producers.

The huge subsidies have meant that the US has become the largest producer of ethanol in the world. Yet, despite this huge advantage, some foreign firms can still make it in the American market. Brazilian sugar-based ethanol costs far less to produce than American corn-based ethanol. Brazil's firms are far more efficient than America's subsidized industry, which puts more energy into getting subsidies out of Congress than in improving efficiency. Some studies suggest that it requires more energy to produce America's ethanol than is contained in it.

If America eliminated these unfair trade barriers, it would buy more energy from Brazil and less from the Middle East. Evidently, the Bush administration would rather help Middle East oil producers, whose interests so often seem at variance with those of the US, than Brazil. Of course, the administration never puts it that way; with an energy policy forged by the oil companies, Archer Daniels Midland and other ethanol producers are just playing along in a corrupt system of campaign-contributions-for-subsidies.

In the trade talks, America said that it would cut subsidies only if others reciprocated by opening their markets. But, as one developing country minister put it, "Our farmers can compete with

America's farmers; we just can't compete with America's treasury." Developing countries cannot, and should not, open up their markets fully to America's agricultural goods unless US subsidies are fully eliminated. To compete on a level playing field would force these countries to subsidise their farmers, diverting scarce funds that are needed for education, health, and infrastructure.

In other areas of trade, the principle of countervailing duties has been recognised: when a country imposes a subsidy, others can impose a tax to offset the unfair advantage given to that country's producers. If markets are opened up, countries should be given the right to countervail American and European subsidies. This would be a major step forward in trying to create a fair trade regime that promotes development.

At the onset of the development round, most developing countries worried not only that the EU and the US would renege on their promises (which they have in large part), but also that the resulting agreement would once again make them worse off. As a result, much of the developing world is relieved that at least this risk has been avoided. Still, there was a second risk: that the world would think that the agreement itself had accomplished the objectives of a development round set forth at Doha, with trade negotiators then turning once again to making the next round as unfair as previous rounds. This concern, too, now seems to have been allayed.

There remains one further concern: America has rushed to sign a series of bilateral trade agreements that are even more one-sided and unfair to developing countries, which may prompt Europe and others to do likewise. This divide-and-conquer strategy undermines the multilateral trade system, which is based on the principle of non-discrimination. Countries that sign these agreements get preferential treatment over all others. But developing countries have little to gain and much to lose by signing these agreements, which almost never deliver the promised benefits.

Indeed, the entire world is the loser if the multilateral trade system is weakened. The rest of the world must not embrace America's unilateral approach: the multilateral trade system is too precious to allow it to be destroyed by a US president who has repeatedly shown his contempt for global democracy and multilateralism.

**About the Author:** *Joseph E. Stiglitz, the 2001 recipient of the Nobel Prize in economics, is the author of the forthcoming book **Making Globalization Work**. Anton Korinek of Columbia University contributed to this piece.*

## OPTIONAL READINGS

**The American**  
**The Journal of the American Enterprise Institute**  
**American.com**

**A Magazine of Ideas**

### **A Tale of Two Nanos**

By Daniel Griswold Wednesday, January 3, 2007

Filed under: Science & Technology, Economic Policy, World Watch

**Daniel Griswold finds a thriving global labor market in his Christmas stocking.**

A few days before Christmas, my kids and I picked through the dwindling and deeply discounted inventory of CDs at the local Tower Records store, which was about to close its doors for the last time. New technology had put them out of business. Why leave home to spend \$17.99 for a compact disc when you can spend far less to download your favorite songs from iTunes, Apple's online music store, and play it on your Apple iPod Nano?

My two sons, aged 15 and 12, each received a Nano for Christmas. In a small way, my family's purchase of two Nanos helped to put the sales clerks at Tower Records out of a job. As I was admiring the cool design and user-friendly functions on my boys' new Nanos, I noticed an inscription on the back: "Designed by Apple in California. Assembled in China." That's a more clever label—and a more accurate depiction of economic trends—than the "Made in China" we see stamped on so many imported shirts, shoes, toys, and consumer electronics.

To those obsessed with the trade balance as a zero-sum scorecard, another imported, \$200 Nano merely adds to our growing bilateral trade deficit with China and knocks a few more Americans out of jobs. Wouldn't we be better off, they ask, if the whole thing were made and assembled at home by American workers?

The answer is a definite no.

As with other high-tech devices, iPods are assembled in China, but the real guts of the device—the brand name, the design, the engineering, the most sophisticated components—come from the United States and other countries outside of China. Like

trade in general, importing iPods from China creates a win-win scenario for people in both countries. Assembling the devices is relatively high-paying work in China, so the Chinese workers and their economy do benefit to some extent. But Americans benefit even more from the deal—even, in the long run, the tattooed and pierced erstwhile clerks from Tower.

Thousands of Apple designers, engineers, and programmers are better off, along with the company's suppliers and everyone who owns Apple stock. And of course, the owners of the 70 million iPods sold since 2001 are reaping far more enjoyment from the devices than the Chinese workers who assembled them. Judging by the delight on their faces a few days ago, my two boys are clearly among the winners.

The example of our two Nanos provides a metaphor for America's trade relationship with China. Extrapolating from trade numbers through October 2006, Americans bought an estimated \$286 billion worth of goods "Made in China" in the year just ended. More than three-quarters of those goods are consumer products that make our lives better everyday at home and the office—just the kind of stuff that made its way under our Christmas trees this holiday season. When congressional leaders talk about getting tough with China by imposing tariffs on all those imports, it must bring a twisted smile to the cold-hearted Grinch.

A steep tariff on iPod Nanos and other imports from China would only succeed in driving up the cost and price of those imports. It would probably still not make economic sense to have them assembled in the United States, because such relatively low-skilled, labor-intensive work would still be done more cheaply in some other developing country. Higher prices for Nanos would mean fewer sales, fewer opportunities for Apple's own high-skilled workers, lower returns for its shareholders, and fewer Americans experiencing the pleasure of holding one in their hands.

True to the theory of comparative advantage, our trade with China helps us focus on what we do best—such as designing and engineering high-tech devices—while the Chinese do more of what they do best—producing lower-end parts and products at competitive cost, and combining them with more sophisticated components made elsewhere for final assembly and delivery. As the Nano illustrates, China has become the final link in a global manufacturing supply chain in which the United States continues to play a leading role.

In the short run, our friends at Tower are the big losers in this Christmas tale of two Nanos. But given the dynamic, flexible nature of our global labor market, they will no doubt find jobs somewhere else before too long, most likely better jobs. Perhaps, eventually, they will find jobs in sunny California designing devices that will make Nanos obsolete—and will stuff my sons' sons' stockings.

*Daniel Griswold is director of the Center for Trade Policy Studies at the Cato Institute and author of the recent study, "Who's Manipulating Whom? China's Currency and the U.S. Economy," available at <http://www.freetrade.org/>. He blogs at [Cato-at-liberty](http://Cato-at-liberty).*





---

## THE JEAN MONNET PROGRAM

*Professor J.H.H. Weiler*  
*European Union Jean Monnet Chair*

Jean Monnet Working Paper 7/01

Ernst-Ulrich Petersmann

### **TIME FOR INTEGRATING HUMAN RIGHTS INTO THE LAW OF WORLDWIDE ORGANIZATIONS**

**Lessons from European Integration Law for Global Integration Law**

# TIME FOR INTEGRATING HUMAN RIGHTS INTO THE LAW OF WORLDWIDE ORGANIZATIONS

## Lessons from European Integration Law for Global Integration Law

by Ernst-Ulrich Petersmann\*

“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

Universal Declaration of Human Rights 1948, Article 28

### Abstract

Most people spend most of their time on their economic activities of producing goods and services and exchanging the fruits of their labor for other goods and services that are necessary for their survival and personal development. Also international trade and investments are never ends in themselves, but *means* for increasing individual and social welfare through voluntarily agreed and mutually beneficial transactions involving the exercise of liberty rights and property rights. Even though the *economy* is no less important for citizens and their human rights than the *polity*, the interrelationships between human rights and economic welfare - notably the enormous opportunities of the international division of labor for enabling individuals to increase their personal freedom, real income and access to resources necessary for the enjoyment of human rights - are neglected by human rights doctrine. The “Global Compact”, launched by UN Secretary-General Kofi Annan in 1999, calls upon business to “support and respect the protection of international human rights within their sphere of influence and make sure their own corporations are not complicit in human rights abuses.” This contribution calls for a complementary “Global Compact” between the UN and UN Specialized Agencies, as well as with other worldwide *public organizations* like the World Trade Organization (WTO), so as to integrate universally recognized human rights into the law and practice of *intergovernmental organizations*, for example by requiring them to submit annual “human rights impact statements” to UN human rights bodies and to engage in transparent dialogues about the contribution by specialized agencies to the promotion and protection of human rights. In view of the inherent tendency of liberty to destroy itself (“paradox of freedom”), human rights need legislative, administrative and judicial protection in the national and international economy no less than in the polity vis-à-vis private as well as governmental abuses of power.

Such an “integration approach” differs fundamentally from the 1945 paradigm of “specialized agencies”. It takes into account the regional experiences in Europe that respect for human rights in integration law enhances not only the protection of human rights across frontiers, democratic legitimacy and rule of law at national and international levels of governance, but also economic and social welfare. The article argues that the universal recognition of human rights as “inalienable birth rights” of every human being entails “constitutional primacy” of the inalienable core of human rights vis-à-vis national and international legislative, executive and judicial activities that serve “constitutional functions” by operationalizing and balancing human rights. As in European integration law, human rights should be recognized also in global integration law as empowering citizens, as constitutionally limiting abuses of national and international regulatory powers, and as requiring governments to protect and promote human rights in all policy areas and across national frontiers. The article criticizes UN human rights law for neglecting economic liberties, property rights and freedom of competition because - as legal preconditions for a mutually welfare-increasing

---

\* Professor of international and European law at the European University Institute and its Robert Schuman Center at Florence. Former professor at the Universities of St. Gallen, Fribourg, Lausanne, Geneva and its Graduate Institute of International Studies, as well as legal adviser in the German Ministry of Economic Affairs, GATT and the WTO. Chairman of the International Trade Law Committee of the International Law Association. A first version of this paper was submitted for the “day of general discussion” hosted by the UN Committee on Economic, Social and Cultural Rights on 7 May 2001 at the office of the UN High Commissioner for Human Rights.

division of labor among free citizens that promote efficient use of scarce resources - economic human rights are essential for enabling individuals to acquire, possess, use and dispose of the resources necessary for enjoying human rights. A UN Action Program for integrating human rights into the law of worldwide organizations is necessary so as to render the “indivisibility” of human rights, and their instrumental functions for promoting economic and social welfare and “democratic peace”, more effective. The article concludes with case-studies on the need for integrating liberty rights and social rights into the law of the WTO so as to render human rights and also WTO law more effective.

### **Introduction: Time for Reconsidering the ‘Washington Consensus’ and Strengthening Human Rights in Global Integration Law**

The human rights obligations in the UN Charter and in the Universal Declaration of Human Rights (UDHR) of 1948 were negotiated at the same time as the 1944 Bretton Woods Agreements, the General Agreement on Tariffs and Trade (GATT) of 1947 and the 1948 Havana Charter for an International Trade Organization. All these agreements aimed at protecting liberty, non-discrimination, rule of law, social welfare and other human rights values through a rules-based international order and “specialized agencies” (Article 57 UN Charter) committed to the economic principle of “separation of policy instruments”:

- *foreign policies* were to be coordinated in the UN so as to promote “sovereign equality of all its Members” (Article 2:1 UN Charter) and collective security;
- *liberalization of payments* and *monetary stability* were collectively pursued through the rules and assistance of the International Monetary Fund (IMF);
- GATT 1947 and the Havana Charter aimed at mutually beneficial *liberalization of international trade and investments*;
- *development aid and policies* were coordinated in the World Bank Group;
- and *social laws and policies* were promoted in the International Labor Organization (ILO) and other specialized agencies (like UNESCO and WHO).

Apart from a few exceptions (notably in ILO, UNESCO and WHO rules), human rights were not effectively integrated into the law of most worldwide organizations so as to facilitate *functional international integration* (such as liberalization of trade and payments) notwithstanding different views of governments on human rights and domestic policies (such as *communism*). In accordance with the “principles of justice” elaborated by modern legal philosophers<sup>1</sup> and reflected in the constitutional law of the leading postwar hegemonic power<sup>2</sup>, the postwar institutions gave priority to reciprocal international *liberalization* (e.g. in the context of the IMF, GATT, WTO, WIPO and ILO) and to *wealth creation*. *Economic and social rights* and *redistribution of wealth* were perceived as primarily the responsibility of *national* governments, to be supplemented by “international benevolence”.<sup>3</sup>

---

<sup>1</sup> See e.g. J.Rawls, A Theory of Justice, revised edition 1999, Chapter II, whose conception of “justice as fairness” for defining the basic rights and liberties of free and equal citizens in a constitutional democracy gives priority to maximum equal liberty as “first principle of justice”. Rawls’ “principle of fair equality of opportunity” and his “difference principle” are recognized only as secondary principles necessary for socially just conditions essential for moral and rational self-development of every person. Kantian legal theory also gives priority to a legal duty of states to ensure conditions of maximum law-governed freedom over moral “duties of benevolence” to provide for the needs of the citizens (cf. A.D.Rosen, Kant’s Theory of Justice, 1993, at 217; P.Guyer, Kant on Freedom, Law and Happiness, 2000, at 264 *et seq.*).

<sup>2</sup> For instance, the Bill of Rights, which had to be appended to the US Constitution in order to secure its ratification, focuses more on “inalienable rights” to life and liberty than on social rights to secure “the general Welfare” (recognized as an objective of the US Constitution in its Preamble).

<sup>3</sup> On legal philosophies concerning moral and legal duties of assistance vis-à-vis “burdened societies”, the “principle of just savings”, a “property-owning democracy” promoting widespread ownership of economic and human capital, and on “distributive justice among peoples” see e.g.: J.Rawls, The Law of Peoples, 1999, chapters 15 and 16. Human rights law still lacks a coherent theory on transnational economic and social human

This contribution argues that there are important moral, legal, economic and political reasons why the “logic of 1945” no longer offers an appropriate paradigm for global integration and democratic peace in the 21<sup>st</sup> century. The “human rights clauses” in the European Union (EU) Treaty, in the association and cooperation agreements between the EU and more than twenty countries in Eastern Europe and the Mediterranean, and in the EU’s Cotonou Agreement with 77 African, Caribbean and Pacific states make “respect for human rights, democratic principles and the rule of law ... essential elements” of these agreements.<sup>4</sup> The Quebec Summit Declaration of April 2001 and the “Inter-American Charter of Democracy” of September 2001, adopted by more than 30 member states of the Organization of American States, likewise link the plans for a Free Trade Area of the Americas (FTAA) to the strengthening of human rights and democracy. Even though *realists* continue to dominate foreign policy-making, human rights are becoming ever more important parts of the national identity and of the foreign and security policies of states, as illustrated by the humanitarian intervention by the 19 NATO countries in the Kosovo crisis and their invocation of NATO’s mutual defense principle (Article 5) in response to the terrorist attacks in New York and Washington on 11 September 2001.<sup>5</sup> The now regular civil society protests at the annual conferences of the IMF, the World Bank and the WTO, and the proposals for including environmental rules and social standards into the global integration law of the WTO, are further illustrations of the need to examine whether the European and American “integration paradigm” should not also become accepted at the worldwide level in order to promote consensus on a new kind of global integration law based on human rights and solidary sharing of the social adjustment costs of global integration.

The needed change from international functionalism to constitutionalism does not put into question the economic efficiency arguments for “optimizing” and separating policy instruments.<sup>6</sup> However, European integration confirms that the collective supply of public goods (such as global division of labor) may not be politically feasible without comprehensive “package deals” including redistributive “principles of justice” and solidary responses to “market failures”.<sup>7</sup> Less-developed countries, for instance, often perceive market competition as a “license to kill” for multinational corporations from developed countries as long as liberal trade rules are not supplemented by competition and social rules (as in the EC) promoting fair opportunities and equitable distribution of the gains from trade. In order to remain politically acceptable, global integration law (e.g. in the WTO) must pursue not only “economic efficiency” but also “democratic legitimacy” and “social justice” as defined by human rights. Citizens will rightly challenge the democratic and social legitimacy of integration law if it pursues economic welfare without regard to social human rights, for example the *human right to education* of the 130 million children (aged from 6 to 12) who do not attend primary school; the *human right to basic health care* of the 25 million Africans living with AIDS, or of the about 35'000 children dying each day from curable diseases; and the *human right to food and an adequate standard of living* for the 1.2 billion people living on less than a dollar a day. The new opportunities for the worldwide enjoyment of human rights created by global division of labor (such as additional economic resources, job opportunities, worldwide communication systems, access to new medicines and technologies) must be accompanied by stronger legal protection of social

---

rights (e.g. to food and health protection) vis-à-vis foreign governments and international organizations. On human rights and “global justice” see: R.A.Falk, *Human Rights Horizons. The Pursuit of Justice in a Globalizing World*, 2000.

<sup>4</sup> The quotation is from Article 9 of the Cotonou Agreement signed in June 2000 by the EU, the 15 EU member states and 77 ACP countries. On human rights in the external relations law of the EU see e.g. the contributions by Clapham, Simma, Aschenbrenner and Schulte to: P.Alston/M.Bustelo/J.Heenan (eds.), *The EU and Human Rights*, 1999.

<sup>5</sup> See *International Herald Tribune* of 13 September 2001, at 3. See more generally e.g. D.P.Forsythe (ed.), *Human Rights and Comparative Foreign Policy*, 2000; *idem*, *Human Rights in International Relations*, 2000.

<sup>6</sup> See e.g.: W.M.Corden, *Trade Policy and Economic Welfare*, 1974; W.K.Viscusi/J.M.Vernon/J.E.Harrington, *Economics of Regulation and Antitrust*, 2<sup>nd</sup> ed. 1997.

<sup>7</sup> On the need for international organizations and international aid for the provision of “global public goods” see I.Kaul/I.Grunberg/M.A.Stern (eds.), *Global Public Goods. International Cooperation in the 21<sup>st</sup> Century*, 1999.

human rights so as to limit abuses of deregulation (e.g. by international cartels, trade in drugs and arms, trafficking in women and children), help vulnerable groups to adjust to change without violation of their human rights, and put pressure on authoritarian governments to protect not only business interests but the human rights of all their citizens.

## **1 Legal, Economic and Political Arguments for Integrating Human Rights into the Law of Worldwide Organizations**

Most of the 143 WTO member states have ratified or signed the 1966 UN Covenants on civil, political, economic, social and cultural human rights, other UN human rights covenants as well as regional and bilateral treaties on the protection of human rights. In contrast to the judicial remedies provided for in the European and Inter-American Human Rights conventions<sup>8</sup>, however, the worldwide human rights obligations and supervisory bodies under the six “core” UN human rights treaties (on civil, political, economic, social and cultural human rights, rights of the child, prohibition of torture, racial discrimination and discrimination against women) do not ensure effective protection of human rights by national and international courts.<sup>9</sup> The 183 multilateral treaties on labor and social standards adopted in the ILO suffer likewise from inadequate enforcement mechanisms.<sup>10</sup> In many countries, widespread and unnecessary poverty, health and food problems reflect a lack of effective protection of human rights through legislation, administrative procedures (e.g. in agricultural, health and labor ministries), judicial remedies and assistance by national and international organizations for the protection of human rights (e.g. to health, food and work). The more globalization renders “foreign” and “domestic affairs” inseparable, the more “realist” claims for separation of policy instruments and for “primacy of foreign policy” (including monetary policy in the IMF and trade policy in the WTO) risk undermining human rights and policy-coherence at home and abroad.

From a human rights perspective, the universal recognition of human rights as part of *general international law* requires a human rights framework for *all areas* of international law and international organizations so as to render human rights more effective and promote better coherence of national and international law and policies. The state-centered tradition of treating individuals as mere objects of international law, and the contradictory behavior of governments paying lip-service to human rights in UN bodies but advocating “realpolitik” without regard to human rights in “specialized” international organizations, are inconsistent with the legal primacy and constitutional functions of human rights. The universal recognition of the *indivisibility of civil, political, economic, social and cultural human rights* has contributed to increasing jurisprudence by national and international courts that economic and social rights (such as the EC Treaty guarantees of freedom of trade and non-discrimination of women) may be no less justiciable than civil and political rights.<sup>11</sup>

---

<sup>8</sup> The African Charter on Human and Peoples’ Rights, in force since October 1986 and now ratified by all 53 member states of the Organization of African Unity, does not provide for access to an African Court of human rights. The *African Commission on Human and Peoples Rights* has, however, received one inter-state and several non-state complaints. In some African countries like South Africa, constitutional protection and justiciability of economic, social and cultural human rights are well established.

<sup>9</sup> For critical assessments of the effectiveness of worldwide human rights treaties see e.g.: P.Alston/J.Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, 2000. For a recent collection of international human rights treaties see e.g.: *Human Rights in International Law*, Council of Europe 2000. For the political obstacles to implementing human rights in a world of “realist” power politics see e.g. D.P.Forsythe (note 5).

<sup>10</sup> For a recent critical assessment of the ILO supervisory and promotional systems and of other mechanisms to promote core labor standards worldwide see e.g.: *International Trade and Core Labor Standards*, OECD 2000, at 43 *et seq.* In November 2000, the ILO’s Governing Body concluded that the 1998 report and recommendations of the ILO’s Commission of Inquiry on forced labor in Myanmar had not been implemented and therefore “sanctions” should take effect. The ILO lacks, however, powers to ensure that economic sanctions are effectively implemented.

<sup>11</sup> European jurisprudence (e.g. by the EC Court of Justice and the European Court on Human Rights) has long since recognized that obligations to respect, protect and fulfil economic and social human rights may be “justiciable” even if they entail not only “negative” but also “positive” obligations (e.g. to promote non-discriminatory access to education). On the particular problems of “welfare rights” (such as indeterminacy

Also economists, politicians and civil society groups increasingly recognize the relevance of human rights for economic welfare which must be defined not only in quantitative terms (e.g. as increase in real income and national production of goods and services) but also in terms of substantive freedom and real capability of citizens to have access to the resources necessary for exercising human rights. European integration offers *three important lessons* why, and how, human rights need to be integrated into the law of international organizations so as to better enable citizens to pursue their self-development, peace and prosperity across frontiers.

#### **A The Law of International Organizations Must be Construed in Conformity with the Human Rights Recognized by Member States**

Just as the ratification of the European Convention on Human Rights (ECHR) by all EC member states prompted the EC Court of Justice to construe EC law in conformity with the human rights guarantees of the ECHR, the law of worldwide organizations must be interpreted in conformity with universally recognized human rights law.<sup>12</sup> The necessary balancing of civil, political, economic, social and cultural human rights may legitimately differ from country to country in response to their different laws and procedures, resources and preferences. In worldwide organizations, governments therefore remain reluctant to incorporate “human rights clauses” into the law of specialized organizations so as to avoid conflicts between international and domestic laws. As in the EC, international courts (e.g. the WTO Appellate Body) and human rights organizations (e.g. the UN Committee on Economic, Social and Cultural Rights) should therefore take the lead – with due deference to the “margin of discretion” of democratic legislatures, and in cooperation with the growing civil society requests for more effective protection of human rights in worldwide organizations – in interpreting and progressively developing the law of specialized organizations in conformity with universally recognized human rights. The needed human rights framework for coherent national and international “multi-level governance” requires a “global compact” for incorporating human rights into the *public law* of intergovernmental organizations no less than for promoting respect for human rights in *private business practices* of international corporations. The UN should call upon all international organizations to submit annual “human rights impact statements” examining and explaining the contribution of their respective laws and practices to the promotion of human rights.

#### **B Human Rights Promote the Effectiveness of International Organizations**

The human-rights-approach advocated by the UN Development Program, and its central insight that “rights make human beings better economic actors”, should become accepted as a common legal framework by all international organizations.<sup>13</sup> Legal doctrine has long since neglected that human rights constitute not only moral and legal rights and corresponding obligations of governments. They also serve instrumental functions for solving social problems confronting all societies<sup>14</sup>, such as:

---

of redistributive rights, their dependence on personal responsibility), the distinction between social rights in welfare states and social human rights, and the need for constitutional safeguards against abuses of welfare institutions, see e.g. K.Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, 1999. Many civil and political human rights (like the right to vote) also imply not only “negative” but also “positive obligations” (e.g. to render the right effective through legislation and administrative procedures that involve economic costs).

<sup>12</sup> As shown below, this follows both from UN human rights law as well as from the general international law rules on treaty interpretation (cf. Article 31 of the Vienna Convention on the Law of Treaties), notwithstanding the fact that the statutes of most UN Specialized Agencies (with the exception of the ILO, WHO and UNESCO) do not explicitly refer to human rights.

<sup>13</sup> See: Human Development Report 2000: Human Rights and Human Development, UNDP 2000 (the quotation is from p. iii).

<sup>14</sup> On the instrumental function of human rights for dealing with the problems of limited knowledge, conflicting interests and abuses of power see e.g.: R.E.Barnett, *The Structure of Liberty. Justice and the Rule of Law*, 2000.

- (1) *Conflict of interest problems*: Equal human rights set incentives for transforming the Hobbesian “war of everybody against everybody else” among utility-maximizing egoists in the “state of nature” where the “wild, lawless liberty” (Kant) of individuals may depend on their physical power, into peaceful cooperation based on equal legal rights. Also in the economy, the inevitable conflicts between producer interests (e.g. in high sales prices) and consumer interests (e.g. in low prices) can be reconciled best on the basis of equal liberty rights (e.g. freedom of contract) and other human rights.
- (2) *Power problems*: The history of successive “human rights revolutions” demonstrates that human rights offer “countervailing powers” enabling citizens to defend their human rights to self-government against abuses of government powers and to limit the constitutional task of governments to the “public interest” defined in terms of equal human rights.
- (3) *Compliance and enforcement problems*: Most rules do not enforce themselves. There are also often no political lobbies for rule-compliance and correction of enforcement errors. Human rights (e.g. of access to courts) and corresponding obligations (e.g. for compensation for violations of human rights) set incentives for decentralized enforcement of rules by self-interested, vigilant citizens.
- (4) *Value problems*: By protecting (e.g. through freedom of religion, freedom of opinion and freedom of the press) diversity of individual values and preventing majorities from imposing their value preferences on minorities, human rights promote peaceful coexistence, tolerance and scientific progress.
- (5) *Scarcity problems*: Human rights (e.g. property rights, freedom of contract) set incentives for savings, investments and mutually beneficial division of labor and enable individuals to acquire, buy and sell goods and services whose supply remains scarce in relation to consumer demand.
- (6) *Information problems*: Human rights (e.g. to freedom of information) not only entitle individuals to act on the basis of their own personal knowledge and to acquire and take into account the personal knowledge of others. They also protect decentralized, spontaneous information and coordination mechanisms (such as market prices) which enable individuals to take into account knowledge dispersed among billions of human beings even if individuals remain inevitably “rationally ignorant” of most of this dispersed knowledge.

As long as unnecessary poverty continues to prevent billions of human beings from enjoying human rights, the empirical evidence on the contribution of human rights to economic welfare is of particular importance for promoting the effectiveness of human rights.<sup>15</sup> For instance, property rights and liberty rights set incentives for efficient use of resources and enable citizens to coordinate their individual investments, production, trade and consumption in a decentralized and welfare-increasing manner. By assigning liberty rights (e.g. to self-development, freedom of contract and freedom of exchange) and property rights (e.g. to acquire, possess, use and dispose of scarce resources), and by defining individual responsibility and liability rules, human rights create incentives for savings, investments, efficient use of dispersed knowledge, mutually beneficial cooperation (e.g. through agreed exchanges of property rights) and decentralized markets (e.g. for labor, capital, goods and services) aimed at satisfying consumer demand and consumer preferences. Such “economic markets” inducing investors, producers and traders to supply private goods and services demanded by

---

<sup>15</sup> See note 13 as well as: M.Olson, *Power and Prosperity*, 2000, explaining why “almost all of the countries that have enjoyed good economic performance across generations are countries that have stable democratic governments” (p.43), and why “individual rights are a cause of prosperity” (p.187); R.Pipes, *Property and Freedom*, 1999, who explains prosperity as resulting from “successful struggle for rights of which the right to property is the most fundamental” (p.291); World Development Report 2000/2001: *Attacking Poverty*, World Bank 2000; D.C.North, *Institutions, Institutional Change and Economic Performance*, 1990.

consumers involve democratic “dialogues about values”<sup>16</sup> which are no less important for effective enjoyment of human rights than the “political markets” for the supply of “public goods” by governments.

The centuries-old English and American common law tradition of protecting equal freedoms of traders, competitors and consumers against “unreasonable restraint of trade” and “coercion” reflect an early recognition of the historical experience that markets risk to destroy themselves (e.g. as a result of monopolization and cartel agreements) unless freedom and abuses of power are constitutionally restrained.<sup>17</sup> The history of competition law and constitutional law in Europe and North America confirms the economic insight that the efficiency of market mechanisms (e.g. for allocating resources in a manner coordinating supply and demand) depends, *inter alia*, on effective protection of individual freedoms (e.g. of information, production, trade, competition and freedom of association) and protection of property rights in both material and intellectual resources. If market failures adversely affect human rights, economic theory teaches that governments should correct such market imperfections through “optimal” interventions directly at the source of the problem (e.g. through labor, social and health legislation, prohibitions of cartels and environmental pollution) without preventing citizens to engage in mutually beneficial trade.

The economic and human resources needed for the full enjoyment of human rights thus depend on making human rights an integral part of a social and sustainable market economy.<sup>18</sup> The successful integration of human rights into EC law and policies confirms that the economy and “specialized organizations” must not be regarded as autonomous fields unrelated to the human rights of producers, workers, investors, traders and consumers. In order to strengthen the mutual synergies between human rights and integration law also at the worldwide level, UN human rights law must overcome its longstanding neglect of economic liberty rights, property rights and competition safeguards as indispensable means of promoting widespread ownership of economic and human capital (such as health and education) and of preventing small minorities from controlling the economy and polity. WTO members must likewise interpret their declared treaty objectives of “raising standards of living, ensuring full employment and a large and steadily growing volume of real income..., while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development” (Preamble of the WTO Agreement), in conformity with their human rights obligations.

### **C Human Rights Promote Democratic Legitimacy and Self-Governance in International Organizations**

At the *national level*, most of the 189 UN member states now recognize human rights and the need for constitutional rules protecting, implementing and balancing human rights. In Europe and North America, almost all countries have introduced also complementary constitutional safeguards of market economies and competition laws based on the insight that equal freedoms of citizens need to be protected through institutions, procedures, substantive legal safeguards and individual rights in the *economy* no less than in the *polity* so as to prevent abuses of private and public power that were not consented by citizens and reduce their welfare. At the level of *worldwide organizations*, however, protection of universally recognized human rights often remains ineffective because the

---

<sup>16</sup> Cf. W.Fikentscher, *Wirtschaftsrecht* Vol. I, 1983, at 10.

<sup>17</sup> On this common dilemma of market economies and democracy, and on the replacement of the rights-based common law criteria by efficiency-based economic criteria (such as absence of out-put and price restrictions) in modern US antitrust law, see: G.Amato, *Antitrust and the Bounds of Power*, 1997; D.Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, 1998. More generally on the paradoxical dependence of liberty on constitutional restraints see: J.Elster, *Ulysses Unbound*, 2000.

<sup>18</sup> See e.g. M.Robinson, *Constructing an International Financial, Trade and Development Architecture: The Human Rights Dimension*, in: M.Mehra (ed.), *Human Rights and Economic Globalisation: Directions for the WTO*, 1999, at 187: “if we hope to see human rights flourishing, it will only be in the context of an equitable and sustainable economic order”.



complementary constitutional principles needed for effectuating human rights – such as democratic participation, parliamentary rule-making, transparent “deliberative democracy”<sup>19</sup> and judicial protection of rule of law – have not yet become part of the law and practices of most worldwide organizations.

The history of European integration suggests that the emergence of a human rights culture promoting democratic peace and social welfare depends on empowering individuals to defend not only their civil and political human rights, but also their economic and social rights through individual and democratic self-government and access to courts. Inside the EC, the judicial protection of “market freedoms” and of non-discrimination principles as fundamental individual rights<sup>20</sup> became an important driving force for the progressive realization of the common market and of “an area of freedom, security and justice” (Article 61 EC Treaty). The EC Court emphasized that economic freedoms “are not absolute but must be viewed in relation to their social function”<sup>21</sup> and with due regard to human rights.<sup>22</sup> The EC jurisprudence on social rights (e.g. “the principle of equal pay for male and female workers for equal work” in Article 141 EC Treaty) strongly contributed to the emergence of a European “social market economy” in which EC member states are required to extend social rights (e.g. to education and vocational training) to nationals of other EC member states.<sup>23</sup> The new treaty objective of “appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” (Article 13) confirms the functional interrelationships between economic and political order and human rights.

Outside Europe, the withdrawal, in April 2001, of the complaints in the South African Supreme Court by 39 pharmaceutical companies against government regulations facilitating access to AIDS medicaments likewise demonstrated the importance of *civil society* support and of judicial remedies for reconciling national and international economic law (e.g. on trade-related intellectual property rights) with social human rights. In UN human rights law, however, the *indivisibility of human rights* and *justiciability of economic and social rights* are not sufficiently protected so as to enable citizens, economic operators and judges to enforce and progressively develop economic and social rights in domestic and international courts (as inside the EC). An anti-market bias of UN human rights law will also reduce its operational potential as a benchmark for the law of worldwide economic organizations and for a rights-based market economy and jurisprudence e.g. in WTO dispute settlement practice. Reconciling civil, economic and social human rights also requires to admit that, in a world of constant change, human rights cannot be rights to be immune from adjustment pressures. Promoting individual responsibility and human capacity to adjust to inevitable change in a manner respecting human dignity remains one of the most difficult tasks of a human rights policy protecting individual liberty and global integration across frontiers.

---

<sup>19</sup> See e.g.: H.H.Koh/R.C.Slye (eds.), *Deliberative Democracy and Human Rights*, 1999.

<sup>20</sup> See e.g. Case 240/83, *ADBHU*, ECR 1985 531, para.9: “the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.” Especially the freedom of movements of workers and other persons, access to employment and the right of establishment have been described by the EC Court as “fundamental freedoms” (Case C-55/94, *Gebhard*, ECR 1995, I 4165, para.37) or “a fundamental right which the Treaty confers individually on each worker in the Community” (Case 22/86, *Heylens*, ECR 1987, 4097, para.14). The ECJ avoids “human rights language” for the “market freedoms”, the right to property and the freedom to pursue a trade or business in EC law.

<sup>21</sup> Case C-44/94, *The Queen v. Minister of Agriculture*, ECR 1995 I-3115, para.28.

<sup>22</sup> Cf. L.Betten/N.Grief, *EU Law and Human Rights Law*, 1998; P.Alston *et alii* (note 4).

<sup>23</sup> Due to the constitutional limits of EC law, social rights were initially developed in EC law as a function of market integration rather than of the more recent EC Treaty guarantees of “citizenship of the Union” (Article 17) and of “fundamental social rights” (e.g. Article 136). On the need for integrating social rights into market integration law as a means for limiting social market failures (e.g. resulting from an unjust distribution of resources and purchasing power, inadequate opportunities of all market participants to express their “voice” and “exit”) see e.g.: M. Poirares Maduro, *Striking the Elusive Balance between Economic Freedom and Social Rights in the EU*, in: Alston (note 4), at 459.

## 2 Obstacles on the Way Towards a ‘Human Rights Culture’ in Global Integration Law: Learning from European Integration

State-centered international lawyers often ignore that markets are a necessary consequence of, and an indispensable means for, effective protection of human rights. European integration confirms the insight of “functional theories” that citizen-driven market integration can set strong incentives for transforming “market freedoms” into “fundamental rights” which - if directly enforceable by producers, investors, workers, traders and consumers through courts (as in the EC) – can reinforce and extend the protection of basic human rights (e.g. to liberty, property, food and health). Functional “low policy integration” may also contribute more effectively to “democratic peace” than it may be possible in government-centered “high policy organizations” (like the UN) whose foreign policy and security objectives often meet with political resistance on grounds of national sovereignty.

### A Market Integration Law Can Promote Human Rights

Wherever freedom and property rights are protected, individuals start producing and exchanging goods and services demanded by consumers. Enjoyment of human rights requires use of dispersed informations and economic resources that can be supplied most efficiently, and most democratically, through division of labor among free citizens and liberal trade promoting economic welfare, freedom of choice, and the free flow of scarce goods, services and informations across frontiers.<sup>24</sup> The fact that most people spend most of their time on their “economic freedoms” (e.g. to produce and exchange goods and services including one’s labor and ideas) illustrates that for ordinary people, unlike for many lawyers<sup>25</sup>, economic liberties are no less important than civil and political freedoms (e.g. to participate in the democratic supply of “public goods”).

The moral “categorical imperative” and the legal human rights objective of maximizing equal liberties across frontiers corresponds with the economic objective of maximizing consumer welfare through open markets and non-discriminatory competition. Hence, there is no reason for human rights lawyers to neglect the economic dimensions of human rights problems – such as the dependence of human rights (e.g. to work, food, education, housing and health-care) on supply of scarce goods, services and job opportunities. Likewise, “economic lawyers” must not disregard the human rights dimensions of economic law, for instance that savings, investments and economic transactions depend on property rights and liberty rights (such as freedom of contract and transfers of property rights).<sup>26</sup> Also foreign policy-makers and economists need to reconsider their often one-sided views that economic development should be defined in purely quantitative terms (e.g. without regard to real human capability to enjoy human rights), or that the economic tasks of “specialized agencies” (like the IMF, the World Bank, and the WTO) should not be “overloaded” with human rights considerations because they may be abused as pretexts for protectionist restrictions.<sup>27</sup>

---

<sup>24</sup> On the contribution of liberal trade to economic welfare and to protection of human rights (which, like any legal system, involve economic costs), and, *vice versa*, on the reciprocal contribution of human rights to economic welfare, see the two contributions by A.Sykes, *International Trade and Human Rights: An Economic Perspective*, and E.U.Petersmann, *Economics and Human Rights*, to the forthcoming book by: F.Abbott/T.Cottier (eds.), *International Trade and Human Rights*, 2002.

<sup>25</sup> On the “double standard” in the jurisprudence of US courts which protect civil and political liberties through higher standards of judicial scrutiny than economic liberties, see e.g. B.H.Siegan, *Economic Liberties and the Constitution*, 1980.

<sup>26</sup> On the recognition of the importance of human rights for rendering environmental law and environmental protection more effective see: A.Boyle/M.Anderson (eds.), *Human Rights Approaches to Environmental Protection*, 1998.

<sup>27</sup> See e.g. the paper on ‘Economic, Social and Cultural Human Rights and the International Monetary Fund’, submitted by the IMF’s General Counsel F. Gianviti to the UN Committee on Economic, Social and Cultural Rights at its “day of general discussion” on 7 May 2001, which emphasizes “the principle of specialization that

## **B Market Integration Promotes Legal and Political Integration**

Free trade area agreements, customs unions and common markets were important stages in the historical formation of many federal states. The progressive evolution of the EC Treaty – from a customs union treaty focusing on economic freedoms to a modern “treaty constitution” protecting human rights and “democratic peace” far beyond the economic area – illustrates the functional interrelationships between economic, political and legal integration.

The negotiators of the 1957 Treaty establishing the European Economic Community thought that the human rights guarantees in the national constitutions of EC member states and in the European Convention on Human Rights (ECHR, 1950) were sufficient for protecting human rights in the common market. Hence, similar to GATT 1947 and the WTO Agreement, the EC Treaty of 1957 did not refer to human rights law based on the belief that mutually beneficial economic liberalization would promote, rather than endanger, the national and international human rights guarantees. Today, however, EU law has evolved into a comprehensive constitutional system for the protection of civil, political, economic and social rights of EU citizens across national frontiers. Also the objective of the EU’s common foreign and security policy is defined by the EU Treaty as “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms” (Article 11). The EU has consequently insisted on including “human rights clauses” and “democracy clauses” into international agreements concluded by the EC with more than hundred third countries. The adoption of the Charter of Fundamental Rights of the European Union in December 2000, and the proposals for incorporating this Charter into a European Constitution at the intergovernmental conference scheduled for 2004, confirm the “functional theory” underlying European integration, i.e. the view that *economic market integration* can progressively promote peaceful cooperation and rule of law beyond economic areas, thereby enabling more comprehensive and more effective protection of human rights than has been possible in traditional state-centered international law.<sup>28</sup>

## **C Recognition of Citizens as Legal Subjects of Integration Law Promotes the Emergence of International Constitutional Law**

Inside the EC and in the European Economic Area between the EC and third European countries, the treaty prohibitions of restrictions of the free movement of goods, services, persons, capital and related payments, as well as the treaty guarantees of non-discrimination (e.g. in Article 141), were construed by the EC Court and national courts as *individual economic freedoms* to be protected by the courts.<sup>29</sup> The national constitutional guarantees of “the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” were progressively recognized as “principles which are common to the Member States” and legally binding also on all EU institutions, as later acknowledged in Article 6 of the EU Treaty. In conformity with the EC Treaty requirements to comply with international law (cf. Articles 300,307) and cooperate with other international organizations (cf. Articles 302-306), the EU Treaty now requires explicitly respect for the European Convention on Human Rights (cf. Article 6:2 EU Treaty), the 1961 European Social Charter and 1989 Community Charter of the Fundamental Social Rights of Workers (cf. Article 136

---

has governed the establishment of the specialized agencies and their relationships with the United Nations” (p.44), and concludes that the UN human rights covenants “apply only to States, not to international organizations” (p.10). These arguments, however, do not preclude the legal relevance of general international human rights law for the IMF.

<sup>28</sup> The number of “human rights cases” before the European Court of Human Rights far outnumbers those before the EC Court of Justice. Yet, the guarantees in the European Convention on Human Rights (ECHR) focus on civil and political rights which often do not go beyond those in national constitutions. The EC’s common market freedoms and constitutional law, by contrast, go far beyond national and ECHR guarantees and have contributed to unprecedented levels of economic and social welfare, individual freedom and democratic peace of European citizens.

<sup>29</sup> See above note 20.

EC Treaty), and for the 1951 Geneva Convention and 1967 Protocol on the protection of refugees (cf. Article 63 EC Treaty).

The constitutional guarantees of the EU for economic liberties and complementary constitutional, competition, environmental and social safeguards have also induced numerous EU initiatives to strengthen competition, environmental and social law in *worldwide* international agreements. The strong competition law of the EC reflects the constitutional insight that - in the economy no less than in the polity – equal freedoms of citizens and open markets need to be legally protected against abuses of *public powers* as well as of *private powers*.<sup>30</sup> The EC Treaty prohibitions of cartel agreements (Article 81) and of abuses of market power (Article 82) are not only protected by the ECJ as *individual rights* of “market citizens”. They also prompted all EC member states to enact *national* competition laws enforced by independent *national* competition authorities. Likewise, under the influence of EC competition law and of the incorporation of competition safeguards into the EC's’ “Europe agreements” and association agreements, also most third states in Europe have progressively introduced, since the 1980s, national competition laws protecting citizens and economic competition against abuses of private and public power.

#### **D Lessons for Global Integration Law?**

The paradoxical fact that many developing countries remain poor notwithstanding their wealth of natural resources (e.g. more than 90% of biogenetical resources in the world), is attributed by many economists to their lack of effective human rights guarantees and of liberal trade and competition laws. The absence of effective legal and judicial protection of liberty rights and property rights inhibits investments and acts as an incentive for welfare-reducing private and governmental restrictions of trade and competition and collaboration between cartelized industries and authoritarian governments.<sup>31</sup> The widespread abuses of private power in Africa, Asia and Latin America are no less dangerous for human rights and social welfare than abuses of public government powers. The EC proposals for complementing the liberal trade rules of the WTO by worldwide competition rules have met with increasing support notably by less-developed countries who have suffered from discriminatory cartel practices and find it politically difficult to overcome anti-competitive practices of powerful domestic industries through unilateral national legislation.<sup>32</sup>

Investments, production, trade and also protection of the environment depend on legal incentives and legal rights for investors, producers, traders, polluters and consumers. The EC's integration approach – notably the recognition and empowerment of citizens as legal subjects not only of human rights but also of competition law and integration law - should serve as a model also for *worldwide integration law*. The modern universal recognition of human rights as part of general international law implies that human rights have become part of the “context” for interpreting the law of worldwide organizations and must be taken into account in all rule-making and policy-making processes at national and international levels.<sup>33</sup> Just as the human rights guarantees and competition

---

<sup>30</sup> Also the US Supreme Court rightly emphasized that “antitrust laws ... are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms” (United States v. Topco Assoc. Inc., 405 U.S. 596,610, 1972). Yet, unlike the EC, US law does not protect economic liberties and social rights as fundamental constitutional rights of citizens, and US politicians favor a power-oriented, extraterritorial application of US antitrust laws vis-à-vis third countries rather than worldwide competition rules as suggested by the EC.

<sup>31</sup> See e.g. H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, 2001 (e.g. describing why many natural resources in developing countries remain “dead capital” due to the lack of secure property titles and legal insecurity).

<sup>32</sup> Cf. E.U. Petersmann, *Competition-oriented Reforms of the WTO World Trade System*, in: R. Zäch (ed.), *Towards WTO Competition Rules*, 1999, 43-73.

<sup>33</sup> See Resolution 1998/12 on “Human rights as the primary objective of international trade, investment and finance policy and practice”, adopted by the UN Sub-Commission on Prevention of Discrimination and

safeguards of the EC Treaty have reinforced the legitimacy and effectiveness of EC law and of protection of human rights throughout Europe, also UN human rights law and WTO rules offer mutually beneficial synergies for rendering human rights and the social functions and democratic legitimacy of the emerging global integration law more effective.

### 3 Constitutional Primacy of the Inalienable Core of Human Rights in International Law?

National and international human rights law rests on “recognition of the inherent dignity and of the equal and inalienable human rights of all members of the human family (as) the foundation of freedom, justice and peace in the world” (Preamble of the UDHR). Human dignity (e.g. in the sense of respect for the moral and rational autonomy of each individual to distinguish between good and bad and decide on one’s personal goals in life) has become the common value premise of national and international human rights law.

#### A Human Rights as Part of General International Law

There exist today more than hundred multilateral and bilateral international treaties on the protection of human rights. In the UN Charter, the Universal Declaration of Human Rights (UDHR), the 1993 Vienna Declaration on Human Rights, as well as in numerous other UN instruments, all 189 UN member states have also committed themselves to inalienable human rights as part of *general international law*. In addition, most states recognize human rights in their respective national constitutional laws as constitutional restraints on government powers, sometimes with explicit references to human rights as legal restraints also on the collective exercise of government powers in international organizations (see e.g. Article 23 of the German Basic Law and Article 11 EU Treaty). Human rights have thus become part also of the *general principles of law recognized by civilized nations* (Article 38 of the Statute of the International Court of Justice). As a result, international law is increasingly confronted with the “constitutional problems” addressed in the human rights jurisprudence of the EC Court of Justice: What is the essential core of human rights which must be recognized today as *erga omnes* obligations and *ius cogens*? Can governments evade their human rights obligations by exercising government powers collectively in specialized international organizations? How can the legal supremacy of international law over national law remain effective and be judicially enforced if human rights are not effectively protected in all fields of international law? Can international courts ignore the worldwide experience in all states that protection of human rights risks to remain ineffective without respect for complementary due process guarantees and other “constitutional principles” of rule of law, democratic government and judicial review? How to interpret and, in case of conflict, reconcile “state sovereignty”, “popular sovereignty” and “individual sovereignty” in a manner respecting the constitutional primacy of human rights?<sup>34</sup>

General international law (as codified in Article 31:3 of the 1969 Vienna Convention on the Law of Treaties) requires interpreting international treaties “in their context”, including “any relevant rules of international law applicable in the relations between the parties” such as universal human rights. Even though the law of e.g. the WTO does not explicitly refer to human rights, Article 3 of the WTO Dispute Settlement Understanding (DSU) requires “to clarify the existing provision of those agreements in accordance with customary rules of interpretation of public international law”. Universally recognized human rights are today part of the “context” for the interpretation of the law of worldwide organizations. They may be important for interpreting not only “general exceptions” (e.g. in GATT Article XX), but also basic guarantees of freedom (e.g. in GATT Articles II-XI), non-discrimination, property rights, individual access to courts, and the “necessity” requirements for safeguard measures to protect “public interests” and human rights.

---

Protection of Minorities in August 1998 and subsequently endorsed by numerous NGOs, cf.: M.Mehra (note 18), at 123 *et seq.*

<sup>34</sup> Cf. E.U.Petersmann, International Activities of the European Union and Sovereignty of Member States, in: E.Cannizzaro (ed.), *The European Union as an Actor in International Relations*, 2002.

## **B Has the “Inalienable Core” of Universally Recognized Human Rights Become *Ius Cogens*?**

Human rights define legal principles, rights and corresponding obligations for individual and democratic self-development and are today universally recognized by all UN member states as inalienable “birth rights” of every human being which precede and constitutionally limit government powers. Human rights need to be legally concretized, mutually balanced and implemented by democratic legislation which tends to vary from country to country. Their inalienable core, however, is “acknowledged” rather than “granted” by governments, as recognized in national as well as international legal practice: “Human dignity is inviolable. It must be respected and protected” (Article 1 of the Charter of Fundamental Rights of the European Union). “The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world” which “shall bind the legislature, the executive and the judiciary as directly applicable law” (Article 1 German Basic Law of 1949). In UN practice, the “right to development” and the corresponding government obligations are defined in terms of the realization of all human rights.<sup>35</sup>

The International Court of Justice (ICJ) has recognized that human rights constitute not only *individual rights* but also, in case of universally recognized human rights, *erga omnes* obligations of governments based on treaty law and general international law.<sup>36</sup> The universal ratification of human rights treaties (such as the UN Convention on the Rights of the Child ratified by 191 states), and the universal recognition in these treaties “of the equal and inalienable rights of all members of the human family” as set out in the UDHR<sup>37</sup>, reflects a worldwide *opinio iuris* on the *inalienable erga omnes* character of core human rights. This *opinio iuris* on essential and inalienable core human rights is not contradicted by the diversity of views on the precise scope, meaning and *ius cogens* nature of many specific human rights whose legal implementation may differ from country to country and from treaty to treaty. In contrast to the EC Court of Justice which construed the common human rights guarantees of EC member states as constituting general constitutional principles limiting the regulatory powers also of the EC<sup>38</sup>, the ICJ has not yet specified to what extent human rights entail constitutional limits also on the UN and its Specialized Agencies. Likewise, the WTO jurisprudence has not yet clarified the impact of human rights (e.g. to human health and food) on the interpretation of e.g. the intellectual property rights guaranteed in the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS), or on the numerous WTO exceptions protecting national policy autonomy for non-trade concerns.

International legal practice confirms an increasing *opinio iuris* that membership in the UN and in the ILO entails legal obligations to respect core human rights.<sup>39</sup> Dictatorial governments can no

---

<sup>35</sup> See UN General Assembly Declaration 41/128 of 4 December 1986 on the ‘Right to Development’.

<sup>36</sup> See e.g. the Barcelona Traction judgment (ICJ Reports 1970, 32) and the Nicaragua judgment (ICJ Reports 1986, 114).

<sup>37</sup> Quotation from the preamble to the 1989 UN Convention on the Right of the Child, which also confirms the universal recognition of the rights set out in the UDHR. See: Human Rights in International Law (note 9), at 169.

<sup>38</sup> In *Internationale Handelsgesellschaft* (Case 11/70, ECR 1970, 1125, 1134), the ECJ held that respect for human rights forms an integral part of the general principles of Community law: “the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community” (paras.3-4).

<sup>39</sup> See e.g.: ILO Declaration on Fundamental Principles and Rights at Work (ILO 1998, at 7), adopted by the International Labour Conference on 18 June 1998, which recognizes (in its paragraph 2) “that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination

longer freely “contract out” of their human rights obligations by withdrawing from UN human rights covenants or ILO conventions.<sup>40</sup> Legal practice suggests that not only the prohibitions of genocide, slavery and apartheid, but also other core human rights must be respected even “in time of public emergency” (cf. Article 4 of the ICCPR, Article 15 ECHR) and, since the end of the cold war, have become *erga omnes* obligations of a *ius cogens* nature.<sup>41</sup>

### **C Constitutional Primacy of Human Rights in European Law**

European integration law recognizes the legal *primacy* and constitutional functions of human rights in various ways. It was essentially due to the human rights jurisprudence of national courts in EC member states that the EC Court acknowledged, since the *Stauder case* (1969), that not only EC member states but also the EC itself must respect human rights in all EC policy areas: “respect for human rights is a condition of the lawfulness of Community acts”.<sup>42</sup> Article 6 of the Treaty on European Union (EU) now explicitly confirms that the “Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Breaches of these principles can entail sanctions (Article 7) and prevent admission to the EU (Article 49 EU Treaty).

The constitutional objective of the “common foreign and security policy” of the European Union – namely “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms” (Article 11 EU Treaty) – reflects the insight that human rights apply to the exercise of all government powers, as already stated in the French Declaration of the Rights of Man and the Citizen of 1789: “The final end of every political institution is the preservation of the natural and imprescriptible rights of man. Those rights are liberty, property, security, and resistance to oppression.”<sup>43</sup> Most policy objectives of specialized agencies (such as monetary stability, trade liberalization, health protection) can be understood as protecting liberty, property, non-discrimination and other human rights across frontiers.<sup>44</sup> Arguably, the universal recognition, in both national and international law, of the *inalienable character* of the essential core of human rights implies recognition of the legal primacy of their *inalienable core* vis-à-vis governmental and intergovernmental limitations that are arbitrary or “unnecessary” for protecting other human rights. The explicit *necessity requirements* for limitations on freedom and on other human rights – to be found not only in national constitutions and human rights treaties but also in the safeguard clauses of worldwide and regional trade agreements (such as GATT Article XX) – must be construed in conformity with this constitutional primacy of the inalienable core of human rights.

### **D Can “Specialized Organizations” Exclude Human Rights from their Field of Specialization?**

Like the negotiators of the EC Treaty in 1956/57, government representatives in specialized international organizations sometimes appear to believe that governments remain “sovereign” to

---

of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation”.

<sup>40</sup> See General Comment 5 on Article 4 of the UN Covenant on Civil and Political Rights, adopted by the Human Rights Committee on 31 July 1981 and recently revised (cf. D.Goldrick, *The Human Rights Committee*, 1994, at 315).

<sup>41</sup> For detailed references to state practice see: I.Seiderman, *Hierarchy in International Law*, 2001.

<sup>42</sup> Opinion 2/94, *European Court Reports (ECR) 1996, I-1759, para.34.*

<sup>43</sup> French Declaration of the Rights of Man and the Citizen (1789), section 2, cf.: Finer/Bogdanor/Rudden, *Comparing Constitutions*, 1995, at 208. The constitutional theories e.g. of Kant and Rawls likewise conclude that “democratic peace by satisfaction” (as opposed to “peace by power”) requires that “promotion of human rights ... should be a fixed concern of the foreign policy of all just and decent regimes” (Rawls, above note 3), at 48.

<sup>44</sup> On the “human rights functions” of the law of the IMF, the World Bank and GATT see E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, 1991, chapter VII.

exclude human rights from the law of specialized agencies and from the “covered agreements” of WTO law. Yet, the *lex posterior* and *lex specialis* rules for the relationships between successive international treaties (as laid down in Articles 30,41 and 58 of the 1969 Vienna Convention on the Law of Treaties) cannot derogate from the *inalienable ius cogens* nature of the obligation of all national and international governments to respect the essential core of human rights (cf. Article 53 of the Vienna Convention). UN human rights law explicitly recognizes (e.g. in Article 28 of the UDHR quoted at the beginning of this article) that human rights entail obligations also for intergovernmental organizations. From a human rights perspective, all national and international rules, including economic liberalization agreements like the IMF and WTO agreements, derive their democratic legitimacy from protecting human dignity and inalienable human rights which today constitutionally restrain all national and international rule-making powers.

The generously drafted “exceptions” in global and regional integration law, and the usually deferential jurisprudence of international courts (e.g. WTO dispute settlement bodies) vis-à-vis national restrictions necessary for protecting public interests<sup>45</sup>, confirm that, in cases of conflict, the essential core of human rights must prevail. As in EC law, the obligations of states to respect, promote and fulfill human rights must be recognized as extending also to their participation in worldwide organizations like the Bretton Woods institutions and the WTO. Neither the “progressive realization” commitment in Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>46</sup>, nor the *proviso* in its Article 24 that “(n)othing in the present Covenant shall be interpreted as *impairing* the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies”, can serve as pretexts for non-compliance by unwilling governments and organizations with their human rights obligations.

#### **4 Human Rights as Constitutional Restraints on the Law and Powers of International Organizations**

The “paradox of liberty”, i.e. that real freedom and legal constraints condition each other, applies to both national as well as international law. Article 28 of the UDHR – according to which “(e)veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” – reflects the insight that protection and promotion of human rights are often no less dependent on *intergovernmental* rules and policies (e.g. on collective security, international division of labor, prevention of terrorism) than on *national* implementing measures. Article 24 of the ICESCR confirms implicitly that human rights entail obligations not only for states but also for their collective exercise of government powers in international organizations.<sup>47</sup>

If human rights require international law and international institutions to be so structured as to promote and protect human rights across frontiers: How can human rights be rendered more effective in the law of worldwide organizations? The various UN Declarations on the “Right to Development” call upon international organizations to incorporate human rights into their policies and to promote

---

<sup>45</sup> See e.g. the WTO Appellate Body report of 12 March 2001 (WT/DS135/AB/R) on EC import restrictions affecting asbestos and asbestos-containing products that threaten the health of EC citizens.

<sup>46</sup> Cf. General Comment No.3 on “The nature of States parties obligations (Art.2, para.1 of the Covenant)”, adopted by the UN Committee on Economic, Social and Cultural Rights in 1990 and reproduced e.g. in: A.Eide/C.Krause/A.Rosas (eds.), *Economic, Social and Cultural Rights*, 1995, at 442-445. The fact that the ICESCR formulates some rights in terms of *principles* rather than precise *rules* only indicates that some economic and social human rights, like certain civil and political rights (such as the right to vote), need to be concretized through implementing legislation and administrative or judicial decisions. On the distinction between *principles* and *rights* see e.g.: R.Dworkin, *Taking Rights Seriously*, 1977, 23 *et seq.*

<sup>47</sup> Article 24 states: “Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.” By interpreting the law of intergovernmental organizations in conformity with human rights, conflicts and “impairments” can and must be avoided.



participation of individuals and civil society organizations in the work of international organizations.<sup>48</sup> Yet, in intergovernmental organizations (like the UN) and “producer-driven” organizations (like the WTO and ILO), “top-down reforms” for strengthening human rights and democratic rule-making procedures remain slow because many diplomats and influential industries (including their worker representatives in the ILO) prefer to avoid limiting their powers and privileges in specialized agencies and benefit from continuing the classical international law approach of treating citizens as mere objects of international law that should be kept out of intergovernmental organizations.<sup>49</sup> Also many lawyers, economists, political scientists and ordinary citizens doubt whether the universal recognition of human rights requires the EC and worldwide organizations to evolve into human rights organizations and to supplement the international human rights guarantees by “international constitutional law”.<sup>50</sup> Especially in the US with its long-standing reluctance to submit itself to international human rights law and its traditional focus on *civil* and *political* rather than *economic* and *social human rights*, convincing citizens, governments and courts of the need for economic and social human rights remains a political challenge which appears unlikely to be met by governments, business and courts in the US.<sup>51</sup>

History suggests that democratic participation in the exercise of government powers rarely comes about “top-down” without prior “bottom-up pressures” and “glorious revolutions” by citizens, parliaments and courageous judges defending human rights vis-à-vis abuses of government powers and fighting for democratic reforms of authoritarian government structures. The postwar Bretton-Woods Agreements and the UN Charter presented such hard-fought-for “revolutions” in international law designed at extending freedom, non-discrimination, rule of law and social welfare across frontiers, even though diplomats carefully avoided the politically charged language of “international constitutional law” (e.g. in contrast to the “Constitution of the ILO” of 1919).

#### **A. Human Rights and the “Constitutional Functions” of International Guarantees of Freedom, Non-discrimination and Rule of Law**

All human rights need to be made effective and mutually balanced through national and international rule-making and rule-implementation. Reciprocal international guarantees of freedom, non-discrimination, rule of law, transparent policy-making, social safeguard measures and wealth-creation through a mutually beneficial division of labor – such as those in the 1944 Bretton-Woods Agreements, the ILO Constitution, GATT 1947 and the 1994 WTO Agreement – aim at extending basic human rights values across frontiers. In this respect, they can be understood as serving “constitutional functions” for the legal protection of human rights values at home and abroad.<sup>52</sup> Of course, “not all international rules serve constitutional functions”, and the lack of

---

<sup>48</sup> See e.g. the Report of the Intergovernmental Group of Experts on the Right to Development in UN Doc. E/CN.4/1998/29 of 7 November 1997.

<sup>49</sup> See e.g. the special report on human rights in *The Economist* of 18 August 2001, in which the US ambassador to the UN Human Rights Commission explains the non-ratification of the ICESCR by the USA with the “concern” that this “would mean citizens could sue their governments for enforcement of rights” (p.20).

<sup>50</sup> See e.g. A. von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, in: *Common Market Law Review* 37 (2000), 1307-1338, who argues, *inter alia*, that “human rights should not be understood as the *raison d’être* of the Union” (p.1338), and that developing human rights from a common market perspective is often not convincing (p. 1336).

<sup>51</sup> On “double standards” in US policies vis-à-vis international human rights treaties see: United States of America. *Rights for All*, Amnesty International Publication 1998, at 123-135.

<sup>52</sup> For a detailed explanation see Petersmann (above note 44) as well as: E.U.Petersmann, *National Constitutions and International Economic Law*, in: M.Hilf/E.U.Petersmann (eds.), *National Constitutions and International Economic Law*, 1993, at 3, 47 *et seq.* The theory of the “constitutional” and “domestic policy functions” of international guarantees of freedom, non-discrimination and rule of law was developed in the 1980s (see E.U.Petersmann, *Trade Policy as a Constitutional Problem. On the ‘Domestic Policy Functions’ of International Trade Rules*, in: *Swiss Review of International Economic Relations* 41 (1986), 405-439; *idem*, *Constitutional Functions of Public International Economic Law*, in: *Restructuring the International Economic Order. The Role of Law and Lawyers*, Colloquium on the occasion of the 350<sup>th</sup> anniversary of the University of Utrecht, 1987,

adequate constitutional safeguards in the law of international organizations facilitates "intergovernmental collusion" endangering democratic governance and human rights.<sup>53</sup> For example, the general exceptions and safeguard clauses in the WTO Agreement leave each government broad discretion as to how economic freedoms should be reconciled with other human rights subject to "necessity" and non-discrimination requirements (e.g. in GATT Article XX, GATS Article XIV, Article 8 of the TRIPS Agreement) that are similar to those in human rights law. Yet, the move from "negative integration" in GATT 1947 to "positive integration" in the WTO may endanger protection of human rights and democratic governance in areas such as health protection and intellectual property law<sup>54</sup>

The focus of GATT/WTO law is neither on de-regulation nor on distributive justice, but on *optimal trade regulation* through welfare-increasing *non-discriminatory internal regulation* (rather than welfare-reducing *discriminatory* border restrictions or export subsidies). GATT and WTO jurisprudence has so far hardly ever challenged the sovereign right of GATT and WTO member states to protect the human rights of their citizens through *non-discriminatory* internal or international social rules (e.g. ILO-conventions, human rights treaties, environmental agreements) if procedural due-process requirements had been met (e.g. for risk-assessment procedures prior to the application of sanitary measures, consultations with exporting countries that were adversely affected by environmental regulations unilaterally adopted in importing countries).<sup>55</sup> Should WTO law follow the example of EU law and integrate human rights and social rules more explicitly into WTO law and jurisprudence? Or should human rights and international income redistribution be left to other "specialized agencies" like the various UN human rights bodies, the World Bank and the ILO? Is interpretation of WTO law in conformity with human rights, as required by general international law, sufficient for ensuring coherence between human rights and trade law?

## B. Human Rights Require International Constitutional Law

Since the Greek republics in the 5<sup>th</sup> century BC, *constitutionalism* has emerged in a process of "trial and error" as the most important "political invention" for protecting equal liberties against abuses of power. The continuing evolution of national and international constitutionalism can be defined by *six interrelated core principles* which are recognized in the constitutional laws of most democracies: (1) rule of law; (2) limitation and separation of government powers by checks and balances; (3) democratic self-government; (4) human rights; (5) social justice; and (6) the worldwide historical experience that protection of human rights and "democratic peace" cannot remain effective without international law providing for reciprocal *international legal restraints* on abuses of foreign policy powers.<sup>56</sup>

---

49-75). The theory focused on the *substantive constitutional values* of the GATT 1947 guarantees of freedom, non-discrimination and rule of law, rather than on the formal primacy of "higher" international law over domestic law, or on the procedural advantages of *reciprocal pre-commitments* ("*hands-tying*") at the international law level designed to limit mutually harmful "beggar-they-neighbor policies" at domestic policy levels. The theory noted "the increasing recognition of agreed principles of substantive equality and solidarity in international law" (Petersmann, note 44, at 91), Yet, in view of the "separation of policy instruments" underlying the Bretton Woods Agreements and the cold war dissent on human rights, the theory did not challenge the "logic of 1945" and did not address the question examined in this article, i.e. the impact of the more recent universal recognition of human rights on the law and policies of worldwide organizations.

<sup>53</sup> The quotations are from the titles of various chapters in: Petersmann (note 44), e.g. chapters VI and VII.5.

<sup>54</sup> These dangers are emphasized e.g. in: E.U.Petersmann, The WTO Constitution and Human Rights, *Journal of International Economic Law* (JIEL) 3 (2000), 19-25; *idem*, From 'Negative' to 'Positive' Integration in the WTO: Time for Mainstreaming Human Rights into WTO Law, in: *Common Market Law Review* 37 (2000), 1363-1382.

<sup>55</sup> In contrast to GATT/WTO law, European Community law has gone much further in challenging and replacing national by EC social, environmental and human rights rules, cf. M. Poirares Maduro (note 23).

<sup>56</sup> For an explanation of this definition of "constitutionalism", and of the countless possibilities of defining and balancing these constitutional core principles in national and international law depending on the particular contexts, see: E.U.Petersmann, Human Rights and International Economic Law in the 21<sup>st</sup> Century, in: *JIEL* 4

The legal concretization of these core principles in national constitutions (e.g. in national catalogues of human rights), and increasingly also in international "treaty constitutions" (such as the EC Treaty and the ILO Constitution), and their mutual balancing through democratic legislation, legitimately differ from country to country, from organization to organization, and from policy area to policy area. There are also valid "realist" reasons why "democratic peace" may be possible only among constitutional democracies, and power politics may remain necessary to contain aggression from non-democracies where human rights are not effectively protected.<sup>57</sup> Yet, are there convincing arguments why "constitutionalization" of international law and international organizations may be "a step too far"?<sup>58</sup> Are "international constitutional law" and "cosmopolitan integration law", as explained by *Kant* and confirmed by European integration law, indispensable for limiting abuses of foreign policy powers and protecting equal human rights and democratic peace across frontiers?<sup>59</sup>

The universal recognition of human rights, and the adoption by almost all states of national constitutions and international treaties committed to the promotion of human rights, reflect the worldwide experience that human rights cannot remain effective without constitutional safeguards, democratic legislation and international law protecting freedom and rule of law across frontiers through legal restraints on abuses of power. History and constitutional theory confirm that liberty, democracy, market competition and social justice are not gifts of nature but "constitutional tasks".<sup>60</sup> Rule of law may be possible in a dictatorship. Effective protection of equal human rights, however, is logically and practically inconceivable without rule of law, limitation and separation of government powers, democratic self-government, social market economies identifying and satisfying consumer demand, and respect for international law.<sup>61</sup> Since the basic function of democratic constitutions is to

---

(2001), 3-39; *idem*, How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?, in: Michigan Journal of International Law 20 (1999), 1-30; *idem*, Constitutionalism and International Organizations, in: Northwestern Journal of International Law and Business 17 (1996), 398-469.

<sup>57</sup> See e.g. H.Kissinger, Does America Need a Foreign Policy?, 2001, according to whom "in today's world, at least four international systems are existing side by side" (at 25 *et seq.*), such as "democratic peace" in relations between Western Europe and North America; "strategic rivalry" among the great powers of Asia; ideological and religious conflicts in the Middle East; and the poverty, health and civil war problems dominating politics in most of the African countries.

<sup>58</sup> See: R.Howse/K.Nicolaidis, Legitimacy through "Higher Law"? Why Constitutionalizing the WTO is a Step Too Far, manuscript (September 2001) to be published in: T.Cottier/P.Mavroidis (eds.), The Role of the Judge: Lessons for the WTO, 2002. The authors define neither their use of the term "constitutionalizing" in a precise manner nor, in their criticism of a "libertarian approach", what they mean by "the fallacy of constitutionalism". While I agree with much of their criticism (e.g. of proposals for "federal global governance"), some of their concepts remain vague (such as "top-down empowerment" in the WTO context), and the addressees of their criticism are often not identified (Howse/Nicolaidis do not refer to any of my publications listed above in footnotes 44 and 56). The authors admit that integration of human rights and environmental law into WTO law, as suggested in my publications, "could ultimately result in creating some conditions for constitutionalism in the long run". Yet, they don't refute my argument (see e.g. above note 54) that the one-sided focus of the GATS- and TRIPS Agreements on producer interests, and the one-sided WTO jurisprudence on environmental and health protection measures, already offer enough evidence for the need to further "constitutionalize" trade policies and WTO law (e.g. through more stringent parliamentary, judicial and civil society review at national and international levels, and more explicit references to human rights).

<sup>59</sup> On the need for international constitutional law in the trade policy area see e.g. chapters VIII and IX of my 1991 book (note 44), and: Hilf/Petersmann (note 52), at 42 *et seq.* Specifically on the need for protecting individual rights also in the trade policy area see e.g.: E.U.Petersmann, Limited Government and Unlimited Trade Policy Powers: Why Effective Judicial Review and a Liberal Constitution Depend on Individual Rights, in: Hilf/Petersmann (note 52), 537-561.

<sup>60</sup> See e.g. F.A.Hayek, The Constitution of Liberty, 1960; *idem*, Law, Legislation and Liberty, 1982; W.Fikentscher, Freiheit als Aufgabe, 1997.

<sup>61</sup> For instance, equal protection of human rights is impossible without rule of law; individual freedom requires limited government; democratic self-government cannot be maintained over time without "constitutional democracy" committed to long-term principles and human rights; abuses of power can be curtailed most effectively through divided-power-systems; rule of law across frontiers is impossible without international law.

protect the “rights retained by the people” (Ninth Amendment of the US Constitution) against abuses of all government powers, and most *foreign policies* become effective by taxing and restricting *domestic citizens*, constitutional restraints on *foreign policy powers* are no less necessary for the protection of human rights than restraints on domestic policy powers.<sup>62</sup>

How then can the “Lockean dilemma” be overcome that most national constitutions grant governments broad discretionary foreign policy powers which can easily undermine domestic constitutional restraints (e.g. by redistributing income among domestic citizens through “voluntary” trade restrictions)? Most countries have learnt through experience that *unilateral* national constitutional restraints on foreign policy powers cannot effectively deal with the “*Janus face* problem” of foreign policies, e.g. the fact that foreign policy discretion to discriminate among 200 sovereign states offers governments more than 200 possibilities for discriminating among domestic citizens trading with foreign countries and for taxing and redistributing income of domestic citizens through trade restrictions. Due to the *relational nature* of most foreign policy goals (such as “democratic peace” among democracies, freedom of trade between exporting and importing countries, exchange rate stability between different currencies), foreign policy abuses can be legally limited most effectively through *reciprocal international law rules*. Such rules tend to offer also more precise substantive and procedural “benchmarks” for parliamentary, judicial and intergovernmental review of foreign policy measures than the usually vague national constitutional rules for foreign policy-making. As noted above, reciprocal international guarantees of freedom, non-discrimination and rule of law can also serve “constitutional functions” for protecting and extending human rights values across frontiers and for “constitutionalizing”<sup>63</sup> discretionary foreign policy powers on the basis of “higher” international law and its enforcement through national and international courts and stricter parliamentary and democratic control.

### C. Human Rights as Incentives for “Decentralized Ordering” and a “Self-Enforcing Constitution” Across Frontiers: The Subsidiarity Principle

The EU “principles of liberty, democracy, respect for human rights and fundamental freedoms” (Article 6 EU Treaty) are reflected also in the explicit Treaty requirements that actions by the Community shall be “in accordance with the principle of subsidiarity” and “not go beyond what is necessary to achieve the objectives of this Treaty” (Article 5 EC Treaty); decisions shall be “taken as openly as possible and as closely as possible to the citizen” (Article 1 EU Treaty). Similar to the historical experiences inside many federal states, the EC Treaty objective of an “internal market ... without internal frontiers in which the free movement of goods, persons, services and capital is ensured” (Article 14) was to some extent achieved only after the empowerment of self-interested market participants to enforce access to foreign markets and freedom of competition through independent “guardians of the law” (e.g. competition authorities) and courts against governmental and private market access barriers and restraints of competition.<sup>64</sup> The political EC Treaty goals “to establish progressively an area of freedom, security and justice” (Article 61 EC Treaty) and a “common foreign and security policy” are likewise linked to a “basic rights strategy”, as reflected in the Treaty commitment “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms” inside and outside the EC (cf. Articles 6, 11 EU Treaty).

---

<sup>62</sup> For detailed explanations of these arguments see e.g. my publications quoted in note 52.

<sup>63</sup> On different definitions of “constitutionalization” see e.g.: E.U.Petersmann, Constitutionalism and International Adjudication, in: *Journal of International Law and Politics* 1999, 101-135; D.Z.Cass, The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade, in: *EJIL* 12 (2001) 39-75. The methods of “constitutionalization” in EU law (such as legal supremacy with direct effect and direct applicability of EC rules) go far beyond those of worldwide international law.

<sup>64</sup> See the comparative study of the common market law in the USA, Switzerland, Germany and the EC in Petersmann (note 44), chapter VIII.

In the context of worldwide organizations, human rights are no less important for promoting not only individual and democratic self-government and legitimacy, but also decentralized enforcement of rule of law and decentralized coordination across frontiers among billions of autonomous citizens participating in global *economic* as well as *political markets*.<sup>65</sup> For example:

- Human rights (e.g. to property, freedom of contract, freedom of information, freedom of opinion and association), and the market mechanisms resulting from the protection of human rights, not only empower individuals to act on the basis of their own personal knowledge and to acquire and take into account the personal and local knowledge of others of which each person is inevitably ignorant.<sup>66</sup> Such decentralized ordering of the actions of diverse persons with limited knowledge reduces also the need for centralized government regulation of conflicting preferences (e.g. by imposing the majorities' preferences on minorities) which might unnecessarily limit individual freedom and disrupt decentralized ordering.<sup>67</sup>
- Human rights enable decentralized solutions also for the "value problem" that human views about "truth" may differ, and value judgments about "the good" and "the beautiful" are not necessarily true.<sup>68</sup> Economic as well as political markets are decentralized means for evaluating scarce resources (e.g. private and public goods and services) in a manner respecting individual freedom (e.g. of supply and demand of private goods, political votes on the collective protection of social rights) and promoting "dialogues about values" and allocation and distribution of resources in accordance with consumer demand.<sup>69</sup>
- By requiring respect for equal human rights and by defining core human rights as "inalienable", human rights constrain, delimit and coordinate individual freedom and other human rights, promote individual responsibility (e.g. to use resources efficiently and not to harm others), and require substantive and procedural justification of governmental restraints of human rights. Human rights require transparent government (e.g. publication of laws) and "deliberative democracy", and inform and educate people on how they can realize individual and democratic self-government and mutually beneficial cooperation across frontiers while avoiding conflicts with the independent actions of others.<sup>70</sup>

---

<sup>65</sup> On the gradual emancipation of the individual, and the emergence of a human right to democracy in national and international law see e.g. T.M.Franck, *The Empowered Self. Law and Society in the Age of Individualism*, 1999. On markets and democracy as organized dialogues about economic and political value judgments see e.g. Fikentscher (note 60), at 51.

<sup>66</sup> Cf. F.A.Hayek, *The Use of Knowledge in Society*, in: Hayek, *Individualism and Economic Order*, 1948, 77-78; T.Sowell, *Knowledge and Decisions*, 1980.

<sup>67</sup> On the importance of human rights for solving this "knowledge problem" see: Barnett (note 48), at 29 *et seq* who rightly emphasizes that centralized ordering – e.g. of families, companies, governmental and non-governmental organizations – "needs to take place within a decentralized framework" (at 61).

<sup>68</sup> On Immanuel Kant's distinction between truth (analyzed in Kant's *Critique of Pure Reason*), value judgments (analyzed in Kant's *Critique of Practical Reason*), and esthetic judgments (analyzed in Kant's *Critique of the Human Ability to Judge*), and on decentralized methods (i.e. markets and democracy) and centralized methods (e.g. dictatorship) to overcome conflicts about value judgments, see e.g. Fikentscher (note 16), at 50-51.

<sup>69</sup> Whether market competition can be said to "ensure the best possible satisfaction of demand given the scarcity of goods" (Fikentscher, note 16, at 75) depends on whether "justice" can be defined in terms of equal liberties, efficiency and avoidance of unnecessary waste of resources (cf. Petersmann, note 44, at 60-61, 86 *et seq.*), and on how social human rights (e.g. to protection against economic hardship inconsistent with human dignity) can be integrated into a "social market economy" without distortion of price mechanisms, economic efficiency and equal liberties (as required by the economic theory of optimal intervention and also by the Rawlsian theory of justice according to which "basic liberties can be restricted only for the sake of liberty" but not solely for the sake of improving the condition of those who are economically and socially least well off, cf. Rawls, note 1, at 266, 474 *et seq.*). Human rights imply, for instance, that consumers may legitimately value goods regardless of the value of work invested by producers during the production of the goods concerned.

<sup>70</sup> On the importance of communicating "justice" in a manner making the abstract notion of justice and its concrete requirements accessible to everyone in a society see: Barnett (note 14), at 84 *et seq.*

- Human rights justify not only individual claims and individual access to courts for the settlement of “cases and controversies” between persons who are directly affected by a dispute. They also require to submit evidence, legal reasoning and claims in terms of rights and “justice” to judges in the context of judicial procedures subject to multiple safeguards (e.g. appellate review, democratic criticism, correction by legislation).<sup>71</sup> Through an evolutionary common law process of adjudication and progressive national and international codification, human rights thereby promote an ever more precise definition, delimitation and evolution of civil, political, economic, social and cultural human rights across frontiers. The legal priority and judicial clarification of human rights promote continuous review and adjustment of law and “justice” to new situations like global integration.<sup>72</sup>
- Liberty rights, property rights and other human rights also set incentives for savings and investments (e.g. by requiring restitution or compensation in case of takings of property rights), for reconciling conflicts among self-interested individuals (e.g. by requiring consent to rights transfers), and for decentralized “checks and balances” promoting rule of law (e.g. due to the right of self-defence by adversely affected right-holders).<sup>73</sup>

#### **D. Human Rights, Common Market Rules, Competition and Trade Rules: How to Construe Liberty Rights and their “Indivisibility”?**

Human rights historically evolved in particular civil, political, economic and social contexts before the modern recognition that “all human rights are universal, indivisible and interdependent and interrelated.”<sup>74</sup> How should human rights to liberty and equality be construed in the particular context of the law and powers of international organizations (like the EC and WTO)? European Community law, for instance, protects

- general “principles of liberty” (Article 6 EU Treaty) based on common constitutional traditions in EC member states;
- a general human “right to liberty” (Article 6) and additional specific liberty rights recognized in the Charter of Fundamental Rights of the EU<sup>75</sup> (e.g. in Articles 11-16);
- the “principle of an open market economy with free competition” (Articles 4,98,105,157);
- general and specific guarantees of non-discrimination (e.g. in Articles 12,13,19,23,30,39,43,49,56,90,141 EC Treaty), some of which confer individual rights;
- a “system ensuring that competition in the internal market is not distorted” (Articles 3,g) based on directly applicable competition rules (e.g. Articles 81,82);
- general legal principles on “a common market and an economic and monetary union” (Article 2) and on an “internal market ... without internal frontiers in which the free movement of goods, persons, services and capital is ensured” (Article 14);
- specific treaty guarantees on “free movement of persons, goods, services and capital, and the freedom of establishment”, which is also referred to in the Preamble to the Charter of Fundamental Rights of the EU.

<sup>71</sup> On the comparative advantages of these law-determining procedures, and their links to “justice”, rule of law, as well as to the efficient use of resources, see: Barnett (note 14), at 120 *et seq.*

<sup>72</sup> On the inevitable task of judges to decide new kinds of disputes on the basis of general *principles* rather than established *rules* that may not be adequate for dealing with unforeseen new situations, see also: F.A.Hayek, 1960 (note 59), at 115 *et seq.* For a refreshing criticism of the US constitutional law tradition to focus on literary analysis and arguments over founders’ intentions (rather than on the constitutional tasks and real-world consequences of alternative constitutional interpretations) see: R.D.Cooter, *The Strategic Constitution*, 2000.

<sup>73</sup> Cf. Barnett (note 14), at 169 *et seq.*, 197 *et seq.*

<sup>74</sup> Vienna Declaration of the UN World Conference on Human Rights (1993), section I.5, cf.: The United Nations and Human Rights 1945-1995, UN 1995, at 450.

<sup>75</sup> See the text published in the Official Journal of the EC, C 364/1-22 of 18 December 2000, and the commentary by: K.Lenaerts/E.E.De Smijter, A ‘Bill of Rights’ for the European Union, in: *Common Market Law Review* 38 (2001), 273-3000.

Community law requires to interpret these various treaty provisions in a mutually coherent manner. Just as in some member countries (like Germany) the national constitutional guarantees of freedom to pursue a trade or business are construed to protect also individual rights to import and export subject to constitutional and legislative restraints, it was only logical for the EC Court of Justice to interpret the corresponding Community guarantees of “freedom to choose an occupation” and “freedom to conduct a business”<sup>76</sup> in conformity with the EC Treaty’s customs union principle and to recognize “freedom of trade as a fundamental right”.<sup>77</sup> The Court likewise construes the EC’s common market rules and competition rules (e.g. Articles 81:1, 82) as individual “market freedoms” which can be directly enforced by individuals through the courts.<sup>78</sup> In contrast e.g. to modern US antitrust adjudication which tends to interpret US antitrust rules almost exclusively in the light of economic efficiency criteria and consumer welfare<sup>79</sup>, the interpretation by the EC Court of the EC’s common market rules and competition rules takes into account not only economic criteria but also the contribution of the “market freedoms” and competition rules to the realization of a single internal market and to the protection of individual freedom and individual access to courts.<sup>80</sup>

The comprehensive EC guarantees of individual economic liberties differ from the constitutional and legal traditions in countries (like England and the USA) where domestic courts accord higher standards of judicial review and protection to civil and political freedoms than to economic liberties in view of the fact that constitutional law and competition law have guaranteed a common market and market competition in these countries long since.<sup>81</sup> In other countries (like Germany) which have experienced dictatorial governments colluding with cartellized industries in suppressing the economic and political liberties of their citizens, the constitutional liberties have been construed by courts as protecting maximum equal freedoms of citizens (subject to constitutional limits and democratic legislation) in economic markets no less than in political markets.<sup>82</sup> EC law suggests that this comprehensive constitutional protection of liberty rights, in the economic area no less than in the political field, offers more protection for citizens in countries and international organizations (like the EC) which do not benefit from centuries-old constitutional guarantees of a common market and long-standing antitrust law protecting undistorted competition (as in the USA). This is even more true if the manifold *instrumental functions of human rights* (e.g. for handling the

---

<sup>76</sup> These fundamental rights were recognized by the EC Court on the basis of the common constitutional traditions in EC member states and are now explicitly regulated in Articles 15 and 16 of the EU Charter of Fundamental Rights (note 75) in a manner protecting legitimate expectations in rule of law (cf. Article 16: “The freedom to conduct a business in accordance with Community law and national laws and practices is recognized”).

<sup>77</sup> See above note 20.

<sup>78</sup> Cf. e.g. C.A. Jones, *Private Enforcement of Antitrust Law in the EC, UK and the USA*, 1999.

<sup>79</sup> See e.g. R.H. Bork, *The Antitrust Paradox*, 1993.

<sup>80</sup> Cf. P. Eeckhout, *Trade and Human Rights in EU Law*, in: F. Abbott/T. Cottier (eds.), *International Trade and Human Rights*, 2002. On the objectives of EC competition policies see: C.D. Ehlermann/L.L. Laudati (eds.), *European Competition Law Annual 1997: Objectives of Competition Policy*, 1998. There is, however, today broad consensus also in the EC that competition policy should focus on economic efficiency and consumer welfare, and that other policy objectives (like industrial policy, protection of small and medium-sized enterprises, employment, fight against inflation, improvement of the environment) should not be pursued by competition policy, but by means of other, more effective instruments.

<sup>81</sup> For criticism of the US “double standard” which (since the 1930s) accords a higher degree of judicial protection to civil and political freedoms than to economic liberties see e.g.: B.H. Siegan, *Economic Liberties and the Constitution*, 1980; J.A. Dorn/H.G. Manne (eds.), *Economic Liberties and the Judiciary*, 1987. J. Rawls, notwithstanding his definition of the state’s first goal as protecting maximum equal liberty, likewise limits his interpretation of basic liberties to those that “are essential for the adequate development and full exercise of ... moral personality over a complete life” (J. Rawls, *Political Liberalism*, 1996, at 293). This focus on essential civil and political liberty appears influenced by the particular context of US constitutional law where, due to the effective protection of the common market and freedom of competition through US constitutional and antitrust law, constitutional protection of economic liberty rights may have been less necessary than e.g. in the EC.

<sup>82</sup> For comparative studies of national constitutional guarantees of freedom of trade see Petersmann (note 44), chapter VIII.

social problems of limited knowledge, decentralized coordination, mutually beneficial division of labor, conflicts of interests, abuses of power, incentives for savings and investments, decentralized enforcement of rule of law) are taken into account. From the human rights perspective of the more than 1 billion people living on less than one dollar a day, the marketplace for goods (e.g. food) and services (e.g. job opportunities, education and health services) is no less important for survival and self-development than the marketplace for politics and ideas.

#### **E. Consequences of the Indivisibility of Human Rights in European Integration Law: Lessons for Global Integration Law?**

The EC Treaty clearly recognizes the European historical experience that economic, political and legal freedom cannot be separated, and that abuses of private economic power (such as the collaboration of cartelized industries with dictatorial governments in Nazi-Germany) can be no less dangerous for citizens than abuses of political power. Private autonomy in law and in the economy must be protected by basic rights vis-à-vis abuses of both *political* as well as *economic power*. Thus, the EC Treaty protects “citizenship of the Union” (Article 17) by *civil rights* (such as the “right to move and reside freely within the territory of the Member States”, Article 18) and *political rights* (such as the “right to vote and to stand as a candidate at municipal elections in the Member State in which he resides”, Article 19) as well as *economic rights* (such as freedom of trade and competition protected by Articles 28,29,81 and 82) and *social rights* (such as the right to “equal pay for male and female workers for equal work or work of equal value”, Article 141).<sup>83</sup> The EU Treaty and the EU Charter of Fundamental Rights likewise protect civil, political, economic and social human rights and fundamental rights. European integration confirms the potential synergies between human rights law and economic integration law: Inside Europe, it has become generally recognized that economic organizations (like the EC and the EEA) can pursue their objectives (e.g. of “an open market economy with free competition”, Article 4 EC Treaty) more effectively if they are seen by citizens and national parliaments to support and promote human rights and social justice, and if they empower self-interested citizens to participate in democratic rule-making and to invoke and enforce the common market rules and competition rules through courts and other decentralized law-enforcement processes (e.g. through national competition authorities)..

Articles 302-307 of the EC Treaty explicitly require the EC to cooperate with other international organizations and to respect treaties concluded by EC member states with third countries. Article 6 of the EU Treaty consequently confirms that the “Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Agreements concluded by the EC are not only “binding on the institutions of the Community and on Member States” (Article 300:7 EC Treaty). The EC Court has recognized long since that such international agreements, and also general international law rules binding on the EC, constitute “an integral part of the Community legal system” with legal primacy over “secondary EC law” adopted by the EC institutions.<sup>84</sup> The EC Court therefore emphasizes that Community law must be construed in conformity with international law, and that all Community competencies must be exercised in compliance with the international legal obligations of the EC.<sup>85</sup> Precise and unconditional international guarantees of freedom and non-discrimination (e.g. in free trade area agreements between the EC and third countries) were recognized by the EC Court to constitute *individual rights*

---

<sup>83</sup> On the interrelationships between European citizenship, nationality and the various categories of human rights, citizen rights, fundamental rights (e.g. to equal pay for male and female workers for equal work as defined in Article 141 of the EC Treaty) and other individual rights (e.g. rights dependent on residence rather than citizenship) cf. N.Reich, Union Citizenship – Metaphor or Source of Rights?, in: European Law Journal 7 (March 2001), 4-23; M. La Torre (ed.), European Citizenship: An Institutional Challenge, 1998.

<sup>84</sup> On this jurisprudence by the ECJ see e.g.: D.McGoldrick, International Relations Law of the EU, 1997; A.Dashwood/C.Hillion (eds.), The General Law of the EC External Relations, 2000.

<sup>85</sup> See notably Case C-162/96, *Racke*, ECR 1998, I-3655.



whose violation by EC institutions or by member state governments may entail legal responsibilities of reparation of injury and of financial compensation of the adversely affected individuals.<sup>86</sup>

The jurisprudence of the European Court of Human Rights confirms the interrelationships between civil, political, economic and social human rights, for instance the importance of freedom of opinion, freedom of the press and property rights for economic competition. The Court's recognition of a larger "margin of appreciation" for governmental limitations of human rights in economic competition than in the political marketplace has remained controversial.<sup>87</sup> The Court has also emphasized that the human rights obligations of the more than 40 member states of the ECHR (including all 15 EU member states) apply not only to national measures but also to *collective* rule-making in international organizations:

"Where States establish international organizations, or *mutatis mutandis* international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."<sup>88</sup>

In *Matthews v. UK*, the European Court of Human Rights found the United Kingdom in violation of the human right to participate in free elections of the legislature even though the law which denied voting rights in Gibraltar implemented a treaty concluded among EC member states on the election of the European Parliament: "there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to 'secure' the rights (under the ECHR) in respect of European legislation in the same way as those rights are required to be 'secured' in respect of purely domestic legislation".<sup>89</sup> In conformity with its consistent interpretation of the ECHR as a "living instrument" and "constitutional charter" that needs to be construed in the light of changing circumstances, the Court also admitted a complaint against all 15 EC member states requiring the Court to find that EC member states are legally responsible for the violation of the due process guarantees of the ECHR resulting from a refusal by the EC Commission to suspend a fine imposed for infringement of EC competition rules.<sup>90</sup> Should, in a similar way, contracting parties of the ECHR be held legally liable for human rights violations resulting from e.g. WTO dispute settlement rulings or from their national implementation of WTO rules?

## **5 Indivisibility and Justiciability of Freedom and other Human Rights in UN Law? Towards "Global Freedom?"**

The 1948 Universal Declaration of Human Rights integrated civil, political, economic, social and cultural human rights in one single legal text. However, the numerous UN declarations on the indivisible and interrelated character of civil, political, economic, social and cultural human rights have so far not been translated into reality on the worldwide level of UN law. Even though

---

<sup>86</sup> See e.g. Case 104/81, *Kupferberg*, ECR 1982, 3641; Cases C-46 and 48/93, *Brasserie du pêcheur* and *Factortame*, ECR 1996 I 1029.

<sup>87</sup> See e.g. the Markt Intern GMBH judgment of 20 November 1989 (Series A, no.165) and the Jacobowski judgment of 23 June 1994 (Series A no.291) of the European Court of Human Rights (reported also in: D.Gomien/D.Harris/L.Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, 1996, at 288-290) in which the Court balanced the rights to freedom of expression and freedom of competition and recognized a larger margin of appreciation in economic matters even if the prohibited expressions of opinion had been factually correct. For a criticism of this jurisprudence see e.g. J.A.Frowein/W.Peukert, *EMRK Kommentar*, 2<sup>nd</sup> edition 1997, at 401.

<sup>88</sup> European Court of Human Rights, Third Section Decision as to the Admissibility of Application No.43844/98 by T.I. against the United Kingdom, 7 March 2000, at page 16 (nyr).

<sup>89</sup> European Court of Human Rights, judgment of 18 February 1999 on complaint No. 24833/94, see: *Europäische Grundrechtszeitschrift (EUGRZ)* 1999, 200.

<sup>90</sup> See: Complaint No. 56672/00 (*Senator Lines v. 15 EC-States*), reported in *EUGRZ* 2000, 334.

the survival and personal development of billions of people depend on the international division of labor, and unnecessary poverty, food and health problems prevent billions of people from enjoying their human rights, UN human rights law and most human rights lawyers continue to focus more on protection of civil and political rights than on economic and social human rights. The UN Covenants of 1966, for example, protect “first generation” civil and political rights more effectively than “second generation” economic, social and cultural rights.<sup>91</sup> Only more recent UN human rights treaties dealing with specific problem areas – such as the 1979 Convention on the Elimination of all Forms of Discrimination of Women as well as the 1989 Convention on the Rights of the Child - have begun to return to a holistic human rights conception by granting equal importance to economic, social and cultural rights as to civil and political rights in their realm of protection.<sup>92</sup> UN law still seems far away from “making the global economy work for human rights” by embedding a strong human rights culture in the worldwide division of labor.<sup>93</sup>

Human rights need to be protected, mutually balanced and reconciled not only at the national level through democratic legislation, but also across frontiers through international treaties. National and international human rights include rights to democratic participation in the exercise of government powers and rights of access to courts.<sup>94</sup> All legislative, executive, judicial and also foreign policy activities of governments must aim at promoting human rights: “Human rights and fundamental freedoms are the birthrights of all human beings; their protection and promotion is the first responsibility of Governments.”<sup>95</sup> Does the collective intergovernmental rule-making in UN agencies and the WTO, often behind closed doors and without effective parliamentary control, comply with these human rights requirements of democratic rule-making maximizing human rights? Moreover, UN and European human rights law recognize that democratic limitations on human rights are subject to constitutional requirements of legality, non-discrimination, necessity and proportionality: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society” (Article 29 UDHR). Are the centuries-old traditions of discriminatory border restrictions against foreign goods, foreign services and foreigners justifiable in terms of human rights notwithstanding their welfare-reducing effects?

The exercise of all human rights depends on resources (such as food, information, health and educational services). Open borders enable domestic consumers to enjoy more, better and a larger variety of goods and services at lower prices than in the domestic markets, without preventing governments from applying “optimal policy instruments” for correcting “market failures” and supplying “public goods”. Since legislative, administrative and judicial protection of human rights is costly and liberal trade increases national income and consumer welfare, it is not surprising that constitutional democracies tend to have open economies, whereas non-democracies often close not only their “political markets” but also their economic markets. The manifold interrelationships between decentralized, democratic coordination among autonomous citizens in “political markets” and decentralized, rights-based coordination in “economic markets” continue to be unduly neglected by the one-sided disregard of UN human rights law for the constitutional preconditions for the proper functioning of national and international economic markets as “engines” for creating and supplying economic resources needed for enjoyment and effective protection of human rights.

---

<sup>91</sup> See e.g. A.Eide/C.Krause/A.Rosas (note 46), at 15-77.

<sup>92</sup> Cf. I.Merali/V.Oosterveld (eds.), *Giving Meaning to Economic, Social and Cultural Rights*, 2001.

<sup>93</sup> M.Robinson, *Making the Global Economy Working for Human Rights*, in: G.P.Sampson (ed.), *The Role of the World Trade Organization in Global governance*, 2001, at 209.

<sup>94</sup> See e.g.: C.Harlow, *Access to Justice as a Human Right: The European Convention and the European Union*, in: Alston *et alii* (note 4), 187-214.

<sup>95</sup> Vienna Declaration (note 74), section 1.

The new human rights challenges resulting from the modern globalization of communications, markets and governance structures illustrate the significance of a dynamic conception of liberty, as it is reflected in the Ninth Amendment of the US Constitution: “the enumeration of certain rights in this Constitution shall not be construed to deny or disparage others retained by the people”.<sup>96</sup> Constitutions and human rights instruments are historical and political documents which, even though the text may focus on particular problems at a particular time (e.g. “civil” and “political liberty” rather than “economic liberty”), should be construed as protecting individuals against all arbitrary coercion. It is no coincidence in this respect that modern constitutions of European countries with historical experiences of dictatorship (notably in Germany) protect individual freedom of personal development in the *Kantian sense* of maximum equal liberty across frontiers, and grant corresponding rights of access to courts and judicial review of whether legislative or administrative restraints of individual freedom are “unnecessary”, disproportionate or otherwise arbitrary.<sup>97</sup> Nor is it a coincidence that almost all European countries, following their negative experiences with widespread cartelization and abuses of economic power during the first half of the 20<sup>th</sup> century, have adopted national and international competition rules since the 1950s prohibiting abuses of private and public economic power and granting citizens judicially enforceable rights against restraints of competition and abuses of “market power”.<sup>98</sup> By protecting new “transnational fundamental rights” which had previously not been recognized in national constitutions of EC member states, EC constitutional law has extended human rights across frontiers based on a dynamic conception of freedom and fundamental citizen rights.

UN law emphasizes the “indivisibility” of civil, political, economic, social and cultural human rights and the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>99</sup> Yet, the practice of UN specialized agencies and of the WTO is still far away from understanding and regulating economic issues as human rights issues. For example, protection of private property is not mentioned in the UN human rights covenants even though private property rights are indispensable not only for economic welfare (e.g. as legal incentives assigning responsibility for maintaining an asset, for bearing the loss for not doing so, for enabling transfers of resources and an exchange economy) but also for political freedom and the rule of law.<sup>100</sup>

In the jurisprudence of the EC Court of Justice and the European Court of Human Rights, economic and social rights have been recognized long since as legal and “justiciable” rights to be protected by national and international courts.<sup>101</sup> The entry into force in 1999 of the 1995 Protocol providing for collective complaints under the European Social Charter of 1961 confirms the increasing recognition of legal and judicial remedies for the protection also of social rights. The UN Committee on Economic, Social and Cultural Rights has consistently argued that all ICESCR rights constitute individual rights, and possibilities for collective rights guarantees, and corresponding state

---

<sup>96</sup> See the criticism by Hayek (note 72) that the meaning and constitutional functions of this provision were “later completely forgotten” (at 186).

<sup>97</sup> See e.g. Article 2 (1) of the German Basic Law: “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” Article 2 (1) has been construed by German courts to protect also individual economic freedom across frontiers (e.g. rights to import and export subject to democratic legislation), cf. Petersmann (note 44), at 336 *et seq.* Article 93 of the Basic Law protects individual access to the Federal Constitutional Court by means of direct “constitutional complaints which may be filed by any person alleging that one of his basic rights ... has been infringed by public authority.”

<sup>98</sup> See the books by Amato and Gerber above in note 17.

<sup>99</sup> Vienna Declaration (note 90), section 5.

<sup>100</sup> On these historical, philosophical, economic and legal links between private property and freedom see: R.Pipes, *Property and Freedom*, 1999.

<sup>101</sup> See e.g. M.Scheinin, *Economic and Social Rights as Legal Rights*, in: Eide *et alii* (note 46), 41-62.

obligations to respect, protect and fulfil the rights of individuals and groups.<sup>102</sup> Yet, human rights are not yet effectively integrated into the law and policies of most worldwide organizations.

## **6 Protection of Human Rights in Economic Integration Helps Citizens to Acquire the Resources Necessary for the Enjoyment of Human Rights**

Economists tend to define economic development in quantitative terms (e.g. increase in GNP and national income). The contribution of human rights to the correction of market failures (such as inadequate “voice” and “exit” opportunities in markets, “external effects”, socially “unjust” distribution of income), to the reduction of transaction costs, the promotion of market competition (e.g. through freedom of association and mobility of persons), and to the protection of “substantive freedom” of consumers and of the poor have been rarely examined by economists. While the contribution of law to economic welfare has been emphasized since Adam Smith’s *Inquiry into the Nature and Causes of the Wealth of Nations* (1776), the various economic theories on “law and economics”, “institutional economics” and “constitutional economics” have not systematically analyzed the contribution of human rights to economic welfare. Only recently have economists suggested to define economic development in terms of real substantive freedom and “capability” of citizens to self-development.<sup>103</sup> A few recent economic studies offer empirical evidence that “rights make human beings better economic actors”, and that economic underdevelopment (e.g. famines, lack of investments, inefficient capital markets) seems to be closely related to lack of effective protection of human rights, democracy and accountability of governments.<sup>104</sup>

Most lawyers likewise disregard the contribution of human rights to economic welfare. In constitutional democracies with longstanding constitutional guarantees of a common market and liberal trade (like the USA), the concept and necessity of economic and social human rights often remain controversial. Where competition is effectively protected through antitrust law (as in the USA), competition rules are often applied on the basis of economic efficiency criteria (such as absence of price and output restrictions) rather than on the basis of equal freedoms of competitors and consumers.<sup>105</sup> Human rights lawyers are often averse to taking into account economics in the consideration of human rights problems, or assume that the “laws of the market” are anarchic and offer no legitimate criteria for the solution of human rights problems.

Yet, billions of individuals have to face “scarcity of resources” as their most urgent human problem (e.g. for satisfying consumer demand for food, medicines, housing, education, health services and job opportunities) and freedom of exchange as their most important “instrumental liberty” for human survival and self-development. Since the exercise of human rights depends on scarce economic resources, human beings inevitably compete for access to and allocation of such resources. Consumer-driven market prices are the only spontaneous information, allocation and coordination mechanism respecting the freedom and divergent preferences of investors, producers, traders and consumers. Division of labor, based on private property rights and equal freedoms (e.g. freedom of contract to transfer property rights), has proven to be an indispensable complement of human rights, necessary for promoting savings and investments, productive uses of scarce resources,

---

<sup>102</sup> See E.Riedel, Rights subjected to the Complaints Procedure, paper submitted to the Workshop on the Justiciability of ESC Rights with Particular Reference to an Optional Protocol to the ICESCR at the UN High Commissioner for Human Rights, 5-6 February 2001.

<sup>103</sup> Cf. A.Sen, Development as Freedom, 1999.

<sup>104</sup> See the Human Development Report 2000 (above note 13) and the World Development Report 2000/2001 on “Attacking Poverty” (World Bank 2001) which defines “poverty as encompassing not only low income and consumption but also low achievement in education, health, nutrition, and other areas of human development”, including “powerlessness and voicelessness” of poor people; the report emphasizes the importance of protection of property rights (e.g. p.34) and “empowerment” of poor people through democratic processes and accountability of governments (see p.39).

<sup>105</sup> See e.g. the book by Bork above note 79.

satisfaction of consumer demand, and inducing citizens to increase the supply of goods, services and income for the enjoyment of human rights.

Economic history confirms the central insight of Adam Smith's *Inquiry into the Nature and Causes of the Wealth of Nations* (1776) that economic welfare is essentially a function of legal guarantees for economic liberty, property rights, legal security and open markets as decentralized incentives for savings, investments and division of labor. Even though many less-developed countries are rich in economic, biological and human resources, their lack of legal security and inadequate protection of property rights impede investments, savings, efficient use of resources and economic development.<sup>106</sup> The sad reality of unnecessary poverty and gross violations of human rights in many countries is viewed by "constitutional economics" as proof of "constitutional failures" that are due to inadequate constitutional protection of civil, political, economic and social human rights, including economic liberties, property rights, monetary and competition safeguards necessary for a mutually beneficial division of labor.<sup>107</sup>

The 1966 UN Covenant on Economic, Social and Cultural Rights does not protect the economic freedoms, property rights, non-discriminatory conditions of competition and rule of law necessary for a welfare-increasing division of labor satisfying consumer demand through private investments and efficient supply of goods, services and job opportunities.<sup>108</sup> The UN Covenant's social rights are therefore often criticized as a one-sided attempt at redistribution without adequate attention for wealth-creation and without proper balance among rights and obligations.

The EC's "treaty constitution", by contrast, protects welfare-enhancing market competition in a much more comprehensive manner in the economy no less than in the polity. Free movements of goods, services, persons, capital and related payments, non-discriminatory conditions of competition, as well as social rights are constitutionally protected in EC law as "fundamental rights".<sup>109</sup> The single European market could never have been realized without private enforcement of these economic liberties by EC citizens and without their judicial protection by national courts and by the EC Court vis-à-vis governmental and private restrictions and discrimination. EC competition law and the ever more comprehensive EC guarantees of social rights and of regional adjustment assistance are indivisible components of the EC's "economic constitution" and "social market economy" without which political acceptance of the "acquis communautaire" by many less-developed, newly acceding European countries would not have been democratically feasible.<sup>110</sup> Indivisibility of *political* as well as *economic freedom* and responsibility, constitutional safeguards against abuses of *economic power* no less than against abuses of *political power*, and social rights promoting a "social market economy" have become hallmarks of European integration law that should serve as models for worldwide integration law.

---

<sup>106</sup> See e.g. de Soto (note 31), who points out that many developing countries are rich in resources which, due to inadequate protection of private property rights, remain "dead capital" that cannot be economically used.

<sup>107</sup> On "constitutional economics" and the need for an "economic constitution" see E.U.Petersmann (note 44), e.g. chapters III-VII, as well as D.Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, in: *American Journal of Comparative Law* 42 (1994), 25-84. Numerous recent economic studies suggest "that almost all of the countries that have enjoyed good economic performance across generations are countries that have stable democratic governments" ( M.Olson, note 15, at 43, 192: "The countries with the highest per-capita incomes – the developed democracies – are also the countries where individual rights are best protected.").

<sup>108</sup> "Economic freedoms" are mentioned only in Article 6 of the ICESCR on the right to work. Property rights were not mentioned in the Covenant due to disagreement on how to delimit private property and public interest legislation.

<sup>109</sup> See above at notes 20 and 80.

<sup>110</sup> Cf. e.g. M.Poiars Maduro, *Striking the Elusive Balance between Economic Freedom and Social Rights in the EU*, in: Alston *et alii* (note 4), 449-472. On the constitutional impact of EU constitutional law on the national constitutional laws of EC members and acceding countries see: A.E.Kellermann/J.W. de Zwaan/J.Czuczai (eds.), *EU Enlargement. The Constitutional Impact at EU and National Level*, 2001.

Just as European economic integration law has become reinforced by integrating human rights, the increasing calls for “mainstreaming human rights” into worldwide economic integration law (e.g. of the WTO, IMF, ILO and World Bank) offer important synergies for strengthening both human rights law and global integration law.<sup>111</sup> The indivisibility of civil, political, economic, social and cultural human rights requires more effective legal protection also of individual *economic liberties* as necessary precondition for *personal* and *political liberties*, stronger social rights, and a mutually welfare-increasing division of labor in which the social adjustment costs to global integration are jointly shared (e.g. through integrated IMF and World Bank assistance programs for newly acceding WTO member countries). European integration law offers important lessons for the necessary reforms of UN human rights law and of global integration law: The need for constitutional, legislative and judicial safeguards against freedom’s inherent tendencies of destroying itself is a constitutional task in *all areas* of civil, political, economic, social and cultural life.

## **7 Human Rights Require International Competition Rules Protecting Consumer Welfare and Freedom of Choice of Citizens**

Indivisibility of human rights implies that the human right to liberty must protect the right of each individual to self-determination and self-development in *all areas* of social life through constitutional restraints on power and corresponding liberty rights of citizens provided the equal human rights of all others are respected.<sup>112</sup> Equal freedoms of investors, producers, traders and consumers, and their unequal resources, knowledge, capabilities and preferences, inevitably entail competition as the only decentralized information and coordination mechanism which respects individual freedom of choice and enables individuals to overcome their inevitable ignorance in an extended division of labor among billions of autonomous producers and consumers. Human rights must not ignore the historical experience and “ordo-liberal insight” that the proper functioning and perceived “justice” of economic markets depends on legal guarantees of “constitutive principles” (e.g. monetary stability, open markets, private property rights, freedom of contract, liability, respect for human rights) and “regulative principles” (e.g. policy coherence, optimal policy instruments, necessity and proportionality of government interventions) without which “market failures” and „government failures“ risk to distort and discredit competition.<sup>113</sup> From a human rights perspective, constitutional protection of human rights in the economy is no less important for the welfare of citizens than protection of human rights and constitutional restraints on powers in the polity.

Human rights also imply that the constitutional task of promoting non-discriminatory conditions of competition and social welfare requires not only “negative freedoms” (e.g. in the sense of absence of illegal force and unnecessary coercion). Constitutional guarantees of “positive freedoms” (in the sense of participatory and re-distributive rights), of individual responsibility (e.g. for savings and investments, injury caused to others or to oneself), undistorted competition and social justice are no less necessary for promoting equal opportunities.<sup>114</sup> In order to remain politically and socially acceptable, market economies must offer fair opportunities *to all* (e.g. for the free development of individual capacities) and must limit, through competition law and social law, the

---

<sup>111</sup> See E.U.Petersmann, Human Rights, Cosmopolitan Democracy and the Law of the World Trade Organization, in: Fletcher/Mistelis/Cremona (eds.), Foundations and Perspectives of International Trade Law, 2001, at 79-96; S.I.Skogly, The Human Rights Obligations of the World Bank and the International Monetary Fund, 2001.

<sup>112</sup> On constitutions as “precommitment devices” and the need for a general “constraint theory” see: J.Elster, Ulysses Unbound, 2000.

<sup>113</sup> On ordo-liberal theories on the interrelationships between economic, political and legal order and the need for an “economic constitution” see e.g. Petersmann (note 44), chapter III; Gerber (note 17), chapter VII.

<sup>114</sup> On the numerous different concepts of equal freedoms, “basic capability equality” (A.Sen) and distributive justice, and on the problems of knowledge, conflicts of interests, and abuses of power confronting the implementation of concepts of social justice, see S.Darwall (ed.), Equal Freedom, 1995; Barnett (note 14), at 308 *et seq*; J.Raz, The Morality of Freedom, 1986.

inherent market tendencies towards self-destruction and socially unjust distribution of risks and benefits. The democratic legislation on how to balance and delimit economic freedoms (such as freedom of contract, professional and entrepreneurial freedom), property rights and social rights may legitimately differ from country to country depending on its available resources and prevailing social views. Yet, all constitutional democracies in Europe and North America recognize that neither democracies nor economies can realize their human rights objectives without institutional, procedural and substantive legal restraints on private and public power and corresponding citizen rights designed to avoid abuses that were not consented to by citizens and reduce social welfare.<sup>115</sup>

In the pursuit of their constitutional task of defining, delimiting, promoting, protecting and reconciling equal rights and competition across frontiers in an ever more precise and more effective manner, most governments in Europe and North America have also accepted the need for international competition rules which prevent and control – e.g. through competition legislation, independent competition authorities, judicial protection of individual rights and international cooperation among antitrust authorities – “unreasonable restraints of competition” on the basis not only of equal rights, but also of economic criteria (such as prohibitions of price fixing, market-sharing and output restrictions) that offer more precise guidelines for distinguishing welfare-increasing from welfare-reducing restraints of competition. There is broad agreement among competition authorities in Europe and North America today that the direct objective of competition laws and policies should focus on economic efficiency and consumer welfare, even if their indirect long-term objectives also include protection of equal freedoms of market participants and dispersion of private and public power.<sup>116</sup> Other policy objectives, like protection of small enterprises and promotion of social justice, can be pursued more effectively through other policy instruments that avoid distortions of trade and competition (e.g. tax benefits and subsidies for small enterprises). The European concept of “social market economy” clearly admits that markets do not guarantee socially just results and need to be complemented by strong social rights. For example, competition, new technologies and changing consumer demand may entail “constructive destruction” (*Schumpeter*) and adjustment costs that may arise through no fault of producers and require a social “safety net” in order to remain democratically acceptable and protect the human rights of vulnerable groups.

## **8 Can a “United Nations Action Program” Succeed in Integrating Human Rights into the Law of Worldwide Organizations?**

The incorporation of human rights into European integration law reflects effective protection of human rights in both the national and European economy and polity of EU member countries. UN human rights law, by contrast, has not succeeded so far to protect human rights effectively in the national and increasingly globalized economy and governance systems of all UN member states. Initiatives for integrating human rights into the law of worldwide organization are unlikely to come from specialized economic organizations like the WTO. More than 50 years after the Universal Declaration on Human Rights, it is time for a comprehensive UN program for integrating human rights in a coherent manner into the law of worldwide organizations so as to “constitutionalize” the world economy and global governance. Are the powers of the UN (e.g. under Articles 62-64 of the UN Charter) sufficient for bringing about the needed “human rights revolution”?

In contrast to the anti-market bias of earlier UN recommendations for a “New International Economic Order”<sup>117</sup>, the recent UN Secretary-General’s report on “Globalization and its impact on the full enjoyment of all human rights”<sup>118</sup> is characterized by a balanced attempt at reconciling human rights, market competition and globalization. It emphasizes, *inter alia*,

---

<sup>115</sup> On this common dilemma of democracies and market economies see Amato (note 17).

<sup>116</sup> See: C.D.Ehlermann/L.L.Laudati (eds), *European Competition Law Annual: Objectives of Competition Policy*, 1998.

<sup>117</sup> See e.g. E.U.Petersmann, *Charter of Economic Rights and Duties of States*, in: Bernhardt (ed.), *Encyclopedia of Public International Law Vol.1*, at 561-566.

<sup>118</sup> UN documents A/55/342 of 31 August 2000 and A/56/254 of 31 July 2001.

- the worldwide opportunities of increasing the resources available for the realization of human rights through global division of labor provided market competition is accompanied by appropriate domestic policies;<sup>119</sup>
- the complementary functions of international guarantees of freedom and non-discrimination e.g. in IMF and WTO law and in human rights law;
- the need to correct “market failures” so as to ensure that economic growth leads to greater promotion and protection of human rights;
- the importance of human rights (such as the rights to health, food and a clean environment) for the interpretation of “public interest clauses” in the law of worldwide organizations and for the structural adjustment programs of international financial institutions;
- the positive effects of new technologies (e.g. for education and the successful organization of civil society initiatives), but also their unequal distribution and certain negative effects (e.g. in terms of increased vulnerability of capital markets, abuses of the Internet for spread of hate speech, etc);
- the positive contribution of human rights to a geographically more even distribution of investments and financial flows, and the adverse effects of trade protectionism on development and human rights;
- frequent links between lack of democracy and certain negative aspects of international trade (such as illegal trafficking of drugs, diamonds and human beings).

The UN High Commissioner for Human Rights, whose mandate includes coordination of all UN human rights activities and improving their effectiveness, has likewise called for a rights-based and rules-based approach to development making the world economy and international economic institutions part of a human rights culture.<sup>120</sup> The “Global Compact” launched by UN Secretary-General Kofi Annan in 1999 for greater business support for human rights, core labor standards and protection of the environment offers important complementary strategies for bringing the benefits of globalization and of human rights to more people worldwide. Also non-economic NGOs are increasingly involved in preparing “bottom-up reforms” of the state-centered UN system.<sup>121</sup>

A “Global Compact” committing all worldwide organizations to respect for human rights, rule of law, democracy and “good governance”<sup>122</sup> in their collective exercise of government powers would promote the overall coherence and democratic legitimacy of the UN system and create new incentives for rendering human rights more effective. Just as “European citizenship” has reinforced and enlarged civil, political, economic, social and cultural rights of EU citizens, “UN citizenship” and “good corporate citizenship” should become new legal titles for individuals and stakeholder groups for democratic participation in the UN governance systems and for greater responsiveness of the UN legal system to the needs and human rights of all people.<sup>123</sup> The “global compact” should include

---

<sup>119</sup> The recent WTO report on *Trade, Income Disparity and Poverty* (by Ben-David and Winters, Special Studies No.5, WTO 1999) offers empirical evidence that trade contributes to economic growth and promotes alleviation of poverty provided trade liberalization is complemented by appropriate domestic policies (e.g. for education, health and consumer protection) that have much larger effects on poverty alleviation than trade policy.

<sup>120</sup> See e.g. M. Robinson (above note 93), 209-222.

<sup>121</sup> Cf. the UN Secretary-General’s *Millennium Report* on “We the Peoples”, UN 2000, and the Progress Report by the UN High Commissioner for Human Rights on “Business and Human Rights”, UNHCHR 2001.

<sup>122</sup> Several international organizations have committed themselves to principles of “good governance” without clarifying the relationship between this vague political principle and human rights, cf. e.g.: *Governance and Human Rights*, World Bank 1995; *Participatory Development and Good Governance*, OECD 1995.

<sup>123</sup> Introducing “UN citizenship” as a human rights concept would, however, require far-reaching democratic reforms of the UN legal system which appear hardly feasible through amendments of the UN Charter pursuant to its Articles 108 or 109, cf. E.U.Petersmann, *How to Constitutionalize the United Nations? Lessons from the “International Economic Law Revolution”*, in: V.Götz/P.Selmer/R.Wolfrum (eds.), *Liber Amicorum G. Jaenicke*, 1998, 313-352.



commitments of all international organizations to integrate human rights into their respective laws and practices and to submit annual “human rights impact statements” examining and explaining their contribution to the protection and enjoyment of human rights. Such a human rights policy could help to overcome also the widespread distrust by civil society groups vis-à-vis non-transparent rule-making in “specialized organizations”. It could also assist national parliaments in exercising more effective democratic control over “multi-level governance” in international organizations.

Just as proposals for integrating human rights into European integration law were not initiated by trade politicians, it seems unrealistic to expect such initiatives from specialized worldwide economic organizations or from national trade, finance and economic ministries. In the Uruguay Round of multilateral trade negotiations, for instance, trade diplomats preferred negotiating international rules behind closed doors unobstructed by close parliamentary and democratic scrutiny; and industries lobbied one-sidedly for incorporating into the WTO “positive integration law” focusing on intellectual property rights beneficial for industries without references to social human rights. In contrast to the comprehensive obligations and forceful dispute settlement and enforcement systems of WTO law, the small WTO Secretariat and consensus-based WTO decision-making procedures remain politically weak. Obstruction by a few self-interested politicians or by non-democratic governments is often enough to prevent international organizations from referring to human rights.

As in other fields of human rights law, initiatives for protecting human rights more effectively in the economy will depend on democratic vigilance and bottom-up pressures by courageous citizens and judges defending human rights. The universal recognition of human rights promotes a progressive empowerment of individuals and of non-governmental organizations (NGOs) to insist on democratic reforms of the state-centered system of international law and international organizations. The 1966 Optional Protocol to the UN Covenant on Civil and Political Rights provides for a direct complaints procedure for individuals claiming to be victims of human rights violations. The preparations of a corresponding Optional Protocol for the International Covenant on Economic, Social and Cultural Rights (ICESCR) reflect the need, as well as the difficulties, to strengthen direct remedies for individuals in the monitoring and enforcement mechanisms of economic and social human rights.<sup>124</sup> Are non-binding UN resolutions unsuitable means for strengthening the obligation of states to protect human rights in the trade and economic policy area, including state responsibility “to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights”?<sup>125</sup>

For a globally interdependent but highly decentralized world composed of about two hundred states and several hundred intergovernmental organizations, the primacy of the UN Charter (cf. Article 103) and of UN human rights law offers a constitutional framework for the overall coherence of the policies of governments, “specialized agencies”, and of the billions of producers and consumers in the global economy. While the International Labor Organization, the World Bank and the World Intellectual Property Organization have increasingly integrated human rights and individual complaints procedures into their law and practices<sup>126</sup>, government representatives in other worldwide

---

<sup>124</sup> The ICESCR entered into force in 1976 and has today been ratified or acceded to by 144 states. A draft optional protocol to the ICESCR providing for a right of individuals or groups to submit communications concerning non-compliance with the covenant was elaborated by the UN Committee on Economic, Social and Cultural Rights and submitted to the UN Commission on Human Rights in 1996, but has not yet been approved by member states (cf. the Report of the High Commissioner for Human Rights in E/CN.4/2000/49 of 14 January 2000).

<sup>125</sup> Quotation from the 1997 “Maastricht Guidelines on Violation of Economic, Social and Cultural Rights”, section 18, which continues to define state responsibility under current international law in the following terms: “States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors” (see: Mehra, note 18, at 251-260).

<sup>126</sup> See e.g. IBRD, *Development and Human Rights: The Role of the World Bank*, 1998; Human Development Report 2000, UNDP 2000; *Intellectual Property and Human Rights*, WIPO 1999. The IMF guidelines (see e.g. *Good Governance: The IMF’s Role*, 1997) and WTO reports do not explicitly refer to “human rights”.

organizations (like the International Monetary Fund and the WTO) remain reluctant to admit that also the *collective exercise* of their powers (e.g. in the monetary and trade policy areas) is limited by human rights and must serve the interests and democratic rights of all affected citizens. Explicit recognition of the “human rights functions” of WTO rules, even if contained only in a political declaration by WTO member states, would help to refute the claim by anti-globalization activists that “human rights offer a principle on which to base opposition to the challenges posed by economic globalization” and by WTO law.<sup>127</sup> Yet, without additional political initiatives by the UN Secretary-General, UN human rights bodies, domestic parliaments and other civil society representatives, the needed integration of human rights into the law of all worldwide organizations risks to make little progress.

As long as UN human rights law does not provide for effective judicial remedies at the international level, there is no reason why specialized international courts should be less capable than politicized UN bodies to protect human rights in the interpretation and application of global integration law. For example, just as the EC Court of Justice, more than thirty years ago, responded to the invocation of human rights in national courts by confirming that “fundamental human rights (are) enshrined in the general principles of Community law and protected by the Court”<sup>128</sup>, WTO dispute settlement panels and WTO Appellate Body judges should acknowledge that universally recognized human rights have become part of general international law which WTO judges have to take into account in their interpretation and application of WTO rules.

## **9 Need for Closer Cooperation between UN Human Rights Bodies, International Organizations, Parliaments and Non-Governmental Human Rights Groups**

According to Article 18 of the UN Covenant on Economic, Social and Cultural Rights, “the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities.” Human rights and their corresponding government obligations are referred to in the statutes and mandates of several international organizations, such as the human right to education to be promoted by the UN Educational, Scientific and Cultural Organization (UNESCO); the human rights to work and freedom of association to be protected by the International Labor Organization (ILO); the human right to health as the central legal objective of the World Health Organization (WHO); the human right to food as a major task of the Food and Agricultural Organization (FAO); the protection of intellectual property rights by the World Intellectual Property Organization (WIPO); and the promotion of children rights by the UN Children’s Fund (UNICEF). Article 2 of the UN Covenant on Economic, Social and Cultural Rights requires “to take steps, individually and through international assistance and cooperation ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant”. More comprehensive cooperative arrangements for making the legal and supervisory activities of the UN Committee on Economic, Social and Cultural Rights and the multilateral rule-making and operational assistance by specialized international organizations mutually reinforcing are indispensable for enhancing the effectiveness of complementary international and national measures for the promotion of human rights.

In the elaboration of its so far 14 “general comments” (e.g. on the human right to health), and during its “days of general discussion”, the UN Committee on Economic, Social and Cultural Rights cooperates already actively with specialized international organizations (such as WHO, IMF, World Bank, ILO, WIPO and also WTO) and non-governmental human rights groups. The Committee also submitted a declaration to the second ministerial conference of the WTO at Seattle in November 1999 reminding all states, and also the WTO, of their human rights obligations. Yet, many specialized

---

<sup>127</sup> For a too one-sided critique of the WTO and of “dehumanising effects of globalisation” see e.g. M.Kothari, *Globalisation, Social Action and Human Rights*, in: Mehra (note 18), at 46.

<sup>128</sup> Case 29/69. *Stauder*, ECR 1969. 419, para.7.

worldwide organizations (such as IMF and WTO) lack special rules, procedures and institutions for protecting human rights in their specialized fields of activities. As a result, the "human rights functions" of economic policy objectives (such as monetary stability as a precondition for the protection of the value of property rights in money), and the "economic functions" of human rights (such as liberty rights and property rights as preconditions for a market economy), tend to be unduly neglected in specialized organizations.

The objective of integrating human rights into national and international development strategies can hardly be achieved without more political support also from parliaments and non-governmental organizations for integrating human rights into the rule-making and operational activities of specialized organizations. Human rights and the corresponding state obligations further require more effective international accountability mechanisms and judicial remedies as part of human rights law and of global integration law.

## **10 Human Rights and the Global Integration Law of the WTO**

The numerous references in WTO law to the law of other worldwide organizations (such as the UN, the IMF and the World Bank) demonstrate the obvious fact that the WTO objective of maximizing individual and social welfare through worldwide division of labor cannot be realized without other supplementary worldwide agreements, such as the IMF rules on the promotion of stable exchange rates and on liberalization of current payments and capital flows. Can WTO law - as the most important legal and institutional framework for the worldwide liberalization of welfare-reducing discriminatory barriers to the international flow of goods, services, investments and persons - realize its ambitious goals of "global freedom", market integration, worldwide rule-making and rule of law without regard to universally recognized human rights?

The legal, political and economic arguments for interpreting WTO rules in conformity with universally recognized human rights have already been mentioned (e.g. in section 1 above). Yet, can the adjustment of WTO law to universal human rights be left to WTO judges who may be unfamiliar with human rights and the jurisprudence of human rights courts (notably those WTO panel members and Appellate Body member who are no lawyers)? How will the trade specialists in the WTO Secretariat react who have to advise and assist WTO panels in the drafting of dispute settlement reports? Will the trade diplomats in the WTO's Dispute Settlement Body adopt panel and appellate reports suggesting "new human rights interpretations" of WTO rules? How to deal with the risk of protectionist abuses of human rights arguments for justifying trade restrictions? Since the WTO perceives itself as a "member-driven organization" where multilateral rule-making will succeed in overcoming domestic protectionist pressures only with the help of political support by powerful export industries: Will economists and industries change their declared preference for "specialized organizations" and "separation of policy instruments"? Will human rights activists and UN human rights bodies support integration of human rights into the WTO? How will other worldwide organizations (like the World Bank and the IMF) react to a new "integration paradigm" linking trade liberalization and its adjustment problems to promotion of economic and social human rights and joint financial "burden sharing" (as in European integration)?

The values underlying WTO law – such as protection of legal freedom, property rights, non-discrimination, rule of law, access to courts, economic welfare and national sovereignty to pursue non-economic policy objectives that are considered more important than liberal trade – mirror corresponding human rights principles. Even though WTO law nowhere explicitly refers to human rights, it serves manifold "human rights functions" across frontiers. Given the widespread bias among human rights lawyers vis-à-vis economics and WTO law, and the agnostic attitude of many trade specialists vis-à-vis human rights, it is an important task of academics to promote more dialogue and better understanding among these different communities of trade specialists and human rights advocates so as to render both human rights law and WTO law more effective in dealing with worldwide poverty, health and human rights problems.

## **A Human Rights Functions of WTO Guarantees of Freedom, Non-Discrimination and Rule of Law**

In contrast to most human rights treaties, the WTO guarantees of freedom, non-discrimination and rule of law go far beyond national constitutional guarantees in most countries which tend to limit economic freedom to domestic citizens and, for centuries, discriminate against foreign goods, foreign services, foreign investors and foreign consumers (e.g. by permitting export cartels). By extending equal freedoms across frontiers and subjecting discretionary foreign policy powers to additional legal and judicial restraints ratified by domestic parliaments, WTO law serves “constitutional functions” for rendering human rights and constitutional restraints more effective in the trade policy area.<sup>129</sup> Economic theory confirms the constitutional value of liberal trade: trade transactions are voluntarily agreed upon only if they are mutually beneficial for the seller and the buyer; and the economic gains from trade do not depend on the nationality of traders. Political theory points to additional gains from peaceful trade cooperation, such as promotion of freedom and “positive peace”. Modern theories of justice justify the WTO objective of maximizing equal freedom across frontiers by the ethical “categorical imperative” (*Kant*) and by the rational self-interest of all individuals in equal freedom and mutually beneficial cooperation.<sup>130</sup> In case of potentially negative implications of liberal trade (such as trade in arms and transboundary movements of environmental waste), WTO law provides for generously drafted “exceptions” which allow unilateral national safeguard measures including governmental restrictions of freedom and property rights for the benefit of other, more important human rights (e.g. limitations of intellectual property rights so as to allow “parallel imports” of medicines at socially affordable prices, cf. Articles 6 and 8 of the TRIPS Agreement).

Constitutional theory (e.g. by *Kant* and *Rawls*) and practical experience (notably in European integration) demonstrate that national constitutions cannot effectively protect human rights and democratic peace across frontiers without complementary *international constitutional restraints* on foreign policy powers and *cosmopolitan guarantees* of human rights vis-à-vis foreign governments.<sup>131</sup> For example, just as all states guarantee freedom of trade *inside* their national boundaries, effective protection of the human rights of their own citizens requires to constitutionally protect also freedom to produce, trade and consume *across frontiers* as an indivisible part of individual liberty, as in EC law. Domestic political support for this objective can be achieved more easily through *reciprocal international agreements* rather than through *unilateral national legislation*.<sup>132</sup> Yet, even though WTO rules are formulated in terms of international rights and obligations of governments, they serve *human rights functions* for protecting individual liberty, non-discrimination, rule of law and welfare-increasing cooperation among domestic and foreign producers, investors, traders and consumers across frontiers.

## **B The Struggle for Protecting Human Rights across Frontiers: The Example of Liberty Rights as “Negative”, “Positive” and “Institutional Guarantees”**

The idea and legal recognition of “basic individual rights”, “fundamental rights” and “human rights” goes back to the beginnings of written history. Precursors include the rights to asylum granted by Greek city-states; Roman citizenship rights; rights of the nobility in the Middle Ages (e.g. in the Magna Carta 1215); religious freedom protected in the constitutional charter adopted by the Dutch

---

<sup>129</sup> See above section 4 A, notably note 51.

<sup>130</sup> See e.g. J.Rawls (note 1), at 53, whose “first principle of justice” is: “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.” On the interdependence between human rights, democracy, rule of law and peace see e.g.: J.Symonides (ed.), *Human Rights: New Dimensions and Challenges*, UNESCO 1998.

<sup>131</sup> See above section 5 and Petersmann, *How to Constitutionalize International Law* (note. 56).

<sup>132</sup> See the reasons explained in: E.U.Petersmann, *Why Do Governments Need the Uruguay Round Agreements, NAFTA and the EEA?* In: *Swiss Review of International Economic Relations* (Aussenwirtschaft) 49 (1994), 31-55.

provincial assembly at Dordrecht in 1572; the English *Habeas Corpus Act* of 1679 and *Bill of Rights* of 1689; the French Declaration of the Rights of Man and the Citizen of 1789; and the *Bill of Rights* appended to the US Constitution in 1791. The particular focus of liberty rights (e.g. freedom of religion, freedom of association, freedom to demonstrate) was often shaped by historical events (such as the schism of the Christian church from the 16<sup>th</sup> century onwards) and by political struggles against the rulers. Transnational protection of new “globalization rights”<sup>133</sup> and of non-discrimination, rule of law, democratic governance and social justice across frontiers are the human rights challenges of the 21<sup>st</sup> century.

In the history of federal states (such as the US, Switzerland and Germany) and of customs unions (such as the German Customs Union 1834-1866, the EEC Treaty), liberty rights were progressively extended across frontiers inside the federation and inside the customs union by means of *objective guarantees* of freedom of trade. The elaboration of federal *human rights catalogues* (e.g. in US, Swiss, German and EC constitutional law) and the inclusion of guarantees of human rights and democracy into international integration law (e.g. in the EU) have been politically possible only at later stages of market integration.<sup>134</sup> The judicial interpretation of liberty rights, and of the constitutional guarantee that no person shall be deprived of “liberty without due process of law” (Fifth and Fourteenth Amendments of the US Constitution), have changed over time both in Europe and North America.<sup>135</sup> In modern welfare states like Germany, for example, liberty rights are no longer interpreted only as “negative freedoms” but also as “positive rights” and “institutional guarantees” which require legislation (such as competition and social rules for a “social market economy”) enabling citizens to actively use their protected freedom and preventing abuses of power.<sup>136</sup> Even though “globalization of freedom” has become a new fact in many markets and communication systems, legal and human rights doctrines adjust only slowly their state-centered focus to the challenges of global integration law.<sup>137</sup>

**a) Do Human Liberty Rights Protect Individual Freedom Across Frontiers? On Freedom of Trade and “Legal Protectionism”**

National and international human rights instruments – from the US Declaration of Independence of 1776 up to the Universal Declaration of Human Rights of 1948 and the Charter of Fundamental Rights of the EU adopted in December 2000<sup>138</sup> - recognize not only *specific* liberty rights (cf. Article 16 EU Charter: “freedom to conduct a business in accordance with Community law and national laws”), but also unalienable *general* human rights to liberty (e.g. Article 2:1 German Basic Law, Article 6 EU Charter, Article 3 UDHR). Most human rights instruments further recognize that “human dignity is inviolable” and “must be respected and protected” (Article 1 Charter of the EU). If human dignity is interpreted in accordance with the moral “categorical imperative” as requiring maximum equal liberty for personal self-development consistent with equal human rights of all others, it is only logical to construe the general human right to liberty as applying to *all areas of personal development* which are not protected through specific human rights. Some constitutional texts explicitly provide for such general rights to maximum equal liberty subject to other constitutional restraints and democratic legislation (e.g. Article 2:1 of the German Basic Law).<sup>139</sup> Other constitutional systems (e.g. in the USA) achieve similar results by the constitutional requirement that governmental restrictions of freedom need a legal basis in constitutional law and

---

<sup>133</sup> See M.D.Pendleton, A New Human Right – The Right to Globalization, in: Fordham International Law Journal 22 (1999), 2052.

<sup>134</sup> For a comparative legal analysis with numerous references to the relevant legal texts see: Petersmann (note 44), chapter VIII.

<sup>135</sup> See e.g. J.H.Garvey/T.A.Aleinikoff, Modern Constitutional Theory: A Reader, 3<sup>rd</sup> ed. 1994, at 618 *et seq.*

<sup>136</sup> Cf. e.g. E.Grabitz, Freiheit und Verfassungsrecht, 1976.

<sup>137</sup> Cf. H.H.Koh, The Globalization of Freedom, in: The Yale Journal of International Law 26 (2001), 305-312

<sup>138</sup> See above note 75.

<sup>139</sup> See above note 97.

democratic legislation.<sup>140</sup> Comparative studies of constitutional democracies confirm that in "most of the English-speaking world and most of Western Europe ... there is general acceptance of a principle of maximum individual freedom consistent with equal freedoms for others" subject to democratic legislation.<sup>141</sup>

The Preamble to the US Constitution describes its objectives as, *inter alia*, to "promote the general welfare and secure the blessings of liberty to ourselves and our posterity." In view of the logical impossibility of enumerating all areas of individual liberty protected by the Constitution, and in order to reduce the danger of interpreting human rights catalogues as excluding liberty rights not explicitly listed, the founding fathers of the US Constitution made it explicit in the Ninth Amendment of the Constitution that "the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people". In the constitutional deliberations, other law-makers considered the Ninth Amendment as unnecessary because the constitutional principle of limited government prohibited governmental restraints of freedom that were not necessary for the protection of human rights.<sup>142</sup> How justified the concerns of the US founding fathers had been, is illustrated by the denial by US courts of any "vested right to trade with foreign nations".<sup>143</sup> In European law, it has likewise been claimed<sup>144</sup> that the lack of any explicit legal guarantee of freedom of trade with third countries should be understood as excluding the existence of such a right, without even examining whether the "freedom to conduct a business in accordance with Community law" (now explicitly recognized in Article 16 of the EU Charter of Fundamental Rights) must not be construed in conformity with the customs union principle (Article 23 EC Treaty) to the effect that freedom to conduct a business protects also freedom to import from, and export to, third countries in conformity with EC law.

The "double standard" practiced by some courts (especially in democracies with traditionally effective constitutional safeguards of economic freedom, like England and the USA) in favor of a higher degree of judicial scrutiny in the review of governmental restraints of civil and political rights compared with economic rights, is based on grounds of constitutional separation of powers and judicial self-restraint *vis-à-vis* economic legislation.<sup>145</sup> Domestic judges tend to refrain also from reviewing compliance with WTO law and its underlying economic insight that discriminatory trade restrictions are hardly ever an optimal policy instrument for promoting consumer welfare.<sup>146</sup> Individual rights to maximum equal liberty in all areas of personal development are more frequent in "post-war constitutions" (e.g. the German Basic Law of 1949), "post-revolutionary" human rights instruments (like the French Declaration of Human Rights and the Rights of the Citizen of 1791) and "international constitutions" (like the EC Treaty) designed to prevent the recurrence of historical experiences of "constitutional failures" (e.g. collaboration of cartelized industries in Germany with the Nazi dictatorship). One major advantage of such broad liberty guarantees is to promote freedom and rule of law by facilitating judicial review of illegal government restrictions.<sup>147</sup>

---

<sup>140</sup> Cf. F.L.Morrison/R.E.Hudec, Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States, in: Hilf/Petersmann (above note 52), 91-133, at 92 *et seq.*

<sup>141</sup> C.B.Macpherson, The Life and Times of Liberal Democracy, 1977, at 7.

<sup>142</sup> See e.g. S.Sherry, The Founders' Unwritten Constitution, in: University of Chicago Law Review 1987, 1127 *et seq.*

<sup>143</sup> For a discussion of this jurisprudence see: Petersmann, National Constitutions and International Economic Law (note 52), at 14-15.

<sup>144</sup> E.g. by S. Peers, Fundamental Right or Political Whim? WTO Law and the European Court of Justice, in: G.de Burca/J.Scott (eds.), The EU and the WTO, 2001, 111, at 129 ("no right to trade deserves to be recognized").

<sup>145</sup> Cf. e.g. H.J.Abraham, Freedom and the Court, 5<sup>th</sup> ed. 1988, at 11-37.

<sup>146</sup> See note 144 above and the explanation by Cordón (above note 6) why the modern economic theory of optimal interventions, and its justification of freedom of trade, have nothing to do with *laissez faire* liberalism.

<sup>147</sup> This is so in countries like Germany where "basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law" (Article 1:3 Basic Law), and "in no case may the essential content of a basic right be encroached upon" (Article 19:2 Basic Law). For, Article 19:4 of the Basic Law guarantees

Do human rights end at national borders? Or do they also limit *foreign policy powers* and protect human rights across frontiers? Modern national constitutions (such as Articles 23 and 24 of the German Basic Law), European Community law and also UN human rights law (e.g. Article 28 of the UDHR) confirm that "inalienable" human rights are designed to limit all government powers, regardless of whether they are exercised unilaterally by national government institutions or collectively by international organizations. The German Law on Foreign Economic Relations of 1961, for example, explicitly recognizes that the constitutional guarantees of liberty (e.g. in Articles 2, 12 and 14 of the Basic Law) protect also freedom to import and export subject to legislative restrictions which "are to be limited as to character and extent to the minimum necessary to achieve the purpose stipulated in the empowering legislation" and "are to be formulated in such a way as to interfere as little as possible with the liberty of economic activities" (Article 1 of the German Law on Foreign Economic Relations).<sup>148</sup> In a judgment of 1904, the US Supreme Court likewise recognized: "No one has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles ... may be imported into this country and the terms upon which a right to import may be exercised."<sup>149</sup>

Like most other human rights, constitutional liberty rights are subject not only to legislative restrictions aimed at balancing and reconciling different human rights. They also require legislative, executive and judicial implementing measures limiting the inherent tendencies of liberties and markets to destroy themselves (e.g. through monopolies and cartels) and enabling individuals to positively exercise their freedoms. Since, for domestic policy reasons, most governments liberalize their discriminatory border restrictions preferably through *reciprocal international agreements* (e.g. in the WTO) rather than unilaterally: Should the constitutional liberty rights of citizens be construed as conferring individual rights to free movements of goods, services, capital and persons in conformity with such international liberalization agreements ratified by domestic parliaments? Should national judges review whether discriminatory border restrictions limit individual liberty in a manner inconsistent with precise and unconditional international treaty obligations of the country concerned, or whether discriminatory border restrictions impose "unnecessary" restrictions that cannot promote equal human rights of domestic citizens?

## **b) Interpretation of Freedoms of Trade in International Integration Law**

How should universal and regional human rights guarantees of personal liberty (e.g. in Article 3 UDHR) be construed in the particular legal context of international organizations? Do "historical", "textual" and "legalist interpretations" justify the view that such guarantees traditionally end at national borders, and their instrumental function for promoting individual and social welfare through mutually beneficial cooperation across frontiers cannot justify "new interpretations"? Does the particular context of worldwide organizations (such as weak parliamentary and judicial control of collective international rule-making), and the function of human rights to protect maximum equal liberty of citizens, lend support to "contextual" and "functional interpretations" that human rights should be presumed to apply to *foreign policy powers* no less than to *domestic policy powers*, and should be construed in conformity with self-imposed intergovernmental obligations to protect freedom, non-discrimination and rule of law across frontiers?

---

recourse to a court against violations by public authority of any person's right, and the possibility of direct constitutional complaints to the Federal Constitutional Court (cf. Article 93 of the Basic Law) is frequently used by individuals requesting the Court to review whether their individual liberty protected by Article 2:1 has been unnecessarily restricted by legislative or administrative measures.

<sup>148</sup> For a detailed discussion of the constitutional and legislative protection of "freedom of trade" in Germany see: Petersmann, National Constitutions and International Economic Law (note 52), at 22-23.

<sup>149</sup> *Buttfield v. Stranahan* (1904), 192 U.S. 470, 493. For a criticism of more recent lower court decisions in the US see Petersmann (note 52), at 14-17.

The very idea of protecting personal self-development ("human dignity") and maximum equal liberties through human rights requires to protect also mutually beneficial *transnational* cooperation among citizens, as it has been done in the jurisprudence of the EC Court of Justice protecting free movement of goods, services, persons, capital and payments as "fundamental rights" of citizens in the EU. This legal and judicial limitation of the centuries-old tradition in nation states to discriminate against foreigners, foreign goods, foreign services and foreign investments has not only extended the fundamental rights of EC citizens across frontiers. It has also enhanced their social welfare and their potential for personal self-government and self-development. Since the "freedom to conduct a business in accordance with Community law", protected by Article 16 of the EU Charter of Fundamental Rights in accordance with the jurisprudence of the EC Court<sup>150</sup>, must be construed in conformity with the EC Treaty guarantees for free movement of goods, services, persons, capital and payments, it was also logical for the EC Court to recognize "freedom of trade as a fundamental right", as it had been done before by some Constitutional Courts in EC member countries.<sup>151</sup>

The EC Treaty's customs union principle prohibits not only discriminatory tariff and non-tariff trade barriers among EC member states (cf. Articles 28-30,90) but also vis-à-vis third countries, as specified in the customs union rules of GATT (e.g. GATT Articles II,XI,XXIV) ratified by the EC and by all EC member states.<sup>152</sup> International agreements ratified by the EC, like the GATT and other WTO Agreements, are legally binding on the EC and all its member states (cf. Article 300:7) with a legal status inside the EC that is, according to the EC Court, higher than autonomous "secondary law".<sup>153</sup> EC law must be construed consistently with international law binding on the EC, and "the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed" (Article 220). The EC Court should therefore guard the rule of law not only with regard to the *internal dimension* of the customs union principle (Articles 28-30,90 EC Treaty) but also vis-à-vis its precise and unconditional *external prohibitions* of tariffs and non-tariff trade barriers since these GATT and WTO obligations (e.g. in GATT Articles II,III:2,XI:1) are recognized as an "integral part of the Community legal system" with a legal rank superior to EC regulations and other "secondary law."<sup>154</sup> Yet, the EC Court has persistently refused to apply GATT and WTO rules and dispute settlement rulings unless EC regulations were intended to implement particular WTO obligations or made reference to specific WTO provisions.<sup>155</sup>

The EC Court's judicial self-restraint in ensuring the GATT- and WTO-consistency of EC regulations undermines the rule of law and democratic legitimacy of EC law. Since the 1970s, more than 30 GATT and WTO dispute settlement reports have found the EC institutions to violate GATT and WTO guarantees of freedom of trade ratified by the EC and by all national parliaments in EC member states for the benefit of EC citizens. EC citizens and their national parliaments have never granted, neither in EC law nor in WTO law, a mandate to EC institutions to violate precise and unconditional WTO guarantees of freedom of trade, non-discrimination and rule of law.<sup>156</sup> By

---

<sup>150</sup> For references to the ECJ jurisprudence see: Eeckhout (note 80).

<sup>151</sup> See above note 20 and Petersmann, note 143, at 17-25.

<sup>152</sup> On the WTO membership of the EC and EC member states see: P.L.H. Van den Bossche, *The European Community and the Uruguay Round Agreements*, in: J.Jackson/A.Sykes (eds.), *Implementing the Uruguay Round*, 1997, at 23 *et seq.* On GATT's customs union principle as a constitutional principle explicitly incorporated into the EC Treaty see: E.U.Petersmann, *Constitutional Principles Governing the EEC's Commercial Policy*, in: M.Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension*, 1993, 21-62.

<sup>153</sup> See e.g. Case C-61/94, *Commission v. Germany*, ECR 1996 I-3989, and note 84 for further references to the jurisprudence by the EC Court.

<sup>154</sup> See note 153.

<sup>155</sup> For recent surveys and criticism of the contradictory ECJ jurisprudence concerning the EC's GATT and WTO obligations see Peers (note 144) and G.A.Zonnekeyn, *The Latest on Indirect Effect of WTO Law in the EC Legal Order*, in: JIEL 4 (2001), 597-608.

<sup>156</sup> The invocation by the EC Court (in case C-149/96, *Portugal v. Council*, ECR 1999 I-8395) of Article 22 of the WTO's DSU (i.e. the possibility of offering compensation by the EC so as to prevent countermeasures by



undermining the rule of EC law and of international law, the EC institutions undermine also their own legal and democratic legitimacy as well as the liberty rights of EC citizens to exercise their human rights across frontiers in conformity with EC law and international law binding on the EC.

The success of the EC's common market law was largely due to decentralized private and judicial enforcement of the pertinent EC rules through self-interested citizens and national and European courts. The EC's proposals for more decentralized enforcement of EC competition law by citizens and national courts are presented as a new paradigm for more democratic governance in the EU.<sup>157</sup> Since liberal trade and competition rules serve complementary functions for promoting individual and social welfare through "a system ensuring that competition in the internal market is not distorted" (Article 3,g EC Treaty), citizens and courts should also be more actively enlisted in the decentralized enforcement of the external customs union rules of the EC. Having recognized that the EC Treaty grants individual rights to freedom of competition and freedom of trade inside the EC, national and EC courts should protect these freedoms also in the external relations of the EC against manifestly illegal restraints of trade and competition by the EC institutions. Legal and judicial protection of such freedoms has nothing to do with "*laissez faire* liberalism" and one-sided protection of "negative liberties". Freedom of competition and freedom of trade protect also "positive liberties" of participating in a mutually beneficial division of labor. Lawyers should no longer ignore the basic insight of modern economic theory that governments should correct "market failures" through domestic interventions directly at the source of the market distortion without restricting the gains from trade. EC lawyers defending illegal and welfare-reducing trade protectionism as "realpolitik" so as not to "disarm politicians and civil servants"<sup>158</sup> undermine the human rights of EC citizens to protection of maximum equal liberties, rule of law and social welfare in the EC.

### **C Human Rights Criteria for Interpreting the WTO's *Public Interest Clauses*: the Human Right to Health and Access to Medicines**

The universal recognition of human rights requires to construe the numerous public interest clauses in WTO law in conformity with the human rights requirement that individual freedom and non-discrimination may be restricted only to the extent necessary for protecting other equal human rights. The non-discrimination and "necessity" requirements in the "general exceptions" of WTO law (e.g. in GATT Article XX and GATS Article XIV) reflect these human rights principles. WTO law gives clear priority to the sovereign right to restrict trade if this is necessary for the protection of human rights (e.g. to life, health, food, education, a clean and sustainable environment, and social security). The recent WTO panel and Appellate Body reports on US import restrictions of shrimps (aimed at protecting endangered species of sea turtles) confirmed that import restrictions may be justifiable under WTO law for protecting human rights values not only inside the importing country but also in other countries and in the High Seas.<sup>159</sup>

By prohibiting discriminatory and protectionist abuses, the "general exceptions" in WTO law aim at reconciling freedom of trade with the "human rights functions" of safeguard measures restricting liberal trade. In such legal and judicial balancing processes, human rights must guide the interpretation not only of the WTO's "exceptions" and safeguard clauses, but also the interpretation of the basic WTO guarantees of freedom, non-discrimination, property rights and rule of law which protect the corresponding human rights guarantees of individual liberty, non-discrimination, private property and access to courts. Moreover, the right of the importing country to protect the human rights

---

third countries) can not legally justify the refusal by the EC Court to protect the rule of law inside the EC against manifest violations of EC law and WTO law that were not democratically authorized by national parliaments.

<sup>157</sup> Cf. C.D.Ehlermann/I.Atanasiu (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, 2001, at xviii.

<sup>158</sup> Peers (note 144), at 123.

<sup>159</sup> See the Appellate Body report of 22 October 2001 on US Import Prohibition of Certain Shrimp and Shrimp Products, DS58/AB/RW, with references to the earlier WTO panel and Appellate Body reports.

of its citizens needs to be balanced with the corresponding right of the exporting country and also with the economic insight that trade restrictions are only rarely an efficient instrument for correcting “market failures” and supplying “public goods.”<sup>160</sup>

In past GATT and WTO practice, governments have hardly ever referred to human rights in their invocations of the “general exceptions” (e.g. in GATT Article XX) and other safeguard clauses in GATT and WTO law, e.g. when applying measures “necessary to protect public morals” or to “protect human, animal or plant life or health.”<sup>161</sup> There appears to be no evidence, however, that past GATT practice under Article XX has been inconsistent with human rights. GATT dispute settlement jurisprudence, for instance, has never challenged the legality of non-discriminatory, “necessary” safeguard measures under GATT Article XX. Also WTO practice seems to be consistent so far with interpreting the “general exceptions” in WTO law (e.g. Article XIV GATS, Article 8 TRIPS Agreement) in conformity with human rights (such as the rights to health, food, adequate housing and education, or the right to protection of moral and material interests resulting from scientific, literary or artistic production of which one is the author).<sup>162</sup> The numerous “human rights clauses” in international economic agreements concluded by the EC with third countries have likewise been used only rarely for trade restrictions as a remedy for human rights violations.<sup>163</sup>

General Comment No.14 (2000) on the human right to the highest attainable standard of health (Article 12 ICESCR), adopted by the UN Committee on Economic, Social and Cultural Rights in May 2000<sup>164</sup>, defines the right to health as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as availability, accessibility and affordability of health facilities, goods and services. The legal obligations of states to respect, protect, promote and fulfil this human right requires legislative implementation, judicial protection and health policy measures which, “depending on the availability of resources, ... should

---

<sup>160</sup> In its Resolution 1999/30 of 26 August 1999 on “Trade Liberalization and its Impact on Human Rights”, the Sub-Commission (of the UN Commission on Human Rights) on the Promotion and Protection of Human Rights declared “that sanctions and negative conditionalities which directly or indirectly affect trade are not appropriate ways of promoting the integration of human rights in international economic policy and practice.” See also Resolution 1998/12 on “Human rights as the primary objective of trade, investment and financial policy” adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights, and Resolution 1999/30 on “Trade liberalization and its impact on human rights” adopted by the same UN Sub-Commission in 1999.

<sup>161</sup> For a rare exception, see the submission from Mauritius in WTO document G/AG/NG/W/36/Rev.1 of 9 November 2000, which claims that Article 20 of the Agreement on Agriculture (regarding the taking into account of “non-trade concerns”) should be read in conjunction with Article 11 of the ICESCR recognizing the right of everyone to adequate food.

<sup>162</sup> In the negotiations for the WTO Ministerial Declaration of November 2001 on access to medicines and review of Article 27:3(b) of the TRIPS Agreement, the “Africa Group”, for instance, referred explicitly to human rights as criteria for interpreting the TRIPS Agreement. The WTO Secretariat also actively contributed to the discussions leading to the report of the UN High Commissioner for Human Rights on the impact of the TRIPS Agreement on human rights (E/CN.4/Sub.2/2001/13) and to Resolution 2001/21 by the UN Sub-Commission on Human Rights on “Intellectual Property and Human Rights” (E/CN.4/Sub.2/RES/2001/21 of 16 August 2001).

<sup>163</sup> The EC’s suspension of trade preferences for Yugoslavia in November 1991, for instance, was motivated by the military hostilities in the former Yugoslavia rather than by human rights violations. In the context of the Lomé-Convention, the EC reacted to human rights violations (e.g. in Rwanda) by suspension of financial and technical assistance rather than trade restrictions. The EC’s Generalized System of Tariff Preferences (GSP) offers additional preferences to developing countries which respect basic ILO guarantees (such as freedom of association and minimum age for admission to employment); temporary withdrawal of GSP benefits by the EC in response to violations of human rights have been rare (e.g. in the case of Myanmar). There is thus hardly any empirical basis for the criticism (e.g. by P. Prove, *Human Rights at the WTO?* in: Mehra, note 18, at 32) of an alleged “bias of the WTO” because “the primary entry point for human rights concerns would be as justifications for sanctions and trade conditionalities”.

<sup>164</sup> See UN document E/C.12/2000/4, CESCR of 4 July 2000 and, on the preparatory work: B.C.A. Toebes, *The Right to Health as a Human Right in International Law*, 1999.

facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required".<sup>165</sup> The General Comment recognizes that trade restrictions e.g. on individual access to essential food, drugs and health services can be inconsistent with the human right to health, and that cooperation might be required also in the WTO for the implementation of the right to health.<sup>166</sup>

The universalization and expanding subject matters of both human rights and intellectual property law have prompted negotiations in various UN bodies and also in the WTO on the clarification of the complex interrelationships between the TRIPS Agreement and human rights. While the need for intellectual property as incentive for research and development (e.g. of new pharmaceuticals) is no longer contested, the proper balancing between the social objectives of the TRIPS Agreement (see Articles 7 and 8), its "regulatory exceptions" (e.g. in Article 6 for "parallel imports", Article 31 for "compulsory licencing", Article 40 concerning abuses of intellectual property rights), and the appropriate scope of intellectual property protection (e.g. for genetic and other living materials, rights of indigenous peoples) raises numerous controversial questions.<sup>167</sup> Yet, there seems to be broad agreement that the TRIPS provisions are flexible enough to permit necessary health protection measures so as to ensure access to affordable medicines to treat AIDS and other pandemics.<sup>168</sup>

#### **D Democratic Balancing of Human Rights: Are WTO Rules Adequate?**

In their continuing evolution, human rights and global integration law require constant mutual balancing and concretization aimed at maximizing human rights.<sup>169</sup> This human rights objective can be realized only if - similar to the bargaining inside national parliaments on the balance of private and public interests in national economic and human rights legislation - international rule-making is constitutionally restrained so as to avoid human rights being "traded away".<sup>170</sup> Just as views on to the appropriate balancing of human rights in national legislation tend to differ depending on the interests involved, there continue to be serious doubts whether the trade-oriented TRIPS provisions appropriately balance e.g. the human rights "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" with the right of everybody "to enjoy the benefits of scientific progress and its applications" (cf. Article 15:1 ICESCR). While national and international judges tend to exercise deference vis-à-vis legislative discretion, human rights require judges to protect the essential core of human rights against unnecessary interference by national and international rule-makers.

The high minimum standards of the TRIPS Agreement for the protection of intellectual property rights are beneficial for industries in developed countries where more than 90% of patented inventions are registered. It remains to be clarified whether the relatively vague TRIPS provisions on prevention of abuses of intellectual property rights (e.g. Articles 8,40), on the transfer and dissemination of technology (e.g. Article 7), and on the protection of traditional knowledge, genetic resources and "farmers rights" (e.g. in Article 27) are adequate for less-developed countries which own 90% of the world's biogenetic resources and depend on importation of technology and on more

---

<sup>165</sup> General Comment No.14 (note 157), paragraph 39.

<sup>166</sup> See e.g. paragraphs 41, 43 and 64 of the General Comment No.14 (note 163).

<sup>167</sup> See e.g. G.Dutfield, Intellectual Property rights, Trade and Biodiversity, 2000.

<sup>168</sup> See e.g. the report of the joint WHO/WTO Workshop on Differential Pricing and Financing of Essential Drugs of 8-11 April 2001 (which notes that about 95% of the WHO list of "essential drugs" are not or no longer patented, and differential pricing and international financing of essential drugs are consistent with the TRIPS Agreement).

<sup>169</sup> See E.Kwakwa, Intellectual Property and Human Rights, in: Abbott/Cottier (note 24).

<sup>170</sup> For instance, the inalienable "moral rights" of authors recognized in Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works (1896) were not mentioned in the TRIPS Agreement. See also F.J.Garcia, The Global Market and Human Rights: Trading Away the Human Rights Principle, in: Brooklyn Journal of International Law 1999, 51.

effective property rights protection of their own resources. While intellectual property protection of e.g. biotechnology may be necessary for protecting human rights (including the right to food), such protection needs to be balanced with legitimate protection of e.g. traditional knowledge owned by indigenous people, “farmers rights” and the human right to health and access to medicines at affordable prices.

The report by the UN High Commissioner on the impact of the TRIPS Agreement on human rights confirms that human rights are important “context” for the interpretation of TRIPS provisions, for instance as regards “parallel imports” of low-priced medicines, “exhaustion” of intellectual property rights, compulsory licensing and “local working” requirements for patented inventions.<sup>171</sup> The need for balancing human rights arises also in many other areas of WTO law and practice. The right to work, for instance, may need to be protected through social adjustment assistance (as permitted under GATT Articles XVI and XIX) if the private adjustment costs impose unjust sacrifices on workers in import-competing sectors. Human and labor rights may require governments to promote labor mobility so that unemployment caused by import competition can be compensated by new employment opportunities in the export sector. The WTO rules on non-discriminatory market access may necessitate complementary competition and social rules protecting small enterprises and vulnerable groups from abuses of market power. The WTO’s safeguard clauses leave broad discretion to each WTO member country for dealing with these and other trade and adjustment problems in a manner protecting human rights with due regard to the scarcity of resources. WTO bodies must exercise deference to legitimate balancing decisions by national governments and parliaments which enjoy more democratic legitimacy for the inevitable trade-offs than distant WTO bodies focusing on trade rules.

### **E Need for WTO Competition and Social Rules as Necessary Complements of Human Rights**

There is broad consensus today among governments and economists that market competition may lead to “market failures” (including inadequate commercial investments for medicines needed by poor people in tropical countries) which may necessitate national competition and social rules. The widespread protectionist abuses of economic and regulatory power, such as abuses of intellectual property rights for restricting and allocating markets and for blocking competing research efforts, also require *international* competition rules in the WTO so as to help governments to coordinate their national competition policies and to overcome domestic protectionist pressures against effective competition rules at home. The 1997 GATS Protocol on Telecommunications, for instance, already includes detailed competition rules in view of the fact that, in many countries, telecommunication services are dominated by monopolies and distorted through subsidies and restraints of competition. The liberalization of many other services sectors (like road, rail, air and maritime transports) will likewise remain impossible without complementary limitations on monopolies and restraints of competition. Many international restraints of competition are particularly harmful for less-developed countries (e.g. in case of export cartels, international shipping and air transport cartels charging discriminatory prices on routes to developing countries). As sectoral competition rules risk being

---

<sup>171</sup> See the report mentioned above (note 162). Cf. also e.g. Resolution No.2/2000 on ‘International Trade Law’ (notably Annex I on “Exhaustion of Intellectual Property Rights and Parallel Trade”) adopted by the worldwide International Law Association on 29 July 2000 (cf. ILA, Report of the 69<sup>th</sup> Conference, London 2000, 18-25), and the withdrawal, in April 2001, of the law suit in the South African Supreme Court by 39 pharmaceutical firms against the South African government in order to enforce drug patents that would have slowed the fight against AIDS. A WTO dispute settlement panel was set up in January 2001 (cf. WT/DS199) to examine a US complaint against Brazil’s industrial property law which imposes a “local working” requirement according to which a patent shall be subject to compulsory licensing if the subject matter of the patent is not worked in Brazil. Brazil justified its threat of compulsory licensing for local production of generic drugs at lower costs by health policy objectives and as a means to put pressure on US and European pharmaceutical companies to lower their prices for HIV/AIDS drugs. The US later withdrew its complaint and acknowledged the right of Brazil to take measures necessary for ensuring supply of AIDS medicaments at affordable prices to patients in Brazil.

abused by special interest groups, the proposals for limiting cartel agreements, other anti-competitive business practices and abuses of intellectual property rights through worldwide WTO minimum standards for undistorted competition and transnational cooperation among competition authorities are of constitutional significance for protection of freedom, non-discrimination and mutually beneficial division of labor across frontiers.<sup>172</sup>

## F Need for More Democratic Rule-Making in Worldwide Organizations

Secretive and producer-driven intergovernmental rule-making procedures in specialized international organizations, including the WTO and standard-setting practices in UN Specialized Agencies (like FAO and ITU), may be inconsistent with the human rights to democratic participation in the exercise of government powers and to transparent decision-making maximizing equal human rights.<sup>173</sup> In order to promote more effective democratic and parliamentary control of trade policy-making, transparency and more responsible *deliberative democracy* in the trade policy area, the International Law Association has recommended the establishment of an advisory WTO parliamentary committee and of an advisory WTO civil society committee. Citizens and NGOs could thus be represented in a more balanced manner so as to make the one-sided influence of “producer interests” on trade policy-making processes more accountable vis-à-vis representatives of consumer interests and other “public interests”.<sup>174</sup> Since more than 110 WTO member countries ratified the ICESCR, and almost all of them ratified the UN Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child, the time has also come for express references - in WTO Ministerial Declarations and in WTO jurisprudence - to the promotion and protection of human rights so as to enhance a more coherent constitutional discourse and more general awareness of the complementary functions of human rights and of global integration law. Such WTO references to human rights could also help other WTO bodies (such as the WTO’s Trade Policy Review Mechanism) to contribute so the needed integration and “constitutionalization” of the so far fragmented human rights treaties and sectoral integration agreements.

### Conclusion: Need for Multi-Level Constitutionalism Protecting Human Rights More Effectively

The universal recognition and protection of inalienable human rights at national, regional and worldwide levels requires a new human rights culture and a citizen-oriented national and international constitutional framework different from the previously prevailing state-centered conceptions and functionalism. In Europe, the emergence of “multi-level governance” has led to “multi-level constitutionalism”<sup>175</sup> and “divided power systems” that have succeeded in overcoming Europe’s history of periodic wars and of “constitutional failures” of nation states to protect human rights and peaceful division of labor across frontiers. Just as *within* federal states “the federal and state Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes”<sup>176</sup>, international law and international organizations must be understood as parts of the constitutional limitations on abuses of foreign policy powers necessary for protecting human rights more effectively.<sup>177</sup> National constitutional law and human rights cannot achieve their objectives unless they are supplemented by *international constitutional law* and by effective protection of human rights in the economy no less than in the polity.<sup>178</sup>

---

<sup>172</sup> Cf. E.U.Petersmann (note 32).

<sup>173</sup> Cf. E.U.Petersmann, From “Negative” to “Positive” Integration (note 54).

<sup>174</sup> Cf. the Resolution by the International Law Association mentioned in note 171.

<sup>175</sup> Cf. I.Pernice, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited? In: Common Market Law Review 36 (1999), 703-750.

<sup>176</sup> A.Hamilton, Federalist No.46, in: Hamilton et alii, The Federalist Papers, 1787/88.

<sup>177</sup> On these “constitutional functions” of international law and international organizations for the protection of human rights see Petersmann (above notes 44 and 52).

<sup>178</sup> See also Petersmann, Constitutionalism, International Law and ‘We the Citizens of the United Nations’, in: *Liber Amicorum H. Steinberger*, 2001.

Promotion and protection of human rights is not only the task of national and international human rights law and of specialized human rights institutions. Also the law of worldwide and regional organizations (like UN law, WTO law and EU law) serves “constitutional functions” for protecting freedom, non-discrimination, rule of law and social welfare across national frontiers. Historical experience confirms that, without such multilateral rules, national parliaments can neither effectively supervise foreign policies among 200 sovereign states nor ensure that foreign policy decisions respect human rights and rule of law not only at home but also across frontiers. European and global integration law further demonstrate that the different layers of national and international constitutional rules need to be supplemented by corresponding national and international rule-making, executive and judicial processes that must be subject to effective democratic controls and constitutional safeguards of “subsidiarity”, “necessity” and “proportionality” of regulatory limitations of human rights (cf. Article 5 EC Treaty).

As described already by *Kant* more than 200 years ago, human rights and democracy require *national* as well as *international constitutionalism*. The democratic legitimacy of the various levels of government derives from respect for human rights and from democratic participation of citizens in the exercise of national and international government powers. Just as national citizenship and European Union citizenship are complementary (cf. Article 12 EC Treaty), citizens must become recognized also as legal subjects of international law and international organizations. Their democratic participation and more effective representation in international organizations requires far-reaching constitutional reforms of the state-centered international legal system so as to enable e.g. “UN citizens” and “WTO citizens” to invoke international guarantees of freedom before domestic courts and participate more actively in parliamentary and civil society institutions at national and international levels.

The German Constitutional Court, for example, has rightly interpreted the creation of the European Central Bank as an act that redefines the guarantee of private property in money protected by the German Constitution (Article 14) as a fundamental right.<sup>179</sup> From such a human rights perspective, the state-centered interpretation of the Agreement establishing the IMF as an exclusively monetary agreement on the rights and obligations of governments in the field of monetary policy, without legal relevance for the human rights obligations of governments and of UN agencies, appears too one-sided.<sup>180</sup> International guarantees of freedom, non-discrimination and rule of law, such as the UN guarantees of human rights and the WTO guarantees of liberal trade and property rights, should be seen as part of the domestic constitutional systems of WTO members which need be protected by domestic courts so as to safeguard human rights across frontiers. Human rights law requires that the delegation of regulatory powers to national, regional and worldwide institutions must always remain constitutionally limited. Democratic sovereignty remains, as proclaimed in the Preamble to the UN Charter, with “We the Peoples of the United Nations”. The protection of human dignity and of “individual sovereignty” through human rights and global integration law remains the biggest constitutional challenge of law and governance in the 21<sup>st</sup> century at all national and international levels of the exercise of governmental and private power.-

---

<sup>179</sup> German Constitutional Court judgment of 31 March 1998, in: Bundesverfassungsgericht 97, 350.

<sup>180</sup> The presentation by the IMF legal adviser F. Gianviti, in the above-mentioned “day of general discussion” at the Office of the High Commissioner for Human Rights on 7 May 2001, of the IMF as an exclusively monetary institution – without legal mandate for promoting human rights and without legal obligations under UN human rights treaties – was rightly criticized by human rights organizations for disregarding the IMF obligations under the general human rights law (cf. Skogly, note 111, e.g. at 192 *et seq.*) as well as the “human rights functions” of IMF law (e.g. for the protection of property rights in money).



## THE JEAN MONNET PROGRAM

---

*Professor J.H.H. Weiler*  
*European Union Jean Monnet Chair*

This paper is a part of contributions to the Jean Monnet Working Paper  
[No.12/02](#), Symposium: Trade and Human Rights: An Exchange

Robert Howse

**Human Rights in the WTO: Whose Rights, What Humanity?**  
**Comment on Petersmann**

NYU School of Law • New York, NY 10012

All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

ISSN 1087-2221  
© Robert Howse 2002  
New York University School of Law  
New York, NY 10012  
USA



## **Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann**

Robert Howse\*

*The relationship between human rights and market freedoms is far more complex than Petersmann acknowledges. Although Petersmann relies heavily upon notions such as constitutionalism and democratic decision-making, the terms are ill-defined and their application unconvincing. The author engages with Petersmann's contention that governments would contemplate greater international market intervention to promote social goals and challenges his interpretation of several of the leading WTO decisions.*

This is a wide-ranging essay by a scholar who has been a pioneer in relating the law and philosophy of human rights to the multilateral trading regime. This is now a fashionable subject, and we do well to remember that, as it were, Petersmann was there first.

It is impossible to disagree with many of Petersmann's propositions, stated at the high level of abstraction that characterizes much of this text. After the failure of communism in the Soviet Bloc, and of neo-Marxist development models in the third world, there are few who would disagree with Petersmann that the full realization of human rights is incompatible with ruthless suppression of market freedoms. Yet a moment's reflection on phenomena such as conflict diamonds and sex tourism suffices to remind us that the markets and trade are entwined with some of the most horrific human rights abuses, and on a massive scale. It is true that democracy and democratization have been linked to the project of a Free Trade Agreement of the Americas (and rightly so), but it is also true that the neo-liberal economic policy prescriptions presupposed by some (albeit not all) aspects of that project have contributed to social and political instability in some Latin American countries, threatening the gains of democratization. Nor is the European experience, on which Petersmann relies heavily, as straightforward as he presents it. Europe began with the European Coal and Steel Community (ECSC), not a free market project, but a dirigiste one, premised on the gains to social and political stability of industrial planning at the European level; and the early failure to transform the ECSC into a constitutional European project resulted in two tracks, a human rights track represented by the European Convention on

Human Rights and the European Court of Human Rights, as well as a common market track, the latter entailing not only the protection of market freedoms but also supranational economic regulation, underpinned by institutions of governance.<sup>1</sup> It is true, and indeed worthy of recollection, that free trade and human rights are both the intellectual progeny of the Enlightenment, represented by Petersmann through the figure of Immanuel Kant. But Kant, at least, was open-eyed; he saw the connection of the commercial spirit of his age not only with democratic republicanism but also with horrific imperialistic violence.

In sum, the relation of market freedom, or free trade, to human rights is in almost all situations a complex one, which cannot be well grasped by thinking in general terms about 'synergies', nor in terms of linear or teleological progression from economic integration to human rights-based constitutionalism. In order, therefore, to engage with Petersmann's project for the 'integration' of human rights and international economic law into a constitutional order, we have to pass to the specifics, and to be ever mindful of the context, the times in which we live, and in the name of *whom* and *what* the discourses of human rights, free trade, and constitutionalism are being invoked. God, or the devil, is in the details.

What, exactly, is Petersmann's vision of free trade constitutionalism and what is its relationship to the project of international human rights law? In this essay, Petersmann does not define constitutionalism, or the 'constitutional', very precisely, except to identify it (only in the conclusion, however) as a mechanism that protects against abuses of power and to associate its core substantive content with six 'principles'.<sup>2</sup> In the body of the essay, Petersmann deploys the language of constitutionalism in a rather loose manner. Thus, all of the following are invocations of the 'constitutional' idea of Petersmann:

- Human rights tend 'to limit the *constitutional* task of governments to the "common public interest" defined in terms of equal human rights' (at 627).

---

\* Professor, University of Michigan Law School.

<sup>1</sup> See, generally, P. Magnette, *L'Europe, l'Etat et la democratie* (2000).

<sup>2</sup> These are: the rule of law, the limitation and separation of government powers by checks and balances, democratic self-government, human rights, social justice, and the notion that human rights cannot be effectively protected without international law supplying international 'public goods' and legal restraints on 'abuses of foreign policy powers'.

- '... the complementary *constitutional* principles needed for effectuating human rights — such as democratic participation, parliamentary rule-making, transparent "deliberative democracy" and judicial protection of the rule of law – are not yet part of the law and practice of most worldwide organizations' (at 627).
- 'The *constitutional* guarantees of the EU for economic liberties and the complementary *constitutional*, competition, environmental and social safeguards have also induced numerous EU initiatives to strengthen competition, environmental and social law in worldwide international agreements. The strong competition law of the EC reflects the *constitutional* insight that – in the economy no less than in the polity – equal freedoms of citizens and open markets need to be legally protected against abuses of public powers as well as of private powers' (at 632).
- 'In addition, most states recognize human rights in their respective *constitutional* laws as *constitutional* restraints on government powers...' (at 633).
- '... the ICJ has not yet specified to what extent human rights also entail *constitutional* limits on the UN and its specialized agencies' (at 634).
- '... inalienable human rights which today *constitutionally* restrain all national and international rule-making powers' (at 635).
- '... the UN Charter presented such hard-fought-for "revolutions" in international law designed to extend freedom, non-discrimination, the rule of law and social welfare across frontiers, even though diplomats carefully avoided the politically charged language of "international *constitutional* law" (e.g. in contrast to the "Constitution of the ILO" of 1919)' (at 636).
- '... the WTO rules – even if formulated in terms of rights and obligations of governments – serve as "*constitutional* functions" for rendering human rights and the corresponding obligations of governments more effective in the trade policy area' (at 644).
- 'As sectoral competition rules risk being "captured" and abused by special interest groups, the proposals for limiting cartel agreements and other anti-competitive business practices and abuses of intellectual property rights through worldwide WTO minimum standards for undistorted competition and transnational cooperation among competition authorities are of *constitutional* significance for the protection of freedom, non-discrimination and the mutually beneficial division of labour across frontiers' (at 647).

- '... international "treaty *constitutions*" (such as the EC Treaty and the ILO Constitution) ... (at 648)'.

It is difficult to discern a precise claim about constitutionalization of international law from all these various usages of the word, in its adjectival and other variants. In fact, however, Petersmann's earlier work *is* fairly precise or specific in what is meant by constitutionalism. Constitutionalism is identified with legal pre-commitment that ties the hands of governments, allowing them to resist pressures by rent-seeking groups for interference with property and other economic rights.<sup>3</sup> For Petersmann, domestic constitutional arrangements are inadequate to achieve this purpose; hence, the rationale for treaties such as the GATT. Petersmann, a long-serving GATT official, was probably unique among 'insiders' in grasping, as early as the 1970s, that purely economic rationales for multilateral trade liberalization were weak or precarious – after all classical economics suggested that, in most situations, unilateral trade liberalization increased domestic welfare, thus making bargained multilateral liberalization a puzzle, considered strictly from the perspective of the economic theory of trade.<sup>4</sup> In addition, while generally speaking those legal scholars who studied the GATT tended to view it as a set of bargained concessions, Petersmann was ahead of his time in seeing the importance of the multilateral trading regime embodying *rules*, such as non-discrimination (MFN and National Treatment). While such rules can be understood functionally in terms of constraining 'cheating' on bargained concessions, they have, nevertheless, the formal structure of general juridical

---

<sup>3</sup> See especially, the English version of Petersmann's *Habilitationschrift, Constitutional Functions and Constitutional Problems of International Economic Law* (1991), which is probably the first sustained effort to provide a comprehensive legal theory of the trade regime. For a critical engagement with Petersmann's theory of constitutional pre-commitment as applied to the WTO, see Howse and Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far', in R. Porter, *et al.*, (eds), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (2001).

<sup>4</sup> This is not the only way of addressing the puzzle. Influenced by the work of such scholars as Anne-Marie Slaughter, John Ruggie, Robert Keohane on post-war multilateralism, I have provided an account of bargained trade liberalization that stresses the role of multilateral rules in constraining the externalization of the costs of domestic adjustment to economic and social change and crisis, so as to prevent a protectionist race-to-the-bottom. Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime', 1 *AJIL* (2002) 94. As well, more recent work in the economics literature has provided a complementary explanation, based on 'terms of trade' externalities, K.

norms, and therefore their validation, including through interpretation by judicial or quasi-judicial tribunals, inevitably raises the question of justice. Even if economists may explain the rules instrumentally, or in terms that are indifferent to justice or fairness, their interpretation by an impartial and disinterested 'third party' (the judge) cannot be *purely* instrumental. The judge is inevitably concerned with justice, and seeks an interpretation that can be seen as fair *inter partes*.<sup>5</sup> This implication of a legal, as opposed to a diplomatic, approach to dispute settlement was seen more clearly and earlier by Petersmann than by the other greats of GATT era trade law scholarship, Hudec and Jackson, who embraced judicialization of dispute settlement, but within an overall pragmatic or economic functionalist vision of the rules in the multilateral trading system.

For Petersmann, then, legitimacy of the WTO as a juridical system depends on the transformation of what he calls 'market freedoms' into 'fundamental rights'. Petersmann is well aware that in the Covenant on Economic, Social and Cultural Rights, the right to property and freedom of contract have not been recognized as human rights, and attributes this fact to 'anti-market bias'. But this is a question-begging manner of making the case that property and contractual rights *should* be recognized as fundamental rights at the international level. In the present essay, Petersmann is not only for these economic rights, but also for 'social rules' at the global level<sup>6</sup> and other human rights needed to correct market 'abuses'. But he provides not a shred of evidence that a more optimal democratic response to the limits of markets will be facilitated by governments having to justify their social interventions at the international level as limits on the 'fundamental rights' of property and contract. According to Petersmann, 'Human rights need to be legally concretized, mutually balanced and implemented by democratic legislation which tends to vary from country to country.' At one point in his essay, Petersmann suggests that the effect of giving property and contractual rights the status of fundamental rights

---

Bagwell and R. W. Staiger, GATT-THINK 16 National Bureau of Economic Research, Discussion Paper No. 8005 (2000).

<sup>5</sup> See A. Kojève, *Outline of a Phenomenology of Right* (transl. R. Howse and B.-P. Frost) (2000), Ch. III; see also, Steger, 'Afterward: "The Trade and . . ." Conundrum – A Commentary', 1 *American Journal of International Law* (2002) 135.

<sup>6</sup> Although, perhaps tellingly, the section of the article entitled 'The Need for WTO Competition and Social Rules as Necessary Complements to Human Rights' deals only with competition rules and never actually discusses social rules.

at the international level would be to constrain that democratic balancing by imposing a requirement of necessity whenever a government seeks to limit such rights (at 641). In Petersmann's ideal world, a citizen could directly challenge social, environmental or other public policies and the government that had enacted those policies would be required to show that they are necessary limits on freedom of trade (or property rights). To the extent that the public policies in question themselves happen to be based on human rights (for example, social rights), we can see clearly the hierarchy of rights that Petersmann is proposing. Social and other positive human rights may only be pursued by governments to the extent to which they can be shown as 'necessary' limits on market freedoms. But why not the reverse? Why not subject *free trade rules* to strict scrutiny under a necessity test, where these rules make it more difficult for governments to engage in interventionist policies to protect *social* rights?

Petersmann's implicit answer to this question entails recourse to the standard faith of the ideological free traders that 'trade restrictions are only rarely an efficient instrument for correcting "market failures" and supplying "public goods"' (at 32). Precisely *because* of this faith, trade-restricting market interventions to fulfil social or other human rights obligations are likely to be viewed with great scepticism if one sees trade liberalization rules as economic rights – the free trader can always imagine, in the abstract, an alternative policy instrument to trade restrictions, which is less trade restrictive and supposedly more efficient.

But in the real world, policy-makers have a limited and constrained tool kit available to them to fulfil social and other human rights. Labelling may be more efficient than a ban on a toxic substance with industrial uses. But what if those handling the substance are mostly illiterate? Adjustment and training and education subsidies to workers may be more efficient than trade restrictions, but what if a country has had fiscal restraint imposed on it by the IMF and the capital markets (as a condition for future access to those markets)?

Petersmann's notion that the substantive obligations of the WTO law (such as National Treatment) be understood as fundamental rights would make it *more* difficult than at present for WTO members to defend their public policies in terms of reasonable limits on those obligations. The key passage in Petersmann's essay is the following: 'The universal recognition of human rights requires us to construe the numerous public interest clauses in WTO law in conformity

with the human rights requirement that individual freedom and non-discrimination may be restricted only to the extent necessary for protecting other human rights' (at 645).

Here is a concrete suggestion about legal interpretation that allows us to test the implications of Petersmann's general theory in the real world. The existing exceptions in Article XX of the GATT, for example, which Petersmann includes in the category of 'public interest' clauses, refer to a range of public policy objectives, which may or may not be conceived in human rights terms – including the protection of animal and human life and health (XX(b)), the conservation of exhaustible natural resources (XX(g)), the effective enforcement of domestic laws and regulations (XX(d)). On Petersmann's approach, once a GATT obligation characterized as a fundamental right was found to be violated, a WTO member could only invoke one of these exceptions, if it were to make its argument in human rights terms. There are some in the human rights community who might see this as a fine way of getting states to pay closer attention to human rights law, especially to the content of economic, social and cultural rights. However, there are significant risks here. One, that is fairly obvious, is that institutionally within the WTO culture, there is enormous scepticism about expansive understandings of human rights, and even about economic, social and cultural rights generally.<sup>7</sup> I myself have argued that international human rights law is relevant to defining these exceptions, and I do think that in specific cases it is possible that the Appellate Body of the WTO (which is staffed not only by trade 'experts' but also distinguished public international lawyers such as Georges Abi-Saab) would appreciate the relevance of human rights to a WTO member's justification of its policies in terms of Article XX.<sup>8</sup> Nevertheless, depending on human rights analysis to make the kind of case the US made in *Shrimp/Turtle* about the conservation of exhaustible natural resources seems questionable. The extent to which environmental concerns are appropriately translated into the notion of 'environmental rights' is quite controversial, and in the presence of this controversy, and given the

---

<sup>7</sup> At the World Trade Forum in Berne last August, where many of the leading traditional WTO experts gathered to address the question of WTO law and human rights, several of the most eminent of them even questioned whether any human rights were sufficiently well understood or clearly embodied in international law so as to be relevant to the operation of the WTO!

<sup>8</sup> R. Howse and M. Matua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000).

institutional context of the WTO, the Appellate Body might well be inclined to take a cautious or conservative view.

Petersmann finesses this issue by suggesting that in the *Shrimp/Turtle* case the Appellate Body of the WTO 'confirmed that import restrictions may be justifiable under WTO law for protecting human rights values' (at 645). But, in fact, in that decision, the Appellate Body did not link the notion of conservation of exhaustible natural resources to human rights values.<sup>9</sup> Of course, it might be possible to do so, interpreting the idea of sustainable development in human rights terms, but the Appellate Body did not do so. Nor did it have to refer to any norm of international human rights law in order to find that the notion of exhaustible natural resources included living species.

Nor in the *Shrimp/Turtle* case did the Appellate Body apply the necessity test that Petersmann recommends. The text of Article XX (g) requires only that the measures in question be 'in relation to' the conservation of exhaustible natural resources, and the Appellate Body found a rational connection or nexus between the US measures and the goal of protecting exhaustible natural resources.<sup>10</sup> Moreover, in recent case law, the Appellate Body has taken a flexible view of

---

<sup>9</sup> *US-Import Prohibition of Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (12 October 1998), paras 129-131. For an analysis of this ruling and the Appellate Body's subsequent ruling on US implementation, see Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate', 27 *Columbia Journal of Environmental Law* (2002) 489. See also for analysis of the first AB ruling, Mavroidis, 'Trade and Environment after the Shrimp-Turtle Litigation', 34 *Journal of World Trade* (2000)73 and Chang, 'Toward A Greener GATT: Environmental Trade Measures and the Shrimp/Turtle Case', 74 *Southern California Law Review* (2000) 31.

<sup>10</sup> *US-Shrimp* Report, *supra* note 9, at para. 141: 'The means are, in principle, *reasonably* related to the ends' (emphasis added). In the earlier *Gasoline* case, the AB noted that is unreasonable to infer a necessity test as a general requirement of the 'public interest' clauses in GATT Article XX. The Appellate Body held: 'in enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories: "necessary" – in paragraphs (a), (b) and (d); "essential" – in paragraph (j); "relating to" – in paragraphs (c), (e) and (g); "for the protection of" – in paragraph (f); "in pursuance of" – in paragraph (h); and "involving" – in paragraph (i). It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category,



the level of scrutiny appropriate under those exceptions in Article XX of the GATT where the word 'necessary' does appear. Thus, in the recent *Korea-Beef*<sup>11</sup> and *EC-Asbestos*<sup>12</sup> cases, the Appellate Body has suggested that a measure may be found to be 'necessary' even if it is not indispensable for achieving a particular goal, provided that the measure is proportional to the objective, and it has also held that where values such as human life are at stake the margin of appreciation for domestic regulators should be particularly wide. Petersmann's conception of 'necessity' – premised on the notion that what is to be justified is the overriding of fundamental human rights to free trade – would take us back to the kind of jurisprudence characteristic of the pre-WTO era, where the hypothetical availability of a less-trade-restrictive alternative in the ideal world of the economist would be enough for a member's measure to fail the test of being 'necessary', for example, for the protection of human health.<sup>13</sup>

Ironically, when Petersmann goes on in his essay to discuss democracy, he himself points to a reason of principle why WTO dispute settlement tribunals should show some deference to domestic regulations, which is valid even where those regulations cannot be proven to be

---

the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.' *United States-Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body. WT/DS52, 20 May 1996, at 12.

<sup>11</sup> *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161, 169AB/R, 11 December 2000, at paras 161-164.

<sup>12</sup> *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001. For a detailed analysis of these aspects of the *Korea-Beef* and *EC-Asbestos* cases, see Howse and Tuerk, 'The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001), pp. 324-327.

<sup>13</sup> Here the most illustrative example is the *Thai Cigarette* case. In that case, Thailand was unable to justify a ban on imported cigarettes on the basis that the imports came with sophisticated Western marketing techniques that were persuading large numbers of young people to take up smoking, thereby triggering a future health crisis. The panel ruled that there was the less restrictive alternative of legal regulation of advertising, marketing methods, and so forth; however, the panel ignored evidence before it from the World Health Organization suggesting that in a number of cases developing countries had discovered that, given their legal and monetary resources, tobacco multinationals were able to find their way around such restrictions, once their products were on the market in the country concerned. *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37 S/200-228 (1990).

'necessary' for the protection of human rights. Thus, he observes: 'WTO bodies must exercise deference to legitimate balancing decisions by national governments and parliaments which enjoy more democratic legitimacy for the inevitable trade-offs than distant WTO bodies focusing on trade rules' (at 646).

Yet, as we have just seen, when Petersmann himself moves to the concrete level, and elaborates the implications for legal interpretation of the notion that GATT obligations are fundamental human rights, this cashes out into less, not more, deference to domestic democratic regulatory choices. It is hard not to see some kind of tension or contradiction here.

Yet Petersmann is too sharp a thinker to simply leave it at that. One reason why Petersmann's thought on these matters may be more consistent than it first seems is the influence that the example of the jurisprudence of the European Court of Justice has on his way of understanding the issues. Petersmann sees the Court as understanding the freedoms (free movement of goods, services, capital and people) in the Treaty of Rome as fundamental human rights;<sup>14</sup> and he also sees the Court as sensitive to social justice and the democratic choices of member states. He might argue that a human rights approach to WTO rules does suggest a stricter legal test for limits to WTO obligations, but a stricter test *applied with a human rights sensibility* would actually result in more not less appropriate deference to domestic regulations.

Perhaps then we should support those aspects of Petersmann's project that suggest the desirability of building a human rights sensibility within the WTO. But what *kind* of human rights sensibility? Petersmann's reference to the 'integration' of different bodies of human rights law, or different rights, tends to obscure the fact that an emphasis on market freedoms as fundamental human rights<sup>15</sup> reflects one *particular* kind of rights sensibility. There is a set of very basic political and normative struggles surrounding the entrenchment of the free market outlook into human rights law that have not, contrary to Petersmann, been exhausted by the Cold

---

<sup>14</sup> As a matter of positive law, there is a serious question as to whether the ECJ ever viewed what it was doing in those terms; but that is a matter for European law experts to debate, and I am not one of them.

<sup>15</sup> In one footnote he even apparently approvingly cites Richard Pipes for the proposition that the right to property is the most fundamental human right.

War. One only has to look at the controversy surrounding the expropriation provisions of the NAFTA investment Chapter, where individual investors have standing to sue governments, including for some kinds of regulatory changes that fundamentally affect the value of their property.<sup>16</sup>

Given these controversies, it would appear to be in Petersmann's favour that he advocates greater democratic participation in the WTO as a corollary to the building of a human rights sensibility into the Organization. His idea of democracy, however, seems to focus on the creation of WTO advisory committees, of parliamentarians and NGOs. But it is an open question whether such ideas will ultimately not simply cabin or constrain democratic deliberation, through formalizing an understanding of which stakeholders have a legitimate place at the table; if democracy is about real power and real influence in shaping outcomes, these proposals risk being placebos. Periodic meetings of such committees are no substitute for an ongoing and inclusive process of engagement of civil society and political actors with the activities of the WTO. In fairness, Petersmann also favours greater domestic parliamentary control over the making of WTO treaty rules. But whether this really cashes out into greater democratic legitimacy depends on how well informed parliamentarians are, to what extent they are independent rather than subject to the discipline of the Party whip and therefore no real check on the executive, and also the extent to which we believe that approval of today's government is enough to provide legitimacy for rules that will have significant impact long after that government is gone, and which it is costly for a future government to reverse (as, in practical terms, it would either have to get the consent of all other members to change the rules or accept a waiver, or be faced with the very high-stakes choice of withdrawing from the WTO). Given the costs of reversibility by a future government, my own view is that the people should be consulted directly by referendum on the results of the Doha round, and that all governments should undertake to translate the proposals into local languages, and distribute them to the entire population, either electronically where feasible and/or through pamphlets available at post offices or other contact points.

---

<sup>16</sup> For an attempt by a NAFTA Ch. 11 investor-state arbitral panel to define the limits of the concept of 'expropriation' in Ch. 11 as applied to regulatory actions of the host state, see *Pope & Talbot Inc. and Government of Canada*, Interim Award by the Arbitral Tribunal, 26 June 2000, at paras 88 *et seq.*

Governments should also provide access to national radio and television to groups with different points of view, as part of an informed public debate leading up to such a referendum.



## THE JEAN MONNET PROGRAM

---

*Professor J.H.H. Weiler*  
*European Union Jean Monnet Chair*

This paper is a part of contributions to the Jean Monnet Working Paper  
[No.12/02](#), Symposium: Trade and Human Rights: An Exchange

Philip Alston

**Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to  
Petersmann**

NYU School of Law • New York, NY 10012

All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

ISSN 1087-2221  
© Philip Alston 2002  
New York University School of Law  
New York, NY 10012  
USA

# Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann

Philip Alston\*

## Abstract

*Petersmann's proposal for the enforcement of human rights through the WTO is presented as though it were simply a logical development of existing policies, rather than representing a radical break with them. In a form of epistemological misappropriation he takes the discourse of international human rights law and uses it to describe something which is in between a Hayekian and an ordoliberal agenda. It is one which has a fundamentally different ideological underpinning from human rights law and would have extremely negative consequences for that body of law. Many of his characterizations of the existing state of the law – whether at the national, EU or international levels – are questionable. What is needed is for all participants in the debate over the future relationship between trade and human rights, be they ordoliberals such as Petersmann or mainstream human rights proponents, to move beyond such analyses and to engage in a systematic and intellectually open debate which acknowledges the underlying assumptions and meets a higher scholarly burden of proof than has so far been the case.*

## 1. Introduction

Any current bibliography of international legal analyses of the relationship between trade and human rights will be replete with the works of Ernst-Ulrich Petersmann, many of which put

---

\* Member of the Board of Editors. Work on this Article was supported by a grant from the Max Greenberg and Filomen D'Agostino Research Funds at the New York University School of Law.

forward a version of the argument which is reflected in the article above.<sup>1</sup> At first glance it is a highly attractive account. At last one encounters a trade lawyer who embraces enthusiastically and wholeheartedly the human rights agenda! At last an international economic law expert who, in a determinedly interdisciplinary way, integrates philosophy, human rights and economic theory; one who seeks to tame the excesses so noisily decried by the anti-globalization protesters of Seattle and subsequent fame. Petersmann embraces the human rights agenda from within the citadel of international economic law and brings his formidable experience as a former legal adviser in the German Ministry of Economic Affairs, the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) to bear in the name of an approach which would resolve once and for all the seemingly intractable conflicts between trade and human rights which so bedevil the analyses of other authors. ‘Democratic legitimacy’ and ‘social justice’ are both ‘defined by human rights’ and must therefore be embraced by the ‘global integration law’ which is pursued by the WTO.<sup>2</sup>

But despite his consistent invocation of the discourse of human rights – and contrary to the reader’s first impressions as well as to Petersmann’s own perception of his work – his approach is at best difficult to reconcile with international human rights law and at worst it would undermine it dramatically. In essence, the result of following the approach set out would be to hijack, or more appropriately to Hayek, international human rights law in a way which would fundamentally redefine its contours and make it subject to the libertarian principles expounded by writers such as Friedrich Hayek, Richard Pipes and Randy Barnett.

In light of such a negative assessment it might reasonably be asked whether there is any point in seeking to respond in detail to an analysis with which one disagrees so comprehensively and which, although it has frequently been published before, has drawn so little sustained reaction from other scholars. But there are several strong reasons which argue in favour of a detailed rebuttal of these views.

---

1 Petersmann, ‘Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration’, 13 *EJIL* (2002) 621 [hereinafter Petersmann].

2 *Ibid*, at 624.



The first is that Petersmann has long been a prominent and respected international trade lawyer and what he thinks is thus potentially influential. The second is that the article which is the principal focus of this reply is not an isolated foray but an encapsulation of views which have been reproduced many times over in the space of well over a decade. Indeed, few academics could have shown such perseverance and determination in working with the same array of materials in the context of so many different analyses.<sup>3</sup> This side of Petersmann's work resembles

---

3 The (certainly incomplete) list of relevant publications of which I am aware includes the following: E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991), Ch. VII; Petersmann, 'National Constitutions, Foreign Trade Policy and European Community Law', 2 *EJIL* (1993) 1; Petersmann, 'National Constitutions and International Economic Law', in M. Hilf and E.-U. Petersmann (eds), *National Constitutions and International Economic Law* (1993) 3; Petersmann, 'Constitutional Principles Governing the EEC's Commercial Policy', in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension* (1993) 21; Petersmann, 'Constitutionalism and International Organizations', 17 *Northwestern J. Int'l L. Bus.* (1996) 398; Petersmann, 'How to Constitutionalize the United Nations? Lessons from the "International Economic Law Revolution"', in V. Götz, P. Selmer and R. Wolfrum (eds), *Liber Amicorum G. Jaenicke* (1998) 313; Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?', 20 *Mich. J. Int'l L.* (1999) 1; Petersmann, 'Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition', 34 *New Eng. L. Rev.* (1999) 145; Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?', 31 *NYU J. Int'l L. & Pol.* (1999) 753; Petersmann, 'From "Negative" to Positive "Integration" in the WTO: Time for "Mainstreaming Human Rights" into WTO Law?', 37 *CMLR* (2000) 1363; Petersmann, 'The WTO Constitution and Human Rights', 3 *JIEL* (2000) 19; Petersmann, 'Human Rights and International Economic Law in the 21st Century', 4 *JIEL* (2001) 3; Petersmann, 'Time for Integrating Human Rights into the Law of Worldwide Organizations', *Jean Monnet Working Paper of New York University School of Law* 7/01

the standard ‘stump’ speech of a politician which contains the same message and relies on the same content time and time again, but on each occasion is delivered in a slightly different form depending on the audience. This fact probably explains why more than one-fifth of the citations provided in the article above are to the author’s own previous writings.<sup>4</sup>

The third is that so few scholars have apparently responded to Petersmann’s oft-repeated views. Although the literature on trade and human rights (the latter being interpreted as including labour rights) has burgeoned in recent years,<sup>5</sup> remarkably little attention has been given by most of the mainstream writers to Petersmann’s thesis. By leaving his thesis only marginally contested there is a significant risk that those who do not have a strong grasp of the complexity of the issues raised by the trade and human rights linkage will assume that his work on this issue enjoys a level of acceptance which it in fact does not.

A fourth reason is that Petersmann has to date been reluctant to engage with those few scholars who have been critical of his work. One such example is provided in the article above. Steve Peers has presented a detailed, sustained and measured critique of Petersmann’s basic and

---

(2001); Petersmann, ‘European and International Constitutional Law: Time for Promoting “Cosmopolitan Democracy” in the WTO’, in G. de Búrca and J. Scott (eds), *The EU and the WTO* (2001) 81; Petersmann, ‘International Activities of the European Union and Sovereignty of Member States’, in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002) 321; Petersmann, ‘Human Rights in European and Global Integration Law: Principles for Constitutionalizing the World Economy’, in A. von Bogdandy, P. Mavroidis and Y. Mény, *European Integration and International Coordination: Festschrift für C. D. Ehlermann* (2002) 383; Petersmann, ‘Constitutionalism, International Law and “We the Peoples of the United Nations”’, in H.-J. Cremer (ed.), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (2002) 291; Petersmann, ‘Economics and Human Rights’, in F. Abbott and T. Cottier (eds), *International Trade and Human Rights* (2002, forthcoming).

4 Nineteen of 85 footnotes are either wholly or partly self-referential.

5 Gabrielle Marceau has identified the principal recent analyses in her article ‘The WTO Dispute Settlement and Human Rights’, 13 *EJIL* (2002, forthcoming), at note 1.

oft-repeated proposition that there is a freestanding human right to trade.<sup>6</sup> Petersmann makes no mention of the Peers article in the two pieces published on the same subject in 2002,<sup>7</sup> but it does attract a footnote in the article above. Peers' analysis is dismissed on the grounds that he wants 'human rights [to] end at national borders' and is opposed to 'constitutional protection' for 'the freedom of transnational economic transactions'.<sup>8</sup> In fact, Peers endorses neither of those propositions, even implicitly. Petersmann has been similarly reluctant to engage with another critique by Robert Howse and Kalypso Nicolaides,<sup>9</sup> who address several important dimensions of his standard analysis. Their critique focuses on his revisionist reading of Kant, his suggestion that governments should entrench free trade rights at the international level despite the fact that the vast majority of them have not treated trade in that way in their domestic constitutions, and his insistence that an approach which ties the hands of governments by putting the priority of free trade out of reach in democratic debate is consistent with the citizen empowerment of which he is so fond. In reply, Petersmann is content to pose a rhetorical question, based on the title of their article, which is designed to dispose of the matter. He asks, without responding: 'are there convincing arguments that "constitutionalism" is a "fallacy", and "constitutionalizing the WTO a step too far"?'<sup>10</sup>

The final reason for focusing carefully on Petersmann's analyses is that the relationship between human rights and trade is one of the central issues confronting international lawyers at the beginning of the twenty-first century and any proposal which purports to marry, almost symbiotically, the two concerns warrants careful consideration. As George Soros has recently written: 'The WTO opened up a Pandora's box when it became involved in intellectual property rights. If intellectual property rights are a fit subject for the WTO, why not labor rights, or human

---

6 Peers, 'Fundamental Rights or Political Whim? WTO Law and the European Court of Justice', in G. de Búrca and J. Scott (eds), *The EU and the WTO* (2001) 111, at 123-130.

7 See *supra* note 3.

8 Petersmann, at 644.

9 Howse and Nicolaides, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far', in R. Porter *et al.* (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001).

10 Petersmann, at note 78 and accompanying text.

rights?'.<sup>11</sup> While Soros opposes such a development there is an increasing number of authors who have called for the 'constitutionalization' of the WTO and who consider that the inclusion of human rights within its mandate would help to overcome the democratic deficit from which it currently suffers. Petersmann's article thus compels a more systematic evaluation of these different proposals and lays out some of the principal arguments put forward by the proponents of WTO constitutionalization.

## 2. Some Methodological Shortcomings

In marked contrast to his earlier pathbreaking work on GATT law, Petersmann's analyses of this issue are open to strong challenge on both methodological and substantive grounds. I will address the latter in terms of six propositions which I believe encapsulate his approach. But before doing so, it is appropriate to note some of the methodological weaknesses which characterize not only the article above but also the general body of his previous work on which it draws. The principal shortcoming is highlighted by Howse when he comments that 'it is impossible to disagree with many of Petersmann's propositions' essentially because they are stated at such a 'high level of abstraction'. This is well illustrated by the concept of 'constitutionalism' which infuses all of his writings in this area but which, as Howse demonstrates, remains essentially undefined.<sup>12</sup> In one of his most recent writings Petersmann provides instead a survey of just under three pages which spans the 'historical evolution of constitutionalism', starting with Plato and Aristotle and moving through Cromwell, Montesquieu, Gianotti, and others, and concluding with Rawls.<sup>13</sup>

Petersmann's preferred technique is to identify an issue, make a strong assertion, invoke perhaps one source, and then move on to the next issue. The views attributed to the authors whose work is invoked in order to justify these assertions – ranging from Kant, Rawls, Sen and

---

<sup>11</sup> Quoted in Stiglitz, 'A Fair Deal for the World: A Review of "On Globalization" by George Soros', *NY Rev. Bks*, 23 May 2002, at [www.nybooks.com/articles/15403](http://www.nybooks.com/articles/15403).

<sup>12</sup> Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann', 13 *EJIL* (2002) 651; Walker, 'The EU and the WTO: Constitutionalism in a New Key', in de Búrca and Scott, *supra* note 3, at 31.

<sup>13</sup> Petersmann, in Cremer, *supra* note 3, at 292-294.

Hayek to Kissinger, Barnett, de Soto or Corden – are rarely examined in any detail. Conflicting interpretations of the works themselves are neither cited nor engaged with. And critics whose approach challenges directly the views invoked are not mentioned.<sup>14</sup> Of the named authors, for example, Kant is the only one whose views Petersmann has expounded at any length, but he nevertheless invokes all of the others whenever he needs authority for a proposition that would otherwise be notably open to challenge. And when it comes to Kant, the considerable complexities of Kant’s writings are distilled down to reductionist formulae, which enable most of Petersmann’s key propositions to be characterized as Kantian.<sup>15</sup>

The second major methodological shortcoming of Petersmann’s work on trade and human rights is his tendency to meld different and quite heterogeneous legal regimes into an analysis which seems to imply that they are all parts of a single coherent whole. Thus, at one point in his article above, he jumps from general propositions about the universality of human rights law to assertions (undeveloped and undocumented) about the constitutional practices of ‘virtually all countries in Europe and North America’, to the invocation of some of the jurisprudence of the European Court of Justice and then on to the significance of the withdrawal of certain cases before the South African Constitutional Court. It is as though the mixing of heterogeneous ingredients in a single brew could produce a magical potion capable of resolving the most intractable problems confronting lawyers and others working in these fields.

Moreover, none of the ingredients of this eclectic mix is examined in any detail or with a critical, evaluative eye. Instead, the various sources are introduced almost anecdotally. The overall effect is like a version of the pea and thimble trick, in which there are a number of

---

<sup>14</sup> A similar criticism was made in a review of work done by Petersmann almost 15 years ago: ‘The reader is placed on notice early that this is more a tract than an analysis, when the author summarizes what “economists” think by quoting only Milton and Rose Friedman, and citing only to economists who can be fairly characterized as hard-liners on free trade policies. The much acclaimed recent work of Paul Krugman, James Brander and other strategic trade theorists is never cited, much less discussed.’ Tarullo, ‘Book Review’, 84 *AJIL* (1990) 338, at 339.

<sup>15</sup> See analysis in Section 4 below.

thimbles and a single pea. The observer is supposed to guess where the pea is, while the performer moves the thimbles around. In this case, as soon as the basis of a given claim (the pea) has been identified in a particular locus (one of the thimbles) and the reader wants to engage in a critical debate on the merits, Petersmann moves the analysis – just as the reader might have begun to realize that the pea was not really under the thimble in question but was elsewhere. In other words, the focus of the debate keeps shifting so that when its shortcomings are about to become obvious the focus is moved elsewhere and the totality of the arguments are assumed to be persuasive where none of the individual parts was. This is particularly marked in relation to the basis of the claim that the right to free trade is already to be found in one body of law or another.

A third methodological shortcoming, linked to the other two, is a certain historical revisionism, which enables Petersmann to view events rather selectively so that they fit conveniently into his grand scheme of things. Thus he opens his analysis by stating that the 1944 Bretton Woods agreements, the 1945 UN Charter, the 1947 General Agreement on Tariffs and Trade (GATT), the 1948 Havana Charter and the 1948 Universal Declaration of Human Rights (UDHR) ‘all ... aimed at protecting’ various ‘human rights values through a rules-based international order and “specialized agencies” ... committed to the economic principle of “separation of policy instruments”’.<sup>16</sup> In fact, human rights are completely absent from the Bretton Woods agreements, the GATT, and the Havana Charter (although the latter did address labour rights issues). And indeed no historically informed observer would have expected any such reference, given that the UDHR itself was adopted after the Bretton Woods agreements and the GATT and it was only acceptable to governments on the basis of an explicit understanding that it was non-binding and created no obligations for UN Member States. Neither this historical dimension nor the insistence of the relevant agencies that they have no human rights mandate *per se* deters Petersmann from discerning that ‘most [of their] policy objectives ... can be understood as protecting ... human rights values’.<sup>17</sup> Moreover, the statement that all of these instruments reflected an economic functionalist principle is hardly true of the UDHR. And nor was the UN Charter premised upon the separation of policy instruments, given the clear but subsequently

---

<sup>16</sup> Petersmann, at 622.

<sup>17</sup> *Ibid*, at 634.

frustrated aspirations of the Economic and Social Council to act as a mechanism of coordination among the different instruments and agencies.

### **3. Constructing the Argument**

At the substantive level Petersmann's thesis can be encapsulated in six propositions, although he has not specifically spelled it out in such terms. The propositions are:

- (a) Human rights have constituted an integral part of the momentum for European integration.
- (b) Human rights and market freedoms are, in effect, one and the same thing.
- (c) Human rights, including 'economic liberty rights', are part of binding international law.
- (d) There is a 'worldwide integration law' which is, or should be, based on the EU model, which has been, inter alia, 'citizen-oriented'.
- (e) The WTO would protect human rights more effectively than any other international institutional arrangements.
- (f) A United Nations 'global compact' which encourages the WTO and the IMF to promote human rights is the best way forward.

I now turn to examine the validity of each of these propositions.

#### ***A. Human Rights Have Constituted an Integral Part of the Momentum for European Integration***

In essence Petersmann's call for the 'constitutionalization' of world trade amounts to a prescription for implementing, at the global level, the approach which he considers to have been so successful at the European level. His prescription of a worldwide integration law based on human rights proceeds from the premise that the European model has historically had a major human rights component. According to his account, the EC's special recipe for the achievement of integration has involved 'the recognition and empowerment of citizens as legal subjects not

only of human rights but also of competition law ...'.<sup>18</sup> The EU model is one which complements 'human rights guarantees by liberal trade and competition rules conferring individual rights on EC citizens'.<sup>19</sup> The process has been driven by a "functional theory" underlying European integration [which is] that economic market integration' can enable 'more comprehensive and more effective protection of human rights than has been possible in traditional state-centred international law'.<sup>20</sup> The outcome of this process is that 'EU law has evolved into a comprehensive constitutional system for the protection of civil, political, economic and social rights of EU citizens across national frontiers'.<sup>21</sup>

But this account is highly problematic, for several reasons. The first is that it is historically incorrect. Human rights were, on virtually all accounts of the evolution of European integration through the common market, an afterthought. They were not mentioned at all in the Treaty of Rome of 1957, which specifically eschewed the strategy of its failed forerunner, the proposed European Political Community, that would have incorporated the ECHR.<sup>22</sup> Even when limited human rights provisions were included in the Treaty on European Union they were far from reflecting an integrated human rights vision for the Community. Instead, they were 'grafted on to a set of Treaties which, despite the broad range of powers and policies covered, were for a long time very largely focused on economic aims and objectives with little reference to other values'.<sup>23</sup> The EEC Treaty was essentially a blueprint which sought to promote integration through a functional economic approach. The second reason is that when human rights, in the form of fundamental rights, began to make their way into the jurisprudence of the European Court of Justice it was in relation to a narrow range of rights, such as the right to property and the

---

18 *Ibid*, at 632.

19 See von Bogdandy *et al.*, *supra* note 3, at 386.

20 Petersmann, at 631.

21 *Ibid*, at 631.

22 For a review of the historical evolution of human rights in the EC/EU context, see P. Craig and G. de Búrca (eds), *EU Law: Text, Cases and Materials* (3rd. ed., 2002), at Ch. 8.

23 *Ibid*.



freedom to pursue a trade or profession, rather than to any balanced conception of human rights, as Petersmann's account implies.

Third, human rights were, at least initially, introduced not because of any grand vision of a Europe united to defend human rights and economic liberties, but as a response to various efforts by Community institutions which were seen as a threat to the national legal orders of the Member States.<sup>24</sup> One commentator has argued that even the gradual introduction of human rights into the Community legal order, with a view to limiting the discretion of the *supranational* institutions, has not changed the fact that 'the Common Market still towers over all other objectives' and that human rights are used in the Community legal order 'to a large extent simply as limits to discretion'.<sup>25</sup> If the 'recognition and empowerment of citizens as legal subjects ... of human rights' was such a central part of the EU's integration strategy, as Petersmann suggests, why was it that the ECJ in its Opinion 2/94 attached such importance to the fact that '[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights'<sup>26</sup> and refused to endorse Community accession to the ECHR until such time as the treaty was amended so as to provide an explicit basis for such action?

Fourth, far from Petersmann's depiction of trade and competition rules acting as a complement to human rights guarantees, the opposite has been the case. A very limited and narrow range of economic freedoms, many of which are not *per se* recognized as economic rights within the framework of international human rights law, has assumed principal importance. As Besselink has recently observed in examining the relationship between these two sets of rights, 'it is not difficult to analyse the case law of the ECJ on human rights in terms of the predominance of economic (fundamental) rights over the classic human rights'.<sup>27</sup> Fifth, the EU is struggling,

---

<sup>24</sup> See de Witte, 'Le role passé et future de la Cour de justice des Communautés européennes dans la protection des droits de l'homme', in P. Alston (ed.), *L'Union Européenne et les Droits de l'Homme* (2001) 895, at 899.

<sup>25</sup> See von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', 37 *CMLR* (2000) 1307, at 1308 and 1335.

<sup>26</sup> [1996] ECR I, 1759, para. 27.

<sup>27</sup> Besselink, 'Case Note', 38 *CMLR* (2001) 437, at 454.

even today, to determine the appropriate role for human rights in its future constitutional order. In this respect, it is sufficient to refer by way of illustration to von Bogdandy's analysis, which argues directly against Petersmann's basic assumption as to the appropriate role of human rights within the European legal order. In his view, 'there are good arguments against the proliferation of human rights and human rights discourse in ever more legal fields ...'. Instead, the 'core objectives of the Union should ... remain peace, wealth and an ever closer union among its peoples'.<sup>28</sup>

A final element which is worthy of mention is that Petersmann attributes the EU's achievement of a complementary approach to human rights and economic freedoms to the balance struck within 'EU integration law' itself. There seems to be little room in his analysis for the role played by the European Convention on Human Rights and the implementation system which it has developed over the years. It could well be argued that the ECHR, along with the Commission and Court established pursuant to it, have done more than the EU and the ECJ to ensure that human rights are a central component of European integration. But there are good reasons for Petersmann to downplay this element because the package of norms reflected in the ECHR is very different from his preferred selection of 'economic rights' and the ECHR implementation system could, at least prior to the recent adoption of Protocol No. 11, be compared more readily to the international human rights system for which Petersmann has so little time than to the EU.<sup>29</sup>

---

<sup>28</sup> von Bogdandy, *supra* note 25, at 1337-1338. I should emphasize that von Bogdandy's views are cited here only to illustrate the extent to which a full-blown human rights dimension to EU law remains deeply contentious in some circles. My own view is strongly to the contrary, for the reasons spelled out in Alston and Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy', in P. Alston (ed.), *The EU and Human Rights* (1999) 1. Cf. de Búrca, 'The Case for an EU Human Rights Policy', in P. Beaumont, C. Lyons and N. Walker (eds), *Convergence and Divergence in European Public Law* (2002).

<sup>29</sup> See text accompanying note 68 below.

Against this background, it is puzzling that Petersmann could speak of the EU approach to balancing human rights and economic freedoms as ‘a model for “constitutionalizing” ... worldwide integration law by integrating civil, political and economic liberties, constitutional law and comparative law’.<sup>30</sup> Unless, of course, despite his insistence that human rights must be the pre-eminent values, he really does want the unbalanced EU approach, which has, at least to date, privileged economic freedoms over human rights, to prevail also at the international level. But at the very least the non-revisionist story of the unfolding of the place of human rights within EU integration law provides a strong lesson in the complexity of reconciling these two areas of law and cautions against uncritical assertions that the EU has attained any sort of ideal equilibrium.

### ***B. Human Rights and Market Freedoms Are, in Effect, One and the Same Thing***

The meaning attributed to human rights and related terms is crucial to an understanding of Petersmann’s approach, but they are rarely defined with any precision. This becomes especially problematic in relation to terms such as ‘human rights’, ‘fundamental rights’, ‘economic rights’, ‘economic liberties’, and ‘economic freedoms’, all of which appear at different times in his analysis. For the most part they seem to be used interchangeably, although from both a philosophical and a legal perspective there are enormous differences among them.

The first task then is to ascertain exactly what Petersmann has in mind when he uses one term or another. Here we confront a fundamental lack of clarity, which is perhaps best illustrated by an example from the article above in which he talks of the importance of ‘the economic dimensions of human rights’. But what are these dimensions? The answer he offers is that ‘savings, investments and economic transactions depend on property rights and liberty rights’. In describing what he means by the latter he immediately comes full circle by defining them as ‘freedom of contract and transfers of property rights’.<sup>31</sup> But there are also ‘economic freedoms’, such as the freedom ‘to produce and exchange goods and services including one’s labour and ideas’.<sup>32</sup> Given the elusiveness of a helpful definition, it might be more productive to inquire as to

---

<sup>30</sup> See von Bogdandy *et al.*, *supra* note 3, at 386.

<sup>31</sup> Petersmann, at 630.

<sup>32</sup> *Ibid*, at 629.

the relationship which he envisages among these apparently not so different concepts. He addresses this issue in a major article in the *Common Market Law Review*: ‘As freedom from hunger and economic welfare are preconditions for the enjoyment of many other human rights, the WTO guarantees of economic liberties and of welfare-increasing cooperation across frontiers serve important *human rights functions*.’<sup>33</sup>

His basic contention is that international economic law should proceed ‘from a human rights approach’ and thereby recognize, like the European Court of Justice, ‘the principle of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right’. In elaborating upon this he explains that:

From a human rights perspective, the WTO guarantees of freedom and non-discrimination in transnational relations, and of the ‘necessity’ requirement for governmental safeguard measures limiting individual liberty and property rights, serve the same ‘constitutional functions’ as the corresponding guarantees in European and national constitutional laws.<sup>34</sup>

On the basis of these illustrations from his work, a number of questions emerge: (i) in what way has the ECJ recognized freedom of trade as a human right?; (ii) in applying the principle of free movement of goods and freedom of competition, has the ECJ in fact proceeded on the basis of a human rights approach?; (iii) in what ways are the WTO ‘guarantees of freedom and non-discrimination’ analogous to human rights?; and (iv) are social rights part of Petersmann’s definition of human rights?

In response to the first of these questions, Peers has provided a detailed account of the relevant jurisprudence, which leads him to the conclusion that although the Court alluded to a right to trade in one case, it is, in the overall context, ‘an odd reference, which the court has been reluctant to repeat’.<sup>35</sup> His analysis leads firmly to a negative answer to the first question. In the

---

<sup>33</sup> See Petersmann, in *CMLR*, *supra* note 3, at 1375 (emphasis in original).

<sup>34</sup> Petersmann, in von Bogdandy *et al.*, *supra* note 3, at 387.

<sup>35</sup> Peers, *supra* note 6, at 125.

article above Petersmann seeks to dismiss this critique by suggesting that Peers' position is that 'no right to trade deserves to be recognized'. But in fact he takes this statement entirely out of context. It comes at the end of a lengthy analysis of whether such a right has already been recognized (he concludes convincingly that it has not) and thus how it might in the future come to be recognized. Peers concludes that:

If the advocates of recognition of a new 'right to trade' cannot win the argument in the normal forums available for the development of international or national human rights law, no 'right to trade' deserves to be recognized.<sup>36</sup>

Thus the quote that Petersmann attributes to Peers, and on the basis of which he dismisses his analysis, is misleading and does not convey the essence of Peers' position.

The second question concerns the human rights status of the market freedoms upon which the EC has been constructed. They include, in particular, the free movement of goods, persons, services and capital. Leaving aside the fact that Petersmann strategically omits the free movement of persons from his approach, the issue is whether these principles, which the ECJ's jurisprudence has gradually turned into fundamental freedoms, have also thereby acquired the status of human rights? Within the field of EU law, some authors have attributed to these freedoms 'a quasi-human rights character'.<sup>37</sup> But even this does not get us as far as the proposition for which Petersmann argues. If the Court has really treated these principles as full-fledged human rights, there would presumably be instances in which one right has been held to prevail over another and thus in which, for example, the right to free movement of goods would have prevailed over a traditional human right such as the right to association or the right to privacy. But in so far as this can be said to have happened, it has been largely in the context of competing commercial rights such as freedom of commercial expression, so that, for example, advertising restrictions on services and goods have had to be liberalized or adjusted. And even where the Court has taken a stand on human rights issues in such contexts, the motivations are not always straightforward, as Weiler's critique of

---

<sup>36</sup> *Ibid*, at 129.

<sup>37</sup> De Witte, *supra* note 24. He cites A. Bleckmann, *Europarecht* (1997), at 269-278 for this proposition.

some of the Court's positions on free movement has illustrated. Thus, he notes that the provisions for free movement of workers can be viewed in very different ways:

On the one hand they have a de-humanizing element in treating workers as 'factors of production' on par with goods, services and capital. But they are also part of a matrix which prohibits, for example, discrimination on grounds of nationality, and encourages generally a rich network of transnational social transactions'.<sup>38</sup>

A third question is whether the WTO does in fact, as Petersmann claims, provide 'guarantees of economic liberties'. He refers often in his writings to the 'WTO guarantees of freedom, non-discrimination and property rights'.<sup>39</sup> But these are not rights conferred on individuals in the sense of human rights. The only individual rights of which I am aware are the intellectual property rights recognized in the 1994 TRIPS Agreement (Agreement on Trade-related aspects of Intellectual Property Rights). So while the WTO does indeed provide some guarantees of economic liberties, these cannot reasonably be equated to human rights in any broad sense familiar to the traditions of international human rights law. The only exception, albeit a potentially significant one, is the right of authors and inventors to the protection of their interests, recognized in Article 15 of the International Covenant on Economic, Social and Cultural Rights. Much more importantly, any such rights arising out of WTO agreements are not, and should not be considered to be, analogous to human rights. Their purpose is fundamentally different. Human rights are recognized for all on the basis of the inherent human dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are seen as objects rather than as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy, but not as political actors in the full sense and nor as the holders of a comprehensive and balanced set of individual rights. There is nothing *per se* wrong with such instrumentalism but it should not be confused with a human rights approach.

---

<sup>38</sup> Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique', 3 *EJIL* (1992) 65.

<sup>39</sup> E.g. Petersmann, in *JIEL* (2000), *supra* note 3, at 23.

The fourth question is of major importance. Do social rights form a part of Petersmann's definition of human rights? In the article above, and elsewhere, he makes it clear that they do. Thus, for example, he calls for the 'stronger legal protection of social human rights' and illustrates what he means by giving examples of the denial of the rights to education, health care and food.<sup>40</sup> He goes on to lament the fact that in 'UN human rights law ... the indivisibility of human rights and the justiciability of economic and social rights are not sufficiently protected'.<sup>41</sup> Elsewhere he notes that the EU model which should be followed worldwide 'effectively protects human rights, economic liberties and social rights of citizens'.<sup>42</sup> But given this formal embrace of social rights, the question then becomes how this is able to be reconciled with the thrust of his writings as a whole? The problem is that he manages to combine statements which are almost straight out of Hayek – such as the claim that the 'division of labour among free citizens and liberal trade [are] the most important means for promoting freedom and individual welfare'<sup>43</sup> – with statements about the central importance of social rights. Yet those rights are completely anathema not only to Hayek but also to the philosophical approach of several other of the leading figures who feature prominently and consistently in Petersmann's analyses. Thus, as an authority in relation to the 'the instrumental function of human rights' he cites Randy Barnett whose work has become a favourite of libertarians. Barnett believes that 'the government of a good society should protect persons and their property from being used without their consent' and consequently condemns social rights (resource redistribution) as an unjustifiable form of interference with personal flourishing. Instead, he considers the role of government is to protect 'each person's liberty rights to acquire, use, and dispose of resources in the world without violating the like rights of others.'<sup>44</sup>

Petersmann sees human rights as not only adding 'moral legitimacy' to the free trade agenda but also as being economically necessary 'for the proper functioning of economic and

---

<sup>40</sup> Petersmann, at 624.

<sup>41</sup> *Ibid*, at 628.

<sup>42</sup> See von Bogdandy *et al.*, *supra* note 3, at 384.

<sup>43</sup> *Ibid*.

<sup>44</sup> Barnett, 'The Right to Liberty in a Good Society', 69 *Fordham L. Rev.* (2001) 1603, at 1614-1615.

“political markets” and for rendering competition “self-enforcing” by assignment of individual freedoms, property rights and liability rules to all economic actors and scarce resources’.<sup>45</sup> It is through such explanations of his interest in human rights that the functional definition of ‘human rights’ which underlies his thesis becomes apparent. He supports that statement by a reference to the work of Richard Pipes, which presents ‘private property as an indispensable ingredient not only of economic progress but also of individual liberty and rule of law’.<sup>46</sup> But although Petersmann relies upon Pipes in other analyses as well, including the one above,<sup>47</sup> he does not examine Pipes’ thesis in any more detail. When we do so, it becomes apparent that Pipes’ views are fundamentally incompatible with the social rights aspects of the thesis that Petersmann puts forward. According to Pipes, ‘the main enemy of freedom is not tyranny but the striving for equality’.<sup>48</sup> In his view, the welfare state project of the twentieth century subjected the institution of private property to a relentless attack which has undermined it and thus also individual liberty.

In line with such thinking, Petersmann notes that poverty in developing countries ‘is attributed by many economists to their lack of effective human rights guarantees and of liberal trade and competition laws’, which leads him to focus not on freedom of speech or the right to association, and certainly not on social rights, but rather on the absence of ‘effective legal and judicial protection of liberty rights and property rights’.<sup>49</sup> Since he has defined liberty rights as freedom of contract and property rights, the real focus of his concept of human rights is remarkably narrow and the most striking characteristic of his references to social rights is their incompatibility with almost all of the remainder of his analysis. In his scheme of things, the WTO is never going to be called on to promote social rights, which means that despite the homage paid to them they remain entirely marginal to the essential thrust of his proposals.

One final comment is called for in relation to the human right to trade. In philosophical terms it is often difficult to distinguish means from ends and the same applies to abstract or

---

<sup>45</sup> See Petersmann, in *CMLR*, *supra* note 3, at 1376.

<sup>46</sup> *Ibid*, at 23.

<sup>47</sup> Petersmann, at note 11.

<sup>48</sup> Pipes, ‘Private Property, Freedom and the Rule of Law’, *Hoover Digest* (2001), No. 2, <http://www-hoover.stanford.edu/publications/digest/012/pipes.html>.

<sup>49</sup> Petersmann, at 632.



scholarly discussions of human rights theory. But the international law of human rights – the most prominent positivistic manifestation of which is contained in the UDHR and the two International Covenants – is clearly premised on the recognition of certain specific rights and the consequent downgrading of other values which can then be seen as means by which to attain certain rights but not as ends in themselves. It is true that this distinction has been blurred by governments which are more concerned to promote their ideological objectives than to protect the integrity of the corpus of human rights. This has been the case most notably in the context of the debates over the right to development, in which the right of individuals to an adequate standard of living has often been conflated with the ‘right’ of states both to limit the enjoyment of other human rights in the name of development and to receive development aid from richer states. But, far from justifying distortions of the concept of human rights in the name of higher ends, these largely unsuccessful and essentially unnecessary sorties have instead served to reinforce the need to respect the distinction between ends and means. Empirically it is clear that human beings have been able to enjoy a full range of human rights in societies which do not recognize a human right to free trade as such. Indeed, given the rarity of such formal recognition and the constant threats to free trade in practice, it might not be an exaggeration to say that a list of countries respecting human rights including a right to free trade could be counted on the fingers of one hand. Petersmann himself cites Germany on the basis of the relevant provisions of the Basic Law.

Money is, in many ways and in many contexts, essential to the full enjoyment of human rights. Yet no one has yet suggested that there is a human right to money per se. Following philosophers like Amartya Sen, there may well be an ‘entitlement’ to that amount of money which is necessary in order to purchase the essentials required for a life in dignity, but even this way of approaching the issue does not turn money itself into a right. There is, at least for the time being, no right to an internet connection, although it could easily be argued that it is a prerequisite for the achievement of many goals in today’s world. Money and internet access, like trade, remain important means by which to attain the higher goals of human dignity which have been recognized as human rights. But they themselves have not thereby metamorphosed into rights accepted as such by the international community, as Petersmann’s analysis would lead us to believe.

### ***C. Human Rights, including ‘Economic Liberty Rights’, Are Part of Binding International Law***

From a human rights perspective, the main thrust of Petersmann’s analysis is captured in his insistence upon the ‘constitutional primacy of the inalienable core of human rights’ and on the resulting obligation of international agencies such as the WTO to respect and promote those rights. This is based on a variety of claims. The first is that inalienable human rights (he does not define what is meant by ‘inalienable’ and, although used in preambular formulations, it is not a term to which particular significance has been accorded in international law) are part of general international law on the basis of ‘the UN Charter, the Universal Declaration of Human Rights and the 1993 Vienna Declaration on Human Rights, as well as in numerous other UN instruments’. As a statement of the sources of human rights law this is singularly confused. The specific legal implications of the Charter guarantees, in isolation, are not entirely clear and have been much debated. The Universal Declaration, for all its importance, is not in its entirety part of customary law according to the majority of commentators and only a determined optimist would place significant reliance, in formal legal terms, upon the non-binding outcome of a UN conference such as the Vienna Declaration. Petersmann then goes on to state, without qualification or explanation, that human rights are also part of general principles of law in accordance with Article 38 of the Statute of the International Court of Justice. While this is a proposition with which I have considerable sympathy,<sup>50</sup> it is also one which has been strongly contested and its validity is by no means self-evident as Petersmann implies.

Not wishing to leave any source unturned, Petersmann then argues that ‘universally recognized human rights’ constitute *erga omnes* obligations. There is indeed said to be a ‘worldwide *opinio juris*’ on this matter, which is based upon the universal ratification of the Convention on the Rights of the Child and ‘the universal recognition in [various] treaties of the “equal and inalienable rights of all members of the human family” as set out in the UDHR’.<sup>51</sup> What exactly these universally recognized rights are is never made clear. Nor does he get into the

---

<sup>50</sup> Simma and Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, General Principles’, 12 *Aust. YB Int’l L.* (1992) 82.

<sup>51</sup> Petersmann, at 633-634.

thorny subject of which rights have achieved *erga omnes* status. His legal analysis of the international law status of human rights is rendered even less clear by his reference to the '*jus cogens* nature of many specific human rights whose legal implementation may differ from country to country and from treaty to treaty'. There are, in fact, relatively few rights which have achieved *jus cogens* status, and it would be extremely difficult to argue that those that have, such as the prohibition against genocide and slavery, may be implemented in different ways depending on the state concerned or the treaty involved. All the more so since no particular treaty is involved, at least not in the sense of providing the foundation for, or the formulation of, a *jus cogens* norm.

But whatever the shortcomings of this analysis from an international law point of view, the real problem is the use to which it is put. In essence Petersmann seeks to set up a logical progression which moves from the statement that there is a core of universally recognized rights to the proposition that these rights must thus be respected by international organizations, to the conclusion that his favoured list of human rights will thus trump anything else that governments or international organizations might seek to do.

Are international organizations as such obligated to respect human rights? Although it is a proposition to which almost any proponent of human rights would be sympathetic, this does not overcome the fact that it remains contentious from a legal point of view and has been explicitly disputed by the international legal advisers of many of the key agencies, including the World Bank and the IMF. As a general statement of principle it should be unproblematic, but the difficulties begin when one seeks to identify the specific legal arguments which underpin the asserted obligation. Petersmann begins this task by stating that 'international legal practice confirms an *opinio iuris* that UN membership entails legal obligations to respect core human rights'. Although this statement applies only to governments, since they alone can achieve UN membership, the analysis quickly moves on to embrace also the actions of 'intergovernmental' actors and the obligations of 'all national and international governments' (a term which, happily, remains undefined) to respect human rights. The endpoint of this analysis is that human rights 'today constitutionally restrain all national and international rule-making powers'.<sup>52</sup>

---

<sup>52</sup> Petersmann, at Section 4.

From whence does this obligation derive? The first source cited is the ILO Declaration on Fundamental Principles and Rights at Work. But apart from the fact that this Declaration deals only with labour rights and not with human rights in general (whereas Petersmann's proposals are clearly not aimed at strengthening labour rights), the Annex to the Declaration states specifically that it 'is of a strictly promotional nature'.<sup>53</sup> Although there is intentional ambiguity in terms of their legal characterization, and some ILO officials and governmental representatives would clearly be happy if the Principles were to crystallize into customary international law, this is certainly not yet the case.

The second source is 'UN human rights law' which, it is said, 'explicitly recognizes ... that human rights entail obligations also for intergovernmental organizations'. The only authority offered for that broad proposition is Article 28 of the UDHR. This provision states that 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' It thus addresses in only the most oblique way the issue at hand and an extended and careful argument would be required to derive from it, in a manner that would be convincing to an international lawyer, anything close to the proposition that Petersmann claims it 'explicitly recognizes'.

***D. There Is a 'Worldwide Integration Law' which Is, or Should Be, Based on the EU Model, which Has Been, inter alia, 'Citizen-Driven'***

The term 'worldwide integration law' recurs frequently in Petersmann's writings.<sup>54</sup> Although it remains undefined, the model is clearly that of the EU and it seems to involve 'the recognition and empowerment of citizens as legal subjects not only of human rights but also of competition law and integration law'.<sup>55</sup> Thus he cites the anti-globalization demonstrations as 'illustrations of

---

<sup>53</sup> <http://www.itcilo.it/english/actrav/telearn/global/ilo/law/idec.htm>.

<sup>54</sup> See e.g. Petersmann, in von Bogdandy *et al*, *supra* note 3 ('Human Rights in European and Global Integration Law ...'). The article above also refers to 'the emerging global integration law', at 16.

<sup>55</sup> *Ibid.*

the need to examine whether the European and US “integration paradigm” should not also become accepted at the worldwide level’.<sup>56</sup> The EC model is defined elsewhere as one of ‘complementing human rights guarantees by liberal trade and competition rules conferring individual rights on EC citizens’.<sup>57</sup>

These formulations contain several contentious elements: (i) is there really a ‘worldwide integration law’;<sup>58</sup> (ii) is such a thing desirable; (iii) if it is, should it necessarily be modelled on the experience of the EU and the US; and (iv) has the EU approach really been citizen-driven? It is not clear that there is any such thing as ‘worldwide integration law’. The term is not one that is used by other scholars and has certainly never been used by the UN or any of the specialized agencies, even though it is to the latter that Petersmann attributes the task of building and implementing such a law. Indeed, all such agencies would vehemently deny that they were engaged in anything as nefarious as trying to bring about worldwide integration. Both the term itself and the way in which it seems to be inextricably linked to the values and goals of the EU would seem to imply that the international community is committed to a global version of EU integration. But leaving aside the minor questions as to whether this would be either feasible or desirable, there is no foundation for such an assertion. It remains an essentially Eurocentric assumption that the aspirations of the broader global community would surely be to emulate the trajectory and the modalities used by the EU to forge an ever-closer union.

The other major question that emerges is whether the EU and US integration models, and more especially their steps to promote freedom of trade, have in fact been ‘citizen-driven’ as Petersmann claims.<sup>59</sup> Indeed, his entire enterprise of seeking to have the EU experience writ large

---

56 Petersmann, at 623.

57 Petersmann, in von Bogdandy *et al.*, *supra* note 3, at 386.

<sup>58</sup> Even the term ‘EC integration law’, which Petersmann uses frequently, can today be considered to be relatively problematic. While much of the EC project has been about economic integration, the inexorability of the nexus between law and integration in the EC has been convincingly challenged. See Shaw, ‘EU Legal Studies in Crisis: Towards a New Dynamic’, 16 *Oxford J. Legal Studies* (1996) 231.

59 Petersmann, at 629.

on the global stage is said to be motivated by a desire to promote and ensure the type of citizen empowerment which has been achieved in the EU. He contrasts that model with ‘the classical international law approach of treating citizens as mere objects of international law that should be kept out of intergovernmental organizations’.<sup>60</sup> But neither dimension of this claim is anywhere near as straightforward as Petersmann suggests. At the international level, citizens, usually acting through non-governmental organizations, have in fact had a significant impact in terms of defeating the launching of a new trade round of negotiations based on the model put forward by governments at Seattle, preventing the negotiation of a Multilateral Agreement on Investment within the context of the Organisation for Economic Co-operation and Development, and compelling a reorientation of the interpretation of the health exceptions to the TRIPS rules. On the other hand, the drive to develop the Single European Market has often been alleged to have been dominated by big business to the exclusion of citizen groups.<sup>61</sup> Indeed it is only in the last decade, since the crises surrounding the ratification of the Maastricht Treaty, that the EU has begun to demonstrate awareness of the need to move away from the early functionalist elite-driven model of European integration to a more constitutional approach which consciously reaches out and seeks to involve civil society proper. In many respects, the European process has not differed greatly from the free trade agenda promoted in the United States. The key actors within the latter context have recently been identified in the following terms:

Over the past decade, the business coalition that forced through the Uruguay Round and North American Free Trade Agreements, and the deal to bring China into the World Trade Organisation, was a broad group of bankers, service industries, drug companies, farmers, high-technology industries, and manufacturers.<sup>62</sup>

---

60 *Ibid*, at 636.

61 See, e.g., M. Green Cowles, *The Politics of Big Business in the European Community: Setting the Agenda for a New Europe* (1996).

62 Alden, ‘Corporate Apathy Shackles Step to Freer Trade’, *The Financial Times*, 14 May 2002, at 4.

This is indeed a ‘broad group’, but it is hardly one that merits the description of the process as being ‘citizen-driven’ or even ‘citizen-oriented’. Petersmann pays homage to the role of the citizen by noting that human rights have historically been achieved not through top-down approaches but rather as a result of “‘bottom-up pressures” and “glorious revolutions” by citizens ...’. But the role of this inspiring vision of the uprising of the masses to demand their rights in Petersmann’s understanding of history is immediately discredited by his assertion that the agreements to establish the World Bank and the IMF are indicative of ‘such hard-fought-for “revolutions” in international law designed to extend freedom, non-discrimination, the rule of law and social welfare across frontiers ...’.<sup>63</sup> The Fund and the Bank as the products of popular demands by citizens is hardly a picture which emerges from any of the histories of the relevant organizations. As Ciorciari recently summarized a careful review of the historical sources: ‘It is beyond dispute that the United States and Great Britain dominated both the preparation of the Bretton Woods Institutions and the Conference itself.’<sup>64</sup> Indeed, far from being citizen-driven initiatives, the history books tend to present the agreements as being primarily the outcome of negotiations of positions developed by just two individuals, John Maynard Keynes for the UK and Harry Dexter White for the US.<sup>65</sup>

A related dimension of the EU as an ideal model for the world as a whole is that the EU is seen to have been a driving force for good within the international economic order and this virtue has in turn been driven by its commitment to economic liberties. Thus Petersmann notes that ‘[t]he constitutional guarantees of the EU for economic liberties ... have also induced numerous EU initiatives to strengthen competition, environmental and social law in worldwide international

---

63 Petersmann, at 636.

64 Ciorciari, ‘The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement’, 33 *Cornell Int’l L.J.* (2000) 331, at 361, n. 178.

65 See R. Gardner, *Sterling-Dollar Diplomacy* (2nd. ed., 1969); E. Mason and R. Asher, *The World Bank since Bretton Woods* (1973); A. van Dormael, *Bretton Woods: Birth of a Monetary System* (1978); and R. Skidelsky, *John Maynard Keynes, Vol. 3: Fighting for Freedom, 1937-1946* (2001).

agreements'.<sup>66</sup> The reality of course is more complex. Many of the EU's initiatives in these areas have been driven by narrow self-interest rather than by any abstract commitment to the promotion of economic liberties. In so far as this latter term is intended to cover human rights initiatives in general, the assertion neglects to take account of the EU's failure to ensure that all of its members have ratified the European Social Charter, its failure to have insisted on such ratification as a prerequisite for admission to the Union, its resistance to efforts to ensure that EU-based transnational corporations are required to respect human rights in their activities, its members' rejection of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, its inclusion of respect for minority rights in the conditions to be met by new members while those rights are marginal to its own arrangements and are virtually absent from the EU Charter of Fundamental Rights,<sup>67</sup> or its reticence about human rights matters in general, let alone social rights, in the framework of the activities of the IMF and the World Bank.

The EU is not exactly the persistently virtuous actor in international affairs as it is portrayed by Petersmann.

### ***E. The WTO Would Protect Human Rights More Effectively than Any Other International Institutional Arrangements***

The first step in this part of Petersmann's argument is to criticize or discredit the UN's human rights arrangements, thus setting the scene for them to be replaced by the WTO as the principal means by which to promote respect for human rights. Having sought to establish that the EU is citizen-driven, he then contrasts it with the 'UN-directed international community', which is characterized as 'state-centred' and 'authoritarian'.<sup>68</sup> There is no small irony in this characterization, given that the process that Petersmann advocates is in effect the top-down

---

<sup>66</sup> Petersmann, at 632.

<sup>67</sup> See generally J.-Y. Carlier and O. De Schutter (eds), *La Charte des droits fondamentaux de l'Union européenne: Son apport à la protection des droits de l'homme en Europe* (2002).

<sup>68</sup> This 'authoritarian' approach is said to be favoured by Georges Abi-Saab, particularly in his General Course at the Hague Academy of International Law. See Petersmann, in von Cremer, *supra* note 3, at 291, note 1.



imposition by elites of a rigid commitment to free trade. The next step is to criticize the ‘lack of judicial safeguards, not only in the UN Charter but also in the various UN human rights covenants, for the protection of human rights and the rule of law at the national and international levels’ and to argue that these weaknesses confirm ‘the power-oriented structure of UN law, one that does not take human rights seriously’.<sup>69</sup> In fact, it is true that the implementation arrangements reflected in the principal UN human rights treaties are much weaker than they should be, but the reason is that governments have steadfastly and very openly refused to develop the system any further. For some reason Petersmann assumes that the very same governments, acting within the framework of the WTO, would take a dramatically different attitude to a proposal purporting to achieve the result which they have adamantly opposed in the human rights setting.

The WTO forum is praised as the one that would promote EU-style ‘economic market integration’, which leads to ‘more comprehensive and more effective promotion of human rights than has been possible in traditional state-centred international law’.<sup>70</sup> And yet the WTO is very much a part of a state-centred international legal system. Indeed, to take but one example, it is so state-centred that it has sought strongly to discourage the acceptance of *amicus curiae* briefs by the Appellate Body, despite the latter’s expressed wish to make use of them.

Petersmann’s faith in the WTO is largely justified by the oft-repeated assertion that the Organization has ‘constitutionalized’ trade law on the basis of “rule-of-law”; compulsory adjudication; “checks and balances” between legislative, executive and judicial powers; and the legal primacy of the WTO “Constitution” ...’.<sup>71</sup> Without wishing to engage in a debate over whether the WTO system really reflects an ideal checks and balances approach, it is nevertheless useful to ask how the WTO promotes the rule of law. That concept is referred to 26 times in the article above and Petersmann considers that the WTO promotes the rule of law ‘more effectively than any other worldwide treaty’.<sup>72</sup> It does this through ‘its unique compulsory dispute settlement

---

<sup>69</sup> *Ibid*, at 292.

<sup>70</sup> Petersmann, at 631.

<sup>71</sup> Petersmann, in *JIEL* (2000), *supra* note 3, at 24.

<sup>72</sup> *Ibid*, at 25 and again at 39.

and appellate review system, and its compulsory guarantees of access to domestic courts'.<sup>73</sup> But any conception of the rule of law – defined by Dicey as ‘the universal subjection of all classes to one law’,<sup>74</sup> or by Hayek as the possibility ‘to foresee with fair certainty how the [government] will use its coercive powers’<sup>75</sup> – which contents itself with mechanisms for the enforcement of trade rules risks reducing the concept almost to vanishing point. Petersmann’s conception of the rule of law seems not only to be devoid of the substantive content which Ronald Dworkin, let alone the International Commission of Jurists, would insist should be part of it, but one which is not even complete in any narrow procedural sense of the term. Given Petersmann’s affinity with, and regular references to, Hayek,<sup>76</sup> and the fact that the rule of law is one of the leitmotifs of the latter’s work, one might expect that he would share that conception. But the inclusion of social rights in Petersmann’s accounts of his project makes it incoherent for him to rely in this respect upon Hayek, who drew great satisfaction from the fact that ‘those who pursue distributive justice will in practice find themselves obstructed at every move by the rule of law’ as he had defined it.<sup>77</sup>

As Fallon has observed, although the concept of the rule of law remains much celebrated, its precise meaning ‘may be less clear today than ever before’ and its modern-day invocations are ‘typically too vague and conclusory to dispel lingering puzzlement’.<sup>78</sup> Even the World Bank, which has begun to embrace the rule of law with an enthusiasm that would worry many of its critics, has endorsed an analysis which cautions that ‘[p]olicymakers need to be clear about what they mean by the rule of law because answers to many of the questions they are interested in – [such as] whether “rule of law” facilitates economic development ... – depend crucially on what

---

<sup>73</sup> *Ibid*, at 25.

<sup>74</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., 1915, repr. 1982), at 114.

<sup>75</sup> F. Hayek, *The Road to Serfdom* (1944), at 98.

<sup>76</sup> He was once Hayek’s student in Freiburg. See von Bogdandy *et al.*, *supra* note 3, at 384.

<sup>77</sup> F. Hayek, *The Constitution of Liberty* (1960), at 233.

<sup>78</sup> Fallon, “‘The Rule of Law’ as a Concept in Constitutional Discourse”, *97 Colum. L. Rev.* (1997) 1, at 1 and 56.

definition of the rule of law is being used'.<sup>79</sup> While Petersmann offers no definition, both the way in which he uses the term and the extent to which he links it to the role of the courts brings it closer to a vision of the rule of lawyers than to any recognizable version of the rule of law.

The reason why the WTO and the IMF are seen by Petersmann as the most effective agents for the promotion of human rights is because he considers existing human rights law and the institutions established to promote it to be deficient. Thus, while extolling the virtues of human rights and the need to make them central to 'worldwide integration law' he observes that:

the interrelationships between human rights and economic welfare – notably the opportunities of the international division of labour for enabling individuals to increase their personal freedom, real income and access to resources necessary for the enjoyment of human rights – are neglected by human rights doctrine.<sup>80</sup>

In general, this part of Petersmann's analysis is characterized by a number of unresolved contradictions. Having expressed so many reservations about what the UN has been able to achieve in the human rights area and been so critical of the authoritarian nature and government-centredness of the UN, Petersmann ends his analysis by proposing that 'international organizations must be understood as a "fourth branch of government"'.<sup>81</sup> An even more obvious contradiction is reflected in his call for the UN Committee on Economic, Social and Cultural Rights, along with the WTO, to 'take the lead ... in interpreting and progressively developing the law of specialized organizations in conformity with universally recognized human rights'.<sup>82</sup> Yet this is the Committee which has as its sole function the monitoring of implementation of the UN Covenant on Economic, Social and Cultural Rights, a treaty which he says, at a later point in the analysis, 'reflects an anti-market bias which reduces the Covenant's operational potential as a

---

<sup>79</sup> 'The Rule of Law as a Goal of Development Policy', <http://www1.worldbank.org/publicsector/legal/ruleoflaw2.htm>. See also World Bank, *Annotated Bibliography: Legal Institutions of the Market Economy* (July 2000), at <http://www1.worldbank.org/publicsector/legal/annotated.pdf>.

<sup>80</sup> Petersmann, at 639.

<sup>81</sup> *Ibid*, at 649.

<sup>82</sup> *Ibid*, at 625.

benchmark for the law of worldwide economic organizations and for a rights-based market economy and jurisprudence ...'.<sup>83</sup> Similarly, he laments the fact that the Covenant 'does not protect the economic freedoms, property rights, non-discriminatory conditions of competition and the rule of law necessary for a welfare-increasing division of labour satisfying consumer demand through private investments and the efficient supply of goods, services and job opportunities'.<sup>84</sup> For him then the solution is straightforward. It is to give the principal responsibility for promoting, interpreting, and even implementing these and the other core UN human rights standards to the WTO while insisting that it is capable of pursuing an integrated vision which remains faithful to the dictates of human rights law.

But this process of human rights-based (or more accurately human rights justified) 'constitutionalization' of the WTO is a highly contentious one. While it is true that some human rights, and many labour rights, proponents would like to see a significant role for the Organization in these respects, their suggestions stop considerably short of Petersmann's vision. The reason is simply that while the former might argue for a much greater sensitivity on the part of the institutions of the WTO to human rights values, or even for sanctions to be adopted by the WTO against member countries which violate these, they certainly do not see it as an Organization which is designed, structured, or suitable to operate in the way that one with major human rights responsibilities would. The Agreement Establishing the WTO is not a constitutional instrument in the sense of constituting a political or social community,<sup>85</sup> and its mandate and objectives are narrowly focused around the goal of 'expanding the production of and trade in goods and services'. Despite the expansion of the original GATT mandate into areas such as the services industries and intellectual property rights, and proposals to expand its role to cover the enforcement of regimes at the national level which are favourable to international foreign investment, the basic structure of the Organization has remained unchanged. It is an institution which is dominated by producers, and in which the economic, social, cultural, political and various other interests of a great many people are not, in practice, represented. Its institutional structure, its processes and the outcomes it sanctions are far from what would be required of a

---

<sup>83</sup> *Ibid*, at 628-629.

<sup>84</sup> *Ibid*, at 639-640.

<sup>85</sup> See generally Walker, *supra* note 12.

body to which significant human rights authority could be entrusted. While Petersmann acknowledges many of these shortcomings his suggestions for remedying them include the creation of various advisory bodies, ‘more responsible participation of NGOs, and more meetings open to the public’. The *quid pro quo* for this tinkering would be ‘precise and unconditional WTO guarantees of freedom and non-discrimination [to] be protected by domestic laws and judges as individual rights’.<sup>86</sup> A more unequal trade-off would be difficult to imagine. The ‘human rights’ thus granted would be a mirage which would have little impact other than to reinforce the strength of trade norms and the role of the WTO while leaving the existing, significantly ineffectual, human rights legal regime intact.

#### ***F. A United Nations ‘Global Compact’ which Encourages the WTO and the IMF to Promote Human Rights Is the Best Way Forward***

One of the most practical proposals that Petersmann puts forward is that the UN should launch ‘a “Global Compact” committing all worldwide organizations to respect for human rights, the rule of law, democracy and “good governance” in their collective exercise of government powers’.<sup>87</sup> There is something to be said for an initiative which would commit all of these agencies to respect human rights in all of their activities, but is doubtful that the most appealing model is that of the existing Global Compact between business and the UN. It is defined by the latter as not being ‘a regulatory instrument or code of conduct, but a value-based platform designed to promote institutional learning. It utilizes the power of transparency and dialogue to identify and disseminate good practices based on universal principles’.<sup>88</sup> Without entering into the many criticisms that have been made of the Compact as a toothless tiger or window-dressing, it must suffice to say that the UN and the various specialized agencies already have endless dialogues designed to promote policy coordination and it is difficult to see how the addition of one new one, albeit termed a Global Compact, would be more successful in relation to human rights when other dialogues have yet to be especially productive. But the more puzzling nature of the proposal is that it reduces the focus to a very soft and dialogue-based effort to promote human rights,

---

<sup>86</sup> Petersmann, in de Búrca and Scott (eds), *supra* note 3, at 109-110.

<sup>87</sup> *Ibid*, at 27.

<sup>88</sup> <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/whatitis.htm>.

which would seem to be singularly modest given Petersmann's earlier conclusion that all of the agencies are already 'constitutionally constrained' by human rights law.

#### 4. Is Petersmann's Analysis 'Kantian'?

In the article above Petersmann tells us that the experience of European integration 'confirms the Kantian insight that human rights cannot become effective without constitutional safeguards and judicial remedies'.<sup>89</sup> This reflects his previous writings on this topic, which have been replete with references to the philosophy of Immanuel Kant. In one recent article there are more than 30 mentions of Kant in the text alone, including references to the 'Kantian recommendation' for limited UN membership, a 'Kantian commitment' in the preamble of the Universal Declaration of Human Rights, 'the Kantian ideal of an international social contract', and 'Kantian legal theory' in general.<sup>90</sup> More specifically, the WTO, the EC and the North American Free Trade Agreement (NAFTA) all turn out to be part of the modern-day Kantian project. In one analysis he suggests that both 'European integration law and the 1994 WTO Agreement' are based upon the same 'underlying Kantian legal theory'.<sup>91</sup> He develops the point elsewhere:

[A]s Kant predicted, individual freedom and the rule of law are today more effectively protected in international economic law (such as WTO law) and in regional integration law among constitutional democracies (such as [EC and NAFTA] law) than in other areas of international law.<sup>92</sup>

The link between WTO law and human rights is also Kantian:

From this Kantian ethical perspective, the guarantees of freedom and non-discrimination in WTO law serve *human rights functions* by enabling individuals

---

<sup>89</sup> Petersmann, at 637.

<sup>90</sup> Petersmann, in Cremer, *supra* note 3, at 303, 305, 304 and 312 respectively.

<sup>91</sup> Petersmann, in *Mich. J. Int'l L.*, *supra* note 3.

<sup>92</sup> Petersmann, in *NYU J. In'l L. & Pol.*, *supra* note 3, at 755.

to enhance their personal autonomy and welfare through peaceful cooperation across frontiers.<sup>93</sup>

And Kant's contribution is not limited just to trade law. Thus, the North Atlantic Treaty Alliance (NATO) is described as a 'Kantian alliance of free states'.<sup>94</sup> More generally Petersmann's two major projects, which he identifies as international constitutional law and cosmopolitan integration law, are said to have been 'explained by *Kant*'.<sup>95</sup> European integration law and 'transnational "cosmopolitan law"' turn out to be identical and to correspond to 'the Kantian insight that market freedoms are indispensable ...'.<sup>96</sup> Kantian analysis also leads to the conclusion that we need 'a new UN Charter based on human rights and cosmopolitan democracies' and a Charter amendment which would make the jurisdiction of the International Court of Justice compulsory for all members of this new Kant-inspired structure for the United Nations.<sup>97</sup>

In some respects Petersmann's consistent reliance upon Kant is a reflection of a broader resurgence of interest on the part of international lawyers in the great philosopher.<sup>98</sup> But Kant's work is especially complex. It has been described as 'formidably and unbendingly professional, elaborately schematic, ponderous with technical terms, and exceedingly laborious to read and to understand'.<sup>99</sup> It is hardly surprising then that, among the international lawyers who have studied it, it has given rise to what has been called 'a ferocious and complex debate regarding which set of ideas can properly be called the "Kantian" view of ... international law and what, if any, value

---

<sup>93</sup> See Petersmann, in *CMLR*, *supra* note 3 above, 1375 (emphasis in original).

<sup>94</sup> Petersmann, in *Mich. J. Int'l L.*, *supra* note 3, at 16.

<sup>95</sup> Petersmann, in *Jean Monnet Working Paper*, *supra* note 3, text preceding note 59.

<sup>96</sup> Petersmann, in *Mich. J. Int'l L.*, *supra* note 3, at 17.

<sup>97</sup> *Ibid.*, at 20 and 21.

<sup>98</sup> For a list of some of the more important recent works see Capps, 'The Kantian Project in Modern International Legal Theory', 12 *EJIL* (2001) 1003, note 6.

<sup>99</sup> Warnock, 'Kant', in D. J. O'Connor (ed.), *A Critical History of Western Philosophy* (1964) 296, at 297.

can be attached to it'.<sup>100</sup> Thus, for example, the work of Fernando Tesón,<sup>101</sup> upon which Petersmann has relied in the past,<sup>102</sup> has been strongly contested by Patrick Capps.<sup>103</sup> Both the complexity of Kant's ideas and the intensity of the debate over them would seem to place a particular onus of analytical rigour upon any international lawyer who seeks to rely heavily upon Kant to support his analysis. But although Petersmann's past writings have recited lengthy passages from Kant, he neither engages in any analysis to justify the very strong interpretations that he puts forward, nor does he make any use of any of the very extensive secondary literature on Kant in general or in relation to international law. He confines himself to citing several books about Kant, but does not engage in any way with them.<sup>104</sup>

If the propositions for which he invokes Kant were entirely uncontroversial then the absence of any critical analysis might not be a cause for concern. But in fact many of his assertions are open to challenge. Since a detailed response would take up far more space than is available for this reply it must suffice to mention a few of the main criticisms that might be levelled at this aspect of Petersmann's work. First, there are critical distinctions in Kant's writings which Petersmann manages to blur in order to provide a foundation for many of his assertions as to what Kant's philosophy implies about the relationship between commerce and international law. In Kant's philosophy the move from international morality to international law

---

<sup>100</sup> Orend, 'Kant on International Law and Armed Conflict', 11 *Can. J. L. & Juris.* (1998) 329, at 329-330.

<sup>101</sup> See F. Tesón, *A Philosophy of International Law* (1999).

<sup>102</sup> Petersmann cites Tesón, 'The Kantian Theory of International Law', 92 *Colum. L. Rev.* (1992) 53, at 54 note 7, as authority for the proposition that 'Kant was ... the first to suggest human rights as the basis of international law'. Petersmann, in *NYU J. In'l L. & Pol.*, *supra* note 3, at 762.

<sup>103</sup> Capps, *supra* note 98.

<sup>104</sup> In the article above he cites at note 2 A. D. Rosen, *Kant's Theory of Justice* (1993) and P. Guyer, *Kant on Freedom, Law and Happiness* (2000). In *Mich. J. Int'l L.*, *supra* note 3, he adds citations (at note 23) to C. Covell, *Kant and the Law of Peace* (1998); and (at note 47) Doyle, 'Kant, Liberal Legacies and Foreign Affairs', in M. Brown *et al.* (eds), *Debating the Democratic Process* (1996).



is a conceptually challenging one, as Capps has shown.<sup>105</sup> But Petersmann's analysis demonstrates no awareness of complexity in this respect.

Second, the differences and similarities between Kant's writings and those of other philosophers, even those self-described as Kantian or neo-Kantian, are often significant and need to be acknowledged. Given the substantial differences in approach between Kant and John Rawls,<sup>106</sup> the following generalization makes little sense:

Constitutional theory (e.g. by *Kant* and *Rawls*) and practical experience (notably in European integration) demonstrate that national constitutions cannot effectively protect human rights and democratic peace across frontiers without complementary *international constitutional restraints* on foreign policy powers and *cosmopolitan guarantees* of human rights vis-à-vis foreign governments.<sup>107</sup>

Similarly the assertion that '[a]s described already by *Kant* more than 200 years ago, human rights and democracy require *national* as well as *international constitutionalism*' is unhelpful without a careful exposition of what these terms might reasonably mean to a Kantian.<sup>108</sup>

Third, while Kant wrote about a 'pacific federation' among states, he stressed that 'it does not aim to acquire any power like that of a state, but merely to preserve and secure the freedom of each state in itself'.<sup>109</sup> Although Petersmann has actually cited this remark,<sup>110</sup> it does not prevent him from presenting as a Kantian notion his vision that all states should be tied closely together

---

<sup>105</sup> Capps, *supra* note 98, at 1007.

<sup>106</sup> Unlike Kant, Rawls is content for liberal and non-liberal states to co-exist in international law, does not insist on a universalist position, and speaks, in his later work, of the law of peoples rather than cosmopolitan justice. See J. Rawls, *The Law of Peoples* (1999).

<sup>107</sup> Petersmann, in *Jean Monnet Working Paper*, *supra* note 3, at note 131.

<sup>108</sup> *Ibid*, at note 179.

<sup>109</sup> Kant, 'Perpetual Peace', in H. Reiss (ed.), *Political Writings* (1971) 102.

<sup>110</sup> Petersmann, in *Mich. J. Int'l L.*, *supra* note 3, at 9.

under a regime of ‘worldwide integration law’ in the context of which the WTO could enforce a right to free trade in the name of human rights.

Fourth, Petersmann makes frequent and generous recourse to the concept of the ‘categorical imperative’, which is a foundation stone of Kant’s philosophy. In the paper above he does so twice and equates it ‘with the economic objective of maximizing consumer welfare through open markets and non-discriminatory competition’. Elsewhere he notes that ‘[m]odern theories of justice justify the WTO objective of maximizing equal freedom across frontiers by the ethical “categorical imperative” (*Kant*)’.<sup>111</sup> Writing about the Vienna Declaration, adopted at the 1993 World Conference on Human Rights, he writes that, although it recognized the duty of states to protect human rights, it left open the question of whether that formulation ‘should be construed in conformity with the *categorical imperative* of Kantian philosophy as an obligation to maximize the equal freedoms of the citizens, including their freedom of trade...’.<sup>112</sup> One can only assume that the diplomatic delegations in Vienna were distracted by more ephemeral matters! The focus on both negative and positive freedoms in modern human rights law is also said to reflect an approach which conforms to the categorical imperative.<sup>113</sup>

By invoking the term in such an imprecise and, it must be said, almost profligate fashion, Petersmann not only confuses but also devalues an important and complex term of art, the core meaning of which is generally taken to be that a person's actions should be capable of universal justification and in this way vouch respect for the common dignity of humanity. Exactly how this can be adapted and used in the way that Petersmann does is not made clear. Of course, it is easy to see how the Kantian imperative might be invoked in support of themes such as the absoluteness, inalienability and indefeasibility of certain action norms in accordance with which one might build the ethical foundations of a theory of rights, but this requires hard philosophical work rather than mere assertion. Instead, by seeking in effect to convert the categorical

---

<sup>111</sup> Petersmann, in *Jean Monnet Working Paper*, *supra* note 3, at text preceding note 130.

<sup>112</sup> See Petersmann, in *CMLR*, *supra* note 3, at 1375.

<sup>113</sup> Petersmann, in Cremer, *supra* note 3, at 306.

imperative into a freedom to trade in a series of easy steps, Petersmann barely scratches the surface of the longstanding debate.<sup>114</sup>

Fifth, Petersmann does not squarely confront the consequences of adopting a Kantian approach to participation in the UN or in the WTO.<sup>115</sup> An insistence that only democratic governments could participate would in fact defer the implementation of Petersmann's programme almost indefinitely since a great many countries would need to be expelled from both organizations and their readmission would be dependent upon their attainment and maintenance of a democratic form of government. How an assessment of whether they are 'democratic' would be made, and by whom, are questions to which Petersmann does not seem to have given much thought, although the despair that he expresses in response to the politicization of the UN's human rights system would presumably make him loathe to let any of those bodies make the decisions. Perhaps he would want such matters to be determined by the judiciary in whom he has such faith, but it is unlikely that any governments, including those of the exemplary EU, would divest themselves of such crucial decision-making authority.

At the end of what Petersmann would call a long Kantian road the reader must ask why the author has felt the need to invoke the name of Kant so often. Several reasons might be suggested. The intention might be to provide an analytical framework for the overall analysis, or it might be to draw a firm contrast with other philosophical approaches which have been rejected, or it might be to more closely identify with other writers who have developed the same approach. But Petersmann does not seem to use Kant for any of these purposes. Instead the objective seems to be to provide a philosophical gloss and the intimation of a theoretical framework in support of the otherwise blunt assertions of the author's main belief, which is that a right to free trade is the panacea which will bring wealth and liberty to all mankind. In other words, Kant's philosophy is

---

<sup>114</sup> E.g. the debate about whether the Kantian concept is primarily about duties and cannot easily be extended to embrace rights. On this 'highly controversial' point see Capps, *supra* note 98, at note 9.

<sup>115</sup> Although he has asked some of the questions that arise in this respect, he has proffered no answers. See Petersmann, in Cremer, *supra* note 3, at 304-305.

actually superfluous to the analysis, but is invoked to give it an intellectually more compelling tone.

## 5. Conclusion

Ernst-Ulrich Petersmann and other like-minded commentators have responded to the end of the Cold War and the ascendancy of a form of neo-liberal economic orthodoxy by calling for a fundamental realignment of international human rights law in order to give appropriate priority to what they call ‘economic liberties’. Petersmann has made an important and distinctive contribution to the debate by suggesting that the entrenchment of these values can best be done at the international level, using the well-established techniques of international law, and by urging that the principal locus of action should be the international economic institutions such as the WTO and the IMF rather than the UN’s human rights bodies. If one takes an ordo-liberal starting point<sup>116</sup> then these proposals, which would have the effect of prioritizing property and free trade over virtually all other values and would do so by giving them the imprimatur of human rights, make perfect sense. There is also a powerful instrumentalist motivation as Petersmann acknowledges when he says that ‘human rights law offers WTO rules moral, constitutional and democratic legitimacy that may be more important for the parliamentary ratification of future WTO agreements than traditional economic and utilitarian justifications’.<sup>117</sup>

Petersmann is in fact far from being the first to advocate a human right to free trade. In his 1944 State of the Union address, President Franklin D. Roosevelt put forward an economic bill of rights which included: ‘The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or

---

<sup>116</sup> Ordoliberalism insists on the importance of an appropriate constitutional and regulatory framework to provide the setting within which a private law system premised on private property, contractual freedom, open markets, etc. can flourish. See generally Joerges, ‘The Science of Private Law and the Nation State’, in F. Snyder (ed.), *The Europeanization of Law: The Legal Effects of European Integration* (2000) 47.

<sup>117</sup> See Petersmann, in *CMLR*, *supra* note 3, at 1377.

abroad.’<sup>118</sup> Ironically, when the American Law Institute subsequently adapted the long list of economic and social rights proposed by Roosevelt for possible inclusion in the UDHR they omitted this right but retained virtually all of the standard economic and social rights that were subsequently recognized in the relevant provisions of the Universal Declaration.<sup>119</sup> Moreover, Petersmann’s proposal to privilege the right to property recalls the arguments put forward over the years by Richard Epstein, who has long advocated an interpretation of the fifth amendment to the US Constitution (the so-called ‘takings clause’ which prohibits the taking of private property ‘for public use without just compensation’), which would give far greater protection to property rights than they currently enjoy and would result in the overriding of many of the social and labour rights which currently exist under US law.<sup>120</sup> In these respects, Petersmann’s proposals are hardly novel.

The principal problem with his approach, however, is that it is presented as though it were simply a logical development of existing policies, rather than representing a dramatic break with them. In a form of epistemological misappropriation he takes the discourse of international human rights law and uses it to describe an agenda which has a fundamentally different ideological underpinning. Thus, his proposals are presented as: involving a relatively minor adaptation of existing human rights law; amounting to little more than the transposition of a balanced and proven EU policy on human rights and trade; being entirely consistent with widely accepted conceptions of constitutionalism and the rule of law; being fully compatible with the recognition of a wide range of social rights; and being a straightforward application of Kantian principles. But as the preceding analysis has sought to show, none of these characterizations is accurate.

---

<sup>118</sup> Eleventh Annual Message to Congress (Jan. 11, 1944), in J. Israel (ed.), *The State of the Union Messages of the Presidents*, Vol. 3 (1966), 2875, at 2881.

<sup>119</sup> American Law Institute, ‘Statement of Essential Human Rights’, UN Doc. A/148 (1947).

<sup>120</sup> R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). For a critique in relation to labour law, see Schwartz, ‘Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?’, 37 *Am. U.L. Rev.* (1987) 9.

The proposed agenda is in fact a revolutionary and radical one which, if adopted, would have far-reaching consequences for the existing international human rights regime as well as for the balance of values reflected in the vast majority of existing constitutional orders. The most fundamental change is that human rights would, despite all of the Kantian rhetoric, become detached from their foundations in human dignity and would instead be viewed primarily as instrumental means for the achievement of economic policy objectives. Individuals would become the objects rather than the holders of human rights. While their broader range of human rights would continue to be protected through ineffectual institutional arrangements, they would become empowered as economic agents acting to uphold the WTO agenda. More specifically in terms of changes, a very large number of national constitutions, only a handful of which recognize anything approaching a right to free trade, would have to be amended. International human rights instruments, which have proved notoriously difficult to amend, would have to be substantially revised if the rights to property, contract and freedom of trade are to be recognized and made judicially enforceable in the way Petersmann envisages. Economic actors, such as corporations, would be empowered far beyond existing practice to invoke the protection of human rights instruments. The various limitations upon the right to property, which have been prominent in the application of that right by international human rights organs, would be dramatically curtailed.<sup>121</sup> At the political level, the reluctance to incorporate any human rights dimension within the WTO framework, a position which the vast majority of governments have consistently manifested in that context, would need to be overcome. Finally, there is the paradox implicit in a project which proceeds on the basis of the constant reiteration of the importance of democratic values being achieved through measures designed to put the principle of free trade, repackaged as a human right to be enforced by international economic agencies, effectively beyond the reach of all domestic constituencies.

Rather than waiting for these radical changes to occur within our lifetimes it would seem to be more productive to pursue the debate over the appropriate relationship between trade and

---

<sup>121</sup> Despite the extensive limitations upon the right to property permitted under existing human rights law David Kennedy has lamented ‘the overwhelming strength of the "right to property" in the human rights vocabulary’. Kennedy, ‘The International Human Rights Movement: Part of the Problem?’, *Eur. Hum. Rts. L. Rev.* (2001) 245.

human rights in two directions. The first, which focuses on the ways in which the two separate bodies of law can best be reconciled and made complementary to the greatest extent possible, is already well under way (the ‘trade and ...’ debate), although Petersmann’s writings show a reluctance to place much store upon this approach. The second is to begin a more sustained and critical debate that focuses upon the agenda that Petersmann describes, but does so in a systematic and intellectually open way which acknowledges the underlying assumptions and imposes a high scholarly burden of proof on the proponents of the different positions. Petersmann is correct when he says that the human rights community has so far been reluctant to take such proposals seriously and perhaps one very constructive result of his many writings will be to compel the sort of debate which is required. But it cannot be based on flimsy assertions such as those put forward by another commentator who has also called for ‘economic freedoms, including property and contract rights [to] be placed at the top of a new agenda for international human rights’ and asserts that empirical studies vindicate the efficiency of such an approach in order to guarantee ‘wealth, social stability and civil rights’.<sup>122</sup> Human rights proponents, on the other hand, can no longer dismiss the strong version of claims made on behalf of property rights and free trade without engaging with them in a more convincing and incisive manner.

---

<sup>122</sup> McGinnis, ‘A New Agenda for International Human Rights: Economic Freedom’, 48 *Cath. U.L. Rev.* (1999) 1029, at 1032-1034. In a brief history of international human rights law (at 1030) the author manages to present a remarkably revisionist account of the drafting of the UDHR.



## THE JEAN MONNET PROGRAM

---

*Professor J.H.H. Weiler  
European Union Jean Monnet Chair*

This paper is a part of contributions to the Jean Monnet Working Paper  
[No.12/02](#), Symposium: Trade and Human Rights: An Exchange

Ernst-Ulrich Petersmann

**Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder  
to Alston**

NYU School of Law • New York, NY 10012



All rights reserved.  
No part of this paper may be reproduced in any form  
without permission of the author.

ISSN 1087-2221  
© Ernst-Ulrich Petersmann 2002  
New York University School of Law  
New York, NY 10012  
USA

# Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston<sup>\*</sup>

Ernst-Ulrich Petersmann<sup>\*\*</sup>

Alston's Comment on my article<sup>1</sup> systematically misrepresents my publications and imputes to me absurd and irresponsible views which I have rejected in more than 200 publications over 30 years (Section 1). Without taking into account my books on national and international constitutional law, and without any attempt to test or falsify my 'constitutional approach' and the historical evidence supporting it, Alston's criticism of 'methodological shortcomings' seeks refuge in polemics (Section 2). Alston ignores the vast European literature and legal practice in support of 'social market economies', and fails to identify and discuss the sources of our different human rights conceptions, i.e., my broader interpretation of human dignity and of personal liberty rights (Section 3). I hope that this short rejoinder will help readers understand that Alston's nightmare of a Don Quixotte attacking the UN system exists only in the author's aggressive fantasies.

## 1 Why Does Alston Distort My Views Rather than Discuss Them?

Since the beginning of my academic career as a lecturer in constitutional law at the universities of Hamburg and Heidelberg in the early 1970s, I have emphasized that the core of human rights

---

<sup>\*</sup> *Editors Note:* The Editors of the EJIL welcomed the request of Professor Petersmann to publish a rejoinder to the comment by Philip Alston and also welcomed his wish to have the rejoinder published in the same issue as the comment. This, however, limited both the time and space available to Professor Petersmann to prepare his rejoinder. The entire Petersmann–Alston exchange will be posted on the website ([www.ejil.org](http://www.ejil.org)), including the longer version of Professor Petersmann's paper to which he makes reference in his rejoinder. Both authors have been invited, should they wish, to amplify their comments on the website.

<sup>\*\*</sup> Professor (joint chair) for International and European Law and Policy at the European University Institute and its Robert Schuman Centre in Florence, Italy. In view of the page limitations imposed on both my article and this rejoinder, I refer to the longer responses to my critics in: Petersmann, 'Time for Integrating Human Rights into the Law of Worldwide Organizations', *Jean Monnet Working Paper 7/2001*, Harvard Law School.

<sup>1</sup> Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 *EJIL* (2002) 621.

consists of inalienable ‘birth rights’ deriving from the inherent dignity and basic needs of every human being, as universally recognized today in numerous human rights treaties. Even where this ‘constitutional contract premise’ is not recognized in national and international constitutional instruments (like the EC and WTO treaties), I have long been a supporter of interpreting national and international government obligations as serving ‘constitutional functions’ for the protection of human rights. Contrary to Alston’s claim, I have never argued for a ‘fundamentally different ideological underpinning’<sup>2</sup> of national and international law.

Again, contrary to Alston’s claims, I have never argued for ‘a freestanding human right to trade’.<sup>3</sup> The Anglo-Saxon preference for interpreting the human right to liberty as protecting only civil and political liberties, together with Alston’s anti-market bias, seem to render it incomprehensible for him to extend constitutional liberty rights to economic and professional activities, including the movement of goods, services, persons and capital across frontiers, as is the case, for instance, in German and EU constitutional law.<sup>4</sup> The everyday experience of billions of people who can survive only by trading the fruits of their labour in exchange for goods and services indispensable for their personal self-development should be recognized as a human rights problem rather than merely as a legislative or administrative task to be left to ‘benevolent governments’. Contrary to Alston’s insinuations, a broader interpretation and constitutional protection of human liberty (e.g.,- in the sense of maximum equal individual freedoms across frontiers, as protected by Article 2:1 of the German Basic Law) has nothing to do with ‘prioritizing property and free trade over virtually all other values’.<sup>5</sup> My publications emphasize, in conformity with the jurisprudence of European courts, that all human rights need to be mutually balanced through the implementing legislation and administrative protection; and that international courts must respect the margin of appreciation of democratic parliaments in this balancing process.

My publications also stress that EC law (e.g. Article 30) and WTO law (e.g. Articles XX GATT, XIV GATS, 7, 8 TRIPS Agreement) rightly give priority to non-economic ‘human rights values’. This interpretation is not refuted by Alston’s schoolmasterly reply that the Bretton Woods Agreements and WTO law do not explicitly refer to human rights. Nor does Alston

---

<sup>2</sup> Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’, 13 *EJIL* (2002) 815, at 842 [hereinafter ‘Alston’].

<sup>3</sup> *Ibid.*, at 817.

<sup>4</sup> For more detailed explanations see Petersmann, *supra* note \*\*, at 35-43.

<sup>5</sup> Alston, at 841.

elaborate the allegedly ‘extremely negative consequences’<sup>6</sup> of my recommendation to follow the example of EU law and explicitly recognize the human rights obligations of all IMF and WTO Members as part of international integration law (e.g. by means of IMF and WTO declarations).

Even though Alston quotes my calls for stronger legal protection of social human rights, he infers from my citations of Hayek and other defenders of liberty rights that I must be a supporter of the opposite belief that ‘human rights and market freedoms are, in effect, one and the same thing’.<sup>7</sup> Alston fails to mention the effective protection of a ‘social market economy’, for instance in German and EC constitutional law, nor does he refer to the vast European literature (including my own books) on why and how liberal and social values must be reconciled through social legislation. My books<sup>8</sup> define the ‘human rights functions’ of international economic law not only in terms of promoting the availability and accessibility of traded goods (like food and medicines), traded services (like health and education services) and open markets that are essential for the fulfilment of many social human rights (e.g., to food, health, education and development). They also suggest interpreting national and international guarantees of freedom, non-discrimination, rule of law and social justice (e.g., in the Bretton Woods and WTO agreements) in a mutually coherent manner as empowering citizens, obliging governments and reinforcing individual rights (e.g., to ‘negative’ as well as ‘positive freedoms’, non-discrimination and individual access to courts). It is not only the numerous ‘general exceptions’ in EC and WTO law that can be construed as serving social human rights (e.g., to protection of human health against dangerous imports). The basic EC and WTO guarantees of liberty and non-discrimination should also be recognized, and in part are recognized (e.g. in the European Court of Justice (ECJ) jurisprudence on the ‘principle of equal pay for male and female workers for equal work’ in Article 141 EC) as human rights protecting personal liberty and human dignity.

In contrast to Alston’s assertion, I have never argued ‘that the EU has attained any sort of ideal equilibrium’<sup>9</sup> in protecting human rights. My argument is modest: EU integration law, including the ECHR, protects civil, political, economic and social human rights in a more balanced way than does UN law, notwithstanding the many weaknesses of EU law and its late

---

<sup>6</sup> *Ibid*, at 815.

<sup>7</sup> *Ibid*, at Section 3B.

<sup>8</sup> Cf. e.g. E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

<sup>9</sup> Alston, at 823.

explicit recognition of the ECHR (cf. Article 6 EU). Contrary to Alston's claims, I have never asserted 'that the international community is committed to a global version of EU integration';<sup>10</sup> nor that the EU is 'an ideal model for the world as a whole';<sup>11</sup> nor that the EU is 'the persistently virtuous actor in international affairs.'<sup>12</sup> My publications on EU international relations law are often quoted because of my criticism of the EU (e.g., its welfare-reducing WTO violations).

Alston carelessly invents and imputes to me irresponsible views, such as that UN human rights arrangements should 'be replaced by the WTO as the principal means by which to promote respect for human rights';<sup>13</sup> that 'the WTO would protect human rights more effectively than any other international institutional arrangement';<sup>14</sup> that the WTO 'reflects an ideal checks and balances approach';<sup>15</sup> that 'the WTO and the IMF are ... the most effective agents for the promotion of human rights';<sup>16</sup> or that one should give 'the principal responsibility for promoting, interpreting, and even implementing ... core UN human rights standards to the WTO'.<sup>17</sup> I have expressed none of these views. My argument is that, just as EU protection of human rights has usefully complemented protection under the ECHR, so too consideration of the human rights obligations of WTO Members in interpreting WTO rules could reinforce UN human rights law and help create the resources needed for the enjoyment of human rights.

A quick perusal of my books on GATT and WTO law could have enabled Alston to realize that I have long emphasized the limited scope of WTO law, the limited jurisdiction of WTO dispute settlement bodies, and the inadequate democratic 'checks and balances' in the WTO. My EJIL contribution argues in favour of strengthening UN human rights law by integrating it into the law of worldwide organisations such as the WTO.

Alston's presentation of me as someone who wishes to see 'individuals ... become the objects rather than the holders of human rights'<sup>18</sup> puts my human rights arguments on their head. Furthermore, empirical evidence (e.g., in the EC) contradicts Alston's claim that recognition of

---

<sup>10</sup> *Ibid*, at 831.

<sup>11</sup> *Ibid*, at 832.

<sup>12</sup> *Ibid*, at 833.

<sup>13</sup> *Ibid*, at 833.

<sup>14</sup> *Ibid*, at Section 3E.

<sup>15</sup> *Ibid*, at 834.

<sup>16</sup> *Ibid*, at 835.

<sup>17</sup> *Ibid*, at 835.

<sup>18</sup> *Ibid*, at 842.

individual economic and social market rights makes ‘human rights ... detached from their foundations in human dignity’.<sup>19</sup> Personal self-development in dignity depends on access to scarce resources and to a welfare-increasing division of labour as matters of individual rights and of individual responsibility, not only as a matter of government benevolence.

## **2 Why Does Alston Denounce My ‘Constitutional Approach’ without Testing or ‘Falsifying’ It?**

Alston’s relentless misrepresentations continue when he criticizes ‘methodological shortcomings’.<sup>20</sup> For instance, even though the ECJ has explicitly described the non-discrimination requirement in Article 141 as a ‘fundamental human right’, and has explained its case law on direct applicability of EC Treaty provisions on the free movement of goods in terms of ‘freedom of trade as a fundamental right’, Alston denies that ‘such a right has already been recognized’.<sup>21</sup> One may disagree with these quotations from the ECJ, as well as with my proposal to interpret the judicial recognition of ‘fundamental market freedoms’ in the EC as a logical continuum of a broad concept of ‘the right to liberty’ (cf. Article 6 EU Charter of Fundamental Rights) and of the ‘freedom to conduct a business in accordance with Community law and national laws’ (Article 16 EU Charter). But why does Alston deny indisputable facts in the jurisprudence of the ECJ?

Alston nowhere tests my empirical and normative hypotheses on interrelationships between human rights and constitutionalism. My doctoral thesis, which compared regional integration law in Europe, the Americas, Africa and Asia, identified ‘normative individualism’ as one reason for the comparatively greater effectiveness and welfare-creating effects of European integration law.<sup>22</sup> My habilitation book, which compared national and international constitutional restraints on foreign policy powers in federal states and in the EC, identified ‘international constitutionalism’ as a precondition for the effective protection of human rights and the rule of law in international relations. My functional definition of ‘international constitutionalism’ in terms of six ‘core principles’ and their functional interrelationships<sup>23</sup> differs inevitably from my definition of ‘constitutionalism’ in nation-states (e.g., focusing on the basic

---

<sup>19</sup> *Ibid*, at 842.

<sup>20</sup> *Ibid*, at Section 2.

<sup>21</sup> *Ibid*, at 825.

<sup>22</sup> E.-U. Petersmann, *Wirtschaftsintegrationsrecht und Investitionsgesetzgebung der Entwicklungsländer* (1974).

long-term rules constituting a political community and on their legal primacy over post-constitutional legislation and policies).<sup>24</sup> Alston ignores the functional dependence of human rights on national and international constitutional restraints and makes no attempt to refute my hypotheses.

Alston likewise refuses to test or falsify the vast empirical evidence which indicates that the economic welfare of most countries, and the consumer welfare of their citizens, are clearly related to their constitutional guarantees of freedom, property rights and other human rights.<sup>25</sup> As emphasized in my publications, the non-economic benefits of integration law (such as the protection of human rights and ‘democratic peace’ in Europe, compulsory jurisdiction for peaceful settlement of disputes in the EC and WTO) offer additional evidence for mutual synergies between economic integration law, human rights and social welfare. Alston's authoritarian reliance on discretionary government regulation of economic activities ignores the fact that governments usually cannot directly produce the economic resources needed for the protection of human rights. Economic welfare depends on constitutional guarantees for the division of labour, savings, investments and trade among individuals and on the protection of human rights.

My ‘constitutional approach’ and its underlying hypothesis – i.e., that effective protection of human rights in international relations depends on national and international legal protection of six constitutional ‘core principles’ – are rarely applied in the literature on international relations. Rather than denouncing the brief summaries of my methodological assumptions as “‘stump” speeches’,<sup>26</sup> Alston should broaden his perspective and examine the interrelationships between human rights and constitutionalism more seriously. Alston laments that the 29 pages of his comment do not allow him to give ‘a detailed response’ to our controversies: yet, is it honest of him to blame me for not discussing his numerous additional human rights questions on the 30 pages accorded my article, and to then portray this as proof that I am ‘reluctant to engage with those few scholars who have been critical of ... [my] work’?<sup>27</sup>

---

<sup>23</sup> See Petersmann, *supra* note 1, at n. 76.

<sup>24</sup> Cf. Petersmann, *supra* note 4, 212 *et seq.*

<sup>25</sup> See, e.g., the annual reports on ‘Economic Freedom in the World’, published by the Fraser Institute in Vancouver, which emphasize the empirical correlations between economic freedom, economic welfare and relatively higher average income of poor people.

<sup>26</sup> Alston, at 816.

<sup>27</sup> *Ibid.*, at 817.

### 3 Why Does Alston Fail to Discuss Our Different Normative Premises?

Alston neither identifies nor discusses the three normative differences between our human rights conceptions:

1. My interpretation of human liberty rights aims not only at protecting maximum equal freedom, subject to democratic legislation, in *all areas of personal self-development* (e.g., also including individual production and consumption of essential goods, services and income) and *across frontiers* (i.e., challenging welfare-reducing border discrimination against foreign goods, services and persons). Alston limits Kant's 'categorical imperative' to its 'universal law component'; the additional objectives of Kant's moral imperative referred to in my article – i.e., protection of human dignity and personal self-government by treating human beings as legal subjects rather than as mere objects, and by accepting 'universalizable personal freedom' as an end in itself – prompt me to argue for constitutional liberty rights as *justiciable individual rights* which courts should also protect in transnational relations as individual rights (e.g., to import and export essential goods and services subject to democratic legislation, balancing this freedom with the protection of other human rights). Conferring equal individual rights enables a higher degree of legal autonomy, empowerment and responsibility of individuals, and a more decentralized 'self-enforcing constitution', than does a paternalistic reliance on authoritarian regulation of personal freedom without legal and judicial protection of individual rights (as in many foreign policy areas). The experience with constitutional and judicial protection of every individual's 'right to free development of his personality', pursuant to Article 2 of the German Basic Law, confirms that such a broad constitutional and judicial protection of personal freedom offers individuals important procedural and substantive legal safeguards without unduly limiting the regulatory discretion of democratic legislatures and democratic governments.

2. My focus on the 'indivisibility' and 'inalienable nature' of core human rights reduces the dangers of a 'positivist' reliance on separate 'civil', 'political', 'economic', 'social' and 'cultural' human rights that have been conceded by governments at particular times in particular human rights instruments, such as the risk of leaving non-enumerated 'inalienable' human rights without legal protection and curtailing human personality by artificial legal distinctions. Treating separate human rights treaties as deriving from one 'inalienable human rights constitution' better protects the diversity and holistic nature of human personality and helps overcome partial human rights perspectives, such as Alston's refusal to protect 'normative individualism' and human



rights in ‘economic markets’ no less than in ‘political markets’. Human liberty rights, property rights, non-discrimination rights, social rights, procedural and democratic rights can be protected more effectively if they are understood as parts of a constitutional law that dynamically evolves, in particular national and international contexts, in response to new human rights preferences and challenges (e.g., as formulated in the EU Charter of Fundamental Rights).

3 Human rights protect individual and democratic diversity (e.g., human dignity in the sense of moral and rational autonomy) and, in a world of scarce resources, inevitably give rise to competition. The resulting conflicts of interest – for instance, between utility-maximizing producers and consumers in economic markets, and among citizens and self-interested politicians in political markets – create human rights problems which cannot be understood without taking into account ‘market failures’ as well as ‘government failures’. The welfare-increasing effects of economic and political competition (e.g., as a spontaneous information mechanism, allocation-, coordination- and sanctioning-mechanisms, ‘voice’ and ‘exit options’ *vis-à-vis* abuses of power) are not gifts of nature. They depend on the protection of human rights through a ‘limiting constitution’ and an ‘enabling constitution’ (e.g., enabling a collective supply of public goods) in all areas of personal self-development. Hence, an ‘economic constitution’ is no less necessary than a ‘political constitution’. Alston’s preference for promoting human rights through ‘benevolent governments’ rests on authoritarian premises and a pretence of knowledge often dispersed among individuals and unknown to centralized bureaucracies. My proposals for empowering individuals pursue the same human rights values through decentralized and more complex ‘market governance mechanisms’ which treat citizens as legal subjects rather than mere objects. My emphasis on the instrumental functions of human rights (e.g., as incentives for rendering citizens not only ‘better democrats’ but also ‘better economic actors’) pursues the same human rights objective of a life of dignity and personal self-government.

#### **4. Conclusion**

Alston's Comment offers polemics rather than constructive criticism. Human rights must be constitutionally protected in economic markets no less than in political markets. Human rights specialists who neglect the constitutive function of human rights for welfare-creation, as well as the need for competitive markets and efficient policy instruments for reducing unnecessary poverty, risk undermining personal self-development and human rights.