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# Trade, Law *and* Development

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## ***Volume Masthead***

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Ernst-Ulrich Petersmann, 'Fragmentation' and 'Judicialization' of International Law as Dialectic Strategies for Reforming International Economic Law  
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'FRAGMENTATION' AND 'JUDICIALIZATION' OF  
INTERNATIONAL LAW AS DIALECTIC STRATEGIES FOR  
REFORMING INTERNATIONAL ECONOMIC LAW

ERNST-ULRICH PETERSMANN\*

*International economic law (IEL) continues to evolve through dialectic processes of unilateral, bilateral, regional and worldwide regulation. The human rights obligations of all UN member states call for 'normative individualism' in economic regulation and justify 'fragmentation' of state-centred treaties so as to protect human rights and international public goods more effectively for the benefit of citizens. The 'structural biases' and often indeterminate rules and principles in competing treaty regimes for multilevel governance of interdependent public goods require protecting transnational rule of law for the benefit of citizens based on 'consistent interpretations', 'judicial comity' and 'cosmopolitan re-interpretations' of IEL so as to protect not only rights of governments, but also of citizens. The political resistance and 'veto powers' of self-interested government executives in the UN and the WTO are increasingly circumvented by 'constitutionalizing' and 'judicializing' IEL 'bottom-up' through bilateral and regional agreements and adjudication. International courts cooperating with domestic courts in protecting cosmopolitan rights have been more effective in protecting cosmopolitan rights and other 'aggregate public goods' than 'Westphalian international courts' prioritizing rights of governments over rights of citizens.*

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### I. INTRODUCTION: THE DIALECTIC EVOLUTION OF INTERNATIONAL ECONOMIC LAW

International economic law (IEL) continues to evolve in response to the human search for utility maximization through exchange, allocation of property rights for scarce resources, ordering through markets, stable currencies and contract law as decentralized coordination mechanisms, and justification of good faith (*pacta sunt servanda*) in mutually beneficial ‘bartering’ (in the sense of the Greek word *‘katalattein’* – meaning ‘admitting strangers into the community’, ‘changing from enemy into friend’).<sup>1</sup> As division of labour and trade have proven to be of existential importance for individual and social welfare, trade law, contract law and market regulations belong to the oldest parts of legal systems (*ubi commercium, ibi jus*). The Roman *jus gentium* governing transactions with foreigners and administered by the *praetor peregrinus* served as the foundation for the medieval merchant law (*lex mercatoria*) throughout Europe and for its modern transformation into global commercial and financial law. Since England’s unilateral abolition of its protectionist ‘corn laws’ in 1846, in response to Richard Cobden’s political campaign for ‘free trade’, IEL continues to evolve through dialectic interactions between unilateral, bilateral, regional and multilateral economic regulations. For instance, the 1860 ‘Cobden-Chevallier’ trade agreements between England and France set the model for a European trading system based on bilateral trade agreements and stable currencies (based on silver or gold standards) that were interlinked through ‘most-favoured-nation clauses’ and periodically renegotiated until the end of the 19th century. Yet, due to colonialism, imperialism and the increasing rejection of *laissez-faire* liberalism, European states failed to reconstruct a liberal trading system in Europe following World War I. When the financial crisis of 1929 and the protectionist ‘Smoot-Hawley Tariff Act’ of 1930 in the USA risked triggering another breakdown of the world trading system, US Secretary of State Cordell Hull succeeded in persuading the US Congress to adopt the 1934 US Reciprocal Trade Agreements Act granting advance authority for the subsequent

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<sup>1</sup> On the historical evolution of IEL see E.U. PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW, INTERNATIONAL AND DOMESTIC FOREIGN TRADE LAW AND POLICY IN THE UNITED STATES, THE EUROPEAN COMMUNITY AND SWITZERLAND 10, 31 (1991) [hereinafter PETERSMANN – CONSTITUTIONAL FUNCTIONS].

negotiation of more than 30 reciprocal trade liberalization agreements by the USA up to the outbreak of World War II.<sup>2</sup>

The standard clauses used in these bilateral trade agreements and the elaboration of the economic theory of ‘optimal intervention’ during the 1940s (notably by Nobel Prize laureate James Meade) enabled a new economic consensus for the multilateral post-war trading system based on the General Agreement on Tariffs and Trade (GATT 1947). Trade liberalization was no longer linked to ‘*laissez-faire*’ politics. Even if ‘market failures’ (like lack of competition, adverse externalities, information asymmetries, social injustices, public goods) justified governmental or other regulatory interventions (e.g. through judicial remedies), ‘optimal policy instruments’ (like information, taxation, regulation, subsidies) should correct market failures directly at their source in non-discriminatory ways (e.g. through tax, competition, environmental and social regulation) without distorting open trade and competition. Hence, ‘if economists ruled the world, there would be no need for a World Trade Organization. The economist’s case for free trade is essentially a unilateral case: a country serves its own interests by pursuing free trade regardless of what other countries do.’<sup>3</sup> Yet, as import-competing producers often resist trade liberalization and politicians respond to ‘rent-seeking’ protectionist pressures by granting import protection in exchange for political support, political trade negotiations tend to be based on reciprocal bargaining in order to commit governments to two objectives: *first*, to the use of transparent, non-discriminatory and price-oriented trade policy instruments (i.e. tariffs and non-discriminatory domestic regulations rather than discriminatory non-tariff trade barriers); and *second*, to avoidance of adverse externalities (like export subsidies, terms-of-trade manipulation). Hence, international trade agreements aim at limiting ‘domestic governance failures’ (*‘commitment theory’* explaining trade agreements in terms of reciprocal commitments to limit mutually harmful trade protectionism) as well as at limiting international coordination problems (e.g. *‘terms of trade theory’* explaining trade agreements as reciprocal commitments to avoid harmful international externalities that affect world prices and ‘terms of trade’).<sup>4</sup>

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<sup>2</sup> Cf. K. Dam, *Cordell Hull, the Reciprocal Trade Agreements Act and the WTO*, in REFORMING THE WORLD TRADING SYSTEM. LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE 83-96 (E.U. Petersmann ed., 2005).

<sup>3</sup> P. Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LIT. 113 (1997).

<sup>4</sup> The ‘terms of trade’ explanation of trade agreements by some economists is rejected by most non-economists on the ground that there is little empirical evidence for ‘terms-of-trade’ manipulation in view of the pervasive information problems; the increasing regulation of domestic ‘market failures’ and ‘governance failures’ in trade agreements confirms their ‘domestic policy’ and ‘constitutional functions’; cf. PETERSMANN – CONSTITUTIONAL FUNCTIONS, *supra* note 1 & D.H. Regan, *What are Trade Agreements For?*

Unilateral trade liberalization is politically difficult to realize in all countries without reciprocal liberalization commitments setting incentives for export industries and citizens to create new and more competitive job opportunities in the export sector, and to resist protectionist pressures. Thus, governments should maximize domestic consumer welfare through free trade agreements and non-discriminatory regulation of 'market failures' as well as of 'governance failures'.

As illustrated by the disagreement among the 160 WTO members to conclude their Doha Round negotiations since 2001, reciprocal trade negotiations in the GATT and World Trade Organization (WTO) risk being sub-optimal policy instruments. The transformation of GATT 1947 and of the 1979 Tokyo Round Agreements among a limited number of about 25-30 GATT contracting parties into the worldwide WTO trading, legal and dispute settlement system was partly due to (a) unilateral threats such as trade sanctions by the USA pursuant to Section 301 of its Trade Act; and (b) collective threats of excluding 'free riders' from the world trading system (e.g. due to the termination of GATT 1947 by the end of 1995). Similarly, the multilateral WTO system remains exposed to political threats of 'unilateralism', of bilateral and regional 'opt-outs', and of abuses of veto-powers in consensus-based WTO negotiations. At the WTO Ministerial Conference at Bali in December 2013, for instance, the 'positional' rather than 'principled' bargaining underlying India's 'no compromise, non-negotiable' insistence on amending WTO disciplines on agricultural subsidies so as to legalize agricultural protectionism led to repeated negotiating impasses.<sup>5</sup> The widespread dissatisfaction with endless WTO negotiations has prompted many WTO members to prioritize trade negotiations outside the WTO – notably on 'deep' free trade agreements in the context of a Trans-Pacific Partnership (TPP), a Transatlantic Trade and Investment Partnership (TTIP) and a Plurilateral Agreement on Trade in Services (TISA)<sup>6</sup>, which are likely to

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*Two Conflicting Stories Told by Economists, with a Lesson for Lawyers*, 9 J. INT'L ECON. L. 951-988 (2006).

<sup>5</sup> According to newspaper reports (e.g., Mubarak Zeb Khan, *Why Pakistan Stayed Away from WTO Meeting*, DAWN, Dec. 9, 2013, <http://www.dawn.com/news/1061370>), Pakistan's Trade Minister left the ongoing Bali conference criticizing opportunist 'obstructionism' of some negotiators in response to domestic political pressures, including the unwillingness of India's Trade Minister to even discuss in the WTO the domestic food subsidies under the Indian government's food security program for nearly two-thirds of the Indian population and related trade-distortions.

<sup>6</sup> The TISA continues being negotiated among a group of about 40 WTO members comprising about 68% of world trade in services. Even though the negotiations take place inside the WTO premises, they are neither based on the Doha mandate nor on the general mandate of art. II(2) of the WTO Agreement. It remains open when the negotiations will



produce much larger trade liberalization and strategic reforms of the world trading system (e.g. in terms of standard setting for international restraints of 'market failures' and 'governance failures') than may be possible in the context of further Doha Round negotiations.

## II. THE 'HUMAN RIGHTS REVOLUTION' AND GLOBALIZATION JUSTIFY 'FRAGMENTATION' OF INTERNATIONAL LAW

Law and governance need to be justified vis-à-vis citizens in order to be voluntarily complied with and democratically supported. The UN Charter principles of 'sovereign equality of states'<sup>7</sup> and 'self-determination of peoples'<sup>8</sup> aim at protecting international peace by legally recognizing the territorial *status quo*. These principles apply even if the territorial borders, related distribution of natural resources and legal privileges of the permanent members of the Security Council may be as arbitrary from a moral point of view as the distribution of natural human capacities among individuals. The UN legal obligations to respect, protect and fulfil 'human rights and fundamental freedoms for all'<sup>9</sup> limit injustices following from power-oriented allocation of rights and from natural inequalities among individuals (in terms of genetics, health and human capacities) by protecting equal individual and popular rights to liberty and self-development. Human rights help to establish 'conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.<sup>10</sup> These tensions between power politics aimed at protecting *order* (as defined by governments) and *justice* aimed at protecting constitutional rights (as defined by national parliaments and constitutional courts) call for constitutional reforms of international law in the 21st century in order to protect international public goods demanded by citizens more effectively and more legitimately. The UN Charter specifies neither its 'principles of justice' nor the human rights

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come to an end, which contents the agreements will have, under which conditions other WTO members may join either the negotiations or an agreement, and how a future TISA could be integrated into the WTO framework (for example, following the example of the 1997 agreements on basic telecommunications and financial services whose results were multilateralised on an MFN basis, by incorporating the agreement into WTO law as a plurilateral agreement following the example of the Government Procurement Agreement, or by presenting TISA as a preferential trade agreement on services pursuant to GATS, art. V). The negotiations are conducted in a non-transparent manner as neither the WTO secretariat nor other WTO members are granted observer status or are even informed about the aim and progress of the negotiations.

<sup>7</sup> U.N. Charter art. 2.

<sup>8</sup> U.N. Charter arts. 1 & 55.

<sup>9</sup> Cf. U.N. Charter arts. 1, 55, & 56.

<sup>10</sup> U.N. Charter, Preamble.

obligations of all UN member states in view of the fact of ‘reasonable disagreement’ among individuals and people with diverse constitutional traditions, resources, democratic preferences, conceptions for a ‘good life’, ‘political justice’, ‘constitutional’ and ‘parliamentary democracy’ and majoritarian politics. The ‘value pluralism’ underlying UN law and also WTO law often justifies competing interpretations of indeterminate treaty provisions and of the interrelationships between individualist, democratic and state-centred principles of international law depending on whether the legal claims are advanced by civil society, human rights advocates, democratic institutions and courts of justice or by non-democratic rulers and their diplomats.

*A. Domestic constitutionalism and the emerging UN human rights constitution*

In contrast to English and authoritarian constitutional traditions of interpreting constitutionalism as ‘constitutional contracts’ among institutions<sup>11</sup>, the American and French human rights revolutions of the 18th century interpreted their democratic constitutions as ‘social contracts among equal citizens’. They established governments with constitutionally limited powers deriving their legitimacy from protecting fundamental rights of citizens such as human rights to resist abuses of feudal and colonial power politics. From a human rights perspective, citizens are ‘agents of justice’ and ‘democratic principals’ establishing governance institutions with limited, delegated powers that remain constitutionally restrained by constitutional and human rights, including human rights to democratic governance<sup>12</sup>, to ‘access to justice’ and to justification of all governmental restrictions of equal freedoms as ‘first principle of justice’.<sup>13</sup> Every

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<sup>11</sup> *E.g.*, the ‘Bill of Rights’ enacted by the British Parliament during the ‘glorious revolution’ in 1689 and accepted by the new King as a ‘constitutional limitation’ so as to uphold the nation’s ‘ancient rights and liberties.’

<sup>12</sup> *See, e.g.*, Universal Declaration of Human Rights art. 21(3), G.A. Res. 217(III) A, U.N. Doc. A/810, at 71 (III) (Dec. 10, 1948) [hereinafter UDHR] (‘The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’). The guarantees of freedom of expression (art. 19), freedom of assembly (art. 20) and democratic participation (art. 21) are confirmed in many UN and regional human rights conventions and national constitutions and render non-democratic governance powers illegitimate.

<sup>13</sup> On guarantees of ‘access to justice’ in UN and GATT/WTO law see, ACCESS TO JUSTICE AS A HUMAN RIGHT (F. Francioni ed., 2007); A.A. CANÇADO TRINDADE, THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE (2011); E.U. PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 194, 233 (1997) [hereinafter PETERSMANN – GATT/WTO]. On the human right to justification see R. FORST, THE RIGHT TO JUSTIFICATION. ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE (2012). On Kantian and Rawlsian ‘theories of justice’ justifying ‘equal freedoms’ as ‘first principle of

UN member state has accepted legal obligations under the UN Charter, under one or more of the 9 core UN human rights conventions<sup>14</sup>, and under general international law to respect, protect and fulfil human rights inside and beyond states. The customary rules of treaty interpretation and adjudication specifically require interpreting UN and WTO law, and settling related disputes, ‘in conformity with the principles of justice and international law’. This includes ‘the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all’.<sup>15</sup> The universally recognized ‘inalienable core’ of national and international human rights law (HRL) – such as mutual respect and multilevel legal protection of human dignity, access to justice and to democratic justification of law – can be construed as the modern ‘constitutional foundation’ of legitimate national and international legal systems in the 21st century.<sup>16</sup>

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justice’ see E. U. PETERSMANN, *INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY. CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS* ch. II & VI (2012), [hereinafter PETERSMANN – *INTERNATIONAL ECONOMIC LAW*].

<sup>14</sup> These include the 1965 Convention on the Elimination of all Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; the Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 UNTS 3; the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3; and the Convention for the Protection of all Persons from Enforced Disappearance, Dec. 20, 2006, U.N. Doc. A/RES/61/177 (2006).

<sup>15</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (the quoted text is from the Preamble; it reflects the ‘integration principle’ contained in Article 31 which is widely recognized as a codification of international customary law).

<sup>16</sup> On the moral foundations of HRL, their impact on legal methodology, and the emerging ‘human rights constitution’ see E.U. Petersmann, *Human Rights and International Economic Law*, 4(2) *TRADE L. & DEV.* 283, 286-291 (2012) [hereinafter Petersmann – *Human Rights*]; E.U. Petersmann, *Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution*, in *INTERNATIONAL TRADE AND HUMAN RIGHTS* 29-67 (F.A. Abbott et al. eds., 2006).

B. *Human rights constrain the 'rules of recognition'*

All UN and WTO member states recognize UN and WTO law as 'legal systems' comprising 'primary rules of conduct' and 'secondary rules of recognition, change and adjudication'.<sup>17</sup> The universal recognition and explicit incorporation of 'inalienable human rights' and other 'principles of justice' into positive international law entails a 'dual nature' of modern legal systems: authoritatively issued rules of 'positive law' need justification by constitutionally agreed 'principles of justice' in order to be socially effective and supported by citizens as 'just'. This 'dual nature' of modern national and international legal systems calls for a 'human rights approach' to interpreting also IEL, as emphasized by UN human rights bodies and European courts of justice.<sup>18</sup> UN law does not limit the 'sources' and 'rules of recognition' of international law to 'international conventions ... recognized by states'.<sup>19</sup> The additional sources listed in Article 38 of the ICJ Statute – like '(b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law'<sup>20</sup> – must be construed 'in conformity with principles of justice' and 'human rights and fundamental freedoms for all'; arguably, these treaty and customary law requirements recognized in the UN Charter and in general international law<sup>21</sup> require subjecting state consent to constitutional restraints such as recognition of governmental legitimacy by citizens, civil society, parliaments and courts of justice, as required by HRL and democratic constitutionalism. The preparatory drafting history of international treaties is recognized only as a 'supplementary means of interpretation'<sup>22</sup>; the inalienable core of human rights has become *jus cogens*. Hence, the universal recognition of human rights contradicts claims by diplomats that they control the '*opinio juris sive necessitatis*' as traditional gate-keepers of 'Westphalian international law among states'. Just as the incorporation of human rights and 'principles of justice' into modern national and international legal systems refutes traditional claims of 'legal positivism' that law must remain separate from morality, so do the text of Article 38 ICJ Statute, HRL and the jurisprudence of courts of

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<sup>17</sup> On the characteristics of 'legal systems' as a union of 'primary rules of conduct' and 'secondary rules of recognition, change and adjudication' see H.L.A. HART, *THE CONCEPT OF LAW* ch. V (1994).

<sup>18</sup> Cf. PETERSMANN - INTERNATIONAL ECONOMIC LAW, *supra* note 13, ch. IV & VII.

<sup>19</sup> Statute of the International Court of Justice art. 38, Oct. 24, 1945, 3 Bevens 1179 [hereinafter ICJ Statute].

<sup>20</sup> *Id.* art. 38.

<sup>21</sup> E.g., VCLT, *supra* note 15 (as codified in the Preamble and Articles 31-33 of the VCLT).

<sup>22</sup> Cf. VCLT, *supra* note 15, art. 32.

justice refute power-oriented claims by non-democratic rulers that the international ‘rules of recognition’ make the legally binding force of all international law dependent on state consent as expressed by diplomats. In order to protect human rights and international public goods more effectively than it has been possible so far under power-oriented conceptions of ‘Westphalian international law among sovereign states’, the international ‘rules of recognition’ of UN law and also of IEL must be construed in conformity with the legal duties of all governance institutions to respect, protect and fulfil human rights and other constitutional rights ‘retained by the people’.<sup>23</sup> In both national and international legal systems, the ‘moral powers’ and human and constitutional rights of citizens - as derived from respect for human dignity and protected by democratic legislation, judicial remedies and also by HRL - remain the ultimate sources of law and political legitimacy in the 21st century, as convincingly explained also by the late R. Dworkin in his last legal analysis published *post mortem*.<sup>24</sup> As citizens and democratic institutions may legitimately disagree on how to prioritize, balance and construe civil, political, economic, social and cultural rights in different legal, economic and political contexts, respect for democratic ‘constitutional pluralism’ and the ‘inalienable core’ of human rights are more convincing constitutional bases of modern IEL than mere state consent by rulers and their diplomats.<sup>25</sup>

C. HRL requires ‘cosmopolitan re-interpretation’ of Westphalian IEL’

From a human rights and constitutional perspective, ‘(e)ach nation has a general responsibility to do what it can to improve the legitimacy of its own coercive government, and a responsibility to attempt to improve the organization of states in which it functions as a government’.<sup>26</sup> Arguably, the prioritization of rights of governments in the Bretton Woods and WTO Agreements – without even mentioning human rights, general consumer welfare and democratic accountability – is a major cause of the disregard for human rights and general consumer welfare in IMF, World Bank and WTO governance. Human rights advocates identify the legal source of individual,

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<sup>23</sup> Cf. U.S. CONST. amend. IX.

<sup>24</sup> Cf. R. Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2-30 (2013) [hereinafter Dworkin]. On the diverse ‘moral powers’ of individuals (for example, their conceptions of the good, the rational and the reasonable), their only limited ‘overlapping consensus’, diverse ‘comprehensive doctrines’, ‘burdens of judgments’ (Rawls), the need for tolerance (for example, in compromising on a political *modus vivendi*), and the legal relevance of ‘public reason’ for explaining the diversity of ‘social contract views’ see S. FREEMAN, *JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY* (2009).

<sup>25</sup> Cf. PETERSMANN - INTERNATIONAL ECONOMIC LAW, *supra* note 13, ch. II.

<sup>26</sup> Dworkin, *supra* note 24, at 27.

popular and state duties to respect, protect and fulfil human rights inside and beyond state borders in principles of *individual* and *popular* 'responsible sovereignty' and 'shared responsibilities' rather than in *state sovereignty*.<sup>27</sup> Just as most UN member states have adopted new (big C) Constitutions in response to the 'human rights revolutions' and decolonization following World War II so as to define their national 'constitutional contracts' in more democratic ways, the post-war emergence of hundreds of new international treaties and institutions for the collective supply of international public goods continues to entail 'fragmentation of international law' and new institutional regimes among like-minded countries. These are aimed at limiting the 'governance failures' and 'market failures' tolerated by Westphalian 'international law among sovereign states'. The interpretation, coordination and democratic legitimacy of many of these specialized legal regimes and institutions remain often contested among citizens, civil society, governments and diplomats. This is due, *inter alia*, to their use of indeterminate principles (like 'sustainable development'), technical rules (e.g., on 'risk assessment procedures'), legal and institutional biases (e.g., prioritizing monetary, trade, environmental, financial or criminal law and institutions), and to the often insufficient procedures for coordinating specialized legal regimes (e.g., through various UN bodies) so as to promote synergies and avoid 'regime collisions'. The reports by the Study Group of the International Law Commission on '*Fragmentation of International Law: Problems caused by the Diversification and Expansion of International Law*' recognized the legitimacy of specialized legal regimes for the collective supply of diverse international public goods and concluded that the recognition by specialized treaty regimes of their remaining integral parts of the general international law system tended to avoid legal conflicts and provide political and legal procedures for reducing 'legal fragmentation' if conflicts arose.<sup>28</sup> Just as diverse regional human rights regimes can be justified by national and regional preferences to provide for differentiated standards and procedures of human rights protection going beyond the minimum standards in UN HRL, so can bilateral, regional and other functional international trade, investment, environmental, security or criminal adjudication regimes be justified in terms

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<sup>27</sup> On mutual respect of human dignity as foundation of human rights and related personal, popular and international 'shared responsibilities' see Petersmann – *Human Rights*, *supra* note 16, ch. III & IV; I.M. YOUNG, RESPONSIBILITY FOR JUSTICE (2011); GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (M. Langford et al. eds., 2013).

<sup>28</sup> Cf. Report of the Int'l Law Comm'n, 58<sup>th</sup> Sess., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law, May 1 – June 9, July 3 – Aug. 7, 2006, U.N. Doc. A/CN4/L.682 (Apr. 13, 2006) [hereinafter ILC Report on Fragmentation] & Conclusions of the Work of the Study Group of the Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN/L.702 (July 18, 2006).

of human rights and other international public goods demanded by citizens. As HRL also protects individual and democratic diversity, the plurality of almost 200 sovereign states with often diverse preferences, resources and political priorities makes the reality of hundreds of regional, functional and global public goods regimes among ‘alliances of the willing’ politically inevitable. The UN Charter provides for the political, legal and institutional coordination of the UN Specialized Agencies as integral parts of the UN system. Even though GATT, the WTO and the hundreds of regional free trade and economic integration agreements remain formally outside this UN system, the WTO closely cooperates with UN institutions on the basis of formal cooperation agreements among the WTO and UN Specialized Agencies like the IMF and the World Bank.

### III. MULTILEVEL GOVERNANCE OF THE WORLD ECONOMY REQUIRES JUDICIAL PROTECTION OF TRANSNATIONAL RULE OF LAW FOR THE BENEFIT OF CITIZENS

Colonialism and World Wars I and II illustrated the power-oriented and ‘anarchic’ nature of Westphalian concepts of ‘international law among sovereign states’ based on ‘Hobbesian social contracts’ among rational egoists maximizing their self-interests through use of ‘absolute powers’ and ‘efficient breaches of the law’ whenever opportune.<sup>29</sup> The founding fathers of the US Constitution and of the 1789 French *Declaration of the Rights of Man and of the Citizen* rejected such ‘interest-based social contracts’ in favour of ‘rights-based’ conceptions of ‘constitutional contracts’ (as proposed by Locke and Rousseau)<sup>30</sup> that delegated only limited powers to legislative, executive and judicial branches of government subject to constitutional rights retained by the people.<sup>31</sup> In contrast to the Hobbesian conception of selfish individuals living in a social ‘war of everybody against everybody else’, HRL relies on human ‘dignity, reason and conscience’<sup>32</sup> of individuals and their moral powers of choosing their own conceptions of a good life and social justice respecting everyone’s ‘duties to the community, in which alone the free and

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<sup>29</sup> On power-oriented ‘realist’ theories of international law see J. L. GOLDSMITH & E. A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005) ([I]nternational law emerges from states acting rationally to maximize their interests, given their perception of the interests of other states and the distribution of state power.).

<sup>30</sup> *Constitution – Rousseau and the General Will*, BRITANNICA ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/134169/constitution/22055/Rousseau-and-the-general-will> (last visited May 19, 2014).

<sup>31</sup> On the different kinds of utilitarian, moral, civil and constitutional ‘social contract theories’ see *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* (D. Boucher & P. Kelly eds., 1994).

<sup>32</sup> UDHR, *supra* note 12, art. 1.

full development of his personality is possible'<sup>33</sup>. Constitutionalism and theories of justice explain why 'democratic peace' is possible only on the basis of constitutional contracts among free and equal citizens institutionalizing impartial 'principles of justice' and 'public reason' through constitutional, legislative, administrative and judicial decision-making procedures embedded into 'participatory', representative and 'deliberative democracy'. History confirms that democratic constitutionalism can constitute systems of fair cooperation and inclusive 'public reasoning' among free and equal citizens; in such a constitutional framework, the different conceptions of a 'good life' do not prevent progressive clarification of the 'basic legal structures' protecting common reasonable self-interests of citizens in collective supply of public goods.<sup>34</sup>

#### A. Failures of 'UN constitutionalism'

Most UN member states have adopted national Constitutions (written or unwritten) for the collective supply of national public goods recognizing human rights, the rule of law and democratic self-government as 'principles of justice' and 'overlapping consensus' that reasonable citizens can accept as a fair basis for public justification of law, governance and social cooperation. Yet, the more globalization transforms *national public goods* into '*global aggregate public goods*' building on interdependent local, national, regional and international public goods regimes, the more national Constitutions turn out to be 'partial constitutions' that can protect international public goods only in cooperation with other states based on international law and institutions. All UN member states have joined functionally limited treaty (small c) constitutions like the 'constitutions' (*sic*) of the International Labor Organization (ILO), the World Health Organization (WHO), the UN Educational, Scientific and Cultural Organization (UNESCO) and of the Food and Agriculture Organization (FAO); the 'constitutional functions' of these functionally limited 'UN treaty constitutions' include (1) establishing multilevel governance institutions; (2) limiting their legislative, executive and dispute settlement powers; (3) regulating their collective supply of functionally limited 'aggregate public goods' through 'primary rules of conduct' and 'secondary rules of recognition, change and adjudication'; and (4) justifying the governance systems, for instance, in terms of protecting labour rights and

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<sup>33</sup> *Id.* art. 29.

<sup>34</sup> On the non-rival and non-excludable nature of 'public goods' that prevent their production in private markets see *Multilevel Governance of Interdependent Public Goods: Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century* (E.U. Petersmann ed., Florence: RSCAS Working Paper No. 2012/23, 2012) [hereinafter Petersmann, *Multilevel Governance*].



‘social justice’ through ILO law, fundamental rights to health protection through WHO law, human rights to education, justice and ‘rule of law’ through UNESCO law, or ‘ensuring humanity’s freedom from hunger’ through FAO law. Yet, just as the proposals for transforming the League of Nations Covenant and the UN Charter into ‘constitutions of mankind’<sup>35</sup> have revealed themselves as utopian, neither the UN Specialized Agencies nor the WTO have succeeded in realizing their human rights objectives (like ‘sustainable development’) and protecting other international public goods effectively.<sup>36</sup> Due to the absence of effective ‘constitutional checks and balances’ limiting abuses of power and protecting human rights, intergovernmental power politics prevailed— focusing on ‘state sovereignty’ rather than on ‘popular sovereignty’, ‘democratic responsibilities’ and governmental ‘duties to protect’ human rights.

‘UN constitutionalism’ has obviously failed to reduce unnecessary poverty and protect human rights in many UN member states. The non-implementation of UN HRL inside many countries is related to the ‘executive dominance’ and collusion among governments preventing inclusive ‘democratic discourse’ of the need for more effective protection of cosmopolitan rights empowering citizens to hold governments more accountable for their governance failures (such as unnecessary poverty of some 2 billion people living on \$2 dollars or less per day, human rights violations, restrictive business practices, environmental pollution and social exploitation in so many countries). Due to globalization, individuals increasingly use their ‘first moral power’ – i.e. ‘the capacity to form, to revise, and rationally to pursue a conception of the good’<sup>37</sup> – for participating in international communication and the global economy (e.g. as consumer and producer of traded goods and services). The ‘second moral power’ has been defined by Rawls as ‘the capacity for an effective sense of justice, i.e. the capacity to understand, to apply and to act from (and not merely in accordance with) the principles of justice’<sup>38</sup>, for instance in order to realize the human responsibility for respecting, protecting and fulfilling the human right of ‘everyone to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’.<sup>39</sup> This is considered by most citizens as much more difficult. In view

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<sup>35</sup> Cf. H. LAUTERPACHT, *The Covenant as the Higher Law*, in 4 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF SIR H. LAUTERPACHT 326-336 (E. Lauterpacht ed., 1978); B. FASSBENDER, *THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* 71, 86 (2009).

<sup>36</sup> Cf. Petersmann, *Multilevel Governance*, *supra* note 34.

<sup>37</sup> Cf. John Rawls, *Kantian Constructivism in Moral Theory*, in JOHN RAWLS. COLLECTED PAPERS 303, 312 (S. Freeman ed., 1999) [hereinafter Rawls].

<sup>38</sup> *Id.* at 312.

<sup>39</sup> UDHR, *supra* note 12, art. 28.

of the ‘rational ignorance’ of citizens towards the complexity of multilevel governance problems in distant UN and WTO institutions, both their *individual capacities* (e.g. in the sense of Kant’s ‘moral imperative’ of acting on the basis of autonomously legislated ‘universalizable principles’ of justice) as well as their *collective capacities* (e.g. in the sense of Rawls’ theory of justice) for democratic decision-making on the ‘basic structure’ for supplying international public goods remain limited. This individual and collective ‘democracy deficit’ vis-à-vis the power-oriented ‘basic structures’ and governance of international relations makes cosmopolitan rights, judicial remedies and protection of transnational rule of law for the benefit of citizens all the more important.

B. *Failures to protect the legal coherence of the multilevel trading system through ‘consistent interpretations’ of WTO law*

Since 1948, GATT and WTO members have avoided transforming GATT and the WTO into UN Specialized Agencies in order to avoid undue politicization of worldwide trade regulation. Yet, in contrast to the multilevel judicial protection of cosmopolitan rights and of transnational rule of law in international commercial and investment law and the interdependence of imports and exports of goods and services in the context of global supply chains, trade diplomats (e.g. in the EU and the USA) insist that domestic courts should not interfere with their diplomatic ‘freedom of manoeuvre’ to violate WTO law without legal accountability to adversely affected citizens.<sup>40</sup> Trade policies are further ‘politicized’ by the one-sided focus of GATT/WTO rules on trade liberalization through market access commitments treating non-trade issues as ‘exceptions’ (e.g. in GATT Article XX) without any references to human rights and general consumer welfare. Many benefits of the WTO trading and legal system (e.g. in terms of legal security, access to the best markets for goods and services demanded by consumers) are open to all countries and ‘non-exhaustible’. Hence, academics and policy-makers

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<sup>40</sup> Cf. E.U. Petersmann, *Can the EU’s Disregard for “Strict Observance of International Law” (Article 3 TEU) Be Constitutionally Justified?*, in LIBER AMICORUM FOR J. BOURGEOIS 214-225 (M. Bronckers et al. eds, 2011) [hereinafter Petersmann, *EU’s Disregard*]. The term ‘freedom of manoeuvre’ continues to be used by both the political EU institutions and the CJEU (for example, in Joined cases C-120 & C-121/06 P, FIAMM, 2008 E.C.R. I-6513, ¶ 119) as the main justification for their disregard of legally binding WTO rules and WTO dispute settlement rulings. Also ‘innocent bystanders’ (for example, EU exporters) adversely affected by foreign counter-measures in response to EU violations of WTO obligations lack effective remedies; Cf. M. Bronckers & S. Goelen, *Financial Liability of the EU for Violations of WTO Law – A Legislative Proposal Benefitting Innocent Bystanders*, in REFLECTIONS ON THE CONSTITUTIONALISATION OF INTERNATIONAL ECONOMIC LAW – LIBER AMICORUM FOR E. U. PETERSMANN 173-192 (M. Cremona et al. eds., 2014) [hereinafter REFLECTIONS ON THE CONSTITUTIONALISATION].

increasingly analyze the world trading system from the perspective of ‘public goods theories’ in order to better understand the functional unity of the local, national, regional and international components of the world trading system, its ‘collective action problems’ and the need for reconciling ‘overlapping public goods’ (e.g. through the increasing cooperation among the WTO and other UN institutions in order to avoid ‘regime collisions’ through a ‘Geneva consensus’).<sup>41</sup> WTO law justifies this conception of the WTO as an ‘aggregate public good’ in view of, *inter alia*, the WTO provisions

- recognizing the ‘systemic nature’ and ‘basic principles’ underlying WTO rules (*cf.* the Preamble of the WTO Agreement: ‘determined to preserve the basic principles ... underlying this multilateral trading system’);
- emphasizing that ‘the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system’ (Article 3:2 DSU);
- mandating the WTO dispute settlement bodies ‘to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’ (Article 3:2 DSU);
- requiring ‘each Member (to) ensure the conformity of its laws, regulations and administrative procedures with its obligations’ under WTO law (Article XVI:4 WTO Agreement), and excluding ‘reservations ... in respect of any provision of this Agreement’ (Article XVI:5);
- prescribing legal protection of individual access to justice also in domestic legal systems inside WTO members, for instance in the field of GATT (*cf.* Article X), the WTO Antidumping Agreement (*cf.* Article 13), the WTO Agreement on Customs Valuation (*cf.* Article 11), the Agreement on Pre-shipment Inspection (*cf.* Article 4), the Agreement on Subsidies and Countervailing Measures (*cf.* Article 23), the General Agreement on Trade in Services (*cf.* Article VI GATS), the Agreement on Trade-Related Intellectual Property Rights (*cf.* Articles 41-50, 59 TRIPS) and the Agreement on Government Procurement (*cf.* Article XX);
- providing for institutionalized review of free trade and customs union agreements (e.g., pursuant to GATT Article XXIV and GATS Article

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<sup>41</sup> On defining ‘public goods’ in terms of their ‘non-excludable’ and ‘non-exhaustible use’ see Petersmann, *Multilevel Governance*, *supra* note 34. This conference book also includes numerous contributions (for example by the former WTO Director-General Pascal Lamy and the former President of the European Parliament Josep Borell) on the cooperation of the WTO with UN institutions and regional economic organizations like the EU.

- V), other plurilateral trade agreements (e.g., pursuant to Articles II:3, III:1 and X:9 WTO Agreement) and domestic trade policies (e.g., pursuant to Article III:4); and
- promoting 'greater coherence in global economic policy-making' (Article III:5 WTO Agreement) and related policy areas (e.g., as required by the 1994 Ministerial Decision on 'Trade and Environment') in view of the interdependencies between the monetary, financial, trade, environmental and related legal systems as 'overlapping aggregate public goods'.

The customary law requirements of interpreting treaties in conformity with 'any relevant rules of international law applicable in the relations between the parties'<sup>42</sup> and of settling 'disputes concerning treaties, like other international disputes, ... in conformity with the principles of justice and international law' as 'embodied in the Charter of the United Nations', including 'universal respect for, and observance of, human rights and fundamental freedoms for all'<sup>43</sup>, likewise call for 'consistent interpretations' of 'overlapping public goods regimes'. As WTO institutions increasingly recognize the need to 'limit the likelihood of a clash of regimes'<sup>44</sup> by cooperating with other international organizations (like the IMF, WIPO, the WHO) whose rules are often enforceable in domestic courts<sup>45</sup>, the insistence of trade diplomats on 'freedom to violate WTO rules' becomes even more anachronistic. At national levels, constitutional democracies protect *public goods* by constitutional approaches and justify (e.g., inside the EU and the EEA) legal protection of freedom of trade among domestic citizens in terms of 'principles of justice'

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<sup>42</sup> VCLT, *supra* note 15, art. 31(3)(c).

<sup>43</sup> *Id.* Preamble.

<sup>44</sup> Cf. WORLD TRADE ORGANIZATION, *World Trade Report 2013-Factors Shaping the Future of World Trade*, 15 (2013), [http://www.wto.org/english/res\\_e/booksp\\_e/wtr13-0\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/wtr13-0_e.pdf). A recent illustration is the Joint Study by the WHO, WIPO & WTO, PROMOTING ACCESS TO MEDICAL TECHNOLOGIES AND INNOVATION (2013), [http://www.wto.org/english/res\\_e/booksp\\_e/pantiwhowipowtoweb13\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/pantiwhowipowtoweb13_e.pdf) (notwithstanding its explicit disclaimer that it does not purport to present any authoritative legal interpretations of WTO rules that remain the exclusive authority of the WTO Ministerial Conference and the WTO General Council); cf. Marrakesh Agreement Establishing the World Trade Organization art. IX(2), Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

<sup>45</sup> E.g., IMF exchange regulations pursuant to Articles of Agreement of the International Monetary Fund art. VIII(2)(b), 27 Dec. 1945, 2 U.N.T.S. 39; WIPO guarantees of intellectual property rights such as copyrights, patent and trade mark rights; WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (2<sup>nd</sup> ed. 2005), available at [http://www.who.int/topics/international\\_health\\_regulations/en/](http://www.who.int/topics/international_health_regulations/en/) (as incorporated in domestic health protection regulations in many UN member states).

like ‘equal freedoms’.<sup>46</sup> Why do citizens, parliaments, ‘courts of justice’ and governments so often shun their democratic responsibilities for interpreting also WTO rules - and protecting welfare-enhancing freedoms of trade beyond state borders - in conformity with the human rights obligations of UN member states and other ‘principles of justice’? Are WTO diplomats justified in pursuing ‘sustainable development’ as an explicit treaty objective of the WTO without any reference in WTO rules to general consumer welfare, democratic governance and human rights which, according to the UN resolutions on the ‘right to development’, are the moral and legal justification for designing international economic law and institutions?<sup>47</sup> Is it justifiable that, at the request of trade politicians (notably from the USA), anti-dumping and other trade remedies disputes continue to be exempted in the WTO from the general jurisdiction of the WTO Legal Affairs Division for handling WTO disputes?<sup>48</sup> Why do most domestic courts, at the request of trade politicians, not participate in ‘providing security and predictability to the multilateral trading system’<sup>49</sup> through ‘consistent interpretations’ of domestic trade laws in conformity with WTO obligations and ‘judicial comity’ vis-à-vis WTO dispute settlement rulings so as to hold governments accountable to adversely affected citizens for welfare-reducing abuses of trade policy powers in violation of WTO agreements ratified by parliaments for the benefit of citizens? From a ‘public goods’ perspective, the constitutional experience of all democracies that ‘rule of law’ is a precondition for democratic supply of *national public goods*, is even more important for *transnational ‘aggregate public goods’* like the WTO agreements ratified by parliaments so as to provide ‘security and predictability to the multilateral trading system’<sup>50</sup> for the benefit of citizens. As long as trade rules continue being distorted by power politics, their lack of fairness and legitimacy is bound to undermine also their economic efficiency, transnational rule of law and democratic support by reasonable citizens.<sup>51</sup>

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<sup>46</sup> As ‘first principle of justice’ in terms of Kantian and Rawlsian constitutionalism. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>47</sup> Cf. C. Tietje, *The Right to Development within the International Economic Legal Order*, in REFLECTIONS ON THE CONSTITUTIONALISATION, *supra* note 40, at 543-558.

<sup>48</sup> Cf. PETERSMANN – GATT/WTO, *supra* note 13, at 90-91.

<sup>49</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

<sup>50</sup> DSU art. 3.

<sup>51</sup> Cf. F.J. GARCIA, *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW – THREE TAKES* (2013) [hereinafter GARCIA] (criticizing US attitudes of ‘regulating my market at home, and deregulating markets abroad in order to facilitate exploitation of other markets internationally’, as well as US power politics in NAFTA and CAFTA dispute settlement procedures, at 260 as illustrating ‘how U.S. trade policy is not always consistent with notions of justice inherent in domestic law’, at 257, 324).

C. 'Judicial comity' between WTO, regional and national dispute settlement jurisprudence?

Arguably, the 'consistent interpretation' requirements of national and international legal systems also imply 'judicial comity' requirements whenever national and international 'overlapping jurisdictions' are confronted with essentially the same disputes over legal interpretations; 'judicial administration of justice' may then require examining whether, and under what legal conditions, the different courts should aim at mutually coherent decisions. The WTO Appellate Body report on *Brazil-retreaded tyres* defined some of the legal conditions under which judicial regard to previous national and regional dispute settlement rulings on related trade disputes may be justifiable.<sup>52</sup> WTO jurisprudence also confirms that jurisdictional overlaps between WTO and regional dispute settlement procedures may entail competing jurisdictions for 'double breaches' of both WTO and regional trade rules and 'double exercises' of such jurisdictions unless an 'exclusive forum clause' may justify judicial deference by one jurisdiction in favour of the other.<sup>53</sup> Dispute settlement proceedings outside the WTO increasingly refer to WTO rules and WTO dispute settlement jurisprudence. Some courts use WTO dispute settlement reports as evidence for factual determinations, procedural aspects, general principles of international law, the rules on treaty interpretation, and substantive rules.<sup>54</sup> Also the design of dispute settlement procedures in regional trade agreements is increasingly influenced by the quasi-judicial model of the WTO dispute settlement system and jurisprudence, notwithstanding the

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<sup>52</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO DS332/AB/R (Dec. 3, 2007) (adopted Dec. 17, 2007) (the Appellate Body held that the national and MERCOSUR court decisions authorizing imports of used tyres resulted in the import ban being applied in a discriminatory manner as Brazil had not invoked the environmental justifications in the national and MERCOSUR court proceedings that Brazil had invoked in the WTO dispute settlement proceedings).

<sup>53</sup> In the *Mexico-soft drinks* dispute, the WTO Appellate Body noted explicitly that NAFTA's exclusive forum clause had not been exercised (*cf.* Appellate Body Report, *Mexico-Tax Measures on Soft Drinks and other Beverages*, ¶ 54, WT/DS308/AB/R) (Mar. 6, 2006). On the problems of justifying a WTO panel decision declining jurisdiction in favour of an 'exclusive jurisdiction' agreed among WTO members in a regional trade agreement, see Gabrielle Marceau & Julian Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreement and the WTO*, 1 J. INT'L DISP. SETTLEMENT 67-95 (2010). For a complete overview of GATT/WTO jurisprudence involving regional trade agreements see A. de Mestral, *Dispute Settlement under the WTO and under Regional Trade Agreements: An Uneasy Relationship*, 16 J. INT'L ECON. L. 777-825 (2013).

<sup>54</sup> For the identification of 150 references in international dispute settlement proceedings outside the WTO to WTO rules and dispute settlement procedures see Gabrielle Marceau et al., *The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation*, J. WORLD TRADE 481-574 (2013).

fact that apart from the regional dispute settlement institutions in the European Union and the European Economic Area (i.e., the Court of Justice in the EU and the EFTA Court) as well as in a few Latin-American economic integration regimes<sup>55</sup> – the actual use of many other regional economic dispute settlement procedures remains limited, for instance, due to the preference of countries (e.g., in NAFTA) to submit their disputes to the WTO.<sup>56</sup> Yet, at the request of governments interested in limiting their own legal and judicial accountability vis-à-vis domestic citizens for injury caused by illegal trade restrictions, domestic courts in the EU, the USA and other WTO members continue to disregard WTO obligations, WTO dispute settlement rulings and transnational rule of law for the benefit of citizens. Overcoming this ‘legal fragmentation’ of global ‘aggregate public goods’ requires limiting abuses of the ‘executive dominance’ in multilevel governance of international public goods. Even though neither ‘consistent interpretations’ nor ‘judicial comity’ may require compliance with intergovernmental ‘rule by law’, judicial protection of transnational ‘rule of law’ for the benefit of citizens – including ‘providing security and predictability to the multilateral trading system’<sup>57</sup> – calls for judicial consideration of the impact of relevant international legal obligations and related dispute settlement rulings on the ‘administration of justice’ in related disputes in other jurisdictions.

*D. Lack of ‘cosmopolitan public reason’ undermines the legitimacy and decentralized coordination of the world trading system*

International commercial and investment law are construed by national and international courts and arbitral tribunals as protecting individual rights of traders and investors that can be invoked and enforced in national and international courts so as to secure transnational rule of law for the benefit of citizens. Even though ‘global supply chains’ for the ‘global production’ of goods and services in the modern world economy call for legal coherence of commercial, trade and investment regulation, WTO law and WTO governance institutions prioritize rights of governments and do not protect justice vis-à-vis individuals. For instance, the WTO legal guarantees of access to domestic legal and judicial remedies do not empower citizens to directly invoke and enforce WTO law in domestic courts; and, at the request of trade diplomats and protectionist lobbying groups interested in ‘hegemonic trade politics’ without

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<sup>55</sup> E.g., Mercado Común del Sur (MERCOSUR), the Andean Community, the Central American Common Market (CACM), and the Caribbean Community (CARICOM).

<sup>56</sup> Cf. C. Chase et al., *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?* (World Trade Organization, Working Paper No. ERSD-2013-07, 2013).

<sup>57</sup> DSU art. 3.

judicial accountability vis-à-vis citizens for violations of GATT/WTO rules, the EU and the USA have adopted implementing legislation requesting courts *not* to accept requests from non-governmental actors to enforce GATT/WTO rules.<sup>58</sup> Yet, welfare-reducing protectionism and power politics undermine not only the democratic legitimacy of WTO law; they also weaken the coherence of the multilevel trading system and of its decentralized implementation by national legislators, governments, regulatory agencies and private economic actors who, without effective remedies to enforce GATT/WTO rules, have no incentives to support or enforce compliance with GATT/WTO law. Such Westphalian prioritization of the rights of governments over those of citizens runs counter not only to HRL and its guarantees of access to justice against illegal government restrictions of mutually beneficial cooperation among citizens; it also distorts the decentralized functioning of a multilevel legal and trading system depending on a shared reasoning promoting decentralized coordination, transnational rule of law, and overlapping consensus on principles of justice that reasonable citizens, governments, and non-governmental economic actors can support in spite of their often diverse self-interests and democratic preferences.<sup>59</sup> Like citizens in a pluralistic, democratic society, economic actors participating in the global division of labour share practical and moral coordination problems, which require reciprocal commitments to constituting, limiting, regulating, and justifying multilevel governance institutions for the benefit of citizens.<sup>60</sup> As the global division of labour is driven by demand and supply among *private* producers, investors, traders, and consumers benefitting from rules-based cooperation and interested in the decentralized enforcement of just rules, a truly *transnational* economic law requires cosmopolitan rights, rule of law, democratic empowerment, and self-governance among free and equal citizens no less than economic law inside constitutional democracies. Multilevel legal and judicial guarantees of transnational rule-of-law for the benefit of citizens can resolve

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<sup>58</sup> Cf. Petersmann, *EU's Disregard*, *supra* note 40 and on the EU and US implementing legislation see PETERSMANN – GATT/WTO, *supra* note 13, at 18-21.

<sup>59</sup> On this need for reconciling utility-maximizing models of rational pursuit of self-interests with multilevel constitutionalism protecting the reasonable interests of all citizens beyond state borders see PETERSMANN - INTERNATIONAL ECONOMIC LAW, *supra* note 13, ch. III; P. CLEMENTS, *RAWLSIAN POLITICAL ANALYSIS RETHINKING THE MICROFOUNDATIONS OF SOCIAL SCIENCE* (2011).

<sup>60</sup> On the importance for people to agree on shared reasons for just laws coordinating a 'stable equilibrium' in the decentralized application and enforcement of rules by individual agents that will support the institutions and interactions required by a political conception of justice only if they can be reasonably assured that they will benefit as a result, *see also* G.K. Hadfield & S. Macedo, *Rational Reasonableness: Toward a Positive Theory of Public Reason*, (Univ. of S. Cal. L. & Econ. Working Paper Series, Working Paper No. 127, 2011) [hereinafter G.K. Hadfield & S. Macedo].



the ‘mutual assurance problem’ that rational and reasonable actors will support the rule-of-law only if it is based on fair terms and provides assurance that others will likewise do so. By offering ‘public reasons’ for resolving conflicts over rights and questions of justice on the basis of the rule-of-law, public adjudication assures citizens of the fairness of law and of rules-based social cooperation: ‘Public reasons are the building blocks of an autonomous public political morality’ and for ‘a shared logic of cooperation that is independent of each one’s personal conception of the good’.<sup>61</sup>

*E. The ‘dispute settlement system of the WTO’ requires multilevel judicial protection of transnational rule of law for the benefit of citizens*

National as well as international courts of justice have legitimate constitutional reasons for administering justice by protecting cosmopolitan rights of citizens and transnational rule-of-law in mutually beneficial trade transactions among citizens across national frontiers. WTO law protects access to justice at national levels, at transnational levels<sup>62</sup> and international levels. The consistent interpretation and judicial comity requirements underlying national and international legal systems<sup>63</sup> require multilevel trade adjudicators to cooperate in their common task of ‘providing security and predictability to the multilateral trading system’<sup>64</sup> and ensuring ‘the conformity of laws, regulations and administrative procedures with obligations’.<sup>65</sup> If the purpose of democratically legitimate law is to institutionalize public reason through constitutional, legislative, administrative, judicial, and international rulemaking and adjudication for the benefit of citizens, then the WTO legal and dispute

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<sup>61</sup> *Id.* at 7, who define ‘public reason’ as a ‘system of reasons that all can participate in’ as an essential, reciprocal ‘coordinating device’ in societies that depend on decentralized support of rules and their justification by ‘principles of justice’ for the stability and legitimacy of legal regimes. In view of the permanent fact of ‘reasonable disagreement’ among citizens over their respective conceptions of a ‘good life’ and over comprehensive theories of political justice, public reason must be limited to an ‘overlapping consensus’ (J.Rawls) among people with often conflicting moral and political worldviews. For instance, GATT/WTO law focuses on voluntary market access commitments subject to ‘general exceptions’ reserving sovereign rights to unilaterally adopt trade restrictions necessary for protecting non-economic public goods that people may legitimately define differently in different jurisdictions.

<sup>62</sup> *E.g.*, WTO Agreement on Preshipment Inspection, 1868 U.N.T.S. 368 ( providing for commercial arbitration in the WTO at the request of exporters challenging trade restrictions imposed by preshipment inspection companies).

<sup>63</sup> *Cf.* VCLT, *supra* note 15, art. 31. On the ‘consistent interpretation principle’ see A. NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 139-165 (2011).

<sup>64</sup> DSU art.3

<sup>65</sup> Marrakesh Agreement art. XVI(4).

settlement system should be interpreted not only as protecting rights and obligations of governments, but also rights of citizens, transnational rule of law for the benefit of non-governmental economic actors, and ‘principles of justice’ as explicitly recognized in national and international legal systems.<sup>66</sup> The GATT/WTO provisions on access to justice at national, transnational, and international levels of dispute settlement do not provide for uniform standards of judicial review. Yet, the explicit recognition of the systemic character of ‘the dispute settlement system of the WTO (as) a central element in providing security and predictability to the multilateral trading system’<sup>67</sup> calls for interpreting the multilevel GATT/WTO legal and dispute settlement provisions in mutually coherent ways for the benefit of citizens so as to reduce transaction costs and legal insecurity of private economic actors. Inside constitutional democracies (e.g. in US antitrust law) and regional economic integration law (e.g. of the EU and EEA), individual plaintiffs invoking and enforcing competition and trade rules in domestic courts have been likened to ‘attorney generals’ pursuing individual as well as ‘community interests’<sup>68</sup>. Similarly, the customary law requirement of interpreting WTO rules ‘in conformity with the principles of justice and international law’ requires impartial courts of justice to promote consistent interpretations of multilevel trade regulation protecting the cosmopolitan rights of traders, producers, investors, and consumers participating in the mutually beneficial, global division of labour.<sup>69</sup> The principles of consistent interpretation and judicial comity offer sufficiently flexible methods of respecting legitimate constitutional pluralism and the diverse conceptions of international economic law, for instance defining IEL

- **as a part of public international law** regulating the international economy on the basis of sovereign equality of states;
- **as global administrative law** aimed at limiting abuses of power through multilevel administrative law principles such as transparency,

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<sup>66</sup> On the multilevel GATT legal and dispute settlement system see PETERSMANN – GATT/WTO, *supra* note 13, at 233; on the ‘constitutional functions’ of certain IMF and GATT rules see PETERSMANN – CONSTITUTIONAL FUNCTIONS, *supra* note 1, at 210.

<sup>67</sup> DSU art. 3.

<sup>68</sup> This conception was emphasized by the CJEU in Case 26/62 Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1 (where the CJEU stated that ‘the vigilance of the individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by (ex) Articles 169 and 170 to the diligence of the Commission and the Member States’).

<sup>69</sup> For a discussion of the diverse methodological approaches to adjudication in international economic law see E. U. Petersmann, *Judging Judges: From ‘Principal-Agent Theory’ to ‘Constitutional Justice’ in Multilevel Judicial Governance of Economic Cooperation among Citizens*, 11 J. INT’L ECON. L. 827-884 (2008).

legal accountability, limited delegation of powers, due process, and judicial remedies; and/or

- **as multilevel public and private regulation** of the global economy with due respect for constitutional pluralism inside national jurisdictions.<sup>70</sup>

#### IV. CONSTITUTIONALIZING IEL AND INTERNATIONAL ‘PUBLIC REASON’ BOTTOM-UP?

Similar to the Constitutions of other federal states, Article 301 of the Indian Constitution provides that ‘trade, commerce and intercourse throughout the territory of India shall be free’. Article 19 of the Constitution, like the protection of individual freedom of trade in many Constitutions of other federal states such as Germany and Switzerland, complements this protection of free trade limiting the exercise of legislative and administrative trade restrictions inside the federation by individual rights of all citizens to ‘practise any profession, or to carry on any occupation, trade or business’. In its external trade policies, India successfully defended its GATT/WTO rights through active use of the GATT/WTO dispute settlement procedures vis-à-vis third countries. Yet, its post-colonial focus on ‘state sovereignty’ and socialism contributed to ideologically motivated trade protectionism undermining consumer welfare, poverty reduction and non-discriminatory conditions of competition inside India.<sup>71</sup> Like many other less-developed countries, it was only since the late 1970s and as part of the implementation of the 1979 Tokyo Round Agreements that India engaged more actively in liberalizing its welfare-reducing trade barriers.<sup>72</sup> How should citizens respond

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<sup>70</sup> For a discussion of five competing conceptions and ‘narratives’ of IEL see PETERSMANN - INTERNATIONAL ECONOMIC LAW, *supra* note 13, ch. I.

<sup>71</sup> The growth-inhibiting effects of Gandhi’s focus on village cultures (‘return to the spinning wheel’) and Nehru’s Soviet-style central planning are often criticized by foreign observers like Singapore’s former prime minister Lee Kuan Yee, in: T. PLATE, GIANTS OF ASIA : CONVERSATIONS WITH LEE KUAN YEE 110 (2013).

<sup>72</sup> Till today, many GATT/WTO diplomats criticize India’s neglect for trade liberalization as reflecting the political indifference of Indian political elites towards eliminating unnecessary poverty, inequality and corruption inside India through efficient regulation of ‘market failures’ as well as of ‘governance failures’; cf. J. DRÈZE & A. SEN, AN UNCERTAIN GLORY. INDIA AND ITS CONTRADICTIONS (2013) (arguing that India’s main problems lie in longstanding neglect of the essential needs of poor people, women, social and physical infrastructure, and of human capabilities, in contrast to the more balanced, simultaneous pursuit of economic and human development in other Asian countries like Japan, South Korea and China). The book on REIMAGINING INDIA: UNLOCKING THE POTENTIAL OF ASIA’S NEXT SUPERPOWER (McKinsey & Company ed., 2013) likewise criticizes ‘endemic

to the fact that, even though trade and democracy are driven by private supply and demand, GATT/WTO law continues the ‘Westphalian tradition’ of treating citizens as mere legal objects without empowering them to invoke and enforce GATT/WTO rules in national and international institutions? How can governments be held accountable vis-à-vis citizens for their obvious governance failures in many less-developed countries to protect general consumer welfare and human rights through IEL? Human rights require justifying law and governance by ‘principles of justice’. As India’s Constitution, in its Preamble, commits the government ‘to secure to all its citizens

- Justice, social, economic and political;
- Liberty of thought, expression, belief, faith and worship;
- Equality of status and opportunity; and to promote among them all
- Fraternity assuring the dignity of the individual and the unity of the Nation’;

How should India’s participation in multilevel governance of international public goods be regulated so as to realize such ‘principles of justice’ which reasonable citizens and democratic parliaments should support also in *transnational governance* protecting the reasonable long-term interests of all citizens? Even though modern Constitutions recognize the importance of international law and international organizations for protecting common self-interests of citizens across national frontiers, they tend to remain agnostic vis-à-vis multilevel governance in worldwide UN and WTO institutions. The more globalization transforms *national* into *international public goods* demanded by citizens, the more important it becomes to agree on a ‘foreign policy constitution’ constituting, limiting, regulating and justifying multilevel governance of international public goods.<sup>73</sup>

#### *A. Cosmopolitan rights and judicial remedies can protect against redressable injustice*

Similar to the distinction between intuitive ‘fast thinking’ and reasonable ‘slow thinking’ in brain research<sup>74</sup>, modern theories of justice emphasize the need for limiting the utility-maximizing pursuit of self-interests by rational economic and political actors through constitutional ‘checks and balances’ so as to institutionalize

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corruption’, fiscal indiscipline, ‘top-heavy central government’, inadequate education and infrastructure systems as ‘governance failures’ impeding development in India.

<sup>73</sup> On this ‘constitutional gap’ see PETERSMANN – CONSTITUTIONAL FUNCTIONS, *supra* note 1, ch. VIII & IX.

<sup>74</sup> On the distinction – as two dialectic thinking processes characteristic of human rationality – of ‘unconscious, intuitive fast thinking’ from ‘conscious slow thinking’ based on deductive reasoning double-checking the cognitive biases of human instincts and intuition see D. KAHNEMAN, THINKING, FAST AND SLOW 20 (2011).

‘public reason’ through legislative, democratic and judicial clarification of agreed ‘principles of justice’ and accountability mechanisms protecting equal rights of citizens against abuses of public and private power.<sup>75</sup> Since the ‘provisional application’ of GATT 1947, the ‘public reason’ influencing international economic regulation continues to change dramatically. For instance:

- From 1948 until the 1980s, GATT 1947 was dominated by intergovernmental power politics, as illustrated by the deliberate decisions of the two first GATT Director-Generals (i.e., Wyndam White and Olivier Long, both lawyers by training) to avoid establishing a GATT Office of Legal Affairs and quasi-judicial GATT dispute settlement procedures that could hold trade politicians judicially accountable for their frequent violations of GATT rules to the detriment of consumer welfare.
- The parliamentary ratification and implementation of the 1979 Tokyo Round Agreements and the establishment of a GATT Office of Legal Affairs in 1982/83 reflected the willingness of most of the developed GATT contracting parties to ‘legalize’ and ‘judicialize’ intergovernmental trade diplomacy, at least among those 25-30 GATT contracting parties that had ratified the Tokyo Round Agreements.
- The replacement of GATT 1947 by the global WTO Agreement and its compulsory WTO dispute settlement system introduced ‘horizontal checks and balances’ between the political and (quasi)judicial WTO institutions further limiting abuses of trade policy powers and strengthening intergovernmental ‘rule by law’ among today’s 160 WTO members.
- The multilevel judicial protection of transnational ‘rule of law’ for the benefit of citizens through thousands of international investment agreements, transnational arbitral awards, national and regional court decisions and multilevel judicial cooperation in international commercial law, investment law, regional economic and human rights law, as well as in other areas of international law like international criminal law and the law of the sea, reflect the increasing recognition that ‘public justice’ and democratic legitimacy require justifying IEL not only through parliamentary ratification of economic agreements, but also in terms of rights of citizens, general consumer welfare and multilevel judicial protection of transnational rule of law.

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<sup>75</sup> Modern theories of justice emphasize the dependence of constitutional democracies on a ‘four-stage sequence’ (cf. JOHN RAWLS, *A THEORY OF JUSTICE* 195 (1972)) of transforming agreed ‘principles of justice’ into constitutional and legislative rules and their administrative and judicial enforcement subject to democratic accountability mechanisms and judicial remedies of citizens. On the need for promoting ‘cosmopolitan public reason’ in international economic regulation see PETERSMANN - INTERNATIONAL ECONOMIC LAW, *supra* note 13.

As long as individual ‘autonomous justice’ (in the sense of Kantian ‘moral imperatives’) and ‘collective justice’ (in the sense of Rawls’ theory of justice for perfectly just institutions in a closed state) do not prevent the obvious injustices in international economic relations (e.g. during the financial crises since 2008 due to under-regulation of financial markets), legal and judicial protection of cosmopolitan rights can empower individuals to redress particular injustices and promote ‘public reason’ by pursuing and advancing ‘public justice’ (Kant) piecemeal.<sup>76</sup> The American and European common market law, competition law and democratic constitutional regimes empower citizens to assume their individual and democratic responsibilities to engage in mutually beneficial cooperation protected by constitutional and judicial safeguards of rule of law. Hence, the EU-US negotiations on a TTIP Agreement have the potential of extending rights-based ‘cosmopolitan international economic law’ not only in transatlantic relations, but also as ‘best standard’ for decentralized, rules-based and depoliticized limitations of abuses of intergovernmental power politics beyond Europe and North America. The ‘Kadi-jurisprudence’ of the European Court of Justice (e.g., annulling the EU implementation of UN Security Council sanctions targeting alleged terrorists without ‘due process of law’) illustrates how ‘constitutional reforms’ of intergovernmental power politics in global institutions may be promoted through judicial remedies by national and international courts of justice.<sup>77</sup> Due to the disregard in WTO jurisprudence of the customary law requirements of interpreting treaties and settling related disputes in conformity with the human rights obligations of the states concerned and other ‘principles of justice’, it may only be a matter of time until WTO governance measures may likewise be challenged by national and regional jurisprudence on grounds of human rights and other ‘principles of justice’. For instance, in the currently pending WTO disputes challenging

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<sup>76</sup> Cf. A. SEN, *THE IDEA OF JUSTICE* (2009). The author focuses on reducing injustices and on how different realizations of justice might be compared and evaluated, rather than on what perfectly just social arrangements might be. On diverse theories of justice justifying international economic regulation and the importance of ‘piecemeal reforms’ through judicial remedies see PETERSMANN – INTERNATIONAL ECONOMIC LAW, *supra* note 13, ch. VI and VIII.

<sup>77</sup> Cf. Case C-402/05P & C-415/05, P. Kadi and Al Barakaat Found. v. Council and Comm’n, 2008 E.C.R. I-6351; Joined Cases C-584/10P, C-593/10P & C-595/10P, ¶ 131 (judgment of July 18, 2013) (not yet reported). The EU can rightly claim that its ‘Kadi jurisprudence’ – rather than ‘fragmenting international law’ – has contributed to reforming UN Security Council policies in conformity with the human rights obligations of all UN member states; for example, by strengthening legal remedies in UN Security Council decision-making procedures and recognizing the sovereign rights of UN members to adopt higher levels of human rights protection in national and regional legal systems than have been agreed so far in UN human rights and security regulations.

Australia's 'plain packaging legislation' adopted by the Australian parliament and approved by the Australian Supreme Court as being necessary for protecting human rights and public health, Australia's democratic institutions may find it difficult to understand that the 'balancing' of trade and intellectual property rules by WTO trade bodies could legitimately challenge the transparent, democratic and judicial 'balancing' of public interests and human rights inside a constitutional democracy.

*B. Constitutional and judicial 'bottom-up reforms' may be easier than WTO amendments*

The UN and the WTO remain indispensable global institutions for inclusive rule-making and policy coordination. Yet, due to the difficulties of amending and reforming global agreements, the necessary adjustments of WTO governance to the requirements of more effective governance of international 'aggregate public goods' require 'bottom up reforms' through regional and plurilateral agreements limiting or circumventing abuses of consensus principles, veto powers and legal requirements in WTO law of 'single undertakings' and ratification of amendments by two-thirds majority. The current negotiations on TPP and TTIP agreements among 40 WTO members are likely to introduce additional legal disciplines on 'market failures' (like anticompetitive business practices) and 'governance failures' (like discriminatory treatment of foreign investments) that have been rejected by less-developed countries in the Doha Round negotiations and run counter to the self-interests of rulers in less-developed countries interested in limiting their legal, democratic and judicial accountability vis-à-vis citizens and in redistributing domestic income through restrictions of trade and competition. As discussed in the concluding *Part V*, 'Westphalian courts of justice' prioritizing rights of governments – like the ICJ, the WTO dispute settlement bodies and the International Tribunal for the Law of the Sea – have proven to operate less effectively than 'cosmopolitan international courts of justice' cooperating with domestic courts in jointly protecting rule of law for the benefit of citizens and cosmopolitan rights across frontiers like the ECJ, the EFTA Court, investor-state arbitration, commercial arbitration, the Iran-US Claims Tribunal, regional human rights courts, and international criminal courts.<sup>78</sup> Citizens and parliaments have strong self-interests in using and better controlling trade negotiations outside the WTO as strategic opportunities for 'constitutionalizing Westphalian power politics' and intergovernmental dispute settlement proceedings that disregard (e.g. in the WTO) human rights, general consumer welfare and transnational rule of law for the benefit of citizens. For example, extending the model of Article XX of the WTO Agreement on Government Procurement could set incentives for decentralizing and depoliticizing trade disputes among states by empowering

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<sup>78</sup> Cf. PETERSMANN – INTERNATIONAL ECONOMIC LAW, *supra* note 13, ch. VIII.

private economic actors to invoke and enforce WTO rules in domestic courts. WTO competition and investment rules and related dispute settlement proceedings could likewise set incentives for citizen-oriented reforms of the WTO legal and dispute settlement system. In the TTIP negotiations, the US ‘global administrative law’ and European ‘constitutional law’ conceptions of IEL can complement each other by justifying additional judicial remedies empowering national and transnational courts of justice to protect and clarify trade rules with due regard to the general principles common to American and European constitutional law. The long-term goal of creating a transatlantic common market among EU, EEA and NAFTA countries could have geopolitical significance far beyond the obvious economic gains. For instance, it could influence worldwide economic, environmental and legal regulation for the benefit of citizens. Yet, limiting power politics and related interest group politics (like US interferences into WTO and NAFTA dispute settlement procedures, EU and US non-compliance with WTO dispute settlement rulings) will not be possible without civil society support and non-governmental organizations explaining the need for citizen-oriented ‘public reason’ and cosmopolitan ‘constitutional reforms’ of IEL so as to protect global ‘aggregate public goods’ more effectively and more legitimately.

## V. THE ‘JUSTICE DEFICITS’ OF UN AND WTO LAW REQUIRE JUDICIAL PROTECTION OF COSMOPOLITAN INTERNATIONAL ECONOMIC LAW

This contribution has emphasized that – similar to the dialectic evolution of IEL (*Part I*) – the UN legal system continues to evolve in dialectic ways (*Part II*) in response to civil society struggles for protection of human rights. The indeterminateness and inadequacy of the UN Charter provisions for the collective supply of global public goods and the power-oriented diplomacy in UN politics have contributed to the emergence of hundreds of specialized treaty regimes prioritizing specific public goods like the IMF monetary system, the WTO trading system, or the WHO health law system. This justifiable ‘fragmentation’ of international law entails risks of legal incoherence due to structural biases and ‘forum shopping’ in specialized legal regimes like investment law, intellectual property law, environmental law, and human rights law. However, these dangers have so far rarely materialized<sup>79</sup>; they

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<sup>79</sup> The most cited example is the *Tadic case* of 1999, in which the Appeals Chamber of the International Criminal Tribunal for Yugoslavia used an ‘overall control standard’ for the accountability of foreign states over acts of parties in civil war that differed from the ‘effective control standard’ developed by the ICJ in the *Nicaragua case* (*cf.* Prosecutor v. Tadic, Case No. IT-94-1-A, ¶¶ 50, 122 (Int’l Crim. Trib. for the former Yugoslavia July 15, 1999)).



remain legally constrained by the general international law requirements of interpreting treaties and settling related disputes with due regard to ‘any relevant rules of international law applicable in the relations between the parties’, ‘in conformity with principles of justice’ and the ‘human rights and fundamental freedoms’ of all citizens.<sup>80</sup> As the UN Charter recognizes ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law’<sup>81</sup>, *Parts II* and *III* recalled the responsibility of civil society, democratic institutions and courts of justice to insist on re-interpreting existing IEL rules for the benefit of citizens so as to reduce the human rights deficits and ‘governance failures’ of intergovernmental politics among self-interested diplomats through legal and judicial protection of cosmopolitan rights and other ‘principles of justice’. *Part IV* argued that the commitments of national, regional and UN legal systems to HRL and to other ‘principles of justice’ (e.g. as developed in the jurisprudence of European Courts of Justice and of UN human rights bodies) justify limitations of power-oriented, legal and economic ‘formalism’ (e.g. focusing on ‘state sovereignty’ and ‘Kaldor-Hicks efficiency’ rather than on governmental duties to protect human rights and prevent the unnecessary poverty of more than 2 billion poor people lacking effective access to rule of law, medicines, health, water and adequate food).

The methodological perception of the law of international organizations as regulating ‘overlapping public goods’ has the advantage of illustrating the ‘constitutional functions’ of international law both for the domestic law dimensions of ‘aggregate public goods’ as well as for the necessary reconciliation of functionally limited, yet overlapping international public goods regimes. In examining justifications of trade restrictions in the light of the law of other international organizations<sup>82</sup>, WTO dispute settlement bodies increasingly cooperate with the other international organizations concerned.<sup>83</sup> The more globalization transforms *national* into *international aggregate public goods*,

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<sup>80</sup> *Belilos v. Switzerland*, Eur. Ct. H. R. 4 (1988) (This case is often cited as an example of why HRL may justify interpretation methods different from the customary methods codified in the VCLT). On the need for ‘systemic interpretation’ and the ‘principle of systemic integration’ see ILC Report on Fragmentation, *supra* note 28, ¶¶ 410-413. The report claims ‘that legal technique (is) perfectly capable of resolving normative conflicts or overlaps by putting the rules and principles in a determinate relationship with each other’, at ¶ 410; ‘if lawyers feel unable to deal with this complexity, this is not a reflection of problems in their ‘tool-box’ but in the *imagination* about how to use it’, at ¶ 488.

<sup>81</sup> ICJ Statute, *supra* note 19, arts. 38(c) & 38(d).

<sup>82</sup> For example, in Accordance with IMF law as required by General Agreement on Tariffs and Trade art. XV, Oct. 30, 1947, 55 U.N.T.S 194 [hereinafter GATT].

<sup>83</sup> Cf. M. FOLTEA, INTERNATIONAL ORGANIZATIONS IN WTO DISPUTE SETTLEMENT: HOW MUCH INSTITUTIONAL SENSITIVITY? (2012).

the more important become constitutional and ‘global administrative law’ constraints on the exercise of all governance powers, including the human right of ‘(e)veryone ... to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’<sup>84</sup>. As human rights recognize human beings as being entitled to individual ‘access to justice’ and to justification of governmental restrictions of ‘equal freedoms’ as ‘first principle of justice’<sup>85</sup>, national and international legal systems increasingly protect peaceful cooperation and dispute resolution among free and equal citizens by cosmopolitan rights of citizens and related principles of *formal justice* (like equal treatment), *procedural justice* (like impartial third-party adjudication of disputes), *distributive justice* (like differential treatment taking into account differences among free persons), *corrective justice* (like correction of improper gains), *commutative justice* (like *pacta sunt servanda*) and *equity* (taking into account particular circumstances justifying deviations from formal principles of justice). The increasing number of academic publications challenging ‘global justice’ of WTO rules and related interest group politics reflect increasing demands by civil society that IEL and international institutions distributing social benefits and burdens among citizens require legal justification. Yet, the diverse social and democratic preferences, resources, traditions and conflicts of interests inside countries frequently entail ‘reasonable disagreement’ among individuals, people and governments on the ‘right economic regulation’ in different private and public, national and international ‘contexts of justice’.

*A. From intergovernmental power politics to cosmopolitan IEL?*

The transformation of free trade areas and customs unions into cosmopolitan constitutional systems – first among German states during the 19th century (e.g. the German Zollverein 1834-1919) and, since the 1950s, among the today 31 member states of the European Economic Area (EEA), confirmed the significance of rules-based, transnational economic cooperation for constructing ‘cosmopolitan peace’ through ‘cosmopolitan law’, as predicted in Immanuel Kant’s blueprint for ‘*Perpetual Peace* (1795). Following World War II, all EEA member countries transformed their economies through trade liberalization and trade regulation into ‘social market economies’ protecting transnational ‘equal freedoms’ as ‘first principle of justice’ and ‘difference principles’ justifying social rights. Even though the member countries of the North American Free Trade Agreement (NAFTA) follow more utilitarian and libertarian conceptions of trade regulation compared with the egalitarian conceptions underlying European trade regulation, all European and NAFTA

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<sup>84</sup> UDHR, *supra* note 12, art. 28.

<sup>85</sup> Cf. PETERSMANN - INTERNATIONAL ECONOMIC LAW, *supra* note 13, ch. VI.

countries recognize governmental duties to protect free trade as an instrument for promoting economic liberties, non-discriminatory conditions of competition, due process of law and general consumer welfare.<sup>86</sup> The increasing references in the jurisprudence of international courts (notably in Europe) to ‘principles of justice’ and ‘human rights and fundamental freedoms’ illustrates that regional courts are increasingly willing to hold governments accountable for neglect of human rights and other ‘principles of justice’ in multilevel economic governance. As discussed in *Part IV*, the evolution of the GATT/WTO legal system likewise illustrates an evolution of ‘public reason’ dominating GATT/WTO governance. For instance:

- Since the ‘provisional application’ of GATT 1947 as of 1 January 1948 up to the conclusion of the Tokyo Round Agreements in 1979, trade diplomats conceived ‘justice’ as ‘international order protected by power’, prioritizing rights of governments over rights of citizens. GATT rules were applied only subject to ‘grandfather reservations’ exempting GATT-inconsistent, existing legislation from the intergovernmental GATT disciplines. GATT negotiations remained dominated by ‘political realism’ (e.g. exempting competitive imports of cotton and textiles from less-developed countries in response to domestic protectionist pressures) and ‘diplomatic dispute settlements’ without references to the customary rules of treaty interpretation and without establishing an impartial GATT Office of Legal Affairs. Even though GATT diplomacy aimed at remedying some injustices of colonial politics (e.g. by adding Part IV to GATT 1947), trade diplomats often justified their pragmatic ‘management approach’ by the view of *Thrasymachos* in Plato’s *Republic* that ‘justice is merely whatever the powerful say it is’.
- The 1979 Tokyo Round Agreements were justified vis-à-vis citizens by their parliamentary ratification and legislative implementation, yet without granting citizens (e.g. traders, investors, producers and consumers) rights to invoke and enforce the Tokyo Round rules in domestic courts.
- The 1994 WTO Agreements promoted ‘commutative justice’<sup>87</sup> and ‘constitutional justice’ by subjecting trade policymaking to more

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<sup>86</sup> Cf. PETERSMANN – CONSTITUTIONAL FUNCTIONS, *supra* note 1; GARCIA, *supra* note 51.

<sup>87</sup> The Latin term ‘commutare’ means ‘to exchange’; ‘commutative justice’ refers to mutual agreements on functionally limited ‘treaty principles of justice’ like reciprocal market access commitments and the economic efficiency principles underlying the legal ranking of economically ‘optimal trade policy instruments’ in GATT/WTO law (for example, non-discriminatory domestic regulations and subsidies rather than border discrimination; tariffs rather than non-tariff trade barriers and sanitary regulations on the basis of science-based ‘risk-assessments’ rather than on the basis of discriminatory protectionism). Due to the

comprehensive judicial review at national and international levels of governance. Yet, notably inside the EU and USA, the effectiveness of judicial remedies at domestic levels was deliberately undermined by preventing citizens from invoking and enforcing GATT guarantees of freedom, non-discrimination and rule of law in domestic courts. The WTO Agreement on Preshipment Inspection remains the only WTO Agreement providing for individual access to private *commercial arbitration* administered by the WTO in cooperation with the International Chamber of Commerce.

Cosmopolitan conceptions of economic and HRL<sup>88</sup> aim at multilevel legal and judicial protection of commercial, property and other rights of citizens and transnational rule of law protecting citizens through institutionalized networks of national and transnational courts and arbitral tribunals. Cosmopolitan legal regimes - like transnational commercial and investment law and arbitration, rights-based free trade agreements like EEA law, common market and competition law agreements of the EU, international criminal law and related adjudication - have proven to protect international public goods more effectively than 'Westphalian regimes' without effective legal, democratic and judicial accountability of governments vis-à-vis adversely affected citizens.<sup>89</sup> Similar to defining '*cosmopolitan constitutionalism*' by the *trias* of human rights, rule of law and democratic governance, *cosmopolitan legal regimes* can be defined by their multilevel judicial protection of individual rights and rule of law for the benefit of citizens, for instance through

- cooperation between national courts and arbitral tribunals in the recognition, surveillance and enforcement of arbitral awards ;<sup>90</sup>
- cooperation among national and regional economic and human rights courts like the European Free Trade Area (EFTA) Court, the EU Court of Justice (CJEU) and the European Court of Human Rights (ECtHR);
- the arbitration and annulment procedures of the International Center for the Settlement of Investment Disputes (ICSID) in cooperation with national courts;

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absence of universally agreed criteria of just results of economic exchange, IEL provides for more dispute settlement procedures than most other areas of international law.

<sup>88</sup> The Greek term 'cosmopolite' refers to a 'citizen of the world' recognizing all human beings as morally equal and constituting a single world community that should avoid national prejudices.

<sup>89</sup> Cf. PETERSMANN - INTERNATIONAL ECONOMIC LAW, *supra* note 13, at 145.

<sup>90</sup> For instance, pursuant to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

- or the more than half a dozen of international criminal courts complementing national criminal jurisdictions.

*B. Cosmopolitan re-interpretation of IEL through multilevel jurisprudence?*

This contribution has argued that the power-oriented ‘basic structures’ of UN and WTO law, their ‘member-driven governance’ and disregard vis-à-vis human rights violations in so many UN and WTO member states are increasingly challenged by bilateral, regional and plurilateral agreements. Further, adjudication protecting cosmopolitan rights and ‘transitional justice’ through ‘fragmentation’ and piecemeal reforms of ‘Westphalian international law’ has corrected abuses of power and ‘tied down Leviathan’ for the benefit of citizens.<sup>91</sup> More effective protection of international public goods often depends on ‘cosmopolitan re-interpretations’ of existing UN and WTO legal rules, for instance by justifying ‘collective responsibilities’ to prevent crimes against humanity and protect other ‘common concerns’ (e.g. to prevent climate change). At regional and bilateral governance levels,

- the European Convention on Human Rights explicitly aimed at, and succeeded in, transforming the human rights provisions of the UDHR into more effective, cosmopolitan HRL than any UN human rights convention;
- similarly, the European Economic Community Treaty of 1957 explicitly aimed at, and succeeded in, transforming the GATT customs union rules into more effective cosmopolitan economic law than any GATT/WTO agreement;
- the thousands of bilateral investment treaties (BITs) explicitly aim at, and succeeded in, transforming ‘Westphalian international investment law’ and diplomatic protection methods into cosmopolitan investment law protecting individual rights and judicial remedies.

In each of these examples of ‘fragmenting’ and replacing ‘Westphalian international law’ through ‘cosmopolitan law’, the multilevel cooperation among national and international tribunals justified protecting transnational ‘rule of law’ for the benefit of individual rights and ‘access to justice’. UN and WTO law, by contrast, continues being neglected by many domestic courts at the request of diplomats. It is only more recently that ICJ and WTO jurisprudence also justify some judgments in terms of cosmopolitan rights and principles of justice protecting citizens, rather than only in terms of rights and obligations of sovereign states.

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<sup>91</sup> On this emergence of a ‘new disaggregated world order’ and ‘judges constructing a global legal system’ see A.M. SLAUGHTER, *A NEW WORLD ORDER* 65 (2004).

C. *Human rights in ICJ jurisprudence*

The ICJ takes it for granted that:

‘Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable.’<sup>92</sup> Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it.<sup>93</sup>

Yet, similar to the deferential jurisprudence of the Permanent Court of International Justice towards state sovereignty (e.g., in terms of presumptions against limitations of national sovereignty, narrow interpretations of such treaty limitations), the contribution of the ICJ to the development of HRL has remained so limited during the first 50 years of ICJ jurisprudence that it makes it ‘necessary to question whether the International Court is a court of law, let alone a court of justice’.<sup>94</sup> Only states - i.e., legal constructs empowering the rulers over a population in a given territory, often without guarantees of democratic representation may be parties in cases before the ICJ. Moreover, the Court’s jurisdiction is limited to cases submitted with the consent of the defendant state. Hence, large parts of the global social reality such as individuals, international organizations, and the more than 2 billion poor people living without effective protection of their human rights have no effective access to the ICJ and are not effectively represented in disputes before the ICJ. Principles of justice and of equity continue to be important in the ICJ jurisprudence on procedural ‘due process of law’. ICJ jurisprudence has also contributed to the settlement of border disputes like the delimitation of adjacent ‘territorial seas’ and ‘continental shelves’. Notwithstanding references to human rights in some ICJ judgments and advisory opinion since the *Corfu Channel Case* (1949), it is only since the 1990s that the ICJ uses HRL as *ratio decidendi* for limiting judicial deference towards abuses of government powers.<sup>95</sup> In spite of the ‘optional protocols’ to some UN human rights conventions enabling individual complaints to political UN bodies, UN law does not offer effective legal and judicial remedies protecting human rights

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<sup>92</sup> North Sea Continental Shelf (Fed. Republic Ger. v. Den.; Fed. Republic Ger. v. Neth.), 1969 I.C.J. 3, ¶ 88 (Feb. 20).

<sup>93</sup> Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, ¶ 71 (Feb. 24).

<sup>94</sup> P. Allott, *The International Court and the Voice of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 17, 27 (V. Lowe & M. Fitzmaurice eds., 1996) [hereinafter Lowe & Fitzmaurice].

<sup>95</sup> For detailed analyses of the ICJ jurisprudence on human rights see the two contributions by Judge B. Simma, *The ICJ and Human Rights*, in SOCIETÀ ITALIANA DI DIRITTO INTERNAZIONALE (ED): LA TUTELA DEI DIRITTI UMANI E IL DIRITTO INTERNAZIONALE 3-30 (2012), [hereinafter Simma] & Judge A. Yusuf, *The ICJ and the Development of Human Rights Law*, in SOCIETÀ ITALIANA DI DIRITTO INTERNAZIONALE (ED): LA TUTELA DEI DIRITTI UMANI E IL DIRITTO INTERNAZIONALE 573-581 (2012).

and other 'principles of justice' vis-à-vis individuals and peoples exploited by non-democratic rulers, whose human rights violations are regularly not challenged in the ICJ. The few investment disputes decided by the ICJ have been criticized as proving the inadequacy of ICJ proceedings for protecting investor rights and human rights by means of 'diplomatic protection' and prior 'exhaustion of local remedies', resulting in ICJ judgments more than 20 years after the contested governmental interferences into the investor rights (e.g., in the *ELSI* case).<sup>96</sup> The deliberate avoidance by the ICJ, up to its *Genocide case* in 2007, of references to judgments of other international courts, and the limited ICJ jurisdiction for human rights treaties<sup>97</sup>, illustrate the narrow conceptions of procedural and substantive 'principles of justice' in UN law and in ICJ jurisprudence focusing on 'sovereign equality of states' and the ICJ as 'the principal judicial organ of the UN'<sup>98</sup>, yet without protecting effective judicial 'access to justice' as a human right and without engaging in 'judicial dialogues' with other jurisdictions in order to clarify 'principles of justice'. The ICJ judgment of November 2010 in the *Diallo Case (Guinea v Congo)* seems to be the first economic dispute in which the ICJ assessed breaches of human rights treaty obligations referring to the jurisprudence of UN and regional human rights bodies.

#### D. *Cosmopolitan rights in WTO jurisprudence*

GATT/WTO dispute settlement procedures are limited to GATT/WTO members and have so far never applied the human rights obligations of all UN member states as applicable law or 'relevant context' for interpreting GATT/WTO obligations. As in the UN, governments remain unwilling also in GATT and the WTO to submit human rights disputes to international adjudication and to raise human rights arguments in GATT/WTO dispute settlement proceedings. International judges have to respect their limited jurisdiction as well as 'party autonomy' (as illustrated by the prohibition of going *ultra petita partium*). The intergovernmental structures of ICJ and GATT/WTO dispute settlement proceedings entail that legal responsibility in ICJ and GATT/WTO dispute settlement proceedings remains essentially 'Westphalian responsibility' by states/governments vis-à-vis other states/governments, often without effective remedies and enforcement

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<sup>96</sup> Cf. Judge S.M. Schwebel, *The Treatment of Human Rights and of Aliens in the ICJ*, in Lowe & Fitzmaurice, *supra* note 94, at 350.

<sup>97</sup> Only five of the major human rights conventions include a compromissory clause providing for ICJ jurisdiction, and none of these clauses seem to have been used so far by states for challenging human rights violations by other states in the ICJ; cf. Simma, *supra* note 95.

<sup>98</sup> U.N. Charter art. 92.

mechanisms as illustrated by the absence of reparation of injury in GATT/WTO jurisprudence. Yet, the GATT/WTO dispute settlement system goes beyond the inter-state structures of ICJ dispute settlement proceedings, for instance

- by protecting ‘access to justice’ not only for states, but also for economically independent ‘customs territories’ (like Hong Kong, Macao, Taiwan), customs unions (like the EU) as well as access by individual and corporate actors to domestic courts;
- by protecting ‘violation complaints’ on the basis of legal presumptions that every violation of a GATT/WTO ‘primary rule of conduct’ justifies the presumption of ‘nullification or impairment’ of treaty benefits due to distortions of competition;
- by extending legal responsibility through the admissibility of ‘non-violation complaints’ protecting ‘commutative justice’ (e.g. in the sense of the mutually agreed balance of reciprocal trade commitments) against lawful trade distortions provided the complainant can prove the unexpected ‘nullification or impairment’ of the agreed balance of reciprocal, competitive benefits;
- by permitting ‘situation complaints’ that may protect sovereign rights and legitimate expectations even beyond ‘violation’ and ‘non-violation complaints’ (e.g., in case of an unforeseen economic depression or environmental crisis threatening human, food and health security and the corresponding human rights to an adequate standard of living for oneself and one’s family);<sup>99</sup>
- by providing for compulsory and exclusive jurisdiction of WTO dispute settlement bodies;<sup>100</sup> and
- by regulating compliance with WTO dispute settlement rulings and ‘retaliation powers’ in ways which set incentives for termination of illegal WTO measures ‘consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding’.<sup>101</sup>

Yet, the WTO’s focus on the justice dimension of reciprocal market access commitments among governments and on sovereign rights to protect non-

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<sup>99</sup> On the six different kinds of legal complaints under GATT art. XXIII and similar provisions in other WTO rules, and on the controversial relationship between ‘non-violation complaints’, ‘good faith principles’, and explicit WTO rules (e.g., on ‘actionable subsidies’) see PETERSMANN – GATT/WTO, *supra* note 13, ch. 3. HRL could offer ‘relevant context’ for interpreting the contested scope of ‘situation complaints’ in GATT/WTO law; cf. ICESCR, *supra* note 14.

<sup>100</sup> Cf. DSU arts. 6, 23.

<sup>101</sup> Cf. DSU arts. 22, 23.



economic public interests pursuant to WTO exception clauses fails to protect justice vis-à-vis individuals. Due to the domination of GATT/WTO decision-making procedures by diplomats interested in limiting their legal and judicial accountability vis-à-vis citizens adversely affected by governmental violations of GATT/WTO obligations, the domestic legislation implementing GATT/WTO law inside some GATT/WTO members (like the EU and the USA) purports to exclude individual rights to invoke and enforce the GATT/WTO obligations of governments in domestic courts.<sup>102</sup> Many domestic courts also neglect the ‘consistent interpretation’ and ‘judicial comity’ requirements underlying WTO law and, at the request of governments, interpret and apply domestic trade laws without regard to WTO legal obligations and WTO dispute settlement rulings. It is only more recently that WTO Appellate Body jurisprudence has interpreted GATT/WTO ‘principles of fair price comparison’ and of cosmopolitan rights<sup>103</sup> for the benefit of adversely affected citizens and companies. For instance, in the almost 20 WTO dispute settlement proceedings challenging the protectionist ‘zeroing practices’ of European and US antidumping authorities in their calculations of antidumping duties, the WTO Appellate Body has insisted on interpreting the WTO requirement of ‘fair price comparisons’ from the perspective of the reasonable interests of economic actors rather than - as advocated by the WTO panels - from the perspective of EU and US antidumping bureaucracies claiming that they had not intended to limit their ‘sovereign right to apply zeroing methodologies’ by concluding the WTO Agreement on Antidumping.<sup>104</sup> But WTO dispute settlement reports do not balance private and public interests in terms of ‘human rights and fundamental freedoms for all’ if neither the complainant nor the defendant invoke ‘principles of justice’, as illustrated by the WTO dispute over limitations of ‘trading rights’ and freedom of information on grounds of political ‘content control’ of internet services in China<sup>105</sup>. As human rights are not part of the

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<sup>102</sup> Cf. PETERSMANN – GATT/WTO, *supra* note 13.

<sup>103</sup> E.g., the intellectual property rights and ‘trading rights’ recognized in the WTO Protocol on the Accession of China; see WTO Protocol on the Accession of the People’s Republic of China, Nov. 23, 2001, WT/L/432.

<sup>104</sup> On the WTO dispute settlement proceedings challenging the ‘zeroing methodology’ in antidumping calculations see S. Cho, *Global Constitutional Lawmaking*, 31 U. PA. J. INT’L L. 621-678 (2010).

<sup>105</sup> Cf. Appellate Body Report, *China-Publications and Audiovisual Products*, WT/DS363/AB/R (Dec. 21, 2009) (*adopted* Jan. 19, 2010). Even though US Secretary of State H. Clinton had advocated ‘freedom of the internet’ as a global model of internet regulation, the US acceptance of Chinese ‘content control restrictions’ as being compatible with WTO law seems to reflect the US practices of justifying its own, disproportionate electronic spying practices on governments, citizens, and companies all over the world. On legal inconsistencies of disproportionate large-scale surveillance practices with HRL see Didier

‘covered WTO agreements’ and their ‘relevant context’ for clarifying WTO rules remains contested, WTO dispute settlement bodies prioritize the principle of ‘party autonomy’ (*non ultra petita partium*) over the legal maxim of *jura novit curia*.

*E. Cosmopolitan rights in investor-state arbitration*

In contrast to the multilateral codification of bilaterally developed treaty standards - such as on most-favoured-nation treatment and national treatment - in some provisions of the GATT/WTO Agreements, neither the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards nor the 1965 World Bank Convention establishing ICSID set out the ‘primary rules of conduct’ governing transnational commercial and investment law. Like the DSU, the New York and Washington Conventions leave the clarification of the applicable law to multilevel rule-making and jurisprudence. Similar to the judicial clarification of specialized ‘commercial law principles’<sup>106</sup>, the hundreds of arbitral awards in investor-state arbitration over the past decades continue to clarify the often indeterminate legal standards of investment protection provided for in BITs and general international law, such as sovereign rights to expropriate and regulate; the conditions of the legality of expropriation; fair and equitable treatment (FET); full protection and security; ‘umbrella clauses’ incorporating other government obligations into the treaty obligations under BITs; guarantees of access to justice and fair procedures; exceptions clauses (e.g. providing for ‘necessity’ and other emergency situations); preservation of rights (e.g. under other international treaties); prohibition of arbitrary or discriminatory measures; national treatment, most-favoured-nation treatment, and rights to transfer funds abroad. The increasing ‘judicial dialogues’ among investment tribunals and their ‘cross-treaty interpretation referring either to BIT practice of wholly unrelated countries or to model treaties or, finally, using teleological interpretation methods’<sup>107</sup> are reflected in the following finding of the tribunal in *Saipem v Bangladesh* (2007):

‘The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals (...) It has a duty to adopt solutions established in a series of consistent cases

(...) It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the

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Bigo et al., *Mass Surveillance of Personal Data by EU Member States and its Compatibility with EU Law* (CEPS Working Paper No. 61, Nov. 2013).

<sup>106</sup> E.g., as regards international loan and bail-out agreements.

<sup>107</sup> Cf. S.W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 293-321 (2009).

harmonious development of international investment law and thereby meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'.<sup>108</sup>

In reconciling diverse private and public interests, investment adjudication increasingly refers to trade law, environmental law and human rights so as to interpret the diverse, specialized legal regimes, dispute resolution mechanisms and related 'jurisdictional overlaps' in mutually consistent ways.<sup>109</sup> As the jurisdiction of ICSID arbitration is limited 'to any legal dispute arising directly out of an investment'<sup>110</sup>, investment tribunals have declined competence to examine alleged human rights violations by detention and expulsion of foreign investors<sup>111</sup>, or counter-claims by the host state of alleged tax fraud by the investor.<sup>112</sup> Yet, according to Article 42 ICSID Convention, the

'(t)ribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State Party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.

Hence, ICSID tribunals have emphasized that a limited jurisdiction must not imply a limited scope of the applicable law:

'the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider judicial context in which rules from other sources are integrated through implied incorporation methods or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.'<sup>113</sup>

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<sup>108</sup> Saipem S.p.A v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction, ¶ 67 (Mar. 21, 2007), 22 ICSID Rev. - FILJ 100 (2007).

<sup>109</sup> On the frequent jurisdictional overlaps of economic disputes see L. Guglya, *The Interplay of International Dispute Resolution Mechanisms: the Softwood Lumber Controversy*, 2 J. INT'L DISP. SETTLEMENT 175-207 (2011).

<sup>110</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 575 U.N.T.S. 159.

<sup>111</sup> Cf. Biloune & Marine Drive Complex Ltd v. Ghana (UNCITRAL), Award on jurisdiction & liability (Oct. 27, 1989), 95 I.L.R. 184 [hereinafter Biloune]. See also Biwater Gauff Ltd v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008) [hereinafter Biwater], where the tribunal did not elaborate on the human rights arguments presented in an *amicus curiae* submission.

<sup>112</sup> Cf. Amco Asia Corporation v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction (May 10, 1988), 1 ICSID Rep. 543 (1993).

<sup>113</sup> Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶¶ 20, 21 (June 27, 1990), 4 ICSID Rep. 246 (1997).

Most ICSID tribunals no longer perceive themselves as exclusively 'private dispute resolution service providers' referring only to arguments presented by the parties to the dispute; they increasingly make also their own independent, legal assessments following the maxim of *jus novit curia*, according to which a court should, of its own motion, apply any rule of law relevant to the facts and to the dispute resolution, even if the applicable rule of law has not been explicitly pleaded (except for 'exception clauses' whose invocation remains within the discretion of the parties to the dispute).<sup>114</sup> Tribunals increasingly admit the inherent conflicts between public and private interests, 'public law' and 'private law' perspectives in investment law, and competing interests also among capital-importing countries (e.g. negotiating BITs in order to attract scarce foreign capital and know-how). Hence, adjudicators acknowledge the need for 'balancing' all public and private interests involved rather than defining the relevant 'epistemic community' in narrow commercial terms. Investment tribunals must review both private claims focusing one-sidedly on cosmopolitan investor rights as well as government claims that tribunals must always defer to government discretion and to intergovernmental interpretations limiting the jurisdiction of tribunals even retroactively in pending investment disputes.<sup>115</sup> In *EDF Services v Romania* (2009), the arbitral tribunal emphasized:

'The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host

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<sup>114</sup> On these two types of 'dispute-oriented tribunals' and 'legislator-oriented tribunals' see O.K. Fouchald, *Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, 19 EUR. J. INT'L L. 301-364 (2008).

<sup>115</sup> See *North American Free Trade Agreement: Notes of Interpretation of Certain Chapter 11 Provisions*, FOREIGN TRADE INFO. SYS.: ORG. OF AM. ST.(July 31, 2001), [http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp) (The 'Interpretive Note' issued by the NAFTA Federal Trade Commission states that in order to limit the judicial articulation of stricter standards by NAFTA investment tribunals: "The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." The question of whether this intergovernmental interpretation could retroactively limit the judicial powers of interpretation in the pending NAFTA arbitration remained controversial.

State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.<sup>116</sup>

Similarly, in *Saluka v Czech Republic* (2006), the tribunal held:

'No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.'<sup>117</sup>

Depending on whether the foreign investor, the host state or its citizens are perceived as victims or perpetrators of human rights violations, the impact of HRL on judicial interpretations of investment law and arbitration may differ considerably, for instance due to the limited jurisdiction of commercial and ICSID arbitration.<sup>118</sup> Yet, the arbitral jurisprudence of denying protection for investments in violation of host state law could justify judicial review of human rights abuses by foreign investors. In response to Argentina's invocation of human rights as a defence, the *Suez v Argentina* tribunal found that 'Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus ... Argentina could have respected both types of obligations'.<sup>119</sup> But the *Bewater Gauff v Tanzania* arbitration<sup>120</sup> illustrates that a governmental interference with investor rights may be justifiable on the ground of the investor's poor performance of the concession contract designed to ensure access to human rights (e.g., access to essential water services). Even though host states have apparently not yet used the procedural possibility under Article 36 of the ICSID Convention of suing foreign investors separately, affected people in the host state's population may challenge investment-related human rights violations by submitting *amicus curiae* petitions to arbitral tribunals or challenging human rights violations in national courts and regional human rights courts, especially if both the home and host states involved are parties to the same human rights obligations.<sup>121</sup> Judicial balancing between public and

<sup>116</sup> EDF (Services) Ltd v. Romania, ICSID Case No. ARB/05/13, Arbitral Award, ¶ 217 (Oct. 8, 2009).

<sup>117</sup> *Saluka v. Czech Republic*, UNCITRAL Partial Award of 17 March 2006, at para. 305.

<sup>118</sup> In the *Biloune*, *supra* note 111, the investment tribunal denied its jurisdiction in the context of the investment dispute to examine whether Ghana had committed the alleged violations of human rights (such as arbitrary detention and deportation of the claimant).

<sup>119</sup> *Pan American Energy LLC & BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Award, 238-240 (July 14, 2006).

<sup>120</sup> *Cf. Bewater*, *supra* note 111.

<sup>121</sup> *Cf. U. Kriebaum, Foreign Investors and Human Rights: The Actors and their Different Roles, in THE FUTURE OF ICSID AND THE PLACE OF INVESTMENT TREATIES IN INTERNATIONAL LAW 45-59 (N.J. Calamita et al. eds., 2012).*

private rights and interests may also differ depending on the relevant constitutional context, for instance depending on whether democracy is legally defined in terms of ‘parliamentary freedom’ to regulate (as in some Anglo-Saxon democracies) or in terms of equal constitutional rights of citizens limiting governmental ‘rule by law’ (as in the laws of many European ‘constitutional democracies’). The judicial allocation of procedural burdens of proof may be influenced by diverse judicial conceptions of investment law, for instance as *restraining public regulatory powers* for the benefit of cosmopolitan rights rather than as *servicing exclusively public interests*.<sup>122</sup> The ‘integration principle’<sup>123</sup>, BIT ‘umbrella’ and ‘FET clauses’, and the inherent judicial powers promote increasing references in investment adjudication to trade law, human rights and environmental law and adjudication within the limits of the jurisdiction, applicable law and treaty interpretation methods.<sup>124</sup> The finding of the ICSID annulment committee in the *Sempra v Argentina* case (2011) that a ‘manifest error of law’ (i.e., applying the customary law standard of ‘necessity’ rather than the applicable treaty standard of ‘necessity’) amounted to a ‘manifest excess of power’ justifying annulment of the arbitral award, illustrates judicial attempts at administering justice by interpreting judicial powers broadly.<sup>125</sup> In order to justify judicial restraints of abuses of political powers and limit incoherencies of intergovernmental rule-making (e.g. so as to reconcile economic and non-economic interests in BITs and WTO agreements that lack explicit ‘exception clauses’), judicial recourse to ‘constitutional’ and ‘cosmopolitan methodologies’ for clarifying ‘incomplete economic agreements’ may be more appropriate for the ‘balancing’ of all adversely affected, public and private interests than state-centred ‘legal paradigms’ from times long past.

F. *The limited impact of ‘human rights clauses’ in EU trade agreements with third states*

The preceding survey reveals how ‘judicial methodologies’ for ‘balancing’ public and private interests often differ among trade, investment, commercial and human rights tribunals and national courts in spite of the legal requirements of ‘consistent interpretations’, ‘judicial comity’ and deciding

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<sup>122</sup> On these competing conceptions of ‘public-private divides’ see A. Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. INT’L ECON. L. 500-502 (2011).

<sup>123</sup> VCLT, *supra* note 15, art. 31.

<sup>124</sup> E.g., arguments that BIT ‘umbrella clauses’ transform WTO dispute settlement findings of trade discrimination into relevant context for interpreting BIT prohibitions of discrimination of foreign investors in government procurement proceedings.

<sup>125</sup> Cf. A. Pellet, *Annulment Faute de Mieux: Is There a Need for an Appeals Facility?*, in THE FUTURE OF ICSID AND THE PLACE OF INVESTMENT TREATIES IN INTERNATIONAL LAW 255 (N.J. Calamita et al. eds., 2012).

disputes in accordance with other applicable rules of international law. The 'human rights clauses' incorporated into the EU's economic agreements with more than 130 third states could justify increasing judicial recourse to the 'integration principle' of Article 31:3 of the VCLT for interpreting separate legal regimes more coherently so as to protect cosmopolitan rights of citizens. For instance, the 'equity' obligations included into 'FET' investment obligations and into other 'principles of justice' could justify more comprehensive 'proportionality balancing' than required by customary 'minimum standards' of 'Westphalian international law'. In response to the WTO Appellate Body ruling in the *GSP dispute*, the EU's Generalized System of Trade Preference (GSP) now differentiates trade preferences according to the human rights, labour rights, environmental and other 'good governance' conventions ratified by beneficiary countries; this may prompt recipient countries to challenge such legal WTO differentiations in WTO dispute settlement proceedings on grounds of human rights. The EU-Korea Free Trade provisions on civil society participation in the implementation of product standards, 'sustainable development', 'conditionality' and other 'linkage commitments' protecting non-commercial interests, could promote the acceptance of 'cosmopolitan positive integration' approaches. Unfortunately, the Lisbon Treaty's requirement<sup>126</sup> for protecting 'cosmopolitan rights' in the EU's foreign policies has not yet prompted EU diplomats to become international standard-setters for promoting transnational rule of law for the benefit of citizens and for rules-based protection of international public goods. Nor have the 'human rights clauses' prompted EU trade diplomats to reconsider their selfish practices of requesting domestic courts to deny citizens effective legal and judicial remedies against harmful violations of free trade agreement commitments.<sup>127</sup> Even though WTO and EU law do not prescribe 'direct applicability' of the EU's international trade obligations by citizens in domestic courts, the multilevel, cosmopolitan treaty and trade objectives of WTO and EU law for 'providing security and predictability to the multilateral trading system'<sup>128</sup> (Article 3 DSU) should, as stated in Article 21 TEU, be advanced by the EU 'in the wider world' in conformity with its own EU human rights and rule of law principles requiring consistent protection of EU citizen rights.

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<sup>126</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 21, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

<sup>127</sup> Cf. E.U. Petersmann, *Integrating Human Rights into EU Trade Relations – The EU as a Global Role Model?*, in *Linking trade and non-commercial interests: the EU as a global role model?* 15-26 (T. Takacs et al. eds., CLEER Working Paper 2013/4).

<sup>128</sup> DSU art. 3.

## VI. CONCLUSION: HUMAN RIGHTS REQUIRE EMPOWERING CITIZENS THROUGH COSMOPOLITAN ECONOMIC LAW

European law was designed in response to unique governance failures (ushering in World Wars I and II and genocide) caused by power politics and naïve reliance on ‘Aristotelian virtue politics’ by ‘benevolent governments’. It has unique experiences with using ‘cosmopolitan constitutionalism’ for promoting the vigilance of self-interested citizens and independent ‘courts of justice’ to act as ‘countervailing powers’ limiting abuses of public and private power in transnational economic relations and promoting cosmopolitan IEL. European economic law was based on the common treaty obligations of EU member states - such as the GATT customs union rules, the IMF exchange rate obligations, the ICAO air transport rules, the WIPO intellectual property rules and the UN human rights obligations. The state-centred treaty obligations were construed and legally protected as cosmopolitan rules for the benefit of citizens inside the EU as well as in external free trade agreements with third states. As the ‘overlapping consensus’ among the diverse 28 EU member states rests on ‘cosmopolitan constitutionalism’ (i.e. human rights, rule of law, democratic self-government), EU law prescribes compliance with these principles also in the EU’s external relations:

‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law’ (Article 21:1 TEU).

The 2013 *Report of the Panel on Defining the Future of International Trade*, convened by WTO Director-General P. Lamy, concluded ‘that governments face a four-pronged convergence challenge’: (1) failures to promote further convergence of their trade regimes through multilateral WTO negotiations; (2) incoherencies of preferential and WTO trade regimes; (3) incoherencies between ‘trade and other domestic policies, such as education, skills and innovation’; and (4) inadequate ‘coherence between trade rules and policies, norms and standards in other areas of international co-operation’.<sup>129</sup> These ‘convergence challenges’ reflect not only policy alternatives; the unnecessary poverty and lack of democratic governance in many less-developed countries (notably in Africa and Asia) also illustrate ‘governance gaps’, ‘rule of law gaps’

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<sup>129</sup> WORLD TRADE ORG., *The Future of Trade: The Challenges of Convergence – Report of the Panel on Defining the Future of Trade convened by WTO Director-General Pascal Lamy*, 39 (Apr. 24, 2013) [http://www.wto.org/english/thewto\\_e/dg\\_e/dft\\_panel\\_e/future\\_of\\_trade\\_report\\_e.pdf](http://www.wto.org/english/thewto_e/dg_e/dft_panel_e/future_of_trade_report_e.pdf).



and ‘justice deficits’ of IEL. This contribution has argued that the ‘human rights approaches’ advocated by the UN High Commissioner for Human Rights for interpreting and developing IEL<sup>130</sup> must be complemented by multilevel constitutional, legislative, administrative and judicial regulation of ‘market failures’ as well as of ‘governance failures’ in IEL - with due respect for the legitimate reality of ‘constitutional pluralism’ protecting the diverse traditions of parliamentary democracy, ‘constitutional democracy’, and national ‘margins of appreciation’ for the ‘balancing’ of civil, political, economic, social and cultural rights.

If the purpose of constitutionalism and democracy is defined in terms of institutionalizing ‘public reason’ for protecting constitutional rights of citizens, then the power-oriented domination of UN and WTO institutions by the self-interests of governments is part of the problem, rather than of the solution, of multilevel governance of ‘aggregate public goods’. Due to the absence of a transnational ‘*demos*’ and of effective parliamentary and judicial control of intergovernmental power politics, transnational ‘cosmopolitan democracy’ must rely more on rights-based ‘participatory democracy’, cosmopolitan rights and their multilevel, legal and judicial protection vis-à-vis the ‘executive dominance’ in multilevel governance of international public goods. ‘Cosmopolitan interpretations’ of IEL and their judicial protection for the benefit of citizens can initiate ‘cosmopolitan reforms’ and citizen-oriented ‘public reason’ in multilevel governance by linking the ‘cosmopolitan functions’ of IEL to existing domestic rights of citizens and to the universal human rights obligations of UN member states. This is illustrated by the common market rights of European citizens, the derivation of investor rights from bilateral investment treaties, the universal recognition of commercial freedom of contract, property rights and freedom of arbitration, and their multilevel judicial protection by arbitral and national courts. Also GATT and the WTO Agreements include a large number of requirements to make available judicial, arbitral or administrative tribunals and independent review procedures not only at international governance levels among WTO members, but also in domestic legal systems. As the legal and ‘dispute settlement system of the WTO’ is explicitly committed to ‘providing security and predictability to the multilateral trading system’<sup>131</sup> and to ‘raising standards of living, ensuring full employment’ and promoting ‘sustainable development’ for the benefit of citizens,<sup>132</sup> the WTO guarantees of ‘access to justice’ and of ensuring inside each WTO member ‘the conformity of (domestic) laws, regulations and administrative procedures with its obligations as provided in

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<sup>130</sup> Cf. PETERSMANN – INTERNATIONAL ECONOMIC LAW, *supra* note 13, chs. IV & V.

<sup>131</sup> DSU art. 3.

<sup>132</sup> Marrakesh Agreement Preamble.

the annexed Agreements<sup>133</sup> justify interpreting precise and unconditional WTO obligations of governments also in terms of cosmopolitan rights of citizens. HRL and regional environmental law likewise include numerous guarantees of access to justice or to ‘a review procedure before a court of law or another independent and impartial body established by law’ in transnational environmental regulation.<sup>134</sup> National Constitutions increasingly respond to systemic governance failures by providing for broad legal and judicial remedies whenever ‘rights are violated by public authority’<sup>135</sup>, just as some regional economic agreements (like the Lisbon Treaty) are committed to facilitating ‘access to justice’,<sup>136</sup> ‘rule of law’<sup>137</sup> and a ‘right to an effective remedy and to a fair trial’ whenever ‘rights and freedoms guaranteed by the law of the Union are violated’.<sup>138</sup> In view of the evident connections between access to justice, democratic justification of law and governance and judicial protection of equal individual rights, UN and WTO law can learn from the European experience for promoting ‘just institutions’ governing IEL for the benefit of citizens and empowering individuals to protect themselves against the ‘pervasiveness of unreason’<sup>139</sup> in the politics of UN and WTO member states. In the absence of worldwide agreement on ‘global justice’ and on comprehensive ‘theories of justice’, cosmopolitan constitutionalism has the advantage of promoting individual reasonableness and empowering courts of justice to review and publicly explain whether the reasoning of the complainant or that of the defendant should prevail in the particular dispute before the court. Rights-based individual and judicial reasoning are also bound to advance justice as fairness and human rights beyond particular disputes, for instance by helping to identify social injustices, promoting tolerance (e.g. vis-à-vis competing different reasonable positions), contributing to ‘democratic government by discussion’, institutionalizing ‘public reason’ and rewarding ‘struggles for justice’ in conformity with democratic constitutions and their ‘consistent interpretation’ with the international legal obligations ratified by domestic parliaments for the benefit of citizens.

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<sup>133</sup> Marrakesh Agreement art. IX(4).

<sup>134</sup> Cf. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 9, June 25, 1998, 2161 U.N.T.S 447.

<sup>135</sup> E.g., Grundgesetz für die Bundesrepublik Deutschland [Constitution], May 23, 1949, art. 19(4) (Ger.).

<sup>136</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 67(4), Sep. 5, 2008, 2008 O.J. (C.115) 47.

<sup>137</sup> Treaty of Lisbon art. 2.

<sup>138</sup> Charter of Fundamental Rights of the European Union art. 47, Oct. 26, 2012, 2012/C 326/02.

<sup>139</sup> K.A. Appiah, *Sen's Identities*, in ARGUMENTS FOR A BETTER WORLD: ESSAYS IN HONOR OF AMARTYA SEN - I, 488 (K. Basu & R. Kanbur eds., 2009).