

ARTICLES

Ernst-Ulrich Petersmann, *Human Rights and International Economic Law*

Mavluda Sattorova, *Investment Treaty Breach as Internationally Proscribed Conduct: Shifting Scope, Evolving Objectives, Recalibrated Remedies?*

Surendra Bhandari, *Doha Round Negotiations: Problems, Potential Outcomes and Possible Implications*

NOTES AND
COMMENTS

Daniel Gervais, *Challenges in Intellectual Property Governance: Providing the Right Incentives in the Quest for Global Innovation*

Mitsuo Matsushita, *A Note on the Appellate Body Report in the Chinese Minerals Export Restrictions Case*

Felicity Hammond, *A Balancing Act: Using WTO Dispute Settlement to Resolve Regional Trade Agreement Disputes*

BOOK REVIEW

Nicolas Lamp, *A Review of Sonia E. Rolland, Development at the World Trade Organization (Oxford Univ. Press 2012)*

TL
&D

Trade, Law *and* Development

Vol. 4, No. 2

2012

PATRON

Justice N. N. Mathur

FACULTY-IN-CHARGE

Yogesh Pai

EDITORS-IN-CHIEF

Meghana Chandra

Shreya Munoth

EDITORS

Lakshmi Neelakantan
(SENIOR MANAGING)

Prianka Mohan
(CONTENT)

Neha Reddy
(CONTENT)

ASSOCIATE EDITORS

Nakul Nayak
(MANAGING)

Ali Amerjee

Prakhar Bharadwaj

Kruthika Prakash

COPY EDITORS

Chinmay Deshmukh

Shivangi Tyagi

Rohan Tigadi

Thomas J. Vallianeth

CONSULTING EDITORS

Shashank P. Kumar
Aman

Gopalakrishnan R.
Prateek Bhattacharya

Meghana Sharafudeen
Jayant Raghu Ram

BOARD OF ADVISORS

Raj Bhala

Glenn Wiser

Jagdish Bhagwati

Daniel Magraw

B. S. Chimni

M. Sornarajah

Ricardo Ramírez Hernández

Vaughan Lowe

W. Michael Reisman

Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

HUMAN RIGHTS AND INTERNATIONAL ECONOMIC LAW

ERNST-ULRICH PETERSMANN*

The customary methods of international treaty interpretation and dispute settlement, as codified in the Vienna Convention on the Law of Treaties, require interpreting treaties and settling disputes 'in conformity with the principles of justice and international law', including 'human rights and fundamental freedoms for all' (Preamble, VCLT). As all member states of the United Nations (UN) have human rights obligations, this article explores the impact of human rights on legal methodology, on the justification of international economic regulation, and on promoting 'human rights coherence' of international economic law (IEL) as well as synergies between IEL and human rights law (HRL).

TABLE OF CONTENTS

- I. INTRODUCTION
- II. MORAL FOUNDATIONS OF HRL AND THEIR IMPACT ON LEGAL METHODOLOGY
- III. HOW SHOULD IEL BE JUSTIFIED?: JUSTICE, RULE OF LAW AND HUMAN RIGHTS
- IV. DIVERSE TRADITIONS OF JUSTIFYING IEL
- V. MULTI-LEVEL CONSTITUTIONAL PLURALISM CAN PROMOTE SYNERGIES BETWEEN HRL AND IEL
- VI. CONSTITUTIONAL JUSTICE REQUIRES CITIZEN-ORIENTED 'PUBLIC REASON' IN IEL
- VII. HOW SHOULD IEL IN THE 21ST CENTURY BE DESIGNED?
- VIII. NEED FOR 'STRUGGLES FOR JUSTICE' FOR 'CONSTITUTIONALISING' IEL
- IX. REGULATION OF THE 'COLLECTIVE ACTION PROBLEMS' IN MULTI-LEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS REQUIRES A PARADIGM CHANGE IN IEL
- X. LESSONS FROM THE 'EUROPEAN LABORATORY' FOR MULTI-LEVEL ECONOMIC REGULATION PROTECTING HUMAN RIGHTS AND OTHER INTERNATIONAL PUBLIC GOODS

* Emeritus Professor of International and European law at the European University Institute, Florence, Italy, and Former Professor at the University of Geneva and its Graduate Institute for International Relations (Switzerland). Former Legal Advisor in the German Ministry of Economic Affairs, GATT and the WTO; Former Secretary, Member and Chairman of numerous GATT/WTO dispute settlement panels. The author can be contacted at: [ulrich.petersmann\[at\]eui.eu](mailto:ulrich.petersmann[at]eui.eu).

I. INTRODUCTION

This article proceeds from the fact that all UN member states have legal obligations under the UN Charter, UN human rights conventions as well as general international law to respect, protect and fulfil human rights at home and abroad. This has also been confirmed and progressively developed by national and international Human Rights Law [HRL] and UN human rights conventions like the 1989 UN Convention on the Rights of the Child [CRC], ratified by more than 190 states and confirming ‘equal and inalienable rights of the human family (as) the foundation of freedom, justice and peace in the world’ (Preamble, CRC). It argues that this ‘constitutional foundation’ and limitation of international law in the 21st century requires justifying, interpreting, designing and developing IEL in conformity with human rights and ‘principles of justice’. As human rights protect individual and democratic diversity and a right ‘to a social and international order in which the rights and freedoms set forth in this Declaration (i.e., the 1948 Universal Declaration of Human Rights) can be fully realised’ (Article 28 UDHR), the necessary multi-level governance for the collective supply of national and international public goods demanded by citizens must be based on respect for legitimately diverse ‘constitutional pluralism’ and ‘cosmopolitan constitutionalism’ empowering citizens and democratic institutions to realise their collective responsibility for protecting human rights, democratic self-governance, rule of law, fulfilment of basic needs and collective supply of international public goods.¹ Justice, human rights, democracy and rule of law – like many provisions of IEL – are ‘interpretive legal concepts’ which people share, even though they often disagree about the criteria for interpreting and applying these legal terms. Hence, as explained by R. Dworkin,²

- at the ‘semantic stage’, a ‘useful theory of an interpretive concept must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures’;³
- at the ‘jurisprudential stage’, the legal interpreter must search for the values that supply the best interpretation of the aspirational values of legal concepts like rule of law, including the ‘ideal of political integrity’ as a requirement of governing ‘through a coherent set of political principles whose benefits extend to all citizens’ and legitimise coercive power of states;⁴

¹ Cf. ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS 113-54(2012) [hereinafter PETERSMANN].

² Cf. RONALD DWORKIN, JUSTICE IN ROBES Ch. 1 (2006).

³ *Id.* at 12.

⁴ *Id.* at 13.

- at the ‘doctrinal stage’, the ‘truth conditions of propositions of law’ must be constructed ‘in the light of the values identified at the jurisprudential stage’ so that legal justifications fit the practice as well as the values that the practice serves (e.g., the constitutional and procedural practices in which legal claims are embedded);⁵
- at the ‘adjudicative stage’, courts of justice deploying the monopoly of coercive power must impartially and independently review whether the enforcement of the law in particular cases by political officials is legally justified by ‘the best interpretation of legal practice overall’.⁶ According to Dworkin’s ‘adjudicative principle of integrity’, judges should interpret law - in conformity with its objectives of legality, rule of law and its underlying constitutional principles of justice - as expressing ‘a coherent conception of justice and fairness’: ‘law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.’⁷

This article begins with a discussion of the impact of HRL on legal methodology in IEL research [Part II] and the diverse approaches to justifying IEL [Part III–IV]. Then, it briefly discusses the importance of ‘constitutional pluralism’ [Part V] and ‘constitutional justice’ [Part VI] for interpreting, designing and developing IEL in the 21st Century [Part VII]. The article emphasises the need for citizen-driven ‘struggles for justice’ in order to realise ‘constitutional reforms’ of IEL, with due respect for the legitimate diversity of national Constitutions and democratic systems [Part VIII]. The more economic and legal ‘globalization’ transform ‘national public goods’ into transnational ‘aggregate public goods’ (like international rule of law, a mutually beneficial global division of labour), the more national law and institutions are required to be supplemented by international law and institutions for constituting, limiting, regulating and justifying the multi-level governance of transnational ‘international public goods’ [Part IX]. Multi-level political, legal and judicial governance in the European Union (EU), in the

⁵ On the two tests of ‘fit’ and ‘value’ as ‘different aspects of a single overall judgment of political morality’ and ‘best justification’ of legal practices, *see id.* at 15-7.

⁶ *Id.* at 18, 25.

⁷ RONALD DWORIN, *LAW’S EMPIRE* 225, 243 (1986). Even though Dworkin developed this legal methodology for national legal systems, the methodology is legally applicable also for international law and the customary methods of international treaty interpretation ‘in conformity with principles of justice’ and the human rights obligations of states. *See* Vienna Convention on the Law of Treaties preamble, art. 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331.

enlarged 'European Economic Area' (EEA) of the member states of the EU and the European Free Trade Area (EFTA), as well as in the implementation of the European Convention of Human Rights (ECHR) for the benefit of 800 million citizens in the 47 ECHR member states offers a 'laboratory' for multi-level economic regulation and multi-level protection of human rights across national borders, which offers lessons for incremental 'constitutional reforms' in regional economic and legal systems outside Europe as well [Part X].

II. MORAL FOUNDATIONS OF HRL AND THEIR IMPACT ON LEGAL METHODOLOGY

Many national constitutions, regional human rights conventions and all UN human rights instruments derive human rights from respect for the human dignity of all human beings who – as stated in Article 1 of the UDHR – 'are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. The increasing recognition of human rights to democratic self-governance (Article 21 UDHR), access to justice (Article 8 UDHR), to protection 'by the rule of law' (Preamble UDHR) and 'a social and international order in which the rights and freedoms can be fully realised' (Article 28 UDHR), reflects the constitutional dimensions of HRL. The moral justification of the entitlement of every individual to 'inalienable' and 'indivisible human rights' requires legal and constitutional protection *vis-à-vis* all governance institutions (e.g., also *vis-à-vis* 'smart sanctions' imposed by the UN Security Council without judicial remedies for adversely affected individuals, protection of the 'dignity of labour' *vis-à-vis* abuses of economic power), including judicial review of state-centred 'rules of recognition' determining the validity and content of human rights and international rules.⁸ For instance, as the human rights obligations of all UN member states and their guarantees of democratic governance require recognising citizens as co-authors of representative lawmaking, the citizen-driven and rights-based nature of international economic co-operation may justify 'constitutional interpretations' protecting cosmopolitan rights, general consumer welfare and transnational rule of law for the benefit of citizens rather than special interests of government officials (e.g., to avoid judicial accountability) and of 'rent-seeking' interest groups. The codification of the customary rules of treaty interpretation in the VCLT provides for interpretation based on text, context, objective and purpose (Articles 31-33) 'in conformity with the principles of justice and international law', including 'human rights and fundamental freedoms for all' (Preamble VCLT). In contrast to the interpretation methods practiced in many national jurisdictions and in view of the lack of parliamentary lawmaking in most international organisations, the preparatory drafting history is recognised only as a 'supplementary means of

⁸ See PETERSMANN, *supra* note 1.

interpretation' (Article 32). Hence, claims that judges must respect the often uncertain meaning that some diplomats and government officials claim to have intended for treaty texts – rather than explore the most coherent interpretations benefitting citizens in conformity with 'principles of justice' justifying the respective treaty obligations – remain contested, notably in case of multilateral 'legislative treaties' that were initially negotiated by only few governments (like GATT 1947) without a formal record of the drafting history and have subsequently been ratified by national parliaments in many other countries. UN law does not limit the 'sources of law' and 'rules of recognition' to 'international conventions ... recognized by states' (Article 38, Statute of the ICJ); the additional sources – like (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised 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' (Article 38 ICJ Statute) – may depend no less on recognition by citizens, civil society, parliaments and courts of justice than on claims by diplomats that they control the '*opinio juris sive necessitatis*' as traditional gate-keepers of 'Westphalian international law among states'.⁹

National and international courts often agree on only a few 'core elements' of human dignity,¹⁰ like the requirements that (1) every human being possesses an intrinsic worth and moral entitlement to human rights, merely by being human; (2) this moral worth and entitlement must be recognised and respected by others; and (3) the state must be seen to exist for the sake of the individual human being, and not *vice versa*. Beyond these core elements, the transformation of moral principles of dignity and human rights into positive law may legitimately vary among jurisdictions according to their respective traditions, resources and democratic preferences (e.g., on how to prioritise and protect legal rights under conditions of scarce resources).¹¹ Constitutions with commitments to 'establish justice' (as stated in the Preamble of the United States Constitution) and protect rights 'retained by the people' (as stated in the Ninth Amendment) offer dynamic legal and democratic frameworks for social and political movements claiming, recognising, legalising and enforcing economic and social rights such as right to food, water,

⁹ The term 'Westphalian international law among states' is used here for the prevailing state practice between the peace treaties of Westphalia (1648) and World War II to define the legitimacy of states in terms of the effective power of the rulers over the population in a specified territory without regard to the democratic legitimacy of their 'right to rule'.

¹⁰ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR J. INT'L L. 655 (2008).

¹¹ On the constitutional and judicial protection of 'dignity rights' in Asia, Africa, Europe, Latin America and North America over the past 60 years, see Erin Daly, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* (2012).

health protection, education and housing that are increasingly protected in national constitutions, legislation, administrative regulations, judicial remedies and international agreements in developed as well as less-developed democracies.¹² In similar ways, the EU Court of Justice [CJEU], the EFTA Court, the European Court of Human Rights [ECtHR] and increasingly, regional economic courts in Africa and Latin America are interpreting regional economic and human rights conventions in mutually coherent ways as requiring judicial review of economic restrictions with due regard to HRL.¹³ This article argues that – as suggested by the UN High Commissioner for Human Rights in numerous expert reports on the human rights dimensions of WTO law and international investment law¹⁴ – IEL must also be interpreted in the 21st century in conformity with the legal obligations of all 193 UN member states to respect, protect and fulfil human rights, as explicitly required by the customary methods of treaty interpretation codified in the Vienna Convention on the Law of Treaties.¹⁵

Since 1945, all UN member states have regularly re-affirmed that ‘(a)ll human rights are universal, indivisible and interdependent and interrelated...it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms’.¹⁶ The EU Charter of

¹² See the examples of constitutional and judicial innovations in South Africa, Colombia, Ghana, India, European and North American countries in KATHARINE YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (2012); *COURTING SOCIAL RIGHTS. JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri & Daniel M. Brinks eds., 2008); BERTRAND G. RAMCHARAN, *JUDICIAL PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: CASES AND MATERIALS* (2005).

¹³ See, e.g., Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, 19 EUR. J. INT’L L. 769 (2008). See also the ‘judicial balancing’ of economic and human rights in the MERCOSUR arbitral award of Sept. 6, 2006 in the ‘Bridges case’ between Argentina and Uruguay; cf. Lucas Lixinski, *Human Rights in MERCOSUR*, in *THE LAW OF MERCOSUR* 351 (Franca Filho et al. eds., 2010). A 2012 judgment by the Court of Justice of the Economic Community of West African States found the Nigerian government responsible for environmental and human rights abuses by oil companies and other perpetrators, notably violating Articles 21 (on the right to natural wealth and resources) and 24 (on the right to a general satisfactory environment) of the African Charter on Human and Peoples’ Rights; cf. Press Release, Amnesty International, PRE01/619/2012, available at, <http://www.amnesty.org/en/for-media/press-releases/ground-breaking-ecowas-court-judgment-orders-government-punish-oil-company>.

¹⁴ For a discussion of these reports by the UN High Commissioner, see JAMES HARRISON, *THE HUMAN RIGHTS IMPACT OF THE WTO* (2007) [hereinafter HARRISON].

¹⁵ Ernst-Ulrich Petersmann, *International Trade Law, Human Rights and the Customary International Law Rules on Treaty Interpretation*, in *THE WTO AND HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES* 69-90 (Sarah Joseph et al. eds., 2009).

¹⁶ Vienna Declaration and Programme of Action adopted at the UN World

Fundamental Rights expresses this ‘indivisibility’ of human rights by limiting the separation of civil, political, economic, social and cultural human rights in some UN human rights conventions by protecting – in one single human rights charter ratified by all 27 EU member states – multiple dignity rights (Title I), liberty rights (Title II), equality rights (Title III) solidarity rights (Title IV), citizen rights (Title V) and guarantees of justice (Title VI) in the economy no less than in the polity, thereby also protecting the individual liberty to decide which dimensions of civil, political, economic, social and cultural human rights an individual values most. Arguably, respect for the multiple dimensions of autonomy rights requires respecting the diverse ‘contexts of justice’ in international economic regulation, such as:

- *private freedoms* of citizens (e.g., freedoms of association) to define and develop one’s individual identity in private communities with due respect for the legitimate diversity of individual and social conceptions of a ‘good life’;
- *moral freedoms* of all members of global humanity (e.g., to respect for, and protection of, ‘inalienable’ and ‘indivisible’ human rights) in their relationships with other human beings inside and beyond states;
- *legal freedoms* of citizens to equal treatment and participation in legal communities, including ‘negative freedoms’ from unjustified government restrictions and ‘positive freedoms’ of participation and development of one’s human capacities;
- *political freedoms* of citizens to participate as co-authors of democratic legislation in the democratic exercise of national governance powers;
- *cosmopolitan freedoms* of citizens (e.g., in their roles as producers, investors, traders and consumers cooperating in the global division of labour) to be recognised and legally protected as ‘world citizens’ in national and international law in order to be able to exercise their collective responsibility for jointly supplying transnational public goods demanded by citizens.¹⁷

Conference on Human Rights by more than 170 states on June 25, 1993 (A/CONF.157/24, para.5). This ‘universal, indivisible, interrelated, interdependent and mutually reinforcing’ nature of human rights was reaffirmed by all UN member states in numerous human rights instruments such as U.N. Resolution 63/116 of Dec. 10, 2008 on the ‘60th anniversary of the Universal Declaration of Human Rights’ (UN Doc A/RES/63/116 of Feb. 26, 2009).

¹⁷ The different private, legal and political ‘contexts of justice’ in particular communities, and of moral and cosmopolitan principles in the world community of human beings, have been recognised in human rights declarations since the *Déclaration des droits de l’homme et du citoyen* of 1789; cf. RAINER FORST, CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM (2002).

UN law leaves states a large ‘margin of appreciation’ as to how civil, political, economic, social and cultural human rights should be legally protected, prioritized and reconciled in case of conflicts. The 1966 UN Covenant on Economic, Social and Cultural Rights (ICESCR) focuses on the right to work (Article 6), the right to just and favourable conditions of work (Article 7), labour and trade union rights (Article 8), the right to social security and insurance (Article 9), protection of the family, mothers and children (Article 10), the right to an adequate standard of living (Article 11), the rights to mental and physical health (Article 12) and to education (Article 13). Yet, apart from a brief reference to ‘safeguarding fundamental political and economic freedoms to the individual’ (Article 6.2), the ICESCR does not refer to the economic freedoms of profession, trade and private property which are emphasised in the EU Charter of Fundamental Rights, in conformity with the constitutional traditions in EU member states. The lack of universal agreement on economic liberties reflects the tradition in many common law countries of protecting freedom of contract, freedom of profession and other economic freedoms as common law guarantees rather than as constitutional and human rights. The ‘incomplete nature’ of HRL and of its multi-level implementation in IEL may justify claims for ‘additional human rights’ – like the ‘right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights’.¹⁸ Protection of human rights by UN human rights bodies and courts of justice may entail legal presumptions limiting authoritarian claims that governments (as ‘agents’ with limited powers) have not conceded such rights to their citizens (as the ‘democratic principals’ of national and international law in the 21st century).

HRL also protects institutional guarantees of democratic participation, individual access to justice and judicial protection of rule of law that enable citizens, their democratic representatives and courts of justice to challenge power-oriented, intergovernmental economic regulation, even in case of EU regulations implementing legally binding sanctions approved by the UN Security Council.¹⁹ Arguably, the emerging ‘multilevel human rights constitution’ changes the rules of recognition of international law by constitutionally limiting power-oriented claims by rulers and their diplomats to interpret and define the scope of international rules, general principles of law and human rights. HRL may justify legal claims that human rights (e.g., access to water and essential medicines), universally recognised in UN Resolutions, may be relevant context for interpreting IEL ‘in conformity

¹⁸ This right was recognised in U.N. General Assembly Resolution, U.N. Doc.A/64/L.63/Rev.1 (July 26, 2010) as well as in U.N. Human Rights Council Resolution, A/HRC/Res/15/9 (Sept. 30, 2010) (deriving this right from ‘the right to an adequate standard of living’).

¹⁹ See Joined Cases C-402 & C-415/05, *Kadi & Al Barakaat v. Council of the European Union*, 2008 E.C.R. I 6351 [hereinafter *Kadi & Al Barakaat*].

with principles of justice'. Courts of justice – as the most independent guardians of the constitutional rights of citizens which, unlike political bodies, have to justify judicial decisions on the basis of constitutional principles – may insist on their 'constitutional mandate' of interpreting and applying IEL in conformity with human rights so as to protect citizens against abuses of public and private power. The rights-based jurisprudence in European economic law illustrates how multi-level judicial protection of individual rights may be warranted notably in citizen-driven areas of IEL. HRL calls for regulating mutually beneficial co-operation among citizens in the international division of labour in terms of rights and judicial remedies of citizens rather than merely rights of states so as to protect citizens against abuses of public and private power and give concrete legal meaning to the universal recognition that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised' (Article 28 UDHR). As explained by Kantian legal philosophy,²⁰ respect for human dignity and justice requires treating human beings as ends in themselves by protecting maximum equal freedoms of individuals and promoting public reason through ever more precise national, international and cosmopolitan safeguards in the economy, no less than in the polity. Just as national 'human rights revolutions' since the 18th century continue to challenge authoritarian conceptions of 'rule by law' and related legal methodologies by insisting on constitutional and democratic guarantees of constitutional and human rights protecting 'rule of law' for the benefit of citizens, so does the worldwide and regional HRL limit IEL and discretionary foreign policy powers by empowering citizens, civil society and courts of justice to challenge abuses of power through individual and judicial 'struggles for justice' in IEL.²¹

III. HOW SHOULD IEL BE JUSTIFIED?: JUSTICE, RULE OF LAW AND HUMAN RIGHTS

Law as an instrument of governance needs justification. Economists tend to

²⁰ On Kantian legal theory, see PETERSMANN, *supra* note 1, at 160-91. Like Hobbes, Kant regarded the natural condition of the relations among men and states as a state of war that could be terminated only through a 'constitutional contract'. This, in contrast to Hobbes, required limiting abuses of governance powers in all human interactions at national, international and transnational levels.

²¹ On the need for such 'struggles of justice', see *infra* Part VIII. On the empirical evidence that rights-based 'cosmopolitan regimes' of human rights and IEL (as in EU, EEA and ECHR law and jurisprudence, investment and commercial law and arbitration) have protected individual rights, general consumer welfare and transnational rule of law more effectively than state-centered 'Westphalian conceptions of international law', see PETERSMANN, *supra* note 1 at 145-53.

justify economic rules in terms of promoting economic efficiency, individual utility, consumer welfare or total welfare. Yet, increases in gross domestic product may not prevent continuing deprivation of the poor from access to basic education, health care, food, water, housing and other ‘basic needs’ necessary for developing their human capabilities;²² mere promotion of ‘market equilibrium’ through supply and demand, or ‘price-setting’ by monopolist suppliers (e.g., of tap water and patented medicines), may be inconsistent with human rights and corresponding government obligations to fulfil basic needs of everybody (e.g., in terms of human right of access to water, food and essential medicines at affordable prices). Utilitarian focus on ‘output legitimacy’ cannot avoid questions of ‘input legitimacy’; for example, regarding the frequent ‘producer-bias’ in IEL resulting from inadequate regulation of ‘market failures’ and ‘private-public partnerships’ favouring special producer interests over general consumer welfare.²³ Similarly, positivist legal claims (based on authoritative issuance of rules and their social efficacy) justifying ‘rule of men’ and their ‘rule by law’ continue being challenged, since antiquity, by invoking principles of justice as legal conditions of the validity of rules. Whereas conservative conceptions of justice emphasise the need for rule-following and upholding legality, reformative conceptions of justice acknowledge the additional function of law and courts of justice to ensure equity with due regard to the particular circumstances of disputes and the inevitably incomplete nature of rule-making. Hence, there are longstanding traditions of complementing universal conceptions of ‘formal justice’ (e.g., as defined by equal human rights and sovereign equality of states) by particular conceptions of ‘substantive justice’ (e.g., in terms of equity and difference principles justifying rectification of formally equal treatment so as to render to every man his due).

As the need for labouring in order to gain the resources for human survival (*animal laborans*), and the human desire for social recognition through work (*homo faber*) are essential parts of the human *vita active*,²⁴ private commercial law and public economic and trade regulation – as instruments for enhancing legal security for international trade and reducing transaction costs – belong to the oldest fields

²² On ‘capabilities’- and human development approaches criticising the dominant ‘GDP approaches’ see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) [hereinafter SEN]; MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011).

²³ On ‘producer biases’ in national trade laws and trade policies, see, for example, ERNST-ULRICH PETERSMANN, *CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL AND DOMESTIC FOREIGN TRADE LAWS AND FOREIGN TRADE POLICY IN THE UNITED STATES, THE EUROPEAN COMMUNITY AND SWITZERLAND* Ch. V, VI (1991) [hereinafter PETERSMANN, *CONSTITUTIONAL FUNCTIONS*].

²⁴ See HANNAH ARENDT, *THE HUMAN CONDITION* (1958).

of national and international law (*ubi commercium, ibi jus*). Modern IEL differs from most other fields of international law by ever more comprehensive guarantees of legal and judicial remedies protecting reciprocal rights and obligations not only of states, but also of individuals participating in the international division of labour. Yet, due to the utilitarian and often mercantilist traditions of international economic regulation, international economic treaties outside Europe only rarely refer to human rights and fail to protect transnational ‘rule of law’ effectively for the benefit of citizens. For instance, even though WTO law and dispute settlement procedures are explicitly committed to ‘providing security and predictability to the multilateral trading system’ (Article 3, Dispute Settlement Understanding) and provide also for individual access to national courts (e.g., in GATT Article X), most national courts in the 158 WTO members do not allow citizens to invoke and enforce the WTO obligations of their governments in domestic courts.²⁵ As constitutional and legal protection of economic and social rights remains weak in many common law countries and less-developed countries (LDCs), effective protection of ‘freedom from poverty’ and constitutional limitations of abuses of government powers (like the ‘lending privilege’ and the ‘resource privilege’ of authoritarian rulers to use foreign loans and sell domestic resources for their selfish interests)²⁶ in worldwide IEL often remain a cosmopolitan dream.

Similar to Article 1 of the UN Charter, customary law prescribes that ‘disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law’ (Preamble VCLT). The Agreement establishing the World Trade Organization (WTO), like many other international economic treaties, recognises ‘basic principles and objectives [...] underlying this multilateral trading system’. Some of these principles are specified in WTO provisions, for instance in the General Agreement on Tariffs and Trade (GATT) and other WTO agreements on trade in goods, services and trade-related intellectual property rights. Other principles are incorporated into WTO law by reference to other international law rules, for example in the WTO Dispute Settlement Understanding (DSU) which requires interpreting WTO law ‘in accordance with customary rules of interpretation of public international law’ (Article 3.2). These customary rules include rules and principles for textual, contextual and teleological interpretation of treaties aimed at

²⁵ See Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 72 (Ernst-Ulrich Petersmann ed., 1997); Meinhard Hilf, *The Role of National Courts in International Trade Relations*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 559 (Ernst-Ulrich Petersmann ed., 1997).

²⁶ See FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? (Thomas Pogge ed., 2007).

mutually coherent interpretations on the basis of legal presumptions of lawful conduct of states, the systemic character of international law, and the mutual coherence of international rules and principles. The customary law requirement of interpreting treaties ‘in conformity with principles of justice’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’ (Preamble VCLT), also calls for clarifying the substantive principles of justice underlying IEL, like freedom, non-discrimination, rule of law, independent third-party adjudication and preferential treatment of LDCs. For example, WTO dispute settlement bodies – like other international courts – tend to invoke inherent powers for administering justice if the WTO dispute settlement procedures lack specific rules (e.g., on burden of proof, preliminary rulings, *amicus curiae* briefs, public meetings of dispute settlement panels). The distinction in GATT Article XXIII between ‘violation complaints’, ‘non-violation complaints’ and ‘situation complaints’ reflects the ancient legal distinctions between principles of distributive, commutative, corrective justice and equity. Rules and adjudication that are not perceived as just by governments, citizens and ‘courts of justice’, are unlikely to be effective over time.²⁷

Hence, IEL must be justified and evaluated in terms of justice and human rights, even if human rights are not incorporated into the law of worldwide economic organisations. Legal and judicial interpretation of WTO rules in conformity with human rights – similar to the 1994 Ministerial Decision on the mutual coherence of trade and environmental policies and the 1996 WTO Ministerial Declaration rejecting ‘the use of labour standards for protectionist purposes’ and calling for co-operation with the International Labor Organization as ‘the competent body to set and deal with [labour] standards’ - may be more appropriate for promoting legal coherence among IEL and HRL in worldwide governance institutions than incorporating UN human rights obligations into WTO law and following the model of the incorporation of intellectual property treaty obligations into the WTO Agreement on Trade-Related Intellectual Property Rights [TRIPS]. However, this may be neither legally necessary nor politically desirable in view of the ‘reasonable disagreement’ among WTO members on how to reconcile civil, political, economic, social and cultural human rights in the context of economic regulation.²⁸

²⁷ See Ernst-Ulrich Petersmann, *Constitutional Theories of International Economic Adjudication and Investor-State Arbitration*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 137-94 (Pierre-Marie Dupuy et al. eds., 2009).

²⁸ See Chantal Thomas, *The WTO and Labor Rights: Strategies of Linkage*, in THE WTO AND HUMAN RIGHTS 257 (Sarah Joseph et al. eds., 2009). The 1994 Ministerial Decision is reproduced in WTO, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 469 (1995). The 1996 WTO Ministerial Decision is to be found in Singapore Ministerial Declaration, WT/MIN (96)/DEC (Dec. 18, 1996).

The worldwide recognition of human rights and corresponding obligations of all UN member states entails that citizens increasingly challenge the democratic legitimacy of power-oriented structures of international law. For example, the human rights of access to justice challenge the lack of effective legal and judicial remedies for the individual in UN human rights law and the ‘protection biases’ in many international economic treaties favouring powerful producer interests over general consumer welfare which is nowhere mentioned in worldwide economic agreements like the WTO Agreement. Arguably, the one-sided focus of the GATT/WTO rules on safeguard measures (Article XIX GATT) and anti-dumping measures (Article VI GATT), protecting import-competing producers against ‘injurious imports’ should be balanced by cost-benefit analyses weighing the ‘protection rents’ for producers against the often much bigger welfare losses in terms of consumer welfare and productivity gains from competition. The basic WTO principles of reciprocal trade liberalisation, legal protection and regulation of freedom of trade – subject to comprehensive ‘exceptions’ protecting sovereign rights to give priority to non-economic public interests – may be justified by diverse theories of justice, such as:

- utilitarian theories defining justice in terms of maximum satisfaction of individual preferences and consumer welfare through consumer-driven, non-discriminatory conditions of competition and division of labour in global markets;
- libertarian theories focusing on legal protection of individual liberty and property rights for empowering individuals to enhance their welfare through mutually beneficial co-operation based on voluntarily agreed ‘just transfers of property rights’;
- egalitarian concepts defining justice not only in terms of equal freedoms and rule of law, but also in terms of social human rights and democratically agreed redistribution and ‘difference principles’ benefiting poor people; and
- international theories of justice based on sovereign equality and empowerment of states and peoples to increase their national welfare through liberal trade subject to ‘public interest exceptions’ that give priority to sovereign rights to protect non-economic citizen interests.²⁹

The reasonable disagreement on how IEL should be interpreted and clarified in light of principles of justice and the human rights obligations of UN member states entails methodological questions of legal interpretation. For instance, even though the universal recognition of human rights and other ‘principles of justice’ reduces the practical relevance of the perennial controversies among ‘legal

²⁹ For a comprehensive discussion of theories of justice in IEL, see PETERSMANN, *supra* note 1 at 332-52.

positivists' (defining law by the two elements of 'authoritative rules' and their 'social efficacy') and 'non-positivist' conceptions of law (defining law by additional 'principles of justice'), judicial interpretations of IEL rules may legitimately disagree on:

- the relationship between human rights and the diverse principles of procedural, formal and substantive justice (e.g., does every injustice violate human rights, making every human rights violation unjust?);
- the relationship between human rights as moral principles and positive international law (e.g., do all violations of 'principles of justice', like violations of human rights, affect the validity of IEL rules? Can diverse constitutional conceptions of human rights justify diverse interpretation of IEL rules?); or
- on the legal boundaries for allegedly 'democratic limitations' of individualist conceptions of human rights and IEL by communitarian values (like Confucian 'Asian preferences' for social harmony over judicial protection of individual rights; prohibitions of certain goods and services justified by religious Islamic beliefs).

Hence, as human rights also protect individual and democratic diversity, the reality of legitimate 'constitutional pluralism' among countries may justify legitimately diverse national implementations of IEL obligations depending on the diverse contexts of national constitutional and human rights regimes, the diverse democratic preferences of peoples, and their legitimately diverse prioritisation of scarce resources for supplying national and international public goods for the benefit of citizens. Such 'constitutional pluralism' may justify judicial deference at national and international levels of governance, for instance in judicial interpretations of 'public interest exceptions' (such as Article XX GATT) protecting sovereign rights to restrict international trade in order to safeguard 'public morals' and other 'public interests'. Yet, such legal and judicial deference towards national policy discretion must remain limited by international 'principles of justice' such as protection of 'reciprocity' of internationally agreed WTO obligations subject to the 'special and differential treatment' provisions in favour of LDCs and guarantees of 'good faith' interpretations of WTO law.

IV. DIVERSE TRADITIONS OF JUSTIFYING IEL

Just as 'social contract theories' have justified national and international legal systems in diverse ways, conceptions of human rights, democracy and international law legitimately differ among peoples. For instance, in contrast to utilitarian conceptions of 'social contracts' (e.g., by T. Hobbes) as a delegation of 'absolute powers' by the people in exchange for the protection of peace and legal security by the ruler, modern theories of justice (from I. Kant to J. Rawls) justify national and

international legal systems in terms of deontological social contract theories based on principles of ‘justice’ and human rights.³⁰ Whereas many common law countries (like England and the USA) have prioritised civil and political rights and some Asian countries prioritise certain economic and social rights (e.g., in China), the EU Charter of Fundamental Rights commits all 27 EU member states to multi-level legal and judicial protection of civil, political, economic, social and cultural rights. The EU remains the only international economic organisation that has ratified a UN human rights convention (e.g., the UN Convention on the Rights of Persons with Disabilities) and is constitutionally required by Article 6 of the 2009 Lisbon Treaty on European Union, to accede to the ECHR. Even if it remains unlikely that any regional economic organisation outside Europe will follow the ‘model’ of ‘mainstreaming human rights’ into European economic law, the case-law of the CJEU, the EFTA Court, the ECtHR and national courts in Europe offer numerous examples of the legal and judicial problems of preventing conflicts – and promoting synergies – between IEL and HRL.³¹

European economic law is explicitly ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ (Article 2 of the Treaty on European Union). The EU’s common market and competition rules for 500 million EU citizens in 27 EU member states are based on multi-level judicial protection of individual market freedoms, other fundamental rights and rule of law complementing the European ‘area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States’ (Arts. 67 of TEU). The EU Charter of Fundamental Rights guarantees multi-level legal and judicial protection of dignity rights, freedoms, equality, solidarity rights, access to justice and citizen rights in the economy no less than in the polity, without prejudice for higher levels of protection in national constitutions and other international agreements (Article 53). This highest level of protection principle is likewise recognised in the ECHR (Article 53). It entails that national and international courts in the 47 member states of the ECHR are legally required to review whether national and international economic regulation can be justified as transparent, non-discriminatory, necessary and proportionate instruments for protecting fundamental rights and other public interests, with due regard for domestic ‘margins of appreciation’ in the local, national or regional implementation of international human rights obligations. The CJEU emphasises the need for full judicial review of whether private, national and EU restrictions of fundamental rights – including economic freedoms and property rights – are compatible with the constitutional principles and fundamental

³⁰ See THE SOCIAL CONTRACT FROM HOBBS TO RAWLS (David Boucher & Paul Kelly eds., 1994).

³¹ For details, see PETERSMANN, *supra* note 1 at 210-60.

rights of European law, even in the case of EU regulations implementing legally binding sanctions approved by the UN Security Council.³² The EU Treaty prescribes ‘strict observance of international law’ (Article 3) and respect for the principles of ‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity’ (Article 21) also for the EU’s external relations and international economic regulation.

Even though more than 70% of UN member states have accepted ‘human rights clauses’ in their trade agreements with the EU and other developed countries, most regional economic treaties outside Europe, the worldwide Bretton Woods Agreements establishing the International Monetary Fund (IMF) and the World Bank Group, as well as WTO law avoid references to human rights. Yet, the universal recognition of human rights may justify legal presumptions that IEL rules should be presumed to regulate the economy in conformity with the human rights obligations of states. Various studies by the UN High Commissioner for Human Rights on the consistency of international trade and investment law with human rights,³³ like the ever-larger number of academic case studies on the human rights dimensions of IEL,³⁴ have produced no evidence of inherent conflicts between worldwide economic treaties and HRL. As international treaties must be interpreted and applied in conformity with the human rights obligations of states, state practice and dispute settlement practices continue to progressively clarify the often controversial human rights dimensions of IEL. For instance, in the *EC-Tariff Preferences* dispute,³⁵ the WTO Panel interpreted the non-discrimination requirement in the WTO’s Enabling Clause as requiring that identical tariff preferences under the Generalized Systems of Preferences (GSP) be provided to all LDCs without differentiation. The Appellate Body³⁶ reversed this finding and concluded that ‘the term “non-discriminatory” ... does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential treatment, however, preference-granting countries are required, by virtue of the

³² See Kadi & Al Barakaat, *supra* note 19.

³³ See HARRISON, *supra* note 14.

³⁴ See HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier et al. eds., 2005); INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES (Frederick Abbott et al. eds., 2006); THE WTO AND HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES (Sarah Joseph et al. eds., 2009).

³⁵ Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003).

³⁶ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (April 7, 2004).

term “non-discriminatory”, to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the “development, financial and trade needs” to which the treatment in question is intended to respond.³⁷ In response to the various disputes over compulsory licensing of medicines, WTO Members adopted a ‘waiver’ in August 2003, as well as a subsequent amendment of Article 31 *bis* of the TRIPS Agreement, authorizing compulsory licensing of medicines for export to countries with insufficient or no production capacity in the pharmaceutical sector.³⁸ Yet, the fact that Canada’s license for exports to Rwanda has remained the single compulsory license to date and only Zambia among Sub-Saharan African countries ratified the TRIPS Amendment, supports the view that access to essential medicines may be secured also by interpreting the TRIPS Agreement in conformity with the human rights obligations of WTO Members.³⁹ Also, India’s WTO complaint against the EU because of seizures by Dutch customs authorities of generic medicines in transit through Schiphol airport on the basis of Dutch patents led to an agreed settlement of the dispute in July 2011, with the EU agreeing that mere transit of goods through an EU port or airport does not constitute grounds for suspicion of patent infringements.⁴⁰

Many international economic treaties serve constitutional functions by committing governments to the use of transparent, non-discriminatory and efficient instruments of monetary, trade, investment, environmental and social policies, thereby promoting consumer welfare and limiting protectionist abuses of foreign policy powers through international legal and judicial constraints. From a

³⁷ *Id.* at ¶ 173.

³⁸ Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 and Corr. 1 (Sept. 1, 2003).

³⁹ See HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES (2007).

⁴⁰ The Indian position regarding the treatment of goods in transit from the standpoint of potential infringement of intellectual property rights was subsequently supported also by the CJEU in its judgment in joined cases C-446 & C-495/09, *Koninklijke Philips Electronics NV v. Lucheng Meijing Industrial Company Ltd, Far East Sourcing Ltd, Röblig Hong Kong Ltd, Röblig Belgium NV and Nokia Corporation v. Her Majesty’s Commissioners of Revenue and Customs* (Dec. 1, 2011). These cases involved detentions by Belgian and English customs authorities of goods in transit on grounds of alleged infringements of industrial design rights, copyright and trademarks. The CJEU held that the mere transit of goods through EU territory does not provide the basis for suspicion of infringement within an EU member state; for, applying locally-held intellectual property rights to goods in transit would effectively amount to extraterritorial extension of intellectual property rights. A finding of actual infringement would require a higher level of proof, such as a sale or offering for sale onto the EU market, or documents showing that diversion to EU consumers was envisaged.

human rights perspective, international guarantees of freedom, non-discriminatory market access, property rights, rule of law and judicial remedies in IEL can be interpreted – as in European economic law – as internationally agreed extensions of corresponding constitutional guarantees in domestic laws for the benefit of mutually beneficial co-operation among citizens across frontiers.⁴¹ By linking the legal objectives of national and international legal guarantees and emphasising their ‘domestic policy functions’ for the benefit of citizens, domestic courts may find it easier to apply domestic rules in conformity with the international legal obligations of the country concerned as required by the ‘consistent interpretation principles’ underlying national and international legal systems (cf. Article 31 VCLT). This is also true for interpretation of IEL in conformity with international dispute settlement, which, in the case of more than 450 WTO disputes since 1995, has not revealed any systemic inconsistencies between HRL and IEL. Yet, governments and rent-seeking interest groups all too often collude in limiting the legal, judicial and parliamentary accountability of governments for redistributing domestic income for the benefit of powerful interest groups in violation of IEL. Even if there are no inherent conflicts between IEL and HRL, citizens rightly challenge that IEL does not adequately contribute to the promotion of the human rights of the two billion unnecessarily poor people without effective access to essential medicines, water, food, rule of law and protection of human rights. Hence, national and international courts of justice have good reasons to insist on their judicial duties of ‘administering justice’ in transnational economic adjudication ‘in conformity with principles of justice’ and human rights, as explicitly required by customary international law.

V. MULTI-LEVEL CONSTITUTIONAL PLURALISM CAN PROMOTE SYNERGIES BETWEEN HRL AND IEL

Proposals for co-ordinating the hundreds of fragmented, international and national legal regimes by using the formal conflict rules codified in the VCLT (such as *lex specialis*, *lex posterior*, *lex superior*) are based on ‘Westphalian principles’ (like ‘sovereign equality of states’) that may neglect effective protection of human rights; for instance, if corrupt rulers abuse their ‘lending privilege’ and ‘resource privilege’ for appropriating and transferring wealth abroad to the detriment of domestic citizens. The diverse forms of supranational integration law in the EU, more deferential common market law in the European Economic Area (EEA), and even less judicial interference by the ECtHR based on principles of ‘prior exhaustion of local remedies’ in national courts and judicial respect for ‘margins of appreciation’ in national HRL illustrate how – by interpreting state sovereignty, popular sovereignty and individual sovereignty in mutually coherent ways and

⁴¹ See PETERSMANN, CONSTITUTIONAL FUNCTIONS, *supra* note 23.

subjecting multi-level economic governance to diverse multi-level constitutional and judicial restraints – IEL can be transformed into an instrument for promoting consumer welfare, rule of law and human rights across frontiers.⁴² ‘Constitutional pluralism’, as applied by national and international courts throughout Europe, argues that the legitimate diversity of democratic constitutions is a value in itself. The plurality of legitimate, yet potentially conflicting claims based on diverse national and international constitutional systems, may have to be reconciled by the legal and judicial balancing of competing constitutional principles, human rights and deliberative democracy rather than by the legal formalism of state-centred conflict rules. Such citizen-centred—rather than state-centred—conceptions of sovereignty, focusing on the ancient premise of ‘man as the measure of all things’ (Parmenides), have a long tradition in theories of justice. Also, modern constitutional theories focusing on constitutional, legislative, administrative and judicial ‘institutionalization of public reason’, ‘deliberative democracy’ and judicial protection of fundamental rights are particularly appropriate in citizen-driven areas of multi-level IEL and HRL, as illustrated by the rights-based regional economic and human rights regimes in Europe, investor-state arbitration and international commercial law and arbitration.⁴³

Similar to the private and public, national and international regulation of international economic co-operation, human rights are regulated and protected at local, national and international levels. Like economic and social rights, human rights can be interpreted as fundamental freedoms protecting ‘human capacities’ and legal autonomy. UN human rights law tends to prescribe only minimum standards of protection with due respect for national ‘margins of appreciation’ for regulating, prioritising and mutually balancing civil, political, economic, social and cultural rights. However, human rights require respecting legitimate ‘constitutional pluralism’ in the multi-level protection of human rights and multi-level regulation of international economic co-operation among citizens. The UN High Commissioner for Human Rights has argued for a ‘human rights approach’ in multi-level economic regulation so as to limit the often one-sided focus on producer interests by promoting synergies between economic regulation and human rights. For instance, by providing access for poor people to food, water, health services, education, electricity and housing through private-public partnerships and regulating sanitary, environmental and other product and production standards with due regard for the basic needs of peoples.⁴⁴ The UNHCHR differentiates between obligations to respect human rights (e.g., by

⁴² For numerous case studies, see PETERSMANN, *supra* note 1, at 436-81.

⁴³ See *supra* notes 2-7, 22, 28 and 43.

⁴⁴ See HARRISON, *supra* note 14; PETERSMANN, CONSTITUTIONAL FUNCTIONS, *supra* note 23.

refraining from interfering in the enjoyment of such rights), to protect human rights (e.g., by preventing violations of such rights by third parties), and to fulfil human rights (e.g., by taking appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights). As recourse to trade sanctions for promoting respect for human rights abroad (e.g., trade sanctions targeting authoritarian rulers suppressing human rights in Burma, Tunisia, Zimbabwe, etc) can aggravate the problems of people adversely affected by trade sanctions,⁴⁵ the UNHCHR reports emphasise both potential synergies as well as potential conflicts between human rights and economic rules in the context of trade liberalisation, trade restrictions and other economic regulation. Apart from promoting ‘negative human rights coherence’ (in terms of absence of conflicts between IEL and HRL) and ‘positive human rights coherence’ (in terms of mutually beneficial synergies, e.g., in promoting ‘human capital’), the need for incremental ‘constitutional reforms’ of IEL also raises difficult questions of ‘institutional coherence’ of IEL and HRL, for instance in terms of appropriate regulation of the jurisdictions of economic and human rights organisations and courts of justice so as to promote their co-operation in securing ‘negative’ and ‘positive coherence’ among IEL and HRL.

VI. CONSTITUTIONAL JUSTICE REQUIRES CITIZEN-ORIENTED ‘PUBLIC REASON’ IN IEL

Political scientists focus on ‘power’ and ‘ideas’ for explaining international relations, for instance the hegemonic leadership of the USA after World War II in convening international conferences for designing and concluding the UN and Bretton Woods agreements on the basis of draft texts prepared by the US government. In worldwide governance institutions like the WTO operating on the basis of ‘consensus’ among all 158 WTO members, the failure to reach agreement – after 12 years of Doha Round negotiations since 2001 – on improving the WTO system continues to prompt ever more WTO member to resort to ‘second-best alternatives’ like regional free trade agreements and functional ‘network governance’ (e.g., the international competition network among more than 65 national competition authorities created in 2005 after the breakdown of WTO negotiations on trade-related competition rules). Such ‘second-best substitutes’ for supplying the international ‘aggregate public good’ of an international legal and dispute settlement system for world trade aim not only at pragmatic creation of ‘regional’ and ‘functional public goods’ as future building blocks for the still elusive

⁴⁵ For a discussion of the US Burmese Freedom Act imposing unilateral trade sanctions on Burma for the May 2003 attack on Aung San Suu Kyi, see Jenny Schultz & Rachel Ball, *Trade as a Weapon?: The WTO and Human Rights-based Trade Measures*, 12 DEAKIN L. REV.41 (2007).

global 'aggregate public good' of an efficient and more legitimate world trading system, but they also aim at challenging intergovernmental power politics in the WTO through more inclusive, regional and functional forms of 'public reason' in order to create incentives for consensus-building on WTO reforms. From the perspective of both procedural theories of justice (like J. Rawls' theory of 'justice as fairness') and substantive theories of justice (like human rights theories), the needed constitutional reforms of intergovernmental power politics can be promoted by stronger legal and judicial protection of human rights and deliberative democracy as preconditions for stronger 'participatory democracy' and multi-level judicial protection of cosmopolitan rights *vis-à-vis* the ubiquity of abuses of public and private power in international economic relations.

National and international economic courts increasingly protect individual access to justice (e.g. in Article 47 of the EU Charter of Fundamental Rights), far beyond the limited scope of human rights guarantees of access to justice (e.g., in Articles 6, 13 ECHR), as requiring judicial review of whether governmental restrictions of fundamental rights are necessary and proportionate means for protecting other fundamental rights and public interests.⁴⁶ It is notably at the request of individual complainants that the CJEU, the EFTA Court, the ECtHR as well as national courts have increasingly construed the international EU treaty, the EEA agreement and the ECHR as constitutional safeguards of fundamental rights, thereby strengthening transnational rule of law and the legitimacy and effectiveness of European economic law for the benefit of citizens.⁴⁷ This 'constitutionalization' of European IEL confirms John Rawls' constitutional insight that – in order to remain effective over time – democratic rule-making, administration and adjudication must remain justifiable and constitutionally restrained by 'principles of justice' and 'public reason'.⁴⁸ According to Rawls, it is 'the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body' which requires that the democratic exercise of coercive power over one another can be recognised as being democratically legitimate only when 'political power [...] is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason'.⁴⁹ Intergovernmental power politics in UN and WTO institutions, by contrast, remains characterised by the

⁴⁶ See ACCESS TO JUSTICE AS A HUMAN RIGHT (Francesco Francioni ed., 2007); *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* (Hellen Keller & Alec S. Sweet eds., 2008).

⁴⁷ See the numerous examples from European jurisprudence in PETERSMANN, *supra* note 1 at 272-318, 436-81.

⁴⁸ JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

⁴⁹ JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 41(2001).

exclusion of effective legal, democratic and judicial remedies of citizens against welfare-reducing trade protectionism. The less national parliaments control intergovernmental rule-making, the more the deficit in parliamentary and deliberative democracy must be compensated by rights-based constitutionalism and multi-level judicial protection of constitutional rights and participatory democracies across frontiers. As explained by Rawls, ‘in a constitutional regime with judicial review, public reason is the reason of its supreme court’; transparent, rule-based and impartial judicial reasoning, subject to procedural guarantees of due process of law, make independent courts the less politicised ‘fora of principle’ that are of constitutional importance for an ‘overlapping, constitutional consensus’ necessary for legally stable and just relations among free, equal and rational citizens who tend to remain deeply divided by conflicting moral, religious and philosophical doctrines. Just as the CJEU, the ECtHR, the EFTA Court and national courts have successfully transformed the international EU and EEA treaties as well as the ECHR into constitutional orders founded on respect for human rights, so can incremental ‘judicial constitutionalization’ of international trade, investment and environmental treaty regimes contribute to making IEL more consistent with HRL and to strengthening multi-level governance of international public goods demanded by citizens.

VII. HOW SHOULD IEL IN THE 21ST CENTURY BE DESIGNED?

Similar to the story of the blind men touching different parts of an elephant and describing the same animal in contradictory ways, private and public, national and international lawyers continue to perceive IEL from competing perspectives, for instance as (1) public international law (e.g., the Bretton Woods Agreements), (2) ‘global administrative law’ (e.g., the legal practices of UN Specialized Agencies and the WTO), (3) ‘conflicts law’ (e.g., international commercial law and arbitration), (4) multi-level constitutional regulation (e.g., rights-based European economic law and adjudication) or (5) multi-level economic regulation of the economy (e.g., NAFTA law) within the limits of national, democratic constitutionalism.⁵⁰ Most governments emphasise the need for ‘member-driven governance’ in worldwide organisations pursuant to the ‘Westphalian paradigm’ of ‘international law among sovereign states’. IEL continues being analysed in most textbooks as well as in international jurisprudence (e.g., by the WTO Dispute Settlement Body) as a part of public international law regulating the international economy. This prevailing paradigm of IEL risks undermining the protection of human rights and other interrelated ‘public goods’,⁵¹ especially if new emerging

⁵⁰ For a discussion of these five competing conceptions of IEL, see PETERSMANN, *supra* note 1, at 43-91.

⁵¹ On the defining characteristics of ‘public goods’ (like their non-excludable and non-

powers (like China) continue emulating 'US exceptionalism' and power politics (e.g., by abusing anti-dumping rules as a political 'selective safeguard clause' for redistributing domestic income in favour of powerful lobbies).⁵² In regional economic agreements (like NAFTA) and bilateral investment treaties (BITs), IEL is increasingly used as a multi-level regulation of the economy, protecting no longer only rights and obligations of governments but also of citizens, companies and other non-governmental organisations (e.g., investor rights and investor-state arbitration pursuant to Chapter 11 of NAFTA). Yet, such multi-level economic regulation approaches are often influenced by hegemonic pressures (e.g., by the USA in NAFTA and by capital-exporting countries in BITs) and remain ineffective in many regional free trade areas and customs unions among LDCs due to inadequate judicial safeguards of cosmopolitan rights and transnational rule of law.

The diverse constitutional conceptions of IEL applied by governments and courts in the EU, the EEA as well as in the ECHR reflect the constitutional insight that the legitimacy and effectiveness of both intergovernmental as well as multi-level economic regulation need to be enhanced by multi-level parliamentary, deliberative and participatory democracy as well as by judicial protection of constitutional rights of citizens and the transnational rule of law. Most governments outside Europe remain unwilling to follow these diverse 'European models' of multi-level economic regulation. Yet, all UN member states have accepted human rights obligations and multi-level constitutional commitments of a higher legal rank for protecting equal freedoms and rule of law (e.g., under national constitutions, Article 103 UN Charter, the WTO legal and compulsory dispute settlement system). The increasing co-operation among international, regional and domestic courts and investor-state arbitral tribunals – notably in international trade law, investment law and the law of the sea, but also in HRL and international criminal law – continue to prompt courts to clarify common 'constitutional principles' (like access to justice, due process of law) underlying HRL, IEL and the law of many international organisations. As respect for human dignity requires respecting the diverse value preferences of individuals and democratic communities, HRL also requires respecting reasonable disagreement among

rival use benefiting all citizens) which, in contrast to private goods, must be collectively supplied by governments, see GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul et al. eds., 1999). Human rights and international rule of law are intermediate public goods necessary for collective supply of other international public goods like a mutually beneficial world trading system.

⁵² On abuses of anti-dumping rules in order to justify discriminatory import restrictions that would not be allowed under the general safeguard clause of Article XIX GATT, see Brian Hindley, *Antidumping Action and the EC: A Wider Perspective*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 371 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993).

individuals and states on how civil, political, economic, social and cultural rights and other constitutional principles should be reconciled with IEL so as to maximise efficient uses of scarce resources with due respect for human rights. The UN Covenant on Economic, Social and Cultural Rights (1966) recognises this national 'margin of appreciation' by acknowledging that each state party 'undertakes to take steps, individually and through international assistance and co-operation..., to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means' (Article 2.1). Similarly, many IEL agreements, like the WTO Agreement on TRIPS recognise that less-developed countries may need more time than developed countries for protecting economic rights (like patent rights) in conformity with human rights (e.g., of access to health protection and to essential medicines).

Alternative conceptions of IEL as 'conflicts law' or 'global administrative law' (GAL) emphasise that the legal and judicial co-ordination of national and international legal regimes (e.g., commercial law and arbitration regimes), and the promotion of 'good governance' and legal accountability in international organisations, may benefit from the 'conflict of law principles' in international private law as well as from respect for multi-level administrative law principles. Yet, just as private law and administrative law are part of broader constitutional and legal systems inside states, the legitimacy of legal and judicial application of 'private law principles' and 'global administrative law principles' in transnational and international relations depends on the respective constitutional context and applicable law of international organisations and courts with diverse memberships and legal systems. As national and international 'aggregate public goods' are interrelated (like efficient trading, financial and environment protection systems), multi-level governance of interdependent public goods requires integrating the diverse international, transnational, constitutional, administrative and private law conceptions of IEL in order to promote overall legal coherence of multi-level rule-making, administration and adjudication. Notwithstanding their common commitments to an inalienable core of human rights, the constitutional and legal systems of UN member states and international organisations for multi-level governance of interdependent public goods will continue to legitimately differ from each other depending on the specific regulatory challenges, collective action problems, value preferences and limited resources of the states and citizens involved.

VIII. NEED FOR ‘STRUGGLES FOR JUSTICE’ FOR ‘CONSTITUTIONALISING’ IEL

Kant was the first legal philosopher to explain why the ‘moral imperative’ of legal and judicial protection of maximum equal freedoms can become a reality only through antagonistic struggles for public justice and multi-level constitutional protection of equal freedoms in all human interactions at national, transnational and international levels. Reducing the unnecessary poverty of some 2 billion people living on 2 dollars or less per day is not only a ‘moral imperative’, but also a legal requirement of modern HRL. As stated already in the Preamble to the UDHR, ‘it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights be protected by the rule of law.’ The successful judicial transformation of European economic law through the jurisprudence and judicial co-operation of the CJEU, the EFTA Court, the ECtHR and national courts in protecting fundamental rights of citizens⁵³ confirms the important emphasis in UN human rights law on access to justice and the need for international co-operation and assistance for protecting human rights across frontiers. HRL and the ‘constitutional functions’ of courts of justice require national and international judges to co-operate in interpreting law, including citizen-driven IEL, in conformity with its rule-of-law objectives and underlying constitutional principles of justice (e.g., as defined by human rights) as expressing rights-based conceptions of justice and transnational rule of law.

Interpreting worldwide economic treaties in conformity with principles of justice will inevitably remain contested among citizens and governments with conflicting self-interests and value preferences.⁵⁴ For instance:

- Regional ‘market freedoms’ (as protected in free trade areas), ‘trading rights’ (as protected in WTO law) and worldwide liberalisation of market access for movements of goods, services, persons, capital and related payments may be justified not only on utilitarian grounds,⁵⁵ but also as imperfect, cosmopolitan extensions of Rawls’ first principle of justice, to be defined in terms of equal rights of citizens to ‘the most extensive total system of equal basic liberties compatible with a similar system of liberty for all’.⁵⁶

⁵³ *Supra* Part IV; PETERSMANN, *supra* note 1 at 210-60, 436-81.

⁵⁴ PETERSMANN, *supra* note 1 at 332-52.

⁵⁵ On utilitarian Anglo-Saxon theories of ‘justice as efficiency’, see RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 10 (2d ed., 1977) (“Efficiency means exploiting resources in such a way that ‘value’ – human satisfaction as measured by aggregate consumer willingness to pay – is maximized”).

⁵⁶ JOHN RAWLS, *A THEORY OF JUSTICE* 250 (1971).

- Worldwide and regional rules on preferential treatment of LDCs (e.g., by means of non-reciprocal tariff preferences, financial and technical assistance, trade facilitation and capacity-building) and certain social rights can be interpreted as an international extension of Rawls' second principle of justice calling for differential treatment beneficial for the poor.
- The general exceptions and numerous safeguard clauses in worldwide and regional economic agreements can be construed as reflecting the Rawlsian claim that, as national welfare depends more on a country's social institutions than on its natural resources, reasonable persons and people should agree on social and constitutional arrangements that provide all citizens with the natural and social goods essential for satisfying basic needs.⁵⁷ Such a 'democratic, social responsibility principle' also supports the human rights claim that respect for human dignity (e.g., in the sense of individual autonomy and responsibility) requires empowering citizens by rights-based regulation of international economic co-operation among citizens.
- The ever more comprehensive compulsory jurisdiction of national and international courts for protecting rule of law in international economic co-operation, and the customary law requirement of interpreting international treaties and settling related disputes 'in conformity with principles of justice' and the human rights obligations of states, can be seen as protecting 'constitutional justice' (e.g., in the sense of constitutional guarantees of equal freedoms, impartial procedures, access to independent 'courts of justice'), as one of the oldest paradigms of rule of law.

The universal recognition of human rights and the increasing dependence of citizens' welfare on globalisation and collective supply of international public goods, challenge traditional claims that national law and international law must remain based on categorically different kinds of public reason (e.g., citizen-oriented democratic legislation versus inter-state rules).⁵⁸ Transnational protection of

⁵⁷ See JOHN RAWLS, *THE LAW OF PEOPLES* 37-38, 106-20 (1999) ("the crucial element in how a country fares is its political culture – its members' political and civic virtues – and not the level of its resources").

⁵⁸ Rawls' moral justification of the different 'public reason' underlying national and international law is rightly challenged by human rights advocates emphasising the transnational legal obligations of modern HRL. Even though former UN Secretary-General K. Annan convincingly claimed that 'the poor are poor not because of too much globalisation, but because of too little.' (Press release, United Nations, Secretary-General, addressing Participants at Millennium Forum, Calls for intensified 'NGO revolution,' UN Press Release SG/SM/7411 (May 22, 2000)), the prevailing 'public reason' in many LDCs

human rights and global public goods requires cosmopolitan conceptions of international law acknowledging that the legitimacy of international law derives from respect for human rights (normative individualism) and that national constitutions have become ‘partial constitutions’ that can no longer protect many international public goods demanded by citizens without cosmopolitan rights of citizens to participate in collective supply of international public goods. Also international trade liberalisation can be justified not only in utilitarian terms of welfare economics, but also as a legal requirement of protecting equal freedoms to engage in mutually beneficial exchanges enhancing human self-development.⁵⁹ The longstanding traditions of welfare-reducing trade protection and other kinds of discrimination against foreign goods, services, foreigners and less-developed countries are often driven by non-transparent forms of power politics, for the benefit of rent-seeking interest groups, at the expense of general consumer welfare. Under the European common market rules, for example, their replacement of protectionist anti-dumping laws by welfare-maximising competition rules among the 30 member countries of the EEA, confirm the constitutional insight that – within a reasonable framework of rules and institutions – power politics can be legally transformed for the benefit of citizens, not only inside states, but also in international relations among states which, for centuries, had engaged in wars and mutually harmful protectionism. Yet, unless citizens assume their democratic responsibilities and use their constitutional rights for challenging the ubiquity of selfish abuses of power in transnational economic relations, the moral and constitutional ‘imperative’ of protecting human rights across frontiers – also in IEL regulating the global division of labour – can hardly be realised.

IX. REGULATION OF THE ‘COLLECTIVE ACTION PROBLEMS’ IN MULTI-LEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS REQUIRES A PARADIGM CHANGE IN IEL

The creation of a liberal trading, financial and development system in the 1940s was due to post-war US leadership resulting in the UN Charter, the 1944 Bretton Woods Agreements, GATT 1947 and the UDHR. So, what does the failure of leadership – not only by the USA, but by the EU as well as by LDCs – for further trade liberalisation in the WTO’s Doha Development Round

does not (yet) support global economic integration in view of the ubiquity of ‘governance failures’.

⁵⁹ See SEN, *supra* note 22. For comparative studies of protection of freedom of trade as a fundamental right in national and European constitutional laws, see NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993).

negotiations and for preventing climate change tell us about prospects for extending legal protection of human rights to multi-level governance of international economic relations? The promotion of consumer welfare and transnational rule of law by the European common market law based on GATT's custom union rules, like the reunification of a single common market among the four Chinese customs territories of the People's Republic of China, Hong Kong, Macau and Taiwan based on WTO rules, illustrate the 'interdependence' of national and international public goods. Had China, rather than withdrawing from GATT in 1949, complied with GATT rules since 1948, the impoverishment of hundreds of millions of Chinese citizens could have been avoided. Similarly, protection of the economic welfare and human rights of billions of citizens all over the world will depend on whether IEL will succeed in regulating the 'collective action problems' of a mutually beneficial world trading, financial, environment and development system more effectively.

European integration law refutes claims that the anarchical structures of international relations make collective supply of international public goods legally and politically impossible. It rather confirms that collective supply of international public goods requires rights-based rules, institutions and governance mechanisms going beyond those of the Westphalian system of international law among sovereign states, so as to limit the five main 'collective action problems'⁶⁰ impeding multi-level governance of interdependent public goods:

- The *jurisdictional gap*, that is the incapacity of every state to provide global public goods without international co-operation, requires delegation of additional governance powers to international organisations as international guardians of public goods (including human rights) so as to overcome 'prisoner dilemmas' in decentralised co-ordination among states and co-operation among citizens.
- The *governance gap*, that is the inability of most intergovernmental organisations to protect, regulate and govern collective supply of international public goods effectively, requires new forms of multi-level rule-making, administration and judicial protection of rule of law and constitutional rights. The one-sided focus of the 'Westphalian conception' of international law among sovereign states on foreign policy discretion and power politics of governments, risks undermining transnational rule of law and cosmopolitan conceptions of IEL focusing on consumer welfare and human rights rather than 'state interests' (as defined by national rulers and powerful interest

⁶⁰ For detailed analyses of these 'collective action problems', see Ernst-Ulrich Petersmann, *Multilevel Governance of Interdependent Public Goods: Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century* (EUI Global Governance Program, Working Paper RSCAS 2012/23).

groups). Human rights and democratic governance require that rules must be justifiable – at all levels of multi-level governance – in terms of satisfying the reasonable interests of all affected citizens and governments.

- The *incentive gap*, that is the inherent temptation of free-riding in collective supply of international public goods, requires common, but differentiated responsibilities not only among states but also for civil society and the ‘corporate social responsibilities’ of businesses. Examples include financial incentives for poor countries that provide transnational environmental services by protecting tropical forests that are of global importance for bio-diversity and carbon-reduction. Consensus-based WTO negotiations lack adequate financial and other incentives for less-developed WTO members (e.g., in terms of capacity-building and trade facilitation) to participate in and support new WTO rules limiting market failures (e.g., by means of WTO competition and environmental rules) and protecting global public goods (e.g., in terms of promoting international food and energy security). Multi-level regulation of citizen-driven market competition should provide for stronger participation rights and legal remedies of private actors. For instance, empowering citizens to enforce international trade, competition and investment rules in domestic courts against arbitrary violations of the rule of law. European economic law illustrates that such ‘countervailing rights’ of citizens offer a decentralised means for internalising harmful externalities and limiting the ubiquity of abuses of public and private power. Rights-based constitutionalism sets an incentive for the promotion of a participatory democracy and citizen-driven clarifications of public reason.
- The *participation gap*, i.e. the need for inclusive consensus-building and democratic governance beyond nation states. It requires leadership, incentives and financial assistance for capacity building by coalitions of the willing so that all relevant public and private actors co-operate in the collective supply of international public goods. Citizen-driven economic and environmental systems cannot function legitimately and effectively without rights of all affected citizens to participate in multi-level decision-making and have recourse to legal and judicial remedies against unjustified restrictions of individual rights and market distortions. If consensus practices impede worldwide regulatory reforms, ‘competing liberalization and regulation’ among ‘coalitions of the willing’ need to be promoted, as in the case of the WTO rules permitting free trade areas, customs unions and trade preferences among less-developed countries.

- The *rule of law gap*, i.e. the inevitable legal fragmentation among hundreds of national, international and transnational legal regimes interacting in the supply of global public goods. Legal predictability, transnational rule of law and legal respect for legitimately diverse conceptions of justice, human rights and constitutional pluralism are essential for the collective supply of global public goods. Transnational rule of law must be promoted by recognising, 'balancing' and reconciling competing rights and constitutional claims on the basis of common constitutional principles, like the human rights obligations of UN member states.

X. LESSONS FROM THE 'EUROPEAN LABORATORY' FOR MULTI-LEVEL ECONOMIC REGULATION PROTECTING HUMAN RIGHTS AND OTHER INTERNATIONAL PUBLIC GOODS

Following centuries of 'European governance failures' ushering in periodical wars and colonial power politics, the more than 60 years of peaceful European economic and legal integration since 1950 among the 27 EU member states and additional associated states (like the 4 EFTA states) suggest that multi-level economic, political and legal governance in the EU has succeeded more quickly and more comprehensively than any other regional organisation (e.g., in Africa and the Americas) in using crises as opportunities for improving multi-level legal and constitutional protection of individual rights, transnational rule of law and social welfare of citizens. Does the *European laboratory* for multi-level governance offer more general policy lessons for the biggest policy challenge of the 21st century, i.e., to protect human rights and other international public goods more effectively across frontiers?

This article has argued for cosmopolitan and 'constitutional reforms' of IEL based on the following five propositions: (1) The prevailing conceptions outside Europe of legal nationalism and international law among sovereign states fail to protect human rights and other international public goods effectively. Due to the overlapping nature of many interdependent public goods (like rule of law, an efficient trade and financial system, protection of the environment), countries risk undermining the reasonable self-interests of citizens and states. (2) The international governance failures are largely due to inadequate regulation of the five major 'collective action problems' in the multi-level governance of international public goods. (3) The 'collective action problems' differ among policy areas and require sector-specific, multi-level regulation avoiding the utopia of unitary global governance. For instance, citizen-driven markets and environmental pollution require multi-level regulation and judicial protection of rights and responsibilities

not only of states, but also of citizens, with due respect for the legitimate diversity of constitutional conceptions of how human rights must be protected in the worldwide division of labour. (4) The prevailing conceptions of international law among sovereign states, GAL, multi-level economic regulation, international private law (conflicts law) and national legal systems must be integrated into a more coherent, multi-level governance based on common constitutional principles of justice (e.g., as defined by human rights and national constitutions) and multi-level constitutional restraints of multi-level governance protecting legitimately diverse constitutional rights of citizens. (5) The inevitable legal fragmentation among national and functionally limited, transnational legal regimes must be mitigated by multi-level legal and judicial co-operation in protecting transnational rule of law and cosmopolitan rights of citizens. This is required also by the human rights obligations of all UN member states and the customary law requirement of interpreting international treaties and settling international disputes, 'in conformity with principles of justice' and the human rights obligations of governments.

European multi-level governance approaches – notwithstanding their frequent rejection by non-European states focusing on state sovereignty and state interests rather than on cosmopolitan community interests of citizens – offer a tool box for improving multi-level economic regulation in the 21st century based on respect for human rights and unity in diversity (i.e., the motto of the 2004 Treaty establishing a Constitution for Europe). From the perspective of citizens, European economic integration has enabled multi-level judicial protection of dignity rights, freedoms, equality, solidarity, other human rights and EU citizen rights – as constitutionally guaranteed in the EU Charter of Fundamental Rights - which the 500 million EU citizens had never enjoyed before in transnational economic co-operation. The citizen-driven judicial governance and multi-level judicial protection of civil, political, economic, social and cultural human rights across frontiers have demonstrated that rights-based, multi-level constitutionalism and courts of justice can succeed in limiting political governance failures (such as welfare-reducing border discrimination against foreign goods, services, persons and investments) and enhance the transformative power of welfare-increasing synergies between IEL and HRL. The ECJ, the EFTA Court, the ECtHR and national courts in Europe – by protecting fundamental rights of citizens as well as of non-governmental actors (like companies and trade unions) against national, international and private abuses of power through judicial review of the necessity and proportionality of public and private restrictions of fundamental freedoms and human rights – have demonstrated in thousands of judicial proceedings that citizens will benefit from interpreting and applying IEL in conformity with human rights. Many of these disputes over alleged conflicts between IEL and HRL are likely to arise in non-European jurisdictions as well; for dispute settlement in fora such as the WTO, regional economic and human rights courts, investor-state

arbitration and domestic courts. This article has argued that Anglo-Saxon traditions of ‘majoritarian democracy’ questioning the justiciability of such disputes and calling for ‘judicial deference’ *vis-à-vis* (inter)governmental power politics need to be challenged by citizens and civil society through struggles for ‘constitutional justice’, ‘constitutional democracy’ and ‘cosmopolitan constitutionalism’. Without multi-level constitutional restraints on abuses of public and private power, human rights and general consumer welfare of citizens cannot be effectively protected across frontiers in a globally integrated economy. In Europe, HRL and IEL have uniquely contributed to the expansion of constitutional rights of citizens and their multi-level judicial protection. The ever closer co-operation among national and European courts continues to promote cosmopolitan and constitutional conceptions of international law, among the 30 member states of the EEA and the 47 member states of the ECHR, by interpreting the ‘rules of recognition’ of European economic law in conformity with the human rights of the more than 800 million citizens protected by the ECHR. By demonstrating common self-interests in international public goods, challenging regulatory failures of legal nationalism and proposing legal restraints of vested interests obstructing and distorting multi-level economic regulation, independent guardians of public goods – like the EU Commission and international courts can protect cosmopolitan rights across national frontiers and justify citizen-oriented interpretations of IEL in terms of individual and democratic self-interests and common but differentiated responsibilities for problem-solving.