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Bridging Foundations

Human Rights and International Trade Law: Defining and Connecting the Two Fields

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The first panel of the conference at Georgetown University in April 2004 was asked by the conference organizers to address the following five questions: (I) Are human rights and trade law of an inherently different nature or do both set out fundamental freedoms of a constitutional type? (II) Are market freedoms part and parcel of human rights? (III) Can the agreement establishing the World Trade Organization (WTO) serve 'human rights functions', or should a 'merger and acquisition of human rights by trade law' be resisted? (IV) What are the relationships between human rights focused on equality versus those based on freedom? (V) What are the relationships between economic and social rights versus civil and political rights? Sections I to V of this contribution offer answers to these questions based on my speaking notes distributed at the conference in Washington. Section VI clarifies additional questions raised in the conference discussions. Section VII concludes by explaining why the post-war paradigm of 'embedded international liberalism' has entailed important policy failures, and why my proposals for 'constitutionalizing' multilevel trade governance in the WTO are—contrary to the views of my Australian and North-American critics—not 'a step too far'.

From the point of view of human rights, the history of international law, including international trade law, could be written as a history of abuses of foreign policy powers to the detriment of general citizen interests (eg, in protection of consumer welfare, rule of law, human rights). Since I joined the GATT secretariat in 1981 as the first 'legal officer' ever employed by GATT, I argued in a number of articles and books that GATT rules should be perceived not only as *foreign policy instruments* (eg, in order to improve access to foreign markets), but also as *domestic policy instruments* that could serve not only economic functions (eg, for promoting economic welfare) but also 'constitutional functions' (eg, by rendering domestic constitutional principles of freedom, non-discrimination, rule of law, and judicial review more effective in the trade policy area).

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Following the universal recognition of human rights after the fall of the Berlin wall, I also called for mainstreaming human rights into the law of worldwide organizations in order further to 'constitutionalize' bi-level foreign policy-making, rule-making, and adjudication at national and intergovernmental levels.[1] It was to be expected that both proposals would be criticized by trade diplomats as a restraint on their trade policy discretion; yet, I was surprised by the violent criticism from P Alston and by his misunderstanding of the moral and constitutional foundations of both proposals.[2] My hope to contribute to the necessary clarification of some of the difficult *interface problems* of international trade law, human rights law and constitutional law prompted me to prepare this contribution for a public debate with P Alston in a conference organized by the American Society of International Law in 2004. When it later turned out that Alston would not contribute to this book, I respected the wish of the editors to delete from this contribution my own criticism of, and defences against, what I perceived as an unfair misrepresentation of my published views by Alston. I wish to emphasize that this contribution was written with the limited objective of helping economic lawyers and human rights lawyers to engage in a meaningful dialogue on more effective legal responses to the appalling, unnecessary global poverty, health, and human rights problems that challenge the credibility of the UN human rights system no less than that of the WTO legal system. In view of everyone's inevitably limited expertise in this vast field of international relations, human rights, and comparative constitutional law, there remains an urgent need for a broader, public discussion of how international law can be transformed into a more effective instrument for protecting human rights and social justice in the economy and beyond (eg, against terrorism).

In order to exclude a repetition of the misunderstandings in what the editors presented as the 'Alston–Petersmann debate', let me recall the three normative premises on which all my arguments are based, before addressing the specific questions in sections I to VII.

First, the today universal recognition—not only in the Preambles of all UN human rights conventions but also in regional and many national human rights instruments and state practices—of 'the inherent dignity and of the equal and inalienable rights of all members of the human family (as) the foundation of freedom, justice and peace in the world' justifies the claim that respect for human dignity and for human liberty has become the *ius cogens* core of 'inalienable human rights' limiting all governance powers at national and intergovernmental levels.

Secondly, human life in dignity, liberty, and social responsibility requires legal protection of individual freedom to participate in markets (eg, as dialogues

[1] E U Petersmann, Time for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integrating Law, Jean Monnet Working Paper 7 (2001).

[2] cf P Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, European Journal of International Law (2002) 815–844; E U Petersmann, Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston, European Journal of International Law (2002) 845–851.

about values, decentralized information, coordination and discovery mechanisms) and to exchange the fruits of one's labour for scarce goods and services needed for personal self-development. Specialization (eg, in families, societies) and exchange are among the most basic human activities. While some market freedoms have a 'price' rather than 'dignity', others are of existential importance for individual, social, and democratic self-development. Human rights cannot be effectively protected without due regard to the economic insight that personal freedom is not only a fundamental moral and constitutional principle, but also the most important *instrument* for satisfying human needs.

Thirdly, even though constitutional contracts for the collective supply of public goods may legitimately differ among rational citizens due to different value preferences and historical experiences (cf the diversity of agreed, specific human rights guarantees), respect for human dignity requires treating individuals as legal subjects and autonomous 'market citizens' (eg, respect for the 'indivisible' individual liberty to decide which equal freedoms an individual values most). As explained by Immanuel Kant more than 200 years ago, the moral imperative requiring legal protection of maximum equal freedom and democratic peace cannot be realized without complementary national, international, and cosmopolitan constitutional guarantees. The challenge for international law and policy in the twenty-first century remains the same as described by Kant: '*Sapere aude*',[3] rather than justifying abuses of power politics as 'sorry comforters'.[4]

I. ARE HUMAN RIGHTS AND TRADE LAW OF AN INHERENTLY DIFFERENT NATURE, OR DO BOTH SET OUT FUNDAMENTAL FREEDOMS OF A CONSTITUTIONAL TYPE?

A. Similarities: Constitutional protection of human rights and freedom of trade

Human rights and freedom of trade *inside* a country tend to be guaranteed in national constitutions. This constitutional protection of freedom of trade inside a nation can be justified not only on economic and political grounds but also as being directly rooted in respect for human dignity, individual autonomy, and free development of one's personality. If human dignity—as protected for example in the German Constitution (Article 1) and in the 2004 Treaty

[3] I Kant, What is Enlightenment? (1784), in I Kant, Political Writings (ed H Reiss), 1977, at 54: 'Enlightenment is man's emergence from his self-incurred immaturity . . . The motto of enlightenment is therefore: *Sapere aude*! Have courage to use your own understanding!'

[4] I Kant, Perpetual Peace (1795), I Kant (n 3), at 103: 'For Hugo Grotius, Pufendorf, Vattel and the rest (sorry comforters as they are) are still dutifully quoted in *justification* of military aggression, although their philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force, since states as such are not subject to a common external constraint.'

Establishing a Constitution for Europe (Article II-61)[5]—is defined in terms of respect for moral and rational autonomy, vulnerability, and responsibility of individual human beings, then the legal protection of maximum, equal personal freedoms—through national, international, and transnational constitutional rules that empower individuals as legal subjects of law, limit abuses of power in all human interactions, and protect individual and democratic self-determination under the rule of law—can be seen as a 'moral categorical imperative'.[6] Individual liberty rights and property rights (without which most individuals cannot survive and develop their personality autonomously)—in the economy no less than in the polity—derive their moral justification from respect for, and legal protection of, human dignity and personal self-development under the rule of law. Most individuals survive by trading the fruits of their labour in exchange for goods and services needed for their personal self-development in dignity. Many people spend most of their time on their professional education, professional activities, and trading the fruits of their labour in exchange for needed goods and services. Arguably, the existential core of freedom of profession and trade is no less rooted in human dignity, individual rationality, personal autonomy, and responsibility of individuals than civil and political freedoms.

National constitutions (eg, Article 2 German Basic Law) and European Union (EU) law tend to accord less constitutional protection to *transnational* freedom of trade with third countries (cf Articles 131–133 EC) than to freedom of trade inside the state (cf Article 12 German Basic Law) or inside the EU (cf Articles 25–30 EC). In a similar way, national constitutions and human rights treaties often protect the extraterritorial exercise of civil and political human rights (eg, human rights to liberty, democratic rights) less than their exercise inside the country, as illustrated by the omission of a right to asylum in

[5] (Hereinafter 2004 EU Treaty Constitution.) Official Journal of the EU C 310 of 16 December 2004.

[6] On this moral 'Kantian premise' of my 'constitutional' (ie citizen- and human-rights-oriented) approach to international law, on Kant's moral justification of the need for national, international, and transnational constitutional guarantees of equal freedom, and Kant's historical theory of the antagonistic evolution and ever more precise legal definition of national and international guarantees of equal freedom, see E U Petersmann, How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?, 20 Michigan Journal of International Law (1998) 1–30. Kant defines law ('Recht') as 'the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom', and follows from his moral 'categorical imperative' that 'every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is right' (I Kant, The Metaphysics of Morals, in I Kant (n 3), 133). Contrary to Alston's insinuations that 'Kant's philosophy is actually superfluous to (my) analysis' (Alston (n 2) 841), my publications have emphasized long since that this moral justification of a rights-based, cosmopolitan approach to international law, and of treating citizens as legal subjects also of international economic law, is much more important than the additional economic justifications for empowering citizens to increase scarce resources through liberal (ie liberty-based) division of labour. Human rights lawyers (like P Alston) who ignore the moral justification of economics and of economic law, miss the most difficult dimension of the poverty problem and of making human rights more effective.

many national constitutions, the UN Covenant on Civil and Political Rights, and in the European Convention on Human Rights (ECHR). Yet, this *national focus* of national human rights law and trade law, and the *regional focus* of European human rights law and trade law, do not necessarily imply that cosmopolitan worldwide guarantees of human rights and freedom of trade are less important for human welfare and democratic peace than the corresponding, interrelated, national and regional guarantees of human rights and freedom of trade. For example, the comprehensive constitutional guarantees of 'market freedoms' (Article I-4), fundamental rights (eg, Article I-9), and human rights (eg, in Part II of the Charter of Fundamental Rights of the Union) in the 2004 EU Treaty Constitution, are all explicitly 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (Article I-2); they may be no less important for the welfare of EU citizens (cf Article I-10) than are their national, geographically less comprehensive guarantees of human rights and freedom of trade.

Outside the *ius cogens* nature of the inalienable core of human rights, general international law does not recognize a general legal hierarchy of human rights law over international trade agreements. WTO rules, like the EC's common market rules, are multilateral in form and substance and protect important human rights values (such as freedom, non-discrimination, peaceful cooperation, rule of law); they are not of a generally inferior legal rank compared with environmental and human rights agreements.[7] The international law rules on the relationship between successive treaties (such as *lex posterior derogat legi priori, lex specialis derogat legi generali*) leave open many questions regarding the legal relationships between human rights and international trade agreements. The UN Charter, the law of some UN Specialized Agencies (such as the International Labour Organization (ILO) and the UN Educational, Scientific, and Cultural Organization (UNESCO)), and human rights law commit all UN member states to the protection and promotion of human rights.[8] UN bodies have so far failed, however, to clarify the scope of human rights obligations under general international law (eg, for the more than fifty countries that have not ratified the UN Covenant on Economic, Social, and Cultural Rights). Outside Europe, most international trade agreements do not include explicit human rights provisions, just as most human rights treaties do not include explicit trade provisions. The prevailing 'realist school' continues to perceive international law as a system of rights and duties among sovereign states and

[7] For a different view see J Pauwelyn, Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law (2003), according to whom WTO obligations are reciprocal and bilateral in nature and may be modified bilaterally as well as multilaterally without recourse to the relevant WTO procedures (eg for amendments, waivers, regional integration agreements).

[8] For a collection of more than a hundred UN human rights instruments see The United Nations and Human Rights, UN (1995). European human rights instruments are collected, eg in Human Rights in International Law, Council of Europe (2000). On the controversial legal hierarchy of the 'inalienable core' of human rights see also I Seiderman, Hierarchy in International Law (2001).

disagrees with my view that—since the universal recognition of human dignity as the source and 'inalienable core' of human rights in worldwide, regional, and national human rights instruments—the rights of states have become constitutionally limited by human rights.[9]

The jurisprudence of WTO dispute settlement bodies, the EC Court of Justice, and the European Court of Human Rights suggests that conflicts between human rights and liberal trade rules arise only rarely and can be resolved through interpretation, mutual balancing, and reconciliation of the relevant trade rules and human rights without recourse to the contested *ius cogens* core and the *erga omnes* character of human rights. As the European Community is based on the regional integration rules of WTO law (such as Articles XXIV GATT, V GATS), the human rights arguments submitted to the EC Court in past disputes over the justification of national restrictions of freedom of trade within the EC could just as well have been presented to WTO dispute settlement bodies if the same national restrictions had been challenged by a third WTO Member.[10] Both the EC Court and WTO dispute settlement bodies use general balancing principles (such as transparency, non-discrimination, necessity, and proportionality) in deciding on whether national restrictions of freedom of trade are necessary for the protection of public interests.[11] Just as the European Court of Human Rights respects a national 'margin of appreciation' in its judicial review of whether national limitations of specific human rights are 'necessary in a democratic society', so the EC Court of Justice and WTO dispute settlement bodies often limit their judicial standards of review of the rights of WTO Members to regulate, for instance, if national government decisions have to take into account complex situations, or if trade courts have to 'weigh and balance' conflicting rights and obligations in order to determine

[9] For a defence of the 'constitutional approach' to international law see E U Petersmann, Constitutional Primacy and Indivisibility of Human Rights in International Law? in S Griller (ed), International Economic Governance and Non-Economic Concerns (2003) 211–266. On the constitutional limitation of state sovereignty by popular sovereignty and human rights in Europe see E U Petersmann, From State Sovereignty to the 'Sovereignty of Citizens' in the International Relations Law of the EU? in N Walker (ed), Sovereignty in Transition (2003) 145–166.

[10] In the *Schmidberger* Case, for example, the EC Court found that a public demonstration on a major motorway temporarily restricted freedom of trade in goods, but was justified by Arts 10 and 11 of the European Convention on Human Rights (Case C-112/00, ECR 2003 I-5659). In the *Omega* Case, the Court held that a national restriction of freedom of services inside the EC was justified on the ground that it was necessary for protecting public policy by prohibiting a commercial activity affronting human dignity (laser games simulating acts of homicide), cf Case C-36/2002, Judgment of 14 October 2004, in Common Market Law Reports (2005) 91. The same human rights arguments could have been taken into account in the interpretation of Arts XX GATT and XIV GATS.

[11] Such a general balancing approach is prescribed in Art II-112(1) of the 2004 EU Treaty Constitution. Art II-112(3) makes clear that the specific limitation clauses in the ECHR must be respected. On the 'weighing and balancing' test and balancing principles in WTO jurisprudence see M Hilf/G J Goettsche, The Relation of Economic and Non-Economic Principles in International Law, in S Griller (ed), International Economic Governance and Non-Economic Concerns (2003) 5–46.

the 'necessity', or the 'scientific justification', of trade restrictions aimed at protecting health or other public interests.[12]

The interpretation of trade rules with due regard to the human rights obligations of the trading countries concerned is consistent with my view that, as a result of the universal recognition of inalienable human rights in UN law and sixty years of UN and state practice regarding the legal protection of human rights, the finding by the European Court of Human Rights—that human rights treaties have become part of an objective 'constitutional order' based no longer exclusively on states but also on individuals as legal subjects[13]—should also be recognized in UN practice.[14] It is true that—in contrast to the worldwide *opinio iuris* on the existence of human rights obligations under national and international law—many UN member governments continue to violate their human rights obligations vis-à-vis their citizens, often without sanctions by UN bodies. Yet, just as the *opinio iuris* on the legal status of the seabed as a 'common heritage of mankind' has evolved into customary law without actual exploitation of the common seabed resources, so too should the implementation of UN human rights law, imperfect though it may be, lead to the transformation of UN human rights law into a UN human rights constitution, acknowledging the long-standing human rights obligations and practices of virtually all UN member states and bodies. Such a constitution would limit the powers of UN member states and bodies for the benefit of their citizens as legal subjects of UN law.[15] In addition to human rights law, international

[12] cf eg the WTO Panel report in WT/DS285/R (10 November 2004) (currently under appeal), *US—Measures Affecting the Cross-Border Supply of Gambling*, 6.461: 'Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values . . . the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate.'

[13] cf European Court of Human Rights, judgment on *Loizidou v Turkey* (preliminary objections) (23 March 1995) para 75.

[14] cf E U Petersmann, How to Reform the UN System? Constitutionalism, International Law and International Organizations, Leiden Journal of International Law 1997, 421–474; ibid, Constitutional Approaches to International Law: Interrelationships between National, International and Cosmopolitan Constitutional Rules, in J Bröhmer et al (eds), Festschrift für Georg Ress (2005) 207–222. On the impact of universal human rights on the sources and structure of international law see eg O de Frouville, L'Intangibilité des droits de l'homme en droit international (2004) 25–26, 266.

[15] As regards the constitutional limits of intergovernmental organizations (like the UN and the EU) deriving from the human rights obligations of their respective member states, the pertinent jurisprudence by the European Court of Human Rights and the EC Court of Justice should be applied to UN law *mutatis mutandis*, ie the International Court of Justice should recognize that universal human rights obligations binding on all UN member states are no less binding on their intergovernmental decision-making in UN bodies. The very limited lists of *ius cogens* human rights proposed by US authors (cf Third Restatement of the Foreign Relations Law of the US, American Law Institute (1990) s 701) reflects the US reservations vis-à-vis worldwide and regional human rights treaties, but needs to be updated in the light of the expanding UN consensus on 'inalienable' human rights, such as the human rights to education and health, now incorporated into over 100 national constitutions and worldwide treaties like the UN Convention on the Rights of the Child, ratified by almost all states except the US.

economic law (eg, the more than 2,500 bilateral investment treaties), and regional integration law, there are many other areas of international law (like international criminal law, humanitarian law) that recognize individuals as legal subjects and give rise to a newly emerging 'global administrative law'.[16] For the same reasons that freedom of profession and trade has received constitutional protection in European constitutional law, my publications argue (see below Section II.E) that—at least in Germany and in the EU—such constitutional rights to liberty, freedom of profession, and protection of private property should be construed in conformity with the UN and WTO obligations of the countries concerned: an individual's right to trade the fruits of her labour in exchange for foreign goods and services needed for personal self-development in dignity should be protected in conformity with the international legal obligations of the country concerned.

B. Integrated or separate regulation of human rights and trade law?

No country is rich and autonomous enough to renounce the benefits of liberal trade. The welfare of virtually every country depends on liberal trade rules as the legal basis for creating the welfare needed to fulfil human rights (eg, of access to essential medicines at affordable prices) and satisfy consumer demand (eg, for imported food). All constitutional democracies are either members of the WTO or are in the process of negotiating their WTO membership. Yet, even though WTO rules may be of essential importance for realizing human rights (such as individual access to essential food, education, medicines, freedom of profession), the human rights dimensions of trade rules are not explicitly addressed in WTO law. The Preamble of the WTO Agreement defines the objectives of the WTO in terms of

> raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.

Many other WTO rules recognize that the WTO objectives extend far beyond economics. Yet, human rights are nowhere mentioned in WTO law, just as most free trade area or customs union agreements (including the EEC Treaty of 1957) do not explicitly refer to human rights. The 'general exceptions' in the General Agreement on Tariffs and Trade (eg, GATT Article XX), the General Agreement on Trade in Services (eg, GATS Article XIV), and in the Agreement on Trade-Related Intellectual Property Rights (eg, TRIPS Article 8) permit restrictions 'necessary to protect public morals' or human health, without

[16] cf B Kingsbury/N Krisch/R Stewart, The Emergence of Global Administrative Law, Institute for International Law and Justice, New York University, Working Paper (2004) 1.

clarifying whether human rights are part of the domestic 'public order', as it is recognized in many European countries, or whether the right of governments to protect public health may actually be an obligation under human rights law. WTO diplomats emphasize the limited mandate of the WTO and carefully avoid discussing human rights in WTO bodies. WTO dispute settlement bodies have hardly ever been confronted with human rights arguments.[17] Like the law of all UN Specialized Agencies, the WTO agreement confers only a limited jurisdiction on the WTO that focuses on the reciprocal liberalization of market access barriers and market distortions, and the limited harmonization of trade rules, certain non-discriminatory internal regulations (eg, technical regulations, sanitary and phytosanitary standards, and intellectual property rights), and related legal procedures (eg, for 'risk assessments', safeguard measures, individual access to courts). Similar to the jurisprudence of the European Court of Human Rights on the 'strict interpretation' of the scope of exception clauses in the ECHR and on the 'margin of appreciation' of national authorities regarding the domestic 'necessity' of restrictions (notably in economic regulation),[18] the WTO Appellate Body also applies stricter standards of judicial review to discriminatory trade restrictions under WTO exceptions clauses (eg, Article XX GATT) than to non-discriminatory regulations based, for example, on the WTO Agreements on Technical Barriers to Trade, Sanitary and Phytosanitary Measures.[19]

The lack of any explicit linkages of human rights and trade rules in WTO law contrasts with the integrated regulation of the common market and human rights in many national constitutions as well as in the 2004 EU Treaty Constitution. Most national constitutions protect freedom of trade *inside* national frontiers without authorizing sub-national authorities (eg, cities, states) to introduce internal, discriminatory market restrictions vis-à-vis domestic citizens. National constitutions thereby recognize that a common market and freedom of trade require constitutional protection and, like human rights, cannot be left to the whim of post-constitutional majority decisions. The constitutions of some federal states (such as Germany and Switzerland) explicitly protect freedom of trade as a constitutional right of domestic citizens.[20] Other constitutions protect the internal market through objective constitutional restraints (eg, in Article I, section 8 of the US constitution) without explicitly granting corresponding individual rights of freedom of trade inside the country. The EU Treaty, the EU Charter of Fundamental Rights (2000), and the 2004 EU

[17] cf E U Petersmann, Human Rights and the Law of the World Trade Organization, Journal of World Trade (2003) 242–281.

[18] On these two principles, and their inherent tensions, in the jurisprudence of the European Court of Human Rights see eg D Gomien/D Harris/L Zwaak, Law and Practice of the European Convention on Human Rights and the European Social Charter (1996) 211–219.

[19] cf V Heiskanen, The Regulatory Philosophy of International Trade Law, Journal of World Trade (2004) 1–36, 25–29, 33.

[20] cf M Hilf/E U Petersmann (eds), National Constitutions and International Economic Law (1991).

Treaty Constitution protect free movement of goods, services, persons, and capital, as well as non-discrimination, as 'fundamental freedoms' at the same constitutional level as other 'fundamental rights',[21] without according constitutional primacy to civil and political over economic rights. Similar to the recognition in the 1993 Vienna Declaration of the UN World Conference on Human Rights that 'all human rights are universal, indivisible and interdependent and interrelated', the EU and its Charter of Fundamental Rights are 'founded on the indivisible, universal values of human dignity, freedom, equality and solidarity'.[22] Compared with the integrated regulation of human rights and freedom of trade in national constitutions (eg, in Articles 1 to 19 of the German Basic Law), in the 2004 EU Treaty Constitution, and also in the international trade agreements with human rights clauses concluded by the EU with more than 100 third-party countries, the separate UN human rights covenants and UN human rights institutions remain fragmented and hardly coordinated with worldwide economic treaties and institutions.[23] For example, whereas the EU Treaties refer explicitly to the European Convention on Human Rights, to the European Social Charter, and the 1951 Geneva Convention on the status of refugees, the WTO Agreement includes not a single reference to any human rights treaty, just as no UN human rights covenant refers to the Bretton Woods Agreements, the GATT, or the WTO.

Human rights and fundamental freedoms are rightly recognized as constitutional framework for a 'social market economy' in EU law. The 'indivisibility' of civil, political, economic, social, and cultural human rights and fundamental freedoms is far more realized in EU law than in UN human rights law. For example, freedom to sell and buy goods and services, private property, freedom of production, trade, and investments, and freedom of competition and non-discriminatory conditions of competition are legally protected in the 2004 EU Treaty Constitution, but not in UN human rights law. Human rights are, however, relevant for the production and distribution of goods, services, and capital in the world trading system based on WTO law, even if this fact is acknowledged neither in WTO law nor in UN human rights law. Just as the EU Charter of Fundamental Rights emphasizes that 'it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social

[21] See eg Arts I-4, I-9, II-75 and 76 of the 2004 Treaty Establishing a Constitution for Europe. In EU law, the distinction between 'fundamental freedoms' and 'fundamental rights' remains controversial (below II. B). The EC Treaty limits 'freedom of establishment as a fundamental right' to EU citizens and thereby recognizes that 'market freedoms' and 'fundamental rights' under EC law are not general human rights.

[22] The quotation is from the Preamble of the EU Charter and is discussed by J Kenner, Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility, in T Hervey/J Kenner (eds), Economic and Social Rights under the EU Charter of Fundamental Rights (2003) ch 1.

[23] On the 'human rights clauses' in the EC's international trade agreements, and their impact on economic and social rights, see eg I Martin/A Abdellatif (eds), The Impact of Free Trade Areas on Economic and Social Rights in the Mediterranean Area (2005). For a comparison of UN and EU human rights law see eg D McGoldrick, The Charter and UN Human Rights Treaties, in S Peers/A Ward (eds), The EU Charter of Fundamental Rights (2004) 83–122. See also E U Petersmann, On Indivisibility of Human Rights, European Journal of International Law (2002) 381–385.

progress and scientific and technological developments', so do my publications emphasize the need for further developing UN human rights law, for referring to it in the law of worldwide organizations (similar to the EU Treaty references to the ECHR) and making it more supportive of overcoming poverty and promoting a 'social market economy'.

C. Individual freedom, diversity, and competition as common problems of human rights law and trade law

UN human rights law, like the EU Charter of Fundamental Rights and modern national constitutions (eg, Article 1 of the German Basic Law), proceeds from the constitutional recognition of human dignity as the source of inalienable human rights: All UN human rights covenants proclaim in their respective preambles that human rights 'derive from the inherent dignity of the human person'. The Universal Declaration of Human Rights (UDHR) and the 1993 Vienna Declaration of the UN World Conference on Human Rights distinguish between 'human rights and fundamental freedoms [as] birthrights of all human beings', whose 'universal nature' is said to be 'beyond question',[24] and the legal protection of human rights 'by the rule of law'.[25] My publications emphasize this distinction in UN human rights law between inalienable human rights as moral birthrights of each human being, on the one hand, and 'steps to be taken by the States Parties . . . to achieve the full realization' of the respective human rights, on the other, which might require national as well as international rule-making and administrative and judicial measures—including participation in a liberal world trading system—so as to protect and fulfil human rights and increase the number, quality, and variety of available goods and services. Even though Article 2 of the UN Covenant on Economic, Social, and Cultural Rights (ICESCR) qualifies these 'steps' more than most other human rights covenants,[26] it is well-established that the ICESCR entails far-reaching legal obligations to respect, protect, and fulfil the protected human rights.

The distinction between human birthrights (as 'rights to have rights') and human rights law entails that human rights law does not *establish*, but only *guarantees*, human rights; it also warrants the question whether the existing UN human rights law adequately protects universal human rights, for instance, in the area of poverty reduction and the world economy. The fact that about forty per cent of the world population lives on two dollars per day or less, and that this poverty is economically unnecessary and politically avoidable, suggests that, in many UN member countries, human rights continue to lack effective legal protection.

[24] cf the Vienna Declaration, pt I.1., in The United Nations and Human Rights, UN (1995) 448–449. [25] Preamble of the UDHR, in The United Nations and Human Rights (n 24) 81.

[26] Art 2 Para 1 reads: 'Each State party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

Human rights protect individual and democratic diversity and inevitably produce competition (eg, in the sense of rivalry concerning scarce resources). In both the economy as well as in the polity, human rights need to be coordinated and mutually balanced by democratic legislation and judicial protection. The democratic preferences, constitutional traditions, and available economic resources differ from country to country. Their respective constitutional, legislative, administrative, and/or judicial definition and protection of 'human dignity' and human rights—and also of freedom of trade—likewise legitimately differ among states. While human dignity is today universally recognized in numerous UN human rights instruments as the source of inalienable human birthrights, the function and meaning of dignity for legitimating and defining human rights remain controversial: depending on the particular historical circumstances and democratic preferences, different people may legitimately disagree on whether 'life, liberty and property' (as claimed by John Locke and in the Fourteenth Amendment to the US Constitution), 'life, liberty and the pursuit of happiness' (as claimed in the US Declaration of Independence), 'freedom, equality and fraternity' (as claimed in the 1789 French Declaration of the Rights of Man and Citizens), or the 'indivisible, universal values of human dignity, freedom, equality and solidarity' (as claimed in the EU Charter of Fundamental Rights) can be derived and legitimized from human dignity as human birthrights. In addition, the systems of classifying human rights legitimately differ among countries. According to Immanuel Kant, 'freedom [in the sense of independence from the coercive will of another], in so far as it can coexist with the freedom of everyone else in accordance with a universal law, is the sole human right belonging to every man by virtue of his humanity'.[27] According to other philosophers like Hannah Arendt, the right to live under a rule of law is the only human right.[28] In contrast to the distinction of civil, political, economic, social, and cultural human rights in the UN human rights covenants, the EU Charter of Fundamental Rights distinguishes dignity rights (title I), freedoms (title II), equality rights (title III), solidarity rights (title IV), citizen rights (title V), and rights to justice (title VI).

According to a long tradition in economic thought—from Adam Smith via Friedrich Hayek up to Nobel Prize laureate Amartya Sen—market economies and economic welfare are only instruments for enabling and promoting individual freedom as the ultimate goal of economic life and the most efficient means of realizing general welfare.[29] There are far-reaching differences between

[27] I Kant, The Metaphysics of Morals, in H Reiss (ed), I Kant, Political Writings (1970) 136.

[28] H Arendt, Es gibt nur ein einziges Menschenrecht, Die Wandlung (4) (1949) 754–770.

[29] On defining economic development not only in terms of Pareto efficient satisfaction of utilitarian consumer preferences, but also in terms of individual decisional autonomy, individual 'immunity from encroachment', and substantive 'opportunity to achieve', see A Sen, Rationality and Freedom (2002) eg ch 17 on 'markets and freedoms'. See also F A Hayek, The Constitution of Liberty (1960) 35: 'Economic considerations are merely those by which we reconcile and adjust our different purposes, none of which, in the last resort, are economic (except those of the miser or the man for whom making money has become an end in itself).'

the liberal Smithian conception of freedom (eg, as absence of arbitrary interference into individual liberty), the constitutional Hayekian conception (eg, of liberty as constitutional, legislative, and judicial guarantees against arbitrary domination of the individual), Sen's social empowerment concept of positive individual freedom, and the related conceptions of the individual (eg, as an atomistic, autonomous being or as individuals embedded in economic and social relationships).[30] The various approaches to defining economic development not only in quantitative macroeconomic terms but more broadly as freedom, especially Sen's conception of freedom as empowerment and human capacity for personal self-development, are more consistent with the universal recognition of human rights (including the so-called 'human right to development') than the macroeconomic, state-centred conceptions of national income and 'efficiency' cherished by many economists and WTO governments.[31] Economists should accept 'normative individualism' as a universally agreed value premise and policy objective as reflected in Article 1 of the UDHR: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

This conception of humans as not only free, equal, and rational, but also as morally and socially responsible human beings who have 'duties to the community in which alone the free and full development of his personality is possible' (Article 29 UDHR), differs positively from the frequent economic assumption of an atomistic, utility maximizing *homo economicus*.

Individual freedom, diversity, and rivalry are core problems of both human rights and trade law. My publications emphasize that international economic law and policy should focus not only on the 'process of competition' (whose legal prerequisites are treated as a 'black box' by many economists), the 'efficiencies' resulting from competitive markets (eg, productive, allocative, and dynamic efficiencies), and maximizing consumer welfare or 'total welfare' (including both consumer surplus and producer surplus). No less important is the legal protection of individual liberties (from the exercise of which competition arises) and of the 'economic constitution'—ie, freedom, private property, non-discriminatory conditions of competition, open markets, social justice, and other constitutional preconditions for an efficient and socially just economy—against abuses of economic and political power.[32] This 'constitutional approach'

[30] On the different liberal and republican concepts of freedom see eg P Pettit, Republicanism. A Theory of Freedom and Government (1997). On the evolving perceptions of the individual in economics see eg J B Davis, The Theory of the Individual in Economics (2003).

[31] cf E U Petersmann, The Human Rights Approach Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy? Journal of International Economic Law (2004) 603–625.

[32] This ordo-liberal emphasis on the need for a legal constitution of a liberal economic order distinguishes EC economic and competition law from the focus only on 'economic efficiency' as the leading objective in US antitrust policy. On the plurality of economic, legal, political, and social aims in EC competition policy, and the different focus of US antitrust policies, see eg D Hildebrand, The Role of Economic Analysis in the EC Competition Rules, 2nd edn (2002) 99–101.

focusing on the protection of individual economic rights against abuses of private and public power in the economy is faced with the same 'dilemma' as the constitutional protection of human rights in the polity: where should the legal boundaries be drawn so as to protect individual rights against abuses of economic power and political power?[33] The 'development as positive freedom approach' emphasizes the manifold linkages between economic and political freedoms and social opportunities (eg, in terms of access to education and health care).[34] The UN Development Reports increasingly acknowledge that human rights and constitutional freedoms not only empower citizens to become better 'democratic citizens', but also set incentives for investments, savings, a welfare-enhancing division of labour, and consumer-driven competition.[35] Some specialized UN Agencies (eg, the ILO, FAO, WHO, UNESCO) explicitly define their objectives in terms of human rights (eg, core labour rights, human rights to food, health, and education). Others, like the World Bank, recognize in their policies that 'sustainable development is impossible without human rights', just as 'the advancement of an interconnected set of human rights is impossible without development'.[36] WTO law does not explicitly refer to human rights, but must be construed in conformity with the obligations of all WTO Members to respect and protect universally recognized human rights.

D. Human rights law and trade law as cosmopolitan 'layered' legal orders

International trade law belongs to the oldest fields of law (*ubi commercium, ibi ius*) and has evolved as a private and public, national and international 'layered' legal order since antiquity (eg, in the context of the network of trade agreements concluded in the Mediterranean more than 2,000 years ago).[37] Private contract law, tort law, private property rights, and commercial law (*lex mercatoria*) have enabled a national and transnational 'private law society' producing, trading, and distributing goods, services, and capital long before the constitutional recognition of human rights since the eighteenth century. Just as trade law has evolved bottom-up in response to the demand of private economic actors and continues to be regulated in national, regional, and worldwide rules, so too has human rights law evolved bottom-up in response to the demands of citizens, and is legally protected in national, regional, and worldwide rules. The inclusion of freedom of trade in the guarantees of Magna Carta (1215) illustrates that

[33] cf G Amato, Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market, 1997; E U Petersmann, Theories of Justice, Human Rights and the Constitution of International Markets, in Symposium on the Emerging Transnational Constitution, Loyola Law Review (2003) 407–459.

[34] cf A Sen, Development as Freedom (1999) eg chs 6 and 7 on the importance of democracy for preventing famines and other 'market failures'.

[35] Human Development Report 2000: Human Rights and Human Development, UNDP (2000).

[36] Development and Human Rights, The Role of the World Bank, World Bank (1998) 2.

[37] cf E U Petersmann, Principles of World Trade, in R Bernhardt (ed), Encyclopedia of Public International Law, vol 4 (2000) 1542–1552.

struggles for constitutional protection of individual rights have often focused not only on civil and political liberties (as in some of the human rights declarations during the eighteenth century), but also on economic and social rights (as in the UDHR of 1948).

Citizens invoke and apply human rights and trade rules in a particular national legal context, relying primarily on national and regional rather than worldwide human rights and trade rules. My publications emphasize that—since the rights of legitimate governments derive from the rights of their citizens—international trade law should be construed, in conformity with the universal recognition of inalienable human rights, as a cosmopolitan law based on human rights and popular sovereignty of peoples—rather than as a state-centred, international law regulating rights and duties of states.[38] As a legal secretary, member, or chairman of numerous GATT and WTO dispute settlement panels for more than twenty years, I was legally required to follow the customary methods of treaty interpretation prescribed by international law (eg, Article 3 of the WTO Dispute Settlement Understanding), and have often emphasized the need for exercising 'judicial economy' and judicial self-restraint vis-à-vis the numerous GATT and WTO provisions protecting regulatory discretion of GATT and WTO member countries.[39] This positive law perspective of an international judge applying intergovernmental rules does not restrict my ability, as an academic and human rights advocate, to emphasize the legal, economic, and political advantages of 'decentralizing' intergovernmental disputes by empowering citizens—not only in the polity by means of civil and political human rights, but also in the economy by legal and judicial protection of economic and social rights, including the right to invoke precise and unconditional international trade obligations of governments in domestic courts.

E. Consequences of a 'constitutional approach' to international trade law

Many of my publications proceed from the unique constitutional context of German and 'European constitutional law', which protect individual liberty and judicial remedies—also in the economic area—through 'multilevel constitutional guarantees' against legislative and administrative restrictions of individual freedom in a more comprehensive manner than in national Anglo-Saxon constitutional systems (eg, in the United States).[40] Such a European perspective—as reflected in the constitutional commitment of national as well as European governance to promotion of 'human dignity, freedom, democracy,

[38] cf Petersmann (n 9).

[39] cf eg Paras 2–3 of the Panel Report on *Mexico—Measures Affecting Telecommunications Services* (WT/DS204/R) (2 April 2004, adopted in June 2004).

[40] See the comparative constitutional studies in M Hilf/E U Petersmann (n 20) and eg E J Eberle, Dignity and Liberty, Constitutional Visions in Germany and the United States (2001). On the broad constitutional guarantees of human dignity and general individual freedom and non-discrimination in Arts 1–3 of the German Basic Law, in addition to specific constitutional guarantees of freedom and equality, see eg R Alexy, A Theory of Constitutional Rights (2002) ch 7.

equality, the rule of law and respect for human rights' inside and outside the EU (Articles I-2 and 3 of the 2004 EU Treaty Constitution)—justifies constitutional interpretations of EU law that may run counter to the national constitutional traditions in Anglo-Saxon countries (eg, in North America) and, sometimes, prompt Anglo-Saxon nationalists to criticize European internationalists as extraterrestrial idealists coming from Venus.[41] For instance:

(1) From a German and European human rights perspective, all democratic legislation and democratically approved, intergovernmental agreements, including trade law, derive their legitimacy from respecting, protecting, and/or promoting human rights and democratic self-government, even if such 'constitutional functions' are not explicitly acknowledged in the legal instruments concerned (eg, on the parliamentary ratification of the WTO Agreement by all twenty-five EU member states as well as by the EC).
(2) Since all democratic government activity must be presumed to serve the constitutional rights of domestic citizens, also intergovernmental guarantees (eg, in the EC's free trade agreements) of freedom, non-discrimination, and rule of law for private cooperation across frontiers should be presumed to protect the rights not only of states, but also of their citizens, and to require respect for human rights in the implementation of the agreement concerned.
(3) The 'indivisible' nature of human rights (eg, to liberty) is more consistently protected in EU law than in worldwide international law, including UN law and WTO law. Yet, as human rights tend to be exercised and protected in local communities with diverse democratic preferences and constitutional traditions, human rights treaties leave a 'margin of discretion' for the legislative, administrative, and judicial balancing and implementation of human rights. For instance, in countries with long-standing constitutional and legislative protection of a common market (as in the US), without a national Bill of Rights (like Australia), with less comprehensive constitutional protection of a national common market (as in Canada), or in common markets without a common state (as in the EC), the diversity of constitutional contexts and of related human rights traditions may justify diverse ways of legislative, administrative, and judicial protection and of mutual balancing of human rights and trade rules.[42]

[41] cf the neo-conservative US author R Kagan who argued in his book on Paradise and Power (2002) that—when it comes to international relations—Americans are from Mars (ie more inclined to use force as a legitimate and efficacious way of eliminating threats), and Europeans are from Venus (ie more inclined to focus on 'soft power' so as to influence others by incentives and values rather than by military threats).

[42] This legitimate diversity of national constitutional traditions, and my focus on legal and judicial protection of individual rights (eg, by German and EC judges) rather than on state rights and WTO jurisprudence, appear to have prompted misunderstandings by my American, Australian, and Canadian critics.

(4) The diverse constitutional traditions of defining and protecting 'human dignity' (eg, pursuant to Article 1 of the German Basic Law, Article 1 of the EU Charter of Fundamental Rights), the constitutional guarantee of 'liberty' (eg, in Article 6 of the EU Charter), 'fundamental freedoms' (eg, in Article I-4 of the 2004 EU Treaty Constitution), or 'freedom to conduct a business' (eg, in Article II-76 2004 EU Treaty Constitution) reflect diverse historical experiences and legitimate efforts at realizing human rights in different constitutional contexts. In polities with historical experiences of 'high degrees of constitutional failures' (like Germany and Europe), as well as in common markets without a common state (like the EC), the constitutional recognition of respect for human dignity as a human right (eg, in Article 1 German Basic Law, Article 1 EU Charter of Fundamental Rights), and the constitutional and judicial protection of liberty rights across national boundaries (eg, in Article 2 German Basic Law), empower citizens and protect human freedom and rule of law also in the economic area. Such constitutional safeguards appear to be more effective than if the human right to liberty is construed narrowly—as in many Anglo-Saxon democracies without historical experiences of dictatorship, cartelization of the national economy, or genocide—as protecting mainly freedom from arrest and other bodily restraint, without judicial protection of 'substantive due process' in the trade policy area.[43]

(5) Laws regulating *cross-border trade* and competition laws are part of *administrative law*, that is, they are based on legislation and administered by special government agencies, like customs authorities and competition authorities. Such trade and competition rules tend to be administered on the basis of *economic rationales*, such as promotion of consumer welfare and economic efficiency, often without references to human rights and 'social justice' (eg, regarding the distribution of income, the adjustment costs of import competition, inadequate market incentives for investing in research and development of new medicines for 'neglected diseases' suffered by poor people in poor countries). Yet, European competition law defines the objective of competition policy not only in macroeconomic efficiency terms (as it is done in the US, for example), but also in terms of protecting economic freedom and the common

[43] See eg the comparative study of the different 'common market rules' in the 18th-century US Constitution, the 19th-century Swiss Constitution, the 20th-century German Basic Law, and in the EC Treaty Constitution in E U Petersmann, Constitutional Functions and Constitutional Problems of International Economic Law (1991). See notably the conclusion in ch VIII that international guarantees of freedom of trade, rule of law, and of non-discriminatory private cooperation across frontiers can serve 'constitutional functions' for extending national constitutional guarantees of freedom, non-discrimination, and rule of law beyond national boundaries. The fact that trade politicians, domestic judges, and domestic parliaments often ignore international trade law and favour judicial review of trade legislation only vis-à-vis foreign states (eg in the WTO), but not vis-à-vis their own domestic legislation, confirms the importance of constitutional protection of a welfare-increasing division of labour among citizens across frontiers.

market.[44] EU law further recognizes that human rights require a 'social market economy' (Article I-3 of the 2004 EU Treaty Constitution) ensuring satisfaction of the basic needs of the 'losers' in international competition, protection of poor and vulnerable people without purchasing power, democratic participation, and social justice.

(6) The enjoyment of most human rights depends on access to scarce resources. The unnecessary poverty of billions of people is therefore the most urgent human rights problem. The universal recognition of human rights obviously does not depend on economic theories. Consumer-driven competition and a mutually beneficial international division of labour are, however, important tools for enhancing productivity, individual freedom, and access to more, better, and a larger variety of goods and services necessary for the enjoyment of human rights. Constitutional protection of economic and social rights for the welfare-increasing functioning of consumer-driven economic markets is no less important for satisfying citizen demand than constitutional protection of civil and political rights for citizen-driven 'political markets' (democracy).[45] Constitutional protection of freedom of trade, and recognition of the 'constitutional functions' of intergovernmental liberal trade rules, must be combined with governmental correction of market failures (like unjust distribution of resources) and the supply of collective public goods (like protection of human rights). Economic theory confirms that discriminatory trade restrictions are only rarely optimal policy instruments for protecting social rights and human welfare. Protection of freedom of trade as an individual right therefore has nothing to do with laissez-faire liberalism: optimal government policies must combine freedom of trade with non-discriminatory internal government interventions (eg, human rights law, tax law, competition law, social law, environmental law) correcting market failures directly at their domestic source and supplying public goods in a non-discriminatory way.

(7) The fact that trade liberalization agreements address human rights concerns only in 'exceptions clauses' (eg, GATT Article XX)—just as human rights treaties often address economic concerns only indirectly in their 'limitations clauses'—is due to the limited objectives and legal system of such agreements (eg, the legal protection, in GATT Article XXIII, of reciprocal market access commitments against unilateral 'nullification of impairment'). This legally separate regulation of different fields of law and policies does not prevent democratic lawmakers and courts from balancing trade rules and human rights in a mutually coherent manner with due regard to the human rights obligations of governments. In *Schmidberger v*

[44] cf G Monti, Article 81 EC and Public Policy, Common Market Law Review (2002) 1057–1099; G Amato (n 33).

[45] cf E U Petersmann, Constitutional Economics, Human Rights, and the Future of the WTO, Aussenwirtschaft (Swiss Review of International Economic Relations) (2003) 49–91; A Sen, Development as Freedom (1999).

Austria, for example, the EC Court reconciled the EC Treaty guarantees of free movement of goods with the protection of freedom of expression and freedom of assembly, as guaranteed in Articles 10 and 11 of the European Convention on Human Rights, without squeezing the human rights guarantees into the 'exception clause' of Article 30 EC Treaty 'in order to determine whether a fair balance was struck' between the trade interests and the human rights interests concerned.[46] In contrast to Anglo-Saxon constitutional traditions (eg, in North America), such mutual balancing of 'fundamental economic freedoms' and human rights—based on principles of procedural as well as substantive *due process of law* (eg, transparency, non-discrimination, necessity, proportionality, cf Article II-112 of the 2004 EU Treaty Constitution)—has become part of the common constitutional traditions of all EC member states, and has also been applied in the jurisprudence of the European Court of Human Rights[47] and of WTO dispute settlement bodies.[48] These 'constitutional balancing principles' must duly take into account the specific limitation clauses in human rights provisions, as recognized in the 2004 EU Treaty Constitution (cf Article II-112(3)). The *Hertel* judgment by the European Court of Human Rights[49] illustrates the danger that national commercial courts, and even a national Supreme Court, may be inclined to restrict the individual freedom to express misleading statements in the field of unfair competition law more strictly than human rights courts.

II. ARE MARKET FREEDOMS PART AND PARCEL OF HUMAN RIGHTS?

The universal recognition of human rights as deriving from human dignity (see above I.C) suggests that 'liberties to be' require protection as human rights, at least to the extent that they are existentially necessary for personal self-development in dignity. 'Liberties to have', produce, acquire, sell, or consume goods and services may have a 'price' rather than 'dignity' (in Kant's terminology).

[46] See Case C-112/00, *Schmidberger v Austria* (n 10) Paras 80–81.

[47] eg in *Immobiliare Saffi v Italy*, Judgment of 28 July 1999, where the European Court of Human Rights found that lack of police assistance for the execution of a judicial decision (the eviction of a tenant from the applicant's apartment) constituted a breach of the applicant's right to property; cf A R Coban, Protection of Property Rights within the European Convention on Human Rights (2004) ch 7.

[48] cf M Hilf/G J Goettsche (n 11).

[49] In its judgment of 25 August 1998 in *Hertel v Switzerland* (published in Reports 1998-VI), the European Court of Human Rights concluded that restrictions on freedom of expression imposed under the Swiss Unfair Competition Law, and upheld by the Swiss Supreme Court, were in violation of Art 10 of the European Convention on Human Rights; the Court considered it 'necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely "commercial" statement, but his participation in a debate affecting the general interest, for example, over public health' (Para 47, 2330).

A. Moral foundations of market freedoms

Economists and some human rights advocates view property rights and market freedoms as mere instruments for the promotion of savings, investments, and more efficient production and allocation of goods and services. My publications and other lawyers emphasize that economic efficiency and satisfaction of consumer demand serve human values (measured by economists in terms of human willingness to pay for scarce goods and services) and are of crucial importance for social justice.[50] John Locke justified property rights as moral entitlements to the fruits of one's labour provided the valuable good (or the added value of the good) was produced without violating the rights and basic needs of others.[51] Hegel's *Philosophy of Right* perceives the appropriation, ownership, and alienation of property as expressions of the will, personality, independence, and self-development of the owner in relation to objects and to others who must respect property rights and may perceive the personality of individuals (eg, of an artist) in the light of their property (eg, artworks); this often close interrelationship between personality and property illustrates that—just as property may be an existential component of the autonomy, personality, and social recognition of an individual—so can deprivation of property also imply an attack on the personality of the owner.[52] Joseph Raz and other legal philosophers rightly emphasize the role of property rights as constituent elements of an autonomous life with privacy, material security, and 'positive freedom' that should be limited only to protect the freedom of others, and requires respect for the fruits of lawful individual choices.[53] As property rights include the right to dispose of one's property, these various moral justifications of legal protection of property rights also justify private rights to supply or demand one's goods in private markets. As 'enabling devices for individual autonomy',[54] markets and their various social functions (eg, as information, coordination, and sanctioning mechanisms) can be justified not only on grounds of economic efficiency and as incentives for exertion, creativity, and

[50] cf eg R Posner, The Economics of Justice (1981); E U Petersmann, Morality, Human Rights and International Economic Law: Towards Cosmopolitan Market Integration Law? in H D Assmann/R Sethe (eds), Recht und Ethos im Zeitalter der Globalisierung (2004) 53–86.

[51] cf the Essay Concerning the True Origin, Extent and End of Civil Government in J Locke, Two Treatises of Government (1689) Paras 27–41, where Locke assumes that, in a state of nature without money, persons must limit their unilateral appropriations to a proportional share so that 'enough, and as good' for others is left. Locke's labour theory as the moral justification of just property acquisition raises numerous problems (cf J W Harris, Property and Justice, 1996; J Waldron, A Right to Private Property, 1988). Notably Locke's views on self-ownership and property rights over one's body may be inconsistent with respect for human dignity: Individuals have personality rights over their bodies and can claim property rights over body parts only to the extent that such body parts could be separated with the consent of the person (eg hair) and without violating one's human dignity.

[52] cf G W F Hegel, The Philosophy of Right (translated by Knox) (1965); J E Penner, The Idea of Property in Law (1997).

[53] cf eg A R Coban (n 47) 65–77; J Raz, Morality of Freedom (1986) 372–375.

[54] cf J Gray, The Moral Foundations of Market Institutions (1992) eg 3.

decentralized coordination of autonomous actions, but also as preconditions for individual autonomy and for a free, informed, and accountable society. Of course, democratic legislation must regulate markets in the public interest.

EU law distinguishes between human rights, on the one side, and 'fundamental freedoms' (cf Article I-4 of the 2004 EU Treaty Constitution) and 'fundamental rights' (cf the EU Charter of Fundamental Rights), on the other; only the latter may be limited to EU citizens (eg, in the case of the right of establishment inside the EU) and may be extended to foreigners on the basis of reciprocal international guarantees as, for example, in the national treatment commitments under the General Agreement on Trade in Services (GATS). Hence, the EU concept of 'fundamental freedoms' differs from the use of 'fundamental freedoms' in the 'European Convention on Human Rights and Fundamental Freedoms' which appears to use the terms 'human rights' and 'fundamental freedoms' synonymously. It remains to be clarified by the EC Court whether, in case of conflicts between 'fundamental market freedoms' and human rights, the general 'balancing principles' provided for in Article II-112 of the 2004 EU Treaty Constitution (such as proportionality, necessity, the need of a legal basis and 'objectives of general interest') apply to both market freedoms and human rights alike, or whether the specific limitation clauses in the ECHR and in UN human rights conventions require a stricter protection of human rights.[55]

B. Constitutional protection of market freedoms

Owing to the inherent tendencies of liberal markets to destroy themselves through abuses of power ('paradox of liberty'), even liberal defenders of *spontaneous order*, like Nobel Prize economist von Hayek, emphasize the need for

- a *constitution of liberty* limiting public and private abuses of power; and for
- general *rules of just conduct* protecting the proper functioning of economic markets,[56] for instance, in order to remove 'discriminations by law which had crept in as a result of the greater influence that certain groups . . . had had on the law', or to ensure 'the provision by government of certain services which are of special importance to some unfortunate minorities, the weak or those unable to provide for themselves'.[57]

Constitutional law and constitutional economics agree that freedom—in economic markets no less than in political markets (democracy)—is no gift of nature, but must be legally constituted and transformed from the lawless, wild freedom (eg, of Robinson Crusoe) in the state of nature into legally and constitutionally secured freedom. The laissez-faire concept of freedom (eg, as absence

[55] The overlaps, differences, and possible interactions of the EU Charter of Fundamental Rights, the ECHR, and the UN human rights covenants are discussed by D McGoldrick (n 23).

[56] cf F A von Hayek, The Constitution of Liberty (1960); id, Law, Legislation and Liberty (1980).

[57] F A von Hayek, Rules and Order (1973) 141–142.

of arbitrary coercion) is inconsistent with the constitutional concept of freedom (eg, emphasizing the need for constitutional, legislative, and judicial guarantees against arbitrary domination) as well as with the human rights concept of freedom as positive capacity to personal self-development under the rule of law in a democratic society, with due regard to the equal human rights of all others.

Liberal economists (like Hayek) tend to criticize social welfare legislation and discriminatory trade restrictions if they distort market prices and consumer-driven competition in order to 'direct private activity towards particular ends and to the benefit of particular groups'.[58] *Ordo*-liberal economists, 'constitutional economics', and social market theories emphasize the 'market-creating functions' of constitutional liberty rights, property rights, non-discrimination rights, and also of social rights if they empower market participants to make a better use of scarce resources (eg, human capital), promote social justice and social consensus, and reduce adjustment costs (eg, as a result of greater social stability in an extended division of labour) and transaction costs.[59] Constitutional protection of liberty rights and social rights can reinforce competition and market freedoms by empowering individuals (eg, by means of property rights) and protecting their freedom of choice and market access. Modern development economists, like Nobel Prize laureate Amartya Sen, emphasize these mutually reinforcing interrelationships between economic, social, and political liberties and opportunities.[60]

The divergent constitutional approaches to economic freedom in European and American constitutional laws are reflected in the similarly divergent approaches in EU and US competition laws. Europeans perceive competition as a legal construct designed to protect not only consumer welfare but also other important social functions (eg, competition as a procedure for the discovery of new information, protection of individual freedom, openness of the common market, limitation of abuses of economic power). European competition law is part of the EC Treaty constitution and recognizes freedom of competition and mobility of producers and consumers as individual rights.[61] In contrast, in the US, where a common market and effective competition laws have existed for already more than a century, competition tends to be perceived in 'purely economic' terms, and US antitrust experts claim that competition policy should interfere only on economic efficiency grounds (eg, in case of price-fixing, output restraints, or monopolization). Competition law is defined more broadly in the EC Treaty as prohibiting also the abuse or strengthening of dominant market positions, and applies to private as well as public undertakings, as well as to actions of state aid.

[58] F A von Hayek, Rules and Order (1973) 142–143.

[59] cf E U Petersmann (n 45); W Sauter, The Economic Constitution of the EU, Columbia Journal of European Law (1998) 27–68; S Deakin/J Browne, Social Rights and Market Order: Adapting the Capability Approach, in T Hervey/J Kenner (eds) (n 22) 27, 29 et seq.

[60] cf A Sen (n 34) xii.

[61] On this neo-liberal interpretation of EC trade and competition rules as protecting not only consumer welfare, but also competition as a process depending on individual market freedoms and property rights, see eg E J Mestmäcker/H Schweitzer, Europäisches Wettbewerbsrecht, 2nd edn (2004) 72–84.

C. Human rights as market freedoms?

The human rights conception of individuals as social human beings who have 'duties to the community' (Article 29 UDHR) and 'should act towards one another in a spirit of brotherhood' (Article 1 UDHR) is not inconsistent with the economic perception of individuals pursuing their self-interests in maximizing their 'utility' (eg, income and other scarce resources like goods, services, and charity) through division of labour in competition with other individuals. UN human rights instruments neglect the fact that legal protection of human rights inevitably gives rise to economic markets (ie, private demand for, and supply of, scarce private goods, services, and capital) that are closely interrelated with political markets for the collective supply of 'public goods' (eg, rule of law and democracy). For example, economic transaction costs are directly related to legal security. Economic incentives (eg, for savings and investments) depend on individual legal rights (eg, to private property) and their legal and judicial protection over time. Most human relations are characterized by freedom of choice, scarcity, and rational utility maximization. Many human rights (like freedom of opinion, freedom of profession, rights to democratic participation) can, therefore, be understood as 'market freedoms' (eg, to participate in 'opinion markets for ideas', and 'political markets' for democratic elections) that are indispensable to the constitutional protection of economic competition. This constitutional significance of market liberties for human life is emphasized by modern economists like Amartya Sen and should not be overlooked by human rights lawyers:

> [F]reedom of exchange and transaction is itself part and parcel of the basic liberties that people have reason to value. The freedom to exchange words, or goods, or gifts does not need defensive justification in terms of their favourable but distant effects; they are part of the way human beings in society live and interact with each other . . . The contribution of the market mechanism to economic growth is, of course, important, but this comes only after the direct significance of the freedom to interchange—words, goods, gifts—has been acknowledged . . . It is hard to think that any process of substantial development can do without very extensive use of markets.[62]

Based on 'the principle of an open market with free competition' (cf Articles 4, 98, 105, 157 EC) and 'freedom to conduct a business in accordance with Community law and national laws' (Article 16 of the EU Charter of Fundamental Rights), European constitutional rules protect free movement of goods, services, persons, capital, and related payments, and non-discrimination as individual 'fundamental freedoms' and impose corresponding government obligations to guarantee an 'internal market . . . without internal frontiers in which the free movement of goods, persons, services and capital is ensured'

[62] A Sen (n 34) 6–7.

(Article 14 EC).[63] My publications[64] construe these specific market freedoms of the EC Treaty constitution as manifestations of a more general 'freedom of trade'[65] rooted in the indivisible, constitutional guarantee of liberty' (Article 6 EU) as well as in more specific guarantees of freedom of profession and private property.[66] My proposals for 'constitutionalizing international trade law'[67] are aimed at protecting individual freedom, non-discriminatory conditions of competition, democratic governance, and social justice bottom-up (eg, through stronger judicial protection of individual rights) rather than only top-down through intergovernmental reforms and redistributive social rights and policies that have failed to overcome poverty and protect human rights effectively.

D. Common regulatory problems of political markets and economic markets

John Locke asserted that 'the *state of nature* has a *law of nature* to govern it, which obliges every one: And reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to

[63] Art I-4 of the 2004 Treaty Establishing a Constitution for Europe protects 'free movements of persons, goods, services and capital, and freedom of establishment' as 'fundamental freedoms'. On the legal and judicial protection, in Art 81:1 EC, of individual freedom of action of market participants see eg G Monti (n 44) 1059–1062. In its annual reports on competition policy, the EU Commission acknowledges a 'right of European consumers to purchase goods in the Member State of their choice' (eg Annual Report 1992, 50). The EC Treaty 'principle of an open market with free competition', by contrast, does not impose clear and unconditional obligations which can be relied upon by individuals (cf Case C-9/99, *Echirolles*, ECR 2000 I-8207).

[64] eg E U Petersmann (n 33) 419–421.

[65] See eg Case 240/83, ADBHU, ECR 1985 531, para 9: 'the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.' Especially the freedom of movements of workers and other persons, access to employment, and the right of establishment have been described by the EC Court as 'fundamental freedoms' (Case C-55/94, *Gebhard*, ECR 1995 I-4165, para 37) or 'a fundamental right which the Treaty confers individually on each worker in the Community' (Case 22/86, *Heylens*, ECR 1987 4097, para 14). Other judgments speak of a 'fundamental right to freedom of economic activity' (Case C-104/97, *Atlanta*, ECR 1999 I-6983, para 47). The ECJ rightly avoids 'human rights language' for the EC guarantees of 'market freedoms' which may be limited (eg as regards freedom of establishment) to EU citizens.

[66] See eg the individual right to general freedom of action and free development of a person's personality in Art 2:1 of the German Basic Law which has been recognized by the courts to protect also individual rights eg to import and export goods and services subject to democratic legislation. On the legal and procedural advantages and problems of such a broad constitutional guarantee of general individual freedom see eg R Alexy (n 40) ch 7. It remains to be seen whether the constitutional guarantee of 'freedom' (eg in Art 6 EU) and the 'right to liberty' (in Art 6 of the EU Charter of Fundamental Rights) will be construed narrowly (as in Art 5 of the European Convention on Human Rights) or more broadly in view of the comprehensive EU Treaty guarantees of economic liberties. Art II-112 of the 2004 EU Treaty Constitution explicitly reserves the possibility of construing EU rights guarantees more broadly than the corresponding ECHR guarantees. In German constitutional law, freedom of trade is legally and judicially protected as being guaranteed by the general freedom of action (Art 2), freedom of profession (Art 12), and the constitutional protection of property rights (Art 14 of the Basic Law) which include the freedom to sell one's property.

[67] cf E U Petersmann, Why Constitutionalizing the WTO Is Not a Step too Far, in C Joerges/E U Petersmann (eds), Transnational Social Regulation and International Trade Law (2005) ch 1.

harm one another in his life, health, liberty, or possessions.'[68] Locke claimed that rational individuals should respect each other's life, liberty, and property as 'natural rights' even if they had no common government. The evolution of private commercial law since antiquity (*lex mercatoria*) was no less based on similar rational rules than the claims, in the American and French human rights declarations of the eighteenth century, of inalienable 'natural rights' as being rationally necessary for enabling citizens to live in 'liberty, equality and pursuit of happiness'. Modern legal philosophers like Hart, even if they reject the identification of 'natural law' with physical laws (eg, governing biology), take as given facts of 'human nature and the world in which men live' (1) human vulnerability; (2) approximate equality; (3) limited altruism; (4) limited resources; (5) limited understanding and strength of will; and (6) the struggle for survival.[69] Other legal philosophers focus on different elements of human nature (eg, 'reason and conscience', as emphasized in Article 1 UDHR) and argue that—given the pervasive social problems of limited knowledge, conflicting interests, and abuses of power confronting every human society—'*if* human beings are to survive and pursue happiness, peace and prosperity while living in society with others, *then* their laws must not violate certain background natural rights or the rule of law'.[70] In a similar manner, competition lawyers derive from the characteristics of human rivalry and competition in the economy the need for national competition rules that, in most countries, focus on prohibition of price-fixing and output restraints, abuses of market power, and the control of mergers and acquisitions.

My own publications proceed from the positively existing human rights law in Europe and perceive 'international economic law' in a broad sense, that is, as comprising not only *international law* rules regulating economic activities,[71] but including private and public, national and international law[72] constituting a layered, interrelated legal system for the regulation of private and public economic activities in five major sectors (ie, international movements of goods, services, persons, capital, and payments). My rights-based approach to economic law—that is, my focus on the legal protection of individual rights to (1) have, (2) possess, (3) produce, (4) consume, (5) buy or sell, or (6) otherwise acquire or dispose of scarce goods, services, or capital—is inevitably related to the human rights question how individual (human) rights should be legally defined and judicially protected so as to satisfy basic human needs (eg, to consume goods and services essential for survival and personal self-development). From such a citizen perspective, human rights, constitutional law, and economic law

[68] J Locke, Two Treatises of Government (1690) (1963) 311.
[69] H L A Hart, The Concept of Law (1961) 188–193.
[70] R E Barnett, The Structure of Liberty (1998) 17.
[71] This is the prevailing approach in French literature, cf D Carreau/P Juillard, Droit International Economique, 4th edn (1998).
[72] This is the prevailing approach in American and German literature, cf A F Lowenfeld, International Economic Law (2002); W Fikentscher, Wirtschaftsrecht (1983); E U Petersmann (n 43).

are all confronted with the same 'social contract question': Which individual rights should rational citizens recognize so as to enable and promote mutually beneficial social cooperation in freedom, peace, and prosperity? I am agnostic vis-à-vis the natural law question whether natural rights for peaceful social cooperation have the same status for rational societies as natural principles governing biology, agriculture, or engineering. Yet, the 'indivisibility' of human dignity, liberty, and human rights, and the inevitable 'constitutional ignorance' (Hayek) of every individual vis-à-vis the constantly changing market processes in the economy as well as in the polity, prompt me to emphasize that the economy and the polity, and human rights and economic law, are best perceived as being 'indivisible' and as requiring mutually consistent constitutional protection. Just as the historical context of the human rights revolutions during the eighteenth century justified a focus on civil and political human rights inside states, so do the poverty problems and global integration in the twenty-first century call for more effective protection of human rights in the law and practice of international organizations.

Unlike moral philosophers like Thomas Pogge,[73] I perceive human rights not only as moral and institutional rights, but also as interactional legal rights and corresponding obligations—not only on the part of national governments, but also of intergovernmental and non-governmental organizations whose powers threaten the realization of human rights. Such a 'legalization' and 'judicialization' of social relations may be seen as a 'necessary evil' without which abuses of power and conflicts of interests cannot be effectively contained. In addition, however, an empowerment of individuals as legal subjects of international law also offers individual incentives for a cosmopolitan transformation of the state-centred, power-oriented system of international law, for better use of knowledge dispersed among billions of individuals, and for harnessing self-interested individuals for the decentralized enforcement of the rule of international law. As worldwide poverty is avoidable through constitutional and economic reforms, I challenge human rights lawyers (like Philip Alston) who treat the economy as a 'black box' and ridicule proposals for 'constitutionalizing' international law aimed at empowering individuals and people. Since 'normative individualism' and inalienable human rights remain valid also in *transnational* relations, I criticize 'theories of justice'—like John Rawls' theory for a just 'law of peoples' governing relations among 'liberal' and 'decent people',[74] or Frank Garcia's state-centred 'liberal theory of just trade'[75]—that admit only modest,

[73] cf T Pogge, World Poverty and Human Rights (2003) 64–65.

[74] cf J Rawls, The Law of Peoples (1989) and—for a thorough criticism—T Pogge, Realizing Rawls (1989); id, The Incoherence between Rawls' Theories of Justice, 72 Fordham Law Review (2004) 1739.

[75] cf F Garcia, Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade (2003) who, even though he locates 'the inquiry into justice and international trade law in our relationships to persons in other jurisdictions' (69), translates the individualist 'difference principle' of J Rawls to the world of trade in a state-centred manner: 'International social and economic inequalities are just only if they result in compensating benefits for all, and in particular for the least advantaged

moral international duties of assistance rather than relying on actionable human rights and constitutional reforms of international law in the struggle against avoidable poverty.

E. Freedom of trade as a fundamental right?

In national constitutional systems (eg, in Germany and Switzerland), the constitutional protection of property rights includes the right to sell one's property, just as constitutional guarantees of freedom of profession also protect the right to trade one's products and services in accordance with national law.[76] The 2004 EU Treaty Constitution explicitly provides for similar constitutional safeguards at the level of EU law by protecting the 'free movement of persons, services, goods and capital, and freedom of establishment' as 'fundamental freedoms' (Article I-4). Moreover:

- 'Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.' (Article II-75)
- 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognized.' (Article II-76)
- 'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions' . . . (Article II-77)

As most individuals survive by trading the fruits of their labour in exchange for needed goods and services, my publications argue for extending the 'constitutional guarantees of freedom of trade' in German and EU constitutional law to transnational trade with third countries by interpreting precise and unconditional, intergovernmental prohibitions of trade restrictions (eg, in GATT and WTO law) as justifying corresponding, individual rights in domestic legal systems—provided the respective domestic legal systems permit such a 'cosmopolitan interpretation' (as, arguably, in EU law). Of course, the intergovernmental GATT and WTO rules do not constitute individual rights, and some national legal systems (eg, in the US) explicitly exclude the 'direct applicability' of WTO rules. If at all, individual freedoms to trade across frontiers can be derived only from interpreting domestic constitutional guarantees in conformity with international liberalization commitments of the countries concerned, for example, if trade agreements

states' (134). Rawls himself refused to apply his 'difference principle' in support of international redistribution because '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', J Rawls (n 74) 117; hence, contrary to the arbitrary distribution of social 'primary goods' (like health, liberty, opportunities) among individuals that justifies the 'difference principle' within a society, international economic inequality among countries is to a large extent due to avoidable differences in productivity and constitutional choices.

[76] cf E U Petersmann (n 43) ch VI.

provide explicitly (eg, in Part I.5 of the WTO Agreement on the Accession of China) or implicitly for a 'right to trade' in terms of a 'right to import and export goods'. Such a WTO-consistent interpretation of domestic constitutional guarantees of freedom of profession, property, and trade can also be based on the human rights argument that economic development should be defined—as suggested by Nobel Prize economist Amartya Sen—not only in quantitative, macroeconomic terms but more broadly as positive freedom and human capacity for personal self-development.[77] European integration demonstrates that empowering individuals bottom-up (eg, by judicial interpretation of domestic laws in conformity with the self-imposed intergovernmental obligations of governments) can enable constitutional reforms that governments are unwilling to initiate top-down by transforming intergovernmental trade rules into a cosmopolitan legal system.

Constitutional protection of freedom of trade gives concrete legal meaning to Article 28 of the UDHR, according to which '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. The Universal Declaration of Human Rights explicitly recognizes that respect for human dignity requires national and international cooperation for the protection of economic rights: 'Everyone, as a member of society, . . . is entitled to realization, through national efforts and international co-operation . . . , of the economic, social and cultural rights indispensable for his dignity and the free development of his personality' (Article 22). From a 'basic needs perspective', freedom of trade is no less an 'existential liberty' and of fundamental importance for individual and social survival and poverty reduction than many human rights. It is true that constitutional guarantees of market freedom tend to be limited to national citizens or EC citizens unless the freedoms have been extended to third persons by means of reciprocal international agreements (eg, in the European Economic Area). Such constitutional limitations confirm that market freedoms—even if they are not protected as human rights, but are based on reciprocal, international guarantees of market access (as inside the EC)—deserve constitutional protection as fundamental freedoms of existential importance for many citizens. Of course, as must other constitutional freedoms, freedom of trade must remain subject to democratic legislation and—as illustrated by the human rights jurisprudence of the EC Court—subject to administrative restrictions designed to protect other human rights or important public interests.

F. Constitutional functions of GATT and WTO guarantees of freedom, non-discrimination, and rule of law?

In view of the power-oriented nature of international relations among some 200 sovereign states, most national constitutions subject *foreign policy powers*

[77] On defining economic development in terms of individual decisional autonomy, individual 'immunity from encroachment', and substantive 'opportunity to achieve', see A Sen, Rationality and Freedom (2002) eg ch 17 on 'markets and freedoms'.

to much less constitutional and judicial restraints than *domestic policy powers*. As foreign policy powers include powers to tax and restrict *domestic citizens*, my publications have emphasized long since that the reciprocal GATT and WTO guarantees of transnational freedom, non-discrimination, and rule of law can serve 'constitutional functions' for protecting individual freedom and non-discrimination across frontiers by limiting and subjecting discretionary trade policy powers to the rule of international law.[78] As productivity and the domestic supply of consumer goods and services can be increased through trade, the progressive extension of the constitutional protection of freedom of trade—eg, from (1) medieval city republics (like Florence) to (2) nation states to (3) the EC market and (4) beyond EC frontiers—should be continued in conformity with WTO law so as to maximize satisfaction of basic needs, personal self-development (eg, freedom of profession, freedom of education), and consumer welfare beyond traditional border discrimination. Even to the extent that international 'market freedoms' operate beyond their 'existential core' as 'instrumental liberties' subject to manifold legislative and administrative restraints (as permitted by WTO law), the fact remains that—owing to the common market and customs union law of the EC—EU citizens enjoy legal freedoms that they never had before. Their political significance for promoting mutually beneficial cooperation, rule of law, and 'democratic peace by satisfaction of consumer demand' throughout Europe goes far beyond their 'instrumental function' for securing a common market.[79]

Yet, national and international rules protecting freedom of trade only provide *opportunities*, which—unless they are grasped by businesses, consumers, and governments—offer no guarantee of welfare. Freedom of trade also entails competitive pressures and adjustment costs that may justify temporary import protection and adjustment assistance. Economists assume that economic liberty, division of labour, and competition will induce the *homo economicus* to maximize his individual and social welfare:

> The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often encumbers its operations.[80]

[78] See eg E U Petersmann (n 43) ch VII. Of course, this 'constitutional function' for limiting domestic trade policy powers for the benefit of domestic citizens is only one among many other 'foreign policy functions' of liberal international trade rules, and may not become effective in countries with dualist legal practices (like the US) rather than monist legal systems (like the EU).

[79] On EU law as the most effective 'peace treaty' and European security strategy in modern history, distinctly different from the power-oriented and unilateralist US National Security Strategy of 2002, see E U Petersmann, The 2004 Treaty Establishing a Constitution for Europe and Foreign Policies: A New Foreign Policy Paradigm? in R Iglesias et al (eds), Festschrift für Manfred Zuleeg (2005) 165–183.

[80] A Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776, 1976) book IV ch 5.

Hence, most economists claim that 'the world needs more globalization, not less',[81] and that globalization—contrary to the views of its critics—is also socially, not just economically, benign and 'has a human face'.[82] Can these economic assumptions be reconciled with the fact that, according to UN statistics, out of a total of 6.16 billion human beings in 2001, some 2.73 billion were reported to be living on $2 per day or less, and nearly 1.1 billion of these below the $1 per day international poverty line? How should the world trading system embodied in the WTO respond to the fact that such—often avoidable—poverty problems undermine the enjoyment of basic human rights and the legitimacy of national and international governing institutions? Does WTO law leave enough 'policy space' to WTO Members for addressing poverty-related problems, such as the production of traded goods (eg, by the approximately 250 million children between 5- and 14-years-old working outside their households) in violation of universally agreed 'core labour standards'?[83] Does the WTO system—as it is claimed by some of its critics[84]—contribute to the number (some 800 million human beings) who are undernourished, or to the more than 880 million lacking access to basic health services, by justifying the numerous trade barriers and trade distortions that restrict the trade and income opportunities of LDCs?

Most economists reply that the persistence of severe poverty has local causes, like bad governance, unfavourable population policies, geography, and religious or oppressive cultural traditions: 'Since the success of the economy depends on the quality of the state, the inequality in the quality of states guarantees persistent inequality among individuals.'[85] Some deduce as a result of this that global inequality and poverty are 'not a question of justice'.[86] In addition, legal philosophers like John Rawls—even if they consider a national economic order as unjust if it leaves basic human needs and human rights unfulfilled on a massive and avoidable scale—infer from the domestic origins of poverty that overcoming worldwide poverty requires, first of all, better *national* policies and better social institutions inside poor countries, notwithstanding international moral duties of assistance.[87] The explicit development objectives of the Doha

[81] M Wolf, Why Globalization Works (2004) 320.

[82] In this sense: J Bhagwati, In Defense of Globalization (2004) chs 2 and 19.

[83] Even though incorporation of a 'positive social clause' into WTO law continues to be opposed by LDCs, WTO law permits non-discriminatory internal regulations and 'general exceptions' for 'measures necessary to protect public morals' and 'public order' (cf GATT Art XX, a, GATS Art XIV, a, Art 8 TRIPS Agreement) that could justify trade restrictions on goods produced in violation of universally agreed core labour standards and human rights. As 'public order' is construed in EU law as including respect for human rights and labour rights, WTO governments may be surprised to learn from future WTO jurisprudence that the WTO's exception clauses already include a 'social clause' and 'human rights clause'.

[84] cf eg T Pogge (n 73) 15–19.

[85] M Wolf (n 81) 316.

[86] The Economist (11 March 2004).

[87] cf J Rawls (n 74) eg 37–38, 106–120. For a criticism of Rawls' 'purely domestic poverty hypothesis' and of his support only for moral obligations of international assistance see T Pogge (n 73), according to whom the world trading system and the more advantaged citizens of the affluent countries could easily prevent the avoidable life-threatening poverty in the world and must be held morally responsible for 'harming the global poor', including the often avoidable death of about 14 million people p.a. dying from poverty-related diseases.

Round, and the acceptance by every WTO Member of human rights obligations under UN law, reflect the recognition of such moral and legal obligations to reduce unnecessary poverty and widespread human rights violations inside WTO member countries. There is also economic evidence that WTO rules have—as claimed in the Preamble of the WTO Agreement—contributed to 'raising standards of living . . . and expanding the production of and trade in goods and services' for the benefit of LDCs: 'Developing countries that increased their integration into the world economy over the past two decades achieved higher growth in incomes, longer life expectancy, and better schooling.'[88] China's and India's experiences in achieving faster growth and poverty reduction through greater integration into the world economy confirm once again that international trade law can play a major positive role in protecting freedom of trade and reducing poverty in LDCs.[89] Constitutional guarantees of freedom of trade can empower individual traders, investors, producers, and consumers to seize the opportunities and potential welfare gains that GATT and WTO rules offer and which government bureaucracies all too often neglect.

G. Respect for divergent constitutional traditions of protecting market freedoms

Depending on the democratic preferences and constitutional contracts concerned, some national constitutions (eg, in federal states like Germany and Switzerland) and EU constitutional law (eg, Articles 15, 16 EU Charter of Fundamental Rights) protect 'market freedoms' as constitutional rights and decentralized instruments for achieving a common market. Other constitutions protect freedom of commerce and other 'market freedoms' through objective constitutional guarantees (such as the commerce clause in Article I, Section 8 of the US Constitution). Each of these alternative constitutional approaches can be implemented with due respect for human rights. The constitutional protection of freedom as a general constitutional principle (Article 6 EU), of 'market freedoms' as 'fundamental freedoms' (Article I-4 2004 EU Treaty Constitution), of an 'open market economy with free competition' (Articles 4, 98, 105 EC Treaty), and a 'social market economy' (cf Article I-3 2004 EU Treaty Constitution) offers additional, transnational constitutional safeguards in the unique context of the European 'common market without a common state'. Constitutional protection of economic as well as of political 'market freedoms'

[88] N Stern, Introduction to: Development, Trade and the WTO, World Bank (2002) xi. See also Global Economic Prospects and the Developing Countries: Making World Trade Work for the World's Poor, World Bank (2002).

[89] See eg the Least Developed Countries Report 2004, UNCTAD (2004); L A Winters, Trade Policies for Poverty Alleviation, in Development, Trade and the WTO, World Bank (2002) 28–37. China's trade surplus—which amounted vis-à-vis the US to more than $100 billion in 2004, and vis-à-vis the Eurozone to more than $48 billion during the first 10 months of 2004—illustrates the importance of international trade as a source of national income of foreign exchange.

is more consistent with the 'indivisibility' of fundamental rights. The tradition in Anglo-Saxon countries of giving priority to civil and political over economic and social rights, and of favouring judicial self-restraint vis-à-vis *substantive due process of law* in the economic policy area,[90] is no reason for emulating their national, constitutional models in the very different EU context of an 'international constitutional democracy' required to promote 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights' across national frontiers in Europe as well as 'in its relations with the wider world' (Article I-3 2004 EU Treaty Constitution).

The 1949 German Basic Law has responded to the historical experience of dictatorship, dictatorial cartelization, and the transformation of the German economy into a war machinery leading to holocaust and the Second World War, by providing for broad constitutional and judicial protection (eg, in Articles 2:1, 93, 104) of maximum equal freedom—subject to democratic legislation—as individual rights to be legally and judicially protected against unlawful legislative or administrative restraints.[91] The comparatively more successful, national constitutions of many Anglo-Saxon countries were lucky to avoid the 'constitutional failures' that Germany experienced under its Weimar Constitution of 1919. As constitutional rules reflect historical experiences and responses to previous 'government failures', it is only natural that American, Australian, or Canadian lawyers do not perceive modern European constitutional law as a persuasive paradigm for reinterpreting or redesigning their successful national constitutions. For example, while the strict judicial review by the EC Court of Justice of the 'necessity' and proportionality of national, legislative departures from EC rules has been crucial for the realization of a common market in Europe, the US Constitutional Court's discontinuation, since the 1930s, of judicial review of 'substantive due process of law' in economic legislation remains hardly contested in the United States. Contrary to the comprehensive guarantees of economic and social rights in the 2004 EU Treaty Constitution, President Roosevelt's 1944 proposals for a 'Second Bill of Rights' protecting economic and social rights (including freedom of trade and 'the right to earn enough to provide adequate food and clothing and recreation') were never enacted in US law.[92] These examples illustrate that the

[90] cf B H Siegan, Economic Liberties and the Constitution (1980).

[91] See R Alexy (n 40) ch 7. The constitutional guarantee of a general human freedom of action, in Art 2:1 of the German Basic Law, amounts to a 'constitutional right to the constitutionality of all state action. So the basic principle of the Rule of Law becomes a constitutional right', R Alexy, 226. The German Constitutional Court has thus recognized: 'Everyone can allege by way of constitutional complaint that a law limiting his freedom of action does not belong to the constitutional order because it infringes (either procedurally or substantively) individual provisions of the Constitution or general constitutional principles and thus that it infringes his constitutional right under Article 2(1) Basic Law' (BVerfGE 6, 32, 41).

[92] cf eg V C Jackson/M Tushnet, Comparative Constitutional Law (1999) ch 12; H J Steiner/P Alston, International Human Rights in Context, 2nd edn (2000) 243. On the 'federal rejection', but 'state protection', of economic and social rights in the US see J M Woods/H Lewis, Human Rights and the Global Marketplace. Economic, social and cultural Dimensions (2004) ch 10.C.

constitutional protection of market freedoms, and their balancing with human rights, may legitimately vary among constitutional democracies depending on their diverse constitutional traditions and preferences.

H. Emergence of international constitutional law?

International constitutional law limiting the powers of international organizations (like the UN, the WTO, and the EU) continues to be neglected by many 'realist' international lawyers outside Europe.[93] As the constitutional laws and constitutional courts of some EU member states had protected 'freedom of trade' and made respect for EU law conditional on respect for fundamental rights, it was only consequent for the EC Court to construe the EC Treaty's 'market freedoms' as individual rights and, thereby, to empower EU citizens to act as legal guardians of the progressive realization of the common market by enforcing their market freedoms in the national courts. Treating EU citizens as legal subjects entitled to rule of law, and protecting their 'freedom to conduct a business in accordance with Union law' across frontiers (as, for example, in Article 16 of the EU Charter of Fundamental Rights), not only enlarged the power and legitimacy of EU judges; it also promoted the decentralized enforcement of EU law and offered a moral 'Kantian justification' to the recognition of EU citizens as legal subjects of EU law.[94] Even though the European constitutional requirements of a transnational 'representative democracy' (Article I-46) and 'participatory democracy' (Article I-47 2004 EU Treaty Constitution) differ inevitably from *national* constitutional traditions, Europeans tend to be more inclined to argue for 'democratic reforms' of worldwide organizations than American lawyers focusing on national sovereignty and on the constitutional right of the US Congress to adopt legislation regardless of the international legal obligations of the US.

Since the 2004 EU Treaty Constitution, it has been widely accepted throughout Europe that there are good reasons for treating the EU's primary law as constitutional law: it establishes public power, legitimates rule-making and policy-making, provides for a citizenship of the Union, protects fundamental rights, and regulates the relationship between national, European, and international law on

[93] This neglect appears to be closely related to the little interest, also by many human rights lawyers and trade lawyers, in comparative constitutional law as an important prerequisite for a better understanding of the many policy failures in the field of human rights and trade law, cf M Hilf/E U Petersmann (n 20). The main critics of my 'constitutional approach' (like P Alston and R Howse) never refer to my major book publications in this area (see eg n 20, n 43, or E U Petersmann (ed), Constitutional Problems of European Integration, Special Issue of the 'Swiss Review of International Economic Relations' October 1991) and condemn my 'methodological approach' without responding to my published arguments.

[94] On the use of Kantian moral and legal principles for justifying the 'direct applicability' and legitimacy of EU law see eg E J Mestmäcker, On the Legitimacy of European Law, in Rabels Zeitschrift für ausländisches und internationals Privatrecht 58 (1994) 615–635; id, Wirtschaft und Verfassung in der Europäischen Union (2003) 33–38, 78–91.

the basis of federal principles.[95] The constitutional approach of the EU Treaty goes far beyond the state-centred rules of the North American Free Trade Agreement (NAFTA) which protects neither individual 'market freedoms' nor human rights across frontiers. The intergovernmental WTO rules, like the intergovernmental NAFTA provisions, provide market access rights only for member governments without any references to human rights. Trade politicians remain eager to defend their sweeping trade policy powers in the WTO and to limit their democratic accountability by treating citizens as mere objects of WTO law. Most WTO Members will, therefore, welcome Alston's opposition to integrating international labour law, social rights, and other human rights into WTO law.

The jurisprudence of national and European courts in Europe clearly contradicts Alston's claim that constitutional protection of economic liberties and market freedoms implies—in the inevitable legal and judicial balancing of economic liberties with other human rights—that market freedoms will prevail over other social and human rights. EU member states and the EC Court—for instance, in its judgments relating to equal pay,[96] health and safety,[97] transfers of undertakings,[98] and the competition law implications of collective bargaining[99]—rightly recognized the *social* EC Treaty objectives, social rights, and 'solidarity rights' as being of no less importance than *economic* Treaty objectives and economic rights. Yet, the 'European consensus' on the benefits of international judicial protection of 'market freedoms' and human rights continues to be fiercely opposed by the state-centred 'Washington consensus' which distrusts international law and rejects international legal restraints on the power of the US Congress. EU constitutionalism, with its constitutional commitment to 'strict observance of international law' (Article I-3 2004 EU Treaty Constitution), is based on a 'Venusian internationalist paradigm', whereas current US constitutionalism and US foreign policies focus on 'Martian nationalism' and power-oriented unilateralism rather than on international law as 'the supreme law of the land' (cf Article VI, section 2 of the US Constitution).[100]

Economic courts (like the EC Court) might impose a high burden of proving that national restrictions of freedom of trade in the EC's common market can be justified on non-economic grounds.[101] Human rights courts (like the

[95] cf. A von Bogdandy/J Bast (eds), Principles of European Constitutional Law, 2005.

[96] Case 43/75, *Defrenne v Sabena*, ECR 1976 455.

[97] Case C-84/94, *United Kingdom v Council*, ECR 1996 I-5755.

[98] Case C-51/00, *Temco Service Industries v Imzilyn and others*, ECR 2002 I-969.

[99] Case C-67/96, *Albany International v Stichting Bedrijfspensionenfonds*, ECR 1999 I-5751.

[100] cf n 41. The strong focus of the 2004 EU Treaty Constitution on the primacy of international law remains constitutionally restrained by the strong emphasis on the common constitutional principles and traditions of EU member states.

[101] cf the EC Court judgment in Case C-112/2000, *Schmidberger* (n 10), in which the EC Court accepted the invocation of freedom of expression (Art 10 ECHR) and freedom of assembly (Art 11 ECHR) as justifying a demonstration blocking Austrian motorways and restricting free movement of goods inside the EC (Art 28 EC). In the *Omega* judgment (n 10), the EC Court applied a different methodology for its finding that the German restriction of freedom of services was justified on public policy grounds so as to protect human dignity as guaranteed in Art 1 of the German Basic Law.

European Court of Human Rights) rightly impose even higher burdens of proving that restrictions on human rights (eg, freedom of speech) can be justified on economic grounds.[102] Even if trade courts should distribute the burden of proof differently from human rights courts—depending on the relevant legal claims, legal defences, and limited jurisdiction of courts—the different procedures should neither change the constitutional balancing principles (such as 'necessity' and 'proportionality' of restrictions of individual freedom) applied by courts for reconciling trade rules with human rights, nor the need to respect the specific limitation clauses in the human rights provisions of the ECHR. The EC Court jurisprudence confirms that conflicts between economic and non-economic fundamental rights tend to be rare if the respective 'economic constitution' (like the EC Treaty) also protects human rights. The WTO Agreement includes no reference to human rights. Yet, the various studies by the UN High Commissioner for Human Rights on the human rights dimensions of WTO rules have not identified any conflicts between WTO rules and human rights. The numerous WTO exceptions and safeguard clauses appear to offer sufficient legal flexibility for protecting and promoting human rights.[103]

III. A HUMAN RIGHTS FUNCTION FOR WTO GUARANTEES VERSUS MERGER AND ACQUISITION OF HUMAN RIGHTS BY TRADE LAW?

The legal relevance of national and international human rights for interpreting international economic agreements has been illustrated in a number of recent reports by the UN High Commissioner for Human Rights on the human rights dimensions of the WTO Agreements on Trade-Related Aspects of Intellectual Property Rights,[104] the Agreement on Agriculture,[105] the General Agreement on Trade in Services,[106] international investment agreements,[107] non-discrimination in the context of globalization,[108] and on the impact of trade rules on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[109]

[102] See eg the judgment of the European Court of Human Rights of 25 August 1998 in *Hertel v Switzerland* (n 49).

[103] cf E U Petersmann (nn 17 and 31).

[104] The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, E/CN.4/Sub.2/2001/13 (27 June 2001).

[105] Globalization and its Impact on the Full Enjoyment of Human Rights, E/CN.4/2002/54 (15 January 2002).

[106] Liberalization of Trade in Services and Human Rights, E/CN.4/Sub.2/2002/9 (18 June 2002).

[107] Human Rights, Trade and Investment, E/CN.4/Sub.2/2003/9 (2 July 2003).

[108] Analytical Study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization, E/CN.4/2004/40 (15 January 2004).

[109] The right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Report by the Special Rapporteur Paul Hunt on his Mission to the WTO, E/CN.4/2004/49/Add.1 (1 March 2004).

A. Human rights functions of international liberal trade rules

The reports by the UN High Commissioner for Human Rights call for a 'human rights approach to trade' which

(i) sets the promotion and protection of human rights as objectives of trade liberalization, not exceptions;
(ii) examines the effect of trade liberalization on individuals and seeks to devise trade law and policy to take into account the rights of all individuals, in particular vulnerable individuals and groups;
(iii) emphasizes the role of the State in the process of liberalization—not only as negotiator of trade law and setter of trade policy, but also as the primary duty bearer of human rights;
(iv) seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
(v) requires a constant examination of the impact of trade liberalization on the enjoyment of human rights;
(vi) promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization.[110]

The High Commissioner differentiates between obligations to respect human rights (eg, by refraining from interfering in the enjoyment of such rights), to protect human rights (eg, by preventing violations of such rights by third parties), and to fulfil human rights (eg, by taking appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realization of such rights). As enjoyment of human rights depends on availability, accessibility, acceptability, and quality of traded goods and services, the relevance of WTO rules for the collective supply of 'public goods' (like access to low-priced goods and services), for limitations of 'market failures' (eg, in case of essential services), and for protection and fulfilment of human rights, is acknowledged and discussed. The reports underline that, what are referred to—in numerous WTO provisions—as *rights* of WTO Members to regulate, may be *duties* to regulate under human rights law (eg, so as to protect and fulfil human rights of access to water, food, essential medicines, basic health care, and education services at affordable prices).

My publications emphasize that the 'human rights functions' and 'constitutional functions' of international guarantees of freedom, non-discrimination, rule of law, and of other international rules (including some WTO rules) depend on the respective *domestic* constitutional rules. They may be weak or ignored in 'dualist' legal systems and in long-standing constitutional democracies (like the US) that refuse to ratify important UN human rights conventions and insist on legal primacy of democratic legislation over international law (eg, the 'later-in-time rule' in US constitutional law providing for the legal

[110] Document E/CN.4/Sub.2/2002/9, 2.

primacy of later US legislation over prior international treaty obligations). 'Constitutional functions' of WTO guarantees of freedom, non-discrimination, rule of law, and social protection (eg, against injurious imports subject to restriction under the numerous WTO exception clauses) should, however, be recognized in democracies with 'monist' legal systems incorporating WTO rules into their domestic law, especially in customs unions with limited powers like the EC, whose citizens can directly invoke the EC's customs union rules (based on GATT Article XXIV and GATS Article V) in domestic courts. European constitutional law provides for a higher legal rank of international treaties over regulations and decisions by EC bodies (cf Article 300 EC) in order to secure rule of law and respect by intergovernmental bodies for treaties ratified by parliaments. EU bodies have limited powers and no mandate to violate self-imposed international treaty obligations. The EC experience of decentralized ('democratic') enforcement of common market rules by EU citizens and national judges, acting as self-interested 'guardians of rule of law', remains important for *international* integration systems without a common state, notably if (as, for example, in the EC) parliamentary control of foreign policy powers and respect for international legal obligations by EU institutions sometimes remain weak (as illustrated by the more than forty GATT and WTO dispute settlement findings of illegal EC trade restrictions and trade distortions).

B. Human rights as constitutional restraints of trade policy powers

What can be gained by conceptualizing trade law as an instrument for promoting human rights? A 'merger and acquisition of human rights by trade law' has not been proposed by any trade lawyer and, like other suggestions by Philip Alston (eg, for 'enforcement of human rights through the WTO'), should be resisted. Such polemic by human rights experts (eg, if they condemn the WTO as 'a veritable nightmare' for developing countries and women[111]) does not help clarify the interrelationships between human rights and economic law. The recent reports by the UN High Commissioner for Human Rights on the 'human rights dimensions' of the WTO Agreements on Agriculture, the TRIPS Agreement, GATS, investments, and non-discrimination do not identify concrete conflicts between WTO rules and human rights. More comprehensive 'human rights impact assessments' by the UN human rights bodies regarding UN and WTO economic activities remain, however, desirable.

Human rights were gradually introduced into the law of the European Community as limits to the discretion and regulatory powers of the EC. Even the EU Charter of Fundamental Rights explicitly provides that it 'does not

[111] Globalization and its impact on the full enjoyment of human rights, ECOSOC document E/CN.4/Sub.2/2000/12 (15 June 2000) para 15. Apart from a reference to patents and their possibly adverse effects on pharmaceutical prices (depending on the competition, patent, and social laws of the countries concerned), the report nowhere identifies conflicts between WTO rules and human rights.

establish any new power or task' for the EC (Article 50).[112] In the same way, my proposal for a WTO Declaration acknowledging the existence of universal human rights binding every WTO Member (see below under VI.A) would limit rather than empower WTO bodies. For example, in contrast to the EC Court jurisprudence on the interpretation of EC Community law as constituting direct individual rights, the intergovernmental nature of WTO rules prevents WTO dispute settlement findings that WTO obligations addressed to member states entail direct rights for individual citizens. The recognition, in UN instruments, of a human right 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 UDHR) reflects a broad conception of human rights, going far beyond the nationalist *Lockean* constitutional traditions in some Anglo-Saxon countries.[113] Yet, even though all WTO Members have ratified UN treaty obligations to respect human rights, UN human rights obligations offer no basis for interpreting WTO rules as directly empowering individual citizens.

My publications infer from constitutional commitments to respect human dignity (eg, in Article 1 of the German Basic Law, Article 1 of the EU Charter of Fundamental Rights) an obligation of German and EC institutions to treat citizens as legal subjects rather than as mere objects of paternalistic governments.[114] This bottom-up constitutional approach differs from the top-down human rights approach advocated recently by R. Howse:

> The concept of the right to development, in linking development to the entire human rights framework, with its strong global legitimacy, evokes the possibility of the reorientation of the WTO project such that it may once again regain a kind of normative unity, which it possessed around the conclusion of the Uruguay Round through the neo-liberal ideology of globalization, development and growth that prevailed at the time, but which is certainly not a basis for consensus, but rather the opposite, today.[115]

The citizen-oriented interpretation of the GATT-based customs union rules of the EC as individual market freedoms has uniquely contributed to the rule of law and 'democratic peace' throughout Europe. The EC's human rights obligations offer additional arguments for treating EC citizens as legal subjects of EC law and as legal beneficiaries of the EC's international legal obligations.

[112] On the limited functions of human rights in EC law see A von Bogdandy, The EU as a Human Rights Organization? Human Rights and the Core of the EU, Common Market Law Review (2000) 1307.

[113] On the contrast between the Lockean concept of rights-based domestic policies and his justification of broad discretionary foreign policy powers (the 'primacy of foreign policy') see eg E U Petersmann, Constitutionalism and International Organizations, Northwestern Journal of International Law & Business 17 (1996) 398, 415 et seq.

[114] On the controversy over whether Art 1 of the EU Charter of Fundamental Rights recognizes a fundamental right to human dignity or merely an objective constitutional principle, see the commentary on Art 1 of the Charter by M Borowsky in J Meyer (ed), Kommentar zur Charta der Grundrechte der EU (2003) 45–66.

[115] R Howse, Mainstreaming the right to development into international trade law and policy at the WTO, E/CN.4/Sub.2/2004/17 (9 June 2004).

Since the rights of governments derive from the rights of their citizens, 'State interests' and precise and unconditional intergovernmental obligations (eg, to protect individual freedom and non-discrimination) should be defined—at least inside the 'monist' EC legal system—for the benefit of domestic citizens as conferring individual rights and obligations. These constitutional arguments have prompted me to argue—for more than twenty years[116]—that German and EC judges should also protect individual rights of German and EC citizens to invoke precise and unconditional GATT obligations in domestic courts in order to ensure rule of international law for the benefit of EC citizens.

The international WTO judge, by contrast, is required to construe WTO rules—in conformity with the customary methods of international treaty interpretation[117]—as rights and obligations of WTO Members. The UN treaty obligations to respect human dignity[118] may be construed to require governments to respect, protect, and promote the legal *autonomy* of individuals not only in the polity, but also in the economy.[119] Yet most WTO Members recognize neither human dignity as a human right nor the domestic 'direct applicability' of WTO rules in domestic courts for the benefit of private economic actors. It is only exceptionally (eg, in Article XX of the WTO Agreement on Government Procurement) that WTO rules require governments to make certain WTO obligations directly applicable in domestic courts. Just as UN human rights law acknowledges a margin of appreciation for the domestic implementation of many UN human rights obligations, so does WTO law leave broad regulatory discretion regarding the domestic implementation of WTO obligations. Even if a domestic court should construe the WTO 'objective of sustainable development' (found in the Preamble of the WTO Agreement) in conformity with the UN resolutions on the human right to development,[120] such a WTO obligation

[116] cf E U Petersmann, Application of GATT by the EC Court of Justice, Common Market Law Review (1983) 397–437. On the recent 'WTO jurisprudence' of the EC Court see E U Petersmann, On Reinforcing WTO Rules in Domestic Laws, in J J Barcello III/H Corbett (eds), Rethinking the World Trading System (2005) ch 11.

[117] cf Art 3:2 of the WTO Dispute Settlement Understanding (DSU).

[118] In the Preambles of the 1966 UN Covenants on Civil and Political Human Rights (ICCPR) and on Economic, Social, and Cultural Human Rights (ICESCR), the more than 150 signatory states of these human rights covenants recognized 'that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world', and 'that these rights derive from the inherent dignity of the human person'. See also K Dicke, The Founding Function of Human Dignity in the Universal Declaration of Human Rights, in D Kretzmer/E Klein (eds), The Concept of Human Dignity (2002) 111–120.

[119] cf E U Petersmann, Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution, in C Breining/T Cottier (eds), International Trade and Human Rights (2004). On the function of constitutional guarantees of human dignity to empower and constrain individuals see eg D Beyleveld/R Brownsword, Human Dignity in Bioethics and Biolaw (2001) ch 1.

[120] On 'first', 'second', and 'third generation' human rights, including the still contested rights to development and democratic governance, see eg C Tomuschat, Human Rights. Between Idealism and Realism (2003) ch 3. On the relevance of the human right to development for interpreting WTO rules see R Howse (n 115).

to promote individual rights and human development would not include an obligation to enable domestic citizens directly to invoke and enforce WTO rules through domestic courts.

IV. HUMAN RIGHTS FOCUSED ON EQUALITY VERSUS THOSE BASED ON FREEDOM

Constitutional history is characterized by the progressive extension of liberty rights (eg, those enjoyed by male citizens in the ancient Greek republics) to other social groups (like women, former slaves, etc) who successfully struggled for their non-discriminatory treatment. Modern theories of justice (from I Kant to J Rawls) tend to prioritize human rights to liberties over human rights to redistribution of resources.[121] The dialectic interrelationships between liberty rights, equality rights, and social rights is reflected in the judicial enforcement of liberty rights and non-discrimination rights across borders by European Courts (eg, the EC and EFTA Courts), which has also contributed to promotion of social rights in European law (eg, gender equality, extension of free movement of persons and of their social security rights to family members of workers, and EC labour and social rights).[122] The integrated codification and protection of civil, political, economic, and social human rights in the EU Charter of Fundamental Rights better reflects the universal recognition of the 'indivisibility' of human rights than does the legally and institutionally fragmented, and in many ways (eg, regarding judicial remedies) inadequate, protection of human rights in the separate UN human rights conventions.

The protection of 'dignity rights' (Chapter I), 'freedoms' (Chapter II), 'equality rights' (Chapter III), and 'solidarity rights' (Chapter IV) in the EU Charter of Fundamental Rights illustrates potential synergies between human rights law and trade law. Whereas the EU Charter of Fundamental Rights states in its Preamble that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity', the Preamble of the WTO Agreement only refers to the determination of WTO Members 'to preserve the basic principles and to further the objectives underlying this multilateral trading system', without specifying what these 'basic principles' are. The WTO prohibitions of tariffs and non-tariff barriers (eg, GATT Articles II, XI:1) protect private freedom of trade across frontiers, just as the WTO requirements of most-favoured-nation treatment (eg, Article I GATT, Article II GATS, Article 4 of the TRIPS Agreement) and of national treatment (eg, Article III GATT, Article XVII GATS, Article 3 of the TRIPS Agreement) promote non-discriminatory treatment of traded products, services, service providers, other traders, and holders of intellectual property rights across frontiers. There are various parallels and functional interrelationships between the non-discrimination

[121] cf E U Petersmann (n 33).

[122] cf M Bell, Anti-Discrimination Law and the EU (2002).

requirements of human rights instruments and those of WTO law, for example, regarding the prohibition of both *de jure* as well as *de facto* discrimination and the existence of affirmative action obligations (eg, obligations under GATS Article XVII to guarantee substantive equality between foreign and domestic service suppliers).[123] The UN High Commissioner for Human Rights has rightly emphasized that 'respect for the principle of non-discrimination is a fundamental means of promoting a more inclusive globalization that reduces inequalities within and between nations'; 'combating discrimination and promoting equality can influence positively the dynamics of growth and poverty reduction'.[124] In WTO bodies, however, the human rights dimensions of WTO guarantees (eg, of liberty, non-discriminatory treatment, and rule of law) are hardly ever discussed.

V. ECONOMIC AND SOCIAL RIGHTS VERSUS CIVIL AND POLITICAL RIGHTS

Human dignity, human rights, and human liberty are indivisible. Economic and social human rights are no less important for the personal self-development in dignity than civil and political human rights. The focus of the US Constitution on civil and political liberties—without explicit guarantees of social welfare rights—has sometimes been criticized as reflecting the predominant political influence of landowners and slave-holders during the drafting of the US Constitution. Whereas the US Constitution celebrates liberty in its Preamble and in the Fifth and Fourteenth Amendments as the fundamental value, Germany's Basic Law and the EU Charter of Fundamental Rights proclaim—in their respective Articles 1—the 'inviolability' of 'human dignity' as the highest value. From the latter perspective, respect for human dignity is the 'inalienable core' that must be protected in the respective field of every human right. As most people spend most of their time on their professional education and activities for gaining the resources for personal survival and self-development, Anglo-Saxon constitutional traditions of favouring civil and political liberties over economic and social rights—as reflected in the non-ratification of the UN Covenant on Economic, Social, and Cultural Rights by the United States—are hardly a model for the more than forty per cent of the world population that must survive on two dollars or less per day, often without 'real liberty' of self-realization.

The political and social need for a 'just balance' between the aspirations for individual freedom and the demands of organized society for 'social justice' is reflected in the numerous 'exceptions' and 'public interest' provisions in WTO

[123] See the report mentioned in n 108.

[124] ibid, 18. See also the World Development Report 2000/2001: Attacking Poverty, World Bank (2001) 56: 'lower inequality can increase efficiency and economic growth through a variety of channels.'

law. These provisions give clear priority to the rights of WTO Members to restrict trade, albeit sometimes subject to constitutional balancing principles like non-discrimination, necessity, and proportionality, which tend to be construed in a flexible manner by WTO dispute settlement bodies.[125] Consensus-based new agreements among 148 WTO Members will depend ever more on 'solidarity commitments' reducing the administrative 'implementation costs' of WTO obligations, the adjustment costs to import competition (notably in poor countries), and protecting the human rights of the 'losers' in international competition.

A WTO Declaration recognizing the universal human rights obligations of all WTO Members, and acknowledging the 'human rights dimensions' of a rules-based world trading system, could enhance the democratic legitimacy and social acceptability of WTO law and the consensus-building for a successful conclusion of the WTO's ongoing 'Development Round'. Proposals for such a Declaration by trade lawyers were opposed at the conference in Washington by human rights lawyers in view of the lack of expertise of the WTO in the field of human rights. Also trade diplomats prefer to avoid human rights discourse in WTO bodies and focus on their WTO mandate for reciprocal liberalization and regulation of world trade.

VI. THE CONFERENCE DISCUSSION AT WASHINGTON IN APRIL 2004

One can still hope that the increasing number of international discussions among human rights experts and trade experts, as at the conference in Washington in April 2004, will encourage human rights communities, economic lawyers, and trade diplomats to cultivate a better 'multi-lingualism' for their common task of defending respect for 'inalienable' and 'indivisible' human rights as the constitutional basis for peaceful cooperation among citizens inside states and across frontiers. The global division of labour based on GATT–WTO rules has contributed to an unprecedented 'wealth of nations'. The rapid economic growth in formerly underdeveloped countries, like China and India, has also reduced the number of people living below the absolute poverty line of one dollar per day. Yet, it appears obvious that the international objective of the UN's Millennium Summit to 'halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger', can not be realized without more effective protection of human rights at national and international levels and a more socially just worldwide division of labour based on WTO rules.

[125] cf M Hilf/G J Goettsche (n 11).

A. Lack of consensus on a human rights approach to trade

At the conference discussions in Washington, the WTO's worldwide rule of law system and compulsory dispute settlement procedures were rightly hailed as central pillars of the present world order. My own plea for transforming the state-centred UN system, and the fragmented UN human rights instruments, and power-oriented UN institutions, into a citizen-centred 'UN human rights constitution'[126] met with scepticism by the human rights lawyers and 'realist' Washington lawyers present at the meeting. American academics and policy-makers prefer to view the worldwide poverty problems as a moral challenge rather than as a human rights challenge,[127] and perceive proposals for citizen-oriented constitutional reforms of the global institutional order as incompatible with the reality of power politics and national 'sovereignty' of the United States.[128] In addition, my proposal for a WTO Declaration on 'International Trade and Human Rights' was met with a mere scintilla of support at the conference in Washington.

In their 1996 Singapore Ministerial Declaration, WTO Members renewed their commitment to the observance of internationally recognized core labour standards, affirmed their support for the ILO's work in promoting these standards, and rejected protectionist abuses of such standards. In a similar way, WTO Members could enhance the 'input-legitimacy' of WTO rules and WTO negotiations by a WTO Ministerial Declaration

(1) renewing the commitment of WTO Members to respect universal human rights in all policy areas;
(2) affirming their support for the legal protection of human rights through the competent UN human rights bodies and national institutions;
(3) supporting the need for harnessing the complementary functions of WTO rules and human rights for welfare-increasing cooperation among free citizens in international trade, in conformity with the worldwide recognition—in the 1993 Vienna Declaration of the UN World Conference on Human Rights—that 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing' (para. 8);
(4) acknowledging that the customary rules of international treaty interpretation may require WTO bodies to take into account human rights obligations of WTO Members in the interpretation of WTO rules; and

[126] cf E U Petersmann (n 119).

[127] See eg F Garcia (n 75) and T Pogge (n 73) who focuses on the lack of morality of our failure to help those in desperate need rather than on designing practical legal and human rights strategies for poverty reduction.

[128] The new report by the Consultative Board chaired by Peter Sutherland, The Future of the WTO (2004) rightly criticizes (in ch III) the contradictions between the nationalist focus on 'state sovereignty' (eg in the US) and the fact that ever more global public goods—like the rules-based world trading system and international peace—can only be supplied by collective, intergovernmental rule-making with the democratic support by the private sector.

(5) urging WTO dispute settlement bodies, if they are requested by WTO Members to take into account human rights as relevant legal context for the interpretation of WTO rules, to exercise judicial restraint and fully respect the margin of appreciation which every WTO Member may legitimately claim with regard to the domestic implementation of international and national human rights guarantees.

A collective pledge by WTO Members to respect their existing, universal human rights obligations could—without creating new legal obligations or new WTO competencies, and without attempting to define the contested scope of the universal human rights obligations under general international law—improve the limited 'input-' and 'output-legitimacy' of WTO rules and WTO negotiations by acknowledging that the numerous 'public interest clauses' in WTO law are flexible enough to enable WTO Members to respect human rights obligations in the trade policy area and to take into account the social adjustment problems of international trade (eg, for small subsistence farmers in poor countries, for vulnerable 'losers' in international competition, for sick people depending on access to foreign medicines at affordable prices). The WTO Declarations on access to medicines, the WTO waiver for the 'Kimberley Process' on the control of conflict diamonds, and the WTO dispute settlement rulings on the right to make trade preferences for less-developed countries conditional on 'objective standards' bear witness for this general consistency of WTO law and human rights.[129] Just as the EC Court has clarified—in its *Omega* judgment—that the specific circumstances justifying trade restrictions for the sake of 'public policy' (including protection of human rights) 'may vary from one country to another and from one area to another',[130] so too could it be useful to clarify by means of a WTO Declaration that the circumstances justifying trade restrictions pursuant to GATT Article XX(a) and GATS Article XIV(a) in order to protect 'public morals' and 'public order', or prevent 'a serious threat to a fundamental interest of society', may legitimately vary among countries.

The proposed Declaration could also contribute to limiting the one-sided 'producer bias' of WTO rules by acknowledging that the legitimacy of WTO rules depends on serving the interests of all human beings with due respect for human rights. Just as the WTO Ministerial Declaration on core labour standards helped the ILO to reach consensus on the 1998 ILO Declaration on Fundamental Principles and Rights at Work and on using ILO dispute settlement proceedings more effectively (eg, vis-à-vis Myanmar), so could a positive WTO response to the UN proposals for a 'human rights approach to trade' help the competent UN human rights bodies enhance mutual synergies between human rights law and international trade law. Similar to the functionally

[129] See the case studies on these WTO practices in part II of this volume.
[130] ECJ (n 10) para 31.

limited mandate of UN Specialized Agencies, the WTO should remain a trade organization without a mandate for a comprehensive human rights *policy*. Unlike the 2004 EU Treaty Constitution and the EU Charter of Fundamental Rights, which are explicitly 'founded on the indivisible, universal values of human dignity, freedom, equality and solidarity' and mandate the EU to protect economic and social rights in the limited field of EU competencies, the WTO must remain focused on the liberalization and regulation of trade barriers and respect the fact that many WTO Members have not ratified the UN Covenant on Economic, Social, and Cultural Rights.

A few months after the Washington conference, at the biannual conference of the worldwide International Law Association (ILA) in Europe (Berlin) in August 2004, my proposal to elaborate jointly—by the ILA's International Trade Law Committee and its Human Rights Committee—an ILA Resolution on 'Human Rights and International Trade Law' was supported without any opposition.[131] In view of the manifold synergies between human rights and liberal trade rules in European integration, European lawyers find it obviously easier than Washington lawyers to accept that human rights and trade law can and should mutually support each other. Owing to their cosmopolitan integration law, Europeans are also much more willing to view international and domestic legal rules as a functional unity for promoting human rights at home and abroad. European lawyers are adept at distinguishing between the inevitably limited, positive law perspective of international judges (eg, in European courts and the WTO Appellate Body) and policy-oriented arguments for 'international constitutional law' (as elaborated, for example, in the 'European Conventions' that prepared the 2000 EU Charter of Fundamental Rights and the 2004 EU Treaty Constitution). Trade diplomats from developing countries with rights-based democratic constitutions, like India and South Africa, likewise argue for synergies between economic and social human rights and liberal trade rules.[132] John Rawls' *Law of Peoples*, by contrast, and apparently also Philip Alston's criticism—in his remarks, at Washington, on my perception of international and national human rights as a functional unity—reflect the different American worldview defending constitutional democracy at home and 'realist' power politics abroad, with only modest international 'duties of assistance'.[133]

[131] cf the Sixth Report of the ILA's International Trade Law Committee, paras 45–46, published in the ILA 2004 conference proceedings, Berlin (2005) at 565.

[132] See eg the contribution by South Africa's WTO Ambassador F Ismail, A Development Perspective on the WTO July 2004 General Council Decision, in E U Petersmann (ed), Reforming the World Trading System. Legitimacy, Efficiency, Democratic Governance (2005) 53–82.

[133] For a criticism of Rawls' theory of justice among peoples see T Pogge (n 74); E U Petersmann (n 33); A Buchanan, Justice, Legitimacy and Self-Determination. Moral Foundations for International Law (2004).

B. How can the Doha Round negotiations deliver a 'Development Round'?

At the conference in Washington, a large part of the discussions focused on how the Doha Round negotiations in the WTO can actually deliver the declared goal of a 'Development Round', and how WTO rules can be made more responsive to the needs of producers, traders, and consumers in less-developed countries (LDCs). A few months later, the WTO General Council Decision of 1 August 2004[134] reiterated the broad agreement among WTO Members on three priority areas of the Doha Round, namely (1) better market access for goods and services from LDCs; (2) a re-balancing of WTO rules in favour of LDCs (including more effective special and differential treatment); and (3) improved technical and capacity-building assistance for LDCs. Yet, just as there is no agreement on the relevance of human rights for WTO law and policies, so there is also no consensus—neither in the WTO nor in academic discussions like those at Washington—on whether poverty reduction should become a priority of WTO rules and of the Doha Round negotiations, as suggested by some of the critics of the WTO.[135] According to many trade experts, trade rules and trade institutions are not well suited to addressing the manifold aspects of 'poverty' (such as the domestic causes of poverty, the vulnerability of the losers in international competition) in a comprehensive manner.[136]

UN human rights law defines 'justice' in terms of respect for the 'inherent dignity and the equal and inalienable rights of all members of the human family'.[137] As long as WTO law purports to serve the interests of states without regard to justice or members' level of respect for human rights, justice-related claims for redistribution cannot be convincingly based on WTO law.[138] The claims by LDCs for a 'New International Economic Order' (NIEO) founded on non-reciprocal, preferential treatment of LDCs and stabilization of their commodity prices were incorporated into Part IV of GATT 1947 on 'Trade and Development' as well as into the 1979 GATT Decision on 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of

[134] WT/L/579 (2 August 2004) paras 1(d) and (g).

[135] cf eg K W Abbott, Development Policy in the New Millennium and the Doha Development Round (2003) ch II.

[136] See eg M Finger, The Doha Agenda and Development: A View from the Uruguay Round (2002). The complex interrelationships between trade liberalization and poverty alleviation are explained in World Trade Report 2003, WTO (2003) 109–117.

[137] See n 118.

[138] cf eg J Rawls, A Theory of Justice (revised edn 1999), according to whom equal liberties must be protected before 'social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity' (72, 266–267). In his Law of Peoples (n 74), Rawls declined to extend these 'difference' and 'equal opportunity' principles to international relations on the ground that, in international relations, states must tolerate the right to self-determination of 'decent peoples' even if the latter do not comply with modern human rights law. This Rawlsian conception of an 'international law of peoples' is widely criticized on moral and legal grounds (n 133 and F Teson, Philosophy of International Law (1998) ch 4). For 'Rawlsian tolerance' vis-à-vis violations of universally recognized human rights is neither moral nor conducive to the promotion of 'democratic peace' and human rights in LDCs.

Developing Countries'.[139] The moral legitimacy of these majority claims by often non-democratic governments, and the economic efficiency of the NIEO strategy, remain, however, contested.[140]

There is broad agreement today that the numerous exceptions to the trade preferences for LDCs (eg, for cotton, textiles, and agricultural exports), and the exemption of LDCs from GATT and WTO obligations to open markets and adjust to competition, have contributed to a welfare-reducing protectionism not only inside LDCs, but also against competitive exports from LDCs. As GATT and the WTO only offer *opportunities* for making a more efficient use of domestic resources by liberalizing domestic market barriers on a reciprocal basis, the little involvement of most less-developed GATT contracting parties in the eight GATT Rounds of multilateral trade negotiations could offer only limited trade benefits. LDCs are now participating much more actively in the Doha Round negotiations and rightly insist that this 'Development Round' must realize the explicit WTO objective of 'positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.[141] LDC claims based on the obvious benefits of reciprocal trade liberalization, on respect for human rights, and on the need for WTO capacity-building assistance for the implementation of WTO obligations in LDCs appear more convincing than moral claims for 'corrective justice' aimed at correcting the past 'marginalization' of many LDCs under GATT 1947.[142] Economic evidence confirms that 'developing countries may be best served by full integration into the reciprocity-based world trade regime rather than continued GSP-style special preferences',[143] notably in labour-intensive sectors like agriculture and textiles where LDCs enjoy obvious competitive advantages.

C. A new 'human rights conditionality' for trade preferences for LDCs?

Several participants in the conference in Washington discussed India's challenge of the EC's generalized system of tariff preferences (GSP) and the legal

[139] Decision of 28 November 1979, GATT doc L/4903.

[140] See eg R Hudec, Developing Countries in the GATT Legal System (1987).

[141] The quoted text is from the Preamble to the WTO Agreement and was re-affirmed in the Doha Declaration, para 2 (cf The Doha Declarations, WTO (2002) 2).

[142] F Garcia (n 75) proposes a justice-based 'difference principle' also for the world of trade: 'International social and economic inequalities are just only if they result in compensating benefits for all, and in particular for the least advantaged states', 134. Yet, contrary to Garcia's assumption that social and economic inequalities among developed and less-developed countries are a result of inherent differences in their natural endowments (ie an arbitrary distribution of 'natural primary goods' in terms of Rawls' theory of justice), economists emphasize that 'rich countries are rich because their citizens produce more per head, not because they have secured privileged access to 'the planet's goods', or to its resources' (D Henderson, The Role of Business in Modern World: Progress, Pressures and Prospects for the Market Economcy (2004) 83). For a criticism of Garcia's book see the book review by J Pauwelyn forthcoming in George Washington International Law Review (2005).

[143] C Ozden/E Reinhardt, The Perversity of Preferences: GSP and Developing Country Trade Policies 1979–2000, World Bank Research Paper (2003) 1, 22.

findings of a WTO dispute settlement panel, in December 2003, that the term 'non-discriminatory' in the WTO's 'enabling clause' required 'that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of *a priori* limitations' and preferential treatment for the least-developed among the LDCs.[144] On appeal, the WTO Appellate Body report of April 2004 reversed this panel finding by concluding 'that the term "non-discriminatory" . . . does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that . . . identical treatment is available to all similarly-situated GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond'.[145] The Appellate Body recognized that 'Members' respective needs and concerns at different levels of economic development may vary', and emphasized that (1) the existence of a 'development, financial (or) trade need must be assessed according to an objective standard';[146] and (2) 'the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences', without imposing 'unjustifiable burdens on other Members'.[147] In response to these important clarifications of WTO rules, the EU Commission has proposed a new GSP system aimed at promoting 'sustainable development' by differentiating tariff preferences depending on whether LDCs have ratified and effectively implemented major UN human rights conventions, ILO conventions, UN environmental conventions, UN conventions on drugs, and the UN Convention against corruption.[148] It remains to be seen whether such justice- and needs-based 'objective standards', differentiating among LDCs on the basis of their participation in UN and ILO conventions, will evolve into a new 'integration law paradigm' for interpreting the 'sustainable development' objectives of the WTO and for mainstreaming human rights into trade policy and WTO law.

VII. NEED FOR A NEW 'TRANSNATIONAL CONSTITUTIONALISM': EUROPEAN LEADERSHIP?

The post-war international order of the twentieth century—notably the 1944 Bretton Woods agreements, the UN Charter, GATT 1947, and also the Universal Declaration of Human Rights (UDHR)—was designed and initiated thanks to the far-sighted leadership of US politicians like Cordell Hull and

[144] European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R (1 December 2003) paras 7.161, 7.176.

[145] WT/DS246/AB/R (7 April 2004) paras 173, 190.

[146] WT/DS246/AB/R, paras 161–163.

[147] WT/DS246/AB/R, paras 164–167.

[148] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee—Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015 COM (2004) 461 final, Brussels (7 July 2004).

Eleanor Roosevelt.[149] The US vision of 'embedded international liberalism'—which perceived international organizations as limited frameworks for reciprocal, intergovernmental bargaining, subject to national parliamentary oversight and approval of intergovernmental agreements by domestic parliaments—was based on respect for national sovereignty and effective Congressional control of foreign policy powers.[150] This US strategy for foreign policies and international law embedded in national constitutionalism—rather than in *international constitutionalism* as within the EU—remains predominant in the US, as reflected in the US National Security Strategy of 2002 and its strong assertion of unilateral US rights to preventive action against perceived threats from abroad. The US worldview was also reflected in the conference discussions at Washington, for example in John Jackson's scepticism vis-à-vis judicial review of 'substantive due process' in economic law (as it is practised by the EC Court of Justice), in John McGinnis' plea for international 'regulatory competition' as a decentralized means of promoting human rights values (in contrast to the European tradition of an explicit 'human rights conditionality' of trade agreements), in Fred Abbott's concerns at extending 'fundamental freedoms' to corporations (as recognized by both the EC Court and the European Court of Human Rights), and in the nationalist criticism by Alston—as well as in the publications by Robert Howse[151]—of my proposals for a citizen-oriented 'constitutionalization' of the UN and the WTO.

The post-war European experience with 'international constitutionalism' in the EU and in the Council of Europe was fundamentally different from the state-centred North American integration approach (eg, in NAFTA). The vicious circle of periodic wars and widespread poverty in Europe was overcome by the progressive transformation of functional economic integration law (in the European Coal and Steel Community and EEC) into international constitutional guarantees of respect for human rights, rule of law, a common market, and democratic peace inside the EU. The progressive extension of the EU Treaty to now twenty-five member states, the supranational jurisdiction of the

[149] On the Cordell Hull strategy, which C Hull saw as the prerequisite for international peace (and for which he received the Nobel Peace Prize in 1945), see K Dam/C Hull, The Reciprocal Trade Agreements Act and the WTO, in E U Petersmann (n 132) ch 3.

[150] The term 'embedded liberalism' was coined by J Ruggie, International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order, in S D Krasner (ed), International Regimes (1983) 195–231. The 'realist' criticism that the 'most serious fault' in past US foreign policy was its 'legalistic-moralistic approach to international relations', has been expressed by US diplomats and political scientists long since (eg G F Kennan, American Diplomacy 1900–1950 (1951) 95).

[151] Cf R Howse/K Nicolaidis, Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far, in R B Porter et al (eds), Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium (2001) 227, 230. See also R Howse, Human Rights in the WTO: Whose Rights, What Humanity?, European Journal of International Law (2002) 651–659, who wrongly portrays my arguments for construing domestic guarantees of freedom and non-discrimination in accordance with the corresponding GATT/WTO obligations (what I call their 'constitutional functions') as if I had claimed 'that GATT obligations are fundamental human rights', 658.

European Court of Human Rights for the judicial protection of the ECHR in forty-four European countries, and the free trade agreements with human rights guarantees linking the EU with almost all other European and Mediterranean countries have transformed European integration law into the most successful peace system of modern history.

American and European constitutional law illustrate that individual liberty, democratic peace, and social welfare can be realized through diverse constitutional strategies. The remainder of this contribution briefly discusses why—contrary to the nationalist North American fears that 'constitutionalizing the WTO is a step too far'[152] and might unduly limit US sovereignty—the increasing reality of multilevel governance in regional and worldwide institutions requires multilevel constitutional restraints protecting human rights, democratic decision-making, and social justice more effectively—not only at national, but also at intergovernmental levels of decision-making on international economic law (eg, WTO law) and human rights law (eg, UN law).

A. The limits of embedded liberalism: Multilevel governance requires multilevel constitutionalism

Most national constitutions are characterized by an asymmetry between strict constitutional restraints on *domestic* policy powers and broad *foreign policy discretion* for defending the national interest in the 'Machiavellian arena' of international power politics. As foreign policy powers operate by taxing and restricting domestic citizens (eg, by means of import restrictions and export subsidies), ineffective constitutional restraints on discretionary foreign policy powers risk undermining also *internal* constitutional restraints.[153] It is only through *reciprocal* international guarantees of freedom, non-discrimination, and rule of law that most states, and also the EU, are willing and politically able (eg, owing to the strong domestic pressures against *unilateral* trade liberalization) to limit their trade policy discretion by more precise, legal and judicial restraints of a higher legal rank.

'Embedded international liberalism' may offer an advantageous foreign policy paradigm for the power-oriented pursuit of national interests in *international fora* by an international hegemon like the US. The 'realist' US perception of intergovernmental organizations as frameworks for the pursuit of national interests has contributed to the prevailing paradigm of a 'member-driven WTO' and 'member-driven GATT Rounds' in which the powerful trading countries have defined the agenda in response to their domestic interests and to the detriment of LDCs (eg, legalization of import restrictions on agricultural goods, cotton, textiles, and other 'sensitive exports' from LDCs). Not even the WTO Director-General has been given a mandate to make proposals for the collective

[152] R Howse/K Nicolaidis (n 151).
[153] On this 'Lockean dilemma' see E U Petersmann (n 43) chs VII.5 and VIII.5.

supply of 'global public goods' rather than the pursuit of national interests. From a human rights perspective and economic perspective, the 'national interest approach' to foreign policies has four major shortcomings which impede the collective supply of global public goods, such as an open, rules-based world trading system, poverty reduction, 'sustainable development', and peace:[154] (a) the 'jurisdictional gap'; (b) the 'democratic participation gap'; (c) the 'incentive gap'; and (d) the 'constitutional gap' with regard to multilevel governance for the supply of global public goods. Viewed from this systemic perspective of collective action problems for the supply of global public goods,[155] the WTO legal and governance system—although more developed than other worldwide organizations—remains imperfect in many ways.

1. The 'jurisdictional gap' impeding a liberal world trading system

There is a 'jurisdictional gap' between the national interests (eg, the protectionist self-interests of import-competing producers) and national jurisdiction determining trade policy-making at national levels, on the one hand, and the worldwide economic and non-economic benefits of open markets and a rules-based world trading system as a global public good, on the other. The import restrictions and trade-distorting subsidies practised by many developed GATT members under GATT 1947 to the detriment of agricultural, cotton, textiles, and other competitive exports from LDCs are examples of the harmful 'external effects' of introverted, nationalist trade policies. The very long duration of the multilateral textiles agreements (1962–2004) illustrates that power-oriented, intergovernmental decision-making offers inadequate incentives for holding national governments accountable for the mutually harmful 'external effects' of their nationalist protectionism and for promoting the needed 'internalization of external effects'. The inadequate participation of many LDCs in the eight multilateral 'GATT Rounds' has entailed enormous welfare losses not only for the LDCs concerned (eg, in terms of often high domestic protectionism and vested interests opposed to liberalization), but also for consumer welfare in developed countries. The WTO jurisdiction over many trade-related policy issues appears too limited, for instance, in the field of competition policies (eg, export cartels), trade-related investment and development policies (eg, capacity-building in LDCs for the domestic implementation of WTO rules), and promotion of trade-related human rights (eg, the human rights of access to food and medicines as relevant legal context for designing trade rules on food aid and access to medicines). National interest politics must be supplemented

[154] The two tests of a public good, ie non-rivalry and non-excludability, also apply to an open world trading system, for example in the sense that the needed multilateral trade liberalization must be publicly and collectively produced and offers welfare gains (eg, lower prices, new technologies) that can be consumed without rivalry and without excluding consumers in closed economies.

[155] On the 'jurisdictional gap', 'participation gap', and 'incentive gap' for effective and 'inclusive regulation' of worldwide problems see, more generally, eg I Kaul/I Grunberg/M A Stern (eds), Global Public Goods. International Cooperation in the 21st Century (1999).

by 'collective goods politics' based on a broader WTO jurisdiction and stronger WTO capacities for helping governments open their markets, maximize domestic consumer welfare, and 'internalize' the mutually harmful 'external effects' of national trade protectionism. Moreover, outside the trade policy area, unilateralism (such as use of US military power for foreign 'regime change') and nationalist foreign policies have persistently failed to supply the needed global public goods (like international rule of law, democratic peace, poverty reduction, and protection of the environment), and often lack the international legitimacy that only democratically agreed multilateralism, respect for human rights, and more effective multilevel governance can offer.

2. The 'democratic participation gap' in multilevel trade governance

The consensus practice in WTO decision-making ensures that even though only thirty WTO Members account for 90 per cent of world trade, all 148 WTO Members have a 'voice' in WTO negotiations. Yet, consensus among WTO governments in no way proves that agreements result from representative, participatory, and deliberative democratic procedures in each WTO member state and promote human rights, consumer welfare, and other general citizen interests. WTO diplomats claim that compliance with domestic and internationally agreed decision-making procedures and the welfare-enhancing effects of trade liberalization legitimize WTO agreements. Critics argue, however, that WTO rules favour one-sidedly protectionist producer interests and have done too little to reduce the appalling poverty and disregard for human rights in many less-developed WTO member countries. As goods and services are produced and traded by individuals, the intergovernmental WTO rules should treat citizens as legal subjects rather than mere objects of paternalistic trade protectionism.

As regards transparency and dialogue with civil society, there is now broad agreement on the primary responsibility of national governments for inclusive decision-making and democratic accountability of trade policies at national levels. Yet there is also increasing awareness that, apart from the US Congress and a few other national parliaments in constitutional democracies, inclusive democratic participation in national trade policy-making and effective parliamentary control of WTO negotiations appear to be weak or non-existent in many WTO member countries, including most EU member states where national parliaments have lost control over trade policy-making and the European Parliament has not yet been granted co-decision powers in the trade policy area.[156] The Uruguay Round Agreements have illustrated that—once the intergovernmental negotiations had led to international agreement on the more than 25,000 pages of treaty texts—national parliaments in most WTO member countries 'rubber-stamped' the results without any concrete possibility for

[156] cf S Ostry, External transparency: the policy process at the national level of the two-level-game, in M Moore (ed), Doha and Beyond. The Future of the Multilateral Trading System (2004) ch 6.

're-opening' the negotiations; the German Parliament, for example, had not even received a complete German translation of the voluminous WTO texts when the parliament had to decide on the ratification of the WTO Agreement.[157] Bi-level negotiations at national and intergovernmental levels suffer from information asymmetries: most people, and their representatives in national parliaments, rationally focus on domestic policy issues and lack the knowledge, information, and expertise in WTO matters that, for example, WTO negotiators have.[158] As a result, people affected by WTO rules sometimes feel disenfranchised and distrust the WTO because producer-driven WTO negotiations appear committed neither to promotion of consumer welfare, nor to respect for human rights and democratic procedures.

Just as 'public–private partnerships in WTO litigation' have become frequent because close links between trade representatives and domestic interests may lead to better informed and better controlled trade policies,[159] so could a stronger involvement of members of national parliaments in WTO negotiations—and more systematic consultations with parliamentarians, civil society, and business at national as well as international levels—lead to better informed and better monitored WTO negotiations. The new advisory report on *The Future of the WTO* admits that 'legitimacy requires, in part, that parliaments be associated with the adoption of negotiating positions by governments and WTO rule-making more generally'; but the report also notes 'the massive resistance of developing countries' to transforming the regular practice (since 1999) of inter-parliamentary meetings at WTO ministerial conferences into an advisory WTO parliamentary body.[160] Some of these concerns of LDCs, at least to the extent that their opposition is motivated by lack of resources rather than by non-democratic governments, could possibly be overcome by ensuring, through financial and technical assistance, that parliamentarians from LDCs can actually participate in annual WTO parliamentary meetings in no less an effective manner than members of parliaments from developed WTO countries. The long-standing GATT–WTO policies of disregarding the lack of democracy, rule of law, and unnecessary poverty in so many less-developed member countries undermine the legitimacy and effectiveness also of the WTO.

Reducing the 'democratic participation gap' requires also a more transparent, and more cosmopolitan, WTO framework for regular consultations with

[157] cf the country studies in J Jackson/A Sykes (eds), Implementing the Uruguay Round (1997).

[158] On these 'principal–agent relationships' see eg R Howse, How to Begin to Think about the 'Democratic Deficit' at the WTO, in S Griller (n 11) 79, who rightly concludes that NGOs can help to reduce 'agency costs' and 'therefore make classic representative democracy function better', 89. The US Congress has required extensive consultation by US trade negotiators with US legislators and often insisted on the inclusion of US Congressmen into the US trade delegation in GATT and WTO negotiations. Such an active involvement of national legislators in GATT and WTO negotiations has remained, however, very exceptional.

[159] cf G Shaffer, Defending Interests: Public–Private Partnerships in WTO Litigation (2003).

[160] cf The Future of the WTO (n 128) 46. On involvement of parliamentarians in WTO discussions see also the two WTO publications WTO Policy Issues for Parliamentarians, WTO (2001); Regional Workshop for Parliamentarians on the Multilateral Trading System, WTO (2003).

representative NGOs (eg, by institutionalizing the annual WTO symposia with NGOs) so as to set additional incentives for support by civil society and business for a liberal world trading system. The WTO would have to ensure—by means of 'accreditation procedures'—that only transparent and representative NGOs are accredited whose expertise can contribute to realizing the WTO objectives. More importantly, new WTO provisions on democratic accountability of the operational WTO bodies vis-à-vis an advisory WTO body composed of members of national parliaments would have to protect the operational effectiveness of WTO negotiations and rule-making (eg, by providing for only one regular annual meeting of an advisory, parliamentary WTO assembly prior to an annual WTO ministerial meeting).

Today's almost complete transparency of WTO documents and the increased accessibility of the WTO for NGOs have yielded the remarkable circumstance that 'some 1578 participants representing 795 NGOs attended the Cancun Ministerial, compared to 235 participants representing 108 organisations who attended the Singapore meeting' in 1996.[161] In order to make NGOs more active agents of multilateralism, the WTO's annual public symposia with NGOs on WTO policy issues should become institutionalized and supported by financial assistance for the participation of NGO representatives from LDCs. The time and resources required for such dialogue of WTO delegates with parliamentarians and civil society representatives are the necessary price for promoting the 'publicity of public goods' through more inclusive 'deliberative democracy' and 'cosmopolitan constituencies'—not only at national but also at international levels of multilevel trade governance. As the world economy is driven by private actors, the input and public support of the private sector for the world trading system remain crucial. A 'new tripartism involving government, business and civil society'[162] in multilevel trade governance would also require a stronger administrative capacity and additional financial resources of the WTO Secretariat, as well as continued efforts at further enhancing the WTO's external transparency for the benefit of civil society, for example, by opening WTO dispute settlement proceedings to the public.

3. Reducing the 'incentive gap' for harnessing private sector participation

Embedded international liberalism has favoured power-oriented, intergovernmental bargaining (eg, exclusion of agricultural, cotton, and textiles trade from GATT rules in response to US interest group pressures), 'realist support' for undemocratic governments (eg, in oil-producing countries), and neglect of global public goods, like rule of law, open markets, poverty reduction, respect for protection of human rights and the environment, or reciprocal prohibition of export cartels. European integration law has demonstrated that recognition of citizens and private economic actors as legal subjects of international trade law is the most democratic method of involving citizens as self-interested agents

[161] The Future of the WTO (n 128) 42. [162] I Kaul/I Grunberg/M A Stern (n 155).

in the progressive development and decentralized enforcement of international trade law. The more WTO law applies beyond border rules to the harmonization of *internal* regulations (such as product, production, health, and environmental standards), the more domestic participatory mechanisms inside countries—and capacity-building assistance for less-developed WTO members—are necessary so as to give incentives for democratic participation in rule-making and domestic implementation of WTO rules. The still widespread protectionism and avoidable poverty in many LDCs should be recognized as a 'global bad' that requires much bolder WTO strategies for helping LDCs implement democratic trade policy and legal reforms for the benefit of their citizens.[163] The public and private gains offered by such reforms (notably in the least-developed countries and 'failed states') can be realized more effectively by harnessing the private sector as an active agent for the domestic implementation of WTO rules. The current proposals for promoting capacity-building and trade-facilitation in LDCs offer plenty of opportunities for engaging the private sector and NGOs inside LDCs to support administrative, legal, and trade reforms in less-developed WTO countries.

4. Multilevel governance requires multilevel constitutionalism

The 'real new world order' is based on ever more extensive multilevel governance[164] (eg, in the field of international monetary cooperation, competition, trade, finance, product and production standards, risk regulation, telecommunications, protection of the environment, protection of human rights, and collective security) through networks of international treaties and regulatory bodies, courts, and other law enforcement agencies (such as Interpol). International integration reveals that national constitutions are incomplete, partial constitutions that can protect citizen rights, democracy, and rule of law in *transnational* relations only in connection with multilateral agreements for the protection of individual rights, democratic governance, rule of law across frontiers, and global public goods. Most worldwide agreements do not provide for effective individual rights and judicial remedies that can be directly invoked and enforced by individuals, as in the case of the EC Treaty, the European Economic Area Agreement, and the European Convention on Human Rights. Unlike the US Congress, most national parliaments in developing countries lack the information, resources, and incentives for effectively controlling international rule-making and multilevel governance in distant, international institutions. The WTO remains the most effective worldwide rule of law and compulsory dispute settlement system protecting mutually beneficial cooperation among citizens across frontiers. Yet, even in the WTO, international rule-making, policy-making, adjudication, and democratic legitimacy could benefit from

[163] cf E U Petersmann (ed), Developing Countries in the Doha Round, EUI Working Paper (2005).

[164] cf A M Slaughter, A New World Order (2004); I Bache/M Flinders (eds), Multi-Level Governance (2004).

additional institutional and constitutional reforms, as recently emphasized in the advisory report on *The Future of the WTO*.[165]

B. Constitutional elements of WTO law

National constitutions and international treaty constitutions (like the EU Treaty and the UN Charter) make use of three basic constitutional techniques: (1) distinction between 'constitutional choice' and 'post-constitutional choices' (eg, by delegating only limited powers to legislative, executive, and judicial bodies); (2) constitutional recognition of a higher legal rank of constitutional rules over post-constitutional rules (eg, in Article 103 of the UN Charter and Article XVI:3, 4 of the WTO Agreement); and (3) the general and abstract nature of constitutional rules which should be binding on all without discrimination. 'Democratic constitutionalism' is characterized by five additional constitutional principles: (1) the rule of law requirement; (2) respect for human dignity and human rights; (3) democratic self-government; (4) separation of powers and other horizontal and vertical checks and balances (eg, subsidiarity requirements); and (5) 'social justice' as a precondition for maintaining the needed social consensus over time.[166] WTO law meets the three *formal criteria* characteristic of 'constitutional rules':

- The distinction between long-term 'constitutional rules' and 'post-constitutional' decision-making is reflected in the more stringent WTO requirements for the entry into force, and amendments, of the WTO Agreement (Articles X, XIV) than for normal decision-making by consensus or majority-voting (Article IX WTO Agreement).
- The WTO Agreement asserts legal primacy over conflicting provisions in the Multilateral Trade Agreements annexed to the WTO Agreement (cf Article XVI:3), as well as over conflicting implementing 'laws, regulations and administrative procedures' inside WTO members (Article XVI:4), and legally limits the scope for decision-making by WTO bodies (Articles IX, X).

[165] See n 128, notably the recommendations (in ch X) of a commitment by developed WTO Members to phase out all their tariffs (para 3); to provide additional resources for improved WTO relationships with civil society (para 14); to further improve the WTO dispute settlement system by, *inter alia*, opening Panel and Appellate Body hearings to the public (para 21); to promote more flexible decision-making and provide for 'a contractual right, including the necessary funding arrangements, for least-developed countries to receive appropriate and adequate technical assistance and capacity building aid as they implement new obligations' (paras 25–27); to promote consensus-building by annual WTO Ministerial conferences, WTO summits of World Leaders every five years, a new 'senior officials' consultative board to be chaired and convened by the Director-General' (para 29), and a new 'constituency structure based on the representation of regional trade agreement and other regional groups' (ch VIII para 335); to enhance the powers and duties of the WTO Director-General and the WTO Secretariat as guardians of the WTO system (ch IX); and annually to increase the WTO budget (para 37).

[166] cf E U Petersmann, European and International Constitutional Law: Time for Promoting 'Cosmopolitan Democracy' in the WTO, in G de Burca/J Scott (eds), The EU and the WTO (2001) 81–110.

- WTO rules generally protect freedom of trade (eg, Articles II, XI GATT, XVI GATS), most-favoured-nation treatment (eg, Articles I GATT, II GATS, 4 TRIPS Agreement), national treatment (eg, Article III GATT, XVII GATS), private property rights (cf the TRIPS Agreement), rule of law and broadly defined 'public goods' (eg, GATT Articles XVIII–XXI, GATS Articles XIV, XIV*bis*, Articles 6–8, 30–31, 40 of the TRIPS Agreement) for the benefit of private traders, investors, producers, and consumers.

Although only an intergovernmental, functionally limited 'world trade constitution' covering about ninety-five per cent of world trade, the WTO Agreement also imposes far-reaching *substantive limits* on national and intergovernmental trade policy powers to tax and restrict citizens. Four out of the five substantive criteria used above for defining 'constitutionalism' in a more substantial manner are reflected in WTO law, albeit only in imperfect ways:

- The WTO Agreement (eg, Article XVI) and its Dispute Settlement Understanding (DSU) aim at rule of international law by protecting 'the rights and obligations of Members under the covered agreements' and 'providing security and predictability to the multilateral trading system' (Article 3 DSU).
- The WTO protects freedom and non-discrimination in international trade and is committed to 'sustainable development' (Preamble of the WTO Agreement) and to (quasi)judicial interpretation of WTO law 'in accordance with customary rules of interpretation of public international law' (Article 3 DSU). These customary rules of international treaty interpretation (as codified in Article 31 of the Vienna Convention on the Law of Treaties) also require that interpretation of WTO law be with due respect for relevant, universal human rights obligations of WTO Members.
- Horizontal and vertical separation of powers is protected by the compulsory WTO dispute settlement system and by the power of WTO Members to reject dispute settlement rulings, adopt authoritative interpretations (Article IX WTO Agreement), or acquiesce in WTO jurisprudence (eg, on the admissibility of *amicus curiae* briefs) even if the pertinent judicial interpretations have been criticized by almost every WTO Member.
- The WTO objectives of 'raising standards of living, ensuring full employment', and promoting 'sustainable development' and 'positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development' (Preamble) reflect a concern for 'social justice', albeit inadequately defined.

Many 'constitutional safeguards' of the WTO were deliberately designed so as to overcome the 'constitutional failures' of the 'embedded liberalism' model underlying GATT 1947, for example, so as to render illegal the numerous bilaterally agreed departures from GATT rules (eg, through 'voluntary export

restraints'); to promote rule of law through compulsory WTO adjudication and appellate review, and enhance more transparent, rules-based trade policy-making through the WTO Trade Policy Review Mechanism. Obviously, the WTO's 'embedded international trade constitutionalism' remains imperfect in many ways. It could be further developed, for instance by linking WTO obligations to domestic constitutionalism in order to promote—through 'multilevel constitutionalism'—stronger compliance with, and democratic control of, WTO obligations in domestic legal systems where producers, investors, traders, and consumers operate and depend on rule of law. Using constitutional discourse for the existing imperfect WTO law helps to identify, inter alia

- the lack of input-legitimacy of the WTO (eg, lack of explicit respect for human rights, inadequate parliamentary involvement);
- the numerous 'constitutional problems' of WTO rule-making and adjudication (eg, non-transparent dispute settlement proceedings, inadequate legal protection of the autonomy of dispute settlement panels);
- the functional interrelationships and potential synergies between the different levels of national and international constitutional safeguards.

For instance, the customs union obligations of the EC under GATT Article XXIV have been transformed by the EC Treaty into 'market freedoms' and non-discrimination requirements that have become recognized as 'fundamental freedoms' of EU citizens (cf Article I-4 of the 2004 EU Treaty Constitution). WTO rights of WTO Members may become obligations under human rights law (eg, to promote access to essential medicines and protect domestic consumers against injurious imports). WTO obligations of WTO Members may justify individual rights under domestic constitutional rules, such as intellectual property rights and the legal protection across frontiers of the 'freedom to conduct a business in accordance with Union law', as provided for in the EU Charter of Fundamental Rights and in Articles II-76 and 77 of the 2004 EU Treaty Constitution. Protection of property rights, non-discrimination requirements, or safeguard clauses in WTO rules may become relevant legal context for the interpretation and application of domestic constitutional guarantees of property, non-discrimination, and social security.

C. Should multilevel governance in the WTO be further 'constitutionalized'?

The focus of the 'Union's values' on 'respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights' (Article I-2 2004 EU Treaty Constitution) reflects the constitutional insight that 'state interests', state consent, and state-centred international law rules can often no longer be properly evaluated and interpreted without regard to human rights and democratic procedures. WTO rules directly impact individual freedom and human welfare in more than 150 countries. The UN High Commissioner for

Human Rights has rightly emphasized that, because each WTO Member has human rights obligations under international treaty law as well as under general international law, there is a need for mainstreaming human rights into trade policy-making, for example, by

- examining the effect of trade policies on vulnerable individuals and groups, and by
- taking human rights into account as 'relevant legal context' for interpreting trade rules and designing trade institutions.[167]

The universal recognition of human rights does not only *limit* the powers of states and of intergovernmental organizations. Respect for human rights can also *enhance* their 'power of legitimacy', democratic ethos, and political ability to transform power-oriented, state-centred structures into citizen-oriented, democratic, and cosmopolitan cooperation for worldwide poverty reduction, protection of individual rights and of the environment, and enhancement of individual and social welfare (eg, through trade). The progressive extension of EU law to twenty-five member states, and the 'human rights clauses' in the EU's agreements with third states, illustrate how 'soft power of attraction' (eg, to join the EU and WTO rule-of-law systems) may be more successful in 'constitutionalizing' power politics than unilateral recourse to 'hard military power'.

1. Strengthening of 'cosmopolitan democracy' at the WTO level

In terms of *representative democracy*, many people are not democratically represented in the WTO. In terms of *participatory democracy*, many GATT–WTO rules and procedures are 'producer-biased' and promote general consumer welfare only in indirect, highly imperfect ways.[168] In terms of *deliberative democracy*, the mercantilist discourse in WTO negotiations focuses on producer interests and state interests rather than on general consumer and citizen interests. Most parliaments tend to intervene in WTO negotiations, if at all, only after agreement has been reached at the intergovernmental level. Periodically elected members of parliaments (eg, US Congressmen) may likewise have a producer bias if they depend on industry support in their respective constituencies (eg, for election campaign financing). WTO negotiators frequently claim that 'coalition-building' and 'confidence-building' require confidentiality rather than public discourse. Such confidential and consensus-based negotiation methods further reduce the scope for democratic persuasion in WTO negotiations. The few trade liberalization commitments by many LDCs in the eight 'GATT Rounds' confirm that the protectionist self-interests of trade bureaucracies (notably in non-democratic WTO countries) all too often prevail over the general citizen interests in trade liberalization as a means for obtaining more,

[167] cf nn 104–109 and E U Petersmann (n 31).

[168] cf P Mavroidis, Come Together? Producer Welfare, Consumer Welfare and WTO Rules, in E U Petersmann (n 132) ch 12.

better, and a larger variety of goods and services at lower prices. Reliance on the good intentions of WTO negotiators, or on the power-oriented pursuit of national interests by the major exporting countries, is an inadequate policy from a constitutional and citizen perspective.

As explained above (VII.A), the information asymmetries and 'incentive gaps' impeding stronger representative, participatory, and deliberative democracy in the WTO could be reduced by 'collective democratic monitoring' of WTO negotiations by an advisory WTO body composed of members of national parliaments as well as by institutionalizing the annual WTO symposia with representative NGOs. Even if such advisory WTO bodies would only hold annual meetings, they could force trade diplomats and the WTO secretariat to conceptualize and publicly defend trade policy in terms of much broader public interests. This could enhance the quality, publicity, and legitimacy of WTO debates and, thereby, parliamentary and civil society support for reducing the 'jurisdictional gap' of the WTO, for example by strengthening collective public support for capacity-building in LDCs for domestic implementation of WTO rules and for more active participation of parliamentarians and NGOs from LDCs in WTO deliberations.

The establishment of an advisory WTO parliamentary body and an advisory WTO civil society representation (limited to transparent and representative NGOs that can contribute to realizing WTO objectives) would entail additional costs, and might not facilitate the pursuit of 'national interests'. Yet, by setting incentives for public discourse and support for more broadly defined global public goods, the mercantilist producer bias of traditional trade diplomacy, and the 'external effects' of national trade protectionism, could be countered by stronger, direct representation of collective 'cosmopolitan interests' in the global public good of a liberal, rules-based world trading system. The economic 'power' of trade negotiators (eg, measured in terms of market opportunities and other economic benefits they can offer or withhold) and 'national interest politics' would be confronted with the power of 'cosmopolitan, deliberative democracy' and 'collective good politics'. Democratic accountability for harmful 'external effects' of national trade protectionism and cronyism, and democratic legitimacy of WTO decision-making processes could be enhanced.

2. *Strengthening of participatory and representative democracy at domestic levels*

Enhancing the deliberative dimensions of WTO decision-making will be easier than strengthening involvement by national parliaments in WTO rule-making and private sector participation in the domestic implementation and enforcement of WTO rules, especially in non-democratic WTO countries. The US legislation on the implementation of the Uruguay Round Agreements insists that citizens cannot directly invoke WTO rules in US courts in order to challenge domestic trade restrictions that violate WTO law.[169] EU law (Article 300 EC) recognizes

[169] See the analysis by D Leebron, Implementation of the Uruguay Round Results in the United States, in J Jackson/A Sykes (n 157).

international agreements as an 'integral part of the Community legal system' with a higher legal rank so that—in contrast to the 'later-in-time rule' in US constitutional law (which enables the US Congress to deviate from international treaty obligations through later laws)—the EC and every EC institution 'must respect international law in the exercise of its powers'.[170] In view of these stronger effects of international law inside the Community, and the only weak parliamentary control of trade policy-making inside the EU, it is not surprising that the EU has proposed more effective 'checks and balances' at the international WTO level (eg, an advisory parliamentary WTO body, a permanent WTO dispute settlement panel) in order to subject WTO rule-making and WTO adjudication to additional legal and political constraints.[171]

'Deliberative democracy' in distant worldwide organizations can never replicate or replace the representative, parliamentary forms of democratic self-government practised inside national democracies.[172] From a citizen perspective, the legitimacy of international organizations depends more on respect for, and promotion of, individual constitutional rights than on direct participation of citizens and their elected representatives in worldwide organizations. 'Constitutionalizing' international organizations like the WTO should—following the rights-based 'constitutionalization' of the EU, the European Economic Area (EEA), and the Council of Europe—aim at extending individual freedom and other human rights dimensions, rule of law, judicial control, and democratic 'input-legitimacy' of WTO rules and policies by promoting synergies between WTO rules and domestic constitutional rules. The focus should be on

- stronger involvement of members of national parliaments (eg, through creation of an advisory parliamentary WTO body) in order to render information and control by national parliaments over trade policy-making more effective;
- promotion of transparency and engagement with representative civil society organizations by WTO bodies so as to enhance 'deliberative democracy' and 'participatory democracy' in the trade policy area;
- decentralization and de-politicization of intergovernmental WTO disputes over private rights (eg, about private intellectual property rights and other individual rights, such as in anti-dumping proceedings) by empowering citizens directly to invoke and enforce, under reciprocally agreed conditions, certain precise and unconditional WTO rules in domestic courts (following the example of Article XX of the WTO Agreement on Government Procurement);[173]

[170] See eg Case C-162/96, *Racke v Hauptzollamt Mainz*, ECR 1998 I-3655, para 45.

[171] See eg the contribution by E Mann, Member of the European Parliament, in E U Petersmann (ed) (n 132). On the proposals for a Permanent WTO Panel see F Ortino/E U Petersmann (eds), The WTO Dispute Settlement System 1995–2003 (2004) ch 3.

[172] R Dahl, Can International Organizations Be Democratic? A Skeptic's View, in I Shapiro/C Hacker-Cordon (eds) (1999) 32.

[173] For a detailed explanation of this proposal see E U Petersmann, Prevention and Settlement of Transatlantic Economic Disputes: Legal Strategies for EU–US Leadership, in E U Petersmann/M A Pollack (eds), Transatlantic Economic Disputes: The EU, the US and the WTO (2003) ch 1.

- interpretation of existing WTO rules (eg, on 'sustainable development' and protection of human health) in conformity with the existing human rights obligations of WTO members for the benefit of individual citizens;
- transformation of the existing *ad hoc* WTO dispute settlement panels into a more independent, permanent Panel so as further to strengthen judicial review and rule of law.

D. Divergent North American and European constitutional approaches: Nationalism versus internationalism?

From the state-centred perspective of the US and other constitutional democracies that do not protect market freedoms as individual 'fundamental rights', and whose parliaments effectively control trade policy-making, 'constitutionalizing the WTO' has been criticized as 'a step too far', and a 'return to non-constitutional approaches to reviving the multilateral trading system as an interstate bargain' may appear preferable.[174] Yet, the WTO jurisprudence

- on the balance of powers between political and (quasi)judicial WTO bodies;
- on the division of authority between states and the WTO itself;
- on legal coherence between WTO rules and the law of other international organizations (such as the FAO's Codex Alimentarius Commission, other International Standards Organizations) and international agreements concluded by WTO Members outside the WTO; or
- on preferential treatment of less-developed WTO Members based on 'objective standards'

reveals constitutional dimensions (such as recourse to necessity, proportionality, and other 'constitutional principles' for the balancing of the rights and obligations of WTO Members) that are prompting an increasing number of lawyers—also in the US—to analyse WTO law in constitutional terms.[175] From the perspective of EU citizens, the lack of parliamentary control and of judicial review of WTO rules inside the EU entails that additional 'constitutional checks and balances' of intergovernmental rule-making and adjudication in the WTO appear desirable. As WTO guarantees of freedom, non-discrimination, and rule of law extend the corresponding EC market freedoms across frontiers, and neither the EC Council nor the EC Commission have been granted powers to violate WTO rules, I have argued long since for empowering citizens to invoke and enforce precise and unconditional WTO obligations of the EC institutions in domestic courts so as to ensure a more effective rule of law, broader citizen rights, and the prevention of intergovernmental WTO disputes by decentralized,

[174] cf R Howse/K Nicolaidis (n 151) 230.

[175] cf eg J P Trachtman, Changing the Rules. Constitutional Moments of the WTO, in Harvard International Review XXVI (Summer 2004) 44, 48: 'We must avoid the false limitation assumed by those who say the WTO can never have a constitution'; J H Jackson, The WTO: Constitution and Jurisprudence (1998).

more democratic enforcement of precise and unconditional WTO obligations in domestic courts.

WTO obligations have been recognized as an 'integral part of the Community legal order' inside the EC, with a legal rank superior to EC secondary law (eg, regulations and decisions), and have been explicitly referred to in several EC implementing regulations (eg, on anti-dumping procedures).[176] But the EC Court of Justice—like the domestic courts of other WTO members—has concluded from the intergovernmental structures and reciprocity principles of WTO law that the 'purpose of the WTO agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals' who, as a consequence, 'cannot rely on them before the courts and . . . any infringement of them will not give rise to non-contractual liability on the part of the Community'.[177] In its second *Biret* judgment of 30 September 2003, the Court summarized its WTO jurisprudence in the following terms:

> It is clear from case-law which is now firmly established that in view of their nature and structure the WTO Agreement and its annexes, in the same way as (GATT 1947), do not in principle form part of the rules by which the Court of Justice and the Court of First Instance review the legality of acts adopted by Community institutions . . . , that individuals cannot rely on them before the courts and that any infringement of them will not give rise to non-contractual liability on the part of the Community.[178]

This long-standing opposition by EU institutions against judicial review, and against their legal and democratic accountability vis-à-vis EU citizens for the frequent violations of their EU obligations to comply with their self-imposed WTO obligations, continues to be justified by reference to the lack of 'direct applicability' of WTO rules in other WTO member countries.[179] It is only in the context of reciprocal free trade and customs union agreements that the EU remains willing to recognize individual rights directly to invoke and enforce in domestic courts reciprocal free trade rules. As inside the EU and the EEA, such

[176] For details see P L H van den Bossche, The EC and the Uruguay Round Agreements, in J Jackson/A Sykes (eds) (n 157) 23–102.

[177] According to the same judgment, 'it is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions in the WTO agreements, that it is for the Community judicature to review the legality of the Community measure in question in the light of the WTO rules', cf EC Court of Justice, Case T-210/00, *Etablissement Biret SA v EU Council*, ECR 2002 II-47, paras 71–73.

[178] Case C-94/02, *Biret*, ECR 2003 I-1497, para 71.

[179] The EC Court's legal arguments—such as reliance on Art 22 DSU—continue to be widely criticized as being inconsistent with WTO law (Art 22 DSU only provides for the possibility of agreed compensation as a means of avoiding countermeasures, without limiting the WTO obligation of implementing WTO dispute settlement rulings) and with the Court's legal obligations under the EC Treaty to defend the rule of law (Art 220), including international law binding on each EC institution (Art 300:7). The Court's reciprocity argument is a political argument because—as emphasized by the Court in its earlier jurisprudence—the lack of direct applicability of intergovernmental trade rules in third countries does not affect the legal reciprocity of the international trade agreements concerned (cf EC Court Case 104/81, *Kupferberg*, ECR 1982 3641).

judicial protection of individual market freedoms as fundamental rights is beneficial not only on economic and democratic grounds: as recognized by many political philosophers, judicial protection of rule of law and of individual freedoms in international trade is also consistent with the Kantian moral 'categorical imperative' and offers an effective strategy for promoting international peace, for 'peace is the natural effect of trade' (Montesquieu).

E. EU leadership for a 'new transnational constitutionalism'?

Similar to the struggles for decolonization, the promotion of a citizen-oriented 'human rights approach' to international law and international relations is an uphill battle that is often ridiculed by 'realist' diplomats (notably from non-democratic countries) who fear democratic accountability and publicity, and benefit from the power-oriented structures of international law (eg, in the case of international loans and sales of oil, diamonds, and other natural resources by non-democratic governments for the benefit of their rulers). WTO members avoid human rights discourse in WTO bodies and are likely to disagree even on the most basic human rights concepts, such as respect for human dignity and human liberty. WTO diplomats rightly prefer to leave clarification of the human rights dimensions of WTO rules to specialized human rights bodies outside the WTO. WTO dispute settlement bodies, however, may be legally required by the DSU (cf Article 3:2) and by the customary methods of international treaty interpretation to take into account universal human rights obligations of WTO members as 'relevant legal context' for the interpretation of WTO rules.

The inadequate input legitimacy of WTO law (eg, in terms of explicit respect for human rights and democratic procedures) yields the unfortunate result that national parliaments, courts, and citizens rightly distrust WTO decision-making processes and, in many countries, do little to ensure its effective implementation in domestic legal systems.[180] In order further to strengthen the 'constitutional functions' of WTO guarantees of freedom, non-discrimination, rule of law, and social safeguard measures for the benefit of citizens, the EU could propose, for example,

- a WTO Declaration pledging respect for the existing, universal human rights obligations of WTO members—without creating new WTO obligations or new WTO competences;
- an explicit WTO obligation committing domestic courts to interpret domestic laws in conformity with relevant WTO obligations; and
- reciprocal WTO agreements on the prevention and 'decentralization' of certain intergovernmental WTO disputes over private rights by empowering

[180] Unpublished research on the implementation of the Uruguay Round Agreements in African countries suggests that many national legislatures in less-developed African countries did not adopt any implementing legislation during the period 1994–1996.

individuals and domestic courts to enforce certain precise and unconditional WTO guarantees of freedom, non-discrimination, rule of law, and social safeguards in domestic legal systems.

Yet, even inside monist legal systems like EU law, intergovernmental guarantees of freedom, non-discrimination, rule of law, and social safeguard measures are often not legally and judicially protected as part of a multilevel constitutional order promoting freedom and human rights at home and abroad. The democratic right of EU citizens to be represented in all organizations where the EU exercises common policy powers (including the many UN bodies financed largely by the EU without admitting EU membership) should become a central objective of a rights-based EU foreign policy strategy—not only for legal and constitutional reasons, but also because respect for human rights and for new forms of democratic governance must become part of a comprehensive security strategy aimed at addressing the 'root causes' of conflicts by promoting conflict prevention, democracy building, and 'sustainable development' through constitutional protection of human rights and 'democratic peace'.

The today universal recognition of human rights has far-reaching implications for the interpretation of many international law rules. The universal human rights obligations of all WTO members call for transforming the intergovernmental WTO law into a cosmopolitan 'constitution of liberty' and rights-based 'social market economy'. The 2004 EU Treaty Constitution requires the EU to promote 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights' not only in Europe, but also in the EU's external relations with third countries (Article I-4). The 'European Security Strategy' adopted by the European Council[181] rightly focuses on poverty reduction and conflict prevention in 'failed states' and on promotion of democratic governance and rights-based development in Europe's neighbouring countries. As the world's sole 'international constitutional democracy', and based on Europe's high standards of multilevel constitutional protection of human rights, the EU should become the world's leader for protecting human rights and promoting democratic reforms of international governance. The EU's 'power of democratic legitimacy', and its 'soft power' as the main financier of many UN bodies, complement the hegemonic power of the US and offer manifold tools for advancing democratic, constitutional reforms of international organizations.

Multilevel constitutionalism helps better to understand, use, and strengthen the functional interrelationships between international and domestic constitutional rules. Just as democracies are not sustainable over time without 'constitutional democracy', so can market economies not properly function without respect for human rights and 'economic constitutions' that protect non-discriminatory, consumer-driven competition and social justice. The legal ordering of the spontaneous cooperation among billions of producers,

[181] A Secure Europe in a Better World (12 December 2003).

investors, traders, and consumers in 148 WTO member countries cannot be effectively secured and efficiently guided through WTO law unless WTO rights and obligations are more strongly embedded in multilevel constitutionalism at home and abroad. More active parliamentary participation in the negotiation, adoption, and implementation of international rules, and the vigilance of self-interested traders, producers, investors, and consumers in promoting rule of law and open markets across discriminatory border restrictions, offer the most democratic and most effective, decentralized mechanisms for transforming state-centred intergovernmental rules into mutually beneficial cooperation among citizens based on respect for rule of law and citizen rights. The unique, historical experience of European integration should prompt the EU to 'lead by example' in calling for the needed constitutional reforms of multilevel governance in worldwide organizations like the UN and the WTO.

The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations

CHRISTINE BREINING-KAUFMANN*

INTRODUCTION

Linking trade and human rights[1] has become a controversial issue not only in academia,[2] but also in court proceedings,[3] political discussions,[4] and businesses.[5] At the heart of the debate are perceived imbalances and differences between human rights and international trade law with respect to the reciprocity of rights and obligations, the legal nature of the rights (hard or soft law, negative, and/or positive obligations), and the concept of responsibility and 'ownership' (states, individuals, private entities).

Following the wishes of the editors, this article will first look at the conceptual differences in an attempt to outline a matrix as a framework for the discussion on how to reconcile the different approaches. Current developments with respect to national regulations, such as the US Alien Tort Claims Act, and possible conflicts between human rights and WTO law will then be analysed with a focus on trade aspects.[6]

* I am grateful to Debra Steger and Rolf H Weber for comments and discussions.

[1] T Cottier, Trade and Human Rights: A Relationship to Discover, 5 Journal of International Economic Law (2002) 111–132.

[2] See the controversy between P Alston and E U Petersmann, E U Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 European Journal of International Law (2002) 621–650; R Howse, Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann, 13 European Journal of International Law (2002) 651–659; P Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, 13 European Journal of International Law (2002) 815–844; E U Petersmann, Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston, 13 European Journal of International Law (2002) 845–851.

[3] Examples are the cases discussed under III B.1 and B.2.

[4] Intervention of the US Department of Justice as *amicus curiae* in pending ATCA cases.

[5] An example is the conference on 'Human Rights and the Private Sector' that was organized in November 2003 by the Novartis Foundation for Sustainable Development. It brought together industry leaders and NGOs.

[6] The UN norms on responsibility of transnational corporations are discussed in K Lucke's contribution in this chapter.

I. CONCEPTUAL FRAMEWORK: FROM COHERENCE TO FRAGMENTATION — AND BACK AGAIN

A. Coherence: Common origins

Of special importance for and at the heart of the discussions about the establishment of a post-war world order was the 'Four Freedoms' address of President F D Roosevelt in January 1941. The speech led to the Atlantic Charter, a joint declaration by Winston Churchill and F D Roosevelt, which contained their vision of a peaceful world order after the war. This new world order was to rest on four pillars, trade and finance on the one hand, and peace and human rights on the other. The first two were further developed at the conference of Bretton Woods in 1944; human rights and the establishment of a legal framework for a peaceful post-war order were left to the new United Nations. In hindsight, this early crossroad already seems to symbolize the different conceptual avenues that the two fields of regulation would take in the years to follow.

The bitter memories of high unemployment, hyperinflation, recession, and fluctuating exchange rates were still fresh in the delegates' minds, and the world was still at war when the delegates of forty-five countries met in Bretton Woods, New Hampshire in 1944. The Bretton Woods Conference was followed by additional conferences in London (1946), Lake Success and Geneva (1947), and Havana (1948), all dedicated to establishing an International Trade Organization in an effort 'to win the peace'. Liberalization of international trade was seen as a means to re-establish peaceful international relations and finally enhance human welfare and democracy. In the spirit of traditional international law, peaceful cooperation of sovereign states in the Westphalian sense stood at the centre of the deliberations for a new international trade organization. What the drafters of what later became the GATT had in mind was therefore not some abstract economic policy goal, but the goal of overcoming the bleak inheritance of an era marked by totalitarian regimes and disrespect of human dignity. Concerns about human dignity—with an emphasis on the individual[7]—also paved the way to the Universal Declaration of Human Rights in 1948, which marked the birth of the contemporary human rights system. While the 'Four Freedoms' address included the freedom from want as one of the fundamental human rights, the Universal Declaration extended the human rights platform to embrace civil, political, economic, social, and cultural rights and—by interrelating the different rights—made them mutually enforcing. The shared goals of the legal instruments for both international trade and human rights find their expression in Article 28 of the Universal Declaration: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.'

[7] Human Rights were an issue neither in Bretton Woods nor during the negotiations for the Havana Charter.

At the time, the Universal Declaration was not a legally binding instrument, and it was thought that it would be followed by more detailed provisions in a single convention. However, the Cold War ideologically split the world and led to the drafting of two separate treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Both covenants were adopted in 1966 after lengthy debates within the UN organs. Yet it was ten years before they received the requisite number of ratifications and could enter into force. Until then, there was no other human rights instrument with such a broad coverage as the Universal Declaration.

From the beginning, the respect of state sovereignty has played a crucial role in the development of international trade and human rights. Thus, both essentially contain rules that limit state actions in regulation and practice.

B. Fragmentation

Although the different regimes had a common starting point, they developed in very different ways, which resulted in a 'unity of legal thought and diversity of legal order',[8] leading to a fragmentation or diversification[9] of international law. For a thorough legal analysis at least three key factors need to be examined: the different notion of legal subjects, the different nature of (state) obligations, and the different compliance mechanisms in the two regimes.

1. New players—old rules

International legal regimes after the Second World War were based on the traditional Westphalian concept of the sovereign nation state. States were the only recognized subjects of international law. With new actors such as individuals, groups, non-governmental organizations (NGOs), and multinational enterprises (MNEs) taking the stage, this concept was put into question.

The reactions to the new actors were all rooted in an adherence to the 'old' rules, but they had very different emphases.

HUMAN RIGHTS LAW

Although the need to establish a legal framework for protecting the individual was recognized immediately after the Second World War, the Universal Declaration was deliberately framed as a non-binding document.[10]

[8] G Abi-Saab, Fragmentation or Unification: Some Concluding Remarks, 31 New York University Journal of International Law and Politics (1999) 919–933 at 920.

[9] G Hafner, Risks Ensuing from Fragmentation of International Law, Official Records of the UN General Assembly, 55th Session, Supplement No 10 (A/55/10), Annex, 321–329.

[10] In the words of Eleanor Roosevelt, chairperson of the commission on Human Rights, acting in her capacity as the principal representative of the United States: 'In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of this document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation.' Quoted after H Lauterpacht, International Law and Human Rights, London (1950) 398–399.

International human rights law, especially the two UN Covenants, responded to the need to strengthen the position of individuals in international law by—at least partially—recognizing them as subjects of international law. Human Rights law thus applied an *existing* tool—the concept of subjects of international law—to a *new* phenomenon. Individuals are no longer mere objects of Human Rights law, but the holders of the substantive rights guaranteed by Human Rights law. In some instances, they are even entitled to initialize legal actions against violating states.[11] Correspondingly, international courts extended the responsibility for serious human rights violations to individuals even if they do not actively participate but 'give practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime'.[12]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) summarized this shift in focus from states to individuals in its *Tadic* decision when it addressed the responsibility of individuals for crimes against humanity:

> A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law hominum causa omne jus constitutum est (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. [. . .] If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[13]

Such a paradigmatic shift implies a departure from the positivist approach, which was applied in the *Lotus* case,[14] and requires a broader notion of social justice that includes the protection of human rights. This is where 'international society' and NGOs come into play: they serve as transnational networks of people pursuing common goals such as human rights. NGOs have indeed become increasingly active in the human rights discussion. According to Articles 62 and 71 of the UN Charter and current practice, NGOs in consultative status with the UN Economic and Social Council (ECOSOC) can submit written or oral complaints against a member state for the violation of human rights. Several ECOSOC resolutions set out the procedure by which such communications are to be treated. The main requirement for alleged human rights violation complaints is that such complaints must be primarily

[11] T Franck, The Empowered Self: Law and Society in the Age of Individualism, Oxford/New York (1999) 199.

[12] ICTY, *Prosecutor v Furundzija*, Case No IT-95-17/1-T (1998), reprinted in 98 International Legal Materials (1999) 317, para 235.

[13] ICTY, *Prosecutor v Dusko Tadic*, Case No IT 94/1-A, Decision on the Defence Motion for Interlocutory Appeal (2 October 1995) reprinted in 35 International Legal Materials (1996) 32, para 97.

[14] Lotus Case (*France v Turkey*) (1927), PCIJ Series A. No 10; C Chinkin, Human Rights and the Politics of Representation: Is There a Role for International Law,? in M Byers (ed), The Role of Law in International Politics—Essays in International Relations and International Law (2000) 131–147 at 131.

motivated by the desire to assist ECOSOC or its subsidiary bodies in their work. In other words, NGOs must not abuse their consultative status for political motives. In addition, complaining organizations must keep actions that are related to ECOSOC Resolution 1503 strictly confidential until the Commission on Human Rights decides whether it will make recommendations to ECOSOC.[15] This requirement only applies to complaints in the field of human rights.[16]

Addressing the influence that multinational enterprises have on human rights was more difficult. Although an abundance of codes of conduct, guidelines, and the like, such as the UN Global Compact[17] or the OECD Guidelines,[18] have evolved over the years, all efforts to establish *binding* rules for multinational corporations have so far failed.

The Nuremberg Court held private enterprises *indirectly* responsible for crimes against humanity if they had acted on behalf of the state,[19] or if individuals[20] in leading positions had been involved in the crime of genocide. So far, no general direct legal responsibility of private enterprises has been established in international law. The Statute of the International Criminal Court (ICC) does not impose obligations on enterprises; they can only be held accountable if their actions can be attributed to individuals or states. Some scholars[21] extend the concept of second liability as it is contained in Article 25(3)c and d of the ICC Statute to enterprises. Neither state practice nor the jurisprudence of international courts has yet confirmed this approach.

This is where the new UN norms on the responsibilities of transnational corporations[22] come into play. They emphasize state obligations to protect human rights, including ensuring that transnational corporations and other businesses respect human rights. In a second step, they then extend that obligation to the corporations themselves—within their respective spheres of activity and influence.[23]

[15] Procedure for dealing with communications relating to violations for human rights and fundamental freedoms, Resolution 1503 (XLVIII) of the Economic and Social Council (27 May 1970) para 8.

[16] R Lagoni/E Chaitidou, in B Simma (ed), The Charter of the United Nations, 2nd edn Oxford (2002) Commentary to Article 71, MN 14.

[17] For an overview see ICHRP, International Council on Human Rights Policy, Beyond Voluntarism—Human rights and the developing international legal obligations of companies, Geneva (2002).

[18] OECD Guidelines for Multinational Enterprises, Revision 2000 (27 June 2000).

[19] International Military Tribunal (Nuremberg), Judgments and Decisions (1 October 1946) reprinted in 41 American Journal of International Law (1947) 172–333 at 241–243.

[20] International Military Tribunal (Nuremberg), Judgments and Decisions (1 October 1946) reprinted in 41 American Journal of International Law (1947) 172–333 at 220.

[21] A Clapham/S Jerbi, Categories of Corporate Complicity in Human Rights Abuses, 24 Hastings International and Comparative Law Review (2001) 339–349 at 342–349.

[22] UN Sub-Commission on the Promotion and Protection of Human Rights, Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

[23] para 1 of the Norms.

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It has been argued that international trade law did not react to these developments at all: in fact, there is no mention of individuals or human rights in international trade agreements except for Articles 11, 14, and 16 of the TRIPS agreement which grant rights to producers and owners of trademarks. So what has happened in international trade law? The rules drafted in Bretton Woods and during the negotiations for the Havana Charter, which later became the GATT, were legally binding treaty rules. Yet, despite their form as 'hard' law, their substance was to a large extent defined by political consensus, weak implementation mechanisms, and a strong influence of economic, market-related considerations. In several rounds leading up to the Uruguay round, these rules were further defined and the GATT seemed on its way to become what Bruno Simma once described as a 'self-contained regime':[24] a body of highly specialized provisions addressing trade issues—and only trade issues—in great detail. States were the only actors to play a role; neither individuals nor non-state organizations had access to procedures or information. With the establishment of the WTO, the international trade regime was strengthened in terms of *legalization*: the move from GATT to the WTO has been applauded as a shift in legal paradigm from diplomatic arbitration to dispute settlement based on the rule of law.[25]

In other words, international trade law reacted to the emergence of new actors by focusing on what it considered its core competence—international trade—and it applied the methods and rules of traditional international law as a body of law that regulates the peaceful cooperation among equal sovereign states.

It is therefore not surprising that NGOs have no legal status within the WTO framework. There is neither a consultative status as established within ECOSOC nor a right to submit complaints. The highly controversial issue of submitting *amicus curiae* briefs will be addressed in the context of the upcoming review of the dispute settlement mechanisms in the WTO. Until then, according to the rulings of the Appellate Body, NGOs are free to submit *amicus curiae* briefs,[26] yet the dispute settlement organs are under no legal obligation to accept or even consider them. There is no consensus on whether panels or the Appellate Body are required to give their reasons when they choose not to consider such briefs.

[24] B Simma, Self-contained regimes, Netherlands Yearbook of International Law, vol XVI (1985) 111–136.

[25] Yet, J Weiler and others raised the question whether the shift in legal paradigm from GATT to WTO represents a victory for the rule of law or merely a victory for the rule of lawyers: J H H Weiler, The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement, in R B Porter/P Sauvé/A Subramanian/A B Zampetti (eds), Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium, Washington D.C. (2001) 334–350 at 336.

[26] *European Communities—Trade Description of Sardines* [hereinafter *EC—Sardines*], Report of the Appellate Body, WT/DS231/AB/R (26 September 2002).

2. *Rights and obligations*

HUMAN RIGHTS

The concept of granting human rights to individuals also had an impact on the shaping of respective state obligations. According to the UN Covenants and their implementation and supervisory bodies, states have an obligation to *respect, protect, and fulfil*.[27]

The obligation to *respect* requires the state and all its organs to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom. At a secondary level, states are required to *protect* the individual's rights from violation by third parties. Such an obligation implies the horizontal effectiveness of rights, a concept that has been widely accepted in both national constitutional[28] and international case law.[29] It is important to note that horizontal obligations, unlike obligations with *Drittwirkung*, that is, obligations that directly apply to private subjects, remain state obligations; thus, as a rule, private actors cannot be held directly accountable under international law. There is a need for state protection from fraud and unethical behaviour in trade and contractual relations. This protective function of the state is widely used and is the most important aspect of state obligations with regard to economic, social, and cultural rights. In this context, standards for multinational enterprises are becoming increasingly important, for example, with regard to labour standards and freedom of association. At the international level, different attempts have been undertaken to establish guidelines for MNEs. Among the most important are, as mentioned above, the OECD Guidelines, the UN Global Compact, and the most recent UN norms for transnational corporations. At the tertiary level, states have an obligation to *fulfil*, thus to facilitate opportunities by which the rights can be enjoyed. This obligation also requires states to assist those who otherwise cannot enjoy their rights.[30]

The UN Covenants also impose an obligation on member states[31] to cooperate internationally and to provide assistance. This obligation can be traced

[27] The concept was originally developed by A Eide, Right to adequate food as a human right, Centre for Human Rights, Geneva, Human Rights Study Series No 1, New York (1989) and the Report Updating the Study on the Right to Food, UN Doc E/CN 4./Sub.2/1998/9. The concept was then adopted and further developed by the competent UN organs.

[28] For example, the Swiss Constitution (in force since 1 January 2000, SR 101) provides in Art 35: '1. The fundamental rights shall be realised in the entire legal system. 2. Whoever exercises a function of the state must respect the fundamental rights and contribute to their realisation. 3. The authorities shall ensure that the fundamental rights also be respected in relations among private parties whenever the analogy is applicable.' A similar provision can be found in s 8 of the South African Constitution of 1996: '(1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of the state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the rights and of any duty imposed by the rights.'

[29] A landmark case in this respect was the Inter-American Court of Human Rights decision in *Velasquez Rodriguez v Honduras*, reprinted in 28 International Legal Materials (1989) 294. For an overview M Craven, The International Covenant on Economic, Social and Cultural Rights—A Perspective on its Development, Oxford (1998) 111.

[30] A Eide, Report (n 27).

[31] Art 2(1) ICESCR.

back to Articles 55 and 56 of the UN Charter. So far, the respective organs have elaborated little on the content of these obligations. The Committee on Economic, Social, and Cultural Rights (CESCR) has underlined the duty of states to restrain themselves from any action that might impede the realization of economic, social, and cultural rights in other countries in the context of the work of international lending institutions. Thus, in its General Comment No 2, the Committee addressed the issue of the adverse effects of structural adjustment programmes on the realization of human rights.[32]

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The WTO is a member-driven organization with national sovereignty—in the words of John Jackson—as one of its 'mantras'.[33] This notion reflects the traditional understanding of international law as a body of rules applicable between sovereign countries.[34] As such, WTO law grants specific rights and obligations to the member states. Nowhere—except for in the TRIPS agreement[35]—are individuals or non-governmental organizations[36] mentioned in the agreements.

In contrast to European law, which requires that member states take all necessary and appropriate measures 'to ensure that e.g. free movement of goods is respected on their territory',[37] WTO law imposes mainly negative obligations on states; it limits the use of national sovereignty. Where positive or affirmative obligations, such as the consideration of food security[38] and the possible creation of a Revolving Fund in Article 20 of the Agreement on Agriculture (AoA), occur, they are framed as commitments for the future and for further negotiations. The language very much resembles the notion of 'progressive realisation' that we find in Article 2(1) of the ICESCR. While the Committee on Economic, Social, and Cultural Rights made it clear that this provision imposes a *legal* obligation on states to move as expeditiously and effectively as possible toward the full realization of the rights covered,[39] no such statement has been made in the context of the WTO. A remarkable step deserves attention though: In the context of the ongoing discussions about non-trade concerns under Article 20 AoA, Mauritius submitted a paper on 'Developing Countries and

[32] Committee on Economic, Social, and Cultural Rights, General Comment No 2 (E/1990/23), International Technical Assistance Measures; R H Weber, Ethik im Aussenwirtschaftsrecht, 12 Aktuelle Juristische Praxis (2003) 1338–1352.

[33] J H Jackson, The WTO 'Constitution' and Proposed Reforms: Seven Mantras Revisited, 4 Journal of International Economic Law (2001) 67–78 at 72. Jackson elaborates on a modern concept of sovereignty in Sovereignty-Modern: A New Approach to an Outdated Concept, 97 American Journal of International Law (2003) 782–802.

[34] *Lotus* Case (n 14) 18: 'Le droit international règle les rapports entre des États indépendants.'

[35] Arts 11, 14, and 16.

[36] The TBT refers to non-governmental organizations when addressing international standard setting.

[37] European Court of Justice, Case C-112/00, *Schmidberger v Austria* (12 June 2003) para 59.

[38] For the discussion within the UN see K Mechlem, Food Security and the Right to Food in the Discourse of the United Nations, 10 European Law Journal (2004) 631–648.

[39] Committee on Economic, Social, and Cultural Rights, General Comment No 3 (E/1991/23) on the Nature of States Parties' Obligations, paras 13–14.

Non-Trade Concerns',[40] in which the provisions of the ICESCR on the right to food are identified as being particularly relevant to the future negotiations on the AoA non-trade concerns. The paper argues that the AoA 'should be examined from a broad angle taking into account the relevant parts of the results of the Uruguay Round as well as other commitments of sovereign nations under other multilateral agreements, treaties, covenants or conventions'. It also notes that the first preambular paragraph of the WTO Agreement of 1994 contains similar objectives and that the WTO does not envision trade as an end in itself but that relations in the field of trade and economic endeavour should lead to the improvement of the general welfare of people and the maintenance of the environment. In this sense, the text of the WTO Agreement appears to have been carefully drafted so that countries would not be compelled to make commitments that contradicted their obligations under other multilateral frameworks. This passage is one of the rare references to human rights in a formal process in the WTO, and it appears to agree with the need identified by the CESCR to 'ensure that in international agreements the right to food is given adequate consideration'.[41]

Whereas in Bretton Woods and during the negotiations for what later became the GATT, trade was seen as a means to an end—higher standards of living, full employment, and the like—the argument seems somehow to have been put on its head in international trade and economic law today: in adopting an *instrumental* approach human rights can—if at all—be applied only if they serve the purpose of achieving the objectives of the WTO Agreement, or at least do not unduly hamper them. An example for this approach is the necessity text required by Article XX GATT.

Instrumentalizing human rights need not *a priori* be a bad thing. First of all, the definition of the objective is of crucial importance. If the WTO Agreements are—as in my opinion they should be—seen as a means eventually to serve the wellbeing of the individual as set forth in the preamble of the Marrakesh agreement, instrumentalizing human rights for that purpose has no negative effect. Yet, the problem starts with what has been called the *economization of human rights*. If the goal of the instrumentalization of human rights is limited to economic objectives such as ensuring market access, then the instrumentalist approach will inevitably limit the applicability of human rights: a thought which raises concern in the human rights community.

3. Equality and non-discrimination

In both human rights and international trade law, the notion of non-discrimination and equality is of crucial importance.[42] Yet there are fundamental conceptual

[40] Note on non-trade concerns—Revision, G/AG/NG/W/36/Rev.1 (9 November 2000).

[41] Committee on Economic, Social, and Cultural Rights, General Comment No 12 (E/C.12/1999/5) on the right to food.

[42] Analytical Study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization, UN Doc E/CN.4/2004/40 (15 January 2004).

differences not only between human rights and international trade law, but also between domestic constitutional notions of non-discrimination and equality.[43]

For international human rights law, the principle of non-discrimination and equality is a value in itself that can be derived directly from human dignity.[44] In international trade law equality and non-discrimination are recognized as basic principles mainly in order to guarantee market access,[45] not because they are values as such. In this concept, economization somewhat appears to be built *into* the principle.

Another form of economization takes place mostly at the national level and has to do with costs. An example in the context of service liberalization under GATS may illustrate this. A recent study[46] on the movement of doctors and nurses from India and the Philippines to the UK and the US found that discrimination based on national origin seems to be a key element of why industrialized countries hesitate to liberalize movement of persons. Reasons for such discrimination can be language skills and attitude, but very often the key factor is cost.

Similar difficulties may arise in the context of public procurement: A constitutional notion of equality may require a country to provide for preferential treatment, for example, for minority owned businesses in public procurement. Such an understanding of non-discrimination that involves affirmative action programmes contrasts sharply with the market access oriented notion of non-discrimination in WTO law.

4. *Dispute settlement mechanisms*

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Apart from states, individuals and non-governmental organizations are playing an increasingly important role in human rights dispute settlement. Many human rights have been declared as being directly applicable and thus can be invoked in national courts by individuals. In addition, specific procedures have been established for individual complaints. As a rule, in the global context, such individual complaints form part of optional protocols to the respective covenants.

NGOs still cannot access these dispute settlement mechanisms, but they may contribute significantly in the state report system. The Convention on the Rights of the Child can serve as an indicator as it explicitly acknowledges this role by formally providing for NGO participation in the review process with an

[43] J C McCrudden, Equality and Non-Discrimination, in D Feldman (ed), English Public Law, Oxford (2004) 581–668 at 581–607.

[44] C Tomuschat, Human Rights: Between Idealism and Realism, Oxford (2003) 41–43.

[45] K Bagwell/P C Mavroidis/R W Staiger, It's a Question of Market Access, 96 American Journal of International Law (2002) 56–76.

[46] C Breining-Kaufmann/R Chadha/L A Winters, GATS and Temporary Movement of Natural Persons in the Health Sector, in Centre for International Trade, Economics and Environment, CUTS–CITEE (ed), EU–India Network on Trade and Development, New Delhi (2003) 110–146.

emphasis on facilitating the fact-finding process of the Committee.[47] It must be mentioned in this context that all attempts by NGOs to turn to the advisory jurisdiction of the International Court of Justice to gain access have failed so far.[48]

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Unlike the European Court of Justice (ECJ), the Appellate Body has not developed general principles of law that are applicable to all member states. Therefore, it is still up to member states to determine whether they follow a monistic or dualistic approach, a concept that has been abandoned by the ECJ by stating that some norms of the Treaty Establishing the European Community can be invoked in national courts by individuals regardless of the system the member state applies.[49] So far, most WTO member countries have not granted direct effect to the WTO agreements.[50]

One reason for this reluctance seems to be the lesson learnt from European experience: recognizing direct effect results in a shift of power between constitutional institutions and gives more power to individuals and NGOs at the cost of government and parliament. Some commentators have argued that if WTO law were attributed direct effect in domestic courts, the dispute settlement system would likely be increasingly invoked for reasons of domestic policy to defend the interest of investors and exporters.[51] At this stage, where the WTO is still a purely intergovernmental organization with no representation of civil society, the institutional framework for accommodating direct effect has not yet been established. In other words, it is hard to see how direct effect of WTO law could be sustainable without increased democratic participation at the institutional level.

[47] Art 45(a) of the Convention on the Rights of the Child, adopted by GA Res. 44/736 (20 November 1989) allows the Committee on the Rights of the Child to invite 'competent bodies to provide expert advice on the implementation of the Convention'.

[48] Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) (8 July 1996) General List Nos 93 and 95, reproduced in 35 International Legal Materials (1996) 809. The opinion was formally first requested by the World Health Organisation as a consequence of the mobilization of international civil society that was given expression through the World Court Project, an NGO initiative. Subsequently, the General Assembly also requested an opinion in more general terms. The court exercised its discretion to respond to the General Assembly's request, despite the argument that it should not do so because the original NGO involvement had rendered the questions political and that these unorthodox origins had in some sense tainted the request. See C Chinkin (n 14) 138; D Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, 88 American Journal of International Law (1994) 611–642 at 624. D Thürer, The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State, in R Hofmann (ed), International Law—From the Traditional State Order Towards the Law of the Global Community, Berlin (1999) 37–58 at 45–46.

[49] Case 26/62, *Van Gend & Loos v Netherlands Inland Revenue Administration* (1963) ECR 1.

[50] T Cottier, A Theory of Direct Effect in Global Law, in A von Bogdandy/P C Mavroidis/Y Mény (eds), European Integration and International Co-ordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann (2002) 99–123 at 105–106.

[51] C D Ehlermann, Six Years on the Bench of the 'World Trade Court'. Some Personal Experiences as Member of the Appellate Body of the World Trade Organization, 36 Journal of World Trade (2002) 605–639 at 637.

Still, *informal* participation of non-governmental actors in WTO dispute settlement has increased dramatically: First of all, most WTO disputes are initiated by non-state actors such as trade associations at the national level.

Secondly, fact-finding seems to be the gate of entry for NGOs in most international dispute settlement procedures. Where formal mechanisms—as in the Convention on the Rights of the Child—are absent, *amicus curiae* briefs are the tool of choice. The WTO dispute settlement organs have struggled with the admissibility of *amicus curiae* briefs for quite some time. One key argument against their admission was—and still is—that they could be 'abused' to 'infiltrate'[52] the dispute settlement with non-trade related issues and—for example in the case of labour standards—violate the Singapore Declaration.[53] In economic terms, the question is whether WTO dispute settlement should also address problems that arise as a result of non-pecuniary externalities and are dealt with in agreements outside the trade context.

In a highly controversial move, the Appellate Body decided to admit unsolicited *amicus curiae* briefs based on Article 13 of the Understanding on Dispute Settlement (DSU) and by doing so granted a right of access—not a right to participate—to dispute settlement to non-state actors.[54] Although NGOs and individuals do not have standing and are not parties to the dispute, their right to provide panels and the Appellate Body with their point of view has been clearly confirmed.[55]

5. *Preliminary conclusions*

The brief study of the legal framework shows that international trade and human rights law have conceptually moved in different directions although they started off with a common objective. WTO law does provide some 'open' provisions where human rights could be considered. In the rare circumstances where human rights are indirectly addressed, such as, for example, in Article 20 AoA, state obligations are framed in terms of future commitments or the need for further negotiations.

[52] This notion was used by the organizers of the 2002 World Civil Society Forum when allocating topics for panels: 'the process by which the norms of environmental law, the general principles of international law and labour standards *infiltrate* the rules of trade law, with mentioning the role of civil society organizations . . .' (emphasis added).

[53] WTO, Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN (96)/DEC, Doc No 96-5316, confirmed at the Doha Ministerial summit: WTO, Doha Ministerial Declaration (adopted on 14 November 2001) WT/MIN(01)/DEC/W/1, para 8: 'We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.'

[54] *EC—Sardines* (n 26) paras 156–168; *United States—Import Prohibition of Certain Shrimp and Shrimp Products* [hereinafter *US—Shrimp/Turtles*], Report of the Appellate Body, WTI/DS58/AB/R (6 November 1998) paras 100–110; *United States—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R (10 May 2000) paras 36–42.

[55] For a detailed analysis see C Breining-Kaufmann, Participation in the WTO Dispute Settlement Procedures—The story of amicus curiae briefs, Contribution to the World Trade Forum 2002.

With respect to equality and non-discrimination, the situation is much more complex: fundamental conceptual differences occur not only between human rights and international trade law but also between national and international regulations.

The next section will look at possible conflicts between the two regimes and seek methods to reconcile the two.

II. AREAS OF CONFLICT AND THE NEED FOR COORDINATION

A. Where conflicts occur

What are possible scenarios for conflicts between human rights obligations and WTO law? Five major categories seem important for our discussion: the exceptions in Article XX GATT, the definition of 'like products' in Article III GATT, labelling programmes and their compatibility with the Agreement on Technical Barriers to Trade (TBT), unilateral or regional measures, and economic sanctions.

1. Justified violations of the GATT

One conceptual method to take human rights into consideration is the justification of violations of the GATT. Article XX grants exceptions from the most-favoured nation principle for *inter alia* reasons of public morals and the protection of human life and health.

Much has been written[56] on whether the exception of public morals in Article XX(a) justifies a violation of the most-favoured nation principle based on human rights considerations. Public morals is not an established concept in international law. Virtually anything could be characterized as a moral issue and the danger of protectionist abuse is real. At least since the Second World War, human rights have been considered a core element of public morality. Still, the key questions remain which human rights could be considered to be part of public morals? and who should decide this question? In addition, the concrete content of human rights with respect to international trade needs to be defined. For example, it needs to be determined what the right to food implies for state obligations under the AoA. What standards should be applied? Should the WTO dispute settlement bodies define them or rely on decisions by the competent UN organs?

So far, there is no jurisprudence on the interpretation of Article XX(a). Yet, the Appellate Body recently confirmed a panel's view that the notion 'public morals' in Article XIV(a) GATS in conjunction with footnote 5 of the GATS 'the term "public morals" denotes standards of right and wrong conduct maintained

[56] For an overview see G Marceau, The WTO Dispute Settlement and Human Rights, 13 European Journal of International Law (2002) 753–814.

by or on behalf of a community or nation', and refers to 'the preservation of the fundamental interests of a society, as reflected in public policy and law'.[57]

The exception in Article XX(b) also leaves room for considering human rights as far as they are related to the protection of human life and health. An example that could fit within the exception of Article XX(b) would be intolerable forms of exploitative child labour that put children's health at risk. In *EC—Asbestos*[58] the Appellate Body made it clear that Article XX(b) and the notion of risk is open to a dynamic interpretation, thus taking into account developments in other international organizations such as the WHO or the ILO. In fact, the decision in *EC—Asbestos* is the first case in which WTO dispute settlement organs referred to ILO Conventions. The main issue in the case was the protection of workers against harmful effects of asbestos.

If a state can establish that a measure violates the most-favoured nation principle in Article I for reasons mentioned in Article XX(a) or (b) the measure still needs to comply with the chapeau of Article XX, which is an expression of the principle of good faith. Measures taken under Article XX are only justified if they do not arbitrarily discriminate between countries where the same conditions prevail and if they do not result in a disguised restriction of international trade. In the human rights context, this means that a member state could not impose an import ban on products from Myanmar/Burma because of serious violations of human rights while still allowing the importation of similar products manufactured under similar conditions from China. Such a policy would be considered unjustified discrimination under Article XX. Also, the same human rights standard must be applied to both domestic and imported products.

In addition, if the measures were not based on clear, transparent rules and did not comply with due process, this would constitute an arbitrary discrimination.[59]

Finally, when is a measure a 'disguised restriction of international trade'? Three criteria have been established by the WTO dispute settlement organs to determine whether a measure is a disguised restriction on international trade: (1) the publicity test, (2) the consideration of whether the application of a measure also amounts to arbitrary and unjustifiable discrimination, and (3) the examination of 'the design, architecture and revealing structure'[60] of the measure at issue.

2. *Like products in Article III GATT*

With respect to the other core principle in WTO law, the national treatment as stated in Article III GATT, the question is when are products considered like

[57] *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R, 20 April 2005, paras 296–299.

[58] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* [hereinafter EC—Asbestos], Report of the Appellate Body, WT/DS135/AB/R (12 March 2001) para 162.

[59] *US—Shrimp/Turtles* (n 54) paras 172–176.

[60] WTO, Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d), and (g), WT/CTE/W/203 (8 March 2002).

products? Can products that are physically identical be treated differently because of human rights violations that occur during their production? At the heart of the discussion is the controversy over whether Article III also covers the manner in which the products are manufactured—for example Process and Production Methods (PPMs). Two highly criticized—and unadopted—panel decisions[61] held that Article III deals only with products as such, but not with the process of manufacturing them. Yet, in *EC—Asbestos*,[62] the Appellate Body left the door open for future consideration of PPMs. It decided that physical characteristics are not the only criterion for treating products differently. In fact, a product is not considered a like product if, for example, consumers treat it differently because of potential health risks. Therefore, the crucial criterion is the 'competitive relationship' between the two products. Article III is not about market entry but about avoiding protectionism for domestic products. Physical characteristics still play an important role in determining whether such a competitive relationship exists but they are not the only criterion. At this stage, it is difficult to interpret the Appellate Body's decision. It could also be read as imposing a high burden of proof on a member state that wants to contradict physical evidence.[63] In sum, WTO jurisprudence has not yet answered the question whether PPMs can produce the 'unlikeness' of two products under Article III.

3. *Labelling programmes*

A third group of possible conflicts are labelling programmes. Recent examples include the Belgian law to promote socially responsible production that entered into force on 1 September 2002.[64] With respect to human rights, it explicitly refers to the ILO's core labour standards and thus includes *inter alia* the protection of freedom of association as a requirement for obtaining the label. With respect to the TBT two questions arise: First, are labels to be considered as standards or regulations that are covered by the TBT? In a second step, it then needs to be examined whether the concrete labelling scheme relates to the 'characteristics for products or related process and production methods'.[65]

[61] *United States—Restrictions on Imports of Tuna*, Report of the Panel (16 August 1991) (unadopted), reprinted in ILM, vol 3/1991, 1594–1623, para 5.15 [hereinafter *US—Tuna/Dolphin I]; United States—Restrictions on Imports of Tuna*, Report of the Panel (16 June 1994) (unadopted), GATT doc DS29/R, para 5.9 [hereinafter *US—Tuna/Dolphin II*]. Both decisions were not adopted by the United States. *US—Shrimp/Turtles* (n 54). For a critique of the product/process distinction see R Howse/D Regan, The Product/Process Distinction—An Illusory Basis for Disciplining Unilateralism in Trade Policy, 11 European Journal of International Law (2000) 249–289 and the reply by J H Jackson, Comments on Shrimp/Turtle and the Product/Process Distinction, 11 European Journal of International Law (2000) 303–307. While R Howse/D Regan argue that there is no textual basis in the WTO agreement for the product/process distinction, J H Jackson raises institutional and textual concerns about defining where to draw the line between the PPMs that should be considered and those that should not.

[62] *EC—Asbestos* (n 58) especially para 100. [63] G Marceau (n 56) 808.

[64] Loi visant à promouvoir la production socialement responsable du 27 février 2002, published in Moniteur Belge (26 March 2002) 2nd edn, 12428–12432. [65] TBT, Annex 1.1 and 1.2.

So far, there has been no explicit decision by the dispute settlement organs on this issue. Still, some related decisions allow for the tentative conclusion that labelling programmes are covered by the TBT as either regulations or standards.[66] In the case of the Belgian labelling programme, once a company decides to apply for the label, the compliance with the criteria established by the government is mandatory in order to obtain a label. Moreover, if the criteria are no longer met, the government can withdraw the label; this demonstrates clearly that we are in fact dealing with regulations under the TBT. The provisions on standards, on the other hand, apply only if the rules are not legally enforceable and therefore not considered governmental and mandatory. Article 4 TBT requires all central government standardizing bodies to comply with the TBT's Code of Good Practice.

In addition, the key question whether human rights related labelling programmes refer to 'products or related processes and production methods' in the light of the definition in Annex 1.1 and 1.2 of the TBT Agreement has not yet been answered by the WTO dispute settlement organs. Still, we can refer to *EC—Asbestos*,[67] where the Appellate Body had to interpret the exact same phrase in the context of health-related measures.

According to the Appellate Body and the wording of Annex 1.1 and 1.2, any label related to the product is, as such, a product characteristic. This definition includes all PPMs except those that have nothing to do with the product. An example of the latter would be a label that refers to the compliance of distributors with human rights vis-à-vis their employees. Such a regulation would not be related to a specific product and thus not fall under the scope of the TBT.[68]

Even if one does not agree with the concept of viewing PPM-related labels as product characteristics, there is still a strong argument for the cover of such labelling programmes by the TBT: If we turn to the analysis of like products under Article III GATT and the criterion of competitive relationship, it could be envisioned that the Appellate Body would interpret Annex 1.1 and 1.2 similarly, that is, in such a way as to include PPMs if they have an impact on the product's market appearance and performance. What would this mean in practice? If, for example, a product carrying a label that refers to child labour was treated differently by consumers from a like product without a label, the TBT Agreement would cover the labelling programme.

Once the TBT Agreement is applicable it imposes several obligations on states: The main principles are compliance with national treatment and MFN obligation and the prohibition of the creation of unnecessary obstacles to

[66] TBT Annex 1.1 and 1.2; *Canada—Administration of the Foreign Investment Review Act*, Report of the Panel, L/5504–30S/140 (adopted on 7 February 1984) [hereinafter *Canada—FIRA*]; *EC—Asbestos* (n 58) paras 72–75.

[67] *EC—Asbestos* (n 58) para 67.

[68] A different way of looking at this problem would be to interpret the process and production methods narrowly, thus excluding all procedures that are not specifically applied to the product in question but of a general nature.

international trade. With regard to technical regulations, Article 3 holds the government responsible for acts of local and non-governmental bodies. Article 4 requires member states to ensure that all organizations involved in standardizing and its enforcement accept and comply with the Code of Good Practice in Annex 3 of the TBT Agreement. Annex 3.D provides national treatment and most-favoured nation obligations with respect to standards. Annex 3.E addresses one of the concerns of developing countries, namely, that they might not be able to meet standards without losing their competitive advantage, by determining that 'the standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade'.

In sum, the state has a *positive* obligation to ensure that local and non-governmental bodies comply with Article 2 when setting or enforcing regulations. With respect to standards, the state has to set up rules or incentives for private standard setting organizations to comply with the Code of Good Practice. However, this obligation is softened by several factors: First, it does not contain any substantial rights but deals with the *process* of standard setting. Secondly, the Code of Good Practice does not establish a new scheme of rules but mainly refers to obligations already formulated elsewhere, like the GATT for example, or international standards that already exist.[69] Overall, this concept corresponds to the voluntary nature of most labelling programmes and the general tendency of the TBT Agreement to concentrate on the regulatory process and to leave the authority for substantial standard setting within the state's sovereignty.

The new Belgian law led to intensive discussions in the Committee on TBT and met strong resistance by ASEAN countries.[70] Three major arguments were made: Malaysia, on behalf of the ASEAN countries,[71] stated that the law would bring labour issues back into the WTO, which was contrary to the Singapore Declaration.[72] In addition, some delegations considered the law discriminatory and to be creating unnecessary obstacles to trade.[73] While it is still disputed whether the TBT covers also non-product-related PPMs,[74] the issue comes down to the question whether there are alternative less trade-restrictive means for Belgium to achieve the objective, that is, the promotion of core labour rights. Since the label is voluntary, this seems a very difficult point for the complainant to prove. Assuming that the TBT covers all PPMs, the Belgian law is unlikely to be in violation of the TBT.

[69] With Annex I, Art 4 ILO standards are recognized as relevant for the interpretation of the TBT. In addition, the ISO/IEC Directory of International Standardizing Bodies, 7th edn (1995) lists the ILO and the specified standards.

[70] Committee on Technical Barriers to Trade. Minutes of the discussions in G/TBT/M/23 (8 May 2001) and G/TBT/M/24 (14 August 2001).

[71] The whole statement of ASEAN can be found in Asean concerns regarding the proposed Belgian law for the promotion of socially responsible production, Committee on Technical Barriers to Trade, G/TBT/W/159 (28 May 2001).

[72] G/TBT/M/23, para 15.

[73] G/TBT/M/23, paras 9, 10, and 15.

[74] This argument was made by Hong Kong in the context of the Belgian law: G/TBT/M/23, para 10.

4. Unilateral or regional measures

In addition, unilateral or regional measures such as selective purchasing laws or General System of Preferences schemes (GSP) can create conflicts with obligations under WTO law. Recent examples include the sanctions imposed by the Commonwealth of Massachusetts on Burma/Myanmar. In 1989, the United States had indefinitely suspended Burma's preferred trading status owing to the country's labour rights violations.[75] In 1996, Massachusetts enacted legislation restricting the authority of its agencies to purchase goods or services from companies doing business with or in Burma (Myanmar).[76] The legislation was based directly on previous legislation regulating state contracts with companies that had South African links. The statute generally bars state entities from buying goods or services from any person (defined to include a business organization) identified on a 'restricted purchase list' of those doing business with Burma. Doing business with Burma was defined broadly. Although the statute had no general provision for waiver or termination of its ban, it did exempt from boycott any entities present in Burma solely to report the news, or to provide international telecommunication goods or services, or medical supplies.

The Massachusetts law created concern at home and abroad: Following the federal legislation, in 1998 the National Foreign Trade Council, a non-profit corporation representing companies engaged in foreign commerce, brought a claim challenging the Massachusetts law. It argued that the state law was contrary to the constitution. Japan and the European Community formally complained to the United States and the WTO that the Massachusetts law was contrary to the Agreement on Government Procurement (GPA) as it was adopted in 1994.[77] After the US Supreme Court had ruled that the Massachusetts law was unconstitutional,[78] the EC and Japan withdrew their complaint. Still, the Supreme Court neither addressed the question of whether the Massachusetts law violated the relevant WTO/GATT rules nor referred to the dormant commerce clause.

Another example is the EC General System of Preferences (GSP)[79] that provides market access on a preferential basis to developing countries. Among the conditions for additional trade preferences[80] is *inter alia* the compliance

[75] Proclamation No 6245, 3. C. F. R. 7, 7–9 (1992), reprinted in 105 Stat. 2484, 2484–2486 (1991); Proclamation No 5955, 3. C. F. R. 29, 29–31 (1990), reprinted in 103 Stat. 3010, 3011–13 (1989).

[76] An Act Regulating Contracts with Companies Doing Business with or in Burma (Myanmar) (25 June 1996) Massachusetts General Laws §§ 7:22G-7:22M.

[77] Request by Japan in GPA/W/39, reply by the United States in GPA/W/52. Request by the European Union for consultations WT/DS88/1 and GPA/D2/1, in which Japan joined (WT/DS88/2) and the request for the establishment of a panel WT/DS88/3. In a separate procedure, Japan, joined by the European Union, requested the establishment of a panel WT/DS95/3.

[78] *Crosby v National Foreign Trade Council*, 530 U.S. 366, 373 (2000).

[79] Council Regulation (EC) No 2501/2001 (10 December 2001), applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004.

[80] E Fierro, The EU's Approach to Human Rights Conditionality in Practice, The Hague/London/New York (2003) 256–268.

with core labour standards. For the definition of these standards, the regulations refer to the fundamental ILO Conventions.

While the GSP system has generally been viewed as compatible with WTO law, especially under Part IV of the GATT and the Enabling Clause,[81] several developing countries challenged the system in the WTO.[82] In general, GSP is an exception to the MFN principle in Article I of the GATT. In 1979, the Enabling Clause was introduced to allow positive discrimination in favour of developing countries. A Resolution 21(II) adopted by UNCTAD in New Delhi in 1968 characterized GSP as a 'non-reciprocal and non-discriminatory generalised system of preferences in favour of developing countries'. This definition implied that differences of treatment between developing countries cannot be established and that the system should benefit them all and be based on objective criteria. Yet, in reality, concessions under GSP are unilateral and voluntary. The country that applies a GSP system has great freedom in its design and establishes differences according to different criteria, such as the competitive relationship of the products, relative development level of the beneficiaries, and so on.[83] This was precisely what several developing countries led by India and Thailand were challenging. During the proceedings India withdrew its challenge with respect to labour rights.[84] In the light of the ILO Declaration on Fundamental Principles and Rights at Work it would indeed appear that to require compliance with standards that are already binding on developing countries cannot be discriminatory.[85]

5. *Economic sanctions*

Finally, economic sanctions such as have been initiated by the ILO in the case of Burma/Myanmar[86] raise questions about their compatibility with WTO law. A new approach has been taken by the WTO with respect to conflict diamonds: In May 2003, a waiver[87] was granted for trade restrictions imposed on WTO members *not* participating in the Kimberley Certification Scheme combating

[81] Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, L/4903, GATT BISD 26S/203. The Appellate Body confirmed that the Enabling Clause is an exception to Art I:1 GATT: *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body, WT/DS246/AB/R (7 April 2004) para 99 [hereinafter *EC—Tariff Preferences*].

[82] *EC—Tariff Preferences* (n 81).

[83] For an excellent analysis see L Bartels, The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program, 6 Journal of International Economic Law (2003) 507–532.

[84] For an analysis of the challenge of labour and environmental provisions see R Howse, Back to Court after Shrimp/Turtle? Almost but not quite yet: India's Short-Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences, 18 American University International Law Review (2003) 1333–1381.

[85] L Bartels (n 83) 525–526.

[86] Resolution adopted by the International Labour Conference at its 88th Session (June 2000), GB 280/6 Appendix 6.

[87] Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds: Communication, G/C/W/432/Rev.1 (24 February 2003).

so-called 'conflict diamonds'. This could be interpreted to mean that, without the waiver, trade restrictions on conflict diamonds would not be compatible with existing WTO law. Such an interpretation would also have serious implications on the consideration of human rights violations especially with respect to PPMs in the context of other WTO provisions as discussed above.[88] This issue is discussed in Krista Nadakavukaren Schefer's article in this volume.

B. Methods for reconciliation—the 'linkage' debate

The debate about a possible conflict or linkage between free trade and human rights seems fairly new; in fact its inception coincides with the establishment of the WTO in 1994. The relationship between human rights in general and trade liberalization has been put on the agenda, predominantly by NGOs.

The fragmentation of international law leads to frictions between the objectives of human rights and international trade law. Such frictions occur on both the international—horizontal—and the national—vertical—level. Of course, specialization implies special regimes. In the interest of international law as a reliable and credible system of norms, such regimes must not become self-contained regimes, rather, some relationship between the two must be established.[89]

1. Treaty interpretation

VIENNA CONVENTION ON THE LAW OF TREATIES

Article 3.2 of the Rules on Dispute Settlement declares the provisions of the Vienna Convention on the Law of Treaties (VCLT) applicable to all WTO member states whether they have ratified the Convention or not. The Appellate Body has confirmed the importance of Article 31 VCLT on several occasions.

The idea of the GATT being a 'self-contained' regime was brought to an end by the very first report of the Appellate Body, wherein it stated that the WTO system cannot be construed in '*clinical isolation*' of the widespread sources of public international law.[90] Two years later, the Appellate Body held for the first time that the VCLT is the key to finding additional sources for the interpretation of the GATT.

The Marrakesh Agreement establishing the WTO is the umbrella agreement for the entire WTO system and thus has a special status. Its preamble is the most comprehensive statement of the objectives of the WTO system,[91] and therefore

[88] For a detailed analysis J Pauwelyn, WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for 'Conflict Diamonds', 24 Michigan Journal of International Law (2004) 1177–1207.

[89] For a comprehensive analysis J Pauwelyn, Conflict of Norms, Cambridge (2003).

[90] *United States—Standards for Reformulated and Conventional Gasoline* [hereinafter *US—Gasoline*], Report of the Appellate Body, WT/DS2/AB/R (20 May 1996) 16 (III.B.).

[91] R Howse/M Mutua, Protecting Human Rights in a Global Economy—Challenges for the World Trade Organization, International Centre for Human Rights and Democratic Development, Montreal (2000) 12–13.

allowed the Appellate Body to rely heavily on it in *US—Shrimp/Turtles* for the definition of the term 'exhaustible resources'.[92] Yet, the preamble does not mention human rights. Instead, both the GATT and the Marrakesh Agreement state raising standards of living and full employment as goals. Where human rights enhance development, they are therefore covered by the preamble. It can of course easily be argued that sustainable development and human rights go hand in hand. However, concluding that the preamble of the Marrakesh Agreement therefore embraces the realization of human rights as an objective seems to go a little far.[93]

Given this somewhat inconclusive result with regard to human rights that cannot be directly related to sustainable development, let us move on to Article 31(3)c. This provision states that, in interpreting a treaty provision, all other international legal obligations that the parties have adhered to must be considered. The issue here is consistency. Treaty provisions should not be interpreted in a way that is contradictory to other international legal obligations between the parties. Also, the ICJ allows for treaty interpretation in the light of international law as it has evolved and developed since the time when the treaty was concluded: 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'[94]

In practice, there are many conflicts arising from different obligations in different legal instruments. In fact, Article 31(3)c is more than just a rule for coordination. It requires states to act in good faith and comply with obligations they have accepted. For example, Article 31(3)c tells us to consider the UN Covenants on human rights when interpreting the meaning of public morals in Article XX GATT if the parties to the dispute have ratified the Covenants. By doing so, Article 31(3)c prevents states from 'cherry-picking', that is, from choosing the treaty that best fits their needs in a specific situation. We currently encounter such problems in the context of the General Agreement on Trade in Services (GATS) where developing countries decline to offer preferences, stating that such concessions would conflict with the conditions imposed on them by IMF structural adjustment programs.[95]

With regard to the WTO, it is important to note that interpreting its provisions in their contemporary context, that is, in an evolutionary manner, does

[92] *US—Shrimp/Turtles* (n 54) paras 129–131.

[93] R Howse/M Mutua (n 91) 13, quoting A Sen but leaving open whether the preamble should be interpreted as including human rights.

[94] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Reports (1971) 31 para 53.

[95] A similar argument was put forward by Argentina. It stated that the provisions of the Memorandum of Understanding with the IMF and the provisions of Art VIII GATT were irreconcilable. However, the Appellate Body did not follow that argument. It held that since the GATT does not contain any IMF-related exceptions under art VIII GATT, independent IMF rules such as a Memorandum cannot justify Argentina's violation of Art VIII GATT. *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel* [hereinafter *Argentina—Footwear*], WT/DS56/AB/R (adopted on 22 April 1998) DSR 1998:III, para 69.

not imply that these rules are of a constitutional nature. The WTO today is only 'constitutional' in the sense that it has developed into an international organization that is working on an international legal order for international trade that needs increasing legitimacy and transparency. Yet, it is not constitutional in the sense exported from national law as an organization that pursues objectives which go beyond the interest of the member states or that creates legal norms that are non-amendable by the states.[96]

Since the relationship between labour rights conventions and trade agreements cannot sufficiently be clarified by treaty interpretation according to Article 31(3)c VCLT, a look at Article 30 VCLT and Article 103 UN Charter is necessary.

As discussed earlier, Article 31 VCLT requires treaty provisions to be read in their context and in the light of existing international law. In practice, this principle has been confirmed for international environmental law by the Appellate Body.[97] With regard to the significance of textual interpretation and the question whether the historical or the contemporary context at the time the dispute settlement takes place should be considered, the Appellate Body opted for an evolutionary dynamic approach to interpretation. In *US—Shrimp/Turtles* it held that the term 'exhaustible resources' must be read 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'.[98]

The Appellate Body cited the ICJ's statement in the *Namibia Advisory Opinion* that some terms are not static but rather 'by definition evolutionary'.[99] It then moved on to include the relevant provisions in the United Nations Convention on the Law of the Sea (UNCLOS) which were considered as reflecting customary international law by the United States although it had not ratified UNCLOS. Similar to the WTO agreements that are considered the international legal order for international trade, UNCLOS is often referred to as a constitutional framework for the law of the seas.

CONSIDERATION OF HUMAN RIGHTS IN WTO LAW

So far, there have been no decisions relating to human rights. In light of the Appellate Body's jurisprudence, the general rule of Article 31 VCLT would be applicable as well. Yet, in situations where labour rights could become an issue, member states have argued that their consideration by WTO dispute settlement organs would be contrary to the Singapore Declaration and its recent restatement at the Doha Conference.[100] This argument is flawed in several respects: The Singapore Declaration was a reply to requests by some members, in particular

[96] J Pauwelyn (n 89).

[97] *US—Shrimp/Turtles* (n 54) paras 129–131.

[98] *US—Shrimp/Turtles* (n 54) para 129, emphasis added; G White, Treaty Interpretation: The Vienna Convention 'Code' as Applied by the World Trade Organization Judiciary, 20 Australian Yearbook of International Law (1999) 319–340 at 324–325.

[99] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Reports (1971) 31, para 53. See also n 94 and accompanying text.

[100] WTO, Singapore Ministerial Declaration (adopted on 13 December 1996) WT/MIN (96)/DEC, Doc No 96–5316 and WTO, Doha Ministerial Declaration (adopted on 14 November 2001) WT/MIN(01)/DEC/W/1, para 8.

the European Union and the United States, to include a social clause in the WTO agreements. It therefore addresses the *institutional* question whether labour rights should be included in WTO law. In other words, the declaration is about the *substance* of WTO law, not about its application. By considering core labour rights when applying WTO law, the WTO dispute settlement organs would not create new obligations for the member states since these obligations already exist for ILO member states. Instead, they would comply with what Article 3(2) DSU requires, namely 'to clarify the existing provisions of those agreements'. The same is true for considering human rights in general.

Still, several difficulties need to be pointed out: First, further detailed studies are necessary to clarify the concrete content of human rights in the trade context. An example is the right to food with respect to the AoA. What exactly does the protection of this right imply in terms of trade measures? All we have today are general principles.[101] For labour rights, the Singapore Declaration to some extent helps clarify the situation by stating that the ILO, as the leading institution for labour issues, will have to develop benchmarks for measuring when core labour rights are violated in order to provide the dispute settlement organs with reliable indicators. Considerable work has already been done in this field by the United Nations Development Program[102] and the World Bank. In fact, the challenge that the WTO dispute settlement organs are facing here may seem new for international trade lawyers, but is familiar to constitutional courts and the human rights community. The CESCR[103] has been working on establishing a set of accepted benchmarks[104] for quite some time. In the fight against poverty, the OECD, the World Bank, and the UN system have joined forces to agree on indicators for monitoring progress toward the targets.[105]

At the national level, constitutional courts in both developing[106] and developed[107] countries have established benchmarks to measure the violation of social and economic rights.

CONCLUSION

In sum, the first conclusion is that, whenever possible, provisions in international economic law have to be interpreted in the light of existing human rights obligations of the parties involved, thus providing for coherence[108] between two different set of rules at the international level.

[101] C Tomuschat (n 44) 39–41.

[102] Of particular importance is the Human Development Index, developed by the UNDP and published in its annual Human Development Report.

[103] Committee on Economic, Social, and Cultural Rights, General Comment No 1 (1989), UN Doc HRI/GEN/1/Rev.3 (1997) 56 para 3 names the 'establishment of priorities which reflect the provisions of the Covenant' as one of the functions of reporting procedures.

[104] P Alston, International Governance in the Normative Areas, UNDP Background Papers: Human Development Report (1999) 15–18.

[105] UNDP, Poverty Report (1998) 15.

[106] *The Government of South Africa v Grootboom* (2001) (1) SA 46 (CC) (4 October 2000).

[107] For Switzerland BGE 105 V 63; J P Müller, Grundrechte in der Schweiz, Berne (1999) 173–178.

[108] This is a different notion of coherence from the one used by T M Franck. T M Franck, Fairness in International Law and Institutions, Oxford/New York (1995) 38–40 uses the example of GSP, which in his view is inconsistent with MFN but coherent with the underlying purpose of GATT.

Yet, as we have seen, in some cases conceptual differences between human rights and international trade law lack the linkages that are necessary to allow for compatible interpretation. Such an example in my view is the concept of non-discrimination. Thus human rights compatible interpretation of WTO law cannot be applied to all human rights under all circumstances. It is not a one size fits all tool.

Secondly, deference should be given to the competent treaty bodies when interpreting human rights in a trade law context and the other way around. This could be done by asking for advisory opinions or consultations with the competent international institutions.[109] Still, under GATT 1994 it needs to be clarified whether Article 13 DSU would allow for such consultations.

2. *'Multilevel consistency'*

Conflicts between human rights and international trade law norms occur not only at the international level but also between national and international obligations.

The European Court of Human Rights held on several occasions, recently in *Matthews v United Kingdom*,[110] that the human rights obligations of the European Convention on Human Rights (ECHR) not only apply to national measures but also to collective rule-making in international organizations. A party to the ECHR cannot dispose of its obligations by adhering to a supranational organization. With its decisions the court put the principle of consistency as it is outlined in Article 31(3)c VCLT into practice: states must not be allowed to pick whatever standard fits their needs best in a specific situation. The decision in *Matthews v United Kingdom* could be seen as a first step in an attempt to establish a system of international separation of powers.

Another issue that needs to be further explored in this context is whether a general principle of multilevel consistency could be derived from the principle of democracy.[111] Do citizens have a right to a consistent legal order and can they hold their government responsible for acting in a consistent way in different legal fora?

3. *Suggestions in UN reports*

The UN High Commissioner on Human Rights addressed possible conflicts between human rights and international trade law in a series of reports: on the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights,[112]

[109] Under GATT 1947, the Panel in *Thailand—Restrictions on importation of and internal taxes on cigarettes*, Report of the Panel (adopted on 7 November 1990) (DS10/R-37S/200) paras 50–57 at the request of the parties consulted with the WHO. The consultation was based on the explicit agreement of the parties: para 3 ii.

[110] *Matthews v the United Kingdom*, Application No 24833/94, European Court of Human Rights (18 February 1999) 28 European Court of Human Rights 361 (1999).

[111] This idea is developed further in C Breining-Kaufmann, Globalization and Labour Rights: The Conflicting Relationship between International Economic Institutions and Core Labour Rights, forthcoming Oxford: Hart Publishing (2005).

[112] E./CN.4/Sub.2/2001/13.

the WTO's Agreement on Agriculture,[113] the WTO's General Agreement on Trade in Services,[114] a report on Human rights, trade, and investment,[115] and a report on the principle of non-discrimination.[116] All these reports emphasize WTO members' commitments to human rights and call for a 'human rights approach' to trade which

(a) sets the promotion and protection of human rights among the objectives of trade liberalization;
(b) examines the effects of trade liberalization on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals and groups;
(c) emphasizes the role of the states in the process of liberalization—not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer for the implementation of human rights;
(d) seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
(e) requires a constant examination of the impact of trade liberalization on the enjoyment of human rights; and
(f) promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization.[117]

To some extent, these reports were the reaction to a widely criticized earlier report on globalization and its impact on the full enjoyment of all human rights that was prepared by special rapporteurs J Oloka-Onyango and Deepika Udagama for the Commission on Human Rights. Their first preliminary report became known as the 'nightmare report'[118] because it labelled the WTO as a 'veritable nightmare' for developing countries and women. In their final report the authors propose a 'restatement of the human rights obligations in the globalization process'.[119] They suggest a set of core human rights principles that should apply in the formulation, implementation, and evaluation of policies in the globalization process.[120] These principles should also apply to international economic institutions such as the World Bank, the IMF, and the WTO. Conceptually, mainstreaming—some—human rights into obligations under WTO law seems to be the preferred approach.

III. RESPONSIBILITY OF MULTINATIONAL ENTERPRISES (MNES)?

Multinational enterprises play an important economic and political role in their host countries. In the 1970s, the number of reports about unethical and illegal

[113] E./CN.4/2002/54. [114] E./CN.4/Sub.2/2002/9. [115] E./CN.4/Sub.2/2003/9.
[116] E./CN.4/2004/40. [117] E./CN.4./Sub.2./2002/9 p 2 and paras 4–14.
[118] E./CN.4/Sub.2/2000/13. [119] E./CN.4/Sub.2/2003/14.
[120] E./CN.4/Sub.2/2003/14, Annex.

activities of multinational corporations increased and led to intensive discussions within international organizations, especially the UN, the OECD, and the ILO, about how to hold MNEs liable for breaches of human rights and environmental standards.

A. Public international law

Traditional international law applies to sovereign states. Acknowledging individuals as subjects of international law is a relatively recent development. After the Second World War, private enterprises were held responsible for crimes against humanity if they acted on behalf of the state. No general direct legal responsibility of private enterprises has so far been established in international law. The Statute of the International Criminal Court (ICC) does not impose obligations on enterprises although they can be held responsible if their actions can be attributed to individuals or states. Some scholars extend the concept of *second liability* as it is contained in Article 25(3)c and d of the ICC Statute to enterprises. Yet, so far neither state practice nor the jurisprudence of international courts has confirmed this approach. Only very few human rights impose direct obligations on enterprises.[121] An example is the prohibition of slavery.

Similarly, the new International Law Commission's provisions on state responsibility do not touch on corporate responsibility.[122] This imbalance becomes particularly obvious in bilateral investment treaties, where corporations are granted rights, yet without corresponding obligations.[123] It is this lack of provisions in international law that led to establishment of national laws, especially the 're-animation' of the Alien Tort Claims Act in the United States.

B. National laws

1. Criminal law

Many countries provide special legal procedures that allow for prosecution for grave violations of international human rights. Most commonly, such provisions are part of a country's criminal law.

The most prominent example outside the United States, which will be discussed in the next section, is Belgium. In 1993 it adopted a law which permitted victims to file complaints in Belgium for serious violations of human rights

[121] For a compilation of international norms that are binding on corporations H H Koh, Separating Myth from Reality about Corporate Responsibility Litigation, 7 Journal of International Economic Law (2004) 263–274.

[122] International Law Commission, State Responsibility, Draft Articles adopted by the International Law Commission at its fifty-third session (23 April–1 June and 2 July–10 August 2001) UN Doc A/CN.4/L.602 Rev.1. On 12 December 2001, the UN General Assembly 'took note' of the draft, thus staying neutral with regard to its content: UN Doc A/RES/56/83 (28 January 2002).

[123] For an overview see L E Peterson, International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration. Research paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs (2003).

committed abroad.[124] There was no need to establish a relationship with Belgium in order to file a case. The law was a landmark and brought about a number of cases being filed in Belgium, *inter alia* against several heads of state. It was also applicable to enterprises.

The need for establishing 'filters' to prevent frivolous cases and render the law more effective was soon recognized and supported by human rights organizations. In April 2003, the parliament decided to amend the law in order to offer a 'court of last resort' for atrocity victims in Belgium, with the Ministry of Justice obtaining some discretion in referring cases that had no relationship with Belgium to other countries or courts if public interest so required.[125]

Hence, in August 2003 the law was repealed by the Belgian parliament following political pressure from *inter alia* the United States but also Belgian businesses organizations. Belgian courts now have jurisdiction over international crimes only if there is a strong nexus with Belgium.[126]

Most European countries apply a similar approach. In Switzerland, enterprises can be held directly responsible under criminal law for a handful of crimes.[127] Except for the financing of terrorist activities[128] and the establishment of criminal organizations[129] none of them has to do with human rights. Generally, the Penal Code holds enterprises accountable for crimes that have been committed in exercising business activities and—because of poor organization of the company—cannot be attributed to a natural person.[130] Universal jurisdiction only applies in very few cases. In the context of human rights, genocide committed abroad can be prosecuted in Switzerland if the perpetrator is in Switzerland and cannot be extradited.[131] As a rule, crimes committed abroad can only be brought before a Swiss court if Switzerland is under an international legal obligation to exercise jurisdiction and if the act is also considered a crime in the country where it occurred. In addition, the perpetrator has to be in Switzerland.[132]

A similar provision can be found in the Spanish Organic Law of the Judicial Power (OLJP).[133] Its Article 23 paragraph 4 provides for universal jurisdiction for crimes committed by Spanish or foreign citizens outside Spain when such crimes can be qualified, according to Spanish criminal law, as genocide or

[124] Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire. The law was amended in 1999: Moniteur Belge (23 March 1999) 9286–9287.

[125] Loi du 23 avril 2003 modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire, Moniteur Belge (7 May 2003) 2nd edn, 24846–24853.

[126] Loi du 5 août 2003 relative aux violations graves du droit international humanitaire, Moniteur Belge (7 August 2003) 2nd edn, 40506–40514.

[127] Art 100quater art 6 bis para 1 of the Swiss Penal Code (SR 311.0).

[128] Art 260ter of the Swiss Penal Code (SR 311.0).

[129] Art 260quinquies of the Swiss Penal Code (SR 311.0).

[130] Art 100quater para 1 of the Swiss Penal Code SR 311.0).

[131] Art 264 para 2 of the Swiss Penal Code (SR 311.0).

[132] Art 6 bis para 1 of the Swiss Penal Code (SR 311.0).

[133] Ley Orgánica 6/1985, de 1 de Julio, de Poder Judicial.

terrorism. Among them are crimes which, according to international legal obligations, must be prosecuted in Spain.

2. *Alien Tort Claims Act*[134]

APPLICABLE PRINCIPLES

The Alien Tort Claims Act (ATCA) was adopted by the first Congress of the United States in Section 9 of the Judiciary Act of 1789.[135] It reads: 'The district court shall have original jurisdiction of a civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'[136]

While hardly any claims were brought under the ATCA for a long time, the situation changed dramatically with the groundbreaking decision in *Filártiga v Peña-Irala*.[137] In this case, the relatives of a Paraguayan citizen who had been murdered by a police official in Paraguay successfully sued the official in the United States for torture. The court held that 'deliberate torture perpetrated under colour of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus whenever an alleged torturer is found and served with process within Untied States borders, the ATCA provides jurisdiction.'[138]

After a more restrictive decision in *Tel-Oren v Libyan Arab Republic*,[139] Congress breathed new life into the ATCA by passing the Torture Victim Protection Act of 1991[140] and explicitly adopting the interpretation offered in *Filártiga*. Subsequent decisions consistently have found that Congress intended the ATCA to provide subject matter jurisdiction and a cause of action for violations of the law of nations.[141]

Today, the statute thus provides both a federal cause of action and a federal forum for claims brought (1) by an alien; (2) alleging a tort; and (3) committed in violation of a US treaty or the law of nations.[142] To be actionable, the suit must state a claim for a tortious violation of contemporary international law—whether customary law or a treaty—and the plaintiff must establish personal jurisdiction over the defendant. An alleged violation must be of an

[134] This section draws substantially on a much longer and different book manuscript (n 111).

[135] Act of 24 September 1789, ch 20 s 9(b), 1 Statute 73, 77 (1789).

[136] 28 USC § 1350 (1994).

[137] *Filartiga v Pena-Irala*, 630 F. 2d 876, 2d Cir. (1980).

[138] *Filartiga v Pena-Irala*, 630 F. 2d 876 at 878, 2d Cir. (1980).

[139] *Tel-Oren v Libyan Arab Republic*, 726 F. 2d. 774, 817, D.C. Cir. (1984). Judge Bork held that 'international law typically does not authorize individuals to vindicate rights by bringing actions in either international or municipal tribunals'. According to this view, individuals are not considered subjects of international law.

[140] Torture Victim Protection Act of 1991. Act 12 March 1992, P.L. 102–256, 106 Stat 73, 28 USCA § 1350 note.

[141] *Kadic v Karadzic*, 74 F. 3d 377, 378, 2d Cir. (1996), citing H.R.Rep. No 367, 102d Cong., 2d Sess. at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86.

[142] *Alvarez-Machain v Sosa*, 331 F. 3d 604 at 612; *Hilao v Estate of Marcos [Marcos II]*, 25 F. 3d 1467 at 1475 (9th Cir. (1994).

international norm that is 'specific, universal and obligatory'.[143] Such obligations certainly include norms of *ius cogens*.[144] In recent decisions, the Ninth Circuit Court of Appeals has made clear that while a violation of *ius cogens* is *sufficient* to warrant an actionable claim under the ATCA, it is not *necessary*. By doing so, the court overruled an interpretation of the law of nations as encompassing only norms of *ius cogens*, an interpretation that would be contrary to the text of the ATCA. Similarly, the Second Circuit Court of Appeals defines the 'law of nations' as 'clear and unambiguous rules of customary international law'.[145] In *Filártiga*,[146] the court left open the question whether the ATCA applies *only* to state actors or also to non-state actors. Four years later, in *Tel-Oren*, Judge Edwards commented that individual liability was available under the ATCA for a handful of acts including piracy and slave trading. However, Judge Edwards limited the application of the ATCA to private defendants by declining 'to read section 1350 to cover torture by non-state actors, absent guidance from the Supreme Court on the statute's use of the term "law of nations" '.[147]

As a result, although the ATCA does not require that the defendant have acted under colour of law, most courts have held that customary international law itself imposes a state action requirement for claims of torture; summary execution and disappearance; cruel, inhuman, or degrading treatment; arbitrary detention; and systematic race discrimination. Still, in *Kadic v Karadzic* the court held that 'certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals'.[148] On the basis of this statement, it might therefore be possible to bring a claim under the ATCA against private actors. The prohibition of forced labour is considered a norm of *ius cogens* by the courts and can therefore be the object of an ATCA suit.[149] In fact, in recent years several cases concerning forced labour have been filed under the ATCA.

[143] *Filartiga v Pena-Irala*, 630 F. 2d 876 at 881, 2d Cir. (1980). In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160 at 1177, N.D. Cal. (2001). Several courts stated that the list of claims actionable under the ATCA should at least include the rights recognized by the Restatement (Third) of the Foreign Relations Law of the United States as peremptory norms of customary international law. These include (a) genocide, (b) slavery or slave trade, (c) murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention, systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights. *Kadic v Karadzic*, 70 F. 3d 232 at 240–241, 2d Cir. (1995). *Alvarez-Machain v Sosa*, 331 F. 3d 604 at 612, 9th Cir. (2003).

[144] *Alvarez-Machain v Sosa*, 331 F. 3d 604 at 612, 9th Cir. (2003); *Hilao v Estate of Marcos [Marcos II]*, 25 F. 3d 1467 at 1475, 9th Cir. (1994); *Filartiga v Pena-Irala*, 630 F. 2d 876 at 885–887. S H Cleveland, Global Labor Rights and the Alien Tort Claims Act, 76 Texas Law Review (1998) 1533–1579.

[145] *Flores v Southern Peru Copper Corp*, 343 F. 3d 140 at 160, 2d Cir. (2003).

[146] *Filartiga v Pena-Irala*, 630 F. 2d 876 at 878, 2d Cir. (1980).

[147] *Tel-Oren v Libyan Arab Republic*, 726 F. 2d 774 at 795, D.C. Cir. (1984).

[148] *Kadic v Karadzic*, 70 F. 3d 232 at 239, 2d Cir. (1995).

[149] *John Doe I v Unocal Corp*, Nos 00–56603, 00–57197, D.C. No CV–96–06959–RSWL, 2002 WL 31063976, C.A. 9th Cir., Cal. (18 September 2002) at 8, 9.

CASE LAW

Burmese villagers against Unocal

A first group of cases dealt with claims brought by Burmese villagers against the American oil company Unocal. Unocal was involved in a joint venture to build a pipeline for natural gas off the coast of Burma to the Thai border. The villagers claimed that Unocal was liable for international human rights violations and, in particular, the use of forced labour perpetrated by the Burmese military for the benefit of the pipeline. While one class action was dismissed on procedural grounds by the Ninth Circuit Court of Appeals,[150] in another, the District Court decided on the merits but found that Unocal did not actively participate in the forced labour practices and therefore was not liable under international law:

> The evidence does suggest that Unocal knew that forced labour was being utilized and that the Joint Venturers benefited from the practice. However, because such a showing is insufficient to establish liability under international law Plaintiffs' claim against Unocal for forced labour under the Alien Tort Claims Act fails as a matter of law.[151]

The court referred to the industrialist cases against German companies and their owners after the Second World War.[152] Because Unocal did not directly employ or seek to employ forced labour, the court denied the application of the principles developed in *Iwanowa v Ford Motor Company*.[153] On appeal,[154] the Ninth Circuit Court rejected this argument, stating that the District Court erred in relying on the 'active participation' standard which had been applied by the Nuremberg Military Tribunals only in cases to overcome the defendants 'necessity defence'[155] and held that the standard developed by the International Criminal Tribunal for the former Yugoslavia in the *Furundzija*[156] case was applicable. Under this standard, aiding and abetting liability under international criminal law means knowing and practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of the crime. In assessing the facts, the court concluded that Unocal knew or should reasonably

[150] *Doe v Unocal Corp*, 248 F. 3d 915, 9th Cir. (2001).

[151] *Doe v Unocal*, 110 F. Supp. 2d 1294, 1310, C.D. Cal. (2000).

[152] *United States of America v Friedrich Flick* [The *Flick* Case], 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (195), *United States of America v Carl Krauch* [The *Farben* Case], 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (1952); *United States of America v Alfred Felix Alwyn Krupp von Bohlen und Halbach* [The *Krupp* Case], 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (1950). See also *Flick v Johnson*, 174 F. 2d 983, 984, D.C. Cir. (1949).

[153] *Iwanowa v Ford Motor Co*, 67 F. Supp. 2d 424, 440 (D.NM.J. 1999). The court held that Ford's 'use of unpaid, forced labor during World War II violated clearly established norms of customary international law'. The plaintiff Iwanowa had been literally purchased by Ford together with 38 other children from Rostock.

[154] *John Doe I v Unocal Corp*, Nos 00–56603, 00–57197, D.C. No CV-96–06959-RSWL, 2002 WL 31063976, C.A. 9th Cir., Cal. (18 September 2002) at *13.

[155] These were cases where the defendants argued that the act they were charged with was necessary to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil. *United States v Krupp* (n 152) 1436.

[156] *Prosecutor v Furundzija* (n 12).

have known that its conduct—including hiring the Myanmar Military to provide security and build infrastructure along the pipeline route in exchange for money or food—would assist or encourage the Myanmar Military to subject the plaintiffs to forced labour, a 'modern form of slavery', and thus a violation of international *ius cogens*. As a result, the court reversed the District Court's grant of Unocal's motion for summary judgment on forced labour claims under the ATCA. Following this judgment, the case would have gone back to the District Court. Yet, in February 2003 a motion for rehearing the case *en banc* was granted and it was ordered that the panel decision could not be cited as precedent with the Circuit.[157] On 17 June 2003, the Ninth Circuit Court, *en banc*, heard the case. Before the hearing, the US Department of Justice submitted an unsolicited *amicus curiae* brief claiming that the panel had made several analytical errors:

> The Court has construed a statute that on its face merely confers subject matter jurisdiction as also affording an implied private right of action. [. . .] Recent Supreme Court precedent, however, prohibits finding an implied private right of action in this jurisdictional grant. Moreover, it is clearly error to infer a right of action to enforce unratified or non-self-executing treaties, and non-binding United Nations General Assembly resolutions. Finally, contrary to the long-established presumption against extraterritorial application of a statute, this court has extended the causes of action recognized under the [ATCA] to conduct occurring wholly within the boundaries of other nations, involving only foreign sovereign or nationals, and causing no direct or substantial impact in the United States.
>
> Under this new view of the [ATCA], it has become the role of the federal courts to discern, and enforce through money damage actions, norms of international law from unratified or non-self-executing treaties, non-binding United Nations General Assembly resolutions, and purely political statements. Although often asserted against rogues and terrorists, these claims are without bounds, and can easily be asserted against allies of our Nation. [. . .] This court's approach to the [ATCA] bears serious implications for our current war against terrorism, and permits [ATCA] claims to be easily asserted against our allies in that war. [. . .]
>
> Wide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our Nation's foreign affairs. In the view of the United States, the assumption of this role by the courts under the [ATCA] not only has no historical basis, but more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles.
>
> While the United States unequivocally deplores and strongly condemns the anti-democratic policies and blatant human rights abuses of the Burmese (Myanmar) military government, it is the function of the political Branches, not the courts, to respond (as the U.S. Government actively is) to bring about change in such situations. Although it may be tempting to open our courts to right every wrong all over the world, that function has

[157] *Doe v Unocal Corp*, Nos 00-56603, 0056628, Doc Nos CV-96-06959-RSWL, CV-96-06112-RSWL, 2003 WL 359787, C.A. 9th Cir. Cal. (14 February 2003).

not been assigned to the federal courts. When Congress wants the courts to play such a role, it enacts specific and carefully crafted rules, such as in the Torture Victim Protection Act of 1991 ('TVPA'), 28 U.S.C. § 1350 note. The [ATCA], which is a simple grant of jurisdiction, cannot properly be construed as a broad grant of authority for the courts to decipher and enforce their own concepts of international law. Thus, respectfully, the Government asks the court to reconsider its approach to the [ATCA].[158]

Two weeks earlier, the same court had held that a foreigner had a right to bring suit in the United States over alleged human rights abuses abroad.[159] Therefore, in the hearing, the judges focused on the question which standards should be applied to Unocal's actions: standards drawn from federal case law or from international law, and if from international law, whether from civil law or criminal law, including jurisprudence of the Nuremberg, Yugoslavia, and Rwanda tribunals?[160] In March 2005, Unocal and the plaintiffs agreed on an out-of-court settlement of the dispute.[161]

Forced labour during the Second World War

A second group of cases relates to forced labour during the Second World War. In the most recent cases, Korean and Chinese plaintiffs sought damages and other remedies from Japanese corporations. The court held that the forced labour practices during the Second World War undoubtedly violated international law and that therefore the ATCA was applicable. However, because the conduct took place more than fifty years ago, the court concluded that the claims must be dismissed because they were time-barred.[162] Since the ATCA does not contain a statute of limitations, the court, following instructions by the Supreme Court,[163] had to 'borrow' the most suitable limitations period from some other source, traditionally the law of the forum state. The court concluded that the Torture Victim Protection Act (TVPA), which was enacted by Congress in 1991 as a statutory note to the ATCA, serves as the closest federal statute to the ATCA.[164] The TVPA provides a ten-year limitations period. Since the Korean and Chinese plaintiffs gave no reasons why their claims could not have been brought under the ATCA within ten years of the war's end, the court finally concluded that the ten-year limitations period on the international law claims under the ATCA had expired.[165] While it is certainly remarkable how the courts are applying international labour rights, it does not seem convincing to refer to national law with regard to time limitations.

[158] Brief for the United States of America, as Amicus Curiae (filed 8 May 2003) at 2–4. Available at http:/www.lchr.org/Issues/ATCA/atca_02.pdf.

[159] *Alvarez-Machain v US*, 331 F. 3d 604, 9th Cir. (2003).

[160] L Girion, Unocal Case Focuses on Liability Standards, Los Angeles Times (18 June 2003).

[161] The details of the settlement were not disclosed.

[162] In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160 at 1179, 1180, N.D. Cal. (2001). Affirmed by *Deutsch v Turner Corp*, 324 F. 3d 692, 9th Cir. (2003).

[163] *DelCostello v International Brotherhood of Teamsters*, 462 US 151, 158 (1983).

[164] In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160 at 1180, N.D. Cal. (2001). Affirmed by *Deutsch v Turner Corp*, 324 F. 3d 692, 9th Cir. (2003).

[165] In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160 at 1181, N.D. Cal. (2001). Affirmed by *Deutsch v Turner Corp*, 324 F. 3d 692 at 717, 9th Cir. (2003).

Chinese prison labour

Finally, a case relating to Chinese prison labour was brought before a Washington DC District Court.[166] Four Chinese citizens who were current or former inmates of a 'Shanghai Reeducation Through Coerced Labour' prison camp claimed that they had been the victims of various human rights abuses perpetrated by the Chinese government, *inter alia*, to engage in prison labour, which included the sewing of soccer balls. The defendants were the Politburo of the Central Communist Party of China in Beijing and its chairman Li Peng, the Bank of China, a commercial Chinese bank owned by the Chinese government, and Adidas America. The court dismissed the claim for lack of subject-matter jurisdiction. While there was no doubt that the plaintiffs were aliens and the claim was for a tort, the third requirement to establish jurisdiction under the ATCA was less clear. The court took the view that, under the ATCA, private entities such as Adidas can only be found to have violated the law of nations if acting either as an officer of the state or under colour of state law or if extreme forms of egregious misconduct had occurred.[167] The court stated first that the only factual allegation tying Adidas to the soccer ball project was the presence of Adidas logos on the soccer balls that Chinese inmates were forced to assemble. Therefore, a formal agreement between Adidas and the Chinese Government and a direct role of the company in the plaintiffs' incarceration and their treatment could not be established. As a result, the court considered the case different from *Iwanowa v Ford Motor Co*[168] and *Doe I v Unocal*.[169] It then moved on to examine whether jurisdiction could be established under the *private actor* doctrine. The court found that

> [F]orced prison labour under dire conditions may be condemnable in its own right, it is not the equivalent of the acts of genocide at issue in Kadic, or the slave labour practices at issue in Unocal or Iwanowa. Moreover, forced prison labour is not a state practice proscribed by international law . . . It therefore cannot be within the 'handful of crimes' to which the law of nations attributes individual responsibility.[170]

While the court referred to § 702 of the Restatement (Third),[171] it clearly erred in excluding the prohibition of forced prison labour from international law. The prisoners in this case had not been convicted in a court of law—they were political prisoners. Article 8(3)(b) ICCPR contains an exception for prison labour but only for prisoners who have been convicted in court. This is an important point that the court missed in this case. With respect to the government, the court applied the Foreign Sovereign Immunities Act of 1976

[166] *Bao Ge v Li Peng*, 201 F. Supp. 2d 14, D.D.C. (2000).
[167] *Bao Ge v Li Peng*, 201 F. Supp. 2d 14 at 20, D.D.C. (2000).
[168] *Iwanowa v Ford Motor Co*, 67 F. Supp. 2d 424 at 445–446, D.NM.J. (1999).
[169] *John Doe I v Unocal Corp*, 963 F. Supp. 880 at 891–892, C.D. Cal. (1997).
[170] *Bao Ge v Li Peng*, 201 F. Supp. 2d 14 at 22, D.D.C. (2000).
[171] Restatement (Third) of the Foreign Relations Law of the United States § 702, American Law Institute (1987) vol 2, 161.

(FSIA)[172] and concluded that although products of Chinese forced prison labour are being imported into the United States, the operation of the Chinese judicial and penal systems is still not a commercial activity and therefore does not constitute an exception to foreign state immunity under the FSIA.[173] It quoted the Supreme Court, which in 1993 had ruled that 'however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood . . . as peculiarly sovereign in nature . . . Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce.'[174]

Recent developments: *Sosa v Alvarez-Machain*

In a long-awaited landmark decision,[175] the Supreme Court in June 2004 decided on some of the controversial issues with respect to the applicability of the ATCA. The court held that the ATCA gave federal courts jurisdiction to hear 'claims in a very limited category defined by the law of nations and recognized as common law'.[176] It thus unanimously defined the ATCA as a jurisdictional statute creating no new causes of action. Yet, its history makes it clear that it was enacted on the understanding that common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.[177] Historically, only *three* offences were recognized as violations of the law of nations: piracy, infringement of the rights of ambassadors, and violations of safe conducts. The court then moved on to a discussion of what the law of nations encompasses today. In a split decision,[178] it held that federal courts could still receive claims under the ATCA provided that they were based on 'the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognised'.[179] In other words, the court refers to customary international law. Given the difficulties in defining the contents of customary international law and the discretion of judges in doing so, the court establishes a set of specific

[172] 28 USC §§ 1330, 1391(f) and 1602–1611. The FSIA permits jurisdiction and thus an exception to foreign state immunity, if the foreign sovereign's acts are commercial and have a direct effect in the United States.

[173] *Bao Ge v Li Peng*, 201 F. Supp. 2d 14 at 24–25, D.D.C. (2000). Similarly in *Hwang Geum v Japan*, 172 F. Supp. 2d 52 at 63, D.D.C. (2001): 'The described conduct is unquestionably barbaric, but certainly is not commercial in nature. Japan's use of its war-time military to impose 'a premeditated master plan' of sexual slavery upon the women of occupied Asian countries might be characterized properly as a war crime or a crime against humanity. This conduct, however, was not in connection with a commercial activity. . . . As plaintiffs correctly recognize, this system 'required' the resources at the government's disposal. Such conduct is not typically engaged in by private players in the market.'

In 1996, an exception was added to the FSIA, permitting suits against countries designated as state sponsors of terrorism. 28 USC § 1605(a)(7). See *Cicippio v Islamic Republic of Iran*, 18 F. Supp. 2d 62, D.D.C. (1998).

[174] *Saudi Arabia v Nelson*, 507 U.S. 349, 361–362 (1993).

[175] *Sosa v Alvarez-Machain*, 124 S. Ct. 2739 (2004). [176] ibid 2754. [177] ibid 2761.

[178] Justices Scalia, the Chief Justice, and Justice Thomas limit the scope of the ATCA to the three violations of international law recognized at the time of the ATCA's passage.

[179] *Sosa v Alvarez-Machain* (n 175) 2761–2762.

requirements for the creation of causes of action under the ATCA. As a rule, federal courts should look for legislative guidance before exercising what the Supreme Court calls 'innovative authority over substantive law'. Overall, the creation of a private right of action is a decision that should be left to legislative judgment. In addition, the possible collateral consequences and implications for the foreign relations of the United States of making international rules privately actionable argue for judicial caution:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.[180]

Balancing these interests, the majority of the court concluded that a narrow class of international norms is still actionable and that 'the door is still ajar subject to vigilant doorkeeping'.[181] As a result, in order to establish a cause of action, the norm needs to be recognized as a norm of customary international law and it needs to be sufficiently definite. In the view of the Supreme Court, the latter criterion implies an assessment of the practical consequences of making such a cause available to litigants in federal court. Foreign policy considerations as they have been raised by the administration in its submission can play a role here.

CONCLUSION

In sum, there is a strong argument that the ATCA provides a cause of action for at least one human right: the abolition of forced labour.[182] The Supreme Court did not decide on the question whether private corporations can be held accountable under the ATCA. Therefore, the respective decisions by the Court of Appeals are still good law. Overall, as noted above, litigation under the ATCA faces a number of procedural hurdles, the most difficult being to establish a forum somewhere in the United States. According to the *forum non conveniens* rule,[183] a defendant has to prove that a better alternative forum exists[184] and that private and public interests warrant a trial abroad.[185] If multinational enterprises are involved, a headquarters or incorporated branch in the US is usually required by the courts.[186] Yet, in the case against Union Carbide following the gas disaster in Bhopal, the courts held that although Union

[180] ibid 2763. [181] ibid 2764.

[182] See also the concurring opinion of Justice Breyer, *Sosa v Alvarez-Machain* (n 175) 2782–2783.

[183] 28 USC § 1404 (a): '[F]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' See also S Anderes, Fremde im eigenen Land: Die Haftbarkeit transnationaler Unternehmen für Menschenrechtsverletzungen an indigenen Völkern, Zurich (2001) 173–175.

[184] *Piper Aircraft v Reyno*, 454 U.S. 235, 257 (1981).

[185] In re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December 1984, 809 F. 2d 195 (2d Cir. 1987), cert denied, 484 U.S. 871 (1987); In re Air Crash Disaster near New Orleans, LA, on July 1982, 821 F. 2d 1164, 5th Cir. (1987); *Gulf Oil Corp v Gilbert*, 330 U.S. 508 (1947).

[186] *Jota v Texaco*, 157 F. 3d 153 (2d Cir. 1998): The defendant had its headquarters in the United States and all evidence was in the US; *Lony v E.I. Du Pont de nenemours & C.*, 935 F.2d 604, 3d Cir. (1991) at 608.

Carbide had its headquarters in the US, the *forum non conveniens* rule would apply because all the witnesses and evidence were in India.[187] In addition, violations of human rights, no matter how severe, cannot be brought before a US court under the ATCA if personal jurisdiction cannot be established. Foreign companies that lack sufficient US contacts to support personal jurisdiction are therefore effectively immune from liability.[188] For all other companies, the threat of ATCA liability may indeed influence their decisions on foreign direct investment and thus indirectly have an effect on possible host countries' labour rights policies. A country may have an interest, similar to that of complying with OECD guidelines, in complying with core labour standards in order to attract investment by foreign companies.

3. An emerging general principle of international law?

Since there is no forum for hearing allegations of human rights violations by enterprises, holding corporations responsible by allowing victims to sue them for damages under national torts law has been discussed as a possible avenue. Examples include the ATCA cases mentioned above but also a claim recently brought by Gypsy International Recognition and Compensation Action (GIRCA) against IBM in Switzerland.[189] In other words, the absence of direct legal obligations for enterprises under international human rights law and the lack of stringent self-regulatory practice increasingly encourage victims to use torts procedures while at the same time relying on international human rights law.[190]

GENERAL REQUIREMENTS FOR TORT CLAIMS

The rules on obligations originating from tort in the Swiss Code of Obligations[191] may serve as an example to illustrate a concept that in its essence is

[187] In re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December 1984, 809 F. 2d 195, 2d Cir. (1987) at 199–203.

[188] In *Doe v Unocal Corp* 27 F. Supp. 2d 1174, 1190, C.D. Cal. (1998) the district court dismissed a suit against the French oil company Total S.A. because Total's contacts with California were insufficient to give rise to either specific or general jurisdiction. The court rejected the plaintiffs' argument that the California contracts of Total's subsidiaries could be attributed to Total itself. By contrast, in *Wiwa v Royal Dutch Petroleum Co*, 226 F. 3d 88, 2d Cir. (2000) at 93–99, the US Court of Appeals for the Second Circuit upheld the trial's court ruling that personal jurisdiction over the defendants both of whom were foreign corporations, was proper. The court held that the activities of the defendants' investor relations office in New York City were sufficient to establish general personal jurisdiction. Cert denied in 532 U.S. 941 (2001). Developments in the Law: International Criminal Law: V. Corporate Liability for Violations of International Human Rights Law, 114 Harvard Law Review 2025 (2001) 2039. See also A K Sacharoff, Multinationals in Host Countries: Can They Be Held Liable under the Alien Tort Claims Act for Human Rights Violations, 23 Brooklyn Journal of International Law (1998) 927–964 at 927. Confirmed in *Wiwa v Royal Dutch Petroleum Co*, No 96 CIV. 8386(KMW), U.S. Dist. 2002 WL 319887 at *12, S.D.N.Y. (28 February 2002).

[189] On appeal, the Swiss Federal Supreme Court confirmed jurisdiction of the Geneva Cour de Justice without deciding any substantial questions, 4C. 296/2004, decision of 22 December 2004.

[190] For a more detailed analysis of the advantages over criminal law J Terry, Taking Filártiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad, in C Scott (ed), Torture as Tort, Comparative Perspectives on the Development of Transnational Human Rights Litigation, Oxford (2001) 109–133 at 115–118.

[191] SR 220, Arts 41–49.

applied in several civil law countries.[192] Article 41 holds 'who[m]ever unlawfully causes damage to another, whether wilfully or negligently' responsible for damages. Accordingly, four conditions need to be met: damage, illegality, causal link, and fault.

Damage and illegality

Under Article 41, a personal injury is per se illegal. The same is true when an *absolute right* of the victim has been violated.[193] Clearly, having been defined as *obligations erga omnes* by the ICJ,[194] fundamental human rights are absolute rights. Therefore, a violation of fundamental human rights is illegal per se, regardless of whether it is the result of a specific illegal action.[195] However, which human rights are fundamental and thus absolute is the subject of debates;[196] consensus exists only for the prohibition of slavery, racial discrimination, and genocide. The distinction is important because in cases where there is only a damage in assets, and neither a personal injury nor a violation of an absolute right, Article 41 only grants relief if there is violation of a protecting norm, a so-called '*Schutznorm*', that is, a norm specifically tailored to protect from economic losses.[197] Could certain human rights qualify as such norms? Obviously, by this question having been asked, the whole matrix discussed earlier about the concrete content of human rights obligations unfolds again. Definitely, a human right to free trade and the related right to competition as suggested by Ernst-Ulrich Petersmann[198]—if they were accepted—would be applicable under this standard. In this sense, they could complement the protection provided for states through WTO dispute settlement at the individual level through civil courts. Generally speaking, economic and social rights are more likely to include the protection of personal assets. Yet, as we have seen, they are often not directly applicable and require further clarification by

[192] Art 1382 Code Civil français. Judge Simma drew a similar conclusion in referring to Swiss norms as somewhat representative in its separate opinion in the Case Concerning Oil Platforms, *Islamic Republic of Iran v United States of America*, ICJ (6 November 2003) General List No 90. The discussions on 'Erfolgsunrecht' and 'Verhaltensunrecht' are not important in our context, since whatever theory one follows, in our context, it will lead to the same result. V Roberto Schweizerisches Haftpflichtrecht, Zurich (2002) § 8 Rz 248 f., 262.

[193] K Oftinger/E W Stark, Schweizerisches Haftpflichtrecht, Allgemeiner Teil, vol I, 5th edn Zurich (1995) § 4 N 26–31.

[194] Barcelona Traction, Light and Power Co. Ltd. (Second Phase) (*Belgium v Spain*), ICJ Reports (1970) 3, 32.

[195] So-called 'Erfolgsunrecht': K Oftinger/E W Stark (n 193) § 4 N 15.

[196] An example is the recent decision by the European Court of Human Rights in the case of *Von Hanover v Germany*, Application No 59320/00 (24 June 2004). The dispute was about pictures published in the German tabloid press that showed Princess Caroline of Monaco and her family at private occasions. The court held that the right to privacy in Art 8 of the European Convention of Human Rights is of fundamental importance and that its protection extends beyond the private family circle (para 69). It thus concluded that, under the circumstances, the protection of Art 8 prevailed over the freedom of expression in art 10.

[197] For an overview of the concept: R H Weber, Schadenersatz kraft Schutznormen: Anwendung auch im Fernmelderecht?, 6 sic! – Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht (2003) 477–485 at 478–480.

[198] E U Petersmann, Constitutional Economics, Human Rights and the Future of the WTO, 58 Aussenwirtschaft (2003) 49–91.

domestic law. As a result, much more detailed studies will be necessary to provide a concrete answer.

Fault: willingness or negligence

In addition, holding enterprises accountable under this standard requires willingness or negligence of their organs[199] or employees.[200] Thus tortfeasors need to be or should have been aware of the implications of their actions on the victims. However, knowledge about the unlawfulness is not required.[201]

In the context of business responsibility, liability for *not* taking action, that is, negligence, may be of particular relevance. Such liability exists where enterprises are under an *obligation* to act.[202] This concept, in its essence, emanates from due diligence as a core principle of every legal system. It implies also that whoever creates or maintains a dangerous situation has a duty to take appropriate precautionary measures (*Gefahrensatz*). The concept which has been accepted as an obligation *erga omnes* by the ICJ in international environmental law[203] has recently been affirmed for enterprises by several non-binding documents, such as the Global Compact or the proposed UN Norms on Corporate Responsibility. For the financial services industry, leading institutions confirmed the importance of considering human rights in their activities in a recent study published under the Global Compact.[204] As a result, responsibility for negligence applies not only where there is an explicit legal obligation to act but also when it could and should have been foreseen that damages would occur and when these damages could have been avoided by taking appropriate action.[205]

In the human rights context, such an approach could overcome some of the intrinsic obstacles in establishing a concept for holding corporations responsible for human rights violations. As we have seen, there is currently no consensus on imposing any, let alone positive, human rights obligations directly on corporations. Under tort law it is, however, possible to hold corporations responsible for human rights violations that were foreseeable and could have been avoided by applying necessary precaution. There is no abstract definition of what appropriate precautionary measures are. Some light has been shed on this concept in the context of the recent discussions on corporate governance[206]

[199] Art 55 Swiss Civil Code (SR 210). [200] Art 55 Swiss Code of Obligations (SR 220).

[201] K Oftinger/E W Stark (n 193) § 5 N 37 and 41. [202] ibid § 3 N 52.

[203] Case Concerning the Gabcíkovo-Nagymaros Project (*Hungary v Slovakia*), ICJ Reports (1997) 50 para 97, 113. In Report of the Appellate Body, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (16 January 1998), the Appellate Body found it unnecessary to determine whether the 'precautionary principle' has reached the status of a general principle of international law.

[204] Who Cares Wins: Connecting Financial Markets through a changing World. Recommendations by the financial industry better to integrate environmental, social, and governance issues in analysis, asset management, and securities brokerage. Study financed by the Swiss Department of Foreign Affairs under the Global Compact, Geneva/New York (2004).

[205] K Oftinger/E W Stark (n 193) § 5, N 51.

[206] The notion of corporate governance can be understood in different ways: What is of interest here is a broad notion of corporate governance, the so called stakeholder governance, as

that led to the establishment of new rules for companies. Such rules can be binding norms of usually private law or come in the form of codexes or best practices that are, as such, of a non-binding nature, yet can have legal implications (soft law). Among the most prominent examples are the OECD Principles of Corporate Governance.[207] Regardless of their legal nature, such standards may serve as a basis to determine the content of adequate precautionary measures.

ADDITIONAL REQUIREMENTS

In addition, under tort law, adequate causality, a causal link, must be established:[208] The court is required to make a value judgement about the ascription of legal responsibility for the damage. Finally, claimants have to prove a damage, pecuniary[209] or non-pecuniary.[210] In sum, by requiring willingness or negligence and the proof of a damage, the law seems to compensate for the fact that violations of absolute rights can lead to liability without any conduct that is illegal per se.[211]

Referring to national tort regulations inevitably raises questions of private international law. While public international law grants limited substantial rights in the form of human rights, private international law seeks to regulate private law relationships across borders, but only structurally, not in terms of substantial rights. When a plaintiff initiates a tort claim, a court essentially will have to answer three questions: First, it will have to consider whether there are enough connections to hear the case and if so, whether there are nevertheless reasons for exercising some form of discretion, for example, the *forum non conveniens* rule. Secondly, the court will have to decide what country's legal system is applicable to the dispute in terms of substantial law. Over centuries, tort claims would be governed by the *lex loci delicti*.[212] Today, a more differentiated approach is applied: Generally a forum could be established at the place where both the tortfeasors and the victim have residence. In Switzerland this would be the preferred option. Another—and from a comparative law point of view still the most common—choice of forum would be the place where the violation of the rights in question took place (*lex loci delicti*[213]). As shown in the context of

opposed to a narrower notion that focuses on the control of the company by shareholders. Gion Giger, Corporate Governance als neues Element im schweizerischen Aktienrecht, Zurich (2003) 7–13.

[207] OECD, Principles of Corporate Governance (2004).

[208] K Oftinger/E W Stark (n 193) § 3, N 14–27. For British law: S Deakin/A Johnston/B Markesinis, Markesinis and Dean's Tort Law, 5th edn, Oxford (2003) 81–83.

[209] Art 41 Code of Obligations. [210] Art 49 Code of Obligations.

[211] Similar K Oftinger/E W Stark (n 193) § 4, N 15 fn 25.

[212] For an overview A Heini in D Girsberger et al, Zürcher Kommentar zum IPRG, 2nd edn, Zurich (2004), Vor Art. 132–142, N 1–3.

[213] For the problems involved with the *lex loci delicti* rule J A Orange, Torture, Tort Choice of Law and Tolofson, in C Scott (ed), Torture as Tort, Comparative Perspectives on the Development of Transnational Human Rights Litigation, Oxford (2001) 291–323.

the ATCA, the United States applies a 'conflicts resolution' approach[214] which to a large extent replaced the *lex loci delicti*. Thirdly, there may be questions of enforcement and recognition of judgments issued by foreign courts. In sum, private international law will not tell us what the rules are but where to find them.

CONCEPTUAL IMPLICATIONS

From an (admittedly modest) comparative perspective, several countries follow similar approaches[215] that are reflected in the Alien Tort Claims Act, English Courts' jurisprudence,[216] and both French[217] and German tort law.[218] Conceptually, this results in employing 'private law' to vindicate 'public law' norms[219] and in thereby abandoning the classic dualism between private and public spheres of activity.[220] In addition, the line between national and international law becomes blurred resulting in what could be called a 'transnational law' of delictual civil liability for human rights violations.[221] With respect to violations of human rights that qualify as obligations *erga omnes*, the concept of accepting human rights violations as a basis for a tort claim could be qualified as an emerging general principle of law within the meaning of Article 38, paragraph 1(c) of the ICJ statute.

Having developed such a principle still leaves us with the question of what national courts are going to do with it. According to common doctrine, the direct applicability of international law by national courts depends on domestic law. Therefore, in countries that follow a monistic system, such as Switzerland, general principles of international law will be applied by national courts, while in a dualistic system, the principle will first have to be transformed into national law.

In the context of the WTO, it must be kept in mind that general principles of international law by virtue of Article 31 VCLT would also be applicable

[214] American Law Institute, Restatement (Second) of Conflict of Laws, § 145 and § 145 cmt. A (1971); F Juenger, Choice of Law in Interstate Torts, in 118 University of Pennsylvania Law Review (1969) 202–235.

[215] While it cannot be overlooked that conceptual differences between the notion of unlawfulness and wilfulness/negligence exist, they do not play a role in our context. For a very clear outline of the relationship between the two, R H Weber, Sorgfaltswidrigkeit—quo vadis, 107 Zeitschrift für Schweizerisches Recht NF I (1988) 39–59; 43–46.

[216] S Deakin/A Johnston/B Markesinis (n 208) 74–83; P R Peyer, Zur Ersatzfähigkeit reiner Vermögensschäden: Rechtsvergleichende Betrachtung eines neueren methodischen Ansatzes, recht (2002) 99–107.

[217] Arts 1382–1385 Code civil français.

[218] § 823 Bürgerliches Gesetzbuch vom 18.8.1896 (BGB).

[219] Similarly but with an emphasis on harmonizing national rules: C Scott, Translating Torture into Transnational Tort, in C Scott (ed), Torture as Tort, Comparative Perspectives on the Development of Transnational Human Rights Litigation, Oxford (2001) 45–63 at 51–53.

[220] A convincing critique of the public–private dichotomy in international law and its negative impacts on the realization of human rights and the continued subordination of women in the private sphere: C Chinkin, A Critique of the Public/Private Dimension, 10 European Journal of International Law (1999) 387–395. For an overview in domestic law: A Clapham, Human Rights in the Private Sphere, Oxford (1993) 124–133.

[221] C Scott (n 219) 53.

to dispute settlement under the WTO agreements within the limits of Article 3(2) DSU.[222]

IV. CONCLUSIONS

Although human rights and international trade law share a common starting point, they developed in very different ways and have become specialized regimes. The main conceptual differences can be summarized as follows:

1. *Subjects*: Human rights law integrated 'new actors' by granting rights and corresponding obligations to individuals as new subjects of international law. NGOs in some instances have observer status and limited rights but are not generally acknowledged as subjects of international law. International trade law did not accommodate the emergence of new actors in legal terms. Neither individuals nor NGOs have a legal status. In practical terms, the importance of NGOs with respect to fact finding has been recognized by admitting them—at the discretion of the dispute settlement bodies—as *amici curiae*.
2. *Structure of rights and obligations*: Whereas human rights obligations are typically framed as obligations to respect, protect, and fulfil, international trade law concentrates on negative obligations, that is, limitations of national sovereignty. Where positive obligations appear they are framed in a very open way, usually requiring states to negotiate further. Still, such open obligations—from a conceptual point of view—allow for the consideration of human rights.
3. *Non-discrimination and equality*: Fundamental conceptual differences exist with regard to the notion of non-discrimination and equality. These differences cannot be overcome by treaty interpretation.
4. *Methods for reconciliation*: The Appellate Body has recognized the importance of interpreting WTO law according to the rules of Article 31 VCLT and in the light of existing international law. This method is of particular importance in the context of exceptions such as in Article XX GATT and also in interpreting Articles III GATT and the TBT. Yet several questions need yet to be answered: Which human rights are universally accepted and can be considered in the context of WTO law? Who should decide on this question? What are the concrete obligations enshrined in human rights law with regard to trade law? And again: Who should develop such benchmarks?
5. *National regulations*: National laws address the responsibility of multinational enterprises in different ways. In practice, tort law is becoming the most important tool to hold MNEs accountable: private law procedures are

[222] The Appellate Body referred to the principle of good faith as an accepted principle of international law in *US—Shrimp/Turtles* (n 54) para 158; *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R (24 July 2001) para 101.

applied for claims that in their essence are based on international human rights law. The traditional concepts of public and private on the one hand, national and international law on the other hand, cannot accommodate these developments. What is needed is a 'transnational' approach that goes beyond designing separate categories of law, but instead integrates the norms that are relevant to solve the concrete problem of holding MNEs accountable for human rights violations. A first step in developing such an approach is the suggested general principle of international law.

6. *The way ahead*: With the basic methodological framework being laid out, there is still a need to clarify the interaction of linkages or conditionalities with trade policies. In addition, further studies are necessary to determine the concrete content of human rights obligations in a trade context.

Sosa v Alvarez-Machain and Human Rights Claims against Corporations under the Alien Tort Statute

CARLOS MANUEL VÁZQUEZ

When the Supreme Court's decision in *Sosa v Alvarez-Machain*[1] was handed down, some believed that the case sounded the death knell for the use of the Alien Tort Statute[2] to maintain human rights claims against private corporations in the courts of the United States.[3] These claims seem to me to be overstated. The decision clarifies the nature of claims under the Alien Tort Statute to some extent, and places some limits on the theories available in actions against private corporations, but for the most part such suits remain as viable after *Sosa* as they were before. Unocal's recent decision to settle the claims against it for human rights violations in Burma[4] is perhaps an implicit recognition that *Sosa* did not doom such claims.

That is not to say, however, that victims of corporate human rights violations in developing countries should hold out much hope that their lot will be bettered through Alien Tort Statute litigation in the United States. Even before *Sosa*, such suits had a chance of producing results favourable to foreign plaintiffs only with respect to a very narrow category of human rights violations. Suits under the Alien Tort Statute were never a very promising mechanism for addressing the problem of human rights violations caused by corporate conduct abroad.

This paper first briefly describes the evolution of the Alien Tort Statute from the time it was reinvigorated in *Filártiga v Peña-Irala*[5] to the Supreme Court's decision in *Sosa*. It then discusses the implications of *Sosa* for human rights claims against private corporations and assesses the potential significance of federal human rights litigation as a mechanism for addressing the problems of those whose human rights are adversely affected by US corporations operating abroad.

The Alien Tort Statute was enacted in 1789 as part of the United States' First Judiciary Act.[6] It provides that the federal courts shall have jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[7] There is little direct evidence of the

[1] 124 S. Ct. 2739 (2004). [2] 28 U.S.C. § 1350 (2000).

[3] R S Greenberger/P W Tam, Human Rights Suits Against U.S. Firms Curbed, Wall Street Journal (30 June 2004) A3; W Richey, Ruling Makes it Harder for Foreigners to Sue in US Courts, Christian Science Monitor (30 June 2004) 3.

[4] E Alden et al, Unocal Pays Out in Burma Abuse Case, Financial Times (14 December 2004) 12 (quoting the plaintiffs' lawyer as stating that the settlement was 'going to do some great things for the victims in Burma'). [5] 630 F.2d 876, 2d Cir. (1980).

[6] Judiciary Act of 1789, ch 20, § 9(b), 1 Stat. 73, 77 (1789) (codified as amended 28 U.S.C. § 1350 (2000)). [7] 28 U.S.C. § 1350.

sorts of actions the framers of the statute intended it to cover. Judge Friendly called it a 'legal Lohengrin' because 'no one seems to know whence it came'.[8] For most of the country's history, the statute lay dormant. The US Court of Appeals for the Second Circuit breathed life into the statute in 1980 in the *Filártiga* case. The court there found that the statute conferred jurisdiction over a suit by the sister and father of a Paraguayan who had been tortured in Paraguay by the defendant, a low-level Paraguayan official who was then living in New York.[9] The court held that jurisdiction existed because the plaintiffs were aliens and they were suing for a tort committed in violation of international law. The bulk of the opinion addressed whether torture violated international law, and the court concluded that it did. It wrote that 'for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind'.[10]

Filártiga exemplifies the least controversial category of contemporary human rights lawsuit under the Alien Tort Statute. The defendant was the person who had personally perpetrated the acts complained of, and those acts violated clearly established norms of international human rights law. Subsequent litigants pushed the envelope in several directions. Suits were brought against persons who authorized or failed to prevent violations of human rights norms, but did not personally commit them.[11] Others were brought against entities that were not recognized states,[12] or officials of such entities.[13] Suits were brought alleging violations of less-established principles of international law.[14] Some of these suits survived motions to dismiss; others did not.

As long as only foreign officials were being sued, human rights litigation under the Alien Tort Statute did not excite significant opposition, except within a segment of legal academia.[15] In fact, Congress codified this line of cases, and extended the right of action to citizens, when it enacted the Torture Victim Protection Act.[16] The lack of opposition may have had something to do with the fact that the defendants typically left the country or were expelled after being served with the complaint,[17] and as a consequence the suits that were not dismissed at the threshold usually wound up producing default judgments that, with few exceptions, were never collected. Thus, although these lawsuits

[8] *ITT v Vencap, Ltd.*, 519 F.2d 1001, 1015, 2d Cir. (1975).

[9] *Filartiga v Pena-Irala*, 630 F.2d at 887. [10] ibid.

[11] See *Hilao v Estate of Marcos*, 103 F.3d 789, 9th Cir. (1996); *Xuncax v Gramajo*, 886 F. Supp. 162, 171–75, D. Mass. (1995).

[12] *Tel-Oren v Libyan Arab Republic*, 726 F.2d 774, D.C. Cir. (1984).

[13] *Kadic v Karadzic*, 70 F.3d 232, 2d Cir. (1995), cert. denied, 518 U.S. 1005 (1996).

[14] *Flores v Southern Peru Copper Corp.*, 343 F.3d 140, 2d Cir. (2003) (environmental harm); *Tel-Oren*, 726 F.2d 774 (terrorism).

[15] See C A Bradley/J L Goldsmith, III, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham Law Review 319, 358–359 (1997); J M Simon, The Alien Tort Claims Act: Justice or Show Trials?, 11 Boston University International Law Journal 1 (1993).

[16] Codified in a note to 28 U.S.C. § 1350.

[17] eg *Paul v Avril*, 901 F. Supp. 330, S.D. Fla. (1994); *Todd v Panjaitan*, No 92-12255, 1994 WL 827111, D. Mass. (26 October 1994).

showed the United States' abhorrence of the conduct of the defendants, and also gave victims a forum for the ventilation of their claims and deterred foreign torturers from travelling to the United States, they did not generally provide compensation to the victims. The lawsuits served a largely expressive function, and the costs were borne largely by foreign plaintiffs (and the human rights organizations representing them) and, where the defendant did not default, by foreign individuals guilty of gruesome acts.

Litigation under the Alien Tort Statute began attracting significant attention outside the human rights community when the lawsuits began targeting US corporations that were alleged to have aided and abetted foreign states in violating international law, or to have committed violations of international law directly themselves. The best known of these cases is *Doe v Unocal*.[18] The plaintiffs were Burmese villagers who alleged that the US corporation Unocal had made use of forced labour in connection with its Yamada Pipeline project in Burma. A panel of the US Court of Appeals for the Ninth Circuit allowed the case to proceed on two alternative theories. First, it held that the international law norm prohibiting forced labour was 'among the "handful of crimes . . . to which the law of nations attributes *individual liability*," such that state action is not required'.[19] Secondly, it held that Unocal could be held liable for aiding and abetting the Burmese government's violations of the plaintiffs' human rights if Unocal's conduct violated international law norms prohibiting aiding and abetting.[20] Judge Reinhardt concurred, but differed with the majority regarding the law that determined Unocal's liability for aiding and abetting. In the view of Judge Reinhardt, plaintiffs did not have to establish that Unocal's conduct violated international law. If the Burmese government's conduct violated international law, 'the ancillary legal question of Unocal's third-party tort liability should be resolved by applying general federal common law tort principles, such as agency, joint venture, or reckless disregard'.[21]

This and other lawsuits against US corporations[22] produced a backlash against the Alien Tort Statute. Books about the Alien Tort Statute began appearing with titles such as *Awakening Monster*.[23] The executive branch, which had sided with the plaintiffs in prior ATS cases,[24] began arguing that *Filártiga* had been wrongly decided. The United States filed an amicus brief supporting en banc review in *Unocal*, arguing that the Alien Tort Statute is

[18] 2002 U.S. App. LEXIS 19263.

[19] ibid (quoting *Tel-Oren v Libyan Arab Republic*, 726 F.2d 774, 794–95, D.C. Cir. (1984)) (J Edwards, concurring).

[20] ibid.

[21] ibid (J Reinhardt, concurring).

[22] eg *Wiwa v Royal Dutch Petroleum Co.*, 226 F.3d 88, 2d Cir. (2000); *Villeda Aldana v Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, S.D. Fla. (2003); *Estate of Rodríguez v Drummond Co.*, 256 F. Supp. 2d 1250, N.D. Ala. (2003); *Presbyterian Church of Suda v Talisman Energy, Inc.*, 244 F. Supp. 2d 289, S.D.N.Y. (2003); *Abdullahi v Pfizer, Inc.* (2002) U.S. Dist. LEXIS 17436, S.D.N.Y. (2002); *Sarei v Rio Tinto Ltd.*, 221 F. Supp. 2d 1116, C.D. Cal. (2002).

[23] G C Hufbauer/N K Mitrokostas, Awakening Monster: The Alien Tort Statute of 1789 (2003).

[24] See Memorandum for the United States as Amicus Curiae, *Filartiga v Pena-Irala*, 630 F.2d 876, 2d Cir. (1980).

purely a jurisdictional statute, that it does not create a right of action, and that a right of action for claims relying on customary international law may be maintained only if other statutes—such as the Torture Victim Protection Act—create a right of action.[25] (The Court of Appeals granted the petition for rehearing en banc and vacated the panel's decision.[26]) The United States took a similarly broad position in its amicus brief in *Sosa v Alvarez-Machain*, even though narrower arguments would have sufficed to deny relief in that case.[27] Had the Court agreed, *Filártiga* itself would have been effectively overruled and the Alien Tort Statute would have returned to its somnolent pre-*Filártiga* state.

The Supreme Court in *Sosa* rejected the United States' interpretation. Rather than reverse *Filártiga*, it cited it with approval and left the door ajar for the use of the Alien Tort Statute to challenge human rights abuses.[28] But the Court enjoined the courts to be 'vigilant doorkeep[ers]'.[29] The Court held that the Alien Tort Statute was purely jurisdictional, meaning that the right of action must have its source elsewhere. However, rather than requiring a federal statutory source for the right of action, such as the Torture Victim Protection Act, the Court recognized a power in the federal courts to enforce a 'limited category' of norms of customary international law as a matter of federal common law.[30] It recognized that, at the time the Alien Tort Statute was enacted, customary international law was regarded as part of the common law and enforceable as such in the courts without prior transformation into domestic law by statute. The Court concluded that the framers of the statute meant to authorize the adjudication in federal court of a 'narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs'.[31] 'Uppermost in the legislative mind appears to have been offences against ambassadors; violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated.'[32] After considering a number of reasons counselling caution in adapting the expectations of the statute's framers to today's world, in which the common law is understood very differently from in the past and customary international law has a very different content, the Court held that the courts 'should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the Alien Tort Statute] was enacted'.[33]

Although the Court did not say that the courts should always recognize private claims for violations of international law norms with content that is as

[25] Brief for the United States as Amicus Curiae, *Doe v Unocal Corp*., 9th Cir. (2002) (Nos 00-56603, 00-56628).

[26] *Doe v Unocal* (2003) U.S. App. LEXIS 2716, 9th Cir. (14 February 2003).

[27] See Reply Brief for the United States as respondent Supporting Petitioner, *Sosa v Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No 03-339); Brief of the United States as Respondent Supporting Petitioner, *Sosa v Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No 03-339).

[28] *Sosa*, 124 S. Ct. 2764. [29] ibid. [30] ibid 2754. [31] ibid 2756.

[32] ibid 2759. [33] ibid 2766.

definite as the historical paradigms, I think it is fair to read the opinion as contemplating that such claims should ordinarily be recognized, subject to possible limiting doctrines of a procedural nature, such as exhaustion of remedies, or case-specific deference to foreign policy concerns of the executive branch. In a footnote, the Court stated that the 'requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law', and listed exhaustion of remedies and deference to the executive as possible additional limitations.[34] The Court did not limit the possible limitations to those two, nor did it adopt those two limitations. The two are therefore merely illustrations of *the sort* of limitations the Court has in mind. Significantly, neither relates to the nature of the international law obligation that was violated.

That international law norms that protect individuals and are of definite content and wide acceptance will generally be enforceable through federal common law actions under *Sosa* is strongly suggested by the Court's statement that the approach it was adopting 'is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court'.[35] The Court cited *Filártiga* with approval for the proposition that 'the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind'.[36] It also cited Judge Edwards' statement in *Tel-Oren* that the 'limits of section 1350's reach' should be defined by 'a handful of heinous actions—each of which violates definable, universal and obligatory norms',[37] and the holding of *In re Estate of Marcos Human Rights Litigation* that '[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory'.[38] The opinion thus appears to approve of the *Filártiga* line of cases as it had been applied by most lower courts until that point.

One of the open questions after the *Sosa* decision concerns the extent to which the Alien Tort Statute remains available as a source of jurisdiction over suits against private corporations. Some commentators have read the Court's opinion as sounding the death knell to such suits,[39] while others believe that *Sosa* blesses them.[40] In my view, *Sosa* does neither. The Court referred to suits against corporations only in a footnote, in which it said that '[a] related consideration [related, apparently, to whether the international-law norm is sufficiently well-established] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual'.[41] The footnote does not rule out the possibility that private corporations might be subject to

[34] ibid 2766 fn 21. [35] ibid 2765–66.

[36] ibid 2766 (quoting *Filartiga*, 630 F.2d at 890). [37] *Tel-Oren*, 726 F.2d at 781.

[38] In *re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475, 9th Cir. (1994). [39] See n 3.

[40] See R Gertner, Human Rights Claims Against Corporations May Go Forward, Law Wkly. USA (19 July 2004) at 1 (quoting W Aceves, a professor who submitted an *amicus* brief in support of Alvarez, stating that the court 'has given a green light to litigation under the Alien Tort Statute').

[41] *Sosa*, 124 S. Ct. at 2766 fn 20.

federal common law rights of action for violations of customary international law. Indeed, one of the two cases the Court cited in this footnote, without disapproval, held that a suit could be maintained under the Alien Tort Statute against a 'private actor' alleged to have committed genocide.[42] That Unocal does not believe that *Sosa* precludes Alien Tort Statute suits against private corporations is suggested by its recent decision to settle the *Unocal* case for an undisclosed sum that reportedly 'thrilled' the plaintiffs' lawyers.[43]

Sosa also sheds some light on the issue that divided the panel in *Unocal*. The majority held that, if the plaintiff did not rely on a norm of international law directly applicable to private parties, an ATS action could succeed against a private party only if principles of international law imposed liability on the private party for aiding and abetting the state's violation of international law. Judge Reinhardt maintained that, if the plaintiff could establish a violation of an international legal norm by the state, the private party could be found liable for aiding and abetting under federal common law. The Supreme Court's analysis in *Sosa* seems closer to Judge Reinhardt's than to that of the *Unocal* majority, although that analysis may well lead to the conclusion reached by the majority.

For the *Sosa* majority, the liability of a defendant in an ATS case results from a combination of international law and federal common law. The opinion strongly suggests that the courts are to look to international law to determine whether a primary rule of international law has been violated. If such a violation has occurred, the existence of a secondary rule entitling the plaintiff to relief is a matter of judge-made federal common law.[44] Consistent with this interpretation the Court speaks of the judicial '*creation* of a federal remedy'[45] or 'the *creation* by judges of a private cause of action to enforce . . . the rule [of customary international law]'.[46] Similarly, in rejecting Alvarez's arbitrary detention claim, the Court notes that he invoked a 'broad principle' that reflects an 'aspiration' rather than an established rule of law, and it concluded that '*[c]reating* a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise'.[47] The implication is that it is appropriate for the courts to create a remedy for injuries caused by conduct that violates well-defined and well-established norms of international law. If so, the *Unocal* majority was too demanding in insisting that the plaintiff must establish that international law imposes individual

[42] See *Kadic v Karadzic*, 70 F.3d 232, 239–241, 2d Cir. (1995), cited in *Sosa*, 124 S. Ct. at 2766 (describing Kadic as holding that there was a 'sufficient consensus in 1995 that genocide by private actors violates international law').

[43] See L Girion, Unocal To Settle Rights Claims, L.A. Times (14 December 2004).

[44] In international legal discourse, 'secondary rules' are those that specify the legal consequences of a breach of the primary rules. On the distinction between the primary and secondary rules of international law, see Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No 10, Comment 1, U.N. Doc A/56/10 (2001).

[45] *Sosa*, 2767 (emphasis supplied).

[46] ibid 2769 fn 29 (emphasis supplied).

[47] ibid 2767 (fns omitted; emphasis supplied).

liability for the acts committed by the defendant. The defendant's liability is a matter of secondary or remedial law. As Judge Reinhardt wrote, 'international law applies to determine whether a violation has occurred'.[48] If there has been a violation of international law, it is for the Court to create a remedy in appropriate circumstances.

It is true that the Court in *Sosa* indicated that the question 'whether international law extends the scope of *liability* for a violation of a given norm to the perpetrator being sued' would be a 'consideration' 'if the defendant [were] a private actor such as a corporation or individual'.[49] Although its use of the term 'liability' here does suggest that international law determines the remedy as well as the violation, I doubt that that is what the Court meant. The cases it cited to illustrate the point both involved, in the Court's own description, whether primary norms of international law were 'violate[d]'.[50] Moreover, the Court's statement that this is a 'consideration' may just mean that it is sufficient but not necessary that international law impose individual liability. Thus, despite this footnote, the thrust of the Court's analysis is consistent with Judge Reinhardt's conclusion that, in ATS cases, the rules governing primary conduct come from international law, while the secondary, or remedial, rules are a matter of federal common law.

On the other hand, the Supreme Court might well reject Judge Reinhardt's specific conclusion that the 'aiding and abetting' standards that apply in ATS cases come from federal common law rather than international law. If the Court in *Sosa* held that international law supplies the primary rules while federal common law supplies the secondary rules, it may follow that the plaintiff must establish that *the defendant's* conduct violated international law. Aiding and abetting standards may relate to primary rules of international law, if one defines primary rules as those that determine whether the defendant committed a violation of the law in the first place. Thus, if the norm that was allegedly violated is one that only applies to state action, the plaintiff may have to show that the private defendant 'aided and abetted' the violation under international law standards. Under this approach, private parties could be subjected to liability in ATS cases if they violated international law norms that apply to private parties, or if they aided and abetted a state's violation under international law standards.

It is of course possible that later cases may rule out the judicial creation of rights of action against private parties altogether. The Court, after all, urged caution and gave a non-exhaustive list of illustrations of possible additional limitations. But the Court gave no affirmative support to a rule barring the recognition of a private right of action against private corporations that violate norms of international law that are sufficiently defined and established. Thus, the Alien Tort Statute remains available as a basis for human rights suits against private corporations, although, in the light of *Sosa*'s holding that the ATS is

[48] *Unocal* (J Reinhardt, concurring).
[49] *Sosa* at 2766 fn. 20 (emphasis supplied).
[50] Ibid.

purely jurisdictional, such suits should probably be called 'federal common law' actions rather than Alien Tort Statute actions.[51]

Even though human rights claims against private corporations remain available after *Sosa*, it cannot be said that the Alien Tort Statute offers much hope for redress for people from developing countries whose human rights have been adversely affected by private corporations. First, most international law norms regarding human rights do not apply directly to private businesses. The *Unocal* case implicated one of only a 'handful' of norms that has a plausible claim to being applicable to private entities—the norm prohibiting forced labour, which the panel in *Unocal* viewed as the contemporary version of the norm prohibiting slavery. With respect to other norms, corporations could be held liable in ATS lawsuits, at best, only through an aiding and abetting theory. The question whether the international law standards for aiding and abetting must meet the *Sosa* standard of being well-established and well-defined and, if so, whether they do meet that standard, was before the Court of Appeals in *Unocal* at the time the settlement agreement was reached. The United States submitted an *amicus* brief arguing that the standard does apply and was not met.[52] Regardless of how that issue is ultimately decided, the prospect of maintaining lawsuits against private corporations for human rights violations under an aiding and abetting theory would remain quite narrow. Liability as an aider and abettor would appear to be available at best only when the state is the principal culprit and the corporation the enabler. That will be the case, I suspect, only in a very small proportion of the situations in which human rights are threatened by private corporations.

Not everyone agrees that only a handful of international human rights norms impose obligations directly on private actors, such as corporations. A different view is reflected in a document titled 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', which was adopted in August 2003 by the Sub-commission on the Promotion and Protection of Human Rights of the UN Commission on Human Rights,[53] but was tabled by the Commission in August 2004 for further discussion.[54] This document sets forth a lengthy list of obligations of private

[51] Even though the Court took pains to clarify that it regarded the Alien Tort Statute as purely jurisdictional, and the private right of action as federal common law, it is not clear to me that there is much practical difference between its holding and a holding that the private right of action has its basis in the Alien Tort Statute. The right of action clearly does have its basis in the Alien Tort Statute in the sense that the Court relied on the expectations of the framers of that statute to approve the judicial recognition of private rights of action to enforce norms of customary international law as a matter of federal common law.

[52] Supplemental Brief for the United States of America as Amicus Curiae in *Doe v Unocal Corp*., Nos 00-56603, 00-56628 (dated August 2004).

[53] UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter 'Norms'].

[54] See A Blyth, Compromise deal reached on UN Norms, Ethical Corporation (21 April 2004) available at http://www.ethicalcorp.com/content.asp?ContentID=1947; B Hearne, Proposed UN Norms on human rights shelved in favor of more study, Ethical Corporation (3 May 2004) available at http://www.ethicalcorp.com/content.asp?ContentID=1981.

corporations under international law. The document does not make it entirely clear whether it was meant to reflect existing international law or instead to furnish a basis for the development of international law. In my view, it does a bit of both. A few of the obligations set forth in the document do apply directly to private actors. These include the prohibition of forced labour, already discussed, and the prohibition of genocide.[55] But most of the obligations set forth in the document apply to private actors, at best, indirectly.[56] This is the case, for example, with respect to the anti-corruption provisions,[57] which are based on conventions that require states to enact laws prohibiting certain acts by private actors.[58] Similarly, the antidiscrimination norms[59] appear to be indirectly applicable to private actors, insofar as they are based on the UN conventions addressing race and gender discrimination.[60]

Other human rights norms to which the Norms purports to hold private corporations seem difficult to apply to the conduct of private entities at all. For example, the Norms provide that '[t]ransnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression'.[61] The content of the obligation to 'contribute to [the] realization' of economic and social rights is difficult to ascertain, given that, under the Convention on Economic, Social, and Cultural Rights, these rights are subject to progressive realization, meaning that the parties to the convention are required to 'take steps to the maximum extent of their available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant'.[62] The obligation to realize these rights progressively necessarily recognizes that there are a number of conflicting demands on a state's resources. Is it envisioned that a private corporation would have similar discretion to balance the competing demands on its resources? Is the demand to make a profit to survive in the unforgiving global marketplace to be taken into account in determining how much of the corporation's resources are available? Do the Norms reflect the belief that international law draws a line between appropriate and excessive profits? In short, translating an obligation of states to an

[55] Norms (n 53) Art 3.

[56] See Generally Carlos M Vázquez, Direct vs. Indirect Obligations of Corporations Under International Law, 43 Colum. J. Transnational Law 927 (2005).

[57] Norms (n 53) Art 11.

[58] See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997) Arts 1, 2, 4, 37 I.L.M.1.

[59] Norms (n 53) Art 2.

[60] Convention on the Elimination of All Forms of Racial Discrimination, Art 2(1)(d) (28 September 1966) 660 U.N.T.S. 195, 5 I.L.M. 352; Convention on the Elimination of Discrimination Against Women, Art (2)(e), G.A. Res. 34/180, UN GAOR, 34th Sess., Supp. No 46 at 193, UN Doc A/RES/34/180 (1979) (entered into force 3 September 1981).

[61] Norms (n 53) Art 12.

[62] International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, UN GAOR, 21st Sess, Supp. No 16 at 49, UN Doc A/6316 (1966).

obligation of private enterprises poses especially severe challenges in the case of economic and social rights.

Yet it is economic and social rights that preoccupy those who advocate expanding the obligations of private corporations under international law. Such arguments tend to emphasize the economic power of corporations in today's world, which dwarfs that of many sovereign countries and enables the corporations to force economic concessions from developing countries. Because such countries cannot protect their citizens against such powerful economic forces, it is argued, the international community must step in.[63] If the case for direct international regulation of private corporations by international law is based on this economic imbalance of powers, it seems to reflect primarily a concern about the protection of economic and social rights, broadly understood. Yet it is these rights that are least likely to be enforceable in US courts through the Alien Tort Statute. Not only is the application of these norms to private corporations most problematic in this context, even the obligations *of states* in this area are rather ill-defined.

Nor is there much ground for optimism that the ATS will be expanded to make such rights judicially enforceable by aliens against US corporations. The interests that would be burdened by such an extension of the ATS are politically and economically powerful business entities in the United States. Those primarily benefited are relatively powerless individuals in foreign countries, who lack a voice in the American political process. Indeed, the United States is not even a party to the Covenant on Economic and Social Rights. The possibility that any developed country will significantly burden its own businesses for the benefit of the downtrodden in other countries seems remote.

It also seems unlikely that the international community will address this problem in the manner seemingly contemplated by the Norms—that is, through the articulation and enforcement of international law obligations directly on private corporations. Most who argue for extending international law to private corporations appear to view international articulation and enforcement of such norms as a supplement to national regulation rather than a threat to state sovereignty.[64] This overlooks the fact that direct international regulation of private entities would represent a significant loss of power for states, which otherwise would retain control of compliance with international law. Such a move would make international law more effective, but it would do so by circumventing states. It is for this reason that the international law obligations that are recognized to apply directly to private parties do not exceed a handful. Attempts to expand the number are likely to face significant resistance.

[63] eg S R Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale Law Journal (2001) 443, 461–62.

[64] This seems true of the UN Norms themselves, which, while articulating the obligations of corporations directly under international law and calling for international enforcement mechanisms, see UN Norms (n 53) Art 16, affirm that states have the primary duty to protect human rights. See ibid Arts 1, 17, 19.

If so, then any international regulation of corporations is likely to be indirect. In other words, it is likely to take the form of treaties imposing on states the obligation to regulate corporations in certain ways. Many such treaties already exist, but they typically contemplate that states will regulate the conduct of corporations in their own territory, not extraterritorially.[65] A state could conceivably decide to enforce these norms extraterritorially, subject to norms of international law that might limit its ability to do so, such as those regarding free trade. But, for reasons already discussed, there may not be much basis for optimism that they will do so to any significant extent. It may be more promising for those of us concerned with the lot of the poor in developing countries to focus more of our efforts on building the will and capacity of the governments of developing countries to protect the interests of their citizens through national or multinational regulation of private corporations doing business in their territories.

[65] See, eg, conventions cited above (n 60).

States' and Private Actors' Obligations under International Human Rights Law and the Draft UN Norms

KARIN LUCKE*

I. INTRODUCTION

Over the past few years, the UN human rights system has increasingly addressed the challenges posed by an increasingly complex international trade regime. The High Commissioner for Human Rights has prepared a series of reports concerning human rights, trade, and investment addressing the impact on human rights of the Agreement on Trade-Related Aspects of Intellectual Property Rights (E/CN.4/Sub.2/2001/13); globalization, with an emphasis on agricultural trade (E/CN.4/2002/54), the liberalization of trade in services (E/CN.4/Sub.2/2002/9), trade and investment liberalization (E/CN.4/Sub.2/2003/9), and the fundamental principle of non-discrimination in the context of globalization (E/CN.4/2004/40).[1]

In addition, the human rights treaty bodies have been more frequently confronted with trade-related questions, particularly with regard to the privatization of services. They have taken up the issue in the context of General Comments, concluding observations, and recommendations to States parties in the context of the Committees' periodic dialogues with States parties and during days of discussion, for instance the Committee on Economic, Social, and Cultural Rights (CESCR) with regard to intellectual property rights, and the Committee on the Rights of the Child (CRC) with regard to private service provision.

* These remarks are made in the author's personal capacity, and do not necessarily reflect the position of the Office of the High Commissioner for Human Rights.

[1] The first report considered the human rights implications of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). It examined the TRIPS Agreement in light of the obligations of States under the ICESCR, and reviewed specific ways in which the Agreement could be interpreted and implemented that are consistent with the right to health. The second report focused on the WTO Agreement on Agriculture, examining ways in which the reform process concerning agricultural trade could be directed towards protecting the right to food and the right to development of people in developing countries. The third report focused on the liberalization of trade in services and its relationship with the enjoyment of human rights, in particular the right to health, the right to education, and the right to development. The fourth report focused on trade and investment liberalization, underlining the need for investment agreements to take into account the promotion of corporate social responsibility as well as the need for States to maintain the policy space necessary to promote human rights through appropriate regulation. The fifth report on non-discrimination compared the human rights principle of non-discrimination with the trade principle of non-discrimination and highlighted the importance of implementing these two principles consistently. The report illustrates the interaction between the two principles by reference to government procurement, agricultural trade, and social labelling.

In the light of the powerful role of businesses in the globalization of the world economy, and the impact on national conditions, the international community has become increasingly aware of the need to clarify the responsibilities of business. The question how to incorporate respect for human rights into business operations has also become significant. Calls for an increase in the accountability and the responsibilities of corporations for the respect of human rights principles and norms have not only led to examination of the international legal responsibilities of legal persons for human rights violations, but also, in recent years, some national judiciaries have begun to hold companies accountable for their involvement in human rights violations abroad. Numerous companies have adopted voluntary codes of conduct and various initiatives have been taken at the international level to address this issue, including the launching of the UN Global Compact.[2] However, non-governmental human rights organizations have expressed their concerns regarding the Global Compact's effectiveness due to, *inter alia*, the lack of legally enforceable standards, the lack of a monitoring and enforcement mechanism, and a lack of clarity about the meaning of the standards themselves.[3]

Growing concern with this question led to the establishment, in 1999, by Resolution 1998/8, of a working group of the Sub-Commission on the Promotion and Protection of Human Rights on the working methods and activities of transnational corporations, with the mandate to study the impact of the activities of transnational corporations on the enjoyment of human rights and to examine the extent of States' obligations in this regard. On 13 August 2003, by Resolution 2003/16, the UN Sub-Commission on the Promotion and Protection of Human Rights approved the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' and transmitted them to the Commission on Human Rights for consideration and adoption. In decision 2004/116 the Commission confirmed the importance and priority it accords to this question and requested

> the Office of the High Commissioner for Human Rights (OHCHR) to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia, the draft norms contained in [document (E/CN.4/Sub.2/2003/12/Rev.2)], and identifying outstanding issues, to consult with all relevant stakeholders in compiling the report . . . and to submit the report to the Commission at its sixty-first session in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation.

[2] The Global Compact was launched by the Secretary-General of the United Nations in 1999, asking businesses to commit themselves voluntarily to a set of principles relating to respect for human rights and protection of the environment, in order to promote good practices based on universal principles.

[3] Human Rights Watch, Corporate Social Responsibility, Letter addressed to the SG, Kofi Annan (28 July 2000).

During its sixty-first session, by Resolution 2005/69, the Commission requested the UN Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises to, *inter alia*, identify and clarify the human rights responsibilities of companies, a decision which has been welcomed by many stakeholders as a positive step.

The reports of the High Commissioner for Human Rights note that international trade law and human rights law have developed in isolation from each other. However, increasingly, the links between the two areas of law are being recognized and attempts are being made to understand how they interact, 'in an attempt to provide greater coherence to international law and policy-making and a more balanced international and social order'. 'While WTO Agreements provide a legal framework for the economic aspects of the liberalization of trade, they focus on commercial objectives. The norms and standards of human rights provide the means of providing a legal framework for the social dimensions of trade liberalization' (E/CN.4/Sub.2/2002/9, paragraph 4). Philip Alston put it as follows: 'Their purpose is fundamentally different. Human rights are recognized for all on the basis of the inherent human dignity of all persons; trade-related rights are granted to individuals for instrumental reasons. Individuals are seen as objects rather than as holders of rights.'[4]

All WTO members are parties to at least one of the human rights treaties with a legal obligation to respect, protect, and fulfil the human rights they stipulate. These obligations have been undertaken by States parties in parallel, but often-disconnected, processes. The question now arises whether the obligations are compatible, mutually reinforcing, or mutually exclusive.

The following aims to outline some of the issues related to the obligations of States and rights/obligations of private actors in the context of trade from the perspective of human rights law. It first examines what the treaties and their monitoring bodies say about the obligations of States parties to implement the rights contained in the treaties, as well as the obligations, both direct and indirect, of non-State actors. Secondly, it addresses the most significant initiative at the international level relating to the responsibilities of private actors in the context of human rights law, notably by the Sub-Commission on the Promotion and Protection of Human Rights, which has also been the subject of much controversy. The paper also sets out a number of questions which are relevant in this context.

II. STATES' OBLIGATIONS UNDER HUMAN RIGHTS LAW

The starting point for an analysis must be an examination of the nature of the rights themselves. International human rights law has many sources, including regional arrangements such as the European Convention on Fundamental

[4] P Alston, Resisting the Merger and Acquisition of Human Rights By Treaty Law: A Reply to Petersmann, European Journal of International Law (2002) 13 (815) 7.

Rights and Freedoms. I will restrict myself here to the rights stipulated in the core international human rights treaties,[5] and Committees' General Comments on the implementation of treaty articles.[6]

'General Comments' of the treaty bodies can vary in form and scope according to the body of experts adopting them and the particular human rights of concern—however, generally, they can be described as expert opinions on the scope and content of particular rights or principles as understood by a treaty body in light of its experience in monitoring the particular convention. General Comments do not of themselves create legal obligations on States parties, although they often reflect common understandings of international law.

The current position as to legal obligations is quite clear. The framework of international human rights law is State-centric. It obliges States to respect, protect, and fulfil human rights. The human rights obligations assumed voluntarily by governments require the use of all appropriate means to ensure that actors under their jurisdiction act in compliance with international standards.

With regard to the International Covenant on Economic, Social, and Cultural Rights (ICESCR), States do not assume obligations of immediate implementation of all aspects of the rights in the Covenant, but rather to take steps 'to the maximum of its available resources' in order to achieve 'progressively the full realization' of these rights. The Committee on Economic, Social, and Cultural Rights (CESCR) in its General Comment No 3 (1990) points out, however, that, 'while the Covenant provides for the progressive realization and acknowledges the constraints due to limits of available resources, it also

[5] Seven core human rights treaties set legal standards for States parties for the promotion and protection of human rights: the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families.

[6] Seven United Nations human rights treaty bodies monitor the implementation at the national level of human rights provisions contained in those treaties which have entered into force, the latest of which will monitor the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and met for the first time in March 2004. Each treaty body is comprised of a committee of experts, who are of recognized competence in the field of human rights, who are nominated and elected by States parties to the treaties, but serve in their individual capacities. With the exception of the Committee on the Elimination of Discrimination against Women, which is serviced by the Division for the Advancement of Women in the Department of Economic and Social Affairs in New York, each treaty body—the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Rights of the Child and the Committee on Migrant Workers—is serviced by the Treaties and Commission Branch of the Office of the High Commissioner for Human Rights in Geneva. The principal objective of the human rights treaty body system is to ensure human rights protection at the national level through implementation of the human rights contained in the treaties. Monitoring and encouragement of implementation are effected by the treaty bodies through several procedures. Each treaty body reviews reports submitted by States parties on a periodic basis; five treaty bodies are mandated to review complaints of individuals—four complaints procedures are currently in force; and two treaty bodies are empowered to carry out inquiries into systematic violations of the treaty concerned.

imposes various obligations which are of immediate effect' (para 1). Among these, the Committee singles out two obligations in particular, namely, the undertaking of States parties to guarantee that the rights set out in the Covenant will be exercised without discrimination, and the undertaking in Article 2(1) 'to take steps', which the Committee has interpreted as meaning that steps must be taken towards the goal of progressive realization within a reasonably short time after the Covenant's entry into force. These steps should be deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

There is growing appreciation of the fact that obligations are closer to rights stipulated in the International Covenant on Civil and Political Rights (ICCPR) than initially thought, and vice versa, that is, that civil and political rights have aspects of fulfilment over time. Human rights obligations are a mixture of positive and negative obligations, and in its recently revised General Comment on Article 2 on the nature of the general legal obligations imposed on States parties to the Covenant, replacing its General Comment No 3, the Human Rights Committee, which monitors the implementation at the national level of the ICCPR, has pointed out that 'the legal obligation under article 2, paragraph 1, is both negative and positive in nature', and that '[a]rticle 2 requires that states parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'.[7]

The CESCR has given significant attention to the question of States parties' obligations, with General Comment 14 on the right to health providing a full examination of how CESCR interprets the nature and scope of States parties' obligations under the Covenant. States, as parties to the treaty, have the primary obligation to ensure that the legal rights conferred on persons under their jurisdiction, by ratification, are *respected*, *fulfilled*, and *protected*. The obligation to *respect* is described as requiring States parties to refrain from interfering directly or indirectly with the enjoyment of the right. The obligation to *protect* requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right. The obligation to *fulfil* requires States to take positive measures, including appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of the right. According to General Comments 12 and 13, the obligation to *fulfil* incorporates an obligation to facilitate and an obligation to provide. This obligation has been expanded to include the obligation to *promote* in the context of General Comment 14 (see paragraph 33). As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. This framework provides a useful tool in considering the extent of States parties' obligations, under the Covenant, in an environment where many additional actors are involved.

[7] CCPR/C/21/Rev.1/Add.13 (26 May 2004) paras 6 and 7.

In its General Comments, CESCR has employed a framework consisting of four elements in giving depth to the normative content of particular rights (eg, the right to health in General Comment 14), namely: availability, accessibility, acceptability, and of good quality. Accessibility is defined as having four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility, and information accessibility (paragraph 12). The more recent General Comment on the right to water also employs this framework.

Further guidance on the nature and scope of the obligations of States parties to the ICESCR is provided by the 'Limburg Principles' (E/CN.4/1987/17 Annex) developed by a group of experts of international law in 1986, and the 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', drafted in 1997 by a similar group of experts. Although not legally binding, these principles and guidelines give an authoritative interpretation of the state of economic, social, and cultural rights. It is expected that the current discussions in the context of the open-ended working group to consider options regarding an optional protocol to the ICESCR will shed further light on questions related to the justiciability of economic, social, and cultural rights.

The Committee on the Rights of the Child's recently adopted General Comment on Article 4, relating to States parties' overall implementation obligations, outlines the Committee's understanding of the obligations under the Covention.[8] The Comment makes reference to similar articles in other Conventions, notably Article 2 of the ICCPR and Article 2 of ICESCR, and highlights the interdependence and indivisibility of economic, social, and cultural rights and civil and political rights, noting that all rights should be regarded as justiciable (paragraphs 5 and 6). With regard to economic, social, and cultural rights and the States parties' obligation to 'undertake such measures to the maximum extent of their available resources', the Committee concurs with CESCR in asserting that 'even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances' (CESCR General Comment No 3, paragraph 11).

III. PRIVATE ACTORS AND INTERNATIONAL HUMAN RIGHTS LAW

While international law is clear that the obligation to ensure rights is placed on the State, which has the obligation to ensure that the respective rights are not violated within their jurisdictions, treaties and their monitoring bodies are increasingly referring to the responsibilities of private actors, including in their General Comments and concluding observations.

[8] CRC General Comment No 5 (2003) CRC/GC/2003/5.

A. Human rights treaties and private actors

The preamble of the Universal Declaration of Human Rights affirms that, 'every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for the rights and freedoms'.

There is a recognition of the indirect responsibility of private actors in treaty law. For instance, the Convention on the Elimination of all Forms of Discrimination against Women spells out in Article 2(e) the obligation of States parties '[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'. A similar obligation is included in the Convention on the Elimination of All Forms of Racial Discrimination, which, in Article 2(d) obliges States parties to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization'.

Significantly, there is a growing recognition of direct responsibility of non-State actors under international human rights treaties. Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts addresses the issue of armed groups, which indicates the willingness of States to regulate the behaviour of non-State entities and represents a positive evolution in international law. According to paragraph 1 of that article, armed groups are not allowed to recruit persons below the age of eighteen years, whether compulsorily or voluntarily, nor to let them participate in hostilities, be it in a direct or indirect manner. Paragraph 2 of this article requests States parties to take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

The Convention on the Rights of the Child itself enshrines the general principle that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' (Article 3(1)) and that 'States parties shall ensure that institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision' (Article 3(3)). It thereby establishes the obligation of the State party to set standards in conformity with the Convention and ensure compliance by appropriate monitoring of institutions, services, and facilities including those of a private nature. Along the same lines, the general principle of non-discrimination as enshrined in Article 2, as well as the right to life and to maximum survival and development (Article 6), assumes particular importance in the context of the current debate, with the State party equally being obliged to create standards consistent and in conformity with the Convention.

Human rights treaty bodies have also specifically made reference to the responsibilities of business and service providers in the implementation of specific rights in their respective treaties, particularly in General Comments. For instance, the Committee on the Rights of the Child's General Comment No 5 on Article 4, general measures of implementation, dedicates one section to the issues arising in the context of privatization, emphasizing that 'States parties to the Convention have a legal obligation to respect and ensure the rights of children as stipulated in the Convention, which includes the obligation to ensure that non-State service providers[9] operate in accordance with the provisions, thus creating indirect obligations on such actors' (paragraph 43). The Committee further emphasizes that the fact of enabling the private sector to provide services 'does not in any way lessen the State's obligation to ensure for all children within its jurisdiction the full recognition and realization of all rights in the Convention (articles 2(1) and 3(2))'. It also notes that Article 3(1) establishes the obligation that the best interests of the child be a primary consideration in all actions concerning children, whether undertaken by public or private bodies, and emphasizes the requirement under Article 3(3) that appropriate standards be established by the competent authorities, which requires rigorous inspection. The Committee concludes by proposing 'that there should be a permanent monitoring mechanism or process aimed at ensuring that all State and non-State service providers respect the Convention' (paragraph 44).

General Comment 12 of the Committee on Economic, Social, and Cultural Rights (CESCR) on the right to adequate food notes in paragraph 20 that

> [w]hile only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society—individuals, families, local communities, non-governmental organizations civil society organizations, as well as the private business sector—have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector—national and transnational—should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.

It also notes that the international financial institutions should pay greater attention to the protection of the right to food in the lending policies, credit agreements, and structural adjustment programmes (paragraph 41).

Similarly, CESCR's General Comment No 14 on the right to the highest attainable standard of health (Article 12)[10] makes specific references to the responsibilities of the private sector, noting particularly in paragraph 42 that 'while only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society—individuals, including health professionals, families, local communities, intergovernmental and

[9] In this context, the private sector has been defined as including businesses, NGOs, and other private associations, both for profit and not-for-profit.

[10] paras 35, 36, 39, 42, 51, 55, 56.

non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities regarding the realization of the right to health'. General Comment 13 of CESCR on the right to education (Article 13) warns of possible consequences of private activity in this sector, noting that 'the State has an obligation to ensure that the liberty set out in 13(4)—the liberty of individuals and bodies to establish and direct educational institutions—does not lead to extreme disparities of educational opportunity for some groups in society'.[11]

The Human Rights Committee also, in its General Comment 31, notes in paragraph 8 that

> the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States parties of those rights, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by acts by private persons or entities.

B. The impact of private actors and international institutions on the enjoyment of human rights

Despite numerous references in international human rights treaties to the responsibilities of the States parties vis-à-vis private sector activities, implementation of rights guaranteed in the relevant Conventions by States parties is frequently affected by their lack of capacity or unwillingness to adopt measures that ensure respect of the provisions of the Conventions by actors in the private sphere. The CESCR has on several occasions expressed its concern about the extent to which international economic policies and practices affect the ability of States to fulfil their obligations under the ICESCR. For instance, in its General Comment No 15 on the right to water, it calls upon relevant international organizations concerned with water as well as those concerned with trade, such as WTO, to cooperate effectively with States parties in relation to the implementation of the right to water at the national level. Furthermore, 'the international financial institutions, notably the International Monetary Fund and the World Bank should take into account the right to water in their

[11] Additional reference to non-State actors can be found, *inter alia*, in CESCR General Comment No 13 on the right to education (Art 13) para 30; CESCR General Comment 15 (Arts 11 and 12) on the right to water (paras 23 and 24, 44(b), 60); the Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No 19 on Violence against Women, para 9; and CEDAW General Recommendation No 24 on Art 12—women and health, para 15. The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights note in para 18 that 'States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of non-State actors.'

lending policies, credit agreements, structural adjustment programmes and other development projects (see general comment No 2 (1990)), so that the enjoyment of the right to water is promoted' (paragraph 60). In its statement on globalization adopted in May 1998, it calls on the World Bank, the IMF, and WTO to devise methods of measuring the impact of their policies on the enjoyment of economic, social, and cultural rights and to revise those policies accordingly. In its statement to the WTO Third Ministerial Conference in Seattle in November 1999, the Committee urged WTO members to adopt a human rights approach at the Conference, recognizing that 'promotion and protection of human rights is the first responsibility of Governments'.

The Committee on the Rights of the Child specified in its recommendations following its day of discussion on 'the private sector as service provider' that 'States parties undertake assessments of the potential impact of global trade policies concerning the liberalization of trade in services on the enjoyment of human rights, including children's rights'.[12] In particular, the Committee recommended that these assessments should be undertaken prior to making commitments to liberalize services within the context of WTO or regional trade agreements. Further, if commitments to liberalize trade in services are made, the effects of those commitments on the enjoyment of the rights of the child should be monitored and the results of the monitoring should be included in State reports to the Committee.

In its section on international cooperation in General Comment No 5, the CRC recommends specifically that 'the World Bank, the International Monetary Fund and the World Trade Organization should ensure that their activities related to international cooperation and economic development give primary consideration to the best interests of children and promote the full implementation of the Convention' (paragraph 64).

IV. NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS

Several recent inter-governmental initiatives have created international guidelines or principles on responsibilities for human rights of private sector entities. Of particular relevance for our purposes are the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' approved on 13 August 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights by Resolution 2003/16.[13] Fundamentally, the Norms are a manifestation of the realization that responsibilities of businesses have to be more clearly defined. They are intended to

[12] CRC/C/121, para 653 (13).
[13] E/CN.4/Sub.2/2003/12/Rev.2 and E/CN.4/Sub.2/2003/38/Rev.2.

clarify the responsibilities of businesses and propose ways to implement and monitor such responsibilities. The Norms constitute a succinct but comprehensive document in which all the existing international human rights principles applicable to business are gathered.

A word of caution: The Norms do not 'privatize' the responsibilities of governments for the implementation of treaty obligations. Indeed, the opening paragraph on the general obligations makes clear that 'states have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring the transnational corporations and other business enterprises respect human rights' (paragraph 1).

The Norms are not a treaty elaborating legal obligations for States parties and are thus not legally binding, other than for those issues, such as the prohibition of slavery, already the subject of international and national law. However, they are the first non-voluntary initiative at the international level and are more authoritative and comprehensive than existing codes of conduct adopted by companies. The Norms clarify obligations of businesses under international human rights law based on existing standards and offer a useful benchmark against which national legislation can be evaluated and monitored. It has been suggested by some that the Norms could provide a conceptual foundation for the development of a legally binding instrument.

The Norms apply to 'transnational corporations' and 'other business enterprises'. A transnational corporation is defined as '[a]n economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively' (paragraph 20). The term 'other business enterprise' includes 'any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor' (paragraph 21).

Much has already been written about the Norms, including by David Weissbrodt,[14] one of the members of the working group, and the following is only a brief summary of some key issues, including the proposed implementation mechanisms. The Norms cover a wide range of human rights, labour, humanitarian, environment, consumer, and anti-corruption legal principles, but are more comprehensive and focused on human rights than the existing voluntary codes. The Norms largely reflect, restate, and refer to existing international norms and are structured according to several categories, starting with a section on general obligations, which emphasizes that the Norms in no way diminish the obligations of States under international and national law, including that transnational corporations and other business enterprises respect human rights. The Norms further specify that *within their respective*

[14] D Weissbrodt/M Kruger, current development: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 97 American Journal of International Law (2003) 901.

spheres of activity or influence, these entities 'have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international and national law' (paragraph 1). The substantive part of the Norms includes sections on the right to equal opportunity and non-discriminatory treatment, the right to security of persons, the rights of workers, respect for national sovereignty and human rights, obligations with regard to consumer protection, and obligations with regard to environmental protection. Furthermore, the Norms include a section on general provisions of implementation, as well as a section on definitions used in the Norms.

In terms of implementation, the Norms propose various strategies. First, relying on transnational corporations and other business enterprises themselves to take positive measures, the Norms propose that each such entity adopt, disseminate, and implement internal rules of operation in compliance with the Norms. Furthermore, they should periodically report on and take measures to implement the Norms fully, and incorporate the Norms in contracts and dealings with others (paragraph 15). The Commentary suggests a series of measures ranging from dissemination and training, to ensuring internal monitoring and the monitoring of their supply chain. It also calls for the establishment of legitimate and confidential avenues for workers to file complaints. Also, businesses should engage in periodic assessments of the impact of their activities on human rights (paragraph 16).

Secondly, the Norms propose external periodic monitoring and verification by United Nations, other international, or national mechanisms already in existence or yet to be created, which should be transparent and independent (paragraph 16). The Commentary to paragraph 16 suggests that, 'UN human rights treaty bodies should monitor implementation of these Norms through the creation of additional reporting requirements for States and the adoption of General Comments and recommendations interpreting treaty obligations.' Similarly, country rapporteurs and thematic mandate holders are encouraged to use the Norms and other relevant international standards for raising concerns about activities of transnational corporations and other business enterprises within their respective mandates. UN agencies are advised to use the Norms as a basis for procurement determination. Furthermore, the Commentary encourages other actors to use the Norms, including trade unions, NGOs and industry groups.

As a third method of enforcement, the Norms recommend that States should 'establish and reinforce the necessary legal and administrative framework for ensuring the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises' (paragraph 17). The Commentary suggests that governments 'implement and monitor the use of the Norms, for example, by making them widely available and using them for relevant legislation or administrative provisions, such as through the use of labor inspections, ombudspersons, national human rights commissions or other national human rights mechanisms' (Commentary, paragraph 17).

Finally, the Norms include a provision dealing with reparations with a view to addressing violations, stipulating that 'transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failure to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken'. In this context, it is suggested that the Norms be applied by national courts and/or other international tribunals, pursuant to national and international law (paragraph 18).

The Sub-Commission transmitted the Norms to the Commission on Human Rights (CHR) for consideration and adoption and recommended that it invite governments, UN bodies, specialized agencies, NGOs, and other interested parties to submit comments on the Norms to its 61st session and to the Sub-Commission at its 57th session. It further recommended that, after having received such comments, the CHR consider establishing an open-ended working group to review the Norms and its commentary. Regarding implementation of the Norms, it requested the working group to receive information from a variety of stakeholders including governments, NGOs, businesses, individuals, groups of individuals, and other sources with regard to the possible negative impact of the activities of transnational corporations and business enterprises on human rights, and information on implementation of the Norms. The working group was also asked further to explore possible mechanisms for implementing the Norms.

The Commission on Human Rights considered the Norms during its 2004 session in Geneva (60th session, 15 March to 23 April 2004). On 20 April, the Commission adopted Decision 2004/116, by consensus, requesting ECOSOC to 'request the Office of the High Commissioner for Human Rights to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights'. In compiling the report, for submission to the 61st session of the Commission on Human Rights, OHCHR was requested to consult with all relevant stakeholders and 'to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation'. At the same time, the decision clearly stated that the document forwarded by the Sub-Commission (E/CN.4/Sub.2/2003/12/Rev.2) 'has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard'.

In accordance with the decision of the Commission on Human Rights, OHCHR initiated a consultation process with a wide range of stakeholders, which included seeking written inputs into the report as well as holding a public consultation with stakeholders on 20 October 2004, in cooperation with the Global Compact Office. The High Commissioner for Human Rights submitted

her report on the issue to the 61st session of the CHR (E/CN.4/2005/91). The report considers the scope and legal status of exiting initiatives and standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights as well as outstanding issues requiring further consideration by the Commission, and offers a series of conclusions and recommendations to assist the Commission in identifying options for strengthening standards on business and human rights. With reference to the draft Norms, the report highlights the wide spectrum of views with regard to their value and content and outlines the key points made by stakeholders critical and supportive of the draft Norms (see paragraphs 20 and 21 of the report).

In its conclusions and recommendations, the report emphasizes that 'there is a gap in understanding the responsibilities of business with regard to human rights' and 'that there is growing interest in discussing further the possibility of establishing a UN statement of universal human rights standards applicable to business' (paragraph 52 (a–b)). It confirms the need for a continued dialogue on this question among all stakeholders, and in particular a need to involve effectively voices of States and stakeholders from developing countries. It also highlights the significant attention given to the draft Norms in the consultation process and suggests that despite the differing options on the draft, 'useful elements' as noted by the CHR in decision 2004/116 should be more closely identified, emphasizing that the 'road-testing' of the draft Norms by the Business Leaders' Initiative on Human Rights could prove useful in this endeavour. The High Commissioner thus recommended to the Commission that the draft Norms be maintained among existing initiatives and standards on business and human rights, with a view to their further consideration. The report also identifies the need to elaborate further on outstanding issues, including the concepts of 'sphere of influence' and 'complicity', the nature of positive responsibilities on business to 'support' human rights, responsibility in relation to subsidiaries and supply chain, and questions relating to the jurisdiction and protection of human rights in situations where States as the primary duty bearer are unwilling or unable to protect human rights. Finally, the report considers that the development of tools such as training materials and methodologies for undertaking human rights impact assessments could address a significant need.

On 20 April 2005, the Commission adopted Resolution 2005/69 entitled 'Human rights and transnational corporation and other business enterprises', by a roll-call vote of forty-nine in favour to three against, with one abstention, requesting the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises for an initial period of two years, with the following mandate (outlined in paragraph 1 of the resolution):

(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

(b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
(c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity ' and 'sphere of influence';
(d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
(e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.

The resolution was welcomed by many stakeholders as a positive step, as, for the first time, the Commission on Human Rights has decided to examine seriously the impact of business on human rights. The appointment of a special representative to focus on the issue of business and human rights represents an opportunity for governments, business, and all relevant stakeholders to work together to define a common understanding of the role and responsibilities of business in human rights and can contribute to strengthening standards and their implementation. The resolution establishing the mandate underlines that in carrying out his or her work, the special representative should take into account the report of the High Commissioner for Human Rights and the contributions to that report provided by all stakeholders, as well as existing initiatives, standards, and good practices. It is hoped that the special representative will build on the draft Norms when carrying out his or her work, particularly in the task to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights, as they are the most comprehensive statement of standards relevant to companies in relation to human rights.

V. QUESTIONS

A number of questions are relevant to this topic:

- How can the treaty body reporting procedure be used to flag areas of tension between human rights and trade and specifically the impact of trade on human rights, particularly in the absence of an individual complaints procedure under the ICESCR? For instance, NGOs have shown increased interest (eg, by submitting country-specific documentation) in the reporting procedure to highlight issues of concern.
- Do private companies have a responsibility to respect human rights? It is clear that they have a 'moral duty', but does this extend to legal obligations?

- How can we ensure that corporate activities are consistent with human rights standards and how do we ensure accountability for violations?
- How can accountability of business be strengthened? Should there be an internationally binding instrument to deal with alleged violations of human rights by companies in a transparent and effective manner? What would be the effect of imposing direct legal obligations on business under international human rights law? What are the possible options for an international legal framework? What should be the monitoring and enforcement mechanisms?