WHY RATIONAL CHOICE THEORY REQUIRES A MULTILEVEL CONSTITUTIONAL APPROACH TO INTERNATIONAL ECONOMIC LAW

A RESPONSE TO *THE CASE AGAINST REFORMING THE WTO ENFORCEMENT MECHANISM*

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This contribution proceeds from my criticism of Professor Nzelibe's paper,[1] made at the Bonn conference in December 2006. Part I criticizes Nzelibe's methodology. Part II argues that from a citizen perspective, it is rational to insist that state-centered and intergovernmental approaches to international economic law must be complemented by constitutional approaches which offer more efficient, democratically legitimate and legally coherent instruments for multilevel regulation of international trade among private competitors and for judicial enforcement of trade rules. Part III shows that legal coherence and democratic legitimacy of international and national trade law can be enhanced by taking the international legal obligations to interpret international treaties "in conformity with principles of justice and international law"[2] more seriously, so as to promote more consistency between trade law and the human rights obligations of all WTO member states, and other principles (such as due process) that underlie the legal system of the WTO. Part IV asserts that global interdependence (of economic markets, trade governance, environmental issues, and security risks) requires more than simply new governance mechanisms for the collective supply of international public goods. It also requires additional limitations on abuses of public

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1. Jide Nzelibe, *The Case Against Reforming the WTO Enforcement Mechanism*, 2008 U. ILL. L. REV. 319.

2. Vienna Convention on the Law of Treaties, pmbl., May 23, 1969, 1155 U.N.T.S. 331; U.N. Charter art. 1, para. 1.

and private power based on respect for constitutional pluralism, the principles for resolving conflicts of laws by referring to the laws of the importing country (e.g., regarding product and consumer protection standards) or of the exporting country (e.g., regarding production standards), mutual recognition, international harmonization, or multilevel regulation of standards. One-sided power oriented international law doctrines, as applied by Nzelibe, may lead to wrong policy conclusions. Part V argues that there are strong arguments *in favor* of reforming the WTO enforcement mechanisms so as to better protect consumer welfare and other general citizen interests in open markets and in the judicial protection of rule of law.

I. METHODOLOGICAL CRITICISM[3]

Nzelibe convincingly explains the obvious, that introducing collective sanctions in cases of violations of WTO law is likely to increase the global level of protectionism without offsetting compliance benefits, and that allowing intergovernmental monetary damages risks leading to excessive levels of litigation and protection costs higher than the putative benefits for developing countries (LDC). For these and other reasons, it appears unlikely and undesirable that WTO members will approve these proposals, preventing them from becoming WTO law.

Nzelibe's paper focuses on certain intergovernmental dimensions of the WTO sanctions system without examining the WTO sanctions regime more comprehensively, for instance by addressing the following methodological, constitutional, and political questions:

- Why should an economic analysis of the WTO sanctions regime focus on "realist" reform proposals, such as increasing governmental rights of states to impose collective sanctions and request monetary compensation rather than on liberal (i.e., liberty-based) and constitutional reforms, such as decentralizing WTO disputes by increasing private rights and judicial remedies in domestic courts, as done in the WTO Agreements on TRIPS, Government Procurement, and on the Accession of China?[4]

- Does the WTO sanctions system regulate the relationships between intergovernmental and domestic sanctions efficiently? For instance, why does WTO law require only China to protect pri-

3. This section is based on my written comment of December 2006 on the paper by Professor Nzelibe as presented and discussed at the conference in December 2006. Nzelibe's revised paper responds to my comments, wrongly attributing to me the proposition of "private access to WTO litigation." *See* Nzelibe, *supra* note 1, at 330. I have consistently argued for delegating WTO disputes over private rights to *domestic courts* provided they are authorized to apply the relevant GATT/WTO rules.

4. *Cf.* Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273 (2006).

vate "right[s] to import and export"?[5] What are the economically optimal policy instruments for a more efficient WTO sanctions regime from economic and liberal perspectives? Would "economic analysis" confirm that the GATT concept of "rebalancing reciprocal concessions" by means of retaliation is a myth[6] and economically inefficient for promoting consumer welfare?

- What kind of legal and judicial remedies would a theory of justice require? Why do WTO Members and WTO dispute settlement bodies neglect their legal obligation to interpret international treaties "in conformity with the principles of justice and international law," as prescribed in the Vienna Convention on the Law of Treaties?

- Why have traditional public international law rules on state responsibility, such as reparation of injury, been excluded in GATT/WTO dispute settlement practices? Would "institutional analysis" confirm that WTO dispute settlement bodies risk being incapable of calculating the proposed monetary damages?

- Why have proposals for suboptimal, intergovernmental WTO sanctions, such as collective sanctions and monetary compensation, been made mainly by LDCs?

- Could a WTO requirement of "WTO-consistent interpretation" by domestic courts, and of prior exhaustion of local remedies in case of infringements of private rights protected by WTO law, reduce the number of intergovernmental disputes?

- Should a WTO sanctions system differentiate between the different kinds of WTO disputes depending on the nature of their underlying conflicts of interests?[7]

- Why are WTO governments only willing to prevent intergovernmental disputes by alternative private access to national and international courts with more effective judicial remedies in the context of regional agreements (e.g., regarding the EC, EEA, NAFTA, and Andean Common Market Agreements), but resist such alternative dispute settlement mechanisms in WTO/DSU negotiations?

5. World Trade Organization, Protocol on the Accession of the People's Republic of China, Nov. 23, 2001, WT/L/432, Pt. I, sec. 5, para. 1 [hereinafter WTO Protocol on the Accession of China].

6. *Cf.* Holger Spamann, *The Myth of 'Rebalancing' Retaliation in WTO Dispute Settlement Practice*, 9 J. INT'L ECON. L. 31 (2006).

7. *Cf.* Ernst-Ulrich Petersmann, *Prevention and Settlement of Transatlantic Disputes: Legal Strategies for EU/US Leadership*, *in* TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO 3, 30 (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003).

Also from economic and utilitarian perspectives, the WTO dispute settlement and sanctions systems remain inefficient and suboptimal in many ways:

- they proceed from the principle of state sovereignty to restrict trade—rather than from equal basic freedoms (as the first principle of justice) and recognition of citizens as legal subjects of modern, international trade law and main actors in international trade (e.g., as individual producers, traders, investors, and consumers);

- they protect neither consumer welfare nor nondiscriminatory conditions of competition effectively;

- the authoritarian premises of GATT/WTO law—as reflected in the treatment of producers, investors, traders, and consumers as mere objects of authoritarian trade governance rather than as legal subjects and self-interested guardians of the rule of law in international trade—undermine the democratic acceptability and effectiveness of WTO rules in domestic legal systems;

- the intergovernmental focus of WTO dispute settlement procedures unnecessarily politicizes international trade disputes and often transforms private disputes (e.g., over private intellectual property rights) into disputes among governments entailing political and macroeconomic distortions (e.g., in case of trade retaliation);

- the intergovernmental WTO rules offer inadequate incentives for rule compliance (e.g., by *not* requiring WTO-consistent interpretation and judicial application of WTO rules by domestic judges, and by *not* providing for domestic, decentralized enforcement of WTO guarantees of freedom and of nondiscriminatory conditions of competition among private competitors);

- intergovernmental monetary compensation or collective sanctions further reduces consumer welfare without effectively sanctioning protectionist rent seeking.

International relations theory and international law doctrine distinguish realism, liberalism, institutionalism, and constructivism as the four major theoretical approaches to international relations and international law.[8] When, based on my personal experiences as legal advisor in the Uruguay Round Negotiating Groups, which elaborated the WTO Dispute Settlement Understanding (DSU) and the institutional framework

8. THE METHODS OF INTERNATIONAL LAW (Steven R. Ratner & Anne-Marie Slaughter eds., 2004); Kenneth W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT'L & INT'L REL. 9, 12 (2006).

of the WTO Agreement, I published one of the first books on the GATT/WTO dispute settlement system following the entry into force of the WTO Agreement, I emphasized the need to use these simplifying theories in complementary rather than mutually exclusive ways[9]:

- The "realist" focus on states as the principal actors in international politics, and on their power-oriented pursuit of national interests, appears to be consistent with the intergovernmental structures of WTO law, with the "member-driven" nature of reciprocal bargaining in GATT and WTO negotiations, and with the reliance of the WTO dispute settlement system on self-help in case of violations of WTO obligations (e.g., recourse to WTO dispute settlement procedures and to countermeasures *vis-à-vis* WTO Members refusing to implement WTO dispute settlement rulings).

- The trade policies of constitutional democracies are, however, also clearly influenced by the liberty-based, normative arguments of economic, political, and legal liberalism, as illustrated by the focus of GATT/WTO rules on nondiscriminatory conditions of competition in economic markets as well as by the strong influence of export industries and import-competing producers on "political markets" (such as market access negotiations by periodically elected governments that must respond to the pressures, demands, and rational choices of their domestic constituencies). The liberal criticism of treating states as a "black box" offers politically important insights into the domestic origins of intergovernmental negotiations (e.g., the influence of private rent seeking), their "domestic policy functions" (e.g., for limiting domestic political pressures for import protection by offering additional export opportunities), and the policy impact of nongovernmental organizations (NGOs) on intergovernmental relations.

- The institutional changes from GATT to the WTO also illustrate that—just as economic "market failures" can be reduced through mutually agreed rules and institutions (e.g., on protection of property rights and prohibition of cartels)—rational governments can reduce "government failures" and collective action problems, such as uncertainty and free riding, by deliberately changing the legal and institutional (dis)incentives for (non)cooperation. For instance, the Uruguay Round agreement providing for compulsory jurisdiction of WTO dispute settlement bodies for independent, factual, as well as legal, dispute settlement findings and the creation of the WTO Appellate Body enabled the United

9. ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 4–24 (1997).

States and other powerful WTO Members to legally limit their traditional recourse to unilateral self-help and trade sanctions.[10] Constitutional theory explains under which conditions rational actors can create "constitutional moments" inducing individuals to limit their selfish maximization of short-term interests by means of long-term rules of a higher, legal rank that protect their common long-term interests.

- The impact of power, liberal values (such as rational maximization of self-interests through voluntary market exchanges), institutions, constitutions, and NGOs on intergovernmental negotiation strategies reveals that—just as the perennial conflicts inside the minds of individuals (between individual rationality, morality, sentiments, and biological and psychological determinants of our physical bodies, for example) may be perceived and resolved in many different ways (e.g., by impartial reasoning about different human conceptions, psychoanalysis of contested facts, religious commitment to metaphysical beliefs)—national and international, political and legal strategies tend to be constructed by diverse human and social understandings, ideas, rules, and other complex, social determinants. The successful transformation of the European "international law among states," and of centuries of power politics among EC member states, into a European "Community Law" protecting peaceful cooperation among more than 480 million free "EC citizens" across national frontiers, confirms that changes in the constitutional structures, incentives, and perceptions of human relations can be of constitutive importance for individual and social conduct not only inside states, but also in transnational relations beyond states. Constitutionally defined and socialized rules of conduct can change utility-maximizing conduct of rational individuals interested in avoiding the psychological discomforts of illegal or otherwise unsocial behavior. In the trade policy area, for example, empirical studies confirm that WTO membership and the legal accountability for violations of WTO obligations can effectively change the conduct of economic and political actors (China is one example), even if such institutional changes never fully determine human choices.

Hence, my own publications have advocated the following:

- One-sided state-centered approaches to international law are losing democratic support and legitimacy inside and among constitutional democracies: producer-driven, intergovernmental trade governance in the WTO, for instance, is increasingly challenged

10. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 23, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

by civil society, parliaments, and NGOs for neglecting consumer welfare, human rights, democratic governance, protection of the environment, and social justice (e.g., poverty reduction), and for proving incapable of transforming the WTO legal and dispute settlement system into a more efficient and more just trading system. Also, the political consensus for concluding the Doha Development Round negotiations among 150 WTO Members may not materialize without broader "constitutional approaches" promoting more democratic participation by citizens, more democratic legitimacy, and more social justice in the WTO (e.g., in terms of responding to civil society concerns, capacity-building in LDCs, and sharing of adjustment costs).[11]

- Just as the transformation of the intergovernmental European system of international law into a citizen-centered, European constitutional order was driven by multilevel judicial governance (notably by the EC Court of Justice, the European Court of Human Rights, and national courts), so could a more coherent, multilevel judicial governance system of the WTO play a crucial role in promoting international rule of law, as well as in clarifying and strengthening the "principles of justice" underlying WTO law, for the benefit of citizens and of citizen-oriented interpretations of WTO rules and procedures.[12] The universal recognition of human rights, national constitutionalism, and global threats (like the terrorist attacks in September 2001 preceding the launching of the Doha Round negotiations in November 2001) has facilitated changes in the "bounded rationality" of governments enabling a progressive transformation of the power-oriented GATT 1947 system into a more rule-oriented WTO legal system based on principles of "rational choice constitutionalism."[13]

II. RATIONAL CHOICE THEORY REQUIRES MULTILEVEL CONSTITUTIONAL APPROACHES TO INTERNATIONAL ECONOMIC LAW

Economists, political scientists, and lawyers tend to agree today that, inside citizen-driven markets and constitutional democracies, analyses of the economy, the polity, and of law should proceed from norma-

11. Ernst-Ulrich Petersmann, *Constitutionalism and WTO Law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 32, 34 (Daniel L. M. Kennedy & James D. Southwick eds., 2002); *cf.* Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, *in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 5–57 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

12. *See* Ernst-Ulrich Petersmann, *Multilevel Judicial Governance in the WTO Without Justice?*, *in* THE WTO AT 10: GOVERNANCE, DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES (Merit E. Janow ed., 2007).

13. *See infra* Part II.

tive individualism and from the assumption of rational choices of individuals confronted with scarcity of resources and with competition among rational egoists for scarce goods and services. Regarding international trade law and trade policies among states, however, most international relations scholars, economists, and lawyers—Nzelibe included—dismiss constitutional arguments as "rhetorical" in view of the "conscious choice" by WTO member states and their politicians in favor of a power-oriented system of "international law among states." According to Nzelibe, "one has to acknowledge this fundamental departure from the first-best scheme" until the "distant future" when "some public-spirited politicians might decide to reverse course on this crucial institutional design issue."[14] Nzelibe infers from this power-oriented premise that, in "the current scheme, in which governments invariably act as political filters in deciding which claims to bring, bilateral retaliation might serve as the best available remedial mechanism for addressing international trade violations."[15]

The adoption of national constitutions by almost all UN member states confirms the insight of constitutional theory that citizens have rational self-interests in limiting—in all human interactions at national, transnational, and international levels—the perennial abuses of public and private powers through long-term rules of a higher legal rank that protect equal basic freedoms and social rights against such abuses of power and enable the collective supply of public goods. Since the Constitution [sic] Establishing the International Labor Organization (ILO) of 1919, many other intergovernmental agreements for the collective supply of international public goods by international organizations—such as the World Health Organization (WHO), Food and Agriculture Organization (FAO), and the UN Educational, Scientific and Cultural Organization (UNESCO)—were named "constitutions" in view of the fact that they:

(1) constitute a new legal order with legal primacy over that of the member states;

(2) create new legal subjects and hierarchically structured institutions with limited governance powers;

(3) provide for institutional checks and balances, e.g., among rule-making, administrative and dispute settlement bodies in the WTO;

(4) legally limit the rights of member states (e.g., regarding withdrawal, amendment procedures, and dispute settlement procedures);

14. Nzelibe, *supra* note 1, at 330.
15. *Id.*

(5) provide for the collective supply of "public goods" that, as in the case of the above-mentioned treaty constitutions (of the ILO, WHO, and UNESCO), are partly defined in terms of human rights; and often

(6) operate as "living constitutions" whose functions—albeit limited in scope and membership—increasingly evolve in response to changing needs for international cooperation.

International "treaty constitutions" differ fundamentally from national constitutions by their limited policy functions and less-effective constitutional restraints. State-centered international lawyers therefore prefer to speak of "international institutional law." From citizen-oriented economic and constitutional perspectives, however, international organizations are becoming no less necessary for the collective supply of public goods (such as the legal protection of nondiscriminatory competition in world markets) than national organizations. The new international regulatory demands for and new forms of international governance require new forms of democratic participation and legitimization, as well as new judicial and constitutional safeguards of the rule of law and protection of individual rights. *International constitutionalism* is a functionally limited, but necessary, complement to *national constitutionalism* which, given an increasingly globally interdependent world, can only protect human rights and democratic self-government coherently and effectively when used together as interrelated networks based on constitutional pluralism. Both national and international treaty constitutions reflect dynamic, political *equilibria* between universal and particular, procedural, as well as substantive values, whose empowering functions, limiting functions, legitimizing functions, adjustment functions, and manifold interrelationships may differ from one field (like the top-down structures of the collective security system based on the UN Charter and the UN Security Council) to the other (such as the bottom-up, tripartite structures of ILO law for the protection of core labor rights and labor markets). The progressive adjustment of national and international legal systems is increasingly influenced by the emergence of "international administrative law" and "judicial governance" to clarify common legal principles (such as due process of law) and limit new forms of multilevel governance that underlie incomplete, international treaty regimes and their administrative implementation and judicial review.

III. NEED FOR BASING INTERNATIONAL LAW AND JUDICIAL GOVERNANCE ON "PRINCIPLES OF JUSTICE"

The understanding of law as a struggle for just rules and fair procedures goes back to ancient Greece[16] and is today widely shared in constitutional democracies. As explained by L. Fuller, law must order social life not only by "subjecting human conduct to the governance of rules";[17] law must also aim at establishing a *just* order and procedures for the *fair* resolution of disputes.[18] Since the American and French democratic revolutions in the Eighteenth Century, fairness and justice have been increasingly defined not only in terms of procedural justice, such as rights to a fair hearing, democratic participation, and access to courts, but also in terms of substantive human rights.[19] The UN Charter, in order "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,"[20] commits all UN member states to "respect . . . and observ[e] . . . rights and fundamental freedoms for all,"[21] as well as "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[22] Numerous UN human rights instruments confirm "the inherent dignity and . . . the equal and inalienable rights of all members of the human family [is] the foundation of freedom, justice and peace in the world,"[23] and have progressively specified and extended the conventional and general human rights obligations of UN member states. Also, the Vienna Convention on the Law of Treaties affirms "that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law."[24] Yet, as most UN bodies continue to be dominated by intergovernmental power politics, the intergovernmental structures of UN law have failed to effectively empower citizens as legal subjects of UN law and "democratic owners" of UN governance bodies. As international law requires inter-

16. On the ancient Greek concept of "law as participation in the idea of justice" see CARL JOACHIM FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 8–12 (1963). The Greek and Roman words for "law" (dikaio, jus) and "justice" (dikaiosyni, justitia) have an identical core.

17. LON L. FULLER, THE MORALITY OF LAW 96 (1969).

18. For Fuller's criticism of positivist conceptions of law, see Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 641 (1958).

19. *See, e.g.*, THE FEDERALIST NO. 51 (James Madison) ("Justice is the end of government. It is the end of civil society. It ever has been and will be pursued until it is obtained, or until liberty be lost in the pursuit.").

20. U.N. Charter pmbl.

21. *Id.* art. 55.

22. *Id.* art. 1.

23. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. Doc. A/810 (Dec. 12, 1948).

24. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

preting the "principles of justice" in conformity with the universal human rights obligations of all UN member states, human rights advocates increasingly challenge the lack of legitimacy of this continued UN focus on "sovereign equality of states" and on intergovernmental power politics, rather than on human rights and individual and democratic empowerment of citizens.[25]

Liberal and communitarian theories of justice justify the focus of international law on state sovereignty by the view that "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."[26] This national conception of legal justice and of purely domestic causes of poverty is being challenged by the universal recognition of human rights and the globalization of markets, social interdependencies, and related risks.[27] F.J. Garcia has argued that the five "circumstances of justice" (as identified by Rawls) necessitating legal principles of justice inside national communities also exist increasingly in international relations: scarcity of resources, shared geographical spaces, capacity to help and harm each other, nonaltruistic behavior of most people, and conflicting claims whose peaceful settlement requires "principles of justice."[28] Just as principles of representative national democracy are increasingly complemented inside the EC by Community law principles of participatory, deliberative, and international democracy in order to better legitimize and control the EC's governance mechanisms and international harmonization of national laws, so does the democratic legitimacy of the intergovernmental UN and WTO governance mechanisms depend on transforming the power-oriented "society of states paradigm" into a more citizen-oriented, communitarian paradigm reflecting the common interests, common risks, and common responsibilities of citizens and states for the collective supply of international public goods and for an equitable sharing of the adjustment costs. Justice must become a political virtue not only of communities inside states, but also for functionally defined international communities, including the "WTO community," benefiting from the international division of labor and international adjustment processes made possible by WTO law. The less capable national constitutions and national societies remain in securing the well being of national citizens, the stronger the need for the promotion of international communities and "transnational justice" supporting international rule making for the collective supply of international public goods. If international governance becomes an indispensable "fourth branch of governance" supplementing national legislative, administrative, and judicial governance

25. *See, e.g.*, ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004).

26. JOHN RAWLS, THE LAW OF PEOPLES 117 (1989).

27. *See, e.g.*, T. POGGE, WORLD POVERTY AND HUMAN RIGHTS (2003).

28. *See* Frank J. Garcia, *Globalization and the Theory of International Law* (Boston Coll. Law Sch. Research Paper No. 75, 2005).

mechanisms,[29] international governance mechanisms must become consistent with democratic and social "principles of justice."

The WTO Agreement explicitly recognizes "basic principles and . . . objectives underlying this multilateral trading system."[30] Some of these principles are specified in WTO provisions, (e.g., the GATT[31]) and other WTO agreements on trade in goods,[32] services,[33] and trade-related intellectual property rights.[34] The WTO requirement of interpreting WTO law "in accordance with customary rules of interpretation of public international law"[35] refers to more than formal interpretative principles (such as *lex specialis, lex posterior, lex superior*) aimed at mutually coherent interpretations on the basis of legal presumptions of lawful conduct of states, of the systemic character of international law, and the mutual coherence of international rules and principles. The customary law requirement of interpreting treaties "in conformity with principles of justice" also calls for clarifying the substantive principles of justice underlying WTO law, like freedom, nondiscrimination, rule of law, independent third-party adjudication and preferential treatment of LDCs. The basic WTO principle of progressive liberalization and legal protection of liberal trade can be justified by all liberty-based theories of justice, such as:

- utilitarian theories defining justice in terms of maximum satisfaction of individual preferences and consumer welfare through voluntary exchanges;
- libertarian theories focusing on protection of individual liberty and property rights;
- egalitarian concepts defining justice more broadly in terms of equal human rights and democratic consent; and

29. *See* Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 440 (1996).

30. Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 155, 33 I.L.M. 1144 (1994).

31. General Agreement of Tariffs and Trade-Multilateral Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 13, 15 (1994) [hereinafter GATT]. Exemplary provisions are found at GATT art. III, ¶2; art. VII, ¶1; art. X, ¶3; art. XIII, ¶5, art. XX, §j; art. XXIX, ¶6; art. XXXVI, ¶9.

32. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 279 (1994); Agreement on Rules of Origin art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 397 (1994).

33. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1994).

34. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994).

35. DSU art. 3.2.

- international theories of justice based on sovereign equality and effective empowerment of states to increase their national welfare through liberal trade.[36]

Hence, the diversity of libertarian, egalitarian, or utilitarian value preferences should not affect the recognition that WTO guarantees of freedom, nondiscrimination, and rule of law reflect, albeit imperfectly, basic principles of justice by enhancing individual liberty, nondiscriminatory treatment, economic welfare, and poverty reduction across frontiers. In terms of the Aristotelian distinction between "general principles of justice" (like liberty, equality, fair procedures, and promotion of general consumer welfare) and particular principles of justice requiring adjustments depending on particular circumstances, WTO rulemaking and dispute settlement procedures can also contribute to "corrective justice" and "reciprocal justice," just as the special, differential and nonreciprocal treatment of less-developed WTO Members in numerous WTO provisions may contribute to "distributive justice." The focus of the WTO Doha Development Round negotiations on capacity building and trade facilitation for the benefit of LDCs reflects the political insight that consensus-based trade negotiations among 150 WTO Members are likely to fail if they only aim at "international order"[37] without regard to social justice and democratic acceptability of future worldwide agreements in the more than one hundred less-developed WTO member countries.

IV. GLOBAL MARKETS REQUIRE A MULTILEVEL ECONOMIC CONSTITUTION RESPECTING HUMAN RIGHTS AND CONSTITUTIONAL PLURALISM

Economic markets, like political markets, are not gifts of nature, but have to be legally constituted, regulated, and institutionally protected by monetary competition and judicial authorities protecting monetary stability, nondiscriminatory conditions of competition, rule of law, and private autonomy. The overall coherence of national and international economic law necessary for an efficient functioning of international markets depends not only on coherent legal principles of international private and public law, but also on their democratic recognition and support as legitimate and just. Modern theories of justice postulate "basic equal freedoms" as the "first principle of justice," and constitutional "difference principle[s]" as "secondary principles of social justice" justifying preferential treatment of disadvantaged individuals whose personal self-

36. For overviews of these theories, see F.J. GARCIA, TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE (2003); A. BEVIGLIA ZAMPETTI, FAIRNESS IN THE WORLD ECONOMY: US PERSPECTIVES ON INTERNATIONAL TRADE RELATIONS (2006).

37. On the pursuit of "order" rather than "justice" in international political relations see ORDER AND JUSTICE IN INTERNATIONAL RELATIONS (Rosemary Foot et al. eds., 2003); JANNA THOMPSON, JUSTICE AND WORLD ORDER (1992).

development requires special, social assistance.[38] The principles of international private law (e.g., for allocating jurisdiction in case of "conflicts of laws"), international public law (e.g., for delimiting "sovereign equality" and legal responsibility of states), international economic law (e.g., the principles of mutual recognition and harmonization of product and production standards), and the law of international organizations (e.g., protecting international minimum standards for human rights, collective security, and peaceful settlement of disputes) dynamically evolve and interact in response to the structural changes of international relations so as to promote international cooperation and prevent and settle international conflicts on the basis of rule of law.

In the EC, the progressive transformation of the intergovernmental EEC Treaty into a multilevel constitutional law protecting EC citizen rights was driven by democratic and judicial struggles for better protection of individual rights and led, also, to extension of national principles of justice to the multilevel governance of the EC and its "social market economy." The EU Charter of Fundamental Rights and the 2004 Treaty Establishing a Constitution for Europe[39] (TCE) protect specific dignity rights,[40] freedoms,[41] equality rights,[42] solidarity rights,[43] EU citizen rights,[44] and rights of access to justice[45] that are all "founded on the indivisible, universal values of human dignity, freedom, equality and solidarity."[46] European constitutional law has evolved into a complex system of multilevel guarantees protecting individual and democratic freedom and nondiscriminatory conditions of competition in the EC's common market based on the rule of European law across national boundaries. Respect for the "indivisible" individual liberty to decide which equal freedoms an individual values most justifies also the EC guarantees of economic freedoms, such as freedom of profession,[47] freedom to conduct a business in accordance with the rule of law,[48] or the right to property,[49] which may be of no less existential importance for individual self-development than civil and political rights. Also the European Court of Human Rights

38. Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights and the Constitution of International Markets*, 37 LOY. L. REV. 407, 413–14 (2004).

39. The text of the Charter of Fundamental Rights is published in the Official Journal of the EC, Charter of Fundamental Rights of the European Union, Dec. 12, 2000, 2000 O.J. (C 364) 1–22, and is also included in the Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 41–54 [hereinafter EC Const. Treaty], signed by all twenty-seven EC member states and ratified so far by eighteen states. Even if the TCE should not enter into force, its basic constitutional principles are likely to remain part of European constitutional law.

40. EC Const. Treaty, *supra* note 39, arts.61–65.

41. *Id.* arts. 66–79.

42. *Id.* arts. 80–86.

43. *Id.* arts. 87–98.

44. *Id.* arts. 99–106.

45. *Id.* arts. 107–110.

46. Charter of Fundamental Rights of the European Union, *supra* note 39.

47. EC Const. Treaty art. 75.

48. *Id.* art. 76.

49. *Id.* art. 77.

(ECtHR) protects complaints by economic actors, such as companies, and fundamental freedoms and property rights in the economy as well as in the polity. Europe's international and judicial guarantees of economic and political freedoms go far beyond those in UN human rights law, which, for historical and political reasons, left the regulation of international economic relations to specialized UN Agencies and other intergovernmental agreements.

The historical reasons for the incomplete protection of economic liberties in UN human rights instruments and for leaving reciprocal economic liberalization to the Bretton-Woods Agreements must not lead to the wrong conclusion that economic liberties (such as freedom of profession and private property) deserve less constitutional protection at international levels. The "human rights functions" of the core labor standards and "tripartite governance structures" guaranteed by the ILO Constitution are emphasized in the ILO Preamble, according to which "the failure of any nation to adopt humane conditions of labour is an obstacle" to social justice and lasting peace in other countries.[50] The mutually beneficial, peaceful economic cooperation among billions of producers, investors, traders, and consumers on the basis of GATT and WTO rules has enhanced economic welfare, freedom, and the rule of international law in all 150 WTO member countries beyond what has ever been possible without these international agreements. As international agreements on the reciprocal liberalization and regulation of international movements of goods, services, persons, capital, and related payments tend to go far beyond national constitutional guarantees, their international guarantees of economic freedom, nondiscrimination, and rule of law can serve "constitutional functions" for correcting "constitutional failures" at national levels of governance and for extending legal and judicial protection of economic freedoms and mutually beneficial cooperation among free citizens across discriminatory state frontiers, without limiting the sovereignty of countries to protect their often higher national standards of human rights and social justice.[51]

An increasing number of international lawyers in Europe and North America acknowledge the potential "constitutional functions" of international law for the collective supply of "international public goods." They refer to a "WTO Constitution" in view of

(a) the comprehensive rule making, executive, and (quasi-) judicial powers of WTO institutions;[52]

50. Int'l Lab. Org., *Constitution of the International Labour Organization*, *in* INTERNATIONAL GOVERNMENT ORGANIZATIONS: CONSTITUTIONAL DOCUMENTS 994 (Amos J. Peaslee ed., 1974) [hereinafter ILO Const.].

51. *See generally* ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991).

52. *See* JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 36–100 (1998).

(b) the "constitutionalization" of WTO law resulting from the jurisprudence of the WTO dispute settlement bodies;[53]

(c) the domestic "constitutional functions" of GATT/WTO rules, for example, for protecting constitutional principles such as freedom, nondiscrimination, rule of law, proportionality of government restrictions, and domestic democracy (for instance, by limiting the power of protectionist interest groups) for the benefit of transnational cooperation among free citizens;[54]

(d) the international "constitutional functions" of WTO rules, for example, for the promotion of "international participatory democracy" (e.g., by holding governments internationally accountable for the "external effects" of their national trade policies, by enabling countries to participate in the policy making of other countries),[55] the enhancement of "jurisdictional competition among nation states,"[56] and "the allocation of authority between constitutions;"[57]

(e) the necessity of "constitutional approaches" for a proper understanding of the law of comprehensive international organizations that use constitutional terms, methods, and principles for more than fifty years;[58] or

(f) the need to interface and coordinate different levels of governance on the national and international level.[59]

International governance, by rulemaking, rule implementation, and adjudication at the international level, raises legitimacy and constitu-

53. *See* Deborah Z. Cass, *The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39 (2001).

54. *See* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000); Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organisation*, 24 U. PA J. INT'L ECON. L. 1 (2003) (contrasting the "inward-looking, economic vision of the WTO" in helping member countries addressing internal political failures with the "external, participatory vision of the WTO" helping WTO members to address concerns raised by policy decisions in other countries).

55. *See, e.g.*, Peter M. Gerhart, *The WTO and Participatory Democracy: The Historical Evidence*, 37 VAND. J. TRANSNAT'L L. 897 (2004).

56. *See* John O. McGinnis, *The World Trade Organization as a Structure of Liberty*, 28 HARV. J. L. & PUB. POL'Y 81 (2004).

57. Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623, 627 (2006).

58. *See*, *e.g.*, PETERSMANN, *supra* note 51; Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, *in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31 (Grainne de Búrca & Joanne Scott eds., 2001). For examples of Constitutional terms usage, see generally ILO Const., *supra* note 50; EC Const. Treaty, *supra* note 39; *Constitution of the World Health Organization*, *in* BASIC DOCUMENTS (46th ed. 2007); Food and Agriculture Organization [FAO], *Constitution of the Food and Agriculture Organization*, *in* 1 BASIC TEXTS OF THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (2006 ed.).

59. *See* Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. U.N. L. 261, 261–64 (2003).

tional problems that cannot be solved by transferring the constitutional methods applied inside constitutional democracies to the level of functionally limited intergovernmental organizations. Some organizations, such as the World Bank, the OECD, and the EU Commission, have committed themselves to "principles of good governance" (such as transparency, democratic participation, accountability, effectiveness, and coherence) so as to legitimize their international governance and integration law. Yet, such bureaucratic justifications cannot effectively protect human rights and constitutional democracy from being undermined through intergovernmental collusion, as illustrated by the secretive taxation of citizens and the intergovernmental redistribution of domestic income by means of "voluntary export restraints" and power-oriented trade governance under GATT 1947. UN human rights bodies, the ILO, and civil society rightly insist on the need for human rights approaches to the interpretation and application of international economic law, taking into account the obligations of all UN member states to respect, protect, and promote human rights with due respect for the diversity of constitutional democracies and national conceptions of social justice.[60]

Also, economists since Adam Smith emphasize that economic welfare depends on open markets and rule of law, which cannot remain effective over time without respect for justice (*ubi commercium, ibi* jus).[61] Markets and human rights proceed from the same value premise: that individual autonomy must be respected, that values can be derived only from the rational consent of the individual (normative individualism), and that economic markets as well as political markets are the most efficient, citizen-driven instruments for realizing individual and democratic self-development and welfare. The information, coordination, and "sanctioning" functions of market mechanisms are ultimately based on decentralized dialogues among citizens about the value, production, and distribution of scarce goods and services. An increasing number of empirical studies confirm that the economic welfare of most countries, and the consumer welfare of their citizens, are correlated to their constitutional guarantees of freedom, property rights, and nondiscriminatory competition[62]: "individual rights [are] a cause of prosperity."[63] Because

60. Ernst-Ulrich Petersmann, *The 'Human Rights Approach' Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is It Relevant for WTO Law and Policy?*, 7 INT'L ECON. L. 605 (2004).

61. The founding father of economics, Adam Smith, justified his "system of natural liberty" on considerations of both economic welfare and justice: "Justice . . . is the main pillar that upholds the whole edifice. If it is removed, . . . the immense fabric of human society . . . must in a moment crumble into atoms." ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (D.D. Raphael & A.L. Mactie eds., 1976) (1775).

62. *See, e.g.*, JAMES GWARTNEY ET AL., ECONOMIC FREEDOM OF THE WORLD: 2005 ANNUAL REPORT (2005) (emphasizing the empirical correlation between economic freedom, economic welfare, relatively higher average income of poor people, and, with a few exceptions (such as Hong Kong), political freedom). Already Adam Smith's inquiry into the nature and causes of the wealth of nations concluded that the economic welfare of England was essentially due to its legal guarantees of eco-

economic welfare can be increased by "successful struggle for rights of which the right to property is the most fundamental,"[64] "almost all of the countries that have enjoyed good economic performance across generations are countries that have stable democratic governments."[65] The UN High Commissioner for Human Rights and UN development strategies increasingly stress that the unnecessary, widespread poverty of more than one billion people in LDCs living on $1 or less per day reflects not only a denial of human rights, but also of rights-based development strategies. Additionally, the interpretation of international legal obligations of promoting "sustainable development" in conformity with the human rights obligations of governments could also empower individuals, their representative institutions, and courts to use the obligatory nature of human rights and of corresponding government obligations for rendering poverty reduction strategies more effective. Such empowerment could lead to holding governments more accountable for their frequent disregard of human rights and their welfare-reducing trade protectionism.[66]

V. THE CASE *FOR* REFORMING THE WTO ENFORCEMENT MECHANISM

WTO law and its Dispute Settlement Understanding regulate "the dispute settlement system of the WTO"[67] as a multilevel system with compulsory jurisdiction for judicial settlement of disputes at intergovernmental and domestic levels. Whereas the WTO dispute settlement panels, the WTO Appellate Body, WTO arbitration, and domestic courts serve independent, judicial functions, the intergovernmental WTO "Dispute Settlement Body is . . . to administer these rules and procedures and . . . the consultation and dispute settlement provisions of the covered agreements."[68] The administration of justice in the WTO legal system is, thus, based on multiple horizontal and vertical "checks and balances." As the WTO dispute settlement system serves not only "to preserve the rights and obligations of members under the covered agreements," but also "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law,"[69] the judicial clarification of WTO law constitutionally limits the "member-

nomic freedom, property rights, and legal security for investors, producers, traders, and consumers. ADAM SMITH, NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

63. MARCUR OLSON, POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS 187 (2000).

64. RICHARD PIPES, PROPERTY AND FREEDOM 291 (1999).

65. OLSON, *supra* note 63, at 43.

66. *Cf.* Louise Arbour, *Using Human Rights to Reduce Poverty*, DEVELOPMENT OUTREACH, Oct. 2006, http://www1.worldbank.org/devoutreach/october06/article.asp?id=379.

67. DSU art. 3.2.

68. DSU art. 2.1.

69. DSU art. 3.2.

driven governance"[70] and contributes to the progressive development of WTO law.

The constitutional functions and democratic legitimacy of this multilevel "judicial governance"[71]—and, more generally, of the multilevel legal and judicial WTO guarantees of freedom, nondiscrimination, rule of law, and national sovereignty in international trade—remain inevitably contested depending on the diverse, national conceptions of constitutional democracy and other forms of governance. From a constitutional and citizenship perspective, I have long argued that the higher legal rank of constitutional and international guarantees of freedom and rule of law inside constitutional democracies requires legal protection of WTO rules by all—legislative, executive, and judicial—governance powers vis-à-vis the perennial abuses of public and private power. This constitutionally mandated "multiple protection"[72] assigns to independent courts autonomous, judicial functions that are different from democratic and administrative governance functions. Judicial review can be constitutionally justified as being necessary for enforcing the constitutional rules prescribed by the people, as well as the individual rights retained by citizens, *vis-à-vis* the everyday exercises of majoritarian politics and governance powers, subject to respect for the constitutional limits of judicial powers *vis-à-vis* other forms of democratic governance.[73] From a rights-based constitutional approach to international integration, the constitutional ideal of the Eighteenth Century democratic revolutions in the United States and France, that rights depend on the separation of the judicial power from the legislature and executive, and that judges must defend constitutional freedoms against majoritarian and administrative abuses of power, also offers legitimacy to judicial interpretation and protection of WTO rules for the benefit of citizens—without prejudice to the executive powers of WTO Members to adopt authoritative interpretations[74] or amend WTO rules,[75] or the power of other dispute settlement bodies to chal-

70. *See* Ernst-Ulrich Petersmann, *From 'Member-Driven Governance' to Constitutionally Limited 'Multi-Level Trade Governance' in the WTO*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 86–110 (G. Sacerdoti et al. eds., 2006).

71. *Cf.* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000) (explaining that constitutional courts "perform four basic functions: (1) they operate as a 'counterweight' to majority rule; (2) they 'pacify' politics; (3) they legitimize public policy; and (4) they protect human rights.").

72. For "dualist conceptions" of democracy as two-track process, see, e.g., BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3–23 (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 5–6 (1998). *See also* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001), (arguing that democratic legislatures and elections provide only an incomplete representation of the people, and that judicial interpretation and application of the Constitution by courts are integral parts of constitutional self-government).

73. On the diverse theories of justification of judicial review see Michael Troper, *The Logic of Justification of Judicial Review*, 1 INT'L J. CONST. L. 99, 99–121 (2003).

74. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13, 19 (1994).

75. *Id.* at 33 I.L.M. 20.

lenge previous WTO interpretations and engage in "judicial dialogues" complementing "deliberative democracy" and "participatory democracy."

Most of the more than two hundred legal rulings by WTO dispute settlement bodies in the context of the altogether more than three hundred WTO dispute settlement proceedings since 1995 have been regularly adopted and implemented by WTO members subject to rare exceptions, for example when the EC Council or the United States Congress lacked the necessary political majorities for amending domestic legislation so as to comply with WTO dispute settlement rulings. Courts in most WTO member countries accept legal obligations to interpret domestic trade rules in conformity with the WTO obligations of the country concerned. Yet, often at the request of their respective governments, they disregard WTO obligations and WTO dispute settlement rulings in domestic dispute settlement proceedings.[76] For instance, both the EC and the US permit only their export industries to petition WTO dispute settlement proceedings against foreign governments (e.g., pursuant to Section 301 of the US Trade Act and the corresponding "Trade Barriers Regulation" of the EC), without allowing their domestic industries and state governments to challenge violations of WTO rules in domestic courts.[77] Even though WTO law commits all domestic government bodies, trade bureaucracies are eager to limit their own judicial accountability and have only rarely agreed to WTO obligations requiring domestic courts to apply specifically agreed WTO rules at the request of private plaintiffs (as provided for in Article XX of the WTO Agreement on Government Procurement).

One of the main constitutional and political lessons of fifty years of peaceful European integration among the forty-six member countries of the Council of Europe is that the collective supply of international public goods (like consumer-driven competition and division of labor among 480 million EC citizens in the EC's common market, protection of hu-

76. *Cf.* Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is The Charming Betsy Sinking?*, 24 FORDHAM INT'L L.J. 1533 (2001). The European Court of Justice has a long history of ignoring GATT and WTO rules at the request of political EC bodies which have often misinformed the EC Court on the meaning of GATT/WTO rules and dispute settlement reports (e.g., in Case 112/80, Firma Anton Dürbeck v. Haupt Zollamt Frankfurt, 1981 E.C.R. 1095, the Commission misinformed the EC Court on an unpublished GATT dispute settlement finding against the EC, and the Court relied on this information without verifying the obviously wrong information provided by the Commission).

77. The EC's legal advocates claim that "it is difficult to point out one specific moment at which it can be established beyond doubt that WTO rules have been breached, even after a decision of a panel or report of the Appellate Body," and "that it is rarely or never possible to speak of a sufficiently serious breach of WTO law" by the political EC institutions justifying the EC's noncontractual liability for damages pursuant to Article 288 of the EC Treaty. Pieter Jan Kuijper & Marco Bronckers, *WTO Law in the European Court of Justice*, 42 COMMON MARKET L. REV. 1313, 1334 (2005). At the request of the political EC institutions the EC Court has refrained long since from reviewing the legality of EC acts in the light of the EC's GATT and WTO obligations. *Id.* at 1323–24, 1342. This judicial self-restraint has been influenced by the fact that US legislation explicitly prevents U.S. states from challenging the WTO-consistency of US federal measures. *Id.* at 1316.

man rights, democratic peace, and rule of law in and among all member states of the Council of Europe) require not only new forms of multilevel rulemaking and governance, but also new forms of citizen-driven, democratic participation, legitimization, and judicial enforcement of international rules. In view of the inevitable limitations of traditional forms of national governance in a globally interdependent world, private freedom, democracy, and social justice must be constitutionally protected against the manifold new threats by extending constitutional safeguards (like due process of law) *vis-à-vis* the new forms of international governance. Even inside the EC, the classic "community methods" of intergovernmental, supranational, parliamentary and, judicial governance and democratic participation are constantly evolving into new forms of governance, such as the creation of more than twenty-five EC Agencies, informal "open methods of coordination," multiple forms of "comitology," pan-European networks of national regulatory authorities (e.g., for the multilevel governance of competition and telecommunications inside the EC), and outsourcing by the EU Commission to private undertakings of administrative tasks (like the management of the ".eu" electronic domain name). Just as the constitutional coherence and legitimacy of these dynamic changes in multilevel governance in Europe depends on empowering citizens and courts to act as self-interested guardians of the rule of law, the fundamental rights of EC citizens, and the accountability of national and European governance agencies, so does the ever more complex delegation and limitation of governance powers in the world trading system require new constitutional safeguards that must complement the traditional forms of representative, parliamentary democracy by strengthening citizen rights and their judicial protection *vis-à-vis* abuses of multilevel trade governance. The cosmopolitan nature of international trade and consumer-driven competition protected by WTO rules should be legally reflected in domestic rights of producers, investors, traders, and consumers to challenge violations of WTO rules in the domestic courts of WTO Members without need for petitioning their home governments to transform such private disputes into intergovernmental disputes with the risk of welfare-reducing trade sanctions.

As constitutional conceptions and protection of economic rights, democracy, and judicial review differ among countries, using domestic courts for enforcing international agreements ratified by domestic parliaments for the protection of individual economic freedoms and rule of law in international trade offers not only more efficient, but also more democratically reliable legal and judicial remedies protecting individual freedom and private access to justice. Many WTO disputes arise only because WTO Members (including the United States and the EC) prevent their domestic courts from applying WTO rules. The unofficial names of WTO disputes (such as "Kodak/Fuji" or "Havana Club") reflect the fact that many intergovernmental WTO disputes are initiated by private complainants (by invoking Section 301 of the US Trade Act or

the corresponding EC Trade Barriers Regulation) in order to protect private rights or other private interests (e.g., of service suppliers, investors, government procurement suppliers, and holders of intellectual property rights).[78] WTO dispute settlement proceedings at intergovernmental levels are often suboptimal, inefficient methods for the settlement of disputes over private rights and obligations (e.g., to pay customs duties).[79] Such WTO disputes could often be prevented if domestic courts were offering effective private remedies against violations of WTO rules. Reciprocal WTO commitments to decentralize and depoliticize certain trade disputes over private rights and obligations—by enlisting domestic courts and the vigilance of self-interested citizens to interpret and apply justiciable WTO rules in domestic legal systems where traders rely on these rules—would reduce transaction costs, enhance rule of law, promote "democratic ownership" of world trade law, and limit "judicial protectionism" in domestic courts. As long as the EU and the United States cling to their mercantilist power politics of permitting only their export industries to petition WTO dispute settlement proceedings against foreign governments, without allowing their domestic industries to challenge the same WTO-inconsistent domestic practices and potential WTO violations in domestic courts, the proposed decentralization and depoliticization of such WTO disputes appear politically feasible only through additional, reciprocal WTO commitments.

The commitment of the EU to "uphold and promote its values and interests" in its "relations with the wider world," including "strict observance and the development of international law,"[80] reflects a constitutional ideal of the rule of international law that is far from being realized in the administration of justice by national, European, and international courts in the external relations of the EC. Also the U.S. government is committed to using international law for promoting freedom and rule of law in foreign countries; yet, its nationalist conception of constitutional democracy and its hegemonic conception of foreign policy usually prompt the U.S. government and U.S. lawyers to perceive international economic law as mere "global administrative law" that may be disregarded at any time by the U.S. Congress and by U.S. courts. The pro-

78. Whereas the WTO Protocol on the Accession of China, *supra* note 5, and the domestic laws of some WTO Members with civil-law traditions (like the EC) guarantee private "right[s] to trade," including "right[s] to import and export goods," WTO members with common law traditions (like the United States) protect freedom of trade more through objective guarantees than through individual rights. Ernst-Ulrich Petersmann, *National Constitutions, Foreign Policy and European Community Law*, 3 EUR. J. INT'L L. 1, 27–28 (1992).

79. For a practical illustration of this argument, see the case study of the "Havana Club" dispute in the WTO, in which two wealthy French and U.S. companies succeeded in transforming their private dispute over private trademark rights into an intergovernmental dispute between the EU and the US, entailing threats of transatlantic trade war. F.M. Abbot & T. Cottier, *Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US-Section 211 Omnibus Appropriations Act 1998*, *in* TRANSATLANTIC ECONOMIC DISPUTES 429 (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003).

80. EC Const. Treaty, *supra* note 39, art. 3.

nouncements by U.S. courts that WTO dispute settlement rulings "are not binding on the United States, much less this court"[81] reflect a regrettable disregard for the international legal obligations of the United States and for the interests of U.S. citizen in rule of law in international trade in conformity with international agreements ratified by the U.S. Congress.

The increasing judicial recourse—not only by European courts but also in the case law of the WTO Appellate Body—to "principles" and "balancing" for justifying interpretive choices is in line with modern constitutional theories of adjudication, such as Dworkin's "adjudicative principle of integrity," which requires judges to regard law as expressing "a coherent conception of justice and fairness."[82] Yet, national and international judges fail to cooperate and to support the struggles of citizens for more rule of law in international trade. Similar to the *dictum* by Justice Oliver Wendell Holmes that his judicial task was not to administer justice, but to apply the laws of the U.S. Congress,[83] multilevel judicial governance in international trade relations tends to neglect the legal and judicial task of interpreting international treaties "in conformity with principles of justice," as explicitly acknowledged in the VCLT.[84] The lack of effective legal and judicial remedies of citizens against the frequent violations by their own governments of their WTO obligations to respect freedom, rule of law, and nondiscriminatory treatment of citizens in international trade illustrates the political limits of rule of law, of the judiciary, and of constitutional justice inside democracies. The Machiavellian justifications by trade bureaucrats of their own violations of the rule of law are reminiscent of the monarchical past[85] where courts were expected to serve the political rulers rather than the welfare of their citizens; the legal and judicial incoherencies in international trade relations—even among leading democracies like the EC and the USA—recall the insight of the founding fathers of constitutional democracy that "constitutional justice" and democratic peace cannot be realized without individual access to courts and without judicial enforcement of the rule

81. Corus Staal BU v. U.S. Dep't of Commerce, 395 F.3d 1343, 1348 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006). In the *Corus Staal* dispute, the U.S. Supreme Court denied petition for certiorari, notwithstanding an *amicus curiae* brief filed by the EC Commission supporting this position. Brief for the European Commission as Amicus Curiae Supporting Petitioner, Corus Staal BU v. U.S. Dep't of Commerce, 546 U.S. 1089 (2006) (No. 05-364), 2005 WL 3309310 (arguing that the Federal Circuit erred in refusing "to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.").

82. RONALD DWORKIN, LAW'S EMPIRE 225, 243 (1986) ("Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.").

83. For a discussion of this *dictum* by Justice Holmes see THOMAS SOWELL, THE QUEST FOR COSMIC JUSTICE 169 (1999).

84. Vienna Convention, *supra* note 24.

85. *Cf.* Kuijper & Bronckers, *supra* note 77, at 1332–34 (arguing for focusing on the political "law in action" rather than the WTO "law in the books").

of law. More effective legal protection of mutually beneficial economic cooperation among free citizens across national border barriers requires transforming constitutional nationalism into multilevel constitutionalism as the most rational instrument for protecting citizens against the widespread abuses of bureaucratic policy powers in the intergovernmental supply of international public goods.