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# Constitutionalism and International Organizations

*Ernst-Ulrich Petersmann\**

Peaceful cooperation among individuals and among states has become a globally recognized policy objective. The worldwide trend towards deregulation, market economies, protection of human rights and democracies reflects an increasing recognition that individual freedom, non-discrimination and rule of law are the best conditions for promoting individual and collective self-determination and social welfare. But in contrast to the long-standing constitutional theories for national democracies, there is a troubling paucity of theory on how to achieve a peaceful *international order* based on worldwide liberal rules. During the first half of the 20th century, government policies in international relations continued to be dominated by power politics, protectionism and pragmatic trial and error with tragic experiences of government failures, such as wars and unnecessary widespread poverty.

The disappearance of the cold war international system and the emergence of market-oriented global integration have created new opportunities for the establishment of a liberal international order based on principles of constitutionalism and democracy. However, traditional democratic theories offer little guidance for achieving a liberal global order, or for reforming the outdated UN system, due to their one-sided focus on nation states and on the challenges to democracy that emerge *within* national boundaries.<sup>1</sup> European integration law and theory have likewise focused on the *domestic policy constitu-*

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<sup>1</sup> DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* 99-136 (1995).

tion and common market law of the European Union (EU). Due to the lack of a corresponding *foreign policy constitution*, the discretionary *foreign policy powers* of the EU have, so far, not been effectively constitutionalized. Therefore, the *external relations law* of the EC continues to be dominated in many areas by *power-oriented* rather than *rights-based* paradigms.<sup>2</sup> The constitutionalization of EC law in the case law of the EC Court of Justice and the enlargement of the EU to 15, and soon more than 20, member states are progressively extending the supra-national EC guarantees of free trade, rule of law, fundamental rights, judicial review and democracy throughout Europe.

### I. INTERNATIONAL ECONOMIC LAW: A MODEL FOR REFORMING THE INTERNATIONAL ORDER?

International economic law continues to provide the core of European integration law and has moved to the centre of foreign policy-making. It has become one of the most important foreign policy instruments for promoting not only economic welfare but also individual freedom and rule of law. Some of the paradigms of modern international economic law – such as the protection of individual property rights through a compulsory system of third-party adjudication and appellate review in the 1994 Agreement Establishing the World Trade Organization (WTO) and the progressive overcoming of the outdated distinctions between the *external law* and *internal law* of states in European integration – could offer models for reforming international relations in other areas as well.<sup>3</sup> This exemplary function of liberal international economic rules seems to confirm the long-standing emphasis in political philosophy (e.g., of *I. Kant* and *D. Hume*) and economic theory (e.g., of *D. Ricardo* and *A. Smith*) that the mutual gains from voluntary international trade, and from an international division of labour based on liberal rules, offer the most important means to overcome the “Hobbesian war of everybody against everybody else” through peaceful cooperation, even if people and governments act as self-interested utility-maximizers.

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<sup>2</sup> See Ernst-Ulrich Petersmann, *Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU*, 32 COMMON MKT. L. REV. 1123, 1170-72 (1995); *idem*, *The External Powers of the Community and the Union: Proposals for Protecting the Interests of EU Citizens*, in THE TREATY ON EUROPEAN UNION: SUGGESTIONS FOR REVISION, 265-77 (Asser Instituut, 1996).

<sup>3</sup> See Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996).

International lawyers, even if aware of the serious limitations of the state-centered *Westphalian system* of classic international law and of the inadequacies of the inter-governmental UN system for maintaining *democratic peace*, often fail to understand the economic logic and moral foundations of *international economic law* and its systemic significance for a peaceful international order. Market institutions are an indispensable complement of human rights for promoting individual autonomy and human well-being in a vital part of everybody's life (e.g., as student, producer and consumer). Economic law is a necessary precondition for the proper functioning of markets and for avoiding both *market failures* as well as *government failures*. The post-war transformation of the anarchic "international law of coexistence" into a peaceful "international law of cooperation" has been most successful in the realm of international economic law and European integration law with its supra-national guarantees of individual freedom, legal equality, democratic participation and rule of law. Thus, there is no reason for general international lawyers to neglect international economic law as an allegedly "immature specialization."

Nor is there a reason for immature legal generalizations in the field of international economic law because, due to governments' insistence on reciprocity, general international law rules have become largely supplanted by treaty law in international economic relations. The transnational exercise and legal protection of individual freedoms and the judicial settlement of disputes appear today more developed and more effective in regional and worldwide economic law than in most traditional areas of international law, which are still dominated by the mediation of citizen interests through government bureaucracies.<sup>4</sup> Since most people spend most of their time on the production of goods and services (such as education) as a means to acquire other goods and services inside and outside their home country, the frequent *double standard* cultivated by many lawyers and courts (that is, their preference for, and higher level of scrutiny accorded to, *civil and political rights* rather than to *economic and social rights*, and their disregard of the increasingly *transnational exercise* of individual rights in the modern global economy) reflects a strange *legal anachronism* and disregard of the actual individual preferences of the modern *homo economicus*.

If the *benevolent government assumption* were true, e.g., that governments maximize the *public interest* of their citizens, a liberal trade

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<sup>4</sup> See ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 375-461 (1991).

order should emerge spontaneously pursuant to the today worldwide economic insight that trade liberalization tends to maximize consumer welfare by enabling citizens to buy more, better and cheaper goods and services in the best markets. Trade liberalization also promotes competition, investment, innovation and monetary and price stability, and it limits abuses of power. Why is it then that for centuries the foreign policies of most countries have been dominated by power-oriented, welfare-reducing protectionism and other government failures? Why did it take more than eight years to conclude the Uruguay Round of multilateral trade negotiations (1986-1994) and to replace the old "GATT 1947" by the 1994 WTO Agreement?<sup>5</sup> Why does the WTO Agreement include a large number of references to other worldwide and regional agreements, such as the UN Charter, the Agreement establishing the International Monetary Fund, as well as international commodity agreements, international environmental agreements, international agreements on technical regulations and services trade (such as the International Telecommunications Union, air transport and shipping agreements), international agreements on the protection of intellectual property rights and regional free-trade and customs union agreements like the EC? What are the legal consequences of meshing international régimes, with numerous references to individual rights (such as intellectual property rights) and individual access to domestic courts, for the interpretation of WTO law in international and domestic dispute settlement proceedings? How should national and international policy-making processes be regulated and controlled so as to more effectively protect the equal liberties and democratic rights of domestic citizens against power politics and "rent-seeking?" What can we learn from the WTO Agreement for reforming the UN Charter and for "constitutionalizing" foreign policy powers so as to better entrench human rights and democratic peace for the benefit of individual citizens?

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<sup>5</sup> For a survey and analysis of the Uruguay Round negotiations see J. Croome, *Reshaping the World Trading System - A History of the Uruguay Round*, WTO 1995; Ernst-Ulrich Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 EUR. J. INT'L L. 161, 215-21 (1995); THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 501-77 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 2d ed. 1991). For a systematic analysis of the Uruguay Round Agreements see THE URUGUAY ROUND RESULTS, A EUROPEAN LAWYERS' PERSPECTIVE (Bourgeois et al. eds., 1995); BERNARD M. HOEKMAN & MICHAEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 169-71 (1995); JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 1118-26 (3d ed. 1995); THE NEW WORLD TRADING SYSTEM (OECD, 1995).

## II. LIBERAL INTERNATIONAL ORDER: THE NEED FOR RULES AND ORGANIZATIONS

How can we achieve peaceful cooperation among more than five billion individuals in about two hundred sovereign states, and maintain full respect for their equal human rights, their "sovereign equality" and for our "constitutional ignorance" (*von Hayek*) of their constantly changing individual preferences and plans? History and constitutional theory teach that *national order* and *international order* require three different kinds of rules to solve the "coordination problems," "organization problems" and "constitutional problems" of national and international societies (See *Table 1*):

### A. Transaction Law

There is, *first*, a need for *general rules* (e.g., on freedoms, property rights, legal equality and contract law) to enable voluntary transactions among individuals as well as among states (such as liberal trade) and to promote "spontaneous decentralized order." Without such rules and decentralized *transaction law*, the conflicts among the short-term interests of individuals risk endangering their common long-term interests, thus leading to a "*Hobbesian war* of everybody against everybody else." International trade and international trade law, for instance, have emerged spontaneously wherever economic liberty, property rights, legal equality, contract law and arbitration were protected through general rules.<sup>6</sup> But it is also a common experience of national and international legal systems that the "*Hobbesian dilemma*" is difficult to overcome due to the "*prisoners dilemma*" of cooperation. Even if rules are recognized as a necessary precondition for mutually beneficial cooperation, voluntary agreement on national and international rules may not come about if citizens and governments focus on their short-term self-interests (e.g., in "free-riding" and circumventing general rules) rather than on their common long-term interests (e.g., in rule of law and liberal trade). The social "*coordination problem*" is further complicated by the fact that general rules and self-interested utility maximization by the *homo economicus* also give rise to "spontaneous disorder," such as abuses of private market power, pollution of the environment and, at the intergovernmental level, power politics and mutually impoverishing protectionism. Peaceful cooperation therefore requires solutions also to the following

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<sup>6</sup> Ernst-Ulrich Petersmann, *Principles of World Trade*, 8 ENCYCLOPEDIA OF PUB. INT'L L. 530 (1981).

**Table 1: Constitutional Problems of Social Order**

| Kinds of Order  | National Order   | International Order   |
|---|--|---|
| <p><i>Coordination Problems:</i></p> <p>General rules on freedoms, property rights, equality and contract law enabling agreed transactions and "spontaneous order"</p> <p>(Transaction Law)</p> | <p>"Hobbes' Dilemma" (conflicts of short-term interests)</p> <p style="text-align: center;">↓</p> <p>General Rules (e.g., freedoms, property rights and other rules reflecting common long-term interests)</p> <p style="text-align: center;">↓</p> <p>"spontaneous decentralized order" (e.g., markets)</p> <p style="text-align: center;">↓</p> <p>"market failures" and spontaneous disorder (e.g., pollution)</p> <p style="text-align: center;">↓</p> | <p>"International Anarchy" ("beggar-my-neighbour policies")</p> <p style="text-align: center;">↓</p> <p>General "International Law of Coexistence" (e.g., "sovereign equality of states," reciprocity, human rights)</p> <p style="text-align: center;">↓</p> <p>Spontaneous order (e.g., balance of power and "self-help" systems, international division of labour)</p> <p style="text-align: center;">↓</p> <p>"Market failures" and "government failures" (e.g., wars, mercantilism)</p> <p style="text-align: center;">↓</p> |
| <p><i>Organization Problems:</i></p> <p>"Result-oriented" rules, procedures and organizations with legislative, administrative and judicial functions</p> <p>(Organization Law)</p>             | <p>Organizations are necessary</p> <p>a) to limit "market failures" such as:<br/>— abuses of power<br/>— pursuit of short-term self-interests with adverse "external effects"</p> <p>b) to supply "public goods" (e.g., legal security and information), and</p> <p>c) to limit "government failures" (e.g., protectionism)</p> <p style="text-align: center;">↓</p>   | <p>International Organizations are necessary</p> <p>a) to limit transnational "market failures" such as:<br/>— abuses of power<br/>— pursuit of short-term self-interests with adverse "external effects"</p> <p>b) to supply "international public goods," and</p> <p>c) to limit "government failures" (e.g., protectionism)</p> <p style="text-align: center;">↓</p>   |
| <p><i>Constitutional Problems:</i></p> <p>Long-term rules of a higher legal rank enabling "constitutional order"</p> <p>(Constitutional Law)</p>  | <p>Constitutional restraints (e.g., fundamental rights, objective principles of rule of law and democracy) and institutional "checks and balances" on government powers</p> <p style="text-align: center;">↓</p> <p>"Locke's Dilemma" (inadequate constitutional restraints on foreign policy powers, asymmetries in information and in foreign policymaking)</p>  | <p>"Kant's Imperative:" <i>Perpetual Peace</i> requires international rule of law principles among states and towards foreign citizens</p> <p style="text-align: center;">↓</p> <p>Inadequate supply of "international public goods" ("constitutional failures")</p>  |

*coordination problems:* How to induce individuals and governments to cooperate and agree on rules that protect the equal freedoms of individuals and of their governments, and to promote welfare and se-

curity through mutually beneficial cooperation? How to prevent *international anarchy* in a decentralized international system based on self-help (Article 51 of the UN Charter) and discretionary, power-oriented foreign policies? How to counteract the risks of "market imperfections" and "spontaneous disorder" (e.g., in the case of pollution)?

### B. Organization Law

These latter challenges call for *result-oriented rules, procedures and organizations* so as to limit market failures (such as abuses of economic power and market-distorting "external effects") and to supply public goods that are not secured through spontaneous market mechanisms (such as legal security and "social justice"). But how should such organizations be designed so as to avoid inefficient bureaucracies and "government failures" (such as protectionist abuses of regulatory powers) which might be worse than "market failures?" To what extent do citizens and their governments need *international organizations* for the supply of *international public goods* and for the effective control of *transnational market failures*? Is it still justified that the post-war international organizations focus more on the limitation of "government failures" (such as governmental restrictions of liberal trade and of human rights) than on anti-competitive business practices? Are there convincing reasons for the traditional refusal by government bureaucracies to recognize individual citizens as direct subjects of public international law, and for the paternalistic mediation of private interests through their governments? How can the *public interest* be known and legitimately defined if the equal rights of domestic citizens, and their possibility to freely express their individual preferences in the economic and "political markets," are not effectively protected? Is the traditional distinction between national law, whose rules can be directly invoked and enforced by domestic citizens through national courts, and international law, whose rules are often declared by governments to be "not directly applicable," in the interest of domestic citizens? What are the optimal relationships between integration goals, international institutions and domestic law reception of international law? How should legislative, executive and judicial competences be allocated so as to better protect the transnational exercise of individual rights and limit abuses of international regulatory powers?



### C. Constitutional Law

The risks of government failures and transnational market failures call for long-term *constitutional rules* of a higher legal rank so as to protect the equal rights of the citizens against abuses of *post-constitutional*, current policy-making processes and regulatory powers. The modern evolution of human rights into worldwide treaty and customary law implies that all governments are bound to protect the dignity, liberty, legal equality and other basic rights of their citizens. The guarantees of political liberties in worldwide and regional human rights conventions, such as the right of every citizen “[t]o take part in the conduct of public affairs, directly or through freely chosen representatives”<sup>7</sup> so that “[t]he will of the people shall be the basis of the authority of government,”<sup>8</sup> require democratic institutions protecting the basic rights of all citizens from abuses of government power, including abuses supported by a majority or by non-democratic governments that do not respect the democratic right of self-determination.<sup>9</sup> Also, outside the area of international human rights law, most worldwide international agreements (such as GATT and the WTO Agreement) serve “constitutional functions” by protecting freedom, non-discrimination, rule of law and judicial protection of individual rights across frontiers. The transition from an international order based on hegemonic power (notably of the permanent members of the UN Security Council) to the “international rule of law”<sup>10</sup> and the emerging right to democratic governance<sup>11</sup> are, however, still-continuing and fragile developments.

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<sup>7</sup> The International Covenant on Civil and Political Rights, art. 25, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976), also guarantees the right of every citizen “[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”

<sup>8</sup> Universal Declaration of Human Rights, art. 21, G.A. Res. 217A (III), U.N. GAOR, 3rd. Sess., at 71, U.N. Doc. A1810 (1948), *reprinted in* Djonvich, 2 United Nations Resolutions 139 (Series No. 1, 1973).

<sup>9</sup> On the need of developing international law in pro-democratic directions, including some form of collective democratic security, see JAMES CRAWFORD, *DEMOCRACY IN INTERNATIONAL LAW* (1994).

<sup>10</sup> On the distinction between “rules of law” and “the Rule of Law,” and the requirements for the international rule of law, see Arthur Watts, *The International Rule of Law*, 36 GERMAN Y.B. INT’L. L. 15 (1993).

<sup>11</sup> Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

#### D. Need for a Constitutional Theory of International Relations

From a human rights perspective, governments derive their legitimacy from essentially three sources: (1) the protection of the equal rights of their citizens; (2) democratic decision-making by the people and their freely elected representatives; and (3) the welfare-increasing results of democratic policy-making.<sup>12</sup> A rights-based conception of representative democracy is firmly rooted in moral philosophy (such as *Immanuel Kant's* "categorical imperative") and legal principles of justice (such as *John Rawls' theory of justice*).<sup>13</sup> It is also vindicated by utilitarian economic and political theories and empirical evidence. Economic theory, for instance, emphasizes that individual liberties and actionable property rights are preconditions for the proper functioning of *economic and political markets*, and for the maximization of individual autonomy, human well-being, economic efficiency and social welfare in a free society.<sup>14</sup> Political theory and historical experience (e.g., in the context of EC law and of the European Convention on Human Rights) confirm that granting actionable rights to self-interested citizens offers the most effective incentives for a self-enforcing liberal constitution. For a variety of reasons, periodically elected governments often cannot act as neutral maximizers of the *public interest*. Since most people earn their income as a producer in a specific area but spend their income on thousands of different products and services, it is rational for them to concentrate on their producer interests; hence, in all societies, producer interests tend to be more organized and politically influential than dispersed consumer interests. Governments depend on political support and accommodate interest

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<sup>12</sup> Cf. Ernst-Ulrich Petersmann, *The Moral Foundations of the European Union's Foreign Policy Constitution: Defining 'European Identity' and 'Community Interests' for the Benefit of EU Citizens*, 51 *AUSSENWIRTSCHAFT [SWISS REV. INT'L ECON. REL.]* 151 (1996).

<sup>13</sup> See the first of the "two principles of justice" developed in JOHN RAWLS, *A THEORY OF JUSTICE* 136-41 (1973): "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." *Id.* at 60.

<sup>14</sup> See GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES* (1985). James Buchanan's comparison of John Rawls' theory of justice and Adam Smith's theory of natural liberty concludes that Rawls' "first principle," *supra* note 13 and Smith's principle of natural liberty are "substantially equivalent," apart from the fact that Rawls puts the emphasis on political freedom, whereas Smith focuses on economic freedom; cf. James M. Buchanan, *The Justice of Natural Liberty*, in ADAM SMITH AND MODERN POLITICAL ECONOMY 124 (G. Driscoll ed., 1979) ("Particular interferences that would . . . be classified as 'unjust' by Rawlsian criteria would correspond very closely to those Smith classified in the same way."). On the function of market mechanisms to promote individual freedoms (such as decisional autonomy and substantive opportunities to choose) see Amartya Sen, *Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms*, 45 *OXFORD ECON. PAPERS* 519, 520 (1993).

group pressures. The asymmetries in the organization and political influence of interest groups represent a permanent threat to the equal rights of domestic citizens. They call for constitutional safeguards enabling the citizens to defend their individual rights and protect their long-term *general interests* (e.g., in equal liberties, democratic decision-making, due process of law and "social justice").

Empirical research into the relationship between economic freedom and economic growth of 102 countries over the period 1975-1995 has confirmed that the more economic freedom a country has had, the more economic growth it has achieved and the richer its citizens have become.<sup>15</sup> Thus, the fact that the average per capita income of, for example, Singapore, increased from about 500 U.S. dollars in 1965 to more than 25,000 dollars in 1995, whereas the per capita income of some African developing countries stagnated during the same 30 year period, seems, in large part, due to the respective government policies. Conflict researchers of wars over the last 200 years have also confirmed that democracies tend to resolve their conflicts of interests peacefully and hardly ever wage war on each other.<sup>16</sup> One of *Immanuel Kant's* prescriptions for perpetual peace, that "the Civil Constitution . . . shall in every State be Republican" because rights-based democracies tend to promote rule of law and peaceful settlement of disputes not only at home but also in their external relations, thus appears to have been validated.<sup>17</sup>

Yet, even if the need for national and international rules and organizations to deal with the various *coordination, organization and constitutional problems* of a liberal international order has been recognized, we still lack a constitutional theory on the optimal relationships between the national and international rules and organizations. For instance: How can agreement on legal restraints of the traditional "primacy of foreign policy" and broad foreign policy discretion be reached? To what extent should foreign policy powers and international organizations be limited by constitutional principles of rule-of-law and judicial protection of individual rights? How can international rule-making and the administrative powers of international organizations be prevented from undermining domestic democracies

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<sup>15</sup> See JAMES GWARTNEY ET AL., *ECONOMIC FREEDOM OF THE WORLD: 1975-1995* (1996). Of course, the empirical correlation between economic freedom and wealth does not prove causation, and the measurement of governmental restrictions on "economic freedom" raises difficult normative and empirical problems.

<sup>16</sup> See Erich Weede, *Some Simple Calculations on Democracy and War Involvement*, 29 J. PEACE RES. 377, 382 (1992).

<sup>17</sup> MICHAEL HOWARD, *WAR AND THE LIBERAL CONSCIENCE* 27, 6-7 (1978).

and political accountability? Should worldwide, regional and national economic institutions be coordinated by means of intergovernmental policy coordination or rather by means of decentralized "competition among governments?"<sup>18</sup> Should individual citizens be entitled to invoke and enforce international guarantees of freedom and non-discrimination (such as those in GATT/WTO and EC law) in domestic courts?<sup>19</sup> Neither the constitutional theories nor the constitutional traditions in the various countries of the world seem to offer clear answers to these questions.

### III. THREE DIFFERENT CONCEPTS OF FOREIGN POLICY-MAKING AND THEIR CONSEQUENCES FOR THE FOREIGN RELATIONS LAW

#### A. Need for Constitutional Restraints on Foreign Policy Powers

For a number of economic, political and legal reasons, *foreign policy powers* are among the most dangerous powers of governments. For example:

##### 1. *Foreign Policy as Income Redistribution*

Economic theory teaches that trade restrictions and many other foreign policy measures operate by taxing and restricting domestic citizens, and by redistributing income among domestic groups, in a surreptitious and welfare-reducing manner.<sup>20</sup> An import tariff, for instance, entails not only higher prices, fewer products and less freedom of choice for domestic consumers, but also redistributes income by enabling import-competing producers to exploit domestic consumers through "protection rents" at considerable "deadweight costs" for the domestic economy (e.g., due to inefficient import substitution). While liberal trade rules benefit all consumers, import protection benefits only a few import-competing producers at the expense of other citizens. The democratic legitimacy of this indirect income redistribution is often doubtful, especially if it is implemented through adminis-

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<sup>18</sup> See Ernst-Ulrich Petersmann, *International Competition Rules for Governments and for Private Business*, 30 J. WORLD TRADE 5 (June 1996).

<sup>19</sup> For a discussion of these questions see NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (M. Hilf & E.U. Petersmann eds., 1993).

<sup>20</sup> For modern surveys of the evolution of international trade and economic theory see e.g., ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM (Alan V. Deardorff & Robert M. Stern eds., 1994); J. BHAGWATI, POLITICAL ECONOMY AND INTERNATIONAL ECONOMICS (1991); W.M. CORDEN, TRADE POLICY AND ECONOMIC WELFARE (1974).

trative *fiat* without parliamentary control so as to accommodate “rent-seeking” interest groups.<sup>21</sup>

## 2. Foreign Policy as Domestic Policy

Because *foreign policy powers* (e.g., to levy tariffs, restrict imports, devalue the exchange rate or wage war) often operate by taxing and restricting *domestic* citizens and enable governments to redistribute income among *domestic* groups (e.g., by granting protection rents to powerful lobbies), *foreign policy instruments* can be used to circumvent the legal restraints on *domestic policy instruments* (e.g., on the general taxing and spending powers of governments). Thus, rather than asking for parliamentary authorization for domestic subsidies, governments often prefer to subsidize their *clientèles* indirectly through non-transparent, administrative non-tariff trade barriers. Modern international relations theories rightly emphasize the domestic sources of foreign policy demands (“all politics is local”) as well as their domestic policy functions (for example, in election campaigns).<sup>22</sup>

## 3. Foreign Policy as a Prerogative of the Executive

International law assumes that the executive has comprehensive foreign policy powers over e.g., treaty-making and international remedies, even if foreign policy powers are exercised in violation of national law. Also, many national legal systems continue to view international relations as a *Machiavellian* arena of power politics, where the executive must enjoy broad discretionary foreign policy powers without effective substantive and procedural constitutional restraints. But the “benevolent government assumption” – such as the romantic view of *J.J.Rousseau* (1712-1778) that governments act as mere agents of the “general will” of the people, and “this general will . . . tends always to the preservation and welfare of the whole and of

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<sup>21</sup> *Rent-seeking* is a widely used term for directly unproductive, resource-using activities (such as lobbying for governmental market distortions by means of tariffs, quantitative restrictions, antidumping measures and subsidies) which do not produce new goods or services but redistribute income (e.g., monopoly rents) towards the rent-seekers at the expense of consumers, tax-payers and society at large. Regulatory discretion facilitates, and therefore acts as an incentive for, rent-seeking, which can change the losers in *economic markets* into the winners in the *political markets*. Rent-seeking is economically and politically harmful because it reduces consumer welfare and favors corporatist structures of interlocking political and private interest groups and *interest group politics* detrimental to the *general interest* (e.g., of consumers in non-discriminatory liberal trade). Empirical evidence suggests that rent-seeking is widespread and has a strong bearing on the discretionary trade policies in many countries.

<sup>22</sup> Cf. Ethan B. Kapstein, *Is Realism Dead? The Domestic Sources of International Politics*, in INTERNATIONAL ORGANIZATION 751-74 (1995).

every part"<sup>23</sup> – is inconsistent with the centuries-old reality of welfare-reducing foreign policies (such as wars and protectionism), and also with the theoretical perception of citizens as self-interested utility maximizers (*homo economicus*). Rousseau's fiction – that "la volonté générale" and "la volonté de tous" are by definition identical – ignores the most difficult constitutional problem identified by the founding fathers of the U.S. Constitution: that the less government powers are constitutionally restrained, the more they risk being abused ("all power risks to corrupt, and absolute power corrupts absolutely"); and that constitutions must also provide "checks and balances" against the risks of parliamentary interest-group politics and a possible dictatorship by the majority (as in the French revolution under Robespierre).

#### 4. *Inadequate Parliamentary and Judicial Control*

The risk of false majorities (e.g., in parliamentary "log-rolling") exists particularly in the economic and foreign policy areas, as evidenced by the infamous *Smoot-Hawley Tariff Act of 1930* by the U.S. Congress which triggered a worldwide wave of protectionism and economic depression. The indirect and often non-transparent manner of taxing domestic citizens and redistributing their income through *discretionary foreign policy instruments* contributes not only to rent-seeking interest group politics, but also to a "rational ignorance" of most citizens vis-à-vis the politicized exercise of foreign policy discretion (e.g., regarding the thousands of customs tariffs). The frequent parliamentary assertion of unlimited regulatory powers in the foreign policy area and the widespread judicial "political question doctrines" concerning *domestic* policy measures and the judicial self-restraint concerning foreign "acts of state;" weaken the constitutional restraints on foreign policy powers even further.

#### 5. *Irrational Double Standards*

The frequent xenophobia ("we" versus "they"), mercantilist thinking ("exports are good, imports are bad") and other double standards in foreign policy-making (e.g., liberalization of domestic trade, protectionism vis-à-vis foreign trade) make it easy for politicians to

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<sup>23</sup> THE POLITICAL WRITINGS OF JEAN JACQUES ROUSSEAU 241 (C.E. Vaughan ed., 1915). According to Rousseau, the general will is always right: "The social compact gives the body politic absolute power over all its members. Each man alienates, I admit, by the social compact only such part of his powers, goods and liberty as it is important for the community to control; but it must also be granted that the sovereign is sole judge of what is important" (*Social Contract*, II, iv).

present foreign policy measures as being in the “national interest,” even if they reduce national consumer welfare (e.g., anti-dumping measures against low-priced imports) and punish foreigners for acts (e.g., “dumping” of low-priced products) that are considered laudable when done by a fellow citizen. In contrast to *domestic policy*, citizens often view *foreign policy* as a black box to be left to the “foreign policy experts.” As a consequence, the foreign policies tend to be less transparent and less effectively controlled by the public than domestic policies.

Modern constitutional democracies proceed from the individualist premise that values can be derived only from the individual, and only if his or her human dignity, individual liberty and legal equality are effectively protected.<sup>24</sup> The general *public interest* of the citizens cannot even be known by governments without enabling their citizens to freely express their individual preferences in transparent, democratic decision-making processes and open markets. From this rights-based perspective, the main task of foreign policy-making must be to negotiate national and international rules and procedures enabling citizens to exercise their equal rights across frontiers and protecting them from abuses of foreign policy powers. Without effective constitutional restraints on the traditional foreign policy discretion, governments will be unable to maximize the general interests of their citizens in equal liberties and democratic peace across frontiers. For “democratic government, if nominally omnipotent, becomes as a result of unlimited powers exceedingly weak, the playball of all the separate interests it has to satisfy to secure majority support.”<sup>25</sup>

But how can discretionary foreign policy powers be constitutionalized? Why are most governments politically unable to liberalize their welfare-reducing trade barriers unilaterally, as recommended by economic theory? What determines foreign policy-making? Are the causes of wars and international economic conflicts to be sought in the international state-system, in the inter-actions among social groups, in the widespread existence of economic and social injustice as emphasized e.g., in the Constitution of the International Labour Organization (“universal and lasting peace can be established only if it is based upon social justice”), or in individual actions and the denial of demo-

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<sup>24</sup> See, e.g., Article 1 of the 1949 Basic Law of the Federal Republic of Germany: “(1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.”

<sup>25</sup> 3 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 99 (1982).

cratic principles, as emphasized e.g., in the Constitution of the United Nations Educational, Scientific and Cultural Organization ("since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed")? International relations theories offer diverging answers to these questions (See *Table 2*).<sup>26</sup> But both modern economic "public choice theories" as well as "constitutional theories" criticize the "myth of benevolent government." They posit that the perception of man as a self-interested "utility maximizer" (*homo economicus*) is a more useful model for analyzing and explaining not only *economic markets* but also *political markets*.<sup>27</sup> As all governments depend on domestic political support, and there are powerful domestic group interests benefiting from the redistributive effects of most foreign policy decisions, the existing asymmetries in policy-making processes and the proper constitution and legal limitation of policy powers are the central problem in the *foreign policy area*. The different approaches to this constitutional problem are strongly influenced by the different national traditions and concepts of government and foreign policy-making.

#### B. The Hobbesian Concept of Power Politics and Economic Mercantilism

According to the English philosopher *Thomas Hobbes* (1588-1679), life in a society without central government and without general rules risks to be "solitary, poor, nasty, brutish and short" because the conflicts between the selfish short-term interests of individuals may lead to a constant "war of all against all." Hence, there is a need for a strong government to protect the rule of law so as to overcome the "Hobbesian War." *Thomas Hobbes* conceived government as a "benevolent dictator" above the law ("*legibus absolutus*"). The "social contract" proposed by *Hobbes* implied a ceding of individual rights to absolute monarchies with legally unlimited powers, constrained only by their moral accountability to God. The "public interest" to be protected by the sovereign was the sum of the individual

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<sup>26</sup> For an interdisciplinary analysis of the international trading system from the point of view of these different theories see Ernst-Ulrich Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 EUR. J. INT'L L. 161 (1995).

<sup>27</sup> For a criticism of the *public interest model* see Brennan & Buchanan, *supra* note 14, at 33-45. Even though the *homo economicus model* may embody more cynicism about individual behavior patterns than evidence warrants, its usefulness for designing constitutional rules has long been recognized e.g., in the writings of *David Hume*: "In constraining any system of government and fixing the several checks and controls of the constitution, every man ought to be supposed a knave and to have no other end, in all his actions, than private interest." *Id.* at 59.



**Table 2: Premises of Major International Relations Theories**

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|---|---|
| <p>“Realist” theories (“Third images” focusing on the state-system)</p>   | <p><i>Premises:</i> (1) States are key actors in world affairs; (2) They act as unitary-rational maximizers of national interests; (3) International anarchy (i.e., national self-help due to lack of centralized authority) is the principal force conditioning the actions of states; (4) States are therefore preoccupied with their security, independence and relative power (“high politics,” security dilemma); (5) They often fail to cooperate even when they have common interests (hegemonic cycles of expansion, recession or balance of power; “defensive positionalism”).</p>   |
| <p>“Neoliberal Regime” theories focusing on international rules and organizations for overcoming the deficiency of the self-help system</p> | <p><i>Premises:</i> International rules, procedures and institutions (“regimes”) can help states to overcome the systemic “prisoner dilemma” and “free-rider dilemma” of international relations among sovereign self-interested states “after hegemony” through (1) formation of “clubs” with advanced-country participants, (2) monitoring of rule-compliance (as a disincentive for “cheating”), (3) institutionalized fora for long-term cooperation (“game iteration” and “tit-for-tat strategies”), (4) rule-oriented reduction of international transaction costs and (5) sanctions towards “free-riders.”</p>   |
| <p>Functionalism and Neo-Functionalism</p>  | <p><i>Premises:</i> Functional integration of “low politics” based on self-interests of subnational and supranational actors enables “attitude change” (“deeds, not words,” participation of citizens, depoliticization). It can expand indirectly to areas of “high politics” due to transnational interest groups, functional interdependences (“spill-over”), advantages of international cooperation and transfer of powers to international organizations (“form follows function,” “networks of pooled sovereignty,” political “push” and “pull-over” through intergovernmental package deals and supranational organizations).</p>   |
| <p>“Public choice theories” (“First and second images” focusing on individual actions, interest group politics and governments)</p>         | <p><i>Premises:</i> Methodological individualism (there is no “national interest;” private and public choices are made by individuals which tend to maximize their self-interests; individual preferences differ). Methodological pluralism (e.g., political processes are determined by incentives for individuals, interest groups, bureaucracies etc.; “rent-seeking” and redistributive effects of policies are important incentives). Asymmetries in the political influence of group interests favor “government failures”. (similar to “market failures” in private markets). Importance of small groups for the supply of “public goods.” <i>Domestic</i> politics, “rent-seeking” and non-state actors are determinants also of <i>foreign</i> policies (e.g., success of “market integration,” failures of “policy integration” in EC).</p> |
| <p>Constitutional theories (“First, second and third images”)</p>   | <p><i>Premises:</i> Individual liberty/dignity and legal equality as highest sources of values. Need for protecting individual political equality through constitutional constraints on collective democratic procedures. Necessity of general, long-term “constitutional rules” of a higher legal rank for the protection of fundamental individual rights and for limiting abuses of powers in “post-constitutional policy processes.” Inalienable human rights, rule of law, separation of powers (notably judicial protection of individual rights and of their supremacy over government powers) and “constitutionally limited democracy” as bases for constitutional reforms. Decentralized spontaneous coordination and satisfaction of individual preferences as constitutional values.</p>   |

interests of the domestic citizens. But *Leviathan’s* discretion to define and pursue this “public interest” was legally unlimited. Accordingly, both domestic and international law permitted the use of power and

wars as instruments of foreign policy. The international state system, for instance between the Westphalian peace treaties (1648) and the First World War (1914), remained characterized by "international anarchy" and unstable "self-help" systems. International economic relations, until the middle of the 19th century, remained dominated by power-oriented *mercantilism* and *colonialism*, that is, the attempt to increase the gold and silver supplies of the rulers, and thereby their political and military power, by means of import restrictions, export subsidies, colonial preferences, monopolistic navigation acts and monetary "bullionism."

At least implicitly, the Hobbesian concept of almost unlimited government powers and mercantilist import substitution have continued to shape the policies of many communist countries and less-developed countries after World War II. In Africa south of the Sahara, for instance, "development dictatorships," protectionism, import-substitution policies, trade preferences for the former colonial powers, monetary restrictions, market-sharing arrangements (e.g., for international shipping services) and weak law-enforcement have remained widespread, and prompted many African countries to accept no significant trade liberalization commitments under GATT law (Nigeria, for instance, had only a single tariff binding for stockfish until the 1980s). As predicted by economic and political theory,<sup>28</sup> political instability, economic under-development, legal insecurity with investment disincentives and unnecessary poverty were the logical consequences of such power politics in many of these countries.

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<sup>28</sup> Since Adam Smith's *INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776), it has become general opinion among economists that mercantilist trade restrictions reduce, rather than increase, consumer welfare subject to a few academic exceptions, the conditions of which are almost impossible to determine in reality. Already two hundred years ago, in his draft treaty on "Perpetual Peace" (1796), the German philosopher Kant also explained why non-democracies are more likely to engage in welfare-reducing power politics than democracies: "If . . . the consent of the citizens is required to decide whether or not war is to be declared, it is very natural that they will have great hesitation in embarking on so dangerous an enterprise. For this would mean calling down on themselves all the miseries of war . . . But under a constitution where the subject is not a citizen, and which is therefore not republican, it is the simplest thing in the world to go to war. For the head of state is not a fellow citizen but the owner of the state, a war will not force him to make the slightest sacrifice so far as his banquets, hunts, pleasure palaces and court festivals are concerned." See I. Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT, *POLITICAL WRITINGS* 100 (Hans Reiss & H.B. Nisbet ed., 1991). Empirical research appears to confirm that no stable democracy seems to have waged war against another over the past 50 years. See John M. Owen, *How Liberalism Produces Democratic Peace*, 19 *INT'L SEC.* 87, 122 (1994).

C. The Lockean Concept of Rights-Based Domestic Policies and  
the “Primacy of Foreign Policy:” The Example of the U.S.  
and EC Implementing Legislation for the 1994  
WTO Agreement

During the 18th century, the value premises and abuses of *monarchical absolutism* and of mercantilist trade policies were increasingly challenged. According to *John Locke* (1632-1704), the sole legitimate task of governments was to protect the basic rights of the citizens, such as the right to life, liberty and property. The *social contract* served the purpose of establishing governments with limited powers to protect these equal rights, which the citizens retained as *inalienable rights*. The legitimacy of this governmental task derived also from the fact that only the protection of equal rights of the citizens benefits everyone. The *public interest* to be promoted by governments was conceived as being identical with the sum of the individual interests of domestic citizens, as protected by their equal rights and democratic decision-making procedures. Since democratically elected governments had no mandate to violate the rights of their citizens, the majority of the founding fathers of the U.S. Constitution even considered it unnecessary to list the inalienable fundamental rights in the U.S. Constitution. In contrast to the supremacy of fundamental rights for *domestic* policy-making within constitutional democracies, *John Locke* admitted, however, that *foreign policy powers* are “much less capable to be directed by antecedent, standing, positive laws, . . . and so must necessarily be left to the prudence and wisdom of those whose hands it is in, to be managed for the public good:”

What is to be done in reference to foreigners, depending much upon their actions, and the variations of designs and interests, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill, for the advantage of the Commonwealth.<sup>29</sup>

This lack of effective legal restraints on foreign policy powers and the optimistic reliance on the “prudence and wisdom” of politicians entailed a dilemma in Locke’s constitutional theory. This was aggravated by Locke’s view that the domestic executive powers and the foreign policy powers “are hardly to be separated, and placed . . . in the hands of distinct persons,” because “both of them requiring the force of the society for their exercise, it is almost impracticable to place [them] . . . in distinct, and not subordinate hands, or . . . in persons that might act separately, . . . which would be apt sometime or

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<sup>29</sup> 2 JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT ch. 12 (1690).

other to cause disorder and ruine."<sup>30</sup> Yet, since *foreign policy powers* operate by taxing and restricting *domestic citizens* and are often not separable from *domestic policy powers*, the constitutional restraints remained incomplete and ineffective without a *foreign policy constitution*. In *Montesquieu's* (1689-1755) theory of separation of legislative, executive and judicial governmental powers, the foreign policy powers were perceived as limited by international law.<sup>31</sup> In state practice, however, most governments assert constitutional power to violate international law in the name of the "primacy of foreign policy" and of alleged "national interests." But these "national interests" are often the interests of the government in power rather than the interests of its citizens in rule of law, individual rights and open markets.

1. *Implementation of the WTO Agreement in U.S. Law:  
Congressional and Executive Discretion to Violate  
International Law*

In U.S. constitutional law and jurisprudence, the commerce clause in Article I, sec.8, cl.3 of the U.S. Constitution is construed as a seemingly unlimited power of Congress to restrict or completely prohibit foreign trade, including judicial review of foreign trade restrictions. United States foreign trade legislation generally declares international trade agreements not to be self-executing, and U.S. courts have long since held that "no one has a vested right to trade with foreign nations."<sup>32</sup> Also the 1994 Uruguay Round Agreements Act of the U.S. Congress specifically provides:

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.<sup>33</sup>

Furthermore, Section 102(c)(1) explicitly mandates that no person other than the United States "shall have any cause of action or defense under any of the Uruguay Round Agreements" or challenge "any action or inaction . . . of the United States, any State, or any political subdivision of a state on the ground that such action or inaction is inconsistent" with one of the Uruguay Round Agreements. The Uruguay Round Agreements are thus unlikely to be directly applied by U.S. courts in any proceeding other than a proceeding brought by the U.S. government for the purpose of enforcing obliga-

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<sup>30</sup> *Id.*

<sup>31</sup> See MONTESQUIEU, DE L'ESPRIT DES LOIS ch. VI (1748).

<sup>32</sup> For a discussion of this U.S. practice see NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW, *supra* note 19, at 14-17.

<sup>33</sup> Uruguay Round Agreements Act, Pub. L. No 103-465, 108 Stat. 4809 §102 (1994).

tions under these agreements. To the extent that the Uruguay Round Agreements Act does not specifically implement the international obligations, prior legislation and regulatory powers will prevail, as stated in Section 102(a)(2):

CONSTRUCTION: Nothing in this Act shall be construed

(A) to amend or modify any law of the United States, including any law relating to

(i) the protection of human, animal, or plant life or health,

(ii) the protection of the environment, or

(iii) worker safety, or

(B) to limit any authority conferred under any law of the United States, including section 301 of the Trade Act of 1974, unless specifically provided for in this Act.

Under the “later-in-time-rule” of U.S. constitutional law and practice, statutes later-in-time take precedence over both earlier statutes and international treaties. If statutory law is unclear and does not specifically provide for compliance with the Uruguay Round Agreements, administrative agencies may deviate from the international WTO obligations. Pursuant to the “Chevron doctrine,” U.S. courts will defer to such agency interpretation of a statute provided it is “reasonable.”<sup>34</sup>

International disputes over the consistency of U.S. laws and administrative regulations with the international guarantees of freedom and non-discrimination in WTO law are therefore more likely to be resolved at the international WTO level than before domestic U.S. courts. The Uruguay Round Agreements Act requires that WTO dispute settlement proceedings involving the United States are carried out by the U.S. Trade Representative (USTR) in a transparent manner (e.g., publication of U.S. submissions in conformity with the Freedom of Information Act) in close consultation with Congressional committees, private sector and non-governmental organizations. It also makes clear that any WTO dispute settlement decision finding the U.S. in violation of its WTO obligations, notwithstanding its legally binding force under international law, will not be incorporated into U.S. law without following a specified domestic implementation process controlled by Congress and a “WTO Dispute Settlement Re-

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<sup>34</sup> On the *Chevron Doctrine* and its influence on the formulation of the “standard of review” in the WTO dispute settlement procedures see S. P. Croley & J. H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 2 AM. J. INT’L L. 193 (1996). See also D. Leebron, *Implementation of the Uruguay Round Results in the United States*, in CONSTITUTIONAL AND NATIONAL GOVERNMENTAL PROCEDURES FOR IMPLEMENTING THE URUGUAY ROUND AGREEMENTS (J. H. Jackson & A. O. Sykes eds., 1997).

view Commission” consisting of five federal appeals court judges.<sup>35</sup> The Commission, whose establishment was considered necessary in order to control and scrutinize the quasi-automatic adoption of WTO dispute settlement reports, is charged with reviewing all WTO dispute settlement reports finding against the United States so as to determine whether the WTO Panel or Appellate Body

- (A) . . . exceeded its authority or its terms of reference;
- (B) . . . added to the obligations of or diminished the rights of the United States under the Uruguay Round Agreement which is the subject of report;
- (C) . . . acted arbitrarily or capriciously, engaged in misconduct, or demonstrably departed from the procedures specified for panels and Appellate Bodies in the applicable Uruguay Round Agreement; and
- (D) . . . deviated from the applicable standard of review, including in antidumping, countervailing duty, and other unfair trade remedy cases, the standard of review set forth in Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.”

In case of such a determination, Congress can direct the President to undertake negotiations to modify the WTO dispute settlement rules and, following three such determinations by the Commission within a 5-year period, require U.S. withdrawal from the WTO. While such determinations and U.S. withdrawal from the WTO appear unlikely, and the existence of these review procedures may assist the President in fending off protectionist interest group pressures, they put the WTO and the USTR on notice that the U.S. Congress will control trade policy-making processes and WTO dispute settlement proceedings in a manner transparent to the public. But the denial of direct effect of WTO law in U.S. domestic law can also operate as an invitation for domestic interest groups to lobby for implementing laws and agency regulations inconsistent with international law. The protectionist Smoot-Hawley tariffs of 1930 are an infamous example of how congressional log-rolling on behalf of rent-seeking interest groups can trigger a disastrous worldwide economic crisis. The lack of effective judicial review by U.S. courts of compliance with the international WTO guarantees of freedom, non-discrimination and rule-of-law reduces the “checks and balances” in the trade policy area even further. United States law thus not only enables the legislature, executive and courts to deviate from WTO law in a manner inconsistent with the international legal obligations undertaken by the United

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<sup>35</sup> See G.N. Horlick, *WTO Dispute Settlement and the Dole Commission*, 6 J. WORLD TRADE 45-48 (1995).

States, but also, notwithstanding the impressive assertion of congressional control over the implementation of WTO law, sets strong incentives for rent-seeking interest groups to influence the domestic implementing rules to their benefit. For example, according to the "1995 Report on the WTO Consistency of Trade Policies by Major Trading Partners" published by the Japanese Government's advisory "Industrial Structure Council," over 650 pages of the U.S. Uruguay Round Agreements Act include a large number of such protectionist departures from the international WTO law.<sup>36</sup>

2. *Implementation of the WTO Agreement in EC Law: Discretion of the EC Council to Violate International Guarantees of Freedom and Non-Discrimination?*

Following the U.S. precedent, the EC Council Decision of 22 December on the conclusion, on behalf of the EC, of the Uruguay Round Agreements includes the following paragraph:

Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.<sup>37</sup>

As the WTO Agreements include numerous precise and unconditional guarantees of freedom, non-discrimination and private rights, such as the intellectual property rights protected in the Agreement on Trade-Related Intellectual Property Rights (TRIPS) and the large number of guarantees of private access to *domestic courts* (e.g., in Article X GATT, Article 14 Antidumping Agreement, Article 23 Subsidies Agreement, Article 42 TRIPS Agreement), the reference to the "nature" of the WTO Agreements is no convincing reason for preventing EC citizens from invoking precise and unconditional WTO rules before domestic courts. Article XX:2 of the WTO Agreement on Government Procurement, for instance, by requiring each member country to "provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest," could be read to require the direct applicability of the Government Procurement Agreement in such domestic "challenge proceedings." In several EC member countries (such as Germany) and other WTO member states (such as Switzerland), the official government statements on the national implementing legisla-

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<sup>36</sup> Cf. 1995 Report on the WTO Consistency of Trade Policies by Major Trading Partners, Industrial Structure Council, Japan, 1995, at 83 *seq.*

<sup>37</sup> Official Journal of the EC, No. L336-2 (December 23, 1994).

tion explicitly recognize that the TRIPS Agreement rules may be directly applicable and enforceable in domestic courts.

The denial of any rights of EC citizens to invoke the 25,000 pages of WTO law before domestic courts is also difficult to reconcile with the principle of "primacy of international law," which is recognized in many EC Treaty provisions (such as Articles 228-234). Pursuant to Article 228:7 of the EC Treaty, international agreements concluded by the EC "shall be binding on the institutions of the Community and on Member States." This obligation under "primary EC law" has so far been construed by the EC Court to the effect that international agreements concluded by the EC become an "integral part of the Community legal system" with legal primacy over "secondary EC law" (such as EC Council regulations).<sup>38</sup> The above-mentioned attempt by the EC Council to evade these constitutional restraints and to prevent EC citizens from invoking the international WTO obligations of the EC in domestic courts is inconsistent with the EC primary law principle of "primacy of international law" and is therefore not legally binding on the EC Court. The EC Court remains free to decide that directly applicable WTO rules are an integral part of Community law and, in view also of their ratification by the parliaments of EC member states, may not be ignored at the whim of a majority in the EC Council.

In a series of judgments and preliminary rulings in 1994/95 on the EC Council Regulation No.404/93 of February 1993 on the EC's common market organization for bananas, the EC Court has, however, denied both EC member states as well as EC citizens the right to invoke the international GATT obligations of the EC in domestic courts, including the EC Court, unless the contested EC regulations explicitly acknowledge their objective of implementing GATT obligations.<sup>39</sup> The practical effect of this new EC jurisprudence is to leave to the EC Council whether it wants to comply with the international GATT obligations of the EC, and whether it wants to allow EC Courts and domestic courts to review the GATT-consistency of EC secondary law. Paradoxically, compliance by the EC with the self-imposed WTO obligations of the EC and its member states may therefore be protected more effectively through the WTO dispute settlement system than through the EC Court of Justice. The above-mentioned Council Decision on the conclusion of the Uruguay Round Agreements shows a clear preference of the Council for maximizing its own trade policy powers, rather than the rights and interests of EC

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<sup>38</sup> On the EC's foreign policy constitution see Petersmann, *supra* note 2, at 1159-72.

<sup>39</sup> For a criticism of this case law see Petersmann, *supra* note 19.



citizens as protected by WTO law. Foreign policy considerations, such as emulating the corresponding provision in the U.S. Uruguay Round Agreements Act, and reciprocal bargaining are seen as more important than protecting the rights of EC citizens by allowing them to invoke precise and unconditional WTO rules in domestic courts.

3. *The “Lockean Dilemma:” “Primacy of Foreign Policy” vs. the International Rule of Law*

The EC and U.S. implementing legislation for the Uruguay Round Agreements illustrate the continuing “Lockean dilemma” of EC and U.S. foreign trade laws: international law asserts legal primacy over domestic law, as illustrated by Article 27 of the 1969 Vienna Convention on the Law of Treaties (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”), and requires its performance in good faith (cf. Article 26 of the Vienna Convention). The self-imposed international legal obligations also include numerous safeguard provisions which enable each member country to protect its national interests and to challenge treaty violations by other members. Yet, national legislatures and executives insist on their power to tax and restrict domestic citizens also in clear violation of voluntarily undertaken international guarantees of freedom, non-discrimination and rule of law, such as those contained in WTO law. And to this effect, they prevent domestic citizens and courts to directly apply the international rules concerned. The large number of GATT dispute settlement findings on the GATT-inconsistency of e.g., U.S. and EC measures illustrates that such legal inconsistencies between the international and the domestic conduct of governments are not merely theoretical hypotheses, but frequent realities.

The paternalistic “mediation” of the citizens’ interests by “benevolent governments” might not be perceived as a problem from a *Hobbesian perspective of government*. But if governments are viewed from a *Lockean perspective* as having limited powers, whose legitimacy derives from the protection of the equal liberties and other rights of their citizens, the legal incapacitation of the citizens in the area of international trade law can be seen as a “Lockean dilemma.” The legal inconsistencies between international and domestic trade rules undermine legal security and the effectiveness of international and domestic law. They also raise doubts about the good faith and legitimacy of governments which negotiate international guarantees of freedom and non-discrimination for the benefit of domestic citizens

but, in the context of the domestic implementing measures, often give in to protectionist pressures for departures from self-imposed international legal commitments and prevent their own citizens and courts from relying on the international rule of law.

*D. The Kantian Concept of National and International Constitutionalism*

That *foreign policy powers* require specific constitutional restraints, was already recognized in some of the "city constitutions" of the Italian city republics during the Middle Ages. *D. Gianotti's* book on "The Florentine Republic" (1534), for instance, stressed the need for the separation of powers based on the distinction of four state functions (elections, legislation, execution, foreign and security policy) and three decision-making phases (initiation of proposals, deliberation and decision, judicial review).<sup>40</sup> But it was the German philosopher *Immanuel Kant* (1724-1804) who explained first why the "constitutionalization" of domestic policy powers cannot remain effective without a corresponding constitutionalization of foreign policy powers through international legal rules for the relations among states as well as vis-à-vis foreign citizens.

In his "Idea for a Universal History with a Cosmopolitan Purpose" (1784), Kant emphasized that "the problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed *external relationship* with other states, and cannot be solved unless the latter is also solved." As elaborated in Kant's proposals for an international treaty on "Perpetual Peace" (1795), this "hidden plan of nature to bring about an internally – and *for this purpose* also externally – perfect constitution as the only possible state within which all natural capacities of mankind can be developed completely" requires extension of the rule-of-law principles to the intergovernmental relations among states as well as to their transnational relations with foreign citizens.<sup>41</sup> For the law can prevail both at home and abroad only if war is abolished as a means of politics and peace is established in national and in international relations according to the principles of equal rights.

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<sup>40</sup> See generally DONATO GIANOTTI, *REPUBBLICA FIORENTINA* (Giovanni Silavano ed., Librairie Droz S.A. 1990).

<sup>41</sup> See Kant, *supra* note 28, at 47, 50. See also Ernst-Ulrich Petersmann, *The Foreign Policy Constitution of the European Union: A Kantian Perspective*, in *FESTSCHRIFT FÜR E.J. MESTMÄCKER* 433-448 (1996); Ernst-Ulrich Petersmann, *Rights and Duties of States and Rights and Duties of their Citizens*, in *RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: VÖLKERRECHT, EUROPARECHT, STAATSRRECHT*, *FESTSCHRIFT FÜR R. BERNHARDT*, 1087-1128 (1995).

Kant's ethical theory was aimed at "a constitution allowing the greatest possible human freedom in accordance with laws which ensure that the freedom of each can coexist with the freedom of all others." The individual freedoms were conceived as rights (e.g., to freedom, legal equality, property, participation in the government and popular sovereignty) so as to enable their enforcement against anyone who violates freedom illegitimately. In order to secure peace at the national and international level, "all men who can at all influence one another must adhere to some kind of civil constitution" of the three following types:

- (1) a constitution based on the *civil rights* of individuals within a nation (*ius civitatis*);
- (2) a constitution based on the *international rights* of states in their relationships with one another (*ius gentium*);
- (3) a constitution based on *cosmopolitan right*, in so far as individuals and states, coexisting in an external relationship of mutual influences, may be regarded as citizens of a universal state of mankind (*ius cosmopolitanum*). This classification, with respect to the idea of a perpetual peace, is not arbitrary but necessary. For if even one of the parties were able to influence the others physically and yet itself remained in a state of nature, there would be a risk of war, which it is precisely the aim of the above articles to prevent.<sup>42</sup>

It is noteworthy that Kant's rights-based approach for a national as well as international "law-governed social order," in which social antagonisms can be overcome through peaceful change on the basis of general rules and judicial protection of equal rights, is also advocated by the economic theory of property rights, because the proper functioning of both *economic* and *political markets* depends on the assignment of property rights to all market participants and to all scarce resources.<sup>43</sup> In state practice, the experience with European Community (EC) law and with the European Convention on Human Rights (ECHR) appears to have vindicated such a liberal rights-based approach, for the effectiveness of the EC Treaty's customs union rules and of the ECHR's human rights guarantees was largely a function of the judicial protection of corresponding individual rights by the EC Court and the European Court of Human Rights. For instance, the internal "market freedoms" of the EC Treaty's customs union law were effectively enforced by the EC Court as directly applicable individual rights vis-à-vis *national* trade restrictions. But the Court never recognized corresponding "market freedoms" in the foreign trade law

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<sup>42</sup> Kant, *supra* note 28, at 98.

<sup>43</sup> See generally NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW, *supra* note 19, at 25-28.

of the EC vis-à-vis trade restrictions imposed by the *EC institutions*. As a consequence, the EC's foreign trade law remained characterized by protectionist trade restrictions which – even if they had been found to be clearly illegal in GATT dispute settlement proceedings between the EC and third GATT contracting parties – were often maintained and not challenged by the EC Court, notwithstanding their welfare-reducing and discriminatory effects on EC citizens.<sup>44</sup> As predicted by Kant, the effectiveness of national and international guarantees of freedom and non-discrimination has depended, at least in European integration, on enabling the citizens to defend such freedoms as individual rights to be protected by the courts.

IV. THE *KANTIAN IMPERATIVE*: CONSTITUTIONAL FUNCTIONS OF  
INTERNATIONAL GUARANTEES OF FREEDOM, NON-  
DISCRIMINATION, RULE-OF-LAW AND  
“DEMOCRATIC PEACE”

Kant's proposals for extending the constitutional concept of the *Rechtsstaat* – the state governed according to the rule of law and aimed at protecting the equal liberties of the citizens in conformity with the principle (“categorical imperative”) of acting according to maxims which can at the same time become universal laws – to international relations did not envisage the establishment of international organizations. His proposal for an international treaty on “perpetual peace” was limited to republican states, whose domestic and foreign policy arrangements ought to be based on universally applicable liberal principles. Kant's expectation was that, as individual citizens (in contrast to heads of state) have to bear the costs of welfare-reducing foreign policies (such as wars), their self-interest would lead them to vote for rule-oriented rather than power-oriented policies also in international affairs.<sup>45</sup> The federation of republican states opposed to war would have to be progressively enlarged. But progress towards rationality, e.g., the establishment of a republican constitution, could not be held up for long. Kant emphasized that the international “*federation of peoples . . .* would not be the same thing as an international state:”

This federation does not aim to acquire any power like that of a state, but merely to preserve and secure the *freedom* of each state in itself, along with that of the other confederated states, although this does not

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<sup>44</sup> See, e.g., Ernst-Ulrich Petersmann, *International and European Foreign Trade Law: GATT Dispute Settlement Proceedings against the EEC*, 22 COMMON MKT. L. REV. 441 (1985).

<sup>45</sup> See Kant, *supra* note 28, at 100.

mean that they need to submit to public laws and to a coercive power which enforces them, as do men in a state of nature. It can be shown that this idea of *federalism*, extending gradually to encompass all states and thus leading to perpetual peace, is practicable and has objective reality.<sup>46</sup>

Kant did not explain, however, why hierarchical organizations were needed for securing peace and rule of law *within states*, but not *among states*. He rather conceived “an enduring and gradually expanding federation likely to prevent war” as a sub-optimal substitute as long as “the positive idea of a world republic cannot be realized.”

There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an *international state (civitas gentium)*, which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right . . . , the positive idea of a *world republic* cannot be realized. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding *federation* likely to prevent war.<sup>47</sup>

It was only through the traumatic experiences of World Wars I and II that governments finally learned to accept the need for worldwide *constitutional rules* (such as the prohibition of the use of force and the collective security arrangements in the UN Charter) and their collective enforcement through international organizations (such as the UN and its Security Council). Not only *within states*, but also *among states* do the limitation of government failures and the supply of “public goods” depend on agreed procedures and institutions for rule-making, rule-application and rule-enforcement (cf. *Table 1*). Judging from our historical experience with “constitutionalizing” domestic policy powers, there is no reason to assume that the principles of “constitutionalism” (*infra* section A), discovered in painful political processes of “trial and error” over more than 2,500 years of political history, may be less important for “domesticating” *foreign policy powers* than they have been for limiting abuses of *domestic policy powers* in constitutional democracies. A close look at EC law (*infra* section B) and at the law of worldwide organizations, such as the UN and the WTO (*infra* section C), confirms the empirical fact that these international treaties include a large number of “constitutional guarantees” of freedom, non-discrimination, rule of law, separation of powers and other fundamental rights which are increasingly enforced through na-

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<sup>46</sup> See *id.*, at 102, 104.

<sup>47</sup> See *id.*, at 105.

tional and international courts and are of importance also for the interpretation and application of WTO law.

#### A. National and International Constitutionalism: A Brief Survey

Constitutionalism was preceded by a long history of *political ethics*, whose major insights can be subdivided into three major branches:

*Person-oriented ethics* focusing on the virtues of the rulers (e.g., *Plato's* philosopher kings, *Erasmus'* "Institutio principis christiani," or *Machiavelli's* "Prince").

*Institution-oriented ethics* searching for rules and institutions so as to limit abuses of government powers and protect the liberty of citizens through the rule of law (e.g., *Aristotle's* comparative analysis of 158 city constitutions so as to discover the best conditions for man's life as a "political animal"); and

*Result-oriented ethics* focusing on the output of political processes (e.g., *Popper's* emphasis on piecemeal reforms based on "trial and error," rather than utopian "social engineering" with possibly dangerous side-effects, and *Rawl's* proposals for "justice as fairness" and for a "difference principle" designed to ensure that social and economic inequalities can be expected to be to everyone's advantage).<sup>48</sup>

Kant perceived progress towards constitutional democracy as a moral obligation of all people of good will. Yet, even though person-oriented political ethics continues to be important in international relations (as illustrated by the administering of an oath to the UN Secretary-General and also to the members of the WTO's new Appellate Body), it is laws and political institutions which, according to Kant, can compel even a nation of devils – albeit not morally good in themselves – to behave as good citizens.<sup>49</sup> According to *K. Popper*, the fundamental question of law and political science is not "Who shall govern?" It is rather "How much power must be delegated to governments? And how must laws and political institutions be designed so that even incompetent and dishonest politicians cannot cause too much harm?"<sup>50</sup>

The legal, economic and political structures of today's global system differ fundamentally from the state-centered system between the peace treaties of Westphalia (1648) and World War II. For instance, in addition to roughly 200 sovereign states, there are today more than 300 intergovernmental international organizations, some of which

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<sup>48</sup> See Alois Riklin, *Politische Ethik*, in *POLITISCHE THEORIE UND IDEENGESCHICHTE IM GESPRÄCH* 81-102 (H. Kramer ed. 1995) (explaining these three strands of political ethics).

<sup>49</sup> Kant, *supra* note 28, at 112.

<sup>50</sup> K.R. POPPER, *AUF DER SUCHE NACH EINER BESSEREN WELT* 249 (1984).

have become important actors in international relations (such as the UN Security Council) and even members in other international organizations (cf. the EC membership in the WTO). The international organizations established since World War I – such as the League of Nations, the International Labour Organization, the UN, the Bretton Woods Institutions, the Council of Europe and the European Communities – reflect a variety of differing legal, procedural and institutional approaches. But, notwithstanding the “pragmatism” regarding legal-institutional reforms of international relations, the statutory objectives of most international organizations are aimed at limiting abuses of government powers (such as acts of aggression, oppression of fundamental rights, welfare-reducing protectionism, competitive monetary devaluations) and at supplying international public goods (such as peace, legal security, stable exchange rates, currency convertibility, liberal trade, protection of the environment, democracy, social welfare). As illustrated in *Table 3*, there are obvious parallels not only between the basic principles of *national constitutionalism* (as listed in sections a-f in the first column of *Table 3*) and the constitutional principles of EC law (listed in the second column of *Table 3*); also the international GATT/WTO guarantees of freedom, non-discrimination and rule of law correspond to basic constitutional principles (see the third column of *Table 3*) and serve “constitutional functions” for the protection of freedom, non-discrimination and rule of law in the transnational relations of individual citizens.<sup>51</sup>

B. Constitutionalism and the European Community:  
A Brief Survey

The WTO world trade and legal system differs from systems like the UN and IMF systems by its stringent legal disciplines for regional organizations (notably free trade areas and customs unions) and the full membership of the European Community. The regional law of free trade areas and customs unions has often served as a pace-setter for subsequent reforms of GATT law on the worldwide level. It is also noteworthy in this respect that the basic postulates of national constitutionalism have all been recognized as part of EC law.<sup>52</sup> In many instances, the initiatives for this progressive constitutionalization of EC law did not come from the EC governments but from national courts and the EC Court, when they had been seized by EC

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<sup>51</sup> See Petersmann, *supra* note 4, at 210 (explaining these “constitutional functions” of the liberal rules, e.g., in GATT law, EC law and certain other international organizations, in detail).

<sup>52</sup> See Petersmann, *supra* note 2, at 1123-1175 (showing this proposition in detail).

Table 3: National and International Constitutionalism:  
Constitutional Functions of International Guarantees of  
Freedom, Non-discrimination and Rule of Law

| National Constitutionalism  | European Community Law  | GATT/WTO Rules   |
|---|---|--|
| a) Objective rule-of-law principles and primacy of constitutional rules over post-constitutional policy-making processes                          | Objective rule-of-law principles (e.g., non-discrimination requirements in Article 6 EC) and interpretation of EC Treaty as a constitution with legal primacy over secondary EC law and unwritten constitutional guarantees | Objective rule-of-law principles, non-discrimination and transparency requirements (e.g., in GATT Articles I, X and XIII), legal primacy of WTO law over GATT law (Article XVI:3 WTO) and over domestic laws (Article XVI:4 WTO) |
| b) Horizontal and vertical separation of powers ("mixed constitutions")   | Separation of powers (e.g., among EC institutions and vertically according to the subsidiarity principle)   | Horizontal and vertical separation of power (e.g., in Articles III, XI, XXIII, XXIV GATT)  |
| c) Limitation of government powers through inalienable fundamental rights (individualism as value premise)  | Judicial protection of directly applicable "market freedoms" (e.g., Article 30 EC) and fundamental rights guaranteed by EC law (e.g., Article F TEU)*   | GATT and GATS guarantees of freedom of trade; Limitation of government powers through individual rights (e.g., Art. X GATT: individual access to courts, TRIPS Agreement: individual intellectual property rights)               |
| d) Necessity and proportionality of all governmental restraints (individual liberty and legal equality as value premises)                         | Necessity and proportionality requirements of EC law and their judicial protection (e.g., in the context of Articles 30, 36 EC)   | Legal ranking of trade policy instruments in GATT law according to their efficiency; prohibitions of "unnecessary" trade restrictions (e.g., in TBT Agreement)   |
| e) Democratic participation in the exercise of government powers  | EU citizenship, direct election of European Parliament, democracy as constitutional principle of EU law (e.g., Article F TEU)   | Parliamentary ratification of GATT and WTO Agreements, transparency requirements   |
| f) Social justice (e.g., through progressive taxation, income redistribution, social legislation and governmental supply of other "public goods") | EC "social provisions" (e.g., Articles 117-122 EC), European Social Fund (Articles 123-125), consumer protection rules (e.g., Article 129a), European Regional Development Fund, etc.                                       | Safeguard clauses for "public policy" purposes (e.g., in GATT Articles XIX-XXI); special and differential treatment for less-developed country members   |

\*TEU = Treaty on European Union.

citizens in order to protect themselves against abuses of regulatory powers by the EC and member state governments.

### 1. Rule of Law and Constitutionalism

The idea of an "empire of laws, not of men" (*Harrington, 1656*), which had been developed already in *Plato's* proposals for a "nomocracy" as a practical substitute for his utopian idea of a government by "philosopher kings," is reflected in the explicit commitment of the EC Treaties to "the rule of law" (for example, in the Preamble



of the Treaty on European Union; hereinafter TEU) and in the mandate of the EC Court to “ensure that in the interpretation and application of this Treaty the law is observed” (Article 164 EC). In its case law, the EC Court has recognized most national “rule of law” principles (such as legal certainty, protection of legitimate expectations, non-discrimination, non-retroactivity and proportionality of restrictions) as general principles of EC law. Also the distinction between constitutions of a higher legal rank and post-constitutional laws, first elaborated by *Aristotle* and recognized in the constitutional laws of all EC member states, has been recognized by the EC Court as part of Community law; thus, according to the Court, “the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.”<sup>53</sup>

## 2. *Separation of Powers*

The idea, again first developed by *Plato* and *Aristotle*, of separating government powers through a “mixed constitution” with monocratic, oligocratic and democratic elements, so that “le pouvoir arrête le pouvoir” (*Montesquieu*) underlies the horizontal separation of powers among the various EC institutions and the vertical separation of powers between the EC, member states and the fundamental rights of the “citizens of the Union” (*cf.* Article 8 EC). Thus, the EC Court has recognized in a series of judgments “the Court’s duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied and to see to it that the Parliament’s prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner.”<sup>54</sup> The principles of limited Community powers and “subsidiarity” are explicitly laid down in Article 3b of the EC Treaty.

## 3. *Fundamental Rights*

The limitation of all governmental powers through inalienable fundamental rights, which has become the foundation stone of constitutional democracies since the American Declaration of Independence (1776) and the French Declaration of the Rights of Man (1789), is explicitly recognized in Article F of the TEU and in the unwritten

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<sup>53</sup> Case 294/83, *Parti Ecologiste “Les Verts” v. European Parliament*, 1986 E.C.R. 1339, 1365.

<sup>54</sup> Case 70/88, *European Parliament v. Council*, 1990 E.C.R. 2041, 2042.

fundamental rights guarantees of EC law. One of the major constitutional achievements of EC law is to have extended these guarantees of equal liberties and property rights to the field of transnational "market freedoms" pursuant to the EC "principle of an open market economy with free competition" (Article 3a).

#### 4. *Necessity and Proportionality of Governmental Restraints*

The additional limitation of governmental powers by the constitutional requirements of the "necessity" and "proportionality" of governmental restraints of individual liberties is explicitly recognized in EC law (e.g., Article 3b EC) and in the case law of the EC Court of Justice regarding the admissibility of governmental limitations on individual freedoms. For instance, the "necessity" and "proportionality" of national restrictions of intra-EC trade are, according to the EC Court, unwritten conditions for the consistency of such restrictions with Articles 30 or 36 of the EC Treaty.

#### 5. *Democracy*

The "democratic functioning of the institutions" is the declared objective of the TEU (cf. the Preamble), which also stipulates that the national "systems of government are founded on the principles of democracy" (Article F). According to the EC Court, the powers of the directly elected European Parliament reflect "at the Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly."<sup>55</sup> The EC Treaty provisions on the "citizenship of the Union" (Article 8) recognize the nationals of member states as legal subjects and citizens of the Union with individual political and economic rights.

#### 6. *Social Justice*

The constitutional principle of "social justice" is reflected in the EC Treaty's "social provisions" (Articles 117 et seq.), which are designed "to promote . . . social progress for their peoples" (Preamble TEU). The EC Treaty includes many other provisions for the supply of "public goods" for the benefit of the "citizens of the Union" (Article 8 EC Treaty).

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<sup>55</sup> Case 138/79, *SA Roquette Frères v. Council*, 1980 E.C.R. 3333, 3334.

C. Constitutionalism and Worldwide International Organizations:  
A Brief Survey

The above-mentioned constitutional principles are also increasingly shaping the law of worldwide international organizations, such as the UN, the International Labour Organization (ILO), the Bretton Woods institutions and also the WTO. For instance:

1. *Rule of Law and Constitutionalism*

Objective rule of law principles – such as the UN Charter principles of “sovereign equality” of states, the prohibition of the threat or use of force, peaceful settlement of disputes, non-intervention in matters which are essentially within the domestic jurisdiction of a state and self-determination – have become part of general international law or even *ius cogens*. In the field of international trade law, the GATT/WTO rules specify the general rule of law principles, such as by means of worldwide requirements of non-discrimination (for example, in Articles I, III, XIII, XVII GATT), transparency (for example, Article X GATT), peaceful settlement of disputes through the mandatory WTO dispute settlement system and the prohibition of unilateral reprisals (cf. Article XXIII:2 GATT, Articles 22, 23 Dispute Settlement Understanding; hereinafter DSU). Both the UN Charter (cf. Article 103) and, to a lesser extent, the WTO Agreement (cf. Article XVI:3) assert priority over other international agreements so as to strengthen their respective constitutional functions for the use of lawful and welfare-increasing instruments of foreign policy. The UN, ILO, WTO and many other UN bodies and conventions set up institutionalized supervisory mechanisms for the systematic monitoring of the implementation of their international agreements in the domestic law of member countries.

2. *Separation of Powers*

Horizontal and vertical institutional “checks and balances” are one of the major objectives of international organizations, e.g., by subjecting foreign policies, trade policies, monetary and social policies of member countries to international supervision in different fora (such as the UN, WTO, IMF and ILO) and to international procedures for the rule-oriented rather than power-oriented settlement of international disputes. While the judicial review of international decisions like Security Council decisions by the International Court of Justice

remains controversial,<sup>56</sup> the WTO's Dispute Settlement Understanding explicitly states that it shall also apply to consultations and the settlement of disputes between Members concerning their institutional and membership rights and obligations under the provisions of the WTO Agreement and the Dispute Settlement Understanding itself (cf. Article 1:1 of the DSU). Also the quasi-automatic adoption by the WTO Dispute Settlement Body of Panel and Appellate Body Reports implies a discrete strengthening of separation of powers between WTO bodies and member states.

### 3. *Fundamental Rights*

In the UN Charter and in the increasing number of UN human rights conventions, all members states have committed themselves to "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (e.g., Articles 55, 56 UN Charter). The limitation of government powers through legal guarantees of freedom and non-discrimination is the major purpose of the international GATT/WTO guarantees of liberal trade in goods and services and of non-discriminatory conditions of competition. By prohibiting governments from discriminating among the more than 120 WTO member countries, WTO law takes away more than 120 possibilities of governments to discriminate among their own citizens through tariffs and non-tariff barriers, and to thereby redistribute income for the benefit of protectionist interest groups. The WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS) includes detailed guarantees of copyrights, trademarks, industrial designs, patents and other intellectual property rights, which have long been recognized and protected by courts as individual rights. The WTO Agreement also includes a large number of legal guarantees of private access to domestic courts so as to enforce intellectual property and other rights of private citizens. In other worldwide and regional organizations, such as the UN, ILO and the Council of Europe, the worldwide and regional human rights guarantees are increasingly contributing to the view that systematic violations of human rights and democracy may be inconsistent with membership in such organizations. Thus, UN Security Council Resolution 940 of 31 July 1994 considered the "deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties," as a "threat to peace and security in the region" justifying a mili-

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<sup>56</sup> See, e.g., J.E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996).

tary intervention pursuant to Chapter VII of the UN Charter aimed at “the restoration of democracy in Haiti and the prompt return of the legitimately elected President.”

#### *4. Necessity and Proportionality of Governmental Restraints*

Necessity and proportionality requirements for governmental restraints of individual freedoms (including the freedom to import and export) are to be found in a large number of international treaty provisions such as in GATT law (cf. Article XX GATT) and in the General Agreement of Trade in Services (for example, Articles VI, XIV GATS). Also the legal ranking of admissible trade policy instruments in GATT law in accordance with their economic efficiency – such as the general admissibility of non-discriminatory internal taxes and regulations (Article III), the legal limitations on the use of subsidies (Article XVI) and tariffs (Articles II, XXVIII) and the general prohibitions of non-tariff border measures (Article XI) – are aimed at limiting the use of disproportionate and mutually harmful policy instruments. In many fields of international law (e.g., regarding reprisals and self-defence), the requirement of proportionality has become recognized as a principle of general international law.

#### *5. Democratic Participation*

Democratic exercise of government powers is promoted by the parliamentary ratification of international agreements (such as the 1994 WTO Agreement) and the increasing number of regional agreements providing for parliamentary bodies (such as the Parliamentary Assembly of the Council of Europe and of the Organization for Cooperation and Security in Europe). While the word “democracy” is not explicitly mentioned in the UN Charter, the UN’s Universal 1948 Declaration of Human Rights makes clear that the legitimacy of governments depends on free elections (cf. Article 21) and on promoting the equal human rights and freedoms of all citizens (Article 29). The number of international dispute settlement mechanisms providing for direct access of private citizens is also increasing (for example, in UN human rights conventions, the ILO, the 1968 World Bank Convention on the International Center for the Settlement of Investment Disputes, the 1982 Law of the Sea Convention, the European Convention on Human Rights); similar to the tripartite composition of ILO Bodies with employers’, workers’ and governments’ representatives, such international treaty provisions on the participation of private citizens in international organizations reflect the “democratic functions” of in-

ternational liberal rules and organizations for the protection of individual rights.

### 6. *Social Justice*

The promotion of social justice, for instance through the social and labour standards in the more than 180 ILO Conventions, through UN human rights conventions and the development aid of the World Bank Group, is a declared policy objective and major task of international organizations. The numerous safeguard clauses in GATT/WTO law for national "public policy exceptions" (such as those in Articles XVIII-XXI GATT) also reflect the view that liberal trade agreements must be reconciled with the sovereign right of governments to pursue social policies that are considered more important than liberal trade.

## V. PROBLEMS OF A CONSTITUTIONAL THEORY OF INTERNATIONAL ORGANIZATIONS

The worldwide trends towards protection of human rights, democracy, deregulation and the globalization of market economies suggest that the above-mentioned "constitutionalization" of foreign policies and of international organizations will continue. The entry into force of the WTO Agreement on 1 January 1995 is a major achievement on the road towards global economic integration based on rule of law and democratic structures for the benefit of individual citizens. The GATS, for instance, aims at liberalizing the high degree of protectionist regulation of domestic services, as well as the thousands of bilateral market-sharing agreements such as for international air and maritime transport, by means of multilateral rules and "GATS Rounds" similar to the progressive liberalization of trade in goods in the framework of GATT. The proposals for following the precedents of the GATS and TRIPS Agreements by extending the coverage of the WTO Agreement to additional new subjects – such as international competition, investment, environmental, social and labour rules – suggest that many governments perceive the WTO as a promising model for negotiating additional worldwide rules in these fields.

History since World War II seems to confirm the liberal assumptions that constitutional democracies favour peaceful change in their international relations, and that there is a clear interrelationship between economic freedom, open markets, economic growth and de-

mocracy.<sup>57</sup> It is therefore surprising that economics, law and political science have so far failed to elaborate a convincing theory on the legal-institutional requirements of a liberal international order and on the optimal assignment of foreign policy tasks to the various international organizations. The WTO Agreement has brought about a new legal framework for a liberal world economy with many innovative legal features, such as the compulsory WTO dispute settlement system with Appellate Review. But it remains controversial whether the proposals for additional international competition, investment, environmental, labour and social rules should be pursued within the WTO or in other international organizations. Perhaps the greatest weakness of the international legal system remains that, as rightly criticized by UN Secretary-General Boutros-Ghali, “democracy in the international community of states remains at a very rudimentary stage.”<sup>58</sup>

Today’s worldwide recognition of human rights as part of international customary law and UN treaty law, including everyone’s “right to take part in the government of his country, directly or through freely chosen representatives,” and the need for periodic democratic elections as “the basis of the authority of government” (cf. Article 21 of the 1948 Universal Declaration of Human Rights), offer an important basis for further “constitutionalizing” and “democratizing” international relations and organizations. The acknowledgment, in the UN Charter, of human rights as a precondition for international peace has already prompted the UN Security Council to interpret its powers under chapter VII in a broad sense for the protection of *democratic peace*. Yet, without a convincing “constitutional theory” of international relations, governments lack the necessary blueprint for overhauling the UN system. The actual preference of governments for pragmatic piecemeal reforms on the basis of “trial and error” too often leads to

tinkering with organizational charts, shifting financial envelopes, reordering bureaucratic priorities, downsizing headquarters and field operations, streamlining managerial and administrative procedures, or oiling the intergovernmental machine. While these issues might be considered important, they have generally resulted in a concentration of focus on reformist prescriptions that are limited and narrow in scope and superficial and short-term in vision and effect.<sup>59</sup>

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<sup>57</sup> See, e.g., J. GWARTNEY ET AL., *ECONOMIC FREEDOM OF THE WORLD: 1975-1995* (1996).

<sup>58</sup> Boutros Boutros-Ghali, *Democracy: A Newly Recognized Imperative*, 1 *GLOBAL GOVERNANCE* 3, 10 (1995).

<sup>59</sup> W.A. Knight, *Beyond the UN System? Critical Perspectives on Global Governance and Multilateral Evolution*, 1 *GLOBAL GOVERNANCE* 229, 251-52 (1995).

A more comprehensive theory of international organizations would, *inter alia*, have to offer answers to the following questions:

A. What Are the Legitimate Functions of International Organizations?

International organizations are needed for essentially the same reasons as national organizations (*cf. Table 1*), *e.g.*, to correct "market failures" as well as "government failures" and to assist in the supply of "public goods."

*First*, international rules and organizations may be necessary for correcting cross-border "market failures" such as transnational "externalities." For instance, the GATT rules on product standards (Article III), antidumping duties (Article VI) and safeguard measures (*e.g.*, Article XX) reserve the right of countries to protect themselves against *e.g.*, injurious imports notwithstanding their reciprocal market access commitments under GATT law.

*Second*, international rules and organizations may be needed for correcting "government failures" such as trade protectionism. For instance, economic theory shows that *unilateral* trade liberalization increases the economic welfare of the liberalizing country. The main reasons why governments prefer, nonetheless, to liberalize trade through *reciprocal agreements*, rather than *unilaterally*, are *political* and *legal* rather than *economic*:<sup>60</sup> Reciprocal trade liberalization agreements are the only way of guaranteeing export industries secure access to foreign markets; export industries therefore prefer *reciprocal trade liberalization*, and governments need this political support from "their" export industries in order to overcome the protectionist resistance against trade liberalization from import-competing producers at home. Reciprocal international guarantees of freedom of trade and non-discrimination therefore serve important *domestic policy functions* for limiting government failures by helping governments to overcome the asymmetries in their national foreign policy-making processes. This also explains the high rate of "success" of GATT dispute settlement rulings: Governments know very well that compliance with their self-imposed GATT commitments, and with GATT dispute settlement rulings, increases national economic welfare; and that by "tying their hands to the mast" (like *Ulysses* when he approached the island of the *Sirenes*), reciprocal international pre-commitments help

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<sup>60</sup> For a detailed economic, political and legal explanation of this important insight see Ernst-Ulrich Petersmann, *Why Do Governments Need the Uruguay Round Agreements, NAFTA and the EEA?*, 49 *AUSSENWIRTSCHAFT* [SWISS REV. INT'L ECON. REL.] 31 (1994).



them to resist the siren-like temptations from “rent-seeking” interest groups at home.

*Third*, international organizations may be necessary to assist in the supply of *international public goods*. For instance, according to various economic estimates, the implementation of the WTO Agreement is likely to increase net world welfare by more than 250 billion U.S. dollars over the next years. Without the most-favoured-nation obligation in GATT Article I, the “multilateralization” of the Uruguay Round results among the 124 participating countries would require several thousand bilateral agreements to achieve the same legal effect. International “regime theories” emphasize that international institutions, supervisory and dispute settlement mechanisms can help to overcome the “prisoners’ dilemma” of international cooperation<sup>61</sup> and reduce “free riding,” for instance through the formation of “clubs” for the collective supply of international public goods (such as trade liberalization) by means of collective rule-making (e.g., in the periodic “GATT Rounds”), institutionalized monitoring of rule-compliance (e.g., in GATT’s “Trade Policy Review Mechanism”), confidence-building measures (e.g., transparency and dispute settlement requirements) and sanctions against “free-riders” (e.g., limitation of agreed trade liberalization to member countries, suspension of concessions in response to infringements of GATT rules).<sup>62</sup>

But there are also many reasons why international organizations, or the transfer of discretionary regulatory powers to them, may be unnecessary or undesirable. For instance, international rules and organizations are easier to justify when they promote freedom, non-discrimination and *market integration* across frontiers, than in the case of discretionary international *policy integration* which, due to inadequate

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<sup>61</sup> International relations theory uses the game of the Prisoners’ Dilemma (PD) in order to exemplify why cooperation is often difficult to achieve without adequate information and confidence even though all players would benefit from such cooperation. The PD relates to the tale of two guilty prisoners suspected of a major crime. If the public prosecutor has only enough evidence to convict them of a misdemeanor, each prisoner will benefit if neither confesses the crime. To elicit confessions, the public prosecutor can create the PD by separating the prisoners (e.g., preventing information and cooperation among them) and offering each the following deal: If either prisoner confesses while the other does not, all charges against the confessor will be dropped, while the non-confessor will receive the maximum possible sentence. Game theory shows that these incentives will typically induce confession by both prisoners, resulting in high prison sentences which could have been avoided by cooperation and silence.

<sup>62</sup> For a survey of the various “realist,” “neoliberal,” “functional,” “public choice” and “constitutional” theories of international relations, and their relevance for explaining GATT and the WTO, see Ernst-Ulrich Petersmann, *supra* note 26, at 161-221, and A.M. Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 717-743 (1995).

constitutional restraints, may increase the risk of government failures (as in the example of the EC's common agricultural policy). Also, multilateral trade negotiations are often abused for welfare-reducing, restrictive arrangements, rather than for mutually beneficial trade liberalization.

Article III of the WTO Agreement illustrates the various functions of international organizations by assigning the following five tasks to the WTO:

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Agreements.
2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes . . . in Annex 2 to this Agreement.
4. The WTO shall administer the Trade Policy Review Mechanism . . . provided for in Annex 3 to this Agreement.
5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

This statutory definition shows that the WTO – similar to the old “GATT 1947,” which was terminated with effect from the end of 1995 – has not only administrative and executive tasks, plus surveillance, dispute settlement and coordination functions, but also negotiating and rule-making functions. The vast scope of jurisdiction of the WTO not only for trade in goods, but also for trade in services, trade-related investment measures and intellectual property rights, can be legitimized by the legal and economic functions of liberal trade rules to protect equal individual rights in a mutually beneficial manner increasing consumer welfare. Likewise, the application of the WTO Agreement not only to states but also to “separate customs territories” (like Hong Kong, Macao and the EC, cf. Articles XI, XII WTO Agreement), is legitimized by the fact that this extended scope of application increases the scope for mutually beneficial cooperation.

From the above-mentioned *Lockean* and *Kantian* perspectives, however, the legitimacy of the tasks assigned to the WTO, and to other national and international organizations, depends on the extent to which they promote the equal liberties and individual rights of domestic citizens. Most GATT/WTO rules are designed to protect freedom of trade, non-discriminatory conditions of competition, investment and individual property rights. By extending the national legal protection of individual liberties and non-discrimination across frontiers, they serve “constitutional functions” for the benefit of domestic consumers, traders and producers. Moreover, the GATT/WTO rules have been ratified by national parliaments in most WTO member countries and have thereby acquired additional democratic legitimacy.

But the legitimacy of GATT/WTO rules may be challenged if they authorize restrictions and distortions of individual freedoms (e.g., in Article VI GATT on anti-dumping measures against “dumped” imports causing or threatening “material injury to an established industry”) which reduce consumer welfare and redistribute income among domestic groups in a discriminatory and often non-transparent manner.<sup>63</sup> And if, as in the WTO Agreement on Safeguards, the admissibility of import restrictions is conditional on procedural and substantive “public interest” requirements, the question arises: How must such procedural and substantive requirements be interpreted in order to define the “public interest” in a legitimate manner? Is a “*Hobbesian* interpretation” of the national “foreign policy interest,” e.g., a power-oriented determination of the “primacy of foreign policy” without regard to the general consumer interests in non-discriminatory liberal trade, consistent with the liberal functions of the international guarantees of freedom and non-discrimination in GATT/WTO law?

The explicit mandate of the WTO as a *negotiating forum*, emphasized in Article III of the WTO Agreement, reflects the widely shared belief of governments that it may be politically easier to negotiate future trade, competition, environmental, investment, social rules or intellectual property rights in the context of comprehensive “WTO package deals” than outside the WTO, where it may be more difficult to offer cross-concessions in other fields and exclude “free-riding.” But the various “realist,” “neoliberal” and “functional” theories of international relations have not yet developed a model for successful

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<sup>63</sup> On the mutual inconsistency of antidumping and competition rules in the EC and the United States, see Petersmann, *supra* note 18, at 5.

international bargaining and "institution-building." Nor do we have convincing institutional theories on e.g., how to reform the UN system.

B. How to Ensure that International Rules and Organizations Do  
Not Undermine the Requirements of Constitutional  
Democracy?

From the *national* perspective of constitutional democracies and their citizens, international organizations can be viewed as a "fourth branch of government" which, like national organizations, derive their legitimacy from promoting the equal liberties and "public interest" of domestic citizens. It is therefore important to ensure that international agreements do not undermine the basic constitutional principles of democracies. For instance, the domestic constitutional principles of parliamentary and direct democracy (e.g., in Switzerland) may require that the rules negotiated among governments in the framework of international organizations (such as the Uruguay Round Agreements) be ratified by national parliaments and subjected to popular *referenda* by domestic citizens. Effective international rule-making must therefore be supplemented by democratic procedures on the international and domestic levels of policy-making. It may be enhanced by enabling parliaments and public opinion to be fully informed already during the intergovernmental negotiations at the international level so as to preempt "democratic opposition" in the subsequent ratification processes at the national level.

After the domestic ratification of international rules, their effective integration into the respective domestic legal systems raises numerous legal and political questions. The *domestic* constitutional guarantees of fundamental rights, democracy, proportionality and rule of law may not only require that domestic law be construed in conformity with self-imposed international obligations; they may also require that the *international* GATT/WTO guarantees of freedom and non-discrimination be interpreted, as parts of the respective domestic legal system, in a "Lockean" or even "Kantian" perspective so as to maximize the equal rights of domestic citizens, e.g., by enabling them to invoke and enforce precise, unconditional international guarantees of freedom and non-discrimination through domestic courts. But for reasons of international reciprocity, domestic courts often prefer to construe international agreements as they are applied by the international treaty organs or by other contracting parties. The procedure in Article 177 of the EC Treaty for preliminary rulings, at the request of

national courts, by the EC Court concerning the interpretation of EC law is one illustration of how national and international dispute settlement procedures can be effectively coordinated. The dispute settlement panels pursuant to chapter 19 of the North American Free Trade Agreement, which can review national antidumping and countervailing duty determinations on the basis of the applicable domestic law of the NAFTA member country concerned, offer another method for reconciling international and domestic trade rules and dispute settlement procedures.

It seems doubtful, however, whether national parliaments should be granted the power to introduce legislation inconsistent with international obligations previously ratified by themselves. Such a power-oriented *later-in-time rule* is not only inconsistent with the international rule of law; it also seems unnecessary in view of the many possibilities of terminating or adjusting international obligations. Moreover, the U.S. experience suggests that a "later in time rule" operates as an invitation for protectionist interest groups to lobby for subsequent legislative deviations from the previous international commitments. The flexibility of international law enables each country to defend its national interests in conformity with international law, e.g., by giving parliaments a stronger role in international treaty-making procedures, or by terminating or suspending international treaty obligations in response to treaty violations by other contracting parties. In the EC, international agreements concluded by the EC become an "integral part of the Community legal system" with legal primacy over secondary EC law; hence, neither the EC Council nor the European Parliament are empowered to violate international agreements of the EC. The EC institutions must also respect international agreements that have been concluded by EC member states prior to their EC membership (cf. Article 234 EC Treaty) or as "mixed agreements" ratified by both the EC and its member states.

C. How to Design International Rule-Making, Rule-Administration and Adjudication in a Manner Maximizing the Equal Rights of Member Countries and of their Citizens?

Not only *within* states, but also *among* the about 200 sovereign states are rule-making, rule-application and rule-enforcement procedures necessary. These procedures often differ depending on whether they relate to general customary or treaty rules for voluntary cooperation among states, or to result-oriented "secondary treaty law"

adopted by the bodies of international organizations. For instance, the rules of the old "GATT 1947" could be enforced through the GATT dispute settlement procedures only in the relations among GATT contracting parties. The dispute settlement procedures of the WTO also apply to disputes over the institutional provisions of the WTO Agreement (cf. Article 1 DSU) and enable the appeal of WTO panel reports to a standing Appellate Body (cf. Article 17 DSU). The establishment of this Appellate Body reflects a discrete strengthening of separation of powers in international organizations.

As regards international rule-making, modern negotiation theories, constitutional theories and "public choice" theories emphasize the need for "principled negotiations"<sup>64</sup> and for creating incentives (such as a "veil of uncertainty" over future positions, repetitive bargaining and "tit-for-tat-strategies" of reciprocal cooperation)<sup>65</sup> which induce people and governments to focus on their common long-term interests in general rules and fair procedures. But little research has so far been done on the interdependences between rule-making procedures, institutional law and the respective substantive tasks. It is an important experience of European integration that rule-making may be greatly facilitated by the right of initiative of an independent expert body (like the EC Commission). In the Uruguay Round negotiations, for instance, international agreement on the new rules was sometimes facilitated by draft and compromise proposals from the GATT Secretariat which "mediated" between conflicting proposals from government delegations, or which initiated discussions on systemic problems rising from the hundreds of specific negotiating proposals (e.g., discussions on the institutional framework necessary for implementing the Uruguay Round results). The GATS and TRIPS Agreements are also evidence of the fact that the rule-making procedures of the GATT/WTO (e.g., "global package deals") may enable results that were never possible in sectoral organizations (like WIPO and the International Telecommunications Union) or in UN bodies like the UN Conference on Trade and Development.

Another lesson from the EC and from other international organizations is that transparency, and advisory committees with representa-

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<sup>64</sup> On the method and advantages of "principled negotiation," in contrast to "positional bargaining," see ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1983); ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES* (1988).

<sup>65</sup> See, e.g., BRENNAN & BUCHANAN, *supra* note 14, at 28, 79; ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 173 (1984); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 12 (1982).

tives from non-governmental organizations, can strengthen the political acceptability of international rule-making.

The WTO Agreement includes also a large number of provisions on international notifications of domestic implementing laws and on the institutionalized supervision of their domestic implementation. As no legislator can foresee all the actual effects of legislation upon the autonomous actions of individuals and of other governments, and rules do not enforce themselves, the effectiveness of rule-oriented international cooperation often depends on international procedures for the agreed interpretation of the international rules, and for the peaceful settlement of disputes over their application at the international and national levels. One of the major reasons for incorporating the GATS and TRIPS rules into WTO law was the view of governments that the "integrated" WTO dispute settlement and enforcement rules are more effective than those in sectoral agreements (e.g., under the authority of WIPO). National and international trade law, notably in federal states and in the EC, has been shaped by case law, and often developed through judicial protection of individual rights. In the EC's common market law, the five "*market freedoms*" (for goods, services, persons, capital and payments) were effectively enforced by the EC Court as *individual freedoms* of EC citizens.

A rights-based approach, enabling self-interested individuals to enforce international guarantees of freedom and non-discrimination through the courts, has likewise enabled a dynamic evolution of the European Convention on Human Rights. As stated by the European Court of Human Rights in the *Golder Case*, "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts;" the "principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognised fundamental principles of law."<sup>66</sup> The very small number of complaints among member state governments at the EC Court, as well as at the European Court of Human Rights, confirms that individuals, interested in protecting their freedom and non-discrimination through invoking international treaty obligations and judicial remedies, may be the best guardians and promoters of rule-oriented international cooperation.

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<sup>66</sup> 57 INTERNATIONAL LAW REPORTS 201, 217 (Hersch Lauterpacht ed., 1980).

VI. THE WTO AGREEMENT AS A GLOBAL INTEGRATION  
AGREEMENT

The non-ratification of the 1948 Havana Charter for an International Trade Organization left the post-war "international economic constitution," based on the 1944 Bretton Woods agreements and the "GATT 1947," incomplete. The progressive transformation of the GATT – from a provisional short-term contract on the reciprocal liberalization of tariffs into a complex long-term system of more than 200 multilateral trade agreements<sup>67</sup> with comprehensive institutions and decision-making powers – could fill only part of this "constitutional gap." In many areas not covered by GATT law – such as international movements of services, persons and capital – the sectoral *compartmentalization* of international economic law favoured the re-emergence of the pre-war problems of bilateralism, sectoral market-sharing agreements (e.g., for international air and shipping transport), monopolies, cartelization and other forms of protectionism. Even in areas covered by GATT law – such as trade in agricultural, steel and textiles products – governments often gave in to protectionist pressures for departures from their GATT obligations of open markets and non-discriminatory competition. This welfare-reducing trade protectionism reflected a "government failure" to fulfil the legitimate tasks of governments to protect the general interest of their citizens in liberal trade and rule of law. The sectoral erosion of the GATT legal disciplines for liberal trade also revealed broader "constitutional failures" of national and international economic law.<sup>68</sup> It confirmed once again that legal guarantees of freedom and non-discrimination cannot remain effective, either at the national or at the international level, unless they are placed into a constitutional framework of institutional "checks and balances" and judicial protection of individual freedoms against protectionist abuses of governmental powers.

The WTO Agreement, adopted by 124 countries and the EC on 15 April 1994, is not only the longest agreement ever concluded (comprising some 25,000 pages) but also the most important worldwide agreement since the UN Charter of 1945. It comprises a preamble and 16 Articles regulating the scope and functions of the WTO, its institutional structure, legal status and relations with other organizations, decision-making procedures and membership. Its legal complexity derives from the additional 29 Agreements and

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<sup>67</sup> See GATT STATUS OF LEGAL INSTRUMENTS (GATT Secretariat ed., 1993).

<sup>68</sup> For an interdisciplinary analysis of protectionism as "government failure" and "constitutional failure" see PETERSMANN, *supra* note 4, at ch. V and VI.



Understandings listed in the 4 Annexes to the WTO Agreement,<sup>69</sup> and from its inclusion in the “Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,” which was adopted by 124 governments and the EC on 15 April 1994 and includes 28 further Ministerial Decisions, Declarations and one Understanding related to the Uruguay Round Agreements.

As a global integration agreement, which regulates international movements of goods, services, persons, capital and related payments in an *integrated* manner, the WTO Agreement reduces the current fragmentation of separate international agreements and organizations for movements of goods, services, persons, capital and payments (see *Table 4*). Fifty years after the Bretton Woods Conference, its entry into force on 1 January 1995 completed the legal structure of the Bretton Woods system based on the IMF, the World Bank Group and the WTO. Even more so than the IMF and the World Bank, whose stat-

**Table 4: International Economic Order and International Economic Law**

| International Economic Order  |   |                               |                               |                                 |                               |
|---|---|-------------------------------|-------------------------------|---------------------------------|-------------------------------|
| Sectors and Levels of Regulation  | Goods   | Services                      | Persons                       | Capital                         | Payments                      |
| National Private Law  | <i>e.g.</i> , economic freedoms, contract law, private property rights and commercial arbitration as legal preconditions of an international division of labour |                               |                               |                                 |                               |
| National Public Law   | <i>e.g.</i> , constitutional rules, human rights, general economic laws, regulations and organizations  |                               |                               |                                 |                               |
| International Public Law  | <i>e.g.</i> ,<br>GATT,<br>EFTA  | <i>e.g.</i> ,<br>ICAO,<br>ITU | <i>e.g.</i> ,<br>ILO,<br>OECD | <i>e.g.</i> ,<br>IBRD,<br>ICSID | <i>e.g.</i> ,<br>IMF,<br>GATT |
|   | <i>e.g.</i> , 1994 Uruguay Round Agreement Establishing the WTO, EEA and NAFTA Agreements   |                               |                               |                                 |                               |
| Supranational EC Law  | <i>e.g.</i> , EC Treaty, European Union Treaty, general principles of EC law  |                               |                               |                                 |                               |
| LAW OF INTERNATIONAL ECONOMIC RELATIONS AS A “LAYERED SYSTEM”<br>(International Economic Law in the broad sense comprising of private and public, national and international legal regulations of the interdependent economic activities) |   |                               |                               |                                 |                               |

<sup>69</sup> See THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (GATT Secretariat ed., 1994). The more than 100 tariff schedules on trade in goods were published by the WTO in 27 volumes. The GATS and the schedules of services commitments were published in 3 additional volumes. See 1-31 URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, LEGAL INSTRUMENTS EMBODYING THE RESULTS OF THE URUGUAY ROUND, GATT (1994).

utes include only few substantive rules for the conduct of governmental policies and for the rule-oriented settlement of international disputes, the WTO was designed to also serve constitutional functions (below A) and rule-making functions (B), in addition to its executive functions, surveillance functions and dispute settlement functions (C) for the foreign economic policies of member states.

#### A. Constitutional Functions of the WTO Agreement

As a new global framework agreement for the conduct of trade-related policies, the WTO Agreement sets out the basic rights and duties of its member countries and lays the legal foundation for a new international economic order for the 21st century. Its "constitutional functions" for limiting discretionary trade policy powers of governments through worldwide, long-term rules of a higher legal rank are reflected, *inter alia*, in the following provisions:

##### 1. The "single undertaking approach"

The WTO Agreement incorporates the following 29 Agreements and Understandings listed in Annexes 1 to 4:

- ANNEX 1A: MULTILATERAL AGREEMENTS ON TRADE IN GOODS
  - General Agreement on Tariffs and Trade 1994, supplemented by 6 Understandings on Articles II:1(b), XII, XVII, XVIII, XXIV, XXV and XXVIII and by the 'Marrakesh Protocol to the GATT 1994,'
  - Agreement on Agriculture,
  - Agreement on the Application of Sanitary and Phytosanitary Measures,
  - Agreement on Textiles and Clothing,
  - Agreement on Technical Barriers to Trade,
  - Agreement on Trade-Related Investment Measures,
  - Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,
  - Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994,
  - Agreement on Preshipment Inspection,
  - Agreement on Rules of Origin,
  - Agreement on Import Licensing Procedures,
  - Agreement on Subsidies and Countervailing Measures,
  - Agreement on Safeguards;
- Annex 1B: General Agreement on Trade in Services and Annexes
- Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights
- Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes
- Annex 3: Trade Policy Review Mechanism

- Annex 4: Plurilateral Trade Agreements
  - Agreement on Trade in Civil Aircraft,
  - Agreement on Government Procurement,
  - International Dairy Agreement, and
  - International Bovine Meat Agreement.

The WTO Agreement has thus created a highly complex, multi-layered legal system (cf. *Table 5*). The objective of integrating all these agreements into one single legal framework is explained in the Preamble:

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

The reference in the Preamble to the aim of “the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so,” likewise reflects the comprehensive “integration goals” of the WTO Agreement. Legally, the “single undertaking approach” is made effective through Article II:2 and 3:

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as ‘Multilateral Trade Agreements’) are integral parts of this Agreement, binding on all Members.
3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as ‘Plurilateral Trade Agreements’) are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

The institutional consequence of this is made explicit in Article II:1:

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

The single undertaking approach is further extended by Article XI:1, according to which “original membership” is limited to the “contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and *for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS*” (emphasis added). This additional condition of WTO membership, which also applies to accessions (Article XII), was agreed upon only at a late stage in the Uruguay Round negotiations in order

Table 5: The 1994 Agreement Establishing the World Trade Organization (WTO)

| AGREEMENT ESTABLISHING THE WTO   |  |  |   |
|--|--|--|---|
| Multilateral Agreements on Trade in Goods (Annex 1A)   | General Agreement on Trade in Services (GATS, Annex 1B)  | Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, Annex 1C) | Plurilateral Trade Agreement (Annex 4)  |
| <ul style="list-style-type: none"> <li>— GATT 1994</li> <li>— Understandings on Interpretation of GATT Articles</li> <li>— Marrakesh Protocol on Schedules of Concessions</li> <li>— Agreement on Agriculture</li> <li>— Agreement on the Application of Sanitary and Phytosanitary Measures</li> <li>— Agreement on Textiles and Clothing</li> <li>— Agreement on Technical Barriers to Trade</li> <li>— Agreement on Trade-Related Investment Measures</li> <li>— Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</li> <li>— Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994</li> <li>— Agreement on Preshipment Inspection</li> <li>— Agreement on Rules of Origin</li> <li>— Agreement on Import Licensing Procedures</li> <li>— Agreement on Subsidies and Countervailing Measures</li> <li>— Agreement on Safeguards</li> </ul> | <ul style="list-style-type: none"> <li>— Marrakesh Protocol on GATS Schedules of Specific Commitments</li> <li>— 1995 Second Protocol of Financial Services Commitments</li> </ul> |  | <ul style="list-style-type: none"> <li>— Agreement on Trade in Civil Aircraft</li> <li>— Agreement on Government Procurement</li> <li>— International Dairy Agreement</li> <li>— International Bovine Meat Agreement</li> </ul> |
| Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2)   |  |  |   |
| Trade Policy Review Mechanism (Annex 3)  |  |  |   |
| WTO as a Negotiating Forum for Additional Rules (Ministerial Decisions)  |  |  |   |

to remedy two structural weaknesses of the old "GATT à la carte" system, namely:

- non-participation by more than two-thirds of GATT contracting parties in the 1979 Tokyo Round Agreements, leading to a "fragmentation" of GATT rights and obligations; and
- avoidance of substantive trade liberalization commitments by many less-developed countries, which undertook only few commitments in their respective GATT schedules of concessions.

"Free-riding," which was widespread under the "GATT à la carte" system because non-signatories of the Tokyo-Round Agreements benefited from them due to GATT's most-favoured-nation obligation and due to the frequent practical need to apply import regulations uniformly, has thus been significantly reduced by the single undertaking approach and membership requirements of WTO law.

## 2. *Termination of "GATT 1947" as an incentive for joining the WTO*

In contrast to the old GATT, which lacked explicit institutional provisions because it had been conceived as a provisional agreement to be integrated into the 1948 Havana Charter (cf. Article XXIX),<sup>70</sup> the legal status of the WTO as an international organization with legal personality is clearly established (Articles I, VIII). According to Article II:4,

[t]he General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947 . . . , as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

This method of making the new "GATT 1994" legally distinct from the old "GATT 1947" was part of the strategy to exclude "free-riding" and to replace the old GATT by a new WTO. In a Decision adopted at the Implementation Conference on 8 December 1994, it was agreed that

the stability of multilateral trade relations would . . . be furthered if the GATT 1947 and the WTO Agreement were to co-exist for a limited period of time;

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<sup>70</sup> On the establishment of all necessary GATT organs in GATT practice, the pragmatic servicing of the GATT by the staff of the Interim Commission for the International Trade Organization (ICITO) established in 1948 to prepare the entry into force of the ITO Charter, and the evolution of GATT into an international organization with comprehensive decision-making and treaty-making powers, see JOHN JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990). See also 2 GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, 1085-1133 (1995).

. . . during that period of co-existence, a contracting party which has become a Member of the WTO should not be under a legal obligation to extend the benefits accruing solely under the WTO Agreement to contracting parties that have not yet become WTO members and should have the right to act in accordance with the WTO Agreement notwithstanding its obligations under the GATT 1947;

. . . The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.<sup>71</sup>

This termination of the GATT 1947 at the end of 1994 (with effect from the end of 1995), and the GATT "waivers" granted in this Decision enabling GATT member countries to limit the benefits under the WTO Agreement to WTO members, entailed another threat against "free-riders:" the contracting parties of GATT 1947 were faced with the choice of either joining the WTO Agreement or of finding themselves outside the world trading system without legally secure access to foreign markets.

Notwithstanding the legal separation and termination of the GATT 1947, the GATT provisions, and the legal instruments and decisions adopted by the GATT contracting parties, were incorporated into the "GATT 1994" by reference in Annex 1A of the WTO Agreement. This legal continuity is also reflected in many other WTO provisions. For instance, Article IX of the WTO Agreement enjoins the WTO to "continue the practice of decision-making by consensus followed under GATT 1947." And Article 3 of the WTO's dispute settlement understanding affirms the members' "adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."

### *3. Legal primacy of the WTO Agreement over other international trade agreements*

According to Article XVI:3 of the WTO Agreement, "(i)n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provisions of this Agreement shall prevail to the extent of the conflict." The various Multilateral Trade Agreements include a number of additional

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<sup>71</sup> Decision of 8 December 1994 adopted by the Preparatory Committee for the WTO and the CONTRACTING PARTIES to GATT 1947, doc. PC/12, L/7583.

rules on possible “conflicts of law.” For instance, the general interpretative note at the beginning of Annex 1A states:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization . . . , the provision of the other agreement shall prevail to the extent of the conflict.

As a consequence, the WTO Agreement and the Multilateral Trade Agreements on goods other than the GATT 1994 prevail over any conflicting provisions in the GATT 1994. For instance, according to Article 2:4 of the Agreement on Sanitary and Phytosanitary Standards (SPS):

Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

The WTO Agreement on Safeguards prohibits certain “orderly marketing arrangements” including “actions under agreements, arrangements and understandings entered into by two or more Members” (Article 11). Various Multilateral Trade Agreements, as well as the GATT and the TRIPS Agreements, include references to other international agreements concluded outside the GATT/WTO framework. The WTO Agreement on Sanitary and Phytosanitary Standards, for instance, requires members to “base their sanitary or phytosanitary measures on international standards” (Article 3), and defines the latter by reference to international agreements like the International Plant Protection Convention (see Annex A to the SPS Agreement). Also, the GATT 1994 asserts legal priority over, and prescribes legal limitations for, e.g., free-trade areas, customs unions and any “interim agreement necessary for the formation of a customs union or of a free trade area” (Article XXIV), as well as for intergovernmental commodity agreements (Article XX,g).

In view of the very large number of international agreements incorporated into the WTO Agreement or referred to e.g., in the GATS and TRIPS Agreements, the WTO rules on the legal hierarchy among these agreements are of constitutional significance for avoiding conflicts of laws in international relations.

4. *Institutions and decision-making powers for overcoming the  
"prisoners' dilemma" of international cooperation*

The institutions and decision-making powers of the WTO reflect the goal of inducing countries to take a broader "systemic view" of their general interests and to avoid mutually harmful, non-cooperative behavior. Under the old "GATT à la carte" system, the separate legal standing, and different membership, of the GATT 1947 and of the 1979 Tokyo Round Agreements entailed the possibility of legal and institutional conflicts; the GATT Council, for example, had no authority over the interpretation of the Tokyo Round Agreements, and e.g., the minimum prices prescribed in the Tokyo Round Dairy Arrangement deviated from the general GATT rules. Moreover, decision-making in the specialized committees under the Tokyo Round Agreements was often influenced by narrow sectoral interests; thus, dispute settlement reports on anti-dumping measures were regularly adopted when elaborated in the general GATT dispute settlement procedures and submitted to the GATT Council, but mostly blocked when elaborated in the special dispute settlement procedure under the Anti-dumping Agreement and submitted to the Anti-dumping Committee.<sup>72</sup> Under the WTO Agreement, by contrast, the *Ministerial Conference* has "the authority to take decisions on all matters under any of the Multilateral Trade Agreements" (Article IV:1) so as to ensure the overall consistency of decision-making in the WTO. In the intervals between meetings of the Ministerial Conference, the *General Council* shall conduct the functions of the Ministerial Conference. This central and high-level jurisdiction is likely to induce governments to focus more on their *general interests* and to balance the sectoral interests involved. The General Council also discharges the responsibilities of the *Dispute Settlement Body* (DSB) and of the *Trade Policy Review Mechanism* (Article IV:2-4) for all covered agreements.

As indicated above, Article III defines five functions of the WTO as: a "framework for the implementation, administration and operation" of the WTO Agreement; a "forum for negotiations among its Members concerning their multilateral trade relations;" an integrated dispute settlement system for clarifying and enforcing the rules; a "Trade Policy Review Mechanism" for promoting transparency, a better understanding of trade policies of member states and rule-compliance; and an institution for "achieving greater coherence in global

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<sup>72</sup> See Ernst-Ulich Petersmann, *International Competition Rules for the GATT/WTO World Trade and Legal System*, 27 J. WORLD TRADE 35, 68-75 (December 1993).



economic policy-making” in cooperation with the IMF and the World Bank Group. These comprehensive rule-making, executive, coordination, dispute settlement and surveillance functions of the WTO are based on the constitutional insight that the negotiation and effectiveness of worldwide rules depend on supplementary institutions and procedures for overcoming the “prisoners’ dilemma” of international cooperation.

5. *Worldwide legal guarantees of freedom, non-discrimination and rule of law*

Most WTO rules are designed to promote freedom and non-discriminatory conditions of competition for importers, exporters, producers, investors and consumers in international trade with goods and services. The gist of the numerous Multilateral Trade Agreements on goods, incorporated into Annex 1A of the WTO Agreement, is to give further precision to strengthen and supplement the general GATT guarantees of freedom of trade and non-discrimination, especially with regard to agricultural, textiles and “grey area” trade restrictions (such as “voluntary export restraints” and “orderly marketing arrangements”) which have escaped effective GATT legal disciplines for a long time. The General Agreement on Trade in Services (GATS) extends liberal framework rules and procedures for periodic “GATS Rounds” of multilateral liberalization to international trade in services.

The TRIPS Agreement explicitly recognizes in its preamble “that intellectual property rights are private rights.” Its provisions on copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and protection of undisclosed information also include guarantees for the private enforcement of these individual rights through civil, administrative and court procedures. Also, many other WTO agreements include requirements of private access to domestic courts (e.g., in GATT Article X:3, Article 13 Antidumping Agreement, Article 23 Subsidies Agreement). They confirm, thereby, their ultimate function to protect the rights of private citizens.

B. Rule-Making Functions of the WTO Agreement

One of the major functions of “GATT 1947” has been to serve as a forum for bilateral and multilateral negotiations on rule-making. The eight GATT Rounds of multilateral trade negotiations, for example, led to a large number of additional trade agreements on the liber-

alization of tariffs and non-tariff trade barriers. Similarly, the GATS envisages the progressive liberalization of international trade in services through successive "GATS Rounds" and multilateral agreements on services trade. According to Article III:2 of the WTO Agreement, the WTO may also provide a forum for further negotiations among its members on other aspects of their multilateral trade relations. Article 9 of the WTO Agreement on Trade-Related Investment Measures, for instance, requests the Council for Trade in Goods to consider "whether this Agreement should be complemented with provisions on investment policy and competition policy." The broad coverage of the WTO facilitates "package deal negotiations" behind a "veil of uncertainty" by linking issues concerning different subject matters, and by making progress in one area conditional on progress in another area ("overall reciprocity"), as in the Uruguay Round of multilateral trade negotiations 1986-1994.

The old GATT 1947 was based on the legal principle of decision-making "by a majority of the votes cast" (GATT Article XXV) and on the practice of decision-making by consensus. In the WTO, the "practice of decision-making by consensus" (Article IX:1 WTO Agreement) and the majority requirements (e.g., for interpretations and waivers) have been tightened so as to better accommodate concerns with protecting national sovereignty and preventing imbalances in rights and obligations. The general principle underlying these rules is that the WTO does not have the power to impose new trade policy obligations. Amendments therefore require either acceptance by all members (Article X:2) or, if acceptance by two thirds of the members is sufficient, shall take effect only for the members that have accepted them unless otherwise provided (cf. Article X:3-5). The experience with GATT 1947, which was formally amended the last time in 1965 to introduce Part IV on "Trade and Development," suggests that the future development of WTO law may likewise be based on the negotiation of additional GATT and GATS commitments and supplementary Plurilateral Trade Agreements rather than on formal amendments of the WTO Agreement. A "building block approach" of negotiating additional Plurilateral Trade Agreements (e.g., on investment, competition and environmental rules), beginning with a limited number of like-minded countries, could again lead to a "WTO à la carte" system. This might later prompt WTO countries to repeat the Uruguay Round approach and replace the WTO Agreement by a new agreement.

C. Executive, Surveillance and Dispute-Settlement Functions of  
the WTO Agreement

According to Article III of the WTO Agreement, the WTO shall facilitate the implementation, administration and operation of the covered agreements. It shall also administer the Trade Policy Review Mechanism (TPRM) and cooperate with other intergovernmental and non-governmental organizations (cf. Article V). The various executive tasks are assigned to the WTO Secretariat and to a complex institutional system of specialized Councils, Committees and other subsidiary bodies, under the general authority of the Ministerial Conference and the General Council.

The WTO shall continue the *practice* of decision-making by consensus followed under GATT 1947 (Article IX:1 WTO Agreement). But where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. *Consensus as a rule*, rather than as a *practice*, is prescribed for the addition of further "Plurilateral Trade Agreements" to Annex 4, for amendments of the dispute settlement rules (Article X:8), as well as for decision-making by the DSB (cf. Article 2:4 DSU) subject to the proviso that "a panel shall be established" (cf. Article 6:1 DSU), and panel or Appellate Body reports "shall be adopted by the DSB," unless the DSB decides by "negative consensus" *not* to take such decisions (cf. Articles 6,16, and 17 of the DSU). Each WTO member shall have one vote except for the EC which, although a full member of the WTO, shall have a number of votes equal to the number of its member states which are WTO members (Article IX:1). The requirements for majority voting differ depending on whether decisions are taken e.g., by the Ministerial Conference and the General Council (Article IX:1), and whether they concern "interpretations of this Agreement and of the Multilateral Trade Agreements" (Article IX:2), "waivers" (Article IX:3-5), amendments (Article X), accessions (Article XII) or the WTO dispute settlement mechanism.

Article XVI:4 of the WTO Agreement stipulates that "(e)ach member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." The similar provisions in the Tokyo Round Agreements were generally construed to require the adoption of laws, regulations and procedures that *enable* contracting parties to act in conformity with their obligations under these agreements, without necessarily *requiring* them to do so. The reason for this interpretation is the fact that the trade laws of most countries apply also to non-

member countries of GATT and the WTO, and authorize governments to deviate from their GATT obligations e.g., in relation with third countries. Several GATT dispute settlement panels concluded that only legislation mandatorily requiring governments to act inconsistently with their GATT obligations amounts to a violation of GATT, regardless of whether or not the provision had already been applied in a concrete case or was only capable of creating future trade distortions; but "legislation merely giving those executive authorities the power to act inconsistently with the General Agreement is not, in itself, inconsistent with the General Agreement,"<sup>73</sup> as long as it is applied in a manner consistent with the GATT obligations of the government concerned. The same interpretation is likely to prevail with regard to the WTO obligations to ensure the conformity of domestic laws and regulations with WTO law.

The WTO's Trade Policy Review Mechanism (TPRM) is designed:

to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.<sup>74</sup>

The periodic reviews of the foreign economic policies of all WTO member countries, and the publication of the various reports and discussions, have greatly enhanced the transparency of the multilateral trading system and the peer pressure on compliance with GATT/WTO rules. This "preventive diplomacy" and "conflict avoidance strategy" supplements the WTO rules for the mandatory settlement of disputes once they have arisen.

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<sup>73</sup> *United States-Panel Report on Imports of Tuna*, GATT B.I.S.D. 39th Supp., 155, 197 (1992); *United States-Panel Report on Taxes on Petroleum and Certain Imported Substances*, GATT B.I.S.D. 34th Supp., 136, 163 (adopted June 17, 1987).

<sup>74</sup> See Annex 3 of the WTO Agreement, section A (i), in *RESULTS OF THE URUGUAY ROUND*, *supra* note 69, at 434.

VII. THE WTO AGREEMENT AND WTO DISPUTE SETTLEMENT  
SYSTEM AS MODELS FOR REFORMING OTHER  
INTERNATIONAL ORGANIZATIONS?

What can we learn from the constitutional functions and constitutional principles of the WTO Agreement, and notably from its compulsory worldwide dispute settlement system, for the task of “constitutionalizing” the UN and other international organizations? Could the GATT and WTO strategies for overcoming the prisoners’ dilemma in the field of global economic cooperation, where they enabled a worldwide “functional integration” with progressive “spillovers” into additional areas of cooperation, also be applied in the power-oriented realm of foreign “high politics” in the UN?<sup>75</sup> Are there parallels between the constitutional needs of a liberal international trade order and those of a liberal international political order? Are the functional interrelationships between *international* and *domestic* legal guarantees of “market freedoms” and non-discrimination in the international trade order (e.g., in WTO law, EC law and domestic trade laws), which have been crucial for actually achieving the GATT-, WTO- and EC Treaty objectives of liberal trade, also important for achieving the UN objective of “democratic liberal peace?” What can we learn from the international WTO guarantees of individual rights (e.g., intellectual property rights), and from their (quasi)judicial protection at the national and international level, for achieving more effectively the UN objective of protection of human rights?

A. The Uruguay Round: A Model for Reforming the UN System?

There is today worldwide agreement that many chapters of the 1945 UN Charter have become outdated (e.g., chapters XI to XIII on non-self-governing territories and the trusteeship system). There is also widespread concern at the fact that less than a third of the UN member countries, and only one of the five permanent members of the UN Security Council, have accepted the compulsory jurisdiction of the International Court of Justice (ICJ) pursuant to Article 36:2 of the Statute of the ICJ. As in the case of GATT 1947, the basic principles of the UN Charter need to be adapted to the vastly altered circumstances of the modern globally integrated world where decolonization has been achieved and – with the waning of the East-

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<sup>75</sup> For a discussion of the various “realist theories,” “régime theories,” “(neo)functional theories,” “public choice” and “constitutional theories” of international relations, see Petersmann, *supra* note 5, at 182-221.

West and North-South divides – human rights have become universally recognized principles of customary international law. The increasing number of proposals for procedural and institutional reforms (e.g., of the UN Security Council) reveal, however, a troubling paucity of theory (e.g., on how to strengthen the democratic legitimacy of the UN and prevent non-democratic UN members from blocking UN reforms focusing on “democratic peace”).<sup>76</sup> In the U.S. Congress, proposals for a U.S. ultimatum to the UN (“Reform or Die”) are increasingly discussed, and legislation has been introduced under which the United States would withdraw from the UN, which would be replaced by a league of democracies.<sup>77</sup>

Governments should therefore examine whether the successful Uruguay Round negotiations could serve as a model for reforming the UN system. For example, should a limited number of OECD countries take the initiative by announcing their intention to negotiate a new UN Charter and withdraw from the 1945 UN Charter within a few years (similar to the termination of GATT 1947 after a transitional period of coexistence of the old GATT 1947 and the new WTO)? Should they insist on linking such a new UN Charter with UN human rights conventions (similar to the linkage of the WTO Agreement with the intellectual property rights conventions) so as to reduce free riding and non-cooperation in securing *democratic peace*? Should, similar to I. Kant’s proposals for a draft treaty on “Perpetual Peace,” a new UN Charter be limited to constitutional democracies which promote human rights, rule of law and peaceful conflict resolution? Could the compulsory WTO dispute settlement system serve as a model for a mandatory global jurisdiction of the ICJ? Should a revised UN system broaden the “cross-retaliation powers” of the UN Security Council and of the World Bank Group vis-à-vis non-democracies (similar to the “cross-retaliation” that may be authorized by the WTO Dispute Settlement Body in response to persistent violations of WTO law)? Could the full WTO membership of the EC serve as a precedent for a UN membership and IMF membership of regional unions like the EC? Could GATT Article XXIV and GATS Article V

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<sup>76</sup> For a recent survey of such proposals for reforming the UN system see Knight, *supra* note 59, at 229-53.

<sup>77</sup> Cf. Jesse Helms (chairman of the Senate Foreign Relations Committee), *A U.S. Ultimatum for the U.N.: Reform or Die*, WALL ST. J., Aug. 21, 1996. “The time has come for the U.S. to deliver an ultimatum: Either the U.N. reforms, quickly and dramatically, or the U.S. will end its participation. For too long the Clinton administration has paid lip service to the idea of U.N. reform without imposing any real costs for its absence. Without the threat of American withdrawal, nothing will change.” *Id.*

serve as models for worldwide legal disciplines on regional integration agreements (e.g., for coordinating worldwide and regional human rights protection)?

Constitutional theory suggests that the legitimacy of any comprehensive reform of the UN depends on the strengthening of its human rights guarantees and of democracy, which is nothing else than the institutional consequence of effective human rights.<sup>78</sup> Empirical political studies confirm that *democratic peace* is much more likely among democracies which, as *I. Kant* predicted, have only very rarely initiated aggression against other democracies.<sup>79</sup> Constitutional theory further demonstrates, and GATT and EC experience confirms it, that the effectiveness of international rules depends on supplementary dispute settlement and enforcement mechanisms (like the WTO's Trade Policy Review Mechanism and dispute settlement system). The long and often unsuccessful series of attempts at administrative, financial and institutional piecemeal reforms of the UN illustrates the advantages of the WTO approach of replacing the old GATT 1947 by a new WTO Agreement. EC law, as well as the increasing protection of *individual* rights and access to domestic courts in WTO law, underline the need for protecting the rights of "we the people." Discretionary regulatory powers at the international level require no less constitutional safeguards than at the national level in order to limit abuses of national and international bureaucracies.

The transformation of Europe by means of EC law, and by the network of association agreements between the EC and most other European states, illustrates that economic integration law has moved to the centre of foreign policy-making and *democratic peace* in Europe. General international lawyers – who sometimes justify their disregard of international economic law by discounting it as an allegedly

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<sup>78</sup> See, e.g., Article 21 of the 1948 Universal Declaration of Human Rights: "(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. . . . (3) The will of the people shall be the basis of the authority of governments; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). While the word *democracy* does not appear in the UN Charter, the latter begins with the opening words "We the peoples of the United Nations." For the reasons described by constitutional theory, democracy is one of the pillars on which peaceful international cooperation must be built in order to reduce the inherent instability of the power- and state-centered *Westphalian system*.

<sup>79</sup> Empirical evidence confirms not only that democracies are less likely to use military force against other democracies but also that "democracies play the game of 'tit-for-tat' with non-democracies. They rarely initiate conflict, but retaliate when provoked. It is also notable that . . . democracies tend to win their wars." M. Wolf, Richard Cobden and the Democratic Peace 9 (1996) (mimeo on file with author).

“immature specialization” – risk becoming “immature generalists” if they fail to take into account that the WTO Agreement is likely to become “the key to the promotion and reinforcement of democracy and democratic institutions in the decades to come.”<sup>80</sup> Its substantive guarantees of freedom, non-discriminatory competition and rule of law, as well as its institutional “checks and balances” and compulsory dispute settlement system, are in many respects more developed and more ambitious than those of other worldwide organizations. The opportunities for strengthening a liberal international order, based on constitutionalism and democracy, need to be grasped. The challenges to democracy from international integration – such as the steady increase in the *transnational exercise of individual rights*, and in *regulation at the international level* rather than within nation-states – require strengthening democratic decision-making and human rights also at the *domestic level* so as to protect the equal rights and self-determination of the citizens from being undermined by international integration.

#### B. Proliferation and Need for Reforms of International Dispute Settlement Mechanisms

The post-war developments in international treaty practice – notably the trends towards multilateral treaties, worldwide and regional organizations and integration treaties of direct relevance for private citizens – have also led to a significant increase in the number of international dispute resolution bodies. Like the development of international organizations, this proliferation of international adjudicatory bodies evolved on a pragmatic *trial and error* basis. For instance, the courts, commissions and committees set up under the various African, Inter-American, European and worldwide human rights conventions differ from one another considerably, notwithstanding their often overlapping jurisdiction for the interpretation of human rights guarantees. They also do not provide for procedures to promote the mutual consistency of their interpretation and application. The International Court of Justice (ICJ), as “the principal judicial organ of the United Nations” (Article 92 of the UN Charter), also has jurisdiction for the general and conventional human rights guarantees of international law. The ICJ’s case law on human rights, however, – apart from clari-

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<sup>80</sup> Peter Sutherland, *Global Trade - The Next Challenge*, 49 AUSSENWIRTSCHAFT [SWISS REV. INT’L ECON. REL.] 7, 8 (1994). On the U.S. – and sometimes EC – leadership in the Uruguay Round negotiations see also JARROD WIENER, *MAKING RULES IN THE URUGUAY ROUND OF THE GATT: A STUDY OF INTERNATIONAL LEADERSHIP* (1995).



fyng the general international law rules on diplomatic protection and the UN Charter obligations in the human rights field, including obligations *erga omnes* – has remained very limited.<sup>81</sup> There are no rules similar to the appellate review in the WTO, which could ensure unity of interpretation of international law by the various international courts, apart from the possibility of appeals from the judgments of the Administrative Tribunals of the UN and the ILO by requesting an advisory opinion from the ICJ.<sup>82</sup> Due to the preference of governments to provide for special treaty interpretation procedures and separate dispute settlement mechanisms in the context of multilateral treaties, rather than for recourse to the ICJ, the ICJ plays a minor part in most areas of modern multilateral treaty law. Moreover, by permitting only states to have access to the contentious jurisdiction of the ICJ, the Statute of the ICJ continues to ignore the structural changes in the state-centered “Westphalian international legal order” over the past decades, such as the important role of individuals, private enterprises and international organizations in promoting voluntary and peaceful international cooperation.

Similar to the dispute settlement practice in GATT and the WTO, where recourse to arbitration has been rare, traditional *ad hoc* arbitration among states has markedly declined since World War II: notwithstanding the tripling of the number of sovereign states since 1945, there were only 43 arbitrations during the period 1945-1990, compared to 178 inter-state arbitrations between 1900-1945. Only two cases were submitted to the Permanent Court of Arbitration at The Hague after 1945, compared with 23 cases during the first half of this century.<sup>83</sup> The Iran-United States Claims Tribunal and the United

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<sup>81</sup> See generally S.M. Schwebel, *The Treatment of human rights and of aliens in the International Court of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 327, 329-44 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (examining the Court's role in the sphere of international human rights); THE INTERNATIONAL COURT OF JUSTICE 1946-1996, 358 (Arthur Eyffinger ed., 1996) (“no cases have been dealt with by the Court which solely or mainly concerned questions of human rights.”).

<sup>82</sup> See generally Georges Abi-Saab, *The International Court as a World Court*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 81, at 13-14 (noting that the appeals from the judgments of the administrative tribunals of the UN and the ILO through requested advisory opinions “push the situation forwards towards the progressive emergence of an international judicial or adjudicative system.”).

<sup>83</sup> For details see William E. Butler, *The Hague Permanent Court of Arbitration*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 43-53 (Mark W. Janis ed., 1992) (examining the structure of the Hague Permanent Court of Arbitration); Christine Gray & Benedict Kingsbury, *Inter-State Arbitration since 1945: Overview and Evaluation*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 43-84 (Mark W. Janis ed., 1992) (examining inter-state arbitration attempts since 1945). The 95th annual report of the Permanent Court of Arbitration on its activities in 1995 refers, however, to a large number of proceedings initiated pursuant to the

Nations Compensation Commission for Iraq have, however, given rise to a large number of arbitration awards dealing with special crisis situations.

The Statute of the ICJ has been adjusted so as to render recourse to it more flexibly and easily. Thus, the encouragement of the chambers procedures in the ICJ's 1978 "Rules of Court" has reduced the substantive differences between arbitration and judicial settlement (e.g., by enabling party control over the composition of the tribunal); this has prompted increasing recourse to *ad hoc* chambers of the ICJ rather than to the full Court of 15 or more judges. The UN Trust Fund created in 1989 has assisted states in the settlement of disputes through the ICJ by reducing the financial burden of court proceedings (such as the costs of legal counsel, secretariat assistance, accommodation and translation) and of executing Court judgments (see, e.g., the financial assistance granted for the marking out of the adjudged boundary in the frontier dispute case between Burkina Faso and Mali). The increase in UN membership to 185 states, and improvements in the internal judicial practice of the ICJ, have contributed to an increase in the number of cases before the Court since the late 1980s.

Yet, more fundamental reforms remain necessary if the ICJ is ever to become a true "supreme court" of the world community. For example, the fact that "only States may be parties in cases before the Court" (Article 34 Statute of the ICJ) implies that international disputes involving international organizations or private individuals are likely to be settled outside the ICJ. The only 58 (1995) acceptances of "compulsory" jurisdiction under Article 36:2 of the Statute, and the many reservations to these declarations, reflect a continuing distrust on the part of many states in adjudication by the ICJ.<sup>84</sup> The lengthy written and oral proceedings (with occasionally more than 50 public sittings in a single case), court deliberations among 15 or more judges and sometimes excessively long judgments and separate opinions (totalling not infrequently several hundred pages) continue to be criticized as too time-consuming and inefficient.<sup>85</sup> The limited jurisdiction

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UNCITRAL Arbitration Rules for disputes between a state party and foreign enterprises, in which the International Bureau of the Court was involved.

<sup>84</sup> See generally MICHLA POMERANCE, *THE UNITED STATES AND THE WORLD COURT AS A SUPREME COURT OF THE NATIONS: DREAMS, ILLUSIONS AND DISILLUSION* (1996).

<sup>85</sup> See, e.g., Robert Y. Jennings, *The International Court of Justice after Fifty Years*, 89 AM. J. INT'L L. 493, 497-505 (1995) (suggesting that oral pleadings be shorter and that separate opinions and dissents be "made as economical as may be" to alleviate a growing docket in the International Court).

of the ICJ for the review of the legality of actions by UN organs, the infrequent recourse to the advisory jurisdiction of the ICJ and the criticism of the ICJ's appellate review function for questions arising from decisions of the UN and ILO Administrative Tribunals, further illustrate the limits of the ICJ as a constitutional and administrative court of the UN system.<sup>86</sup> While formal amendments of the Statute of the Court, which is an integral part of the UN Charter, will be difficult to achieve, a recent study group report on the procedures and working methods of the ICJ rightly concluded that many needed reforms could be made through changes in the judicial practices within the existing rules, through UN resolutions, or through an optional agreement to which only some states would be party and which would bind only themselves in their relations with the Court.<sup>87</sup>

An increasing number of worldwide and regional organizations provide for their own dispute settlement mechanisms. Examples include the *ad hoc* international criminal tribunals and the UN Compensation Commission concerning Iraq established by the UN Security Council under Chapter VII of the UN Charter; the Law of the Sea Tribunal and arbitration procedures provided for in the 1982 Convention on the Law of the Sea; the new WTO dispute settlement system; the various dispute settlement mechanisms in UN Specialized Agencies (like the International Labour Organization, the World Bank Group, the International Telecommunications Union, the Universal Postal Union); and the judicial and arbitral mechanisms in American and European regional integration (e.g., in the EC, European Convention on Human Rights, Organization for Security and Cooperation

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<sup>86</sup> See, e.g., Lucius Caflisch, *Is the International Court Entitled to Review Security Council Resolutions Adopted under Chapter VII of the UN Charter?*, in *INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW* 633, 660-61 (Najeeb Al-Nauimi & Richard Meese eds., 1995) (arguing that the Court's under-used appellate review function cannot be extended and that the court cannot challenge the legality of the Council's Chapter VII decisions in the framework of contentious proceedings); Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 *AM. J. INT'L L.* 643 (1994) (using the Lockerbie case as a point of departure to discuss the relationship between the ICJ and the Security Council); P. Pescatore, *Two Tribunals and One Court - Some Current Problems of International Staff Administration in the Jurisdiction of the ILO and UN Administrative Tribunals and the International Court of Justice*, in *TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS* 217-238 (N. Blokker & S. Muller eds., 1994).

<sup>87</sup> See generally *The International Court of Justice: Efficiency of Procedures and Working Methods: Report of a Study Group*, in *INT'L & COMP. L. Q. SUPPLEMENT* (January 1996).

in Europe, the Inter-American Court of Human Rights and the North American Free Trade Agreement).<sup>88</sup>

International agreements enabling direct access by private traders, producers, investors, employers, employees or other private citizens to international dispute settlement bodies are increasingly accepted by states. Examples include the International Labour Organization (ILO) system of complaints and various human rights conventions; the arbitration mechanism of the International Center for the Settlement of Investment Disputes (ICSID); the dispute settlement mechanisms provided for in the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA); the 1982 Law of the Sea Convention; the 1994 WTO Agreement on Pre-shipment Inspection; EC law and the 1995 Protocol amending the European Social Charter; and the Canada-United States Free Trade Agreement and the North American Free Trade Agreement.

Courts, arbitration and voluntary recourse to "alternative methods of dispute settlement" (such as mediation and conciliation) have become the principal means of dispute settlement *within* constitutional democracies.<sup>89</sup> But even those states which accept judicial control over national legislation and executive acts in their domestic constitutional systems, often continue to be unwilling to accept mandatory international judicial review of their *foreign policy* measures and of the rule of law in *international* relations. For instance, among the five permanent members of the UN Security Council, only the United Kingdom currently accepts the mandatory jurisdiction of the ICJ. In *international* organizations other than the EC and the Council of Europe, the compulsory jurisdiction of courts and arbitration bodies continues to be the exception rather than the rule. Thus, neither the UN Charter nor the IMF Agreement, the World Bank Agreement, the GATT 1947 nor the WTO Agreement provide for judicial review over the validity of law-making acts by these organizations.<sup>90</sup> The former president of the ICJ even recently held that "it would be unreasonable to look to the International Court of Justice, with its present structure, organization and mode of functioning, for

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<sup>88</sup> See *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*, AM. SOC'Y INT'L L BULL. No. 9 (November 1995).

<sup>89</sup> See, e.g., STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* (1985) (providing an overview of these different methods of dispute settlement at the national level).

<sup>90</sup> See Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L. J. (1993) (on the limited power of the ICJ to review the validity of acts by the Security Council and the General Assembly).

an adequate control of the legality of the acts of international organs."<sup>91</sup>

And even where international adjudication has been accepted by states, compliance with judgments of international courts can present many problems.<sup>92</sup> The experience of both EC law and the European Convention on Human Rights clearly suggests that cooperation between international and national courts, and the right of individuals to invoke the international obligations of governments before the national judiciary, are of crucial importance for rendering international law more effective within domestic legal systems. Such a strengthening of national and international adjudication, and of the corresponding rights of domestic citizens, raises numerous other constitutional and judicial problems, as illustrated by the diversity of national and international court procedures and standards of review in the field of foreign trade law (cf. *Table 6*).<sup>93</sup>

### C. The WTO Dispute Settlement System as a Model?

During the Uruguay Round of multilateral trade negotiations, one of the reasons for negotiating worldwide rules on trade in services, intellectual property rights and trade-related investments in the GATT context was the widely held view among governments that the availability of the GATT dispute settlement system for enforcing the GATS, TRIMS and TRIPS Agreements would render these new rules more effective. The goal of further extending the availability and jurisdiction of the WTO dispute settlement system also appears to influence some of the recent proposals to negotiate additional investment, competition, environmental, social and labour rules in the context of the WTO. Why do many governments view the GATT/WTO dispute settlement system as a model for enforcing international economic rules?

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<sup>91</sup> M. Bedjaoui, *On the Efficacy of International Organizations*, in *TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS*, *supra* note 86, at 25.

<sup>92</sup> In his concluding remarks to this book, H.G. Schermers finds, however, that "compliance is reasonably good, not worse than compliance with the judgments of domestic courts." Henry G. Schermers, *Evaluation*, in *COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS* 133 (Mielle K. Bulterman & Martin Kuijer eds., 1996).

<sup>93</sup> See generally *Table 6*. For a more detailed discussion of the problems illustrated in *Table 6*, see also ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* (1997); ELIHU LAUTERPACHT, *ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE* (1991); BENEDETTO CONFORTI, *INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS* (1993).

Table 6: Judicial Review of Foreign Trade Regulations

| Level of Review  | Powers and Standards of Review   | Policy Problems of Review   |
|--|--|---|
| (1) National courts applying national law (e.g., Article X GATT)   | (1) Compliance with procedures   | Judicial self-restraint?<br>a) for domestic policy reasons? (e.g., separation of powers, political question doctrine, "judicial protectionism")<br>b) for foreign policy reasons?<br>(e.g., "primacy of foreign policy," reciprocity principle) |
| (2) National courts applying international law (e.g., Article 177 EC)  | (2) Accurate determination of facts  | Judicial activism?<br>a) for domestic policy reasons? (e.g., protection of international freedoms as individual rights in EC and ECHR)  |
| (3) International courts applying national law at the request of private parties (e.g., Chapter 19 NAFTA)  | (3) Manifest error of appraisal of the facts                                     | b) for foreign policy reasons? (e.g., "democratic deficit" at EC level, constitutional functions of judicial review)  |
| (4) International courts applying international law at the request of private parties (e.g., Chapter 11 NAFTA, ICSID, Article 173 EC, WTO PSI Agreement) | (4) Misuse of discretionary powers   | "Double Standards"<br>a) for domestic policy reasons? (e.g., "strict scrutiny test" for political liberties, "rational basis test" for economic liberties)  |
| (5) Intergovernmental dispute settlement proceedings (e.g., Chapter 20 NAFTA, Article 173 EC, Article XXIII GATT, Article XXIII GATS)                    | (5) Adequate reasoning of the regulation   | b) for foreign policy reasons?<br>(e.g., stricter ECJ review of national trade measures than of EC trade measures, EC human rights guarantees limited to EC jurisdiction)   |
|  | (6) Violation of substantive rules of<br>a) national law<br>b) international law |   |

In most international organizations other than the GATT 1947 and the WTO, states have been reluctant to initiate dispute settlement proceedings against other states. This is often due to the nature of the international rules concerned. The small number of intergovernmental complaints among states in human rights conventions, for example, seems to be related to the fact that human rights violations are, from a diplomatic perspective, often viewed as a "domestic policy problem" which should be left primarily to complaints by the directly affected citizens. The various procedures for "representations" and "complaints" by governments, non-governmental organizations and individuals pursuant to Articles 24-26 of the Constitution of the ILO relate likewise to essentially domestic conflicts (e.g., between trade unions, employer organizations and governments) over the consis-

tency of national social and labour laws with ILO Agreements and ILO Recommendations. They rely primarily on political methods of dispute settlement without legally binding determinations. The possibility of submitting, pursuant to Article 31 of the ILO Constitution, complaints and other disputes to the ICJ has so far never been used.<sup>94</sup>

Many sectoral international organizations, like the International Civil Aviation Organization and the International Telecommunications Union, have traditionally focused on the *harmonization* of laws (e.g., regarding air safety, international coordination and allocation of radio and television frequencies) rather than on multilateral *liberalization* of market access barriers, such as national monopolies (e.g., of national airlines, postal, radio and television monopolies).<sup>95</sup> Some governments therefore view neither these organizations nor their dispute settlement mechanisms as appropriate frameworks for negotiating and enforcing liberal international trade rules. The substantive standards, dispute settlement and enforcement mechanisms of the World Intellectual Property Organization have likewise been criticized as inadequate by many countries. The proposals, made by the WIPO Secretariat after the conclusion of the Uruguay Round Agreements, to supplement the WTO dispute settlement system by a WIPO "Treaty on the Settlement of Disputes between States in the Field of Intellectual Property" have so far been opposed, notably by the United States.

The several hundred invocations by GATT member countries of the dispute settlement provisions in GATT Articles XXII and XXIII, as well as in the various 1979 Tokyo Round Agreements and 1994 Uruguay Round Agreements, confirm the practical experience in federal states, free trade areas (like the NAFTA) and customs unions (like the EC) that liberal trade rules are well suited for judicial interpretation and enforcement at the request of traders or trading countries. The more than 50 invocations of the WTO dispute settlement system during the first 20 months after its entry into force on 1 Janu-

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<sup>94</sup> But the ILO actively promotes the submission of labour disputes to private arbitration. See ALAN GLADSTONE, *VOLUNTARY ARBITRATION OF INTEREST DISPUTES: A PRACTICAL GUIDE*, (1984); GRIEVANCE ARBITRATION: A PRACTICAL GUIDE (1989). On the ILO as a "standard-setting" organization, which had adopted 174 ILO Conventions and 181 ILO Recommendations by 1993 and on the various supervision and complaints procedures in the context of the ILO, see N. Valticos, *Once More About the ILO System of Supervision: In What Respect is it still a Model?*, in *TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS*, *supra* note 86, at 99-113.

<sup>95</sup> See Ernst-Ulrich Petersmann, *Liberalization of International Air Transport Services through the GATS?*, in *PERSPECTIVES OF AIR LAW, SPACE LAW AND INTERNATIONAL BUSINESS LAW FOR THE NEXT CENTURY* 175-90 (K.H. Böckstiegel ed., 1996).

ary 1995 suggest that the WTO Agreement will continue and reinforce this longtime trend towards "legalization" and "judicialization" of dispute settlement in international trade law. It is noteworthy in this respect that both the EC and the United States, in their domestic implementing legislation for the Uruguay Round Agreements, have extended the rights of private traders and producers to request the initiation of WTO dispute settlement proceedings. The GATT dispute settlement system has also acquired a good reputation regarding the implementation of the roughly 130 dispute settlement reports within a reasonable period of time. In the several hundred bilateral international investment protection agreements, and in international financial organizations such as the World Bank and the Multilateral Investment Guarantee Agency, international court or arbitration procedures are likewise regularly provided for the protection of the property rights of private lenders and foreign investors.<sup>96</sup>

The national and international legal guarantees of economic freedom, non-discrimination and rule of law, such as those in GATT/WTO law, have not only extended, for the benefit of individual citizens and consumers, liberal constitutional principles to the ever more important area of economic policy-making of governments and to the transnational economic activities of citizens. The mutually beneficial character of liberal trade, and the consistent legal and economic rationality of liberal economic rules, have also enabled the emergence of a highly developed case law on a worldwide, regional and national level (e.g., in GATT, the EC and federal states). As international relations are increasingly determined by economic relations, this change from power-oriented "diplomatic" to rule-oriented "legal" methods of foreign policy-making and dispute settlement, and the worldwide acceptance of a compulsory dispute settlement system as part of the WTO Agreement, are an important new development in international law. Due to the fact that the regional law of free trade areas (such as NAFTA) and customs unions (such as the EC) is based on, and strongly influenced by, the worldwide GATT and WTO rules (e.g., Article XXIV), the worldwide and regional dispute settlement practices reveal many parallels and offer a fascinating field for comparative analyses.

The main conclusion of this article goes, however, far beyond the realm of international trade law. For, the Uruguay Round negotia-

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<sup>96</sup> For a survey see R. Dolzer, *Dispute Settlement Mechanisms in the IMF, the World Bank and MIGA*, in *ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW* 139-58 (Ernst-Ulrich Petersmann & Gunther Jaenicke eds., 1992).



tions, the WTO Agreement and the WTO dispute settlement system appear to offer a number of important lessons also for future reforms of the UN Charter and of other dispute settlement mechanisms. For instance:

— The objectives of rendering the UN Charter and the ICJ more effective may be easier to achieve through the negotiation of a new UN Charter with more effective human rights guarantees and compulsory jurisdiction of the ICJ, even if initially limited to a number of like-minded constitutional democracies and co-existing with the 1945 UN Charter during a transitional period (on the model of the temporary co-existence of the GATT 1947 and the WTO), than through amending the existing UN Charter pursuant to its Article 108.

— As in the case of the Uruguay Round negotiations, such a new UN Charter for the 21st century will not come about without strong leadership by the United States and the EU and without comprehensive package deal negotiations.

— As in respect of the old GATT 1947, the 1945 UN Charter could coexist with a new Charter during a transitional period so as avoid a disruption of international legal relations with those countries (notably non-democracies) which might not join the new agreement right from the beginning.

— As in the case of the WTO Agreement, the advantages of a new UN system (such as access to the World Bank Group, membership in UN conventions) might have to be limited, at least in part, to members of the “new UN” so as to set strong incentives for strengthening human rights, democracy, and for joining the new organization.

— The new UN Charter should provide for an integrated and compulsory dispute settlement system applicable to all covered agreements. It should combine the various political and legal methods of international dispute settlement and also strengthen judicial protection of individual rights at the national level.