

Multi-level Judicial Trade Governance Without Justice?

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WTO legal and dispute settlement system**

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"[WTO decisions are] not binding on the US, much less this court."
*US Court of Appeals for the Federal Circuit*²

Law, according to Fuller, regulates social life not only by "subjecting human conduct to the governance of rules,"³ but also by aiming to establish a *just* order and procedures for the *fair* resolution of disputes.⁴ The understanding of law as a struggle for just rules and fair procedures goes back to ancient Greek legal philosophy and, since the democratic revolutions of the 18th century, has become

¹ The author wishes to thank the European University Institute doctoral candidate Mario Mendez for helpful comments and research assistance, as well as Alan Yanovich from the WTO Appellate Body Secretariat for constructive criticism.

² Case 04-1107, *Corus Staal BV and Corus Steel USA v. Department of Commerce, et al.*, Fed. Circ. (2005), available at <<http://www.fedcir.gov/opinions/04-1107.pdf>>. The US Supreme Court denied petition for *certiorari* on 9 January 2006 (available at <<http://www.supremecourtus.gov/docket/05-364.htm>>), notwithstanding an *amicus curiae* brief filed by the European Commission supporting this petition, which stated: "We argue that the Federal Circuit went too far by construing the Uruguay Round Agreements Act to make considerations of compliance with international obligations completely irrelevant in construing a Department of Commerce antidumping determination, and further argue that the Department's 'zeroing' methodology – held invalid by both a WTO Appellate Body and a NAFTA Binational Panel – is not entitled to *Chevron* deference because it would bring the United States into noncompliance with treaty obligations." (available at <<http://www.robinsrussel.com/pdf/265/pdf>>)

³ Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969), at 96.

⁴ For Fuller's criticism of positivist conceptions of law see L.L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630.

ever more widespread in constitutional, democratic and judicial discourse.⁵ Modern constitutional democracies in Europe and North-America accept that protection of constitutional citizen rights requires judicial protection against democratic majority politics so as to limit abuses of legislative and executive powers.⁶ In Europe, this conception of law, politics and courts as constitutionally limited, democratic processes requiring “checks and balances” between legislative, executive and “judicial governance” has been extended also to European integration law as reflected, for example, in the compulsory jurisdiction and comprehensive powers of judicial review of the European Court of Justice and of the European Court of Human Rights as well as in the close collaboration among national and international judges inside Europe for the protection of rule of law among all 46 member states of the Council of Europe. In the law of worldwide organizations, however, “judicial governance” remains contested by “realist” politicians and governments in view of the power-oriented character of many areas of international relations.⁷ Yet, all member States of the United Nations have committed themselves in the Preamble to the UN Charter

⁵ On the ancient Greek concept of “law as participation in the idea of justice” see Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (University of Chicago Press, 1963), chap. II. The Greek and Roman words for “law” (*dikaio*, *jus*) and “justice” (*dikaiosyni*, *justitia*) have an identical core.

⁶ Cf. A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford University Press, 2000), according to whom (at 137) constitutional courts perform four basic functions: (1) they operate as a ‘counterweight’ to majority rule; (2) they ‘pacify’ politics; (3) they legitimize public policy; and (4) they protect human rights. On the ‘dualist conceptions’ of democracy as two-track process see, e.g., C.L. Eisgruber, *Constitutional Self-Government* (Harvard University Press, 2001), who explains why democratic legislatures and elections provide only an incomplete representation of the people, and why judicial interpretation and application of the Constitution by courts are integral parts of constitutional self-government.

⁷ On the pursuit of “order” rather than “justice” in international political relations, see R. Foot, J.L. Gaddis, and A. Hurrell (eds), *Order and Justice in International Relations* (Oxford University Press, 2003); and Janna Thomson, *Justice and World Order: A Philosophical Inquiry* (Routledge, 1992).

"to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." They have defined the purpose of the UN as, *inter alia*, "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."⁸ In accordance with the "principles of justice" recognized in UN law, the customary rules for the interpretation of international treaties require – as explicitly stipulated in the Preamble of the Vienna Convention on the Law of Treaties (VCLT) – "that disputes concerning treaties, like other international disputes, should be settled ... in conformity with the principles of justice and international law", including "respect for, and observance of, human rights and fundamental freedoms for all." The Agreement establishing the World Trade Organization (WTO) describes the "dispute settlement system of the WTO (as) a central element in providing security and predictability to the multilateral trading system"⁹ and provides for compulsory jurisdiction of independent, national as well as international dispute settlement procedures¹⁰ with the mandate, *inter alia*, "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".¹¹ Hence, as WTO law commits all organs of WTO Members, WTO dispute settlement bodies and national trade courts have to examine whether "principles of justice" are part of what the WTO Agreement calls "the

⁸ Article 1, para. 1 of the UN Charter.

⁹ Article 3, para.2, Dispute Settlement Understanding (DSU) of the WTO.

¹⁰On the integrated, multilevel nature of the WTO dispute settlement system see: E.U.Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (Kluwer Publishers, 1997), at 177-183.

¹¹ Article 3, para.2 DSU.

basic principles ... underlying this multilateral trading system"?¹² How should such principles be legally defined in order to provide legal security not only for governments but also for their citizens engaged in international trade?

This chapter argues that the universal recognition of human rights – for example, in the UN Charter, in the law of other worldwide and regional organizations (such as the International Labor Organization, the World Health Organization, the EU), international human rights conventions, international customary law, in national laws and constitutions as well as “general principles of law recognized by civilized nations”¹³ – requires WTO judges, like domestic judges inside constitutional democracies, to interpret international trade law not only in conformity with “*inter-state* principles of justice” (like principles of “due process of law” and procedural justice in dispute settlement proceedings among states). As goods and services are produced, traded and consumed primarily by citizens rather than by governments, and trade regulation directly affects private rights and private interests, judges also have to examine whether “the basic principles ... underlying this multilateral trading system” require judges to take into account the “*intra-state* functions” of international trade law to protect legal security for those engaged in international trade, for instance by interpreting WTO rights and obligations in conformity with universal human rights and other citizen-oriented principles of law and justice (e.g. admission of *amicus curiae* briefs in order to reduce asymmetries of information in intergovernmental dispute settlement proceedings about trade rules affecting private rights and citizen interests). WTO law confers a limited, yet independent mandate and

¹² Preamble to the Agreement establishing the WTO.

¹³ Article 38, para. 1 (c), Statute of the International Court of Justice.

legitimacy on judges which is different from the mandate of political law-makers and government executives and may justify judicial interpretations different from those preferred by national political majorities and trade bureaucracies.

Section I argues that the multilevel WTO legal and dispute settlement system cannot realize the WTO objective of “providing security and predictability to the multilateral trading system” for the benefit of citizens engaged in international trade unless national and international judges cooperate in their judicial task of interpreting national and international trade law, and its *intergovernmental* as well as *citizen-oriented functions*, in more coherent ways. Section II explains why the WTO’s market access commitments, market regulations and ‘public interest exceptions’ may justify citizen-oriented “principles of justice” and judicial interpretations different from those of the intergovernmental “international law of coexistence” among states. Section III discusses some of the “basic principles” underlying WTO law and shows why purely intergovernmental, legal and judicial remedies to violations of WTO rules remain sub-optimal in the modern reality of “multilevel trade governance” at intergovernmental, transgovernmental, national and private levels. Section IV concludes with proposals to grant citizens more effective legal and judicial remedies against welfare-reducing violations of WTO commitments in mutually agreed areas of WTO law, as provided for in the 2001 Protocol on the accession of China to the WTO. Domestic courts could play an important role in the prevention of WTO disputes, as well as in the decentralized settlement of trade disputes and the judicial enforcement of precise and unconditional WTO obligations; for instance, governments and their citizens would mutually benefit from leaving – in mutually agreed areas of trade and on mutually agreed conditions – the legal enforcement of certain WTO dispute settlement findings concerning private

rights to domestic courts once the "reasonable period" for the domestic implementation of WTO rulings has expired.

I. International justice? It's international law, stupid.

The American legal philosopher Ronald Dworkin begins his recent book on *Justice in Robes* with the story of US Supreme Court Justice Oliver Wendell Holmes who, on his way to the court, was greeted by another lawyer: "Do justice, Justice!" Holmes replied: "That's not my job."¹⁴ Similarly, WTO Members, WTO lawyers, and members of WTO dispute settlement bodies emphasize the limited terms of reference of WTO dispute settlement panels "[t]o examine, in the light of the relevant provisions in (. . . the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."¹⁵ As WTO law includes no explicit reference to justice and citizen rights, WTO judges and domestic courts tend to apply WTO law without regard to justice, just as trade economists tend to apply WTO rules (e.g. on anti-dumping measures) without regard to general consumer welfare (which is not specifically mentioned in WTO law as a WTO objective). Citizens rightly criticize the producer-driven trade governance in the WTO, and the lack of any references to general citizen rights and consumer welfare in the WTO legal and dispute settlement system, as unjust power politics undermining the citizen-oriented economic and legal functions of a liberal (i.e. liberty-based) world trading system. Similar to Bill Clinton's slogan in the 1992 Presidential

¹⁴ Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006), chap. 1. For a discussion of this *dictum* by Justice Holmes see also Thomas Sowell, *The Quest for Cosmic Justice* (Free Press, 1999), at 169.

election ("It's the economy, stupid"), the question of why WTO legal guarantees of nondiscriminatory market access and of rule of international law are so often disregarded by domestic courts in the United States, the European Communities (EC) as well as in other WTO Members can be answered: "It's WTO law, stupid."

1. *International rule of law requires constitutional and judicial protection*

In the United States, WTO law is widely perceived as "global administrative law" which may be overruled by the US Congress at any time and which – according to the 1994 Uruguay Round Agreements Act (URAA) – US courts must not directly apply as legal standard for reviewing the legality of US federal measures.¹⁶ Following this US precedent, the EC Council has likewise declared that WTO law "is not susceptible to being directly invoked in Community or Member State courts"¹⁷, notwithstanding the fact that the EC's customs union rules were based on those of GATT and are directly enforceable by EC courts. Both EC and US courts recognize legal obligations to interpret domestic law in conformity with international legal obligations, including those under WTO law. Yet, US courts interpret the Statement of Administrative Action accompanying the URAA as requiring to limit this "consistent interpretation principle" by the doctrine of "Chevron deference" in case of unambiguously expressed intent of Congress as well as in case of "permissible" (or "reasonable"), administrative interpretations of a congressional statute by an executive branch agency charged

¹⁵ Article 7 of the DSU.

¹⁶ Cf. D.W.Leebron, "Implementation of the Uruguay Round Results in the United States, in: J.H.Jackson/A.Sykes (eds), *Implementing the Uruguay Round* (Clarendon Press, 1997, 175-242.

¹⁷ Cf. Petersmann (n.11), at 21.

with the task of administering the statute.¹⁸ Similarly, EC courts have been induced by the EC executives to refrain from challenging EC legal acts in the light of the EC's WTO obligations.¹⁹ As both the EC Commission and the US government consider WTO rules to be judicially enforceable not only vis-à-vis other WTO Members, but also inside the EC as well as inside the US vis-à-vis EC and US member states, their insistence on limiting domestic judicial review and domestic legal accountability of EC and US governments is clearly politically motivated by their concern that the domestic implementation of WTO obligations and of WTO dispute settlement rulings should be left to their own political discretion rather than become a matter of judicial enforcement of the rule of international law.

Yet, neither the US administration nor the EC institutions have a legislative mandate to openly violate the WTO obligations ratified by parliaments for the benefit of their citizens. Their insistence on limitation of domestic judicial review in the trade policy area undermines the separation of power and rule of law by bestowing, at least *de facto*, on the executive branches discretionary powers to violate international law so as to restrict international trade transactions and redistribute income among domestic citizens. The large number of GATT and WTO dispute settlement findings of violations, by both the EC and US

¹⁸ On the controversial relationship between the 'Charming Betsy doctrine' of consistent interpretation and the 'Chevron doctrine' of judicial deference see: A.Davies, "Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the Charming Betsy Canon, in: *Journal of International Economic Law* 10 (2007), 117-149.

¹⁹ The EC Commission's legal advocates claim that "it is difficult to point out one specific moment at which it can be established beyond doubt that WTO rules have been breached, even after a decision of a panel or report of the Appellate Body," and "that it is rarely or never possible to speak of a sufficiently serious breach of WTO law" by the political EC institutions justifying the European Communities' non-contractual liability for damages pursuant to Article 288 of the EC Treaty, cf. P.J. Kuijper, "WTO Law in the European Court of Justice" (2005) 42 *Common Market Law Review* 1313, at 1334.

governments, of their WTO obligations to protect non-discriminatory conditions and rule of law in international trade confirms the basic insight of constitutional theory “that 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.”²⁰ The increasing number of US court findings of administrative interpretations as “reasonable” even if such interpretations (e.g. of WTO rules for the calculation of anti-dumping duties) had been previously found to violate WTO law in legally binding WTO dispute settlement rulings²¹, just as the EC Court judgments on the legality of EC trade restrictions (e.g. on the importation of bananas) without any regard to legally binding WTO dispute settlement rulings to the contrary²², illustrate the lack of international rule of law due to divergent conceptions of “justice”; citizens adversely affected by such illegal administrative trade restrictions for the benefit of powerful, protectionist interest groups often lack effective judicial remedies.

2. *The broader constitutional problem: Constitutional nationalism vs multilevel constitutionalism for the collective protection of ‘international public goods’*

International treaty obligations, including those of WTO law, are legally binding

²⁰ F.A.Hayek, *Law, Legislation and Liberty*, Vol. 3 (Routledge, 1982), at 99.

²¹ See the US court cases discussed by Davies (n. 21).

²² See the EC court cases discussed by E.-U. Petersmann, "On Reinforcing WTO Rules in Domestic Laws", in J.J. Barcelo III and H. Corbett (eds), *Rethinking the World Trading System* (Lexington, 2007), chap. 11.

on all organs of the contracting parties. The denial by US courts²³ of the legally binding nature of WTO dispute settlement rulings reflects parochial disregard for international law. GATT dispute settlement practice confirmed that national court decisions (e.g. regarding subsidy and countervailing duty determinations in clear violation of GATT Article VI) can be successfully challenged in GATT/WTO dispute settlement proceedings confirming the international legal responsibility of the country concerned. The EC Treaty (Article 300, para. 7) explicitly requires all EC institutions to comply with their international legal obligations – not only so as to protect EC member states and EC citizens from international sanctions in response to illegal acts that were not authorized by EC law but, more importantly, because neither democratic governance nor non-discriminatory market competition can remain effective without legal constitution of non-discriminatory conditions of competition and their judicial protection.²⁴ The more citizen welfare depends on the collective supply of international public goods (like a liberal world trading system), the more it runs counter to citizen interests to allow executive agencies to undermine the international rule of law (e.g. by ignoring legally binding WTO dispute settlement rulings) and limit their domestic legal and judicial accountability for illegal restrictions of equal freedoms of their citizens. The fact that both the EC and US governments have time and again requested their respective domestic courts to respect governmental interpretations of WTO law even if legally binding WTO dispute settlement rulings had found such governmental

²³ Cf. note 2 above and, on the legally binding character of WTO dispute settlement rulings: J.H.Jackson, "International Law Status of the WTO Dispute Settlement Reports: Obligation to comply or Option to 'Buy Out'?", 98 *American Journal of Int'Law* (2004), 109 ff.

²⁴ This "constitutional conception" of liberty and of effective market competition in both the EC and the United States differs fundamentally from Anglo-Saxon definitions of "negative liberty" in terms of absence of governmental prohibitions.

interpretations to be in violation of WTO obligations²⁵, reflects a broader constitutional problem: The WTO objective of promoting international rule of law for the benefit of citizens cannot be realized without a coherent conception, and judicial protection, of international rule of law and “international justice”, just as constitutional democracy and common markets inside the EC and the US are not sustainable without rule of law and some agreed conception of “constitutional justice.”²⁶ WTO Director-General Pascal Lamy's public criticism of the breakdown of the Doha Round negotiations in July 2006 – “The pity in all of this is that what is on the table now constitutes greater progress in rolling back farm subsidies and tariffs than anything seen before in global negotiations”²⁷ – illustrates the political dimensions of this “constitutional problem”, namely the lack of political consensus among 150 WTO Members on concluding the “Development Round” of the WTO as long as WTO dispute settlement findings of systemic distortions and discrimination in the world trading system (e.g. by EC import restrictions on bananas, EC and US agricultural subsidies) are not being implemented and the WTO legal and trading system is widely perceived as neither fair, equitable nor just.

The veneration by WTO diplomats for their own “member-driven governance”,

²⁵ For examples of the very selective application of the “consistent interpretation principle” by EC and US courts (e.g. relying on WTO obligations in support of domestic trade restrictions, but avoiding references to WTO law and WTO dispute settlement rulings if their application could lead to overturning domestic interpretations), see: Davies (n.21); Kuijper (n.22).

²⁶ Cf. E.U.Petersmann. “Theories of Justice, Human Rights and the Constitution of International Markets”, in: *Loyola Law Review* 37 (2003), 407-460.

²⁷ See P. Lamy, “What Now, Trade Ministers?”, *International Herald Tribune*, 27 July 2006.

including “the sovereign decision of the violator”²⁸ of WTO obligations, is an offshoot of the “founding myth of GATT” that “all decisions remain exclusively in the hands of the ‘Contracting Parties’”.²⁹ The self-serving criticism by politicians of “judicial governance”, and especially of allegedly non-democratic abrogation of law-making powers by unaccountable WTO judges challenging legislative violations of international law, disregards the fact that international rule of law and judicial safeguards are no less necessary for the collective supply of ‘international public goods’ than domestic rule of law and judicial review are preconditions for the democratic supply of ‘national public goods’. The post-war international legal order was essentially designed on the basis of drafts elaborated by the United States³⁰ and, in the field of WTO law and the more than 250 regional trade agreements (RTAs), has given rise to ever more citizen-oriented “integration law” protecting human rights, labor rights and voluntary transactions among citizens across frontiers.³¹ Many GATT/WTO Members have successfully used GATT/WTO law as an instrument for reforming the protectionist biases in their *domestic* laws, for example for creating a customs union among the 27 EC member States and for committing China, in its 2001 WTO Accession Protocol, to introduce guarantees of rule of law, independent courts, judicial review, and private “rights to trade”. US politicians tend to reject

²⁸ Rufus Yerxa, “The power of the WTO dispute settlement system”, in: R.Yerxa/B.Wilson (eds), *Key Issues in WTO Dispute Settlement. The first ten years* (Cambridge University Press, 2005), 3- 4.

²⁹ G.Abi-Saab, “The WTO dispute settlement and general international law”, in: Yerxa/Wilson (n. 21), 7-8.

³⁰ The 1944 Bretton Woods Agreements, the 1945 UN Charter, the GATT 1947, the 1948 Havana Charter for an International Trade Organization, and the 1948 Universal Declaration of Human Rights were all negotiated on the basis of drafts elaborated by the US government.

³¹ Cf. E.U.Petersmann, “Justice in International Economic Law? From the ‘International Law among States’ to ‘International Integration Law’ and ‘Constitutional Law’”, in: *The Global Community Yearbook of International Law and Jurisprudence 2006* (Oceana, 2007), 105-146.

such use of international law inside the United States on the ground that "the internationalism and multilateralism we promoted were for the rest of the world, not for us."³² The US focus on 'constitutional nationalism' and power-oriented, foreign policies contrasts with the EC's focus on 'multilevel constitutionalism', including multilevel judicial governance as a legal precondition for protecting non-discriminatory, international market competition and rule of international law.³³ Whereas US trade politicians perceive international judges as mere agents of national governments whose judicial mandate and judicial autonomy must be limited as much as possible³⁴, European and international lawyers admit that international judges, no less than judges inside constitutional democracies, inevitably engage in "judicial rule-making" clarifying and complementing incomplete parliamentary and governmental rules by protecting rule of law and the just resolution of disputes. The constitutionally bounded, judicial discretion

³² J. Rubinfeld, "The Two World Orders", in G. Nolte (ed.), *European and US Constitutionalism*, Council of Europe (Cambridge University Press, 2005), 233, at 235.

³³ On American "constitutional nationalism" and European "multilevel constitutionalism," see E.-U. Petersmann, "Multilevel Trade Governance Requires Multilevel Constitutionalism", in C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, 2006), chap. 1; Jeremy Rifkin, *The European Dream: How Europe's Vision of the Future is Quietly Eclipsing the American Dream* (Tarcher, 2004). Europeans agree with the US view that popular sovereignty inside democratic nation States remains a precondition for legitimate transnational governance. Compare Jeremy A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, 2005). The different constitutional conceptions relate to the European willingness to accept more far-reaching constitutional and international legal restraints on national foreign policy discretion in order to promote "international public goods" rather than purely national interests (as advocated by "realist" and "neo-conservative" US defenders of hegemonic national foreign policies). The European Communities' "Area of Freedom, Security and Justice" (Articles 61 ff of the EC Treaty) illustrates the European Communities' successful experience with transforming economic liberalization (for example, the free movement of workers and other persons inside the European Communities) into a common security policy based on "civilian power," rather than military power. European constitutionalism refutes the claim by "realists" that rule of law and "democratic peace" are possible only inside nation States.

may justify citizen-oriented interpretations of intergovernmental guarantees of freedom, nondiscriminatory conditions of competition, rule of law and "public order/morality" exceptions³⁵ that focus not only on the rights of governments, but take into account also the WTO objective of "providing security and predictability to the multilateral trading system"³⁶ for the benefit of citizens and their individual rights. As long as WTO jurisprudence interprets citizen-oriented WTO guarantees only in terms of rights and obligations of governments without regard to citizen rights and justice, domestic judges in constitutional democracies are likely to distrust WTO law and dispute settlement findings as intergovernmental collusion that risks undermining domestic "principles of justice" and constitutional rights of citizens.

II. International integration law and "principles of justice" call for judicial protection of individual rights

According to the International Court of Justice, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."³⁷ The judicial task of settling disputes over the interpretation of international treaties "in conformity with principles of justice and international law" (Preamble VCLT) therefore requires taking into account that the more than 250 RTAs, customs union, and other

³⁴ See, e.g., E.Posner & J.Yoo, *Judicial Independence in International Tribunals*, 93 Cal. L. Rev. 1 (2005).

³⁵ For example, in Articles XX GATT and XIV of the GATS.

³⁶ Article 3 of the DSU.

³⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 31.

integration agreements concluded all over the world, and the increasing focus in international economic, environmental, and human rights law on the protection of *individual* rights and on *private* international economic transactions, reflect the emergence of a dynamically evolving "integration law" acknowledging the need for reconciling rights and obligations of states with the rights and duties of their citizens.³⁸ The more than 60 RTAs concluded after the failure of the 2003 WTO Ministerial Conference illustrate that RTAs are increasingly perceived as alternative *fora*, not only for trade liberalization, but also for trade regulation and non-economic integration. The recent initiatives of transforming regional free trade areas into broader integration agreements (for instance, into an ASEAN community, Eastern and Southern African communities, MERCOSUR, Andean Community, and Central American Economic Integration System) reflect the European experience that the success of trade liberalization and economic integration may depend on embedding it into a broader legal, institutional, social and political framework supported by citizens, business and other nongovernmental constituencies. One defining element of many of these integration agreements is that their rules are embedded into the constituent instruments of international organizations which (e.g. pursuant to Article 5 VCLT) may justify interpretations different from other international treaties³⁹, for example if they provide for compulsory jurisdiction⁴⁰ and private access to

³⁸ Cf. Petersmann (note 34); *idem*, "From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System" (1998) 2 *Journal of International Economic Law* 175.

³⁹ Cf. T.Sato, *The Evolving Constitutions of International Organizations* (Kluwer, 1996), who gives numerous examples for "dynamic interpretation" (e.g. by the ICJ) of the law of international organizations and of "implied powers" in the practice of their treaty bodies and international courts.

⁴⁰ For example, of WTO dispute settlement panels, the WTO Appellate Body, the ECJ, the EFTA Court, and the ITLOS.

national and international courts so as to protect legal security in private international economic transactions.⁴¹ Enforcement of international trade rules and international court rulings (for example, by the ECJ, the EFTA Court, the European Court of Human Rights) by domestic courts has become recognized in European integration law⁴² and in international arbitration, but remains exceptional as regards other worldwide and regional agreements.⁴³

1. *Implications for treaty interpretation*

In European integration law, the different layers of private and public, national and international economic law were progressively integrated into a mutually coherent legal system "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles

⁴¹ For example, the ECJ, the European Court of Human Rights, ICSID Arbitration, Chapter 11 and Chapter 19 NAFTA panels, and the Seabed Chamber of the ITLOS.

⁴² See C. Baudenbacher, "The Implementation of Decisions of the ECJ and of the EFTA Court in Member States' Domestic Legal Orders" (2005) 40 *Texas International Law Journal* 383.

⁴³ Most WTO agreements include requirements (for example, in Article X of the GATT) to make available judicial remedies in domestic courts. Only exceptionally, however, do they *require* domestic courts (for example, in Article XX of the *Agreement on Government Procurement*) to apply relevant WTO rules. Similarly, trade-related UN agreements – like the payments and exchange regulations of the IMF and the labor rights guaranteed in the conventions of the ILO – only rarely provide for the enforceability of citizen-oriented rules by domestic courts. Article VIII, section 2(b) of the IMF Agreement prescribes only the non-enforceability of IMF-inconsistent exchange restrictions: "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement, shall be unenforceable in the territories of any member." Most of the more than 2500 bilateral investment treaties provide for substantive as well as procedural guarantees of the rights of private foreign investors and include private access to international investor-state arbitration (for example, under the auspices of the ICSID, or under the supervision of the International Chamber of Commerce). Such arbitral awards tend to be enforceable in domestic courts based on various international agreements on the mutual recognition and domestic enforcement of national and arbitral judgments. Likewise, an increasing number of RTAs and investment agreements provide for private legal and judicial remedies, including private access to international dispute settlement bodies (for example, pursuant to Chapters 11 and 19 of the NAFTA).

which are common to the Member States,"⁴⁴ and providing for legal and judicial remedies not only for EC member States but also for private citizens. In contrast to this citizen-oriented focus of European economic law, UN law and the *WTO Agreement* continue to be perceived as *intergovernmental* rights and obligations among States protecting freedom and nondiscrimination in international economic relations without corresponding individual rights. For instance, the WTO Appellate Body reversed the invocation by a WTO Panel of a "principle of legitimate expectations" protecting private holders of intellectual property rights.⁴⁵ However, the *WTO Agreement* and the compulsory jurisdiction of the WTO dispute settlement system have transformed the power-oriented "Member-driven trade governance" of the GATT 1947 into a "multilevel trade governance" with stronger legal and judicial "checks and balances".⁴⁶ The customary rules of international treaty interpretation acknowledge that the textual, contextual, teleological and historical approaches to clarifying the "ordinary meaning" (Art. 31, para.1 VCLT) or "special meaning" (Art.31, para.4 VCLT) of the terms of a treaty might be influenced by principles of treaty law⁴⁷, principles of customary international law⁴⁸, "general principles of law" (such as "due process of law"), treaty objectives (such as those listed in the WTO Preamble), and other "relevant

⁴⁴ Article 6 of the EU Treaty.

⁴⁵ WTO Appellate Body, *India – Patents (US)*, WT/DS50/AB/R, at 33-48.

⁴⁶ See E.-U. Petersmann, "From 'Member-Driven Governance' to Constitutionally Limited 'Multi-Level Trade Governance' in the WTO", in G. Sacerdoti, A. Yanovich, and J. Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006), at 86.

⁴⁷ Such as the "good faith" principle in Article 3, para.10 DSU, the "objective assessment" principle in Article 11 DSU, the "special and differential treatment principle" recognized in numerous WTO provisions.

⁴⁸ Like the customary principles of treaty interpretation codified in Articles 31 and 32 of the VCLT.

rules of international law applicable in the relations between the parties" (Article 31, para.3,c VCLT), including "respect for, and observance of, human rights and fundamental freedoms for all"⁴⁹ and peremptory norms of international law.⁵⁰ For instance, it has been recognized in GATT and WTO dispute settlement practice that the "contractual dimensions" of international agreements (for example, the GATT and the GATS schedules of reciprocal commitments) may require interpretative approaches (for example, judicial protection of "non-violation complaints" aimed at maintaining the reciprocal "balance of concessions") that may not be warranted for interpreting the "constitutional dimensions" of GATT/WTO prohibitions of discrimination and non-tariff trade barriers. Hence, citizen-oriented WTO rules protecting individual rights and private transactions may warrant legal interpretations and judicial remedies different from purely intergovernmental WTO rights and obligations.⁵¹

The customary methods of international treaty interpretation also require courts to take into account that the power-oriented, intergovernmental structures of international economic law are increasingly limited by *jus cogens* and *erga omnes* human rights obligations of all UN and WTO Members, by the supranational powers of UN bodies (like the UN Security Council and the ICJ), as well as by other international courts and institutions, especially if they enjoy compulsory and exclusive jurisdiction (as in the case of the DSB or the EC Court of Justice). The hierarchical structures of the law of international organizations

⁴⁹ See Preamble to the *Vienna Convention*.

⁵⁰ See Articles 53 and 64 of the *Vienna Convention*.

⁵¹ As recognized, for instance, in Article 4 of the *PSI Agreement*, Article XX of the *Agreement on Government Procurement*, and in various TRIPS guarantees of legal and judicial remedies for private holders of intellectual property rights.

assert legal supremacy not only vis-à-vis domestic laws,⁵² they also introduce vertical legal hierarchies and constitutional "checks and balances" among the institutions and different levels of primary and secondary law of international organizations.⁵³ In addition, they increasingly limit regional agreements,⁵⁴ bilateral agreements,⁵⁵ and unilateralism through far-reaching legal and institutional restraints⁵⁶ aimed at protecting legal coherence, freedom for international economic transactions, nondiscrimination, rule of law, and welfare-increasing cooperation among citizens across borders.⁵⁷ Even though trade diplomats avoid discussing human rights in the WTO and have delegated the legal clarification of the complex international law context of the WTO to WTO dispute settlement bodies, WTO judges – notwithstanding their practice of interpreting their mandate narrowly as being limited to claims based on WTO law (cf. Art.7 DSU) – may be legally required to respond to legal arguments that, as emphasized also by the UN High Commissioner for Human Rights, the *interpretation* of WTO rules might be influenced by universal human rights.⁵⁸

⁵² See Article XVI:4 of the *WTO Agreement*.

⁵³ See Articles IX and XVI:3 of the *WTO Agreement*.

⁵⁴ See Articles XXIV of the GATT 1994 and Article V of the GATS.

⁵⁵ See Article 11 of the Agreement on Safeguards and the Agreement on Textiles.

⁵⁶ For example, in Articles 16, 17, and 23 of the DSU.

⁵⁷ On this emerging "international constitutional law" see Petersmann (note 36).

⁵⁸ See E.-U. Petersmann, "The 'Human Rights Approach' Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy?" (2004) 7 *Journal of International Economic Law* 605. There is so far no evidence (also not in the reports by the UN High Commissioner for Human Rights on the various WTO Agreements) that any of the more than 500 GATT and WTO dispute settlement proceedings since 1948 should have been decided differently if the judges had interpreted GATT and WTO rules with due regard to human rights. Similarly, the EC Court of Justice, in its more than 50 years of jurisprudence since its establishment in 1952, has hardly ever found that EC and national trade regulations were inconsistent with human rights.

2. *Implications for the jurisdiction of WTO dispute settlement bodies and for the principles underlying the WTO legal system*

As the WTO dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements” (Art. 3 DSU), the “principles underlying this multilateral trading system” only *complement* the specific DSU rules on the limited jurisdiction, applicable law and effectiveness of WTO dispute settlement proceedings without modifying these legal restraints. In case of conflict, the specific WTO rules must be presumed to prevail over general international law rules; silence of WTO treaty rules on specific issues (such as implied powers of WTO dispute settlement bodies) may warrant recourse to general principles underlying WTO law if necessary for administering justice, for instance in order to secure “a satisfactory settlement of the matter” (Art.3, para.4 DSU).⁵⁹

The intergovernmental WTO provisions protect private rights only in indirect ways by requiring WTO Members to protect, for example, private rights to trade (including “rights to import and export” as guaranteed in the 2001 WTO Protocol on the Accession of China), intellectual property rights protected by the *TRIPS Agreement*, private rights of due process in administrative proceedings (for example, on customs valuation, antidumping and safeguard measures, and

⁵⁹ Such inherent powers (e.g. to determine their own jurisdiction, rules on burden of proof, assessment of evidence) are reflected in the DSU provisions on the powers of WTO panels and the Appellate Body to decide on their respective working procedures which have evolved dynamically. In *Nuclear Tests (Australia v France)*, [1974] ICJ Reports 253, the International Court of Justice confirmed: “inherent jurisdiction ... derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded” (at 259).

government procurement), and private rights of access to domestic courts,⁶⁰ or, under exceptional circumstances, to international arbitration.⁶¹ Trade diplomats remain reluctant to recognize in WTO dispute settlement proceedings (for example, over private intellectual property rights and the admissibility of *amicus curiae* submissions) and in WTO politics (for example, in the regular inter-parliamentary WTO conferences during WTO Ministerial Meetings since 1999) that the purpose of WTO provisions goes beyond intergovernmental rights and obligations, or that their “member-driven governance” has become legally limited by “judicial governance.” The UN High Commissioner for Human Rights has emphasized – in a series of reports on the human rights dimensions of WTO law and the human rights obligations of each WTO Member – that the *rights* of WTO Members under the numerous WTO “exceptions” (for example, to protect public morals and public order) may be limited by *obligations* under UN human rights law (for example, to protect human rights to food and access to essential medicines and educational and other public services).⁶² The universal recognition of human rights illustrates that every legal system rests not only on rules, but also on general principles essential for the overall coherence of those

⁶⁰ For example, pursuant to Article X of the GATT 1994, Article 13 of the *Anti-Dumping Agreement*, Article 23 of the *SCM Agreement*, Articles 32 and 41–50 of the *TRIPS Agreement*, and Article XX of the *Agreement on Government Procurement*.

⁶¹ For example, pursuant to Article 4 of the *PSI Agreement*.

⁶² See Petersmann note 61).

rules.⁶³ The universal recognition of human rights and of national constitutions has increased the importance of "general principles of law"⁶⁴ as a source of international law that is increasingly limiting multilevel governance. As all international agreements are "incomplete" and build on other principles of law (like good faith, *pacta sunt servanda*), international courts – and also WTO dispute settlement bodies – have recognized that:

[e]very international convention must be deemed tacitly to refer to general principles of international law for all the questions which it does not itself resolve in express terms and in a different way.⁶⁵

Some of the "basic principles and objectives ... underlying this multilateral trading system", to which the *WTO Agreement* refers in its Preamble, are explicitly specified in a large number of WTO provisions, for instance, in the

⁶³ On today's general recognition that every legal system consists not only of rules but also of more general principles, see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977). On the dual functions of human rights and other constitutional rights as rules, as well as principles for optimizing rules depending on what is factually and legally possible in the particular circumstances, see Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), chap. 3. Whereas rules apply to specific situations based on an "if-then structure," principles are more open norms, applicable to many more situations and requiring the "balancing" of diverse principles in order to specify their legal relevance for the interpretation or supplementation of rules.

⁶⁴ Article 38 of the Statute of the ICJ.

⁶⁵ *Georges Pinson case (France v. United Mexican States)*, Award of 13 April 1928, UNRIIAA vol. V, at 422. The same principle has also been applied in many arbitral awards to transnational investor-state contracts: "It is obvious that no contract can exist *in vacuo*, without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the parties. It is necessarily related to some positive law which gives legal effect to the reciprocal and concordant manifestations of intent made by the parties." *Saudi Arabia v. ARAMCO* [1963] ILR vol. 27, at 165. In the WTO Panel Report in *Korea – Procurement*, the Panel noted similarly as *obiter dictum*: "Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO agreements do not 'contract out' from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO." Panel Report, *Korea – Procurement*, para. 7.96.

GATT⁶⁶ and other WTO agreements on trade in goods,⁶⁷ in services,⁶⁸ and in trade-related intellectual property rights.⁶⁹ Moreover, the WTO requirement of interpreting WTO law "in accordance with customary rules of interpretation of public international law"⁷⁰ encompasses interpretative principles of customary law and "general principles of law" (such as *lex specialis*, *lex posterior*, *lex superior*) aimed at mutually coherent interpretations, for example based on legal presumptions of lawful conduct of States, the systemic character of international law, and the mutual coherence of international rules and principles.⁷¹

III. Need for strengthening the domestic implementation of WTO rules and dispute settlement rulings

1. *WTO law is founded on basic principles of justice*

From the perspective of citizens and their human rights, governments, international law and international trade are mere instruments for promoting the rights, welfare, and self-government of citizens. The universal recognition of human rights requires evaluating international law, including WTO law and policies, in terms of their contribution to the enjoyment of human rights and to economic welfare. Regardless of one's individual value preferences for

⁶⁶ For example, Articles III.2, VII.1, X.3, XIII.5, XX(j), XXIX.6, and XXXVI.9.

⁶⁷ For example, Article 7.1 of the Agreement on Customs Valuation and Article 9 of the Agreement on Rules of Origin.

⁶⁸ For example, Article X of the GATS.

⁶⁹ For example, in the Preamble to and Articles 8 and 62.4 of the *TRIPS Agreement*.

⁷⁰ Article 3.2 of the DSU.

⁷¹ See C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 *International and Comparative Law Quarterly* 279.

libertarian, egalitarian or utilitarian theories of justice, the WTO guarantees of freedom, nondiscrimination and rule of law have considerably enhanced individual liberty, nondiscriminatory treatment, economic welfare, and poverty reduction across borders. They reflect, albeit imperfectly, basic principles of justice.⁷² In terms of the Aristotelian distinction between "general principles of justice" (like liberty, equality, and promotion of general consumer welfare) and particular principles of justice requiring adjustments depending on particular circumstances,⁷³ the WTO dispute settlement procedures contribute to "corrective justice" and "reciprocal justice." The special, differential and nonreciprocal treatment for less-developed WTO Members in numerous WTO provisions also contributes to "distributive justice." These functions of GATT/WTO rules to promote freedom, nondiscrimination, rule of law, and justice in international trade may be called "constitutional functions" in view of their contribution to basic principles of justice.⁷⁴ Yet, such "principles of justice" will be effective only to the extent that WTO rules and dispute settlement rulings are adopted not only in *intergovernmental* relations among States, but also actually implemented in *domestic* laws and policies benefiting citizens. The democratic legitimacy of WTO rules depends not only on their approval by governments, but also on their domestic effectiveness for the benefit of citizens.

⁷² For overviews of theories of justice and the justification of WTO rules by "principles of justice," see Frank J. Garcia, *Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade* (Transnational Publishers, 2003); E.U. Petersmann (note 29 above); Ethan B. Kapstein, *Economic Justice in an Unfair World: Towards a Level Playing Field* (Princeton University Press, 2006). On fairness in US trade policy discourse see: A. Beviglian Zampetti, *Fairness in the World Economy. US Perspectives on International Trade Relations* (Elgar Publishers, 2006).

⁷³ See Aristotle, *Nicomachean Ethics*, translated by M. Oswald (Routledge, 1999), book V.

⁷⁴ See E.U. Petersmann, *Constitutional Functions and Problems of International Economic Law* (Fribourg University Press, 1991), chap. VII.

2. *Legal and judicial remedies against violations of WTO rules remain inadequate*

The absence of an intergovernmental "compliance crisis,"⁷⁵ the submission of only a few proposals by WTO Members on further strengthening the implementation of WTO rulings, and the lack of Doha Round proposals specifically addressing the implementation of WTO rulings by domestic legislatures and courts reflect the relative satisfaction of trade diplomats with their own intergovernmental management of the DSU. From a *citizen perspective*, however, the legal and judicial remedies for the frequent violations of WTO rules remain inadequate for several reasons. Also at the international level, dispute settlement findings requiring the "withdrawal" of illegal measures will remain controversial (for example, whenever GATT/WTO dispute settlement bodies suggest repayment of illegal subsidies or of illegal antidumping/countervailing duties) until WTO Members clarify the available legal remedies in WTO dispute settlement proceedings.⁷⁶ Similarly, WTO dispute settlement practice regarding "suspension of concessions" and other countermeasures remains contested as long as WTO Members fail to specify whether the purpose of such measures is only to "re-balance" reciprocal rights and obligations, or to "induce compliance."⁷⁷ The same is true regarding the availability of other general international law remedies in

⁷⁵ See J. Magnus, "Compliance with WTO Dispute Settlement Decisions: Is There a Crisis?", in R. Yerxa and B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press, 2005), at 242.

⁷⁶ On these legal controversies, see, for example, D. Palmeter and P. Mavroidis, *Dispute Settlement in the WTO. Practice and Procedure*, 2nd edn (Cambridge University Press, 2004), at 295 ff. In a pending dispute before the ECJ (Case 351/2004, *IKEA*), the Court is requested to give a preliminary ruling on whether antidumping duties collected in violation of WTO rules, as confirmed by WTO jurisprudence (in the *EC – Bed Linen* dispute), have to be reimbursed.

⁷⁷ See Palmeter and Mavroidis, *Dispute Settlement in the WTO*, at 300 ff; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, 2003), at 219 ff.

WTO dispute settlement proceedings unless WTO Members (for instance, in disputes involving intellectual property rights protected by the *TRIPS Agreement*, like the *Irish music* case between the European Communities and the United States⁷⁸) request "arbitration within the WTO as an alternative means of dispute settlement," as provided for in Article 25 of the DSU, and explicitly authorize the arbitrators to decide on financial compensation of the private rights holders based on general international law rules.

From the perspective of rational citizens and the economic theory of optimal intervention,⁷⁹ many intergovernmental dispute settlement proceedings involving violations of WTO obligations are suboptimal, wasteful policy instruments. They treat private producers, investors, traders, and consumers adversely affected by such welfare-reducing trade restrictions as mere objects of authoritarian government discretion to violate the rule of law without granting adversely affected citizens effective legal and judicial remedies to protect themselves against abuses of government powers. The only three ECJ judgments in disputes between EC member States since the establishment of the Court in 1952 illustrate that many trade disputes among States and governments could be avoided by:

- leaving the interpretation, application and enforcement of international trade rules to domestic courts; and
- granting effective legal and judicial remedies to self-interested citizens allowing them to challenge, in domestic courts, administrative and legislative violations of international prohibitions of tariffs and non-tariff

⁷⁸ See Award of the Arbitrators, US – Section 110(5) Copyright Act (Article 25.3).

⁷⁹ See Petersmann (note 77), at 57 ff.

trade barriers, as decentralized enforcement agents in multilevel trade governance.

3. *Primary and secondary WTO obligations to comply with WTO rules*

In addition to the "primary" international legal obligations of each WTO Member to implement its WTO obligations in good faith and to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements,"⁸⁰ the adoption of WTO panel and Appellate Body findings by the DSB entails "secondary" obligations:

- to "secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements,"⁸¹ either "immediately" or within "a reasonable period of time"⁸² depending, *inter alia*, on whether compliance with WTO law requires legislative, administrative or judicial measures;⁸³ and
- if WTO treaty benefits continue to be nullified after the end of the implementation period, to accept either "a mutually satisfactory adjustment,"⁸⁴ including voluntary compensation as a "temporary measure" pending "full implementation of a recommendation to bring a measure into conformity with the covered agreements,"⁸⁵ or "suspension of concessions

⁸⁰ Article XVI.4 of the *WTO Agreement*.

⁸¹ Article 3 of the DSU.

⁸² Compare Article 21.3 of the DSU.

⁸³ On the misunderstandings by US lawyers, trade politicians and US courts (see note 2 above) of the WTO obligations to terminate illegal measures, see J.H. Jackson (note 26), 109.

⁸⁴ Article 26.1 of the DSU.

⁸⁵ Article 22.1 of the DSU.

or other obligations" as a remedy aimed at rebalancing reciprocal WTO rights and obligations and inducing compliance with WTO law.⁸⁶

WTO rules and dispute settlement rulings could be implemented more effectively by having stronger *domestic legal and judicial remedies* against violations of WTO rules. For instance, domestic legal remedies should be made available not only to *export* industries⁸⁷ against violations of WTO rules by *foreign* governments, but also to *domestic* importers and consumers against violations of WTO rules by their own government. Such remedies should be made available on internationally agreed terms and conditions.⁸⁸ As WTO dispute settlement rulings are based on *existing* WTO obligations and are subject to numerous safeguards of due process of law (such as appellate review and "reasonable periods" for the implementation of dispute settlement rulings in domestic legal systems), the proposed additional remedies for decentralized enforcement of certain categories of WTO dispute settlement rulings would not change the nature of existing WTO obligations, nor that of constitutionally limited trade governance and trade administration within democracies. Decentralized

⁸⁶ On the voluntary nature of trade compensation under the WTO and the prevailing view that DSU rules and practices exclude general international law obligations of reparation of injury caused by violations of WTO rules (for example, financial compensation), see M. Bronckers and N. van den Broek, "Financial Compensation in the WTO. Improving the Remedies of WTO Dispute Settlement" (2005) 8 *Journal of International Economic Law* 101.

⁸⁷ For example, under Section 301 of the United States Trade Act of 1930 and the Trade Barriers Regulation of the European Communities.

⁸⁸ For example, only after the expiry of the "reasonable period of time" for the domestic implementation of dispute settlement rulings and only in respect of administrative measures, such as in case of manifest disregard for procedural WTO requirements for customs valuation, antidumping calculations, tendering procedures in government procurement, technical barriers to trade, risk assessments, and approval procedures for sanitary measures. For a detailed explanation of this argument, see E.-U. Petersmann, "Prevention and Settlement of Transatlantic Economic Disputes", in E.-U. Petersmann and M. Pollack (eds), *Transatlantic Economic Disputes: The EU, the US and the WTO* (Oxford University Press, 2003), chap. 1.

enforcement could promote important economic values (such as consumer welfare, nondiscriminatory conditions of competition) as well as legal and political values (for example, individual freedom, rule of law, transparent policymaking, participatory democracy, judicial settlement of disputes). Enforcement of WTO rules and of certain WTO dispute settlement rulings could thus be de-politicized and rendered more effective by enlisting domestic courts and individuals as self-interested agents for the decentralized enforcement of a more coherent conception of rule of law in international trade⁸⁹, with due respect for the diversity of national and international approaches to judicial review of trade regulation in civil law and common law countries.⁹⁰

IV. Preventing, decentralizing, and depoliticizing WTO disputes by using domestic courts and citizens to enforce WTO rules

Many WTO disputes arise only because Members (including the United States and the European Communities) prevent their domestic courts from applying WTO rules. The unofficial names of WTO disputes (such as *Kodak/Fuji* and *Havana Club*) reflect the fact that private complainants initiate many intergovernmental WTO disputes (for example, invoking Section 301 of the United States Trade Act or the Trade Barriers Regulation of the European Communities) to protect *private rights* or other private interests (for example, of

⁸⁹ Cf. D.Dyzenhaus, "The Rule of (Administrative) Law in International Law", in: *Law and Contemporary Problems* 68 (2005), 127-166, referring to the "common law constitution" and international law as necessary limits on alleged "executive prerogatives" in transnational relations.

⁹⁰ On the different levels, powers, standards, procedures, policy problems and traditions of judicial review in the trade policy area see Petersmann (note 11), at 233 ff.

service suppliers, investors, government procurement suppliers, and holders of intellectual property rights).⁹¹

1. *WTO disputes over private rights should be settled primarily in domestic courts*

WTO dispute settlement proceedings at the *intergovernmental* level are often suboptimal, inefficient methods for settling disputes over *private* rights and obligations (for example, to pay customs duties).⁹² Such WTO disputes could often be prevented if *domestic courts* offered effective private remedies against violations of WTO rules.⁹³ Reciprocal WTO commitments to decentralize and depoliticize certain trade disputes over private rights and obligations – by enlisting domestic courts and the vigilance of self-interested citizens to interpret and apply justiciable WTO rules in domestic legal systems – would reduce transaction costs, enhance the rule of law, and promote "democratic ownership" of world trade law. As long as the European Communities and the United States stick to their mercantilist power politics of permitting only their *export* industries to petition WTO dispute settlement proceedings against *foreign* governments,

⁹¹ The WTO Protocol on the Accession of China and the domestic laws of some WTO Members with civil law traditions (like the European Communities) guarantee "private rights to trade," including "rights to import and export goods." WT/L/432, part I.5.1. By contrast, WTO Members with common law traditions often perceive economic freedom in terms of absence of legal restrictions (cf. note 27) without protecting economic liberties as constitutional rights.

⁹² For a practical illustration of this argument see the case study of the "*Havana Club*" (US – Section 211 Appropriations Act) dispute in the WTO, in which two wealthy French and US companies succeeded in transforming their dispute over private trademark rights into an intergovernmental dispute between the European Communities and the United States, entailing threats of transatlantic trade war: F.M. Abbott/T. Cottier, "Dispute Prevention and Dispute Settlement in the Field of Intellectual Property Rights and Electronic Commerce: US – Section 211 Omnibus Appropriations Act 1998 ('Havana Club')", in: E.U.Petersmann/M.Pollack (eds), *Transatlantic Economic Disputes* (Oxford University Press, 2003), chap. 16.

⁹³ See Petersmann, "Prevention of Transatlantic Economic Disputes", in: Petersmann/Pollack (note 95) at 41 ff.

without allowing domestic citizens to challenge WTO-inconsistent domestic practices in domestic courts, the proposed decentralization and de-politicization of WTO disputes appear to be politically feasible only through additional reciprocal WTO commitments that:

- require domestic courts to *interpret* domestic trade rules (for example, on customs valuation, antidumping, and intellectual property rights) in conformity with the WTO obligations of the country concerned;⁹⁴ and
- empower domestic courts to *apply* at the request of private plaintiffs specifically agreed, precise, and unconditional WTO rules (as provided for in Article XX of the *Agreement on Government Procurement*) vis-à-vis *administrative* trade restrictions inconsistent with WTO law.

Just as self-interested citizens and the private right to access to domestic courts are recognized as the most important guardians of the rule of law inside constitutional democracies and in European integration law, so should democratic governments leave the settlement of international trade disputes over private rights primarily to their domestic courts. Resort to intergovernmental WTO procedures for the settlement of private disputes should be had only as a

⁹⁴ Even though this principle of WTO-consistent interpretation is recognized in many jurisdictions (for example, pursuant to the *Charming Betsy* doctrine in the United States), it is only rarely applied by domestic courts in many WTO Members. Compare J.A. Restani and I. Bloom, "Interpreting International Trade Statutes: Is The Charming Betsy Sinking?" (2001) 24 *Fordham International Law Journal* 1533. The ECJ has a long history of ignoring GATT and WTO rules at the request of political EC bodies which have often misinformed it on the meaning of GATT/WTO rules and dispute settlement reports. For example, in Case 112/80, *Dürbeck* [1981] ECR, 1095, the Commission misinformed the ECJ on an unpublished GATT dispute settlement finding against the European Communities, and the Court relied on this information without verifying the obviously wrong information from the Commission.

subsidiary means if WTO Members fail to grant effective judicial review⁹⁵ or if national courts ignore or misinterpret WTO rules. The proposed reciprocal WTO commitments could be of crucial importance to promote the rule of law and judicial protection of WTO rules in the large number of less developed WTO Members (like China) lacking effective rule-of-law traditions. Domestic courts in free trade areas and customs unions, like the European Communities which has incorporated WTO law as an "integral part of the Community legal system,"⁹⁶ can offer effective remedies for resolving challenges of national and EC violations of WTO rules - provided domestic courts are mandated to apply the relevant WTO rules.⁹⁷ The EC Court recognizes the "direct applicability" of precise and unconditional international law obligations of the European Communities for almost all areas of international law and for most of the European Communities' international agreements except WTO law, for which the political and judicial EC bodies emulate the dualist approach of the "non-self-executing" provisions in the US Uruguay Round Agreements Act of 1994 and deny "direct applicability" of

⁹⁵ See, for example, the WTO obligations regarding "judicial review" in Section I.2(D) of the WTO Protocol on the Accession of China, WT/L/432, at 4: "China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter."

⁹⁶ See Article 300:7 of the EC Treaty.

⁹⁷ Note that Article 292 of the EC Treaty prevents EC member States from submitting such disputes to the WTO. The legal situation is different in the NAFTA, which has incorporated several WTO provisions and offers member States a choice between NAFTA and WTO dispute settlement proceedings.

WTO rules on political grounds.⁹⁸ Just as WTO obligations of the United States are judicially enforceable only upon a request from the federal government vis-à-vis state actions, so are the European Communities' WTO obligations judicially enforceable inside the European Communities only against member States, but not against the EC institutions.⁹⁹ Similarly, the ECJ emphasizes the legal obligation of national courts to interpret EC law in conformity with the WTO obligations of the European Communities,¹⁰⁰ but often disregards relevant WTO obligations in its own case law. Such double standards and "judicial protectionism" risk being emulated by courts in other WTO countries and weaken WTO commitments to protect private rights and legal security for the benefit of citizens.

⁹⁸See, for example, Case C-245/02, *Anheuser-Busch Inc. v. Budějovický Budvar, národní podnik*, Judgment of 16 November 2004, para 54: "The Court has already held that, having regard to their nature and structure, the provisions of the TRIPS Agreement do not have direct effect. Those provisions are not, in principle, among the rules in the light of which the Court is to review the legality of measures of the Community institutions under the first paragraph of Article 230 EC and are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law." The exceptional judicial recognition of "direct applicability" of WTO rules pursuant to the ECJ's "*Nakajima*" and "*Fediol*" exceptions has rarely been applied by the ECJ. The Court's arguments against "direct applicability" rely on political reciprocity arguments as well as on obvious misinterpretations of WTO rules. Compare Case T-69/00, *FIAMM and FIAMM Technologies v. Council of the European Union and Commission of the European Communities*, Judgment of 14 December 2005: "applicants are wrong in inferring from Articles 21 and 22 of the DSU an obligation on the WTO Member to comply, within a specified period, with the recommendations and rulings of the WTO bodies". Similar political arguments (like the lack of international reciprocity, the need to protect the "scope of manoeuvre" of the political EC bodies) had been rightly rejected by the EC Court in its 1982 *Kupferberg* judgment. Case 104/81, *Kupferberg* [1982] ECR 3659. Unsurprisingly, advocates of the political EC institutions criticize the "*Kupferberg* reasoning" as "richly naïve" and request the Court to respect the political discretion of EC bodies to violate WTO rules (Kuijper, "WTO Law in the ECJ", note 22, at 1320–1323) without regard to the European Communities' constitutional commitment to "strict observance of international law" (Articles 300:7 EC, I-3 2004 of the EC Treaty) and without regard for EC citizen interests in the rule of law.

⁹⁹For a criticism of this ECJ judgment by various EC Advocates-General and academics, see Petersmann (note 25).

¹⁰⁰See, for example, *Anheuser-Busch v. Budějovický Budvar*, paras. 54–57.

2. *Certain final WTO dispute settlement rulings on WTO-inconsistent administrative discrimination should be rendered enforceable by domestic courts*

Intergovernmental dispute settlement proceedings tend to be optimal only for disputes over conflicting *national interests*,¹⁰¹ such as disputes over whether nondiscriminatory public interest legislation is unnecessarily trade-restrictive (for example, approval procedures for sanitary measures and genetically modified organisms), or disputes concerning technical production and product regulations (like for asbestos) and trade restrictions for non-economic purposes (for example, prohibition of gambling services and protection of the environment). Disputes over discriminatory *administrative* trade restrictions that violate private rights should be settled primarily by *domestic* legal and judicial remedies. WTO Members should introduce additional WTO commitments to the effect that, if domestic courts disregard the WTO obligations of the country concerned in their judicial review of certain categories of administrative trade restrictions, then final WTO dispute settlement rulings confirming such WTO violations (for example, on private intellectual property rights, WTO-inconsistent customs valuation decisions, discrimination in government procurement) should be mutually recognized as enforceable in domestic courts under mutually agreed conditions (for example, expiry of the "reasonable period of time" for implementation). More comprehensive domestic judicial remedies (including financial compensation in case of infringements of intellectual property rights, reimbursement of illegal customs duties) could provide incentives for recourse to domestic legal remedies and decentralized enforcement of WTO obligations

¹⁰¹For a detailed explanation of this argument, see Petersmann, "Prevention and Settlement of Transatlantic Economic Disputes", in Petersmann/Pollack (note 89), at 34 ff.

through domestic courts, rather than through intergovernmental welfare-reducing sanctions.¹⁰²

Several EC Advocates-General have rightly emphasized that "in a 'Community governed by law', DSB decisions must be considered as a criterion of the legality of Community measures and that the Court consequently should not, on grounds of doubtful legal merit, give clear approval to legal arguments that would lead to the opposite conclusion."¹⁰³ The lack of judicial remedies available to EC member States and EC citizens against violations of WTO obligations by EC institutions reveals a serious deficit in the EC legal system. Just as the EC Court has declined to enforce WTO obligations vis-à-vis the political institutions of the European Communities, so has the Court also refused to enforce WTO dispute settlement rulings (for example, on the illegality of the European Communities' import restrictions on bananas), even if the implementation period had expired several years ago and the EC institutions had explicitly committed themselves to compliance with the WTO dispute settlement rulings.¹⁰⁴ The Court has rejected the European Communities' non-contractual liability¹⁰⁵ to provide compensation of the damages caused by the sanctions

¹⁰²On the lack of financial compensation in WTO dispute settlement proceedings, see M. Bronckers and N. van den Broek, "Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement" (2005) 8 *Journal of International Economic Law* 101. On the arbitration over monetary compensation for US infringements of copyrights under Article 25 of the DSU, see B. O'Connor and M. Djordjevic, "Practical Aspects of Monetary Compensation: The US-Copyright Case" (2005) 8 *Journal of International Economic Law* 127. On the many disadvantages of trade sanctions in the WTO, see Ronald Z. Lawrence, *Crimes and Punishments? Retaliation under the WTO* (Institute for International Economics, 2003).

¹⁰³Case C-93/02, *Biret International SA v. Council of the European Union*, Opinion by Advocate-General Siegbert Alber [2006] CMLR 435.

¹⁰⁴Case T-19/2001, *Chiquita*, Judgment of February 2005. The Court invoked Articles 21 and 22 of the DSU as justification for its refusal to grant effective judicial remedies.

¹⁰⁵Article 288 of the EC Treaty.

applied against the European Communities for noncompliance with WTO dispute settlement rulings.¹⁰⁶ In another pending dispute, the EC Commission has asked the ECJ to reconsider and replace its "*Nakajima* exception" by a more flexible "consistent interpretation principle"¹⁰⁷ so as to obviate the practice of the European Communities' political institutions to avoid references to WTO law in the EC implementing regulations so as to limit their judicial accountability.¹⁰⁸

Just as "nationalist" US court decisions – for instance, that WTO dispute settlement rulings are not legally binding¹⁰⁹, or that administrative interpretations of US antidumping regulations remain "reasonable" even if they have been formally established as illegal by WTO dispute settlement rulings¹¹⁰ - undermine rule of law and separation of powers to the detriment of citizens in the ever more important field of international trade, so is the refusal by the EC Court to respect and apply the precise and unconditional GATT/WTO obligations of the EC based on political rather than legal grounds and undermines the legal and judicial remedies of EC citizens as well as of EC member states (which are prevented by Article 292 EC Treaty from challenging EC violations of WTO law in WTO dispute settlement proceedings). A reciprocal EC-US commitment to respect certain WTO obligations (e.g. regarding

¹⁰⁶*FIAMM v. Council of EU*, para. 205: The possibility "of tariff concessions being suspended as provided for by the WTO agreements is among the vicissitudes inherent in the current system of international trade. Accordingly, the risk of this vicissitude has to be borne by every operator who decides to sell his products on the market of one of the WTO members."

¹⁰⁷Case 313/2004, *Franz Egenberger*, pending.

¹⁰⁸For the justifications see Kuijper, *WTO Law in the ECJ*", at 1332–1334), who argues in favor of focusing on the political "law in action" rather than the WTO "law in the books."

¹⁰⁹ See note 2 above.

¹¹⁰ See the cases discussed by Davies (note 21).

intellectual property rights) and WTO dispute settlement rulings in their domestic courts would benefit not only EC and US citizens, but would offer much needed leadership for strengthening the rule of law in international trade, for depoliticizing agreed categories of WTO disputes, and for making multilevel governance for the collective supply of international public goods more coherent and more effective.

V. Conclusion

In their judicial protection of the rule of law in international trade, national and international courts must cooperate and take more seriously their international legal obligations to interpret national and international trade law coherently for the benefit of their citizens. The judicial task of settling disputes over the interpretation and application of international treaty obligations “in conformity with principles of justice and international law” requires clarifying the contested meaning of rules in conformity with general principles of international law which, due to the universal recognition of human rights and of citizen-oriented integration law, continue to evolve dynamically. “Judicial clarification” of incomplete and ambiguous treaty provisions, notwithstanding its inevitably law-creating elements, is part of the judicial mandate as long as the international law rules on treaty interpretation and dispute settlement are respected.¹¹¹ The textual, contextual, teleological and historical approaches to interpretation of treaties, with due regard to relevant legal principles and “rules of international law

¹¹¹ The International Court of Justice emphasizes that it cannot “create law” (e.g. in Case *United Kingdom v Iceland*, ICJ Reports 1974, 3, 19). Similarly, the WTO Appellate Body has rightly stated that it is difficult to “envisage circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements” (WTO Appellate Body, *Chile –Alcoholic Beverages*, WT/DS 87,110/AB/R, 79).

applicable in the relations between the parties”, inevitably entail normative judgments that must be scrutinized by “deliberative democracy” and “judicial discourse” among national and international judges. WTO dispute settlement rulings justify “legitimate expectations”¹¹² that must be respected not only by WTO judges but also in disputes over the domestic implementation of legally binding WTO dispute settlement rulings.

Multilevel governance, including multilevel judicial governance, is a precondition for the collective supply of global public goods like international rule of law and a mutually beneficial, worldwide division of labor. The mercantilist EC and US double standards for judicial clarification and enforcement of WTO rules abroad, and for preventing their domestic courts from applying WTO law, need to be limited by reciprocal, political commitments to stronger judicial protection of rule of law “providing security and predictability to the multilateral trading system” (Article 3 DSU). As the single “international constitutional democracy”, the European Communities should take the lead to further strengthen and “civilize” the WTO dispute settlement system and to prevent, decentralize, and depoliticize intergovernmental trade disputes by providing stronger domestic legal and judicial remedies. The power-oriented, “realist” US foreign policies should support the strategic potential of the WTO legal and dispute settlement system to transform formerly closed States without judicial rule of law traditions (like China, Russia, Islamic and developing countries) into rules-based open economies. As long as EC and US politicians pride themselves of their power to ignore WTO obligations and pressure their domestic courts to declare that ignoring WTO dispute settlement rulings is

¹¹² WTO Appellate Body, *Japan – Alcoholic Beverages II* (WT/DS 8,10,11/AB/R), 14.

“reasonable”¹¹³, respect for WTO rules and the domestic enforcement of WTO dispute settlement rulings will remain contested in WTO Members. Without more coherent legal and judicial protection of rule of international law and of a more just WTO trading system, the *Charming Betsy*¹¹⁴ is likely to sink further into oblivion, and citizens will trust neither the WTO legal system nor its democratic legitimacy.-

¹¹³See the criticism by Davies (note 21) of US court decisions applying the ‘Chevron doctrine’ as limiting the judicial function also in respect of administrative interpretations that have been found in legally binding WTO dispute settlement rulings to violate the WTO obligations of the US: “US courts are unlikely to align their views with those of the WTO tribunals” (at 126), as illustrated by the various US court cases discussed by Davies. From 1995 up to the spring of 2006, the United States had 30 and the European Communities had 14 adverse WTO dispute settlement findings of violations of their respective WTO obligations. Both have tended to comply in cases concerning administrative measures. Amending WTO-inconsistent legislation has, however, proven to be politically more difficult, and several “compliance panels” (pursuant to Article 21.5 of the DSU) found that some of the legislative remedial measures continued to violate WTO obligations (for example, concerning US antidumping and subsidy practices, EC import restrictions on bananas and hormone-fed beef).

¹¹⁴*Alexander Murray v. The Schooner Charming Betsy*, 6 US 64 (1804) 118, “An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”