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Constitutional Economics, Human Rights and the Future of the WTO

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Ungenügende marktwirtschaftliche Reformen in Entwicklungsländern und in postkommunistischen Staaten sowie die Beitrittsverhandlungen dieser Länder zur Welthandelsorganisation (WTO) haben die Bedeutung des rechtlichen Ordnungsrahmens für Marktwirtschaften wieder hervortreten lassen – ein Aspekt, der von der neoklassischen Wohlfahrtstheorie stark vernachlässigt wird. Die moderne Theorie der konstitutionellen Ökonomie zeigt, dass nicht nur auf den politischen Märkten für die kollektive Bereitstellung öffentlicher Güter, sondern auch auf den wirtschaftlichen Märkten für die Bereitstellung von Gütern und Dienstleistungen die Effektivität und die Effizienz des Wettbewerbs von der rechtlichen Gewährleistung von Freiheitsrechten, Eigentumsrechten, nicht-diskriminierendem Marktzugang, Verfahrensrechten, Schuldrechtsregeln, und vom verfassungsmässigen Schutz allgemeiner Bürgerinteressen abhängt. Die zunehmende Betonung von Menschenrechten und Demokratie im regionalen Integrationsrecht wirft die Frage auf, ob nicht auch die weltweite wirtschaftliche Integration ebenso mit dem Respekt vor Menschenrechten verknüpft werden sollte.

Dieser Beitrag vertritt die Ansicht, dass die universale Anerkennung von Menschenrechten nicht nur für politische Märkte (z.B. Demokratie) und wirtschaftliche Märkte auf nationaler und internationaler Ebene einen konstitutionellen Rahmen bietet, sondern auch Synergien zwischen den Entwicklungsstrategien der UN und der WTO fördert. Märkte und Menschenrechte basieren auf denselben Werten, sehen sich denselben konstitutionellen Problemen gegenüber, und ergänzen und stärken sich gegenseitig. Schutz und Genuss von Menschenrechten sind auf ökonomische Ressourcen angewiesen, die am effizientesten durch Arbeitsteilung und konsumentengetriebenen Wettbewerb erzeugt werden. UN Organisationen und die WTO können ihre Entwicklungsziele auf effizientere Weise erreichen, wenn sie – in Übereinstimmung mit den «UN Declarations on the Right to Development» – Entwicklung als die Erfüllung von Menschenrechten und die Erzeugung der dazu notwendigen ökonomischen Ressourcen definieren.

Keywords: Human rights, Constitutional economics, Welfare economics, Competition culture, Development strategy, Regional integration, WTO
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1 The Constitution of Markets: From Welfare Economics to Constitutional Economics

Economists distinguish two basic governance mechanisms[1]: hierarchical organizations (such as firms, states, international organizations) and decentralized market competition (e.g. price competition as spontaneous information mechanism, allocation-, coordination-, and sanctioning-mechanisms forcing suppliers to become sensitive to preferences of consumers). Organizations pursue agreed objectives through pre-determined rules, decision-making procedures and institutions (as set out e.g. in the WTO Agreement). In a world of scarcity and diversity where demand for low-priced goods and services, for well-paid jobs and other income opportunities tends to exceed supply, markets and competition emerge inevitably. Markets are characterized by rivalry and competition among autonomous actors (e.g. individuals, states) and, compared with the centralized structures of international organizations, give rise to more complex and more decentralized "market governance problems". Efficient market competition is no gift of nature but depends on rules and government interventions constituting open markets, defining rights and obligations of market actors, correcting market failures and supplying public goods.

1.1 From Welfare Economics to *Ordo*-Liberalism: Promotion of Consumer Welfare

Economists often refer to markets as marketplaces where goods and services compete and in which the market forces of demand and supply tend to bring about equilibrium prices. Neo-classical welfare economics typically focuses on the mechanics of demand and supply and often assumes perfect competition and omniscient, omnipotent and benevolent governments maximizing social welfare through optimal interventions (e.g. strategic trade policy). Even if market failures are admitted (e.g. in case of abuses of market power, external effects, asymmetries in information, non-supply of public goods like social justice), welfare economists often ignore the legal preconditions of efficient competition and the authoritarian premises of their assumptions, for instance, if "economic welfare" is defined not in terms of general consumer welfare but as implying the right of the rulers to promote producer welfare by legally limiting the

1 Cf. e.g. HAYEK (1973) p. 46.

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rights of consumers, and thereby redistributing income, for the benefit of powerful producer interests.

Modern "law and economics" literature[2] and "institutional economics"[3] examine the manifold interrelationships between legal rules and economic welfare, for instance the contribution of liability rules, property rights and individual access to courts as legal incentives for a decentralized internalization of external effects and for spontaneous protection of market participants against other market failures, and the reduction of transaction costs through contract law, litigation rules and law enforcement procedures. They emphasize that what are traded in markets are not only physical resources but *legal rights* to have, use, or transfer scarce resources. Ordo-Liberalism[4] aims at a comprehensive protection of competitive markets by means of a coherent economic constitution safeguarding the "constituent principles" and "regulative principles" without which undistorted competition cannot unfold and general consumer welfare cannot be effectively protected.[5] Whereas welfare economics proceeds from competition within a given set of rules, ordo-liberal economists examine according to which rules the "game of competition" must be played in order to promote general consumer welfare rather than particular, mutually conflicting producer interests (e.g. in protecting rents at the expense of consumer welfare).[6] A central theme of ordo-liberal economists is the question: which welfare-increasing choices among the basic rules of the game may enable more efficient choices within rules?

The ordo-liberal approach was guided mainly by economic theory, especially the attempt to translate the philosophy of the classical economists into the language of the law in order to define and create the legal framework necessary for decentralized coordination of individual supply and demand through a properly-functioning price system and undistorted competition.[7] The ordo-liberal focus on the need for non-discriminatory trade and competition rules remained confronted with the diverging legal traditions, such as protection of national sovereignty to maintain discriminatory border restrictions, and of democratic legislative discretion (parlia-

2 Cf. e.g. KAPLOW and SHAVELL (1999).
3 Cf. e.g. NORTH (1990).
4 Cf. e.g. VANBERG (1998).
5 Cf. e.g. PETERSMANN (1991) pp. 63–68.
6 The game metaphor was used by HAYEK (1960, p. 229) in order to emphasize the dependence of competition on rules and the unpredictability of particular outcomes of competition. Whereas competition rules are typically negative prohibitions (e.g. of anti-competitive behavior), organizations depend more on positive commands and on specific orders.
7 Cf. PETERSMANN (1991) pp. 64–65.

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mentary sovereignty) to regulate different economic sectors in different ways so as to accommodate political majorities.

1.2 From Public Choice Theory to Constitutional Economics: Promotion of General Citizen Welfare

Empirical evidence shows that there is often a wide discrepancy between economic theories (e.g. on maximizing consumer welfare, *productive efficiency* and *allocative efficiency*) and the reality of economic policies. Public choice theory[8] questions whether government institutions have the power, information and motivation for correcting the manifold market imperfections, for instance because individuals are likely to pursue their self-interests in political markets no less than in economic markets, and government regulations are often captured by rent-seeking interests in redistributing income for the benefit of the regulated industries in exchange for political support of the regulators.[9]

In response to these public choice concerns, modern constitutional economics emphasizes the need for limiting and regulating government powers (e.g. monetary, taxing, spending and regulatory powers) through agreed constitutional rules so as to constrain legislative, administrative and other government failures by designing a "constitution of liberty" that maximizes general citizen welfare.[10] *Constitutional economists* emphasize not only (like *institutional economists*) the functional dependence of efficient market competition on liberty rights (e.g. freedom of choice), property rights (e.g. in savings, investments and traded goods), on non-discriminatory market access rights, and on legal security (e.g. *pacta sunt servanda,* due process of law, access to courts) as legal preconditions for agreed market transactions and for reduction of transaction costs. But they also argue that the efficiency of rules and of market outcomes depends on agreement among citizens on the basic rules constituting markets. People can realize mutual gains not only from voluntary contracts in economic markets but also from *constitutional contracts* in political markets enabling citizens to escape from prisoners' dilemmas. Yet, only general citizen interests (e.g. in equal human rights) and general consumer interests

8 Cf. MUELLER (1988).

9 On the redistributive nature and "politicization" of government regulations of the economy, and the inseparable unity of the economy and the polity, see e.g. LEE and MCKENZIE (1987).

10 Cf. e.g. MCKENZIE (1984); BUCHANAN (1987). For a recent survey of the literature see e.g. VANBERG (2001).

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(e.g. in non-discriminatory competition), but not protectionist self-interests of producers are in the rational self-interest of all citizens; general consensus on special interest legislation remains unlikely because it would be neither efficient nor in the rational long-term interests of consumers, for instance, if citizens had to choose among the long-term rules constituting competition, fairness and social justice behind a "veil of uncertainty" about their individual future positions (e.g. as winners or losers in competition, as beneficiaries of special privileges, or as taxpayers financing such protection rents).

In contrast to economic ordo-liberal theories, the contractarian arguments by constitutional economists for an economic constitution protecting non-discriminatory competition and general consumer welfare against abuses of private and public power are strongly influenced by constitutional theories. Both political and economic markets are confronted with the same basic constitutional problem, i.e. how markets can be constrained by agreed legal rules to be responsive to general citizens' interests. Just as voluntarily agreed market transactions and non-discriminatory market competition can promote general consumer welfare, so can mutually agreed constitutional rules and democratic procedures promote general citizen welfare. Constitutional economists have elaborated additional techniques facilitating "rational choice" and agreement on the "social contract" necessary for protecting consumer sovereignty and citizen sovereignty, such as "competition among jurisdictions" enhancing the capacity of democratic governments to serve the common interests of their constituents by limiting the scope for rent-seeking.[11] By placing basic personal liberties and other agreed core values beyond the power of majoritarian politics and by protecting a decentralized "private law society" enabling voluntary cooperation, human rights and open markets facilitate individual consent to the basic constitutional rules.

Yet, the high decision-making costs of consensus requirements make democratic majority decisions inevitable. As majority decisions are replete with opportunities for special interests to exploit the rest of the population, majoritarian democracy remains sustainable only as *constitutional democracy* limiting abuses of majority decisions, e.g. by means of equal human rights and other constitutional guarantees for institutional "checks and balances" and non-discriminatory open markets. International integration law, such as the EC and WTO limitations on discriminatory bor-

11 Cf. VANBERG (2000).

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der restrictions and on discriminatory internal restrictions, has increasingly assumed constitutional functions for limiting constitutional failures at national levels, for instance by protecting personal freedom and non-discriminatory economic, legal and political competition among citizens, as well as among legal jurisdictions, across frontiers.[12]

1.3 From Market Integration to Policy Integration: Human Rights Approaches vs. Good Governance Approaches

The increasing move from "negative" to "positive integration" in the EU and WTO illustrates the functional need and political pressures to complement market integration through policy integration (e.g. in order to promote non-discriminatory market access, reduce transaction costs, limit regulatory competition, and share economic adjustment costs).[13] International governance – for instance, by rule-making, rule-implementation and adjudication at the international level – raises legitimacy problems and constitutional problems which often cannot be solved by transferring the constitutional methods applied inside constitutional democracies to the international level of functionally limited international organizations. Some organizations – like the World Bank, the OECD and the EU Commission – have committed themselves to "principles of good governance" (such as transparency, participation, accountability, effectiveness, coherence) so as to legitimize their international governance and integration law.[14] Yet, functional and technocratic justifications[15] have been criticized as being insufficient for protecting human rights and constitutional democracy from being undermined through intergovernmental cooperation and international organizations.[16] The UN High Commissioner for Human Rights[17] and the UN Committee on Economic, Social and Cultural Human Rights[18] have recently endorsed academic calls for developing human rights approaches to the interpretation and application of WTO rules[19], taking into account the human rights obligations of all WTO members to respect, protect and fulfill human rights at home and abroad.

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12 Cf. PETERSMANN (1991).
13 Cf. PETERSMANN (2002a).
14 Cf. e.g. WORLD BANK (1995); OECD (1995); EUROPEAN COMMISSION (2001).
15 Cf. RADAELLI (1999).
16 Cf. JOERGES, MÉNY and WEILER (2002).
17 Cf. e.g. the report submitted by the HIGH COMMISSIONER FOR HUMAN RIGHTS (2002), e.g. para. 9-17, 40-54.
18 Cf. e.g. the Statement by the Committee on Economic, Social and Cultural Human Rights on *Human Rights and Intellectual Property* (E/C.12/2001/15 of 14 December 2001).
19 Cf. e.g. PETERSMANN (2001a).

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An increasing number of economic studies also point to empirical evidence that the economic welfare of most countries, and the consumer welfare of their citizens, are clearly related to their constitutional guarantees of freedom, property rights and other human rights.[20] Markets and human rights proceed from the same value premise that individual autonomy (human dignity) must be respected; that values can be derived only from the individual and his consent; and that both economic markets as well as political markets serve the same human rights function of promoting decentralized dialogues among citizens about the value, production and distribution of scarce goods and services.[21] There is increasing empirical evidence that "individual rights are a cause of prosperity"[22], that economic welfare can be increased by "successful struggle for rights of which the right to property is the most fundamental"[23], and that "almost all of the countries that have enjoyed good economic performance across generations are countries that have stable democratic governments"[24].

1.4 Constitutional Economics and Human Rights: A New Research Agenda

Most national and international human rights instruments recognize "inalienable" human rights as birthrights of every human being deriving from her or his inherent human dignity and basic needs for personal self-development. This moral and legal foundation of modern human rights law is not inconsistent with economic theories explaining the historical bottom-up struggles of citizens for human rights (e.g. in the English, American and French Revolutions during the 17th and 18th centuries) as rational responses to market failures and to government failures so as to internalize external effects of arbitrary governmental restraints of economic and political competition. Just as economics emphasizes that the legitimacy of economic markets derives from satisfying general consumer interests (rather than protectionist self-interests of producers), so do human rights emphasize that the democratic legitimacy of political markets

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20 Cf. e.g. the annual reports on "Economic Freedom in the World" published by the Fraser Institute in Vancouver, which emphasize the empirical correlation between economic freedom, economic welfare, relatively higher average income of poor people and, with a few exceptions (such as Hong Kong), political freedom. Already ADAM SMITH's inquiry into the *Nature and Causes of the Wealth of Nations* (1776) concluded that the economic welfare of England was essentially due to its legal guarantees of economic freedom, property rights and legal security for investors, producers, traders and consumers.

21 Cf. PETERSMANN (2002a).

22 OLSON (2000) p. 43.

23 PIPES (1999) p. 291.

24 OLSON (2000) p. 187.

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derives from serving the general citizen interests in equal human rights (rather than the self-interests of political entrepreneurs producing collective public goods). Hence, consumers in economic markets as well as citizens in political markets have rational self-interests in using equal human rights for defining more precisely the "limiting constitution" needed for protecting equal freedoms and non-discriminatory competition against abuses of power, as well as the "enabling constitution" needed for promoting efficient supply of private and public goods.

The numerous parallels and interrelationships between the voluntary exchange and consumer sovereignty paradigms of market theories, the constitutional contract and citizen sovereignty paradigms of democratic theories, and modern human rights theories on inalienable, equal human rights have been little studied so far. The remainder of this article discusses the similar value premises *(Part 2),* similar constitutional problems *(Part 3)* and complementary functions of human rights and non-discriminatory market competition *(Parts 4* and *5)*. The article argues that the globalization of markets and of human rights would benefit from a new integration paradigm *(Part 6)* and from new constitutional strategies for overcoming the democracy deficits of state-centered international law *(Part 7)*. International integration law (e.g. in the WTO) should follow the precedent of European integration law and integrate civil, political, economic and social human rights so as to enhance a more cosmopolitan competition culture, with due deference to specialized human rights bodies and to the diversity of national traditions of human rights and of national parliamentary democracies *(Parts 7* and *8)*.

2 Non-discriminatory Markets and Human Rights Proceed from the Same Values

Economic and political markets emerge wherever personal autonomy and diversity of individual capacities and preferences of investors, producers, traders and consumers are respected.

2.1 Normative Individualism: Individual Consumer Sovereignty and Citizen Sovereignty

Since the beginnings of written history, marketplaces have been described as cultural centers not only for the exchange of economic goods but also

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of social services and political ideas (e.g. the *agora* in classical Athens during the 5th century B.C.). Limited knowledge, scarcity of resources, and the natural tendency of pursuing one's self-interest through social cooperation and division of labor prompt most individuals to specialize in the production of scarce goods and services and to exchange the fruits of their labor for other goods and services necessary for survival and personal self-development. Consumer demand, market prices, and competition inform and induce investors, producers, and traders to use production factors and allocate resources in a manner enabling mutually profitable exchanges and supply according to demand. Also the modern globalization of markets through international movements of goods, services, persons, and investments has enabled trading countries to increase their national economic welfare, to reduce absolute poverty inside countries, and to satisfy diversity of individual supply and demand for economic as well as non-economic goods and services.[25]

Like markets, the idea and legal recognition of "basic individual rights", "fundamental rights", and "human rights" goes back to the beginnings of written history. Precursors include the rights to asylum granted by Greek city-states; Roman citizenship rights; rights of the nobility and freedom of trade in the Middle Ages (protected e.g. in the *Magna Carta* of 1215); religious freedom guaranteed in the constitutional charter adopted by the Dutch provincial assembly at Dordrecht in 1572; the English *Habeas Corpus Act* of 1679 and the *Bill of Rights* of 1689; the French Declaration of the Rights of Man and the Citizen of 1789; and the *Bill of Rights* appended to the US Constitution in 1791. The particular focus of liberty rights (e.g. freedom of religion, freedom of association, freedom to demonstrate, freedom of trade) was often shaped by historical events (such as the schism of the Christian church from the 16th century onwards) and by political struggles against the rulers. Liberation of citizens from discriminatory, welfare-reducing border barriers and *transnational* protection of freedom, non-discrimination, rule of law, democratic governance, social justice, and mutually beneficial cooperation across frontiers are the human rights challenges of the 21st century.

The common core of markets and of human rights rests on "normative individualism", i.e. respect for personal autonomy and individual diversity, and for the dependence of values on individual preferences and consent. The Universal Declaration of Human Rights (UDHR 1948) and most

25 Cf. WORLD BANK (2001).

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other national and international human rights instruments proceed from "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world" and explicitly recognize (e.g. in the preambles of most UN human rights conventions) "that these rights derive from the inherent dignity of the human person" (UDHR). The philosopher IMMANUEL KANT defined human dignity in terms of individual moral, rational and personal autonomy to distinguish between good and bad and to live in accordance with self-imposed rules which respect maximum equal liberties for all others.[26] This Kantian moral "categorical imperative" of maximizing equal liberties across frontiers justifies both the idea of inalienable, equal human rights and the economic objective of maximizing consumer welfare through voluntary exchanges and open markets. Human rights, consumer-driven economic markets, and citizen-driven political markets are all designed to protect and promote individual sovereignty as well as social self-government (e.g. consumer sovereignty, citizen sovereignty) based on voluntary cooperation in economic and political markets reflecting social dialogues among supply and demand about values.

2.2 Non-Discriminatory Competition and Constitutionalism as Common Core Values

Human rights proceed from the premise that human dignity entitles every human being to equal human rights which need to be legally protected through non-discriminatory democratic legislation. Human rights include individual and democratic rights to differ from, and to compete with, other people, and give inevitably rise to competition among individuals as well as among democracies with different constitutional preferences and traditions. The resulting conflicts of interests – for instance, between utility-maximizing producers and consumers in economic markets, and among citizens and self-interested politicians in political markets – create governance problems (such as non-discriminatory competition) which re-

26 On KANT's moral "categorical imperatives" for acting in accordance with universal laws ("Act only in accordance with that maxim through which you can at the same time will that it become a universal law"), for respecting human dignity by treating individuals and humanity as ends in themselves ("So act that you use humanity, whether in your own person or that of another, always at the same time as an end, never merely as a means"), and for respecting individual autonomy ("the idea of the will of every rational being as a will giving universal law") and individual right ("Any action is right if it can coexist with everyone's freedom according to a universal law"), and on KANT's theory of the antagonistic human nature promoting market competition and national and international constitutional guarantees of equal freedoms, see e.g. WOOD (1999); PETERSMANN (1999a).

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quire constitutional restraints on abuses of power. The welfare-increasing effects of economic and political competition (e.g. as spontaneous information mechanism, "voice" and "exit" options *vis-à-vis* abuses of power) depend on protection of human rights through an economic constitution no less than through a political constitution. The universal recognition of human rights has contributed to the universal adoption of national constitutions in almost all states of the world and, increasingly, also to the recognition of national and international competition rules by more than hundred countries.

2.3 Human Rights and the Economic Theory of Optimal Interventions

If market failures adversely affect human rights, economic theory teaches that governments should correct market imperfections through "optimal" interventions directly at the source of the problem without preventing citizens to engage in mutually beneficial trade across frontiers.[27] The decentralized empowerment of investors, producers, traders, consumers, and other individuals through assignment of liberty rights, property rights, and other individual rights (e.g. of access to scarce resources, markets, and courts) can reduce market failures in an efficient manner and reinforce a decentralized self-enforcing constitution. National and international human rights instruments define specific civil, political, economic, social, and cultural human rights as remedies for specific human rights problems in conformity with the economic theory of separation of policy instruments.

The private enforcement and judicial protection of the EC Treaty's guarantees of non-discrimination (e.g. "equal pay for male and female workers for equal work" pursuant to Article 141 EC Treaty), and of free movements of goods, services, persons, and capital across frontiers as fundamental individual rights illustrates that a rights-based approach can be successfully applied to economic integration not only inside constitutional democracies but also across frontiers.[28] Human rights to democratic participation in the exercise of government powers, and of individual access to courts, may likewise offer first best policy instruments empowering citizens to protect themselves – through legal, judicial and political remedies – against government failures as well as market failures.

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27 For a survey of this economic theory of optimal intervention see PETERSMANN (1991) pp. 57–58.
28 See below *Parts 3* and *4*.

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3 The Effectiveness of Markets and of Human Rights Depends on Multi-Level Constitutionalism Protecting Non-discriminatory Competition Across Frontiers

Markets and competition depend on property rights (e.g. protecting the freedom to have and use resources exclusively), transaction rights (e.g. to acquire, sell, buy, and transfer property titles in scarce resources), freedom of choice and other framework rules for the individual and collective supply and consumption of private and public goods, and for the legal protection and enforcement of individual rights.

3.1 The "Paradox of Liberty" and Multi-Level Constitutionalism

Philosophers, lawyers and economists emphasize long since that liberty, markets and democracy risk to destroy themselves unless they are protected by constitutional restraints on abuses of power. In order to overcome this "paradox of liberty" and avoid conflicts between our rational long-term interests and emotional short-term temptations, individual decisions (e.g. by *Ulysses* when approaching the island of the *sirenes*) as well as collective decisions (e.g. by a democratic majority that wants to hand over the power to a dictator, as in Germany in 1933) need to be restrained by self-imposed rules ("hands-tying") of a higher legal rank.[29] History confirms that, without such constitutional rules, economic markets for the supply of private goods and political markets for the collective supply of public goods lead to restraints of competition, monopolization and other abuses of market power. Individual and collective liberty thus depend, paradoxically, on legal restraints of individual and collective powers through national and international constitutional rules.[30]

The historical evolution of political markets for the collective supply of public goods (such as democratic self-government) is characterized by the worldwide adoption of national constitutions based on a few *constitutional core principles,* notably: (1) rule of law; (2) limitation and separation of government powers by legal and institutional checks and balances; (3) democratic self-government; (4) human rights; (5) social justice; and (6) the worldwide historical experience that protection of human rights and democratic peace cannot remain effective without international law

29 On this paradoxical dependence of liberty on psychological pre-commitments and constitutional restraints see e.g. ELSTER (2000).

30 Cf. e.g. BARNETT (2000) and PETERSMANN (1991).

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providing for reciprocal *international legal restraints* on abuses of foreign policy powers.[31]

Similar to economic competition law, the basic objective of constitutional law is to protect equal individual freedoms and political competition as legal preconditions for individual and democratic self-government. The definition and mutual balancing of human rights and constitutional principles in national constitutions and in international "treaty constitutions" (such as the EC and ILO Constitutions), as well as the implementation of human rights through democratic legislation, legitimately differ from country to country, and from organization to organization, depending on the historical experiences and constitutional preferences of each society. National and international constitutions confer a higher legal rank on "inalienable human rights" so as to direct and limit post-constitutional choices of government institutions and of citizens within the agreed basic rules.

3.2 Emergence of National and International Economic Constitutions

The centuries-old English and American common law tradition of protecting equal freedoms of traders, competitors and consumers against "unreasonable restraint of trade" and "coercion" reflect an early legal recognition of the economic insight that the efficiency of market mechanisms (e.g. for allocating resources in a manner coordinating supply and demand) depends on legal protection of equal freedoms, property rights (in both material and intellectual resources), and non-discriminatory competition. Since World War II, all constitutional democracies in Europe and North America have introduced comprehensive national and international competition rules based on common core principles[32] and on the common historical experience that abuses of private power may be no less dangerous and welfare-reducing than abuses of public power.[33] Whereas modern US competition policy emphasizes the competition policy objective of protecting competition as a welfare-maximizing *process* (rather than protecting *competitors*), EC competition policy continues to admit the legitimacy of protecting also *economic freedom* of competitors

31 For the countless possibilities of defining and balancing these constitutional core principles in national and international law depending on the particular contexts and preferences see PETERSMANN (2001b).

32 E.g.: prohibition of cartel agreements, of monopolization, and of other abuses of market power; merger control; transnational cooperation among independent competition authorities.

33 On this common dilemma of market economies and democracy, and on the replacement of the rights-based common law criteria by efficiency-based economic criteria (such as absence of output and price restrictions) in modern US antitrust law see AMATO (1997); GERBER (1998).

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in the marketplace even if e.g. vertical restraints neither limit output nor otherwise harm consumers.[34] Yet, notwithstanding the different history and legal framework of competition policies in Europe and North America, there is broad agreement today that

a) the direct objectives of competition policy in Europe and North America should focus on economic efficiency and consumer welfare;
b) the indirect long-term objectives include also dispersion of private and public power and protection of equal opportunities of market participants;
c) other policy objectives (such as protection of small enterprises, social justice) can be pursued more efficiently through other policy instruments (such as tax benefits, production subsidies, labor law, social legislation).

The US Supreme Court has rightly emphasized that "antitrust laws [...] are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms."[35] EC law recognizes competition law as part of EC constitutional law guaranteeing "an open market economy with free competition" (Articles 4, 98, 105, 157 EC Treaty) based on "a system ensuring that competition in the internal market is not distorted" (Article 3g). Free movements of goods, services, persons, capital and related payments, non-discriminatory conditions of competition, as well as social rights are constitutionally protected in EC law as "fundamental rights"[36]. The single European market could never have been realized without private enforcement of these economic liberties by EC citizens and without their judicial protection by national courts and by the EC Court *vis-à-vis* governmental and private restrictions and discrimination. EC competition law and the ever more comprehensive

34 US competition lawyers criticize this European notion of "restriction of economic freedom" on several grounds such as: "(1) its failure to generate precise operable legal rules (i.e. its failure to provide an analytical framework); (2) its distance from and tension with (micro)economics, which does provide an analytical framework; (3) its tendency to favour traders/competitors over consumers and consumer welfare (efficiency); and (4) its capture of totally innocuous contract provisions having no anti-competitive effects in an economic sense" (HAWK 1995). For an explanation of the EC position see e.g. MARSDEN (2000).

35 United States v. Topco Assoc. Inc., 405 U.S. 596, 610 (1972).

36 Cf. e.g. Case 240/83, *ADBHU*, ECR 1985 531, para. 9: "the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance." Especially the freedom of movements of workers and other persons, access to employment, and the right of establishment have been described by the EC Court as "fundamental freedoms" (Case C-55/94, Gebhard, ECR 1995, I 4165, para. 37) or as "a fundamental right which the Treaty confers individually on each worker in the Community" (Case 22/86, Heylens, ECR 1987, 4097, para. 14). The EC Court avoids "human rights language" for the market freedoms, the right to property and the freedom to pursue a trade or business in EC law.

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EC guarantees of social rights and of regional adjustment assistance are indivisible components of the EC's economic constitution. Without these guarantees of a "social market economy", political acceptance of the *acquis communautaire* by many less-developed countries acceding to the EC would not have been democratically feasible.

3.3 The "WTO Constitution" and the Need for International Competition Rules

The 1994 Agreement establishing the WTO uses various constitutional methods, such as the legal primacy of the WTO Agreement over the more than 20 multilateral trade agreements in Annexes 1 to 4, and the compulsory WTO dispute settlement system.[37] GATT and WTO dispute settlement jurisprudence has recognized long since that GATT and WTO rules aim at protecting non-discriminatory conditions of competition.[38] Yet, the various initiatives for negotiating additional competition rules limiting not only governmental but also private restraints of competition have remained little successful under GATT 1947. The WTO's Doha Ministerial Declaration of November 2001 recognizes, for the first time, "the case for a multilateral framework to enhance the contribution of competition policy to international trade and development" (para. 23 of the Declaration), and provides for future WTO negotiations on competition rules e.g. on transnational cartels, cooperation among competition authorities, and capacity building in favor of developing countries.[39] In autumn 2001, the EU and the US also launched a complementary initiative for the establishment of a new "International Competition Network" so as to enhance bilateral cooperation among more than 50 national competition authorities and the elaboration of best practices for international merger reviews.

How can WTO members protect non-discriminatory international competition more effectively and render WTO rules limiting governmental market distortions more coherent (e.g. by limiting the scope for discriminatory market distortions permitted under WTO rules for anti-dumping measures, subsidies and government procurement)? What kind of "competition culture" does the future WTO need? Should the WTO follow the example of the EC Treaty and aim at comprehensive WTO rules protecting non-discriminatory competition against both *governmental* as well as

37 Cf. PETERSMANN (2000) p. 19.
38 Cf. e.g. PETERSMANN (1999b).
39 Cf. ANDERSON and HOLMES (2002).

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private restraints of competition? Should the WTO objectives – for instance, the reference in the preamble of the WTO Agreement to "the optimal use of the world's resources in accordance with the objective of sustainable development" – be construed in conformity with the UN Resolutions on the Right to Development which define development as the fulfillment of human rights and call on all UN institutions, and also on the WTO, to use human rights as agreed guidelines for rendering their respective policies more effective?[40] Answers to these complex questions require a thorough examination of the relationships and potential synergies between markets, human rights and development.

4 Human Rights Promote the Effectiveness of Competition, Democracy and Worldwide Organizations

The insight that human rights make individuals not only better "democratic citizens" but also better "economic actors"[41] is of particular importance for international economic integration and rule-making in worldwide organizations where respect for human rights, rule of law and constitutional safeguards (such as parliamentary and judicial control) in the exercise of the limited powers delegated to international organizations are less effectively protected than inside constitutional democracies. In the European Union, the progressive evolution from a sectoral coal and steel community toward a customs union, common market, monetary union, and political union with a common foreign and security policy was democratically acceptable for national parliaments, citizens and national constitutional courts (e.g. in Germany) only because of the simultaneous transformation of the EC Treaty into a "treaty constitution" committed to the protection of human rights, democratic peace, citizenship of the Union, social justice, and judicial review of the rule of law inside the EC.[42] The EC has likewise insisted on the inclusion of *human rights clauses* and *democracy clauses* into its free trade area, customs union, and association agreements with more than hundred countries in Europe, Africa, Asia, Latin America and the Pacific.

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40 Cf. SKOGLY (2001) pp. 140–142.

41 Cf. UNDP (2000) p. iii.

42 Cf. PETERSMANN (2002a) pp. 381–400. Neither in the EC nor in most federal states (including the USA), the constitutional doctrine of limited delegation of powers has prevented ever-expanding and increasingly vague delegations to the higher (federal) level. Judicial protection of human rights and of open markets offers comparatively more effective constitutional safeguards of individual liberties and deregulation.

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Human rights organizations and civil society groups increasingly request recognition of the human rights obligations of all WTO members also in the WTO and a consultative status of human rights organizations in WTO bodies and decision-making procedures.[43] The focus of human rights on personal autonomy and on democratic diversity corresponds with, and reinforces, the decentralized legal structures of consumer-driven markets and of citizen-driven democracies.

4.1 Six Major Instrumental Functions of Human Rights

Legal doctrine has long neglected that human rights constitute not only moral and legal rights (e.g. of a defensive, procedural, participatory, or redistributive nature), corresponding obligations of governments at national and international levels, and objective principles of justice necessary for protecting democratic peace and for limiting abuses of power also by non-state actors (e.g. freedom of association in labor markets). No less important are the decentralized information-, incentive-, coordination-, enforcement-, and legitimacy-functions of human rights for rendering economic and political competition more effective and for solving social problems confronting all societies.[44] For instance:

(1) *Human rights as instruments for reducing the problem of limited knowledge:*
Human rights (e.g. freedom of information and freedom of the press) entitle individuals to act on the basis of their own personal knowledge and to acquire and take into account the personal knowledge of others. They also protect spontaneous information mechanisms (such as market prices) which enable individuals to take into account knowledge dispersed among billions of human beings even if individuals remain "rationally ignorant" of most of this dispersed knowledge. Such decentralized information and ordering of the actions of diverse persons with limited knowledge reduces the need for centralized government regulation (e.g. laws imposing the majorities' preferences on minorities) which might unnecessarily limit individual freedom and disrupt decentralized ordering (notwithstanding the in-

43 Cf. Notes 17 and 18 above and e.g. the recent report by A.C. HABBARD and M. GULRAUD, *The WTO and Human Rights*, The International Federation for Human Rights, November 2001.

44 On the instrumental function of human rights for dealing with the problems of limited knowledge, conflicting interests and abuses of power see e.g. BARNETT (2000).

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evitable need for some centralized ordering e.g. in governmental and non-governmental organizations, companies, and families).

(2) *Human rights as incentives for mutually beneficial division of labor:* Economic transactions are based on the exercise of liberty rights (e.g. to sell and buy) and the transfer of property rights (e.g. in traded goods). Human rights (e.g. property rights, freedom of contract) set incentives for savings, investments and mutually beneficial division of labor among self-interested actors (e.g. by requiring compensation in case of non-fulfillment of contracts or of governmental takings of property rights). They protect individual rights to acquire, buy and sell goods and services necessary for personal self-development but whose supply remains scarce in relation to consumer demand. Equal human rights force people to take into account the interests of others (e.g. by requiring consent to rights transfers) and to settle disputes peacefully based on respect for the rule of law.

(3) *Human rights as conflict-prevention mechanisms:* Human rights help to transform the Hobbesian "war of everybody against everybody else" into peaceful cooperation based on equal legal rights. In the economy no less than in the polity, the inevitable conflicts of interests (e.g. between producer interests in high sales prices and consumer interests in low prices) can be reconciled best on the basis of equal liberty rights (e.g. freedom of contract) and other human rights. Human rights enable decentralized solutions also for the value problem that human views about "truth" may differ, and value judgments about "the good" and "the beautiful" are not necessarily true.[45] By protecting (e.g. through freedom of religion, freedom of opinion and freedom of the press) diversity of individual values and preventing majorities from imposing their value preferences on minorities, human rights promote peaceful coexistence, tolerance and scientific progress. Effective protection of human rights gives inevitably rise to economic as well as political markets as decentralized means for evaluating scarce resources (e.g. private and public goods and services) in a manner respecting individual freedom

45 On IMMANUEL KANT's distinction between truth (analyzed in KANT's *Critique of Pure Reason*), value judgments (analyzed in KANT's *Critique of Practical Reason*), and esthetic judgments (analyzed in KANT's *Critique of the Human Ability to Judge*), and on decentralized methods (i.e. markets and democracy) and centralized methods (e.g. dictatorship) to overcome conflicts about value judgments, see e.g. FIKENTSCHER (1997) pp. 50–51.

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and responsibility, promoting dialogues about values, and allocating and distributing resources in accordance with consumer demand.

(4) *Human rights as countervailing powers:*
The history of human rights revolutions demonstrates that human rights (e.g. to self-defense *vis-à-vis* illegal abuses of power) offer checks and balances enabling citizens to defend their equal rights against abuses of powers and to limit the constitutional task of governments to the common public interest defined in terms of equal human rights. By defining core human rights as inalienable and requiring respect for the equal human rights of all others, human rights require substantive and procedural justifications of governmental restrictions and promote democratic accountability.

(5) *Human rights as decentralized dispute settlement and enforcement mechanisms:*
Human rights (e.g. of individual access to courts) and corresponding obligations (e.g. for compensation for violations of human rights) set incentives for decentralized enforcement of rules by self-interested, vigilant citizens and for spontaneous, private initiatives to internalize harmful market externalities (e.g. by invoking property rights and human rights to a clean environment *vis-à-vis* harmful pollution).[46] Human rights require legislative, administrative, and judicial protection specifying and balancing human rights, and thereby promote a living "human rights culture" and continuous adjustment of law and justice to changing situations.

(6) *Human rights as sources of democratic legitimacy:*
The human rights to "periodic and genuine elections [...] by universal and equal suffrage" (Article 21 UDHR) and to democratic participation in the exercise of government powers (Article 25 UN Covenant on Civil and Political Rights) promote transparent governance based on "the will of the people" (Article 21 UDHR) and on "deliberative democracy"[47] legitimating the exercise of political power at national and international levels. By defining principles of justice which constitutionally limit and guide all government activities, human rights inform and educate people on how they can realize individual and democratic self-government and mutually beneficial co-

46 On the recognition of the importance of human rights for rendering environmental law and environmental protection more effective see BOYLE and ANDERSON (1998).
47 Cf. e.g. KOH and SLYE (1999).

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operation across frontiers while avoiding conflicts with the independent actions of others.

4.2 Enjoyment and Protection of Human Rights Depend on Economic Resources

As long as unnecessary poverty continues to prevent billions of human beings from enjoying human rights, the empirical evidence for the instrumental function of human rights as incentives inducing economic welfare remains important for realizing the human rights objective of promoting personal self-development in dignity.[48] Poverty reduction depends on increased availability and accessibility of essential goods (e.g. food and medicines), services (e.g. education), and job opportunities. An international trading system enabling mutually beneficial contracts, investments, trade, and distribution of scarce goods and services is essential for the satisfaction of consumer demand, poverty reduction, and the fulfillment of human rights.

The fact that most citizens spend most of their time on their economic activities in order to gain the resources necessary for their personal development and enjoyment of human rights confirms that the *economy* is no less important for citizens and their human rights than the *polity*. Hence, constitutional protection of liberty rights, property rights and other human rights in the economic area is no less important than in other areas.[49] For instance, property rights and liberty rights induce and enable citizens to coordinate their individual investments, production, trade and consumption in a decentralized and welfare-increasing manner. By assigning liberty rights and property rights (e.g. to acquire, possess, use, and dispose of scarce resources), and by defining individual responsibility and liability rules, human rights create incentives for savings, investments, efficient use

48 Cf. e.g. UNDP (2000). On the contribution of liberal trade to economic welfare and to protection of human rights (which, like any legal system, involve economic costs), and, *vice versa*, on the reciprocal contribution of human rights to economic welfare, see the two contributions by SYKES (2002) and PETERSMANN (2002b). See also BEN-DAVID ET AL. (2000) who note that "trade liberalization is generally a positive contribution to poverty alleviation – it allows people to exploit their productive potential, assists economic growth, curtails arbitrary policy interventions and helps to insulate against shocks."

49 On the "double standard" in the jurisprudence of US courts which protect civil and political liberties through higher standards of judicial scrutiny than economic liberties, see e.g. SIEGAN (1980). In European integration, judges review national economic regulations on the basis of much more stringent non-discrimination, necessity, proportionality and human rights standards than in US courts which apply much vaguer "rational basis tests"; cf. the comparative legal study by PETERSMANN (1991) chapter VIII.

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of dispersed knowledge, mutually beneficial cooperation, and decentralized markets aimed at satisfying consumer demand and consumer preferences. Economic markets inducing investors, producers and traders to supply private goods and services demanded by consumers involve democratic "dialogues about values"[50] which are no less important for effective enjoyment of human rights than the political markets for the supply of public goods by governments.

The economic and human resources needed for the full enjoyment of human rights thus depend on making human rights an integral part of a social and sustainable market economy. Economists increasingly emphasize that human rights require to define the goal of economic policy as enabling every citizen to acquire and own the economic resources necessary for exercising his human rights.[51] From a human rights perspective, "market failures" should be defined more broadly as including violations of human rights (e.g. in case of child labor, forced labor, and discrimination of women distorting labor markets; discriminatory takings of property rights without adequate compensation distorting capital markets). "Rules of reason" in competition law, and the "public interest clauses" in regional and global integration law (e.g. Article XX GATT), should be construed as justifying government interventions necessary for the protection of human rights and for the correction of market failures (e.g. if private markets do not supply necessary medicines at socially affordable prices). Yet, interpreting market failures and public interest clauses in conformity with human rights does neither imply that import restrictions are an appropriate policy instrument for dealing with human rights violations in an exporting country; nor that competition authorities should have regulatory powers to protect competitors rather than competition as a process.

The successful integration of human rights into EC law and policies confirms that the economy and specialized organizations must not be regarded as autonomous fields unrelated to the human rights of producers, workers, investors, traders, and consumers. In order to strengthen the mutual synergies between human rights and integration law also at the worldwide level, UN human rights law must overcome its longstanding neglect of economic liberty rights, property rights, and competition safeguards as

50 Cf. FIKENTSCHER (1983) p. 10.

51 Cf. e.g. SEN (2000) who argues that freedom (in the sense of "capabilities" of persons to lead the kind of lives they have reason to value) is at once the ultimate goal of economic life and the most efficient means of realizing general welfare. Constitutional economists have long since emphasized that "an economist who is only an economist cannot even be a good economist" (HAYEK 1984, p. 236).

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indispensable means of promoting widespread ownership of economic and human capital (such as health and education) and of preventing small minorities from controlling the economy and polity. As all WTO members have human rights obligations under international treaty law (e.g. UN human rights conventions) and under general international law, the WTO objective of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income [...], while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development" (Preamble of the WTO Agreement) should be construed in conformity with the human rights obligations of WTO members.

5 Globalization of Markets and of Human Rights Requires a New Integration Paradigm

The human rights obligations in the UN Charter and in the Universal Declaration on Human Rights (UDHR) of 1948 were negotiated at the same time as the 1944 Bretton Woods Agreements, the General Agreement on Tariffs and Trade (GATT) of 1947 and the 1948 Havana Charter for an International Trade Organization. All these agreements aimed at protecting liberty, non-discrimination, rule of law, social welfare, and other human rights values through a rules-based international order.

5.1 Functionalism in Worldwide Organizations

The UN Charter provides for specialized agencies (Article 57 UN Charter) committed to the economic principle of "separation of policy instruments":

- *foreign policies* were to be coordinated in the UN so as to promote "sovereign equality of all its Members" (Article 2:1 UN Charter) and collective security;
- *liberalization of payments* and *monetary stability* were collectively pursued through the rules and assistance of the International Monetary Fund (IMF);
- GATT 1947 and the Havana Charter aimed at a mutually beneficial *liberalization of international trade and investments;*
- *development aid and policies* were coordinated in the World Bank Group;

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- and *social laws and policies* were promoted in the International Labor Organization (ILO) and other specialized agencies (like UNESCO and WHO).

The UN mandate "to coordinate the activities of the specialized agencies" (Article 63) has so far not led to a comprehensive UN law promoting a welfare-creating worldwide division of labor. Apart from a few exceptions (such as the references to human rights in the UN Charter and in the statutes of the ILO, UNESCO and WHO), human rights were not effectively integrated into the law of most worldwide organizations so as to facilitate *functional intergovernmental cooperation* (such as liberalization of trade and payments restrictions), notwithstanding different views on human rights and domestic policies (such as *communism*). In accordance with the "principles of justice" elaborated by modern legal philosophers[52] and reflected in the constitutional law of the leading postwar power[53], the postwar institutions gave priority to reciprocal international *liberalization* (e.g. in the context of the IMF, GATT, WTO, WIPO, and ILO) and to joint *wealth creation. Economic* and *social rights* and *redistribution of wealth* were perceived as primarily the responsibility of *national* governments, depending on national resources and value preferences, to be supplemented by "international benevolence".[54] Article 28 of the UDHR recognized: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized." Yet, UN human rights law lacks a coherent theory on transnational economic and social human rights *vis-à-vis* not only domestic governments but also foreign governments and international organizations.

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52 Cf. e.g. RAWLS (1999a) chapter II, whose conception of "justice as fairness" for defining the basic rights and liberties of free and equal citizens in a constitutional democracy gives priority to maximum equal liberty as "first principle of justice". RAWLS' "principle of fair equality of opportunity" and his "difference principle" are recognized only as secondary principles necessary for socially just conditions essential for moral and rational self-development of every person. Kantian legal theory also gives priority to a legal duty of states to ensure conditions of maximum law-governed freedom over moral "duties of benevolence" to provide for the needs of the citizens (cf. ROSEN (1993) p. 217; GUYER (2000) p. 264 *et seq.*).

53 For instance, the *Bill of Rights* which had to be appended to the US Constitution in order to secure its ratification, focuses more on "inalienable rights" to life and liberty than on social rights to secure "the general Welfare" (recognized as an objective of the US Constitution in its preamble).

54 On legal philosophies concerning moral and legal duties of assistance *vis-à-vis* "burdened societies", the "principle of just savings", a "property-owning democracy" promoting widespread ownership of economic and human capital, and on "distributive justice among peoples" see e.g. RAWLS (1999b) chapters 15 and 16. On human rights and "global justice" see FALK (2000).

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5.2 Emergence of Regional Integration Law Linked to Human Rights

Regional integration law, by contrast, has moved toward a different integration paradigm linking economic integration to constitutional guarantees of human rights, democracy, and undistorted competition. For instance, the "human rights clauses" in the EU Treaty, in the association and cooperation agreements between the EU and more than twenty countries in Eastern Europe and the Mediterranean, and in the EU's Cotonou Agreement with 77 African, Caribbean and Pacific states make "respect for human rights, democratic principles and the rule of law [...] essential elements" of these agreements.[55] The Quebec Summit Declaration of April 2001 and the Inter-American Charter of Democracy of September 2001, adopted by more than 30 member states of the Organization of American States, link the plans for a Free Trade Area of the Americas (FTAA) to the strengthening of human rights and democracy. Article 4 of the Charter establishing the new African Union, signed in July 2002 by more than 50 African countries in order to replace the Organization for African Unity (OAU), likewise commits all member states to "respect for democratic principles, human rights, rule of law and good governance."

5.3 A Global Integration Law Based on Human Rights?

The proposals in the WTO Ministerial Declaration of 14 November 2001[56] for negotiating competition, investment, environmental and health protection rules in the WTO are further illustrations of the need to examine whether the European and American integration paradigm should not also become accepted at the worldwide level in order to promote consensus on a new kind of global integration law based on human rights and solidary sharing of the social adjustment costs of global integration.

The proposed change from *international functionalism* to *constitutionalism* does not call into question the economic efficiency arguments for optimizing and separating policy instruments.[57] However, European integration confirms that the collective supply of public goods (such as global division of labor) may not be politically feasible without comprehensive

55 The quotation is from Article 9 of the Cotonou Agreement signed in June 2000 by the EU, the 15 EU member states and 77 ACP countries. On human rights in the external relations law of the EU see e.g. the contributions by CLAPHAM, SIMMA, ASCHENBRENNER and SCHULTE to: ALSTON ET AL. (1999).

56 WTO Doc. WT/MIN(01)/DEC/W/1 of 14 November 2001.

57 Cf. e.g. CORDEN (1974); VISCUSI, VERNON and HARRINGTON (1997).

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package deals including solidary responses to market failures and redistributive principles of justice.[58] Less-developed countries, for instance, often perceive market competition as a "license to kill" for multinational corporations from developed countries as long as liberal trade rules are not supplemented by competition and social rules (as in the EC) promoting fair opportunities and equitable distribution of the gains from trade.

In order to remain politically acceptable, global integration law (e.g. in the WTO) must pursue not only economic efficiency but also democratic legitimacy and social justice as defined by human rights. Citizens will continue to challenge the democratic and social legitimacy of integration law if it pursues economic welfare without regard to social human rights, for example the human right to *education* of the 130 million children (aged from 6 to 12) who do not attend a primary school; the human right to *basic health care* of the 25 million Africans living with AIDS, or of the about 35,000 children dying each day from curable diseases; and the human right to *food* and an *adequate standard of living* for the 1.2 billion people living on less than one dollar a day. The new opportunities for the worldwide enjoyment of human rights created by global division of labor (such as additional economic resources, job opportunities, worldwide communication systems, access to new medicines and technologies) must be accompanied by stronger legal protection of social human rights so as to limit abuses of deregulation (e.g. by international cartels, trade in drugs and arms, trafficking in women and children), help vulnerable groups to adjust to change without violation of their human rights, and put pressure on authoritarian governments to protect not only the self-interests of the rulers and of big business but the human rights of all their citizens.

6 Constitutional and Human Rights Strategies for Overcoming the Democracy Deficit of State-Centered International Law

From the peace treaties of Westphalia (1648) up to the UN Charter (1945), the *international law of coexistence* evolved as a system of rights and duties of states focusing on the protection of "sovereign equality" of

58 On the need for international organizations and international aid for the provision of "global public goods" see KAUL, GRUNBERG and STERN (1999). The recent WORLD BANK (2001) report emphasizes that open market economies and increased trade offer the best hope for the more than 1 billion people living on less than 1 dollar a day. Over the past two decades of globalization, the successful integration of more than 24 big developing countries into the global industrial economy has increased their income per head (about 5% p.a.) and reduced the number of people in absolute poverty. Countries not participating in the global division of labor have tended to aggravate their poverty problems.

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states (Article 2:1 UN Charter) and on effectiveness of government control over a territory and a population. *Inside* democracies, validity of law depends on respect for human rights and for democratic rule-making procedures. The validity of classical international law rules, however, and the recognition of states as subjects of international law into whose domestic jurisdiction other states must not intervene, does not depend on the democratic legitimacy of the governments concerned. Due to its power-oriented character, the lack of legitimacy of classical international law has been criticized long since (e.g. by colonial and other suppressed people) and has rendered a worldwide rule-of-law system impossible.

Since the fall of the Berlin wall (1989), human rights have become universally recognized by all 190 UN member states not only as part of international treaty law (e.g. in the UN Charter and the 1989 UN Convention on the Rights of the Child, ratified by 191 states), but also of international customary law and of the "general principles of law recognized by civilized nations" (Article 38 Statute of the International Court of Justice). The UN's *international law of cooperation* includes also intergovernmental rights and obligations to mutually beneficial cooperation across frontiers and obligations to respect human rights. Yet, UN law secures neither democratic governance nor democratic legislation implementing and protecting human rights, nor judicial protection of human rights.[59] Can the necessary international governance for the supply of international public goods (such as democratic peace, protection of the "global commons", promotion of human rights, and of welfare-increasing division of labor across frontiers) be realized through power-oriented worldwide organizations without democratic governance at the international level and without effective protection of individual liberty rights, property rights and other human rights necessary for a mutually beneficial division of labor among free citizens?

6.1 Democratic Legitimacy and Accountability of International Organizations Depend on Embedding them into Domestic Constitutional Systems

International organizations can be perceived as a "fourth branch of government", indispensable for the collective supply of international public goods. Their democratic legitimacy depends on subjecting international

59 Cf. PETERSMANN (2002c).

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rule-making and the domestic implementation of the law and policies of international organizations to democratic implementing legislation, parliamentary control, judicial protection of rule of law and of individual rights by national courts, and other domestic constitutional safeguards (such as transparent policy-making in cooperation with representatives of civil society).[60] Regional and worldwide economic integration law, such as the WTO Agreement and the more than hundred free trade area and customs union agreements pursuant to GATT Article XXIV and GATS Article V, derive legitimacy not only from the ratification and implementation of these agreements by national parliaments. No less important is that their substantive legal and judicial guarantees protect individual freedom, non-discrimination, rule of law and welfare-increasing cooperation among producers, investors, traders and consumers far beyond the corresponding legal guarantees in national laws and constitutions.[61] For example, the frequent abuses of national legislative discretion for welfare-reducing, discriminatory border restrictions and discriminatory internal restrictions of competition among domestic citizens are more effectively limited by international law (e.g. IMF, GATT, and WTO rules) than by domestic constitutional laws.

Economists have long since recognized that international guarantees of market competition, non-discrimination and rule of law, such as those in the 1944 Bretton Woods Agreements and in GATT 1947, can serve "constitutional functions" for enabling citizens to increase their individual and social welfare through mutually beneficial division of labor without prejudice to the sovereign rights of governments to correct market failures and supply public goods through national legislation and other government interventions.[62] The liberal trade order before World War I and following World War II illustrated that international market mechanisms – provided they are legally protected and restrained by national and international rules – enable the collective supply of international public goods without a world government.

60 This was the "constitutional approach" suggested in PETERSMANN (1991) chapter IX.
61 Cf. e.g. HILF and PETERSMANN (1993).
62 Cf. PETERSMANN (1991), notably chapter VII.

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6.2 Universal Human Rights Offer Additional Standards of Democratic Legitimacy and Accountability of International Organizations

The move from "negative integration" (e.g. reciprocal liberalization of discriminatory border restrictions in GATT) towards worldwide harmonization of non-discriminatory internal regulations (e.g. for trade-related services, investments, property rights, competition, and environmental rules) raises new concerns about how worldwide rule-making can be legitimized if it is no longer effectively controlled by civil society, national parliaments and "deliberative democracy". Are there alternative means of legitimizing intergovernmental rule-making at the international level even though some of the preconditions of democratic legitimacy – such as a "government of the people, by the people and for the people" (A. LINCOLN) – do not exist in worldwide organizations where governments often continue to behave like monarchs treating their citizens as mere objects and negotiating rules behind closed doors without transparent democratic discussion?

Today's universal recognition, in national, regional and UN human rights instruments, of "the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world"[63] offers a new source of democratic legitimization of international law. As inside constitutional democracies, the legal recognition of an inalienable core of human rights as international *ius cogens* – *acknowledged* as inalienable "birth rights" of every human being, but not *granted* by governments – can be interpreted as constitutional restraint on all government powers, including those of international organizations. UN human rights law and the general international law rules on treaty interpretation (as codified in Article 31 of the Vienna Convention on the Law of Treaties) require interpreting international treaties (including the WTO Agreement) in conformity with universally recognized human rights. International courts (like the International Court of Justice) and quasi-judicial bodies (like the WTO Appellate Body) should follow the example of the EC Court of Justice and of the European Court of Human Rights by recognizing that UN human rights law binds not only *national governments* but also collective rule-making in *international organizations* and domestic implementation of international rules:

63 This citation from the preamble of the UDHR of 1948 continues to be cited in the preambles of most UN human rights conventions, such as the 1989 UN Convention on the Rights of the Child, ratified by 191 states.

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"Where States establish international organizations, or *mutatis mutandis* international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object [of the European Convention on Human Rights] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[64]

Focusing on domestic and international human rights as sources of democratic legitimacy, and as constitutional restraints on the powers of national and international organizations, reduces the significance of the increasing controversy over whether the democratic legitimacy of domestic laws must prevail over those of international rules (as claimed by many US politicians), or whether intergovernmental cooperation and international law enable a broader source of democratic legitimacy than any national parliament in an individual state (as claimed e.g. by most Europeans).

6.3 Market Integration and Citizen Rights in European Integration

In European integration, citizens, parliaments and courts have forced the EC institutions to recognize that, as stated by the EC Court of Justice, "fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court"[65], and "respect for human rights is a condition of the lawfulness of Community acts".[66] The EC Court of Justice construed the common human rights guarantees of EC member states as constituting general constitutional principles limiting the regulatory powers also of the EC.[67] The European Court of Human

64 European Court of Human Rights, Application No.43844/98, T.I. vs. United Kingdom, Admissibility Decision of 7 March 2000, p. 4, European Human Rights Law Review (2000) pp. 429–430. In *Matthews v. UK*, the European Court of Human Rights found the United Kingdom in violation of the human right to participate in free elections of the legislature even though the law which denied voting rights in Gibraltar implemented a treaty concluded among EC member states on the election of the European Parliament: "there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to 'secure' the rights (under the ECHR) in respect of European legislation in the same way as those rights are required to be 'secured' in respect of purely domestic legislation". Cf. European Court of Human Rights, judgment of 18 February 1999 on complaint No. 24833/94, Europäische Grundrechtszeitschrift (EUGRZ) 1999, p. 200.

65 Case 29/69. *Stauder,* ECR 1969. 419, para. 7.

66 Opinion 2/94, ECR 1996 I-1759, para. 34.

67 In *Internationale Handelsgesellschaft* (Case 11/70, ECR 1970, 1125,1134), the ECJ held that respect for human rights forms an integral part of the general principles of Community law: "the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community" (para. 3–4).

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Rights has likewise emphasized that the human rights obligations of the more than 40 member states of the European Convention on Human Rights (ECHR) apply also to *collective* rule-making in international organizations.

The history of European integration suggests that the emergence of a human rights culture promoting democratic peace and social welfare depends on empowering individuals to defend not only their *civil* and *political* human rights, but also their *economic* and *social rights* through individual and democratic self-government and access to courts. Inside the EC, the judicial protection of market freedoms and of non-discrimination principles as fundamental individual rights became an important driving force for the progressive realization of the common market and of "an area of freedom, security and justice" (Article 61 EC Treaty). The EC Court emphasized that economic freedoms "are not absolute but must be viewed in relation to their social function"[68], and with due regard to human rights.[69] The EC jurisprudence on social rights (e.g. "the principle of equal pay for male and female workers for equal work" in Article 141 EC Treaty) contributed to the emergence of a European "social market economy" in which EC member states are required to extend social rights (e.g. to education and vocational training) to nationals of other EC member states.[70]

6.4 How Can the Role of Courts and Human Rights Organizations Be Strengthened in Global Integration Law?

The International Court of Justice (ICJ) has recognized that human rights constitute not only *individual rights* but also, in case of universally recognized human rights, *erga omnes* obligations of governments based on treaty law and general international law.[71] The universal ratification of human rights treaties (such as the UN Convention on the Rights of the Child ratified by 191 states), and the universal recognition in these treat-

68 Case C-44/94, *The Queen v. Minister of Agriculture,* ECR 1995 I-3115, para. 28.

69 Cf. BETTEN and GRIEF (1998); ALSTON ET AL. (1999).

70 Due to the constitutional limits of EC law, social rights were initially developed in EC law as a function of market integration rather than of the more recent EC Treaty guarantees of "citizenship of the Union" (Article 17) and of "fundamental social rights" (e.g. Article 136). On the need for integrating social rights into market integration law as a means for limiting social market failures (e.g. resulting from an unjust distribution of resources and purchasing power, inadequate opportunities of all market participants to express their "voice" and "exit") see e.g. POIARES MADURO (1999) p. 459.

71 Cf. e.g. the Barcelona Traction judgment (ICJ Reports 1970, 32) and the Nicaragua judgment (ICJ Reports 1986, 114).

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ies "of the equal and inalienable rights of all members of the human family", as set out in the UDHR[72], reflects a worldwide *opinio iuris* on the *inalienable erga omnes* character of core human rights. This *opinio iuris* on essential and inalienable core human rights is not contradicted by the diversity of views on the precise scope, meaning, and *ius cogens* nature of many specific human rights whose legal implementation may differ from country to country and from treaty to treaty. In contrast to the EC Court, the ICJ has not yet specified to what extent human rights entail constitutional limits also on the UN and its specialized agencies.

In most worldwide organizations, human rights have not yet been effectively integrated into multilateral rule-making and policies and are not effectively protected through worldwide adjudication. In contrast to the "Matthews principle" recognized in European law[73], citizens outside Europe often lack effective judicial remedies to ensure that international obligations undertaken by their governments (e.g. in the WTO) remain consistent with human rights obligations. The UN Covenant on Economic, Social and Cultural Rights (UNCESCR) offers much looser legal and institutional safeguards for compliance with economic and social human rights compared with the UN Covenant on Civil and Political Rights (UNCCPR).[74] By not mentioning property rights, and by "safeguarding fundamental political and economic freedoms to the individual" only in an indirect and inadequate manner (cf. Article 6:2), the UNCESCR does not protect the legal preconditions for creating the economic resources necessary for the enjoyment of human rights. The regular civil society protests against non-transparent rule-making in worldwide organizations, and the often one-sided industry-pressures determining multilateral negotiations (e.g. in the GATT and WTO), are signs of a continuing "clash of civilizations" between a citizen-oriented *human rights culture* and *power-politics* in intergovernmental negotiations and state-centered organizations.

The UDHR recognizes that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Article 28). Yet, human rights have not yet been effectively defined and protected *vis-à-vis* the *collective exercise of government powers in worldwide organizations.* Just as the human rights guaran-

72 Quotation from the preamble to the 1989 UN Convention on the Right of the Child, which also confirms the universal recognition of rights set out in the UDHR. See COUNCIL OF EUROPE (2000) p. 169.
73 Cf. the judgment by the European Court of Human Rights mentioned above (Note 64).
74 Cf. e.g. ARAMBULO (1999).

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tees and competition safeguards of the EC Treaty have reinforced the legitimacy and effectiveness of European integration and of protection of human rights throughout Europe, so do human rights law and WTO rules offer mutually beneficial synergies at the worldwide level for rendering human rights and the social functions and democratic legitimacy of the emerging global integration law more effective. As in European integration, the WTO Appellate Body and human rights organizations (e.g. the UN Committee on Economic, Social and Cultural Rights) should take the lead – with due deference to the "margin of discretion" of democratic legislatures, and in cooperation with the growing civil society requests for more effective protection of human rights in worldwide organizations – in interpreting the law of specialized organizations in conformity with universally recognized human rights.[75]

Additional bottom-up pressures by civil society representatives, national parliaments and national courts will be necessary for making specialized organizations and government representatives conscious of their human rights obligations. Just as European integration has benefited from recognizing EU citizens and EU parliamentarians as legal subjects of integration law, so could UN law and the global integration law of the WTO acquire additional democratic legitimacy from enabling citizens and national parliaments to participate more actively in the institutional framework of worldwide organizations and in the legal implementation and judicial enforcement of UN human rights law and WTO law. The World Bank, after having rejected the relevance of human rights for the World Bank's lending activities in the 1960s and having accepted the importance of human rights for poverty reduction only in the 1990s, has set an encouraging precedent, with its recent decision in June 2002, to elaborate a human rights strategy for enhancing the synergies between its financial and technical assistance and promotion of human rights. Should the WTO follow this example?

75 In addition to the reports mentioned above (Notes 17 and 18), see also the recent reports by the UN High Commissioner for Human Rights on "The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights" (E/CN.4/Sub.2/2001/13 of 27 June 2001) and on "Liberalization of Trade in Services and Human Rights" (E/CN.4/Sub.2/2002/9).

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7 Human Rights and WTO Rules: Need for Deference *vis-à-vis* Parliamentary Democracy and Specialized Human Rights Bodies

Human rights need to be defined, promoted and mutually balanced through democratic legislation, administrative and judicial protection and international safeguards across frontiers. The "constitutional functions" of the WTO guarantees of freedom, non-discrimination, rule of law and mutually beneficial trade transactions for the corresponding human rights guarantees (e.g. of freedom, non-discrimination and access to courts) are increasingly recognized at the international level.[76] By contrast, the domestic legislative, administrative and judicial implementation of WTO rules, for instance in the USA and in the EU, remains dominated by dualist legal traditions of giving preference to domestic legislative, administrative and judicial discretion as regards compliance with international WTO obligations.

7.1 WTO Rules and Social Human Rights

The relevance of social human rights for the interpretation and application of WTO rules, and the model of the "corporatist legal structure" of the International Labor Organization (ILO) for institutional reforms of the WTO, remain controversial. As regards international labor standards, most WTO governments seem to believe that cooperation through technical assistance and capacity building are more effective instruments for the promotion of labor standards than import restrictions which tend to worsen the working conditions in exporting countries and may be neither an effective nor necessary remedy (in terms of GATT Article XX) for strengthening labor standards.

The interrelationship between trade rules and the human right to health are increasingly recognized. Fulfillment of the human right to health depends, as in the case of other social human rights (e.g. the human rights to food and education), on availability of, and everyone's access to, essential goods (e.g. food, medicines) and services (e.g. health and education services) which are tradable and, if not available at home, may be imported from abroad. As human rights apply not only to domestic citizens and do-

76 Cf. e.g. the UN Secretary-General's recent report on "Globalization and its impact on the full enjoyment of human rights" (Note 17).

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mestic governments but also to foreign citizens and governments abroad, the human rights obligations of all WTO members[77] may be of significance for interpreting WTO rules, e.g. by transforming sovereign *rights* under the numerous WTO exceptions into *obligations* of governments to protect the human rights of their citizens.

The increasing human rights jurisprudence by courts and other human rights bodies may be of relevance for the judicial interpretation also of WTO law. For instance, General Comment No.14 (2000) on the human right to the highest attainable standard of health (Article 12 ICESCR), adopted by the UN Committee on Economic, Social and Cultural Rights in May 2000[78], defines the right to health as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as availability, accessibility and affordability of health facilities, goods and services. The legal obligations of states to respect, protect, promote and fulfil this human right requires legislative implementation, judicial protection and health policy measures which, "depending on the availability of resources, [...] should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required".[79] The General Comment recognizes that trade restrictions e.g. on individual access to essential food, drugs and health services can be inconsistent with the human right to health, and that cooperation might be required also in the WTO for the implementation of the right to health.[80]

The universalization and expanding subject matters of both human rights and intellectual property law have prompted negotiations in various UN bodies and also in the WTO on the clarification of the complex interrelationships between the TRIPS Agreement and human rights. The need for intellectual property as reward and incentive for research and development (e.g. for new pharmaceuticals) is no longer contested. The proper balancing between the social objectives of the TRIPS Agreement (see Articles 7 and 8), its regulatory exceptions (e.g. in Article 6 for "parallel imports", Article 31 for "compulsory licensing", Article 40 concerning abuses of intellectual property rights), and the appropriate scope of in-

77 Of the 144 WTO member states, 112 have ratified the UNCESCR, and all but one (USA) have ratified the UN Convention on the Rights of the Child. On the recognition, e.g. by the ICJ, of human rights obligations under general international law see e.g. Note 71 above.

78 Cf. UN Doc. E/C.12/2000/4, CESCR of 4 July 2000 and on the preparatory work TOEBES (1999).

79 General Comment No.14 (note 78), para. 39.

80 Cf. e.g. para. 41, 43 and 64 of the General Comment No.14 (note 78).

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tellectual property protection (e.g. for genetic and other living materials, rights of indigenous peoples) raise numerous controversial questions.[81]

Yet, there seems to be broad agreement so far that the TRIPS provisions are flexible enough to permit necessary health protection measures so as to ensure access to affordable medicines to treat AIDS and other pandemics.[82] In the WTO Ministerial Declaration on "The TRIPS Agreement and Public Health" of November 2001, for instance, all WTO members "affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all". WTO members also "reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose."[83] Rather than granting a general waiver from WTO law in favor of the human right to health, WTO members preferred to specify those TRIPS provisions which they understand to grant sufficient flexibility for promoting public health and access to medicines for all. This approach seems consistent with the general principle that human rights are not absolute but must be legally implemented through legislative measures taking into account all other human rights.

7.2 Balancing Principles for Reconciling WTO Rules with Human Rights

Does the universal recognition of human rights require to construe the numerous public interest clauses in WTO law in conformity with the human rights requirement that individual freedom and non-discrimination may be restricted only to the extent necessary for protecting other equal human rights? The non-discrimination and necessity requirements in the general exceptions of WTO law (e.g. in GATT Article XX and GATS Article XIV) reflect these human rights principles. WTO law gives clear priority to the sovereign right to restrict trade if this is necessary for the protection of human rights (e.g. to life, health, food, education, a clean and sustainable environment, and social security). The recent WTO panel and Appellate Body reports on US import restrictions of shrimps (aimed

81 Cf. e.g. DUTFIELD (2000).

82 Cf. e.g. the report of the joint WHO/WTO Workshop on Differential Pricing and Financing of Essential Drugs of 8–11 April 2001 (which notes that about 95% of the WHO list of "essential drugs" are not or no longer patented, and differential pricing and international financing of essential drugs are consistent with the TRIPS Agreement).

83 Cf. WTO Doc. WT/MIN(01)/DEC/W/2 of 14 November 2001, para. 4.

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at protecting endangered species of sea turtles) confirmed that import restrictions may be justifiable under WTO law for protecting human rights values not only inside the importing country but also in other countries and in the High Seas.[84]

By prohibiting discriminatory and protectionist abuses, the general exceptions in WTO law aim at reconciling freedom of trade with the human rights functions of safeguard measures restricting liberal trade (e.g. in order to protect human rights and social security in the importing country). In such legal and judicial balancing processes, human rights must guide the interpretation not only of the WTO's exceptions and safeguard clauses, but also the interpretation of the basic WTO guarantees of freedom, non-discrimination, property rights, and rule of law which protect the corresponding human rights guarantees of individual liberty, non-discrimination, private property and access to courts. For instance, the recent statement by the UN Committee on Economic, Social and Cultural Rights on "Human Rights and Intellectual Property"[85] has been criticized for interpreting the TRIPS obligations too one-sidedly in the light of social human rights without recognizing that property rights, including the "moral and material interests" of the holders of intellectual property rights, are protected as human rights themselves.[86] The rights and obligations of the importing country to protect the human rights of its citizens need to be balanced also with the corresponding rights and obligations of the exporting country, and also with the economic insight that trade restrictions are only rarely an efficient instrument for correcting market failures and supplying public goods.[87]

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84 Cf. the Appellate Body report of 22 October 2001 on US Import Prohibition of Certain Shrimp and Shrimp Products, DS58/AB/RW, with references to the earlier WTO panel and Appellate Body reports.

85 Above Note 18, see notably para. 12: "The Committee wishes to emphasize that any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the State party."

86 Cf. e.g. Article 17 of the UDHR ("Everyone has the right to own property") and Article 15 UNCESCR, together with Article 27 of the UDHR, requiring "the protection of the moral and material interests resulting from any scientific, literary or artistic production" of authors.

87 In its Resolution 1999/30 of 26 August 1999 on "Trade Liberalization and its Impact on Human Rights", the Sub-Commission (of the UN Commission on Human Rights) on the Promotion and Protection of Human Rights declared "that sanctions and negative conditionalities which directly or indirectly affect trade are not appropriate ways of promoting the integration of human rights in international economic policy and practice." See also Resolution 1998/12 on "Human rights as the primary objective of trade, investment and financial policy" adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights, and Resolution 1999/30 on "Trade liberalization and its impact on human rights" adopted by the same UN Sub-Commission in 1999.

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In past GATT and WTO practice, governments have only rarely referred to human rights e.g. in their invocations of the general exceptions (e.g. in GATT Article XX) and other safeguard clauses in GATT and WTO law so as to justify measures "necessary to protect human, animal or plant life or health".[88] There appears to be no evidence, however, that past GATT practice under Article XX has been inconsistent with human rights. GATT dispute settlement jurisprudence, for instance, has never challenged the legality of non-discriminatory and "necessary" safeguard measures under GATT Article XX. Also WTO practice seems to be consistent so far with interpreting the general exceptions in WTO law (e.g. Article XIV GATS, Article 8 TRIPS Agreement) in conformity with human rights.[89] The numerous "human rights clauses" in international economic agreements concluded by the EC with third countries have likewise been used only rarely for trade restrictions as a remedy for human rights violations.[90] There appears to have been not a single judgment by the EC Court invalidating an EC measure on grounds of human rights. An explicit recognition of universally recognized human rights as part of the legally relevant context for the interpretation of WTO rules could be politically important for enhancing the legitimacy of WTO law. WTO decisions and dispute settlement rulings explicitly referring to human rights would, however, presumably remain rare in view of the fact that the WTO prohibitions of welfare-reducing trade restrictions are unlikely to conflict with human rights and the WTO safeguard clauses leave each WTO member broad discretion regarding the implementation of human rights.

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88 For an exception, see the submission from Mauritius in WTO Doc. G/AG/NG/W/36/Rev.1 of 9 November 2000, which claims that Article 20 of the Agreement on Agriculture (regarding the taking into account of "non-trade concerns") should be read in conjunction with Article 11 of the ICESCR recognizing the right of everyone to adequate food.

89 A computer search of references to human rights in WTO panel and Appellate Body reports indicates 10 reports since 1996 where parties, third parties, experts, panelists, or the Appellate Body referred to human rights. In the negotiations for the WTO Ministerial Declaration of November 2001 on access to medicines and review of Article 27:3(b) of the TRIPS Agreement, the "Africa Group", for instance, referred explicitly to human rights as criteria for interpreting the TRIPS Agreement. The WTO Secretariat also actively contributed to the discussions leading to the report of the UN High Commissioner for Human Rights on the impact of the TRIPS Agreement on human rights (see above Note 75) and to Resolution 2001/21 by the UN Sub-Commission on Human Rights on "Intellectual Property and Human Rights" (E/CN.4/Sub.2/RES/2001/21 of 16 August 2001).

90 The EC's suspension of trade preferences for Yugoslavia in November 1991, for instance, was motivated by the military hostilities in the former Yugoslavia rather than by human rights violations. In the context of the Lomé-Convention, the EC reacted to human rights violations (e.g. in Rwanda) by suspension of financial and technical assistance rather than trade restrictions. The EC's Generalized System of Tariff Preferences (GSP) offers additional preferences to developing countries which respect basic ILO guarantees (such as freedom of association and minimum age for admission to employment); temporary withdrawal of GSP benefits by the EC in response to violations of human rights have been rare (e.g. in the case of Myanmar). There is thus hardly any empirical basis for the criticism (e.g. by PROVE 1999, p. 32) of an alleged "bias of the WTO" because "the primary entry point for human rights concerns would be as justifications for sanctions and trade conditionalities".

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8 Outlook: Need for a Cosmopolitan Competition Culture, Integration Law and "Cosmopolitics" (PASCAL LAMY)

During the 4th century B.C., Stoic philosophers challenged the traditional distinction between Greeks and barbarians by identifying themselves as cosmopolitan citizens of the world, sharing one common human rationality and subject to one universal *divine logos,* rather than only as citizens of a Greek city-state. In today's globalized world, it is much more obvious that the welfare of every citizen depends not only on respect for human rights inside national democracies but no less on international law, worldwide division of labor and environmental protection of the whole earth. In order to remain democratically acceptable, worldwide organizations must open their doors not only for the rulers of this world but also for all citizens who, as legal subjects of human rights, remain the ultimate source of democratic legitimacy of national as well as international governance. Democratic governance and national trade and foreign policies focusing on the people inside nation states must be supplemented by "cosmopolitics" focusing on universal human rights and the "global commons".[91]

IMMANUEL KANT was the first philosopher who explained, in his essay on *Perpetual Peace* (1795), why human rights, rule of law and democracy inside states cannot remain effective without *international constitutional guarantees* of "democratic peace" among republican states and *cosmopolitan guarantees of human rights* also *vis-à-vis* foreign governments.[92] The EC Treaties have progressively evolved into a new kind of *peace treaties* that reflect, and go far beyond, the Kantian recommendations for protecting perpetual peace on the basis of national and international constitutional guarantees of human rights, rule of law, separation of powers, democracy, and cosmopolitan integration law. The contribution of EC law to more than 50 years of democratic peace among the 15 EC member states – "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" (Article 6 EU Treaty) – is no less important an achievement of European integration than the progressive extension of European integration, from the coal and steel community, customs union, common market and economic and monetary union to the emerging political union with a common foreign and security policy.

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91 Cf. LAMY (2000); CHARNOVITZ (2002).

92 On Kantian legal and constitutional theory see e.g. PETERSMANN (1999a).

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The WTO guarantees of freedom, non-discrimination, rule of law and peaceful settlement of disputes go far beyond those in most other areas of worldwide international law. As in European integration law, the non-economic legal and political benefits of the global WTO system are no less important than the economic welfare gains offered by trade liberalization in the WTO. The new round of WTO negotiations on additional worldwide rules for trade in goods, services, investments, intellectual property rights, competition and environmental rules, and dispute settlement may fail unless governments take human rights and democracy more seriously in the WTO context. All WTO members would benefit from recognizing the relevance of human rights for a welfare-increasing world trading system, for the limitation of abuses of public and private power, and for mutual synergies between market competition enhancing consumer welfare and human rights protecting citizen welfare. WTO competition rules should protect non-discriminatory conditions of competition not only among governments but also among private producers, investors, traders and consumers.

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