Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann

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Abstract

The relationship between human rights and market freedoms is far more complex than Petersmann acknowledges. Although Petersmann relies heavily upon notions such as constitutionalism and democratic decision-making, the terms are ill-defined and their application unconvincing. The author engages with Petersmann's contention that governments would contemplate greater international market intervention to promote social goals and challenges his interpretation of several of the leading WTO decisions.

This is a wide-ranging essay by a scholar who has been a pioneer in relating the law and philosophy of human rights to the multilateral trading regime. This is now a fashionable subject, and we do well to remember that, as it were, Petersmann was there first.

It is impossible to disagree with many of Petersmann's propositions, stated at the high level of abstraction that characterizes much of this text. After the failure of communism in the Soviet Bloc, and of neo-Marxist development models in the third world, there are few who would disagree with Petersmann that the full realization of human rights is incompatible with ruthless suppression of market freedoms. Yet a moment's reflection on phenomena such as conflict diamonds and sex tourism suffices to remind us that the markets and trade are entwined with some of the most horrific human rights abuses, and on a massive scale. It is true that democracy and democratization have been linked to the project of a Free Trade Agreement of the Americas (and rightly so), but it is also true that the neo-liberal economic policy prescriptions presupposed by some (albeit not all) aspects of that project have contributed to social and political instability in some Latin American countries, threatening the gains of democratization. Nor is the European experience, on which Petersmann relies heavily, as straightforward as he presents it. Europe began with the

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European Coal and Steel Community (ECSC), not a free market project, but a dirigiste one, premised on the gains to social and political stability of industrial planning at the European level; and the early failure to transform the ECSC into a constitutional European project resulted in two tracks, a human rights track represented by the European Convention on Human Rights and the European Court of Human Rights, as well as a common market track, the latter entailing not only the protection of market freedoms but also supranational economic regulation, underpinned by institutions of governance.[1] It is true, and indeed worthy of recollection, that free trade and human rights are both the intellectual progeny of the Enlightenment, represented by Petersmann through the figure of Immanuel Kant. But Kant, at least, was open-eyed; he saw the connection of the commercial spirit of his age not only with democratic republicanism but also with horrific imperialistic violence.

In sum, the relation of market freedom, or free trade, to human rights is in almost all situations a complex one, which cannot be well grasped by thinking in general terms about 'synergies', nor in terms of linear or teleological progression from economic integration to human rights-based constitutionalism. In order, therefore, to engage with Petersmann's project for the 'integration' of human rights and international economic law into a constitutional order, we have to pass to the specifics, and to be ever mindful of the context, the times in which we live, and in the name of *whom* and *what* the discourses of human rights, free trade, and constitutionalism are being invoked. God, or the devil, is in the details.

What, exactly, is Petersmann's vision of free trade constitutionalism and what is its relationship to the project of international human rights law? In this essay, Petersmann does not define constitutionalism, or the 'constitutional', very precisely, except to identify it (only in the conclusion, however) as a mechanism that protects against abuses of power and to associate its core substantive content with six 'principles'.[2] In the body of the essay, Petersmann deploys the language of constitutionalism in a rather loose manner. Thus, all of the following are invocations of the 'constitutional' idea of Petersmann:

— Human rights tend 'to limit the *constitutional* task of governments to the "common public interest" defined in terms of equal human rights' (at 627).
— '... the complementary *constitutional* principles needed for effectuating human rights — such as democratic participation, parliamentary rule-making, transparent "deliberative democracy" and judicial protection of the rule of law — are not yet part of the law and practice of most worldwide organizations' (at 627).
— 'The *constitutional* guarantees of the EU for economic liberties and the complementary *constitutional*, competition, environmental and social safeguards have also induced numerous EU initiatives to strengthen competition, environmental

[1] See, generally, P. Magnette, *L'Europe, l'Etat et la democratie* (2000).

[2] These are: the rule of law, the limitation and separation of government powers by checks and balances, democratic self-government, human rights, social justice, and the notion that human rights cannot be effectively protected without international law supplying international 'public goods' and legal restraints on 'abuses of foreign policy powers'.

and social law in worldwide international agreements. The strong competition law of the EC reflects the *constitutional* insight that — in the economy no less than in the polity — equal freedoms of citizens and open markets need to be legally protected against abuses of public powers as well as of private powers' (at 632).

— 'In addition, most states recognize human rights in their respective *constitutional* laws as *constitutional* restraints on government powers . . .' (at 633).

— '. . . the ICJ has not yet specified to what extent human rights also entail *constitutional* limits on the UN and its specialized agencies' (at 634).

— '. . . inalienable human rights which today *constitutionally* restrain all national and international rule-making powers' (at 635).

— '. . . the UN Charter presented such hard-fought-for "revolutions" in international law designed to extend freedom, non-discrimination, the rule of law and social welfare across frontiers, even though diplomats carefully avoided the politically charged language of "international *constitutional* law" (e.g. in contrast to the "Constitution of the ILO" of 1919)' (at 636).

— '. . . the WTO rules — even if formulated in terms of rights and obligations of governments — serve as "*constitutional* functions" for rendering human rights and the corresponding obligations of governments more effective in the trade policy area' (at 644).

— 'As sectoral competition rules risk being "captured" and abused by special interest groups, the proposals for limiting cartel agreements and other anti-competitive business practices and abuses of intellectual property rights through worldwide WTO minimum standards for undistorted competition and transnational cooperation among competition authorities are of *constitutional* significance for the protection of freedom, non-discrimination and the mutually beneficial division of labour across frontiers' (at 647).

— '. . . international "treaty *constitutions*" (such as the EC Treaty and the ILO Constitution) . . .' (at 648).

It is difficult to discern a precise claim about constitutionalization of international law from all these various usages of the word, in its adjectival and other variants. In fact, however, Petersmann's earlier work *is* fairly precise or specific in what is meant by constitutionalism. Constitutionalism is identified with legal pre-commitment that ties the hands of governments, allowing them to resist pressures by rent-seeking groups for interference with property and other economic rights.[3] For Petersmann, domestic constitutional arrangements are inadequate to achieve this purpose; hence, the rationale for treaties such as the GATT. Petersmann, a long-serving GATT official, was probably unique among 'insiders' in grasping, as early as the 1970s, that

[3] See especially, the English version of Petersmann's *Habilitationschrift*, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991), which is probably the first sustained effort to provide a comprehensive legal theory of the trade regime. For a critical engagement with Petersmann's theory of constitutional pre-commitment as applied to the WTO, see Howse and Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far', in R. Porter, *et al.*, (eds), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (2001).

purely economic rationales for multilateral trade liberalization were weak or precarious — after all classical economics suggested that, in most situations, unilateral trade liberalization increased domestic welfare, thus making bargained multilateral liberalization a puzzle, considered strictly from the perspective of the economic theory of trade.[4] In addition, while generally speaking those legal scholars who studied the GATT tended to view it as a set of bargained concessions, Petersmann was ahead of his time in seeing the importance of the multilateral trading regime embodying *rules*, such as non-discrimination (MFN and National Treatment). While such rules can be understood functionally in terms of constraining 'cheating' on bargained concessions, they have, nevertheless, the formal structure of general juridical norms, and therefore their validation, including through interpretation by judicial or quasi-judicial tribunals, inevitably raises the question of justice. Even if economists may explain the rules instrumentally, or in terms that are indifferent to justice or fairness, their interpretation by an impartial and disinterested 'third party' (the judge) cannot be *purely* instrumental. The judge is inevitably concerned with justice, and seeks an interpretation that can be seen as fair *inter partes*.[5] This implication of a legal, as opposed to a diplomatic, approach to dispute settlement was seen more clearly and earlier by Petersmann than by the other greats of GATT era trade law scholarship, Hudec and Jackson, who embraced judicialization of dispute settlement, but within an overall pragmatic or economic functionalist vision of the rules in the multilateral trading system.

For Petersmann, then, legitimacy of the WTO as a juridical system depends on the transformation of what he calls 'market freedoms' into 'fundamental rights'. Petersmann is well aware that in the Covenant on Economic, Social and Cultural Rights, the right to property and freedom of contract have not been recognized as human rights, and attributes this fact to 'anti-market bias'. But this is a question-begging manner of making the case that property and contractual rights *should* be recognized as fundamental rights at the international level. In the present essay, Petersmann is not only for these economic rights, but also for 'social rules' at the global level[6] and other human rights needed to correct market 'abuses'. But he

[4] This is not the only way of addressing the puzzle. Influenced by the work of such scholars as Anne-Marie Slaughter, John Ruggie, Robert Keohane on post-war multilateralism, I have provided an account of bargained trade liberalization that stresses the role of multilateral rules in constraining the externalization of the costs of domestic adjustment to economic and social change and crisis, so as to prevent a protectionist race-to-the-bottom. Howse, 'From Politics to Technocracy — and Back Again: The Fate of the Multilateral Trading Regime', 1 *AJIL* (2002) 94. As well, more recent work in the economics literature has provided a complementary explanation, based on 'terms of trade' externalities, K. Bagwell and R. W. Staiger, GATT-THINK 16 National Bureau of Economic Research, Discussion Paper No. 8005 (2000).

[5] See A. Kojeve, *Outline of a Phenomenology of Right* (transl. R. Howse and B.–P. Frost) (2000), Ch. III; see also, Steger, 'Afterward: "The Trade and . . ." Conundrum — A Commentary', 1 *American Journal of International Law* (2002) 135.

[6] Although, perhaps tellingly, the section of the article entitled 'The Need for WTO Competition and Social Rules as Necessary Complements to Human Rights' deals only with competition rules and never actually discusses social rules.

provides not a shred of evidence that a more optimal democratic response to the limits of markets will be facilitated by governments having to justify their social interventions at the international level as limits on the 'fundamental rights' of property and contract. According to Petersmann, 'Human rights need to be legally concretized, mutually balanced and implemented by democratic legislation which tends to vary from country to country.' At one point in his essay, Petersmann suggests that the effect of giving property and contractual rights the status of fundamental rights at the international level would be to constrain that democratic balancing by imposing a requirement of necessity whenever a government seeks to limit such rights (at 641). In Petersmann's ideal world, a citizen could directly challenge social, environmental or other public policies and the government that had enacted those policies would be required to show that they are necessary limits on freedom of trade (or property rights). To the extent that the public policies in question themselves happen to be based on human rights (for example, social rights), we can see clearly the hierarchy of rights that Petersmann is proposing. Social and other positive human rights may only be pursued by governments to the extent to which they can be shown as 'necessary' limits on market freedoms. But why not the reverse? Why not subject *free trade rules* to strict scrutiny under a necessity test, where these rules make it more difficult for governments to engage in interventionist policies to protect *social* rights?

Petersmann's implicit answer to this question entails recourse to the standard faith of the ideological free traders that 'trade restrictions are only rarely an efficient instrument for correcting "market failures" and supplying "public goods"' (at 645). Precisely *because* of this faith, trade-restricting market interventions to fulfil social or other human rights obligations are likely to be viewed with great scepticism if one sees trade liberalization rules as economic rights — the free trader can always imagine, in the abstract, an alternative policy instrument to trade restrictions, which is less trade restrictive and supposedly more efficient.

But in the real world, policy-makers have a limited and constrained tool kit available to them to fulfil social and other human rights. Labelling may be more efficient than a ban on a toxic substance with industrial uses. But what if those handling the substance are mostly illiterate? Adjustment and training and education subsidies to workers may be more efficient than trade restrictions, but what if a country has had fiscal restraint imposed on it by the IMF and the capital markets (as a condition for future access to those markets)?

Petersmann's notion that the substantive obligations of the WTO law (such as National Treatment) be understood as fundamental rights would make it *more* difficult than at present for WTO members to defend their public policies in terms of reasonable limits on those obligations. The key passage in Petersmann's essay is the following: 'The universal recognition of human rights requires us 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 human rights' (at 645).

Here is a concrete suggestion about legal interpretation that allows us to test the implications of Petersmann's general theory in the real world. The existing exceptions

in Article XX of the GATT, for example, which Petersmann includes in the category of 'public interest' clauses, refer to a range of public policy objectives, which may or may not be conceived in human rights terms — including the protection of animal and human life and health (XX(b)), the conservation of exhaustible natural resources (XX(g)), the effective enforcement of domestic laws and regulations (XX(d)). On Petersmann's approach, once a GATT obligation characterized as a fundamental right was found to be violated, a WTO member could only invoke one of these exceptions, if it were to make its argument in human rights terms. There are some in the human rights community who might see this as a fine way of getting states to pay closer attention to human rights law, especially to the content of economic, social and cultural rights. However, there are significant risks here. One, that is fairly obvious, is that institutionally within the WTO culture, there is enormous scepticism about expansive understandings of human rights, and even about economic, social and cultural rights generally.[7] I myself have argued that international human rights law is relevant to defining these exceptions, and I do think that in specific cases it is possible that the Appellate Body of the WTO (which is staffed not only by trade 'experts' but also distinguished public international lawyers such as Georges Abi-Saab) would appreciate the relevance of human rights to a WTO member's justification of its policies in terms of Article XX.[8] Nevertheless, depending on human rights analysis to make the kind of case the US made in *Shrimp/Turtle* about the conservation of exhaustible natural resources seems questionable. The extent to which environmental concerns are appropriately translated into the notion of 'environmental rights' is quite controversial, and in the presence of this controversy, and given the institutional context of the WTO, the Appellate Body might well be inclined to take a cautious or conservative view.

Petersmann finesses this issue by suggesting that in the *Shrimp/Turtle* case the Appellate Body of the WTO 'confirmed that import restrictions may be justifiable under WTO law for protecting human rights values' (at 645). But, in fact, in that decision, the Appellate Body did not link the notion of conservation of exhaustible natural resources to human rights values.[9] Of course, it might be possible to do so, interpreting the idea of sustainable development in human rights terms, but the

[7] At the World Trade Forum in Berne last August, where many of the leading traditional WTO experts gathered to address the question of WTO law and human rights, several of the most eminent of them even questioned whether any human rights were sufficiently well understood or clearly embodied in international law so as to be relevant to the operation of the WTO!

[8] R. Howse and M. Matua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Montreal: International Centre for Human Rights and Democratic Development, 2000).

[9] *US — Import Prohibition of Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (12 October 12, 1998), paras 129–131. For an analysis of this ruling and the Appellate Body's subsequent ruling on US implementation, see Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate', 27 *Columbia Journal of Environmental Law* (2002) 489. See also for analysis of the first AB ruling, Mavroidis, 'Trade and Environment after the Shrimp-Turtle Litigation', 34 *Journal of World Trade* (2000) 73 and Chang, 'Toward A Greener GATT: Environmental Trade Measures and the Shrimp/Turtle Case', 74 *Southern California Law Review* (2000) 31.

Appellate Body did not do so. Nor did it have to refer to any norm of international human rights law in order to find that the notion of exhaustible natural resources included living species.

Nor in the *Shrimp/Turtle* case did the Appellate Body apply the necessity test that Petersmann recommends. The text of Article XX (g) requires only that the measures in question be 'in relation to' the conservation of exhaustible natural resources, and the Appellate Body found a rational connection or nexus between the US measures and the goal of protecting exhaustible natural resources.[10] Moreover, in recent case law, the Appellate Body has taken a flexible view of the level of scrutiny appropriate under those exceptions in Article XX of the GATT where the word 'necessary' does appear. Thus, in the recent *Korea-Beef*[11] and *EC-Asbestos*[12] cases, the Appellate Body has suggested that a measure may be found to be 'necessary' even if it is not indispensable for achieving a particular goal, provided that the measure is proportional to the objective, and it has also held that where values such as human life are at stake the margin of appreciation for domestic regulators should be particularly wide. Petersmann's conception of 'necessity' — premised on the notion that what is to be justified is the overriding of fundamental human rights to free trade — would take us back to the kind of jurisprudence characteristic of the pre-WTO era, where the hypothetical availability of a less-trade-restrictive alternative in the ideal world of the economist would be enough for a member's measure to fail the test of being 'necessary', for example, for the protection of human health.[13]

Ironically, when Petersmann goes on in his essay to discuss democracy, he himself points to a reason of principle why WTO dispute settlement tribunals should show

[10] *US — Shrimp* Report, *supra* note 9, at para. 141: 'The means are, in principle, *reasonably* related to the ends' (emphasis added). In the earlier *Gasoline* case, the AB noted that is unreasonable to infer a necessity test as a general requirement of the 'public interest' clauses in GATT Article XX. The Appellate Body held: 'in enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories: 'necessary' — in paragraphs (a), (b) and (d); 'essential' — in paragraph (j); 'relating to' — in paragraphs (c), (e) and (g); 'for the protection of' — in paragraph (f); 'in pursuance of' — in paragraph (h); and 'involving' — in paragraph (i). It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.' *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body. WT/DS52, 20 May 1996, at 12.

[11] *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161, 169/AB/R, 11 December 2000, at paras 161–164.

[12] *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001. For a detailed analysis of these aspects of the *Korea-Beef* and *EC-Asbestos* cases, see Howse and Tuerk, 'The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001), pp. 324–327.

[13] Here the most illustrative example is the *Thai Cigarette* case. In that case, Thailand was unable to justify a ban on imported cigarettes on the basis that the imports came with sophisticated Western marketing techniques that were persuading large numbers of young people to take up smoking, thereby triggering a future health crisis. The panel ruled that there was the less restrictive alternative of legal regulation of advertising, marketing methods, and so forth; however, the panel ignored evidence before it from the

some deference to domestic regulations, which is valid even where those regulations cannot be proven to be 'necessary' for the protection of human rights. Thus, he observes: 'WTO bodies must exercise deference to legitimate balancing decisions by national governments and parliaments which enjoy more democratic legitimacy for the inevitable trade-offs than distant WTO bodies focusing on trade rules' (at 646).

Yet, as we have just seen, when Petersmann himself moves to the concrete level, and elaborates the implications for legal interpretation of the notion that GATT obligations are fundamental human rights, this cashes out into less, not more, deference to domestic democratic regulatory choices. It is hard not to see some kind of tension or contradiction here.

Yet Petersmann is too sharp a thinker to simply leave it at that. One reason why Petersmann's thought on these matters may be more consistent than it first seems is the influence that the example of the jurisprudence of the European Court of Justice has on his way of understanding the issues. Petersmann sees the Court as understanding the freedoms (free movement of goods, services, capital and people) in the Treaty of Rome as fundamental human rights;[14] and he also sees the Court as sensitive to social justice and the democratic choices of member states. He might argue that a human rights approach to WTO rules does suggest a stricter legal test for limits to WTO obligations, but a stricter test *applied with a human rights sensibility* would actually result in more not less appropriate deference to domestic regulations.

Perhaps then we should support those aspects of Petersmann's project that suggest the desirability of building a human rights sensibility within the WTO. But what *kind* of human rights sensibility? Petersmann's reference to the 'integration' of different bodies of human rights law, or different rights, tends to obscure the fact that an emphasis on market freedoms as fundamental human rights[15] reflects one *particular* kind of rights sensibility. There is a set of very basic political and normative struggles surrounding the entrenchment of the free market outlook into human rights law that have not, contrary to Petersmann, been exhausted by the Cold War. One only has to look at the controversy surrounding the expropriation provisions of the NAFTA investment Chapter, where individual investors have standing to sue governments, including for some kinds of regulatory changes that fundamentally affect the value of their property.[16]

Given these controversies, it would appear to be in Petersmann's favour that he advocates greater democratic participation in the WTO as a corollary to the building

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World Health Organization suggesting that in a number of cases developing countries had discovered that, given their legal and monetary resources, tobacco multinationals were able to find their way around such restrictions, once their products were on the market in the country concerned. *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37 S/200–228 (1990).

[14] As a matter of positive law, there is a serious question as to whether the ECJ ever viewed what it was doing in those terms; but that is a matter for European law experts to debate, and I am not one of them.

[15] In one footnote he even apparently approvingly cites Richard Pipes for the proposition that the right to property is the most fundamental human right.

[16] For an attempt by a NAFTA Ch. 11 investor-state arbitral panel to define the limits of the concept of 'expropriation' in Ch. 11 as applied to regulatory actions of the host state, see *Pope & Talbot Inc. and Government of Canada*, Interim Award by the Arbitral Tribunal, 26 June 2000, at paras 88 *et seq.*

of a human rights sensibility into the Organization. His idea of democracy, however, seems to focus on the creation of WTO advisory committees, of parliamentarians and NGOs. But it is an open question whether such ideas will ultimately not simply cabin or constrain democratic deliberation, through formalizing an understanding of which stakeholders have a legitimate place at the table; if democracy is about real power and real influence in shaping outcomes, these proposals risk being placebos. Periodic meetings of such committees are no substitute for an ongoing and inclusive process of engagement of civil society and political actors with the activities of the WTO. In fairness, Petersmann also favours greater domestic parliamentary control over the making of WTO treaty rules. But whether this really cashes out into greater democratic legitimacy depends on how well informed parliamentarians are, to what extent they are independent rather than subject to the discipline of the Party whip and therefore no real check on the executive, and also the extent to which we believe that approval of today's government is enough to provide legitimacy for rules that will have significant impact long after that government is gone, and which it is costly for a future government to reverse (as, in practical terms, it would either have to get the consent of all other members to change the rules or accept a waiver, or be faced with the very high-stakes choice of withdrawing from the WTO). Given the costs of reversibility by a future government, my own view is that the people should be consulted directly by referendum on the results of the Doha round, and that all governments should undertake to translate the proposals into local languages, and distribute them to the entire population, either electronically where feasible and/or through pamphlets available at post offices or other contact points. Governments should also provide access to national radio and television to groups with different points of view, as part of an informed public debate leading up to such a referendum.

By way of concluding this debate, a second reply, by Philip Alston, will appear in the next issue of the *EJIL*, and Ernst-Ulrich Petersmann has agreed to write a rejoinder.
