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# Human Rights, International Economic Law and Constitutional Justice: A Rejoinder

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All academics learn from discussion and criticism of their published views. Hence, I congratulated the *EJIL* editors, Alston in 2002 and Weiler in 2008, when they invited a response to my articles in *EJIL*. Following the insulting *EJIL* comments by Alston in 2002, this is the second time in my 37 years of academic teaching that a 'commentator' has imputed to me intoxicating views which I never expressed. Six years after the confabulations by Alston and Howse,<sup>1</sup> Howse remains committed to misrepresenting rather than discussing my legal arguments. Clarifying, in fewer than 2,500 words, the reasons for this 'Alice in Wonderland non-discussion' would have been more enlightening if my Australian and Canadian commentators had respected correct academic citation before publicly putting forth their aggressive legal phantasms. Here I want to suggest ways in which such an exchange may be more constructive.

## 1 First Proposal: Argue Honestly without Insulting

It is becoming a sad tradition that *EJIL* rejoinders have to begin by rejecting insults like – *horribile dictu* – 'Petersmann suggests that the real sin of the Nazis ... was abuses in the over-regulation of the marketplace'; 'the right to strike is an assault on companies ability to exercise their market freedoms'; and 'Petersmann's Lochnerian vision' is inconsistent with 'positive international law of human rights'. I have never expressed such abhorrent views. My sentence referring to the 'Nazi dictatorship from 1933 to 1945' and to its abominable abuses of regulatory powers in the economic area

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<sup>1</sup> Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston', 13 *EJIL* (2002) 845.

justifies no insinuation that I neglect the German holocaust as the worst crime in human history. Nor does my reference to repeated ECJ findings – i.e., that the exercise of the right to strike must respect, and be reconciled with, the ‘market freedoms’ of EC law – justify Howse’s insinuation that I disregard the human right to strike. Nor have I ever endorsed the infamous ‘Lochner judgment’ of the US Supreme Court whose one-sided reasoning is the opposite of the ‘judicial balancing’ of rules and principles by all European courts with due regard to comprehensive human rights guarantees in Europe, which my article presents as diverse models for ‘constitutional justice’ and for judicial interpretations of economic law.

## 2 Second Proposal: Don’t Write Comments if your Prejudices Prevent you from Commenting Fairly

My article’s core argument – that multilevel ‘judicial *Solange* dialogues’ among national and European courts, their respect for ‘constitutional pluralism’, and their diverse ‘constitutional interpretations’ of intergovernmental economic rules in the light of human rights better reflect ‘constitutional justice’, and the customary rules of treaty interpretation, than the one-sided focus by WTO and NAFTA panels on rights and obligations of governments, without judicial regard to the human rights obligations of all UN member states – is diametrically opposite to the disregard for human rights *à la Lochner*. Discrediting judicial review by the ECJ, EFTA, ECtHR, and national courts in Europe, and of my proposals for a ‘constitutional theory of international adjudication’, as ‘Lochnerism’ distorts reality completely. For these European constitutional approaches rightly avoid one-sided judicial focus on the protection of property rights by interpreting economic law with due regard for all human rights and principle-oriented ‘judicial balancing’. The diverse traditions of multilevel European constitutionalism described in my article offer ‘citizen-oriented international law paradigms’ which challenge ‘Lochnerism’ in investor–state arbitration as well as the American reluctance:

- to ratify worldwide and regional human rights conventions (e.g., on economic, social, and cultural rights, children rights, discrimination against women, labour rights);
- to submit to the compulsory jurisdiction of international courts (e.g., the PCIJ, ICJ, ICC, ITLOS, the Inter-American Court of Human Rights);
- to acknowledge more generally the democratic legitimacy of ‘judicial rule-making’ (e.g., prohibiting racial discrimination inside the US);
- to protect ‘social justice’ more effectively (e.g., by social health insurance legislation, judicial protection of international children and labour rights);
- to assume international leadership for international competition, market, environmental regulation, and poverty reduction; or
- to follow the European example of multilevel judicial protection of the rule of international law (including EC law as a more reasonable ‘international law of the future’).

Howse neither responds to my criticism of North American ‘constitutional and judicial nationalism’ and under-regulated ‘capitalism à la Wall Street’, nor does his *anti-Lochnerism* explain his opposition to multilevel European constitutionalism and to the European ‘social market economy’ alternative to North American capitalism. Nor does he offer alternatives for providing ‘global public goods’ more effectively. *Si tacuisses sapientior paruisses.*

### 3 Third Proposal: Treat your Opponents Reasonably, without Unnecessary Polemics

Reasonableness differs from rationality by treating other people with respect. Of course, Howse is right that ‘mere mention of ... self-realization, human dignity and the like’ cannot ‘substitute for justification of particular view(s) of self-realization or human dignity’. These concepts had been explained in my *EJIL* contribution until the text was shortened at the request of the editors. Yet why does Howse avoid commenting on my other publications on these concepts (e.g. defining human dignity in the sense of respect for individual moral and reasonable autonomy and responsibility)<sup>2</sup> and on the European tradition of basing European constitutional law on ‘liberty’ (cf. Article 6 EU) and respect for human dignity (cf. Article 1 EU Charter of Fundamental Rights, Article 1 German Basic Law). My 2002 *EJIL* rejoinder had already identified my individualist conception of human dignity (emphasizing *individual* self-determination of whether professional and other ‘economic struggles for survival’ are valued more or less than non-economic activities) as the main distinction from Alston’s and Howse’s communitarian conceptions. Obviously, the US Supreme Court’s ‘double standard’ in favour of strict judicial scrutiny of ‘substantive due process’ for civil and political freedoms – but only ‘procedural due process protection’ of economic and social rights, or justification of border discrimination among Canadian provinces as ‘social justice’ – reflects democratic traditions different from European constitutionalism. Rather than continuing Quixotic attacks against longstanding European constitutional traditions which have been uniquely successful in limiting border discrimination against foreigners and in protecting a ‘social market economy’ and ‘democratic peace’ among more than 500 million European citizens, why does Howse not respect ‘reasonable disagreement’ and constitutional pluralism?

### 4 Fourth Proposal: Discuss Multilevel Constitutionalism in a Contextual and Comparative Perspective

Howse’s erroneous identification of ‘substantive due process’ in European judicial review of economic regulation as ‘Lochner-style constitutional jurisprudence’ reflects

<sup>2</sup> Petersmann, ‘Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution’, in F. Abbot, C. Breining-Kaufmann, and T. Cottier (eds), *International Trade and Human Rights* (2006), at 29.

the regrettable neglect by many North American international lawyers of comparative constitutional law.<sup>3</sup> As Howse ‘draws from Petersmann’s article a confusing, inconsistent, and obscure picture of the international law framework applicable to the use of non-WTO international law in the interpretation of the WTO Agreements’, let me recall my constitutional interpretations of the WTO requirement of clarifying ‘the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’ (Article 3.2 DSU).<sup>4</sup> Howse’s criticism of my statement – that WTO law does not ‘include an explicit authorization (similar to Article 288 UNCLOS) to decide disputes not only on the basis of WTO law ... but also with due regard to other relevant rules of international law’ – overlooks the well-known distinction between ‘applicable law’ in the relevant jurisdiction and ‘contextual interpretation’, taking into account other ‘relevant rules of international law applicable in the relations between the parties’ (Article 31.3 VCLT). Neither Howse nor the ‘ILC Fragmentation Report’ discusses my argument that customary law – e.g., the requirement ‘that disputes concerning treaties ... should be settled ... in conformity with the principles of justice and international law’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’ (Preamble VCLT) – justifies a ‘constitutional approach’ to treaty interpretation which may be more important for integrating fragmented treaty regimes through multilevel judicial clarification of ‘principles of justice’ than the formalist conflict rules of the VCLT (like *lex specialis*, *lex posterior*, *lex superior*) and (con)textual interpretation pursuant to Article 31 VCLT focusing on intergovernmental rights and obligations.

A comparative, constitutional approach also refutes Howse’s claim that ‘Petersmann’s presentation of the relationship of human rights to private economic activity [is] misrepresenting the significance of taking into account human rights law in the WTO’. I have argued long since, many years before Howse, that the customary methods of international treaty interpretation (as codified in the VCLT) may justify interpreting inter-governmental rights and obligations under UN, GATT, and WTO rules, like those under EC law, as protecting rights and obligations of citizens under human rights law, constitutional rules, and legislation.<sup>5</sup> Contrary to Howse’s claims that ‘Petersmann does not mention even a hypothetical situation’ of overlapping jurisdictions of WTO dispute settlement bodies and human rights courts, I also explained why human rights arguments in European court cases (e.g., about environmental demonstrators blocking freedom of trade, police orders restricting imported laser games so as to protect human dignity) could be simultaneously raised in WTO dispute settlement proceedings against the same EC Member States. My book reflecting on my years of practical experiences as

<sup>3</sup> Cf. M. Hilf and E.-U. Petersmann (eds), *National Constitutions and International Economic Law* (1993).

<sup>4</sup> Petersmann, ‘WTO Dispute Settlement Practice 1995–2005: Lessons from the Past and Future Challenges’, in Y. Taniguchi, A. Yanovich, and J. Bohanes (eds), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations and Regionalism in Asia* (2006), at 38.

<sup>5</sup> Cf. E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991); *idem*, ‘How to Reform the UN System? Constitutionalism, International Law and International Organizations’, 10 *Leiden J Int’l L* (1997) 421.

legal advisor in GATT/WTO dispute settlement panels, as well as in the GATT Negotiating Groups that elaborated the WTO dispute settlement system and WTO institutions, concluded that 'principles of justice' and human rights are relevant contexts for clarifying the systemic dimensions of what WTO law calls 'the basic principles and objectives underlying this multilateral trading system' (Preamble to the WTO Agreement) and its 'dispute settlement system of the WTO' (Article 3 DSU).<sup>6</sup> For example, in contrast to state-centred interpretations by American lawyers of Article 23 DSU as prohibiting domestic courts from determining violations of WTO rules of their own governments,<sup>7</sup> I advocated citizen-oriented interpretations of WTO commitments to 'providing security and predictability to the multilateral trading system' (Article 3 DSU).

## 5 Fifth Proposal: Acknowledge the Constitutional Dimensions of Global Governance Problems

Like the American leadership in designing global governance institutions following World Wars I and II, the world needs American leadership for more effective legal protection of global public goods, including the international rule of law and a mutually beneficial world trading system. In view of the selfish interests of trade diplomats in limiting their legal and judicial accountability *vis-à-vis* domestic citizens for welfare-reducing violations of WTO law, I appreciate Howse's support that the 'betrayal of the rule of law ideal at the WTO' reflects intergovernmental 'discourse failures' which have to be challenged by civil society. In my role as chairman of the International Trade Law Committee of the International Law Association, which represents law associations and lawyers from all over the world, I contributed not only to worldwide calls for more 'consistent interpretation' and judicial protection – by national and international courts – of the 'rule of law' in international trade;<sup>8</sup> the ILA also endorsed my proposal that 'WTO members and bodies are legally required to interpret and apply WTO rules in conformity with the human rights obligations of WTO members under international law'.<sup>9</sup> Interpreting Article 23 DSU as preventing domestic courts from holding their own governments judicially accountable for violations of WTO law runs counter to the citizen's interest in the rule of law. The human right to access to justice and the WTO guarantees of individual access to courts offer (con)textual arguments that Article 23 establishes an exclusive jurisdiction only for intergovernmental disputes; the multilevel 'dispute settlement system of the WTO' should provide 'security and predictability to the multilateral trading system' (Article 3 DSU) also for citizens engaged in, and benefiting from, international trade.

Like most North American supporters of 'global administrative law' based on 'constitutional nationalism', Howse remains sceptical of European proposals that

<sup>6</sup> Cf. E.-U. Petersmann, *The GATT/WTO Dispute Settlement System* (1997).

<sup>7</sup> Cf. R. Bhala and K. Kennedy, *World Trade Law* (1998), at 43.

<sup>8</sup> ILA Resolution 2/2000 on *The Rule of Law in International Trade*, ILA Report 2000, at 18.

<sup>9</sup> ILA Resolution 5/2008 on *Human Rights and International Trade Law*, ILA Report 2008.

multilevel governance for the collective supply of international public goods requires multilevel constitutionalism.<sup>10</sup> Yet, Hobbesian ‘principal–agent theories’ describing diplomats as the real masters of international organizations need to be challenged by ‘cosmopolitan constituencies’ (P. Lamy) and constitutional conceptions of citizens as ‘democratic owners’ of international governance institutions. Why does Howse criticize the more effective and more constitutionally restrained dispute settlement procedures in European courts – and their respect for ‘reasonable disagreement’ and competing conceptions of ‘constitutional justice’ – rather than the ineffectiveness of NAFTA dispute settlement procedures (e.g., the repeated US non-compliance with Chapter 19 and 20 panel findings) and their frequently one-sided focus on investor rights (e.g., under Chapter 11 arbitration)?

## 6 Sixth Proposal: Probe beyond the Surface by Scrutinizing the Foundations

Howse’s conclusion – ‘a human rights suit of clothes just doesn’t hang properly on an old GATT hand’ – does not probe beyond the surface. WTO and EC diplomats have contributed no less to poverty reduction and international rule of law (as a precondition for democratic self-governance in our globally integrated world) than UN human rights diplomats discrediting the WTO as ‘a veritable nightmare’ for developing countries and women.<sup>11</sup> Markets – as citizen-driven dialogues about values (e.g., of goods and services) and information mechanisms (e.g., on supply and demand) – and the regulation of ‘market failures’ are indispensable complements of human rights. As a long-standing advocate of more market regulation (e.g., by means of WTO competition and environmental rules),<sup>12</sup> I also supported the UNHCHR’s recommendations for strengthening the human rights dimensions of WTO agreements so as to enfranchise citizens in their worldwide division of labour.<sup>13</sup> Rather than being ‘blinded by anti-government bias’ (as Howse suggests), I have been one of the most outspoken critics of the North American lack of any coherent theory for the collective supply of global public goods. Does Howse believe that the weak institutions, hegemonic pressures, protectionist lobbying, and lack of international human rights guarantees in NAFTA – which President Reagan presented as North America’s economic constitution – offer a better model than the EC, EEA, and WTO? Judging WTO practitioners and European economic courts by looking at the clothes of people is as superficial as Howse’s comment on my *EJIL* contribution.

<sup>10</sup> Cf. C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006).

<sup>11</sup> *Globalization and its Impact on the Full Enjoyment of Human Rights*, E/CN.4/Sub.2/2000/12, at para. 15.

<sup>12</sup> Cf. E.-U. Petersmann, *International and European Trade and Environmental Law after the Uruguay Round* (1995); *idem*, *Need for Integrating Trade and Competition Rules in the WTO World Trade and Legal System* (1996).

<sup>13</sup> Petersmann, ‘The “Human Rights Approach” Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy?’, (2004) *J Int’l Econ L* 605.