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# *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*

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## **Abstract**

*Petersmann's proposal for the enforcement of human rights through the WTO is presented as though it were simply a logical development of existing policies, rather than representing a radical break with them. In a form of epistemological misappropriation he takes the discourse of international human rights law and uses it to describe something which is in between a Hayekian and an ordoliberal agenda. It is one which has a fundamentally different ideological underpinning from human rights law and would have extremely negative consequences for that body of law. Many of his characterizations of the existing state of the law — whether at the national, EU or international levels — are questionable. What is needed is for all participants in the debate over the future relationship between trade and human rights, be they ordoliberals such as Petersmann or mainstream human rights proponents, to move beyond such analyses and to engage in a systematic and intellectually open debate which acknowledges the underlying assumptions and meets a higher scholarly burden of proof than has so far been the case.*

## **1 Introduction**

Any current bibliography of international legal analyses of the relationship between trade and human rights will be replete with the works of Ernst-Ulrich Petersmann, many of which put forward a version of the argument which is reflected in the article above.<sup>1</sup> At first glance it is a highly attractive account. At last one encounters a trade

\* Member of the Board of Editors. Work on this article was supported by a grant from the Max Greenberg and Filomen D'Agostino Research Funds at the New York University School of Law.

<sup>1</sup> Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 *EJIL* (2002) 621 [hereinafter Petersmann].

lawyer who embraces enthusiastically and wholeheartedly the human rights agenda! At last an international economic law expert who, in a determinedly interdisciplinary way, integrates philosophy, human rights and economic theory; one who seeks to tame the excesses so noisily decried by the anti-globalization protesters of Seattle and subsequent fame. Petersmann embraces the human rights agenda from within the citadel of international economic law and brings his formidable experience as a former legal adviser in the German Ministry of Economic Affairs, the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) to bear in the name of an approach which would resolve once and for all the seemingly intractable conflicts between trade and human rights which so bedevil the analyses of other authors. ‘Democratic legitimacy’ and ‘social justice’ are both ‘defined by human rights’ and must therefore be embraced by the ‘global integration law’ which is pursued by the WTO.<sup>2</sup>

But despite his consistent invocation of the discourse of human rights – and contrary to the reader’s first impressions as well as to Petersmann’s own perception of his work – his approach is at best difficult to reconcile with international human rights law and at worst it would undermine it dramatically. In essence, the result of following the approach set out would be to hijack, or more appropriately to Hayek, international human rights law in a way which would fundamentally redefine its contours and make it subject to the libertarian principles expounded by writers such as Friedrich Hayek, Richard Pipes and Randy Barnett.

In light of such a negative assessment it might reasonably be asked whether there is any point in seeking to respond in detail to an analysis with which one disagrees so comprehensively and which, although it has frequently been published before, has drawn so little sustained reaction from other scholars. But there are several strong reasons which argue in favour of a detailed rebuttal of these views.

The first is that Petersmann has long been a prominent and respected international trade lawyer and what he thinks is thus potentially influential. The second is that the article which is the principal focus of this reply is not an isolated foray but an encapsulation of views which have been reproduced many times over in the space of well over a decade. Indeed, few academics could have shown such perseverance and determination in working with the same array of materials in the context of so many different analyses.<sup>3</sup> This side of Petersmann’s work resembles the standard ‘stump’ speech of a politician which contains the same message and relies on the same content

<sup>2</sup> *Ibid.*, at 624.

<sup>3</sup> The (certainly incomplete) list of relevant publications of which I am aware includes the following: E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991), Ch. VII; Petersmann, ‘National Constitutions, Foreign Trade Policy and European Community Law’, 2 *EJIL* (1993) 1; Petersmann, ‘National Constitutions and International Economic Law’, in M. Hilf and E.-U. Petersmann (eds), *National Constitutions and International Economic Law* (1993) 3; Petersmann, ‘Constitutional Principles Governing the EEC’s Commercial Policy’, in M. Maresceau (ed.), *The European Community’s Commercial Policy after 1992: The Legal Dimension* (1993) 21; Petersmann, ‘Constitutionalism and International Organizations’, 17 *Northwestern J. Int’l L. Bus.* (1996) 398; Petersmann, ‘How to Constitutionalize the United Nations? Lessons from the “International Economic Law Revolution”’, in V. Götz, P. Selmer and R. Wolfrum (eds), *Liber Amicorum G. Jaenicke* (1998) 313; Petersmann, ‘How to

time and time again, but on each occasion is delivered in a slightly different form depending on the audience. This fact probably explains why more than one-fifth of the citations provided in the article above are to the author's own previous writings.<sup>4</sup>

The third is that so few scholars have apparently responded to Petersmann's oft-repeated views. Although the literature on trade and human rights (the latter being interpreted as including labour rights) has burgeoned in recent years,<sup>5</sup> remarkably little attention has been given by most of the mainstream writers to Petersmann's thesis. By leaving his thesis only marginally contested there is a significant risk that those who do not have a strong grasp of the complexity of the issues raised by the trade and human rights linkage will assume that his work on this issue enjoys a level of acceptance which it in fact does not.

A fourth reason is that Petersmann has to date been reluctant to engage with those few scholars who have been critical of his work. One such example is provided in the article above. Steve Peers has presented a detailed, sustained and measured critique of Petersmann's basic and oft-repeated proposition that there is a freestanding human right to trade.<sup>6</sup> Petersmann makes no mention of the Peers article in the two pieces published on the same subject in 2002,<sup>7</sup> but it does attract a footnote in the article above. Peers' analysis is dismissed on the grounds that he wants 'human rights [to] end at national borders' and is opposed to 'constitutional protection' for 'the freedom of transnational economic transactions'.<sup>8</sup> In fact, Peers endorses neither of those propositions, even implicitly. Petersmann has been similarly reluctant to engage with

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Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?', 20 *Mich. J. Int'l L.* (1999) 1; Petersmann, 'Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition', 34 *New Eng. L. Rev.* (1999) 145; Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?', 31 *NYU J. Int'l L. & Pol.* (1999) 753; Petersmann, 'From "Negative" to Positive "Integration" in the WTO: Time for "Mainstreaming Human Rights" into WTO Law?', 37 *CMLR* (2000) 1363; Petersmann, 'The WTO Constitution and Human Rights', 3 *JIEL* (2000) 19; Petersmann, 'Human Rights and International Economic Law in the 21st Century', 4 *JIEL* (2001) 3; Petersmann, 'Time for Integrating Human Rights into the Law of Worldwide Organizations', *Jean Monnet Working Paper of New York University School of Law* 7/01 (2001); Petersmann, 'European and International Constitutional Law: Time for Promoting "Cosmopolitan Democracy" in the WTO', in G. de Búrca and J. Scott (eds), *The EU and the WTO* (2001) 81; Petersmann, 'International Activities of the European Union and Sovereignty of Member States', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002) 321; Petersmann, 'Human Rights in European and Global Integration Law: Principles for Constitutionalizing the World Economy', in A. von Bogdandy, P. Mavroidis and Y. Mény, *European Integration and International Coordination: Festschrift für C. D. Ehlermann* (2002) 383; Petersmann, 'Constitutionalism, International Law and "We the Peoples of the United Nations"', in H.-J. Cremer et al. (eds), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (2002) 291; Petersmann, 'Economics and Human Rights', in F. Abbott and T. Cottier (eds), *International Trade and Human Rights* (2002, forthcoming).

<sup>4</sup> Nineteen of 85 footnotes are either wholly or partly self-referential.

<sup>5</sup> Gabrielle Marceau has identified the principal recent analyses in her article 'The WTO Dispute Settlement and Human Rights', 13 *EJIL* (2002, forthcoming), at note 1.

<sup>6</sup> Peers, 'Fundamental Rights or Political Whim? WTO Law and the European Court of Justice', in G. de Búrca and J. Scott (eds), *The EU and the WTO* (2001) 111, at 123–130.

<sup>7</sup> See *supra* note 3.

<sup>8</sup> Petersmann, at 644.

another critique by Robert Howse and Kalypso Nicolaidis,<sup>9</sup> who address several important dimensions of his standard analysis. Their critique focuses on his revisionist reading of Kant, his suggestion that governments should entrench free trade rights at the international level despite the fact that the vast majority of them have not treated trade in that way in their domestic constitutions, and his insistence that an approach which ties the hands of governments by putting the priority of free trade out of reach in democratic debate is consistent with the citizen empowerment of which he is so fond. In reply, Petersmann is content to pose a rhetorical question, based on the title of their article, which is designed to dispose of the matter. He asks, without responding: ‘are there convincing arguments that “constitutionalism” is a “fallacy”, and “constitutionalizing the WTO a step too far”?’<sup>10</sup>

The final reason for focusing carefully on Petersmann’s analyses is that the relationship between human rights and trade is one of the central issues confronting international lawyers at the beginning of the twenty-first century and any proposal which purports to marry, almost symbiotically, the two concerns warrants careful consideration. As George Soros has recently written: ‘The WTO opened up a Pandora’s box when it became involved in intellectual property rights. If intellectual property rights are a fit subject for the WTO, why not labor rights, or human rights?’<sup>11</sup> While Soros opposes such a development there is an increasing number of authors who have called for the ‘constitutionalization’ of the WTO and who consider that the inclusion of human rights within its mandate would help to overcome the democratic deficit from which it currently suffers. Petersmann’s article thus compels a more systematic evaluation of these different proposals and lays out some of the principal arguments put forward by the proponents of WTO constitutionalization.

## 2 Some Methodological Shortcomings

In marked contrast to his earlier pathbreaking work on GATT law, Petersmann’s analyses of this issue are open to strong challenge on both methodological and substantive grounds. I will address the latter in terms of six propositions which I believe encapsulate his approach. But before doing so, it is appropriate to note some of the methodological weaknesses which characterize not only the article above but also the general body of his previous work on which it draws. The principal shortcoming is highlighted by Howse when he comments that ‘it is impossible to disagree with many of Petersmann’s propositions’ essentially because they are stated at such a ‘high level of abstraction’. This is well illustrated by the concept of ‘constitutionalism’ which infuses all of his writings in this area but which, as Howse demonstrates, remains

<sup>9</sup> Howse and Nicolaidis, ‘Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far’, in R. Porter *et al.* (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001).

<sup>10</sup> Petersmann, at note 78 and accompanying text.

<sup>11</sup> Quoted in Stiglitz, ‘A Fair Deal for the World: A Review of “On Globalization” by George Soros’, *NY Rev. Bks.*, 23 May 2002, at [www.nybooks.com/articles/15403](http://www.nybooks.com/articles/15403).

essentially undefined.<sup>12</sup> In one of his most recent writings Petersmann provides instead a survey of just under three pages which spans the ‘historical evolution of constitutionalism’, starting with Plato and Aristotle and moving through Cromwell, Montesquieu, Gianotti, and others, and concluding with Rawls.<sup>13</sup>

Petersmann’s preferred technique is to identify an issue, make a strong assertion, invoke perhaps one source, and then move on to the next issue. The views attributed to the authors whose work is invoked in order to justify these assertions – ranging from Kant, Rawls, Sen and Hayek to Kissinger, Barnett, de Soto or Corden – are rarely examined in any detail. Conflicting interpretations of the works themselves are neither cited nor engaged with. And critics whose approach challenges directly the views invoked are not mentioned.<sup>14</sup> Of the named authors, for example, Kant is the only one whose views Petersmann has expounded at any length, but he nevertheless invokes all of the others whenever he needs authority for a proposition that would otherwise be notably open to challenge. And when it comes to Kant, the considerable complexities of Kant’s writings are distilled down to reductionist formulae, which enable most of Petersmann’s key propositions to be characterized as Kantian.<sup>15</sup>

The second major methodological shortcoming of Petersmann’s work on trade and human rights is his tendency to meld different and quite heterogeneous legal regimes into an analysis which seems to imply that they are all parts of a single coherent whole. Thus, at one point in his article above, he jumps from general propositions about the universality of human rights law to assertions (undeveloped and undocumented) about the constitutional practices of ‘virtually all countries in Europe and North America’, to the invocation of some of the jurisprudence of the European Court of Justice and then on to the significance of the withdrawal of certain cases before the South African Constitutional Court. It is as though the mixing of heterogeneous ingredients in a single brew could produce a magical potion capable of resolving the most intractable problems confronting lawyers and others working in these fields.

Moreover, none of the ingredients of this eclectic mix is examined in any detail or with a critical, evaluative eye. Instead, the various sources are introduced almost anecdotally. The overall effect is like a version of the pea and thimble trick, in which there are a number of thimbles and a single pea. The observer is supposed to guess where the pea is while the performer moves the thimbles around. In this case, as soon as the basis of a given claim (the pea) has been identified in a particular locus (one of

<sup>12</sup> Howse, ‘Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann’, 13 *EJIL* (2002) 651; see generally on constitutionalism, Walker, ‘The EU and the WTO: Constitutionalism in a New Key’, in de Búrca and Scott, *supra* note 3, at 31.

<sup>13</sup> Petersmann, in Cremer, *supra* note 3, at 292–294.

<sup>14</sup> A similar criticism was made in a review of work done by Petersmann almost 15 years ago: ‘The reader is placed on notice early that this is more a tract than an analysis, when the author summarizes what “economists” think by quoting only Milton and Rose Friedman, and citing only to economists who can be fairly characterized as hard-liners on free trade policies. The much acclaimed recent work of Paul Krugman, James Brander and other strategic trade theorists is never cited, much less discussed.’ Tarullo, ‘Book Review’, 84 *AJIL* (1990) 338, at 339.

<sup>15</sup> See analysis in Section 4 below.

the thimbles) and the reader wants to engage in a critical debate on the merits, Petersmann moves the analysis – just as the reader might have begun to realize that the pea was not really under the thimble in question but was elsewhere. In other words, the focus of the debate keeps shifting so that when its shortcomings are about to become obvious the focus is moved elsewhere and the totality of the arguments are assumed to be persuasive where none of the individual parts was. This is particularly marked in relation to the basis of the claim that the right to free trade is already to be found in one body of law or another.

A third methodological shortcoming, linked to the other two, is a certain historical revisionism, which enables Petersmann to view events rather selectively so that they fit conveniently into his grand scheme of things. Thus he opens his analysis by stating that the 1944 Bretton Woods agreements, the 1945 UN Charter, the 1947 General Agreement on Tariffs and Trade (GATT), the 1948 Havana Charter and the 1948 Universal Declaration of Human Rights (UDHR) ‘all aimed at protecting’ various ‘human rights values through a rules-based international order and “specialized agencies” committed to the economic principle of “separation of policy instruments”’.<sup>16</sup> In fact, human rights are completely absent from the Bretton Woods agreements, the GATT, and the Havana Charter (although the latter did address labour rights issues). And indeed no historically informed observer would have expected any such reference, given that the UDHR itself was adopted after the Bretton Woods agreements and the GATT and it was only acceptable to governments on the basis of an explicit understanding that it was non-binding and created no obligations for UN Member States. Neither this historical dimension nor the insistence of the relevant agencies that they have no human rights mandate *per se* deters Petersmann from discerning that ‘most [of their] policy objectives can be understood as protecting human rights values’.<sup>17</sup> Moreover, the statement that all of these instruments reflected an economic functionalist principle is hardly true of the UDHR. And nor was the UN Charter premised upon the separation of policy instruments, given the clear but subsequently frustrated aspirations of the Economic and Social Council to act as a mechanism of coordination among the different instruments and agencies.

### 3 Constructing the Argument

At the substantive level Petersmann’s thesis can be encapsulated in six propositions, although he has not specifically spelled it out in such terms. The propositions are:

- (a) Human rights have constituted an integral part of the momentum for European integration.
- (b) Human rights and market freedoms are, in effect, one and the same thing.

<sup>16</sup> Petersmann, at 622.

<sup>17</sup> *Ibid.*, at 634.

- (c) Human rights, including ‘economic liberty rights’, are part of binding international law.
- (d) There is a ‘worldwide integration law’ which is, or should be, based on the EU model, which has been, *inter alia*, ‘citizen-oriented’.
- (e) The WTO would protect human rights more effectively than any other international institutional arrangements.
- (f) A United Nations ‘global compact’ which encourages the WTO and the IMF to promote human rights is the best way forward.

I now turn to examine the validity of each of these propositions.

### ***A Human Rights Have Constituted an Integral Part of the Momentum for European Integration***

In essence Petersmann’s call for the ‘constitutionalization’ of world trade amounts to a prescription for implementing, at the global level, the approach which he considers to have been so successful at the European level. His prescription of a worldwide integration law based on human rights proceeds from the premise that the European model has historically had a major human rights component. According to his account, the EC’s special recipe for the achievement of integration has involved ‘the recognition and empowerment of citizens as legal subjects not only of human rights but also of competition law’.<sup>18</sup> The EU model is one which complements ‘human rights guarantees by liberal trade and competition rules conferring individual rights on EC citizens’.<sup>19</sup> The process has been driven by a “functional theory” underlying European integration [which is] that economic market integration’ can enable ‘more comprehensive and more effective protection of human rights than has been possible in traditional state-centred international law’.<sup>20</sup> The outcome of this process is that ‘EU law has evolved into a comprehensive constitutional system for the protection of civil, political, economic and social rights of EU citizens across national frontiers’.<sup>21</sup>

But this account is highly problematic, for several reasons. The first is that it is historically incorrect. Human rights were, on virtually all accounts of the evolution of European integration through the common market, an afterthought. They were not mentioned at all in the Treaty of Rome of 1957, which specifically eschewed the strategy of its failed forerunner, the proposed European Political Community, that would have incorporated the ECHR.<sup>22</sup> Even when limited human rights provisions were included in the Treaty on European Union they were far from reflecting an integrated human rights vision for the Community. Instead, they were ‘grafted on to a set of Treaties which, despite the broad range of powers and policies covered, were for a long time very largely focused on economic aims and objectives with little reference

<sup>18</sup> *Ibid.*, at 632.

<sup>19</sup> See von Bogdandy *et al.*, *supra* note 3, at 386.

<sup>20</sup> Petersmann, at 631.

<sup>21</sup> *Ibid.*, at 631.

<sup>22</sup> For a review of the historical evolution of human rights in the EC/EU context, see P. Craig and G. de Búrca (eds), *EU Law: Text, Cases and Materials* (3rd. ed., 2002), at Ch. 8.

to other values'.<sup>23</sup> The EEC Treaty was essentially a blueprint which sought to promote integration through a functional economic approach. The second reason is that when human rights, in the form of fundamental rights, began to make their way into the jurisprudence of the European Court of Justice it was in relation to a narrow range of rights, such as the right to property and the freedom to pursue a trade or profession, rather than to any balanced conception of human rights, as Petersmann's account implies.

Third, human rights were, at least initially, introduced not because of any grand vision of a Europe united to defend human rights and economic liberties, but as a response to various efforts by Community institutions which were seen as a threat to the national legal orders of the Member States.<sup>24</sup> One commentator has argued that even the gradual introduction of human rights into the Community legal order, with a view to limiting the discretion of the *supranational* institutions, has not changed the fact that 'the Common Market still towers over all other objectives' and that human rights are used in the Community legal order 'to a large extent simply as limits to discretion'.<sup>25</sup> If the 'recognition and empowerment of citizens as legal subjects of human rights' was such a central part of the EU's integration strategy, as Petersmann suggests, why was it that the ECJ in its Opinion 2/94 attached such importance to the fact that '[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights'<sup>26</sup> and refused to endorse Community accession to the ECHR until such time as the treaty was amended so as to provide an explicit basis for such action?

Fourth, far from Petersmann's depiction of trade and competition rules acting as a complement to human rights guarantees, the opposite has been the case. A very limited and narrow range of economic freedoms, many of which are not *per se* recognized as economic rights within the framework of international human rights law, has assumed principal importance. As Besselink has recently observed in examining the relationship between these two sets of rights, 'it is not difficult to analyse the case law of the ECJ on human rights in terms of the predominance of economic (fundamental) rights over the classic human rights'.<sup>27</sup> Fifth, the EU is struggling, even today, to determine the appropriate role for human rights in its future constitutional order. In this respect, it is sufficient to refer by way of illustration to von Bogdandy's analysis, which argues directly against Petersmann's basic assumption as to the appropriate role of human rights within the European legal order. In his view, 'there are good arguments against the proliferation of human rights and human

<sup>23</sup> *Ibid.*

<sup>24</sup> See de Witte, 'Le rôle passé et futur de la Cour de justice des Communautés européennes dans la protection des droits de l'homme', in P. Alston (ed.), *L'Union Européenne et les Droits de l'Homme* (2001) 895, at 899.

<sup>25</sup> See von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', 37 *CMLR* (2000) 1307, at 1308 and 1335.

<sup>26</sup> [1996] ECR I, 1759, para. 27.

<sup>27</sup> Besselink, 'Case Note', 38 *CMLR* (2001) 437, at 454.



rights discourse in ever more legal fields'. Instead, the 'core objectives of the Union should remain peace, wealth and an ever closer union among its peoples'.<sup>28</sup>

A final element which is worthy of mention is that Petersmann attributes the EU's achievement of a complementary approach to human rights and economic freedoms to the balance struck within 'EU integration law' itself. There seems to be little room in his analysis for the role played by the European Convention on Human Rights and the implementation system which it has developed over the years. It could well be argued that the ECHR, along with the Commission and Court established pursuant to it, have done more than the EU and the ECJ to ensure that human rights are a central component of European integration. But there are good reasons for Petersmann to downplay this element because the package of norms reflected in the ECHR is very different from his preferred selection of 'economic rights' and the ECHR implementation system could, at least prior to the recent adoption of Protocol No. 11, be compared more readily to the international human rights system for which Petersmann has so little time than to the EU.<sup>29</sup>

Against this background, it is puzzling that Petersmann could speak of the EU approach to balancing human rights and economic freedoms as 'a model for "constitutionalizing" worldwide integration law by integrating civil, political and economic liberties, constitutional law and comparative law'.<sup>30</sup> Unless, of course, despite his insistence that human rights must be the pre-eminent values, he really does want the unbalanced EU approach, which has, at least to date, privileged economic freedoms over human rights, to prevail also at the international level. But at the very least the non-revisionist story of the unfolding of the place of human rights within EU integration law provides a strong lesson in the complexity of reconciling these two areas of law and cautions against uncritical assertions that the EU has attained any sort of ideal equilibrium.

## ***B Human Rights and Market Freedoms Are, in Effect, One and the Same Thing***

The meaning attributed to human rights and related terms is crucial to an understanding of Petersmann's approach, but they are rarely defined with any precision. This becomes especially problematic in relation to terms such as 'human rights', 'fundamental rights', 'economic rights', 'economic liberties', and 'economic freedoms', all of which appear at different times in his analysis. For the most part they

<sup>28</sup> von Bogdandy, *supra* note 25, at 1337–1338. I should emphasize that von Bogdandy's views are cited here only to illustrate the extent to which a full-blown human rights dimension to EU law remains deeply contentious in some circles. My own view is strongly to the contrary, for the reasons spelled out in Alston and Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy', in P. Alston (ed.), *The EU and Human Rights* (1999) 1. Cf. de Búrca, 'The Case for an EU Human Rights Policy', in P. Beaumont, C. Lyons and N. Walker (eds), *Convergence and Divergence in European Public Law* (2002).

<sup>29</sup> See text accompanying note 68 below.

<sup>30</sup> See von Bogdandy *et al.*, *supra* note 3, at 386.

seem to be used interchangeably, although from both a philosophical and a legal perspective there are enormous differences among them.

The first task then is to ascertain exactly what Petersmann has in mind when he uses one term or another. Here we confront a fundamental lack of clarity, which is perhaps best illustrated by an example from the article above in which he talks of the importance of ‘the economic dimensions of human rights’. But what are these dimensions? The answer he offers is that ‘savings, investments and economic transactions depend on property rights and liberty rights’. In describing what he means by the latter he immediately comes full circle by defining them as ‘freedom of contract and transfers of property rights’.<sup>31</sup> But there are also ‘economic freedoms’, such as the freedom ‘to produce and exchange goods and services including one’s labour and ideas’.<sup>32</sup> Given the elusiveness of a helpful definition, it might be more productive to inquire as to the relationship which he envisages among these apparently not so different concepts. He addresses this issue in a major article in the *Common Market Law Review*: ‘As freedom from hunger and economic welfare are preconditions for the enjoyment of many other human rights, the WTO guarantees of economic liberties and of welfare-increasing cooperation across frontiers serve important *human rights functions*.’<sup>33</sup>

His basic contention is that international economic law should proceed ‘from a human rights approach’ and thereby recognize, like the European Court of Justice, ‘the principle of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right’. In elaborating upon this he explains that:

From a human rights perspective, the WTO guarantees of freedom and non-discrimination in transnational relations, and of the ‘necessity’ requirement for governmental safeguard measures limiting individual liberty and property rights, serve the same ‘constitutional functions’ as the corresponding guarantees in European and national constitutional laws.<sup>34</sup>

On the basis of these illustrations from his work, a number of questions emerge: (i) in what way has the ECJ recognized freedom of trade as a human right?; (ii) in applying the principle of free movement of goods and freedom of competition, has the ECJ in fact proceeded on the basis of a human rights approach?; (iii) in what ways are the WTO ‘guarantees of freedom and non-discrimination’ analogous to human rights?; and (iv) are social rights part of Petersmann’s definition of human rights?

In response to the first of these questions, Peers has provided a detailed account of the relevant jurisprudence, which leads him to the conclusion that although the Court alluded to a right to trade in one case, it is, in the overall context, ‘an odd reference, which the court has been reluctant to repeat’.<sup>35</sup> His analysis leads firmly to a negative answer to the first question. In the article above Petersmann seeks to

<sup>31</sup> Petersmann, at 630.

<sup>32</sup> *Ibid.*, at 629.

<sup>33</sup> See Petersmann, in *CMLR*, *supra* note 3, at 1375 (emphasis in original).

<sup>34</sup> Petersmann, in von Bogdandy *et al.*, *supra* note 3, at 387.

<sup>35</sup> Peers, *supra* note 6, at 125.

dismiss this critique by suggesting that Peers' position is that 'no right to trade deserves to be recognized'. But in fact he takes this statement entirely out of context. It comes at the end of a lengthy analysis of whether such a right has already been recognized (he concludes convincingly that it has not) and thus how it might in the future come to be recognized. Peers concludes that:

If the advocates of recognition of a new 'right to trade' cannot win the argument in the normal forums available for the development of international or national human rights law, no 'right to trade' deserves to be recognized.<sup>36</sup>

Thus the quote that Petersmann attributes to Peers, and on the basis of which he dismisses his analysis, is misleading and does not convey the essence of Peers' position.

The second question concerns the human rights status of the market freedoms upon which the EC has been constructed. They include, in particular, the free movement of goods, persons, services and capital. Leaving aside the fact that Petersmann strategically omits the free movement of persons from his approach, the issue is whether these principles, which the ECJ's jurisprudence has gradually turned into fundamental freedoms, have also thereby acquired the status of human rights? Within the field of EU law, some authors have attributed to these freedoms 'a quasi-human rights character'.<sup>37</sup> But even this does not get us as far as the proposition for which Petersmann argues. If the Court has really treated these principles as full-fledged human rights, there would presumably be instances in which one right has been held to prevail over another and thus in which, for example, the right to free movement of goods would have prevailed over a traditional human right such as the right to association or the right to privacy. But in so far as this can be said to have happened, it has been largely in the context of competing commercial rights such as freedom of commercial expression, so that, for example, advertising restrictions on services and goods have had to be liberalized or adjusted. And even where the Court has taken a stand on human rights issues in such contexts, the motivations are not always straightforward, as Weiler's critique of some of the Court's positions on free movement has illustrated. Thus, he notes that the provisions for free movement of workers can be viewed in very different ways:

On the one hand they have a de-humanizing element in treating workers as 'factors of production' on par with goods, services and capital. But they are also part of a matrix which prohibits, for example, discrimination on grounds of nationality, and encourages generally a rich network of transnational social transactions'.<sup>38</sup>

A third question is whether the WTO does in fact, as Petersmann claims, provide 'guarantees of economic liberties'. He refers often in his writings to the 'WTO

<sup>36</sup> *Ibid.*, at 129.

<sup>37</sup> De Witte, *supra* note 24. He cites A. Bleckmann, *Europarecht* (1997), at 269–278 for this proposition.

<sup>38</sup> Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals — A Critique', 3 *EJIL* (1992) 65.

guarantees of freedom, non-discrimination and property rights'.<sup>39</sup> But these are not rights conferred on individuals in the sense of human rights. The only individual rights of which I am aware are the intellectual property rights recognized in the 1994 TRIPS Agreement (Agreement on Trade-related aspects of Intellectual Property Rights). So while the WTO does indeed provide some guarantees of economic liberties, these cannot reasonably be equated to human rights in any broad sense familiar to the traditions of international human rights law. The only exception, albeit a potentially significant one, is the right of authors and inventors to the protection of their interests, recognized in Article 15 of the International Covenant on Economic, Social and Cultural Rights. Much more importantly, any such rights arising out of WTO agreements are not, and should not be considered to be, analogous to human rights. Their purpose is fundamentally different. Human rights are recognized for all on the basis of the inherent human dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are seen as objects rather than as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy, but not as political actors in the full sense and nor as the holders of a comprehensive and balanced set of individual rights. There is nothing *per se* wrong with such instrumentalism but it should not be confused with a human rights approach.

The fourth question is of major importance. Do social rights form a part of Petersmann's definition of human rights? In the article above, and elsewhere, he makes it clear that they do. Thus, for example, he calls for the 'stronger legal protection of social human rights' and illustrates what he means by giving examples of the denial of the rights to education, health care and food.<sup>40</sup> He goes on to lament the fact that in 'UN human rights law the indivisibility of human rights and the justiciability of economic and social rights are not sufficiently protected'.<sup>41</sup> Elsewhere he notes that the EU model which should be followed worldwide 'effectively protects human rights, economic liberties and social rights of citizens'.<sup>42</sup> But given this formal embrace of social rights, the question then becomes how this is able to be reconciled with the thrust of his writings as a whole? The problem is that he manages to combine statements which are almost straight out of Hayek — such as the claim that the 'division of labour among free citizens and liberal trade [are] the most important means for promoting freedom and individual welfare'<sup>43</sup> — with statements about the central importance of social rights. Yet those rights are completely anathema not only to Hayek but also to the philosophical approach of several other of the leading figures who feature prominently and consistently in Petersmann's analyses. Thus, as an authority in relation to the 'the instrumental function of human rights' he cites Randy Barnett whose work has become a favourite of libertarians. Barnett believes that 'the

<sup>39</sup> E.g. Petersmann, in *JIEL* (2000), *supra* note 3, at 23.

<sup>40</sup> Petersmann, at 624.

<sup>41</sup> *Ibid.*, at 628.

<sup>42</sup> See von Bogdandy *et al.*, *supra* note 3, at 384.

<sup>43</sup> *Ibid.*

government of a good society should protect persons and their property from being used without their consent' and consequently condemns social rights (resource redistribution) as an unjustifiable form of interference with personal flourishing. Instead, he considers the role of government is to protect 'each person's liberty rights to acquire, use, and dispose of resources in the world without violating the like rights of others.'<sup>44</sup>

Petersmann sees human rights as not only adding 'moral legitimacy' to the free trade agenda but also as being economically necessary 'for the proper functioning of economic and "political markets" and for rendering competition "self-enforcing" by assignment of individual freedoms, property rights and liability rules to all economic actors and scarce resources'.<sup>45</sup> It is through such explanations of his interest in human rights that the functional definition of 'human rights' which underlies his thesis becomes apparent. He supports that statement by a reference to the work of Richard Pipes, which presents 'private property as an indispensable ingredient not only of economic progress but also of individual liberty and rule of law'.<sup>46</sup> But although Petersmann relies upon Pipes in other analyses as well, including the one above,<sup>47</sup> he does not examine Pipes' thesis in any more detail. When we do so, it becomes apparent that Pipes' views are fundamentally incompatible with the social rights aspects of the thesis that Petersmann puts forward. According to Pipes, 'the main enemy of freedom is not tyranny but the striving for equality'.<sup>48</sup> In his view, the welfare state project of the twentieth century subjected the institution of private property to a relentless attack which has undermined it and thus also individual liberty.

In line with such thinking, Petersmann notes that poverty in developing countries 'is attributed by many economists to their lack of effective human rights guarantees and of liberal trade and competition laws', which leads him to focus not on freedom of speech or the right to association, and certainly not on social rights, but rather on the absence of 'effective legal and judicial protection of liberty rights and property rights'.<sup>49</sup> Since he has defined liberty rights as freedom of contract and property rights, the real focus of his concept of human rights is remarkably narrow and the most striking characteristic of his references to social rights is their incompatibility with almost all of the remainder of his analysis. In his scheme of things, the WTO is never going to be called on to promote social rights, which means that despite the homage paid to them they remain entirely marginal to the essential thrust of his proposals.

One final comment is called for in relation to the human right to trade. In philosophical terms it is often difficult to distinguish means from ends and the same

<sup>44</sup> Barnett, 'The Right to Liberty in a Good Society', 69 *Fordham L. Rev.* (2001) 1603, at 1614–1615.

<sup>45</sup> See Petersmann, in *CMLR*, *supra* note 3, at 1376.

<sup>46</sup> *Ibid.*, at 23.

<sup>47</sup> Petersmann, at note 11.

<sup>48</sup> Pipes, 'Private Property, Freedom and the Rule of Law', *Hoover Digest* (2001), No. 2, <http://www-hoover.stanford.edu/publications/digest/012/pipes.html>.

<sup>49</sup> Petersmann, at 632.

applies to abstract or scholarly discussions of human rights theory. But the international law of human rights — the most prominent positivistic manifestation of which is contained in the UDHR and the two International Covenants — is clearly premised on the recognition of certain specific rights and the consequent downgrading of other values which can then be seen as means by which to attain certain rights but not as ends in themselves. It is true that this distinction has been blurred by governments which are more concerned to promote their ideological objectives than to protect the integrity of the corpus of human rights. This has been the case most notably in the context of the debates over the right to development, in which the right of individuals to an adequate standard of living has often been conflated with the ‘right’ of states both to limit the enjoyment of other human rights in the name of development and to receive development aid from richer states. But, far from justifying distortions of the concept of human rights in the name of higher ends, these largely unsuccessful and essentially unnecessary sorties have instead served to reinforce the need to respect the distinction between ends and means. Empirically it is clear that human beings have been able to enjoy a full range of human rights in societies which do not recognize a human right to free trade as such. Indeed, given the rarity of such formal recognition and the constant threats to free trade in practice, it might not be an exaggeration to say that a list of countries respecting human rights including a right to free trade could be counted on the fingers of one hand. Petersmann himself cites Germany on the basis of the relevant provisions of the Basic Law.

Money is, in many ways and in many contexts, essential to the full enjoyment of human rights. Yet no one has yet suggested that there is a human right to money per se. Following philosophers like Amartya Sen, there may well be an ‘entitlement’ to that amount of money which is necessary in order to purchase the essentials required for a life in dignity, but even this way of approaching the issue does not turn money itself into a right. There is, at least for the time being, no right to an internet connection, although it could easily be argued that it is a prerequisite for the achievement of many goals in today’s world. Money and internet access, like trade, remain important means by which to attain the higher goals of human dignity which have been recognized as human rights. But they themselves have not thereby metamorphosed into rights accepted as such by the international community, as Petersmann’s analysis would lead us to believe.

### ***C Human Rights, including ‘Economic Liberty Rights’, Are Part of Binding International Law***

From a human rights perspective, the main thrust of Petersmann’s analysis is captured in his insistence upon the ‘constitutional primacy of the inalienable core of human rights’ and on the resulting obligation of international agencies such as the WTO to respect and promote those rights. This is based on a variety of claims. The first is that inalienable human rights (he does not define what is meant by ‘inalienable’ and, although used in preambular formulations, it is not a term to which particular

significance has been accorded in international law) are part of general international law on the basis of 'the UN Charter, the Universal Declaration of Human Rights and the 1993 Vienna Declaration on Human Rights, as well as in numerous other UN instruments'. As a statement of the sources of human rights law this is singularly confused. The specific legal implications of the Charter guarantees, in isolation, are not entirely clear and have been much debated. The Universal Declaration, for all its importance, is not in its entirety part of customary law according to the majority of commentators and only a determined optimist would place significant reliance, in formal legal terms, upon the non-binding outcome of a UN conference such as the Vienna Declaration. Petersmann then goes on to state, without qualification or explanation, that human rights are also part of general principles of law in accordance with Article 38 of the Statute of the International Court of Justice. While this is a proposition with which I have considerable sympathy,<sup>50</sup> it is also one which has been strongly contested and its validity is by no means self-evident as Petersmann implies.

Not wishing to leave any source unturned, Petersmann then argues that 'universally recognized human rights' constitute *erga omnes* obligations. There is indeed said to be a 'worldwide *opinio juris*' on this matter, which is based upon the universal ratification of the Convention on the Rights of the Child and 'the universal recognition in [various] treaties of the "equal and inalienable rights of all members of the human family" as set out in the UDHR'.<sup>51</sup> What exactly these universally recognized rights are is never made clear. Nor does he get into the thorny subject of which rights have achieved *erga omnes* status. His legal analysis of the international law status of human rights is rendered even less clear by his reference to the '*jus cogens* nature of many specific human rights whose legal implementation may differ from country to country and from treaty to treaty'. There are, in fact, relatively few rights which have achieved *jus cogens* status, and it would be extremely difficult to argue that those that have, such as the prohibition against genocide and slavery, may be implemented in different ways depending on the state concerned or the treaty involved. All the more so since no particular treaty is involved, at least not in the sense of providing the foundation for, or the formulation of, a *jus cogens* norm.

But whatever the shortcomings of this analysis from an international law point of view, the real problem is the use to which it is put. In essence Petersmann seeks to set up a logical progression which moves from the statement that there is a core of universally recognized rights to the proposition that these rights must thus be respected by international organizations, to the conclusion that his favoured list of human rights will thus trump anything else that governments or international organizations might seek to do.

Are international organizations as such obligated to respect human rights? Although it is a proposition to which almost any proponent of human rights would be sympathetic, this does not overcome the fact that it remains contentious from a legal

<sup>50</sup> Simma and Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, General Principles', 12 *Aust. YB Int'l L.* (1992) 82.

<sup>51</sup> Petersmann, at 633–634.

point of view and has been explicitly disputed by the international legal advisers of many of the key agencies, including the World Bank and the IMF. As a general statement of principle it should be unproblematic, but the difficulties begin when one seeks to identify the specific legal arguments which underpin the asserted obligation. Petersmann begins this task by stating that ‘international legal practice confirms an *opinio iuris* that UN membership entails legal obligations to respect core human rights’. Although this statement applies only to governments, since they alone can achieve UN membership, the analysis quickly moves on to embrace also the actions of ‘intergovernmental’ actors and the obligations of ‘all national and international governments’ (a term which, happily, remains undefined) to respect human rights. The endpoint of this analysis is that human rights ‘today constitutionally restrain all national and international rule-making powers’.<sup>52</sup>

From whence does this obligation derive? The first source cited is the ILO Declaration on Fundamental Principles and Rights at Work. But apart from the fact that this Declaration deals only with labour rights and not with human rights in general (whereas Petersmann’s proposals are clearly not aimed at strengthening labour rights), the Annex to the Declaration states specifically that it ‘is of a strictly promotional nature’.<sup>53</sup> Although there is intentional ambiguity in terms of their legal characterization, and some ILO officials and governmental representatives would clearly be happy if the Principles were to crystallize into customary international law, this is certainly not yet the case.

The second source is ‘UN human rights law’ which, it is said, ‘explicitly recognizes that human rights entail obligations also for intergovernmental organizations’. The only authority offered for that broad proposition is Article 28 of the UDHR. This provision states 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.’ It thus addresses in only the most oblique way the issue at hand and an extended and careful argument would be required to derive from it, in a manner that would be convincing to an international lawyer, anything close to the proposition that Petersmann claims it ‘explicitly recognizes’.

#### ***D There Is a ‘Worldwide Integration Law’ which Is, or Should Be, Based on the EU Model, which Has Been, inter alia, ‘Citizen-Driven’***

The term ‘worldwide integration law’ recurs frequently in Petersmann’s writings.<sup>54</sup> Although it remains undefined, the model is clearly that of the EU and it seems to involve ‘the recognition and empowerment of citizens as legal subjects not only of human rights but also of competition law and integration law’.<sup>55</sup> Thus he cites the

<sup>52</sup> Petersmann, at section 4.

<sup>53</sup> <http://www.itcilo.it/english/actrav/telearn/global/ilo/law/idec.htm>.

<sup>54</sup> See e.g. Petersmann, in von Bogdandy *et al*, *supra* note 3 (‘Human Rights in European and Global Integration Law’). The article above also refers to ‘the emerging global integration law’, at 16.

<sup>55</sup> *Ibid*.



anti-globalization demonstrations as ‘illustrations of the need to examine whether the European and US “integration paradigm” should not also become accepted at the worldwide level’.<sup>56</sup> The EC model is defined elsewhere as one of ‘complementing human rights guarantees by liberal trade and competition rules conferring individual rights on EC citizens’.<sup>57</sup>

These formulations contain several contentious elements: (i) is there really a ‘worldwide integration law’;<sup>58</sup> (ii) is such a thing desirable; (iii) if it is, should it necessarily be modelled on the experience of the EU and the US; and (iv) has the EU approach really been citizen-driven? It is not clear that there is any such thing as ‘worldwide integration law’. The term is not one that is used by other scholars and has certainly never been used by the UN or any of the specialized agencies, even though it is to the latter that Petersmann attributes the task of building and implementing such a law. Indeed, all such agencies would vehemently deny that they were engaged in anything as nefarious as trying to bring about worldwide integration. Both the term itself and the way in which it seems to be inextricably linked to the values and goals of the EU would seem to imply that the international community is committed to a global version of EU integration. But leaving aside the minor questions as to whether this would be either feasible or desirable, there is no foundation for such an assertion. It remains an essentially Eurocentric assumption that the aspirations of the broader global community would surely be to emulate the trajectory and the modalities used by the EU to forge an ever-closer union.

The other major question that emerges is whether the EU and US integration models, and more especially their steps to promote freedom of trade, have in fact been ‘citizen-driven’ as Petersmann claims.<sup>59</sup> Indeed, his entire enterprise of seeking to have the EU experience writ large on the global stage is said to be motivated by a desire to promote and ensure the type of citizen empowerment which has been achieved in the EU. He contrasts that model with ‘the classical international law approach of treating citizens as mere objects of international law that should be kept out of intergovernmental organizations’.<sup>60</sup> But neither dimension of this claim is anywhere near as straightforward as Petersmann suggests. At the international level, citizens, usually acting through non-governmental organizations, have in fact had a significant impact in terms of defeating the launching of a new trade round of negotiations based on the model put forward by governments at Seattle, preventing the negotiation of a Multilateral Agreement on Investment within the context of the Organisation for Economic Co-operation and Development, and compelling a reorientation of the interpretation of the health exceptions to the TRIPS rules. On the

<sup>56</sup> Petersmann, at 623.

<sup>57</sup> Petersmann, in von Bogdandy *et al. supra.* note 3, at 386.

<sup>58</sup> Even the term ‘EC integration law’, which Petersmann uses frequently, can today be considered to be relatively problematic. While much of the EC project has been about economic integration, the inexorability of the nexus between law and integration in the EC has been convincingly challenged. See Shaw, ‘EU Legal Studies in Crisis: Towards a New Dynamic’, 16 *Oxford J. Legal Studies* (1996) 231.

<sup>59</sup> Petersmann, at 629.

<sup>60</sup> *Ibid.*, at 636.

other hand, the drive to develop the Single European Market has often been alleged to have been dominated by big business to the exclusion of citizen groups.<sup>61</sup> Indeed it is only in the last decade, since the crises surrounding the ratification of the Maastricht Treaty, that the EU has begun to demonstrate awareness of the need to move away from the early functionalist elite-driven model of European integration to a more constitutional approach which consciously reaches out and seeks to involve civil society proper. In many respects, the European process has not differed greatly from the free trade agenda promoted in the United States. The key actors within the latter context have recently been identified in the following terms:

Over the past decade, the business coalition that forced through the Uruguay Round and North American Free Trade Agreements, and the deal to bring China into the World Trade Organisation, was a broad group of bankers, service industries, drug companies, farmers, high-technology industries, and manufacturers.<sup>62</sup>

This is indeed a ‘broad group’, but it is hardly one that merits the description of the process as being ‘citizen-driven’ or even ‘citizen-oriented’. Petersmann pays homage to the role of the citizen by noting that human rights have historically been achieved not through top-down approaches but rather as a result of “‘bottom-up pressures” and “glorious revolutions” by citizens’. But the role of this inspiring vision of the uprising of the masses to demand their rights in Petersmann’s understanding of history is immediately discredited by his assertion that the agreements to establish the World Bank and the IMF are indicative of ‘such hard-fought-for “revolutions” in international law designed to extend freedom, non-discrimination, the rule of law and social welfare across frontiers’.<sup>63</sup> The Fund and the Bank as the products of popular demands by citizens is hardly a picture which emerges from any of the histories of the relevant organizations. As Ciorciari recently summarized a careful review of the historical sources: ‘It is beyond dispute that the United States and Great Britain dominated both the preparation of the Bretton Woods Institutions and the Conference itself.’<sup>64</sup> Indeed, far from being citizen-driven initiatives, the history books tend to present the agreements as being primarily the outcome of negotiations of positions developed by just two individuals, John Maynard Keynes for the UK and Harry Dexter White for the US.<sup>65</sup>

A related dimension of the EU as an ideal model for the world as a whole is that the EU is seen to have been a driving force for good within the international economic order and this virtue has in turn been driven by its commitment to economic liberties.

<sup>61</sup> See e.g. M. Green Cowles, *The Politics of Big Business in the European Community: Setting the Agenda for a New Europe* (1996).

<sup>62</sup> Alden, ‘Corporate Apathy Shackles Step to Freer Trade’, *The Financial Times*, 14 May 2002, at 4.

<sup>63</sup> Petersmann, at 636.

<sup>64</sup> Ciorciari, ‘The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement’, 33 *Cornell Int’l L.J.* (2000) 331, at 361, n. 178.

<sup>65</sup> See R. Gardner, *Sterling-Dollar Diplomacy* (2nd. ed., 1969); E. Mason and R. Asher, *The World Bank since Bretton Woods* (1973); A. van Dormael, *Bretton Woods: Birth of a Monetary System* (1978); and R. Skidelsky, *John Maynard Keynes*, Vol. 3: *Fighting for Freedom, 1937–1946* (2001).

Thus Petersmann notes that '[t]he constitutional guarantees of the EU for economic liberties have also induced numerous EU initiatives to strengthen competition, environmental and social law in worldwide international agreements'.<sup>66</sup> The reality of course is more complex. Many of the EU's initiatives in these areas have been driven by narrow self-interest rather than by any abstract commitment to the promotion of economic liberties. In so far as this latter term is intended to cover human rights initiatives in general, the assertion neglects to take account of the EU's failure to ensure that all of its members have ratified the European Social Charter, its failure to have insisted on such ratification as a prerequisite for admission to the Union, its resistance to efforts to ensure that EU-based transnational corporations are required to respect human rights in their activities, its members' rejection of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, its inclusion of respect for minority rights in the conditions to be met by new members while those rights are marginal to its own arrangements and are virtually absent from the EU Charter of Fundamental Rights,<sup>67</sup> or its reticence about human rights matters in general, let alone social rights, in the framework of the activities of the IMF and the World Bank.

The EU is not exactly the persistently virtuous actor in international affairs as it is portrayed by Petersmann.

### ***E The WTO Would Protect Human Rights More Effectively than Any Other International Institutional Arrangements***

The first step in this part of Petersmann's argument is to criticize or discredit the UN's human rights arrangements, thus setting the scene for them to be replaced by the WTO as the principal means by which to promote respect for human rights. Having sought to establish that the EU is citizen-driven, he then contrasts it with the 'UN-directed international community', which is characterized as 'state-centred' and 'authoritarian'.<sup>68</sup> There is no small irony in this characterization, given that the process that Petersmann advocates is in effect the top-down imposition by elites of a rigid commitment to free trade. The next step is to criticize the 'lack of judicial safeguards, not only in the UN Charter but also in the various UN human rights covenants, for the protection of human rights and the rule of law at the national and international levels' and to argue that these weaknesses confirm 'the power-oriented structure of UN law, one that does not take human rights seriously'.<sup>69</sup> In fact, it is true that the implementation arrangements reflected in the principal UN human rights treaties are much weaker than they should be, but the reason is that governments have steadfastly and very openly refused to develop the system any further. For some

<sup>66</sup> Petersmann, at 632.

<sup>67</sup> See generally J.-Y. Carlier and O. De Schutter (eds), *La Charte des droits fondamentaux de l'Union européenne: Son apport à la protection des droits de l'homme en Europe* (2002).

<sup>68</sup> This 'authoritarian' approach is said to be favoured by Georges Abi-Saab, particularly in his General Course at the Hague Academy of International Law. See Petersmann, in Cremer, *supra* note 3, at 291, note 1.

<sup>69</sup> *Ibid*, at 292.

reason Petersmann assumes that the very same governments, acting within the framework of the WTO, would take a dramatically different attitude to a proposal purporting to achieve the result which they have adamantly opposed in the human rights setting.

The WTO forum is praised as the one that would promote EU-style ‘economic market integration’, which leads to ‘more comprehensive and more effective promotion of human rights than has been possible in traditional state-centred international law’.<sup>70</sup> And yet the WTO is very much a part of a state-centred international legal system. Indeed, to take but one example, it is so state-centred that it has sought strongly to discourage the acceptance of *amicus curiae* briefs by the Appellate Body, despite the latter’s expressed wish to make use of them.

Petersmann’s faith in the WTO is largely justified by the oft-repeated assertion that the Organization has ‘constitutionalized’ trade law on the basis of “‘rule-of-law’; compulsory adjudication; “checks and balances” between legislative, executive and judicial powers; and the legal primacy of the WTO “Constitution”’.<sup>71</sup> Without wishing to engage in a debate over whether the WTO system really reflects an ideal checks and balances approach, it is nevertheless useful to ask how the WTO promotes the rule of law. That concept is referred to 26 times in the article above and Petersmann considers that the WTO promotes the rule of law ‘more effectively than any other worldwide treaty’.<sup>72</sup> It does this through ‘its unique compulsory dispute settlement and appellate review system, and its compulsory guarantees of access to domestic courts’.<sup>73</sup> But any conception of the rule of law — defined by Dicey as ‘the universal subjection of all classes to one law’,<sup>74</sup> or by Hayek as the possibility ‘to foresee with fair certainty how the [government] will use its coercive powers’<sup>75</sup> — which contents itself with mechanisms for the enforcement of trade rules risks reducing the concept almost to vanishing point. Petersmann’s conception of the rule of law seems not only to be devoid of the substantive content which Ronald Dworkin, let alone the International Commission of Jurists, would insist should be part of it, but one which is not even complete in any narrow procedural sense of the term. Given Petersmann’s affinity with, and regular references to, Hayek,<sup>76</sup> and the fact that the rule of law is one of the leitmotifs of the latter’s work, one might expect that he would share that conception. But the inclusion of social rights in Petersmann’s accounts of his project makes it incoherent for him to rely in this respect upon Hayek, who drew great satisfaction from the fact that ‘those who pursue distributive justice will in practice find themselves obstructed at every move by the rule of law’ as he had defined it.<sup>77</sup>

As Fallon has observed, although the concept of the rule of law remains much

<sup>70</sup> Petersmann, at 631.

<sup>71</sup> Petersmann, in *JIEL* (2000), *supra* note 3, at 24.

<sup>72</sup> *Ibid.*, at 25 and again at 39.

<sup>73</sup> *Ibid.*, at 25.

<sup>74</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., 1915, repr. 1982), at 114.

<sup>75</sup> F. Hayek, *The Road to Serfdom* (1944), at 98.

<sup>76</sup> He was once Hayek’s student in Freiburg. See von Bogdandy *et al.*, *supra* note 3, at 384.

<sup>77</sup> F. Hayek, *The Constitution of Liberty* (1960), at 233.

celebrated, its precise meaning ‘may be less clear today than ever before’ and its modern-day invocations are ‘typically too vague and conclusory to dispel lingering puzzlement’.<sup>78</sup> Even the World Bank, which has begun to embrace the rule of law with an enthusiasm that would worry many of its critics, has endorsed an analysis which cautions that ‘[p]olicymakers need to be clear about what they mean by the rule of law because answers to many of the questions they are interested in — [such as] whether “rule of law” facilitates economic development — depend crucially on what definition of the rule of law is being used’.<sup>79</sup> While Petersmann offers no definition, both the way in which he uses the term and the extent to which he links it to the role of the courts brings it closer to a vision of the rule of lawyers than to any recognizable version of the rule of law.

The reason why the WTO and the IMF are seen by Petersmann as the most effective agents for the promotion of human rights is because he considers existing human rights law and the institutions established to promote it to be deficient. Thus, while extolling the virtues of human rights and the need to make them central to ‘worldwide integration law’ he observes that:

the interrelationships between human rights and economic welfare — notably the opportunities of the international division of labour for enabling individuals to increase their personal freedom, real income and access to resources necessary for the enjoyment of human rights — are neglected by human rights doctrine.<sup>80</sup>

In general, this part of Petersmann’s analysis is characterized by a number of unresolved contradictions. Having expressed so many reservations about what the UN has been able to achieve in the human rights area and been so critical of the authoritarian nature and government-centredness of the UN, Petersmann ends his analysis by proposing that ‘international organizations must be understood as a “fourth branch of government”’.<sup>81</sup> An even more obvious contradiction is reflected in his call for the UN Committee on Economic, Social and Cultural Rights, along with the WTO, to ‘take the lead in interpreting and progressively developing the law of specialized organizations in conformity with universally recognized human rights’.<sup>82</sup> Yet this is the Committee which has as its sole function the monitoring of implementation of the UN Covenant on Economic, Social and Cultural Rights, a treaty which he says, at a later point in the analysis, ‘reflects an anti-market bias which reduces the Covenant’s operational potential as a benchmark for the law of worldwide economic organizations and for a rights-based market economy and jurisprudence’.<sup>83</sup>

<sup>78</sup> Fallon, ‘“The Rule of Law” as a Concept in Constitutional Discourse’, 97 *Colum. L. Rev.* (1997) 1, at 1 and 56.

<sup>79</sup> ‘The Rule of Law as a Goal of Development Policy’, [www1.worldbank.org/publicsector/legal/ruleoflaw2.htm](http://www1.worldbank.org/publicsector/legal/ruleoflaw2.htm). See also World Bank, *Annotated Bibliography: Legal Institutions of the Market Economy* (July 2000), at <http://www1.worldbank.org/publicsector/legal/annotated.pdf>.

<sup>80</sup> Petersmann, at 639.

<sup>81</sup> *Ibid.*, at 649.

<sup>82</sup> *Ibid.*, at 625.

<sup>83</sup> *Ibid.*, at 628–629.

Similarly, he laments the fact that the Covenant ‘does not protect the economic freedoms, property rights, non-discriminatory conditions of competition and the rule of law necessary for a welfare-increasing division of labour satisfying consumer demand through private investments and the efficient supply of goods, services and job opportunities’.<sup>84</sup> For him then the solution is straightforward. It is to give the principal responsibility for promoting, interpreting, and even implementing these and the other core UN human rights standards to the WTO while insisting that it is capable of pursuing an integrated vision which remains faithful to the dictates of human rights law.

But this process of human rights-based (or more accurately human rights justified) ‘constitutionalization’ of the WTO is a highly contentious one. While it is true that some human rights, and many labour rights, proponents would like to see a significant role for the Organization in these respects, their suggestions stop considerably short of Petersmann’s vision. The reason is simply that while the former might argue for a much greater sensitivity on the part of the institutions of the WTO to human rights values, or even for sanctions to be adopted by the WTO against member countries which violate these, they certainly do not see it as an Organization which is designed, structured, or suitable to operate in the way that one with major human rights responsibilities would. The Agreement Establishing the WTO is not a constitutional instrument in the sense of constituting a political or social community,<sup>85</sup> and its mandate and objectives are narrowly focused around the goal of ‘expanding the production of and trade in goods and services’. Despite the expansion of the original GATT mandate into areas such as the services industries and intellectual property rights, and proposals to expand its role to cover the enforcement of regimes at the national level which are favourable to international foreign investment, the basic structure of the Organization has remained unchanged. It is an institution which is dominated by producers, and in which the economic, social, cultural, political and various other interests of a great many people are not, in practice, represented. Its institutional structure, its processes and the outcomes it sanctions are far from what would be required of a body to which significant human rights authority could be entrusted. While Petersmann acknowledges many of these shortcomings his suggestions for remedying them include the creation of various advisory bodies, ‘more responsible participation of NGOs, and more meetings open to the public’. The *quid pro quo* for this tinkering would be ‘precise and unconditional WTO guarantees of freedom and non-discrimination [to] be protected by domestic laws and judges as individual rights’.<sup>86</sup> A more unequal trade-off would be difficult to imagine. The ‘human rights’ thus granted would be a mirage which would have little impact other than to reinforce the strength of trade norms and the role of the WTO while leaving the existing, significantly ineffectual, human rights legal regime intact.

<sup>84</sup> *Ibid.*, at 639–640.

<sup>85</sup> See generally Walker, *supra* note 12.

<sup>86</sup> Petersmann, in de Búrca and Scott (eds), *supra* note 3, at 109–110.

### **F A United Nations ‘Global Compact’ which Encourages the WTO and the IMF to Promote Human Rights Is the Best Way Forward**

One of the most practical proposals that Petersmann puts forward is that the UN should launch ‘a “Global Compact” committing all worldwide organizations to respect for human rights, the rule of law, democracy and “good governance” in their collective exercise of government powers’.<sup>87</sup> There is something to be said for an initiative which would commit all of these agencies to respect human rights in all of their activities, but is doubtful that the most appealing model is that of the existing Global Compact between business and the UN. It is defined by the latter as not being ‘a regulatory instrument or code of conduct, but a value-based platform designed to promote institutional learning. It utilizes the power of transparency and dialogue to identify and disseminate good practices based on universal principles’.<sup>88</sup> Without entering into the many criticisms that have been made of the Compact as a toothless tiger or window-dressing, it must suffice to say that the UN and the various specialized agencies already have endless dialogues designed to promote policy coordination and it is difficult to see how the addition of one new one, albeit termed a Global Compact, would be more successful in relation to human rights when other dialogues have yet to be especially productive. But the more puzzling nature of the proposal is that it reduces the focus to a very soft and dialogue-based effort to promote human rights, which would seem to be singularly modest given Petersmann’s earlier conclusion that all of the agencies are already ‘constitutionally constrained’ by human rights law.

## **4 Is Petersmann’s Analysis ‘Kantian’?**

In the article above Petersmann tells us that the experience of European integration ‘confirms the Kantian insight that human rights cannot become effective without constitutional safeguards and judicial remedies’.<sup>89</sup> This reflects his previous writings on this topic, which have been replete with references to the philosophy of Immanuel Kant. In one recent article there are more than 30 mentions of Kant in the text alone, including references to the ‘Kantian recommendation’ for limited UN membership, a ‘Kantian commitment’ in the preamble of the Universal Declaration of Human Rights, ‘the Kantian ideal of an international social contract’, and ‘Kantian legal theory’ in general.<sup>90</sup> More specifically, the WTO, the EC and the North American Free Trade Agreement (NAFTA) all turn out to be part of the modern-day Kantian project. In one analysis he suggests that both ‘European integration law and the 1994 WTO

<sup>87</sup> *Ibid*, at 27.

<sup>88</sup> <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/whatitis.htm>.

<sup>89</sup> Petersmann, at 637.

<sup>90</sup> Petersmann, in Cremer, *supra* note 3, at 303, 305, 304 and 312 respectively.

Agreement’ are based upon the same ‘underlying Kantian legal theory’.<sup>91</sup> He develops the point elsewhere:

[A]s Kant predicted, individual freedom and the rule of law are today more effectively protected in international economic law (such as WTO law) and in regional integration law among constitutional democracies (such as [EC and NAFTA] law) than in other areas of international law.<sup>92</sup>

The link between WTO law and human rights is also Kantian:

From this Kantian ethical perspective, the guarantees of freedom and non-discrimination in WTO law serve *human rights functions* by enabling individuals to enhance their personal autonomy and welfare through peaceful cooperation across frontiers.<sup>93</sup>

And Kant’s contribution is not limited just to trade law. Thus, the North Atlantic Treaty Alliance (NATO) is described as a ‘Kantian alliance of free states’.<sup>94</sup> More generally Petersmann’s two major projects, which he identifies as international constitutional law and cosmopolitan integration law, are said to have been ‘explained by *Kant*’.<sup>95</sup> European integration law and ‘transnational “cosmopolitan law”’ turn out to be identical and to correspond to ‘the Kantian insight that market freedoms are indispensable.’<sup>96</sup> Kantian analysis also leads to the conclusion that we need ‘a new UN Charter based on human rights and cosmopolitan democracies’ and a Charter amendment which would make the jurisdiction of the International Court of Justice compulsory for all members of this new Kant-inspired structure for the United Nations.<sup>97</sup>

In some respects Petersmann’s consistent reliance upon Kant is a reflection of a broader resurgence of interest on the part of international lawyers in the great philosopher.<sup>98</sup> But Kant’s work is especially complex. It has been described as ‘formidably and unbendingly professional, elaborately schematic, ponderous with technical terms, and exceedingly laborious to read and to understand’.<sup>99</sup> It is hardly surprising then that, among the international lawyers who have studied it, it has given rise to what has been called ‘a ferocious and complex debate regarding which set of ideas can properly be called the “Kantian” view of international law and what, if any, value can be attached to it’.<sup>100</sup> Thus, for example, the work of Fernando Tesón,<sup>101</sup>

<sup>91</sup> Petersmann, in *Mich. J. Int’l L.*, *supra* note 3.

<sup>92</sup> Petersmann, in *NYU J. Int’l L. & Pol.*, *supra* note 3 at 755.

<sup>93</sup> See Petersmann, in *CMLR*, *supra* note 3 above, 1375 (emphasis in original).

<sup>94</sup> Petersmann, in *Mich. J. Int’l L.*, *supra* note 3, at 16.

<sup>95</sup> Petersmann, in *Jean Monnet Working Paper*, *supra* note 3, text preceding note 59.

<sup>96</sup> Petersmann, in *Mich. J. Int’l L.*, *supra* note 3, at 17.

<sup>97</sup> *Ibid.*, at 20 and 21.

<sup>98</sup> For a list of some of the more important recent works see Capps, ‘The Kantian Project in Modern International Legal Theory’, 12 *EJIL* (2001) 1003, note 6.

<sup>99</sup> Warnock, ‘Kant’, in D. J. O’Connor (ed.), *A Critical History of Western Philosophy* (1964) 296, at 297.

<sup>100</sup> Orend, ‘Kant on International Law and Armed Conflict’, 11 *Can. J. L. & Juris.* (1998) 329, at 329–330.

<sup>101</sup> See F. Tesón, *A Philosophy of International Law* (1999).



upon which Petersmann has relied in the past,<sup>102</sup> has been strongly contested by Patrick Capps.<sup>103</sup> Both the complexity of Kant's ideas and the intensity of the debate over them would seem to place a particular onus of analytical rigour upon any international lawyer who seeks to rely heavily upon Kant to support his analysis. But although Petersmann's past writings have recited lengthy passages from Kant, he neither engages in any analysis to justify the very strong interpretations that he puts forward, nor does he make any use of any of the very extensive secondary literature on Kant in general or in relation to international law. He confines himself to citing several books about Kant, but does not engage in any way with them.<sup>104</sup>

If the propositions for which he invokes Kant were entirely uncontroversial then the absence of any critical analysis might not be a cause for concern. But in fact many of his assertions are open to challenge. Since a detailed response would take up far more space than is available for this reply it must suffice to mention a few of the main criticisms that might be levelled at this aspect of Petersmann's work. First, there are critical distinctions in Kant's writings which Petersmann manages to blur in order to provide a foundation for many of his assertions as to what Kant's philosophy implies about the relationship between commerce and international law. In Kant's philosophy the move from international morality to international law is a conceptually challenging one, as Capps has shown.<sup>105</sup> But Petersmann's analysis demonstrates no awareness of complexity in this respect.

Second, the differences and similarities between Kant's writings and those of other philosophers, even those self-described as Kantian or neo-Kantian, are often significant and need to be acknowledged. Given the substantial differences in approach between Kant and John Rawls,<sup>106</sup> the following generalization makes little sense:

Constitutional theory (e.g. by *Kant* and *Rawls*) and practical experience (notably in European integration) demonstrate that national constitutions cannot effectively protect human rights and democratic peace across frontiers without complementary *international constitutional restraints* on foreign policy powers and *cosmopolitan guarantees* of human rights vis-à-vis foreign governments.<sup>107</sup>

Similarly the assertion that '[a]s described already by *Kant* more than 200 years

<sup>102</sup> Petersmann cites Tesón, 'The Kantian Theory of International Law', 92 *Colum. L. Rev.* (1992) 53, at 54 note 7, as authority for the proposition that 'Kant was the first to suggest human rights as the basis of international law'. Petersmann, in *NYU J. Int'l L. & Pol.*, *supra* note 3, at 762.

<sup>103</sup> Capps, *supra* note 98.

<sup>104</sup> In the article above he cites at note 2 A. D. Rosen, *Kant's Theory of Justice* (1993) and P. Guyer, *Kant on Freedom, Law and Happiness* (2000). In *Mich. J. Int'l L.*, *supra* note 3, he adds citations (at note 23) to C. Covell, *Kant and the Law of Peace* (1998); and (at note 47) Doyle, 'Kant, Liberal Legacies and Foreign Affairs', in M. Brown *et al.* (eds), *Debating the Democratic Process* (1996).

<sup>105</sup> Capps, *supra* note 98, at 1007.

<sup>106</sup> Unlike Kant, Rawls is content for liberal and non-liberal states to co-exist in international law, does not insist on a universalist position, and speaks, in his later work, of the law of peoples rather than cosmopolitan justice. See J. Rawls, *The Law of Peoples* (1999).

<sup>107</sup> Petersmann, in *Jean Monnet Working Paper*, *supra* note 3, at note 131.

ago, human rights and democracy require *national* as well as *international constitutionalism* is unhelpful without a careful exposition of what these terms might reasonably mean to a Kantian.<sup>108</sup>

Third, while Kant wrote about a ‘pacific federation’ among states, he stressed that ‘it does not aim to acquire any power like that of a state, but merely to preserve and secure the freedom of each state in itself’.<sup>109</sup> Although Petersmann has actually cited this remark,<sup>110</sup> it does not prevent him from presenting as a Kantian notion his vision that all states should be tied closely together under a regime of ‘worldwide integration law’ in the context of which the WTO could enforce a right to free trade in the name of human rights.

Fourth, Petersmann makes frequent and generous recourse to the concept of the ‘categorical imperative’, which is a foundation stone of Kant’s philosophy. In the paper above he does so twice and equates it ‘with the economic objective of maximizing consumer welfare through open markets and non-discriminatory competition’. Elsewhere he notes that ‘[m]odern theories of justice justify the WTO objective of maximizing equal freedom across frontiers by the ethical “categorical imperative” (*Kant*)’.<sup>111</sup> Writing about the Vienna Declaration, adopted at the 1993 World Conference on Human Rights, he writes that, although it recognized the duty of states to protect human rights, it left open the question of whether that formulation ‘should be construed in conformity with the *categorical imperative* of Kantian philosophy as an obligation to maximize the equal freedoms of the citizens, including their freedom of trade.’<sup>112</sup> One can only assume that the diplomatic delegations in Vienna were distracted by more ephemeral matters! The focus on both negative and positive freedoms in modern human rights law is also said to reflect an approach which conforms to the categorical imperative.<sup>113</sup>

By invoking the term in such an imprecise and, it must be said, almost profligate fashion, Petersmann not only confuses but also devalues an important and complex term of art, the core meaning of which is generally taken to be that a person’s actions should be capable of universal justification and in this way vouch respect for the common dignity of humanity. Exactly how this can be adapted and used in the way that Petersmann does is not made clear. Of course, it is easy to see how the Kantian imperative might be invoked in support of themes such as the absoluteness, inalienability and indefeasibility of certain action norms in accordance with which one might build the ethical foundations of a theory of rights, but this requires hard philosophical work rather than mere assertion. Instead, by seeking in effect to convert

<sup>108</sup> *Ibid.*, at note 179.

<sup>109</sup> Kant, ‘Perpetual Peace’, in H. Reiss (ed.), *Political Writings* (1971) 102.

<sup>110</sup> Petersmann, in *Mich. J. Int’l L.*, *supra* note 3, at 9.

<sup>111</sup> Petersmann, in *Jean Monnet Working Paper*, *supra* note 3, at text preceding note 130.

<sup>112</sup> See Petersmann, in *CMLR*, *supra* note 3, at 1375.

<sup>113</sup> Petersmann, in Cremer, *supra* note 3, at 306.

the categorical imperative into a freedom to trade in a series of easy steps, Petersmann barely scratches the surface of the longstanding debate.<sup>114</sup>

Fifth, Petersmann does not squarely confront the consequences of adopting a Kantian approach to participation in the UN or in the WTO.<sup>115</sup> An insistence that only democratic governments could participate would in fact defer the implementation of Petersmann's programme almost indefinitely since a great many countries would need to be expelled from both organizations and their readmission would be dependent upon their attainment and maintenance of a democratic form of government. How an assessment of whether they are 'democratic' would be made, and by whom, are questions to which Petersmann does not seem to have given much thought, although the despair that he expresses in response to the politicization of the UN's human rights system would presumably make him loath to let any of those bodies make the decisions. Perhaps he would want such matters to be determined by the judiciary in whom he has such faith, but it is unlikely that any governments, including those of the exemplary EU, would divest themselves of such crucial decision-making authority.

At the end of what Petersmann would call a long Kantian road the reader must ask why the author has felt the need to invoke the name of Kant so often. Several reasons might be suggested. The intention might be to provide an analytical framework for the overall analysis, or it might be to draw a firm contrast with other philosophical approaches which have been rejected, or it might be to more closely identify with other writers who have developed the same approach. But Petersmann does not seem to use Kant for any of these purposes. Instead the objective seems to be to provide a philosophical gloss and the intimation of a theoretical framework in support of the otherwise blunt assertions of the author's main belief, which is that a right to free trade is the panacea which will bring wealth and liberty to all mankind. In other words, Kant's philosophy is actually superfluous to the analysis, but is invoked to give it an intellectually more compelling tone.

## 5 Conclusion

Ernst-Ulrich Petersmann and other like-minded commentators have responded to the end of the Cold War and the ascendancy of a form of neo-liberal economic orthodoxy by calling for a fundamental realignment of international human rights law in order to give appropriate priority to what they call 'economic liberties'. Petersmann has made an important and distinctive contribution to the debate by suggesting that the entrenchment of these values can best be done at the international level, using the

<sup>114</sup> E.g. the debate about whether the Kantian concept is primarily about duties and cannot easily be extended to embrace rights. On this 'highly controversial' point see Capps, *supra* note 98, at note 9.

<sup>115</sup> Although he has asked some of the questions that arise in this respect, he has proffered no answers. See Petersmann, in Cremer, *supra* note 3, at 304–305.

well-established techniques of international law, and by urging that the principal locus of action should be the international economic institutions such as the WTO and the IMF rather than the UN's human rights bodies. If one takes an *ordo-liberal* starting point<sup>116</sup> then these proposals, which would have the effect of prioritizing property and free trade over virtually all other values and would do so by giving them the imprimatur of human rights, make perfect sense. There is also a powerful instrumentalist motivation as Petersmann acknowledges when he says that 'human rights law offers WTO rules moral, constitutional and democratic legitimacy that may be more important for the parliamentary ratification of future WTO agreements than traditional economic and utilitarian justifications'.<sup>117</sup>

Petersmann is in fact far from being the first to advocate a human right to free trade. In his 1944 State of the Union address, President Franklin D. Roosevelt put forward an economic bill of rights which included: 'The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad.'<sup>118</sup> Ironically, when the American Law Institute subsequently adapted the long list of economic and social rights proposed by Roosevelt for possible inclusion in the UDHR they omitted this right but retained virtually all of the standard economic and social rights that were subsequently recognized in the relevant provisions of the Universal Declaration.<sup>119</sup> Moreover, Petersmann's proposal to privilege the right to property recalls the arguments put forward over the years by Richard Epstein, who has long advocated an interpretation of the fifth amendment to the US Constitution (the so-called 'takings clause' which prohibits the taking of private property 'for public use without just compensation'), which would give far greater protection to property rights than they currently enjoy and would result in the overriding of many of the social and labour rights which currently exist under US law.<sup>120</sup> In these respects, Petersmann's proposals are hardly novel.

The principal problem with his approach, however, is that it is presented as though it were simply a logical development of existing policies, rather than representing a dramatic break with them. In a form of epistemological misappropriation he takes the discourse of international human rights law and uses it to describe an agenda which has a fundamentally different ideological underpinning. Thus, his proposals are presented as: involving a relatively minor adaptation of existing human rights law; amounting to little more than the transposition of a balanced and proven EU policy on human rights and trade; being entirely consistent with widely accepted conceptions of

<sup>116</sup> Ordoliberalism insists on the importance of an appropriate constitutional and regulatory framework to provide the setting within which a private law system premised on private property, contractual freedom, open markets, etc. can flourish. See generally Joerges, 'The Science of Private Law and the Nation State', in F. Snyder (ed.), *The Europeanization of Law: The Legal Effects of European Integration* (2000) 47.

<sup>117</sup> See Petersmann, in *CMLR*, *supra* note 3, at 1377.

<sup>118</sup> Eleventh Annual Message to Congress (Jan. 11, 1944), in J. Israel (ed.), *The State of the Union Messages of the Presidents*, Vol. 3 (1966), 2875, at 2881.

<sup>119</sup> American Law Institute, 'Statement of Essential Human Rights', UN Doc. A/148 (1947).

<sup>120</sup> R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). For a critique in relation to labour law, see Schwartz, 'Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?', 37 *Am. U.L. Rev.* (1987) 9.

constitutionalism and the rule of law; being fully compatible with the recognition of a wide range of social rights; and being a straightforward application of Kantian principles. But as the preceding analysis has sought to show, none of these characterizations is accurate.

The proposed agenda is in fact a revolutionary and radical one which, if adopted, would have far-reaching consequences for the existing international human rights regime as well as for the balance of values reflected in the vast majority of existing constitutional orders. The most fundamental change is that human rights would, despite all of the Kantian rhetoric, become detached from their foundations in human dignity and would instead be viewed primarily as instrumental means for the achievement of economic policy objectives. Individuals would become the objects rather than the holders of human rights. While their broader range of human rights would continue to be protected through ineffectual institutional arrangements, they would become empowered as economic agents acting to uphold the WTO agenda. More specifically in terms of changes, a very large number of national constitutions, only a handful of which recognize anything approaching a right to free trade, would have to be amended. International human rights instruments, which have proved notoriously difficult to amend, would have to be substantially revised if the rights to property, contract and freedom of trade are to be recognized and made judicially enforceable in the way Petersmann envisages. Economic actors, such as corporations, would be empowered far beyond existing practice to invoke the protection of human rights instruments. The various limitations upon the right to property, which have been prominent in the application of that right by international human rights organs, would be dramatically curtailed.<sup>121</sup> At the political level, the reluctance to incorporate any human rights dimension within the WTO framework, a position which the vast majority of governments have consistently manifested in that context, would need to be overcome. Finally, there is the paradox implicit in a project which proceeds on the basis of the constant reiteration of the importance of democratic values being achieved through measures designed to put the principle of free trade, repackaged as a human right to be enforced by international economic agencies, effectively beyond the reach of all domestic constituencies.

Rather than waiting for these radical changes to occur within our lifetimes it would seem to be more productive to pursue the debate over the appropriate relationship between trade and human rights in two directions. The first, which focuses on the ways in which the two separate bodies of law can best be reconciled and made complementary to the greatest extent possible, is already well under way (the 'trade and' debate), although Petersmann's writings show a reluctance to place much store upon this approach. The second is to begin a more sustained and critical debate that focuses upon the agenda that Petersmann describes, but does so in a systematic and

<sup>121</sup> Despite the extensive limitations upon the right to property permitted under existing human rights law David Kennedy has lamented 'the overwhelming strength of the "right to property" in the human rights vocabulary'. Kennedy, 'The International Human Rights Movement: Part of the Problem?', *Eur. Hum. Rts. L. Rev.* (2001) 245.

intellectually open way which acknowledges the underlying assumptions and imposes a high scholarly burden of proof on the proponents of the different positions. Petersmann is correct when he says that the human rights community has so far been reluctant to take such proposals seriously and perhaps one very constructive result of his many writings will be to compel the sort of debate which is required. But it cannot be based on flimsy assertions such as those put forward by another commentator who has also called for 'economic freedoms, including property and contract rights [to] be placed at the top of a new agenda for international human rights' and asserts that empirical studies vindicate the efficiency of such an approach in order to guarantee 'wealth, social stability and civil rights'.<sup>122</sup> Human rights proponents, on the other hand, can no longer dismiss the strong version of claims made on behalf of property rights and free trade without engaging with them in a more convincing and incisive manner.

<sup>122</sup> McGinnis, 'A New Agenda for International Human Rights: Economic Freedom', 48 *Cath. U.L. Rev.* (1999) 1029, at 1032–1034. In a brief history of international human rights law (at 1030) the author manages to present a remarkably revisionist account of the drafting of the UDHR.