

## National Constitutions, Foreign Trade Policy and European Community Law

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'Ignorance, forgetfulness, or contempt of the rights of man are the sole causes of public misfortunes and of the corruption of governments.'

(French Declaration of the Rights of Man and of the Citizen, 1789)

### **I. Constitutional Law in the Age of Integration: Need for Solving the 'Lockean Dilemma'**

#### **A. The 'Hobbesian Dilemma' and the Function of Constitutional Rules**

Thomas Hobbes, in his classic treatise 'Leviathan' (1651), described the life of persons in a society without law and without government as 'solitary, poor, nasty, brutish and short' because selfish individuals operating in a 'state of nature' would steal from each other. His justification of unlimited state powers to implement laws transforming the unconstrained individual pursuit of self-interest (the Hobbesian 'war of all against all') into a rule-ordered society was based on the assumption that the governmental 'Leviathan' would respect his accountability to God and would act as a 'benevolent dictator'. Historical experience with absolute monarchies showed, however, that the assumption of 'benevolent, omnipotent and omniscient' governments was too optimistic. For individuals may pursue their short term self-interests not only in the private domain but also in the public domain. And the asymmetries in the organization and political representation of group interests (e.g. producer interests vs. consumer interests), and the dependence of periodically elected governments on political support, may come into

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conflict with the long term interests of the citizens at large. The American-European tradition of 'constitutionalism' proceeds from this historical insight that the current social processes and also government powers risk to be abused unless they are constrained by long term rules with two *central constitutional tasks*:

- to constitute government powers to protect individual rights ('protective state') and supply public goods ('productive state'), and
- to limit the exercise of all government powers by constitutional restraints and 'checks and balances' so as to avoid 'government failures' and ensure a 'government of the people, by the people, for the people' (Abraham Lincoln).

The constitutional rules determine the fundamental 'rules of the game' and the legal standards against which the post-constitutional choices and current policy processes are to be judged. The prospective, general and long term nature of constitutional rules acts as an incentive to concentrate on the long term common interests rather than the short term results and distributional implications of rules. General constitutional rules can thereby induce people to accept long term considerations of equal treatment, equity, due process and fairness. They help to transform conflicts among short term interests (the 'Hobbesian social dilemma') into a mutually beneficial 'social order' without requiring persons to understand the structure of the overall order and without requiring a higher morality in individual behaviour.

### **B. The 'Lockean Dilemma' and the Need to Constitutionalize Foreign Trade Policy Powers**

According to a long tradition of political arguments defended also by many supporters of liberal democracy (e.g. Locke, Montesquieu, Tocqueville), there is an inherent incompatibility between the requirements of foreign policy and the ideals of rule of law and democratic decision-making.<sup>1</sup> In the words of Locke:

... what is to be done in reference to foreigners, depending much upon their actions, and the variations of designs and interests, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill, for the advantage of the Commonwealth.<sup>2</sup>

The plea for discretionary foreign affairs powers was understandable as long as the 'international law of coexistence' did not prohibit the use of force and international negotiations were viewed as adversary relationships in which each state was bound to seek its exclusive national advantage and needed to react speedily to foreign events. Because foreign policy was generally perceived as 'high policy', permanently confronted with exceptional situations, and the implications of foreign policy decisions on individuals were often indirect and remote, most constitutions focused on domestic

<sup>1</sup> On this 'incompatibility hypothesis' and its refutation see E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991) 288-292.

<sup>2</sup> J. Locke, *Two Treatises of Civil Government* (1690) Vol. II, Chapter 12.

policy issues and granted broad discretionary foreign affairs powers to the Executive subject to less stringent parliamentary and judicial 'checks and balances' compared with domestic policy powers.

However, inadequate constitutional restraints on foreign relations powers are increasingly perceived as a constitutional problem in the modern 'age of integration' where 'international integration law' becomes no less important for ordinary citizens than national legislation. If individual rights are increasingly exercised across national frontiers, it is no longer evident why their regulation by means of international agreements should be left to the Executive or to international treaties concluded 'with the Advice and Consent of the Senate'<sup>3</sup> without full parliamentary and judicial control. Since freedom of trade within federal states and within the EC is widely seen as a hallmark of constitutional achievements, are there valid constitutional reasons to limit freedom of trade to the choice of domestic trading partners without equal protection of trade transactions across EC frontiers? If nationality has ceased to be the reference point for the 'five freedoms' (for goods, services, persons, capital and payments) within the EEC and in the future 'European Economic Area', should individual freedom of trade and non-discrimination not also restrain the vast powers of the EEC to tax and restrict transnational trade transactions with third trading partners?

The need for 'constitutionalizing' foreign policy powers is particularly evident in the ongoing efforts at 'constitution making' and reconstituting governments in Eastern Europe where the absence of liberal constitutional traditions might be compensated to some extent by international legal obligations and their incorporation into domestic laws. Membership in GATT, the IMF and free trade agreements with the EEC are rightly viewed by many of these countries as an effective means of reforming domestic legal, economic and political systems. Adjusting constitutional laws to the requirements of international integration must not involve formal amendments of the written constitutions which almost all countries (save England, Israel and New Zealand) have adopted. European Community law illustrates that far-reaching constitutional reforms of the basic long term legal rules of a society (i.e. its 'material constitution') can be brought about without amendments of the written 'formal constitution'.<sup>4</sup> But the task of 'constitutionalizing' transnational regulatory powers requires a rethinking of constitutional traditions and concepts developed for nation states at a time when international relations were still governed by power politics and wars. One of the fundamental constitutional issues discussed in this paper is whether constitutional reforms should rely on a 'rights-based approach' or whether objective constitutional restraints (such as separation and limited delegation of government powers) are more effective safeguards of individual rights.

3 US Constitution, Article II, §2.

4 See Petersmann, 'Constitutionalism, Constitutional Law and European Integration', in E. U. Petersmann (ed.), *Constitutional Problems of European Integration*, Special Issue 46 *Aussenwirtschaft* (1991) 247ff.

## II. Constitutional Law and Transnational Exercise of Individual Rights: Freedom of Transnational Trade as an Individual Right?

### A. Constitutional Recognition of Supremacy of Individual Rights?

The concept of a limiting constitution grew up in England in response to the abuses of monarchical absolutism, and English constitutional traditions continue to have a bearing on constitutional laws in many countries (in particular those of the Commonwealth). But it is the US Constitution of 1789 which seems to have had the strongest influence on many liberal constitutions adopted by European, Latin American and Asian countries during the 19th century (e.g. the Swiss Constitution of 1874) and the 20th century (e.g. the German Basic Law of 1949). Unlike the English concept of 'parliamentary sovereignty', the US Constitution aimed at 'a government of laws, not of men' (as described in the Bill of Rights preceding the Constitution of Massachusetts of 1780) by subjecting all government powers to permanent constitutional rules with a higher legal ranking than ordinary legislation and government regulation. The chief constitutional principles – such as limited government under the rule of law, separation and only limited delegation of powers, due process and judicial protection of individual rights – were meant to limit also the powers of Congress, and many framers of the US Constitution viewed the legislature as the potentially most dangerous branch of government. Long-term constitutional limitations were designed to protect the general interests of the citizens against the short term interests of organized groups, which have a strong influence on the daily policy process. Such limitations were expected to protect the equal rights of the citizens more effectively and to give the people more control ('sovereignty') over the political order than if decisions were taken successively by constitutionally unconstrained parliaments or by governments dependent upon majority support.

Perhaps the most distinctive contribution of American constitutional law was the emphasis on the *supremacy of individual rights over government powers*. The fundamental rights of the people were recognized as existing prior to government, whose main task – as emphasized already in the Declaration of Independence – was to promote individual rights and provide those 'public goods' that people cannot or do not provide privately. In accordance with the constitutional principles of limited government, enumerated powers, and protection of individual freedoms against government interferences, the US Bill of Rights explicitly reserves certain powers to the states and to the people.<sup>5</sup>

5 Notably in the Ninth Amendment ('The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people') and in the Tenth Amendment ('The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people').

A rights-based approach is also characteristic of European Community law and is one of the main reasons for the success of European integration. As the European Court of Justice recognized early in its history, 'Community law ... not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage',<sup>6</sup> and thus the EEC Treaty's prohibitions on national tariffs and non-tariff trade barriers can be judicially enforced by the Community citizens themselves, often against resistance by their own governments. In addition to the individual rights derived from primary and secondary Community law, more basic human rights are also recognized as part of the Community legal order and act as legal limitations on the powers of the Community. Individual Community rights, by limiting abuses of regulatory powers through decentralized ('democratic') control and enforcement of Community law, could operate as powerful tools of integration also in the field of the foreign trade law of the EEC. But they are confronted with particular 'constitutional problems'. These are, in part, due to the fact that the EEC Treaty – in view of the EC Member States' GATT membership and the comprehensive and detailed obligations which this imposes on them – regulated the foreign trade law of the EEC in only a very scanty manner (e.g. in Articles 110-116, 40, 43). Even the more precise customs union rules of the EEC Treaty (Articles 9-37) are often construed without regard to the underlying GATT obligations of the EEC.<sup>7</sup>

#### **B. Freedom of Foreign Trade as an Individual Liberty? The 'Power Approach' in US Constitutional Law**

In the United States, the Bill of Rights provisions do not 'grant' the people their rights but only protect their 'inalienable' liberties, which are viewed as existing independently of and antedating the Constitution. Liberty of contract and the liberty to produce and distribute goods and services are protected under the due process clauses of the Fifth and Fourteenth Amendments, according to which no person shall be deprived of 'life, liberty or property without due process of law'. The American founding fathers had been motivated to a large extent by problems of economic regulation (see their demand for 'no taxation without representation'), and one of the declared purposes of the Bill of Rights which was added to the Constitution in 1791 had been to place fundamental rights even more clearly beyond the reach of majoritarian politics. The US Supreme Court, up to the early 1930s, declared several federal and state laws dealing with economic and social matters unconstitutional under the 'due process of law clauses' of the Fifth and

<sup>6</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1, 12.

<sup>7</sup> For examples see Petersmann, 'Commentary on Article 234', in H. von der Groeben, J. Thiesing, C. Ehlermann (eds), *Kommentar zum EWG-Vertrag* (4th ed., 1991) Vol. IV, 5750-5753.

Fourteenth Amendments because they deprived a plaintiff of liberty or property without procedural or substantive due process of law.<sup>8</sup>

The meaning of 'unlisted natural rights' can only be authoritatively determined by Congress and the courts. Even though one of the major historical objectives of the US Constitution was to 'secure the blessings of liberty' (preamble) also in the economic field, the US Congress does not appear to recognize an individual liberty to import and export. Thus, Congress replaced the words 'right to export' contained in the first draft of the Export Administration Act of 1979 by the word 'ability to export' so as to avoid the law being 'misconstrued' as denoting a constitutionally protected right to export free from government restriction.<sup>9</sup> US courts have applied, since the 1930s, a 'judicial double standard' which accords a higher level of scrutiny and of judicial protection to civil and political rights than to economic liberties.<sup>10</sup> Thus, the Supreme Court has recognized a right to travel abroad.<sup>11</sup> But US courts have also held that 'no one has a vested right to trade with foreign nations'.<sup>12</sup> According to a recent decision by the Court of Appeals for the Federal Circuit, there has apparently not been one single US court decision over the past 200 years which has upheld a right of importers to overturn a Congressional exclusion of any product from importation. The reason given by the Court for this absence of a 'right to trade' is that

When the people granted Congress the power to 'regulate Commerce with foreign Nations' ... they thereupon relinquished at least whatever right they, as individuals, may have had to insist upon the importation of any product.<sup>13</sup>

But do powers to regulate commerce for the welfare of society really imply or require the relinquishment of all individual rights in this field? Is such an interpretation consistent with the concept of 'unalienable liberties' retained by every person, and which government is not to abridge, as emphasized in the Declaration of Independence? Can interference with commerce for the benefit of society be reconciled with the traditional concept of the US Constitution as a 'protector of liberty' which stands 'for individual rights, protected even against legitimate authority, even against the elected representatives of the people and, in large measure, even when they act in good faith and

8 See B.H. Siegan, *Economic Liberties and the Constitution* (1980) 24ff, 110-182; J.A. Dorn, H.G. Manne (eds), *Economic Liberties and the Constitution* (1987) 1ff, 39ff.

9 Senate Reports No. 169, 96th Congress, 3rd Session, 1, 3 (1979).

10 See also H.J. Abraham, *Freedom and the Court* (5th ed., 1988) 11ff.

11 *Kent vs. Dulles*, 357 US 116, 129 (1958).

12 In a 1904 decision (*Buttfield vs. Stranahan*, 192 US 470, 493), the US Supreme Court decided 'that no one has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles ... may be imported into this country and the terms upon which a right to import may be exercised'. While this decision seemed to imply the existence of a 'right to trade with foreign nations', subsequent court decisions have quoted from the 1904 decision only 'that no one has a vested right to trade with foreign nations'. By omitting the above-mentioned qualifications of the 1904 decision, the courts have (mis)construed the 1904 decision as a precedent for the denial of any 'vested right to trade with foreign nations'.

13 *Arjay Associates Inc. v. Bush*, 891 F2d 891, at 898 (Fed. Cir. 1989).

in the public interest'?<sup>14</sup> If the constitutional concept of limited government was designed to exclude parliamentary supremacy and to confine all government powers to limited purposes in order to protect the people against arbitrary interferences with their rights, should it not also be observed whenever trade policy taxes and restricts domestic consumers (e.g. by imposing tariffs and restrictions on imported goods) and distorts domestic competition for the benefit of import-competing producers (who benefit from higher prices and 'protection rents')? Is trade protection not 'precisely the sort of potentially smelly dispensation of economic favours that most needs additional, objective supervision'?<sup>15</sup>

The limitations on the legislature in the first Article of the Bill of Rights ('Congress shall make no law' abridging certain freedoms) is illustrative of this concern of the founding fathers of the US Constitution to protect the rights of 'the people' also against congressional legislation and majority politics. The founding fathers explicitly limited the trade regulatory powers and were aware of their potential abuse. Thus, the US Constitution requires that 'all duties, imposts and excises shall be uniform throughout the United States',<sup>16</sup> that 'no tax or duty shall be laid on articles exported from any state',<sup>17</sup> and 'no preferences shall be given by any regulation of commerce or revenue to the ports of one state over those of another'.<sup>18</sup> In addition to these objective constitutional safeguards, which were designed to protect the states against trade-distorting regional preferences rather than to protect free trade, foreign trade transactions covered by existing contracts are constitutionally protected against retroactive government interferences by the constitutional prohibitions on *ex post facto* laws and on impairment of contract obligations (Article I, sections 9 and 10).<sup>19</sup> Aggrieved American importers may also challenge the methods used to calculate and impose customs duties and the propriety of anti-dumping and countervailing duties before the courts. But, in the absence of a 'property right' in the importation or exportation of goods, it is unlikely that US traders adversely affected by foreign trade restrictions have rights protected by the 'due process of law' clause and by the 'taking' limitation in the Fifth Amendment to the Constitution.<sup>20</sup>

The commerce clause, which permits Congress to make laws 'to regulate commerce ... with foreign nations...',<sup>21</sup> is construed today as a seemingly unlimited plenary power enabling Congress to make whatever laws may seem appropriate to it, including the

14 Henkin, 'Introduction' to L. Henkin, A.J. Rosenthal (eds), *Constitutionalism and Rights* (1990) 1.

15 Hudec, 'The Legal Status of GATT in the Domestic Law of the United States', in M. Hilf, F. Jacobs, E.U. Petersmann (eds), *The European Community and GATT* (1986) 187, 246.

16 US Constitution, Art. I, §8, cl. 1.

17 US Constitution, Art. I, §9, cl. 5.

18 US Constitution, Art. I, §9, cl. 6.

19 See, e.g., the 'contract sanctity clause' in section 6 of the Export Administration Amendment Act of 1985, in ILM (1985) 1369ff.

20 See Morrison, Hudec, 'Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States', in M. Hilf, E.U. Petersmann (eds), *National Constitutions and International Economic Law* (1992).

21 US Constitution, Art. I, §8, cl. 3.

power to prohibit imports and exports. The Supreme Court notably declined to apply certain 'inter-state commerce' precedents to the congressional foreign trade policy powers because the latter differed from the 'inter-state commerce' powers and included 'the authority of Congress to absolutely prohibit foreign importations'.<sup>22</sup> In case of challenges to *executive* foreign trade restrictions, the courts examine whether the executive action exceeded the constitutional or statutory authority granted to the Executive.<sup>23</sup> But they do not review whether, even if there was some legal basis for executive action, the foreign trade restriction had been an 'unnecessary' or 'disproportionate' interference with an individual 'right to trade with foreign nations'.

The protection of the transnational exercise of individual economic liberties through objective constitutional principles rather than through recognition of subjective individual freedoms seems to accord with the original conception of the US Constitution and with the US case-law concerning the protection of interstate commerce. The Supreme Court has recognized that the President's foreign affairs power 'of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution'.<sup>24</sup> In a later case the Court confirmed:

Broad as the power in the National Government to regulate foreign affairs must be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigour when that body seeks to regulate our relations with other nations.<sup>25</sup>

Some constitutional lawyers have therefore concluded from the case-law that 'nothing in the Constitution suggests that the rights of individuals in respect of foreign affairs are different from what they are in relation to other exercises of governmental power'... 'Nor is any particular exercise of foreign affairs power exempt from limitations in favour of individual rights'... 'In principle, the Bill of Rights limits foreign policy and the conduct of foreign relations as it does other federal activities'.<sup>26</sup> But the US government, US courts and prevailing constitutional doctrine seem to view the individual freedom to import and export as a privilege granted by Congress, rather than as an individual right that could be invoked as a cause of action e.g. against discriminatory or disproportionate governmental foreign trade restrictions.

22 *Brolan v. United States*, 236 US 216, 222 (1915).

23 In *Youngstown Sheet & Tube v. Sawyer* (343 US 579, 1952), for instance, the Supreme Court held that President Truman's seizure of the steel mills in order to ensure production of steel during the Korean war was unconstitutional, since it was neither authorized by law nor by any direct constitutional power of the President.

24 *US v. Curtiss-Wright Export Corp.*, 299 US 304, 320 (1936).

25 *Perez vs. Brownell*, 356 US 44, 58 (1958).

26 L. Henkin, *Foreign Affairs and the Constitution* (1972) 252ff, 269ff.

**C. Freedom of Trade as a Fundamental Right:  
The 'Rights Approach' of European Community Law**

Influenced by the US Constitution and by its objective to ensure a common market by restricting the regulatory powers of the states, various 19th century constitutions in Europe explicitly guaranteed individual freedom of trade and industry (e.g. Article 3 of the 1867 Constitution of the North German Confederation, French Constitution of 1848). 'Freedom of trade and industry ... throughout the territory of the Confederation, subject to such limitations as are contained in the Federal Constitution and the legislation enacted under its authority' (Article 31(1)), is one of the major guarantees of the Swiss Constitution of 1874. As the regulatory powers of the Cantons under the preceding Swiss Constitution of 1848 had entailed numerous discriminatory restraints on freedom of trade within Switzerland, Article 31(2) of the Constitution of 1874 stipulates that 'cantonal regulations concerning the exercise of trade and industry and the taxes on such activities ... shall not depart from the principle of freedom of trade and industry except where the Federal Constitution provides otherwise'. The constitutional guarantee of freedom of trade was also recognized to protect the individual right to trade with foreign nations. And this freedom of foreign trade was specifically protected by the constitutional requirement in Article 29 that customs duties shall be 'as moderate as possible' except for 'extraordinary circumstances' where 'the Confederation may ... resort temporarily to exceptional measures'.

Freedom of trade, including the right to import and export, is protected under European Community law on three different levels of law:

*1. Freedom of Trade Guarantees in Primary Community Law*

Legal and judicial protection are strongest whenever they are based directly on the EEC Treaty. These 'constitutional' prohibitions of tariffs (e.g. Article 12), non-tariff trade barriers (e.g. Articles 30, 34) and of trade discrimination (e.g. Articles 40(3), 95) are recognized to constitute individual freedoms which can be directly invoked by individuals and enforced through the courts. The EEC Treaty protects freedom of trade also in relations with third countries by prescribing a customs union (Article 9), free circulation within the EEC of goods imported from third countries (Article 10), a common customs tariff (Articles 18-29), and compliance with the international GATT obligations of the EEC and its Member States (e.g. Articles 18, 110, 229, 234). As the GATT prohibitions of tariffs (e.g. Article II), non-tariff trade barriers (e.g. Articles II-XI) and of trade discrimination (e.g. Articles I, III, XIII, XVII) are drafted in a more precise manner than

the corresponding EEC Treaty prohibitions,<sup>27</sup> the EEC Treaty's requirement of 'primacy of international law'<sup>28</sup> binding on the EEC over 'secondary Community law' entails a comprehensive 'foreign trade constitution' limiting the exercise of the discretionary trade policy powers of the Community. Thus, contrary to the case-law of the EC Court of Justice, the customs union principle of the EEC Treaty must be construed in conformity with the GATT obligations of the EEC to the effect that it prohibits non-tariff trade barriers by EC Member States inconsistent with GATT law.<sup>29</sup> The non-discrimination requirements of the EEC Treaty (e.g. Articles 40(3), 95) must be interpreted to prohibit also discriminatory import restrictions violating GATT law.<sup>30</sup>

The customs union law of the EEC authorizes autonomous tariff changes (Article 28), agricultural market regulations (Article 40ff) and international trade agreements (Articles 113, 238) to the extent that they are consistent with the international legal obligations of the EEC (e.g. under GATT and the free trade agreements between the EEC and EFTA countries). However, the EEC Treaty recognizes e.g. in its rules on non-discrimination (e.g. Article 7, 40(3)), undistorted competition (e.g. Article 3(f)) and rule of law (e.g. Article 164), that the discretionary trade policy powers of the EEC must be exercised in a transparent, non-discriminatory and proportionate manner. As the EEC's GATT obligations for the use of transparent, non-discriminatory and proportionate policy instruments (i.e. internal taxes, other non-discriminatory internal regulations, production subsidies or tariffs rather than non-tariff trade border measures) are also in

27 This is not only true for the foreign trade law of the EEC Treaty which lacks precise and unconditional prohibitions on tariffs and non-tariff trade barriers as in GATT Articles II to XI. But also the EEC Treaty provisions on the elimination of tariffs and quantitative restrictions in intra-Community trade often use much vaguer terms (e.g. in Article 12: 'charges having equivalent effect', Article 30: 'measures having equivalent effect') than the corresponding GATT provisions which specify more precisely (e.g. in Articles II, III, XI(1)) the various kinds of prohibited non-tariff trade barriers.

28 On this principle underlying Articles 228 to 234 of the EEC Treaty, see Petersmann, 'Commentary on Article 234', *supra* note 7, at 5726-5729.

29 In Case 37-38/73, *Diamantarbeiders v. Indiamex*, [1973] ECR 1609, the EC Court held, for instance, that 'charges of equivalent effect as tariffs', imposed by an EC Member State on imports from third countries, can be compatible with the foreign trade law of the EEC notwithstanding their inconsistency with GATT Article II. In Cases 51, 86, 96/75, *EMI v. CBS*, [1976] ECR 811, the Court held that the EC common rules for imports relate only to quantitative restrictions 'to the exclusion of measures having equivalent effect' even though the latter are prohibited by GATT Articles XI, III. In Case 174/84, *Bulk Oil v. Sun International*, [1986] ECR 559, discriminatory quantitative export restrictions by an EEC Member State were declared compatible with the foreign trade law of the EEC without regard to the prohibition of such restrictions in GATT Articles XI and XIII.

30 In e.g. Case 245/81, *Edeka AG v. Germany*, [1982] ECR 2745, the Court construed the non-discrimination requirement of EC law in a manner inconsistent with the GATT obligations of the EEC to maintain non-discriminatory market access *vis-à-vis* GATT supplier countries. The case illustrated that discrimination among supplier countries also entails discrimination among competing domestic importers. In Case 193/85, *Co-Frutta*, [1985] ECR 2085, the Court did, however, apply the national treatment requirement for internal taxation (Article 95 EEC) to products imported from third countries in conformity with the EEC's national treatment obligations under GATT Article III(2).

this respect more precise than the corresponding rules in the EEC Treaty, they should be taken into account in the interpretation of the foreign trade law of the EEC.<sup>31</sup>

## 2. Freedom of Trade Guarantees in Secondary Community Law

The general foreign trade regulations adopted by the EC Council – e.g. on the common customs tariff, customs valuation, common rules for imports and exports, anti-dumping and countervailing duty proceedings, and on protection against illicit commercial practices – were explicitly designed to implement the pertinent GATT obligations of the EEC for non-discriminatory access to foreign markets and supplies. Thus, both Council Regulation No. 282/82 on common rules for imports as well as Regulation No. 2603/69 on common rules for exports proceed from the directly applicable legal principles that ‘Importation into the Community ... shall be free, and therefore not subject to any quantitative restriction, without prejudice to measures which may be taken under Title V’..., and ‘The exportation of products from the European Economic Community to third countries shall be free, that is to say, they shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with the provisions of this Regulation’.<sup>32</sup>

The right to import and export is thus also recognized in the secondary foreign trade law of the EEC. The secondary foreign trade law also applies many of the ‘constitutional principles’ of primary Community law, such as the ‘common market’ principle and the principles relating to non-discrimination and legal certainty. In its more recent case-law, the EC Court of Justice has further recognized that even beyond customs law – e.g. in EC Council Regulation No. 2641/84 on the strengthening of the common commercial policy and in EC Council Regulation 2423/88 on protection against dumped or subsidized imports – the secondary foreign trade law is explicitly designed to implement the EEC’s GATT obligations. The Court concluded from that:

... since Regulation No. 2641/84 conferred on the operators concerned the right to invoke GATT provisions in their complaint to the Commission in order to establish the illicit nature of the commercial practices as a result of which they claimed to have suffered injury, those operators were entitled to apply to the Court to review the legality of the Commission decision applying those provisions.<sup>33</sup>

In the recent *Nakajima* case, the Court also reviewed the ‘GATT consistency’ of EC anti-dumping measures on the ground that the EC Anti-dumping Regulation explicitly

31 For further examples see: Petersmann, ‘GATT Law as International Legal Framework of the European Free Trade System’, in O. Jacot-Guillarmod (ed.), *L’avenir du libre-échange en Europe: vers un espace économique européen* (1990) 111-129.

32 See Article 1 of both regulations.

33 Case 70/87, *Fediol v. Commission*, Judgment of 22 June 1989 (not yet reported), para. 22.

referred to the pertinent GATT obligations of the EEC.<sup>34</sup> The explicit references in the often diverse, sectoral foreign trade regulations of the EEC to GATT obligations enhance the scope for legal and judicial protection of individual rights. For the GATT requirements e.g. of transparent policy-making (Article X), non-discriminatory market access (Articles I, III, XIII, XVII) and proportionality of trade restrictions (e.g. Articles II, III, XI, XIII, XVII) apply to all the various interchangeable trade policy instruments. They offer precise, consistency-enhancing legal criteria for the interpretation of the general Community law principles such as 'proportionality' of trade restrictions and protection of 'legitimate expectations'.

In one of its first judgments relating to the anti-dumping law of the EEC, the EC Court rightly emphasized that one important function of the foreign trade law of the EEC was to create legal certainty and predictability for the trade transactions of EC importers, exporters, producers and consumers. Hence:

The Council, having adopted a general regulation with a view to implementing one of the objectives laid down in Article 113 of the Treaty, cannot derogate from the rules laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom the law applies.<sup>35</sup>

But the Court has so far shied away from applying these 'rule of law' and equality principles to the international GATT obligations of the EEC even though the latter were recognized by the Court as an 'integral part of the Community legal order' with legal precedence over secondary Community law. Given the direct effect (in the sense of direct domestic validity) and higher status of international legal obligations in the monist Community legal order, recognition of direct applicability would confer constitutional significance on the international rules concerned. This would appear justified from an individual rights perspective because the GATT guarantees of freedom, non-discrimination, transparent policy-making, proportionality and rule of law go far beyond the autonomous foreign trade law of the EEC. But this seems less justified from a mercantilist perspective of GATT rules as burdensome 'concessions' which governments exchange on a reciprocal basis and which may be withdrawn at the discretion of governments<sup>36</sup> even though they increase the welfare and liberty of domestic traders, producers and consumers by enabling them to buy and sell goods in the best (foreign) markets.

34 Case C-69/89, *Nakajima Co. v. EC Council*, Judgment of 7 May 1991 (not yet reported).

35 Case 113/77, *NTN Toyo Company v. EC Council*, [1979] ECR 1979, 1185, para. 21.

36 The GATT case-law of the EC Court of Justice seems to be influenced by the trade policy argument (emphasized notably by the EC Commission) that e.g. in the United States GATT rules are not 'directly applicable' *vis-à-vis* federal legislation which prevails according to the 'later in time rule'.

### 3. Freedom of Trade as a Fundamental Right

In addition to the judicial interpretation of the 'freedoms of trade' of the EEC Treaty as directly applicable individual rights, the EC Court of Justice has also held that:

... the principle of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of law of which the Court ensures observance.<sup>37</sup>

The official German translation (*grundrechtliche Handlungsfreiheit*) and French translation (*le libre exercice du commerce en tant que droit fondamental*) of this judgment confirm that Community law also guarantees a 'fundamental right of freedom of trade' derived as a 'general principle' from the national legal orders of some Member States. The Court has not specified the precise legal scope of this right. But – as 'freedom of trade and industry' is recognized as an individual right in the constitutional laws of several EC Member States, such as Germany, France and Luxemburg, and as the Court's case-law concerning fundamental rights has emphasized that 'in safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states'<sup>38</sup> – it must be assumed that freedom of trade as a fundamental right guaranteed by Community law is 'inspired' by the corresponding national constitutional traditions as well as by the objective Community law guarantees of freedom of trade and by the need to make these Community rights effective.

The German Basic Law of 1949, for instance, includes explicit guarantees of fundamental economic liberties such as 'the right freely to choose trade, occupation, or profession' (Article 12), 'property and the right of inheritance' (Article 14), and 'the right to form associations and societies' (Article 9). The Basic Law makes it clear that 'the basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law' (Article 1(3)). In addition to the enumeration of specific constitutional guarantees of individual rights, the Basic Law guarantees a general 'right of liberty' according to which 'Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code' (Article 2(1)). This general freedom protects all individual liberties not specifically listed in the Basic Law, including economic liberties, and can be invoked as a cause of action in legal and judicial proceedings against all governmental restraints of individual liberty. In accordance with these constitutional guarantees of freedom of foreign trade, the German Law on Foreign Economic Relations of 1961 prescribes:

(1) In principle trade and commerce with foreign economic areas is free as to goods, services, capital, payments or other economic transactions as well as to transactions between

37 Case 240/83, *Procureur de la République v. ADBHU*, [1985] ECR 531, 548.

38 Case 4/73, *Nold v. Commission*, [1974] ECR 491, 507.

residents in foreign assets and gold. Applicable are the restrictions contained in this Law or prescribed by ordinance based on this Law.<sup>39</sup>

The EC Court does not speak of 'freedom of *foreign* trade' since all cases in which freedom of trade was recognized by the Court as a fundamental right – such as the *Nold*, *Hauer* and *ADBHU* cases – related to professional and trading activities *within* the EEC. At least in the *ADBHU* case, which referred to national environmental restrictions on intra-Community trade, the Court seems to have 'internalized' as a 'freedom of trade' what, from the perspective of national foreign trade laws, would appear as a freedom of *transnational* trade. In its case-law of fundamental rights, the Court rightly emphasizes that:

... the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.<sup>40</sup>

The protection of freedom of internal and external trade in primary and secondary Community law suggests that 'freedom of trade as a fundamental right' also protects the Community citizens' freedom to trade with partners inside and outside the EEC. The 'communitarization' of the national constitutional guarantees of freedom of trade appears justified and necessary in view of the EEC Treaty objective of an 'internal market ... without internal frontiers' (Article 8(a)). But, as in the primary and secondary foreign trade law of the EEC, this freedom of trade is not unlimited:

... the fundamental rights recognized by the Court cannot be regarded as absolute prerogatives but must be considered in relation to their function in society. As a consequence, some restrictions may be imposed on the exercise of these rights, in particular in the context of the common organization of the market. These restrictions must respond effectively to the objectives of the general interest pursued by the Community and must not, with regard to the aim pursued, constitute disproportionate and intolerable interference, impinging upon the very substance of these rights.<sup>41</sup>

In particular, 'freedom of trade as a fundamental right' has nothing to do with *laissez-faire* liberalism. It does not only reflect the view that individual liberty is a constitutional value in itself, which extends into the economic area, and is of fundamental importance to most citizens for their personal development and their professional and economic activities. It also reflects the economic-political insight (underlying e.g. GATT law) that trade policy instruments are hardly ever a 'first best policy' for correcting 'market failures' or supplying 'public goods'. As almost all policy objectives can be achieved in a more transparent and more efficient manner through *internal* policy instruments, such as those admitted under GATT and Community law, the legal limitation of the use of non-transparent, discriminatory or disproportionately harmful trade policy instruments

39 Paragraph 1; See also paragraphs 2, section 2, and 3, section 1.

40 Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, 1134.

41 Case 5/88, *Wachauf v. Federal Republic of Germany*, Judgment of 13 July 1989, para. 18 (not yet reported).

strengthens the ability of governments to resist protectionist pressures and to use policy instruments enhancing the individual rights and welfare of their citizens.<sup>42</sup>

If the communitarian 'freedom of trade as a fundamental right' also protects the freedom to engage in transnational trade *vis-à-vis* third countries, just as the national legal guarantees of 'freedom of trade' (e.g. under German law) are recognized to protect the *transnational* exercise of individual economic liberties, then EC citizens can invoke their fundamental rights under the 'new legal order' of Community law also against non-transparent, discriminatory or arbitrary exercises of the *foreign* relations powers of the EEC. Thus, individual freedom of trade as a fundamental right might facilitate access to courts and judicial recognition of a 'direct and individual concern', which traders adversely affected by EC trade restrictions must prove in order to bring direct complaints to the EC Court. The objective EEC Treaty prohibitions of trade restrictions and the individual freedom of trade are ultimately two different sides of one and the same individual liberty. In determining constitutionally valid reasons to limit the individual freedoms of trade, the various layers of Community law must be construed as a functional unity, taking into account also the international GATT obligations of the EEC for the use of transparent, non-discriminatory and proportionate trade policy instruments.

#### **D. Why Recognition of Individual Freedom of Foreign Trade Matters**

What difference does it make whether economic liberty is protected by 'procedural due process of law' or also by constitutional guarantees of 'substantive due process of law'? Does it add anything to the protection of individual liberty if objective prohibitions of trade restrictions are construed as directly applicable individual freedoms of trade? Given the constitutional premise of both US constitutional law as well as European Community law that individual rights are not 'granted' by governments and that the only legitimate function of governments is to protect the individual rights of the citizens, are there valid arguments to restrict the individual freedom of trade to the choice of domestic trading partners and to deny individual rights to import and export?

The EEC Treaty prohibitions on tariffs and non-tariff trade barriers have become much more effective than the corresponding GATT prohibitions, even though the latter are in some respects (e.g. freedom of transit, prohibition of non-tariff trade barriers and of trade discrimination) framed in more precise and comprehensive terms (e.g. in GATT Articles III, V, XI(1), XIII). This seems to be largely due to the judicial recognition of the EC citizens as legal subjects and not mere objects of European Community law. The experience of European integration appears to confirm the economic theory of property

42 On the 'economic theory of optimal intervention' see, e.g., W.M. Corden, *Trade Policy and Economic Welfare* (1974); J.E. Meade, *Trade and Welfare* (1955).

rights according to which the proper functioning not only of economic markets but also of 'political markets' depends on the appropriate assignment of individual freedoms and property rights. For a number of reasons, objective legal guarantees of economic liberty can become more effective if they are recognized to constitute individual rights:

a) An international division of labour among millions of private citizens in different countries depends on a high degree of specialization, investments and transnational economic transactions. These will not take place without legal security (e.g. of market access) and reliable expectations. International economic transactions consist of exchanges of property rights (e.g. in the purchased goods and related payments) which will be more secure if objective legal guarantees of market access are recognized as individual rights and protected by domestic courts. Such rights to import and export can increase the legal security and the value of international trade transactions.

b) The economic theory of property rights<sup>43</sup> demonstrates not only that precisely defined property rights in private or public goods (such as open markets or a clean environment) are an incentive for their efficient production, use and distribution. They also offer a spontaneous, decentralized remedy against 'market failures' by enabling individual citizens to protect themselves against adverse 'external effects' (e.g. of restraints of competition and environmental pollution). Just as the interpretation by the EC Court of Justice of the prohibition on cartels in Article 85 of the EEC Treaty as a directly applicable 'freedom of competition' has strengthened the effectiveness of Article 85 *vis-à-vis* private restraints of competition, enforceable private rights could also strengthen 'freedom of trade' *vis-à-vis* 'rent-seeking' group interests in welfare-reducing trade restrictions.

c) Individual rights (e.g. of access to foreign markets) are also an incentive for citizens to protect themselves against 'government failures' (such as trade protectionism), arbitrary majority politics and against the 'asymmetries' in current policy-making processes which favour organized 'rent-seeking' producer interests (e.g. in import protection) to the detriment of general, dispersed consumer interests (e.g. in liberal trade).

The foreign trade law of both the USA and the EEC is characterized by the delegation of broad regulatory powers to the Executive without precise criteria for the exercise of these discretionary powers. As objective constitutional safeguards – such as the constitutional requirements of separation and limited delegation of powers and judicial review – are often not effectively observed in the field of foreign trade law and policy, the recognition of individual freedoms of trade and of procedural rights can act as a 'second line of constitutional protection' enabling individual importers, exporters, producers and consumers to defend their rights against 'grey-area' trade restrictions.

43 For a survey see: E.G. Furobotn, S. Pejovich (eds), *The Economics of Property Rights* (1974); A. Schüller (ed.), *Property Rights und ökonomische Theorie* (1983).

d) Individual rights can facilitate and increase the scope of judicial review. The general constitutional guarantee of liberty (including economic liberty) in Article 2 of the German Basic Law, for instance, is recognized by courts to confer a 'standing to sue' against all governmental restraints of individual liberty including foreign trade restrictions. In the EEC, the 'direct applicability' of the customs union law contributed to the judicial willingness to review foreign trade restrictions as domestic legal issues rather than as foreign policy issues. By limiting the admissible policy instruments and decision-making procedures for trade restrictions, directly applicable freedoms of foreign trade can also enlarge the scope for judicial review. The EC Court of Justice has consistently held that foreign trade restrictions must be 'proportional' and may not restrict the freedom of foreign trade more than is necessary to achieve the regulatory objective.<sup>44</sup> In the *ADBHU* case, for instance, the Court stated that 'the principle of freedom of trade ... is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired'. Reviewing in this light certain rules laid down in an EEC directive on the collection of waste oils, the EC Court held that their restrictive effect on the freedom of trade did not 'go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection, which is in the general interest'.<sup>45</sup> But in a considerable number of other cases related to foreign trade restrictions, the Court declared foreign trade restrictions void e.g. because no public interest had been established as a justification of discriminatory import restrictions on goods en route.<sup>46</sup>

e) Recognition of freedom of foreign trade as an individual right further contributes to the insight that individual liberty constitutes a constitutional value in itself also in the area of foreign trade, and not only a means to an end (such as economic welfare). In a constitutionally limited democracy where human rights are recognized as 'the basis and foundation of government' (Virginia Bill of Rights of 1776, Article 1 of the German Basic Law), the 'state interests' must be defined in terms of the individual rights and interests of the citizens. As all government measures must serve the equal rights of the citizens, the justification of foreign trade restrictions in terms of the 'public interest' should be much more specific than is actually the case in most countries. This is true in particular for the EEC where the legitimacy of foreign trade restrictions enacted by the EC Council or by the EC Commission does not derive from parliamentary legislation. This 'democratic deficit' should be compensated by maximizing the equal rights of Community citizens and by enabling them to challenge the legality of foreign trade restrictions before the courts. The active judicial review by the US Supreme Court, the

44 Pescatore, 'Les Principes généraux du droit en tant que source du droit communautaire', in FIDE, *The General Principles Common to the Laws of the Member States as a Source of Community Law* (1986) 17, 19, remarks that the principle of proportionality is among the most frequently invoked principles of Community Law.

45 *ADBHU* [1985] ECR 531, para. 12, 13.

46 See, e.g., Case C-152/88, *Sofrimport*, Judgment of 26 June 1990 (not yet reported).

EC Court of Justice and the Swiss Federal Court of 'interstate commerce' confirms that the often excessive judicial deference towards alleged 'public interests' in foreign trade restrictions is by no means a legal necessity. Courts could and should review whether the often non-transparent, discriminatory and disproportionately harmful government restrictions of transnational trade transactions are actually capable of protecting and promoting the equal rights of domestic citizens.

### **III. National Constitutions and Foreign Trade Law: Are there Effective Objective Constitutional Restraints of Foreign Trade Policy Powers?**

#### **A. Need for Constitutional Restraints on Trade Policy Powers**

From a legal perspective, private international trade and investment transactions are based on the exercise of individual liberties and on agreed exchanges of property rights between residents of different countries. Like any voluntary agreement, international economic transactions are voluntarily agreed upon only if each participant (e.g. seller and buyer) considers the agreement to be beneficial for himself. The fact that each side values the exchanged property rights differently is due to their different preferences, resources, specialization, capabilities and opportunity costs. Because private, voluntary economic transactions tend to be mutually beneficial for the parties involved (but not necessarily for the countries involved), they emerge spontaneously whenever producers, traders and consumers discover an opportunity for a mutually beneficial division of labour.

Import tariffs and other foreign trade restrictions tax and restrict the transnational exercise of individual rights of domestic and foreign citizens and redistribute income between domestic groups (e.g. by taxing consumers for the benefit of the protected industries). Welfare economics teaches that import restrictions also reduce the *social* welfare of the importing country, and that the two theoretical exceptions to this proposition (i.e. the 'optimal tariff' for exploiting national monopoly power and the 'infant or strategic industry tariff' for exploiting 'external effects') are 'essentially theoretical curiosities' because their various conditions 'are impossible to ascertain, in the predictive sense, with any degree of reliability in practice.'<sup>47</sup> Economic analysis therefore confirms that, like any other government powers of economic regulation, trade policy powers require constitutional restraints in order to ensure their transparent, non-discriminatory and proportionate exercise maximizing the equal rights of domestic citizens. The historical experience with the old trade mercantilism up to the 19th century as well as the 'new mercantilism' during the 1930s (and again since the 1970s) further

47 Tumlir, 'GATT Rules and Community Law – A Comparison of Economic and Legal Functions', in M. Hilf, F. Jacobs, E.U. Petersmann, *supra* note 15, 1, 4. On the numerous economic, political and information problems of 'strategic trade protection' see, e.g., J. Bhagwati, *Protectionism* (1988) 106-110.

confirms that government powers of taxation and of economic regulation risk being 'captured' and abused by special interests (including the self-interests of periodically elected politicians) and may lead to 'government failures' much worse than 'market failures'.<sup>48</sup>

Constitutional restraints on trade regulatory powers are needed not only in order to protect the citizens against welfare-reducing trade restrictions by their own governments, but also in order to protect their rights in foreign jurisdictions against abuses of trade regulatory powers by foreign governments. Since the exports of goods, services or capital from one country are the imports of another country, states cannot unilaterally guarantee the rights and market access of their own national traders, producers, investors, consumers or migrant workers in foreign jurisdictions. Nor can they unilaterally determine the value of their national exchange rate, which is one of the most important prices in the national economy and at the same time represents an interrelationship between different economies and currencies. Many other national economic policy decisions by one state (e.g. to grant an export subsidy) can also be rendered ineffective by countervailing measures of another state (e.g. by imposing countervailing duties on subsidized imports). Hence the need arises for *international* legal guarantees of market access such as the international GATT rules for open markets and non-discriminatory competition.

### **B. Limited Government under the Rule of Law?**

In a constitutionally limited democracy, the equal rights of the citizens should be taxed and restricted only by means of transparent, non-discriminatory and proportionate government measures based on a parliamentary authorization and subject to the rule of law and to judicial control. Precise and unconditional legal limitations on the trade policy powers to tax and restrict domestic citizens can be found in international agreements such as GATT. But they are hardly to be found in national constitutions and in autonomous national foreign trade laws. Since the emergence of nation states in Europe, kings and governments have invariably asserted broad discretionary trade regulatory powers as an essential attribute of state sovereignty. Modern 'grey area trade policies' are characterized by the use of non-transparent, discriminatory, disproportionately harmful and, at least in terms of GATT law, illegal trade policy instruments which often elude effective parliamentary and judicial control, such as unpublished 'voluntary export restraints' (= VERs) administered abroad in the exporting

48 On this 'capture theory', according to which discretionary regulatory powers (such as those for the common agricultural policy of the EEC) tend to be exercised for the benefit of the regulated industries, see Nobel Prize economist G.J. Stigler, *The Citizen and the State. Essays on Regulation* (1975). More specifically on the 'political market for protectionism', where import protection is supplied by temporarily elected governments in exchange for political support from 'rent-seeking' organized producer interests, see, e.g., B.S. Frey, *International Political Economics* (1984) 20ff; R.E. Baldwin, *The Political Economy of US Import Policy* (1988).

country.<sup>49</sup> Due to this lack of adequate constitutional and statutory restraints on the plenitude of regulatory powers and trade policy instruments, modern 'grey area trade policy' has in some respects become what it was in the Middle Ages – 'an inscrutable power above the people, to be lobbied, petitioned and propitiated for the favours it can dispense'.<sup>50</sup>

The framers of the US Constitution intended to create a federal government of limited and enumerated powers also with regard to foreign relations. The commerce clause (Article I, §8, cl. 3) was intended to preempt state economic controls and to curb government regulation rather than to confer large regulatory powers to the federal government. But as regards foreign trade, the constitutional powers of Congress 'to regulate commerce with foreign nations', to levy 'taxes, duties, imposts, and excises', and to enact legislation even in breach of international law are construed by the courts to be so broad that apparently no legislative foreign trade restriction has ever been declared by the courts to be void for lack of constitutional authority. Furthermore, the trade regulatory powers delegated by Congress to the President often provide for almost unfettered discretion. As a consequence, the constitutional safeguards of enumerated and limited powers no longer appear to hinder the Executive from imposing non-transparent and discriminatory 'grey area trade restrictions' even if they limit individual rights, tax consumers, distort competition or promote foreign export cartels (e.g. for the implementation of VERs).<sup>51</sup>

True, in a famous *obiter dictum*, the Supreme Court held that the constitutional doctrine of enumerated and limited government powers applied only to domestic but not to foreign affairs and that the President enjoyed 'plenary and exclusive power ... as the sole organ of the federal government in the field of international relations';<sup>52</sup> but this ruling has been widely criticized and is not considered as a valid precedent. Congress appears to assert almost unlimited trade policy powers, including the power to prohibit imports and limit the availability of judicial review of foreign trade restrictions, and seems to view individual freedom of trade as a privilege granted by Congress rather than as an individual right. Milton Friedman, who recently proposed a 'Free Trade Amendment' to the US Constitution which would guarantee 'the right of the people to buy and sell legitimate goods and services at mutually acceptable terms' and would limit the power of the US Congress to tax and restrict foreign trade, considered it 'visionary to suppose that such an amendment could be enacted now'.<sup>53</sup>

49 See Petersmann, 'Grey Area Trade Policy and the Rule of Law', *JWT* (1988) 23-44.

50 J. Tumlin, *Economic Policy as a Constitutional Problem* (1984) 19.

51 For an illustrative case-study see Lochmann, 'The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of US Antitrust Laws', *Harvard Int'l L. J.* (1986) 99ff.

52 *US v. Curtiss-Wright Export Corp.*, 299 US 304 (1936). The US Constitution provides that 'the executive power shall be vested in a President of the United States' (Article II, §1) without specifying the content of this 'executive power'.

53 M. and R. Friedman, *Free to Choose* (1979) 304f.

### C. Limited Community Competences for Trade Policy?

According to the case-law of the EC Court of Justice, Article 113 of the EEC Treaty establishes an exclusive Community competence for a 'common commercial policy' which authorizes not only the trade policy instruments explicitly mentioned in Article 113 but also 'any other process intended to regulate external trade'.<sup>54</sup> According to the Court, the proper functioning of the customs union requires a wide interpretation of the common commercial policy powers of the EEC, and the content of 'commercial policy' is the same 'whether it is applied in the context of the international action of a state or that of the Community'.<sup>55</sup>

Yet, the EEC does not possess 'sovereign powers' but merely derived, enumerated powers 'as provided in this Treaty' (Article 3). These Community competences are limited ('*compétence d'attribution*'), and each institution must act 'within the limits of the powers conferred upon it by this Treaty' (Article 4). Constitutional limitations also derive from the international agreements of the EEC (including the GATT obligations) which are recognized by the EC Court of Justice as an 'integrating part of the Community legal order' with a legal rank prior to 'secondary' Community law. Yet, as indicated above, this legal limitation of Community competences by existing international obligations is often disregarded in the conduct of the EEC's common agricultural and commercial policies.<sup>56</sup> The EC Court of Justice has never declared a Community measure void on the ground of violation of international obligations. According to the 'GATT case-law' of the EC Court, private individuals are not entitled to invoke the international GATT obligations of the EEC as a cause of action before the courts.<sup>57</sup>

The various framework regulations of the EEC for the conduct of the common commercial policy explicitly require the EC organs to act in conformity with their GATT obligations. But the constitutional safeguards of European Community law have not prevented the EEC from using discriminatory import restrictions and non-transparent 'grey area trade restrictions' more frequently than other major trading powers. The EC Commission and Council assert not only the power to tax and restrict Community citizens in a non-transparent, discriminatory and disproportionately costly manner inconsistent with their international legal obligations (e.g. by means of 'voluntary restraint arrangements' for agricultural products, video-recorders and automobiles inconsistent with GATT Articles XI, XIII). They also assert the power to deviate from the competition rules of the EEC and ECSC Treaties so as to support 'crisis cartels' (e.g. for steel products).

54 Case 8/73, *Hauptzollamt Bremen v. Massey-Ferguson*, [1976] ECR 1921.

55 Opinion 1/75, *Understanding on Local Cost Standard*, [1975] ECR 1355, 1362f.

56 See Petersmann, 'The EEC as a GATT Member – Legal Conflicts between GATT Law and European Community Law', in M. Hilf, F. Jacobs, E.U. Petersmann *supra* note 15, 23, 40ff.

57 See the commentary on Article 234 of the EEC Treaty by Petersmann in H. von der Groeben, J. Thiesing, C. Ehlermann (eds), *EWG Kommentar* (4th ed., 1991) 5747-5753.

But can such ‘double standards’ – i.e. to consider the international GATT rules and the competition rules of the EEC to be legally binding on the Member States but not on the Community institutions themselves – be reconciled with the constitutional limitation of the Community competences? As the legitimacy of the EEC derives from the rule of law rather than from parliamentary legitimation, the open disregard for its obligations under both GATT law and European Community law can be seen as a sign of ‘constitutional failure’ of the Community in the field of foreign trade.

#### D. Separation and Limited Delegation of Powers?

The constitutional principle of separation of legislative and executive powers appears to have ceased to act as an effective constraint on the non-transparent, discriminatory and welfare-reducing use of trade policy powers. In the 1953 case ‘*US v. Guy W. Capps, Inc.*’, a US federal court still declared an executive ‘voluntary restraint agreement’ (VRA) between the United States and Canada ‘void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related.’<sup>58</sup> According to this decision, ‘the power to regulate foreign commerce is vested in Congress, not in the executive or the courts’. ‘The Executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports’. That the President’s more general ‘foreign affairs powers’ do not include a power to impose legally binding foreign trade restrictions was confirmed also in the 1974 decision in the case ‘*Consumers Union of US, Inc. v. Kissinger*’, where the US Court of Appeals (District of Columbia) held:

From the wide scope of its legislation regulating trade and governing the circumstances and procedures under which the President is authorized to limit imports, it appears quite likely that Congress has by statute occupied the field of enforceable import restrictions, if it did not, indeed, have exclusive possession thereof by the terms of Article I of the Constitution.<sup>59</sup>

Yet, the latter court decision also found that ‘there is no potential for conflict between exclusive congressional regulation of foreign commerce – regulation enforced ultimately by halting violative importations at the border – and assurances of voluntary restraint given to the Executive.’ In spite of a negotiated bilateral understanding and a statement made by the President that he would not initiate steps to limit steel imports by law if the volume of such imports remained within certain agreed limits, the Court found ‘the question of congressional preemption is simply not pertinent to executive action of this sort’. Only the convincing dissenting opinion by Judge Leventhal pointed out that

58 204 F.2d 655 (Fourth Circuit, 1953).

59 505 F.2d 136 (1974), cert. denied, 421 US 1004.

'Congress has made the exercise of executive authority over import restraints dependent on public ventilation of the issues and has prescribed a procedure with safeguards and right of comment by affected interests. The President has concededly not followed that procedure, and this course cannot stand consistently with the statutory pattern' of Congressional foreign trade legislation. According to the court decision, the most dangerous instrument of modern 'grey area trade policy' undermining national and international foreign trade law, namely VRAs and VERs negotiated by the Executive without legislative authority and outside the general rules and procedures for import restrictions, appear to elude effective legislative and judicial control in the United States. As regards the constitutional requirement of separation of powers, 'the foreign relations powers appear not so much "separated" as fissured, along jagged lines indifferent to classical categories of governmental power'.<sup>60</sup>

The constitutional doctrine of 'limited delegation of powers' seems never to have been used by the Supreme Court for invalidating congressional delegations of foreign trade regulatory powers even if the trade laws did not define precise standards for the exercise of the delegated powers.<sup>61</sup> Numerous foreign trade laws delegate to the President broad discretionary authority to modify tariffs and other trade barriers, to impose trade restrictions for security reasons, or to introduce import restrictions to protect domestic producers. The courts regularly accept such broad delegations of powers in view of the foreign policy dimensions of trade restrictions and an alleged need to 'invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations'.<sup>62</sup>

The foreign trade law of most other countries, and also of the EEC (e.g. Articles 40, 113 of the EEC Treaty), is likewise full of broad legislative delegations of trade policy powers to the Executive without substantive criteria and guidelines for their exercise. The constitutional objectives of the 'limited delegation doctrine' – to require the legislator itself to discuss and decide the basic policy issues in a transparent manner, to formulate generally applicable criteria for the administration of the rules and to enhance thereby the scope for their judicial review – are not achieved. The broad trade policy discretion of uninstructed agencies acts as an incentive for 'rent-seeking' by protectionist interest groups and increases the risk of the abuse of regulatory powers for producing private benefits at collective cost. This is particularly true of the EEC where e.g. the EC Council of Agricultural Ministers (many of whom were former agricultural lobbyists)

60 L. Henkin, *Foreign Affairs and the Constitution* (1972) 32.

61 See however the Supreme Court decision of 23 June 1983 in the *Chadha* case (462 US 919, 1983) and its implications for US foreign trade law, analyzed by Koh, 'Congressional Controls on Presidential Trade Policy-making', *New York University Journal of International Law* (1986) 1189ff.

62 *Field v. Clark*, 142 US 649, 691 (1892).

disposes of an almost unlimited regulatory discretion and has been rightly described by a former member of the EC Commission as an institutionalized 'price cartel of protectionists'.<sup>63</sup>

### E. Effective Judicial Review?

Since the 1930s, the US Supreme Court tends to review socio-economic legislation no longer from the perspective of the constitutional guarantees of economic liberties and property rights ('substantive due process'). It only inquires whether there is a rational nexus between the means chosen and the legislative objective as defined by the legislature. This 'rational basis test' has apparently never led the US Supreme Court to declare federal trade legislation void for lack of a constitutional authority or 'rational basis'. Apart from customs law, only the various trade regulating laws subject to the jurisdiction of the International Trade Commission – especially the anti-dumping, countervailing duty, unfair trade practices and escape clause laws – appear to provide substantive criteria and procedural safeguards enabling effective judicial review. But this judicial review of administrative actions is often hampered by the fact that the trade laws define the regulatory powers and conditions for their use in such broad terms that the courts frequently exercise little or no effective control over administrative trade restrictions.<sup>64</sup> In the words of one often quoted court decision:

Both Supreme Court and Court of Customs and Patent Appeals precedent have established that the Executive's decisions in the sphere of international trade are reviewable only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements. The President's findings of fact and the motivations for his action are not subject to review.<sup>65</sup>

Some other foreign trade statutes provide for even less justiciable standards, so that the courts sometimes refused to entertain a claim of 'arbitrary and capricious action' on the ground that, for example, import quotas on textiles imposed under Section 204, were not reviewable.<sup>66</sup> Even though government regulation of imports has become the most regulated section of the US economy, Professor Hudec's analysis of US court decisions relating to foreign trade concluded that, in general, 'United States courts have not been disposed to apply meaningful legal controls on Executive Branch actions in the field of foreign trade'.<sup>67</sup> Moreover, as the 1981 VER imposed on Japanese automobiles has shown, even a formal decision under the escape clause law (Sections 201 and 203 of the Trade Act of 1974), holding that emergency safeguards were not warranted, is no

63 H. von der Groeben, *Aufbaujahre der EG* (1982) 152f.

64 See the detailed analysis by Morrison, Hudec, *supra* note 20.

65 *Florshein Shoe Co. v. USA*, 744 F.2d 787, 795 (Fed. Cir. 1984).

66 *American Association of Exporters & Importers v. USA*, 751 F.2d 1239 (Fed. Cir. 1985): 'No one has a protectable interest to engage in international trade'.

67 Hudec, *supra* note 15, at 215.

guarantee against the negotiation of VERs outside the legal rules and procedural safeguards mandated by this escape clause law.

US Supreme Court justices have rightly emphasized on several occasions that, as Justice Holmes expressed it in his famous dissent in *Lochner v. New York*, a 'constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez-faire*'.<sup>68</sup> But constitutional lawyers should recognize that freedom of trade constitutes an individual liberty of fundamental importance to most people and a constitutional value independent of any economic theory. This has been long since recognized in respect of the individual choice of domestic trading partners and liberal trade within a federal state or within the EEC. But it is just as much true for transnational economic transactions with third countries. As there is hardly any other area in economics where economists worldwide seem to agree as much as on the individual and social benefits of liberal trade, there is no convincing reason for not protecting equal freedoms and property rights in national as well as transnational trade.

It appears therefore warranted that the European Court of Justice and courts in EC Member States (such as Germany and Italy) tend to protect economic and non-economic liberties alike and examine whether trade restrictions unduly restrict individual economic freedoms and property rights or violate the legal requirements of non-discrimination and proportionality of government restrictions. But both within the USA and the EEC, there continues to be a striking difference between the stringent judicial review of restrictions by Member States on domestic trade (e.g. judicial enforcement of EEC Treaty prohibitions of tariffs and non-tariff barriers as individual freedoms) and the judicial deference to trade restrictions applied towards third countries, where, for example, the EC Court has upheld many discriminatory and non-tariff trade barriers even if they were in clear violation of the international GATT prohibitions of trade discrimination and of non-tariff trade barriers.<sup>69</sup> Due to its often 'inward-looking' attitude and to its apparent reluctance to draw the 'constitutional consequences' from its courageous jurisprudence on the preeminence of international legal obligations over 'secondary' Community law, the judicial review of the EEC's anti-dumping duties and sectoral trade restrictions (e.g. on agricultural, textiles, and steel products) has been largely confined to the review of procedural requirements, 'manifest errors' in the assessment of facts, or apparent 'misuses of power' without scrutinizing the 'rule of international law' within the EEC.

The perception of trade policy as 'foreign' policy (rather than at the same time domestic policy interfering with the equal freedoms and property rights of domestic producers, investors, traders and consumers) seems to be even more widespread in national legal systems based on English or French constitutional traditions (such as the

68 198 US 45, 75 (1905).

69 See *supra* section 5. For an analysis of this case-law of the EC Court of Justice see Petersmann, *supra* note 57.

'act of state doctrine' and limited judicial review of legislative acts). The judicial deference to non-transparent, discriminatory and disproportionate instruments of trade policy suggests that courts often attach more importance to judicial protection of wide discretionary government powers in economic matters than to protection of equal liberties and property rights. The economic insight that transnational economic regulation is a form of taxing and restricting domestic citizens, and that trade restrictions are a very costly and ineffective policy instrument redistributing income among domestic groups in an often arbitrary manner, continues to be alien to many judges and lawyers.

#### **F. Transparent Democratic Policy-Making in the Public Interest?**

In constitutionally limited democracies which recognize human rights as the 'foundation of all government powers' and view governments as mere instruments for the protection and promotion of the citizens' rights, the individual human being with his personal interests, preferences and needs must be the starting point and ultimate object of all government activities. If individuals are the only sources of values and the best judges of their own interests, politics in a constitutional democracy must aim at granting them the widest possible freedom of choice in order to enable them to develop their personal capacities and to express and satisfy their individual values (preferences, interests, rights). Liberty, spontaneous market coordination of production and distribution of goods (rather than political determination of the allocation of resources), other decentralized coordination mechanisms (such as voting) and transparent decision-making procedures enabling the participation of all constitutionally recognized interests carry a positive constitutional value, because they enable individuals to express their preferences and to influence private and public decision-making processes accordingly.

A distinct feature of the foreign trade law of most states is the disregard of consumer interests in open markets and of those of the taxpayer in the use of tariffs rather than non-tariff trade barriers (which forgo potential tax revenue for the benefit of private 'protection rents'). For instance anti-dumping laws, countervailing duty and other import relief laws in most countries (except the EEC) focus on the interests of import-competing producers without any requirement to balance these producer interests against the general interest (e.g. of consumers, traders and the economy at large) in liberal trade. Secrecy and lack of transparency of the administrative management of transnational economic transactions by means of thousands of 'administered prices', production quotas, trade quotas and numerous degrees of trade preferences are characteristic also of the foreign trade policy of the EEC. Most VRAs and VERs are not published, and the 21 common agricultural market organizations of the EEC and the thousands of annually changing trade quotas for textiles, clothing, steel and other products are regulated every year in more than 3000 EC regulations, directives and decisions. Even professional lobbyists find it impossible to read such a flood of regulations even if they are published in the Official Journal. An informed public discussion (e.g. on the 'protection costs') becomes thereby often all but impossible. The

EC Commission itself has openly refused a request by a member from the European Parliament to make the protection costs transparent by a cost-benefit analysis of the effects of trade protective measures on consumers.<sup>70</sup> The lack of transparency also extends to the international GATT obligations of the EEC, for the text of GATT has so far never been published in the Official Journal of the EEC nor in the official gazettes of several EC Member States; even though the GATT obligations are recognized to constitute an 'integral part of the Community legal system'.

#### **IV. Need to Protect the Transnational Exercise of Individual Rights through International 'Constitutional Rules'**

##### **A. Need for a Constitutional Reconstruction**

Just as freedom of internal trade and the corresponding limitation of internal regulatory powers have been granted constitutional rank in the national constitutional laws of federal states and in European Community law, there is also a need for constitutional guarantees for freedom of transnational trade relations (subject to tariffs and lawful safeguard measures) and for corresponding limitations on the trade policy powers. In both domestic and transnational trade relations, equal freedoms and non-discriminatory competition can be maintained in the long run only within a framework of constitutional rules limiting the 'post-constitutional' policy choices and current decision-making processes. Neither within countries nor in transnational trade relations should freedom of trade (subject to tariffs and non-discriminatory government regulations) depend on periodical majority decisions.

The preceding analysis suggests that, in particular in United States and European Community law, the constitutional limitations on the regulatory powers of governments – such as individual liberties and property rights, limited government under the rule of law, separation and only limited delegation of government powers, judicial review and 'due process of law' – were meant to protect also the transnational exercise of individual rights and to secure a 'government of laws, not of men' also in the transnational relations with foreign citizens. As the individual rights were not 'granted' by governments and their enumeration in written constitutions was never regarded as exhaustive, there is no constitutionally convincing reason to assume that the individual freedom of trade is limited to the choice of domestic trading partners and does not also protect transnational trade transactions. Even though this is not the current view of the US Congress and of US courts, there are good legal and policy reasons for protecting freedom of trade not

70 See the answer by the EC Commission to parliamentary question No. 1289/84, OJ (1985) C 113/4.

only by objective constitutional safeguards (such as the requirement of a 'legal basis' and of procedural 'due process' of trade restrictions) but also by recognition and judicial protection of individual freedoms of foreign trade.

### **B. The 'New Mercantilism' as Constitutional Failure**

Why is it that hardly any national constitution explicitly protects the transnational exercise of the economic liberties and property rights of its citizens? Why do most national constitutions regulate only a few institutional and procedural aspects of foreign policy powers, such as declarations of war and treaty-making procedures?

Historically, most national constitutions focused on the task of 'nation-building'. As a result, they are characterized by an 'introverted' and 'defensive' *attitude vis-à-vis* third countries. The prevalence of mercantilist doctrine up to the 19th century and the legal admissibility of war (up to 1928) contributed to a 'power-oriented', politicized view of transnational relations as a struggle among competing nations where governments needed to keep their 'hands free', to insist on 'external sovereignty' and to grant 'trade concessions' only in exchange for reciprocal, equivalent concessions by their trading partners.

Constitutional law doctrine also continues to suffer from the long tradition of political arguments, described already by Thucydides and later defended by supporters not only of monarchical absolutism (e.g. Machiavelli, Bodin, Hobbes) but also of liberal democracies (e.g. Locke, Montesquieu, Tocqueville), that there is an inherent incompatibility between the requirements of foreign policy and the ideals of rule of law and democratic decision-making. But these historical arguments are no longer valid in the modern age of international integration law, where the welfare of individuals and countries depends on 'rule-oriented' international cooperation based on thousands of international agreements. Since World War II, many traditional foreign policy issues (including trade policy) have been increasingly 'depoliticized' by the rule of law. The fact that the distribution and balance of foreign policy powers between the legislature and the executive vary from country to country (with the US Senate being at one extreme and the British House of Commons at the other), indicates that the constitutional regulation of foreign policy is influenced more by domestic constitutional traditions than by foreign policy requirements.

Just as market failures (such as cartels and adverse 'external effects') reflect inadequate legal restraints on self-interested private economic activities with socially harmful effects, the modern 'grey area trade protectionism' is a sign not only of government failures but also of inadequate constitutional restraints on the use of non-transparent, discriminatory and welfare-reducing trade policy instruments. The general arguments in support of rule-oriented, democratic decision-making about transnational exercises of individual rights are valid also for the specific case of trade policy in view of the 'Janus-faced' nature of foreign trade restrictions which, even if directed against

third countries, become effective by taxing and restricting domestic citizens and by reducing their potential welfare (e.g. in terms of freedom of choice and real income). The same political prevalence of 'rent-seeking' interest groups which makes procedural and institutional safeguards necessary in domestic economic affairs (such as an independent central bank protecting the public interest in monetary stability from group interests in inflationary monetary policies, autonomous antitrust authorities protecting the public interest in undistorted competition), also requires constitutional restraints on the foreign economic policy powers of governments. For, if rule of law and democracy are not maintained in the transnational economic relations of the modern integrated societies, they will be difficult to maintain also in many areas of domestic policy.

## **V. Constitutional Functions of International Legal Guarantees of Freedom, Non-Discrimination and Transparent Policy-Making**

### **A. The Constitutional Dilemma: How to Provide International Public Goods without an International Government?**

The recognition of the need to constitutionalize discretionary trade policy powers leads to the question of how this can actually be achieved. Most countries insist on reciprocity of international trade liberalization because liberalization of their own trade barriers is viewed as a 'bargaining chip' for securing more liberal access of their own export industries to foreign markets and for receiving reciprocal guarantees of the rights of their own citizens in foreign jurisdictions.<sup>71</sup> Even if the constitutional guarantees of individual rights, limited government, separation and limited delegation of powers and judicial review were recognized to be applicable to the government powers to tax transnational economic transactions, it seems unlikely that a strict observance of these principles can be achieved unilaterally through national constitutional reforms. For the same 'rent-seeking' pressure groups which prevent liberal trade policies, are likely to oppose also more liberal foreign trade rules.

History shows that there are also important obstacles to achieving a liberal international trade order through international agreements. For liberal international trade is an 'international public good'<sup>72</sup> which tends to be in short supply because it benefits also those 'free riders' and trading countries (e.g. many developing and socialist

71 For a discussion of the various economic, political and legal functions of the reciprocity principle in international trade law see Petersmann, 'The Mid-Term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT Dispute Settlement Procedures', 32 *GYIL*(1989) 280, 310ff.

72 In the sense that, in a world composed of some 180 sovereign states with interventionist economic and trade policies, a liberal international trade order can neither be produced as a 'private good' in private markets (e.g. by means of private law arrangements) nor as a 'national public good' by unilateral national trade liberalization and also benefits third countries maintaining trade restrictions.

countries) which are not willing to contribute to the creation of a liberal international trade order by dismantling their own national trade barriers.

### **B. Past Methods of Constitutionalizing Trade Policy Powers**

At the national level, experience demonstrates that liberal trade within countries can be legally protected in many different ways e.g. through constitutional guarantees of individual freedoms of trade (e.g. in France, Germany and Switzerland), objective constitutional 'commerce clauses' (e.g. in Canada and the USA), or even without explicit constitutional guarantees (e.g. in England). But in most states, transnational freedom of trade across national frontiers seems to have been achieved only by either of the following three legal methods:

a) By the transformation of confederations of states, which had not succeeded in achieving full freedom of trade among the (e.g. American, Swiss or German) countries concerned, into federal states with constitutional guarantees of freedom of trade throughout the Federation. The 'commerce clause' in Article I, §8, cl. 3 of the US Constitution and the liberal trade guarantees in Articles 29, 31 of the Swiss Constitution had been designed to prevent member state governments from restricting trade within the Federation, as the earlier confederations had proved unable to achieve full freedom of domestic trade.

b) By establishing a customs union or a free trade area whose comprehensive coverage enhances full reciprocity and political support for overcoming resistance from sectional interests. For instance, the common trade regulation foreseen in Article XIX of the German Confederation Act of 1815 was progressively achieved in the framework of an international customs union treaty of 1833 establishing the German *Zollverein*, whose common customs area without internal customs duties later led to the explicit recognition of individual freedom of trade and industry in Article 3 of the 1867 Constitution of the North German Confederation. In the EEC, the effectiveness of the agreed international prohibitions of trade restrictions was likewise enhanced by their recognition as directly enforceable, individual market freedoms.

c) By the negotiation of long term trade liberalization agreements. For example, during the European commercial treaty system from 1860 to 1914, where the bilateral trade agreements were interlinked through most-favoured nation commitments and supplemented by national legal guarantees of currency convertibility (due to the gold standard) and of liberal market access. The past seven GATT Rounds of multilateral trade negotiations have progressively liberalized tariffs, but were much less successful in dismantling non-tariff trade barriers.

A common feature of these three different legal methods of protecting freedom of trade across national frontiers consists in legal guarantees at a higher, (con)federal or international level of law limiting the trade policy powers of Member States. The effectiveness of these rules was further enhanced if the federal courts (e.g. in Germany,

Switzerland, the USA, the EC) were willing to enforce these rules *vis-à-vis* Member State restrictions. In Canada, by contrast, the courts have tended to construe the commerce clause in Section 91(2) of the Canadian Constitution very narrowly; by also placing a wide interpretation on the exclusive provincial jurisdiction over 'property and civil rights' (Section 92(12)), they contributed to the continued existence of numerous trade restrictions among the provinces.

### **C. Why It Can Be Easier To Agree On International Rather Than National Freedoms of Foreign Trade**

For a number of reasons, governments often find it politically easier to commit themselves to freedom of foreign trade and to the use of transparent, non-discriminatory and proportionate trade policy instruments (i.e. tariffs) in *reciprocal multilateral agreements* rather than unilaterally in their national laws:

- a) reciprocal international legal guarantees of access to foreign markets offer clear benefits to domestic export industries and thereby increase domestic political support for trade liberalization;
- b) given the widespread mercantilist perception of trade liberalization as a 'concession' (see GATT Article II), legal commitments to liberalize trade barriers appear politically more acceptable on a reciprocal and multilateral basis;
- c) even though each country benefits economically first and foremost from reducing its own trade barriers, joint multilateral trade liberalization reduces the mutual adjustment costs and the risks of trade diversion;
- d) the confidentiality, remoteness and international political significance of multilateral trade negotiations can assist liberal-minded governments in cooperating as a sort of cartel against protectionist domestic interest groups (but it can also be abused for 'protectionist government collusion');
- e) international legal obligations hold a higher legal rank than ordinary domestic legislation or executive regulations in many domestic legal systems (e.g. in European Community law, Japanese law and Swiss law). Liberal international trade obligations for the use of transparent, non-discriminatory and proportionate (i.e. least restrictive) trade policy instruments can thereby reinforce similar domestic requirements.

### **D. Constitutional Functions of Liberal International Trade Rules**

Constitutional theory teaches that individuals and states are more likely to agree on equal freedoms and on general constitutional principles if they have to choose long term basic rules from behind a 'veil of uncertainty' (J. Buchanan) which makes it difficult for them to identify the future impact and results of the rules and makes them more inclined to take into account long term considerations of equity and fairness. Such a 'veil of ignorance' (J. Rawls) existed after World War II when the international GATT rules

were agreed upon as a worldwide framework for trade policy-making. GATT obligations are equivalent to substantive international constitutional rules in that they prescribe more specific, more precise and more comprehensive obligations for freedom of foreign trade, non-discrimination and the use of transparent, proportionate trade policy instruments than are to be found in national constitutions and autonomous foreign trade laws.<sup>73</sup> For instance:

- The GATT principle of 'trade policy by means of tariffs only' (GATT Articles II, XI(1)) limits the broad domestic trade regulatory powers to the use of tariffs as the principal trade policy instrument. It promotes, together with the GATT requirement of 'prior publication of all trade regulations' (Article X), a transparent 'government by discussion' because tariffs are to be determined by parliamentary legislation in most countries and tend to be more transparent than non-tariff trade barriers.
- The GATT requirements of non-discrimination (e.g. Articles I, III, XIII) are more precise and more comprehensive than those of domestic laws and prohibit many discriminatory trade restrictions admitted under domestic foreign trade laws.
- The GATT prohibitions of non-tariff trade barriers (e.g. Articles II, III, V, XI(1)) protect market access and freedom of trade because they are more precise and comprehensive than the corresponding rules in the domestic foreign trade law e.g. of the EEC and the USA. They prohibit many non-tariff trade restrictions admitted under domestic laws and approved by domestic courts.
- GATT law ranks the various trade policy instruments according to their respective welfare costs in almost the same way as economic theory suggests: the less trade-distorting a policy instrument tends to be, the less legal restraints GATT law places on its use. Thus, non-discriminatory taxes, other internal regulations, production subsidies and tariffs are permitted policy instruments but trade discrimination and quantitative trade restrictions are prohibited in view of their trade-distorting effects. By submitting the various interchangeable trade policy instruments to general legal disciplines and ranking them according to their adverse economic and legal effects, GATT law gives a concrete meaning to the constitutional requirement of 'proportionality' in the field of foreign trade law (i.e. the general legal requirement that regulatory instruments must not restrict individual rights more than is necessary to achieve the regulatory objective).<sup>74</sup>

73 For an illustration of these points see Petersmann, *supra* note 1, 408-421.

74 In many countries and also in the EC, the regulation of trade policy instruments differs so much from sector to sector (e.g. trade in agricultural goods, textiles, steel) that a meaningful application of the proportionality principle – to the extent it is recognized at all in the respective domestic foreign trade law (e.g. apparently not by US courts) – has proven very difficult. In Case 245/81, *Edeka AG v. Germany*, [1982] 2745, the EC Court of Justice has, for example, inferred from the Community law principle of proportionality an unwritten competence of the EC Commission to negotiate unpublished 'voluntary export restraints' administered abroad eluding parliamentary and judicial control by adversely affected EC citizens, even though GATT law prohibits such VERs as the least transparent, most costly and most dangerous instrument of trade policy.

## **VI. Conclusions: Need to Incorporate Liberal International Trade Rules into Domestic Laws**

### **A. How to Constitutionalize Foreign Trade Laws?**

International legal guarantees of freedoms, non-discrimination, legal certainty, transparency and use of proportionate policy instruments cannot fulfil their constitutional functions unless they are supplemented by effective enforcement mechanisms and placed into a 'constitutional' system subjecting the interpretation, application and enforcement of the rules to institutional 'checks and balances' so as to ensure the highest possible degree of adherence to the rules. Such a constitutional framework can hardly be made effective within worldwide international organizations which recognize the national sovereignty and diversity of member states (e.g. the sovereign right of each GATT member state to decide on its national level of tariff protection) and provide no effective sanctions against mutually agreed 'rule departures' among governments (such as 'VERs' or the International Textiles Agreement of 1973). For instance, the establishment of parliamentary and judicial 'checks and balances' at the level of worldwide international economic organizations appears hardly feasible. As illustrated by the example of the EEC, even the existence of international parliamentary and judicial bodies is no adequate safeguard against international 'protectionist collusion' among agricultural ministers at the expense of domestic citizens. The experience with the often little success of customs unions and free trade areas in Africa and Latin America confirms that international agreements as such are not yet a guarantee of effective liberalization of national trade barriers.

### **B. International Freedoms of Foreign Trade as Part of Domestic Law**

Experience with European integration law suggests that the most effective means to constitutionalize discretionary national trade policy powers is to incorporate international prohibitions of trade barriers into domestic laws and to enable private traders, producers and consumers to enforce these rules through domestic courts. GATT prohibitions of tariffs and non-tariff trade barriers are also suitable for and capable of 'direct' or 'indirect' application by domestic courts and individual citizens:

- a) Unlike many other international agreements (including most provisions in human rights conventions) which prescribe 'minimum standards' for the conduct of government policies, international prohibitions of tariffs, non-tariff trade barriers and trade discrimination go far beyond the autonomous national guarantees of freedom of foreign trade and enlarge and protect the individual freedoms, property rights and non-discrimination of domestic citizens across national frontiers.
- b) GATT explicitly provides for domestic judicial review procedures (Article X(3)) and states in several provisions that its function is to protect 'traders' (Article X(1)),

'domestic producers' (Article XIX(1)) and 'trade under fully competitive conditions' (Article VII(2)).

c) The basic GATT prohibitions of tariffs (Article II), non-tariff trade barriers (e.g. Articles V, XI(1)) and trade discrimination (e.g. Articles I(1), III, XIII) are unconditional, sufficiently precise and not dependent upon further implementing regulations. The more than 90 dispute settlement decisions under GATT Article XXIII(2) amply confirm that these GATT rules are capable of being interpreted and applied by adjudicative bodies.<sup>75</sup> This is also confirmed by the judicial enforcement of the EEC Treaty prohibitions of non-tariff trade barriers and trade discrimination, which are based on the corresponding GATT prohibitions (e.g. Articles III, XI(1), XIII) but are often drafted in a less precise manner (see e.g. the vague notions of 'measures having equivalent effect' in Articles 30, 34).

d) As noted above, in constitutionally limited democracies, individual rights are not 'granted' by governments. In a similar way, international guarantees of freedom of transnational trade acquire their 'constitutional value' not from the consent of governments but from their function to protect and extend individual rights across national frontiers. As the only legitimate function of governments consists in protecting the equal rights of their citizens, modern constitutions rightly emphasize that e.g. 'the general rules of public international law ... shall directly create rights and duties for the inhabitants' (Article 25 of the German Basic Law). Also contractual international legal obligations for freedom of foreign trade should be viewed as an expression of the constitutional obligations of governments towards their own citizens and should be constitutionally presumed to be directly applicable for the benefit of the citizens.

While liberal trade within federal states and in the EC is generally viewed as a major constitutional achievement, politicians, lawyers and 'practical men' often deride the goal of liberal transnational trade as 'academic' and perceive international trade relations as an adversary, 'power-oriented' Machiavellian arena in which the defence of the national interest requires broad discretionary trade policy powers; hence, international trade agreements should be interpreted in the narrowest possible way in order to minimize the constraints which they impose on national freedom of manoeuvre. International lawyers frequently view international agreements from a 'non-individualistic' perspective as a matter for governments alone. By contrast, economists rightly emphasize that 'foreign' trade policy often taxes and restricts domestic citizens in a welfare-reducing manner. The practice of successful liberalization of tariffs and non-tariff trade barriers within federal states, customs unions and free trade areas clearly proves that freedom of trade is a practical policy. And the ever closer economic, legal and political integration is a sign of how much citizens value the transnational exercise of their individual freedoms across national frontiers.

75 See the contributions by Petersmann, in E. U. Petersmann, G. Jaenicke (eds), *Adjudication of International Trade Disputes in International and National Economic Law* (1992) 77ff., 405ff.

### C. Constitutionalism Must Begin At Home

The 'non-individualistic' perception of international legal guarantees of freedom of trade and of non-discriminatory competition is inconsistent with the value premises underlying democratic constitutionalism. If values can be derived only from the individual, individuals should be granted the widest possible freedom of choice and corresponding responsibility (e.g. the need to adjust to import competition) in order to be able to develop their personal capacities and 'dignity'. Also freedom of trade constitutes an ethical and constitutional value in itself which does not depend upon economic theory. Constitutionalism requires that all forms of coercive government intervention should conform to the 'rule of law' including self-imposed international legal guarantees of freedom and non-discrimination in the transnational relations of citizens.

From the perspective of constitutionally limited democracies, such as those of the major trading countries, liberalism and internationalism must therefore begin at home. Problems in the implementation of international trade rules arise mostly at the level of domestic trade law and policy-making. International legal prohibitions of mutually harmful trade restrictions and of trade discrimination are necessary not only for the external relations of states but even more so for protecting the equal liberties and property rights of domestic citizens participating in and benefiting from the international division of labour. The effectiveness of the international GATT obligations depends upon the more effective incorporation of the international rules into a domestic 'trade policy constitution' so that the rules are binding and protected under domestic laws.

Such a 'constitutional' approach would require a number of important policy changes. Rather than leaving the domestic implementation of liberal international trade rules to the discretion of each government, international trade agreements should regulate their 'domestic law effects' in a manner enabling producers, traders and consumers to invoke and defend their 'freedoms of foreign trade' against government restrictions and against non-transparent interest group politics. International trade agreements should also provide for domestic judicial review, for it is the courts which ultimately have to protect the transnational exercise of individual rights by domestic citizens. Likewise, the effectiveness of individual rights and their judicial protection depend on *procedural* guarantees of 'due process' and 'access to justice'<sup>76</sup> as well as on the interpretation of international and domestic foreign trade law as mutually complementary rules designed to enhance the individual rights and the welfare of domestic citizens.

76 See on this point also Cassese, Clapham, Weiler, '1992 – What are our Rights?', in A. Cassese, A. Clapham, J. Weiler (eds), *Human Rights and the European Community: Methods of Protection* Vol. II (1991) 1, 57ff.