Elements of Constitutionalization: Multilevel Structures of Human Rights Protection in General International and WTO-Law

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Introduction[1]

Both internationalists and national constitutionalists are currently reflecting on changes in the basic structures of public law. From the national perspective, the process of globalization puts into question the hitherto generally accepted position of constitutional law as being at the top of the pyramid of norms. In international law, the development of subject-oriented régimes has led to a proliferation of international courts and other bodies entrusted with the resolution of disputes. This tendency entails a danger of fragmentation which contrasts with the current tendency to discover processes of constitutionalization in international law. Starting from the functions of the constitution in national law, the following paper develops in the first part elements of constitutionalization in international law in general (I.).[2] In the second part, the identified problems are elaborated upon in more detail with respect to the law of the World Trade Organization (II.).

I. Fragmentation and Constitutionalization in General International Law

1. Bundling Constitutional Functions in National Constitutions

Any historical analysis is driven by current interest. Current inquiries into the historical development of the functions of constitutional law reflect an interest in un-

[1] The paper is based on a presentation by the authors at a workshop organized under the auspices of the German Academic Exchange Service (DAAD) on 11 October 2003 at the Bucerius Law School, Hamburg.

[2] This part is largely based on earlier publications, see Christian Walter, *Die Folgen der Globalisierung für die europäische Verfassungsdiskussion*, 115 Deutsches Verwaltungsblatt (DVBl.) 1 (2000); Christian Walter, *Constitutionalizing (Inter)national Governance – Possibilities for an Limits to the Development of an International Constitutional Law*, German Yearbook of International Law 44 (2001), pp. 170.

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derstanding changes in legal structure of how we organize our societies. They reveal – this is our first contention – a specific understanding of the nation state and its constitution that has been taken for granted for many years and is now increasingly questioned: the nation state succeeded in bundling all important constitutional functions into a single political unit (i.e. the nation state) by means – in states with a written constitution –of a single document accorded superior normativity in the internal legal order. This document contains the basic structures in which the exercise of political power is organized; it provides for restraints by creating systems of checks and balances between different branches of government, it offers human rights protection, it dispenses political legitimacy and finally it serves as a means of social integration. The current challenges of a globalized world allow us to see this specificity of the nation state and its constitution more clearly than was possible before. This first contention may be summed up by quoting Habermas:

> "The national self-consciousness of the people provided a cultural context that facilitated the political activation of its citizens. It was the national community that generated a new kind of connection between persons who had been strangers to one another. In this way, the national state could solve two problems at once: it established a democratic mode of legitimation on the basis of a new and more abstract form of social integration."[3]

2. The Role of International Law in this Structure

What was the role of international law under this structure? Traditionally, international law was conceived of as law between sovereign entities (the nation states), which were – at least in theory – internally modeled along the structures just described. Sovereignty in its internal and in its external (i.e. international) aspects[4] was the theoretical concept which explained the structure and which assured that any internal effects of international law (i.e. effects in the domestic legal orders of the states) were dependent upon the consent of the state concerned. This idea is well reflected in the famous Lotus-Judgment of the Permanent Court of International Justice, where the Court held:

> "International law governs the relations between independent States. The rules binding upon States emanate from their own free will as expressed in conventions or by usages […] in order to regulate the relations between these co-existing independent communities or with a view to the achievement of

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[3] Jürgen Habermas, *The European Nation State – its achievements and its limitations*, Rechtstheorie, Suppl. 17, 109,112 (1997).

[4] For both aspects of the traditional concept see recently Christian Hillgruber, *Souveränität – Verteidigung eines Rechtsbegriffs*, 57 Juristenzeitung (JZ) 1072 (2002).

> common aims. Restrictions upon the independence of States cannot therefore be presumed."[5]

With some elements of simplification it is nonetheless fair to say that the role of international law, both under its existence as a law of coexistence and as a law of coordination[6] was to regulate relations between sovereign states rather than to regulate specific subject matters such as trade, environment or security as such. It was created first as a means to ensure coexistence and later to allow for cooperation between sovereign states and in doing so it only indirectly touched upon subject matters. In short: the traditional order was an actor-centered order.

3. Fragmentation and Decentralization of International Law: From an actor-centered system to a subject-oriented approach

What changes are we witnessing today? The fundamental change lies – and this is the second and main contention made here – in a shift from an actor centered-order to a subject-centered order. The new order – which is frequently referred to in political and legal analyses as an order consisting of "régimes" – revolves around subject-matter issues. International law is dealing with "trade", "security", "environment" and so on,. without prior reference to the identity of the actors. In order to avoid misunderstandings, it should be stressed that this shift does not render superfluous the state as a legal entity[7]. States will remain for quite some time the dominant actors in international law. It is states who negotiate and conclude international treaties, their representatives that decide on collective military and non-military action in security issues and that possess the means for military action, and it is the states that are the main subjects of international human rights monitoring In terms of human right protection, the fact that States remain the sole focus of institutionalized human rights monitoring underlines that the state is an essential element in any system of international human rights protection. This is a particularly noteworthy point since the state is usually also seen as the primary violator. That states are also necessary to protect human rights is thus an important point worth remembering when considering the changes to the structure of international law underway.[8] Providing security is probably the oldest function ascribed to the

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[5] *Lotus*, PCIJ 1927, Series A, No. 10, 18.

[6] As to that distinction see W. Friedmann, *The Changing Structure of International Law*, 1964, 60 ff.

[7] In German national constitutional law this aspect is aptly reflected in the formula of "open statehood", see Udo Di Fabio, Das Recht offener Staaten (1998).

[8] See the most recent decision by the *Bundesverfassungsgericht* of 5 November 2003, 2 BvR 1506/03; available in English language version at:

modern state since it has emerged from the religious civil wars of the 16th and 17th centuries. The terrible atrocities of recent civil wars in various parts of the world[9] have dramatically shown the extent to which it is necessary to rely on public authority, duly monitored by institutions of international human rights protection, in order to prevent violations of the most fundamental human rights.[10] All this being said and taken into account, the outcome of an analysis of the current developments remains nevertheless that the role of the state has dramatically changed as compared to the old legal structure.[11] States have not vanished as primary actors of international law, but sovereignty as their main characteristic is substituted more and more by the role of states as creators and transmitters of legal obligations.

4. Structural Consequences I: Blurring of the Border between National and International Law in Practice

The shift from an actor-centered system to a subject centered-system has several consequences. A first important consequence is that the formerly strong barrier between national law and international law is eroding.[12] This can be illustrated by

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http://www.bundesverfassungsgericht.de/entscheidungen/rs20031105_2bvr150603en: "[T]he Federal Constitutional Court indirectly dedicates itself to the cause of enforcing international law and thereby reduces the risk of non-compliance with international law.", para. 38.

[9] As to their religious dimension see Jochen A. Frowein, *Religionsfreiheit und internationaler Menschenrechtsschutz*, in Religionsfreiheit zwischen individueller Selbstbestimmung, Minderheitenschutz und Staatskirchenrecht – Völker- und verfassungsrechtliche Perspektiven, 73, p. 73 (Rainer Grote/Thilo Marauhn eds. , 2001).

[10] Michael Reisman, Designing and Managing the Future of the State, 8 *European Journal of International Law* (EJIL) 409, 416 (1997).

[11] The changing role of the State under the circumstances of globalization is subject of many contributions see among others, John A. Perkins The Changing Foundations of International Law: From State Consent to State Responsibility, 15 Boston University International Law Journal 433 (1997); Oscar Schachter, The Decline of the Nation-State and ist Implications for International Law, 36 *Columbia Journal of Transnational Law* (Colum. J. Transnat'l L.) 7 (1997); Jochen Abr. Frowein, Constitutionalism in the Face of the Changing Nation State, in Constitutionalism, Universalism and Democracy – a comparative analysis (Christian Starck ed. 1999), 53; Peer Zumbansen, Die vergangene Zukunft des Völkerrechts, 34 *Kritische Justiz* (KJ) 46 (2001); Peer Zumbansen, Spiegelungen von Staat und Gesellschaft – Governance-Erfahrungen in der Globalisierungsdebatte, in: Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts (M. Anderheiden / St. Huster / St. Kirste eds.), 79 *ARSP-Beiheft* 15 (2001); St. Hobe, Der offene Verfassungsstaat zwischen Souveränität und Interdependenz (1998).

[12] Andrew Hurrell, International Law and the Changing Constitution of International Society, in *The Role of Law in International Politics*, 327, 338 (M. Byers ed. 2000); D. Kennedy, The Forgotten Politics of International Governance, 6 *European Human Rights Law Review* (EHRLR) 117, 118 (2001), speaks of a "porous boundary."

reference to a number of different areas. A good example, and one which is based upon a legal mechanism but uses economic and political incentives in order to achieve the desired result, is the 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*.[13] This convention prohibits the export of *any* waste to states that are not parties to it.[14] Thus, the economic consequences with respect to the export of waste in general are used as an incentive to encourage participation in this convention. The mechanism is very simple: the more states become parties to the Convention, the stronger the economic pressure to participate in the convention becomes as the number of possible trade partners for non-members diminishes. The convention regulates the procedures for exporting hazardous wastes in detail and has even pre-framed the details of a corresponding EU-regulation.

An important related consequence is that the influence of each single state on the outcome of a specific regulatory issue is reduced. This is even more so, the less "important" in economical, political or military terms the state concerned is. Such a development plays more or less automatically into the hand of strong states and superpowers. Along with this development go issues of legitimacy and democratic responsibility which will not be dealt with in this paper.[15]

5. Structural Consequences II: Human Rights Protection against International Acts

A second important consequence concerns the question of human rights protection. Here, we are faced with a dilemma, well known from the context of European community law.[16] On the one hand, it is evident that the application of national human rights standards may be used as a excuse for circumventing internationally agreed standards. On the other hand, the failure to legislate at the international level may lead to an intolerable deficit in human rights protection. It is not easy to

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[13] ILM vol. 28, 1989, 657.

[14] See Art. 4 Section 5 of the Convention: „A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party."

[15] Solutions have been advanced by several authors. See for instance Otfried Höffe, Demokratie im Zeitalter der Globalisierung (1999); David Held, Democracy and the Global Order (1995); for an overview of positions see Armin von Bogdandy, Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme, in 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* No. 4 (2003), forthcoming.

[16] See generally Trevor Clayton Hartley, The Foundations of European Community Law, 4th ed., pp. 132 (1998).

find a path between these two competing dangers. The issue has given rise to a number of legal disputes, most prominently with respect to the list of terrorist groups designated as such by the Security Council under Resolutions 1267 and 1390.[17] These resolutions provide *inter alia* for mandatory economic measures against private persons who are involved in terrorist activities. However, the procedure for being removed from the list is very complicated - a situation that may result in a person being listed without cause but nevertheless without any effective legal remedy for being removed from the list.[18]

What are the possible remedies to this dilemma? Two different situations may be distinguished: first, there is international law-making which involves the conclusion of treaties or the national application of norms set by an international body. In both situations, only the norms are international, they are not applied by an international organ and they have not been produced by an independent international organ. They require the involvement of national organs which thus – at least theoretically – remain under national control. Such judicial control is possible when the act of ratification is challenged by the Federal Constitutional Court (*Bundesverfassungsgericht*), for example.[19] Also, in applying the international norms, national courts have certain leeway in interpreting them in line with national human rights standards, although here again the problem of uniform application may arise. But at least as a means of last resort, national judicial control can be retained along the lines of the *Solange-II* jurisprudence of the Federal Constitutional Court whereby it is technically possible to block the international norm from application.[20] This is precisely the situation for national acts implementing Security Council Resolutions 1267 and 1390. Here, in principle, national courts can review the situation and, if necessary, refuse to freeze funds or seize assets if they consider human rights standards as not met.

A second type of situation concerns organizations which have the power to directly affect the legal position of an individual whilst bypassing national institutions.

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[17] A case is pending before the Court of First Instance of the European Community, see O.J. 2002 C 44/27. and an order of the Court concerning provisional measures (case T-306/01; available at http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=de); see in this respect Nicola Vennemann, European Union, in *Terrorism as a Challenge for National and International Law: Security vs. Liberty?* (Christian Walter/Silja Vöneky/Volker Röben/Frank Schorkopf eds. (2004), forthcoming, available at: http://edoc.mpil.de/conference-on-terrorism/country.cfm.

[18] See Gernot Biehler, Individuelle Sanktionen der Vereinten Nationen und Grundrechte, 41 *Archiv des Völkerrechts* (AVR) 169 (2003).

[19] BVerfGE 89, 155 – *Maastricht*.

[20] BVerfGE 73, 339, 378.

Here, due to the lack of involvement of national institutions, no control by national courts is possible. Such cases are the really hard cases with respect to the protection of human rights. How can these problems be addressed? One possible approach may be illustrated by the jurisprudence of the European Court of Human Rights. The European Court of Human Rights was confronted in 1999 with two cases brought against Germany that raised the issue of the immunity of international organizations.[21] The applicants, British nationals, had been working for the European Space Operations Centre (hereinafter: ESOC), which is run as an independent operation in Darmstadt, Germany, by the European Space Agency (hereinafter: ESA). When their contracts were terminated and the applicants filed suit against ESA in German labor Courts, German Courts refused to hear the case on the ground of ESA's immunity as an international organization. The applicants claimed a violation of their right of access to the courts guaranteed under Art. 6 (1) of the European Convention on Human Rights. In its decision, the Court accepted that granting international organizations immunity from jurisdiction was a legitimate means of assuring international cooperation.[22] However, it nevertheless required the member states to assure a certain level of human rights protection within the organization created:

> "The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial."[23]

After this rather cautious introduction, which merely states that "there may be implications as to the protection of fundamental rights," but leaves the concrete nature of these implications expressly open, the Court considered that the review mecha-

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[21] Eur. Court H. R., *Waite and Kennedy v. Germany* , Judgment of 18 December 1999, Reports of Judgments and Decisions 1999-I, 393 –; see also the parallel case *Beer and Regan v. Germany*, No. 28934/95; available at: http://hudoc.echr.coe.int/hudoc (visited on 12 November 2003).

[22] *Id.*, *Waite and Kennedy v. Germany*, para. 63.

[23] *Id.,* para. 67.

nisms within the organization in question must be seen as a material factor in determining whether granting the ESA immunity from German jurisdiction is permissible under the Convention. It looked into the mechanisms available in the internal law of ESA and considered them to be sufficiently comparable to national court proceedings so as to provide for effective protection.[24] The result of this approach is that the standards set by the Convention are "exported", so to speak, to the internal regimes of international organizations that are not themselves parties to the Convention. Technically, this is achieved by extending the obligations of the member states from their own legal orders to new regimes which they establish in the pursuit of regulatory aims. In other words, the Convention requires member states to assure that its standards are respected when they create distinct legal orders. The approach of the Court is interesting with respect to general international law because it may have repercussions on the law concerning immunity for international organizations. Where the immunity rule is considered to constitute customary international law, the jurisprudence of the European Court of Human Rights may contribute to a modification that takes up the human rights concerns and only allows for immunity where effective human rights protection is ensured. This may indicate a developing hierarchy in international law which merely relies on the human rights character of the provision in question and thus departs from the current structure of international law in which hierarchy is only accepted with respects to *ius cogens*.[25]

Viewed from the perspective of sovereignty, the approach followed by the Court reveals an interesting shift in the role of state: the member state is used as a necessary intermediary in order to transmit legal obligation from one international regime, *i.e.* the European Convention on Human Rights, to another, the internal legal order of the European Space Agency.[26]

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[24] "[T]he Court finds that, in giving effect to the immunity from jurisdiction of ESA on the basis of Section 20(2) of the Courts Act, the German courts did not exceed their margin of appreciation. Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention.", *id.,* para. 73.

[25] See in this respect Christian Walter, Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß, 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 961, 980 (1999).

[26] The German Federal Constitutional Court has used similar arguments in a recent decision concerning the European Patent Office, which is an organ of the European Patent Organization based in Munich. See Federal Constitutional Court, 4th Chamber of the Second Senate, 54 *Neue Juristische Wochenschrift* 2705 (2001).

II. The Obligation to Protect Human Rights and WTO-Law

1. Balancing of Interests between Human Rights Positions

The practical problems of human rights application in international and transnational contexts can be illustrated by reference to the World Trade Organization (WTO). Viewed from the national perspective, the representatives of the national executives in the committees of the WTO are very often subject to the legal obligation to protect fundamental rights (*Grundrechtsbindung*), as familiar in the German context from Article 20 (3) *Grundgesetz* (Basic Law). Such obligations are aimed primarily at the protection of their own population. It has to be extended by applying the case law of the European Court of Human Rights in Strasbourg, to all actions under the jurisdiction of the State concerned, where that State is a member of the Council of Europe.[27] From the perspective of the WTO, however, one of the central problems in terms of fundamental rights protection is that of transnational protection where the territorial matrix of the conventional human rights protection is inadequate. The nature of the problem is illustrated by the example of the controversial question of access by developing countries to patent-protected pharmaceuticals.[28]

The constitution of the Republic of South Africa emphasizes the State's duty to protect human rights (*Leistungsanspruch*), an obligation stressed in the sector dedicated to health-care provision.[29] The executive's obligation in this regard was the subject of a decision of South Africa's Constitutional Court in July 2002. According to the Court, the South African State has to either require pharmaceutical companies to sell their patent-protected, vital pharmaceuticals or to issue licenses for the domes-

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[27] Eur. Court H. R., *Loizidou v. Turkey*, Series A, Decision of 23 March 1995, No. 310, 23; *Cyprus v. Turkey*, Judgment of 10 May 2001, No. 25781/94; *Bankovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Decision of 12 December 2001, No. 52207/99, para. 61. Instructive on the development of case-law in this respect Parliamentary Assembly Report – Committee on Legal Affairs and Human Rights, Rapporteur Christos Pourgourides, *Areas where the European Convention on Human Rights cannot be implemented* (Doc. 9730) of 11.3.2003, available at: http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9730.htm.

[28] An introduction to this conflict is given by Roger Kampf, Patents versus patients?, 40 *Archiv des Völkerrechts* 90 (2002).

[29] Section 27 of the Constitution: Health care, food, water and social security (1) Everyone has the right to have access to - (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. [...].

tic production in order to fulfill this constitutional guarantee. The Court held that the constitution required the government ''to devise and implement within its available resources a comprehensive and coordinated program to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV''. The provisions of human rights protection in the Constitution of South Africa were constructed to reflect international human rights laws that bind South Africa, and the respondent in the Case – the Treatment Action Campaign – argued, with evident success, that government policy was in breach of South Africa's international legal obligations.[30]

These national – in this case, South African – requirements impair, however, the vested titles of – for example – the German pharmaceutical industry. The enterprises concerned have, on their part, a claim for protection of their intellectual property. This claim derives from both South African law in relation to South Africa, and German fundamental rights (Article 14 (1) *Grundgesetz*) against the Federal Republic of Germany resulting in efforts to grant diplomatic protection.

The companies' legal position receives additional normative protection from the multilateral regime of the TRIPS-Agreement (Agreement on Trade Related Aspects of Intellectual Property concluded under the umbrella of the WTO).[31] With the TRIPS-agreement, the WTO adds its own detailed regulations to the conventional system of the protection of intellectual property, which are intended to harmonize the standards of protection at a high level and to substantially facilitate the enforcement of those rights. It contains not only an organizational and procedural framework, but also material protection standards. In this regard, the regulations in the 5th Section (Articles 27 pp. TRIPS) concerning patents are of significant importance. The norms of the TRIPS-agreement go far beyond earlier such international regulations as the Paris Convention for the Protection of Industrial Property (1967) or the Convention on the Grant of European Patents (Munich Convention) of 5 October 1973. The fulfillment of these aims requires extensive legal adjustments particularly for the newly industrializing and developing countries, and thus substantial effort on their part.

The international system for the protection of intellectual property is open to harsh criticism from the perspective of the urgent need for life-saving pharmaceuticals in the fight against life-threatening epidemics. The problem concerns the distribution

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[30] Constitutional Court of South Africa, Case CCT 8/02, Judgment of 5 July 2002, available at: http://www.concourt.gov.za/.

[31] A systematic overview is given by Peter-Tobias Stoll / Frank Schorkopf, WTO – Welthandelsordnung und Welthandelsrecht, para 587 et seq. (2002).

of compulsory licenses and the interpretation of Article 31 TRIPS. Article 31 allows compulsory licensing and government use of a patent without the authorization of its owner. But this can only be done under a number of conditions aimed at protecting the interests of the patent- holder (bailee). For example, (unless there is an emergency) the person or company applying for a license must have attempted, unsuccessfully, to obtain a voluntary license on reasonable commercial terms, and adequate remuneration must be paid to the patent- holder. The authorization granted under compulsory licensing must also meet certain requirements. In particular, it cannot be exclusive, and it must as a general rule be granted predominantly to supply the domestic market (Art. 31 lit f TRIPS).

The requirement that the compulsory license be used "predominantly" to supply the domestic market entails certain practical problems. It limits the ability of countries that cannot produce pharmaceutical products, because many developing countries neither completely nor partially possess pharmaceutical production capacities, hence, national production is infeasible in many cases. Considering the health situation in a large number of developing countries, in which large parts of the population are infected with life-threatening and largely preventable epidemics (such as HIV, malaria, tuberculosis), substantial resistance to the TRIPS-regime has developed among the group of newly industrialized and developing WTO members. Some WTO Members have even decided to disregard their multilateral obligations for the protection of intellectual property in order to build up pressure on the patent holders.

At the request of the Group of African WTO-Members, the TRIPS-Council held a special discussion on intellectual property rights and access to pharmaceuticals as part of its week-long regular meeting in June 2001. This was the first time this matter had been put on the agenda of a WTO body. The work that subsequently took place in the Council for TRIPS became part of the preparatory work for the WTO Ministerial Conference held in Doha, Qatar in November 2001 and into the Declaration on the TRIPS-Agreement and Public Health that was there adopted by consensus by the WTO Ministers.

In the main Doha Ministerial Declaration of 14 November 2001, WTO members stressed the importance of implementing and interpreting the TRIPS-Agreement in a way that supports public health by promoting both access to existing medicines and the creation of new medicines. They therefore adopted a separate declaration on TRIPS and Public Health.[32] They agreed that the TRIPS-Agreement does not and

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[32] Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/W/2, 14 November 2001, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm. See Frederick M. Abbott, The Doha Declaration of the TRIPS Agreement and Public Health, 5 *Journal of*

shall not prevent members from taking measures to protect public health. They underscored members' ability to use the flexibility contained in the TRIPS-Agreement, including compulsory licensing and parallel importing. They furthermore agreed to extend exemptions on pharmaceutical patent protection for the least-developed countries until 2016. They finally assigned further work to the TRIPS-Council to establish a means of providing additional flexibility, so that countries unable to produce pharmaceuticals domestically can obtain generic supplies of patented drugs from other countries.[33]

In the course of the Ministerial conference in Cancun in August 2003, the WTO members came to a solution on the so-called "Paragraph 6 issue".[34] The TRIPS-Council provided special permission (an interim waiver) to deviate from the obligation in Article 31. The decision allows countries producing generic copies of patented products under compulsory licenses to export the products to eligible importing countries. At the same time the members recognized the necessity of the promotion of the transfer of technology and capacity structures within the pharmaceutical range of products.

This balance of competing interests can be interpreted as a reconciliation of the fundamental rights positions by negotiations (*Verhandlungslösung*).

2. The Reconciliatory Role of International Binding Standards

Such a negotiated reconciliation of interests, however, is only necessary where an international binding standard, capable of compromising interests on a normative basis, is lacking. A particular problem of the WTO, but not confined to it, is that the existing regulations frequently exist at the behest of the determined interests of one side (developed countries, OECD members) and fail to consider the interests of others (especially developing countries). The very existence of the complex WTO-

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international economic law 469 (2002) and Christoph Herrmann, TRIPS, Patentschutz für Medikamente und staatliche Gesundheitspolitik, 13 *Europäische Zeitschrift für Wirtschaftsrecht* 37 (2002).

[33] This is sometimes called the "Paragraph 6 issue", coming as it does under that paragraph in the separate Doha declaration on TRIPS and health.

[34] Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, WT/L/540, Decision of 30 August 2003, available at: http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm. See Michael Slonina, Durchbruch im Spannungsverhältnis TRIPS and Health: Die WTO-Entscheidung zu Exporten unter Zwangslizenzen, *Beiträge zum Transnationalen Wirtschaftsrecht*, vol.20, September 2003, pp. 8 available at: http://www.wirtschaftsrecht.uni-halle.de.

regime creates substantial demands on the members' legislative and administrative resources.

Nevertheless, the agreements under the umbrella of the WTO do try to consider – under the key phrase of "special and differential treatment, S & D" – the specific situation of developing countries. They contain special provisions both giving developing countries additional rights and allowing developed countries the possibility of treating developing countries more favorably than other WTO Members. These special provisions include, for example, longer time periods for the implementation of agreements and commitments as well as measures to increase trading opportunities for developing countries. The current situation of many WTO members indicates, however, that a large number of States find WTO obligations overwhelming as regards their financial, technological and personnel resources. In addition, the reconciliation of interests through negotiations presupposes a sufficient assertiveness on the part of both sides. The parties need officials skilled in trade matters and sufficiently seized of the issues both at the seat of the government and locally on site at the WTO in Geneva.

As the decision of the TRIPS-Council of 30 August 2003 illustrates, the very fact of the WTO's existence requires the general availability of specialist knowledge thereby increasing the need for technology transfer between industrialized and developing countries.

3. Responsibility for the Public Interest

A special problem for the existing WTO structure occurs in cases where questions of public interest fin their way onto the agenda. Issues of public interest – as for example environmental protection – are characterized by the fact, that no one institutionalized subject bears the interest as such. In a functionally differentiated system such interests can only be considered as interests of the community as a whole, involving all actors in the system. However the WTO is not equipped with a special enforcement mechanism for matters of public interest comparable to the reconciliation of conflicting interests by negotiation.

Here, the problems encountered on the international level do not differ from those in national legal orders. The national level also possesses no legal entity responsible as such for environmental protection. Solutions on the national level are therefore found through procedural protection: e.g. certain public and private projects are required to run an environmental impact assessment in order to provide the competent authorities with the necessary information enabling them to take a decision

on a specific project in full knowledge of its possible impact on the environment (*Umweltverträglichkeitsprüfung*)[35]; another mechanism is a collective court action brought in the public interest to serve as a test case (*Verbandsklage*), enabling non-governmental organizations to bring certain cases before the courts.
The specific arrangement of such solutions depends on the specificities of individual legal systems. This becomes clear if we turn our attention to the process of the development of such institutes like environmental impact assessment or collective court action and their acceptance on the national level. To that extent, it is not necessarily surprising that additional obstacles exist on the international level.. This is illustrated by the controversy among the WTO members over the admissibility of amicus curiae briefs in the dispute settlement procedure.[36] When the Appellate Body (AB) asserted the procedural possibility of individuals and organizations submitting amicus curiae briefs while nonetheless not being themselves members of the WTO, this step was extensively criticized.[37] The consistent opposition to amicus curiae briefs in the past by a number of member States points both to the possibilities for and difficulties of such procedural solutions in the international sphere.

4. The Moral Weight of Interests and the TRIPS-Compromise on Public Health

Returning to our initial assertion , that the national and the international legal order have fragmented into specific subject-dependent subsystems, the compromise by WTO members in the TRIPS-Council over the range of patent protection for certain pharmaceutical products indirectly affects positions (property) protected in the national legal orders and hence affects the national law of WTO members. The member States have reduced the scope of human rights protection for their citizens and enterprises by renouncing the rights to non-violation complaints in the dispute settlement and to differentiate the content of property rights by extending the applicability of compulsory licenses. However, this effect is restricted to certain subsystems, such as the protection of intellectual property. Other sectors – e.g. the services sector – are affected only indirectly, because a negotiated compromise always includes principles or compromises capable of generalization. Independent of this indirect influence, each case in an adjacent subsystem requires a new compromise

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[35] Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, O.J. 1997 L 73/5.

[36] See Georg C. Umbricht, An "amicus curiae brief" on amicus curiae briefs at the WTO, 4 *Journal of international economic law* 773 (2001).

[37] Compare WT/DS58/AB/R of 12 October 1998 – *US - Countervailing Duty*; WT/DS135/AB/R of 7 June 2000, para. 39-42, see also the Report on the General Council Meeting of 23 January 2001, WT/GC/M/57, para. 7.

on the level of member State negotiations in order to resolve possible knock-on conflicts.

These developments can be looked at from the perspective of solidarity in a given society. The general rule might be that the more heterogeneous and broad the circle of the states concerned is, the smaller the solidarity between its citizens will be. This means that in such cases the moral weight of a certain interest must be particularly large in order to be generally accepted. The example of the compromise found in the TRIPS-Council for the degree of protection of vital medicine illustrates the point. Infringing upon the property rights of the pharmaceutical industry only becomes acceptable because the life and death of large numbers of people in developing countries stands in opposition to the rather limited total social costs for the industrialized countries. A counter-example might stress this observation: the rather strict law of asylum and regulation of aliens in many states is caused by the populations' reduced willingness to solidarity concerning immigrants and asylum seekers from culturally different and remote countries. Under these circumstances the citizens are not willing to bear the high social costs implicated in high levels of immigration and thus restrictive legislation on asylum and immigration is the result. This is contrasted by the comparatively homogeneous context of the European Union in which Union citizens and their families have the right to move and reside freely within the Member States – with certain rights in the social security systems[38] – and are even allowed to participate in local elections.[39]

III. Conclusion

The shift from an actor- centered to a subject-centered concept of international law raises numerous legal questions at the border between general international law and national constitutional law, many of which have not yet made themselves fully visible. For quite some time we will have to live with intermingling elements from both national constitutional law and international law and the resultant hybrid structure. It is impossible to present general solutions to these very fundamental issues. However, it is suggested here as a general strategy to pursue the main functions which constitutions have fulfilled in national law under the traditional system (i. e. protecting human rights, legitimizing public power etc.) and to try to preserve these functions under the new conditions. The most important loss under the new

[38] Case C-224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi*, 2002 ECR I-6191; Case C-413/99, *Baumbast und R v. Secretary of State for the Home Department*, 2002 ECR I-7091. See Anastasia Iliopoulou / Helen Toner, A new approach to discrimination against free movers?, 28 *European Law Review* 389 (2003).

[39] Article 19 (1) TEC.

hybrid structure in pure legal terms concerns hierarchy. In most national systems, constitutional law is based on a hierarchy of norms, with the constitution, especially its human rights guarantees and its demands for democratic structures, at the top of the pyramid of norms. The structuring force of this hierarchical model is being lost in the process of globalization. It is difficult at this current moment in time to see any substitute for this loss, which leaves us, both on the national and public international level, with relationships of a hybrid structure. This makes it rather to speak at the moment of an "international constitutional law".[40] There may be elements of constitutionalization with respect to certain aspects of general international law and processes of constitutionalization may occur within specific regimes but it rather difficult at the moment to speak of international constitutional law.

Within the WTO-regime, structures of transnational fundamental rights protection can be identified as one element of international constitutionalization. The problem of access to patent-protected pharmaceuticals was mitigated by the TRIPS-Council. The decision allowing countries producing generic copies of patented products under compulsory licenses to export such products to eligible importing countries can also be interpreted as a reconciliation of fundamental rights positions by negotiation. Such balancing of interests by negotiation is especially prevalent in cases where international binding standards are unavailable. Thus where public interests are affected, the regime must take responsibility for the fact that no institutionalized subject is responsible *per se*.

[40] But see Robert Uerpmann, Internationales Verfassungsrecht, 56 *JZ* 565 (2001).