in concert with John Linarelli's recent review in these pages of Mathias Risse's book *On Global Justice*, this conversation highlights the centrality of questions of justice in IEL; the need for a pluralist approach to such questions as befitting the economic regulatory structure of a diverse planet; and the importance of a sincere and sustained engagement by IEL with the fields of constitutional and human rights law if IEL is to meet the challenges of multilevel governance in the delivery of international public goods. With forthcoming reviews of Joel Trachtman's *The Future of International Law* and Aaron James' *Fairness in Practice: A Social Contract for a Global Economy*, we look forward to the continuation of this discussion in these pages.

The Editors

doi:10.1093/jiel/jgu010
Advance Access Publication Date: 5 March 2014

International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods. By ERNST-ULRICH PETERSMANN, Oxford and Portland, Oregon: Hart Publishing, 2012. ISBN 978-1-84946-063-7, 540 pp.

For over three decades, the scholarship of Professor Ernst-Ulrich Petersmann has illuminated trade law for academics, practitioners, and students alike.[1] Writing with intensity, persuasiveness, and enviable productivity, Petersmann has opened more new doors into our thinking about international economic law (IEL)[2] than any scholar of his generation. In the 21st century, Petersmann's *oeuvre* has expanded its focus on the role of human rights norms within IEL. Indeed, more so than any other first-rank scholar, Petersmann has made it his ongoing mission to explore the topologies of both IEL and international human rights law in search of a more mutually reinforcing relationship and, even more ambitiously, a re-conceptualization of IEL.

Peterman's new treatise, *International Economic Law in the 21st Century*, lays out his intellectual edifice in its most comprehensive and inspirational form to date. The 'Introduction and Overview' provides a synopsis of the key theoretical moves regarding the interplay of domestic and international law, and points out how the recent global financial crisis reinforces the arguments in Petersmann's theses. The next eight chapters are self-contained essays on key issues of global governance and law—namely, providing interdependent public goods, respecting constitutional pluralism, imposing restraints on public and private power, making economic regulation consistent with human rights, regulating market failure, undergirding IEL with diverse principles of justice, reforming international organizations, and achieving multilevel

1 See Marise Cremona, Peter Hilpold, Nikos Lavranos, Stefan Staiger Schneider, and Andreas Ziegler (eds), *Reflections on the Constitutionalisation of International Economic Law. Liber Amicorum for Ernst-Ulrich Petersmann* (Leiden: Martinus Nijhoff Publishers, 2013).

2 This review follows the lead in Petersmann's book by using the acronym 'IEL' for international economic law. In my view, 'IEcL' is a better acronym to distinguish economic from international environmental law.

judicial protection of cosmopolitan rights. The last chapter provides a restatement of the key conclusions and lays out a copious research agenda for IEL that will nourish students and professors for decades to come.

Petersmann re-conceptualizes law without the traditional disciplinary borders. Unlike the first great IEL scholar Georg Schwarzenberger (1908–91), Petersmann does not separate IEL from other specialized, self-contained branches of international law such as intellectual property law. Petersmann also writes much more normatively than Schwarzenberger, and rejects the orienting value of international power politics. Petersmann self-identifies with the New Haven School of jurisprudence (pp 24, 137, 243, 402, 488) and its conception of law as a world-constitutive process of authoritative decision. Like the New Haven School co-founder Myres S. McDougal, Petersmann's workshop transcends both sides of the divide between so-called public and private law, and between national and transnational law. In addition, in line with the New Haven School, Petersmann imports valuable insights from the social sciences, in particular law and economics, international economics, and development economics.

More so than any of the other leading scholars in the IEL pantheon, Petersmann champions a cosmopolitan vision of law based on the 'Kantian ideal of universal just rules protecting maximum equal freedom of individuals, constitutional republics, mutually beneficial international trade and democratic peace' (p 352). By 'cosmopolitan', Petersmann means limiting the discretionary foreign policy powers of governments 'by empowering producers, investors, traders and consumers to engage in mutually beneficial economic cooperation across frontiers…' (p 67).

Summarizing Petersmann's scholarship is a difficult task because his reasoning has so many dynamic elements, and his writings are so deeply nuanced and replete with examples. This short book review will therefore abridge his arguments in the interest of providing an overview of his philosophy of law. Among the key questions he discusses are: What is the purpose of IEL? What legitimizes IEL? How would a 'cosmopolitan reinterpretation of the normative foundations of modern IEL' (p 68) compare to traditional Westphalian IEL? How should IEL be enforced? What procedural changes should be made in the WTO to improve its performance in line with this new thinking about IEL?

The purpose of IEL is to help governments and individuals overcome not only market failure, but also government failure. In particular, IEL operates to prevent abuses of private and public power and to ameliorate the undersupply of public goods. The needed public goods include not only outcomes such as the prevention of global warming, but also 'international institutions for the collective supply of interdependent international public goods' (p 57). Such international institutions act as a 'fourth branch of government which like the legislative, administrative and judicial branches require constitutional constraints and democratic legitimation…' (p 27).

For Petersmann, human rights lies at the center of IEL, not merely at its periphery. His treatise argues that 'the human rights obligations of all UN member states require reinterpreting and redesigning IEL…' (p 11) with 'stronger constitutional and judicial protection of individual rights of citizens in IEL whenever governments

restrict or distort mutually beneficial cooperation among citizens across frontiers' (p 19). In his treatise, 'IEL is conceptualized and justified primarily from a cosmopolitan citizen perspective as a system of norms and legal practices in order to promote not only economic efficiency and "sustainable development" but also the fulfillment of the human rights obligations of UN member states and democratic self-government' (p 14). He identifies one important human right throughout the study that is not explicitly included in the Universal Declaration of Human Rights (UDHR)—namely, '[t]he right of citizens to justification of government restrictions of individual freedom can be seen as one of the most basic human rights…' (pp 9–10). He also spotlights the 'human right to have international rights' (p 146), which is also not spelled out in the UDHR.

Seeking justice is central to Petersmann's vision to accomplish 'a cosmopolitan paradigm change in IEL' (p 20). He explains that '[i]t is only by identifying and explaining "principles of justice" justifying IEL that the "forest" behind the innumerable "trees" of IEL can become can become comprehensible again and democratically supported by citizens' (p 139). Indeed, he devotes an entire chapter of this book to explicating the principle that 'transnational rule of law must be justified by an overlapping consensus on principles of justice' (p 332).

The 'human rights revolution' requires that in the 21st century, 'all political power, law and governance must be justified vis-à-vis citizens and civil society…' (p 490). Although Petersmann notes that IEL derives its legitimacy both from inputs (e.g. procedural processes) and outputs (e.g. market outcomes, peace), he simultaneously refines his thesis by explaining that 'the "constitutional legitimacy" of IEL depends primarily on its consistency with human rights and constitutional democracy rather than on utilitarian welfare arguments' (p 30). In another passage, he calls for justifying and constitutionalizing IEL 'in terms of human rights and principles of justice' (p 7).

Throughout his book, Petersmann criticizes traditional 'power-oriented "Westphalian conceptions" of IEL' (p 512). The core dysfunction, he believes, is the 'traditional state-centric view of states as the only subjects of international law', a view that neglects 'the dominant role of non-state actors in the worldwide division of labour and the role of civil society and courts in the "recognition" and interpretation of rules of IEL' (p 14). He describes further this dysfunction: '[a]s illustrated by the unnecessary poverty of so many people in LDCs, the prevailing "Westphalian conceptions" of "international law among sovereign states" fail to protect citizens against widespread abuses of foreign policy powers and under-supply of international public goods' (p 11). Moreover, 'the current IEL system protects neither transnational rule of law for the benefit of citizens nor a just international economic and constitutional order based on coherent principles of justice' (p 368). In addition, public international law approaches 'tend to leave domestic rule implementation to the sovereign discretion of states without providing citizens with effective legal and judicial remedies in case of non-compliance' (p 79). This 'paternalistic treatment of citizens as mere objects of global economic government contributes to alienation and "rational ignorance" of citizens in respect of IEL' (pp 139–40).

Notwithstanding his decades of service in GATT and WTO Secretariats, Petersmann is quick to levy criticism at the contemporary WTO. He complains that '[t]he neglect by WTO dispute settlement bodies of the human rights obligations of WTO members, like the frequent neglect by domestic courts for constitutional requirements of interpreting domestic law in conformity with the international law obligations of the countries concerned (including WTO dispute settlement rulings) leads to citizens lacking effective judicial remedies against violations by governments of their WTO obligations' (p 411). Furthermore, he admits that '[c]ivil society rightly criticizes secretive WTO negotiations, dispute settlement rulings and investment arbitration that disregard consumer welfare and privilege powerful producer interests' (p 20).

To replace Westphalian law, Petersmann urges a 'paradigm shift' (p 2) to a new 'cosmopolitan theory of IEL' (p 24) in which IEL is 'defined, legitimated and protected in conformity with the human rights obligations of UN member states…' (p 302). Petersmann also calls for 'constitutionalizing IEL' (p 437). As he puts it, 'A major task of a cosmopolitan theory of IEL is to go beyond regulating "national self interests" and relations among state agents by extending constitutional safeguards to citizens for their transnational economic cooperation' (p 24). He goes on to explain that IEL should be conceived as a 'layered, multilevel legal order' based on 'respect for legitimate "constitutional pluralism"…' (p 497).

The new IEL paradigm provides a new answer to the core question of how international law obligations of states are to be enforced. International law guarantees of individual freedom should be 'interpreted not only as intergovernmental limitations of state powers, but also as directly applicable *individual freedoms* which citizens should be entitled to invoke and enforce in domestic courts' (p 369). In other words, the individual citizen would have the right to enforce WTO obligations against his or her own government in its domestic court. Individuals could also seek transnational 'judicial protection across national frontiers' (p 55). Refreshingly, in a book about the WTO, there is little attention to WTO enforcement practices of 'suspension of concessions or other obligations (SCOO)'.

Petersmann writes approvingly of the WTO's accession agreement with China in 2001, which contains numerous applicant WTO-plus obligations that applied only to China and not to incumbent WTO members. In his words, '[t]he negotiations on the accession of China to the WTO illustrate that—if the legal preconditions for a well functioning market economy are guaranteed neither at the national level nor in WTO law—constitutional democracies may find it necessary to insist on specific "WTO-plus commitments" to protect individual freedoms to import and export, property rights, and individual access to independent courts offering effective judicial remedies' (p 266).

I found this *ex-post* rationalization surprising because the China accession negotiations were hardly a model for fairness, transparency, or policy consistency. The WTO-plus commitments imposed upon China were not the result of cosmopolitan reason, but rather of the power politics that Petersmann objects to. By subjecting China to an unequal treaty, the accession agreement discriminates against China vis-à-vis other WTO members, including numerous WTO members where the

preconditions for a well-functioning market economy do not exist. Moreover, the drafting of the accession agreement was accomplished in secretive negotiations. Indeed, even a dozen years later, WTO practice continues to be to adopt new accession legal texts *before* the WTO Secretariat publicly releases them. In addition, to say that the demand for the WTO-plus obligations came from 'constitutional democracies' is to ignore the history of the negotiations that showed that the demand for these provisions emanated from powerful special interests. Curiously, Petersmann overlooks all that context in praising the China accession commitments even though in the beginning of his book he criticizes the fact that '[g]overnment representatives and specialized interest groups often collude in functionally specialized, international organizations without adequate democratic accountability of diplomats vis-à-vis general citizen interests…' (p 8).

More positively, the treatise contains numerous pragmatic suggestions for how WTO practices could be improved. For example, Petersmann calls for the following: strengthening the power of initiative of the WTO Director-General and the surveillance powers of the Secretariat; promoting stronger parliamentary control to strengthen checks and balances; increasing participation of civil society NGOs, for example, in trade policy reviews; establishing a Ministerial Executive Council with designated powers; and making available to domestic courts non-binding legal opinions on the interpretation of WTO rules.

Although Petersmann does not attempt to offer a theory of human rights law, his theory of IEL does address the fruitful interplay between the two. He explains that '[t]he functional interrelationship between human rights and IEL are reciprocal: protection and promotion of human rights becomes ever more dependent on IEL as the most important instrument for promoting consumer welfare and mutually beneficial, peaceful cooperation across frontiers; conversely, IEL becomes ever more dependent on respect for human rights as a precondition for international rule of law and for reducing economic transaction costs by protecting producers, traders, investors and consumers in the world wide division of labour' (pp 302–3). Petersmann also responds to a misconception about his scholarship, pointing out that '[he has] never argued for a specific "human right to free trade" as such specific human rights run counter to the "indivisibility" of human rights and the necessary balancing of liberty rights with all other human and constitutional rights' (p 404).

The last chapter in the book presents a comprehensive research agenda. Petersmann reminds us that many constitutional problems of IEL remain 'under-theorized' (p 8), and he offers a Baedeker (my own word, not his) for how economists, political scientist, philosophers, and legal practitioners in the future can take his ideas forward. Consider, for example, this nugget: '[e]conomic analyses of "market failures" and "public choice" analyses of "governance failures" must be supplemented by "constitutional choice" analyses of "constitutional failures" and by "comparative institutional economics" evaluating alternative decision-making processes like citizen driven market processes, political processes and judicial procedures' (p 31). He also predicts that 'it may only be a matter of time until WTO dispute settlement bodies are asked by complainants or defendants to interpret WTO rules with due regard to the human rights obligations of the WTO members concerned' (p 411).

In conclusion, Petersmann begins his tome by warning the reader that the IEL 'system established since the Second World War faces an unprecedented crisis requiring "new thinking"' (p 1). His book succeeds in supplying the required new thinking 'to reinterpret and redesign IEL by focusing on the human and constitutional rights of citizens, democratic self-governance based on transnational rule of law, and on consumer welfare as the major sources of legitimizing IEL' (pp 512–13). Even with its groundbreaking conclusions, I do not know whether the brilliance of this book will lead to the establishment of a Petersmann School of IEL. All too often, scholars prefer to reinvent their own wheels. But I do predict that in the decades ahead, the IEL of the future will move up the path that Ulli Petersmann has so adroitly reasoned with us to follow.

Steve Charnovitz
George Washington University Law School
doi:10.1093/jiel/jgu001
Advance Access Publication Date: 25 February 2014

Global Justice and International Economic Law: Three Takes. By FRANK J. GARCIA, Cambridge University Press, 2013. ISBN 9781107031920, 348 pages.

In his excellent monograph on *Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade* (Transnational Publishers, 2003), Professor Garcia has proceeded from the 'human tendencies toward exchange, toward order, and toward reflection' for exploring the role of justice in the context of international trade law building 'upon the classical concept of justice as Right Order and a liberal account of that Order as distributive fairness' (at xix–xx). Garcia's no less thought-provoking new monograph expands this research into the global justice dimensions of international trade law and trade negotiations by comparing 'three takes' on the relationships between trade law and justice theories: Rawlsian liberalism, communitarianism, and consent theory. As Garcia puts it,

> Each of the three approaches examined in this book – liberal internationalism, global communitarianism, and consent-based trade theory – offers a different way of addressing [the] central problem of normative pluralism… [each] assumes a different conception of the relationship between international trade law and justice, represents a different mode of justice discourse, and makes different demands on international economic law with respect to the promotion of global justice. (at 66)

Garcia acknowledges that there are many other 'Takes' on global justice, such as *cosmopolitanism* and J. Rawls' *Law of Peoples*. Yet, in view of Garcia's criticism of both *cosmopolitanism* (e.g. for neglecting the 'locally derived' communitarian origins of individual identities and of Western liberals' commitment to moral universalism) as well as of Rawls' *Law of Peoples* (e.g. for rejecting the 'difference principle' in Rawls'