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ARTICLE

Methodology problems in international economic law and adjudication

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Abstract This overview of "methodology problems" in international economic law (IEL) and adjudication defines "legal methodology" as the "best way" for identifying the "sources" of law, legitimate authority, the methods of legal interpretation, law-making and adjudication, the "primary rules of conduct" and "secondary rules of recognition, change and adjudication", the relationships between "legal positivism", "natural law" and "social theories of law", and the "dual nature" of modern legal systems. It discusses the methodological challenges resulting from the often incomplete, fragmented and under-theorized nature of multilevel, public and private regulation of transnational movements of goods, services, persons, capital and related payments. Governments and lawyers disagree on how to define the legitimate functions of IEL as an instrument of social change, the "legal system" of IEL, and how to transform the "law in the books" into socially effective "law in action" so as to protect the rights and welfare of citizens more effectively. Democratic, republican and cosmopolitan constitutionalism suggest that the five competing conceptions of IEL as (1) international law among states, (2) private international law (e.g. commercial, investment and "conflicts law"), (3) multilevel economic regulation (e.g. based on "law and economics"), (4) global administrative law and (5) multilevel constitutional law (e.g. in European common market and monetary regulation) need to be integrated; they must protect democratic, republican and cosmopolitan rights of citizens who—as "constituent powers", "democratic principals" and main economic actors—must hold multilevel governance institutions and their limited, delegated powers legally, democratically and judicially more accountable so as to limit "market failures" as well as "governance failures" more effectively. Arguably, the universal recognition of human and

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constitutional rights of citizens requires cosmopolitan reforms of IEL and stronger judicial remedies for protection of transnational rule of law.

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1 Introduction: incomplete, fragmented and under-theorized legal regulation as a methodological challenge

Most international agreements and other legal instruments [like the 1948 Universal Declaration of Human Rights (UDHR)] use indeterminate legal terms and regulate transnational relations in incomplete ways that call for progressive clarification, for instance through national and international rule-making, administration and adjudication. The 1969 Vienna Convention on the Law of Treaties (VCLT) recalls that "disputes concerning treaties, like other international disputes, should be settled … in conformity with the principles of justice and international law", including "human rights and fundamental freedoms for all" especially if the text, context, object and purpose of the applicable treaty provisions remain indeterminate and have to be clarified in conformity with the legal principles underlying incomplete treaty rules. Yet, there is often no agreement among the one hundred and ninety-three UN member states and their citizens on how to define under-theorized "principles of justice" as mentioned in numerous treaties (e.g. the UN Charter, human rights treaties, Article XXIII GATT); also the "balancing" of such principles and related public and private interests in national Constitutions and in jurisprudence of national and international "courts of justice" often remains contested, notably the relationship between state-centered "principles of justice" (like sovereign equality of states), people-centered principles (like self-determination of peoples, democracy) and cosmopolitan principles (like "inalienable" human rights and fundamental freedoms). Moreover, international treaties tend to focus on particular general interests (e.g. protection of specific environmental goods) without clarifying their relationship to other "public goods" (PGs), for example without specifically coordinating "fragmented" regulations pursuing "eco-centric environmental values" with those protecting competing "anthropocentric human rights values" or utilitarian economic values like "efficiency". Who should clarify—or settle disputes over—such "fragmented regulations"? Will different procedures and jurisdictions lead to diverging legal procedures, "applicable law" and "judicial balancing methods", for instance, in the interpretation of regional legal systems? How to coordinate incomplete rules that pursue competing values and are construed differently in different jurisdictions whose judicial decisions are legally binding only on the parties to the disputes? Does the narrow conception of international human rights law (HRL) by hegemonic countries that have ratified and implemented only few UN human rights and ILO labor rights conventions (like China, Russia, the USA) prejudge the different interpretations by countries that have ratified UN, ILO and regional human rights conventions as promoting universal moral and legal civil,

political, economic, social and cultural rights deriving from respect for human dignity?[1]

Western democratic constitutionalism proceeds from the insight that—both in national constitutional democracies and also in supranational regional communities like the European Union (EU)—the constitutionally agreed "principles of justice" (e.g. the human rights proclaimed in the US Declaration of Independence of 1776) must be transformed into constitutional and democratic legislation, administration, adjudication and international agreements in order to "constitutionalize" legal systems and institutionalize "public reason" for the benefit of citizens, thereby enhancing the democratic capabilities and "republican virtues" necessary for protecting PGs. Since Plato's book on The Republic (375 BC), the metaphor of the "state ship" is used in Western republicanism for describing the legal structure that protects society from the dangerous waters surrounding it. The Chinese proverb attributed to the Confucian philosopher Xunzi (298–220 BC) uses the metaphor of the "state ship" in a significantly different way: "The heavens create the people and appoint the ruler. The ruler is like a boat, the people are like the water. The water may support the boat, and it may also capsize it." In the Western metaphor, society and its rulers are on the boat together, and the captain acts as an agent of the people who are the democratic principal and "constituent power". The Chinese metaphor describes the people as keeping the state afloat without being on board the ship and without being capable of reforming or steering it. Such different "pre-conceptions" of law and the state are likely to influence legal interpretations.

For instance, the 1982 Constitution of the People's Republic of China is based on the democratic principle that "all power belongs to the people" (Article 2). Democratic constitutions derive from this principle the need for protecting human rights and delegation of limited powers to democratically elected legislative, executive and judicial government branches so as to protect constitutional, participatory, representative and deliberative self-government by citizens and peoples. China's Constitution, however, emphasizes the need for "dictatorship by the proletariat" (Preamble) and the "people's democratic dictatorship led by the working class" (Article 1), as postulated by Karl Marx based on his claims to know "historic truth" about the domination of the human condition by materialism. Human rights and democratic constitutionalism, by contrast, proceed from the "Kantian premise" that—because the limits of cognitive human reason (e.g. in terms of time, space, causality, subjective human senses) exclude knowledge of

[1] *See*, JOHN RAWLS, THE LAW OF PEOPLES, (1999) (emphasizing the limited political functions of UN HRL (1) to justify the legitimacy of states, (2) interventions in international relations, and (3) to legally limit pluralism among peoples. By contrast, the 2009 Lisbon Treaty on European Union (e.g. Articles 2, 3, 21 TEU) and its EU Charter of Fundamental Rights (EUCFR) recognize civil, political, economic and social human rights as integral parts of European law deriving from respect for human dignity. Even if recognition of UN and regional HRL and its derivation from respect for human dignity does not entail that all moral human rights are part of UN or European HRL, the moral and legal justification by human dignity and basic human needs (including institutionalization of "public reason" as a precondition for democratic capabilities) recognizes much broader "political functions" of HRL (e.g. in the context of international health law, copyright law, humanitarian and criminal law) than the narrow conceptions advocated by Rawls and by advocates of power-oriented, "realist conceptions" of "international law among sovereign states").

"absolute truth"—democratic constitutions must prioritize protection of individual human dignity (e.g. in terms of equal autonomy rights to choose one's own conceptions of a "good life" and "social justice", freedom to "falsify" claims of truth). Also "republican constitutionalism" focuses on participatory rights and republican virtues of citizens who must assume responsibility for protecting collective supply of (inter)national "public goods" (*res publica*). Hence, should a "court of justice" in a constitutional democracy (like India) with a Constitution committed to protection of fundamental rights and democratic constitutionalism interpret international treaty obligations (e.g. under UN HRL) in conformity with the constitutional rights of domestic citizens (e.g. the freedom of occupation, trade or business as protected in Article 19 of the 1949 Constitution of India) without regard to legal claims in other countries that support unlimited powers of governments (e.g. as claimed by communist rulers) and divergent treaty interpretations entailing "lack of reciprocity" in international relations among treaty partners?

2 Legal methodology for the world trading system: a multilevel "Republic of Peoples and Citizens"?

The term "legal methodology" is used here as the "best way" for identifying the "sources" of law, legitimate authority, the methods of legal interpretation, the "primary rules of conduct" and "secondary rules of recognition, change and adjudication", the relationship between "legal positivism", "natural law", and "social theories of law", and the "dual nature" of modern legal systems. The etymological origins of the word methodology—i.e. the Greek word "*meta-hodos*", referring to "following the road"—suggest that globalization and its transformation of most national PGs[2] into transnational "aggregate PGs"—like human rights, rule of law, democratic peace and mutually beneficial, international monetary, trading, development, environmental, communication and legal systems promoting "sustainable development"—require new legal methodologies in order to enable citizens and people to increase their social welfare through global cooperation. For instance, when communist China decided in 1978 to liberalize and regulate its national trade barriers on the basis of GATT rules and succeeded in lifting hundreds of millions of poor people out of poverty through restructuring China's economy in conformity with GATT/WTO law, China's legal methodology of regulating trade and domestic economic welfare fundamentally changed. Even though China prioritized "four modernizations" (of agriculture, industry, science and technology, and national defense), such changes of economic law and legal methodology tend to have systemic repercussions on legal systems beyond the economy. For instance, the autonomous WTO memberships of the four customs territories of China, Macau, Hong Kong and Taiwan set incentives for peaceful reduction of the economic and

[2] Pure "PGs" (like sunshine, clean air, inalienable human rights) tend to be defined by their non-rival and non-excludable use that prevents their production in private markets. Most PGs are "impure" in the sense of being either non-rival (e.g. "club goods") or non-excludable (like common pool resources).

legal divisions of China as a single sovereign country, e.g. due to rules-based free trade agreements progressively recreating a common market.[3] As GATT/WTO law continues to be deliberately kept outside the UN legal system, which of the competing foreign policy paradigms—like nationalist and "realist" foreign policies for an international "society of states", an "international law of peoples", a cosmopolitan international law of citizens, or republican conceptions of "international law for common PGs"—fits best into the system of "international economic law" (IEL)?

2.1 From jurisprudence to legal philosophy

Law can be defined (e.g. also in China) as authoritatively issued rules and related principles of social regulation that are enforced in order to serve social needs and values, as they are defined at particular times in particular places. Jurisprudence in the sense of practical knowledge related to law is much older than legal philosophy about the morality and ultimate values of law. According to the German philosopher Immanuel Kant (1724–1804), philosophy is essentially about three questions: (1) What can we know (e.g. in social and natural sciences)? (2) What shall we do (e.g. in morality and politics)? (3) What can we hope for beyond our limited knowledge (e.g. regarding questions of meta-physics and religion)? According to Kant, human answers to these questions inevitably depend on our conceptions of human beings. This is true also for legal philosophy as part of the social sciences, which is concerned with the two questions of (1) what can we know about law; and (2) what should we do in law and politics as private individuals, citizens, government officials, judges or members of parliaments? Constitutional democracies recognize citizens and peoples as "constituent powers" that must hold all "constituted", limited governance powers legally, democratically and judicially accountable so as to limit abuses of public and private powers in the collective supply of PGs demanded by citizens.

The ancient Greek philosopher Plato compared the "human condition" to prisoners in a cave, who observe shades on the wall without being capable of leaving the cave and regarding the true objects outside the cave in the sunlight that projects the shades into the cave. According to Plato, only philosophers might be capable of leaving the cave and discovering objective truths; hence, citizens should be governed by "philosopher kings" who can discern objective truth. Kant, by contrast, refuted the human capacity to discover objective truth.[4]

[3] CHIEN-HUEI WU, WTO AND THE GREATER CHINA: ECONOMIC INTEGRATION AND DISPUTE RESOLUTION (2012).

[4] On Kant's legal philosophy and its relevance for designing IEL *see*, ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY 161 (2012). Kant's "categorical imperative" is criticized by some philosophers as demanding too much of a "burden of judgment" from ordinary citizens. Aristotle's "Nicomachean Ethic" claimed that—among the four classical "cardinal virtues" (prudence, justice, courage and temperance)—only prudence requires intelligence rather than will power. The three "theological virtues" (faith, love and hope) likewise do not require particular intelligence; they support human-based "cosmopolitan values" rather than state-based power politics.

According to Kant, all human knowledge is constructed by human perceptions and the limitations of autonomous thinking. Kant rejected authoritarian claims of political philosophers like Thomas Hobbes (1588–1679), according to whom citizens should delegate absolute powers to political rulers in order to enable benevolent rulers to terminate the social "war of everybody against everybody else" driven by the rational egoism and animal instincts of human beings (*homo homini lupus est*). According to Kant, the "democratic revolution" leading to the transformation of the American colonies into US demonstrated the human capacity to establish "democratic self-government" and social peace based on rule of law—rather than "rule of men" as postulated by Hobbes. In view of the diverse knowledge of citizens and their diverse democratic preferences, republican and liberal legal philosophies call for justification of law and governance through social contracts among citizens establishing limited governance powers that must remain constitutionally restrained by agreed "principles of justice" based on respect for human dignity, equal constitutional rights, institutional "checks and balances" and "republican virtues" of citizens (like Kant's "moral imperative" of respecting maximum equal liberties subject to rule of law). Such "deontological" justifications of law and democratic governance (e.g. in terms of equal rights of all citizens as "democratic principals" of governance agents) are historically more recent than "consequentialist" justifications (e.g. of "states" and international law in terms of government control over a population in a limited territory). "Republican constitutionalism" (e.g. since the ancient Athenian and Roman city constitutions some two thousand five hundred years ago) was justified on grounds of both rights of citizens (e.g. the property rights of male adults), collective supply of PGs demanded by citizens, and republican "virtue politics" (Aristotle). Democratic, republican and cosmopolitan constitutionalism emphasizes the importance of constitutional rights of citizens for holding all governance agents accountable and for institutionalizing "public reason" guiding the dynamic evolution of legal systems.[5]

2.2 The "human condition" and the "dual nature" of modern legal systems

The Kantian conception of human reasonableness underlies also modern HRL based on the universal "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family (as) the foundation of freedom, justice and peace in the world" (Preamble of the UDHR). "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"

[5] ERNST-ULRICH PETERSMANN, MULTILEVEL CONSTITUTIONALISM FOR MULTILEVEL GOVERNANCE OF PUBLIC GOODS – METHODOLOGY PROBLEMS IN INTERNATIONAL LAW (2016).; Gillion. K. Hadfield & Stephen Macedo, *Rational Reasonableness: Toward a Positive Theory of Public Reason*, 127 (University of Southern California Law and Economics Working Paper Series, Working Paper, 2011) (noting the importance for people to agree on shared reasons for just laws coordinating a "stable equilibrium" in the decentralized application and enforcement of rules by individual agents that will support the institutions and interactions required by a political conception of justice only if they can be reasonably assured that they will benefit as a result).

(Article 1 UDHR). Yet, such legal assumptions of human reasonableness may conflict with economic models of a selfish *homo economicus* maximizing individual preferences through cost-benefit calculations. Also "public choice analyses" of rational behavior in "political markets" acknowledge the psychological, social and cultural influences on decision-making and human behavior, such as the "three principles" of:

- "Thinking automatically" (e.g. "fast" and "spontaneous" rather than "deliberative" and "reasonable slow thinking");
- "Thinking socially" (e.g. adjusting to social contexts of corruption); and
- "Thinking with mental models" that depend on the situation and the culture (e.g. in under-regulated financial industries profiting from tax-avoidance and circumvention of the law).[6]

The search for the "sources" of IEL, the best methods of legal interpretation, the "primary rules of conduct" and "secondary rules of recognition, change and adjudication" of IEL is usually approached from the point of view of legal positivism as a discovery of legal facts in the sense of authoritative law-making and effective law-enforcement. For example, Article 38 of the Statute of the International Court of Justice (ICJ) codifies the sources of international law in terms of "international conventions", "international custom, as evidence of a general practice accepted as law", and "general principles of law recognized by civilized nations". The same article defines the "rules of recognition" not only in terms of recognition by states; the references to "civilized nations" and to "judicial decisions and the teachings of the most highly qualified publicists … as subsidiary means for the determination of rules of law" qualify state consent in conformity with the customary rules of treaty interpretation as codified in the VCLT. For example, the Preamble and Articles 31–33 of the VCLT require not only that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31, para.1). Article 31(3)(c) also clarifies that "(t)here shall be taken into account, together with the context… (c) any relevant rules of international law applicable in the relations between the parties". As all UN member states have accepted human rights obligations as well as other "principles of justice" under the UN Charter and under additional UN conventions, the Preamble of the VCLT emphasizes:

> that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law…,
> Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

[6] WORLD DEVELOPMENT REPORT 2015: MIND, SOCIETY AND BEHAVIOR, (2015).

> Having in mind the principles of international law embodied in the Charter of the United Nations such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all.

The more "principles of justice" and "inalienable human rights" are recognized as integral parts of national and international legal systems, the more does this "dual nature" of modern legal systems—e.g. as legal facts and normative objectives that are inadequately realized in the non-ideal reality of national and international legal systems—challenge traditional distinctions between legal positivism, natural law theories and sociological conceptions of law focusing on the "law in action" as a "reality check" for the "law in the books". The universal recognition of the "inalienable" and "indivisible nature" of civil, political, economic, social and cultural human rights deriving from respect for the human dignity and reasonableness of human beings has incorporated natural law theory into positive national and international legal systems. The "inalienable core" of human rights and democratic self-governance limits power-oriented conceptions of "rule by law". The universal recognition by all UN member states of a human right to democratic self-governance reflects the concern of social theories of law that mere authoritative issuance of legal rules may not create "positive law" unless the rules and governmental authority are also legitimized by democratic consent and voluntary rule-compliance by free and equal citizens. As long as UN and WTO law and practices are dominated by governments that prioritize their own rights over those of citizens, civil societies are rightly challenging state-centered interpretations of IEL excluding democratic rights of citizens to invoke international "PGs treaties" in domestic courts of justice, as illustrated by the criticism from European citizens and parliaments of the exclusion of rights and remedies of citizens in the transatlantic free trade agreement of the EU with Canada (e.g. Article 30.6 CETA draft text of 2016).

2.3 Constitutional and republican conceptions of law as struggles for justice: the PG of an open trading system as a "Republic of Citizens"?

Legal positivism tends to define national and international law by the authoritative issuance and social effectiveness of legal rules and principles of law. Legal systems are construed as a union of "primary rules of conduct" and "secondary rules" of recognition, change and adjudication[7] that dynamically interact with general principles of law and with legal practices; the interactions of indeterminate "principles of law" with specific rules may justify diverse legal interpretations, just as changing legal practices by private and public legal actors may justify conflicting legal claims for "new interpretations" of rules so as to make them more consistent

[7] HLA HART, THE CONCEPT OF LAW (2nd ed. 1994), at 79 ("Law as the Union of Primary and Secondary Rules").

with "principles of justice" and "duties to protect PGs", thereby challenging traditional distinctions between legal positivism, natural law theories and social conceptions of law.[8] The litigation by tobacco producers challenging health regulations restricting supply and consumption of tobacco illustrate how national, regional, WTO and investment tribunals increasingly interpret economic rights in conformity with health rights and corresponding governmental duties to protect public health as a PG, as discussed below (section VI). Regardless of whether the need for legally and judicially reconciling private and public interests focuses on individual rights (e.g. in human rights courts) or on public interests (e.g. in international courts like the ICJ and the WTO Appellate Body), the legislative, administrative or judicial "balancing procedures" must aim at limiting unjustified divergences resulting from legal "fragmentation" or from competing, specialized "jurisdictions".

Similar to past struggles for decolonization, the unnecessary poverty and disregard for human rights inside many UN member states trigger and justify antagonistic "struggles for justice" (e.g. in the successive "Arab springs") by citizens—as democratic holders of "constituent powers"—aimed at legally limiting abuses of public and private "constituted, limited powers". All national and international legal systems are based on "incomplete agreements" that require constant clarifications of indeterminate legal principles and adaptations of incomplete rules to changing circumstances. For example, the recognition by all UN member states of "inalienable" civil, political, economic, social and cultural rights of citizens remains subject to "limitation clauses" in national constitutions, legislation and international agreements that must be applied and clarified through constitutional, legislative, administrative, judicial and international legal processes in response to the often diverse democratic preferences of peoples, the constitutional rights of citizens, their limited resources and the changing international challenges (like climate change and current migration and displacement of sixty million peoples). The American philosopher Rawls suggests to understand legal systems as social and political processes aimed at institutionalizing "public reason" through constitutional, legislative, executive, judicial and international rule-making. From such a dynamic "constitutional perspective", many areas of IEL suffer from non-inclusive rule-making and "limited public reason", for instance due to the "executive dominance" and intergovernmental law-making in most international organizations treating citizens as mere objects rather than as "democratic

[8] ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE (2010) (recognizing that modern positive legal systems include "inalienable" human rights and other constitutional "principles of justice", modern legal positivists acknowledge that moral-based legal arguments may be relevant also for examining the validity of legal rules); KAARLO TUORI, CRITICAL LEGAL POSITIVISM (2002) (the constant interaction between "law as a legal order" and "law as legal practices" is emphasized by "critical legal positivism", according to which law and its legal changes should be examined on (1) the surface level of positive law, (2) the legal culture, and (3) the deep structures of law); Gregory Shaffer, *A New Legal Realism: Method in International Economic Law Scholarship, in* INTERNATIONAL ECONOMIC LAW. THE STATE AND FUTURE OF THE DISCIPLINE (Colin Picker, et al. eds., 2008) (distinguishing four varieties of IEL scholarship: formalist/doctrinal, normative/activist, theoretical/analytical, and empirical).

principals" of all governance institutions.[9] Such "incomplete rules" (e.g. in GATT Article XXIII:1 on "violation complaints", "non-violation complaints" and "situation complaints") may be "efficient" if governments cannot agree on precise definitions of the rules and delegate their progressive clarification to future dispute settlement processes. Similarly, the fragmented international agreements on collective supply of international PGs—like international monetary, trade, investment, environmental, development, human rights and international criminal law agreements—remain subject to "public interest clauses" reserving sovereign rights to limit and reconcile "overlapping treaty obligations" for "interdependent PGs". For example, the 1994 Agreement establishing the WTO recognizes sovereign rights to restrict international trade in order to protect public health. Yet, these rights are acknowledged and regulated in diverse ways, for instance, in treaty preambles (e.g. the Preamble of the WTO Agreement on Technical Barriers to Trade = TBT), in treaty provisions on "objectives" and "principles" (e.g. Articles 7 and 8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), or in exception clauses (like GATT Article XX). WTO dispute settlement panels had to clarify whether these different legal drafting and regulatory methodologies entailed a different scope of the rights concerned. Many "legal standards" and "limitation clauses" in international trade, investment and regional economic integration agreements use indeterminate legal concepts that are progressively clarified through dialectic processes of intergovernmental rule-making, judicial interpretations and "deliberative democracy".[10]

Open international markets are transnational "aggregate PGs" that are produced through a "summation process" of coherent protection of "composite PGs" at local, national, regional and worldwide levels of governance. Their multilevel governance is confronted with numerous "collective action problems". For example, decentralized price and market mechanisms driven by supply and demand of citizens have proven to be indispensable information, coordination and sanctioning mechanisms. Yet, markets suffer from "market failures" like cartel agreements, unilateral abuses of power (e.g. through monopolies), information asymmetries, adverse external effects (like environmental pollution) and social injustices. National and international government efforts at correcting such "market failures" reveal that "governance failures" may harm domestic citizens even more than "market failures", as illustrated by poverty problems inside communist countries due to inefficient, centralized planning and corruption. Also regulatory methodologies depend on our conceptions of human beings, including the limited rationality and reasonableness of many people to control their "animal instincts" (e.g. by exploiting weaker persons through human trafficking, child labor, gender discrimination and other violations of labor rights). The past trials and errors with democratic, republican and cosmopolitan constitutionalism for collective supply of PGs (e.g. in the creation of common markets inside and beyond federal states)

[9] Ernst-Ulrich Petersmann, *The Establishment of a GATT Office of Legal Affairs and the Limited Public Reason in the GATT/WTO Dispute Settlement System, in* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 182–207 (Gabrielle Marceau, et al. eds., 2015).

[10] *See* PETERSMANN, *supra* note 4, at chapter VIII.

suggest that also the global PG of a mutually beneficial division of labor depends on legally empowering producers, investors, traders and consumers through democratic, republican and cosmopolitan rights for constituting, limiting, regulating and justifying IEL, multilevel governance and accountability for "governance failures", "market failures" and other abuses of power. European common market law governing economic cooperation among the thirty-one member states of the "European Economic Area" (EEA) and the multilevel EU citizenship rights and judicial remedies illustrate that such a transnational, functionally limited "republic of peoples" can be a realist, legitimate and powerful strategy for citizen-driven, collective supply of certain PGs rather than a "political utopia". Could it also serve as a model for decentralized economic integration in Asia or among the four Chinese customs territories that are economically independent members of the WTO?

3 How to justify and design IEL for a multilevel "Republic of Peoples"?

European and Asian philosophical thinking and their impact on economic regulation evolved in fundamentally different ways, for instance, in view of the fact that the 2500 years of European deliberations on democratic and republican governance of PGs (*res publica*) and many of the western philosophical categories (like metaphysics, epistemology, psychology, logic) have no equivalents in Indian or Chinese philosophy.[11] The economy of British India under colonial rule was remarkably stagnant and characterized by social oppression (e.g. caste systems), famines and low life expectancy (e.g. twenty-seven years in 1931). India's post-independence achievements in pioneering democratic governance, maintaining a secular state and achieving rapid economic growth since the 1980s (i.e. after previous experimentation with Gandhi's promotion of a "return to the spinning wheel in the village" and Nehru's socialist economic policies) remain qualified by unnecessary poverty, environmental problems and social discrimination (e.g. of the Dalit caste, women), inadequate infrastructures and social services (from schooling and health care to provision of food security, safe water and drainage), unequal income distribution and corruption.[12] The universal commitment (e.g. in UN HRL) to respect the value premises of "normative individualism" and "human dignity" (e.g. in terms of equal autonomy rights) entails that state-centered "Westphalian conceptions" of IEL must remain embedded into citizen-oriented, constitutional rules for constituting, limiting, regulating and justifying multilevel governance of global PGs like the world trading system. As illustrated also by the UN Guiding Principles for business and human rights and their incorporation into the legal practices of thousands of transnational business corporations and other non-

[11] RAMPRASAD CHAKRAVARTHI, EASTERN PHILOSOPHY, (2005) (emphasizing the different focus in Indian philosophy (e.g. its metaphysical focus on exploring one's true self) and Chinese philosophy (e.g. its greater focus on inner and social harmony, wise governments and responsible citizens)).

[12] JEAN DRÈZE & AMARTYA SEN, AN UNCERTAIN GLORY, INDIA AND ITS CONTRADICTIONS (2013).

governmental organizations (like the International Federation of Football Associations) in the context of the "UN Global Compact",[13] the mutually beneficial cooperation among private producers, investors, traders and consumers—and the limited delegation of regulatory powers to multilevel governance institutions—remain constitutionally limited by equal human, constitutional and cosmopolitan rights (like freedom of commercial contracts, property rights, mutually agreed arbitration) limiting abuses of power in all human transactions in national, transnational and international interactions. As centralized, worldwide governance systems tend to be neither politically feasible nor legally and economically desirable (e.g. in view of their inadequate information and coordination mechanisms and potential abuses of power), respect for the constitutional rights of citizens requires decentralized "bottom-up governance" based on multilevel constitutional and republican rights, obligations and decentralized coordination mechanisms (like market competition).

3.1 Republican theories of "aggregate PGs" and "collective action problems"

In contrast to private goods that are produced spontaneously in private markets in response to effective demand by consumers, PGs (like human rights, rule of law) depend on collective supply by governments due to inadequate incentives or means for their private protection. Depending on their respective "provision paths", some PGs can be supplied unilaterally by "single best efforts" (e.g. an invention). The supply of some other PGs depends on the "weakest links" (e.g. dyke-building, global polio eradication, nuclear non-proliferation). "Aggregate global PGs"—like a mutually beneficial world trading system—tend to be supplied through a "summation process" of local, national and regional PGs. They are confronted with numerous "collective action problems" such as:

- "Prisoner dilemmas" and "free-riding" due to attempts at avoiding the costs of producing PGs (like protection of world food security through FAO/WTO commitments, climate change prevention through carbon-dioxide limitations) that benefit also the "free-riders" refusing to share the adjustment costs;
- "Jurisdiction gaps" and "governance gaps" due to power politics (e.g. veto-powers preventing consensus-based conclusion of the WTO Doha Round negotiations, non-ratification of the International Criminal Court jurisdiction by China, Russia and the USA, non-implementation of the Nuclear Non-Proliferation Treaty and its circumvention by "failed states" like North-Korea);
- Lack of resources, inadequate protection of property rights and "capture" of regulatory institutions (e.g. impeding protection of biodiversity and tropical forests in many less-developed countries);
- "Constitutional gaps" and "accountability gaps" (e.g. for protecting human rights and rule of law in UN governance) due to inadequate leadership for

[13] PETERSMANN, *supra* note 4, at 226.

"responsible sovereignty" and "duties to protect internationally agreed common concerns"; or
- "Incentive gaps" and "discourse failures" due to non-inclusive "executive domination" of intergovernmental organizations treating citizens as mere objects rather than as "democratic principals" of all governance institutions and "agents of justice".

As the provision of PGs is the main justification of states and of other public organizations, legal and political research on PGs is much older (e.g. going back to the republican Constitution of ancient Rome some 2500 years ago) than the economic distinction between private and public goods in Adam Smith's *The Wealth of Nations*. PGs theories explore techniques for limiting the collective action problems, for example by

- Limiting "free-riding" through transformation of PGs (like the world trading system) into "club goods" (like the WTO);
- Circumventing veto-powers (e.g. in the WTO) through "plurilateral agreements" among "coalitions of the willing" (e.g. FTAs pursuant to Article XXIV GATT);
- "Differential and preferential treatment" compensating less-developed countries for "positive externalities" (e.g. of protecting tropical forests and their greenhouse gas absorption capacities) and sharing of transitional adjustment costs (e.g. of moving from fossil fuels to "green energy");
- Public education and subsidization of "public reason" (e.g. information on climate change and its harmful effects) in order to limit "discourse failures";
- Limiting domestic "governance failures" through multilevel commitments (e.g. through competition and environmental rules, HRL), assistance (e.g. for national health protection and tobacco control measures), stronger legal and democratic accountability mechanisms, "countervailing rights" of adversely affected citizens, and multilevel judicial remedies; or
- Limiting the "executive dominance" in "disconnected UN and WTO governance" by multilevel parliamentary and judicial involvement promoting "republican governance" and multilevel "democratic constitutionalism".

Some UN Specialized Agencies have been established through functionally limited "treaty-constitutions" that explicitly link their respective multilevel governance of international PGs—for instance, in the ILO, WHO, FAO and UNESCO—to corresponding human rights, such as labor rights and human rights to protection of health, food, education and rule of law. Yet, with the exception of the "tri-partite" composition of the ILO institutions (by representatives of governments, employers and employees), all UN institutions tend to be dominated by intergovernmental decision-making without effective democratic participation and accountability for the frequent non-implementation of UN and WTO obligations inside many countries. Most UN and WTO government executives insist on their "diplomatic privileges" and "member-driven governance" so as to avoid rights of citizens to hold governments accountable by invoking and enforcing UN and WTO

obligations in domestic jurisdictions. Multilevel UN and WTO governance of international PGs often remains "disconnected" and ineffective. The reciprocal rights and obligations among governments in international relations are not implemented and protected by many states due to the treatment of citizens as mere objects rather than legal subjects of international law and the determination of governments to prevent citizens and domestic courts to hold governments accountable for violations of international trade, investment and environmental rules.[14]

3.2 Competing conceptions of IEL and of its underlying "principles of justice"

The universal recognition of "inalienable" and "indivisible" human rights entails increasing legal protection of civil, political, economic, social and cultural freedoms of citizens and economic actors—like producers, investors, traders, consumers and non-governmental organizations—who often conceptualize international economic regulation from different perspectives and value premises. For instance,

- Governments insisting on "state sovereignty" and pursuing "national interests" tend to perceive IEL as public international law regulating the international economy (e.g. the 1944 Bretton Woods Agreements, GATT 1947, the 1994 WTO Agreement);
- Private economic actors using their private legal and economic autonomy in the global division of labor perceive IEL primarily as private international transaction law, commercial, corporate and "conflicts law";
- Citizens, democratic institutions and courts of justice in constitutional democracies tend to perceive IEL from a republican perspective as multilevel democratic regulation of "market failures", "governance failures" and other PGs (e.g. national competition, trade, environmental, labor and social legislation as preconditions for the proper functioning of a "social market economy") that must remain consistent also with principles of economic efficiency;
- EU citizens and their twenty-eight EU member states and representative EU institutions view European economic law as multilevel constitutional regulation of their common market and of multilevel governance of other European PGs (like transnational rule of law and multilevel protection of human and constitutional rights of EU citizens), even if third European countries insist on maintaining their diverse constitutional traditions in designing IEL among EU and, e.g. EEA member countries;
- UN Specialized Agencies, the WTO and ever more regional economic organizations recognize that their primary and "secondary" treaty law is increasingly limited by "global administrative law" principles protecting transparency, legal accountability and rule of law in multilevel governance of

[14] ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 18 (1997) (pertaining to the exclusion by governments of "direct applicability" by citizens of GATT/WTO rules).

international monetary stability, the world trading system, world food security, global health protection and other transnational PGs.[15]

In order to develop a coherent theory of IEL and clarify the legal interrelationships among different value premises, one can use the distinction by the American legal philosopher Ronald Dworkin of the following "four stages of legal theory":

- At the semantic stage of law, many legal terms (like "IEL", human rights, trade and investment law standards like non-discrimination and "fair and equitable treatment") remain indeterminate "interpretive concepts" that may be used by different actors with different meanings;
- At the jurisprudential stage, IEL requires justification in terms of "principles of justice" (e.g. state-centered vs cosmopolitan, constitutional and global administrative law conceptions of IEL) and elaboration of a convincing theory of "rule of law" that citizens can accept as legitimate;
- At the doctrinal stage, the "truth conditions" have to be constructed of how particular fields of law-making and administration can best realize their values and justify their practices and ideals (e.g. insisting on competition, environmental and social law limiting "market failures" as pre-condition of a well-functioning "social market economy"); and
- Judicial administration of justice must apply, clarify and enforce the law in concrete disputes by independent and impartial rule-clarification that institutionalizes "public reason" and protects equal rights and social peace.[16]

Since Aristotle, procedural, distributive, corrective, commutative justice and equity continue to be recognized as diverse "spheres of justice" in the design and justification of dispute settlement systems (e.g. for "violation complaints", "non-violation complaints" and "situation complaints" pursuant to GATT Article XXIII). Post-colonial IEL also includes "principles of transitional justice" based on preferential treatment of less-developed countries (e.g. in Part IV of GATT and in the dispute settlement system of the WTO) as well as "cosmopolitan principles of justice" based on the universal human rights obligations of all UN member states. In contrast to the "freedoms of the ancient" which protected only limited freedoms of a privileged class of male property owners (e.g. in the republican constitutions of Athens and Rome 2500 years ago), modern constitutional democracies proceed from equal human rights and constitutional rights of citizens as preconditions for "constitutional justice".[17]

[15] PETERSMANN *supra* note 4, chapter 1 (discussing these competing conceptions of IEL).

[16] RONALD DWORKIN, JUSTICE IN ROBES (2006).

[17] Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and* "*Constitutional Justice*", 19 EUR. J. INT'L L. 769–798 (2008).

3.3 Does HRL require cosmopolitan conceptions of IEL?

The more civil, political, economic, social and cultural human rights protect corresponding private, political, economic, social and cultural freedoms that must be legally constituted, limited, regulated and justified through democratic legislation, administration, adjudication, international law and multilevel governance of transnational PGs, the more must multilevel economic regulation be interpreted and protected for the benefit of citizens as "democratic principals" of governance agents with constitutionally limited, delegated powers. In regional customs union and free trade agreements (FTAs) among European countries, trade rules addressed to governments have been consistently interpreted and protected by national and European courts as protecting also equal freedoms and rights of citizens rather than only reciprocal rights of governments. As stated by the EU Court of Justice (CJEU):

> "the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down".[18]

Such interpretation of liberal trade rules recognizing private economic actors and citizens as legal subjects of IEL is in conformity with the citizen-oriented, rights-based nature of international commercial law (e.g. based on private contract law, property rights and autonomously agreed arbitration), international investment law (e.g. protecting investor rights and remedies though investment treaties), HRL and constitutional law (e.g. protecting basic rights of citizens as "constituent powers" and "democratic principles" vis-à-vis government agents with limited, delegated powers). It is also supported by the comprehensive GATT/WTO guarantees of individual access to judicial remedies, for instance in the field of GATT (Article X), the WTO Antidumping Agreement (Article 13), the WTO Agreement on Customs Valuation (Article 11), the Agreement on Pre-shipment Inspection (Article 4), the Agreement on Subsidies and Countervailing Measures (Article 23), the General Agreement on Trade in Services (Article VI GATS), the Agreement on TRIPS (Articles 41–50, 59) and the Agreement on Government Procurement (Article XX). Yet, as WTO institutions remain dominated by government executives interested in limiting their legal, democratic and judicial accountability vis-à-vis citizens, WTO dispute settlement bodies are reluctant to balance public and private interests (e.g. in "fair price comparisons" in the determination of "dumping margins" and antidumping duties) in terms of individual rights of citizens. Also in the external FTAs of the EU with third countries, governments increasingly exclude "direct applicability" of FTA provisions by citizens and other non-governmental, economic actors in domestic courts.[19]

[18] *See Defrenne v Sabena*, [1976] ECR 547, ¶ 31; *Angonese* [2000] ECR I-4139.

[19] Aliki Semertzi, *The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements*, 51 CML. REV. 1125–1158 (2014).

4 "Constitutional justice" and different "contexts of justice"

Theories of justice emphasize the need for "constitutional justice" protecting the impartiality and independence of "courts of justice" (as exemplars of public reason) and of constitutional assemblies elaborating "constitutions" constituting a social order and its basic long-term rules, institutions and principles asserting a higher legal rank. Such "principles of justice" are not about absolute truths, but about protecting individual and democratic diversity and legal equality in "different contexts" of procedural, distributive, corrective, commutative justice and equity in all human interactions in national, transnational and international relations by distinguishing, respecting and "balancing" private and public autonomy rights and corresponding duties.[20] The customary law requirement of settling disputes "in conformity with human rights" and other "principles of justice" requires "balancing" all civil, political, economic, social and cultural rights and the corresponding "public interests" and governmental "duties to protect". Such "balancing" and "weighting"[21] may differ depending on the diverse "contexts of justice":

- The different contexts of private moral and legal freedoms protect diverse ethical conceptions of a "good life" through moral and legal rights and duties;
- The utilitarian principles underlying multilevel economic regulation—such as the legal ranking of trade policy instruments in GATT/WTO law according to their respective economic efficiency, or the commitment of EU law to a "highly competitive social market economy" within "an area of freedom, security and justice" (Article 3 TEU) among twenty-eight EU member states—aim at protecting "justice as economic efficiency",[22] albeit often in imperfect ways, as illustrated by the one-sidedly libertarian focus on economic liberties and property rights in international investment, commercial and intellectual property law and adjudication[23]; opposition to government taxation for financing the supply of PGs, risk being inconsistent with HRL and democratic legislation.

[20] RAINER FORST, CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM (2002).

[21] MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY (2012) (referring to balancing" and "weighting" of competing principles and rules as dominant techniques of rights adjudication in national and international legal systems, and on the diverse "suitability", "necessity" and "proportionality *stricto* sensu" tests).

[22] By treating citizens as mere objects of governmental "utility maximization" and neglecting human rights, utilitarian focus on efficient production and distribution offers no guarantee for taking into account the non-economic dimensions of human welfare, for instance, whenever restrictive business practices or emergency situations increase prices depriving poor people of effective access to water, essential food and medical services. The utilitarian assumption that morality consists in weighing and aggregating costs and benefits so as to "maximize happiness" (e.g. by governmental redistribution of the "gains from trade" at the whim of the rulers) risks being inconsistent with the moral principles underlying modern human rights (like respect for human dignity and "inalienable" human rights).

[23] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974) (regarding libertarian theories of "justice in initial holdings" and "justice in transfer"). In the twenty first century, libertarian claims to unrestricted self-ownership (e.g. to sell one's body parts), freedom of voluntary exchange (e.g. for outsourcing pregnancy for pay) and compensation for "regulatory takings" of foreign investor rights, like

- The legal prioritization (e.g. in democratic constitutions and human rights instruments) of human and constitutional rights over utilitarian "common goods" is justified by democratic "discourse justifications" (e.g. recognizing social discourse as reasonable only to the extent that the discourse partners implicitly and autonomously recognize each other as free and equal participants in their discursive search for truth)[24]; contrary to John Locke (who invoked god for justifying human rights), constitutional democracies, European and UN HRL derive "inalienable human rights" from respect for human reasonableness, including a right "to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Article 28 UDHR)[25];
- Even though the universal recognition of human rights (e.g. in UN law) as constitutional foundation of all governance powers confirms the legal priority of equal human freedoms (as defined by human and constitutional rights) as integral part of positive, national and international legal systems in the twenty-first century, most human rights guarantees remain subject to communitarian regulation in order to protect PGs. Yet, in contrast to English conceptions of parliamentary sovereignty and American conceptions of civil and political human and constitutional rights as "trumping" in case of conflicts with democratic majority legislation, European courts acknowledge that legislative and administrative restrictions on human rights require "balancing" of competing civil, political, economic, social and cultural rights in order to establish whether governmental restrictions are suitable, necessary and proportionate means for reconciling competing rights through reasonable procedures.[26]

Footnote 23 continued
libertarian opposition to governmental taxation for financing the supply of collective PGs, risk being inconsistent with HRL and democratic legislation.

[24] Robert Alexy, *Menschenrechte ohne Metaphysik*?, 52 Deutsche Zeitschriftfür Philosophie 15–24 (2004) (on discourse theory, and the implicit, moral respect of discourse partners as having reasonable autonomy and dignity, as justification of human rights "without metaphysics"). *See also* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? (2009) (comparing Kant's moral and Rawls' contractual justifications of principles of justice, human rights and hypothetical "social contracts", and discussing their criticism from communitarian perspectives. Similar to Kant's justification of his cosmopolitan "right of hospitality" on moral grounds, the legal interpretation of EU "market freedoms" as "fundamental rights" can be justified on moral rather than only utilitarian grounds (e.g. as representing "generalizable human interests" of all EU citizens). Also the derivation of individual investor rights and judicial remedies from international investment treaties, like the derivation of labor rights from ILO conventions, can be justified not only on utilitarian grounds, but also on human rights principles.

[25] Kantian, Rawlsian and other modern theories of justice (e.g. by Dworkin and Ackerman) explain why moral respect for human autonomy and reasonableness requires the priority of equal liberty rights (as "first principle of justice") over particular conceptions of the "good life" and the "common good". According to both Kant and Rawls, a just society protects the equal freedoms of its citizens to pursue their own, often diverse conceptions for a good life – provided such conceptions remain compatible with equal freedoms for all – without imposing any particular conception of a good life; cf. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

[26] PETERSMANN *supra* note 4, chapters 3 & 8 (comparing the different American and European judicial standards of reviewing economic legislative and administrative acts.).

The inevitable controversies over principles of procedural justice, distributive justice, corrective and commutative justice and equity in IEL illustrate that—also in many areas of IEL—"justice", as a "relational concept" that protects "just relations among persons", continues to be procedurally and substantively under-defined. It requires multilevel legal clarification through discursive justification and legal and judicial clarification vis-à-vis individuals as "agents of justice", who are entitled to public justification of governmental restrictions of their human, constitutional and other rights.[27] For instance, by clarifying indeterminate rules through legally binding interpretations and judicial "gap-filling", investment arbitral awards and WTO dispute settlement findings—similar to other judicial jurisprudence—progressively develop the law and its underlying "general principles",[28] thereby justifying the systemic relationships between rules and institutions and often inducing legislative and administrative responses that can further clarify indeterminate rules.

4.1 Dialectic "fragmentation" and "integration" of legal systems through democratic, republican and cosmopolitan constitutionalism

In contrast to authoritarian "top-down conceptions" of legal and social regulation (e.g. from Confucius and Plato up to Karl Marx), liberalism and democratic constitutionalism perceive legal, institutional and methodological "fragmentation"—as well as progressive "re-integration" through diverse "constitutional" and "judicial methods"—as dialectic legal processes, as illustrated by the constitutional "checks and balances" separating legislative, executive and judicial branches of government and the customary law requirement of interpreting treaties and settling related disputes "in conformity with the principles of justice and international law" (Preamble and Article 31 VCLT). In view of the human rights obligations and corresponding constitutional limitations of all governance institutions, legal interpretations of IEL should embrace inclusive "constitutional methodologies" that acknowledge

- the reasonable, common interests of all human beings in protecting producers, investors, workers, traders and consumers cooperating in a mutually beneficial, global division of labor;
- the corresponding government duties to respect, protect and fulfill the human and constitutional rights of citizens in response to their democratic demands for more effective protection of international PGs; and

[27] RAINER FORST, THE RIGHT TO JUSTIFICATION. ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE (2012).

[28] Alec Stone Sweet & Giacinto della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez,* 46 N.Y.U. J. INT'L L. & POL. 911–954 (2014): On the different cultures and legal understandings of judicial "balancing" and "proportionality review" *see also*: GRANT HUSCROFT, ET AL., PROPORTIONALITY AND THE RULE OF LAW. RIGHTS, JUSTIFICATION AND REASONING (2014).

- the democratic and republican need for justifying legitimate authority and for holding all government and "governance" powers accountable vis-à-vis citizens as "democratic principles" and "republican owners" of the polity.

Cosmopolitan methodologies—by taking into account the embeddedness of modern legal systems in a "global legal world", as well as the indispensable role of citizens, transnational rights and international law for protecting "aggregate PGs" as defined, *inter alia*, by human and constitutional rights of citizens—can succeed only as multidisciplinary approaches to legal problems in their transnational political, economic, social and cultural contexts, with due respect for "methodological pluralism".[29] As politics will often continue to be controlled by local and national interests, the task of jurisprudential and doctrinal rethinking and reordering of incoherencies among local, national, transnational and international rules, principles and governance institutions falls also on civil society, scholars and courts of justice whenever they are confronted with injustices of UN and GATT/WTO rules and policies and inadequate responses by national governments and parliaments.

4.2 Need for comparative institutionalism

"Comparative institutionalism" empirically confirms that multilevel regulation of transnational PGs should rely on decentralized regulatory methods (like citizen-driven markets, democratic decision-making, contract law and litigation)—rather than only on centralized regulatory agencies and intergovernmental (e.g. UN/WTO) organizations—for limiting the ubiquity of "market failures" and "governance failures" in transnational economic relations. Also the fifteen UN Specialized Agencies rely on diverse treaty rules, institutions and decision-making processes for collective supply of functionally limited, yet interdependent global PGs. Some UN specialized agencies justify their law and governance on deontological grounds, such as labor rights justifying the law and governance of the International Labor Organization (ILO) and the "enjoyment of the highest attainable standard of health (as) one of the fundamental rights of every human being" justifying the law and governance of the World Health Organization (the Preamble of the WHO). Other organizations refer to consequentialist and utilitarian justifications, such as "ensuring humanity's freedom from hunger" as explicit objective of the Food and Agriculture Organization (FAO), or "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand" (Preamble of GATT 1947). The UN Educational, Scientific and Cultural Organization (UNESCO) recognizes the importance of promoting "public reason" and "republican virtues" through "education of humanity for justice and liberty and peace" in view of the fact that "since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed" (Preamble of the

[29] Ernst-Ulrich Petersmann, *Methodological Pluralism and its Critics in International Economic Law Research,* 15 J. INT'L ECON. L. 921–970 (2012).

UNESCO Constitution). The jurisprudence of UN tribunals increasingly reflects the structural and transformational changes of international law, for instance by

- increasing references in ICJ jurisprudence to other international, regional and also national courts of justice "as subsidiary means for the determination of rules of law" (Article 38(1)(d) ICJ Statute) in order to determine what state practice continues to support and accept as law (opinio juris), e.g. the jurisdictional immunity of states even if *jus cogens* is involved[30];
- emphasizing that the settlement of disputes among states must remain in conformity with their human rights obligations[31];
- evolutionary interpretation and development of international environmental law in ICJ judgments like *Gabcikovo-Nagymaros*, *Pulp Mills* and *Whaling in the Antarctic*[32];
- ascertaining international legal practice no longer only in terms of state consent, but recognizing also individuals, corporate actors and international organizations as legal subjects of ever more fields of international law, whose rights limit traditional principles of "international law among states" (e.g. lack of reciprocity as not limiting the application of human rights treaties; recognition of *erga omnes* and *jus cogens* obligations limiting the legal relevance of state consent and enlarging the scope of rights of diplomatic protection against human rights violations; different allocation of burden of proof in case of certain human rights violations by authoritarian governments; award of damages in the 2012 ICJ judgment as reparation for the violation of the human rights of Diallo).[33]

The reality of "institutional pluralism" and "constitutional pluralism" at worldwide, regional and national levels of governance confirms that different "PGs regimes" pursuing different policy objectives and "principles of justice" may also require different governance institutions depending on their specific "collective action problems". For instance, the tripartite structures of ILO institutions are justifiable by the competing rights and interests of labor representatives (e.g. interested in high wages), employer representatives (e.g. interested in low production costs) and governments (e.g. interested in "social peace" and avoidance of costly strikes). The compulsory WTO dispute settlement system offers a mutually beneficial PG due to its reduction of transaction costs, promotion of legal security, and progressive clarification of indeterminate legal rules and principles through impartial and independent adjudication.

[30] *Jurisdictional Immunities of the State*, (*Germany v. Italy*), 2012 I. C. J 99 (Feb. 3).

[31] *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation*), Provisional Measures, Case No. 22, Order of Nov. 22, 2013 ("The settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned").

[32] PIERRE-MARRIE DUPUY & JORGE E. VINUALES, INTERNATIONAL ENVIRONMENTAL LAW (2015) (overview of international environmental adjudication and of human rights courts identifying human rights provisions with environmental content).

[33] Mads Andenas, *Reassertion and Transformation: From Fragmentation to Convergence in International Law*, 46 GEO. J. INT'L L. 685, 712 (2015) (discussing the relevant ICJ judgments in *Congo v Uganda* (2005), *Diallo* (2010/2012) and *Belgium v Senegal* (2012)).

5 Multilevel governance problems of "global PGs": From "law and economics" towards the "Geneva consensus"

A mutually beneficial trading system belongs to the most ancient economic PGs, for instance promoting trade in the Mediterranean and Europe based on Roman law, transnational commercial law (*lex mercatoria*) and international trade agreements among Greek and Italian city republics. The term "Washington consensus" is used for describing the market-oriented economic policies underlying the 1944 Bretton Woods agreements and the 1947 General Agreement on Tariffs and Trade (GATT 1947) as applied by the World Bank and the International Monetary Fund (IMF) in their lending and financial assistance policies. Their focus on macroeconomic disciplines (e.g. fiscal and budget disciplines, tax reform, liberalizing interest rates, competitive exchange rates), trade and investment liberalization, privatization, deregulation and protection of property rights has come under increasing criticism from the "Geneva consensus" underlying the law of UN human rights bodies, the ILO and other UN institutions (like the WHO) at Geneva, which justify multilevel governance of international PGs in terms of civil, political, economic, social and cultural human rights (i.e. normative individualism) rather than only in terms of state sovereignty and economically "optimal ranking" of policy instruments (e.g. market-based tariffs and exchange rates rather than non-tariff trade barriers, separation and market-based coordination of monetary, trade and development policies). The "consistent interpretation" and "integration requirements" underlying the customary rules of treaty interpretation of Article 31(3) of the VCLT legally require taking into account the citizen-oriented "principles of justice" underlying the "Geneva consensus" in the legal interpretation of international treaties and related dispute settlement proceedings. Yet, in view of the "executive domination" of the Bretton Woods institutions and GATT/WTO, it is often only at the request of citizens resorting to national and regional courts of justice that the legal and economic principles underlying international trade and investment law are being reconciled with the constitutional and cosmopolitan principles underlying the human rights obligations of all UN member states.[34]

5.1 The "Washington consensus" on "law and economics" in IEL

Economics studies markets, welfare and human behavior as "cost-benefit relationships" between human ends and scarce means that have alternative uses. The 1944 Bretton Woods institutions—i.e. the IMF and the World Bank—and GATT 1947 promote mutual economic gains from a global division of labor—based on open markets, monetary stability, convertibility of national currencies and development assistance—as advocated by liberal economists since Adam Smith and David Ricardo. They provide for "separation of policy instruments" (e.g. in Article XV GATT) so as to enhance the efficiency of monetary, trade policy and development

[34] PETERSMANN *supra* note 4, at chapter 8. (discussing the jurisprudence of European courts). See also PASCAL LAMY, THE GENEVA CONSENSUS. MAKING TRADE WORK FOR ALL (2013); MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW (2013).

policy instruments, target specific "market failures" and "governance failures" (like currency manipulation, welfare-reducing trade discrimination and protectionism), and limit distortions of trade and competition (e.g. by using payments restrictions as monetary substitute for trade policy instruments). The legal ranking of policy instruments in GATT 1947 is based on "law and economics" and the "optimal intervention theory" elaborated by Nobel Prize economist James Meade:

- Non-discriminatory taxes, product and production regulations, and competition rules are considered to be economically optimal and legally permitted (e.g. pursuant to GATT Article III) in view of their avoidance of discriminatory market distortions.
- Discriminatory trade restrictions at national borders are permitted only as border taxes (notably tariffs) within the limits of reciprocally agreed tariff bindings (Articles II, XVIII GATT) that do not interrupt the market mechanisms based on supply and demand.
- Discriminatory non-tariff trade barriers are prohibited in view of their additional welfare costs and market-distorting effects (cf. Article XI GATT) subject to "public policy exceptions" reserving sovereign rights to protect non-economic PGs (e.g. Article XIX–XXI GATT).
- Discriminatory export subsidies and "import-substitution subsidies" are prohibited according to the GATT/WTO subsidy rules in view of their trade-distorting effects; production subsidies are "actionable" only if they cause injury to competitors.[35]

Economic theories explaining the gains from liberal trade and from "separation of policy instruments", or the design of "optimal interventions" for correcting "market failures" and for addressing collective action problems in supplying "public goods", are important for the rational design of many trade regulations. The economic justifications of the GATT legal requirements of using transparent, non-discriminatory and market-conforming trade policy instruments also serve political and legal "constitutional functions" for limiting welfare-reducing abuses of discretionary foreign policy, for instance by promoting the constitutional values of non-discrimination, transparent, rules-based policy-making as well as citizen-oriented economic, legal and political integration (e.g. within customs unions like the EU and MERCOSUR, or between China, Hong Kong, Macau and Taiwan as autonomous WTO members).[36] Yet, some trade rules (e.g. on safeguards and "exceptions", anti-dumping and countervailing duties) are based on political rather than economic justifications.

[35] HENRIK HORN & PETROS C. MAVROIDIS, LEGAL AND ECONOMIC PRINCIPLES OF WORLD TRADE LAW (2013).

[36] Frieder Roessler, *The Constitutional Function of the Multilateral Trade Order, in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 53 (Meinhard Hilf, et al. eds., 1993) (explaining the economic, political and legal reasons underlying the ranking of trade policy instruments in GATT); Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law in the 21st Century, in* COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW 155–242 (2011).

5.2 The limits of "trade theories" for explaining trade regulation

The Bretton-Woods Agreements, GATT/WTO law and most other areas of IEL outside Europe are based on utilitarian principles of "Kaldor-Hicks efficiency" and cost-benefit-analyses aimed at enhancing "total national welfare" without requiring compensation of the losers from trade or maximization of general consumer welfare (e.g. in the sense of "Pareto efficiency"); the mere possibility of using the gains from trade for funding a hypothetical compensation scheme is considered to be a sufficient justification even if rulers in many UN member states appropriate much of the "gains from trade" (e.g. in terms of tariff revenue and "protection rents") as well as from foreign loans and investment concessions in order to enrich themselves at the expense of general consumer welfare.

According to Nobel laureate Paul Krugman, "(i)f economists ruled the world, there would be no need for a World Trade Organization. The economist's case for free trade is essentially a unilateral case: a country serves its own interests by pursuing free trade regardless of what other countries may do."[37] Economic theories justifying reciprocal trade liberalization in the context of trade agreements can only partially explain trade rules and institutions. Economic "terms-of-trade" theories claim that governments negotiate trade agreements in order to protect market access commitments against foreign "terms-of-trade" manipulation (e.g. by means of export tariffs, which were found to be inconsistent with China's WTO obligations in *China-Raw Materials*).[38] According to "commitment theories", reciprocal trade liberalization commitments are necessary on domestic policy grounds for overcoming political pressures from import-competing producers for "import protection" by enlisting political support from export industries benefitting from reciprocal trade liberalization (e.g. in terms of additional export opportunities, importation of cheaper inputs). As shown by Ethier and Regan,[39] there is little evidence for the claims by "terms-of-trade" theories that:

- governments actually engage in systematic "terms-of-trade manipulation" exploiting "national market power";
- they have the knowledge and political support for manipulating international prices through thousands of "optimum tariff items" aimed at improving terms-of-trade;
- the terms-of-trade tariff revenue will always outweigh the domestic costs from import protection; terms-of-trade considerations can explain all trade rules (e.g. prohibitions of trade embargoes, export subsidies, and of voluntary export restraints, the injury requirement for safeguard measures, third-party adjudication, etc.); and
- "politically motivated trade protection" distorting domestic prices is "politically efficient" and therefore not liberalized by reciprocal trade agreements, notwithstanding the fact that trade agreements and trade negotiators tend to focus on

[37] Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LIT.113 (1997).

[38] Appellate Body Report, *China*: *Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, adopted on 22 February 2012.

[39] Donald H. Regan, *What are Trade Agreements For? Two Conflicting Stories Told by Economists, with a Lesson for Lawyers*, 9 J. INT'L ECON. L. 951 (2006); Wilfred J. Ethier, *The Theory of Trade Policy and Trade Agreements: A Critique*, 23 EUR. J. POL. ECON. 605 (2007).

reducing politically motivated import protection, export subsidies and voluntary export restraints and hardly ever refer to "terms-of-trade" manipulation.

Also economic "commitment theories", "public choice" and "public goods theories" offer few concrete guidelines for designing and justifying trade rules such as the WTO rules on sanitary measures, services trade, intellectual property rights and dispute settlement. "Pareto efficiency" (e.g. in the sense of making the government applying the trade policy measure better off and nobody else worse off) remains rare in international trade regulation. Defining "efficiency" and "politically optimal tariffs" in terms of whatever policy objectives and preferences a government pursues neglects the "input legitimacy" of trade regulation, for instance in terms of democratic legitimacy, rule-of-law, general consumer welfare and respect for human rights. Such "principles of justice" are not mentioned in many functionally limited trade agreements like WTO law; yet, citizens and democratic parliaments increasingly insist on transparent and democratic trade policy-making for the benefit of citizens, as illustrated by

- the European Parliament's refusal, in 2012, to ratify the draft "Anti-Counterfeiting Trade Agreement" negotiated by the EU Commission without public debate[40]; or
- the widespread political opposition in civil society and national and EU parliaments against non-transparent negotiations of transatlantic FTAs of the EU with Canada and the USA and their ratification if the FTAs provide judicial privileges for foreign investors without protecting rights and remedies of adversely affected EU citizens.

5.3 From "justice as efficiency" to "constitutional economics" and "human development"

Economic utilitarianism neglects the impossibility of measuring, comparing and maximizing all human preferences ("utilities") on a single scale. The welfare of a nation, the quality of the life of citizens and their "life satisfaction" (e.g. in terms of health, education, democratic self-government) cannot be inferred from measuring national income. The political and legal goals of democratic constitutionalism to "institutionalize public reason" for the benefit of democratic people and their fundamental rights depend less on economic than on political and legal justifications of trade rules, institutions and dispute settlement systems, for instance in terms of limiting abuses of political and private power. From a constitutional perspective, people are the real wealth of a nation; the objective of development "should be to create an enabling environment for people to enjoy long, healthy and creative

[40] Marise Cremona, *International Regulatory Policy and Democratic Accountability: The EU and the ACTA, in* REFLECTIONS ON THE CONSTITUTIONALISATION OF INTERNATIONAL ECONOMIC LAW – LIBER AMICORUM FOR ERNST-ULRICH PETERSMANN 155 (Marise Cremona, et al. eds., 2014).

lives".[41] Constitutional economists (like Nobel Prize laureate James M. Buchanan) criticize the "constitutional ignorance" of neoclassical welfare economics and trade theory, for instance their often unrealistic assumptions of perfect knowledge and perfect competition, factor mobility at zero transaction costs, "optimal" government corrections of market failures, and authoritarian definitions of "social welfare functions" by aggregating diverse individual preferences.[42] Constitutional economists emphasize not only (like institutional economists) the functional dependence of efficient market competition on liberty rights (e.g. freedom of profession, freedom of contract, freedom of consumer choice), property rights (e.g. in savings, investments and traded goods), non-discriminatory market access rights (e.g. as in EU law), institutions (like a stable currency) and legal security (e.g. *pacta sunt servanda*, due process of law, access to courts) as legal preconditions for efficient agreements on market transactions and reduction of transaction costs. They also argue that people can realize mutual gains not only from voluntary contracts in economic markets, but also from constitutional contracts in political markets that enable citizens to escape from "prisoner dilemmas". By placing constitutional liberties and other agreed core values (like monetary stability) beyond the power of majoritarian politics, and by protecting a decentralized "private law society" based on voluntary cooperation, constitutional citizen rights and open markets facilitate individual consent to the basic constitutional rules.

5.4 The dialectic evolution of IEL: towards a "Geneva consensus"?

The transformation of international investment law (discussed in section six), global health governance (section seven) and of regional economic integration law (e.g. by "mega-regional" FTAs like the EU's transatlantic free trade agreements with Canada and the USA) confirms that—due to the rational egoism ("fast thinking") of economic actors and their limited reasonableness ("slow thinking"), as discussed in section two—IEL tends to evolve through dialectic "learning processes" based on

- *Unilateralism* (e.g. colonialism, unilateral liberalization of the English Corn Laws in 1846, unilateral trade liberalization by China since 1978);
- "*Constitutionalism*" (e.g. creation of common markets and customs unions inside federal states and among European states);
- *Bilateralism* (e.g. the system of bilateral trade agreements among European states 1860–1900, the more than thirty bilateral trade agreements concluded on the basis of the US Reciprocal Trade Agreements Act of 1934, hundreds of bilateral textile agreements since the 1960s, thousands of bilateral tax and investment agreements);
- *Regionalism* (such as the today more than six hundred FTAs) and
- *Global multilateralism* (e.g. in the context of GATT and WTO agreements).

[41] HUMAN DEVELOPMENT REPORT 2010, 1 (2010) (reaffirming a broad definition of "human development (as) the expansion of people's freedoms to live long, healthy and creative lives; to advance other goals they have reason to value; and to engage actively in shaping development equitably and sustainably on a shared planet. People are both the beneficiaries and the drivers of human development, as individuals and in groups).

[42] PETERSMANN *supra* note 4, at 377.

"Fragmentation" and progressive "re-integration" of international law are legally interconnected rather than separate dynamics aimed at reforming international law, for instance by interpreting treaties "in conformity with the principles of justice and international law", including "human rights and fundamental freedoms for all" and other "relevant rules of international law applicable in the relations between the parties" (Preamble and Article 31 VCLT). Due to the self-interests of government executives in limiting their legal and judicial accountability, legal interpretations advanced by citizens and impartial courts of justice often differ from those of UN and WTO diplomats prioritizing their own rights in UN and WTO legal instruments. Debates on "fragmentation" and "constitutionalization" of international law differ depending on whether the legal contexts are controlled by national and international courts (e.g. deciding on national tobacco control litigation) or by government executives attempting to exclude legal and judicial accountability vis-à-vis adversely affected citizens (e.g. by submitting investor-state disputes to secretive arbitration, or by excluding "direct applicability" of FTA rules by citizens in domestic courts). From the perspective of reasonable citizens as "democratic principles" who must hold all governance agents legally, democratically and judicially accountable, the limitation of the "collective action problems" of transnational "aggregate PGs" (like public health protection and a mutually beneficial world trading system) requires supplementing "republican constitutionalism" for collective supply of national PGs by "cosmopolitan constitutionalism" for multilevel governance of transnational aggregate PGs. In conformity with the "systemic integration" requirements of the customary rules of treaty interpretation and adjudication (Article 31(3)(c) VCLT), the human rights obligations of all UN member states contribute to a progressive transformation of IEL and of its state-centered "Washington consensus" towards a more citizen-oriented "Geneva consensus", as it underlies UN HRL and the more citizen-oriented governance of international PGs by UN human rights bodies and UN Specialized Agencies like the ILO, WHO and other organizations at Geneva.

5.5 Multilevel governance and "regulatory competition"

The functional interrelationships of local, national, regional and worldwide governance of "aggregate PGs" are well reflected in IEL. For example,

- WTO membership includes not only states, but also sub-state actors (like economically autonomous customs territories such as Hong Kong, Macau and Taiwan) and supra-national economic organizations (like the EU) with diverse constitutional regimes.
- Trade liberalization and regulation in the context of the WTO take place unilaterally (e.g. in the context of many accession negotiations), bilaterally (e.g. tariff liberalization among "main suppliers"), regionally (e.g. in FTAs and customs unions) and through other "plurilateral" agreements (e.g. the WTO

Government Procurement Agreement) and worldwide WTO agreements (e.g. the 2014 Trade Facilitation Agreement).

- The WTO institutions set incentives for reducing transaction costs by negotiating "incomplete framework agreements" [e.g. the General Agreement on Trade in Services (GATS)] whose rules are progressively clarified and supplemented by additional "annexes" (e.g. on financial services, telecommunication services), "clarification" of indeterminate GATS rules (e.g. through WTO dispute settlement findings), and intergovernmental negotiations on additional liberalization and regulation of services trade (e.g. through a "Trade in Services Agreement" as a preferential FTA in terms of GATS Article V).
- WTO law also provides for "multilevel judicial governance" and rule-clarification based on WTO requirements of individual access to national and regional courts (GATT Article X), commercial arbitration (e.g. pursuant to Article 4 of the WTO Agreement on Pre-Shipment Inspection), WTO dispute settlement panels and the WTO Appellate Body.
- The "horizontal cooperation" among WTO members inside WTO institutions, as well as among WTO institutions and UN Specialized Agencies (pursuant to Article V WTO Agreement), is supplemented by numerous forms of "vertical cooperation" between WTO institutions (like the Trade Policy Review Mechanism (TPRM)) and national institutions (e.g. regular meetings of national parliamentarians inside the WTO, cooperation with national technical standardizing bodies and non-governmental institutions meeting, e.g. in the annual WTO public *fora*).

The "regulatory competition" at private and public, national, regional and worldwide levels of governance promotes dynamic learning processes (e.g. regarding national regulatory agencies for competition policies, risk-assessment procedures for sanitary measures, scope and design of trade-related intellectual property rights, trade-related environmental rules) and legal harmonization at regional and worldwide levels of governance. For instance:

- Most regional FTAs have made the experience that decentralized, legal and judicial accountability mechanisms (e.g. competition, environmental and social rules and institutions, courts of justice) are of crucial importance for limiting "market failures" as well as "governance failures" in the creation of national and regional common markets.[43]

[43] GEORGE ANDERSON, INTERNAL MARKETS AND MULTILEVEL GOVERNANCE: THE EXPERIENCE OF THE EU, AUSTRALIA, CANADA, SWITZERLAND AND THE US (2012); ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW, INTERNATIONAL AND DOMESTIC FOREIGN TRADE LAW AND POLICY IN THE UNITED STATES, THE EUROPEAN COMMUNITY AND SWITZERLAND (1991) (explaining why the constitutional legitimacy of multilevel economic regulation should be enhanced by interpreting the multilevel guarantees of equal freedoms, non-discrimination, rule of law and access to justice in national, regional and worldwide economic law in mutually coherent ways for the benefit of citizens and their constitutional rights in domestic legal systems. Such "mutually consistent interpretations" enhance the legal and judicial accountability of multilevel governance agents that are often inadequately controlled by citizens, civil society, parliaments and courts of justice and fail to effectively protect PGs demanded by citizens).

- Transnational "cosmopolitan rights" protecting citizens across national frontiers—like human rights, EU citizenship rights, rights of free movement of persons beyond state borders (e.g. due to liberalization of services), multilevel EU parliamentarianism, and recognition of transnational rights of migrants (e.g. to take up employment and receive social security benefits while residing in another common market member country)—are no longer "unique European experiments" in rights-based, regional common markets and integration law; their "enabling", "legitimating", "enforcement" and "republicasn functions" (e.g. as decentralized means for limiting implementation deficits of PGs regimes) and "derivative nature" (i.e. being linked to state citizenship rather than to human rights) are increasingly recognized also in African, Latin American and Central American integration regimes.[44]

The vital role of international trade in generating economic growth, reducing unnecessary poverty, promoting peaceful cooperation (e.g. for tackling many other challenges of globalization) and empowering citizens to limit "governance failures" reflects the national and regional experiences of all countries that creation of national and regional common markets is the most important "engine of growth" and of peaceful, social transformation provided trade opening remains embedded into citizen-oriented, rights-based "republican constitutionalism" as it has evolved—through centuries of "trials and errors"—since the ancient city republics in Greece and Italy more than 2500 years ago. Sections six to seven illustrate this need for reforming and adjusting interdependent PGs regimes through multilevel protection of republican rights of citizens by discussing recent changes in international investment law and global health law. Section eight concludes by identifying similarities and differences among "republican constitutionalism" aimed at promoting "republican virtues" and protecting civil and political rights against abuses of state powers, including Chinese political traditions of linking the mandates of political rulers to respect for "social citizenship rights".

6 Legal fragmentation: How to reconcile investment law and adjudication with human rights?

Until the ICJ judgment in the *ELSI* dispute,[45] most international investment disputes were decided either by recourse to domestic courts or by diplomatic protection of the foreign investor by the home state which, occasionally, submitted the dispute to international courts like the ICJ or its predecessor, the Permanent Court of International Justice. Yet, as illustrated by the *ELSI* judgment delivered by the ICJ more than twenty-five years after the dispute arose between the US investor and the

[44] Carlos Closa & Daniela Vintila, Supranational citizenship: rights in regional integration organizations, (2015) (unpublished manuscript, on file with the author, documenting the increasing recognition of transnational economic, labor, social and political citizenship rights (e.g. in the EU, the EEA, the Andean Community, MERCOSUR, the Central American Common Market, the Economic Community of West-African States, the Gulf Cooperation Council) and of regional parliamentary institutions.).

[45] *ELSI Case*, (*United States v. Italy*), 1989 I.C.J. Rep 15.

local authorities in Sicily, most foreign investors perceive prior exhaustion of local remedies in national courts—followed by "politicized", lengthy and costly procedures of diplomatic protection and disputes among states in international courts—as inadequate legal and judicial safeguards of investor rights. Also other investment disputes in the ICJ—like the 2007, 2010 and 2012 judgments in the *Diallo* dispute—illustrated the limited jurisdiction (e.g. due to narrow interpretations of the customary law rules on "effective nationality" and diplomatic protection of company shareholders), long duration (i.e. more than twenty years) and inadequate remedies of the ICJ for deciding complex investment and human rights disputes.[46]

6.1 The transformation of international investment law through investment treaties and arbitration

The transformation of international investment law from a "Westphalian" into a more "cosmopolitan system" evolved since the 1960s in essentially five phases:

- Since the conclusion of the first bilateral investment treaty (BIT) between Germany and Pakistan in 1959, the number of BITs has dynamically increased to now more than 3000 agreements. Yet, the "first generation BITs" did not yet provide for direct access of the foreign investor to independent international arbitration.
- The 1965 World Bank Convention that established the International Centre for the Settlement of Investment Disputes (ICSID), which entered into force already in 1966 (following 20 ratifications), offered a multilateral legal framework for institutionalized, transnational arbitration of investment disputes based on consent between the states and investors involved. The first ICSID disputes were based on investor-state contracts[47] or on national legislation that provided for direct access of foreign investors to international arbitration.[48]
- Treaty-based investor-state arbitration was provided for only in the "second generation BITs" concluded since 1969. In view of its many advantages for private investors (e.g. in terms of direct access to independent international arbitration usually without prior exhaustion of local remedies, direct control of the procedures without dependence on "diplomatic protection", availability of institutionalized ICSID procedures), most modern BITs provide for treaty-based investor-state arbitration.[49]
- In contrast to the less than four hundred BITs concluded prior to 1989, the number of new BITs increased dramatically since the 1990s and exceeds now 3000 BITs or corresponding treaty provisions in FTAs (like NAFTA Chapter XI)

[46] Andenas, *supra* note 33, at 709.

[47] *Holliday Inns v. Morocco*, ICSID Case No. ARB/72/1 (the first ICSID dispute based on an investor-state contract).

[48] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (the first ICSID dispute based on national legislation).

[49] *AAPL v. Sri Lanka*, [1997] 4 ICSID Rep 250 (the first ICSID dispute based on a BIT clause).

and other sectorial agreements (like the Energy Charter Treaty which entered into force in 1998). The number of BITs and related ISDS among less-developed countries also continues to increase.

- Since the 1990s, the number of treaty-based ICSID disputes, or investor-state disputes based on UNCITRAL or other commercial arbitration procedures, and the emergence of case-law referring to the today more than seven hundred known investor-state arbitral awards and related "annulment decisions" or national court decisions as relevant precedents, increased dramatically. The general ICSID and BIT provisions on arbitration procedures (e.g. transparency of the arbitral procedure, burden and standard of proof, multiplicity of procedures, annulment and execution) and on substantive standards (e.g. pertaining to good faith, reasonable expectations, proportionality, due process in expropriations, denial of justice, unjust enrichment, fair and equitable treatment, full protection and security, indirect expropriations, damages, public interests of the host state) leave open many specific legal questions (e.g. concerning also their relationships to WTO law, EU law, commercial arbitration). Judicial clarification of incomplete investment treaty rules and principles (e.g. on the "necessity" of governmental emergency measures) has become a major instrument for progressive development and adjustment of investment law.

The EU negotiations of the Comprehensive Economic and Trade Agreement (CETA) with Canada and of the Transatlantic Trade and Investment Partnership (TTIP) with the USA have revealed "huge skepticism" (EU trade commissioner Malmstroem) in civil society over whether privileged access of foreign investors to transnational investor-state arbitration remains justifiable in relations among constitutional democracies with well-functioning domestic judicial systems. Human rights advocates claim that investor-state dispute settlement (ISDS) among capital-exporting developed countries and less-developed, capital-importing countries was not only designed to protect basic requirements of justice like non-discrimination, fair treatment, prohibition of expropriation without compensation and due process of law. BITs and ISDS were often concluded with despotic and corrupt governments that disregarded human rights and enriched themselves through the collaboration with foreign investors (e.g. in the oil and minerals sector). The civil society perception of systemic bias of ISDS against HRL is one of the main reasons for the civil society opposition to including ISDS into transatlantic FTAs among constitutional democracies with impartial and independent judiciaries committed to protecting constitutional and human rights in non-discriminatory ways without privileging powerful corporate interests and their constituencies (including arbitrators from big law firms advising TNCs and accounting for a large part of ISDS arbitrators).[50] Also the CETA provisions excluding private rights and domestic judicial remedies under CETA (Article 30.6) and "out-sourcing" investor-state disputes to transnational arbitration are criticized for discriminating against domestic citizens and circumventing domestic constitutional restraints, as illustrated

[50] Ernst-Ulrich Petersmann, *Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?*, 18 J. INT'L ECON. L. 579–608 (2015).

by the only marginal role of HRL in most investor-state arbitrations. In a recent legal opinion, the German federation of judges concluded that EU law neither authorizes nor justifies (e.g. in view of the better legal qualifications and greater independence of national and EU courts than arbitral bodies) excluding national and EU courts from reviewing whether national and EU governments violated their legal obligations and rule of law vis-à-vis foreign investors.

6.2 How to reconcile investment law with HRL?

Most BITs and most ISDS awards continue to be silent on HRL. Yet, the human rights obligations of all UN member states, the increasing civil society criticism of the one-sided focus of BITs and ISDS on protecting investor rights rather than regulatory duties of states, and the increasing jurisprudence of European courts and human rights bodies on constitutional and human rights restraints of investor rights prompt an increasing number of references to human rights in ISDS at the request of complainants, host states, third parties and arbitrators. The inclusion of ISDS into modern FTAs, the revision of some model BITs, and the increasing number of third party interventions in ISDS are prompting increasing references to HRL, e.g. in the Preamble to the 2016 CETA and in ISDS awards involving EU member countries.[51] There are also investment-related disputes in regional human rights bodies like the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), or the African Human Rights Commission, as well as ISDS awards referring to the proportionality methods used by regional human rights courts (e.g. for determining the amount of compensation). Also less-developed countries argue for reassessing and reforming BITs so as to protect the regulatory duties of states to protect the human rights of their population.[52]

The "causes of action" in most ISDS procedures are limited to investor claims of violations of investment law; the national and international applicable law in ISDS, however, may include human rights, for instance as relevant context for interpreting BIT provisions on FET. Even though BITs and ISDS tribunals rarely refer to HR arguments, third party submissions increasingly do so (e.g. in case of investments related to public services like supply of water, health services and electricity). In contrast to the integration of HRL and investment law in EU law, the main reasons underlying the separate evolution of investment law and HRL outside the EU are bound to continue, such as:

[51] *Rompetrol Group v Romania,* ICSID Case No. ARB/06/3 (6 May 2013) (the investor pleaded violations of human rights guarantees of "access to justice", e.g. in Articles 6, 13 European Convention on Human Rights, as relevant context for violations of the "fair and equitable treatment" (FET) obligations under the BIT).

[52] UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2014 (2015) ("The IIA regime is going through a period of reflection, review and revision. Investment dispute settlement is at the heart of this debate, with a number of countries reassessing their positions. There is a strong case for a systematic reform of ISDS. UNCTAD's forthcoming World Investment Report 2015 will offer an action menu for investment regime reform").

- State sovereignty and freedom of contract are invoked by powerful actors in order to pursue strategic self-interests (e.g. "national interests" in exploiting power asymmetries through BITs),
- HRL and the more than hundred regional and UN human rights instruments protect diverse, individual and democratic conceptions of the values and hierarchies of legal systems (e.g. monism v dualism, need for balancing the one-sided focus of BITs on protecting investor rights with public interests as protected by the human rights obligations of all UN member states);
- The particular rationalities of social sub-systems (e.g. utilitarian conceptions of IEL vs deontological conceptions of HRL) continue to prompt many economic actors to keep IEL separate from HRL.

Yet, national and international legal systems also require limiting legal fragmentation. For example,

- the integration principle requires interpreting international treaties taking into account "any relevant rules of international law applicable in the relations between the parties" (Article 31(3)(VCLT), including the human rights obligations of all UN member states under general international law and human rights treaties;
- the inalienable and indivisible character of civil, political, economic, social and cultural human rights requires taking into account the similar goals of HRL and investment law (e.g. the common goal of protecting the right to property, rule of law and "balancing" of competing rights);
- also other principles of justice require piecemeal reforms of IEL through clarification (e.g. in new BITs, FTAs and ISDS) of sovereign rights and duties to protect public interests as defined by HRL and related "principles of justice", including principles of procedural justice (e.g. access to justice), distributive justice (e.g. human rights, sovereign equality of states), corrective justice (e.g. compensation), commutative justice (e.g. agreed bargains in concession contracts) and equity (e.g. unforeseen emergency situations).

6.3 The different perspectives of investors, home and host states, *Amici curiae* and judges in ISDS

Human rights arguments can be introduced into ISDS in diverse ways by:

- the investor/complainant, either as a natural person or as corporate actor, as victim[53];
- the defendant/host state as victim/protector of human rights (e.g. in arbitration proceedings challenging tobacco control measures aimed at protecting the

[53] *See*, *Foresti v. South Africa*, ICSID Case No. ARB (AF)/7/1, Award (4 August 2010). (subsequently settled among the parties); *Biloune v Ghana*, Award [1989] 95 ILR 184.

human right to health, challenges of governmental termination of public service concessions on grounds of inadequate protection of access to water);
- the home state invoking his extraterritorial obligations to avoid human rights violations by foreign investors incorporated in the home state;
- other third parties (e.g. NAFTA member states invoking Article 1128 of the NAFTA Agreement enabling third party interventions, submissions by *amici curiae*)[54]; or
- the arbitrators ex officio, for instance in the rare cases where the arbitrators referred to the "proportionality balancing" of human rights tribunals[55] or justified their admission of amici curiae briefs because the dispute may raise "complex public and international law questions, including human rights considerations".[56]

Human rights are often part of the applicable law, for instance if ICSID tribunals "apply the law of the Contracting State (including its rules on the conflict of laws) and such rules of international law as may be applicable" (Article 42 ICSID Convention). If confronted with human rights arguments, ISDS tribunals have emphasized that the "consistent interpretation" requirements cannot override BIT provisions (except in case of *jus cogens*), and that HRL and investment law "are not inconsistent, contradictory, or mutually exclusive. Thus … Argentina could have respected both types of obligations".[57] Human rights were recognized as relevant context for interpreting investment rules or concession contracts, for instance, when Tanzania terminated an investment contract on provision of water services in view of the poor performance of the investor that undermined the rights of citizens of access to water.[58] The legal admissibility and relevance of HR arguments depend on the limited jurisdiction and applicable law in ISDS. In the *Biloune* and *Rompetrol* arbitrations, for example, the tribunal applied investment rules rather than the human rights provisions (e.g. regarding personal freedom, access to justice) invoked by the complainants. Tribunals also remain reluctant to discuss human rights arguments that are only invoked by third parties and which the tribunal may consider to be not at issue among the parties.[59] In the rare cases of complaints that investments were made in violation of human rights, the tribunal may have to examine whether its limited jurisdiction also covers "bad faith investments", or whether allegations of human rights violations are inadmissible (e.g. on grounds of the "clean hands doctrine") if the host state has colluded in human rights violations.

[54] James Harrison, *Human Rights Arguments in Amicus Curiae Submissions, in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, (Pierre-Marie Dupuy, et al. eds., 2009) (noting that the Suez/Vivendi v Argentina arbitrations are among the rare examples where a tribunal responded to the human right arguments of amici curiae).

[55] *See*, *Tecmed v. Mexico,* ICSID Case No ARB (AF)/00/2, Award (29 May 2003).

[56] *Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008).

[57] *Suez v. Argentina*, ICSID Case No. ARB/03/17, Award of (30 July 2010), ¶ 238–240.

[58] Biwater Gauff, *supra* note 56, at ¶ 434, 814.

[59] *United Parcel Service of America Inc. v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001) (regarding the invocation of collective bargaining rights); *Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (26 June 2012) (regarding the invocation of indigenous peoples rights).

HRL may be relevant context for clarifying vague BIT standards (e.g. on "fair and equitable treatment" and "adequate compensation"), inadequately defined "due process" requirements of arbitral procedures, and "judicial balancing" methodologies for reconciling public and private interests.[60] Investment arbitrators may, however, prefer to avoid controversial human rights arguments (e.g. on "corporate social responsibilities" and human rights obligations of corporations) that risk leading to the "annulment" of arbitration awards and render mutually agreed dispute settlements more difficult. In *Glamis Gold v USA*, the arbitrators avoided explicit discussion of the human rights arguments but effectively protected the indigenous people's rights invoked by the defendant and third parties.[61] The judicial reasoning may remain the same regardless of whether the host state justifies the national measure concerned by invoking human rights or the corresponding "public interests" and "duties to protect" (e.g. public health and access to water). Similarly, the judicial findings may not change if the complainant justifies his investor rights as also having a human rights core. There are, however, a number of investment disputes submitted by the investor to both investment arbitration as well as to regional human rights courts,[62] or by third parties to regional human rights bodies (e.g. requesting protection of land rights of indigenous people by the IACtHR).[63] So far, no state seems to have used ISDS (e.g. pursuant to Article 36 ICSID) for suing an investor for violation of human rights obligations; domestic administrative and criminal law sanctions usually offer the host state more effective, alternative means of dispute settlement.

7 How to reconcile health law and IEL with HRL? The example of multilevel tobacco control litigation

IEL has existed since ancient times. Multilateral health law and HRL, by contrast, developed only after World War II in the context of the UN, the WHO and regional organizations. Apart from multiple non-binding resolutions, strategies and codes of practice, the WHO has negotiated only three health agreements: the International Health Regulations, the Framework Convention on Tobacco Control (FCTC), and the Health Nomenclature Regulations.[64]

[60] Vivian Kube & Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration* (European University Institute Working Papers Law Department, Working Paper, 2016/02); Ernst-Ulrich Petersmann, *Judicial Administration of Justice in Multilevel Commercial, Trade and Investment Adjudication?, in* CHINA AND INTERNATIONAL INVESTMENT LAW: TWENTY YEARS OF ICSID MEMBERSHIP 56–115 (Wenhua Shan, et al. eds., 2014).

[61] *Glamis Gold Ltd. v. USA*, 48 ILM 1035 (2009), UNCITRAL Award (8 June 2009); Julien Cantegreil, *Implementing Human Rights in the NAFTA Regime – The Potential of a Pending Case: Glamis Corp. v. USA, in* Pierre-Marie Dupuy, et al. eds., *supra* note 53, at 367.

[62] Sergiy Gryshko, *Khodorovsky v. Russia before the European Court of Human Rights: A Lost Opportunity to Do Justice or Preserving the Legitimacy of ECtHR Adjudication*, 9 TDM 1 (2012).

[63] Ursula Kriebaum, *Foreign Investments and Human Rights. The Actors and their Different Roles*, 10 T.D.M. 14 (2013).

[64] LAWRENCE O. GOSTIN, GLOBAL HEALTH LAW (2014).

7.1 Worldwide recognition of rights to health protection

Virtually all UN member states are members of the WHO and have recognized, e.g. in the 1946 WHO Constitution, "the enjoyment of the highest attainable standard of health (as) one the fundamental rights of every human being" (Preamble) and objective of the WHO (Article 1). Through their ratification of the 1966 UN Covenants on civil and political rights (ICCPR) and economic, social and cultural rights (ICESCR), more than one hundred and sixty UN member states have also recognized the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health" as codified in numerous human rights instruments (e.g. Article 12 ICESCR) as well as additional human rights (like rights to life, civil and political freedoms, access to food, housing, water, education, employment and a clean environment) that are social determinants of health and promote social engagement and political accountability in health protection policies. Both "General Comment 14" elaborated by the UN Committee on Economic, Social and Cultural Rights and "General Comment 15" elaborated by the UN Committee on the Rights of the Child adopted a "holistic approach" that recognizes such related human rights as "integral components of the right to health", thereby emphasizing the synergies (also of not explicitly mentioned rights like access to water and sanitation) with private and public health protection. The rights-based approach has facilitated successful regulation and litigation for health protection in many countries and the proliferation of non-governmental foundations (e.g. the Gates Foundation supporting AIDS medication), stakeholder constituencies (like pharmaceutical industry and trade associations) and private–public partnerships cooperating in multilevel health protection activities.[65]

7.2 The WTO complaints against Australia's legislation on "plain-packaging" of tobacco products

The WHO dispute settlement provisions for access to the ICJ and the Permanent Court of Arbitration have only rarely been used for settling health related disputes. Tobacco companies and tobacco exporting countries prefer challenging tobacco control measures in trade and investment jurisdictions that may be less inclined to prioritize HRL and health law over economic rights and IEL. In 2012/2013, five WTO members (Cuba, Dominican Republic, Honduras, Indonesia, Ukraine) requested consultations and, subsequently, the establishment of dispute settlement panels in order to review the WTO consistency of certain Australian measures concerning trademarks, geographical indications and other plain packaging requirements applicable to tobacco products and packaging.[66] According to the complainants, Australia's plain packaging measures are inconsistent with Australia's WTO obligations under the TRIPS Agreement, the TBT Agreement and the GATT 1994, especially:

[65] GOSTIN *supra* note 64; JOHN TOBIN, THE RIGHT TO HEALTH IN INTERNATIONAL LAW (2012).

[66] WT/DS 434, 435, 441, 458 and 467.

- Article 20 of the TRIPS Agreement: Australia unjustifiably encumbers the use of trademarks for tobacco products in the course of trade through special requirements (e.g. that trademarks relating to tobacco products be used in a special form and in a manner which is detrimental to their capability to distinguish tobacco products of one undertaking from tobacco products of other undertakings);
- Article 2.1 of the TRIPS Agreement read with Article 10bis, paras 1 and 3 of the Paris Convention for the Protection of Industrial Property (as amended by the Stockholm Act of 1967): Australia does not provide effective protection against unfair competition;
- Article 2.1 of the TRIPS Agreement read with Article 6 of the Paris Convention: trademarks registered in a country of origin outside Australia are not protected by Australia "as is";
- Article 3.1 of the TRIPS Agreement: Australia accords to nationals of other Members treatment less favorable than it accords to its own nationals with respect to the protection of intellectual property;
- Article 15(4) of the TRIPS Agreement: the nature of the goods to which a trademark is to be applied forms an obstacle to the registration of trademarks in Australia;
- Article 16(1) of the TRIPS Agreement, because Australia prevents owners of registered trademarks from enjoying the rights conferred by a trademark;
- Article 22(2)(b) of the TRIPS Agreement: Australia does not provide effective protection against acts of unfair competition with respect to geographical indications of tobacco products in foreign countries;
- Article 24(3) of the TRIPS Agreement: Australia is diminishing the level of protection afforded to foreign geographical indications as compared with the level of protection that existed in Australia prior to 1 January 1995;
- Article 2(1) of the TBT Agreement: Australia imposes technical regulations that accord to imported tobacco products treatment less favorable than that accorded to like products of national origin;
- Article 2(2) of the TBT Agreement: Australia imposes technical regulations that create unnecessary obstacles to trade and are more trade-restrictive than necessary to fulfill a legitimate objective taking into account the risks that non-fulfillment would create;
- Article III(4) of GATT 1994: Australia accords to imported tobacco products treatment less favorable than that accorded to like products of national origin;
- Article IX(4) of GATT 1994: Australia imposes requirements relating to the marking of imported cigar products which materially reduce their value and/or unreasonably increase their cost of production.

In view of the systemic legal issues concerning the balance between health and other interests in tobacco regulation, more than sixty-one WTO members (including the EU and twenty-eight EU member states) requested to join the consultations and to intervene as third parties in the WTO panel proceedings. In April 2014, the Dispute Settlement Body (DSB) established five panels on the basis of a "Procedural Agreement between Australia and Ukraine, Honduras, the Dominican Republic, Cuba and Indonesia" providing for the composition by the WTO

Director-General of the same three panelists for each of the five panels and for the harmonization of the timetables for each of the five panel proceedings. In May 2014, the Director-General announced the composition of the panels. In view of the exceptional legal complexity and involvement of more than sixty-five WTO members, the Panel later announced that it expected to be able to conclude these five parallel panel proceedings not before 2016. Judging from past GATT/WTO jurisprudence, there appear to be good reasons to assume that the Panel will dismiss all the above-mentioned legal challenges of Australia's plain packaging legislation.

- If Australia can prove its claim that its plain packaging laws (e.g. prohibiting the use of promotional colors, graphics and logos on tobacco products and allowing the identification of brands and variants only in a standardized font, color and size) apply on a non-discriminatory basis to all tobacco products from all countries including Australia, there will be no violations of Article 2(1) TBT Agreement or Article III(4) GATT. This dispute seems to differ from previous tobacco control disputes in GATT and the WTO, where the USA was found to violate Article 2(1) TBT Agreement because of its discrimination between prohibited clove cigarettes (mainly imported from Indonesia) and domestic "like products" (menthol cigarettes mainly produced in the USA),[67] or where GATT-inconsistent import restrictions of tobacco products were found to be not "necessary" for health protection (in terms of Article XX(b) GATT) in view of the lack of restrictions on domestic tobacco products.[68]
- If Australia can prove its claim that the WHO FCTC is an "international standard" in terms of Article 2(2) TBT whose incorporation into Australia's plain packaging regulations has already contributed to reducing tobacco consumption in Australia, there is also a presumption that Australia's plain packaging regulations are "not more trade-restrictive than necessary" to fulfill a legitimate health protection objective as permitted by Article 2(2) TBT Agreement. The WTO panel could also follow the jurisprudence of the EFTA Court by recognizing that—even if evidence-based, scientific studies on the empirical impact of specific tobacco control measures should not yet be available—governments cannot be prevented from exercising their regulatory duty to protect public health by non-discriminatory tobacco control measures which "by their nature" are suitable to limit, "at least in the long run, the consumption of tobacco products".[69]
- Plain packaging does not prevent the registration of new trademarks or the use of registered trademarks for preventing "all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion" (Article 16:1

[67] Appellate Body Report, *US- Measures affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (adopted 24 April 2012).

[68] Report of the Panel, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT BISD (37th Supp.) (adopted on 7 November 1990).

[69] *Philip Morris Norway AS v. Ministry of Health and Care Services* (E-16/10), EFTA 2011 (Advisory Opinion of 12 September 2011), ¶ 84.

TRIPS Agreement). As the Paris Convention and the TRIPS Agreement leave states considerable scope to refuse registration of trademarks, they seem to imply an even greater regulatory power to limit the use of trademarks if "necessary for public health" protection as acknowledged in Article 8 of the TRIPS Agreement. If, as suggested by the WHO and by the agreed implementing guidelines for the FCTC, non-discriminatory plain packaging legislation is "necessary to protect public health", Australia's burden of proving the "necessity" of its public health measures in terms of Article 8(1) of the TRIPS Agreement could be reversed by a legal presumption based on the FCTC that plain packaging does not contravene international obligations under the TRIPS Agreement or the Paris Convention in relation to the protection of trademarks. If Australia's plain packaging regulations should be found to go beyond what is necessary for public health within the meaning of Article 8 TRIPS Agreement, it could also be found to "unjustifiably encumber" the "use of a trademark in the course of trade" in violation of Article 20 TRIPS Agreement. Yet, according to past WTO and also EU jurisprudence, the Paris Convention and Article 16 TRIPS Agreement confer on trademark owners only a "negative right" to prevent unauthorized third parties from using the registered trademark.[70] The *EC-Trademarks* Panel emphasized that "a fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain the public policy objectives lie outside the scope of intellectual property and do not require an exception under the TRIPS Agreement".[71] Similarly, the Advocate General in the CJEU dispute on the validity on the Tobacco Products Directive stated that "the essential substance of a trademark right does not consist in an entitlement as against the authorities to use a trademark unimpeded by provisions of public law. On the contrary, a trademark right is essentially a right enforceable against other individuals if they infringe the use made by the holder".[72] It appears unlikely, therefore, that Article 20 TRIPS Agreement can be construed as

- protecting a more comprehensive "positive right" to use a trademark that limits the sovereign right to "adopt measures necessary to protect public health" (Article 8 TRIPS Agreement);
- that such a positive, private right could override "justifiable encumbrance" for public health reasons notwithstanding the recognition in Article 7 TRIPS Agreement of the need to protect intellectual property rights "in a manner conducive to social and economic welfare, and to a balance of rights and obligations"; or

[70] Appellate Body Report, *US-Section 211 of the Appropriations Act*, WT/DS176/AB/R, (adopted 1 February 2002) ¶¶ 186–188; Panel Report, *EC-Protection of Trademarks and Geographical Indication*, WT/DS290/R (adopted 20 April 2005) ¶ 7.246.

[71] WT/DS290/R, *supra* note 70, at 7.246.

[72] *The Queen v. Secretary of State for Health, ex parte British Amercian Tobacco Ltd and Imperial Tobacco Ltd*, C-491/01 ECR 2002 I-11453, Opinion of Advocate General Geelhoed, (Sept. 7, 2004) ¶ 266.

- that the complainants can rebut a legal presumption that Australia's implementation of the WHO FCTC does not "unjustifiably encumber" the "use of a trademark in the course of trade".

As the Paris Convention and the TRIPS Agreement recognize sovereign rights to refuse registration and limit use of trademarks on non-economic grounds, and WTO practice and jurisprudence recognize protection of human life and health as "both vital and important in the highest degree",[73] non-discriminatory plain packaging requirements in conformity with the WHO FCTC regulations are also unlikely to distort competition or violate any other TRIPS provisions. As stated in the 2001 Doha Declaration on the TRIPS Agreement and Public Health, the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of WTO Member's right to protect public health".[74]

7.3 "Balancing methods" used in WTO tobacco control disputes

In *US—Clove Cigarettes*, the Appellate Body noted: "[t]he balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members" right to regulate, is not, in principle, different from the balance, set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."[75] Hence, as sovereign rights "to protect public health" and "promote the public interest in sectors of vital importance to socio-economic development" are recognized in numerous WTO provisions (like Article 8 TRIPS Agreement), the dispute over Australia's tobacco regulations offers an important opportunity to further clarify to what extent the legal methodology for ensuring "a balance of rights and obligations" (Article 7 TRIPS Agreement) and "security and predictability in the multilateral trading system" (Article 3 DSU) in the context of the TBT and TRIPS Agreements must follow the WTO jurisprudence on the "necessity test" in WTO exception clauses like GATT Article XX and GATS Article XIV by considering

> The relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives… This comparison should

[73] Appellate Body Report, *EC-Asbestos*, WT/DS135/AB/R (adopted 5 April 2001), ¶ 172.

[74] World Trade Organization, Ministerial Declaration of 20 November 2001, WTO Doc. WT/MIN(01)/DEC/2, ¶¶ 4 & 5(a) (This unanimous WTO Ministerial Declaration is widely recognized as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" that must be taken into account in interpreting the TRIPS Agreement pursuant to Article 31(3)(a) of the VCLT).

[75] Appellate Body Report, *US – Clove Cigarettes supra* note 67, ¶ 96.

> be carried out in the light of the importance of the interests or values at stake.[76]
>
> It rests upon the complaining Member to identify possible alternatives… (I)n order to qualify as an alternative, a measure… must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued" … If the responding Member demonstrates that the measure proposed… is not a genuine alternative or is not "reasonably available", … the measure at issue is necessary.[77]

From the perspective of the customary law requirements to interpret treaties and settle related disputes "in conformity with principles of justice and international law", the judicial reconciliation ("balancing") of economic freedoms with public health protection should not be prejudged by "forum shopping" among competing jurisdictions, or by "rules shopping" regarding specific WTO agreements using "objectives" (like the Preamble of the TBT Agreement, Article 7 TRIPS Agreement), "principles" (like Article 8 TRIPS Agreement), "basic rights" (as in Article 2 SPS Agreement), general treaty provisions (like Article 2 TBT Agreement) or "exceptions" (like Articles XX GATT, XIV GATS) for protecting sovereign rights of WTO members and corresponding rights of citizens to health protection. National courts tend to "balance" economic and health rights on the basis of constitutional principles of non-discrimination, good faith, necessity and proportionality of governmental restrictions.

Also regional and WTO dispute settlement jurisdictions must interpret IEL "in conformity with principles of justice" and "human rights and fundamental freedoms" as accepted by all WTO members. The differences among the applicable laws in different jurisdictions may entail different procedures (e.g. regarding burden of proof, judicial standards of review) and legitimately different interpretations of HRL, constitutional laws, health law and IEL.[78] The WTO panel should therefore repeat and clarify in respect of the TRIPS Agreement what the Appellate Body has already indicated with regard to the TBT Agreement, i.e. that the legal and judicial "balancing methods" for interpreting specific WTO agreements should proceed from the same "principles of justice" that underlie WTO law as well as the human rights obligations of WTO members, i.e.

(a) Relative importance of the competing policy values? The economic and public health objectives and underlying values must be identified, compared and "weighted" in conformity with the WTO, WHO, EU law and human rights principles recognizing sovereign rights to prioritize human health

[76] Appellate Body Report, *Brazil-Retreaded Tyres*, WT/DS332/AB/R, (adopted 17 December 2007), ¶ 178.

[77] *Id.* ¶ 156.

[78] LUKASZ GRUSZCZYNSKI & WOUTER WERNER, DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION 19–37 (2014) (including the contribution by Petersmann, Judicial Standards of Review and Administration of Justice in Trade and Investment Law and Adjudication).

protection over WTO market access commitments and other economic rights (like industrial property rights)[79];

(b) Contribution of the contested measure? The health protection measure restricting economic rights must "bring about a material contribution to the achievement of its objective", rather than only a "marginal or insignificant contribution", based on a "genuine relationship of ends and means between the objective pursued and the measure at issue"[80];

(c) Impact on economic rights? As non-discriminatory product and packaging requirements are unlikely to distort international trade and competition (e.g. among competing trademarks), the weighing and balancing of their impact on economic rights with their contribution to reducing tobacco advertising and tobacco consumption seem to be consistent with "a balance of rights and obligations" that is "conducive to social and economic welfare" (as required by Article 7 TRIPS Agreement) and to avoid "unnecessary obstacles to international trade" (as required by GATT and the TBT Agreement);

(d) Reasonably available alternatives? The WHO FCTC and its ratification by one hundred and seventy-seven countries confirm the view expressed also by the WTO Appellate Body that "certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures".[81] As "(s)ubstituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect",[82]the WTO and WHO principles of preserving for each WTO and WHO member "its right to achieve its desired level of protection with respect to the (health) objective pursued"[83] should prevail in both WTO and WHO law, as suggested also by Article 31(3) VCLT.

The "integration" and "consistent interpretation" requirements of the customary rules of treaty interpretation must not be rendered ineffective by the fact that—in view of the non-state WTO members—no UN treaty has the same membership as

[79] *Affish BV v. Rijksdienstvoor de Keuring van Vee an Vlees*, ECR [1997] I-4362, ¶ 43 (recognizing that "the protection of public health… must take precedence over economic considerations); Frederick Schauer, *Proportionality and the Question of Weight, in* PROPORTIONALITY AND THE RULE OF LAW. RIGHTS, JUSTIFICATION AND REASONING 173 (Grant Huscroft, et al. eds., 2014) (discussing methodologies for "weighting").

[80] Appellate Body Report, *Brazil-Retreaded Tyres*, supra note 76, ¶ 150–15; according to the Appellate Body, the degree of the contribution may be assessed "either in quantitative or in qualitative terms" (¶¶145–146), without being "obliged, in setting health policy, automatically to follow what… may constitute a majority scientific opinion" (*EC-Asbestos*, *supra* note 73, ¶ 178). Hence, even though the FCTC does not legally require "plain packaging", the agreed implementing guidelines recommending to "consider adopting… plain packaging" as a tobacco control measure lend support to Australia's legal argument that its plain packaging regulations aim at reducing tobacco advertising and consumption); Tania Voon & Andrew D. Mitchell, *Implications of WTO law for Plain Packaging of Tobacco Products, in* PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES 109, 127 (Tania Voon, et al. eds., 2012).

[81] Appellate Body Report, *Brazil-Retreaded Tyres, supra* note 76, ¶ 151.

[82] Appellate Body Report, *Brazil-Retreaded Tyres, supra* note 76, ¶ 172.

[83] *Id*.

WTO agreements. From the perspective of citizens and their human rights, legitimate legal, democratic and judicial "balancing" of economic and non-economic rules must remain justifiable by an inclusive "reasonable equilibrium" rather than merely by "instrumental rationality" of diplomats and economists. The criteria of reasonableness and their respective weight may differ depending on the concrete circumstances (e.g. in WTO disputes among members that have accepted the same UN legal obligations and relevant legal context for interpreting WTO rules and principles like "sustainable development"). Democracies should promote consumer welfare through trade liberalization, trade regulation, protection of human rights and compliance with UN and WTO agreements ratified by parliaments for the benefit of citizens even without reciprocity by foreign countries that are less committed to protecting human rights.

7.4 Administration of justice in investor-state tobacco disputes?

In 2010, at the request of several Philip Morris affiliates registered in Switzerland, the ICSID established an investor-state arbitral tribunal so as to examine whether Uruguay's tobacco packaging measures of 2009 were consistent with Uruguay's obligations under a BIT with Switzerland.[84] Previously, the Philip Morris affiliates had challenged the regulations in Uruguay's domestic courts, but the Supreme Court upheld them as constitutional. In July 2013, the ICSID arbitral tribunal decided that it had jurisdiction to hear this case and instructed the parties to prepare substantive arguments.[85] The tribunal also decided to admit an *amicus curiae* submission from the WHO and its FCTC Secretariat in support of Uruguay's justifications of tobacco control measures. The final award was rendered on July 8, 2016; it not only rejected the claims of the complainants, but also ordered Philip Morris to pay Uruguay's fees and other costs in excess of US $ 7 million.[86] The arbitral tribunal upheld the two specific regulations adopted by Uruguay which (1) prohibited tobacco companies from marketing cigarettes in ways that falsely present some cigarettes as less harmful than others; and (2) required tobacco companies to use eighty percent of the front and back of cigarette packs for graphic warnings of the health hazards of smoking. In addition, the tribunal also ruled that Uruguay's courts did not violate Philip Morris' rights, or deny it justice, when it challenged the regulations before those courts. More specifically:

- Uruguay's regulatory measures did not "expropriate" Philip Morris's property. They were *bona fide* exercises of Uruguay's sovereign police power to protect public health, developed by highly trained tobacco control experts and physicians in the Ministry of Public Health with the support of experts from civil society.

[84] *Philip Morris Brand Sarl v. Uruguay*, ICSID Case No ARB/10/7, Notice of Arbitration, (Feb. 19, 2010).

[85] *Philip Morris Brand Sarl v. Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction, (July 2, 2013).

[86] Award of 8 July 2016, ICSID Case No ARB/10/7.

- The measures did not deny Philip Morris "fair and equitable treatment" because they were not arbitrary; instead, they were reasonable measures strongly supported by the scientific literature, and had received broad support from the global tobacco control community.
- The measures did not "unreasonably and discriminatorily" deny Philip Morris the use and enjoyment of its trademark rights, because they were enacted in the interests of legitimate policy concerns and were not motivated by an intention to deprive Philip Morris of the value of its investment.
- Uruguay's courts did not "deny justice" to Philip Morris. Instead, the tribunal found that Philip Morris received due process and fair treatment from the Uruguayan courts.

In 2012, Philip Morris Asia (PMA) commenced arbitral proceedings pursuant to UNCITRAL arbitration rules against Australia challenging the consistency of Australia's plain packaging regulations with Australia's legal obligations under a BIT between Hong Kong and Australia, using the Permanent Court of Arbitration as registry.[87] According to PMA, the plain packaging regulations—by mandating every aspect of the retail packaging of tobacco products including the appearance, size and shape of tobacco packaging, prohibiting the use of trade marks, symbols, graphic and other images, and mandating that brand names and variants must be printed in a specified font and size against a uniform drab brown background—virtually eliminate its branded business by expropriating intellectual property, transforming it from a manufacturer of branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of PMA's investments in Australia. In April 2014, the arbitral tribunal issued Procedural Order No. 8 granting Australia's request to have the proceedings bifurcated between arguments on jurisdiction and arguments on the merits. According to Australia, the tribunal lacked jurisdiction on three grounds:

- First, Australia alleged that PMA's investment in Australia was not admitted in accordance with the BIT because PMA's statutory notice pursuant to Australia's foreign investment rules contained false and misleading assertions as to the purpose of the investment. Australia alleged that PMA's true purpose—that should have been stated on the statutory notice—was to place itself in a position where it could bring this claim under the BIT.
- Secondly, Australia alleged that PMA's claim falls outside the BIT because it relates to a pre-existing dispute; or, alternatively, that it amounts to an abuse of right because PMA re-structured its investments with the express purpose of bringing this claim, after the Australian government had announced its intention to implement plain packaging.
- Thirdly, Australia alleged that PMA's assets—being only its shares in Philip Morris companies registered in Australia—are not "investments" in Hong Kong that enjoy the protection of the BIT.

[87] *Philip Morris Asia Ltd v. Australia,* Procedural Order by the P.C.A, Case No 2012-12 (Dec. 31, 2012).

The tribunal ruled that Australia's first and second jurisdictional arguments should be bifurcated and be heard at a jurisdictional meeting in February 2015. The third jurisdictional argument should be joined with the merits. As PMA had acquired its interest in Philip Morris Australia only some 10 months after Australia's plain packaging measures were announced, and the tobacco industries acknowledged their support for the simultaneous WTO complaints against Australia's plain packaging measures, the parallel complaints in specialized investment and WTO jurisdictions increased widespread concerns against globally integrated tobacco companies. For, by using their enormous financial resources for multilevel litigation strategies based on "forum shopping", "rules-shopping" and legal restructuring of multinational companies so as to use investor-state jurisdictions under the most favorable BIT, tobacco companies could delay tobacco control measures and threaten notably less-developed countries with litigation risks, related costs and "regulatory chill". As regards the substantive complaints, Australia has rejected each of them, notably

- that the Australian packaging requirements amount to expropriation of the investments by PMA, which justify compensation claims in the order of "billions" of dollars (e.g. by undermining the "brand value" based on the "Marlboro" trademark);
- that Australia failed to provide these investments "fair and equitable treatment" and "unreasonably impaired" the investments; and
- that Australia failed to accord the investments "full protection and security".

On December 17, 2015, the website of the PCA indicated that the investment tribunal had issued a decision on jurisdiction and admissibility dismissing the investor's claim of breach of the BIT.[88] The award called the complaint an "abuse of rights" and declined jurisdiction over the case. While the tribunal rejected Australia's first two preliminary objections to jurisdiction, it upheld the third objection by concluding that "the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialize and as it was carried out for the principal, if not the sole purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute."

The claims appear to have been unfounded also on the merits. Australia emphasized the non-discriminatory nature of its plain packaging regulations and their justification by public health reasons and the "police powers exception" recognized in international investment law. It remains contested whether—in international investment law—the "proportionality principle" requires "balancing" the regulatory "public interest" with the investor's private property in order to determine the lawfulness of "regulatory takings". The support expressed by both the WHO and by the FCTC Secretariat for Australia's plain packing regulations

[88] The tribunal's award was published on the PCA website only in May 2016.

lends support to Australia's claim that plain packaging is a justifiable and proportionate means for reducing the adverse health effects of tobacco products. Moreover, as PMA knew Australia's intention to introduce plain packaging legislation at the time when PMA acquired shares in Philip Morris' affiliates in Australia, PMA cannot claim to have had "legitimate expectations" at the time of its investments in Australia that such tobacco control measures would not be introduced. Another question related to whether the arbitral tribunal should—as a matter of judicial comity—take into account the judgment by the Australian High Court on the negative nature of trademarks, the lack of a "taking" and "acquisition" in terms of Australian law (which differs from the BIT context), as well as judgments in other disputes over tobacco control measures (e.g. on whether registration of a trademark in a particular country gives rise to an "investment", whether plain packaging of cigarettes can amount to "expropriation" or violation of the "fair and equitable treatment" obligation, or whether BIT "umbrella clauses" can transform WTO obligations into applicable law in the investment dispute).

8 Outlook: learning from republican and democratic constitutionalism for multilevel governance of PGs

The seventieth anniversary of the UN and the twentieth anniversary of the WTO in 2015 call for reviewing why the UN and so many other international organizations fail—in so many UN member states—to realize their declared objectives of protecting human rights, sustainable development and other PGs. Since the ancient Greek and Italian city republics 2500 years ago, republican constitutionalism has turned out—through centuries of political "trials and errors"—to provide the most effective legal and governance framework for collective supply of PGs. The universal recognition of human rights—by protecting individual and democratic freedoms and development of human capacities—reinforces civil society claims for cosmopolitan citizenship rights and "democratization" of multilevel governance of regional common markets and other PGs.[89] Collective protection of most international PGs—such as human rights, transnational rule of law, sustainable development and "democratic peace"—depends on rules-based cooperation and welfare-increasing division of labor. The preceding overview of methodological problems of IEL and adjudication reveals the need for a thorough reexamination of the legal foundations of UN and WTO law. For instance:

- as no single state can unilaterally protect international "aggregate PGs" without international law and institutions, globalization has transformed state Constitutions into "partial constitutions". The unnecessary poverty of two billion of

[89] PETERSMANN, *supra* note 5; SAMANTHA BESSON & JOSE LUIS MARTI, LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES (2009) (discussing the diverse legal traditions of republicanism and the disagreement on whether the core values of republicanism should be defined in terms of liberty, republican virtues of active citizenry finding self-realization in political participation and collective supply of PGs, communitarianism, social and political equality, or deliberative democracy).

people living on two dollars or less per day without effective access to human rights illustrates that the "disconnected UN and WTO governance" and the large number of authoritarian rulers without democratic legitimacy disempower citizens and undermine their constitutional rights as "constituent powers". UN/WTO governance must be rendered more consistent with the "network conceptions" underlying IEL and the global division of labor (e.g. "global supply chains") so that citizens—as main economic actors and "democratic principles"—can hold "constituted governance powers" more accountable for abuses of power. The historical lessons from "republican constitutionalism" suggest that the private and public, national and international levels of IEL must be "re-connected" through cosmopolitan rights and judicial remedies empowering citizens to hold multilevel governance institutions legally, democratically and judicially more accountable for "governance failures" and neglect for human rights.

- Citizens—as "agents of justice" and "constituent powers" that must define "principles of justice" through constitutional contracts and "access to justice"—must assume more "cosmopolitan responsibilities" for protecting the functional unity of IEL in terms of human rights and republican duties to limit "market failures" and "governance failures". Citizens and people may reasonably disagree on the importance of economic utilitarianism (e.g. for maximizing general consumer welfare) and of communitarian virtues (e.g. for realizing a "social market economy" and institutionalizing "public reason"). HRL and IEL must respect such "reasonable disagreements" and reconcile the "constitutional pluralism" at national and regional levels of governance (e.g. in FTAs) with multilevel governance of international PGs (e.g. in UN and WTO institutions).
- "Fragmentation" (as protected by human and democratic autonomy, state sovereignty) and "legal re-integration" (e.g. pursuant to the "systemic integration" principle in Article 31(3) VCLT) are dialectic characteristics of all complex legal systems. Also the hundreds of FTAs and WTO/FTA dispute settlement proceedings on peaceful cooperation among states—like the thousands of BITs and investment disputes, and the hundreds of constitutional and human rights instruments promoting individual "access to justice" and welfare-enhancing cooperation among citizens—are legally inevitable for adjusting international trade and investment law to the demands of citizens for more social justice. Comparative institutionalism explains why decentralized economic, democratic and judicial governance processes must constitutionally limit majoritarian politics at national and international levels (e.g. opportunistic majority politics undermining rule of law in Greece, veto-powers undermining UN and WTO governance). For instance, the "Kadi jurisprudence" of the CJEU has demonstrated why even UN Security Council "smart sanctions" against alleged terrorists must remain subject to multilevel judicial review and judicial protection of human rights.[90] The customary law requirement of interpreting

[90] GIUSEPPE MARTINICO, ET AL., KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE KADI TRIAL (2014).

treaties and settling related disputes "in conformity with the principles of justice and international law", including "human rights and fundamental freedoms for all" (Preamble and Article 31 VCLT), recalls the need for reconciling state-centered "principles of justice" (e.g. in IEL among sovereign states) with citizen-centered "principles of justice" (e.g. in the commercial and private law dimensions of IEL and the transnational investor-state dimensions of IEL). Due to the domination of UN/WTO governance by self-interested governments, the needed "constitutionalization of IEL" requires judicial administration of justice and democratic struggles by citizens so as to better protect human rights and fundamental freedoms for all.

- Impartial courts of justice tend to be the only branch of government that has to justify its decisions transparently on the basis of "principles of justice" as independent "exemplars of public reason" (Rawls). Multilevel trade and investment courts interpreting "treaty standards" (e.g. on "necessity" of governmental emergency measures in the Argentine economic crisis) increasingly refer to citizen-oriented "general principles of law" (e.g. principles of proportionality balancing and human rights) rather than to standards of customary international law on reciprocal relations among sovereign states.[91] Yet, government executives often remain eager to maintain their diplomatic privileges and limit their judicial accountability vis-à-vis citizens, for instance, by
  - issuing the 2001 "NAFTA interpretation" on Article 1105 NAFTA"s "FET" and "full protection and security" standards;
  - dissolving the Tribunal of the Southern African Development Community following its judgments against Zimbabwe in 2008; or
  - excluding "direct applicability" of FTA rules in FTA's of the EU with third countries since 2006.

As "state sovereignty" derives its legitimacy from protecting "individual sovereignty" and "democratic sovereignty" as defined through human rights, the different levels of democratic self-government—like constitutional, participatory, deliberative and representative, parliamentary democracy—and legal and judicial protection of cosmopolitan rights must be legally protected also in multilevel governance of PGs.

8.1 From the "mandate of heaven" to "constitutional functions" of IEL in Asia? The example of China

Since the ancient teachings of Taoism and Confucianism, Chinese political culture continues to be deeply concerned with morality, virtues, fairness and socio-economic justice as preconditions for keeping people content with the

[91] Sweet & Cananea, *supra* note 28 (discussing ICSID annulment reports annulling several arbitral awards on the ground that the "necessity clauses" in BITs must be interpreted in conformity with the general principles of "proportionality" and "balancing" rather than in terms of the customary rules of treaty interpretation).

government.[92] The recognition of collective rights of peoples to a decent livelihood—and of economic welfare as a condition of a government's legitimacy—have a long tradition in Chinese political thought. The mandate of heaven required benevolent virtues of the ruler, economic welfare and consent by the people; economic subsistence rights were considered to be more important than civil and democratic rights against state power as defined by American and European constitutionalism.[93] Hence, the "mandate of heaven" of Chinese emperors could ultimately justify also rebellion by impoverished people as heaven's way of removing immoral rulers. Yet, Chinese conceptions of "rights" and "judicial review" remain fundamentally different from American and European constitutionalism. When my book on "Constitutional Functions and Constitutional Problems of International Economic Law" (1991) was published in Chinese language in 2004, my Chinese students explained the interest in this book on the following two grounds:

- When China was formally accepted as a WTO member in November 2001, the official newspaper of the Chinese government (the "People's Daily") had described China's WTO accession as a historic event with a far-reaching impact on the economic development and social progress in the new millennium. Similar to my historical and legal explanations of the "constitutional functions" of customs unions for the creation of common markets and economic welfare in federal states (like the USA, Germany, Switzerland) and among the twenty-eight EU member states, it was obvious for Chinese citizens that the GATT/WTO commitments could assist China not only to reform its domestic economy for the benefit of hundreds of millions of poor people by governing the Chinese economy through a more coherent, market-oriented and welfare-creating system of legal rules. At the tenth anniversary of China's WTO accession in 2011, China's former President Hu Jintao also described the opening-up policy adopted in 1978 as the beginning of a continuing process of opening-up China beyond the economy to multilevel legal regulation of PGs, as confirmed by the more recent government decisions (discussed below) to use WTO legal and dispute settlement rulings for promoting rule of law, multilevel legal coherence and independence of courts of justice also inside China.
- The multilevel WTO governance was assisting China in promoting also non-economic PGs like transnational rule of law, for instance among China's four autonomous customs territories and WTO members (China, Hong Kong, Macau, Taiwan) re-establishing a common market similar to the—economically as well as politically motivated—creation of a common market among the thirty-one member states of the European Economic Area (EEA). Yet, the rule of law requirements of WTO law, such as the WTO guarantees of individual access to impartial judicial remedies (as discussed above) and legal limitations on state-trading enterprises, remain inadequately realized inside China; this fact

[92] Guiguo Wang, *The New Haven School of Legal Theory and Traditional Chinese Culture, in* THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE. GLOBAL TRENDS: LAW, POLICY AND JUSTICE 609–623 (2013).

[93] Elizabeth J. Perry, *Chinese Conceptions of "Rights": From Mencius to Mao – and Now*, 6 PERSPECT. POL. 37–50 (2008).

prompted the twelve member states of the Trans-Pacific Partnership (TPP) Agreement signed in February 2016 to include special treaty provisions on "state-led economies" justifying unilateral safeguard measures against governmental market distortions similar to those provided for in China's 2001 Protocol of Accession to the WTO.

8.2 China's 2014 "rule of law" strategy: Does law prevail over the communist party?

The Decision on Advancing the Rule of Law in China, adopted by the fourth plenary session of the eighteenth Communist Party of China Central Committee meeting on October 23, 2014, aims at promoting law and independence of judicial review from local political influences (e.g. by central financing of national and local courts). China's trade minister, in an article on "Strengthening Trade Policy Compliance and Promoting Rule of Law in China" of December 31, 2014, explicitly acknowledged the linkages between China's compliance with WTO rules and dispute settlement rulings, including systemic checks of the "WTO compliance" of national and local trade regulations, with the broader promotion of rule of law in China.[94] The legal and institutional "checks and balances" among legislative, executive and judicial governance powers in WTO law aim at limiting trade politics by "rule of law" in conformity with the parliamentary approval of WTO agreements by national parliaments in WTO members; the WTO requirements of legislative and administrative good faith implementation of WTO law and of its judicial protection also inside domestic legal systems serve to "ensure the conformity of laws, regulations and administrative procedures with WTO obligations" (Article XVI(4) WTO Agreement) so as to provide "security and predictability to the multilateral trading system" (Article 3(2) DSU). China's "rule of law" strategy, however, does not seem to limit the "primacy of communist party politics". Even though China continues to comply with WTO rules and WTO dispute settlement rulings, China's Constitution and judiciary do not effectively limit the political powers of the communist party and its "rule by law" (e.g. using police powers and criminal proceedings for sanctioning political dissenters).[95] Moreover, while China effectively implements some of its other international legal obligations (e.g. to limit tobacco consumption and other health pandemics in conformity with WHO law and the FCTC),[96] it does not effectively implement many of its international human rights commitments, labor law and certain other international legal obligations.[97] China's rejection of the unanimous award of 12

[94] Guohua Yang, *China in the WTO Dispute Settlement: A Memoir*, 49 J. WORLD TRADE 1–18 (2015).

[95] Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to QI Yuling's Case*, 43 SUFFOLK U.L. REV. 669–679 (2010).

[96] Lesley A. Jacobs, *Global Tobacco Control Law and Trade Liberalisation: New Policy Spaces?, in* LINKING GLOBAL TRADE AND HUMAN RIGHTS. NEW POLICY SPACE IN HARD ECONOMIC TIMES 131, 140–143 (Daniel Drache, et al. eds., 2014).

[97] Ljiljana Biukovic, *Is There Space for Human Rights Linkages in China's Trade and Investment Network?*, *in* LINKING GLOBAL TRADE AND HUMAN RIGHTS (Daniel Drache, et. al. eds., 2014);

July 2016 by the arbitral tribunal which was constituted at the request of the Philippines under Annex VII of the UN Convention on the Law of the Sea and found "no legal basis" for China's expansive territorial claims for 85 per cent of the South China Sea,[98] is a recent confirmation that—also worldwide "PGs treaties" (like UNCLOS) with compulsory jurisdiction—do not effectively constrain power politics inside communist countries.

Republican constitutionalism has emerged in China only since 1911, i.e. 2400 years later than in Europe. Transnational rule of law continues to develop inside China in limited fields of IEL such as compliance with WTO law, investment and commercial law and arbitration. China's six hundred law schools and numerous "WTO compliance centers" progressively institutionalize support for China's obligations to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements" (Article XVI(4) WTO Agreement). China has become an active participant in the WTO dispute settlement system, as illustrated by thirteen complaints under the WTO dispute settlement system (2015) and its compliance with WTO dispute settlement rulings against China (by 2015, thirty-seven WTO dispute settlement cases). Many Chinese lawyers rightly emphasize the political, social and legal advantages of China's active participation in the WTO dispute settlement system for promoting better governance of China's trade and legal policies.[99] In the Doha Round negotiations, China emphasizes the need for protecting the integrity of the WTO legal system (e.g. against its fragmentation by FTAs) and the legitimate interests of developing and least-developed WTO members (e.g. in reducing agricultural subsidies and market access barriers by developed countries for agricultural products like cotton).[100] Yet, similar to its initially reluctant participation in the WTO dispute settlement system and following other BRICS countries (like India), China has hardly engaged in leadership for concluding the Doha Round negotiations since 2001. As China has enormously benefited from the WTO trading, legal and dispute settlement system, it has reasonable self-interests in more actively protecting the global PG of a mutually beneficial world trading system. How could this be done in a credible way in spite of the lack of "democratic constitutionalism" in China's "peoples republic"? Can the global "aggregate PG" of a mutually beneficial world trading system be effectively protected if citizens and people do not protect "republican constitutionalism" at local and national levels of governance?

Footnote 97 continued
P.B. Potter, *Human Rights and Social Justice in China*, *in* LINKING GLOBAL TRADE AND HUMAN RIGHTS (Daniel Drache, et. al. eds., 2014).

[98] See Permanent Court of Arbitration Case No 2013-19 in the matter of the South China Sea Arbitration (*The Republic of the Philippines v The Peoples Republic of China*), award of 12 July 2016.

[99] J. Sheng, *The DSS under the WTO: China's Participation therein and Better Governance of China's Trade Policies*, 5 CHINA WTO REV. 58–85 (2015).

[100] Z. Sun, *China's Role in the Doha Round Negotiations*, 5 CHINA WTO REV. 3–27 (2015) (acknowledging the need for reforming the WTO consensus and "single undertaking" rules: "The pursuit of a package solution for over 20 issues and more than 150 members, especially when coupled with an insistence on consensus, is an impossible mission").

8.3 Need for protecting a "Peoples Republic" beyond state borders in multilevel governance of global "aggregate PGS"

This contribution has explained the need for "republican reforms" of multilevel governance so as to protect transnational "aggregate PGs" more effectively for the benefit of citizens. After having cultivated power-based, imperial political traditions in China without republicanism during more than 3000 years, many modern Chinese citizens and lawyers acknowledge that "republican constitutionalism" and "republican virtue politics" (e.g. as advocated by Aristotle) offer important lessons for multilevel governance of transnational PGs for the benefit of citizens also in China in order to protect the human rights and rule of law commitments in China's Constitution and its international legal obligations more effectively. The insistence by the Communist party on exempting its political leadership from constitutional "checks and balances" reflects the Marxian claim to know absolute truth; it reveals authoritarian "rule by law" that runs counter to "republican constitutionalism" protecting citizens, their civil, political, economic, social and cultural freedoms and human rights, and their "people's republic" against abuses of power, as they exist in all civilizations (including China as illustrated by its unnecessary poverty and "cultural revolution" prior to its opening-up policies since 1979). Like the feudal "ancient freedoms" in the Greek and Italian city republics, "communist freedoms" depend on collective political actions that are inadequately restrained by constitutional and judicial protection of human rights against abuses of power. In all countries, such power politics undermines the social advantages of open markets, global competition and cooperation—not only in the economy but likewise also in the polity.

By linking domestic law reforms to its WTO legal and dispute settlement obligations, China's political rulers have undertaken a first step to submit their political powers to external, self-imposed legal and judicial constraints that promote economic welfare and rule of law for the benefit of all Chinese citizens. This transnational "rule of law strategy" could even go beyond the "Westphalian power politics" advocated by EU and US trade diplomats and by most less-developed and least-developed WTO members in the trade policy area. China has not only the economic power (e.g. in terms of domestic market access) to induce other WTO members to take their WTO obligations of transnational rule-of-law (e.g. as required by Article XVI(4) WTO Agreement), multilevel judicial remedies and "consistent interpretations" more seriously. The "WTO plus" obligations in China's Protocol of Accession to the WTO (e.g. in terms of trading rights, intellectual property rights, judicial remedies) also illustrate why China's "rule of law strategy" could set incentives for other WTO members to further strengthen the multilevel, non-discriminatory nature of the WTO legal, dispute settlement and compliance system for the benefit of citizens worldwide. Such transformation of alleged "discrimination against China" (in terms of "WTO plus" obligations) into leadership for non-discriminatory reforms of the WTO legal system could also strengthen China's domestic rule of law reforms; "cosmopolitan rule of law" could benefit traders, producers, investors and consumers in all WTO member countries, revive China's "cosmopolitan traditions" (e.g. at the times of Marco Polo), and strengthen the

democratic legitimacy and effectiveness of WTO law and governance vis-à-vis citizens and other non-governmental economic actors. By empowering citizens and holding multilevel governance institutions more legally and judicially accountable for compliance with international trade rules approved by national parliaments for the benefit of citizens, decentralized enforcement of WTO rules could set incentives for "republican virtues" of citizens, governments and courts of justice and strengthen "republican constitutionalism" protecting the global PG of a mutually beneficial world trading system owned by citizens, peoples and their national republics.

8.4 India as a leader for global governance reforms?

Constitutional democracies committed to protection of human rights emerged in Europe and in the Americas much later than "republican constitutionalism". As human rights also protect individual and democratic diversity, there exists a legitimate multitude of diverse national and regional forms of constitutional, representative, participatory and deliberative "democratic self-governance" of citizens and peoples. Due to its only recent commitment to "republican constitutionalism" since 1911, China's rulers will need more time to decide on how to reconcile their self-imposed human rights commitments with "Chinese ways" of democratic self-governance that are likely to remain different from European and American constitutional traditions. The potential welfare gains from opening-up China's political system to competition and "republican constitutionalism" are likely to be even more important than China's economic gains from joining the WTO trading system. As international trade and investment law have to be construed "in conformity with the principles of justice and international law", including also "human rights and fundamental freedoms for all" (Preamble VCLT), there is no need for explicitly incorporating human rights into worldwide IEL governing countries with very diverse human rights conceptions (e.g. under national, regional and UN HRL). Just as GATT and WTO dispute settlement jurisprudence has avoided violations of human rights in the hundreds of GATT/WTO dispute settlement reports since 1950, the diversity of human rights obligations of WTO members argues for leaving it pragmatically to future WTO jurisprudence, national parliaments, civil society and domestic courts of justice to ensure that HRL and IEL are interpreted, applied and developed in mutually consistent ways for the benefit of citizens, with due respect for their diverse democratic preferences and constitutional traditions.

Constitutional democracies like India, however, should use their constitutional commitments to protection of economic freedoms (e.g. in Article 19 of India's Constitution of 1949) and of other human rights as a constitutional mandate to protect the global "aggregate PG" of a liberal, rules-based trading system inside and beyond India's frontiers. In spite of India's participation in only three GATT dispute settlement proceedings from 1948 to 1995, India's much more active participation in forty-five WTO dispute settlement proceedings from 1995 to 2015 (twenty-one as complainant and twenty-four as respondent)—in addition to its participation as a third party in one hundred and fifteen WTO disputes—illustrates India's

commitment to actively using and shaping the WTO legal and dispute settlement system as a global PG.[101] Since July 1991, India began using also GATT law more actively for liberalizing its economy and, thereby, lifting hundreds of millions of poor citizens out of unnecessary poverty. Yet most foreign observers criticize Indian trade diplomacy for insufficient leadership for liberalizing and regulating international trade in the context of the WTO Doha Round negotiations since 2001. Just as India's active participation in the WTO dispute settlement system was made possible by domestic legal and institutional reforms enhancing India's "legal capacities" (e.g. by promoting better coordination between trade policy officials, legal experts, industry representatives and the Geneva Advisory Center on WTO Law), so does Indian leadership in the WTO Doha Round negotiations require changes in "legal strategies", for instance by prioritizing citizen-oriented WTO legal limitations of "market failures" and "governance failures" over state-centered "special and differential treatment" based on "legal privileges" that have often impeded government efforts at promoting domestic consumer welfare through liberalization and regulation of trade and—in case of "procedural privileges" (e.g. under Articles 21.7 and 21.8 DSU)—have sometimes never been used in WTO dispute settlement practices.[102] Arguably, the Indian Constitution and the customary rules of treaty interpretation call for Indian leadership for interpreting WTO rules in conformity with the human rights obligations of all UN member states so as to better protect "development as freedom" focusing on protection of the human capacities and basic needs of all citizens, as rightly emphasized by India's Nobel Prize economist Amartya Sen.[103]

[101] For analyses of these WTO dispute settlement proceedings and India's litigation strategies *see*, ABHIJITH DAS & JAMES J.NEDUMPARA, WTO DISPUTE SETTLEMENT AT TWENTY: INSIDERS' REFLECTIONS ON INDIA'S PARTICIPATION (2016).

[102] Frieder Roessler, *Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System*, in THE WTO DISPUTE SETTLEMENT SYSTEM 1995–2003 (Frederico Ortino, et al., 2004).

[103] AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000).