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How to Reconcile Health Law and Economic Law  
with Human Rights?  
Administration of Justice in Tobacco Control Disputes

Prof. Dr. Ernst-Ulrich Petersmann



European University Institute  
**Department of Law**

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## **Abstract**

Tobacco companies and tobacco exporting members of the World Trade Organization (WTO) have initiated an increasing number of disputes in national, regional and worldwide jurisdictions and investor-state arbitrations challenging the legal consistency of tobacco control measures - such as Australia's 'Tobacco Plain Packaging' legislation and regulations - with international trade, investment and intellectual property law.

The defendant countries and non-governmental organizations tend to justify tobacco-control measures by invoking public health provisions in international economic law (IEL), domestic constitutional laws, public health legislation, human rights law and the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) ratified by 177 UN member states. This article begins by asking how the fragmented systems of multilevel health, economic and human rights law and governance should be interpreted and coordinated in order to promote their mutual legal coherence. It then explores how multilevel courts should 'administer justice' in tobacco control disputes with due regard to their diverse national and international jurisdictions, applicable laws and methods of legal interpretation. The article concludes that multilevel judicial administration of justice in tobacco control disputes requires judicial cooperation in applying 'constitutional methodologies' (e.g. regarding 'balancing' of competing rights, proportionality of restrictions, reasonable judicial justifications promoting 'public reason'), mutually 'consistent interpretations' (e.g. based on the 'integration principle' limiting legal 'fragmentation') and 'judicial comity' (e.g. regarding rule of law, respecting 'margins of appreciation', protecting 'access to justice') so as to avoid incoherent judgments. The main lesson from the more than 2500 years of legal and political experiences - e.g. since the ancient Constitution of Athens (500 BC) - with collective protection of 'public goods' (res publica) demanded by citizens remains the need for limiting abuses of power through multilevel 'republican constitutionalism' providing for legal, judicial and democratic accountability mechanisms.

## **Keywords**

fragmentation; health law; human rights; investment law; justice; legal interpretation methods; tobacco control; trade law; WHO; WTO.

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## HOW TO RECONCILE HEALTH LAW AND ECONOMIC LAW WITH HUMAN RIGHTS? ADMINISTRATION OF JUSTICE IN TOBACCO CONTROL DISPUTES

*Ernst-Ulrich Petersmann* \*

### Introduction: Law And The ‘Human Condition’

During the 20<sup>th</sup> century, tobacco caused the death of about 100 million people, similar to the combined death toll of World Wars I and II. Why is it that tobacco companies can enrich themselves by selling toxic products and misleading consumers in spite of half a century of scientific evidence that tobacco products kill half of their long-term consumers (currently almost 6 million deaths per year), often at immense, individual suffering and social cost? Why has the WHO – in spite of its unprecedented powers under Article 22 of the WHO Constitution to impose binding legal obligations without a state’s express assent – ‘not passed a single resolution on the right to health’ since the entry into force of the WHO Constitution in 1948?<sup>1</sup> The philosopher Immanuel Kant has famously stated that answering the three central questions underlying philosophy – *i.e.*: What can we know (e.g. in the natural and social sciences)? What may we hope for (e.g. in religions and meta-physics)? What shall we do (e.g. in ethics and politics)? - depends on our conceptions of human beings. Arguably, this is also true for legal interpretations of national and international legal systems, including global health law and IEL. If, as stated in the UN Charter and in the codification of the customary rules of treaty interpretation in the Vienna Convention on the Law of Treaties, treaties must be interpreted, and treaty disputes must be settled, ‘in conformity with the principles of justice and international law’ (Preamble VCLT), then legal interpretations and related dispute settlements may depend on how legal interpreters and judges define the relevant ‘principles of justice’ mentioned in numerous international treaties. For instance, the Preamble of the VCLT refers to four different ‘principles of justice’ defined in UN law - namely, sovereign equality and independence of all states; self-determination of peoples; human rights and fundamental freedoms for all; and peaceful settlement of disputes, without use of force, in conformity with ‘principles of justice’ - without clarifying their contested legal interrelationships (e.g. regarding ‘duties to protect’ human rights as legal limitations of state sovereignty); hence, depending on their reasonable value preferences and rational self-interests, diplomats, governments, judges and citizens may advocate competing conceptions of ‘international law among sovereign states’, ‘international law among peoples’, or ‘cosmopolitan international law’ recognizing citizens as ultimate sources of legal legitimacy and holders of ‘constituent power’ in the 21<sup>st</sup> century.<sup>2</sup> The legal distinctions between ‘violation complaints’, ‘non-violation complaints’ and ‘situation complaints’ in Article XXIII GATT as well as in the WTO Dispute Settlement Understanding (DSU) are likewise based on competing principles of distributive, corrective, commutative justice and equity that - even after 65 years of GATT/WTO jurisprudence - continue to remain controversial among WTO members (e.g. regarding the admissibility of ‘non-violation’ complaints under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights).<sup>3</sup>

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<sup>1</sup> Cf. L.O.Gostin, *GLOBAL HEALTH LAW* (2014), at 120.

<sup>2</sup> Cf. E.U.Petersmann, Need for a New Philosophy of International Economic Law and Adjudication, in: *JIEL* 17 (2014), 639 ff.

<sup>3</sup> Cf. E.U.Petersmann, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (1997), chapter 4.

Also the proposals by UN Human Rights bodies for ‘human rights approaches’ to the interpretation of international trade, investment and intellectual property conventions remain contested by ‘realist politicians’ and have so far hardly influenced WTO jurisprudence and investor-state arbitration.<sup>4</sup> Yet, as illustrated by the ‘*Kadi*-jurisprudence’ of the EU Court of Justice (CJEU) on the inconsistency of UN Security Council ‘smart sanctions’ with EU human rights<sup>5</sup>, the more national and regional jurisdictions inside constitutional democracies prioritize ‘constitutional interpretations’ of international treaties protecting rights of citizens and corresponding government duties to respect, protect and fulfil ‘constitutional rights’ of citizens (e.g. to mutually consistent interpretations of national and international legal systems for the benefit of citizens), the more may such ‘constitutional interpretations’ differ from ‘state-centred interpretations’ advocated in intergovernmental diplomacy and adjudication among states.

Human beings have to earn a living in order to survive (*homo laborans*), and strive for social recognition (*homo faber*). Hence, contract law, property law, economic law (e.g. regulating money and trade), tort law and criminal law belong to the oldest fields of national and international legal systems; they hold individuals legally accountable for what a morally indifferent *homo economicus* may perceive as ‘efficient breaches’ of the law. As social human beings, individuals also depend on political cooperation for the collective supply of public goods (*homo politicus*) - like legal security and social peace, whose non-excludable and/or non-exhaustive advantages impede their decentralized, commercial production in private markets. The diverse social demands of reasonable human beings – for instance as *private citizens* demanding protection of family life, *economic citizens* demanding protection of open, non-discriminatory markets and limitation of ‘market failures’, *state citizens* and *cosmopolitan citizens* demanding multilevel protection of national and transnational public goods and limitation of ‘governance failures’ – continue to prompt social experimentation with diverse forms of political, national and transnational governance and legal systems (*homo ordinans*). Since the ancient city constitutions in Greece and Rome more than 2400 years ago, ‘republican constitutionalism’ has proven to be the most effective and most legitimate, citizen-driven method for collectively supplying ‘public goods’ through limited delegation of government powers subject to legal and democratic accountability mechanisms protecting citizens against abuses of power. Human rights law (HRL) emerged much later than economic law, following the American Declaration of Independence (1776) and the French Declaration of the Rights of Man and the Citizens (1789) based on the today worldwide recognition that ‘(a)ll 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’ (Article 1 of the 1948 Universal Declaration of Human Rights = UDHR). World War II and ‘globalization’ led to 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’; ‘it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’ (Preamble UDHR). Yet, the universal recognition of human dignity (e.g. in terms of the two ‘moral powers’ of reasonable individuals to decide autonomously on their conceptions of a good life and of social and political justice) as the legal foundation of modern international law remains contested by ‘political realists’ emphasizing the reality of international power politics. Just as the ‘basic instincts’, ‘animal spirits’, rational egoism and limited human reasonableness of individuals interact in often unpredictable ways, also collective regulations of ‘market failures’ (e.g. limiting selfish ‘utility maximization’ by the ‘*homo economicus*’ in order to protect non-economic rights of citizens to health protection) and of ‘governance failures’ often remain imperfect. As human reasonableness and the idea of universal, ‘inalienable’ human rights and democratic self-governance are constantly challenged by the

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<sup>4</sup> Cf. E.U.Petersmann, *INTERNATIONAL ECONOMIC LAW IN THE 21<sup>ST</sup> CENTURY. CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS* (2012), 407 ff.

<sup>5</sup> Petersmann (note 4), at 247, 351, 413., 442, 460.

reality of power-oriented 'management' and 'realist pursuit' of rational self-interests by rulers and powerful interest groups (like tobacco industries), the evolution of constitutionalism protecting citizens, peoples and their equal rights as legitimate 'constituent powers' depends on legal, democratic and judicial accountability mechanisms enabling citizens to hold governments accountable for respecting, protecting and fulfilling their limited democratic and 'human rights mandates'.<sup>6</sup>

Similar to the justification of the 1919 Constitution of the International Labour Organization (ILO) by the claim that 'universal and lasting peace can be established only if it is based upon social justice' (Preamble ILO Constitution), the post-World War II efforts at reconstructing a peaceful international legal order began with the 1944 Bretton Woods Agreements establishing the International Monetary Fund and the World Bank, and envisaging the later establishment of an International Trade Organization in order to promote the economic foundations of peaceful international cooperation. In contrast to the post-World War I League of Nations, the UN Charter provided for legal obligations of all UN member states to promote and protect also human rights. The 1948 Constitution of the WHO recognized not only the 'enjoyment of the highest attainable standard of health (as) one of the fundamental rights of every human being'; it also acknowledges that 'the health of all peoples is fundamental to the attainment of peace and security and is dependent on the fullest cooperation of individuals and States' (Preamble WHO Constitution). The ever closer cooperation among the UN, UN Specialized Agencies like the WHO, and the WTO - as illustrated by the joint reports and regular, trilateral symposia of the WHO, WTO and World Intellectual Property Organization (WIPO) on developments in the fields of health, trade and intellectual property - reflects the today worldwide recognition that effective protection of human rights (e.g. of access to food and health protection) requires multilevel, coordinated regulation and governance of interdependent public goods like food security, public health protection and a rules-based world trading system enabling each trading country to increase its national economic productivity and consumer welfare.<sup>7</sup> Coherent resolution of national and international disputes over tobacco control measures requires clarifying how the fragmented legal fields of health law and economic law can be reconciled with the human rights obligations of all UN member states in multilevel legislative, administrative and judicial governance of interdependent 'aggregate public goods'.

### **Constitutionalization or Fragmentation of Legal Systems?**

How should reasonable human beings react to the fact that – even though health law, economic law and HRL evolved separately, as recalled in *Section I* – the factors responsible for poor global health are largely beyond the control of the health sector? In his 'allegory of the cave', the Greek philosopher Plato likened the 'human condition' to bound prisoners confined to a life in a cave, where they mistook the shadows on the wall for reality without being capable of leaving their cave and discovering the truth in the sun-light outside the cave entrance. Similar to the disagreement among evolutionary biologists on whether the physical world of appearances and its underlying 'laws' evolve into ever-greater order or chaos<sup>8</sup>, and to similar disagreements among religions as to the extent to which god created man in his own image (*i.e.* as being capable of enlightenment of the human condition), also anthropologists and lawyers disagree on whether the reasonable human capacities to control human emotions and 'basic instincts' enable people to limit and 'civilize' the power-oriented 'legal fragmentation' of national and international legal systems, for instance by using 'constitutional mind-sets' of reasonable human beings for preventing conflicts and human rivalry through self-imposed 'hands-tying' (following Ulysses' advice upon approaching the island of the sirens) and

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<sup>6</sup> Cf. C.C.Gould, *INTERACTIVE DEMOCRACY. THE SOCIAL ROOTS OF GLOBAL JUSTICE* (2014).

<sup>7</sup> Cf. E.U.Petersmann, Constituting, Limiting, Regulating and Justifying Multilevel Governance of Interdependent Public Goods: Methodological Problems of International Economic Law Research, in: *EUI Working Papers Law* 2013/08.

<sup>8</sup> Cf. the chapter on 'Deciphering Plato's Cave Allegory' in : J.Griffith, *A SPECIES IN DENIAL* (2003), at 83 ff.

‘constitutional contracts’. ‘Realists’ and ‘radical pluralists’ often emphasize the inevitable conflicts among competing legal regimes:

- conflicts resulting from diverse, *internal value assumptions of legal actors* justifying the legal coherence, validity and hierarchy of national and international ‘self-contained legal regimes’ from different legal perspectives, such as different basic norms (‘*Grundnorm*’) and legal preconceptions (‘*Vorverständnis*’) in terms of Kelsen’s legal theory of the structures (‘*Stufenbau*’) of national and international legal orders deriving their respective legitimacy from a presumed, national or international ‘foundational norm’;
- conflicts due to interest-driven, *strategic self-interests of legal actors* and of institutional biases of specialized legal regimes (e.g. of trade law, investment law, intellectual property law, environmental law, UN HRL, UN Security Council regulations), whose respective legal priorities and conflicting legal claims and value premises may be irreconcilable; or
- inherent inter-regime conflicts resulting from their self-contained, ‘*autopoietic dynamic of social differentiations*’ following the particular rationality of social sub-systems (like the economy, security protection, internet regulation) and related, functionally oriented conflict rules and remedies.<sup>9</sup>

My own studies of legal fragmentation of HRL<sup>10</sup> and IEL<sup>11</sup> proceed from the ‘constitutional perspective’ that - as explicitly recognized in the customary law requirement of interpreting international treaties and settling related disputes ‘in conformity with principles of justice’, including also ‘human rights and fundamental freedoms for all’ – multilevel HRL and constitutional law require reconciling and ‘integrating’ fragmented national and international legal regimes, their respective ‘basic norms’, particular interests and systemic rationalities by connecting and ‘balancing’ their underlying constitutional principles and other ‘general principles’ of law and justice in democratic law-making and multilevel adjudication promoting ‘multilevel public reason’. The traditional distinctions and ‘binary logic’ of national and international law categories are progressively transformed by the emergence of ‘transnational law’ and ‘multi-valued legal reasoning’ balancing and reconciling competing legal values and legal regimes, for instance by respecting ‘margins of appreciation’ and ‘*solange*’ doctrines, mutually ‘consistent interpretations’ of national and international rules of law, or ‘equivalent protection’ and ‘reciprocal recognition’ principles.<sup>12</sup> Notably in European law, the progressive ‘constitutionalization’ of IEL continues to promote an international ‘integration law’ deriving its moral and democratic legitimacy explicitly from national, European and UN HRL and multilevel constitutionalism limiting abuses of public and private power. The changes in ‘legal systems’ (e.g. their ‘rules of recognition’), regulatory tasks (e.g. of international public goods), legal orders (e.g. due to ‘transnational law’) and legal phenomena (e.g. due to globalization) may not change ‘the nature’ of law, but require reviewing and adapting our theories of law and interpretation.

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<sup>9</sup> For an analysis of these ‘three versions of radical pluralism’ (Kelsen’s legal orders based on competing ‘foundational norms’, Koskenniemi’s imperial international law regimes, Luhmann’s autopoietic social systems) see: K.Tuori, Transnational law. On legal hybrids and perspectivism, in: M.Maduro/K.Tuori/S.Sankari (eds), *TRANSNATIONAL LAW. RETHINKING EUROPEAN LAW AND LEGAL THINKING* (2014), at 9, 30-37.

<sup>10</sup> Cf. E.U.Petersmann, Human Rights and International Economic Law, in: *Trade, Law & Development* 4 (2012), 283-314

<sup>11</sup> Cf. E.U.Petersmann, ‘Fragmentation’ and ‘Judicialization’ of International Law as Dialectic Strategies for Reforming International Economic Law, in: *Trade, Law & Development* 5 (2013), 209-255.

<sup>12</sup> Cf. Maduro/Tuori/Sankari (note 9) and Petersmann (note 4).

## Constitutionalization of Multilevel Economic Governance?

How should economic rights and human rights (e.g. to health and a clean environment) be reconciled, for instance in those constitutional democracies (like Australia, Brazil and Mexico) that have banned the sale and importation of electronic cigarettes? Since the human rights revolutions during the 18th century, national (big C) Constitutions tend to be adopted by ever-more peoples (the demos) exercising - at exceptional 'constitutional moments' - constituent power (*pouvoir constituant*) so as to organize democratic self-government and collective supply of public goods comprehensively for the benefit of citizens inside democratic states. The constitution, limitation, regulation and justification of international organizations, by contrast, and of their multilevel governance powers for the collective supply of international public goods, tend to be based on functionally limited (small c) 'treaty constitutions' - like the post-war UN 'constitutions' (sic) establishing the ILO, the WHO, the FAO and UNESCO - that continue to dynamically evolve through legal adjustments and 'constitutionalization' of their governance systems in response to demands of citizens and the 'collective action problems' of multilevel governance. As the moral and constitutional foundations of HRL, IEL and also of global health law often remain contested among 'epistemic communities', conceptions of 'human rights as trumps' have prompted human rights advocates (like Philip Alston) to call for 'resisting a merger of IEL and HRL' so as to leave the translation of human rights principles and rules into practical action to UN human rights experts. Such 'paternalistic proposals' by UN experts without economic expertise play in the hands of many diplomats and economic lawyers emphasizing the utilitarian rather than moral foundations of IEL, and the need for prioritizing investments, savings and creation of economic goods and services over their redistribution to disadvantaged people. Yet, even though hegemonic claims of UN human rights experts continue to be resented by many diplomats and economic experts, the 'democratic legitimacy gap' of the Bretton Woods institutions and GATT/WTO politics have contributed to increasing civil society support for 'mainstreaming human rights into the law of worldwide organizations' as a means for 'constitutionalizing intergovernmental power politics' and 'institutionalizing public reason' so as to enhance the 'democratic capability' to protect human rights more effectively.<sup>13</sup> The more HRL and IEL are successfully integrated and 'constitutionalized' inside constitutional democracies as well as in regional legal systems like European Union (EU) law, the European Economic Area (EEA) and the European Convention of Human Rights (ECHR), the less fails elitist opposition from some human rights specialists to empowering citizens by integrating HRL and IEL to convince.<sup>14</sup> Also the UN High Commissioner for Human Rights has advocated a 'human rights approach' to international economic regulation endorsing an 'integration approach', as legally required by the 'integration principle' codified in Article 31:3 (c) of the VCLT and democratically needed in order to 'institutionalize public reason' conditioning the 'collective capability' of protecting public goods.<sup>15</sup> The dynamic evolution of European integration law reflects progressive 'constitutionalization' of European economic

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<sup>13</sup> Cf. E.U.Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, in: *EJIL* (2002) 621-650.

<sup>14</sup> For my defense of the 'legal integration thesis' against the 'separation thesis' advocated by Alston see: E.U.Petersmann, Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston, in: *EJIL* 13 (2002) 845-851.

<sup>15</sup> Cf. E.U.Petersmann, The Human Rights Approach to International Trade Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy? in: E.U.Petersmann (ed), *REFORMING THE WORLD TRADING SYSTEM. LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE* (2005), 357-380. On the idea of public reason as a 'collective capability' see: E.I.Kelly, Public Reason as a Collective Capability, in: *Rutgers Law Journal* 43 (2012), 295-316. 'Public reason' is less demanding than the 'discourse principle' of J.Habermas, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* (1998), at 39 ff: 'Only those norms can claim validity that could meet with the acceptance of all concerned in practical discourse.' Arguably, Habermas' requirement of 'fully inclusive, real discourse' fails to recognize the limits of human cognitive capacities regarding collective supply of global PGs affecting billions of people in diverse countries with diverse democratic preferences; cf. A.Kuper, *DEMOCRACY BEYOND BORDERS: JUSTICE AND REPRESENTATION IN GLOBAL INSTITUTIONS* (2004), 194 ff.

governance more clearly than the less distinct efforts at ‘constitutionalizing’ worldwide institutions and multilevel governance outside Europe (e.g. among national and sub-national WTO members like China, Hong Kong, Macau and Taiwan; multilevel judicial governance based on cooperation among national, regional and WTO dispute settlement systems). For instance:

- The 1951 European Coal and Steel Community and the 1958 European Economic Community among initially 6 EEC member states were progressively transformed – notably through judicial interpretation of the common market freedoms and competition rules as fundamental rights of citizens – into a micro-economic ‘*ordo-liberal* economic constitution’ protecting non-discriminatory conditions of competition among economic actors in the common market, equal fundamental rights and transnational rule of law.<sup>16</sup>
- The 1993 Maastricht Treaty changed this ‘economic constitution’ by adding a ‘macroeconomic monetary constitution’ for the progressive elaboration of a European Monetary Union among the today 28 member states of the European Union (EU).
- The 1998 Amsterdam Treaty provisions on a common ‘area of freedom, security and justice’ initiated an additional ‘security constitution’ that was progressively extended by additional security policy coordination (notably following 9/11) and the ‘foreign policy constitution’ set out in the 2009 Lisbon Treaty.
- The Eurozone crisis measures adopted since 2010 transform and ‘constitutionalize’ multilevel economic governance of the now 19 Eurozone member countries, thereby ‘fragmenting’ the ‘Maastricht constitution’ for the European Economic and Monetary Union among EU member states. Even though the role of courts in macro-economic policy coordination remains more limited than in micro-economic common market regulation, Eurozone crisis measures were increasingly challenged both in the CJEU<sup>17</sup> as well as in national courts. The ‘OMT decision’ of 14 January 2014 by the German Constitutional Court<sup>18</sup> - initiated by complaints from more than 37’000 German citizens invoking the democratic and judicial accountability of German government institutions for controlling the monetary policy powers of the European Central Bank (ECB) - requested a preliminary ruling from the CJEU on, *inter alia*, the question of whether the decision of the ECB Governing Council of 6 September 2012 on purchases of government bonds of over-indebted Eurozone member countries in ‘secondary money markets’ exceeds the limited powers of the ECB and is incompatible with EU law.
- The human rights jurisprudence of the CJEU and the EFTA Court, the EU Charter of Fundamental Rights, the incorporation of the common constitutional principles of EU member states into EU law, and the EU accession to the ECHR illustrate that integrating HRL and IEL has mutually strengthened protection of civil, political, economic, social and cultural rights in all 28 EU member countries and associated EFTA countries by promoting a new, transnational human rights culture. The Charter’s integrated, innovative conception of dignity rights, liberty rights, equality rights, solidarity rights, citizen rights and of guarantees of ‘access to justice’ differs from the fragmented protection of human rights in separate UN human rights conventions and proves that ‘integrating HRL and IEL’ can *strengthen* the constitutional foundations and enforcement of human rights in and beyond IEL.

UN law and WTO law regulate multilevel governance of international economic and non-economic public goods in separate multilateral treaties that – according to the ‘integration principle’ of the customary rules of treaty interpretation (cf. Article 31:3, c VCLT) – must be construed in mutually

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<sup>16</sup> Cf. E.U.Petersmann, *Constitutional Functions of International Economic Law* (1991); K.Tuori/K.Tuori, *THE EUROZONE CRISIS* (2014), at 5 ff.

<sup>17</sup> Cf. Case C-370/12, *Pringle v Government of Ireland*, judgment of 27 November 2012 (not yet reported).

<sup>18</sup> On this decision (2 BvR 2728/13 of 14 January 2014) see the special issue of the *German Law Journal* 2014, 107-382.

consistent ways. Hence, as emphasized by former WTO Director-General Pascal Lamy, also the ‘Washington consensus’ underlying the Bretton Woods and GATT/WTO agreements must remain consistent with the ‘Geneva consensus’ underlying the law of the UN human rights bodies, the WHO, ILO and other UN Specialized Agencies at Geneva.<sup>19</sup> The more globalization transforms *national* into *global public goods* (like public health) that can no longer be unilaterally secured by any single state, the more territorial borders are losing their importance and national Constitutions become ‘partial constitutions’ that can no longer effectively regulate and protect transnational ‘aggregate public goods’ without international law and multilevel governance institutions transcending hierarchical, national governance systems. Limiting ‘legal fragmentation’ in the regulation of interdependent ‘aggregate public goods’ (like mutually beneficial monetary, trading, financial and environmental systems) requires mutually ‘consistent interpretations’ and ‘judicial comity’ in multilevel governance and judicial protection of transnational ‘rule of law’ for the benefit of citizens, including ‘providing security and predictability to the multilateral trading system’ as required by Article 3 DSU. The reports by the Study Group of the International Law Commission (ILC) on ‘*Fragmentation of International Law: Problems caused by the Diversification and Expansion of International Law*’ recognized the legitimacy of specialized legal regimes for the collective supply of diverse international public goods; as specialized treaty regimes remain integral parts of the general international law system, the customary rules of treaty interpretation and dispute settlement offer adequate instruments for avoiding legal conflicts or, should such conflicts arise, for reducing ‘legal fragmentation’ through agreed dispute settlement procedures.<sup>20</sup>

### **Constitutionalization of Multilevel Human Rights and Health Governance?**

Plato’s belief that ‘philosophers’ could leave the ‘human cave’ and, upon their return to the shadowy human realities, could educate rulers so as to constitutionalize power politics through ‘philosopher kings’, was severely disappointed when Plato, during his later work as adviser of the ruler of Syracuse, was punished by the tyrant who offered Plato for sale in the local slave market. UN HRL continues to lack effective legal, administrative and judicial enforcement mechanisms; it has not prevented that more than 2 billion people live without effective protection of their human rights and basic human needs. As argued by theories of justice (e.g. by Plato and Aristotle) since ancient times, the human search for an objectively justified legal order can effectively constrain abuses of public and private power only to the extent that citizens are constitutionally empowered to enforce their rights; law-compliance by citizens depends on justification of law by agreed principles of procedural, distributive, commutative, corrective justice and equity, so that reasonable citizens voluntarily accept legal rules and ‘internalize’ their principles of justice like other ‘cardinal virtues’ (such as human self-control, fortitude, and wisdom). Just as individuals can behave ‘justly’ only to the extent they are governed by their human reasonableness, so must national and international communities be governed by the ‘public reason’ of their citizens in order to become democratically capable of protecting and realizing justice in cooperation and conflicts among citizens inside and beyond states. Respect for equal rights of citizens contributes to ensuring that government policies are not only promoting the interests of particular groups, but are mutually beneficial also for every citizen and for their equal rights. The ‘institutionalization’ of objective ‘principles of justice’ (e.g. through HRL, courts of justice) is likely to remain effective only as long as *legal and political justice* remain embedded and supported by the *personal justice* of law-complying citizens using their equal rights for constitutionally restraining abuses of majority politics. It is from this citizen-oriented perspective of rules-based self-government, democratic responsibility and impartial judicial procedures that – as stated by Socrates (in Plato’s dialogue *Kriton*) – ‘suffering injustice is better than doing injustice.’

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<sup>19</sup> P.Lamy, *THE GENEVA CONSENSUS. MAKING TRADE WORK FOR ALL* (2013).

<sup>20</sup> Cf. UN documents A/CN.4/L.682 (Analytical Report of 13 April 2006) and A/CN.4/L.702 (Conclusions of 18 July 2006).

The WHO Constitution recognizes that ‘the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being’ (Preamble), as recognized similarly in numerous UN and regional human rights conventions and national Constitutions. The right to health requires governments to generate conditions in which everyone can be as healthy as possible, for instance conditions ensuring availability of health services, healthy and safe working conditions, adequate housing and nutritious food. Yet, due also to inadequate legal and judicial remedies under national and international HRL and health law, the WHO, its 194 member states and also the UN have failed, so far, to effectively ‘constitutionalize’ this human right to health by transforming, implementing and enforcing it through multilevel UN/WHO health law, governance and adjudication empowering citizens to hold governments accountable for the unnecessary and unjust ‘health gap’ between rich and poor countries, as illustrated by the fact that, in 2010, ‘780 million people lacked access to clean water and 2.5 billion people were without proper sanitation facilities, while approximately 870 million people faced chronic hunger.’<sup>21</sup> Also most UN ‘Millennium Development Goals’ for improving the protection of child health, maternal health, access to food, water, sanitation, and for reversing the spread of HIV, malaria and other diseases have not been met, partly due to the global financial, food, energy and climate change crises and other detrimental health influences of international regimes beyond the health sector.

There is increasing recognition that ‘(e)ach global health problem ‘is shaped by law’s language of rights, duties, and rules of engagement, such as setting high standards, monitoring progress, and ensuring compliance’; ‘it is only through law that individuals and populations can claim entitlements to health services, and that corresponding state obligations can be established and enforced’; yet, the ‘potential of law, both national and global, to dramatically transform prospects for good health, particularly for the world’s most disadvantaged people’ and for a ‘justice-based commitment to mutual responsibility beyond state borders’, is not realized.<sup>22</sup> Case-studies confirm that in less developed countries with independent judiciaries mandated to protect constitutional rights, also economic and social rights (e.g. to health protection and education) have often been effectively protected.<sup>23</sup> But the necessary reciprocity of human rights and corresponding government obligations remains weak in many countries due to inadequate legal and judicial remedies of citizens for holding governments accountable. In the UN Covenant on Economic, Social and Cultural Rights (ICESCR) and in many other, national and international human rights instruments, the human rights obligations to ‘progressively realize’ access of everyone to acceptable health goods, services, health facilities and other determinants of health (like rights and access to food, clean water and adequate sanitation) are not supplemented by effective legal, democratic and judicial remedies. Even though both the WHO as well as UN human rights bodies emphasize the need for a ‘human rights approach’ to health governance, non-democratic governance and health sector corruption in many countries prevent ‘constitutionalization’ of health protection through legal and judicial remedies holding governments accountable for their frequent failures to comply with existing legal obligations of protecting public health and individual health care. As external assistance can only supplement domestic self-help, it has proven to be unrealistic to expect affluent democratic states to compensate such ‘health governance failures’ by carrying out their responsibilities vis-à-vis poor peoples in lower-income states that do not provide necessary resources within their own economic constraints.<sup>24</sup>

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<sup>21</sup> Cf. Gostin, (note 1), at 13.

<sup>22</sup> The quoted citations are from Gostin (note 1), at 18.

<sup>23</sup> Cf. V.Gauri/D.M.Brinks (eds), *COURTING SOCIAL JUSTICE. JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (2008). For a comparative study of the complex processes of contestation, interpretation and enforcement transforming moral and constitutional into enforceable legal, economic and social rights (e.g. to food, health, housing and education) see also : K.G.Young, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (2012).

<sup>24</sup> Gostin (note 1), at 26.



## Governance Lessons From the 'IEL Revolution'?

In contrast to public health law and HRL, the IEL of the Bretton Woods institutions, GATT and the WTO continue to be strongly influenced by 'utilitarian theories of justice' and economic theories on the gains from liberal trade, 'separation of policy instruments', 'optimal interventions', and efficient policy instruments for addressing collective action problems in supplying public goods.<sup>25</sup> 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.'<sup>26</sup> Yet, the mercantilist realities of *reciprocal trade liberalization in the context of trade agreements* can only partially be explained by economists, such as the legal ranking - in the General Agreement on Tariffs and Trade (GATT 1947) - of diverse trade policy instruments according to their economic efficiency so as to increase 'Kaldor-Hicks efficiency' enabling governments to use the gains from trade liberalization for compensating domestic citizens adversely affected by import-competition and still be better off.<sup>27</sup> By contrast, the explanations offered by economic 'terms-of-trade' theories - *i.e.* that governments negotiate trade agreements in order to protect market access commitments against *foreign 'terms-of-trade' manipulation* - tend to be inconsistent with those offered by economic 'commitment theories', according to which 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 explained by Ethier and Regan<sup>28</sup>, 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';
- that they have the knowledge and political support for manipulating *international prices* through thousands of 'optimum tariff items' aimed at improving terms-of-trade;
- that the terms-of-trade tariff revenue will always outweigh the domestic costs from import protection;
- that terms-of-trade considerations can explain all trade rules; and
- that '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 reducing politically motivated import protection, export subsidies and voluntary export restraints and hardly ever refer to 'terms-of-trade' manipulation.<sup>29</sup>

Arguably, economics offers even less concrete guidelines for designing UN health law and human rights governance. Due to the frequent neglect for 'input legitimacy' also in IEL, citizens and democratic parliaments increasingly insist on transparent and democratic trade policy-making for the

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<sup>25</sup> On the need for reconciling the diverse economic and legal approaches in interpreting IEL see my Chapter IV on 'Need for an Economic Analysis of International Economic Law' in: Petersmann (note 16), 73-94; on theories of justice in IEL see Petersmann (note 3), chapter VI.

<sup>26</sup> P. Krugman, What Should Trade Negotiators Negotiate About? 35 *Journal of Economic Literature* (1997), at 113.

<sup>27</sup> On the economic, political and legal reasons underlying the ranking of trade policy instruments in GATT see: F. Roessler, The Constitutional Function of the Multilateral Trade Order, in: M.Hilf/E.U.Petersmann (eds), *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* (1993), at 53 ff.

<sup>28</sup> Cf. D. Regan, What are Trade Agreements For? Two Conflicting Stories Told by Economists, with a Lesson for Lawyers, in: *JIEL* 9 (2006), at 951; W. Ethier, The Theory of Trade Policy and Trade Agreements: A Critique, *European Journal of Political Economy* 23 (2007), at 605.

<sup>29</sup> Cf. E.U.Petersmann, Trade Policy as a Constitutional Problem. On the 'Domestic Policy Functions' of International Trade Rules, *Swiss Review of International Economic Relations* 41 (1986), at 405.

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.<sup>30</sup> The abuses of 'veto powers' in UN and WTO governance confirm the need for 'constitutional approaches' to constituting, limiting, regulating and justifying multilevel governance powers as being no less important for the legitimacy and efficiency of international law and governance than 'law and economics approaches'. Notably international commercial, investment and regional economic integration law are progressively 'constitutionalized' through multilevel judicial protection of transnational rule of law and multilevel judicial cooperation in clarifying common 'constitutional principles' underlying and justifying commercial contracts and arbitration, investment agreements, investor-state arbitration, and multilevel cooperation among national and regional economic and human rights courts in regional integration notably in Europe and Latin-America. Constitutionalism and functional conceptions of multilevel governance of public health, human rights and economic markets in terms of 'interdependent public goods' rightly emphasize the functional unity of HRL, health law and IEL.<sup>31</sup> Also GATT and WTO law protect sovereign rights to provide non-economic public goods like public health - either through 'exception clauses' (like Articles XX GATT, XIV GATS), recognition as 'principles' (e.g. in Article 8 TRIPS Agreement) or through other treaty provisions (e.g. in Article 2 TBT Agreement). Similar to justifying multilevel *health regulation* by recognizing human rights to healthy living conditions and access to health services and judicial remedies in EU law<sup>32</sup>, also European *economic law* tends to be justified in terms of guarantees of human and fundamental rights, for instance as codified in the EU Charter of Fundamental Rights and in fundamental rights guarantees in national Constitutions of EU member states (like Articles 2,12 and 14 of the German Basic Law protecting economic freedoms, property rights and rule of law).

Just as protection of human rights and principles of justice inside states depends on their constant transformation into constitutional, legislative, administrative and judicial safeguards institutionalizing 'public reason' and democratic responsibilities of reasonable citizens, so must 'democratic constitutionalism' be extended also to functionally limited, *multilevel governance of transnational 'aggregate public goods'* (like public health, undistorted common markets and human rights) for the benefit of citizens. As illustrated by European law, human rights cannot become effective – neither inside states nor beyond states in international relations and IEL – without being embedded into constitutional law, related judicial remedies and social market economies.<sup>33</sup> European integration law confirms both the political feasibility of constitutionalizing international law for the benefit of citizens as well as the legitimate diversity of related legal approaches for constituting, limiting, regulating and justifying multilevel governance (e.g. through 'supranational' EU law or the more deferential EEA law, complementary legal and institutional frameworks like the ECHR). Similar to European market integration offering EU citizens new spaces of legal empowerment and self-development beyond nation states and promoting complementary 'policy integration' (e.g. for social integration of foreign workers and their families into host states)<sup>34</sup>, also multilevel health and human rights governance can

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<sup>30</sup> Cf. M. Cremona, International Regulatory Policy and Democratic Accountability: The EU and the ACTA, in: Cremona/Hilpold/Lavranos/Schneider/Ziegler (eds), *REFLECTIONS ON THE CONSTITUTIONALISATION OF INTERNATIONAL ECONOMIC LAW. LIBER AMICORUM FOR E.U.PETERSMANN* (2014), at 155 ff.

<sup>31</sup> Cf. Petersmann (notes 4, 7) and R.Smith *et alii* (eds), *GLOBAL PUBLIC GOODS FOR HEALTH: HEALTH ECONOMICS AND PUBLIC HEALTH PERSPECTIVES* (2003).

<sup>32</sup> Cf. E.Mo, *HEALTH SYSTEMS GOVERNANCE IN EUROPE. THE ROLE OF EUROPEAN UNION LAW AND POLICY* (2010); H.S.Aasen, *JURIDIFICATION AND SOCIAL CITIZENSHIP IN THE WELFARE STATE* (2014).

<sup>33</sup> On the interrelationships between HRL and constitutional law see also: G.Neuman, Human rights and constitutional rights, in: *Stanford Law Review* 55 (2003), 1863-1900; S.Gardbaum, Human rights as international constitutional rights, in: *EJIL* 19 (2008), 749-768; Petersmann (note 4), at 154 ff.

<sup>34</sup> Cf. M.Dougan/N.N.Shuibhne/E.Spaventa (eds), *EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN* (2012).

empower citizens through legal emancipation beyond nation states and acceptance of ‘cosmopolitan responsibilities’ for collective governance of transnational public goods. EU common market regulation avoids one-sided, libertarian conceptions of economic freedoms and ‘economic man’. The EU citizenship rights, fundamental rights and EU consumer and health protection regulations illustrate that EU law also protects civil, political and social rights, related responsibilities and social needs of EU market participants, as illustrated by the CJEU case-law that the judicial concept of a ‘reasonably well-informed and reasonably observant and circumspect consumer’ does not apply in contexts where the health risks of products are not sufficiently evident (e.g. due to tobacco addiction and other cognitive constraints of vulnerable consumers); they justify content-related product restrictions (such as maximum nicotine yields of tobacco products) rather than only ‘information-related’ product regulations.<sup>35</sup> Constitutional and fundamental rights of citizens entail governmental duties to regulate market competition, for instance by protecting consumers against their individual weaknesses, cognitive constraints and bounded rationality so that public health protection can ‘take precedence over economic considerations’.<sup>36</sup> Yet, governmental limitations of the freedom of consumer choice require legal justification (cf. Article 114:3 TFEU) and must remain subject to judicial review at the request of adversely affected citizens and other market actors.

### **Administration of Justice in Tobacco Control Disputes and the Need for Multilevel Judicial Cooperation**

In contrast to many diseases whose biological agents *decrease* as living conditions improve, the global burden and threat of non-communicable diseases (e.g. NCDs resulting from consuming tobacco, alcohol and unhealthy food) risk *increasing* with economic growth, international trade and the spread of unhealthy lifestyles promoted by industries producing unhealthy commodities and combatting legal limitations on ‘business as usual’. In view of the complex regulatory challenges of health governance and conflicts with powerful industries, the 2013 WHO ‘Global Action Plan for the Prevention and Control of NCDs 2013-2020’, like the preceding 2011 UN ‘Political Declaration of the High-Level Meeting of the General Assembly on the Prevention and Control of NCDs’, emphasized the need for multi-sectoral ‘whole-of-government and whole-of-society efforts’ at regulating the risk-factors of tobacco use, unhealthy diets and abuse of alcohol across diverse sectors such as public health, trade and environmental protection.<sup>37</sup> The needed ‘governance for health’ is recognized as an advocacy and public policy function influencing governance also in non-health sectors (like education, foreign policy, democratic and judicial accountability mechanisms) that can have a positive impact on health protection. Just as UN HRL and WTO law can serve ‘constitutional functions’ for empowering governments to protect human rights and liberal trade against ‘rent-seeking’ industry pressures, the WHO FCTC is being invoked by ever more governments for justifying national health protection measures vis-à-vis the vested interests of the increasingly concentrated tobacco industries.<sup>38</sup> Also in countries that have not ratified the WHO FCTC (like the USA), a federal US district court held in 2006 that tobacco companies ‘knew there was a consensus in the scientific community that smoking caused lung cancer and other diseases by at least January 1964’, and that they nonetheless engaged in a campaign to ‘mislead the public about the health

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<sup>35</sup> On this jurisprudence see : J.U.Franck/K.Purnhagen, *Homo Economicus, Behavioural Sciences and Economic Regulation : On the Concept of Man in Internal Market Regulation and its Normative Basis*, in : *EUI Working Papers Law 2012/26*, at 8f, 14, 16, 18, 20.

<sup>36</sup> CJEU, Case C-183/95, *Affish*, ECR 1997 I-4362, para. 43.

<sup>37</sup> Cf. UN Doc A/RES/66/2 of 22 January 2012.

<sup>38</sup> Over the past decades, the tobacco industry has become increasingly dominated by six companies. Four of these companies are privately owned (i.e. Philip Morris International, British American Tobacco, Imperial Tobacco, and Indian Tobacco Company). Japan Tobacco is 50% owned by the Japanese government. China National Tobacco Company is entirely owned by the Chinese government.

consequences of smoking'. The same court order indicated that the tobacco industry would be required to publish several 'corrective statements' explaining the truth to the public. Yet, it was only in May 2012 – following 6 years of judicial appeals by the tobacco industry, that the district court finally specified the corrective statements the tobacco companies are required to publish, each presaged by a statement that 'A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public ... and has ordered those companies to make this statement. Here is the truth', for instance that

- 'Smoking kills, on average, 1200 Americans. Every day.
- Secondhand smoke kills over 3'000 Americans each year.
- More people die every year from smoking than from murder, AIDS, suicide, drugs, car crashes and alcohol combined.
- When you smoke, the nicotine actually changes the brain – that's why quitting is so hard.'<sup>39</sup>

The exploitation of consumers by powerful industries (e.g. for tobacco and financial products), the often inadequate legal and judicial protection against such abuses, and the explicit warnings in the WHO FCTC against the risks of governmental cooperation with tobacco industries, call to mind the novel on *The Strange Case of Dr Jekyll and Mr Hyde*, in which Stevenson described the 'split personality' of the apparently good Dr Jekyll who transformed himself during the nights into the evil Mr Hyde dominated by violent animal spirits that Dr. Jekyll repressed during the day. This *Section* gives an overview of some of the increasing disputes over tobacco regulations in national, regional and worldwide dispute settlement bodies and investment tribunals in response to legal challenges of unscrupulous business practices of tobacco industries. International lawyers who, as discussed in *Section II*, perceive the evolution of international law as a never ending dialectic between reasonable efforts at 'civilizing international law' and 'apologia' of intergovernmental power politics<sup>40</sup>, may perceive the judicial proceedings in the WTO sponsored by tobacco industries as confirming the 'regulatory capture' of diplomacy by the many 'Mr Hydes'. Yet, from the constitutional perspective discussed in *Section III*, the evolution of *national* tobacco jurisprudence rather confirms the reciprocal, interactive potential of democratic constitutionalism: democratic governments are not only driven by the demands and democratic preferences of citizens; democratic constitutionalism can also civilize and 'constitutionalize' the conduct of citizens and politicians, for instance by promoting multilevel legal and judicial protection of civil, political, economic and social human rights by multilevel governance institutions in conformity with self-imposed, international legal obligations (e.g. under the WHO FCTC) aimed at limiting systemic governance failures inside nation states. The tobacco control disputes in national, regional and worldwide jurisdictions and investor-state arbitration illustrate not only the fierce resistance by powerful industries affected by public health regulations; they also confirm the importance of legal and judicial remedies and of impartial review of business practices as well as of government restrictions of the production, contents, packaging, advertisement, supply and consumption of tobacco products. The WHO dispute settlement provisions for recourse to the International Court of Justice or to international arbitration have hardly ever been used so far. Tobacco industries and tobacco exporting countries prefer challenging the lawfulness of public health protection in non-health fora - like WTO and investment dispute settlement proceedings – in the hope that the institutional choice might influence the necessary 'balancing' of health and non-health concerns, for instance if trade and investment tribunals neglect HRL and WHO law. Also national dispute settlement proceedings (e.g. in less-developed countries) risk being biased by the powerful

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<sup>39</sup> On 'adversarial legalism' and industry challenges of US health regulation limiting tobacco, alcohol and unhealthy food consumption see : S.D.Sugarman, *United States*, in : T.Voon/A.D.Mitchell/J.Lieberman (eds), *REGULATING TOBACCO, ALCOHOL AND UNHEALTHY FOODS. THE LEGAL ISSUES* (2014), at 193 ff.

<sup>40</sup> Cf. M.Koskenniemi, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006); *idem*, *THE GENTLE CIVILIZER OF NATIONS* (2002).

resources and lobbying of tobacco industries, the lack of constitutional guarantees (e.g. in US federal law) of human and constitutional rights to high levels of public health protection, or by the non-participation of some countries (like Argentina and the USA) in the WHO FCTC. In view of the global nature of the tobacco epidemic and of the social injustices caused by ‘business as usual’, national and international courts must cooperate in the more than hundred pending disputes – in national and international courts, arbitral tribunals and other dispute settlement bodies<sup>41</sup> – so as to protect the legal coherence of multilevel health governance and of administration of justice in tobacco control disputes at national and international levels.

### ***Access to justice and tobacco control disputes in domestic courts***

The universal recognition of human rights continues to lead to ever-stronger recognition of ‘basic human rights to justification’, ‘access to justice’ and to effective judicial remedies in ever more fields of national and international legal systems.<sup>42</sup> In democracies with strong human rights protection, constitutional commitment to ‘the improvement of public health’ (Article 47 Constitution of India) and a long tradition of judicial independence (as in India, the third-largest consumer country of tobacco), the ratification of the WHO FCTC - and its international legal obligations to ‘reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke’ by adopting and implementing ‘effective legislative, executive, administrative and/or other measures’ - contributed to further prioritizing tobacco control as a public health task, thereby assisting political institutions to resist political lobbying from tobacco industries by invoking the FCTC and its grounding on the human right to health as justifications for new tobacco control measures. Governmental tobacco control measures have been supported in India by active civil society advocacy and by ‘judicial activism’. Already in 2001, the Supreme Court – acknowledging the health hazards of second-hand smoking and the constitutional rights of individuals (under Article 21) to breathe in a pollution-free environment – mandated all public places to be smoke-free and called upon the legislature to enact a comprehensive tobacco control law.<sup>43</sup> Following the enactment of the Cigarettes and other Tobacco Products Act in 2003, the Indian Supreme Court often adopted a pro-active role in supporting ‘public interest litigation’ aimed at – in the words of former Chief Justice Bhagwati – ‘finding turn around situations in the political economy for the disadvantaged and other vulnerable groups’ so as to ‘ensure that the activities of the state fulfill the obligations of the law under which they exist and function’.<sup>44</sup> Departing from traditional adversarial court procedures where each party produces its own evidence, with cross-examination by the other side and the judge deciding as a neutral umpire, the Supreme Court relaxes the requirements of *locus standi* by allowing any party to initiate court actions on behalf of vulnerable groups, appoints independent commissioners to gather evidence in support of the complaints, and monitors the procedures. For instance, in the 2010 case of *Ankur Gutkha v Indian Asthama Care Society & others*, the Court ordered the Department of Health and Family Welfare to present findings on the health benefits of banning smokeless tobacco products;

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<sup>41</sup> For more details of the cases briefly discussed below see the references in the website <http://www.tobaccocontrollaws.org/litigation/decisions>.

<sup>42</sup> On ‘human beings as justificatory beings’ who are morally and legally entitled to human rights to justification of governmental restrictions of individual freedoms see: R. Forst, *THE RIGHT TO JUSTIFICATION. ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE* (2012), according to whom the right to justification is ‘what the Kantian idea of the dignity of a person as “an end in itself”, as a justificatory being, implies’ (at 130). On ‘access to justice’ in HRL and IEL see, e.g.: F.Francioni, *ACCESS TO JUSTICE AS A HUMAN RIGHT* (2007); E.U.Petersmann, *Judicial Administration of Justice in Multilevel Commercial, Trade and Investment Adjudication?* in: W.Shan/J.Su (eds), *CHINA AND INTERNATIONAL INVESTMENT LAW. TWENTY YEARS OF ICSID MEMBERSHIP* (2014), 56-115.

<sup>43</sup> Cf. A.Yadav/D.Singh, *Tobacco Control in India*, in: A.D.Mitchell/T.Voon (eds), *THE GLOBAL TOBACCO EPIDEMIC AND THE LAW* (2014), 302 ff.

<sup>44</sup> P.Bhagwati, *Judicial Activism and Public Interest Litigation*, *Columbia Journal of Transnational Law* 23 (1985), 561, at 569.

after this evidence demonstrated the health risks of these products (e.g. causation of oral cancer), six states banned gutka and other tobacco foods, citing the Supreme Court of India's leadership on this issue. In another 2011 case *Miraj Products Pvt Ltd v Indian Asthama Care Society & others* concerning the government's lack of enforcement of a 2008 law requiring health warnings and pictures on tobacco products in conformity with the FCTC requirements, the Court requested and received from the government evidence of the harmful effects of tobacco products on the health of consumers and on the necessity of labeling and packaging restrictions aimed at limiting those dangers.

In China and the USA (*i.e.* the two biggest tobacco-consuming countries), the domestic legal and judicial experiences with tobacco-control measures have been very different from those in India. For instance, following the ratification of the FCTC by China in 2005, the FCTC's emphasis on taking gender inequalities seriously in the design and implementation of tobacco control policies prompted China to introduce gender-specific tobacco control measures so as to reduce the exposure of women to second-hand smoke (97% of smokers in China are men). Yet, in view of the absence of an independent judiciary in China, the Chinese tobacco control policies often rely on the WHO's 'naming, blaming, shaming and praising strategy' and related human rights arguments (e.g. based on China's ratification of the ICESCR) in prioritizing national tobacco control measures.<sup>45</sup> The refusal by the US Congress to ratify the FCTC as well as UN human rights conventions protecting economic and social human rights to health (e.g. the ICESCR) entailed that the US tradition of 'legal and judicial adversarialism' – e.g. in terms of a 'particular style of policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation'<sup>46</sup> – in the field of US tobacco control measures evolved in more libertarian ways reflecting 'the litigious nature of US society and the propensity of the courts to be wary of interference with business interests'.<sup>47</sup> The complex, often overlapping allocation of local, state and federal competences for health measures and the different lobbying powers of local health advocacy groups and concentrated industry interests have prompted US tobacco industries to challenge many public health measures on grounds of 'legal pre-emption' (e.g. weak state or federal laws occupying the field and thereby blocking stronger local or state legislation), improper legal authority (e.g. of executive departments like the Food and Drug Administration), and other constitutional claims (e.g. successfully invoking First Amendment protection of 'commercial free speech' against state restrictions limiting tobacco advertising). For instance, in the 1992 *Cipollone* case<sup>48</sup>, the majority in the US Supreme Court decided that tort claims for money damages by smokers based on state 'failure to adequately warn' of the health risks of cigarette smoking were pre-empted by section 5(b) of the Federal Cigarette Labeling and Advertising Act of 1965. Compared with other constitutional democracies, the 'political lobbying power' of tobacco industries (e.g. in influencing US legislation) and their 'adversarial litigation strategies' aimed at preventing, or delaying, US restrictions of supply and consumption of tobacco seem to be stronger in the US in view of the comparatively weak constitutional, legislative and judicial protection of human rights to health protection inside the US and the non-ratification of related UN and WHO conventions by the US Congress.

Australia was not only one of the first countries to sign and ratify the WHO FCTC and to implement comprehensive tobacco control measures (e.g. tax increases, social education campaigns, smoke-free policies) at national, state and local levels in spite of strong industry opposition. Its 'Tobacco Plain Packaging Act 2011' has also been the first national legislation by any country mandating plain

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<sup>45</sup> Cf. L.A.Jacobs, Global Tobacco Control Law and Trade Liberalization : New Policy Spaces? in : D.Drache/L.A.Jacobs (eds), *LINKING GLOBAL TRADE AND HUMAN RIGHTS : NEW POLICY SPACE IN HARD ECONOMIC TIMES*, 131, at 142f.

<sup>46</sup> R.Kagan, *ADVERSARIAL LEGALISM : THE AMERICAN WAY OF LAW* (2002), at 3.

<sup>47</sup> Sugerman (note 39), at 193.

<sup>48</sup> *Cipollone v Liggett Group Inc*, 505 US 504 (1992). For an overview of relevant US jurisprudence see Sugerman (note 39).

packaging for tobacco products as of 2012. This legislation has been legally challenged both by tobacco industries in national courts as well as in investor-state arbitration (e.g. based on claims of illegal takings of property rights) and by tobacco-exporting countries in WTO dispute settlement proceedings (e.g. based on claims of ‘lack of evidence’ justifying the necessity of Australia’s restrictions of intellectual property rights). The legal action in the High Court of Australia had been brought by Japan Tobacco International and British American Tobacco, with Philip Morris Ltd and Imperial Tobacco intervening in the dispute in support of the complainants, on the ground that the Tobacco Plain Packaging Act amounted to an acquisition of property on less than just terms in contravention of section 51 (xxxii) of the Australian Constitution, and that it was therefore invalid. In its judgment of 15 August 2012, the High Court of Australia rejected the challenges to the validity of the legislation with a majority of six to one.<sup>49</sup> As the judgment focused on the particular context of ‘taking’ and ‘acquisition of property on just terms’ under Australian constitutional law rather than on the necessity of plain packaging for limiting the harmful effects of smoking, the judicial reasoning may have only a limited impact (e.g. regarding the scope and ‘taking’ of the affected trademarks and their ‘advertising functions’ under Australian law) on the pending ICSID investment and WTO trade disputes challenging the same legislation. Yet, the judicial justification of government regulation of tobacco advertising, packaging and labeling implementing the WHO FCTC is in line with the jurisprudence by other national courts (e.g. a 2012 judgment by the South African Supreme Court) and is likely to influence the judicial practice in other countries that are already considering to follow the example of Australia’s plain packaging legislation.<sup>50</sup> Many common law countries continue to provide for ‘strong-form judicial review’ only in respect of restrictions of civil and political rights, where courts are empowered to declare legislative acts unconstitutional and to order injunctions against further enforcement of the statute by executive officials. Those Commonwealth countries that have enacted also economic, social, cultural or environmental rights (as, e.g., contained in the Canadian Charter of Rights of 1982, the New Zealand Bill of Rights Act of 1990, the British Human Rights Act of 1998), often provide only for ‘weak-form judicial review’ of economic and social rights with only limited judicial powers to enforce such rights against legislative restrictions even if the latter are found to be inconsistent with constitutional norms.<sup>51</sup> Whereas Canada’s 1985 Tobacco Products Control Act was held by a 1995 decision of the Supreme Court to be an unjustified infringement of freedom of expression, the new legislative restrictions of tobacco advertising were upheld by the Supreme Court in a 2007 judgment that explicitly referred also to Canada’s international obligations under the WHO FCTC to comprehensively ban promotion of tobacco.<sup>52</sup>

With the exception of Argentina, Cuba and El Salvador, all other Latin American countries had ratified the WHO FCTC by the end of 2012 and, with the additional exception of Bolivia, have adopted smoke-free and other tobacco control measures. Yet, due to the resistance from tobacco industries and to litigation aimed at obstructing tobacco control, the implementation of tobacco control legislation has remained weak or delayed in many Latin American countries.<sup>53</sup> Litigation has also been used to further tobacco control, for instance through individual complaints against the state of Mexico for failing to protect individual rights to health. Following a 2011 amendment of Article 1 of Mexico’s

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<sup>49</sup> Cf. *JT International SA v Commonwealth; British American Tobacco Australasia Ltd v Commonwealth* HCA 2012, 43 (5 October 2012).

<sup>50</sup> Cf. M.Rimmer, *The High Court of Australia and the Marlboro Man : The Battle over the Plain Packaging of Tobacco Products*, in : Voon/Mitchell/Liberman (note 39), 337, at 352. On the challenges of tobacco control measures in South African courts see : R.Kitonyo-Devotsu, *Africa*, in : Voon/Mitchell/Liberman (note 39), at 276 ff.

<sup>51</sup> Cf. M.Tushnet, *WEAK COURTS, STRONG RIGHTS. JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

<sup>52</sup> For a discussion of these two Supreme Court decisions see : B. von Tigerstrom, *Canada*, in : Voon/ Mitchell/Liberman (note 39), 212, at 222 ff.

<sup>53</sup> For case-studies of tobacco legislation and tobacco litigation in Latin American countries see: F.Alonso/A.Madrado, *Latin America*, in : Voon/Mitchell/Liberman (note 39), at 232 ff.

Constitution recognizing the principle of progressive realization of human rights and granting constitutional hierarchy to international human rights obligations ratified by Mexico, Mexico's Supreme Court explicitly identified the WHO FCTC as a human rights treaty, which could claim constitutional hierarchy justifying tobacco control measures.<sup>54</sup> In a constitutional challenge of a Colombian law banning advertising, promotion of tobacco products and sponsorship of sporting events by tobacco companies, the Colombian Constitutional Court decided in 2010 that the legislative limitations of the constitutional guarantees of free enterprise and of freedom of commercial expression were justifiable on grounds of health protection.<sup>55</sup> In response to a direct action brought by 5000 Peruvian citizens challenging the constitutionality of a legislative prohibition of smoking in certain public places, the Constitutional Court of Peru decided on 19 July 2011 that the limitation of the constitutional guarantees of personal and economic freedoms was proportionate and justified by the right to health as confirmed by the WHO FCTC.<sup>56</sup> Tobacco litigation in Latin America seems to confirm the constitutional justifiability of legislative tobacco control measures and the positive impact of the WHO FCTC on legislative and 'judicial balancing' of competing rights and obligations. But the lack of administrative and judicial enforcement of tobacco control policies aimed at reducing tobacco supply and consumption through regulation of markets, products and consumer habits remains a major challenge.

The EU, and to a lesser degree also the EEA, remain the only regional organizations providing for multilevel constitutional, legislative, administrative and judicial protection of common economic markets, common health regulation and of comprehensive civil, political, economic and social constitutional and human rights promoting the mutual coherence of economic law, health law and HRL. In spite of the limited EU powers, the Lisbon Treaty on the Functioning of the EU prescribes that '(a) high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities' (Article 168:1 TFEU). In conformity with the EU action programs in the field of public health, the EU has ratified both the WHO FCTC as well as the additional FCTC Protocol to Eliminate Illicit Trade in Tobacco Products, in addition to the ratifications of these WHO conventions by EU member states. Yet, the EU's 2001 Tobacco Products Directive, the 2003 Tobacco Advertising Directive and the 2014 Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco and Related Products were primarily justified by the functionally limited empowerment of the EU to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market' (Article 114 TFEU). The legality of EU tobacco control measures depends on their compliance with the EU legal principles of limited delegation of powers, subsidiarity and proportionality of EU measures. But the jurisprudence of both the CJEU as well as of the European Free Trade Area (EFTA) Court on the regular judicial challenges of EU tobacco control measures has confirmed regulatory discretion of EU legislation (e.g. regarding content, labelling or packaging of tobacco products) to pursue simultaneously internal market and public health objectives.<sup>57</sup> The EU

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<sup>54</sup> Cf. Alonso/Madrado (note 53), at 250. On the similar jurisprudence by Peru's Constitutional Tribunal see: O.A.Cabrera/J.Carballo, Tobacco control in Latin America, in: Mitchell/Voon (note 44), 235, at 245.

<sup>55</sup> On this judgment C-830/10 of 20 October 2010 see Alonso/Madrado (note 53), at 251.

<sup>56</sup> Cf. Alonso/Madrado (note 53), at 251.

<sup>57</sup> On this jurisprudence (such as the Tobacco Advertising judgments of the CJEU of 2000 and 2006, the advisory opinion by the EFTA Court of 2011 at the request of a Norwegian court in a dispute brought by Philip Morris), which seems to confirm the 'constitutionalization' of European economic law discussed above, see: A.Alemanno/A.Garde, European Union, in: Voon/ Mitchell/Liberman (note 39), 259, at 264 ff. On the EU jurisprudence on the 'suitability', 'necessity' and 'proportionality *stricto sensu*' of health protection measures, which tends to engage in more intensive review of restrictive measures adopted by a member state than in case of EU legislation, and the judicial deference vis-à-vis regulatory discretion (except in case of 'manifest disproportionality'), see also: A.Alemanno/E.Bonadino, Plain



tobacco control policies aim at going beyond the minimum standards of the WHO FCTC (cf. Article 2) and include pricing and tax policies, smoking bans in public places and work places, advertising bans (e.g. regarding misleading descriptors like ‘mild’ and ‘light’), and consumer information; some EU member states have already made public their intention to also introduce plain packaging of tobacco. As the EU Charter of Fundamental Rights guarantees ‘a high level of human health protection’ also as a human right (cf. Article 35), the CJEU and the EFTA Court have so far never annulled EU tobacco control measures on grounds of other fundamental rights protected by EU law (like freedoms of expression and information, freedom to conduct a business, rights to property). Also national constitutional guarantees inside EU member states of maximum equal freedoms (e.g. in Article 2:1 German Basic Law) remain subject to democratic legislation that may limit personal freedoms (including ‘freedoms to smoke’) and economic freedoms (e.g. of tobacco companies) on grounds of public health protection.

### ***Tobacco control disputes in the WTO***

The WHO has so far only negotiated three multilateral treaties for enhancing health-promoting norms (i.e. the International Health Regulations, the FCTC and a related Protocol, the Nomenclature Regulations) in view of the preference of WHO member states for multiple WHO ‘soft instruments’ (like resolutions, global strategies, codes of best practices) that are less constraining national sovereignty over health protection regulations.<sup>58</sup> Apart from the fact that the WHO dispute settlement provisions (e.g. for access to the International Court of Justice and the Permanent Court of Arbitration) have hardly ever been used, tobacco companies and tobacco exporting countries seem to 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.<sup>59</sup> 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:

- Article 20 of the TRIPS Agreement, because 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 10*bis*, paras 1 and 3 of the Paris Convention for the Protection of Industrial Property (as amended by the Stockholm Act of 1967), because Australia does not provide effective protection against unfair competition;
- Article 2.1 of the TRIPS Agreement read with Article 6*quinquies* of the same Paris Convention, because trademarks registered in a country of origin outside Australia are not protected by Australia ‘as is’;
- Article 3.1 of the TRIPS Agreement, because Australia accords to nationals of other Members treatment less favourable than it accords to its own nationals with respect to the protection of intellectual property;

(Contd.) \_\_\_\_\_

packaging of cigarettes under EU law, in : T.Voon/A.D.Mitchell/L.Liberman/G.Ayres (eds), *PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES* (2012), 214, at 224 ff, 234 f.

<sup>58</sup> For details see: Gostin (note 1), at 64 ff.

<sup>59</sup> Cf. WTO documents DS434, 435, 441, 458 and 467.

- Article 15.4 of the TRIPS Agreement, because 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, because 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, because 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, because Australia imposes technical regulations that accord to imported tobacco products treatment less favourable than that accorded to like products of national origin;
- Article 2.2. of the TBT Agreement, because 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, because Australia accords to imported tobacco products treatment less favourable than that accorded to like products of national origin;
- Article IX:4 of GATT 1994, because 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 60 third WTO members (including the EU and 28 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 3 panelists for each of the 5 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 65 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 colours, graphics and logos on tobacco products and allowing the identification of brands and variants only in a standardized font, colour 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)<sup>60</sup>, or where GATT-inconsistent import restrictions

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<sup>60</sup> Cf. Appellate Body Report on *US-Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (adopted 24 April 2012).

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.<sup>61</sup>

- 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<sup>62</sup>, there is also a strong 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’.<sup>63</sup>
- 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 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’ in terms of Article 8 of the TRIPS Agreement, 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 that plain packaging does not contravene international obligations under the TRIPS Agreement or the Paris Convention in relation to the protection of trademarks.<sup>64</sup> 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.<sup>65</sup> Just as 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’<sup>66</sup>, so did the Advocate General in the

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<sup>61</sup> Cf. GATT panel report on *Thailand-Restrictions on importation of and internal taxes on cigarettes*, BISD 37S/200 (adopted on 7 November 1990).

<sup>62</sup> Cf. L.Gruszczynski, *The WHO FCTC as an international standard under the WTO Agreement on Technical Barriers to Trade*, in: Mitchell/Voon (note 43), 105-125.

<sup>63</sup> *Philip Morris Norway AS v Ministry of Health and Care Services* (E-16/10), EFTA 2011 (Advisory Opinion of 12 September 2011), para. 84.

<sup>64</sup> See, however, Chang-fa Lo, *Guidelines and protocols under the framework convention*, in : Mitchell/Voon (note 43), 32, at 44 : ‘treaty-interpreters might not be able to infer from the guidelines alone that the adoption of plain packaging requirements is strictly necessary and that there is no appropriate alternative for countries to consider’.

<sup>65</sup> Cf. Appellate Body Report on *US\_Section 211 Appropriations Act*, WT/DS176/AB/R, paras. 186-188 (adopted 1 February 2002); Panel Report on *EC-Protection of Trademarks and Geographical Indications. Complaint by Australia*, WT/DS290/R, para. 7.246 (adopted 20 April 2005). On the WTO and CJEU jurisprudence see also: Alemanno/Bonadino (note 57), at 230 ff.

<sup>66</sup> WT/DS290/R (note 65), para. 7.246.

CJEU dispute on the validity on the Tobacco Products Directive state 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’.<sup>67</sup> It appears unlikely, therefore, that Article 20 TRIPS Agreement can be construed as

- protecting a more comprehensive ‘positive right’ to use a trademark limiting 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 for protecting intellectual property rights ‘in a manner conducive to social and economic welfare, and to a balance of rights and obligations’; and
- that the complainants can rebut the legal presumption that Australia’s implementation of the WHO FCTC does not ‘unjustifiably encumber’ the ‘use of a trademark in the course of trade’.<sup>68</sup>

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’<sup>69</sup>, 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’.<sup>70</sup>

In US – Clove Cigarettes, the Appellate Body noted: ‘The 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.’<sup>71</sup> 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 for further clarifying 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

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<sup>67</sup> *The Queen v Secretary of State for Health, ex parte British American Tobacco Ltd and Imperial Tobacco Ltd*, C-491/01 ECR 2002 I-11453, Opinion of Advocate General Geelhoed, para. 266.

<sup>68</sup> Cf. M. Davison, *The Legitimacy of Plain Packaging under International Intellectual Property Law: Why there is no right to use a trademark under either the Paris Convention or the TRIPS Agreement*, in: Voon *et alii* (note 57), 81-108.

<sup>69</sup> Cf. Appellate Body Report on *EC-Asbestos*, WT/DS135/AB/R, para. 172 (adopted 5 April 2001).

<sup>70</sup> Cf. WT/MIN(01)/DEC/2 of 20 November 2001, paras. 4 and 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.

<sup>71</sup> AB Report, *US – Clove Cigarettes* (note 60), para. 96.

‘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 be carried out in the light of the importance of the interests or values at stake.’<sup>72</sup>

‘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’.<sup>73</sup>

From the perspective of the customary law requirements of interpreting treaties and settling related disputes ‘in conformity with principles of justice and international law’, including ‘human rights and fundamental freedoms for all’ (as codified in the Preamble and Article 31 of the Vienna Convention on the Law of Treaties = VCLT), 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 constitutional rights to health protection. Just as 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, notwithstanding the fact that 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.<sup>74</sup> 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 the specific WTO agreements should proceed from the same ‘principles of justice’ underlying WTO law as well as the human rights obligations of WTO members, i.e.:

1. *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 protection over WTO market access commitments and other economic rights<sup>75</sup>;
2. *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

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<sup>72</sup> Appellate Body Report on *Brazil-Retreaded Tyres*, WT/DS332/AB/R, para. 178 (adopted 17 December 2007).

<sup>73</sup> *Idem*, para. 156.

<sup>74</sup> Cf. Petersmann (notes 2 and 43). On the need for judicial deference see: L.Gruszczynski/W.Wouter (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014), including the contribution by Petersmann, *Judicial Standards of Review and Administration of Justice in Trade and Investment Law and Adjudication*, at 19-37.

<sup>75</sup> On the decision by the CJEU that ‘the protection of public health... must take precedence over economic considerations’ see: Case C-183/95, *Affish*, ECR 1997 I-4362, para. 43. On methodologies for ‘weighting’ see: F.Schauer, *Proportionality and the Question of Weight*, in: G.Huscroft/B.W.Miller/G.Webber (eds), *PROPORTIONALITY AND THE RULE OF LAW. RIGHTS, JUSTIFICATION, REASONING* (2014), 173.

only a ‘marginal or insignificant contribution’, based on a ‘genuine relationship of ends and means between the objective pursued and the measure at issue’<sup>76</sup>;

3. *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);
4. *Reasonably available alternatives?* The WHO FCTC and its ratification by 177 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’<sup>77</sup>; 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’<sup>78</sup>, 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’<sup>79</sup> 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 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 rulers.

### ***Tobacco control disputes in investor-state arbitration***

In 2010, at the request of several Philip Morris affiliates registered in Switzerland, the International Center for the Settlement of Investment Disputes (ICSID) established an investor-state arbitral tribunal so as to examine whether Uruguay’s tobacco packaging measures of 2009 were consistent with

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<sup>76</sup> Cf. the Appellate Body Report on *Brazil-Retreaded Tyres* (note 72), paras. 150-151; according to the Appellate Body, the degree of the contribution may be assessed ‘either in quantitative or in qualitative terms’ (cf. paras. 145-146), without being ‘obliged, in setting health policy, automatically to follow what... may constitute a majority scientific opinion’ (Appellate Body Report on *EC-Asbestos*, note 69, para. 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; cf. T.Voon/A.D.Mitchell, Implications of WTO law for plain packaging of tobacco products, in : Voon *et alii* (note 57), 109, at 127.

<sup>77</sup> Appellate Body Report on *Brazil-Retreaded Tyres* (note 72), para. 151.

<sup>78</sup> Appellate Body Report on *Brazil-Retreaded Tyres* (note 73), para. 172.

<sup>79</sup> Cf. note 72 above.

Uruguay's obligations under a bilateral investment treaty (BIT) with Switzerland.<sup>80</sup> 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<sup>81</sup>; a final decision is expected for early 2015.<sup>82</sup>

Also 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.<sup>83</sup> 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 lacks jurisdiction on three grounds:

- First, Australia alleges 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 alleges 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 alleges 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 restructured its investments with the express purpose of bringing this claim, after the Australian government had announced its intention to implement plain packaging.
- Thirdly, Australia alleges that PMA's assets – being only its shares in Philip Morris companies registered in Australia – are not 'investments' in Hong Kong enjoying the protection of the BIT.

The tribunal ruled that Australia's first and second jurisdictional arguments should be bifurcated and 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 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 BITs and delay tobacco control measures by threatening notably less-developed countries with litigation risks,

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<sup>80</sup> *Philip Morris Brand Sarl v Uruguay* (Notice of Arbitration, ICSID Arbitral Tribunal Case No ARB/10/7, 19 February 2010).

<sup>81</sup> Decision on Jurisdiction of 2 July 2013), ICSID Case No ARB/10/7.

<sup>82</sup> For a discussion of this dispute (e.g. of whether registration of a foreign trademark in the host state and selling tobacco products under that trademark meets the 'Salini test' for foreign 'investments', and whether BIT 'umbrella clauses' can be used for bringing WTO obligations within the applicable law of the investment tribunal) see: B. McGraday, Implications of the ongoing trade and investment disputes concerning tobacco: *Philip Morris v Uruguay*, in: *Voon et alii* (note 57), 173 ff.

<sup>83</sup> *Philip Morris Asia Ltd v Australia* (Procedural Order by the PCA of 31 December 2012), Case No 2012-12.

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 justifying 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’.

According to Australia, all claims should be rejected on grounds of jurisdiction, but are also unfounded on the merits, for instance in view of the non-discriminatory nature of Australia’s plain packaging regulations and their justification by public health reasons and the ‘police powers exception’ recognized in international investment law. Even though 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 packaging regulations would lend 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 relates 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, their ‘taking’ and ‘acquisition’ in terms of Australian law (which differs from the BIT context), as well as the judgment in the dispute launched by Philip Morris against Uruguay (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). Even if Australia’s position that plain packaging amounts to non-compensable regulation rather than compensable expropriation of trademarks of tobacco companies should be overruled by the investment tribunal, PMA might find it difficult to enforce such an award in view of the ‘execution immunity’ of foreign state property.<sup>84</sup>

Similar to the judicial task of a coherent ‘principled reconciliation’ of trade and public health provisions in the more than 60 specific WTO Agreements (including WTO accession protocols) as discussed above, investment arbitral tribunals should likewise aim at reconciling the general principles of law underlying the almost 3’000 investment treaties with the governmental duties to protect public health not only on the basis of the specific treaty commitments, but also with due regard to the progressive judicial clarification of their underlying ‘principles of justice’ acknowledging sovereign rights to give priority to existential public health values over utilitarian justifications of trade and investment law. While some BITs include general ‘exception clauses’ similar to GATT Article XX, other BITs follow the drafting technique of the TBT or TRIPS Agreements by including treaty objectives or ‘general principles’ acknowledging the regulatory discretion of the host state in protecting non-economic public interests like public health.<sup>85</sup> Many BITs provisions are vaguely drafted without clarifying specifically whether tobacco control regulations of demand reduction,

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<sup>84</sup> For a discussion of PMA’s substantive claims and Australia’s BIT obligations see : T.Voon/ A.D.Mitchell, Implications of international investment law for plain tobacco packaging : lessons from the Hong Kong-Australia BIT, in : Voon *et alii* (note 57), 137, at 153 ff.

<sup>85</sup> Cf. J.Chaisse, Exploring the Confines of International Investment and Domestic Health Protections – Is a General Exceptions Clause a Forced Perspective? in: *American Journal of Law and Medicine* 39 (2013), 332-360.



passive smoking, contents of tobacco products, their disclosure, mandatory health warnings, prohibition of deceptive labels and of other tobacco advertising, and sales restrictions may conflict with, e.g., obligations of ‘fair and equitable treatment’ and of ‘full protection and security’, prohibitions of performance requirements or other BIT provisions and related concession contracts. By clarifying indeterminate rules through legally binding interpretations and judicial ‘gap-filling’, investment arbitral awards – similar to other judicial jurisprudence – progressively develop the law and underlying ‘general principles’ justifying the systemic relationships between rules and institutions, thereby often initiating legal transformations (e.g. by inducing legislative and administrative responses to adjudication).<sup>86</sup> The legal requirements of interpreting IEL rules in conformity with human rights and other obligations of states (e.g. global health law adopted by the WHO) limit judicial discretion and justify judicial deference (e.g. towards national legal restrictions of smoking and their judicial justification by human health protection as a ‘higher value’ than the trademarks of cigarette producers); they promote coherence of HRL, health law and IEL and, thereby, also ‘security and predictability’ in the multilateral trading system (Article 3 DSU).

### **Civil, Economic, Political and Cosmopolitan Citizenship Rights and Corresponding Legal Restraints of Multilevel Governance**

According to the UN, ‘the global burden and threat of non-communicable diseases constitutes one of the major challenges for development in the twenty-first century, which undermines social and economic development throughout the world, and threatens the achievement of the internationally agreed development goals’.<sup>87</sup> The spread of the tobacco epidemic is facilitated by international trade, foreign investments and global communication networks. Hence, it was logical for the WHO to respond to the global challenge of tobacco control through worldwide rules like the FCTC, the related guidelines and implementing protocol on eliminating illicit tobacco trade<sup>88</sup>, with due recognition of the primary responsibility of governments and of local stakeholders in responding to the challenges of NCDs. The tobacco disputes illustrate the political and democratic need for establishing ‘stakeholder democracy’ supporting participatory, multilevel governance of international public goods. From the perspective of adversely affected citizens and their constitutional rights – in their four complementary roles as (1) *private citizens* responsible for individual self-realization and family life; (2) *economic citizens* responsible for producing private goods and services necessary for human welfare; (3) *political citizens* responsible for collective supply of *national public goods* (e.g. through constitutional contracts and democratic governance); and (4) *cosmopolitan citizens* responsible for collective supply of *transnational public goods* –, neither the state-centric focus of international law on states and governments nor the one-sided IEL privileges for powerful business actors (e.g. direct access to investor-states arbitration) appear consistent with the equal, inalienable human rights of citizens as holders of legitimate, constituent power responsible for holding multilevel governance institutions accountable for their obvious governance failures. As citizens mutually recognize human rights and Constitutions through reciprocal contracts that delegate only limited powers to national and transnational governance institutions, the constitutional reciprocity, equality and subsidiarity principles entail that law and governance derive their constitutional and democratic legitimacy from protecting the equal rights of *every citizen* and from collectively providing public

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<sup>86</sup> Cf. A.Stone Sweet/G. della Cananea, Proportionality, General Principles of Law, and Investor-State Arbitration : A Response to José Alvarez, in : *New York University Journal of International Law and Politics* 46 (2014), 911-954. On the different cultures and legal understandings of judicial ‘balancing’ and ‘proportionality review’ see also : Huscroft/Miller/Webber (note 75).

<sup>87</sup> Cf. note 37.

<sup>88</sup> Cf. K.Lannan, The WHO Framework Convention on Tobacco Control : the international context for plain packaging, in : Voon *et alii* (note 57), 11 ff .

goods for the benefit of *every citizen*.<sup>89</sup> This constitutional conception of multilevel governance requires a ‘paradigm change’ in favor of ‘cosmopolitan international law’ that can be invoked and enforced by adversely affected citizens in domestic courts so as to hold multilevel governance accountable for complying with their constitutional duties of protecting human rights and other public goods for the benefit of every citizen.<sup>90</sup>

As HRL recognizes citizens and peoples as ‘agents of justice’ and legitimate holders of constituent powers, the human rights obligations of all UN member states require stronger, legal and judicial protection of the rights of all citizens. Stronger cosmopolitan rights and remedies can offer decentralized incentives for challenging multilevel governance failures, identifying exposures to risk factors of NCDs, and for preventing and limiting harmful uses of tobacco, alcohol and unhealthy diets offered by commercial companies and distributed across frontiers by transnational corporations. More equal ‘access to justice’ in order to challenge ‘market failures’ (like disinformation by tobacco industries regarding the addictiveness of nicotine) and related ‘governance failures’ would also help national and international courts of justice to overcome the artificial ‘fragmentation’ of multilevel health, economic and human rights regulations by clarifying the common ‘constitutional principles’ underlying these interrelated fields of legal regulation, like the acknowledgment in UN HRL, WHO law and also WTO law of the need for giving ‘priority to the right to protect public health’ (Preamble FCTC) and to interpret HRL, health law and IEL in mutually coherent ways. Courts of justice can help citizens to limit and ‘constitutionalize’ the ‘regulatory capture’ of UN and WTO law by governments and powerful industry lobbies interested in treating citizens as mere legal objects of UN and WTO law rather than as ‘democratic owners’ of all governance institutions and ultimate sources of all legal values.<sup>91</sup> Just as the ‘European public international law’ system prior to World War II has been criticized as ‘power politics in disguise’ (e.g. in the context of colonial politics), citizens all over the world have good reasons and moral duties to defend their human and constitutional rights vis-à-vis abuses of power in UN and WTO law. As parliaments ratify UN human rights conventions, WHO and also WTO agreements for the benefit of citizens, and legal compliance with these ‘public goods regimes’ has enabled governments to increase human welfare for the benefit of citizens enormously, courts of justice should also protect the rights of adversely affected citizens through ‘consistent interpretations’ and judicial protection of transnational rule of law for the benefit of citizens. While trade, foreign investments and intellectual property can enhance human welfare, they may also contribute to ‘market failures’ (like transmission of disease and lifestyle risks, making prices of essential medicines unaffordable for the poor) and related ‘governance failures’ that must be limited by protecting human, constitutional and other ‘countervailing rights’ of citizens.

If governance is defined as ‘the method by which organized society directs, influences and coordinates public and private activities to achieve collective goods’<sup>92</sup>, then the recommendation in Article 19 of the WHO FCTC to take legislative actions to establish domestic systems of civil and criminal liability consistent with the obligations under the FCTC is of crucial importance for multilevel health governance. In contrast to this non-binding encouragement, some UN human rights obligations and also WTO law require member states to protect individual access to justice in domestic courts. As producers and traders of tobacco, alcohol and unhealthy diets tend to justify their commercial activities by invoking economic freedoms and private property rights, stronger ‘countervailing rights’ and judicial remedies of adversely affected consumers and other citizens to invoke – in case

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<sup>89</sup> Cf. Petersmann (note 2) for the need for such a ‘constitutional interpretation’ of the ‘rules of recognition’ of international law.

<sup>90</sup> Cf. E.U.Petersmann, Human Rights Require ‘Cosmopolitan Constitutionalism’ and Cosmopolitan Law for Democratic Governance of Public Goods, in: *Contemporary Readings in Law and Social Justice* 5(2) 2013, 47-77.

<sup>91</sup> Cf. Petersmann (note 2).

<sup>92</sup> Gostin (note 1), at xii.

of national, transnational and international disputes – their rights to health, food, consumer protection and compensation of injuries are essential for ‘rebalancing access to justice’ and litigation strategies. As investor-state arbitration was designed in the 1960s in order to protect foreign investors against inadequate administration of justice in less-developed countries, it is time for reviewing whether such legal and judicial privileges of foreign investors circumventing domestic jurisdictions, public and transparent adjudication and appellate review are still justifiable (e.g. in free trade agreements among developed countries like Canada, the EU and the USA). If the democratic capability of protecting public goods depends also on institutionalizing ‘public reason’ in order to limit ‘discourse failures’ (e.g. in intergovernmental power politics) and promote voluntary compliance with rule of law, then the legal empowerment of unnecessarily poor people and of civil society is a precondition for democratic governance and more effective protection of transnational public goods. Hence, Article 4:7 of the WHO FCTC rightly emphasizes that civil society participation is ‘essential in achieving the objective of the Convention and its protocols’.

In their ‘judicial balancing’ and ‘weighing’ of competing rights and obligations, national and international courts, investment tribunals and WTO dispute settlement bodies tend to refer to similar constitutional principles like non-discrimination, fair and equitable treatment, good faith, human and constitutional rights, proportionality of governmental restrictions (e.g. in terms of suitability, necessity and ‘proportionality *stricto sensu*’ of health protection measures), and adequate compensation in case of expropriation. Judicial administration of justice in dispute settlement must make up for what was neglected in the creation of conflicts: the legally required limitation of pursuit of rational self-interests, animal instincts (e.g. of Mr. Hyde) and the ‘banality of evil’ (H.Arendt) caused by thoughtless bureaucrats<sup>93</sup> in order to prevent or settle conflicts reasonably in conformity with the law and also with the ‘inner judge’ (I.Kant) of moral persons. Notably in European economic, health and human rights law and in international criminal law, cooperation among national and international jurisdictions (e.g. in terms of ‘judicial comity’, respect for national ‘margins of appreciation’) has proven to be of crucial importance for the effectiveness of multilevel legal, political and judicial governance of transnational public goods like transnational rule of law. The increasing ‘horizontal cooperation’ among UN (e.g. WHO) and WTO institutions and the repeated references by WTO dispute settlement panels to the obligations under the WHO FCTC<sup>94</sup> need to be supplemented by stronger ‘vertical cooperation’ among national, regional and WTO dispute settlement bodies in ‘providing security and predictability to the multilateral trading system’ (Article 3 DSU) in conformity with ‘principles of justice’ and ‘human rights and fundamental freedoms for all’, as recalled in the Preamble of the VCLT. This is particularly urgent in the field of multilevel health protection against tobacco use as one of the largest causes of preventable death worldwide. Multilevel adjudication should recognize this legal and judicial task as a matter of justice rather than only of intergovernmental UN and WTO politics and of governmental discretion that, in too many UN member states, continues to neglect human and cosmopolitan rights of citizens to hold governments accountable for their often shocking failures to protect international public goods and reduce unnecessary poverty for the benefit of citizens. Like HRL, also global health law and IEL will become more effective and more legitimate if all adversely affected citizens have equal ‘access to justice’ and to judicial remedies protecting citizens against toxic products, the global risks of NCDs and other social injustices of allegedly ‘efficient economic regimes’. This contribution has argued that the necessary ‘interconnecting’ of separate health, economic and human rights treaty regimes is not only a

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<sup>93</sup> On Arendt’s controversial psychoanalysis of Eichman, one of the many thoughtless administrators of Hitler’s holocaust, see : H.Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (1963).

<sup>94</sup> Cf. the Panel Reports on *US-Clove Cigarettes* (WT/DS406/R, adopted 24 April 2012), on *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes* (WT/DS302/R, adopted 19 May 2005), and also the finding by the Appellate Body in *US-Clove Cigarettes* (note 60): ‘We do not consider that (any WTO agreement should) be interpreted as preventing Members from devising and implementing public health policies generally and tobacco-control policies in particular... Moreover, we recognize the importance of Members’ efforts in the World Health Organization on tobacco control’ (para. 235).

requirement of mutually consistent legal interpretations, but also of judicial administration of justice for the benefit of citizens as the ultimate sources of legitimacy of national and international legal systems in the 21<sup>st</sup> century. As the effectiveness of the rights and obligations under *international* health, economic and human rights law depends on their *domestic* implementation and on overcoming the state-centricity in international law by enabling ‘every individual and every organ of society’ to strive for universal observance of human rights (as called for in the Preamble of the 1948 UDHR), legal empowerment of citizens is a matter of procedural, distributive and corrective justice in order to reinforce the inadequate ‘top-down governance’ of transnational public goods by more democratic ‘bottom-up governance’ by self-interested, yet reasonable and responsible citizens insisting on the need for institutionalizing ‘public reason’ and challenging abuses of power through ‘access to justice’.

(Florence, 9 December 2014)





