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Trade and investment adjudication involving ‘silk road projects’: Legal methodology challenges

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**TRADE AND INVESTMENT ADJUDICATION INVOLVING ‘SILK ROAD
PROJECTS’: LEGAL METHODOLOGY CHALLENGES**

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Abstract

This contribution discusses legal methodology problems of multilevel trade and investment regulation (section I) and explores related problems of adjudication involving investment projects in the context of China's 2013 'One Belt, One Road' (OBOR) initiative involving more than 65 countries (section II). The very limited number of investor-state arbitration proceedings initiated so far by foreign companies against China - or by Chinese companies against foreign host states – suggests that alternative dispute resolution may become one of the important 'legal innovations' of China's OBOR cooperation. Yet, also involvement of third parties as 'mediators' or 'conciliators' in dispute settlement proceedings raises questions of 'justice' and of legal methodology that are easier to resolve by embedding OBOR regulations into multilateral trade, investment and UN law

Keywords

adjudication; alternative dispute resolution; constitutionalism; legal methodology; principles of justice; trade and investment law

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Introduction*

The 2013 ‘One Belt, One Road’ (OBOR) initiative by the Chinese President Xi Jinping envisages investing more than \$1 trillion for the construction and infrastructure of a ‘Silk Road Economic Belt’ (following the ancient silk road from China through central Asia and the Middle East to Europe) and for a ‘21st Century Maritime Silk Road’ (linking China to Southeast Asia and East Africa) so as to promote international policy coordination, infrastructure facilities connectivity, unimpeded trade, financial integration as well as human ‘people-to-people bonds’ among more than 65 countries bordering these ‘Silk Roads’. The realization of this ambitious financial, investment, trade and policy cooperation will depend, inter alia, on multilevel private and public, national and international legal regulation. Even though the design of OBOR cooperation seems to evolve pragmatically, its legal coherence and legitimacy will require mutually consistent rule-of-law and dispute settlement mechanisms, as illustrated by the establishment of a Chinese-European Arbitration Center at Hamburg (Germany) and of China-Africa Joint Arbitration Centers at Johannesburg (South Africa) and Shanghai (China). The limited number of investor-state arbitration proceedings initiated so far by foreign companies against China - or by Chinese companies against foreign host states - seems to confirm the Chinese preferences for alternative dispute settlement methods that avoid recourse to international or domestic courts (e.g. also in view of the often inadequate independence and judicial expertise of local courts in some African and Asian countries). Promotion of such alternative dispute resolution may become one of the important ‘legal innovations’ of China’s OBOR cooperation. Yet, also involvement of third parties as ‘mediators’ or ‘conciliators’ in dispute settlement proceedings raises questions of ‘justice’ and of legal methodology.

How to promote legitimacy of OBOR regulations? Lessons from the past

Since ancient times, legal rules and institutions (like markets) have proven to be indispensable instruments for international trade (*lex mercatoria*) and for the peaceful governance of peoples. Chinese civilization is older – and was for many centuries more developed (e.g. in terms of inventions like printing, paper-making, the compass, gun-powder, locks for canals) – than European civilization. Yet, the ‘political invention’ of constitutionalism - as a legal limitation on feudal powers (like the decision of the Ming emperor in China in 1480 to forbid overseas trade and exploration) and as the legal foundation of liberty and welfare of citizens - emerged in Europe about 500 BC in response to the rivalry among city republics around the Mediterranean, i.e. millennia before China adopted its first Constitution of 1911. Democratic and republican constitutionalism holds that - in order to limit abuses of power, enhance the input- and output legitimacy of law and governance, be socially accepted as legitimate and voluntarily complied with, and progressively institutionalize ‘public reason’ - all three basic functions of law need to be justified both *among citizens* as ultimate sources of legal legitimacy and ‘constituent powers’, as well as *vis-à-vis citizens* as ‘democratic principals’ of governments, to which citizens delegate only limited ‘constituted powers’:

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- the *instrumental function* of law for the normative ordering of social cooperation (e.g. the need for protecting equal individual rights for welfare-increasing cooperation among free and reasonable citizens);
- the *systemic function* of law for justifying the reasonable coherence of legal ‘primary rules of conduct’ and ‘secondary rules’ of recognition, change and adjudication (e.g. the need for promoting the consistency of utilitarian trade and investment rules with the human rights, rule of law and democracy principles that have become recognized by all UN member states as integral parts of UN law); and
- the *cultural function* of law for transforming the ‘law in the books’ into social facts (‘living law’) through ‘legal socialization’ and ‘institutionalization of public reason’ inducing legal subjects to voluntarily comply with legal rules and principles (e.g. the obligation of each WTO member under Article XVI:4 WTO Agreement to ‘ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements’).

Diversity of Chinese and Western legal traditions and constitutionalism

The bestselling book by Peter Frankopan on ‘The Silk Roads. A New History of the World’ begins with the childhood recollection of the author that the ‘accepted and lazy history of civilization ... is one where Ancient Greece begat Rome, Rome begat Christian Europe, Christian Europe begat the Renaissance, the Renaissance the Enlightenment, the Enlightenment political democracy and the industrial revolution. Industry crossed with democracy in turn yielded the United States, embodying the rights to life, liberty and the pursuit of happiness.’¹ His book documents how this biased, Western vision of history based on a ‘mantra of the political, cultural and moral triumph of the West’ ignores many older civilizations (notably in Asia) and the dark sides of European civilization (like imperial ‘opium wars’ in Asia, genocide in Europe). Yet, the postwar elaboration of international monetary, trade and investment law continues to be mainly shaped by European and North-American countries and by their bilateral and multilateral trade and investment agreements. Will the comparatively fewer Asian initiatives for new regional and multilateral trade and investment rules and organizations - like the Association of Southeast Asian Nations (ASEAN), the Regional Comprehensive Economic Partnership (RCEP), the Trans-Pacific Partnership Agreement (TPP), the China-led OBOR project and the Asian Infrastructure Investment Bank – lead to substantive changes in international economic law (IEL)?

Until World War II, Asian traditions of justifying law and governance vis-à-vis citizens fundamentally differed from those in European and North-American constitutional democracies. For instance, while democratic, republican and cosmopolitan constitutionalism were discussed in Europe and legally evolved since the ancient Athenian democracy and Roman republic 2500 year ago, republican constitutionalism emerged in China only since 1911. Since Plato’s book on *The Republic* (ca 375 BC), the metaphor of the ‘state ship’ is used in Western republicanism for describing the legal structure that protects society from the dangerous waters surrounding it. The Chinese proverb attributed to the Confucian philosopher Xunzi (298-220 BC) used the same metaphor of the ‘state ship’ in a significantly different way: ‘The heavens create the people and appoint the ruler. The ruler is like a boat, the people are like the water. The water may support the boat, and it may also capsize it.’ In the Western metaphor, society and its rulers are on the boat together; the captain acts as an agent of the people who are the democratic principal and ‘constituent power’. The Chinese metaphor described the people as keeping the state afloat without being on board the ship and without being capable of reforming or steering it. Such ‘pre-conceptions’ of law, the state and of citizens are bound to influence legal interpretations. For instance, the 1982 Constitution of the People’s Republic of China is based on the democratic principle that ‘all power belongs to the people’ (Article 2). Democratic constitutions derive from this principle the need for protecting human rights and delegation of limited powers to democratically elected

¹ P. Frankopan, *The Silk Roads. A New History of the World*, London : Bloomsbury, 2015, at xiii.

legislative, executive and judicial government branches so as to protect constitutional, participatory, representative and deliberative self-government of, by and for citizens and peoples. China's Constitution, however, emphasizes the need for 'dictatorship by the proletariat' (Preamble) and the 'people's democratic dictatorship led by the working class' (Article 1), as postulated by Karl Marx based on his claims to know 'historic truth' about the domination of the human condition by materialism. Authoritarian claims to know 'truth' seem to be related also to the neglect for individual rights in the two philosophical schools of Confucianism and Legalism in China, which

shared a vision of society in which individual lives were led within hierarchies and social distinctions and proper behavior derived from an individual's status in those hierarchies'... 'Western thought makes the individual the bearer of rights and bases rights on the fundamental dignity and equality of every human being. There were no such concepts in Chinese thought'; in the Confucian view, 'identity constantly changes, varying with the context; duties and, correspondingly, rights/rites are also constantly being redefined as other actors change.'²

The Confucian view of subordinating individual rights and corresponding duties to collective interests continues to inform many Chinese and Marxist conceptions of individual rights in modern China.³ It reflects patriarchal and communitarian, socialist traditions that are fundamentally different from the more antagonistic, Western conceptions of human and constitutional rights as constitutional constraints aimed at protecting diverse individuals and peoples - as 'constituent powers' and 'democratic principals' vis-à-vis all governance agents - by corresponding legal duties of governments with only limited, delegated and separated, regulatory powers. Article 51 of China's Constitution of 1982⁴ illustrates how Chinese conceptions of individual 'freedoms and rights' differ from 'Kantian interpretations' of respect for 'human dignity' in terms of equal freedoms as 'first principle of justice' asserting moral and constitutional priority over governmental limitations of the diverse civil, political, economic, social and cultural human and constitutional rights and corresponding governmental 'duties to protect'. Yet, both Chinese and Western lawyers acknowledge that the multilevel nature of modern human rights law and constitutional law require respect for legitimate 'constitutional pluralism' depending on the diverse 'constitutional contracts', democratic preferences and ratification of human rights treaties in different jurisdictions. As modern China and other Asian countries adopt ever more legislation and international agreements protecting trading rights, investment rights, intellectual property rights and other economic, social, constitutional and human rights, generalizations contrasting 'rights in the East' and in 'the West' may no longer be justifiable. For instance,

- in 2011, China's patent office received more patent applications than any other patent office in the world;
- China also seems to comply with WTO law and WTO dispute settlement rulings as well as with international investment law and adjudication.

² S.B.Lubman, *Bird in a Cage: Legal Reform in China after Mao*, Stanford University Press 1999, 15-16, 19.

³ Cf. J.Chan, *Confucian Perfectionism. A Political Philosophy for Modern Times*, Princeton University Press 2014 (arguing that China should adopt liberal democratic institutions that are shaped by the Confucian conception of the good rather than the liberal conception of equal rights).

⁴ Article 51 of the 1982 Constitution sets clear limits upon the free exercise of rights by emphasizing the subordination of the individual to the community: 'in exercising freedoms and rights, citizens of the People's Republic of China may not infringe upon the interest of the state, of society or of the collective or upon the lawful freedom and rights of other citizens'. In the Chinese constitutional order, human rights must conform to state-sponsored policies as determined by the communist party (as the ultimate elite and authority) in order to maintain the 'social harmony between individual and state interests' (similar to the Confucian emphasis on maintaining harmony inside the family as the existential unity of human relationships). Conflict (as opposed to social harmony) is considered an ethical and ontological evil that needs to be limited through proletarian 'class struggles' and redistribution of benefits rather than through rights-based constitutionalism and adjudication.

Yet, China has chosen a power-oriented approach disregarding China's legal and judicial obligations under the UN Convention on the Law of the Sea (UNCLOS).⁵ China's political use of history for justifying its territorial and maritime claims over large swaths of the South China Sea reflects long-standing imperial strategies reflecting the ancient Chinese board game *wei qui* (also known in the West by its Japanese name *go*), e.g. building artificial islands and extending military positions surrounding oil, gas and other natural resources aimed at occupying territories and excluding other countries without regard to international law (e.g. the UNCLOS provisions on exclusive economic zones and archipels). Also inside China, the Constitution of 1982 is not effectively enforced in domestic courts; even though most other UN member states have recognized constitutionalism as a reasonable self-restraint on the bounded rationality and 'animal instincts' of human beings and as the most important 'political invention' for decentralized, citizen-driven protection of public goods (PGs), China's communist party avoids applying 'national constitutionalism' for protecting citizens against abuses of power. Yet, China increasingly uses legal self-commitments to UN, WTO, investment and regional law for justifying China's market liberalization and regulations of non-market concerns.⁶ Can utilitarian OBOR regulations effectively protect transnational PGs (e.g. as defined by UN and WTO law) without regard to democratic and republican constitutionalism?

The effectiveness of the Chinese regulatory system (e.g. for obtaining compliance with patent targets set by central government) has been explained in terms of an authoritarian 'pressure driving mechanism'.⁷ Yet, China's communist governance cannot be unilaterally imposed on other OBOR countries. UN human rights law and *democratic constitutionalism* proceed from the 'Kantian premise' that – because the limits of cognitive human reason (e.g. in terms of time, space, causality, subjective human senses) exclude knowledge of 'absolute truth' – constitutional protection of individual autonomy rights (e.g. to choose one's individual conceptions of a 'good life' and of 'social justice', including individual and democratic freedoms to 'falsify' claims of truth) offer more efficient and more legitimate information, coordination and sanctioning mechanisms for providing private and public goods demanded by citizens. '*Republican constitutionalism*' focuses on participatory rights as incentives for citizens to use their 'republican virtues' and assume responsibility for protecting collective supply of PGs (*res publica*). As illustrated by the '*Kadi*-case law' of the European Court of Justice (CJEU) limiting the domestic implementation of UN Security Council 'smart sanctions' against alleged terrorists if such sanctions violate fundamental rights protected in European Union (EU) law⁸, multilevel judicial protection of rule of law in constitutional democracies is committed to interpreting also *international* treaty obligations in conformity with the fundamental rights of citizens as constitutional restraints on abuses of political power. Just as China has accepted multilevel trade adjudication as integral part of WTO law and multilevel investment adjudication as provided for in international investment agreements, OBOR regulations should remain consistent with multilevel judicial remedies in additional areas of international cooperation (like government procurement, labor rights, environmental protection) in order to protect transnational OBOR cooperation in accordance with UN legal guarantees accepted

⁵ See China's rejection of the arbitration award of 12 July 2016 under UNCLOS Annex VII concerning the Chinese claims to control more than 80% of the South China Sea without regard to UNCLOS obligations: Permanent Court of Arbitration Case No 2013-19 in the matter of the South China Sea Arbitration (The Republic of the Philippines v The Peoples Republic of China). The award is published on the PCA website www.pcacases.com/web/view/7.

⁶ Cf. P.D.Farah/E.Cima (eds), *China's Influence on Non-Trade Concerns in International Economic Law*, Routledge: New York 2016. Also Chinese human rights scholarship transcends Confucian Chinese traditions and Marxist ideologies in response to China's ratification of UN human rights conventions and human rights discourse outside China (e.g. justifying human rights as protecting human freedoms, basic interests and capabilities).

⁷ Cf. X.Yang, Pressure Driving Mechanism: A Concise History of the Concept, in: *Social Science* 2012, 11; W.Cheng/P.Drahos, How China Built the World's Biggest Patent Office: The Pressure Driving Mechanism (unpublished manuscript 2017).

⁸ On the '*Kadi*-jurisprudence' annulling—on grounds of human rights violations—the EU implementation of 'smart sanctions' ordered by the UN Security Council against alleged terrorists, see: M. Avbelj et al. (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial*, London: Routledge, 2014.

by OBOR countries. Multilevel judicial governance must remain embedded into 'republican constitutionalism' in order to remain legitimate and voluntarily complied with by governmental and non-governmental actors and litigants. As constitutionalism is about limiting abuses of power and justifying third-party adjudication in terms of protecting equal rights and due process of law, the legitimacy of transnational OBOR cooperation is bound to depend on multilevel respect for the existing, international legal and constitutional obligations of OBOR countries. Even if communist rulers avoid 'constitutional governance' inside China, many OBOR cooperation partners will make their transnational economic cooperation with China conditional on respect for the 'constitutional principles' underlying their respective national Constitutions and UN human rights law.⁹

From 'Western' leadership for the UN/WTO legal system towards Chinese leadership through the OBOR project and mega-regional trade agreements?

The OBOR project – even though primarily motivated by domestic policy goals (e.g. to improve the connectivity of Western China with Western trading partners) - pursues more ambitious goals to refashion the global economic order compared with the postwar reconstruction promoted by the US Marshall Plan. Yet, the postwar US leadership was embedded into US initiatives for the multilateral Bretton-Woods Agreements (1944) and the UN Charter (1945), as promoted by US Secretary of State Cordell Hull (whose leadership was rewarded by the Nobel Peace Prize in 1945).¹⁰ In the Preamble of the UN Charter, 'We the Peoples of the United Nations determined', *inter alia*, 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. This rules-based, universalist US strategy (in contrast to nationalist 'America First' strategies of US President Trump) was further specified in the 1948 Universal Declaration of Human Rights (UDHR) and its 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family (as) the foundation of freedom, justice and peace in the world' (Preamble). Yet, the 2017 British 'Brexit' decision and US President Trump's power-oriented rejection of multilateral agreements¹¹ may signal the end of Anglo-Saxon leadership for protecting international PGs. Will China's 'G-20' initiatives – at the G-20 summit in Shanghai in 2016 - for non-binding 'Guiding Principles for Global Investment Policymaking', and more recent proposals for China's membership in the Transatlantic Partnership Agreement (TPP), lead to transformation of the WTO into a new World Investment and Trade Organization, as recently suggested by Chinese academics¹² so as to promote more legal and institutional coherence between regional and worldwide trade and investment rules and institutions?

The term 'constitutionalism' refers to three complementary 'political inventions' that respond to the 'bounded rationality' of human beings and underlie also mega-regional free trade agreements (FTAs) like the TPP¹³:

⁹ On 'economic constitutionalism' and 'justice as respect for human rights' in IEL see: E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Oxford: Hart 2012.

¹⁰ On Cordell Hull's strategic leadership see: K.Dam, Cordell Hull, the Reciprocal Trade Agreements Act and the WTO, in: E.U.Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency, and Democratic Governance*, Oxford University Press 2005, 83-98.

¹¹ Examples include, *inter alia*, Trump's dismissal of the United Nations (UN) as a 'social club'; his criticism of NATO as 'obsolete'; his support for disintegration of the EU; his withdrawal from the TPP and from the 2015 Paris Agreement on Climate Change Prevention; and his threatening of the North American Free Trade Agreement (NAFTA) and of other multilateral agreements.

¹² *World Investment and Trade Organization: Is It Possible for Global Governance? G20, TPP and WTO*, Chinese Initiative of International Law, WTO Public Forum September 2017.

¹³ For details see: E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods – Methodology Problems in International Law*, Oxford: Hart, 2016.

1. a *legal self-commitment* to constitution, limitation, regulation and justification of multilevel governance of PGs based on agreed ‘principles of justice’ of a higher legal rank with due respect for ‘constitutional pluralism’ (cf. the TPP provisions on environmental protection, good governance, protection of human, labor, investor and intellectual property rights and transnational rule of law);
2. a *political self-commitment* to ‘constitutionalizing’ law and governance through (a) legislative, (b) administrative, (c) judicial and (d) international rules and institutions so as to institutionalize ‘public reason’ and specify the agreed ‘principles of justice’, which – in spite of the ancient origins of constitutionalism – remain imperfectly realized in national and multilevel governance of PGs (cf. the TPP provisions on dispute settlement and domestic implementation of TPP law); and
3. a *methodological self-commitment* (as explicitly reflected also in the Preamble and Article 31:3 of the Vienna Convention on the Law of Treaties, VCLT) to interpreting and restraining the ‘rules of recognition, change and adjudication’ of ‘legal systems’ in conformity with human rights and other ‘principles of justice’ aimed at limiting abuses of power in the *real constitution*.

US President Trump’s disregard for multilateral UN and trade agreements raises the question:

Will Chinese leadership in the OBOR project help to counter the present risks of unraveling the global trading and economic order? Or will resistance by Chinese rulers against constitutional restraints limiting their ‘communist party state’ – notably their rejection of the ‘democratic ideals of 1789’ underlying UN and European human rights law - encourage power politics also beyond state borders (e.g. unilateral occupation of large parts of the South China Sea)? As globalization transforms ever more *national* into *transnational PGs*¹⁴ which no single state can protect unilaterally without international law and multilevel governance institutions: Can the multilevel OBOR governance be constituted, limited, regulated and justified without ‘multilevel constitutionalism’ through ‘bilateral deals’ (following the power-oriented policy paradigm of US President Trump)? Who protects the universally recognized civil, political, economic, social and cultural rights of citizens if ‘the sovereign sleeps’¹⁵ and transnational PGs (like mutually beneficial monetary, trading, investment, environmental, security and rule-of-law systems) are governed through ever more complex ‘networks’ (like global markets and ‘supply chains’ for international production of goods) driven by interest group politics? Can the ‘disconnect’ of the intergovernmental UN/WTO governance from citizens and peoples as ‘constituent powers’ and ‘democratic principals’ of all governance agents be limited so as to better protect human rights, rule of law and democratic governance in UN/WTO practices? Are authoritarian rulers right that economic poverty may justify prioritizing ‘justice as economic efficiency’¹⁶ over protecting ‘justice as

¹⁴ Economists tend to define pure ‘PGs’ (like sunshine, clean air, inalienable human rights) by their non-rival and non-excludable use that prevents their production in private markets. Most PGs are ‘impure’ in the sense of being either non-rival (e.g. ‘club goods’) or non-excludable (like common pool resources). Political and legal ‘republican theories’ tend to focus on whether republican ‘common goods’ for everyone (in contrast to the diverse private interests of citizens) are defined and implemented through participatory procedures and democratic conceptions of public interests (e.g. in protecting the republican values of ‘freedom as non-domination’, political equality, self-government and ‘civic virtues’ of citizens). On the different kinds and ‘collective action problems’ of PGs see Petersmann (note 13).

¹⁵ The distinction between ‘sovereignty’ and ‘government’ appointed by the sovereign people was increasingly discussed since the 16th century in view of the impossibility of applying the Athenian model of permanent self-governance through democratic assemblies in city-republics to nation states with vast territories and people. Hobbes’s suggestion (in *De Cive*, 1642) that the sovereign – after appointing a government – may be considered as ‘sleeping’, contributed to the invention, in the 18th century, of ‘constitutional democracy’ constituting, limiting, regulating and justifying limited government powers through democratically agreed, constitutional rules of a higher legal rank and constitutional rights of citizens aimed at ‘constitutionalizing’ the overall structures of society; cf. R.Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, Cambridge University Press 2016.

¹⁶ By treating citizens as mere objects of governmental ‘utility maximization’ and neglecting human rights, utilitarian focus on efficient production and distribution offers no guarantee for taking into account the non-economic dimensions of human welfare, for instance whenever restrictive business practices or emergency situations increase prices depriving poor people

human rights'? Is the 'invisible hand development paradigm' (e.g. the assumption that private market competition and private law coordination can produce PGs) consistent with the universal recognition of human rights and with the need for reducing unnecessary poverty and environmental destruction?¹⁷

Why the legitimacy of OBOR law and governance depends on constitutionalism

Can the OBOR project be successfully designed and implemented on purely utilitarian principles of governance? Bilateral 'OBOR deals' between China and recipient countries risk conflicting with existing multilateral agreements, as recently recalled by the EU investigations into China's construction of a railway link between Belgrade and Budapest and its alleged violation of EU regulations stipulating public tenders for large transport projects.

The insight that human rights and constitutionalism promote 'reasonableness' and limit rational egoism of individuals underlies UN human rights conventions that are ratified also by China (e.g. the UN Covenant on economic, social and cultural rights). The conferral of the 2017 Nobel Prize for economics to R. Thaler 'for his contribution to behavioral economics' reflects similar economic insights that 'bounded rationality' - for instance by the selfish homo economicus maximizing individual preferences through cost-benefit calculations in economic markets as well as in 'political markets' - remains part of the 'human condition' shaping also economic behavior, such as human responses to the 'three principles' of

- 'thinking automatically' (e.g. 'fast' and 'spontaneous' rather than 'deliberative' and 'reasonable slow thinking');
- 'thinking socially' (e.g. adjusting to social contexts of corruption); and
- 'thinking with mental models' that depend on the situation and the culture (e.g. in under-regulated financial industries profiting from tax-avoidance and circumvention of the law).¹⁸

Constitutionalism is a rational response to this 'human condition' (like risks of rational egoism and of limited human reasonableness) by committing all human beings and citizens to respect for equal human rights, rule of law, democratic input-legitimacy, republican output-legitimacy, inclusive democratic rule-justifications, and democratic and judicial accountability. Also beyond state borders, republican and cosmopolitan constitutionalism includes and protects persons and citizens affected by public and private power through equal rights and remedies in multilevel 'bottom-up governance' of transnational PGs (like the international division of labor based on 'global supply chains').¹⁹ The EU law principles of multilevel legal and judicial protection of

of effective access to water, essential food and medical services. The utilitarian assumption that morality consists in weighing and aggregating costs and benefits so as to 'maximize happiness' (e.g., by governmental redistribution of the 'gains from trade' at the whim of the rulers) risks being inconsistent with the moral principles underlying modern human rights (like respect for human dignity and 'inalienable' human rights).

¹⁷ For a famous criticism of the privatization and 'commodification' of natural resources, human resources and financial resources see the 1944 book by K. Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (new edition, with an Introduction by J. Stiglitz, Boston: Beacon Press, 2004). For a criticism of the regulatory neglect of 'market failures' and 'governance failures' in UN/WTO law see: Petersmann (note 9).

¹⁸ Cf. *World Development Report 2015: Mind, Society and Behavior*, Washington: World Bank 2015 (discussing rational choice theory, behavioral economics, public choice and deliberative democracy theories on how individuals, institutions, and societies make legally relevant decisions, enact laws, or adapt to them).

¹⁹ Kantian arguments for constitutional, cosmopolitan and international rights to equal freedoms are based not only on moral 'categorical imperatives' and *a priori* reasons for reconciling 'the choice of one ... with the choice of another in accordance with a universal law of freedom' (I. Kant, *The Metaphysics of Morals*, Cambridge UP 1996, at 230). Kant also argued that a peaceful international order can be developed only through cosmopolitan law ('*Weltbürgerrecht*') that transforms the classical law among nations ('*Völkerrecht*') through multilevel constitutional guarantees of equal cosmopolitan rights of citizens; cf. J. Bohman and M. Lutz-Bachmann (eds), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, Cambridge University Press 1997. Regional economic integration law among the 28 EU member states and its promotion of

- fundamental rights (e.g. as protected in the EU Charter of Fundamental Rights as integral part of the 2009 Lisbon Treaty and European constitutional law);
- of constitutional, representative, participatory and deliberative democracy (cf. Articles 2, 9-12 TEU); and of
- related constitutional principles (e.g. of conferral of limited powers, subsidiarity, proportionality, rule of law)

may offer the most developed ‘multilevel constitutional law for multilevel governance of PGs.’²⁰ Yet, just as Britain and the USA remain reluctant to limit their national sovereignty by multilevel governance and judicial institutions, so are many Asian governments rejecting European constitutional law as a model for cooperation among Asian countries with different legal and cultural traditions. Such insistence on diversity and ‘constitutional pluralism’ must be respected. Yet, Chinese citizens should not forget their own historical experiences that the widespread poverty inside China – during the decades prior to its economic liberalization policies since 1978 - was unnecessary and caused by ‘government failures’. Just as China’s self-commitment to GATT/WTO law helped lifting hundreds of millions of poor people out of poverty by embedding the ‘open door policies’ initiated by President Deng Xiaoping into the legal framework of GATT/WTO, so could embedding of China’s OBOR project into multilateral trade, investment and regional agreements contribute to legitimizing OBOR governance and related adjudication through multilevel legal restraints on ‘market failures’ and ‘government failures’ inducing private and public, national and transnational actors to limit their rational pursuit of self-interests.²¹

Constitutional pluralism calls for respecting the diversity of ‘principles of justice’

Constitutionalism is about ‘imagined orders’ based on inter-subjectively shared beliefs (e.g. ‘social contracts’) rather than about objective ‘truth’. It must respect culturally diverse traditions of ‘constitutional pluralism’ and of legitimate contestation, for instance

- by foreign ‘market citizens’ contesting discrimination of foreigners; or
- by ‘cosmopolitan citizens’ challenging harmful ‘externalities’ (like transboundary pollution and climate change) and related ‘discourse failures’ in foreign jurisdictions (e.g. in US politics disregarding global PGs like climate change).

By empowering citizens and foreigners to locally engage with, invoke and enforce international rules and human rights in domestic jurisdictions, ‘cosmopolitan constitutionalism’ can promote the legal coherence and effectiveness of multilevel regulation and judicial protection of transnational PGs.²² Theories and ‘principles of justice’ differ according to the diverse ‘contexts of justice’. For example,

- dispute settlement procedures may be justified by diverse principles of ‘*procedural justice*’;
- constitutional assemblies and courts of justice may be designed very differently depending on the agreed principles of ‘*constitutional justice*’;
- the allocation of equal civil, political, economic, social and cultural rights of citizens may be justified by different principles of ‘*distributive justice*’;

‘cosmopolitan rights’ and ‘democratic peace’ during more than 60 years are often seen as empirical evidence confirming Kantian legal philosophy.

²⁰ Cf. Petersmann (note 13).

²¹ On the increasing references to human rights in investor-state arbitration see: V.Kube/ E.U.Petersmann, Human Rights Law in International Investment Arbitration, in: *Asian Journal for WTO & Health Law and Policy* 11 (2016), 67-116.

²² Cf. E.U.Petersmann, Cosmopolitan constitutionalism: linking local engagement with international economic law and human rights, in: L.Biukovic/P.Pitman (eds), *Local Engagement with International Economic Law and Human Rights*, Cheltenham: Elgar Publishing 2017, 26-54.

- principles of '*corrective justice*' may justify very different remedies (e.g. retrospective reparation of injury in investment courts, only prospective remedies in WTO dispute settlement procedures);
- principles of '*commutative justice*' may justify particular interpretations of contractually agreed rights, duties and reciprocity principles (as illustrated by the 'violation', 'non-violation' and 'situation complaints' provided for in Article XXIII GATT); and
- '*equity principles*' may justify particular legal and judicial responses to unforeseen challenges.²³

Impartial third-party adjudication is a much older paradigm of 'constitutional justice' than democratic 'constitutional contracts'. Impartial 'courts of justice' fit republican, cosmopolitan and economic definitions of 'PGs' (e.g. in terms of non-exclusive and non-exhaustive access for all) and are essential for legitimizing legal regulation also of OBOR projects involving countries with diverse legal traditions. 'Constitutional justice' principles, including UN legal principles, aim at limiting power-oriented conceptions of 'PGs' (e.g. unilateral occupation of large parts of the South China Sea in violation of UNCLOS obligations) and of majoritarian politics. Constitutionalism requires international and domestic courts and their participation in multilevel governance of 'PGs treaties' so that treaty interpretations remain justifiable 'in conformity with the principles of justice', including also 'human rights and fundamental freedoms for all', as recalled in the Preamble and Article 31 of the 1969 VCLT. National and regional courts throughout Europe - like the CJEU, the European Free Trade Area (EFTA) Court, the European Court of Human Rights (ECtHR), and national courts cooperating with these European courts - are all committed to 'constitutional methodologies' aimed at protecting fundamental rights of citizens and transnational rule of law based on coherent 'principles of justice' respecting the legitimacy of 'constitutional pluralism' and of legal diversity. Yet, the legal and judicial traditions in many African and Asian countries are obviously different and may legitimately prioritize alternative dispute resolution methodologies.

EU law illustrates how democratic, cosmopolitan and judicial conceptions of 'constitutional justice' can complement each other in justifying citizen-oriented, multilevel governance of transnational PGs and of 'common pool resources'. The universal recognition of 'inalienable' human rights and fundamental freedoms calls for interpreting the rights of *citizens* and *peoples* and the corresponding duties of *states*, *governments* and *international organizations* as reciprocal principal-agent relationships.²⁴ Chinese law and the Chinese OBOR initiative could be strengthened and legitimized through 'republican constitutionalism' recognizing and empowering citizens as owners of PGs. By embedding principles of procedural, distributive, corrective, commutative justice and equity into 'constitutional justice principles', modern *international law* and multilevel governance of PGs can be designed more legitimately and more effectively, for instance by limiting 'constitutional nationalism' through multilevel protection of citizens across national frontiers. Complementing 'republican' by 'economic conceptions' of PGs can help clarify the collective action problems impeding 'constitutional justice' (e.g. in common market and competition law). Citizens must hold rulers more accountable for justifying their widespread disregard for the customary rules of treaty interpretation so that 'PGs treaties' are construed as protecting rights not only of governments, but also of citizens as the main economic actors, 'democratic principals' and 'constituent powers' of multilevel governance agents. As illustrated by widespread corruption problems and civil society contestation of law and governance in many OBOR countries, the voluntary compliance by private and public actors with multilevel 'OBOR regulations' will depend no less on bottom-up support by civil society of 'just rules' than on legal and judicial attempts at their 'top-down enforcement' by governance institutions.

²³ Cf. R.Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism*, Berkeley: University of California Press 2002.

²⁴ On this need for reconciling the three competing conceptions of 'international law among states', 'international law among peoples', and 'cosmopolitan international law based on universal human rights' see: E.U.Petersmann, Human Rights, International Economic Law and 'Constitutional Justice', in: *European Journal of International Law* 19 (2008), 769-798.

Legal methodology problems of trade and investment adjudication involving silk road projects

The term '*legal methodology*' refers to the 'best way' for identifying law, the methods of legal interpretation, the 'primary rules of conduct' and 'secondary rules of recognition, change and adjudication', the relationship between 'legal positivism', 'natural law' and 'social theories of law', and the 'dual nature' of modern legal systems. The etymological origins of the word methodology - *i.e.* the Greek word '*meta-hodos*', referring to 'following the road' - suggest that globalization and multilevel governance of '*transnational PGs*' (like human rights, rule of law, democratic peace, mutually beneficial monetary, trading, development, environmental, communication and legal systems promoting 'sustainable development') require reviewing legal methodologies in order to find 'better ways' enabling citizens and peoples to increase their social welfare through rules-based global cooperation.

Section I explained why *constitutionalism* – as (1) a normative conception for the input-legitimacy of public law, a (2) sociological conception for the output legitimacy of public law, and as (3) a legal methodology for interpreting and developing PGs systems – has proven to be the most important 'political invention' for protecting PGs both inside and beyond states. Constitutionalism suggests that law – including IEL and regulations of OBOR projects – must be understood and developed with due regard to the dynamic interactions between the 'law in the books', the 'law in action', and the underlying 'principles of justice' justifying law and governance vis-à-vis citizens. Transforming *national* into *multilevel constitutionalism* is required, *inter alia*, by

- the universal recognition of human rights²⁵;
- the transformation of *national* into *transnational PGs* due to globalization;
- the need for limiting 'collective action problems' in multilevel governance of transnational 'aggregate PGs'; and by the
- the greater effectiveness of citizen-driven 'bottom-up network governance' compared with intergovernmental 'top-down chessboard governance'²⁶ or authoritarian 'pressure driving mechanisms'.²⁷

This comparatively greater effectiveness of 'cosmopolitan international law' empowering citizens at home and abroad is illustrated by numerous empirical examples like:

- national and international contract, commercial and investment law (e.g. protecting 'global supply chains') enforced through multilevel cooperation among national and international tribunals (e.g.

²⁵ Similar to the recognition of the 'trinity' of human rights, rule of law and democratic governance inside constitutional democracies and in an increasing number of regional institutions (like the EU and the Council of Europe), also UN institutions recognize 'that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations' (UN GA Res. 64/116 of 15 January 2010). From the point of view of legal methodology, it remains contested whether democratic governance and rule of law can be *deduced* - as principles of positive international law - from the government obligations to respect, protect and fulfil human rights; or whether –in order to become positive international law – they must be *inductively proven* to have also been specifically endorsed by states, for instance in the numerous UN and regional human rights conventions and related resolutions of UN and regional institutions recognizing legal duties to democratic exercise of governance powers. Arguably, both the inductive as well as the deductive methodology justify the same conclusion that – since the UDHR of 1948 - all UN member states have consented to UN and regional treaties and resolutions recognizing legal duties to protect democratic governance and related human rights (like freedom of opinion, freedom of assembly, freedoms to participate in representative governments and in regular elections of democratic institutions).

²⁶ Cf. A.M.Slaught, *The Chess-Board and the Web. Strategies of Connection in a Networked World*, New Haven: Yale University Press 2017 (elaborating strategies for designing, improving and managing social networks for resolving collective action problems at local, national and transnational levels of governance).

²⁷ See above note 7.

based on the 1958 New York Convention and the 1966 Convention establishing the International Centre for the Settlement of Investment Disputes, ICSID);

- rights-based common market, competition, labour laws and environmental regulations as enforced by the CJEU and the EFTA Court in cooperation with national courts;
- regional human rights regimes enforced by national and regional human rights courts (e.g. in Africa, Europe and Latin-America);
- international criminal law as enforced through multilevel cooperation among national and international criminal courts;
- multilevel tobacco control regulations in the context of the World Health Organization (WHO) and its Framework Convention on Tobacco Control (FCTC)²⁸;
- internet regulation and its decentralized enforcement through multilevel arbitration procedures (e.g. administered by the World Intellectual Property Organization, WIPO); or
- consular and refugee regulations protecting individual rights and judicial remedies.²⁹

From democratic, republican and cosmopolitan constitutionalism to 'constitutional pluralism'

Since the Athenian democracy and the Roman republic some 2500 years ago, constitutionalism continues to dynamically evolve in response to diverse legal cultures, regulatory contexts and 'collective action problems'. For instance:

- Emancipatory 'constitutionalism 1.0' constituted, limited, regulated and justified legislative, executive and judicial powers for republican (self)government (e.g. from the Athenian democracy and Roman republic to the Constitutions of the USA 1787, India 1949 and China 1982).
- The post-World War II 'human rights constitutionalism 2.0' further limited governance powers by multilevel human rights and judicial remedies (notably in European law); yet it failed to effectively 'constitutionalize' foreign policy powers (e.g. in UN/GATT politics) that often continue to tax, restrict and regulate citizens in their transnational cooperation without effective protection of human rights, rule of law and democratic self-governance.
- Multilevel 'EU constitutionalism 3.0' (e.g. based on Articles 2, 3, 6, 21 Lisbon Treaty and the EU Charter of Fundamental Rights) succeeded in 'constitutionalizing' the common market integration and some foreign policy areas (as illustrated by the *Kadi*-jurisprudence and the European Economic Area Agreement between the EU and EFTA member states).³⁰

Section I argued that globalization and its transformation of *national* into *transnational PGs* (like human rights, open monetary, trading, investment, legal security and environmental protection systems) require 'cosmopolitan UN/WTO constitutionalism 4.0'. UN/WTO governance of global PGs remains, however, legally 'disconnected' from effective democratic control, 'cosmopolitan rights' and judicial remedies of citizens. Due to inadequate restraints on foreign policy powers, intergovernmental power politics continues to prevail over citizen-oriented 'cosmopolitan' and 'constitutional conceptions' of UN/WTO law and governance. The 'America First' policies of US President Trump illustrate how governments and diplomats often pursue rational self-interests (e.g. in satisfying domestic interest groups in exchange

²⁸ On their multilevel judicial enforcement see: L.Gruszczynski, *The WTO and FCTC Dispute Settlement Systems: Friends or Foes?* in: *Asian Journal of WTO & Health Law and Policy* 12 (March 2017) 105-134.

²⁹ For empirical evidence confirming the greater effectiveness of citizen-driven 'cosmopolitan international law' empowering citizens through individual rights, remedies and 'network governance' see: R.Pierik/W.Werner (eds), *Cosmopolitanism in Context. Perspectives from International Law and Political Theory*, Cambridge University Press 2010; Petersmann (note 13), at 59 ff, 321 ff.

³⁰ For different distinctions between 'constitutionalism 1.0, 2.0 and 3.0' see: A.Somek, *The Cosmopolitan Constitution*, Oxford University Press 2014.

for their political support, limiting the legal and judicial accountability of foreign policies vis-à-vis adversely affected citizens). ‘Global democracy’, ‘global justice’, diplomatic and inter-governmental ‘top-down UN/WTO constitutionalism’ remain utopias. Yet, the historical evolution from ‘constitutionalism 1.0’ to democratic ‘European constitutionalism 3.0’ suggests that functionally limited ‘multilevel constitutionalism 4.0’ may be a politically realistic methodology for making multilevel governance of transnational PGs more legitimate and effective, for instance by setting incentives for civil society support of transnational PGs regimes limiting toxic tobacco consumption (e.g. in the context of the 2003 FCTC) and climate change (e.g. in the context of the 2015 Paris Agreement). Arguably, also European constitutional law offers lessons for extending ‘republican’ and ‘cosmopolitan constitutionalism’ beyond national borders; even in different legal contexts of transnational economic cooperation among national republics without effective ‘democratic constitutionalism’ (e.g. among China and Pakistan in the context of their OBOR cooperation), citizen-driven ‘republican constitutionalism’ and inclusive decision-making processes can limit ‘collective action problems’ in multilevel governance of transnational PGs (like the OBOR project of building transnational infrastructures connecting China with Afghanistan and Pakistan across areas dominated by militant local tribes). For instance:

- constitutional and ‘cosmopolitan interpretations’ of multilevel trade and investment regulations (e.g. by national and international courts of justice) can protect legal rights and judicial remedies of non-governmental actors and transnational rule of law, thereby limiting abuses of public and private powers;
- as illustrated by European economic integration law, legal empowerment of ‘citizen struggles for justice’ can promote other PGs like undistorted market competition and ‘democratic peace’;
- the customary law requirements of treaty interpretation ‘in conformity with the principles of justice’, including also ‘human rights and fundamental freedoms for all’ (as codified in the Preamble and Article 31 VCLT), can promote multilevel ‘judicial dialogues’ and strengthen the ‘instrumental’ and ‘systemic functions’ of law as well as the input- and output legitimacy of intergovernmental law-making and multilevel governance.

How to design OBOR dispute settlement procedures?

The effectiveness of international courts of justice and of their multilevel cooperation with national courts is evaluated best by a ‘goal-based approach’³¹ that examines not only the compliance with court judgments (which may depend more on the nature of remedies issued by a court than on the perceived quality of the court’s procedures and reasoning), the usage rates of courts (which may be low due to dispute avoidance through out-of-courts settlements), and the impact of courts on state conduct (e.g. compliance with minimalist judicial remedies that may fail to protect agreed treaty objectives effectively). Most international courts are mandated to also pursue broader goals such as:

- applying, interpreting and, if necessary, clarifying and enforcing the applicable international law rules and principles so as to strengthen the rule-of-law in the competent jurisdictions;
- resolving international disputes and related legal problems;
- supporting the operation of related international legal regimes; and
- legitimizing related rules and institutions.

International judicial effectiveness in realizing the legal and judicial dispute settlement objectives may depend on numerous other factors like the interests of state parties, interest groups and affected individuals; the tribunal’s composition, formal authority (e.g. to compel compliance with the law), independence, human and financial resources; the reputation, functional capacity (e.g. depending on

³¹ Cf. Y. Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, in: *American Journal of International Law* 106 (2012), 225-270.

assistant staff and case-load) and fact-finding capability of tribunals; their persuasive judicial reasoning, 'judicial dialogues' (e.g. with the disputing parties, third parties and other courts with 'overlapping jurisdictions'), the nature of the rules and rule-violations concerned, and on judicial cooperation with domestic institutions concerned.³²

So far, the OBOR project does not envisage establishment of new national or international dispute settlement venues with specific dispute settlement goals, structures, processes, outcomes, stakeholders and constituencies (e.g. bearing the costs of permanent tribunals). As the WTO Dispute Settlement Understanding pursues 'providing security and predictability to the multilateral trading system' (Article 3 DSU) and most countries participating in the OBOR project are WTO member states, the WTO trade, investment, government procurement and dispute settlement rules and procedures might offer the most appropriate jurisdiction for settling related disputes also among countries cooperating in OBOR projects.³³ Similarly, as bilateral and regional investment rules and arbitration procedures aim at protecting and reconciling both the *public interests* of the home and host states involved as well as the *private interests* of foreign investors (e.g. in full security of their property and investor rights), investment disputes arising from the implementation of OBOR projects might be submitted to existing investment jurisdictions (e.g. based on the more than 130 investment treaties concluded by China with other countries).³⁴ The private contract and commercial law disputes arising from joint ventures and other cooperation among Chinese and foreign companies and investors may be submitted and resolved most effectively by submission to one of the numerous private commercial law centers and established arbitration procedures in China and other countries attracting OBOR investment projects.³⁵ To the extent OBOR projects are financed by international and national development banks (like China Development Bank, a state lender which already granted loans worth more than \$160bn to countries involved in OBOR projects), such financing is usually based on contracts incorporating the public procurement regulations of the banks concerned and requiring borrowers and contractors to use such procedures for funded procurements.³⁶ Comparative studies of recent arbitration reforms and of alternative dispute

³² Cf. L.Helfer/A.M.Slaughter, *Toward a Theory of Effective International Adjudication*, in : *Yale Law Journal* 107 (1997), at 273 ff.

³³ If the WTO dispute settlement system is evaluated from the perspective of its much more frequent use by WTO Members since 1995 (e.g. 524 regular requests for consultations, 56 additional 'compliance disputes' pursuant to Article 21.5 DSU, over 350 WTO dispute settlement decisions issued by May 2017) compared with other worldwide dispute settlement systems (e.g. only 23 cases and 6 verdicts issued by the International Criminal Court since 2002; only 25 cases dealt with by the International Tribunal for the Law of the Sea since 1995), statistical analyses confirm the comparatively 'prompt settlement' of disputes 'essential to the effective functioning of the WTO' (Article 3:3 DSU). Yet, the WTO dispute settlement system remains subject to power politics (e.g. political refusal to provide adequate legal and translation staff enabling compliance with the very tight DSU deadlines for WTO panel and Appellate Body proceedings) and to delaying tactics (e.g. more than 90% of the 33 'compliance panels' pursuant to Article 21.5 DSU found that the WTO member concerned had not complied fully with the DSB ruling, triggering subsequent requests in 21 of these disputes for DSB authorization of 'suspension of concessions' as countermeasures, notably against the USA and the EU). Moreover, in 27 out of 122 reports issued by the WTO Appellate Body, the latter was unable 'to complete the analysis' and, after having (partially) reversed the panel's findings, to resolve the dispute by remanding it back to the original WTO panel. However, evaluating the WTO dispute settlement system from a different benchmark than its frequent use and comparatively speedy dispute settlement (e.g. since 2013 about 34 months duration of WTO dispute settlement proceedings) – e.g. in the light of Article 3:2 DSU ('providing security and predictability to the multilateral trading system'; 'clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law') –, could justify more criticism (e.g. in terms of neglecting the customary law requirement of interpreting treaties in conformity with 'human rights and fundamental freedoms for all', as recalled in the Preamble and Article 31:3 of the VCLT).

³⁴ Cf. J.Chaisse (ed), *China's Three-Prong Investment Strategy: Bilateral, Regional and Global Tracks*, Oxford University Press 2017.

³⁵ Cf. J.Paulsson (ed), *International Handbook on Commercial Arbitration*, 4 volumes, The Hague: Kluwer, 2015 (describing commercial arbitration in China in Vol. 1).

³⁶ Cf. S.Williams-Elegbe, *Public Procurement and Multilateral Development Banks. Law, Practice and Problems*, Oxford : Hart, 2017.

resolution methods in Asian countries identify new Asian approaches to modernization of arbitration and mediation procedures.³⁷

Legitimacy challenges of international trade and investment adjudication

Legitimacy of courts (e.g. understood as socially accepted authority) depends not only on the internal rules constituting the legal regimes in which the courts operate. It is also influenced by the ‘principles of justice’ underlying and embedding legal and judicial systems. Judicial jurisprudence may generate additional legitimacy promoting social acceptance by the constituencies concerned.³⁸ Due to the lack of judicial independence inside China’s ‘communist party state’, many foreign actors perceive the ‘source legitimacy’, ‘procedural legitimacy’ and ‘result-based legitimacy’ of Chinese courts as inadequate, even if national courts inside China offer ‘low cost judgments’ compared with more expensive arbitration or international dispute settlement procedures. Comparative studies of international trade and investment courts point to both ‘converging developments’ (e.g. in judicial interpretations of national treatment and most-favored nation treatment obligations in trade and investment agreements, proportionality balancing) and ‘diverging structures’ (e.g. regarding prospective remedies in WTO dispute settlement procedures, retroactive reparation of injury in investment arbitration, cooperation between national courts and investment arbitral tribunals, lack of cooperation among national and WTO trade tribunals).³⁹ Evaluating the legitimacy and comparative advantages of national, regional and worldwide trade and investment courts and of their increasing interactions raises also political, sociological and moral legitimacy questions going beyond ‘positive law’⁴⁰, for instance whether the legitimacy of international courts is ultimately a matter of justifiability towards individuals (e.g. in terms of protecting citizens against arbitrary domination, protecting equal freedoms as individual rights) rather than only vis-à-vis government agents representing states (e.g. in terms of helping them solve collective action problems).⁴¹ The behavior of international judges is influenced not only by law, but also by political constraints and uncertainty depending on their independence, accountability, and the multilevel allocation and separation of powers (e.g. regarding the reappointment of WTO Appellate Body judges and the adoption of Appellate Body reports by the political WTO Dispute Settlement Body). The recent ‘blockage’ of the re-appointment of WTO Appellate Body judges by the USA - based on US claims that they have ‘exceeded their mandates’ - reflects regrettable US power politics disregarding their DSU obligations (e.g. under Article 23:1) and the legitimate use of the customary rules of treaty interpretation by the Appellate Body (as required by Article 3:2 DSU).

The election of authoritarian, political leaders and their ‘populist policies’ have recently led to increasing criticism of international courts, for instance by the US Trump administration (criticizing independent WTO adjudication), China (rejecting the arbitral jurisdiction and awards under the UNCLOS), Britain (rejecting the jurisdiction of the CJEU beyond April 2019, i.e. the presumed entry into force of Britain’s ‘Brexit’, and criticizing the jurisdiction of the ECtHR), as well as by European civil society (e.g. opposing the limitation of national court jurisdictions in favor of investor-state arbitration privileging

³⁷ Cf. A.Reyes/W.Gu (eds), *The Developing World of Arbitration. A Comparative Study of Arbitration Reform in the Asia Pacific*, Oxford: Hart Publishing 2018.

³⁸ On *ad hoc* responses of investment arbitrators responding, e.g., to WTO Appellate Body jurisprudence and ‘judicial proportionality’ reasoning in European courts see: D.Schneiderman, Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint? in: *Journal of International Dispute Resolution* 2 (2011), 471-495.

³⁹ Cf. J.Kurtz, *The WTO and International Investment Law. Converging Systems*, Cambridge University Press 2016; Y.Hua (note 3).

⁴⁰ Cf. G.Ulfstein/M.Zhang/R.Howse/H.Ruiz-Fabri (eds), *The Legitimacy of International Trade Courts and Tribunals*, Cambridge University Press 2017.

⁴¹ Cf. E.U.Petersmann, International dispute settlement and the position of individuals under EU and international law, in: M.Cremona/R.Wessels (eds), *The European Union and International Dispute Settlement*, Oxford: Hart 2017, 213-234.

foreign investors).⁴² The horizontal and vertical allocation of judicial authority, its accountability, democratic control, moral justification and judicial interpretation of indeterminate 'legal principles' will inevitably remain contested also in the implementation of China's OBOR projects, for instance depending on whether international courts will be socially accepted also by non-governmental actors as judicial promoters of 'justice', rule-of-law and other PGs. Future legal and judicial practices in the implementation of OBOR projects will help to discover comparative advantages and 'best practices' of alternative judicial, mediation and conciliation procedures and multilevel institutions for dispute settlement.

Some policy conclusions for the 'OBOR' project

The legitimacy of economic, financial and investment cooperation in the implementation of OBOR projects depends on rules-based legal frameworks, impartial dispute settlement procedures, predictability and compliance of governance with the 'rule of law' as 'a principle of governance in which all persons, institutions and entities, ... including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards' that have become part of universally recognized human rights principles.⁴³

China's leadership in the OBOR project (e.g. as main provider of financial and technical resources, goods and services for OBOR projects) seems to entail predominantly *bilateral* legal structures without creation of new *multilateral* courts, multilateral political control mechanisms and new multilateral treaties protecting non-state actors. Hence, decentralized judicial institutions and coordination mechanisms (e.g. *litis pendens* principles for preventing simultaneous cases before competing courts, *res judicata* principles preventing subsequent cases before different courts, judicial comity principles promoting judicial dialogues and regard to precedents), judicial independence, *bilateral* or *plurilateral* procurement procedures, investment protection and dispute settlement agreements may be more appropriate in view of the enormous diversity of the more than 60 countries participating in OBOR projects. Even if governments remain the 'masters' of intergovernmental OBOR projects, implementation of the infrastructure, investment and economic projects depends on non-state actors and civil society interested in 'non-domination'⁴⁴; they are likely to evaluate the normative legitimacy and social acceptability of OBOR rules, institutions and projects from diverse local perspectives. Protecting legitimate rights and interests of non-governmental actors and local 'compliance communities' (e.g. interested in non-domination, protection of legitimate expectations, respect for human rights and rule of law) and promoting the 'inner morality of law' will be important for successful implementation of OBOR projects and voluntary compliance with related contracts.⁴⁵

⁴² Cf. E.U.Petersmann, Transatlantic Free Trade Agreements: Lack of EU Leadership for Reforming Trade and Investment Law? in: *Revue Internationale de Droit Economique* 2016, 455-480.

⁴³ UN General Assembly Resolution A/RES/67/97 (2012) on 'The Rule of Law at National and International Levels'.

⁴⁴ On 'rule of men' as domination, and 'rule of law' as non-domination, see: P.Pettit, *Republicanism. A Theory of Freedom and Government*, Oxford University Press 1997. According to Pettit, republicanism pursues non-domination in the sense of 'protection from the arbitrary use of political authority and coercive power'. For broader conceptions of republicanism focusing on multilevel governance of PGs see Petersmann (note 13).

⁴⁵ On the 'two moralities of duty and of aspiration', the 'inner morality of law' and related procedural and substantive 'rule of law criteria' (e.g. based on principles of general applicability, promulgation of rules, their non-retroactivity, clarity, consistency, respect for human capabilities, *stare decisis*, and congruence) see: L.L.Fuller, *The Morality of Law*, Yale University Press revised edition 1969. On the need for socially constructing law 'bottom up' by involving all citizens and actors concerned in the making, administration and adjudication of (inter)national rules see: J.Brunée/S.J.Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge University Press 2010, at 86: 'Interactional law only emerges when shared understandings become fused with a 'practice of legality', rooted in Fuller's *eight criteria of legality* and embraced by a community of practice that adheres to those criteria in day-to-day decision-making'. On Fuller's 'inner morality of law criteria' as constitutive elements of 'legality' and rule-of-law see Fuller, at

As national courts in China and in some other OBOR partner countries are widely perceived as failing adequate legitimacy standards (like judicial independence from political interferences, impartiality, due process of law, legal expertise in international law), the international agreements and economic contracts governing the relationships between OBOR donor and recipient countries, investors and their contractors should provide for the existing dispute settlement procedures in international trade, investment, commercial and contract law rather than for submission of disputes to national jurisdictions. The ‘Chinese initiative’ for joining the TPP Agreement and multilateralizing mega-regional FTAs among WTO members deserves support by OBOR partner countries as the most efficient way of reforming WTO law.⁴⁶ The Chinese traditions favoring alternative dispute resolution methods (like mediation and conciliation procedures) should be institutionalized at national and regional levels of OBOR cooperation. Subsidiarity principles are important in designing dispute settlement procedures among and within constitutional democracies provided their national courts are subject to effective constitutional restraints (e.g. in EU and EEA countries cooperating in OBOR projects). In countries without ‘republican constitutionalism’, however, constraining *national* governance institutions through international legal and judicial commitments (e.g. WTO law, international investment law) can improve domestic institutions, enhance legal security and reduce transaction costs, for instance by resorting to ‘positive complementarity principles’ based on cooperation between national and transnational courts and tribunals (like recognition and enforcement by national courts of transnational arbitral awards and international judgments). Multilevel judicial cooperation between international and national courts (e.g. based on ‘preliminary rulings’ by the CJEU, ‘advisory opinions’ by the EFTA Court and MERCOSUR courts) can legalize, ‘judicialize’ and legitimize international politics (e.g. among countries implementing OBOR projects) by compensating inadequate national judicial institutions by an ‘integrated, multilevel judiciary’ engaging in ‘judicial dialogues’, common judicial justifications, ‘checks and balances’, collective learning processes and ‘public reason-giving’. Republican and cosmopolitan constitutionalism can substitute for the lack of democratic constitutionalism inside China and some other OBOR participants, for instance by limiting political and judicial powers and protecting ‘countervailing rights’ of citizens, companies and other non-governmental actors, litigants and third parties affected by dispute settlement proceedings.

197-200. On the interrelationships between Fuller’s eight principles of *generality* (law must take the form of general rules), *publicity* (law must be published), *clarity* (law must be comprehensible and not overly vague), *consistency* (laws must not contradict one another), *feasibility* (it must be possible for people to comply with the law), *constancy* (law must not change too rapidly), *prospectivity* (law cannot be retroactive) and *congruence* (law must be administered and enforced as it is written) with human rights law see : D.Luban, *The Rule of Law and Human Dignity : Re-examining Fuller’s Canons*, in : *Hague Journal of the Rule of Law* 2 (2010), at 29.

⁴⁶ See note 12 and E.U.Petersmann, *CETA, TTIP and TISA: New Trends in International Economic Law*, in: S.Griller *et alii* (eds), *Mega-Regional Agreements: TTIP, CETA, TISA. New Orientations for EU External Economic Relations*, Oxford University Press 2017, 17, 33ff.

