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Between ‘member-driven’ WTO governance
and ‘constitutional justice’: Judicial dilemmas
in GATT/WTO dispute settlement

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**BETWEEN ‘MEMBER-DRIVEN’ WTO GOVERNANCE
AND ‘CONSTITUTIONAL JUSTICE’: JUDICIAL DILEMMAS
IN GATT/WTO DISPUTE SETTLEMENT**

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Abstract

Globalization and the recognition of human rights and constitutionalism by all UN member states entail that also international courts increasingly interpret their judicial mandates and multilateral treaties in conformity with 'constitutional principles' as multilevel governance of transnational public goods (PGs) constraining intergovernmental power politics through judicial protection of transnational rule of law for the benefit of citizens. US President Trump, the 'Brexit', and an increasing number of non-democratic rulers (e.g. in China, Russia, and Turkey) challenge multilateral treaty systems, international adjudication and 'cosmopolitan rights' by 'populist protectionism' prioritizing 'bilateral deals'. This contribution uses the US blockage of the WTO Appellate Body system for illustrating the 'republican argument' that transnational PGs cannot be protected without judicial remedies, rule of law and democratic governance. Adversely affected governments, citizens and courts of justice must hold power politics more accountable so as to protect PGs for the benefit of citizens and their constitutional rights. WTO members should use their power of majority voting for authoritative interpretations of WTO law supporting 'judicial administration of justice' in multilevel governance of the world trading system. Multilevel judicial control of trade regulation legitimizes 'member-driven governance' by protecting rule of law as approved by parliaments for the benefit of citizens, their equal rights and social welfare.

Keywords

Adjudication; courts of justice; governance; judicial functions; principles of justice; World Trade Organization

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Introduction: Judicial administration of justice in the WTO?*

2017 will be remembered as the year when - following China's disregard in the South China Sea for the UN Convention on the Law of the Sea and related international arbitration, increasing disregard (e.g. by Russia and Turkey) for the European Convention on Human Rights and related international adjudication, and the vetoing (e.g. by Russia) of UN Security Council responses to crimes against humanity (like chemical warfare against civil society inside Syria) - the US Trump Administration succeeded in dismantling the WTO Appellate Body (AB), whose jurisprudence was celebrated as the 'crown jewel' of the welfare-enhancing trading system for more than 20 years. At the end of 2017, three of the seven positions of AB judges had become vacant due to US blockage of the procedures for meeting the legal obligations under Article 17 DSU, according to which the AB 'shall be composed of seven persons' (para.1) and the Dispute Settlement Body (DSB) 'shall appoint persons to serve on the Appellate Body for a four-year term' (para.2). As a consequence, the AB membership was no longer 'broadly representative of membership in the WTO' in violation of Article 17:3 DSU. And compliance with the time-periods prescribed in Article 17:5 DSU for completing AB procedures became increasingly impossible, *inter alia* due to the workload and potential conflicts of interests of the remaining AB members from China, India, the USA and Mauritius and their complaints that the AB was not 'provided with the appropriate administrative and legal support as it requires' (Article 17:7 DSU). A complaint by US President Trump of an alleged 'anti-US bias' in WTO dispute settlement practices had been quickly refuted by academics in view of the high 'US win rate' of 78% as a WTO complainant and 36% as a respondent in WTO dispute settlement proceedings.¹ Yet, the US blockage of AB appointments undermined the WTO legal and dispute settlement system without hardly any public, democratic discussion or justification of US non-compliance with DSU procedures. Similar to the US Smoot-Hawley Tariff Act of 1930, unilateral US trade protectionism risks, once again, provoking worldwide economic and political crises and reciprocal retaliatory measures by adversely affected countries. At the WTO Ministerial Conference in December 2017, US Trade Representative (USTR) Lighthizer complained that '(t)oo often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table'.² This contribution explains why this US criticism of multilevel WTO adjudication - like the traditional 'Washington consensus' on trade governance as mere interest group politics dominated by US law firms and their commercial conceptions of GATT/WTO law³ - is inconsistent with the mandate given by all WTO members to the WTO dispute settlement system. As the US offers no legal justification of its unilateral DSU violations, it is time for the 'WTO community' to defend the WTO trading, legal and compulsory dispute settlement system as a

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¹ Cf. G.Shaffer/M.Elsig/M.Pollack, *The Slow Killing of the WTO*, <https://www.huffingtonpost.com>, 6 December 2017, revealing television statements by US President Trump ('The WTO ... was set up for the benefit of everybody but us. They have taken advantage of this country like you wouldn't believe... As an example, we lose the lawsuits, almost all of the lawsuits in the WTO ... Because we have fewer judges than other countries. It's set up as you can't win. In other words, the panels are set up so that we don't have majorities. It was set up for the benefit of taking advantage of the United States') as 'fake news'.

² Quoted from the statement by USTR Ambassador Lighthizer available on the USTR and WTO websites.

³ Following my service as a member of the second GATT dispute settlement panel in *EC-Bananas* (1992), a US Congressman told me that Washington trade lobbyists defined the common characteristic of GATT lawyers and bananas in terms of 'you buy them by the bunch'.

'global PG' essential for realizing the 2030 'sustainable development goals' and related human rights objectives approved by all UN member states for the benefit of humanity.⁴

Section I criticizes UN/WTO diplomats for justifying their intergovernmental power politics by 'reasons of state' (e.g. 'America first') without regard to their parliamentary mandates to implement WTO law for the benefit of citizens as 'democratic principals' of all governance agents. Multilevel judicial review legitimizes 'member-driven WTO governance' by implementing the parliamentary mandate of settling disputes over indeterminate WTO rights and obligations through the 'dispute settlement system of the WTO' (Article 3 DSU) rather than through unilateral power politics (as specifically outlawed in Article 23 DSU). *Section II* explains why national and international courts of justice justify their 'internal' and 'external legitimacy' by 'constitutional justice' principles like impartiality and independence of judges, due process of law, and inclusive reasoning 'in conformity with the principles of justice', including also 'human rights and fundamental freedoms for all', as explicitly confirmed in the customary rules of treaty interpretation. *Section III* argues that – contrary to opportunist claim 'that law is incapable of providing convincing justifications to the solution of normative problems'⁵ – governments, judicial bodies and civil society can, and should, use WTO law for resisting intergovernmental power politics so as to defend 'public reason' and global PGs vis-à-vis 'populist protectionism' - with due respect for legitimate 'legal pluralism'. *Section IV* discusses judicial and 'constitutional dilemmas' resulting from disregard for the customary rules of treaty interpretation (e.g. US insistence on 'bilateral reciprocity' inconsistent with multilateral trading systems); judicial clarification of indeterminate rules, principles and overall consistency of multilevel trade regulation requires 'judicial comity' and 'judicial dialogues' protecting 'checks and balances' between domestic, regional and worldwide jurisdictions defending transnational rule of law.

'Member-driven governance' as a non-democratic paradigm of 'international law among states'

The more globalization transforms *national* into *transnational* 'aggregate PGs' (like the global monetary, trading, environmental, communications and legal systems) that neither states nor private actors can provide and protect without international law and multilevel governance institutions, the more *national* and *international legal regimes* have become dependent on cooperation with non-governmental actors by means of 'transnational law' governing private-public partnerships and limiting 'state sovereignty' (e.g. in human rights law, economic and environmental law and arbitration, criminal law, transnational governance of product, production and sustainability standards, global supply chains, internet governance).⁶ This need for increased participation of citizens and non-governmental organizations in multilevel governance of PGs is legally reinforced by the universal recognition of human rights, rule of law and democratic governance as 'principles' of UN law requiring justification of law and governance vis-à-vis citizens as 'constituent powers' and 'democratic principals' of all

⁴ On the defining characteristics and different kinds of PGs, their 'collective action problems' and regulatory challenges see E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods – Methodology Problems in International Law* (Hart 2017), chapter 2.

⁵ Cf. M.Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument* (CUP 2005), at 69 (emphasizing that normative, deductive legal arguments about justice always risk being challenged as 'utopianism' by voluntarist apologies of governments denying state consent in particular contexts).

⁶ Cf. *Governance and the Law*, World Development Report 2017 (World Bank 2017). The term 'transnational law' is distinguished here from private law, state law and international law by the participation of, and cooperation with non-state actors as in investor-state agreements and arbitration, or in European common market law recognizing citizens and non-governmental actors (like producers, investors, traders, consumers) as legal subjects with rights and remedies protected by EU citizenship rights and multilevel parliamentary, executive and judicial protection of fundamental rights.

governance agents.⁷ Yet, even though the adoption of national Constitutions (written or unwritten) by almost all UN member states promotes 'internationalization' of 'constitutional' and 'global administrative law' principles and their incorporation into multilevel governance (e.g. of the WTO dispute settlement system), most UN/WTO diplomats continue to perceive and design UN/WTO governance as intergovernmental bargaining rather than as a democratic 'principal-agent relationships' committed to protecting the rights and empowerment of citizens in multilevel governance of PGs. Also most WTO lawyers focus on serving the legal, political and economic self-interests of governments and of economic interest groups without regard to human rights and general consumer welfare, which are nowhere mentioned in WTO law. As most democratic parliaments ratifying multilateral UN and WTO treaty systems did not grant discretionary foreign policy powers to arbitrarily violate treaty obligations to the detriment of domestic citizens, it is important to promote stronger constitutional, parliamentary, participatory and deliberative democracy in UN/WTO governance of transnational PGs.

International trade law historically developed as private commercial law based on mutual recognition of freedom of contract, private property, judicial remedies and arbitration (e.g. as protected under the Roman *lex mercatoria* and *jus gentium* as applied during centuries throughout large parts of Europe). Even though bilateral trade agreements were concluded since ancient times, a global trading system based on multilateral trade law emerged only after World War II in the context of decolonization and accession of most countries to the General Agreement on Tariffs and Trade (GATT 1947) and the 1994 Agreement establishing the WTO. In GATT/WTO legal practices, the diplomats representing the 164 WTO members emphasize the need for 'member-driven governance'; they dominate legislative, administrative and also judicial decision-making in GATT/WTO institutions. Their 'diplomatic exclusion' of citizens and non-governmental economic actors from WTO law and governance prevents citizens from recognizing themselves as 'democratic principals' and legal subjects of democratic self-legislation. WTO law subjects the mutually beneficial, global division of labor among citizens to intergovernmental power politics enabling politicians to pursue their self-interests (e.g. by using trade policy for taxing and redistributing domestic income without effective remedies of citizens).⁸ Human rights are nowhere mentioned in WTO law; they are hardly ever mentioned in WTO institutions. As 'states' continue to be defined in UN/WTO practices by power-oriented criteria (e.g. effective control of a government over the population in a limited territory), UN/WTO membership is granted regardless of the constitutional and democratic legitimacy of the governments concerned, for instance if corrupt rulers exploit their citizens by abusing the 'resource privilege', 'borrowing privilege' and 'immunity privilege' of governments and appropriate large sums of money for the private benefit of rulers (e.g. through selling natural resources, borrowing money in the name of the state, and avoiding accountability due to legal and diplomatic immunities). Citizens and democratic institutions lack 'access to justice', for instance because most WTO member governments do not allow their citizens to invoke and enforce WTO rules in domestic jurisdictions so as to hold governments legally and democratically accountable. Members of WTO dispute settlement panels are appointed *ad hoc* for one specific WTO dispute; reappointment of WTO panellists remains rare if their judicial reasoning did not respect the legal preferences of the government concerned. For example, the US government refused

- to re-appoint American AB members (e.g. J. Hillman) on the ground that their support for AB findings against the USA revealed inadequate 'patriotism';
- to re-appoint non-American AB members based on unilateral claims of an alleged 'violation of obligation' (e.g. by Korean AB member Seung Wha Chang who, according to the USA, had made *obiter dicta* beyond the judicial reasoning necessary for deciding the WTO dispute), even though these US claims were rejected by all other members of the WTO Dispute Settlement Body (DSB)

⁷ On the universal recognition of individual rights in human rights law and other parts of modern international law see: A.Peters, *Beyond Human Rights: The Legal Status of the Individual in Public International Law* (OUP 2016).

⁸ On these 'constitutional problems' of trade policies see: E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg University Press/Oxford 1991), at 96 ff.

on legal grounds (e.g. lack of WTO prohibitions of *obiter dicta*, judicial discretion regarding the duty of justifying dispute settlement findings, collective and anonymous decision-making by the AB also if questions are read out by an individual AB member);

- to fill other vacancies in the AB on the ground that application of Rule 15 of the AB Working Procedures⁹ - notwithstanding its elaboration by the AB pursuant to Article 17:9 DSU ‘in consultation with the Chairman of the DSB and the Director-General’, its application by the AB without complaints by WTO members for 20 years, and Article 17:2 DSU requiring the DSB to fill ‘vacancies as they arise’ – should be limited by political DSB decisions authorizing an AB member to continue serving on an appeal after the expiry of his term.

In the view of other WTO members, such obstruction of due process of law violates Articles 3, 17 and 23:1 DSU (e.g. to comply with the DSU procedures and customary rules of treaty interpretation, to respect the legitimate powers of the AB to ask questions to the disputing parties, to justify the rationale of AB legal findings, and to complete a pending AB proceeding as provided for in Rule 15 of the AB Working Procedures). Additional US claims – e.g. that the AB jurisprudence disregarding alleged US intentions during the drafting of the WTO Agreement (e.g. of Articles 2 and 17 of the Antidumping Agreement) amounts to ‘judicial activism’ imposing ‘new obligations’ on the USA – neglect the customary rules of treaty interpretation, as discussed below. Moreover, WTO panel and AB findings become legally binding through adoption by the DSB rather than through judicial fiat. The US disregard of WTO dispute settlement procedures parallels similar US disregard for other multilateral treaties and dispute settlement procedures (e.g. with NAFTA countries); it risks undermining the liberal international order without any democratic discussion and coherent legal justification.

‘Constitutional justice’ as democratic paradigm for international economic adjudication in the 21st century

Sovereign equality of states will remain a foundational principle for international law. Yet, ‘inalienable human rights’ and democratic legitimacy of law and of courts of justice derive from consent by *citizens* - rather than by states - within the constraints of ‘constitutional justice’ as defined by constitutional law, human rights and courts of justice.¹⁰ Impartial third-party adjudication is a much older paradigm of ‘constitutional justice’ (e.g. as applied in ancient Greek and Roman city republics) than democratic ‘constitutional contracts’. As governments have limited mandates to protect PGs for the benefit of citizens, democratic people conceive multilevel governance of PGs as ‘principal-agent relationships’ deriving their legitimacy from ‘social contracts’ among citizens. UN/WTO governance treating citizens as mere legal objects undermines citizen-driven governance, protection of PGs and human rights conceptions of ‘cosmopolitan IEL’.¹¹ Such ‘undemocratic disconnect’ also contrasts with the fact that - during most of the recorded human history - national and international legal systems and IEL were not separated in most domestic jurisdictions.¹² It was essentially due to Hobbes’ antagonistic conception of

⁹ Rule 15 on ‘Transition’ provides: ‘A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to be a Member of the Appellate Body.’ This rule authorizes the AB – not the DSB (whose decision-making by consensus could be abused for blocking and politicizing a pending AB proceeding) – to permit ‘completing a pending AB proceeding’.

¹⁰ Cf. E.U.Petersmann, Constitutional Theories of International Economic Adjudication and Investor-State Arbitration, in: Dupuy/Francioni/Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009), 137-194.

¹¹ Cf. E.U.Petersmann, *International Economic Law in the 21st Century* (Hart 2012).

¹² For instance, facilitated by the codification of the Roman *corpus juris civilis* (529-534) under emperor Justinian, Roman civil law, commercial law and international private law (*jus gentium*) served as common law (*jus commune Europaeum*) promoting and protecting transnational commerce and investments in most European jurisdictions (e.g. inside the West and East Roman Empires and the ‘Holy Roman Empire of a German Nation’). Spanish international lawyers like Vitoria (1492-1546) and Suarez (1548-1617) described the international society as one human community to be governed by natural law.

human societies as a 'war of everybody against everybody else' and to Vattel's treatise on *The Law of Nations* (1758) that the power-oriented paradigm of 'international law of sovereign states' became dominant for justifying intergovernmental power politics (e.g. colonialism and wars) by 'reasons of state'.¹³ Already during the 18th century, philosophers like I. Kant criticized 'Grotius, Pufendorf, Vattel and the rest' as 'sorry comforters . . . still dutifully quoted in *justification* of military aggression', whose 'philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force since states as such are not subject to a common external constraint'.¹⁴ This criticism of 'disconnected governance' is even more justified in today's 'globalized world' where most PGs can no longer be protected without rules-based, multilevel governance and human rights empowering citizens as 'principals' of multilevel governance agents with limited, delegated powers. Inside democracies and European law, it is no longer disputed that legitimacy of law and of multilevel governance derives from 'constitutional contracts' among citizens as protected by democratic lawmakers and impartial courts of justice. As law exists only in the minds of human beings: Can multilevel governance of PGs be made more 'inclusive' so that 'exclusive diplomatic interpretations' of WTO law can be replaced by democratic conceptions recognizing citizens as primary economic actors and subjects of law?

Individual 'access to justice' requires interpreting UN/WTO law as a 'common law of humanity'

Consent by governments is an insufficient justification of international adjudication affecting producers, investors, workers, traders, consumers, taxpayers and other citizens. Institutional, legal, personal and 'sociological legitimacy' (e.g. in the sense of voluntary rule-compliance by citizens) of multilevel governance and courts of justice require additional source-, process- and result-oriented justifications like democratic consent, inclusive participation, due process of law, protection of human rights and of other 'principles of justice' and PGs.¹⁵ In conformity with the constitutional and human rights guarantees of 'access to justice'¹⁶, international commercial, trade, investment, other economic and non-economic agreements (e.g. on international criminal and human rights law) increasingly protect judicial remedies of adversely affected individuals and non-governmental actors in national and international jurisdictions.

The UN Charter was adopted by UN member states on behalf of 'We the Peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained' (Preamble UN Charter). In the UN Charter (e.g. Articles 1, 55, 56) and the Universal Declaration of Human Rights, all UN member states recognized 'the inherent dignity and . . . equal and inalienable rights of all members of the human family (a)s the foundation of freedom, justice and peace in the world' (Preamble UDHR 1948), including the entitlement of everyone 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28); 'everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society' (Article 29 UDHR). Every UN member state has accepted one or more human rights convention(s). Most UN

Constitutional rights of citizens were invoked not only in England for limiting monarchical powers (e.g. in the *Magna Charta* of 1215, the *Bill of Rights* of 1689), but also in the *American Declaration of independence* (1776) and in later human rights revolutions.

¹³ Cf. P.Allott, *Eunomia: New Order for a New World* (OUP 1990), at 242 ff.

¹⁴ I.Kant, *Perpetual Peace* (1795), in: I.Kant, *Political Writings*, H.Reiss (ed) (CUP 1970), at 101.

¹⁵ Cf. Cohen/Follesdal/Grossman/Ulfstein, Introduction : Legitimacy and International Courts, *PluriCourts Research Paper 2017-03*; A. von Bogdandy/I.Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014).

¹⁶ Cf. F.Francioni (ed), *Access to Justice as a Human Right* (OUP 2007); A.Cançado Trindade, *The Access of Individuals to International Justice* (OUP 2011).

member states have accepted ‘inalienable human rights’ also as integral parts of their national Constitutions. Hence, the commitments of UN member states and UN institutions to promote and protect civil, political, economic, social and cultural rights require interpreting UN/WTO law ‘in conformity with the principles of justice’, including ‘human rights and fundamental freedoms for all’, as explicitly acknowledged in the customary rules of treaty interpretation (cf. the Preamble and Article 31 VCLT).¹⁷ Such interpretations balancing state-, people- and citizen-centered ‘principles of justice’ may be relevant, *inter alia*, for treaty objectives (like the WTO commitments to protecting ‘sustainable development’) and related ‘general exceptions’ (e.g. in GATT Article XX). In view of the universal UN definitions of the ‘sustainable development goals’ in conformity with the human rights of citizens, human rights may also be relevant context for interpreting WTO rights and obligations, for instance in the ‘balancing’ of governmental duties to protect human rights to health protection against the health risks of imported tobacco and asbestos products and of abuses of intellectual property rights.¹⁸ As democratic parliaments approved the WTO Agreement and its judicial mandates for the benefit of citizens, judicial protection of ‘security and predictability to the multilateral trading system’ - and judicial rule-clarification in compliance with, and required by WTO law (Article 3 DSU) - serve also democratic functions, as discussed in *section III*.¹⁹

An ‘objective meaning’ of UN/WTO law does not exist without inclusion of citizens as legal subjects and ‘constituent powers’ of UN/WTO governance of PGs.²⁰ As human rights, rule of law and democratic governance are ‘principles’ of UN law that are *not* grounded in state consent, there are increasing calls for ‘constitutionalizing’ and ‘civilizing’ IEL and multilevel governance of PGs.²¹ Human rights and ‘constitutional economics’ require embedding ‘the international community of States’ (Article 53 VCLT) into person-centered conceptions of a global community of peoples, citizens and human beings endowed with human rights, including also rights of access to justice, rule of law and democratic governance. Citizens must assume ‘republican responsibility’ for protecting transnational PGs (*res publica*) not only as ‘state citizens’ and ‘market citizens’, but also as cosmopolitan ‘citizens of the world’

- defining their primary identity by their shared humanity rather than by their nationalities; and
- protecting their rational interests against abuses of power also in multilevel governance of PGs (e.g. by invoking labor rights, investor rights, privacy or consumer protection rights as constitutional restraints on regulatory discretion).

In Europe, the EU Court of Justice (CJEU), the European Free Trade Area (EFTA) Court, the European Court of Human Rights (ECtHR) and national courts interpret and apply the common market law among the 31 member states of the European Economic Area as multilevel constitutional law protecting fundamental rights, transnational rule of law, democratic self-governance and a ‘highly competitive

¹⁷ Cf. Petersmann (note 4), 85 ff. Article 31 VCLT requires interpretation not only ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ (para.1), but also taking into account, *inter alia*, ‘any relevant rules of international law applicable in the relations between the parties’ (para. 3,c) and ‘the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of human rights and fundamental freedoms for all’ (cf. the Preamble of the VCLT illustrating the ‘systemic interpretation’ requirement of Article 31:3,c).

¹⁸ In this sense: M.Kanade, *The Multilateral Trading System and Human Rights* (Routledge 2017); Petersmann (note 11), chapter VIII.

¹⁹ On the democratic legitimacy and limits of ‘judicial law-making’ assigning case-specific meaning through ‘creative interpretation’ that must ‘fit’ the judicial justification, see: Bogdandy/Venzke (note 15), 102 ff, 195.

²⁰ On the diversity of national approaches to multilevel regulation of PGs see Petersmann (note 4) and A.Roberts, *Is International Law International?* (OUP 2017).

²¹ Cf. A.Bianchi, *International Law Theories. An Inquiry into the Different Ways of Thinking* (OUP 2016), at 44 ff; Petersmann (note 4); Symposium: Global Constitutionalism, in: *Indiana Journal of Global Legal Studies* 16 (2009), 385-680; Allott (note 13).

social market economy' (Article 3 TEU) for the benefit of EU citizens and national citizens.²² Most international organizations and their administrative tribunals recognize today 'global administrative law principles' (e.g. of rule of law, limited delegation and separation of powers, transparent governance, access to justice, protection of fundamental rights) limiting multilevel governance of transnational PGs.²³ Arguably, human rights require not only integrating the competing conceptions of IEL as (1) international private and commercial law; (2) public international law among states; and (3) multilevel economic, (4) constitutional and (5) administrative law regulations of PGs.²⁴ Also beyond IEL, citizens, democratic institutions and courts of justice must challenge inadequate 'constitutional restraints' and 'diplomatic two-level games' enabling governments to abuse discretionary foreign policy powers, for instance through religious and populist justifications of wars and power politics violating fundamental rights (like freedom of religion).

'Constitutional justice' as foundation of third-party adjudication in IEL

In 1912, US Secretary of State Elihu Root received the Nobel Peace Prize for his support of a permanent court of international arbitration and international adjudication. Following World War II, it was US Secretary of State Cordell Hull who was awarded – in 1945 - the Nobel Peace Prize for his leadership in establishing the United Nations and a multilateral trading system. Today's US politicians are likely to go into history for undermining multilateral trade law and adjudication. After having blocked third party adjudication under Chapter 20 of NAFTA by refusing to appoint judges, they have withdrawn from the Trans-Pacific Partnership in January 2017, threaten to withdraw also from NAFTA, and dismantle the multilateral WTO legal and dispute settlement system by blocking the appointment of AB judges,

Comparative studies reveal that the design, authority, case-load, autonomy, decision-making and constituencies of UN courts, worldwide and regional trade law, criminal law, administrative law, human rights courts and other dispute settlement bodies (like WTO panels, investment arbitration) differ enormously. These differences are due, *inter alia*, to diverse normative goals, contextual embeddedness (e.g. into diverse treaty regimes, audiences, institutional competition, cooperation with other courts), jurisdictions, composition, procedures and legal remedies (e.g. prospective and declaratory WTO remedies, retrospective reparation of injury by the ICJ, investment courts and regional economic courts).²⁵ As governments often resist multilevel adjudication, the design of multilevel judicial governance and the relationships between legislative, executive and judicial powers remain contested. Yet, there is a core of 'constitutional justice principles' (like independence and impartiality of judges, due process of law, respect for human rights) defining the 'minimum standards' for courts of justice and for the recognition of their judgments, as emphasized in human rights guarantees of 'access to justice' and the recognition of rights-based judicial review as an essential feature of democratic constitutionalism.²⁶

The WTO guarantees of international and domestic judicial remedies were designed to limit power politics by rule of law (e.g. defined as all public legal power being subject to the law as interpreted and enforced by international and domestic courts).²⁷ The DSU protects rights to compulsory adjudication

²² Cf. A.Rosas/L.Armati, *EU Constitutional Law: An Introduction* (Bloomsbury 2018).

²³ Cf. S.Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar 2016).

²⁴ For a discussion of these five competing conceptions of IEL see: Petersmann (note 11), chapter 1.

²⁵ Cf note 15 and R.Devlin/A.Dodek (eds), *Regulating Judges* (Elgar 2016).

²⁶ Cf. note 10 and J.Bell/M.L.Paris (eds), *Rights-based Constitutional Review* (Elgar 2016).

²⁷ On the recognition of individual judicial remedies in GATT/WTO law see: E.U.Petersmann, *The GATT/WTO Dispute Settlement System* (Kluwer 1997), 194 ff, 233 ff. At the request of trade diplomats, domestic courts inside many WTO members (like the USA and EU) prevent citizens adversely affected by violations of WTO law from legally challenging such violations of rule of law.

also in case of violations of *procedural* obligations to have recourse to, and abide by the DSU before making unilateral determinations of alleged WTO violations. Yet, even though unilateral US blockage of reappointment of AB members risks undermining the whole WTO dispute settlement system (e.g. because WTO panel reports won't be adopted before 'completion of the appeal', cf. Article 16:4 DSU), WTO members have not challenged procedural US violations of DSU obligations through judicial remedies. The frequent inadequacy of WTO legal remedies was also illustrated by the complaint of Antigua's WTO ambassador - at the DSB meeting in September 2017 - that the continued US violation of a WTO dispute settlement ruling adopted in 2005 in favor of this small island country amounted to an illegal denial of justice. US insistence on 're-balancing' bilateral trade deficits (e.g. through quantitative restrictions) risks unravelling the multilateral trading system, as it happened in the 1930s when the US 'Smoot-Hawley Tariff Act' (1930) triggered worldwide protectionism and political crises.²⁸

Most worldwide economic agreements providing for international courts do not include provisions on human rights and democratic governance. As *addressees* rather than *subjects* of human rights, state parties in UN and WTO dispute settlement proceedings tend to avoid invoking human rights. Yet, due to the government duties to respect, protect and fulfill human rights and the customary law requirement of interpreting treaties with due respect for the human rights obligations of the parties, human rights arguments are sometimes *implicitly* used by governments and courts, e.g. for justifying trade and investment restrictions as a means for protecting public health, access to food and medicines, labor rights, the environment, indigenous people or public morals. The more regional economic agreements and courts (notably in Europe and Latin America) and investor-state arbitration refer to human rights and fundamental freedoms, the more regional legal and judicial practices might influence also the legal and judicial reasoning in worldwide economic jurisdictions like the WTO.²⁹ Even if WTO panel and AB reports become legally binding upon adoption by the DSB composed of WTO members, their legal legitimacy vis-à-vis affected citizens derives more from 'constitutional justice' than from state consent. These 'constitutional foundations' do not prejudge to what extent 'human rights doctrines' (e.g. on judicial respect for a 'margin of appreciation' in the domestic implementation of human rights obligations) are relevant for interpreting and applying international economic agreements. As human and property rights aim at protecting *private actors* against abuses of *public power*, different legal and judicial contexts (e.g. powerful foreign investors colluding with weak governments in underdeveloped host countries) may justify different judicial reasoning. Diverse approaches to human rights (e.g. in domestic courts of over-indebted host countries of foreign investors) have induced 'strategic choices' of competing jurisdictions (e.g. 'forum shopping' and 'rules shopping'), for instance in favor of investor-state arbitration.

Multiple judicial functions: from *apologia* to '*eunomia*'?

International courts and WTO dispute settlement bodies have not only legal mandates to settle specific disputes based on the consent and legal claims of the parties to the dispute, the agreed applicable law and procedures, and the virtues of the judges. They also participate in clarifying indeterminate rules and principles and - by developing consistent case-law - promote 'judicial law-making' (as distinguished from political legislation). Just as national *legal constitutions* regulate PGs in incomplete ways and mandate legislation, administration and adjudication to progressively transform the *real constitution* into a more *ideal constitution*, so do international treaties regulate specific PGs (like WTO law) with due respect for sovereign rights to 'complete' incomplete PGs treaties by additional regulations (e.g.

²⁸ The recent decision by the Chinese Communist Party (CCP) to force all major firms to have a CCP representative on their board may just be a prelude for such future power politics. US President Trump's mixing of public and private self-interests (e.g. in favor of his family businesses) reveals 'oligarchic practices' as in non-democratic WTO members.

²⁹ For examples see: Petersmann (note 11); 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.

protecting non-economic PGs under Articles III, XIX-XXI GATT). Most treaties pursue this 'constitutional function' of regulating and coordinating PGs without specifying the 'general exceptions' and necessary 'balancing' of economic and non-economic rules in detail. Such 'regulatory gaps' and 'constructive ambiguities' of PGs treaties inevitably trigger disputes, often at the request from special interest groups (including also politicians distributing 'protection rents' in exchange for political support) benefitting from treaty departures and distortions at the expense of general consumer welfare. From this citizen perspective, WTO dispute settlement proceedings have 'constitutional functions' for controlling abuses of trade policy powers – or for legitimizing their exercise - by protecting economic and non-economic 'public interests' in conformity with rule of law and third-party adjudication as defined in the WTO Agreement and approved by parliaments. Domestic lawmakers delegated clarification and *ex post* control of the 'balancing rules and procedures' to both legislative and judicial WTO bodies. Judicial independence, impartiality and 'principled reasoning' tend to protect more inclusive decision-making than intergovernmental interest group politics, for instance in examining the legal 'necessity' of safeguard measures and the availability of less trade restrictive measures. From the perspective of democratic institutions approving the WTO Agreement, WTO dispute settlement bodies have a 'democratic mandate' for protecting rule of law - even if other WTO members lack democratic institutions negotiating, approving and ratifying WTO agreements.

Hence, WTO dispute settlement bodies are *not* merely instruments in the hands of diplomats, government executives and disputing parties, or mere organs of the WTO as an international organization. They are also mandated to protect the WTO 'dispute settlement system' (Article 3 DSU) and 'multilateral trading system' (Preamble WTO) for the benefit of all affected citizens and peoples in all WTO member states. This 'democratic' and 'constitutional mandate' to protect rules-based trade policies and third-party adjudication in conformity with the WTO Agreement as approved by parliaments and member states renders power-politics undermining the DSU illicit, including US claims that:

- AB judges should respect 'historical intentions' of US negotiators (e.g. when they negotiated Articles 2 and 17:6 WTO Agreement on Article VI GATT) rather than apply the prescribed customary rules of treaty interpretation in their clarification of indeterminate rules in the WTO Agreement on Anti-dumping;³⁰
- refrain from '*obiter dicta*' in their judicial duties of justifying their judicial reasoning even though WTO law (unlike common law jurisprudence) does *not* recognize judicial duties to strictly follow previous court decisions (*stare decisis*) and avoid *obiter dicta* in setting out 'the basic rationale behind any findings' (Article 12:7 DSU);
- and the DSB should no longer respect Rule 15 of the AB Working Procedures applied by all WTO members for 20 years and specifically decide whether AB judges may continue working on pending AB disputes after their term has expired (which could further politicize and undermine WTO dispute settlement).

Such apologetic claims for disregarding WTO rules also cannot justify unilateral blockage by US diplomats of the timely reappointment of vacant AB positions, or political interferences by US trade diplomats threatening the independence of AB judges and of their legal support staff in the WTO.

³⁰ The AB jurisprudence has so far never found that Article 2:4 of the WTO Agreement on Article VI GATT - if interpreted 'in accordance with customary rules of interpretation of public international law' (Article 17:6, i ADA) - allows for 'more than one permissible interpretation' (in the sense of Article 17:6, ii ADA) of the rules on fair price comparisons in the determination of dumping, notwithstanding longstanding US claims to the contrary; cf. P. van den Bossche/W.Zdouc, *The Law and Policy of the WTO* (fourth edition CUP 2017), at 762 ff. The US insistence during the Uruguay Round negotiations on Article 17:6, ii ADA aimed at incorporating into WTO law the 'Chevron doctrine' of US administrative law (prescribing judicial deference vis-à-vis US regulatory agencies under the control of the US Congress). Yet, as US negotiators neglected the customary rules of treaty interpretations prescribed in Article 3 DSU, their criticism of the AB jurisprudence for applying the customary rules of treaty interpretation (rather than exercising judicial deference towards alleged intentions of US negotiators) lacks legal justification.

WTO jurisprudence as ‘exemplar of public reason’?

According to the legal philosopher Rawls, independent and impartial judges should use their constitutional mandate for ‘administering justice’ by interpreting and clarifying the applicable law and adjudication as ‘exemplars of public reason’.³¹ ‘Public reason’ is essential not only *inside*, but also *beyond states* for promoting an ‘overlapping consensus’, ‘socialization’ and shared commitments among free, equal and reasonable citizens cooperating in the worldwide division of labor, and also among government representatives with often diverse self-interests and political conceptions of justice. In the WTO legal and dispute settlement system, ‘public reason’ has dynamically evolved in response to WTO jurisprudence, as illustrated by the today generally accepted AB justifications of why, *inter alia*,

- WTO law cannot be interpreted ‘in clinical isolation’ from general international law;
- consistent AB interpretations of ‘fair price comparisons’ in dumping calculations must be taken into account by WTO panels in their interpretation of the WTO Agreement on Article VI GATT;
- WTO judges may accept *amicus curiae* briefs and, with the consent of the parties, open oral proceedings to the public; or
- why judicial reconciliation of WTO market access commitments with non-economic ‘general exceptions’ in WTO law requires proportionate ‘legal balancing’.³²

WTO panel, AB and arbitration procedures serve multiple functions, for example for (1) dispute settlement through third-party adjudication; (2) impartial and independent rule-clarifications enhancing legal security; (3) judicial rule-making (e.g. by elaborating panel, AB and arbitration working procedures as mandated by the DSU); (4) control and legitimization of ‘public reason’ in multilevel trade governance through WTO jurisprudence and its critical discussion in the DSB; (5) protection of transnational rule of law and, thereby, (6) also of democratic legitimacy of trade policies as prescribed by democratic institutions in WTO member states when they approved the WTO legal and dispute settlement system for the benefit of their citizens and peoples. The ‘principles of justice’ behind such multiple judicial functions also justify the specific DSU provisions that panel and AB reports ‘shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the ... report’ (cf. Articles 16:4, 17:14).³³

The General Council of the WTO shall resort to majority voting ‘where a decision cannot be arrived at by consensus’ (Article IX:1 WTO Agreement). Yet, this voting rule is limited by the specific exception (in footnote 3 to Article IX:1) that ‘(d)ecisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2’ of the DSU. There are conflicting views on whether this limitation excludes the legal claim (e.g. by Kuiper) that - based on Article IX:1 WTO Agreement – also the DSB may resort to majority-voting if the WTO practice of searching for consensus is obstructed by illicit power politics.³⁴ Most WTO members seem to argue that - when the WTO General Council ‘discharge(s) the responsibilities of the Dispute Settlement Body’ (Article IV:3 WTO Agreement) and fulfills its legal duties to ‘appoint persons to serve on the Appellate Body’ (Article 17:2 DSU) - decisions must be based on consensus as defined in Article

³¹ Cf. J.Rawls, *Political Liberalism* (Harvard UP 1993), at 231 ff.

³² Cf. van den Bossche/Zdouc (note 30), e.g. at 60 ff, 560 ff, 710 ff.

³³ Such ‘negative consensus’ has so far never emerged in WTO dispute settlement practices.

³⁴ Guest Post from P.J.Kuiper on ‘The US Attack on the Appellate Body’, in: *International Economic Law and Policy Blog* of 16 November 2017 (feedblitz@mail.feedblitz.com). Kuiper seems to argue that Article XVI:3 WTO Agreement justifies interpreting Article 2:4 DSU (decision by consensus) in conformity with Article IX:1 WTO Agreement (majority voting remains possible). Yet, Article XVI:3 WTO applies only ‘(i)n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements’. Does the specific rule in the footnote to Article IX:1 WTO exclude such a ‘conflict’ unless there are specific DSU rules (like Arts 16:4, 17:14 DSU) providing for adoption of DSB decisions in the absence of a ‘negative consensus’ not to adopt a panel or AB report? Or does illicit blocking of the appointment of AB judges ‘conflict’ also with the WTO Agreement and justify Kuiper’s interpretation?

2:4 DSU. Yet, the ambiguous wording of Article IV:3 ('The General Council shall convene as appropriate to discharge the responsibilities' of the DSB) was also construed in WTO practice for convening General Council meetings, when some WTO members wanted to censure the Appellate Body for making rules related to the handling of *amicus curiae* briefs.³⁵ In order to protect the WTO legal and dispute settlement system against power politics, the WTO's General Council could

- adopt an 'authoritative interpretation', if needed by majority voting, clarifying that the long-standing AB practices based on Article 15 of the Working Procedures for the AB are consistent with Article 17 DSU and cannot justify arbitrary blockage of the appointment of WTO AB judges;
- adopt an 'authoritative clarification' that the long-standing AB practice of interpreting Articles 2 and 17:6 of the WTO Agreement on anti-dumping has become an integral part of WTO law and jurisprudence and does not justify arbitrary blockage of the appointment of WTO AB judges;
- following Kuiper's proposal, place the appointment of AB judges on its own agenda in order to prevent arbitrary US blocking of compliance with the DSB's legal obligation (under Article 17 DSU) to appoint seven persons to serve on the AB; and
- clarify that WTO members are entitled to resort to arbitration (pursuant to Article 25 DSU) as a substitute for settling appellate review proceedings.

'Civilizing functions' of 'multilevel judiciaries'

Koskeniemi's claim – 'that law is incapable of providing convincing justifications to the solution of normative problems'³⁶ – prioritizes 'legal deconstruction' over the 'constructive task' of legal systems and 'republican responsibilities' of citizens and governments to protect human rights and related PGs demanded by citizens. Judicial clarification of agreed rules promoting 'public reason' and 'constitutional mind-sets' contributes to 'civilizing', 'socializing' and 'embedding' legal systems by strengthening democratic support (e.g. through promotion of human rights, inclusive legal reasoning, third-party adjudication, judicial clarification of indeterminate legal terms promoting the overall coherence, justice, efficiency and social acceptance of legal systems). The separation of legislative, executive and judicial powers in WTO law rests on 'constitutional principles of justice' aimed at protecting citizens against welfare-reducing abuses of trade policy powers.

US claims that WTO dispute settlement jurisprudence imposes 'new obligations' that were not consented by US negotiators, are inconsistent with the multilaterally agreed mandate of WTO dispute settlement bodies 'to clarify the existing provisions of (WTO) agreements in accordance with the customary rules of interpretation of public international law' so as to provide 'security and predictability to the multilateral trading system' (Article 3:2 DSU). The 'provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement' (Article 3:9 DSU). The lack of authoritative interpretations sought by the USA reveals the lack of legitimacy of US claims that WTO dispute settlement rulings adopted by the WTO membership – in spite of becoming legally binding parts of WTO jurisprudence – justify US blockage of 'due process of law' in the 'administration of justice' pursuant to the DSU. Since the 1950s, the multilevel rules and judicial institutions of trade governance – including the compulsory jurisdiction and jurisprudence of GATT/WTO dispute settlement bodies – have prevented a repetition of the 'governance failures' of the 1930s. US Trade Representative Lighthizer's references to power-oriented trade negotiations under the *ancien régime* of GATT 1947 as a model for 'bilateral deals' among WTO members overlook that WTO law has outlawed discriminatory power politics in international trade (such as 'voluntary export restraints' aimed at limiting bilateral trade deficits). At least in most of the 47 member states of the Council of Europe,

³⁵ Cf. Kuiper (note 34), referring to the Special Session of the General Council of 22 November 2000 (see WTO doc. WT/GC/M/60).

³⁶ Cf. note 5.

national and European courts have recognized long since that judicial ‘administration of justice’ in the 21st century requires giving priority to the legitimate interests of citizens and peoples in maintaining transnational rule of law over illegal interest group politics advocated by politicians benefitting from ‘populist protectionism’ and violations of cosmopolitan rights.

Multilevel judicial cooperation as a shared task for protecting justice in multilevel economic governance

Sections I to III argued that the customary rules of treaty interpretation and the universal recognition of human rights, rule of law and democracy as – albeit indeterminate – principles of UN law justify conceiving GATT/WTO law and institutions as multilevel governance of PGs for the benefit of citizens and peoples – rather than only as frameworks for reciprocal ‘diplomatic bargaining’ and intergovernmental dispute settlement.³⁷ Citizens, democratic institutions and courts of justice must assume their republican responsibilities for protecting PGs and constitutionally agreed ‘principles of justice’ vis-à-vis intergovernmental power politics. As social *production* must precede *distribution* of scarce goods and services, the mutually welfare-enhancing WTO trading, legal and dispute settlement system is of no lesser importance for reducing poverty, enhancing human capacities and empowering self-development of peoples than UN law. Since the establishment of the WTO in 1995, the dispute settlement and judicial functions of the WTO dispute settlement bodies have evolved more dynamically and more successfully than the WTO’s legislative and administrative functions, as illustrated by the more than 540 WTO dispute settlement proceedings leading to the adoption of more than 350 WTO panel, AB and arbitration reports clarifying, developing and enforcing the often indeterminate WTO rules, principles and procedures – compared with the comparatively few WTO agreements negotiated since 1995. Sections II and III rejected power-oriented claims by diplomats that international courts – including WTO panels and the AB – should be viewed as mere instruments of dispute settlement justified by the consent and submission of disputes by states as represented by diplomats. As the customary rules of treaty interpretation require construing WTO rules and dispute settlement procedures ‘in conformity with the principles of justice’ like ‘human rights and fundamental freedoms for all’, a ‘constitutional understanding’ of the WTO legal and dispute settlement systems focuses on their ‘democratic functions’ to protect non-discriminatory conditions of competition, general consumer welfare, and rights of citizens in WTO members through rules-based trade and judicial protection of transnational rule of law, as prescribed by democratic institutions when they approved the WTO Agreement for the benefit of their citizens. The today universal recognition of individual rights of access to justice in national, regional and worldwide legal systems (like human rights law and multilevel trade regulation) confirms this need for conceiving multilevel ‘judicial governance’ as an ‘international judiciary’³⁸ deriving its ultimate legitimacy from protecting equal rights of citizens and transnational rule of law.

³⁷ On the contractual and constitutional dimensions of GATT/WTO rules see Petersmann (note 8) and C.Carmody, Interdependence and the WTO Agreement as a ‘Contractual Constitution’, in: J.Chaisse/T.Lin (eds), *International Economic Law and Governance* (OUP 2016), 462-474. My citizen-oriented ‘constitutional interpretation’ of certain WTO rules does not neglect the fact that GATT/WTO market access commitments often result from bilateral negotiations reflecting ‘reciprocal balances of concessions’ that justify also ‘contractual legal interpretations’, judicial protection of ‘non-violation complaints’, or judicial enforcement – e.g. in the 2004 WTO Panel Report on *Mexico-Telecoms* (WT/DS204/R) – of deliberately indeterminate obligations to prevent ‘anti-competitive measures’ distorting market access commitments.

³⁸ Cf. G.Ulfstein, The International Judiciary, in: J.Klabbers/A.Peters/G.Ulfstein, *The Constitutionalization of International Law* (OUP 2009), 126 ff; Y.Shany, No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary, in: *EJIL* 20 (2009), 73.

'Judicial dilemmas' in clarifying WTO rules

According to Article 3:2 DSU, the WTO dispute settlement system serves not only 'to preserve the rights and obligations of Members under the covered agreements', but also 'to clarify the existing provisions of those agreements', subject to the ambiguous proviso inserted at the request of US negotiators that '(r)ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'. According to the AB, this mandate excludes that correct interpretations in accordance with the customary rules of treaty interpretation 'could add to the rights and obligations of a Member of the WTO'.³⁹ In *US-Shrimp* (1998) and many other WTO disputes (like *Mexico-Telecoms*), the DSB also accepted 'evolutionary interpretations' of WTO rules at the request of the USA (e.g. of the term 'exhaustible natural resources' in Article XX:g GATT, a GATS prohibition of 'anti-competitive measures') even though these interpretations seemed to increase or diminish other WTO obligations (e.g. of examining the disputed measure pursuant to the stricter 'necessity requirement' in Article XX:b GATT).⁴⁰ Also the incomplete GATT/WTO dispute settlement *procedures* have, since 1948, dynamically evolved, for instance through

- panel practices (e.g. granting enhanced third party rights; clarifying legal presumptions of 'nullification or impairment' and the timeframes for panel proceedings);
- AB practices (e.g. clarifying the powers of the AB to 'complete' the panel's legal analyses, the conditions for exercising 'judicial economy', the timeframes for AB proceedings); and through
- agreements among the parties codifying successful dispute settlement practices (e.g. the 1979 GATT Understanding and 1989 GATT Decision on improvements of dispute settlement practices; *ad hoc* 'sequencing agreements' clarifying Articles 21 and 22 DSU; WTO Ministerial Decisions on 'TRIPS non-violation and situation complaints'; *ad hoc* agreements among the parties to a dispute to open panel and AB proceedings to the public).⁴¹

The DSU follows the example of most other international court procedures by delegating limited, legislative powers to WTO panels and the AB for elaborating their own working procedures. Such judicial adoption of working procedures for panel and AB proceedings, like other 'judicial gap-filling' of incomplete DSU rules (e.g. on preliminary rulings by WTO panels, *amicus curiae* submissions), have improved GATT/WTO dispute settlement without recourse to formal DSU amendments. The diplomatic WTO negotiations on DSU reforms since 1997, by contrast, continue to elude a consensus-based conclusion. *Section III* proposed that – in response to unjustified US complaints of 'judicial activism' – the WTO General Council should confirm by 'authoritative interpretations' that Working Rule 15 adopted by the AB in 1996 remains a consistent interpretation of Article 17 DSU and cannot justify US blockage of the appointment of AB judges. 'Authoritative interpretations' confirming successful WTO practices as WTO law can overcome the political 'governance failures' to formally adjust the DSU through consensus-based DSU amendments.

The US blocking of the reappointment of AB judges illustrates the political constraints impeding WTO judges to 'balance' state-, person- and peoples-centered principles of international law as required by the customary rules of treaty interpretation. The fact that governments only rarely invoke in WTO dispute settlement practices their '*duty to protect*' human rights (such as the rights of indigenous peoples invoked by the EU - in *EU-Seals* - as justification of import restrictions on seal products) does not prevent WTO judges from protecting human rights and related 'constitutional principles' (e.g. of 'balancing' competing principles), for instance by construing 'sustainable development' goals and 'general exceptions' of WTO law in conformity with human rights as agreed in the 2015 UN General

³⁹ Cf. Van den Bossche/Zdouc (note 30), at 191.

⁴⁰ Cf. van den Bossche/Zdouc (note 30), at 192.

⁴¹ Cf. F.Roessler, Dispute Settlement in the WTO. From a Deliberately Designed to a Spontaneously Grown Order, in : M.Elsig/B.Hoekman/J.Pauwelyn (eds), *Assessing the WTO. Fit for Purpose?* (CUP 2017), 99 ff.

Assembly Resolutions on the *2030 Agenda for Sustainable Development*.⁴² Yet, the avoidance by WTO diplomats of discussing human rights and ‘principles of justice’ in WTO institutions – like diplomatic claims that WTO judges should perceive themselves only as dispute settlers, who should comply with diplomatically defined ‘member-driven governance’ lest being sanctioned by diplomats, as it happened to the Korean AB judge in 2016 (when the USA blocked his reappointment on the ground of alleged *obiter dicta* and ‘judicial activism’) – hinder the judicial task of interpreting WTO law ‘in conformity with the principles of justice’. Similarly, the diplomatic exclusion of civil society representatives from the WTO Ministerial Conference in December 2017 at Buenos Aires was widely criticized as undermining inclusive, democratic legitimacy of WTO governance.⁴³ As the mandate and legitimacy of WTO adjudication require compliance with the customary rules of treaty interpretation, WTO judges had good reasons to admit *amicus curiae* briefs challenging diplomatic preferences for defining the ‘public reason’ underlying indeterminate WTO rules and principles one-sidedly in terms of intergovernmental interest group politics. Yet, the ‘member-driven context’ of intergovernmental WTO dispute settlement procedures, the economic (rather than legal) background of most WTO judges, and ‘reasonable disagreements’ on how to interpret and prioritize human rights and ‘principles of justice’ inside WTO member states may also justify judicial deference.

Need for ‘judicial comity’ and ‘struggles for justice’

Section II argued that - just as constitutional and human rights emerged from democratic and anti-colonial struggles of citizens and from their judicial protection against abuses of government powers - ‘constitutional justice’ requires ‘cosmopolitan economic law’ and judicial remedies of citizens challenging the ubiquity of abuses of economic and regulatory powers through ‘struggles for justice’ and ‘constitutionalism’, as illustrated by multilevel ‘judicial comity’ between national and regional courts and arbitral tribunals in multilevel judicial protection of individual rights in international commercial, labor and investment law, European common market law, free trade agreements (FTAs) and human rights law. Social participation in the world trading system and in its ‘structural injustices’ (like disregard for labor rights in global supply chains, anti-competitive practices, trade in toxic products) creates political, legal and also judicial ‘responsibilities for justice’.⁴⁴ Even if ‘global democracy’ will remain a utopia for a long time, a ‘global community’ accepting transnational responsibilities has become a social and legal reality. The transformative potential of judicial reconciliation of state-, democratic- and citizen-centered ‘principles of justice’ will become legally and politically easier to accept if judges cooperate at national, regional and worldwide levels of governance in promoting ‘public reason’ and overall coherence of multilevel trade regulation by protecting rights of citizens and of non-governmental economic actors to invoke and enforce trade rules in multilevel jurisdictions. Just as justifications of violence and wars by religious, feudalist or populist ‘reasons of state’ require stronger constitutional restraints (like freedom of religion, separation of political and church powers), the existential importance of the world trading system for poverty reduction requires citizens and courts of justice to exercise stronger democratic and judicial control over abuses of trade policy powers so as to protect equal rights and social welfare of citizens. This is especially true regarding the ‘systemic integration requirement’ of the customary rules of treaty interpretation, which is frequently neglected in multilevel jurisprudence of trade, investment and other economic courts on multilevel conflicts between WTO rules, FTAs, judicial comity between multilevel economic jurisdictions (notably in parallel WTO, FTA and national dispute settlement proceedings, as in the *EC-Bananas* and other WTO disputes), and their interactions with non-economic treaties and jurisdictions (e.g. interpreting UN law and other non-trade law without regard to WTO rules). WTO jurisprudence has recognized that the reference to ‘international law’ in Article 31:3(c) VCLT refers to all sources of international law listed

⁴² UN doc A/RES/70/1 of 21 October 2015.

⁴³ Cf. C.Raghavan, *Contemplating the Unthinkable : A WTO without the US*, in : *Third World Network* 6 December 2017.

⁴⁴ Cf. I.Young, *Responsibility for Justice* (OUP 2011); Petersmann (note 11), chapter VI.

in Article 38 ICJ Statute. Recognition also by *domestic courts* of 'consistent interpretation obligations' could render WTO law and governance much more powerful and legitimate.

Section I and III explained why the US complaints over alleged 'judicial activism' in the WTO reflect US preferences for nationalist politics ('America first') that disregard the 'constitutional mandate' of WTO judges to do justice to the 'WTO community' as a whole, including all affected citizens. Nationalist power politics increases the 'judicial trilemma' that (1) judicial independence, (2) judicial accountability, and (3) judicial transparency are difficult to maximize simultaneously without tradeoffs⁴⁵, especially if UN/WTO diplomats invoke the legal personification of states for excluding citizens from multilevel regulation of PGs. Judges need support from civil society and democratic institutions in order to interpret trade rules for the benefit of citizens and their rights (e.g. as indirectly protected by WTO rules on domestic judicial remedies, trade in 'conflict diamonds', trade preferences for developing countries conditional on compliance with human rights). The cooperation of the WTO Secretariat with rights-based Agencies (like the WHO, ILO and WIPO) in elaborating joint reports on common regulatory challenges in multilevel governance of PGs has assisted WTO jurisprudence in clarifying WTO rules in conformity with UN legal obligations of WTO members (e.g. protecting health rights and tobacco control measures in conformity with WHO conventions). Citizen-driven initiatives – e.g. for the 2001 Doha Declaration on the *TRIPS Agreement and Public Health* - assisted in amending the TRIPS Agreement and influencing related WTO practices interpreting TRIPS provisions in conformity with WHO and WIPO conventions. The task of 'civilizing' and 'constitutionalizing' the interest group politics of trade diplomats requires democratic and judicial 'struggles for justice' and 'legal disaggregation' of 'states' in interpreting WTO law 'in conformity with the principles of justice'. This can be realized only by recognizing multilevel trade regulation and adjudication as PGs that must protect citizens, their equal rights and general consumer welfare.

⁴⁵ Cf. J.L.Dunoff/M.A.Pollack, *The Judicial Trilemma*, *AJIL* 111 (2017), 225 ff.

