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Human rights, constitutional justice and international  
economic adjudication: Legal methodology problems

Ernst-Ulrich Petersmann



European University Institute  
**Department of Law**

**HUMAN RIGHTS, CONSTITUTIONAL JUSTICE AND INTERNATIONAL  
ECONOMIC ADJUDICATION: LEGAL METHODOLOGY PROBLEMS**

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## **Abstract**

International economic law (IEL) developed since ancient times based on private and public, national and transnational regulation of economic transactions and related economic policies. International human rights law (HRL) emerged only in the 20<sup>th</sup> century based on different (e.g. deontological rather than utilitarian) rationalities; it continues to be developed by different international *fora*, but depends on economic law for generating economic goods and services necessary for protecting human rights. Section I discusses the increasing ‘constitutionalization’ of HRL and IEL at national and regional levels of governance and its implications for the settlement of trade and investment disputes. Section 2 discusses ‘constitutional justice principles’ as legal basis for impartial third-party adjudication requiring ‘judicial administration of justice’ and treaty interpretations ‘in conformity with the principles of justice’ and human rights accepted by all UN member states. Section 3 elaborates in more detail problems of ‘systemic interpretation’ and ‘constitutional interpretation’ in IEL. Section 4 gives an overview of procedural human rights dimensions in IEL adjudication, like the human right of access to justice and the emerging common law of transnational adjudication. Section 5 discusses procedural and substantive human rights problems in WTO and investment adjudication. Section 6 criticizes trade and investment adjudication for neglecting HRL and constitutional, distributive, corrective and commutative justice principles.

## **Keywords**

constitutionalism; economic adjudication; human rights; investment law; trade law

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## Introduction: Human rights and international economic law\*

Law exists only in the minds of human beings and in their legal practices. Individuals and institutions at local, national, regional and worldwide levels of governance often perceive legal rules, principles, institutions and legal practices from different perspectives. Their diverse (e.g., inclusive or exclusive) ‘legal perspectivism’ risks impeding an ‘overlapping public reason’ enabling agreed, coherent conceptions of legal systems. Human rights law (HRL) emerged since the democratic revolutions of the seventeenth and eighteenth century as part of national constitutional law. Following World Wars I and II, HRL was further developed through multilateral treaty law and adjudication, general international law, and their – often only selective – implementation in domestic legal systems. As United Nations (UN) HRL continues to be developed by diplomats, conceptions of citizens and of local governance institutions of civil, political, economic, social and cultural human rights inside national jurisdictions often differ.<sup>1</sup> International economic law (IEL), in turn, emerged since ancient times as an instrument for enhancing the welfare of people, for example through market, monetary and trade regulations and agreements (e.g., among the city republics around the Mediterranean Sea); it was supplemented by transnational contract, commercial and conflicts law, for instance based on the Roman *jus gentium* and *lex mercatoria* as practised during centuries in large parts of Europe. Republican and democratic constitutionalism promoted constitutional law, HRL and economic law as coherent parts of national legal systems based on ideas of constitutional contracts and governments of the people, by the people and for the people.

*International* HRL and IEL were developed by different constituencies in separate *fora* without integrating their different (e.g., deontological v. utilitarian) rationalities.<sup>2</sup> Human rights lawyers in the UN often assert the legal primacy of ‘inalienable’ and ‘indivisible’ civil, political, economic, social and cultural human rights, notwithstanding the frequent neglect by UN diplomats and governments of many UN member States of their legal duties to respect, protect and promote human rights and poverty reduction in international and domestic legal practices. As HRL aims at protecting *legal status equality* and *economic sufficiency* (rather than economic equality) without guaranteeing the economic resources necessary for protecting human rights, IEL and adjudication are of constitutional importance for empowering people and protecting human rights and transnational rule of law. Economic lawyers and diplomatic representatives in international economic organisations prioritise their economic perspectives on grounds of economic efficiency, for instance as explained by the theory of ‘separation of policy instruments’ of Nobel Prize economist Jan Tinbergen. But the fragmentation among dozens of human rights treaties and thousands of economic treaties and institutions is progressively reduced through regional and preferential economic agreements protecting human rights and recognising the constitutional foundations of IEL, for instance in the Charter of Fundamental Rights of the European Union<sup>3</sup> (CFR) as integral part of the Lisbon Treaty or in the foreign policy mandate (e.g., in Articles 3

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<sup>1</sup> E.-U. Petersmann, ‘International Economic Law without Human and Constitutional Rights? Legal Methodology Questions for my Chinese Critics’, *Journal of International Economic Law*, 21 (2018), 213-31. As long as human rights are not effectively protected in so many UN member States, international HRL and adjudication remain important for holding governments accountable for failing their legal responsibilities to protect citizens.

<sup>2</sup> See generally T. Cottier, J. Pauwelyn and E. Bürgi (eds.), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005); F. A. Abbott, C. Breining-Kaufmann and T. Cottier (eds.), *International Trade and Human Rights: Foundations and Conceptual Issues* (Ann Arbor: University of Michigan Press, 2006).

<sup>3</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, pp. 391-407.

and 21 of the Treaty on European Union<sup>4</sup> (TEU)) to extend the constitutional ‘principles of justice’ of the European Union (EU) (like democracy, rule of law and human rights) to multilevel governance of public goods (PGs).<sup>5</sup> In view of the lack of worldwide human rights courts and the focus of regional human rights courts on civil and political rather than economic rights, trade and investment adjudication protecting transnational rule of law in mutually beneficial economic cooperation complement the work of human rights courts.

From such constitutional and citizen perspectives, both HRL and IEL derive their legitimacy from constitutional contracts among citizens (e.g., recognising their inalienable human rights and other constitutional rights) and democratic legislation rather than from UN human rights treaties and their ‘diplomatic interpretations’ by UN lawyers.<sup>6</sup> Fragmentation of international treaty law is an inevitable consequence of the sovereign equality and different policy preferences of states; specialised trade and investment courts focus, therefore, on their limited economic law mandates, especially if the latter do not refer to HRL. Yet, most disputes in international economic courts have – albeit only in indirect ways – *implicit* human rights dimensions, for instance if judges have to reconcile World Trade Organisation (WTO) market access commitments or investment protection standards with sovereign rights of democratic self-determination regarding protection of non-economic PGs, or with constitutional rights of citizens adversely affected by toxic tobacco imports or by environmentally harmful foreign investments.

The ‘constitutional functions’ of many international treaties are reflected also in the customary law requirement of interpreting treaties ‘in conformity with the principles of justice’, including also ‘human rights and fundamental freedoms for all’ (Preamble of the Vienna Convention on the Law of Treaties (VCLT)),<sup>7</sup> which may justify judicial deference in judicial interpretations of exception clauses (like Article XX of the General Agreement on Tariffs and Trade (GATT))<sup>8</sup> reserving sovereign rights to protect non-economic PGs. Human rights may be invoked as procedural rights, as applicable law for deciding the dispute (e.g., pursuant to Article 42 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States<sup>9</sup> (ICSID Convention)) or as relevant context for systemic interpretation of the applicable rules and procedures (e.g., pursuant to Articles 3 and 7 of the WTO Dispute Settlement Understanding (DSU)).<sup>10</sup> Even if trade and investment adjudicators acknowledge the legal relevance of human rights for their judicial administration of justice, they tend to give primacy to specific trade and investment treaty provisions before exploring the legal relevance of HRL, especially if human rights have not been invoked by the complainant or defendant. This contribution discusses some legal methodology problems relating to interrelationships between international economic adjudication and HRL by using examples of trade adjudication under the DSU and of investor-state adjudication under the International Centre for Settlement of Investment Disputes (ICSID), bilateral investment treaties (BITs) or commercial arbitration procedures, as analysed in the chapters by Baetens and Hestermeyer in this book.

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<sup>4</sup> Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012, pp. 13-390, Articles 3, 21.

<sup>5</sup> On the need for constitutional justifications of IEL see generally E.-U. Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford and Portland, Oregon: Hart Publishing, 2012).

<sup>6</sup> For my criticism of UN human rights lawyers acting like ‘high priests’ without adequate understanding of IEL and ‘constitutional pluralism’ see E.-U. Petersmann, ‘Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston’, *European Journal of International Law*, 13 (2002), 845-51.

<sup>7</sup> VCLT, Vienna, 23 May 1969, in force 27 January 1980, UN Doc. A/Conf.39/27; 1155 UNTS 331, Preamble.

<sup>8</sup> GATT, Marrakesh, 15 April 1994, in force 1 January 1995, 1867 UNTS 187, Article XX.

<sup>9</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, D.C., 18 March 1965, in force 14 October 1966, 575 UNTS 159, Article 42.

<sup>10</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh, 15 April 1994, in force 1 January 1995, 1869 UNTS 401, Articles 3, 7.

Legal methodology is defined here as the best way for identifying law, notably the methods of legal interpretation, legal systems of *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 as legal facts and as normative, often indeterminate *legal principles*. Since World War II, international regulation and adjudication have fundamentally changed due to *inter alia* (1) the new reality of globalisation of communications, economies, law and PGs like the environment; (2) the legal recognition of inalienable human rights by all UN member States as positive law and democratic mandates for transforming societies and politics; and (3) the emergence of new multilevel governance structures for protecting *transnational PGs* transforming the horizontal international law among States into a more integrated global law of humanity. The etymological origins of the word methodology - i.e., the Greek word *meta-hodos*, referring to ‘following the road’ - suggest that these structural and legal changes require reviewing past legal methodologies in order to find better ways enabling citizens and peoples to increase their social welfare through rules-based cooperation for collective supply of PGs demanded by citizens.<sup>11</sup> For instance, the assumption underlying the VCLT that only States are the legitimate authorities for creating and interpreting international law, has become inconsistent with the universal recognition of human and democratic rights and of courts of justice as interpreters of international law. The jurisprudence of the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR) has succeeded in integrating economic law and HRL for the benefit of citizens and their constitutional rights more than in other regions of the world. The evolution of European constitutional law offers policy lessons for other regional and worldwide economic law and human rights systems – even if their legal contexts differ and activist courts asserting judicial system-building functions are criticised by many governments. This contribution begins with a discussion of (2) the role of judges as guardians of constitutional justice and of (3) problems of systemic and constitutional interpretations of IEL before elaborating (4) procedural as well as (5) substantive human rights dimensions in trade and investment adjudication. Section 6 concludes that – the more globalisation transforms *national* into *transnational PGs*, which no State can unilaterally protect without international law and multilevel governance – international law in the twenty-first century must be developed as a multilevel system of vertical allocation, limitation, regulation and justification of limited, delegated governance powers to the multilevel governance institutions and courts most capable of protecting and promoting human rights and other PGs. HRL requires interpreting legal systems not only as ‘principal-agent relationships’ between citizens as constituent powers and ‘democratic principals’ of governance agents with limited, delegated powers for protecting PGs; it also requires justification of the exercise of all governance powers vis-à-vis affected citizens and empowerment of citizens to hold governments legally, democratically and judicially accountable.<sup>12</sup>

### **Judges as guardians of constitutional justice?**

Law and adjudication are indispensable instruments of socialising, ordering and legitimising cooperation among free and reasonable citizens in economies, societies and related politics as well as in transnational cooperation, for instance by transforming individual self-interests into reasonable common interests protected by common law rules and related jurisprudence. Impartial and independent courts of justice are the oldest paradigm of constitutional justice in the sense of multilateral, legal commitments

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<sup>11</sup> E.-U. Petersmann, ‘Methodology Problems in International Trade, Investment and Health Law and Adjudication’, in C.-J. Cheng (ed.), *Collected Courses of the Xiamen Academy of International Law* (Leiden: Brill Nijhoff, 2017), vol. 11, pp. 228-326.

<sup>12</sup> On multilevel governance of PGs, the defining characteristics and different kinds of PGs (like human rights, rule of law, democratic peace, mutually beneficial monetary, trading, development, environmental, communication and legal systems promoting sustainable development), their ‘collective action problems’ and regulatory challenges see E.-U. Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (Oxford and Portland, Oregon: Hart Publishing, 2017), pp. 189-320.

(e.g., by complainants, defendants and judges) to settle disputes on the basis of agreed, procedural and substantive principles of justice, legal rules, inherent powers and duties for judicial administration of justice (e.g., protecting equal procedural rights of the parties to the dispute). Local and national constitutional assemblies elaborating written or unwritten Constitutions constituting, limiting, regulating and justifying legislative, executive and judicial powers - subject to fundamental freedoms and human rights retained by the people - emerged only later as democratic conceptions of constitutional justice. Examples include the emergence of ancient democratic and republican city republics around the Mediterranean, the democratic revolutions leading to the Magna Charta (1215), the Bill of Rights (1689) and common law jurisprudence in England, and the first written, democratic Constitutions and related Bills or Declarations of Fundamental Rights in the United States of America (USA) and France during the late eighteenth century. The *European convention* (consisting of members of the European Parliament, national parliaments of EU member States and candidate States like Turkey, and representatives of EU member governments) that elaborated the 2004 *Treaty establishing a Constitution for Europe*, and the today almost forty international courts of justice illustrate new kinds of transnational commitments to promoting constitutional justice constituting, limiting, regulating and justifying multilevel governance of PGs such as protection of human rights and of transnational rule of law. Both the judicial and the democratic varieties of constitutional justice build on agreed principles of justice, including respect for human rights. They are relevant for justifying also modern IEL and related adjudication, for instance by providing constitutional principles justifying and limiting the judicial powers of national and international courts (e.g., their mandates for judicial gap-filling and rule-clarifications).

### ***Constitutional justice depends on social contracts***

In his *Theory of Justice*, Rawls develops a theory of justice from the social contract ideas and natural rights theories found in the publications of Locke, Rousseau and Kant based on agreements among free persons committing themselves to reciprocal recognition of equal freedoms as 'first principle of justice' and of a 'difference principle' protecting disadvantaged persons in a well-ordered society.<sup>13</sup> Similar to social contracts among reasonable people submitting their disputes to third-party adjudication constrained by agreed principles of justice, Rawls construes the 'original position' for elaborating constitutional contracts among reasonable members of a well-ordered society as a joint pre-commitment to rights-based principles of justice; the latter distinguish constitutional justice from interest-based *Hobbesian bargains* among rational citizens maximising their respective self-interests. Recognition and protection of human rights make democratic and judicial procedures protecting constitutional justice and democratic constitutionalism normatively necessary for constituting, limiting, regulating and justifying coherent legal and political systems, for instance whenever private property rights transform the *use-value of common resources* into *exchange value of private possessions*.

The increasing number of constitutional democracies and the adoption of national Constitutions (written or unwritten) by almost all 193 UN member States confirm that reasonable *social* and *constitutional contracts* among free and equal citizens agreeing on a public conception of justice can be realised in the real world. Similarly, the history of establishing national and international courts of justice – e.g., in the ancient Greek and Italian city republics around the Mediterranean and in transnational associations like the Holy Roman Empire of a German Nation and its Imperial Court with jurisdiction over many States and free cities – confirms that institutionalised *administration of justice* can be politically and legally realised among reasonable people with a sense of justice promoting stable, social cooperation on grounds of mutual respect as free and equal persons accepting moral responsibilities.<sup>14</sup> Inside and among

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<sup>13</sup> For analyses of Kantian and Rawlsian theories of justice and of their relevance for justifying modern IEL see Petersmann, 'International Economic Law in the 21st Century', pp. 113-209.

<sup>14</sup> J. Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, rev. edn, 1999), pp. 221-27 (describing the 'original position' as a procedural interpretation of Kant's conception of autonomy and the categorical imperative).

constitutional democracies, constitutional contracts constituting, limiting, regulating and justifying democratic self-government – and constitutional justice as the agreed foundation of independent, impartial third-party adjudication - overlap; they require judges to conceive themselves as ‘exemplars of public reason’<sup>15</sup> who must publicly justify their judicial administration of justice in their settlement of disputes by reference to both (1) the agreement among the parties to submit the dispute to third-party adjudication and (2) to the broader legal system of which courts of justice are an integral part. The legal mandates, procedures, applicable law and social constraints of national and international courts differ considerably. In spite of the universal recognition of human rights – including the human right of access to justice<sup>16</sup> - by all UN member States, many States – notably non-democratic countries like China – fail to effectively protect human rights and independent judicial remedies inside their domestic jurisdictions.<sup>17</sup> Transnational trade and investment courts are imperfect substitutes for this frequent lack of effective judicial protection of economic and social rights (especially of foreigners) inside many national jurisdictions.

### ***The jurisdiction of international courts remains contested***

The limited jurisdiction, procedures and applicable law of international courts often remain contested. The WTO panel, appellate and arbitration procedures are the only worldwide, compulsory jurisdiction accepted by more than 160 States, including all five permanent members of the UN Security Council as well as the EU. Yet, apart from the rarely used possibilities of commercial arbitration inside the WTO pursuant to Article 4 of the WTO Agreement on Preshipment Inspection<sup>18</sup> and of *amici curiae* submissions to WTO panels and the WTO Appellate Body (AB), non-governmental actors do not have access to WTO dispute settlement bodies; diplomatic and consular protection, provisional measures, and reparation of injury are not mentioned in WTO dispute settlement procedures, notwithstanding the fact that many WTO disputes are initiated at the request of private economic actors. The blockage by the USA, since 2016, of the appointment of AB judges illustrates that the idea of impartial third-party adjudication based on constitutional justice, and related prohibitions of obstruction of justice, remain contested by hegemonic WTO members.<sup>19</sup> The more the judicial functions to control abuses of power and protect individual rights are universally recognised as defining features of constitutional democracies and of transnational rule of law systems, the stronger become civil society pressures to protect independence, impartiality, procedural fairness, rule of law, access to justice and protection of individual rights also in transnational trade, investment and economic adjudication. Yet, judicial efforts at exerting constitutional authority vis-à-vis abuses of power in transnational economic bargaining confront international courts with numerous obstacles. In both WTO jurisprudence and investor-State adjudication, judges remain reluctant to invoke human rights unless the parties to the dispute invoke such rights (e.g., as justification of trade and investment regulations aimed at protecting PGs, related rights of citizens and indigenous peoples). Even if WTO and investment adjudication are based on State consent, the democratic legitimacy of judges as protectors of the people continues to be challenged, for instance in view of inadequate accountability of judges, governments, trade and investment companies

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<sup>15</sup> J. Rawls, *Political Liberalism* (expanded edn, New York: Columbia University Press, 2005), pp. 231 *et seq.*; E.-U. Petersmann, ‘Constitutional Theories of International Economic Adjudication and Investor-State Arbitration’, in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009), pp. 137-94.

<sup>16</sup> See generally F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007).

<sup>17</sup> See T. Li and Z. Jiang, ‘Human Rights, Justice, and Courts in IEL: A Critical Examination of Petersmann’s Constitutionalization Theory’, *Journal of International Economic Law*, 21 (2018), 193-211.

<sup>18</sup> Agreement on Preshipment Inspection, Marrakesh, 15 April 1994, in force 1 January 1995, 1868 UNTS 368, Article 4.

<sup>19</sup> E.-U. Petersmann, ‘Between “Member-Driven” WTO Governance and “Constitutional Justice”: Judicial Dilemmas in GATT/WTO Dispute Settlement’, *Journal of International Economic Law*, 21 (2018), 103-22 (criticising the disregard by United States (US) trade diplomats of judicial independence, separation of powers and rule of law in multilevel WTO governance).

vis-à-vis adversely affected citizens. The theoretical and practical studies of judicial administration of justice in this book illustrate how national and transnational communities and citizens can benefit from international judicial protection of transnational rule of law, human rights and other PGs. They also demonstrate judicial dilemmas, for instance if judges use ‘dynamic’ interpretation methods balancing the need for change (e.g., in order to realise the law’s purpose for the benefit of today’s citizens) with the need for stability (e.g., in order to respect the common intentions of government negotiators as reflected in the treaty text).<sup>20</sup>

### *Constitutional functions of IEL adjudication?*

All UN member States have ratified one or more UN human rights convention(s) recognising inalienable human rights and related constitutional principles (e.g., of due process of law, necessity and proportionality of governmental limitations of fundamental rights). Since the Universal Declaration of Human Rights (UDHR),<sup>21</sup> many human rights and related principles have also been recognised in hundreds of human rights instruments and international court decisions as general principles of international law that legally constrain multilevel governance powers. Similar to the recognition of common human rights obligations as ‘constitutional principles of law’ in Article 6 of the Lisbon Treaty, the universal recognition of inalienable human rights justifies a legal requirement of re-interpreting and transforming the power-oriented international law of States into rules-based, multilevel governance of transnational PGs protecting citizens as constituent powers and democratic principals of multilevel governance agents with limited, delegated powers.<sup>22</sup> Especially in citizen-driven fields of international trade and investment law, trade and investment adjudicators increasingly examine whether the legal methodologies of European economic courts interpreting, balancing and reconciling IEL with HRL may be justifiable also in different, worldwide and regional contexts (e.g., for interpreting WTO rules, investment law and UN HRL) even if human and constitutional rights inside many UN/WTO member States are less comprehensively protected than inside EU member States. Notably inside and among constitutional democracies, the legal, democratic and judicial requirements of protecting constitutional justice justify interpreting certain UN/WTO rules as protecting not only States and their governments, but also their citizens as constituent powers and democratic principals of governance agents and ultimate sources of legitimacy of law and governance in the twenty-first century.

Judicial protection of equal individual rights and of legal coherence in multilevel legal systems governing the global division of labour remains deeply contested by governments, citizens and economic actors. Governments often find it easier to pursue their political self-interests<sup>23</sup> by limiting their legal, democratic and judicial accountability vis-à-vis citizens. Citizens remain ‘rationally ignorant’ of non-transparent UN/WTO governance in distant institutions. Producers, traders and investors have rational self-interests in influencing economic regulation so as to maximise producer welfare and ‘protection rents’ (e.g. import tariffs enabling protected producers to charge higher prices) rather than market competition and general consumer welfare. Judges tasked with interpreting IEL and settling disputes among such conflicting self-interests are inevitably faced with challenges of jurisdiction, due process of law, applicable law, interpretation methods, judicial ‘balancing’ of competing rights and legal principles, and judicial law-making (e.g., by extending initially State-centred human rights to multilevel governance of PGs and to corporate social responsibilities). The interactions

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<sup>20</sup> A. Barak, ‘On Judging’, in M. Scheinin, H. Krunke and M. Aksenova (eds.), *Judges as Guardians of Constitutionalism and Human Rights* (Cheltenham: Edward Elgar Publishing, 2016), pp. 27-49; Petersmann, ‘Judicial Dilemmas’, on the ‘Chevron doctrine’ in US administrative law and US efforts at incorporating this legal doctrine into the text of Article 17(6) of the WTO Agreement on Article VI of the GATT (Anti-Dumping) and related WTO jurisprudence.

<sup>21</sup> UDHR, 12 December 1948, GA Res. 217A (III), UN Doc. A/810 at 71 (1948).

<sup>22</sup> Petersmann, ‘Multilevel Constitutionalism’, pp. 55 ff.

<sup>23</sup> E.g., in periodical re-election and discretionary distribution of ‘protection rents’ in exchange for political support by ‘rent-seeking’ interest groups.

among national, regional and worldwide legal and judicial systems may require judicial dialogues and judicial deference among overlapping jurisdictions (e.g., citation of International Court of Justice (ICJ) and investment jurisprudence in WTO case law). But the different applicable laws, procedures and contexts in WTO, investment, European economic and human rights courts may also induce WTO judges and investor-State arbitrators to focus on dispute settlement without acknowledging ‘constitutional tasks’ of their respective courts and without engaging in multilevel judicial dialogues with other international and national judges. The more than 880 pages (without Annexes) of each of the WTO panel reports on *Australia – Plain Packaging of Tobacco Products*,<sup>24</sup> for instance, neither refer to human rights such as health rights, nor to related investor-State adjudication in their legal findings on the consistency of Australia’s restrictions on the packaging of tobacco products on grounds of public health protection with Australia’s legal obligations under the GATT, the WTO Agreement on Technical Barriers to Trade<sup>25</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>26</sup> As long as governments claim to be masters of the treaties establishing the courts and downplay the constitutional sources of judicial legitimacy, the independence of WTO judges and of investor-State arbitrators remains de facto limited, for instance by their *ad hoc* appointments for one specific dispute or, in the case of WTO AB judges, for a limited period of time.

### **Problems of ‘systemic’ and constitutional interpretations in international economic law**

International customary law – as reflected in the Preamble and Articles 31-3 of the VCLT – requires interpreting international treaties based on their text, context, object and purpose, and ‘in conformity with principles of justice’ such as the State-, people- and person-centred principles listed in the Preamble of the VCLT, including also ‘human rights and fundamental freedoms for all’. The legal relationships between the three sources of international law mentioned in Article 38 of the ICJ Statute<sup>27</sup> – i.e., treaties, customary law and general principles of law – depend on their respective contents (e.g., in case of *jus cogens* and other rules asserting a higher legal rank); while Article 38 of the ICJ Statute refers to treaties among States, the law-creating procedures for ‘general principles of law recognized by civilized nations’ and for customary law rules are not limited to States; they must be interpreted consistently with the universal recognition of human and democratic rights and courts of justice as impartial interpreters of modern legal systems. Constitutional, legislative and primary treaty rules (e.g., on fundamental rights of citizens) may assert a higher legal rank than delegated, administrative rule-making, adjudication and secondary treaty rules adopted by treaty bodies (e.g., on protection of administrative procedures). Yet, human and constitutional rights also constitute legal principles (e.g., as recognised in Article 6 of the TEU) and mandate the institutionalisation of PGs (like public health systems protecting the human right to health). The globalisation and interactions of modern national, transnational and international legal systems entail dynamic interrelationships between the ‘law in books’, the ‘law in action’, the underlying principles of justice and changing legal cultures and practices, which raise numerous problems for systemic interpretation of interdependent legal rules and principles aimed at reconciling competing legal objectives and values.

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<sup>24</sup> *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R, 28 June 2018.

<sup>25</sup> Agreement on Technical Barriers to Trade, Geneva, 12 April 1979, in force 1 January 1980, 1186 UNTS 276.

<sup>26</sup> TRIPS, Marrakesh, 15 April 1994, in force 1 January 1995, 1869 UNTS 299.

<sup>27</sup> Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945), Article 38.

### ***Problems of systemic interpretation of IEL***

Article 31(3)(c) of the VCLT requires including with the context also ‘any relevant rules of international law applicable in the relations between the parties’. This interpretative task - based on presumptions that (1) parties refer to general principles of international law for questions they do not resolve in a treaty and (2) they do not intend to act inconsistently with their obligations under international law when concluding a new treaty<sup>28</sup> - may raise difficult challenges of systemic integration of the applicable treaty and general international law rules and principles. For instance, IEL tends to be created, developed and analysed from five different perspectives: (1) as international private and commercial law empowering citizens and other economic actors to engage in mutually beneficial cooperation; (2) as international law of States regulating international monetary, financial, trade and investment cooperation and reciprocal liberalisation of market access barriers (e.g., the 1944 Bretton Woods Agreements and GATT 1947);<sup>29</sup> (3) as multilevel economic regulation limiting market failures and governance failures (e.g., through multilevel competition, subsidy and trade rules and institutions); (4) as international administrative law (e.g., regulating international organisations and international administrative tribunals); and (5) as international constitutional law like the 2009 Lisbon TEU constituting, limiting, regulating and justifying multilevel legislative, executive and judicial institutions protecting a common market and other transnational PGs for the benefit of citizens and their fundamental rights as codified in the CFR as well as in the European Convention on Human Rights (ECHR).<sup>30</sup> From the point of view of citizens and their human rights, these different regulatory perspectives focus on complementary, regulatory challenges of the international division of labor aimed at providing scarce goods and services in response to consumer demand. Hence, political, administrative and judicial treaty interpreters may be legally required to interpret the five different IEL perspectives in mutually coherent ways aimed at avoiding inconsistencies caused by legal fragmentation and ‘legal perspectivism’.

### ***Problems of constitutional interpretation of IEL***

If legal and judicial interpretations of IEL treaties have to reconcile State-, people- and person-centred rules and principles, then what kind of ‘balancing’ does ‘justice’ – as ‘the first virtue of social institutions’, as famously explained by Rawls<sup>31</sup> – require from governments and courts of justice in the twenty-first century? Why do national governments, intergovernmental organisations, democratic parliaments, courts of justice, producers, consumers and reasonable citizens so often disagree on the appropriate legal perspectives, principles of justice and methodologies for interpreting State-centred UN/WTO treaty rules for the benefit of citizens?

Modern HRL recognises that human and constitutional rights and democracies derive their legitimacy from the consent of citizens (rather than States) and from their voluntary compliance with mutually agreed principles of justice. Yet, this democratic constitutional foundation of modern legal systems does not prevent the reality of legal fragmentation caused by rationally different self-interests prompting national governments, democratic parliaments, courts of justice, international organisations, producers, investors, traders and consumers to prioritise different interests and perspectives in international economic regulation. For instance, the ‘balancing’ of competing principles (like maximisation of consumer welfare v. producer welfare) by independent and impartial courts of justice often differs from

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<sup>28</sup> M. Koskenniemi, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, paras. 465, 479 *et seq.*

<sup>29</sup> Articles of Agreement of the International Monetary Fund, Bretton Woods, 22 July 1944, in force 27 December 1945, 2 UNTS 39; Articles of Agreement of the International Bank for Reconstruction and Development, 22 July 1944, in force 27 December 1945, 2 UNTS 134; GATT 1947, Geneva, 30 October 1947, in force 1 January 1948, 55 UNTS 194.

<sup>30</sup> For a detailed discussion of these five different ‘IEL perspectives’ see Petersmann, ‘International Economic Law in the 21st Century’, pp. 43-112.

<sup>31</sup> Rawls, ‘Theory of Justice’, p. 3.

that of periodically elected politicians interested in granting ‘protection rents’ to organised producer interests in exchange for their political support; as consumers often remain rationally ignorant of such protection costs reducing their consumer welfare (e.g., due to the large number and non-transparent, small price increases of consumer products), national trade regulations are characterised by producer biases that may be overcome only through reciprocal, multilateral trade liberalisation and judicial protection of general consumer interests. The above-mentioned ‘five IEL perspectives’ differ because different IEL actors (like national governments, intergovernmental organisations, courts of justice, democratic parliaments, producers, consumers) often prioritise different values and different, rational self-interests leading to different kinds of IEL regulations and of ‘legal balancing’.<sup>32</sup>

For instance, in private commercial arbitration and also in public international economic adjudication among States, the parties to an economic dispute often invoke their private or public autonomy as justification for prioritising their economic self-interests by defining the applicable law in commercial and international dispute settlement procedures narrowly without reference to human rights (e.g., in GATT/WTO law and in most BITs). International courts mandated to protect and reconcile individual rights (e.g., in labour disputes of staff members of international organisations, investor-State arbitration, common market rights and fundamental freedoms invoked in regional economic and human rights courts) with judicial protection of general interests are legally required to ‘balance’ individual rights with broader, constitutional and administrative law principles (like limited conferral of powers, proportionality, subsidiarity of the exercise of multilevel ‘concurrent powers’, due process of law) as parts of the applicable law governing international organisations and transnational economic relations. In investor-State arbitration, even if neither the complainant nor the defendant has invoked human rights, the judges and third-party interveners (e.g., indigenous people adversely affected by investment disputes and invoking human rights protecting indigenous people) may convincingly argue that human rights are part of the applicable international and national law (e.g., based on the presumption in Article 42 of the ICSID Convention). Also in WTO dispute settlement proceedings, the defendant may invoke human rights obligations (e.g., to protect indigenous people and public health) as justification of import restrictions (e.g., of seal products, toxic tobacco or asbestos products) or of limitations of abuses of intellectual property rights (e.g., so as to protect human rights of access to medicines). Such human rights justifications may require the competent jurisdiction and judges to ‘balance’ competing rights of the complainant (e.g., tobacco exporters invoking their trade mark rights and other intellectual property rights) and of the defendant (e.g., importing countries limiting misleading abuses of trade marks by tobacco companies in order to protect human health from toxic tobacco consumption). Inclusive dispute settlement procedures (e.g., admitting *amicus curiae* submissions defending adversely affected third party interests) may induce judges to apply more inclusive balancing methods, just as transparent judicial procedures open to the public may induce WTO judges and investment arbitrators to justify their legal findings in more comprehensible words than only ‘WTO jargon’.

### ***Political challenges of international economic adjudication***

In a world that continues to remain dominated by intergovernmental power politics, the jurisdiction and jurisprudence of international courts are often contested by powerful political actors. For instance, comparative studies of regional economic courts emphasise that – just as the political acceptance of the jurisprudence of the CJEU and of the Court of Justice of the European Free Trade Association States (EFTA Court) was enhanced by reasonable judicial dialogues of these courts with national courts, governments and non-governmental complainants – the political backlashes against some of the regional

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<sup>32</sup> This argument is explained in more detail in Petersmann, ‘International Economic Law in the 21st Century’, pp. 43-112. On disagreements on how to constitute, limit, regulate and justify economic markets through economic freedoms, property rights, social rights and judicial remedies of citizens and institutional guarantees (e.g. of monetary stability, undistorted competition, sustainable development) see *idem*, chapters III, IV, VI and VII. On disagreements on distributive justice principles in IEL see O.Suttle, *Distributive Justice and World Trade Law. A Political Theory of International Trade Regulation* (Cambridge: Cambridge University Press 2018).

economic courts in Africa and the only limited support for some of the regional economic courts in Latin America (like the the Court of Justice of the Andean Community), were due to lack of support from national courts and to political resistance from some national governments against judicial accountability.<sup>33</sup> Not only non-democratic rulers, but also democratically elected populist politicians (like President Duterte from the Philippines) and opportunist trade politicians have engaged in obstructing international justice (e.g., by blocking the appointment of WTO AB judges) in response to adverse international judicial decisions.<sup>34</sup> Similar to political resistance inside many UN member States (like China) against effective protection of human and constitutional rights, also UN/WTO governance institutions remain dominated by diplomats and government representatives that often prioritise rights of States and diplomatic immunities over human and constitutional rights of citizens. Civil society, democratic institutions and courts of justice have to struggle for extending constitutional justice from national to transnational jurisdictions and to multilevel governance institutions, for instance by insisting on re-interpretation of international PGs treaties for the benefit of citizens and their human rights and fundamental freedoms as, arguably, required by the customary rules of treaty interpretation and the universal recognition of inalienable human rights.

International courts mandated to protect individual rights against illegal restrictions by States or international organisations - like the CJEU, the EFTA Court, regional human rights courts, transnational investment tribunals and international criminal courts – have responded to this human rights challenge quicker than international courts mandated to settle disputes among sovereign States, like the ICJ, the International Tribunal for the Law of the Sea (ITLOS) and the WTO AB. Transnational commercial and investor-State arbitrators appointed at the request of private parties often accord judicial deference to private autonomy rights to avoid references to human rights as applicable law. Similarly, in international courts mandated to settle economic disputes among States (as addressees rather than subjects of human rights), neither the complaining, nor the defending States may be interested in invoking human rights and corresponding government obligations. Yet, the inherent powers of judicial administration of justice offer WTO judges and investment arbitrators adequate opportunities of taking into account HRL as being relevant for interpreting IEL and deciding IEL disputes.

### **Procedural human rights dimensions in international economic adjudication**

Legal and judicial cultures regarding the human right of access to justice<sup>35</sup> and judicial administration of justice differ enormously among countries and international jurisdictions, for instance depending on the common law or civil law traditions inside countries, the civil, political, economic and social rights concerned, on the diverse legal jurisdictions and different kinds of remedies in international courts (e.g., international nature of ICJ, WTO, ICC and ITLOS dispute settlement procedures, individual access to regional economic, human rights and criminal courts). The ‘burdens of judgment’ (Rawls) prompt also reasonable people, governments and judges to often disagree on comprehensive theories of justice and human rights.<sup>36</sup> For instance, UN HRL offers a very incomplete theory of justice in view of its recognition of the sovereign freedom of each UN member State to decide which UN human rights

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<sup>33</sup> An infamous example was Zimbabwe’s successful insistence under its President Mugabe on indefinite suspension of the Southern African Development Community Tribunal after its judgment protecting the expropriation and compensation claims of a white farmer against the government of Zimbabwe. For comparative studies of regional economic courts see: R.Howse, H.Ruiz-Fabri, G.Ulfstein and M.Q.Zang (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge: Cambridge University Press 2018), e.g. chapters 3-15.

<sup>34</sup> Examples include *inter alia* the withdrawal of the Philippines’ acceptance of the jurisdiction of the International Criminal Court (ICC) following the ICC’s preliminary examination of Duterte’s ‘war on drugs’ campaign; US blockage of nomination of WTO AB judges in response to adverse AB findings against US antidumping and countervailing duties.

<sup>35</sup> See generally Francioni ‘Access to Justice’; A. A. Cançado Trindade, *The Access of Individuals to International Justice* (Oxford: Oxford University Press, 2011).

<sup>36</sup> Rawls, ‘Political Liberalism’, pp. 54-8; Li and Jiang, ‘Human Rights’.

convention the government decides to ratify and implement in its domestic legal system. As China ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>37</sup> but not the International Covenant on Civil and Political Rights (ICCPR),<sup>38</sup> the USA ratified the ICCPR but not the ICESCR, and the CFR goes far beyond these two UN covenants, the procedural and substantive human rights conceptions of Chinese, EU and US governments differ fundamentally. This may prompt economic judges to exercise judicial deference vis-à-vis human rights arguments in WTO and investment disputes and to refrain from addressing arguments that, today, all UN member states have accepted UN and ILO conventions and resolutions recognizing civil, political, economic, social and cultural human rights.

Since UN human rights lawyers admit that the ICESCR remains neutral vis-à-vis national choices of economic systems, and economists argue for separating *economic* from *non-economic policy instruments* on grounds of economic efficiency, most worldwide economic agreements avoid references to human rights. For example, the WTO agreement,<sup>39</sup> the ICSID Convention and most investment treaties include no human rights clauses acknowledging HRL as integral part of the applicable law in international trade and investment disputes. Most worldwide economic organisations - like the International Monetary Fund, the World Bank, GATT and the WTO – follow power-oriented paradigms of member-driven governance and avoid human rights discourse on the ground that they can promote economic welfare objectives more effectively by focusing on their limited economic mandates with due respect for reasonable disagreements among member States on how to construe their often very diverse human rights obligations.

### ***International law of states, peoples, citizens or humanity?***

Judicial mandates, procedures and methodologies in international economic adjudication often depend on how complainants, defendants, judges and other persons affected by the dispute define and interpret the applicable national and international rules of law. Since ancient Roman law, transnational economic law (e.g., the *jus gentium* and *lex mercatorum* administered by the *praetor peregrinus* in Rome) was conceived as part of domestic legal systems aimed at protecting private and public economic actors. The question of whether international law should be conceptualised as a legal system of States, peoples and/or citizens emerged only in later periods of history and has remained contested to date. Since the ancient city republics around the Mediterranean Sea, republican, democratic and cosmopolitan constitutionalism emphasise the need for reconciling individual self-interests with reasonable common interests by civilising, socialising, legitimising and constitutionalising legal systems, for instance through constitutional contracts among free and equal citizens mutually recognising constitutional rights as restraints on multilevel governance powers and adjudication. Alternative, utilitarian conceptions of social contracts as interest-based ‘Hobbesian bargains’ among rational citizens maximising their respective self-interests, and related ‘realist conceptions’ of international law as power politics among sovereign rulers, have been criticised long since as disempowering citizens and evading effective constitutional restraints. Modern European courts of justice and European constitutionalism illustrate why national and international judges can convincingly infer from European and UN HRL constitutional requirements of democratically designing and controlling multilevel governance powers to protect PGs, for instance based on re-conceptualisation of international law as multilevel governance for the benefit of citizens and their constitutional rights.

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<sup>37</sup> ICESCR, New York, 16 December 1966, in force 3 January 1976, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3

<sup>38</sup> ICCPR, New York, 16 December 1966, in force 23 March 1976, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171.

<sup>39</sup> Agreement Establishing the World Trade Organisation, Marrakesh, 15 April 1994, in force 1 January 1995, 1867 UNTS 154.

The supra-national structures of EU constitutional law may be neither politically feasible, nor desirable models for limiting abuses of public and private power in multilevel UN and WTO governance. Yet, as recognised in the 2015 UN General Assembly (GA) Resolution on the 2030 Sustainable Development Agenda and related human rights,<sup>40</sup> inter-governmental power politics can be limited more effectively if UN/WTO governance of PGs remains accountable in terms of democratic control, rule of law, cosmopolitan rights and judicial remedies of citizens at regional and local levels of governance. As discussed above in section 2, modern IEL judges have good reasons to perceive themselves and their judicial mandates as guardians of constitutional justice rather than as mere agents of intergovernmental power politics – even if governments and people may reasonably disagree on how to define the procedural and substantive legal dimensions of constitutional justice in IEL adjudication. In order to civilise intergovernmental power politics and overcome governmental and diplomatic opposition against a democratic re-constitution of international society, citizens must recognise themselves as cosmopolitan citizens responsible for UN/WTO governance. In the twenty-first century, citizens – as constituent powers and democratic principals of legitimate legal systems – are entitled to conceive international law in general, and IEL in particular, as a law of humanity deriving its democratic legitimacy from the consent of citizens, peoples and of their democratic institutions rather than from the consent of diplomats representing States and their rulers. The cosmopolitan responsibilities of citizens for multilevel UN/WTO governance of global PGs complement their responsibilities as national and EU citizens for national and regional governance systems.<sup>41</sup>

### ***How to define due process of law in IEL adjudication?***

Due process of law and related procedural rights protect fair treatment of all participants in legal and judicial proceedings so as to promote governmental and judicial administration of procedural and substantive justice. For instance, WTO law limits recourse to unilateral safeguard measures, limitations of intellectual property rights and WTO dispute settlement proceedings by legal requirements of notification, consultation and other procedural and substantive remedies based on legal principles (like ‘nullification or impairment of benefits’ and ‘non-violation complaints’) that are not precisely defined in the treaty texts. In view of the customary law requirement of interpreting international treaties ‘in conformity with the principles of justice’ as codified and illustrated in the Preamble of the VCLT, GATT and WTO judges have clarified the contextual relevance of principles of procedural and substantive justice (e.g., of commutative justice as foundation for *non-violation complaints*) for interpreting IEL, adjudicating related disputes and promoting systemic integration of international treaty and general international law rules (e.g., as required by Article 31(3)(c) of the VCLT). Principles of justice refer to different contexts of justice<sup>42</sup> requiring diverse legal justifications (e.g., of good faith, fundamental rights of citizens, the necessity and proportionality of their governmental limitation).<sup>43</sup> From the methodological point of view of democratic constitutionalism, human and constitutional rights of citizens and democratic governance derive their legitimacy from the consent of citizens rather than from the consent of diplomats representing States in international lawmaking. In view of the disempowerment of citizens through intergovernmental UN/WTO treaties, the democratic and constitutional legitimacy of many UN/WTO rules remains contested by citizens. As IEL governs and affects producers, traders, investors, consumers and other citizens and remains influenced by intergovernmental power politics, IEL judges have to critically review the legitimacy of their judicial mandates, procedures, applicable

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<sup>40</sup> Transforming Our World: The 2030 Agenda for Sustainable Development, UN GA Res. A/RES/70/1, 25 September 2015.

<sup>41</sup> Petersmann, ‘Multilevel Constitutionalism’, p. 363 f; E.-U. Petersmann, ‘EU Citizenship as a Constitutional Restraint on the EU’s Multilevel Governance of Public Goods’, *European Law Review*, 43 (2018), 89,103 ff.

<sup>42</sup> See generally R. Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism* (Berkeley: University of California Press, 2002).

<sup>43</sup> R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2012).

law and judicial interpretations. For instance, whereas human rights courts (like the ECtHR) tend to interpret human rights conventions as ‘living instruments’ that must be interpreted based on present-day conditions, the diplomatic perception of the WTO Agreement as reflecting an agreed ‘balance of reciprocal concessions’ has prompted US diplomats to insist on explicit DSU prohibitions of judicial interpretations ‘adding to’ or ‘diminishing’ the agreed WTO rights and obligations. Similarly, as discussed in the chapter by Baetens, some investment arbitrators have interpreted BIT stabilisation clauses and legitimate expectations of foreign investors as legal limitations on unforeseen, regulatory changes in the host State justifying investor claims of financial compensation. While the comprehensive applicable law of regional economic and human rights courts may justify a minimalist judicial reasoning (e.g., in many judgments of the CJEU and of the ECtHR), WTO and investment arbitration reports often include hundreds of pages of judicial reason-giving, explanations and justifications of economic judgments.

From constitutional and democratic perspectives, international trade and investment agreements should be construed not only as ‘Hobbesian bargains’ among governments aimed at maximising competing economic interests. The Bretton Woods, WTO and investment agreements and their legal guarantees of economic freedoms, non-discrimination, rule of law, use of efficient and transparent policy instruments, national sovereignty, and of protection of non-economic interests (e.g., in *sustainable development*) also have constitutional functions for democratic self-determination, for example by protecting the diversity of constitutional contracts among citizens on collective supply of PGs and the plurality of (e.g., liberal, egalitarian, economic and democratic) principles of justice and regulatory approaches (like embedded liberalism) that may guide legal and judicial interpretations and justify judicial deference.<sup>44</sup> International economic treaties increasingly recognise and protect individual rights, such as common market rights and fundamental rights protected in regional economic agreements; investor rights protected by international investment agreements; intellectual property rights protected by WTO and World Intellectual Property Organisation (WIPO) conventions; labour rights recognised in international conventions by member States of the International Labour Organisation; and health rights protected in conventions by member States of the World Health Organisation (WHO), like the WHO Framework Convention on Tobacco Control (FCTC).<sup>45</sup> Yet, legal and judicial protection of economic rights in international economic and human rights treaties and adjudication, and their functional linking to corresponding rights and principles in national Constitutions and European constitutional law, remain contested and contextual.

### ***Constitutional pluralism and judicial deference***

In European common market law, for instance, judicial protection of rights of market citizens (e.g., of migrant workers and their families), democratic EU citizenship rights, human rights of non-citizen immigrants, and of rights of non-resident citizens abroad have enhanced ‘democratic inclusion’ of diverse, affected interests of subjected stakeholders in multilevel governance of PGs involving several

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<sup>44</sup> On the contractual and constitutional dimensions of IEL rules see generally E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: University Press Fribourg; Boulder, Oxford and San Francisco: Westview Press, 1991); C. Carmody, ‘Interdependence and the WTO Agreement as a “Contractual Constitution”’, in J. Chaisse and T. Lin (eds.), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Oxford: Oxford University Press, 2016), pp. 462-74. 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 WTO Panel Report on *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004 – of deliberately indeterminate obligations to prevent ‘anti-competitive measures’ distorting market access commitments.

<sup>45</sup> FCTC, Geneva, 21 May 2003, in force 27 February 2005, WHA56.1, 2302 UNTS 166.

States (e.g., in the home and host States of foreign investors and other foreign residents).<sup>46</sup> Yet, the EU's micro-economic common market constitutionalism, macro-economic monetary constitutionalism and multilevel democratic constitutionalism remain contested inside and outside Europe. In *The Law of Peoples*, the American legal philosopher Rawls extended his contractarian theory of justice to international relations.<sup>47</sup> Yet, due to his social grounding of distributive justice in the reciprocity of democratic social cooperation and the conditions of political autonomy within a well-ordered society, Rawls rejected a transnational 'difference/distributive justice principle' and accepted only more limited duties of assistance owed to burdened peoples. Conceptions of distributive justice and of how to design basic social institutions (like property rights and economic relations) within the North American Free Trade Area differ fundamentally from those inside the EU, as illustrated by civil society protests inside the EU against the secretive, intergovernmental negotiations of the Canada-EU Comprehensive Economic and Trade Agreement<sup>48</sup> (CETA) and its neglect of the fundamental rights of EU citizens.<sup>49</sup>

It remains also contested to what extent UN HRL can be construed as including constitutional and redistributive legal obligations not only inside democracies and national economies, but also across sovereign States in transnational cooperation among free and equal citizens. The numerous WTO provisions for preferential treatment of less-developed countries – both in terms of procedures (e.g., legal assistance for less-developed WTO members invoking WTO dispute settlement procedures) as well as substantive tariff and trade preferences – avoid any references to HRL. Notwithstanding human rights arguments for interpreting international economic agreements as joint commitments to uphold cooperative institutions for the protection of mutually beneficial, international PGs, most government executives construe the contractual philosophy underlying international monetary, trade and investment agreements as utilitarian 'Hobbesian contracts' among governments maximising national economic interests (e.g., consumer welfare) rather than as rights-based 'constitutional contracts' negotiated on behalf of free, equal and reasonable citizens accepting the priority of human rights and of international guarantees of economic freedoms, non-discrimination and transnational rule of law. For instance, the blockage – since 2016 – of the appointment of WTO AB judges by the USA undermines the global PG of the compulsory WTO dispute settlement system; it illustrates how consensus-based 'member-driven WTO governance' fails to prevent abuses of veto-powers in UN/WTO governance institutions and to protect rule of law and democratic governance principles.<sup>50</sup> Governments of UN/WTO members also disagree on the role of markets in determining 'equitable market shares' (as postulated in Article XVI(3) of the GATT) and just distributions reflecting peoples' choices. As human rights protect individual and democratic diversity, there may be good reasons for judges in international economic adjudication to exercise judicial deference regarding constitutional rather than 'utilitarian interpretations' of international economic rules and their often indeterminate principles. The 'overlapping consensus' on how to interpret the public reason underlying HRL and multilevel regulation of international markets, market failures and governance failures remains limited and justifies judicial self-restraint.

### ***The human right of access to justice and the emerging common law of transnational adjudication***

In *transnational cooperation* for the common good no less than in national cooperation, free, equal and reasonable persons have a shared social interest in cooperating with one another on publicly justifiable

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<sup>46</sup> R. Bauböck *et al.*, *Democratic Inclusion* (Manchester: Manchester University Press, 2018), pp. 3ff, 233ff; Petersmann, EU Citizenship, p. 103 f

<sup>47</sup> See generally J. Rawls, *The Law of Peoples* (Cambridge, Massachusetts/ London: Harvard University Press, 1999).

<sup>48</sup> Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, Brussels, 30 October 2016, provisionally applied from 21 September 2017, not in force as of 1 August 2018, available at: <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>

<sup>49</sup> E.-U. Petersmann, 'Transatlantic Free Trade Agreements: Lack of EU Leadership for Reforming Trade and Investment Law?', *Revue Internationale de Droit Économique*, 30 (2016), 455-80.

<sup>50</sup> Petersmann, 'Judicial Dilemmas'.

terms that reflect their equal human rights and mutual recognition as free and equal. There is nothing intrinsically undemocratic about courts of justice inside constitutional democracies, their judicial protection of equal rights of citizens against abuses of power, and multilevel judicial protection of individual rights across national frontiers; *transnational adjudication* is necessary for protecting the ‘trinity’ of human rights, rule of law and democracy in multilevel governance of PGs. National and international HRL and constitutional law increasingly recognise individual rights of access to justice and judicial remedies against abuses of governance powers.<sup>51</sup> The post-war creation of ever more international courts gives rise to ever more jurisprudence on a ‘common law of international adjudication’ reflecting common approaches adopted by international tribunals to issues of procedure, remedies and cross-fertilisation of national and international legal principles.<sup>52</sup> The direct access of individuals and other non-governmental actors (e.g., companies) to regional economic and human rights courts, investment tribunals and to intellectual property arbitration promotes *individual access* to transnational justice and transnational ‘common law rules’ transforming individual self-interests into more inclusive, reasonable common interests such as protection of equal human rights.

The more global communications, division of labour and international movements of persons make the cosmopolitan paradigm of human beings as a world community a social reality, the more important becomes the universal recognition in HRL (e.g., Article 29 of the UDHR) and in constitutional law (e.g., Article 52 of the CFR) that governmental limitations of individual freedoms must be justifiable in terms of procedural and substantive ‘due process of law’, ‘human rights and fundamental freedoms for all’. The universal recognition that ‘(a)ll human beings are born free and equal in dignity and rights’ and are ‘endowed with reason and conscience’ (Article 1 of the UDHR) justifies a conception of justice as being based on a human right to justification; as justificatory human beings, citizens and also judges have moral duties to discursively construct and justify constitutional law and challenge injustices by insisting on the public use of human ‘reason and conscience’.<sup>53</sup> The circumstances of justice (like scarcity of resources, limited altruism, competing demands, unequal distribution of human and natural resources) and the universal recognition of the inalienable and indivisible nature of civil, political, economic, social and cultural human rights require respect for ‘subsidiarity principles’, for instance by leaving each state democratic ‘margins of appreciation’ as to which social rights and distributive justice principles a people decides to prioritise. This democratic sovereignty requires respect for diverse democratic preferences, constitutional traditions and legitimate ‘constitutional pluralism’. For instance, interpreting European constitutional guarantees of equal freedoms of EU citizens as ‘first principle of justice’ (in terms of Kantian and Rawlsian constitutional theories) justifies also the common market freedoms of EU citizens<sup>54</sup>; yet, it remains contested by different egalitarian and communitarian, legal and democratic traditions.<sup>55</sup>

### ***System-building judicial interpretations remain contested***

The human right to justification requires multilevel governance institutions to justify their local, national, regional and worldwide regulations of PGs in mutually coherent ways promoting democratic, republican and cosmopolitan public reason and voluntary compliance by citizens with agreed rules. The legitimacy and coherence of multilevel governance of transnational aggregate PGs may necessitate respecting diverse intermediate PGs inside constitutional democracies (like the *trias* of constitutional rights, rule of law and democratic self-government) as legitimately defined by diverse peoples. In IEL adjudication, judges may be requested to clarify under-theorised PGs treaties and indeterminate treaty

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<sup>51</sup> Francioni, ‘Access to Justice’; Cançado Trindade, ‘Access of Individuals’.

<sup>52</sup> See generally C. Brown, *A Common Law of International Adjudication* (Oxford: Oxford University Press, 2007).

<sup>53</sup> Forst, ‘Right to Justification’.

<sup>54</sup> In this sense : Petersmann, ‘International Economic Law in the 21st Century’, chapter III.

<sup>55</sup> Cf. O. Suttle, ‘Distributive Justice’, at 145.

provisions for the benefit of citizens entitled to more effective legal protection of reasonably justified, cosmopolitan rights and other transnational PGs. As illustrated by the jurisprudence of European economic and human rights courts and by the US opposition against the WTO AB jurisprudence limiting abuses of WTO anti-dumping rules and procedures, *bottom-up justice* supported by national courts and civil society tends to be more sustainable justice than intergovernmental *top-down justice*; intergovernmental power politics (as in the case of the blockage of WTO AB judges) risks undermining democratically approved constitutional justice systems (like the compulsory AB jurisdiction) without any democratic discussion. Also proposals for interpreting the universal recognition of human rights as a legal requirement of transforming the power-oriented *international law of States* into rules-based, multilevel governance of transnational PGs protecting citizens – and for embedding UN/WTO governance of transnational PGs into stronger democratic, republican and cosmopolitan constitutionalism protecting equal rights of citizens and inclusive democracy beyond State borders – are resisted by intergovernmental power politics.

Constitutional justice requires recognising citizens as authors and addressees of legal self-government. The insufficient protection of individual rights and remedies in intergovernmental trade negotiations illustrates how principles of justice - as justifications of just relations among persons - continue to be procedurally and substantively neglected in multilevel governance of transnational PGs.<sup>56</sup> For example, the 2009 Lisbon Treaty prescribes a ‘cosmopolitan foreign policy constitution’ for the EU’s external policies that requires limitation of *State-centred, international by person-centred, multilevel dispute settlement* so as to protect equal freedoms of citizens also in their mutually beneficial cooperation in the external relations of the EU.<sup>57</sup> The contexts of justice in the EU’s external relations differ depending on the specific PGs treaties and foreign policy objectives. For instance:

- the EU’s multilevel *legal protection of human rights* in its external relations (e.g., by including human rights clauses into more than 130 trade and cooperation agreements with third countries) strengthens civil society struggles for human rights and rule of law in EU external relations and justifies EU responses to violations of human rights by treaty partners;
- the multilevel *judicial protection of human rights and rule of law* inside the EU - e.g., by means of the *Kadi*-jurisprudence of the CJEU and the ‘*solange*-jurisprudence’ of national constitutional courts and of the ECtHR – has contributed to multilevel governance reforms also outside the EU (e.g., in UN Security Council practices through the institution of an ombudsman reviewing private challenges by persons listed as potential terrorists);
- multilevel *judicial protection of transnational trading, investment and intellectual property rights* may be justifiable in view of corresponding constitutional rights of citizens and explicit treaty clauses (e.g., in EU law, WTO law, WIPO conventions and BITs) protecting rights of citizen beyond national frontiers.

## **Procedural and substantive human rights problems in WTO and investment adjudication**

Even if – as suggested in this chapter – multilevel HRL is interpreted as forming part of multilevel constitutional law limiting path-dependent, intergovernmental power politics, conflicts between IEL and HRL often elude simple solutions based on legal hierarchy (e.g., supremacy of *jus cogens* human rights norms) or on the basis of the State-centred rules of the VCLT, for example in view of the fact that human rights treaties go beyond reciprocal obligations among States by conferring rights on individuals, limit

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<sup>56</sup> E.-U. Petersmann, ‘Transatlantic Trade Agreements and Adjudication without ‘Protection of Citizens’ and their Fundamental Rights?’, *College of Europe Policy Brief*, 15 (2016), 1-4; E.-U. Petersmann, ‘The Position of European Citizens in International Dispute Settlement’, in M. Cremona, A. Thies and R. Wessel (eds.), *The European Union and International Dispute Settlement* (Oxford: Hart Publishing, 2017), pp. 213-34.

<sup>57</sup> E.-U. Petersmann, ‘The European Union’s “Cosmopolitan Foreign Policy Constitution” and Its Disregard in Transatlantic Free Trade Agreements’, *European Foreign Affairs Review*, 21 (2016), 449-68.

inter-State reciprocity principles (e.g., rights to suspend human rights) and acknowledge the importance of human rights jurisprudence for interpreting human rights treaties and democratic legislation. The contributions by Hestermeyer and Baetens confirm that - in contrast to the jurisprudence of the CJEU and of the ECtHR, whose applicable law includes HRL - there are, so far, hardly any 'leading cases' in WTO jurisprudence and investor-State arbitration clarifying the interrelationships between WTO law, international investment law and HRL. This section uses the limited, relevant WTO and investment jurisprudence for discussing the relevance of human rights: (1) as procedural rights, (2) as substantive law for the settlement of WTO and investment disputes and (3) for promoting systemic integration of investment law and HRL. In contrast to the comprehensive human rights jurisprudence of the CJEU, many interpretative problems regarding the interrelationships between WTO law, investment law and HRL remain to be legally and judicially clarified. Due process rights and property rights tend to be more mentioned in trade and investment adjudication than other civil, political, economic, social and cultural human rights. In contrast to most human rights advocates' focus on trade and investment rules as potential obstacles to human rights protection, international economic institutions emphasise the positive contribution of WTO and investment rules to satisfying consumer demand, reducing poverty (e.g., by lifting more than a billion of people out of poverty in China and India alone) and providing resources necessary for human rights protection. For example, the Doha Declaration on the TRIPS Agreement and Public Health<sup>58</sup> contributed to a subsequent 'waiver' and amendment of Article 31 of the TRIPS Agreement and to better provision of essential drugs (such as original HIV medicines) to people in need.

### ***Relevance of human rights as procedural rights in WTO dispute settlement?***

Proceedings in WTO dispute settlement are limited to States and related sub-national or supra-national WTO members like the EU, Macau, Hong Kong and Taiwan. As human rights are rights of individuals and peoples limiting State powers, WTO members and the political and judicial WTO institutions hardly ever refer to human rights, for example in order to clarify *due process of law* guarantees and related procedural rights of governments (e.g., to fair trial, equality of rights, rights to legal representation in WTO dispute settlement procedures). The WTO case law admitting *amicus curiae* briefs and mutually agreed opening of WTO panel and AB proceedings to the public could have been justified in terms of human rights of access to justice and principles of democratic inclusion of third parties that may be legally affected by WTO dispute settlement decisions. Yet, WTO dispute settlement bodies and WTO members emphasise the member-driven tradition of WTO governance and prefer to avoid references to human rights in view of the intergovernmental nature of WTO bodies, of WTO governance and WTO legal practices. The various reports published by the UN High Commissioner for Human Rights on various human rights dimensions of WTO agreements (e.g., on trade in agriculture, services and trade-related intellectual property rights) are hardly ever cited or mentioned by WTO political and judicial bodies. Also in the joint reports elaborated by the WTO, WHO and WIPO secretariats on trade-related health and intellectual property problems, WTO officials remain reluctant to include references to human rights. Among the WTO Directors-General since 1948, Pascal Lamy was the only one explicitly and persistently advocating the development of positive synergies between WTO law and HRL, and engaging in dialogue with UN human rights rapporteurs.<sup>59</sup> Some UN human rights rapporteurs (like Olivier De Schutter) were invited to address WTO meetings and engaged in critical discussions with WTO diplomats. Yet, due to the State-centered focus of most WTO rules and the only *prospective* nature

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<sup>58</sup> Declaration on the TRIPS Agreement and Public Health, Doha, 14 November 2001, WT/MIN(01)/DEC/2.

<sup>59</sup> See O De Schutter, UN Special Rapporteur on the Right to Food, Activity Report, The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System, November 2011, available at: [www.wto.org/english/news\\_e/news11\\_e/deschutter\\_2011\\_e.pdf](http://www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf) and the criticism of its protectionist recommendations in an open letter by WTO Director-General Pascal Lamy posted on the WTO website on 14 December 2011 (referring also to written comments by the WTO Secretariat on an earlier draft of the report), available at: [www.wto.org/english/news\\_e/agcom\\_14dec11\\_e.htm](http://www.wto.org/english/news_e/agcom_14dec11_e.htm)

of WTO legal remedies (i.e., in terms of legal termination of illegal measures *pro futuro* rather than *retrospective* reparation of injury), neither WTO rules nor WTO dispute settlement findings refer to HRL and related human rights jurisprudence.

### ***Relevance of human rights as substantive law in WTO disputes?***

The 2018 WTO panel reports on *Australia – Plain Packaging of Tobacco Products* are the most recent illustration of how WTO members and WTO judges prefer justifying the consistency of health protection measures with WTO rules without explicit references to health rights and related human rights, notwithstanding the explicit references to such rights in the law of the WHO and its FCTC. In the *European Communities (EC) – Measures Prohibiting the Importation and Marketing of Seal Products* dispute, both the complainants, the defendant, the WTO panelists and AB judges referred to protection of indigenous communities and of animal welfare as ‘public moral concerns’ that could justify import restrictions on certain seal products pursuant to Article XX(a) of the GATT.<sup>60</sup> Yet, the judicial findings that the EU prohibitions of the importation and marketing of certain seal products were discriminatory and not justified under Article XX of the GATT, did not rely on human rights arguments (e.g., indigenous peoples rights). In many other GATT and WTO disputes over trade restrictions adopted on grounds of health and environmental protection, ‘public morals’ or ‘public order’ – such as *Brazil – Retreaded Tyres*,<sup>61</sup> *Canada – Periodicals*,<sup>62</sup> *China Publications and Audiovisual Products*,<sup>63</sup> *Dominican Republic – Import and Sale of Cigarettes*,<sup>64</sup> *EC – Approval and Marketing of Biotech Products*,<sup>65</sup> *EC – Asbestos*,<sup>66</sup> *EC – Hormones*,<sup>67</sup> *Thailand Cigarettes (Philippines)*<sup>68</sup> and *US – Gambling*<sup>69</sup> – human rights arguments could have been raised by the parties to the WTO disputes; yet, even if human rights arguments were exceptionally invoked by the parties, they were not mentioned in the judicial findings. As human rights constitute corresponding State duties to protect PGs (like public health) and WTO judges exercise judicial deference vis-à-vis governmental invocations of public morals and public order, the WTO legal system and its comprehensive safeguards of sovereign rights to protect non-economic public interests offer, arguably, sufficient policy space for protecting human rights without violating WTO rules. The WTO jurisprudence confirms, albeit implicitly, the sovereign rights of WTO members to restrict imports of goods and services the production or consumption of which violate human rights.

The WTO jurisprudence tends to limit the applicable law in WTO disputes to WTO agreements and, if necessary for judicial ‘filling of gaps’ in WTO dispute settlement procedures (e.g., due to the lack of WTO rules on burden of proof and preliminary rulings), to general international law principles. Jurisdiction of WTO dispute settlement bodies over legal claims based on non-WTO-law has been

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<sup>60</sup> *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 29 April 2014.

<sup>61</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007.

<sup>62</sup> *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, 30 June 1997.

<sup>63</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 December 2009.

<sup>64</sup> *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, 25 April 2005.

<sup>65</sup> *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R/Corr.1, WT/DS292/R/Corr.1, WT/DS293/R/Corr.1, 10 October 2006.

<sup>66</sup> *EC – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, 12 March 2001.

<sup>67</sup> *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998.

<sup>68</sup> *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, 17 June 2011.

<sup>69</sup> *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R/Corr.1, 20 August 2007.

denied in WTO dispute settlement practice so far. As WTO law protects regulatory sovereignty of WTO members over non-economic PGs, most WTO-related, substantive human rights problems (like access to food and medicines, food security, health protection, public morals, public order, freedom of expression, labour rights, author rights, products of prison labour, human rights conditionality of EC trade preferences, trade-related non-discrimination, judicial remedies and forum shopping) can be – and are – discussed in WTO disputes without explicit references to HRL, notwithstanding occasional references to human rights by the parties to WTO disputes. This dispute settlement practice differs from the more frequent references to human rights in regional courts established under free trade agreements (FTAs) in Europe (notably the EU and European Economic Area agreements) and Latin America (notably the MERCOSUR agreement).<sup>70</sup> In view of the prevailing *economic efficiency-* and *intergovernmental bargaining-*justifications of WTO rules and the deliberate avoidance of *human rights clauses* in WTO law, most WTO diplomats do not perceive references to human rights in WTO dispute settlement reports and WTO discussions as strengthening the legitimacy of WTO rules. These and other political constraints entail that also the trade diplomats serving as WTO panelists do not perceive systemic integration of HRL and WTO law as their primary task. In this regard, WTO market access commitments, WTO exception clauses and WTO-conforming trade restrictions may serve legitimate economic, social and human rights objectives (like protection of public health and food security). As diplomats interpret WTO law as constituting an agreed ‘reciprocal balance of concessions’ embedded into broadly defined WTO exception clauses (like Article XX of the GATT), they tend to perceive WTO law as *lex specialis*. Claims of legal primacy of human rights norms over WTO rules are deliberately avoided; and the *balancing principles* developed in WTO jurisprudence are not perceived as tacit application of human rights without mentioning HRL. The traditional ‘human rights paradigm’ of weak individuals needing protection of their fundamental rights against an oppressive State government is seen by most WTO diplomats as *not* fitting the intergovernmental context of multilevel WTO governance.

Arguably, none of the more than 500 GATT/WTO dispute settlement findings since 1948 has violated HRL. There is also no evidence that the different human rights approaches of regional and WTO dispute settlement bodies prompted the complainants to engage in *forum shopping* and *rules-shopping*. Practices of the WTO seem to confirm the opinion held by most WTO diplomats that – in view of the very diverse, domestic human rights traditions of WTO members – responding to the human rights challenges of WTO law and governance tends to be politically easier and more ‘efficient’ without asking the 164 WTO ambassadors to agree on explicit, legal human rights interpretations (e.g., as occasionally suggested by UN human rights experts). The rare discussions by WTO bodies with UN human rights rapporteurs (e.g., on access to food and to water) remained controversial. As WTO law regulates primarily reciprocal rights and obligations of governments and only exceptionally rights of non-governmental actors (like trading rights, intellectual property rights and judicial remedies), and most WTO members do not recognise direct effects and direct applicability of WTO law inside domestic jurisdictions, WTO dispute settlement bodies tend to interpret their WTO jurisdiction narrowly as excluding direct invocation of human rights unless they are relevant for interpreting WTO rules (e.g., on protection of public morality, public order or human health).

### ***‘Systemic integration’ of investment law and HRL through investment adjudication?***

As explained in the contribution by Hestermeyer, the AB jurisprudence has corrected the over-restrictive interpretation of Article 31(3)(c) of the VCLT (‘in the relations between the parties’) by the Panel in *EC*

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<sup>70</sup> Petersmann, ‘International Economic Law in the 21st century’, pp. 436-485; M. B. Olmos Giupponi, *Rethinking Free Trade, Economic Integration and Human Rights in the Americas* (Oxford and Portland, Oregon: Hart Publishing, 2017). The EU and the USA also increasingly include human rights and labour standards into FTAs with African and Asian countries, which justify withdrawal of trade concessions upon failures to respect, e.g., human and labour rights like freedom of association.

– *Approval and Marketing of Biotech Products*; in interpreting WTO rules, it has taken into account also international agreements concluded by some, but not all WTO members if the treaty provisions to be used for interpretative purposes concern the same subject-matter and do not subvert the common intentions of WTO members when they drafted the WTO provisions concerned. Even though all States Parties to the WTO Agreement have ratified one or more UN human rights conventions, arguments for limiting market failures, governance failures and related injustices in the global division of labour by using the universal recognition of human rights for re-interpreting the *international law of States* as *multilevel governance of PGs* protecting citizens – and by learning from republican, democratic and cosmopolitan constitutionalism – tend to be ignored by WTO practitioners. The changing procedures and jurisprudence of investor-State arbitration reflect these changing structures of international law and HRL more clearly than WTO law and governance.

If the parties to international investment disputes do not refer to human rights, most investor-State arbitral tribunals – and also World Bank ‘inspection panels’ reviewing international development financing – avoid referring to HRL too. Yet, due to increasing civil society criticism of ‘investor biases’ in international investment law and adjudication, the parties to investment arbitration (investors, host States, arbitrators) and third party interveners (e.g., *amici curiae*, possibly also home States of the investor) increasingly use the ‘entry points’ in BITs and in other investment treaties (including modern FTAs) – such as jurisdiction clauses, applicable law clauses, treaty definitions of ‘investment’, the customary rules of treaty interpretation, preambles of investment treaties, State responsibility principles, damage reparation and compensation principles – for referring to human rights as due process rights, procedural fairness principles, ‘balancing principles’, and for clarifying the property rights of investors and the protection standards in BITs (like ‘fair and equitable treatment’ and related ‘reasonable expectations’). Investment arbitrators and democratic governments increasingly recognise that the *public reason* necessary for maintaining the legitimacy, stability and legal justifiability of IEL can no longer disregard the universal recognition of human rights and the injustices in the global economy resulting from violations of human rights and related abuses of public and private power. Yet, neither arbitrators, nor home and host States of the investor have so far developed a systematic methodology for responding to human rights arguments in investment disputes.<sup>71</sup> The recent jurisprudence by the CJEU on the inconsistency with Articles 267 and 344 of the Treaty on the Functioning of the European Union<sup>72</sup> (TFEU) of investor-State arbitration among EU member States<sup>73</sup>, and on the lack of exclusive EU competences to limit individual access to domestic courts inside EU member States by investment provisions in EU FTAs,<sup>74</sup> is likely to promote more consistency between investment adjudication and European constitutional law. Yet, the currently marginal role of HRL as a system of substantive rights in investment arbitration is likely to continue for a number of reasons such as:

1. HRL and investment law share fundamental legal concepts such as non-discrimination, due diligence, procedural fairness, proportionality and protection of private property. Hence, *investment arbitrators* acknowledge that HRL and international investment law ‘are not inconsistent, contradictory, or mutually exclusive’.<sup>75</sup> But arbitrators rarely refer to human rights

<sup>71</sup> See the detailed case-analyses by V. Kube and E.-U. Petersmann, ‘Human Rights Law in International Investment Arbitration’, in A. Gattini, A. Tanzi and F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration* (Leiden: Brill Nijhoff, 2018), pp. 222-68.

<sup>72</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012. pp. 47-390, Articles 267, 344.

<sup>73</sup> Case C-284/16, *The Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, 6 March 2018.

<sup>74</sup> See Opinion 2/15, *EU – Singapore Free Trade Agreement*, ECLI:EU:C:2017:376, 16 May 2017, para. 292 (‘Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States’ consent’).

<sup>75</sup> See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 262.

*ex officio* unless the parties to the dispute make such references. Similar to WTO judges, they use the applicable economic treaties as *lex specialis* before resorting to general human rights provisions in the applicable national and international legal systems or to ‘corporate responsibilities to respect human rights’. The *indivisibility* of human rights seems to exclude *balancing* among economic and non-economic human rights on the basis of *hierarchy* among different human rights without justifying *proportionality balancing* more specifically in terms of the applicable investment rules.

2. Also *investors* tend to perceive protection of their investor rights in investment law to be more specific and more comprehensive than in HRL. Investor claims directly based on HRL rather than investment law (e.g., an independent assertion of denial of justice as a principle of customary law in the *Chevron v. Ecuador I* arbitration) have remained rare also in view of the narrow interpretation of the relevant jurisdiction clauses for investment disputes. In *Biloune v. Ghana*, for instance, the arbitral tribunal construed its ‘investment jurisdiction’ as not covering human rights issues as an independent cause of action.<sup>76</sup> In the investment arbitrations following Russia’s criminal proceedings against the Yukos Oil Company for tax evasion, the tribunals denied being bound by the judgments of the ECtHR in the parallel human rights complaints based on the ECHR; they stressed the differences between HRL and investment law and alleged violations of the Energy Charter Treaty, yet declared to take the human rights judgments into account if needed.<sup>77</sup> The responses of investment arbitrators to investor claims based on human rights (e.g., invoking rights to data privacy) lacked, so far, a consistent methodology.
3. Article 36 of the ICSID Convention and a few jurisdiction clauses in BITs allow *host States* to initiate investor-State arbitration. So far, such complaints do not seem to have taken place in view of the availability of domestic remedies, jurisdictions and constitutional human rights protection.<sup>78</sup> Also counterclaims (e.g., based on Article 46 of the ICSID Convention) that the investor violated human rights obligations, as in the recent *Urbaser v. Argentina* arbitration,<sup>79</sup> have only rarely been brought by the respondent host States. *Home States* have only rarely intervened as third parties or *amici curiae* in investor-State arbitration and hardly ever in order to comply with their own obligations to protect respect for human rights by foreign investors registered in the home country.<sup>80</sup> Even if, as in the *Urbaser* arbitration, the foreign investors had committed themselves to comply with the human rights principles in the UN Global Compact and in the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, the human rights obligations of foreign investors, their relationships to the human rights obligations of host States and home States, and the relationships between HRL and multilevel investment, labour, health, environmental, social and emergency regulations remain controversial.<sup>81</sup> Non-discriminatory health protection regulations (e.g., limiting intellectual property rights of tobacco companies) are increasingly recognised – also in investment arbitration – as lawful limitations of investor rights, especially if they are based on multilateral treaty standards.

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<sup>76</sup> For a discussion of the case law on independent or supportive assertion of human rights by investors see Kube and Petersmann, ‘Human Rights Law’, pp. 228 *et seq.*

<sup>77</sup> *Ibid.*, pp. 233 *et seq.*

<sup>78</sup> E. Cedillo, ‘The Impact of Mexico’s 2011 Human Rights Constitutional Amendment on Arbitral Practice: A View from Local Actors’, in L. Biukovic and P. B. Potter (eds.), *Local Engagement with International Economic Law and Human Rights* (Cheltenham: Edward Elgar Publishing, 2017), pp. 105-24.

<sup>79</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016.

<sup>80</sup> Kube and Petersmann, ‘Human Rights Law’, p. 251 (discussing, e.g., Italy’s *amici curiae* submission in the investment dispute involving *Foresti v. South Africa*).

<sup>81</sup> E.g., in case of investment disputes over ‘necessity defenses’ raised by an over-indebted host State (like Argentina) to justify expropriation of foreign investor rights without full compensation so as to protect access to water for domestic citizens.

4. Human rights arguments introduced by *third party interveners* are likely to increasingly influence investment arbitration, for example due to the admission of *amicus curiae* briefs by non-governmental organisations in both ICSID and commercial arbitration procedures, the increasing transparency and public discussion of investor-State arbitration procedures and jurisprudence, and the civil society pressures for incorporating stronger public interest protection provisions into BITs, FTAs and other investment agreements. *Civil society protests* have prompted judicial clarifications that investor-State arbitration among EU member States is inconsistent with Articles 267 and 344 of the TFEU,<sup>82</sup> just as intergovernmental exclusion of individual access to domestic jurisdictions in investment treaties with third countries may turn out to be inconsistent with EU law (e.g., the individual rights to an effective remedy pursuant to Article 47 of the CFR).<sup>83</sup> The path-dependent investor privileges under BITs are likely to be progressively constitutionalised in relations among constitutional democracies, similar to the replacement of power-oriented GATT/WTO dispute settlement procedures among EU member States by legal guarantees of ‘access to justice’ in domestic and European courts.

### **Conclusion: Access to justice as foundation of legitimate IEL adjudication**

The constitutional law of the EU suggests that equal human and constitutional rights of EU citizens must be legally and judicially protected ‘as openly as possible and as closely as possible to the citizen’ (Article 1 of the TEU) placing ‘the individual at the heart of its activities’ (Preamble of the CFR). As discussed in section 2, HRL requires extending judicial and democratic *constitutional justice* to multilevel governance of transnational PGs for the benefit of EU citizens and their constitutional rights. In the twenty-first century, courts of justice and the EU’s multilevel, constitutional democracy derive their ultimate legitimacy from protecting the constitutional rights and equal remedies of EU citizens, including individual access to justice as protected in Article 47 of the CFR and in other multilevel constitutional guarantees of EU member States. *Ad hoc* investor-State arbitration is not a ‘court or tribunal of a Member State’ within the meaning of Article 267 of the TFEU; as clarified by the CJEU, it is inconsistent with the multilevel system of ‘remedies sufficient to ensure effective legal protection’ required by EU constitutional law (e.g., Article 19(1) of the TEU).<sup>84</sup> The reluctance of governments to refer to HRL in investor-State adjudication and WTO disputes may be justifiable by the narrow economic jurisdictions of these trade and investment courts. The structural biases of WTO and investment arbitration cannot be remedied by admitting third-party interventions and *amici curiae* submissions as advocates for adversely affected third-party interests and public interests, nor by the unsystematic, often insufficiently justified responses of *ad hoc* arbitrators to such third-party interventions and human rights concerns raised by third parties.

Also beyond the EU, reliance on the host State to present the relevant human rights issues to investment arbitrators may not be sufficient, for instance if governments collude in circumventing human rights obligations or have political self-interests in avoiding judicial accountability and in de-politicising investment disputes. As investor rights need to be reconciled with all other human and constitutional

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<sup>82</sup> *The Slovak Republic v. Achmea BV*. This arbitration award seems to leave open the question of whether also investor-state arbitration provided for in treaties concluded by the EU (like the Energy Charter Treaty, recent FTAs of the EU with Canada and Singapore) will be considered by the CJEU as being inconsistent with EU constitutional law.

<sup>83</sup> Opinion 2/15. See also the pending request from Belgium for Opinion 1/2017 by the CJEU under Article 218(11) of the TFEU on the consistency with EU law of the investor-State arbitration procedures in the EU-Canada CETA. A legal opinion by the German Association of Judges inferred from the jurisprudence of the CJEU and from German constitutional law that the CETA limitations of the jurisdiction of national and EU courts for investor-State disputes are neither necessary nor consistent with EU law in view of the alternative of more effective and more comprehensive legal and judicial remedies in European courts: ‘Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015’, Deutscher Richterbund Stellungnahme No. 04/16, February 2016, available at: [www.drj.de/fileadmin/pdf/Stellungnahmen/2016/DRB\\_160201\\_Stn\\_Nr\\_04\\_Europaeisches\\_Investitionsgericht.pdf](http://www.drj.de/fileadmin/pdf/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitionsgericht.pdf)

<sup>84</sup> *The Slovak Republic v. Achmea BV*.

rights of citizens, the civil society opposition against investor-State arbitration privileges is constitutionally justified. Sporadic, judicial initiatives by investment arbitrators to refer to HRL *ex officio* (e.g., to justify the use of ‘proportionality balancing’ of investor rights with other public interests as defined in the jurisprudence of regional human rights courts) for interpretative guidance lack a transparent legal methodology; they remain selective, notably in case of substantive human rights arguments beyond principles of procedural fairness, legal methodology and clarification of principles common to HRL and investment law (like scope of property rights). Judicial dismissals of human rights arguments are often criticised as reflecting biases in favor of protecting property and investor rights through investment law without adequate respect for the inalienable and indivisible nature of human rights.

Remedying the current situation that – apart from references to procedural rights and property rights – references in investment arbitration and WTO adjudication to civil, political, economic, social and cultural human rights and collective ‘third generation rights’ (like a people’s right to self-determination and indigenous peoples’ rights) remain rare and of marginal legal importance, would require legislative clarifications, for example of investment treaty provisions on jurisdiction (e.g., protecting only lawful investments contributing to the economic and social development of the host State), applicable law and systemic interpretation (e.g., acknowledging the human rights dimensions of sustainable development commitments and of corporate social responsibilities). If this cannot be achieved through treaty-amendments or new treaties, it can be promoted through political and judicial treaty interpretations clarifying the relevance of HLR for indeterminate treaty commitments (e.g., to promotion of ‘sustainable development’ in the Preamble of the WTO Agreement, ‘fair and equitable treatment’ in BITs). For example, the 2018 WTO panel reports on *Australia – Plain Packaging of Tobacco Products* recognised the 2001 Doha Declaration on the TRIPS Agreement and Public Health as a ‘subsequent agreement’ of WTO members in the sense of Article 31(3)(a) of the VCLT, which clarified the rights of WTO members to protect public health.<sup>85</sup> The diverging practices of ‘proportionality’-, ‘weighting’- and ‘compensation/quantification of damages’-methodologies may be reduced through more detailed judicial justifications, more judicial comity, judicial dialogues and academic clarifications of public reason. As the legal inconsistencies are often due to incoherent ‘legal perspectivism’ (e.g., different private or public law, national or international law, trade, investment or human rights law perspectives of economic actors, governments, national or international judges), this chapter has suggested doing what the customary law rules on treaty interpretation require, i.e., interpreting the private and public law, economic, administrative and constitutional law dimensions of IEL ‘in conformity with the principles of justice’ from the impartial perspective of constitutional justice for the benefit of citizens and their human and constitutional rights.

European economic integration law has been strongly influenced by leading human rights cases like the *Stauder*,<sup>86</sup> *Hauser*,<sup>87</sup> *Schmidberger*,<sup>88</sup> *Omega*,<sup>89</sup> the *Kadi*<sup>90</sup> judgments or, more recently, the *Polisario*<sup>91</sup> judgment of the CJEU. At the same time, WTO jurisprudence and investor-State arbitration - due to

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<sup>85</sup> *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, para. 7.2409.

<sup>86</sup> Case 29/69, *Erich Stauder v. City of Ulm*, ECLI:EU:C:1969:57, 12 November 1969.

<sup>87</sup> Case C-13/08, *Erich Stamm and Anneliese Hauser*, ECLI:EU:C:2008:774, 22 December 2008.

<sup>88</sup> Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*, ECLI:EU:C:2003:333, 12 June 2003.

<sup>89</sup> Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614, 14 October 2004.

<sup>90</sup> Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461, 3 September 2008.

<sup>91</sup> Case C-104/16 P, *Council v. Front populaire pour la libération de la sagaïa-el-hamra et du rio de oro (Front Polisario)*, ECLI:EU:C:2016:973, 21 December 2016.

their structural biases, inadequate judicial remedies, and narrow definitions of the applicable law without explicit references to HRL - continue to lack similar 'leading cases' clarifying the human rights dimensions of WTO law and investment law. Even though WTO law and most BITs include no references to HRL, the disconnect of intergovernmental WTO and investment law practices from effective democratic and judicial control by citizens needs to be challenged as neglecting the universal recognition of human rights. Transnational trade and investment adjudication must remain linked to human and constitutional rights of access to justice. Human rights require extending the citizen-driven *triangle of constitutional justice* – based on (1) dignity-based human rights of access to justice and to justification, (2) democratic constitutionalism and (3) impartial, independent third-party settlement of disputes affecting individuals and democratic self-government of peoples – to multilevel governance of transnational PGs, including IEL regulating the global division of labour as the most powerful social engine for transforming individual self-interests into common interests. If IEL is interpreted as a *law of citizens and peoples* rather than only of States, IEL adjudication must be embedded into republican and cosmopolitan constitutionalism protecting due process of law and equal rights not only among States, but also transnational rule of law and social welfare for citizens in their mutually beneficial, transnational cooperation.<sup>92</sup> Without recognition of citizens as 'democratic principals' of multilevel governance agents and use of judicial powers for protecting human rights, the democratic legitimacy and support of international trade and investment law and adjudication by citizens and local communities risk being further eroded.

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<sup>92</sup> Petersmann, 'Multilevel Constitutionalism', at 362ff.

