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Abstract

Arbitration and adjudication aim at protecting rule-of-law, which was a life-long concern for Prof. Giorgio Bernini. The United Nations (UN) have defined 'rule of law at national and international levels' as 'a principle of governance in which all persons, institutions and entities, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with internationally recognized human rights'. Such 'rule of law' has emerged in worldwide trade and investment law only since the 1990s with the 'judicialization' of GATT/WTO law and investor-state arbitration (ISA). Both the World Trade Organization (WTO) adjudication and ISA are today challenged: The power-oriented blockage of Appellate Body (AB) nominations by the USA has rendered the WTO AB dysfunctional; it re-introduced power-politics into the WTO dispute settlement system, limited by voluntary 'interim appellate arbitration'. ISA is rejected by some developing countries and inside the European Union as a threat to democratic constitutionalism. This contribution discusses these dialectic developments, i.e. ISA reforms aimed at strengthening 'public law adjudication' inside and beyond the European Union; the WTO appellate court system being transformed into voluntary arbitration in response to alleged 'judicial overreach'; and multilevel judicial cooperation inside the EU, where the German Constitutional Court has - for the first time since the beginning of European economic integration in the 1950s - refused complying with a judgment of the European Court of Justice (CJEU) on the ground that the CJEU and the European Central Bank exceeded their limited powers 'arbitrarily' due to their insufficient 'proportionality justification' of encroachment on national economic and fiscal policy powers. How can rule-of-law, constitutional and 'deliberative democracy' and judicial comity be protected in multilevel, judicial cooperation among national and international courts?

Keywords

adjudication; constitutionalism; democracy; investor-state arbitration; WTO appellate review

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From 'Rule-by-law' to 'Rule-of-law' through Judicial Remedies*

All human societies use law as an instrument of social ordering and governance. And in all human societies, abuses of 'rule-by-law' have led to 'struggles for justice' aimed at protecting 'rule-of-law'. The second half of the 20th century has seen an unprecedented increase in the number of international trade, investment, economic and other courts at bilateral, regional and worldwide levels of governance. They often interact – e.g. in commercial, trade and investment law, regional economic integration law, human rights law and criminal law - with domestic courts aimed at multilevel protection of transnational rule-of-law for the benefit of citizens. This contribution discusses some of the 'judicial comity' and 'complementarity' principles governing multilevel cooperation among national and international courts and arbitral tribunals in their joint protection of rule-of-law and 'access to justice'.

The legitimacy of specialized trade, investment and intellectual property courts and arbitration tribunals – e.g. in the sense of justification of their legal and judicial authority, protection of their independence, and their personal integrity vis-à-vis interest groups – remains contested in democratic and civil societies, similar to the civil society contestation of the 'politicization' of judicial appointments in national courts (e.g. in the USA).[1] Legitimacy challenges of courts depend on their diverse judicial mandates, subject matters, specific goals, design choices, applicable law, processes, audiences, institutional contexts and results:[2]

- *Normative legitimacy* is concerned with the 'right to rule' (e.g. to issue judgments, decisions or opinions) according to agreed standards; it explains why those addressed by an authority should comply with its mandates also in the absence of perceived self-interest or brute coercion.
- *Sociological legitimacy* derives from empirical analyses of perceptions or beliefs that an institution has a right to rule.
- Both the *internal legitimacy* (e.g. the perceptions of regime insiders like WTO diplomats) and *external legitimacy* (e.g. beliefs of outside constituencies like EU citizens, traders, producers, investors and consumers affected by trade and investment adjudication) may be based on *specific support* (e.g. of individual judgments) or *diffuse support* (e.g. individual's favorable dispositions toward a court generally, their willingness to tolerate unpalatable decisions, widespread criticism of the politicization of the appointment of judges in Poland).
- The overall *legitimacy capital* may increase or decline over time depending on source-, process- and result-oriented factors. For instance, due to the US blockage of the nomination of WTO AB judges since 2017, the AB has been reduced to one single member (from China) since 10 December 2019, in clear violation of the collective duties of WTO members to maintain the AB as defined in the WTO Dispute Settlement Understanding (DSU), e.g. as being 'composed of seven persons', with vacancies being 'filled as they arise', and being 'representative of membership in the WTO' (Article 17).

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* Emeritus professor of International and European Law and former head of the Law Department at the European University Institute, Florence, Italy. Former legal advisor in the German Ministry of Economic Affairs, GATT and the WTO; former secretary, member or chairman of GATT and WTO dispute settlement panels. This contribution has been accepted for publication in: F.Marella/N.Soldati (eds), Liber Giorgio Bernini: Arbitration and International Contract Law (2021).

1 R.H.Fallon, Law and Legitimacy in the Supreme Court (Cambridge Mass.: Harvard UP 2018); A.Cohen, Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America (Penguin Press 2019).

2 The following legitimacy criteria are explained in: N.Grosman/H.Grant Cohen/A.Follesdal/ G.Ulfstein (eds), Legitimacy and International Courts (Cambridge: CUP 2018).

- *Source-based legitimacy* of international courts may require not only consent by states, but also - due to the universal recognition of human rights - democratic consent of affected citizens and other non-state stakeholders (like the EU as a WTO member).
- *Process-based legitimacy* raises questions concerning, *inter alia*, the relevant parties and their procedural rights.
- *Result-oriented legitimacy* concerns how well international courts perform their functions (e.g. to settle disputes, protect rule of law, clarify indeterminate rules and principles) and enable the disputing parties to solve their problems (e.g. through rule-compliance).

According to Article 8 of the 1948 Universal Declaration of Human Rights, '(e)veryone has the right to an affective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. Since 1948, individual rights of access to national and international courts have been progressively extended in national and international legal systems, for instance in human rights, trade, investment and economic integration treaties.[3] The protection of a 'right to an effective remedy and to a fair trial' in Article 47 of the 2009 EU Charter of Fundamental Rights (EUCFR) provides:

> 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available for those who lack sufficient resources to ensure effective access to justice.'

From 'Constitutionalism 1.0' to Investor-State Arbitration and Multilevel Investment Adjudication

Like medicines were developed as rational remedies for the failures of the human body, constitutionalism and courts of justice emerged – since the ancient democratic Constitution of Athens and the republican Constitution of Rome more than 2400 years ago – as the most important legal and judicial remedies for political failures and abuses of rule-by-law. For example, in response to its past 'constitutional failures', post-1945 Germany recognized constitutional rights to democratic self-determination (based on Article 38.1 in conjunction with Article 20 Basic Law) and to judicial remedies enforceable in independent courts of justice (Article 19).

Constitutional foundations of commercial and investment arbitration

Constitutional democracies also protect equal private autonomy rights and judicial remedies in the field of commercial arbitration subject to the proviso that national courts (e.g. if requested to enforce private commercial arbitration awards) must review the legal consistency of the awards with the 'public policy' and constitutional law in the country where the complainant seeks recognition and enforcement of the award. Due to the worldwide recognition of human rights, 'public policy' considerations are increasingly recognized to include also procedural human rights of access to justice and substantive (e.g. *jus cogens*) human rights guarantees.[4] Constitutional self-limitation of private and public, domestic and foreign policy powers ('constitutionalism 1.0') has a long tradition in Kantian legal theory, which underlies Germany's constitutional commitments to human dignity and maximum equal freedoms in Articles 1 and 2 of the German Basic Law. It also contributed to Germany's 'exportation of principles of justice', since 1959, through more than 135 bilateral investment treaties (BITs) protecting foreign direct investments through reciprocal guarantees of non-discrimination, full protection and security, fair

3 Cf. M.Kamto/Y.Tyagi (eds), The Access of Individuals to International Justice (Hague Academy of International Law 2019).

4 Cf. A.Jaksic, Arbitration and Human Rights (Frankfurt: Lang 2002).

and equitable treatment, access to judicial remedies and other legal protection standards. Following the conclusion of BITs for protecting foreign investments in less-developed host countries, the 1966 Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID) provided a multilateral, procedural framework for ISA and for judicial enforcement of arbitration awards in the today 163 ICSID member states. The more than 775 ICSID investor-state arbitration proceedings (2019) and the, altogether, more than 1000 known investment arbitrations cases have given rise to increasing criticism, for instance on the ground that BITs, ISA and commercial arbitrators privilege foreign investor rights without adequate regard to the regulatory duties of host states to protect human and constitutional rights of all citizens, and without adequate reconciliation of investment regulation with all other economic and non-economic public interest regulation.[5]

Constitutional limitations of investor-state arbitration

The 2018 Achmea judgment of the EU Court of Justice (CJEU)[6] - according to which ISA in relations among EU member states is inconsistent with the EU constitutional law guarantees of the autonomy of EU law, the exclusive jurisdiction of the CJEU for interpreting EU law, and with multilevel judicial protection of individual rights and judicial remedies by the CJEU in cooperation with national courts – illustrates how Europe's multilevel constitutionalism has imposed constitutional restraints on path-dependent conceptions of commercial autonomy and state sovereignty. The CJEU continues to recognize private party autonomy to submit private and commercial law disputes to private arbitration. Yet, according to the Achmea judgment, both private legal autonomy and the national sovereignty of EU member states have become limited by the autonomy of EU constitutional law to the effect that the more than 200 intra-EU BITs among EU member states can no longer justify ISA in view of the EU Treaty provisions reserving multilevel judicial protection of EU law, individual rights and non-discriminatory treatment to national courts and European courts.[7] In January 2019, EU member states adopted three Declarations committing themselves

- to the termination of their intra-EU BITs before the end of 2019;
- to request all courts to set aside arbitration awards based on intra-EU BITs; and
- to inform ISA tribunals in all pending cases about the legal consequences of the Achmea judgment.[8]

According to the EU Commission, the legal reasoning of the Achmea judgment - which concerned an intra-EU BIT providing for ISA governed by the UN Commission for International Trade Law (UNCITRAL) arbitration procedures, with EU law being part of the applicable law – applies also to ISA governed by the Energy Charter Treaty (ECT) and by ICSID procedures; it requires a 'modernization' of the ECT and ICSID procedures for ISA similar to the EU initiatives for a new 'investment court system' in EU trade and investment agreements with third countries. Another agreement on the termination of BITs among 23 EU member states of 6 May 2020 confirmed the incompatibility with EU law of ISA among EU member states, including 'sunset clauses' in such BITs; all related investment

5 Cf. S.Puig, Debiasing International Economic Law, in: EJIL 30 (2020), 1339-1357. On the neglect for human rights in ISA see: E.U.Petersmann, Can Invocation of Human Rights Enhance Justice and Social Legitimacy in Investment Adjudication? In: Indian Journal of International Economic Law XII (2020), 58-105.

6 Case C-284/16 The Slovak Republic v. Achmea BV [2018] ECLI:EU:C:2018:158.

7 Cf. CJEU (n 6), referring especially to Articles 18 TFEU (prohibition of discrimination), Article 19 TEU (judicial protection of rule-of-law in the EU), 267 TFEU (preliminary rulings reference procedure), 344 TFEU (exclusive jurisdiction of the CJEU for interpreting EU law), to 'the preservation of "the particular nature" of EU law' and of the 'EU principle of mutual trust'. The judgment did not review the compatibility of the substantive clauses of intra-EU BITs with EU law.

8 For a detailed analysis of these Declarations and of the legal consequences of the Achmea judgment on ISA proceedings and on intra-EU BITs see: M.Fanou, The EU as an Actor Shaping the Future of ISDS: Unveiling the interplay between the clash of two autonomies and the reform of investor-State arbitration (EUI doctoral thesis publicly defended on 14 February 2020).

disputes must now be decided by domestic courts in these EU member states with preliminary rulings by the CJEU, if required.[9] Yet, many legal questions regarding the relationships between intra-EU arbitration awards based on the ECT or ICSID procedures and enforcement actions by national courts inside EU member states remain controversial.[10] Opinion 1/2017, in which the CJEU interpreted the ISA provisions in the EU-Canada Comprehensive Economic and Trade Agreement as being consistent with EU law,[11] could suggest that the CJEU may support the view of the EU Commission that also ECT and ICSID arbitration procedures need to be 'modernized' in order to make them compatible with EU constitutional law principles. Based on the Lisbon Treaty's conferral of exclusive EU competence for the common commercial policy, including foreign direct investment, the EU Commission continues to pursue international negotiations aimed at transforming ISA into multilateral investment court systems, for instance by modernizing the UNCITRAL-, ECT- and ICSID arbitration procedures and ISA provisions in EU trade and investment agreements with third states. It remains uncertain how the on-going reform negotiations (e.g. in UNCITRAL and ICSID institutions) will respond to the widespread criticism of traditional ISA – like the lack of an appeal mechanism, insufficient transparency and incoherence of ISA jurisprudence, inadequate independence and impartiality of arbitrators, pro-investor biases threatening the regulatory powers of host states, limiting access to justice, burdening tax-payers and undermining the legitimacy of ISA – by improving the UNCITRAL-, ICSID- and other ISA procedures and protection standards. If economic efficiency is determined also by voluntary compliance with democratically agreed rules protecting informed preferences of citizens, the progressive replacement of FDI privileges by more inclusive investment rules and investment court procedures protecting all affected citizen interests more comprehensively offers social, democratic and legal advantages enhancing also 'economic efficiency' and rule-of-law.[12]

From 'Constitutionalism 2.0' to Multilevel Judicial Protection of Rule-of-law in International Trade

Constitutionalism 2.0 refers to multilateral treaty 'constitutions' establishing worldwide organizations for multilevel governance of public goods (PGs), like the constitutions (*sic*) establishing the International Labor Organizations (ILO), the World Health Organization (WHO), the Food and Agriculture Organization (FAO) and the UN Educational, Scientific and Cultural Organization (UNESCO).[13] Each of these UN Specialized Agencies is embedded into the broader UN system (establishing global security, human rights and development systems); it justifies the respective mandates to protect global 'aggregate PGs' by labor rights (ILO), health rights (WHO), rights to food (FAO), and rights to education and participation in the benefits of science and cultural development (UNESCO).

9 Cf. the Blog Post by M.Fermeglia/ A.Mistura, Killing all Birds with One Stone: Is this the End of Intra-EU BITs? in: EJIL Talk of 26 May 2020.

10 In the Micula et alii v Romania ICSID Case No. ARB/05/20, the final award of 11 December 2013 ordered Romania to pay compensation for the revocation of state aid that had been found by the EU Commission to violate EU state aid prohibitions. The investors successfully challenged in the EU General Court the European Commission's decision to block the enforcement of the award (Cases T-624/15, T-694/15 and T-704/15 Micula and Others v Commission, ECLI EU:T:2019:423 of 18 June 2019); the appeal by the Commission is pending before the CJEU.

11 Case C-1/17, EU:C:2019:341 (30 April 2019).

12 Cf. E.U.Petersmann, Ten Lessons from 'Institutional Economics' for Designing Multilateral Trade and Investment Institutions, in: EUI Law Working Paper 2020-05, at 24ff.

13 On the historical development from 'constitutionalism 1.0' to 'constitutionalism 4.0' see E.U.Petersmann, Multilevel Constitutionalism for Multilevel Governance of Public Goods – Methodology Problems in International Law (Oxford: Hart 2017), 321ff.

The GATT/WTO dispute settlement system

Due to the utilitarian 'neo-liberalism' driving the eight 'GATT Rounds' of multilateral trade liberalization and reciprocal regulation, the GATT/WTO were deliberately kept outside of the UN system. Paradoxically, it was the 1994 WTO Agreement that succeeded in establishing a worldwide, multilevel and compulsory dispute settlement system aimed at protecting rule-of-law in international trade at national and international levels.[14] The 316 disputes under GATT 1947 and the 1979 Tokyo Round Agreements[15], and the more than 600 formal dispute settlement proceedings under the WTO Agreement (1995-2020), protected – for the first time in world history - transnational rule-of-law in trade relations among now 164 WTO members. The complex GATT/WTO jurisprudence approved by GATT/WTO members clarified the rights and duties under international trade law with due regard to general international law and the more than 400 free trade agreements concluded among GATT/WTO members (often providing for additional judicial remedies). As more than 85% of the more than 500 GATT/WTO panel, appellate and arbitration findings were approved and implemented by GATT/WTO members, the GATT/WTO dispute settlement system was the most frequently used, worldwide dispute settlement system in the history of international law. Even if most GATT/WTO members did not allow 'direct application' and judicial enforcement of GATT/WTO obligations in their domestic jurisdictions, many GATT/WTO disputes were preceded or followed by domestic court proceedings (e.g. challenging illegal trade remedies). The global 'interpretive community' of trade lawyers, academics and judges analyzing and developing GATT/WTO law and jurisprudence strengthened this 'international trade law culture' institutionalizing 'public reason' (e.g. in the sense of shared systems of public justification of multilevel trade rules and of their decentralized enforcement), providing for 'security and predictability to the multilateral trading system' (Article 3 DSU), and reducing transaction costs in the global division of labor.

The illegal US assault on the WTO Appellate Body

The 1979 Tokyo Round and 1994 WTO agreements on trade remedies and trade-related intellectual property rights (TRIPS) extended the 'neo-liberal, regulatory capture' inside US trade policies to parts of the worldwide trading system. This contributed to increasing controversies in the WTO dispute settlement system regarding WTO disputes on anti-dumping measures, countervailing duties, safeguard measures and intellectual property rights. At the insistence of US trade negotiators, DSU provisions limited 'due process of law' in unreasonable ways, for instance by prescribing DSU deadlines for appellate review within 60-90 days in order to comply with the deadlines in US trade remedy laws. The trade policies of the US Trump administration were dominated by former US trade remedy lawyers (like R. Lighthizer) and other former US lobbyists (like WTO ambassador Shea), who progressively attacked and ignored WTO rules and jurisprudence (e.g. WTO constraints on trade remedies and on 'bilateral trade deals' exploiting US power vis-à-vis other WTO members).[16] China's totalitarian, state-capitalist trading practices, and the unwillingness of less-developed WTO countries (like India) to engage in reciprocal trade liberalization/regulation, further undermined US support for the WTO system. The legal justifications by the Trump administration of their illegal 'blocking', since 2017, of the WTO AB nominations insisted on US interpretations of WTO rules and US criticism of AB findings without any

14 On the multilevel guarantees in GATT/WTO law of access to domestic courts and to (quasi)judicial remedies in GATT/WTO bodies see: E.U.Petersmann, The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement (Deventer: Kluwer 1997).

15 Cf. the list and analyses of cases in: GATT Disputes 1948-1995, 2 vols. (WTO Geneva 2018).

16 Cf. E.U.Petersmann, The 2018 Trade Wars as a Threat to the World Trading System and to Constitutional Democracies, in: Trade, Law and Development X (2018), 179-225. On the money-driven 'Washington consensus' and 'regulatory capture' of neo-liberal US trade policies, the constitutionally more constrained 'Brussels consensus' on rights-based European ordo-liberalism, and the 'Geneva consensus' (P.Lamy) limiting WTO Appellate Body jurisprudence see: E.U.Petersmann, The WTO Legal and Dispute Settlement Systems in Times of Global Governance Crises, Max Planck Institute MPIL Research Paper 2020-28.

evidence that legal interpretations by the AB violated the customary rules of treaty interpretation or the (quasi)judicial AB mandate for impartial, independent and prompt third-party adjudication through quasi-automatic adoption of the WTO panel and AB reports by the Dispute Settlement Body (DSB). The 2020 USTR Report on the alleged 'over-reach' in AB jurisprudence – notwithstanding its valid criticism of some WTO rules and dispute settlement practices (e.g. that the AB no longer consults with the parties when deciding to disregard the Article 17.5 deadline of 90 days) – revealed systemic biases and false claims such as:

- US denial of (quasi)judicial functions of WTO third-party adjudication, even though numerous WTO publications and WTO dispute settlement reports over more than 20 years acknowledged the (quasi)judicial mandates of WTO dispute settlement bodies (i.e. WTO panels, the AB and the quasi-automatic adoption of their reports by the DSB unless there is 'negative consensus' on rejecting the findings, which never happened);
- US disregard for judicial AB arguments in the performance of the DSU's mandate 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Article 3 DSU), for instance whenever the AB found compliance with the time limit of 90 days (Article 17.5 DSU) – which was imposed by US negotiators in 1993, notwithstanding widespread criticism that no other court seems to be limited by such an unreasonably short time limit – impossible to reconcile with the other AB tasks (e.g. due to illegal US blocking of the filling of AB vacancies);
- contradictory USTR claims that AB legal findings against the US violated the DSU prohibition to 'add or diminish the rights and obligations in the covered agreements' (Article 3.2 DSU) – even if the AB had justified the legal findings on the basis of the customary rules of treaty interpretation and its (quasi)judicial mandate -, notwithstanding the USTR's regular support of AB reports accepting 'creative WTO interpretations' advocated by the USTR as a legal complainant;
- US description of US 'zeroing practices' as a 'common-sense method of calculating the extent of dumping'[17] even if their biases had been consistently condemned by the AB and DSB as violations of the WTO obligations of 'fair price comparisons' (which are hardly mentioned in the USTR report);
- one-sided focus on WTO texts as interpreted by US negotiators without regard to the customary law and DSU requirements to clarify the meaning of the often indeterminate WTO provisions with due regard also to WTO legal texts revealing the 'context, object and purpose' of WTO provisions and the explicitly recognized 'systemic character' of what the WTO Agreement calls 'this multilateral trading system' (Preamble) and its 'dispute settlement system' (Article 3 DSU);
- denigration of AB members as 'three unelected and unaccountable persons'[18] whose 'overreaching violates the basic principles of the United States Government' (USTR Report, Introduction), notwithstanding the election of AB members through consensus decisions of all DSB member governments (including the US), their (quasi)judicial mandate, and the approval of WTO agreements (including the DSU) by the US government and US Congress;
- insulting and unjustified claims that the AB Secretariat had weakened the WTO dispute settlement system by not respecting WTO rights and obligations.[19]

The USTR Report acknowledges that its purpose 'is not to propose solutions'.[20] It repeated what the US ambassador had stated in DSB meetings since 2017: 'WTO Members must come to terms with the failings of the Appellate Body set forth in this Report if we are to achieve lasting and effective reform

17 United States Trade Representative (USTR), Report on the Appellate Body of the WTO, Washington February 2020, at 2.

18 Idem, at 8, 13.

19 Idem, at 120.

20 Idem, at 121.

of the WTO dispute settlement system'.[21] Yet, nothing suggests that – if WTO members should accept the false US claims of the AB's 'persistent overreaching […] contrary to the Appellate Body's limited mandate', and 'the Appellate Body's failure to follow the agreed rules' – the US would be willing to comply with its DSU obligation of filling AB vacancies 'as they arise'[22] and return to WTO third party adjudication, appellate review, customary rules of treaty interpretation and 'judicial interpretations' for the 'prompt settlement' of WTO disputes, as prescribed in the DSU. Past WTO members' 'appeasement' of false USTR claims (e.g. in WTO Ambassador Walker's informal mediation proposal of October 2019 for overcoming the WTO dispute settlement crises) never changed the USTR's refusal to return to WTO third party adjudication as prescribed in the DSU. Since the mandates of two AB judges expired on 10 December 2019, the AB has become reduced to one single judge; it lacks the 'quorum' for accepting new appeals.

From the WTO Appellate Body to 'Multi-Party Interim Appellate Arbitration'

The 'Economic and Trade Agreement' signed by China and the US on 15 January 2020 provides for discriminatory Chinese commitments to buy US products, discriminatory US import tariffs and trade restrictions (e.g. targeting Chinese technology companies) without third-party adjudication. This bilateral 'opt-out' – by the two largest trading nations – from their WTO legal and dispute settlement obligations seems to be the policy option preferred by USTR officials prioritizing 'bilateral US trade deals'; they publicly reflect also on US withdrawal from the WTO Agreement on Government Procurement, and on 'unbinding' US tariff and market access commitments, in order to better use power asymmetries for rebalancing bilateral US trade deficits through bilateral reciprocity negotiations. The US-China trade deal provides for dispute settlement through unilateral USTR determinations; this unilateralism illustrates the hegemonic trade mercantilism, which USTR Lighthizer would like to impose on the rest of the world.[23] The US invocation of the 'security exception' in GATT Article XXI (e.g. for imposing import restrictions on steel and aluminum) illustrates how the Trump administration circumvents WTO rules (e.g. GATT Articles I, II and III) and dispute settlement procedures whenever it suits President Trump and US interest group politics. Whether the EU's initiative for 'Multi-Party Interim Appeal' (MPIA) arbitration based on Article 25 DSU[24] - as a temporary substitute for the dysfunctional AB - can protect the WTO dispute settlement system against increasing power politics, remains to be seen. The nationalist unilateralism and disdain of the US Trump administration for multilateral agreements and third-party adjudication impede reforms of the WTO legal and dispute settlement systems.

'Constitutionalism 3.0': Multilevel Judicial Governance inside the EU and its Constitutional Limits

The UN has defined 'rule of law at national and international levels' as 'a principle of governance in which all persons, institutions and entities, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with

21 USTR Report, Introduction.

22 DSU Article 17.2.

23 Cf. 'Superpower showdown – trading blows in a new cold war', Financial Times 4 July 2020 (citing USTR Lighthizer as publicly stating: 'The only fucking arbitrator I trust is me'). On USTR R.Lighthizer's career as a Washington trade remedy lawyer (notably representing US steel industries) and former USTR negotiator of 'voluntary export restraints' and other bilateral trade deals see: Q.Slobodian, You Live in Robert Lighthizer's World Now, Foreign Policy 6 August 2018.

24 The text of the MPIA was notified to the WTO in WTO document JOB/DSB/1/Add.12 of 30 April 2020 and was accepted, so far (July 2020), by the EU and 21 other WTO members.

internationally recognized human rights'.[25] All UN member states have accepted, for instance in their UN Declaration on the 'Rule of Law at National and International Levels' of November 2012,

- 'that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations';
- 'the rule of law and development are strongly interrelated and mutually reinforcing', and 'the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms'.[26]

The history of democratic constitutionalism confirms that limitation of abuses of majoritarian governance powers requires not only constitutional restraints and corresponding, constitutional rights and judicial remedies of citizens; there is also a need for non-majoritarian institutions (like courts of justice, independent central banks, competition policy institutions, regulatory agencies) protecting PGs and rules-based 'checks and balances' restraining discretionary governance powers. In an interdependent world, judicial administration of justice requires 'comity' and cooperation among domestic and international courts of justice in their joint task of protecting rule-of-law at national and international levels.[27]

Multilevel judicial adjudication inside the European Union

From the beginnings of European integration in the 1950s up to the Maastricht Treaty of 1992, the progressive transformation of European economic integration into a multilevel constitutional order was driven by the jurisprudence of the CJEU (e.g. on legal primacy, direct effect, direct applicability of EU law, judicial protection of human and constitutional rights, implied EU powers) and its acceptance and enforcement inside EU member states. Successive treaty reforms (e.g. introducing direct elections of the European Parliament and its co-decision powers) and independent EU institutions (like the EU Commission as guardian of non-discriminatory conditions of competition) maintained a 'political equilibrium' respecting 'exit, voice and loyalty'.[28] From the 1992 Maastricht Treaty (e.g. consolidating the EU's 'single market', introducing the Economic and Monetary Union) up to the 2009 Lisbon Treaty (TEU), EU member states continued 'constitutionalizing' EU law, for instance by the EU Charter of Fundamental Rights and by progressively improving the EU's micro-economic 'common market constitution', macro-economic 'monetary constitution' and multilevel 'foreign policy constitution'[29], thereby maintaining democratic support based on input-legitimacy, output-legitimacy and respect for multilevel 'constitutional pluralism'. All national courts inside the EU, the CJEU and also the European Court of Human Rights (ECtHR) refer to European human rights law and common market law among EU member states as multilevel constitutional systems.[30]

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25 Cf. Report of the Secretary-General, Delivering Justice: programme of action to strengthen the rule-of-law at the national and international levels, A/66/49 of 16 March 2012, para. 2.

26 UN General Assembly Resolution adopted on 30 November 2012, A/RES/671, paras. 5, 7.

27 Cf. N.Lavranos, The Systemic Responsibility of the ECJ for Judicial Comity towards International Courts and Tribunals, in: M.Cremona et alii (eds), Reflections on the Constitutionalisation of International Economic Law. Liber Amicorum for E.U.Petersmann (Leiden: Brill 2014), 51-64; E.U.Petersmann, 'Constitutional Justice' Requires Judicial Cooperation and 'Comity' in the Protection of 'Rule of Law', in: F.Fontanelli/G.Martinico/P.Carozza (eds), Shaping Rule of Law Through Dialogue (Europa Law Publishing 2009), 1-19.

28 Cf. J.Weiler, The Transformation of Europe, Yale Law Journal 100 (1991), 2403-2483; M.P.Maduro/M.Wind (eds), The Transformation of Europe Twenty-Five Years After (CUP 2017).

29 Cf. E.U.Petersmann, The EU's Cosmopolitan Foreign Policy Constitution and its Disregard in Transatlantic Free Trade Agreements, in: European Foreign Affairs Review 21 (2016), 449-469.

30 Cf. R.Schütze, European Constitutional Law (CUP 2012).

Ultra vires acts and judicial review in the EU

The global financial crisis since 2008, Britain's 'Brexit' referendum of 2016, the hegemonic US assault on the world trading system since 2017, the EU Parliament's declaration of a 'global climate emergency' in November 2019, and the Covid-19 health pandemic of 2020 illustrated successive regulatory challenges testing the limits of EU law and policies, and of their implementation inside EU member states (e.g. in southern EU member states disregarding EU fiscal and debt disciplines, in Hungary and Poland disregarding EU constitutional rights and rule of law). Just as the US Trump administration justified its illegal destruction of the WTO AB by alleged 'judicial overreach' in the AB jurisprudence, so are the limits of jurisdiction of international courts increasingly contested also in other international institutions like the International Court of Justice, ISA and regional courts like the CJEU. For instance, in its judgment of 14 July 2020, the ICJ held that in the course of examining applicable legal defences (like self-defence and countermeasures invoked by Saudi Arabia), a dispute settlement body may also examine and determine, incidentally, all other legal issues whose judicial examination is necessary for making a ruling on the applicability of the defences.[31] Yet, such expansive interpretations of the incidental jurisdiction of international courts remain contested both from the point of view of state sovereignty (e.g. US claims of 'judicial overreach' by the WTO AB) and in multilevel constitutional systems based on conferral of limited powers subject to constitutional restraints (e.g. in relations among national courts, the CJEU, the EFTA Court and the ECtHR). How should international institutions (like the EU, the WTO) and international courts (like the CJEU, the WTO AB) respond to claims that international institutions exceeded the limited powers delegated by their member states?

The judgment of Germany's Federal Constitutional Court (FCC) of 5 May 2020[32] concerned constitutional complaints, initiated in 2015 on behalf of more than 1700 citizens contending, *inter alia*, that the European Central Bank (ECB) decisions introducing the Public Sector Asset Purchase Program (PSPP) and the Corporate Sector Purchase Program (CSPP) constituted *ultra vires* acts violating the EU prohibition of monetary financing (Article 123.1 TFEU) and the principle of conferral of limited EU powers (Article 5.1 TEU in conjunction with Arts. 119, 127 ff TFEU). The complainants asserted violations of their constitutional rights to democratic self-determination and of the constitutional identity enshrined in Germany's Basic Law to the extent that the ECB programs infringed the budgetary powers of the German *Bundestag*. They challenged the omission on the part of the Bundestag, the Federal Government and the Federal Central Bank to take steps against the PSPP; they sought a judicial declaration from the FCC that the Federal Government and the Bundestag violated their constitutional responsibilities with regard to European integration. In 2017, the second senate of the FCC suspended the proceedings and referred a number of related questions to the CJEU for a preliminary ruling pursuant to Article 267.1 TFEU. By judgment of 11 December 2018[33], the CJEU responded that its consideration of the questions from the FCC had disclosed no factor of such a kind as to affect the validity of the ECB decisions concerned. The FCC judgment of 5 May 2020 declared the constitutional complaints 'well-founded to the extent that they challenge the omission on the part of the Federal Government and the Bundestag to take suitable steps to ensure that the ECB, by means of purchasing securities under the PSPP, does not exceed its monetary policy competence and encroach upon the economic policy competence of the Member States' (para. 97). The 'headnotes' summarizing the judgment explain its 'methodological premises' by the following two initial paragraphs:

31 International Court of Justice, Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Quatar) and Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2 of the 1944 International Air Services Transit Agreement (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Quatar), 14 July 2020.

32 Bundesverfassungsgericht 2 BvR 859/15, 1651/15, 2006/15 and 980/16; an English translation of the judgment is available on the website of the FCC: https://www.bundesverfassungsgericht.de.

33 CJEU, Weiss and others, C-493/17, EU:C:2018:1000.

1. 'Where an *ultra vires* review or an identity review raises questions regarding the validity or the interpretation of a measure taken by institutions, bodies, offices and agencies of the European Union, the Federal Constitutional Court, in principle, bases its review on the understanding and the assessment of such a measure as put forward by the Court of Justice of the European Union.'
2. 'The Court of Justice of the European Union exceeds its judicial mandate, as determined by the functions conferred upon it in Article 19(1) second sentence of the Treaty on European Union, where an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective. If the Court of Justice of the European Union crosses that limit, its decisions are no longer covered by Article 19(1) second sentence of the Treaty on European Union in conjunction with the domestic Act of Approval; at least in relation to Germany, these decisions lack the minimum of democratic legitimation necessary under Article 23(1) second sentence in conjunction with Article 20(1) and (2) and Article 79(3) of the Basic Law'.[34]

The FCC findings regarding *ultra vires* acts resulting from insufficient proportionality balancing undermining the democratic legitimation of limited EU powers were based, *inter alia*, on the following conclusions:

- 'The democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law's constitutional identity protected in Art. 79(3) GG; it is therefore beyond the reach of European integration in accordance with Art. 23(1) third sentence in conjunction with Art. 79(3) GG' (para 101).
- 'The Basic Law … prohibits conferring upon the European Union the competence to decide on its own competences (Kompetenz-Kompetenz)'… 'dynamic treaty provisions must be subject to suitable safeguards that enable the German constitutional organs to effectively exercise their responsibility with regard to European integration' (para 102).
- 'It is for the German Bundestag, as the organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core of Art. 20(1) and (2) GG, which is beyond the reach of constitutional amendment'… 'a transfer of sovereign powers violates the principle of democracy at least in cases where the type and level of public spending are, to a significant extent, determined at the supranational level, depriving the Bundestag of its decision-making prerogative' (para 104).
- 'Where measures taken by institutions, bodies, offices and agencies of the European Union exceed the limits of the European integration agenda (*Integrationsprogramm*) in a manifest and structurally significant manner, it is incumbent upon the Federal Government and the Bundestag to actively address the question how the order of competences can be restored and to make a positive determination as to which course of action to pursue' (para 109).
- 'While the Federal Constitutional Court must review substantiated *ultra vires* challenges regarding acts of institutions, bodies, offices and agencies of the European Union, the Treaties confer upon the CJEU the mandate to interpret and apply the Treaties and to ensure uniformity and coherence of EU law (cf. Art. 19(1) subpara. 2 TEU, Art. 267 TFEU); it is imperative that the respective judicial mandates be exercised in a coordinated manner'… 'the Member States remain the "Masters of the Treaties" and the EU has not evolved into a federal state' (para 111).
- 'The *ultra vires* review must be exercised with restraint, giving effect to the Constitution's openness to European integration'… 'The methodological standards recognized by the CJEU for the judicial development of the law are based on the (constitutional) legal traditions common to

34 Article 19(1) TEU reads: 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

the Member States (cf. also Art. 6(3) TEU, Art. 340(2) TFEU), which are notably reflected in the case-law of the Member States' constitutional and apex courts and of the European Court of Human Rights'… 'the mandate conferred in Article 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of the Member States are manifestly disregarded'… (para 112).

- 'If the CJEU crosses the limit set out above, its actions are no longer covered by the mandate conferred in Article 19(1) second sentence TEU in conjunction with the domestic Act of Approval; at least in relation to Germany, its decision then lacks the minimum of democratic legitimation necessary under Art. 23(1) second sentence in conjunction with Article 20(1) and (2) and 79(3) GG' (para 113).
- 'Where such acts of institutions, bodies, offices and agencies of the European Union give rise to effects that bear on Germany's constitutional identity enshrined in Art. 1 and 20 GG, they exceed the limits of open statehood set by the Basic Law'… 'This concerns the protection of the human dignity core enshrined in fundamental rights under Art. 1 GG'… 'as well as the basic tenets that inform the principles of democracy, the rule of law, the social state and the federal state within the meaning of Art. 20 GG. With a view to the principle of democracy enshrined in Art. 20(1) and (2) GG, it must *inter alia* be ensured that the German Bundestag retain for itself functions and powers of substantial significance'… 'and that it remain capable of exercising its overall budgetary responsibility' (para 115).
- 'Based on these standards, the Federal Government and the German Bundestag violated the rights of the complainants'…. 'by failing to take suitable steps challenging that the ECB, in Decision (EU) 2015/774 as amended'…. 'neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality. In light of this, Decision (EU) 2015/774 and amending Decisions' … 'constitute a qualified, i.e. manifest and structurally significant, exceeding of the competences assigned to the ECB in Art. 119, Art. 127 *et seq*. TFEU and Art. 17 *et seq*. ESCB Statute. The differing view of the CJEU set out in its Judgment of 11 December 2018 does not merit a different conclusion, given that on this point, the judgment is simply not comprehensible so that, to this extent, the judgment was rendered *ultra vires*'… 'Nevertheless, it cannot be definitively determined whether the ECB decisions at issue satisfy the principle of proportionality'…[35]

In worldwide organizations like the WTO, the customary rules of treaty interpretation – as codified in the Preamble and Arts 31-33 of the Vienna Convention on the Law of Treaties (VCLT) - serve as methodological standards for examining alleged *ultra vires* acts like 'judicial overreach' by the WTO AB. These customary rules prescribe interpretation based not only on the text, context, object and purpose of treaty provisions; treaty interpretation must also remain 'in conformity with the principles of justice of international law', including also 'human rights and fundamental freedoms for all' (Preamble VCLT). This 'methodology standard' for evaluating 'judicial overreach' was ignored in the power politics of the US Trump administration intent on ridding itself of the judicial review by the AB.

The 'methodology standard' of the VCLT can be interpreted consistently with what the FCC describes as 'the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of the Member States' as 'methodological standards' for reviewing alleged *ultra vires* acts of EU institutions. German constitutional law, the Lisbon Treaty and their multilevel judicial

35 These incomplete excerpts from the long FCC judgment are sufficient for the limited purposes of this article, whose page limitations do not allow a more complete review of the FCC's legal finding that the CJEU rendered the proportionality review meaningless by neglecting the effects of the ECB decisions on national economic and social policies, and by not weighing these effects against the monetary policy objectives of the ECB decisions, thereby affording the ECB a de facto power to decide on the scope of its monetary policy powers (e.g. by using them for economic and fiscal policy purposes without democratic legitimation and control, thus circumventing the prohibition of monetary financing in Article 123(1) TFEU).

interpretation and application illustrate 'systemic constitutional problems' of multilevel governance of 'aggregate PGs' (like transnational economic markets, rule-of-law, democratic governance, multilevel judicial remedies) that are of importance also in multilevel governance of global PGs (e.g. in the WTO) and related judicial challenges (e.g. of the AB and ISA). The remainder of this article illustrates some constitutional limits of multilevel, judicial protection of transnational rule-of-law by briefly discussing the principles of limited delegation of powers, democracy and judicial protection of rule-of-law as constitutional restraints on 'judicial overreach'.

The principle of limited delegation of powers

All international organizations for multilevel governance of transnational PGs operate on the basis of limited delegation of powers by member states. Democratic constitutions delegate governance powers to majoritarian institutions (like parliaments and elected governments) and non-majoritarian institutions (like central banks and courts of justice) subject to requirements of rule-of-law and judicial remedies. As emphasized by the FCC in the above-mentioned judgment on *ultra vires* acts of EU institutions, they don't confer on international organizations 'competence-competence' to enlarge their limited powers for imposing new obligations without consent of member states. The WTO's DSU, for instance, acknowledges: 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements' (Arts 3.2); also 'the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements' (Article 19.2). These provisions, introduced during the Uruguay Round negotiations at the request of the US delegation, are construed in WTO jurisprudence in conformity with the recognition by member states that the DSU 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Art. 3.2 DSU). Even though the customary rules of treaty interpretation are rarely specifically mentioned in the jurisprudence of national and European courts clarifying EU Treaty provisions, national, European and WTO judicial bodies follow similar judicial methodologies of 'systemic treaty interpretation' (Article 31.3,c VCLT) by clarifying treaty provisions on the basis of other treaty obligations and general principles of law common to the member states. Hence, according to the AB, WTO legal interpretations clarifying WTO provisions in conformity with the customary rules of treaty interpretation cannot simultaneously violate the DSU prohibitions of 'add(ing) to or diminish(ing) the rights and obligations provided in the covered agreements' (Articles 3.2 and 19.2 DSU).[36] Arguably, the same 'systemic treaty interpretation' justifies also the above-mentioned *Achmea* judgment of the CJEU that ISA in relations among EU member states has become inconsistent with EU constitutional principles (e.g. on fundamental rights) and EU judicial remedies.

Article 5.1 TEU clarifies the 'principle of conferral' by specifying: 'The use of Union competences is governed by the principles of subsidiarity and proportionality'. In its judicial examination of whether the contested ECB decisions and the related CJEU judgment were consistent with the 'proportionality principle' as defined in the common constitutional traditions of EU member states as applied by their highest courts, the German FCC criticized both the ECB decisions and the related judgment of the CJEU for failing to examine whether the ECB's use of monetary policy instruments disproportionately affected the economic and fiscal policy competences of EU member states; according to the FCC, they 'manifestly fail(ed) to give consideration to the importance and scope of the principle of proportionality (Art. 5(1) second sentence and Art. 5(4) TEU), which also applies to the division of competences'.[37] This kind of criticism of insufficient explanation and justification of 'proportionality balancing', 'judicial overreach' and administrative '*ultra vires* acts' has, so far, not been raised in the context of

36 Cf. AB Report, WT/DS110/AB/R, Chile-Alcoholic Beverages (2000), para.79. For an explanation of the interpretative approaches of the AB see: P.Van den Bossche/W.Zdouc, The Law and Policy of the World Trade Organization. Text, Cases and Materials, 4th ed. CUP 2017, 190 ff.

37 Note 32, para. 119.

WTO law, possibly also due to the lack of a WTO provision equivalent to Article 5 TEU (i.e. limiting the exercise of administrative and judicial powers of WTO institutions by constitutional principles of conferral, proportionality and subsidiarity). The WTO crisis over alleged 'judicial overreach' differs fundamentally from the 'judicial overreach crisis' inside the EU. In the WTO, the US blocking of the filling of AB vacancies is an illegal abuse of US veto-powers in the DSB inconsistent with Article 17.2 DSU. Article IX.1 WTO Agreement authorizes and requires the WTO Ministerial Conference and General Council to fill AB vacancies by majority voting and, thereby, protect the AB as defined in Article 17 DSU, as approved by democratic institutions when they ratified the WTO Agreement.

Democratic constitutional pluralism

Western democracies proceed from human rights, rule-of-law and democracy as three core principles of democratic constitutionalism. Yet, their national Constitutions, democratic legislation, administration and jurisprudence differ depending on their diverse histories and democratic preferences. For instance, the German Basic Law's protection of judicially enforceable, constitutional rights of citizens to democratic self-determination - and of related, institutional guarantees like the parliamentary prerogative of taking all essential decisions on revenue and expenditure as an indispensable element of constitutional democracy in Germany - differs from constitutional traditions in other EU member states. This diversity of democratically defined 'national identities' must be respected by the law of international organizations, as explicitly prescribed in Article 4 TEU and as explained in the German FCC judgment of 5 May 2020: 'The democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law's constitutional identity protected in Art. 79(3) GG; it is therefore beyond the reach of European integration in accordance with Article 23(1) third sentence in conjunction with Art. 79(3) GG'.[38] Such constitutional constraints on multilevel governance of PGs focus on 'constitutional democracy' rather than merely 'majoritarian' conceptions of democracy, as they were invoked by the USTR in support of its criticism of AB jurisprudence. Unlike the explicit limitation of conferral of limited powers in Article 5 TEU by constitutional principles of proportionality and subsidiarity, the WTO provisions limiting the exercise of AB powers (Arts 3.2 and 19.2 DSU) are drafted less precisely.

In its 2020 Report on the WTO AB, the USTR complained of 'persistent overreaching' by the AB in its interpretation of WTO rules:

> 'this overreaching also violates the basic principles of the United States Government. There is no legitimacy under our democratic, constitutional system for the nation to submit to a rule imposed by three individuals sitting in Geneva, with neither agreement by the United States nor approval by the United States Congress'.[39]

Yet, the 177 pages long USTR Report identifies no AB interpretation that could not be justifiable based on the (quasi)judicial DSU mandate 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' for the 'prompt settlement' of disputes (Art. 3 DSU). Nor does the Report identify a US constitutional law provision prohibiting US consent to international third-party adjudication. As both the US government and the US Congress approved the WTO Agreements and the DSU provisions (including Article 17 on the establishment of the AB), and the US government consented to the appointment of each AB member, the USTR claims are factually wrong – as so many other 'false populist claims' of the US Trump administration. False claims by majoritarian government institutions cannot justify non-compliance with democratically approved treaty obligations, such as the illegal US 'blocking' of AB nominations in violation of Article 17.2 DSU. The democratic approval of the WTO Agreement by parliaments conferred limited, democratic legitimacy

38 FCC (n 32), para. 101.

39 USTR Report (n 17), Introduction.

also on the AB as long as it operates within its legal constraints and respects the sovereign powers of WTO members as protected in WTO law, for instance by choosing judicial interpretations that respect legitimate 'constitutional diversity' in the interpretation of the 'general' and 'security exceptions' in WTO law (e.g. on sovereign rights to protect public morals, public order and 'essential security interests'). As Article 7 DSU limits the terms of reference of WTO panels to examining claims based on WTO rules, WTO jurisprudence continues interpreting the 'incidental jurisdiction' of panels and the AB regarding claims, defences and counterclaims by respondent parties in WTO dispute settlement proceedings more restrictively than most other international courts.

Multilevel judicial protection of rule-of-law

This contribution described the emergence of multilevel judicial protection of rule-of-law inside states, in transnational ISA, in the WTO dispute settlement system and in European common market and monetary law. It discussed the increasing challenges to ISA (e.g. inside the EU), to the WTO appellate system (e.g. by the USA) and to the CJEU (e.g. by the German FCC). It argued that – as international organizations do not have 'competence-competence' – disagreements over *ultra vires* acts of international institutions (like the CJEU, ISA or the WTO AB) must be resolved either through multilevel judicial cooperation or agreed compromises among governments with due respect for legitimate 'constitutional pluralism' and for constitutional law principles common to the member states concerned. 'Manifest' and 'structurally significant' *ultra vires* acts, as criticized in the German FCC judgment of 5 May 2020, have remained rare and contested in the evolution of international law and jurisprudence. The FCC emphasized that – as member states remain the 'masters of the treaties', and the EU has not evolved into a federal state – such rare conflicts 'must be resolved in a cooperative manner, in keeping with the spirit of European integration, and mitigated through mutual respect and understanding'.[40] In July 2020, it seemed that the German government was willing to accept 'proportionality justifications' by the ECB; proposals for introducing additional EU law remedies for reviewing alleged '*ultra vires* acts' may no longer be politically necessary.[41]

The compromise proposals by the WTO Facilitator Ambassador Walker[42] for resolving the WTO AB crisis through adoption of WTO General Council Decisions clarifying the WTO AB mandate and launching the selection procedure for the filling of the vacant AB positions were, so far, blocked by the US Trump administration. Similarly, the US continues to veto Mexico's regular requests – on behalf of 121 WTO members – that the DSB initiate the procedure for filling the 6 vacant AB positions. The EU proposal for a 'Multi-Party Interim Appeal Arbitration (MPIA) Arrangement' under Article 25 DSU is in effect as of 30 April 2020 for appellate review among 22 WTO members until the WTO AB can resume its lawful functions, as prescribed by parliaments when they approved the WTO Agreement.[43] Longer-term appeasement of the US destruction of the WTO AB system would have adverse repercussions far beyond the WTO, for example regarding the UN goals for sustainable development and climate change mitigation. If the November 2020 US elections should not lead to the appointment of a more reasonable, democratic US President supporting the WTO legal and dispute settlement system and its overdue reforms, other WTO members should consider filling the six vacancies in the AB by majority decisions of the WTO Ministerial Conference or General Council pursuant to Article IX.1 WTO Agreement so as to protect transnational rule-of-law among the 'willing WTO members' committed to protecting and implementing multilateral PGs treaties like the WTO Agreement, the 2015 Paris Agreement on climate change mitigation, and the WHO constitution for protecting public health.

40 Note 32, para. 111.

41 Cf. J.Weiler/D.Sarmiento, The EU Judiciary after Weiss – Proposing a new Mixed Chamber of the Court of Justice: A Reply to our Critics, in: EJIL Talk Blog, 8 July 2020.

42 Cf. WTO doc. JOB/GC/222 of 15 October 2019.

43 The text to the MPIA was notified to the WTO in WTO document JOB/DSB/1/Add.12 of 30 April 2020 and was subsequently accepted also by other WTO members.

The needed, multilevel governance for protecting these and other, interrelated PGs depends on rule-of-law in order to remain coherent, effective and democratically legitimate.

Conclusion: Constitutional Justice as a Restraint on 'Judicial Overreach'

Judicial administration of justice - by independent, impartial judges applying rules of law in fair procedures in order to settle disputes peacefully - belongs to the oldest paradigms of justice, as illustrated by instructions in the Old Testament to set up courts of law ('Justice, and justice alone, you shall pursue') as well as by judicial settlement of disputes in ancient Greek and Italian city republics (e.g. in the court of Areopagus in ancient Athens), inspired by much older ideals of third-party adjudication as discussed in classical Greek tragedies.[44] This contribution illustrated how the principles of procedural, constitutional, distributive, corrective, commutative justice and equity underlying international economic law and judicial remedies (e.g. the violation-, non-violation- and 'situation-complaints' provided for in Article XXIII:1 GATT) continue to evolve dynamically.[45] Sections I and II described how - in European public law and ISA - arbitration is increasingly replaced by multilevel cooperation among national and European courts of justice protecting equal constitutional rights (as codified in the EUCFR) and transnational rule-of-law. Section III discussed how the compulsory WTO AB system was incapacitated by illegal US power politics and, temporarily, replaced by agreed 'appellate arbitration' based on Article 25 DSU; due to the lack of evidence that the WTO AB engaged in arbitrary *ultra vires* acts violating the customary rules of treaty interpretation, WTO members and WTO institutions remain legally required to protect the AB as defined in Article 17 DSU and to clarify the legal constraints limiting the AB jurisprudence. Section IV used the example of the German FCC judgment on *ultra vires* acts of the ECB and of the CJEU for discussing the constitutional principles restraining multilevel judicial cooperation among national, European and international courts of justice. The FCC found the insufficient 'proportionality balancing' by the ECB and by the CJEU in delimiting EU monetary policy powers from national economic policy powers to infringe the democratic rights of citizens and the parliamentary responsibilities under German constitutional law. By 'giving reasons' and protecting rule-of-law through impartial third-party adjudication, courts of justice contribute to the clarification of 'public reason' and of 'constitutional justice' as a restraint on 'judicial overreach', thereby enhancing the collective capability and democratic legitimacy of multilevel governance and of its democratic support by citizens.

Judicial administration of justice limiting private and governmental autonomy remains contested, as illustrated by the 2018 *Achmea* judgment of the CJEU and by the US complaints of 'judicial overreach' by the WTO AB. The EU initiatives for transforming ISA into a multicourt system – both inside the EU as well as in the context of external EU trade and investment agreements - offer reasonable, political responses to the ongoing challenges of ISA jurisprudence, such as its neglect for human rights.[46] The 2020 judgement by Germany's FCC against alleged *ultra vires* acts of the ECB and the CJEU illustrates the need for reciprocal 'checks and balances' and 'judicial comity' in multilevel judicial governance of transnational PGs. Similarly, the EU constitutional law principles of limited delegation of legislative, administrative and judicial powers, and of their constraints through additional constitutional principles (like human rights, democracy, rule-of-law, conferral, proportionality, subsidiarity), restrain both private and public, national, transnational and international governance powers so as to promote 'constitutional justice'.

This contribution emphasized that the global economic, health, environmental and political crises cannot be resolved in coherent and legitimate ways without multilevel legal and judicial protection of

44 On justice in the Bible and in Greek tragedies and Greek philosophy see D.D.Raphael, Concepts of Justice (OUP 2001).

45 For a discussion of the evolution of these 'principles of justice', and of their relevance for international economic law adjudication, see: Petersmann (n 13), 87ff.

46 Cf. n 5 above.

transnational rule-of-law. Interpreting the WTO 'objective of sustainable development' in conformity with the UN's 2030 Agenda for Sustainable Development would send a clear message to citizens, democratic institutions and governments all over the world that the UN's 17 'sustainable development goals' protecting citizens and their human rights cannot be realized without adjustments of WTO law to the regulatory challenges of the global health, environmental, economic and rule-of-law crises. Unless citizens and people recognize themselves as 'democratic principals' that must hold all governance agents legally, democratically and judicially accountable, the needed transformation of power-oriented conceptions of 'international law among sovereign states' by rules-based, democratically and constitutionally limited conceptions of 'international law of states, peoples and citizens' cannot effectively protect human rights, democratic self-determination of peoples and transnational rule-of-law. The rise of authoritarian rulers and the lack of US leadership suggest that democratic constitutionalism – even though increasingly challenged – becomes ever more important for limiting the ubiquity of abuses of public and private power. Social, democratic and economic welfare depends on personalities like Prof. Giorgio Bernini, who devote their life to promoting and defending justice.