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International Rule of Law and Constitutional Justice in International Investment Law and Arbitration

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ABSTRACT

Judicial administration of justice through reasoned interpretation, application and clarification of legal principles and rules is among the oldest paradigms of constitutional justice. The principles of procedural justice underlying investor-state arbitration remain controversial, especially if confidentiality and party autonomy governing commercial arbitration risk neglecting adversely affected third parties and public interests. There are also concerns that rule-following and formal equality of foreign investors and home states may not ensure substantive justice in the settlement of investment disputes unless arbitrators and courts take more seriously their customary law obligation of settling disputes in conformity with human rights obligations of governments and other principles of justice calling for judicial balancing of all private and public interests affected by the dispute. The constitutional task of judges to apply the law and settle disputes in conformity with principles of justice may require reviewing whether judicial reasoning remains compatible with redistributive principles of case-specific equity, social justice and corrective justice.

INTRODUCTION

This article begins by explaining, in Part I, that the emergence of rule of law in international trade and investments is due to multilevel constitutional restraints on abuses of power and multilevel judicial protection of constitutional justice,

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such as in the review and recognition of foreign arbitral awards and court judgments, international annulment proceedings, and appellate review of dispute settlement rulings. Part II argues that the variety of alternative dispute settlement fora for international investment disputes—like private commercial arbitration, national courts, investor-state arbitration based on bilateral investment treaties (BITs) or regional agreements (like Chapter 11 of the North American Free Trade Agreement (NAFTA)), regional economic or human rights courts, worldwide courts (like the International Court of Justice (ICJ)), and alternative dispute settlement bodies (such as in the World Trade Organization(WTO))—should administer justice in more consistent ways. Additionally, they should reduce the risks of legal and jurisdictional fragmentation in international law by reviewing their textual, contextual, and teleological interpretations of international treaties from the constitutional perspective of the judicial task of settling disputes in conformity with principles of justice and the universal human rights obligations of governments. Part III explores why national and international courts, investor-state arbitral tribunals, and alternative fora for the settlement of transnational investment disputes and other economic disputes, in their judicial review of treaty claims and related contract claims (such as those regarding alleged government interferences into property rights), refer so rarely to the customary law requirement of settling disputes concerning treaties in conformity with the principles of justice and international law codified in the Vienna Convention on the Law of Treaties (Vienna Convention).[1] Part IV explains why constitutional justice is also an appropriate paradigm for commercial investor-state arbitration. Part V concludes that rule of law in international investment law and arbitration requires multilevel judicial cooperation and more comprehensive judicial balancing of private rights and corresponding constitutional obligations of governments.

I. INTERNATIONAL RULE OF LAW REQUIRES RESPECT FOR THE REALITY OF MULTILEVEL CONSTITUTIONAL PLURALISM

Public international law has historically evolved as a decentralized, legal, and coercive order (that is, in the sense of Hans Kelsen's unified conception of national and international law as deriving from the same basic Grundnorm)[2] and power-

1. Vienna Convention on the Law of Treaties, pmbl., May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

2. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 325 (1945); *see also* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 417–18 (1952) (formulating the basic customary norm of the

oriented legal system (like H.L.A. Hart's "concept of law," which consists of primary rules of conduct and secondary rules concerning the recognition, amendment, and enforcement of rules).[3] While the reality of international law, in the sense of the actual invocation, application, and enforcement of rules described as law by governments and courts, has existed for centuries, the authoritative decision-making processes constituting international law (as described by the Yale School founded by Myres McDougal and W. Michael Reisman) are ever more shaped by domestic constitutional systems committed to the protection of human rights. Even though "the need for universal adherence to and implementation of the rule of law at both the national and international levels" is recognized in a few U.N. resolutions,[4] neither the U.N. Charter nor other U.N. treaties constitute an effective rule of law system[5] as a constitutional restraint on the rule of men and their rule by law.[6] In the U.N. Charter, all 192 U.N. member states have reaffirmed—on behalf of "We the peoples of the United Nations"—their "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" so as "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[7] Yet, as long as U.N. human rights conventions do not provide for effective judicial remedies and only about one-third of U.N. member states have submitted to the compulsory jurisdiction of the ICJ and other worldwide courts (such as the International Tribunal for the Law of the Sea), the U.N. objective "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment, or settlement of international disputes"[8] is not effectively secured. Hence, most constitutional democracies (including the United States) take the re-

national and international legal order as follows: "The states ought to behave as they have customarily behaved," allowing revolution and the principle of effectiveness to be law-creating facts).

3. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

4. *E.g.*, G.A. Res. 60/1, ¶ 134, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (U.N. member states also "reaffirm our commitment . . . to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States.").

5. *See* ARISTOTLE, THE POLITICS AND THE CONSTITUTION OF ATHENS 88 (Stephen Everson ed., 2d ed. 1996) (discussing the ancient legal ideal of "rule of law," and its dialectic development on the basis of constitutional rights and principles of justice restraining the instrumental "governance by law").

6. *See* IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS 214 (1998).

7. U.N. Charter pmbl.

8. *Id.* art. 1, ¶ 1.

alistic view that governments should aim at "international rule of law"[9] and submit to the rule of international law only as long as these rules remain consistent with the constitutional guarantees of human rights, democracy, and justice in domestic jurisdictions.[10] Due to the diversity of domestic constitutional traditions, democratic preferences, and international bargaining power among states, national conceptions of international rule of law continue to differ fundamentally among the 192 U.N. member states.

The United States, for example, notwithstanding its hegemonic leadership of multilateral agreements and institutions (such as the United Nations and the Bretton Woods institutions) and its promotion of democratic constitutionalism throughout Europe and the world following World Wars I and II, justifies its long tradition of unilateralism and exceptionalism in its international legal relations on democratic and hegemonic grounds (such as congressional insistence on veto rights in the U.N. Security Council, the International Monetary Fund, and the World Bank; non-ratification by Congress of most U.N. human rights conventions and International Labor Organization conventions; U.S. withdrawal from the compulsory jurisdiction of the ICJ; and U.S. non-adherence to many other international courts like the Inter-American Court of Human Rights).[11] Yet, national law and international law depend on each other for the collective supply of international public goods, like international rule of law. International law cannot be effective without its good faith implementation inside domestic legal systems, in the same way that domestic legal systems cannot remain effective in a globally interdependent world without the international legal coordination of their often adverse external effects on other polities and legal systems. American international lawyers focusing on state interests, as defined by the state's political leadership, openly admit that their power-oriented international law approaches are "not necessarily, or even usually, the policy that would maximize the public good within the state" or collective "international public goods" among states.[12] In light of the "democratic process pathologies such as interest group capture" and "collective action problems in performing cosmopolitan du-

9. *See, e.g.*, G. JOHN IKENBERRY & ANNE-MARIE SLAUGHTER, FORGING A WORLD OF LIBERTY UNDER LAW: U.S. NATIONAL SECURITY IN THE 21ST CENTURY (2006).

10. Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and Constitutional Justice*, 19 EUR. J. INT'L L. 769, 780 (2008).

11. *See generally* MICHAEL IGNATIEFF, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (2005) (discussing U.S. exceptionalism in the realm of human rights); Jed Rubenfeld, *The Two World Orders*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM 233, 233–46 (Georg Nolte ed., 2005) (discussing contemporary U.S. unilateralism).

12. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 7, 87 (2005).

ties," the "absence of democratic support" for the collective supply of international public goods is viewed as "an inherent feature of democratic process" and an insurmountable "hurdle to cosmopolitan action."[13] Imbalances in power and information-sharing, as well as the absence of a centralized enforcement mechanism, "make international collective action problems difficult to overcome even when there is a plausible argument that the international regime, if successful, would enhance the welfare of every participating state."[14]

Such justifications of American nationalism, however, remain unconvincing in view of the effective supply of international public goods through European integration law since the 1960s, coupled with the increasing globalization of human rights, constitutionalism and market integration, as well as market regulation, since the fall of the Berlin Wall in 1989. European lawyers and courts increasingly focus on common constitutional principles and on multilevel parliamentary, governmental, and judicial cooperation for limiting governance failures at national levels, according due respect to the reality of constitutional pluralism in diverse national and international legal regimes. In its September 3, 2008, decision in Kadi v. Council of European Union, for example, the European Court of Justice (ECJ) held that U.N. Security Council sanctions against alleged terrorists can be implemented inside the European Community (EC) only in conformity with European constitutional guarantees of judicial remedy and fundamental rights (such as the right to be heard, the right to effective judicial protection, and respect for private property). Rather than relying on formal monist claims of the supremacy of international law based on U.N. Charter Article 103, Article 27 of the Vienna Convention, or dualist claims of the legal autonomy of EC law, the ECJ reconciled the general rule that "the European Community must respect international law in the exercise of its powers" with the constitutional prohibition of EC measures violating European human rights by means of substantive judicial review leading to the judicial annulment of the EC implementing regulation.[15] U.N. human rights law confirms that, in the absence of adequate guarantees of human rights and judicial review at the U.N. level, U.N. member states and European courts must remain entitled to comply

13. *Id.* at 206–17.

14. *Id.*

15. Joined Cases C-402/05P & C-415/05P, Kadi v. Council of the European Union, 2008 O.J. (C285) 2, 41 C.M.L.R. 1207, 1240 (Aug. 11); *see* THE EUROPEANISATION OF INTERNATIONAL LAW (Jan Wouters et al. eds., 2008) (discussing the status of international law in the EU and its member states); *see also* RELOCATING THE RULE OF LAW (Gianluggi Palombella & Neil Walker eds., 2009) (discussing the EC as a "community of law" based on "rule of law," the conceptual independence of rule of law from democracy and its content-dependent, constitutional assessment).

with their human rights obligations and to protect judicial remedies at national and European levels. The rule of law, therefore, may legitimately differ in domestic and international jurisdictions depending on their often diverse constitutional and international legal obligations and the democratic and judicial conceptions of the rule of law prevailing in that jurisdiction. This was illustrated by the 2006 U.S. Supreme Court judgment in Hamdan v. Rumsfeld.[16]

It is only in the field of international trade and inestment law that the United States has supported initiatives for multilevel judicial protection of international rule of law. Today such protection is an integral part of more than 2,500 BITs, regional trade and investment agreements (such NAFTA), the law of the WTO, and other agreements on international judicial cooperation and international judicial remedies. In European economic law, the treaties establishing the EC, the European Union (EU), the European Economic Area (EEA), and the ever-increasing number of EC free trade agreements with third-party countries in Europe and beyond are all based on common constitutional "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law,"[17] justifying their provision of effective legal and judicial safeguards not only for the sovereign rights of states, but also for the individual rights of their citizens. Just as U.N. human rights conventions explicitly recognize "that these rights derive from the inherent dignity of the human person,"[18] so too does the EU Charter of Fundamental Rights ground the human rights approach to European economic law, and the rights-based conception of the EC's international market freedoms, as fundamental freedoms of individuals to be protected by national and European courts.[19] The multilevel, constitutional, and judicial protection of rule of law and of democratic citizen rights in the European common market law of the thirty EEA member states refutes the prevailing North American view that

16. See Hamdan v. Rumsfeld, 548 U.S. 557, 592–635 (2006), where the Supreme Court defined the rule of law "in this jurisdiction" in conformity with the judicially enforceable Geneva Conventions on the law of war and Article 21 of the U.S. Uniform Code of Military Justice.

17. Consolidated Version of the Treaty on European Union, art. 6, Dec. 29, 2006 O.J. (321E) 1, *available at* http://www.europarl.europa.eu/hearings/20000222/libe/art6/default_en.htm.

18. International Covenant on Economic, Social and Cultural Rights, pmbl., Dec. 16, 1966, 993 U.N.T.S. 3, G.A. 2200A(XXI), U.N. Doc. A/6316, *available* at http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

19. Charter of Fundamental Rights of the European Union, pmbl., Dec. 18, 2000 O.J. (C 364) 1 (acknowledging "the indivisible, universal values of human dignity, freedom, equality and solidarity" and "the principles of democracy and the rule of law"); *see* Ingolf Pernice, *The Treaty of Lisbon and Fundamental Rights*, *in* THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY? 235 (Stefan Griller & Jacques Ziller eds., 2008).

rule of law and democracy can be effective only inside nation-states.[20] Constitutional nationalism and power-oriented foreign policies fail to acknowledge that the collective supply of international public goods depends on multilevel judicial protection of international rule of law, which is universally recognized in the customary law requirement of settling "disputes concerning treaties, like other international disputes, . . . in conformity with the principles of justice and international law," including "universal respect for, and observance of, human rights and fundamental freedoms for all."[21]

II. THE NEED TO CLARIFY THE CONSTITUTIONAL DIMENSIONS OF INTERNATIONAL ECONOMIC ADJUDICATION

Are "principles of justice" the relevant context for the judicial clarification of the often indeterminate procedural rules and the substantive treaty standards in international investment law in the judicial settlement of transnational economic disputes with due regard to obligations of governments to protect human rights vis-à-vis third parties adversely affected by investment disputes? More than 2,300 years ago, Aristotle, in his *Nicomachean Ethics*, discussed a variety of conceptions of conventional justice in terms of rule-following; distributional justice in terms of equal treatment and fairness in distribution; corrective justice; reciprocal justice; and political justice ("the rule of reason" rather than "the rule of man" as "guardian of equality and fairness" among "men who are free and equal" and "whose mutual relationship is regulated by law").[22] Aristotle emphasized that "the judge restores equality" and judges are of particular importance for "equitable justice" in terms of a rectification of law where law falls short by reason of its universality.[23] Modern theories of justice tend to focus on the equal rights and obligations of citizens and peoples rather than on the judicial function of administering justice. Yet, as rational individuals and governments often pursue diverse conceptions of the good life and social justice, principles of national and international justice are

20. *See e.g.*, JÜRGEN HABERMAS, THE DIVIDED WEST 115 (2006); Ernst-Ulrich Petersmann, *Multilevel Trade Governance Requires Multilevel Constitutionalism*, *in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 5 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006); Armin von Bogdandy & Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law* (Inst. for Int'l Law & Justice, Working Paper 2008/3), *available at* http://www.iilj.org/publications/documents/2008-3.Bogdandy-Dellavalle.pdf.

21. Vienna Convention, *supra* note 1, pmbl.

22. *See* ARISTOTLE, NICOMACHEAN ETHICS (Martin Oswald trans., 1999).

23. *Id.* at 122, 142.

in dispute. Hence, national and international courts of justice and intergovernmental negotiations tend to focus on rules and often deliberately avoid clarifying their underlying principles of justice.

The Vienna Convention was drafted at a time when human rights remained deeply contested and suppressed in many states; consequently, the diplomats negotiating the Vienna Convention focused on international treaties among states and their synallagmatic interrelationships of rights and duties among states. Although drafted as a general treaty applicable to all international treaty relationships among states, the Vienna Convention "contains many hidden assumptions that are not justified in respect of human rights treaties"[24] and neither adequately reflects the constitutional functions of human rights treaties nor the internationalization of national constitutions and the constitutionalization of international law.[25] The Vienna Convention's codification of the customary law requirement of settling "disputes concerning treaties, like other international disputes, . . . in conformity with the principles of justice and international law," including "universal respect for, and observance of, human rights and fundamental freedoms for all,"[26] recalls the constitutional functions of courts to interpret and apply international law in conformity with principles of justice and erga omnes human rights obligations. According to the European Court of Human Rights (ECtHR), "the Court's obligation is to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties."[27] Similarly, the ECJ, the European Free Trade Area (EFTA) Court, and various investor-state tribunals emphasize their judicial function of protecting the rule of international law with due regard for the rights of producers, investors, traders, consumers, as well as other citizens against arbitrary interferences by governments and other abuses of public and private power. Just as the idea of rule of law

24. Martin Scheinin, *Impact on the Law of Treaties*, *in* THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 23 (Menno T. Kamminga & Martin Scheinin eds., 2009).

25. *See* Ernst-Ulrich Petersmann, *Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution*, *in* INTERNATIONAL TRADE AND HUMAN RIGHTS 29–67 (Frederick M. Abbott et al. eds., 2006).

26. Vienna Convention, *supra* note 1, pmbl.

27. Bankoviç and Others v. Belgium and 16 Other Contracting States, App. no. 52207/00, 2001-XII E.H.R.R. 65.

has always been related to justice,[28] human rights instruments likewise emphasize "that human rights should be protected by the rule of law."[29] The focus on rule of international law, legal security, legal remedies, and judicial protection of the individual rights of private economic actors has become a defining element of modern international economic law.

The functional interrelationships between law, judges, and justice are reflected in legal language from antiquity (for example, in the common core of the Latin terms jus, judex, justitia) up to modern times (such as in the Anglo-American legal traditions of speaking of courts of justice and giving judges the title of Mr. Justice, Lord Justice, or Chief Justice). As explained by John Rawls, in view of "reasonable pluralism" and "the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body," democratic and judicial exercise of coercive power over citizens is democratically legitimate only when "political power . . . is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason."[30] As constitutions, legislation, and international agreements can regulate dynamically changing economic and social relations only in incomplete ways, judicial interpretation and application of incomplete and often indeterminate rules inevitably entail filling in the gaps and clarifying the contested meaning of general rules. Judicial conceptions of rule of law—not only in terms of legal restraints on power but also in terms of a stable legal order for society that enables its constitutionally limited self-governance[31]—are inevitably influenced by judicial conceptions of principles of justice. Rawls infers from his theory of justice that "in a constitutional regime with judicial review, public reason is the reason of its supreme court."[32] That reason is critical for the overlapping, constitutional consensus necessary for a stable and just society among free, equal, and rational citizens who tend to be deeply divided by conflicting moral, religious, and philosophical doctrines.[33] Just as all

28. *See* CARL JOACHIM FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 8–12, 191–99 (1958) (discussing the ancient Greek concept of "law as participation in the idea of justice," and the need to relate justice to the value of equality).

29. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

30. JOHN RAWLS, JUSTICE AS FAIRNESS 41 (Erin Kelly ed., 2001).

31. *See generally* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001) (discussing the democratic functions of judicial protection of constitutional rights).

32. JOHN RAWLS, POLITICAL LIBERALISM 231 (1993).

33. *Id.* at 158.

constitutional theories of justice and adjudication remain contextually and democratically contested, so also the Rawlsian theory of justice as constitutional impartiality, reasonableness, and judicial protection of individual rights and rule of law remains controversial, especially in view of Rawls' inadequate proposals for an international "Law of Peoples."[34]

The constitutional protection of access to justice and the EC guarantees of independent courts administering justice impartially, subject to due process of law, are positive law examples of constitutional justice as multilevel judicial protection of fundamental rights and of rule of law inside European integration. In the exercise of their constitutional mandate to ensure respect for rule of law in the interpretation and application of EC law,[35] the EC courts and national courts cooperate in the judicial clarification and defense of the core constitutional principles of EC law, such as direct effect, supremacy, direct applicability by citizens, implied powers, and European judicial Kompetenz-Kompetenz. Similarly, the different principles of indirect effect and indirect supremacy of precise and unconditional EEA rules were clarified and justified by the EFTA Court in cooperation with national courts in EEA countries.[36] Other international courts increasingly emphasize the inherent powers of courts of justice to ensure due process of law, to prevent abuses of judicial procedures, to stay proceedings, to correct any injustice caused by an earlier order, to determine the scope of their jurisdiction, and to award remedies necessary for the performance of their judicial function.[37] Courts with compulsory jurisdiction may legitimately assert functions beyond the settlement of concrete disputes, such as the clarification and progressive development of international law, as in ICJ advisory opinions, and of its systemic relationships, as in what Article 3 of the WTO Dispute Settlement Understanding calls "the dispute settlement system of the WTO."[38]

Economic courts—by interpreting and clarifying indeterminate investment rules and incomplete treaty regulations with due regard to customary rules, gen-

34. *See* Ernst-Ulrich Petersmann, *International Trade Law, Human Rights and Theories of Justice*, *in* LAW IN THE SERVICE OF HUMAN DIGNITY 44, 44–57 (Steve Charnovitz et al. eds., 2005) (criticizing Rawls' international theory of justice).

35. *See* Treaty Establishing the European Community, art. 220, Nov. 10, 1997, 1997 O.J. (C340) 3.

36. *See* Petersmann, *supra* note 10.

37. *See* CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 55 (2007).

38. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1123 (1994), *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3.

eral principles of law, judicial precedents, inherent powers of courts, and human rights obligations of governments—may enable avoidance of conflicts among fragmented jurisdictions, treaty regimes, conflicting governmental interpretations, and domestic implementing rules. Judicial clarification of an overlapping consensus on a limited political conception of justice—as reflected in the core guarantees of U.N. human rights law—can help justify, maintain, and adapt international order endorsed by citizens and governments with competing worldviews, provided that the principles respect and protect basic human rights and remain compatible with the enduring reality of diverse and partially conflicting moral, religious, and other worldviews. Due to the frequent lack of explicit international law rules on the coordination of competing and overlapping jurisdictions, judicial comity and conditional solange—cooperation among national and international courts, as long as courts mutually respect the basic constitutional principles of their limited jurisdictions—may offer the most effective, second-best approach for multilevel judicial protection of rule of law and transformative justice in international cooperation among citizens. Occasional inconsistencies among investor-state arbitral awards confirm that the increasing number of national and international tribunals, without appellate review or other effective hierarchical rules, make uniformity of judicial decisions impossible.[39] Furthermore, the inevitable legal and judicial fragmentation of BITs and related investment disputes may also promote collective learning processes that might gradually prompt governments and courts to overcome conflicting regulatory and judicial approaches to investment rules and related disputes.

III. IS THERE A ROLE FOR HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND DISPUTE SETTLEMENT?

International law at the beginning of the twenty-first century is characterized by the legal obligations of all 192 U.N. member states to respect and protect human rights,[40] as well as by the ever more comprehensive, multilevel legal regulation and judicial protection of rights of citizens in their transnational economic cooperation. Human rights and investment law are both aimed at legal protection of individual rights by means of legal and judicial restraints on government powers, such as pro-

39. *See* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES (Karl P. Sauvant ed., 2008) (discussing inconsistencies among BITs and related arbitration awards, and initiatives for enhancing transparency, coherence, and appellate review in investor-state dispute settlement).

40. *See* Scheinin, *supra* note 24.

hibitions on discrimination, substantive safeguards of individual freedoms and private property rights, and judicial remedies at national and international levels, thereby protecting individuals against abuses of power by compensating for the inferior, subordinated legal status of private actors vis-à-vis governments in domestic laws. International investment law remains unique by granting private foreign investors direct access to international arbitral tribunals, often without prior exhaustion of local remedies, in order to challenge governmental restrictions on investor rights and claim damages for governmental breaches of investment law. As the substantive and procedural guarantees of investor rights in international investment treaties and investor-state concession contracts tend to go beyond those provided by human rights law, investors and host states only rarely invoke human rights in investment disputes.[41] Investor-state arbitral tribunals remain reluctant to examine human rights arguments on their own initiative or if raised in amicus curiae submissions, unless human rights have also been argued by the parties. Hence, even though the U.N. High Commissioner for Human Rights has urged U.N. member states to adopt a "human rights approach" to the interpretation and application of international trade and investment law,[42] investor-state arbitration awards have so far contributed little to reducing the fragmentation in the development of human rights law and international investment law.

Investor-state arbitration may be based either on commercial contracts and privately agreed arbitration rules (such as those of the United Nations Commission on International Trade Law (UNCITRAL), the Court of Arbitration of the International Chamber of Commerce (ICC), and the London Court of International Arbitration), or on international treaties (such as BITs and the International Centre for Settlement of Investment Disputes (ICSID)), and legislation. The respective procedures, applicable law, publicity, and international legal effects of private commercial arbitration concerning contract claims may differ fundamentally from those concerning treaty claims.[43] As investor-state arbitrations tend to involve not only private business interests but also the public policies of the host state and rights of workers, consumers, and taxpayers affected by foreign in-

41. *See* Howard Mann, *International Investment Agreements, Business and Human Rights* (Global Forum on Int'l Investment 2008), *available at* http://www.oecd.org/dataoecd/45/50/40311282.pdf (providing examples of investment treaties and investor-state arbitral awards referring to human rights).

42. *See* U.N. Econ. & Soc. Council, Sub-Comm'n on Promotion & Protection of Human Rights, *Human Rights, Trade and Investment*, U.N. Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003).

43. *See* Bernardo M. Cremades & David J. A. Cairns, *Contract and Treaty Claims and Choices of Forum in Foreign Investment Disputes*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES 325 (Norbert Horn ed., 2004) (discussing these important differences).

vestments, the commercial arbitration paradigms of private party autonomy and confidentiality among private parties may not be appropriate for investor-state arbitration. Arbitral awards on investor-state disputes risk lacking credibility and democratic acceptability if they disregard legitimate interests of adversely affected third parties or overrule, in non-transparent proceedings, democratically legitimate government decisions on grounds of investor-state contracts.[44]

Most international investment disputes and investor-state arbitrations relate to legal claims based on investment contracts and international investment treaties that include choice of law clauses and jurisdictional clauses referring, directly or indirectly, to the domestic law of the host state and to "such rules of international law as may be applicable."[45] The sovereign freedom of states to regulate their domestic economy and investment regime, the diversity of national legal and democratic traditions, and the private autonomy of investors and legal protection of their property rights inevitably entail that national investment laws, the more than 2,500 BITs concluded among states, and related arbitration awards differ among countries and jurisdictions. Yet, notwithstanding the lack of a coherent international judicial system and of formal legal obligations among ad hoc arbitral tribunals or competing arbitral institutions, the ever increasing number of investment-related national and international court judgments, arbitral awards, and other dispute settlement reports continue to identify and to clarify common principles underlying the procedural law of international dispute settlement bodies.[46] They also promote mutually consistent interpretations of internationally agreed-upon substantive standards of legal protection, regulation, expropriation, and dispute settlement.[47]

This judicial harmonization is facilitated by contextual, systematic, dynamic, and effective interpretations of investment law in conformity with applicable non-investment law. International investment agreements often explicitly state that tribunals should consider international law as applicable.[48] This is unlike the nar-

44. *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008).

45. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42, Oct. 14, 1966, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

46. *See* BROWN, *supra* note 37.

47. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 19–20 (2008).

48. On the contested question of whether international law plays only a "complementary role" vis-à-vis domestic investment law (e.g. in order to fill a "lacuna" in domestic law) or also a "corrective role" vis-à-vis domestic rules that are inconsistent with international law, see Emmanuel Gaillard & Yas Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington*

rower applicable law clauses in Articles 7 and 17 of the WTO Dispute Settlement Understanding. For example, an increasing number of investor-state arbitral awards examine claims of whether investment rules should be construed in conformity with the pertinent WTO obligations of the state concerned.[49] The dynamically evolving case law of private commercial arbitration, national and international courts, investor-state arbitration based on international investment treaties, and alternative dispute settlement proceedings suggests that—despite the lack of a centralized structure of international law and of an integrated judicial system coordinating competing and often overlapping jurisdictions—courts increasingly employ the customary methods of systematic treaty interpretation, general principles of law and constitutional interpretation for resolving investment disputes by interpreting investment contracts and investment treaties within their broader context of national and international law.

IV. IS CONSTITUTIONAL JUSTICE ALSO AN APPROPRIATE PARADIGM FOR COMMERCIAL INVESTOR-STATE ARBITRATION?

The procedural similarities between international commercial arbitration regarding contract claims and investor-state arbitration regarding treaty claims obfuscate important legal differences. Commercial arbitration is based on private consent to arbitrate, rather than on public law arbitration without privity. Furthermore, commercial arbitration focuses on alleged breaches of an international commercial contract or a related non-contractual dispute rather than on governmental breaches of international law obligations vis-à-vis foreign investors. Invest-

Convention: The Role of International Law in the ICSID Choice of Law Process, 18 FOREIGN INVESTMENT L.J. 375, 399 (2003). *See also* Eastern Sugar v. Czech Republic, SCC No. 088/2004 (Arb. Inst. Stockholm Chamber of Commerce 2007) ("This does not mean that international law applies only when it is in conflict with national law. On the contrary, it means that international law generally applies. It is not just a gap-filling law. It is only where international law is silent that the Arbitral Tribunal should consider before reaching any decision how non conflicting [sic] provisions of Czech law might be relevant, and if so, could be taken into account.").

49. *See, e.g.*, Pope and Talbot v. Canada, 7 ICSID Reps. 102, 111 (2001). In July 2001, the NAFTA Free Trade Commission issued legally binding "Notes of Interpretation of Certain NAFTA Chapter 11 Provisions" stating, inter alia, that—contrary to previous interpretations by NAFTA tribunals—the "fair and equitable treatment standard" must be understood only as a reference to the customary international "minimum standard of treatment." The new Article 6(5) in the 2004 U.S. Model BIT on expropriation and compensation clarifies explicitly that "[t]his Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement." U.S. Trade Representative, 2004 Model BIT, http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

ment treaties, however, more frequently insist on an amicable negotiation period as a procedural requirement prior to arbitration.

While a commercial arbitral tribunal usually "appl[ies] the rules of law which it determines to be appropriate,"[50] public law investment arbitration tends to provide that the "tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable."[51] Investment treaties often include umbrella clauses that further elevate breaches of investor-state contracts to breaches of BITs. Compared with concession contracts concluded by a state jure gestionis (yet without prejudice to state immunity from execution), these investment treaties are acta jure imperii with evident public law and public interest dimensions.

In contrast to the increasing publicity of investment arbitration, confidentiality and privacy of hearings continue to be respected in commercial arbitration. While commercial arbitration awards remain confidential absent express consent or challenges in national courts, public investment arbitration procedures and awards are increasingly published and contribute to the creation of legal precedents. Although the lex arbitri may be important in commercial arbitration for obtaining evidence and for support or annulment by national courts, investment arbitration instantiates a self-contained regime without reference to local courts. Finally, the international legal obligation to enforce commercial awards pursuant to Article III of the New York Convention is subject to limited judicial review by domestic courts; awards rendered pursuant to ICSID procedures must be executed without further analysis by the domestic judiciary and are only subject to ICSID annulment proceedings.[52]

The commercial law principles of party autonomy, contractual freedom, agreed-upon mediation, and confidential arbitration reflect principles of contractual justice. Private arbitrators have a demonstrable self-interest in interpreting their mandate as being limited to dispute settlement for the benefit of their clients, as well as in avoiding human rights arguments that were not raised by the parties. Privately agreed arbitration, however, entails duties to act "judicially" by protecting a fair trial and due process of law and having respect for public order and jus cogens norms. In some jurisdictions there is no opportunity for concurrent court

50. INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 17 (2003), *available at* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf.

51. ICSID Convention, *supra* note 45, art. 42.

52. *See* Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 217 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) (discussing these differences).

control; consequently, the aggrieved party must wait for the end of the proceedings before she may challenge the award.[53] The state consent to investor-state disputes tends to be part of public law instruments, which, in turn, recognize that investor-state disputes, even if they involve contract claims rather than treaty claims, often affect public interests. The public law dimensions of investor-state disputes are also reflected in many other features of investor-state arbitration. For example, they may function to replace litigation in domestic courts and diplomatic protection, to offer remedies against violations of international law, or to facilitate the increasing admission of amici curiae submissions to arbitral tribunals or the subsequent judicial review of arbitral awards in the process of their recognition and enforcement in foreign countries.

The famous 1958 Lüth decision by the German Constitutional Court concerning a private boycott against a film produced by a former Nazi film director also illustrates the potential relevance of constitutional law and human rights for the interpretation and judicial protection of private law.[54] The ECJ likewise considers respect for fundamental economic freedoms and labor rights in relations among private actors, just as the ECtHR emphasizes the objective constitutional order established by the European Convention on Human Rights. The mere fact that commercial investor-state arbitration is grounded in mutual agreement does not effectively preclude concession contracts from remaining subject to constitutional law, regulatory state powers, and human rights.[55] The case law of the European

53. *See* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 5–20 (3d ed. 1999).

54. The Court inferred from Article 1(3) of the German Basic Law that fundamental constitutional rights (such as the general personality right and freedom of expression protected by Articles 2 and 5 of the Basic Law), apart from granting individual rights, also prescribe objective constitutional values that apply to the whole legal order and must be taken into account in judicial interpretation of general private law clauses. BVerfGE 7, 198 (1958), *translated in* Univ. of Texas Foreign Law Translations (Dec. 1, 2005), http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1369; *see* Hannes Rosler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution*, 23 TUL. EUR. & CIV. L.F. 1 (2008).

55. *See* ALEKSANDER JAKSIC, ARBITRATION AND HUMAN RIGHTS (2002). Jaksic emphasizes that "State Parties to the human rights treaties undertake to create an objective legal order." *Id.* at 85. "The violation of the European public order gives rise to a duty to deny the recognition of any legal act which is performed in contravention of such an order." *Id.* at 87. "Human rights norms are applicable to voluntary arbitration procedure and to any proceedings which are capable of affecting the rights and freedoms guaranteed by the human rights instruments." *Id.* at 215. "Parties cannot and are not supposed therefore to waive the irreducible core of procedural guarantees, such as the right to an independent and impartial court, the right to a fair trial and the due process of law which are sine qua non for liberty, dignity, justice and . . . the rule of law principle." *Id.* at 218.

courts, just as the explicit recognition in the EU Charter of Fundamental Rights that European fundamental rights "entail responsibilities and duties with regard to other persons, to the human community and to future generations," illustrates that "principles of justice" and other constitutional restraints in international law may also affect and constitutionally limit private and commercial law practices, including investor-state arbitration based on BITs concluded among EU member states.[56]

V. THE NEED FOR JUDICIAL BALANCING IN THE PROTECTION OF INDIVIDUAL RIGHTS IN INVESTOR-STATE ARBITRATION

The equal procedural status of private and state parties in investor-state arbitration and the development of the customary international law prohibition of "denial of justice"[57] into the human right of access to justice[58] and judicial protection of human rights reflect the increasing recognition of citizens as legal subjects and democratic owners of international law. Can the human rights obligations of governments justify judicial clarification of the often indeterminate BIT standards of protection in conformity with intergovernmental obligations to protect individual rights in BITs, U.N. conventions, World Intellectual Property Organization conventions, International Labor Organization conventions, WTO rules, and individual judicial remedies, subject to legitimate public interest regulation? To what extent does the exponential growth of investor-state arbitration and related human rights jurisprudence[59] provide evidence of the emergence of new customary international law?

International investments have become crucially important for job opportunities and the welfare of a plethora of people in numerous countries. Yet, as illustrated by under-regulation and the 2008 worldwide crisis in transnational banking services, the private, local, national, regional, and worldwide regulation of transnational investments often remains incomplete, especially with regard to the potentially conflicting investor, shareholder, and management interests, worker interests, general citizen interests, and bureaucratic self-interests. Democratic governance re-

56. *See* Christer Söderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, 24 J. INT'L ARB. 455 (2007).

57. *See* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7, 36 (2005) (discussing the customary law requirement to provide decent justice to foreigners and "to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected").

58. *See* ACCESS TO JUSTICE AS A HUMAN RIGHT (Francesco Francioni ed., 2007).

59. *See* Ursula Kriebaum, *Privatizing Human Rights: The Interface between International Investment Protection and Human Rights*, *in* THE LAW OF INTERNATIONAL RELATIONS 165 (August Reinisch & Ursula Kriebaum eds., 2007).

quires not only the transparent discussion and fair balancing of the aforementioned diverse interests of investors, workers, consumers, citizens, and diverse national, transnational, and intergovernmental actors. Constitutional democracy also calls for legal and judicial protection of the constitutional rights of investors, workers, consumers and other citizens, as well as of the legitimate scope of local, national, regional, and worldwide rules and governance institutions. The multilevel regulation of international trade, investments, and dispute settlement illustrates the need for multilevel constitutional safeguards of individual rights against abuses of public and private power at national, transnational, and international levels.[60]

In his *Nicomachean Ethics*, Aristotle concluded that "we must postpone until later an examination of the various kinds of acts of justice and of injustice."[61] Unfortunately, his promise was not fulfilled in any of his extant writings. In Europe, the overlapping consensus among national and European courts on the need for judicial protection of constitutional justice has successfully transformed the intergovernmental EC treaties and the European Convention on Human Rights into constitutional orders founded on respect for human rights and mutually beneficial cooperation among citizens.[62] Their judicial constitutionalization of intergovernmental treaty regimes was accepted by citizens, national courts, parliaments, and governments because the judicial "European public reason" protected individual rights and European public goods (like the EC's common market) more effectively than state-centric interpretations focusing on discretionary government powers without adequate legal and judicial remedies for citizens. Yet, constitutional interpretations of intergovernmental agreements for the benefit of the rights of citizens remain deeply controversial outside the rights-based European economic law,[63] just as the conception of investment treaty arbitration as commercial arbitration, or the "internationalization" of investor-state contracts by means of international arbitration and umbrella clauses that transform contract claims into treaty claims, remains legally and politically contested. By taking their judicial mandate of settling disputes in conformity with principles of justice and international law more seriously, national and international courts can contribute to the clarification and strengthening of the legitimacy of international law in the twenty-first century and to its constitutional foundation on principles of justice.

60. *See generally* Petersmann, *supra* note 20.

61. ARISTOTLE, *supra* note 22, at 133.

62. *See* Petersmann, *supra* note 10 (discussing the legitimately diverse "constitutional interpretations" of economic law by the ECJ, the EFTA Court and the ECtHR).

63. *See, e.g.,* VAN HARTEN, *supra* note 44, at 136 (criticizing the likening of the investor rights approach to legal and judicial remedies under human rights law); *see also* Petersmann, *supra* note 10.

Whereas some investor-state tribunals identify the primary objective of BITs as international legal and judicial protection of investor rights to compensate for the weaker legal status of aliens in host states,[64] others reject one-sided interpretations in favor of foreign investors by emphasizing that the treaty objectives of promoting economic development "utilize investor protection as a means to an end;"[65] the increasing number of explicit BIT exceptions reserving state rights to protect non-economic public interests confirms the need for "a balanced interpretation . . . taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[66] The successful cooperation among national and international courts in European integration suggests that judicial recourse to general principles of law, such as respect for human rights, limited delegation of powers, non-discrimination, and necessity and proportionality of government restrictions of individual rights, offers legal criteria for judicial balancing of public and private interests and for coordinating competing jurisdictions and judicial review standards in international investment disputes, thereby complementing judicial recourse to conflict of law and private law principles, such as judicial comity, res judicata, and litis pendens. The successive agreements among NAFTA member states to limit the NAFTA jurisprudence regarding the NAFTA minimum standard of treatment and expropriation standard,[67] like the recent case law of the ECJ limiting the legal liability of EC institutions for damages caused by EC violations of WTO law,[68] illustrate that, in constitutional democracies as well as in European integration law, state liability for public interest regulation of the economy must remain limited. Moreover, the legal clarification of the general investment protection standards by the judiciary always remains subject

64. *See, e.g.,* Siemens AG v. Republic of Argentina, Decision on Jurisdiction, ICSID Case No. ARB/02/8, ¶ 81 (Aug. 3, 2004): "The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty 'to protect' and 'to promote' investments. . . . The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative;" SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, ¶ 116 (Jan. 29, 2004): "It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."

65. VAN HARTEN, *supra* note 44, at 140 ("The preambular language of investment treaties does not provide a basis for adopting a presumption in favour of safeguarding the claimant against the state.").

66. El Paso Energy Int'l v. Argentine Republic, ICSID Case. No. ARB/03/15, ¶ 70 (Apr. 27, 2006), *available at* http://ita.law.uvic.ca/documents/elpaso-jurisdiction27april2006.pdf.

67. *See* Pope and Talbot, *supra* note 49, at 111; VAN HARTEN, *supra* note 44, at 145–46.

68. *See* Joined Cases C-120/06 P & C-121/06 P, FIAMM & Fedion v. Council & Comm'n, ¶ 108, 2008 E.C.R. 00 (E.C.J. Sept. 9, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0120:EN:HTML.

to democratic rule-making. Both state-centric conceptions of international judges as agents of states with mandates limited by public international law, as well as private law conceptions of commercial arbitrators settling private disputes on the basis of private contracts, must remain consistent with the judicial task of interpreting law and settling disputes in conformity with principles of justice.

Therefore, investor-state arbitrations involving conflicts among private and public interests require reconciling the private and public law dimensions within a public law framework that must avoid one-sided preferential treatment of investor rights. The ECJ, the EFTA Court, the ECtHR, and national courts throughout Europe have also demonstrated the need for judicial respect for the reality of constitutional pluralism; their judicial review of governmental interferences into economic freedoms and other fundamental rights correctly emphasizes that judicial interpretation, application and balancing of rights on the basis of constitutional principles must take into account the human rights obligations of the governments concerned.

One reason for the disregard by investor-state arbitral tribunals and intergovernmental dispute settlement bodies of the customary law requirement of settling international disputes in conformity with principles of justice and human rights is the lack of adequate constitutional checks and balances. An example of this is the self-interests of governments in limiting their legal and judicial accountability for the welfare-reducing effects of discriminatory restrictions of transnational trade and investments. The principles of commutative justice, contractual justice, and conventional justice underlying private commercial arbitration differ fundamentally from, and need to be reconciled with, the principles of constitutional justice limiting governments and public national and international courts. The judicial task of settling disputes with due regard to the constitutional rights of citizens and constitutional restraints of governance powers is essential for maintaining an overlapping consensus on principles of justice among states and citizens with competing self-interests and conflicting conceptions of the good life, social justice, and an efficient regulation of the economy.

Even though human rights arguments have hardly ever been raised in General Agreement on Tariffs and Trade (GATT) and WTO dispute settlement proceedings and were examined by the ECJ in only a very select number of cases among the thousands of ECJ judgments, they may be important parts of the relevant context and democratic legitimacy of judicial settlements of investment disputes with due regard to all parties concerned, including third-party citizens whose interests are adversely affected. As many WTO members (including the United States) have ratified neither regional human rights conventions nor the U.N. Covenant on Eco-

nomic, Social, and Cultural Rights, and the human rights dimensions of economic freedoms and of related general exceptions are likely always to remain controversial, there are also good reasons for judicial self-restraint and judicial deference vis-à-vis the long-standing GATT and WTO practice of invoking and interpreting the broad public interest exceptions in GATT/WTO law without raising human rights arguments in GATT/WTO dispute settlement proceedings. The clarification of principles of justice, initiated by Aristotle more than 2,300 years ago, continues to remain a never-ending challenge for lawyers, scholars, judges, and other citizens in their common and ongoing pursuit of more effective guarantees of constitutional justice in national, as well as in international, relations.