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**ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES**  
**Global Governance Programme-18**

MULTILEVEL GOVERNANCE OF  
INTERDEPENDENT PUBLIC GOODS  
Theories, Rules and Institutions for the  
Central Policy Challenge in the 21st Century

Ernst-Ulrich Petersmann (ed)



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES**  
**GLOBAL GOVERNANCE PROGRAMME**

*Multilevel Governance of Interdependent Public Goods*  
*Theories, Rules and Institutions for the Central Policy Challenge*  
*in the 21st Century*

**ERNST-ULRICH PETERSMANN (ED)**

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## **Abstract**

This publication includes papers of an interdisciplinary conference in 2011 analysing multilevel governance problems of the international trading, environmental, development and rule-of-law systems as interdependent 'aggregate public goods'. It begins with policy-oriented analyses from leading practitioners on the 'gap between theory and practice' in multilevel governance. The analyses of the 'collective action problems' are supplemented by case-studies on the world trading, environmental, development and related rule-of-law systems. Apart from assessing existing multilevel governance arrangements (such as the G20 meetings), the conference papers explore alternative strategies for rendering multilevel governance more effective, for instance by promoting public-private partnerships, empowering private actors through stronger cosmopolitan rights, enhancing legal-judicial accountability of governments and by promoting overall coherence through transnational rule-of-law systems. The papers explore emerging principles for multilevel political governance (like 'responsible sovereignty', unilateral protection of 'common concerns') as well as new forms of multilevel judicial governance strengthening transnational rule-of-law in international trade, investment and environmental regulation.

## **Keywords**

Carbon emission reductions; climate change prevention; environmental law; EU; European Economic Area; G20; IMF; international trading system; Kyoto Protocol; public goods; rule of law; UNFCCC; World Bank; WTO.





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## **Introduction and Overview: Lack of Adequate Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century?**

Ernst-Ulrich Petersmann\*

Globalization has entailed not only more freedoms than citizens have ever enjoyed before; it also continues to make people's life ever more interconnected and 'public' (e.g. through the Internet), thereby contributing to the transformation of ever more local and national goods into international public goods requiring new forms of governance, regulation and justification. The more these new private and public spheres (e.g. of globally integrated financial markets) lack adequate regulation and provoke systemic crises, the more citizens and civil society organizations (like the 'occupy Wall Street' movements) criticize their governments for failure to protect public goods like 'financial stability' and the human rights obligations of all UN member states. This symposium focuses on the interdependent 'public goods' of efficient world trading, environmental, development and rule-of-law systems. The world financial crisis of 2008, the European debt crises since 2010, the failures of the Doha Round and climate change negotiations, and the unnecessary poverty of more than 1 billion poor people are 'public bads' illustrating systemic failures of the prevailing 'Westphalian model' of regulating 'aggregate public goods' (e.g. transnational 'composite goods' like the world trading system composed of vertically and horizontally interconnected, national, regional and worldwide public goods). Even inside the EU, the increasing 'euro-scepticism' reflects distrust by citizens vis-à-vis multilevel governance of public goods distorted by persistent violations of rule of law (e.g. of agreed budget and debt disciplines) and injustices caused by interest group politics (e.g. due to underregulation of financial markets). One conclusion of the conference discussions was that better regulation of interrelated public goods requires more adequate theories, rules and institutions for constructing, providing and maintaining interdependent local, national, regional and global public goods. As the undersupply of international public goods affects the welfare of people in all UN member states, the prevailing 'Westphalian approaches' of intergovernmental regulation (e.g. in UN institutions and the WTO) are increasingly challenged by civil society and by resort to sub-optimal, regional, plurilateral or bilateral policy alternatives (like regional trade agreements, plurilateral negotiation of the 'Anti-Counterfeiting Trade Agreement' outside the WTO, bilateral investment treaties, regional carbon-emission trading systems, humanitarian interventions based on 'duties to protect' agreed 'common concerns'). Constitutional theory and public goods theory challenge the methodological premises of state-centred 'political realism', 'interest group politics' and of Westphalian conceptions of 'international law among sovereign states' by integrating economic, political, legal, social and moral analyses of society in order to design better multilevel governance institutions for collective supply of international public goods.

The papers collected in this publication were first presented and discussed at an interdisciplinary conference on *Multilevel Governance of Interdependent Public Goods* at the European University Institute (EUI), Florence, in February 2011; they build on the existing literature and its conclusion 'that the provision of global public goods occurs largely without the benefit of relevant, up-to-date theory. Public goods theory often lags behind the rapidly evolving political and economic realities – marked by a state-centric and national focus and, consequently, providing poor support for advice on the provision of global public goods in today's multi-actor world' (Kaul et al., 2003, p.5). The conference was convened by Prof. Petersmann in the framework of the PEGGED Project on *Politics, Economics and Global Governance: The European Dimensions*, with the financial support from the European Commission in the context of the Seventh Framework Programme for Research and

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\* European University Institute Florence.

Technological Development. As the existing research had neglected legal theory<sup>1</sup> and the common principles underlying the hundreds of multilateral agreements accepted by UN member states for protecting international public goods, this conference focused on the following two legal and policy questions:

- Can public goods theory be made more policy-relevant by comparing the legal regulation of diverse, international 'aggregate public goods' so as to draw lessons for more efficient, legitimate and effective governance of interrelated public goods and for institutional alternatives? For instance, which legal tools and institutions have been used vis-à-vis 'free-riders' for setting incentives for cooperation in collective supply of international public goods? What are the past experiences with transforming public goods into 'club goods' excluding non-members, granting property rights in 'common pool resources' so as to prevent the 'tragedy of the commons', recognizing 'common concerns', 'duties to protect', corresponding 'access rights', judicial remedies and 'private-public partnerships' of citizens and states at national and international levels as incentives for promoting public goods?
- How should the 'horizontal' and 'vertical' interdependencies between the national and international components of the international trading, environmental, development and related rule-of-law systems be regulated in order to promote the necessary adjustments of multilevel governance to the regulatory needs of globalization in the 21st century? 'Publicness' and 'privateness' of many goods are no innate properties, but socially and legally constructed, for instance by recognition of human rights to governmental protection of public goods (like rule of law and public health), by 'privatizing' the supply of public goods like access to water, or by treaty obligations to cooperate among diverse public goods regimes (like governance of the Internet). How should public goods theory respond to the reality of legitimate 'legal pluralism' at national and international levels requiring respect for 'reasonable disagreement' (e.g. as reflected in 'deferential interpretations' of 'public interest exceptions' like Article XX GATT in international agreements coordinating competing public goods) and for legitimately diverse systems of human rights, democratic 'preference revelation', fair rule-making, legitimate governance and public goods beyond states?

This Introduction summarizes the main conclusions of the conference papers and discussions following the four sections of the conference report. *Section I* explores *Multilevel Governance of Interdependent Public Goods* from the perspective of policy-approaches by governments and leading practitioners. *Section II* analyses *Collective Action Problems Impeding Collective Supply of Interdependent Public Goods* from the perspective of economic, political and legal theories and analyses. *Section III* includes *Case Studies on Multilevel Governance of 'Interface Problems' of the International Trading, Environmental and Development Systems*. *Section IV* concludes with analysing the *Constitutional and Legal Problems of Multilevel Governance of Citizen-driven International Public Goods*. In order to coordinate the papers and focus the discussions on policy issues, participants had been invited to respond to a number of policy questions. In welcoming and thanking the key-note speaker – WTO Director-General Pascal Lamy –, Prof. Petersmann recalled the *genius loci* of Florence:

Since the Middle Ages, the three Florentine 'city republics' and their 'Platonic Academy' – and also today's European University Institute established as an international organization at Florence – offer innovative examples for multilevel governance of public goods challenging power politics. The intellectual revolution of the 'Florentine Renaissance' was based not only on a return to *Platonism* and *Aristotelianism* but also to *humanism* (as illustrated by Pico della Mirandola's *Oration on the Dignity of Man* founded on individual freedom) and to *republicanism*. The political history of Florence offers many examples for the dangers of struggles for governance reforms, as illustrated by the torture of *Machiavelli* following the overthrow of the second republic of Florence

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<sup>1</sup> The two leading research publications on global public goods published by the UN Development Program - i.e. Kaul et al. (1999, 2003) - did not include legal studies. The book edited by Maskus and Reichman (2005) focussed on knowledge as 'perhaps the quintessential public good' (p.47) and on its decentralized supply by means of intellectual property rights excluding 'free-riders' and setting incentives for innovation.

(1494-1512) or by the murder of Pico della Mirandola following his controversial proposals - possibly in the same Badia monastery hosting the EUI today - on reforming the multilevel governance of the Roman church. The EUI's *Global Governance Program* - as one of Europe's research centres on reforms of multilevel governance - is a unique conference venue for exploring governance of public goods and the related need for a new 'public reason'. Petersmann thanked Pascal Lamy for having finally accepted the repeated invitations to deliver a lecture in the Badia monastery of the EUI and concluded by mentioning a recent joke among diplomats at Geneva, which explained why discussing the divine challenges of multilevel governance in the splendid Renaissance *refectorium* of the *Badia* monastery was an appropriate venue:

*US President Obama has an appointment with God and asks him: When will the US deficit be reduced? Not in your lifetime, answers God. And Obama begins crying. German Chancellor Merkel meets God and asks him: When will the Eurozone be out of trouble? Not in your lifetime, replies God. And Merkel begins to cry. China's President Hu Jintao sees God and asks: When will the province of Taiwan be reunited with the communist fatherland? Not in your lifetime, God answers again. And Hu begins to weep. Finally, Pascal Lamy meets God and asks: When will the Doha Round of trade negotiations be concluded? This time, God begins to cry.*

## I. Multilevel Governance of Interdependent Public Goods: Policy Approaches

SECTION I begins with a presentation by WTO Director-General, and former EU Commissioner for Trade Policy, Pascal Lamy on *Global Governance, from Theory to Practice*. Lamy emphasizes 'the gap between theory and practice' in analysing global governance: The prevailing 'Westphalian conception' of international governance postulates that 'as States are coherent and legitimate, global governance is necessarily coherent and legitimate as well'. In international practice, however, 'States are often incoherent'; also 'member-driven international organizations' may lack legitimacy in the eyes of citizens. The 'legal bridges' built between international organizations in order to remedy the 'coherence gap' are often weak. As 'theory and practice do not match', Lamy calls for 'pragmatic solutions ... to be found now to enhance global governance and better address the problems that our world is facing', notably by providing better leadership, more legitimacy, efficient results for the benefit of people at a reasonable cost, and more policy coherence. At the national level, leadership, legitimacy and efficiency are within the same hands of one 'government'; at the international level, however, the three elements are much more complex. European integration has evolved into a unique multilevel governance model based on leadership by the independent European Commission and legitimacy promoted by democratic and judicial EU institutions protecting efficient European achievements like the common market. But the declining participation in elections to the European Parliament and the rising *euro-scepticism* in public opinion reveal the limits of legitimacy even of the EU and the need for pragmatic governance reforms. Lamy supports the emerging 'triangle of coherence' based on (1) the G20 providing political leadership and policy direction; (2) the UN providing a framework for global legitimacy through accountability; and (3) member-driven international organizations providing expertise and specialized regulation, whose mutual coherence is being promoted by the increasing 'bridges' linking the G20 to the UN and to specialized organizations like the WTO as well as through the annual meetings of the 'Chief Executive Board' of the UN. Lamy endorses the attempts at revitalizing the ECOSOC in order to enhance UN system-wide coherence, the increasing number of joint initiatives by the WTO and UN agencies, as well as the readjustment of voting rights in the Bretton Woods institutions. In order to reinforce the '*secondary legitimacy*' of Westphalian organizations deriving from state democracy by '*primary legitimacy*' deriving from direct participation of citizens, global governance must respond to the democratic criticism of 'too-distant, non-accountable and non-directly challengeable decision-making at the international level'. Another lesson from European experience is the need for basing successful integration on common objectives, shared values and an adequate institutional machinery. According to Lamy, the UN human rights values and regional integration as 'the essential intermediate step between the national and the global governance level' need to be strengthened before stronger local and 'community support' for

multilevel governance institutions may emerge. More ‘primary legitimacy’ of global governance based on support from civil society and ‘global citizens’ - identifying with a ‘global community’ and the necessary building of a new ‘polity’ - requires ‘localizing global problems’ and remains ‘the main political challenge we are facing’.

### ***Differences between global and regional governance of public goods***

In the second contribution to Section I, Josep Borrell – President of the European University Institute and former member and President of the European Parliament – analyses *The EU and the European Parliament in International Trade and Climate Change Negotiations*. Borrell agrees with the premise that the transformation of ever more *national public goods* (like common markets, protection of the environment) into *international public goods* makes multilevel governance of *interdependent public goods* the central policy challenge in the 21<sup>st</sup> century, necessitating multidisciplinary analyses and reform proposals. He analyzes the roles of the EU and of its European Parliament in international trade and climate change negotiations in the light of the Lisbon Treaty’s enlargement of the EU competences for common commercial, investment and environmental policies and the co-decision powers of the European Parliament. The more local, national and regional supply of public goods becomes dependent on supplementary worldwide cooperation (e.g. for prevention of climate change), the more complex become governance decisions on which goods should be supplied privately or publicly, and how local, national, regional and global governance institutions can be coordinated so that all citizens benefit. As the Lisbon Treaty commits the EU to ‘promote an international system based on stronger multilateral cooperation and good global governance’ (TEU, 2009, Article 21), the EU often portrays itself as ‘the multilateral player par excellence’ for global governance. Yet, as ‘national self-interest and a lack of political will often prevail’, the EU’s record on these ambitions remains ambiguous. According to Borrell, the EU’s experiences with overcoming such ‘hurdles in the cooperation between sovereign states on shared challenges’ offer also lessons for overcoming collective action problems in global governance, for instance by designing incentives for collective cooperation. Thus, the EU membership in the WTO offers an example for other regional economic organizations of how national, regional and worldwide governance of interdependent public goods (e.g. national, regional and global common markets) can be legally and institutionally coordinated. The European Parliament’s co-decision power to approve or reject all international trade and investment agreements of the EU entails additional levels of ‘politicization’ of decision-making and incentives for rent-seeking that may render protection of international public goods more difficult; hence, ‘Parliament has to prove that its empowerment and enhanced democratic legitimacy do not lead to a deterioration in policy outcomes’. The leading role of the EU in adopting/ratifying the 1997/2005 Kyoto Protocol and enabling the 2011 ‘Durban agreement’ on a new climate prevention convention offers another example of EU leadership in providing global public goods and setting decentralized incentives (e.g. through the European carbon emission trading systems and its inclusion of foreign airlines flying to and from the EU) for collective supply of international public goods. The EU’s leadership role in the WTO as well as in climate change prevention negotiations illustrates the potential contribution of regional organizations to reducing the ‘capabilities-expectation gap’ characterizing global governance; yet, even though the EU model may be used for looking for necessary elements of effective global governance, the EU’s common trade and environmental policies also illustrate the manifold ‘collective action problems’ impeding ‘leading by example’ for multilevel governance of interdependent, international public goods.

The conference discussions focused on the diverse national, regional and worldwide governance responses to the transformation of ever more *national public goods* (like open markets, protection of the environment, human rights) into *international public goods*. In addition to the ‘coherence gap’ and ‘legitimacy gap’ discussed by Lamy, the ‘sovereign equality of states’ also entailed ‘jurisdiction gaps’, ‘governance gaps’, ‘incentive gaps’, ‘participation gaps’ and transnational ‘rule of law gaps’ impeding

collective supply of global public goods (for a discussion of these 'gaps', see Kaul et al., 1999, 450 ff; Petersmann, 2011, 23, 33 ff). The EU model of reducing such 'gaps' by regional 'communitarization' and 'constitutionalization' of economic and environmental policy powers and governance institutions had so far not been followed by other regional economic groupings outside Europe. Also the example of EU membership in the WTO - facilitating transformation of national and regional into global public goods, as illustrated by the EU's leadership role in the Doha Round negotiations - had so far not been followed by other regional trade organizations. The co-decision powers of the directly elected European Parliament went far beyond the more limited powers of parliamentary bodies in other multilateral treaties. But this additional layer of parliamentary 'input legitimacy' in multilevel European governance has also entailed an increase in 'politicization' of decision-making, which risks undermining the 'output legitimacy' of the EU's co-decision-making by non-transparent interest group politics. The leading role of the EU in adopting/ratifying the 1997/2005 Kyoto Protocol and enabling the 2011 'Durban agreement' on a new climate prevention convention were widely seen as successful examples of EU leadership in promoting global public goods and setting decentralized incentives (e.g. through the European carbon emission trading system and its inclusion of foreign airlines flying to and from the EU) for their collective supply.

### ***Legitimacy problems of multilevel governance***

Regarding Lamy's distinction between government-based 'secondary legitimacy' and citizen-based 'primary legitimacy' of 'Westphalian organizations' like the UN and the WTO, former EU ambassador R. Abbott asked whether intergovernmental rule-making could be held to be illegitimate if international organizations cannot achieve what governments do not allow them to do and often fail to do themselves. It was said that also 'private-public partnerships' and 'tripartite structures' - as in the International Labour Organization and in the EU - could be abused for corporatist rather than democratic market regulations. Several speakers argued that, from the 'consumption perspective' of citizens and their human rights, the 'composite nature' of the international trading system and other 'aggregate public goods' called for protecting rights of citizens (e.g. as main economic actors, beneficiaries and 'democratic principals') rather than only rights of governments and states. The often artificial 'foreign-domestic policy divide' entailed that - even though 'aggregate international public goods' extended national public goods across frontiers and international law required treaties to be implemented in domestic legal systems in good faith in conformity with the human rights obligations of all UN member states - most international trade, environmental and human rights treaties did not effectively protect international public goods for the benefit of citizens. Intergovernmental rule-making often failed to meet the requirement of modern theories of justice that protection of constitutional rights of citizens requires a '4-stage sequence' (J.Rawls) of constitutional, legislative, executive and judicial rule-making transforming constitutionally agreed principles of justice into legislation, rules-based administration and judicial protection of 'rule of law' for the benefit of citizens. Theories of justice explained why - for instance in European economic law as well as in international investment and human rights law - 'courts of justice' (like the EU Court and the EFTA Court) could effectively and legitimately protect cosmopolitan and human rights vis-à-vis welfare-reducing violations of international agreements. Arguably, transnational rule of law for the benefit of citizens was an 'intermediate public good' of constitutional importance for protecting 'aggregate public goods' (like human rights, international common markets); governmental violations of transnational rule of law risked undermining the overall coherence of public goods as well as the legitimacy of multilevel governance vis-à-vis citizens. Modern economics likewise postulated that human welfare depends more on the 'human capital' of a people to realize its collective responsibility to institutionalize reasonable rules (e.g. for an efficient division of labour and rule of law promoting investments) than on scarce natural resources. The 'conditionality' of IMF and EU financial assistance to member states with balance-of-payments or 'sovereign debt' problems offered another example of

why Westphalian 'state sovereignty' had to be re-interpreted as 'responsible sovereignty' requiring protection of human rights and other public goods for the benefit of citizens.

## **II. Collective Action Problems Impeding Supply of Interdependent Public Goods**

Public goods theory emphasizes that the 'supply strategies' for the different types of public goods vary depending on their particular characteristics and the preferences of citizens and governments involved (e.g. for 'internalizing external effects' by means of taxes, subsidies or a change in property rights).

### ***Diverse public goods may require diverse supply strategies***

The contribution by I. Kaul on *Global Public Goods: Explaining their Underprovision* begins with discussing the different categories of private and public goods distinguished by economists such as: non-rival and non-excludable pure public goods (like moonshine) and impure public goods that are either non-excludable (like common-pool resources) or non-rival (like club goods, patented pharmaceutical knowledge); depending on the respective 'provision paths', some public goods can be supplied unilaterally by 'single best efforts' (e.g. an invention); the supply of some other public goods depends on the 'weakest links' (e.g. dyke-building, global polio eradication, nuclear non-proliferation); 'aggregate global public goods' tend to be supplied through a 'summation process' of local, national and regional public goods. Global public goods 'differ from their national counterparts in terms of the complexity – the multi-actor, multi-sector, multi-level nature – of their provision path, as well as in terms of the policy-interdependence they entail'. As 'publicness and privateness are in most cases not innate properties of a good but social constructs', the policy choices and preferences of countries vis-à-vis public goods may legitimately differ. In her analysis of why some global public goods are better provided (like global transportation and communication systems) than others, Kaul focuses on economic and political market failures (like free-riding); fairness and efficiency deficits in international negotiations (e.g. due to power politics); organizational constraints (e.g. due to path-dependence); policy stand-offs (e.g. due to contested distributional implications); inconsistency among global public goods (e.g. due to conflicting preferences); and uncertainty caused by the relative recentness of issues. Some of these impediments have prompted policy responses in terms of new principles (like 'duties to protect') and new institutions (like the G20, establishment of a Green Climate Fund for mitigation of and adaptation to climate change). Yet, 'for the most part the reform measures imply incremental change; and many end up in policy stalemates'. According to Kaul, a 'certain amount of ... global decision-making "messiness" could well prove, in the medium and longer-term, to be the more efficient policy path because it might broaden and deepen the political consensus on which change initiatives rest'.

### ***Public goods regimes depend on the related property regimes***

F. Kratochwil's contribution on *Problems of Policy Design based on Insufficient Conceptualization: the Case of 'Public Goods'* explains why the economic focus on non-rivalry and non-exclusivity of public goods neglects many additional reasons for the undersupply of public goods; for, 'there are virtually no public goods that satisfy the two criteria supposedly defining them'. For instance, if overuse is the problem of 'common pool resources', then 'by definition we do not have a public goods problem'. Hence, the prevailing economic conceptualization is 'much too narrow for designing policy responses counteracting the undersupply problem'. Kratochwil proposes instead an alternative 'political economy approach' analysing the undersupply problem within the wider framework of property regimes. Using examples of Roman property law and Adam Smith's analysis of property regulation, Kratochwil demonstrates that most problems of 'common goods' can be better analysed by



focusing on the legal construction of private and public goods instead of assuming certain inherent ‘properties’ of the goods in question. Kratochwil concludes that – just as there is no ‘one size fits all’ solution to the problems of ‘common pool resources’ – the sub-optimal supply of many international public goods results from the interaction of many more factors than their non-rival and non-excludable consumption, such as the lack of resources or the ‘capture’ of regulatory institutions by organized interest groups. Depending on the property regime, the alleged ‘tragedy of the commons’ may turn out to be a ‘comedy of the commons’ enabling a ‘happy ending’ by means of limiting membership and over-use. Rather than resolving a prisoners’ dilemma by focusing on the two alternatives of government intervention or privatization, legal differentiation between different types of ownership rights (e.g. rights of access, extraction, management, exclusion, alienation) may enable more effective provision of public goods. But Kratochwil also recalls that insistence on exclusively private rights was ‘once considered as being the world of the *idiotes* (of the private person in the original meaning of the word) who did not share a common’.

In the conference discussion on the political, legal and institutional incentives to supply global public goods,<sup>2</sup> Kratochwil’s conclusion – i.e. that the economic focus on non-rivalry and non-exclusivity of public goods neglects many additional reasons for the undersupply of public goods (like lack of resources, inadequate regulation of property rights, ‘capture’ of regulatory institutions by organized interest groups), and ‘the conventional public goods debate offers less than it promised for the analysis of social and political problems’ – was widely shared. Economic and political analyses of the different ‘supply conditions’, alternative instruments and institutional designs for constructing public goods and transforming them into ‘club goods’ (such as the WTO), differ enormously. In view of the few examples of ‘pure public goods’ as defined by economists, the term ‘public good’ is often used more broadly for goods that benefit and can be consumed by all citizens and are confronted with political problems of collective action and free-riding.<sup>3</sup> The decentralized, private law forms of the global governance of the Internet by the Internet Corporation for Assigned Numbers and Names (ICANN), and the settlement of thousands of international ‘domain name disputes’ by means of arbitration procedures administered by the World Intellectual Property Organization (WIPO) and enforced by ICANN, illustrate the potential importance of decentralized, rights-based regimes transforming global public goods into institutionalized ‘club goods’ so as to limit incentives for ‘free-riding’ and create incentives for supporting club goods.

### ***Rule-making and compliance depend on procedural fairness***

Some speakers said that the ‘governance failures’ to conclude the Doha and climate change negotiations were related to disagreements on principles of fairness and distribution of costs and benefits (e.g. in less-developed countries refusing WTO disciplines on welfare-reducing practices like non-transparent government procurement). Harmful ‘externalities’ were often a major impediment to collective supply of public goods, as illustrated by the harmful impact of illegal US cotton subsidies on African and Latin-American cotton-exporting countries opposing conclusion of a ‘Doha Development Round’ without US compliance with the WTO dispute settlement rulings on cotton subsidies. The rent-seeking lobbies financing the election campaigns of US congressmen were more

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<sup>2</sup> This discussion benefitted from an additional conference presentation by Dupont on *Why Cooperate? Political, Legal and Institutional Incentives to Supply Global Public Goods*.

<sup>3</sup> On expanded definitions of public goods, see also Kaul (2003, 22, 83 ff), explaining, *inter alia*, why conceptualizing and analyzing global natural commons (such as the atmosphere, the high seas), global humanmade commons (such as global rules, regimes and knowledge) and global policy outcomes (such as global peace, financial stability and environmental stability as global public goods) from the perspective of the ‘triangle of publicness’ (i.e. publicness in consumption: is the good consumed by all? publicness in net benefits: are the net benefits of the good equitably distributed? publicness in decision-making: who decided to place the good in the public domain?) reveal differences that may be important for regulating public goods and for the optimal ‘aggregation technology’.

powerful than the economic and legal arguments against these wasteful subsidy practices in blatant violation of US legal obligations under WTO law. Many discussants supported Lamy's statement that multilevel governance in the 21<sup>st</sup> century required not only utilitarian output legitimacy, but also democratic input legitimacy. 'Responsible sovereignty' should aim at transforming global public goods into club goods so as to limit free-riding, facilitate rules-based bargaining and strengthen third-party adjudication of international disputes, which could enable judicial rule-clarification in case of political stalemates. Several speakers argued that the different speeds and flexibilities in regional European integration offered lessons for reducing worldwide collective action problems regarding public goods, for instance in terms of promoting 'plurilateral agreements' inside the WTO (like the 2011 Government Procurement Agreement), or regional trade agreements, plurilateral competition agreements, bilateral investment and double-taxation agreements among WTO members concluded outside the WTO. It was noted that economic public goods theory offers few criteria as to when global public goods should be regulated issue-by-issue (e.g. pursuant to the economic theory of separation of policy instruments underlying the separate UN Specialized Agencies) or by means of package deals facilitating compromises over the distribution of costs and benefits (as in the 1994 Uruguay Round Agreement establishing the WTO). One discussant referred to P. Lamy's criticism, in a speech delivered in October 2010, of the 'leadership vacuum' in the 'transition from the old governance of the old trade order to the new governance of a new trade order'; paradoxically, the evolution from the comparatively weak GATT 1947 – in spite of its lack of legal ratification, weak institutions and 'grandfather exceptions' exempting inconsistent national legislation – into the worldwide WTO legal and compulsory dispute settlement system had been more successful than the evolution of the Bretton Woods Agreements that had been duly ratified by national parliaments. Yet, the ever larger number of trade agreements concluded outside the WTO, the likely failure of the Doha Round negotiations, and other 'governance gaps' confirmed the 'legitimacy deficits' and 'constitutional limits' of intergovernmental power politics as a legitimate tool for global economic reforms in the 21<sup>st</sup> century. Waiting for global consensus (e.g. among 153 WTO members) had proven to be an unreasonable negotiation strategy, just as the 'single undertaking method' and consensus-based amendment procedures of WTO law risked being impractical 'implementation strategies'.

### **III. Case Studies on Multilevel Governance of 'Interface Problems' of the International Trading, Environmental and Development Systems**

SECTION III was devoted to empirical case-studies of multilevel governance of the international trading, environmental and development systems, which are horizontally and vertically interconnected and, arguably, share mutually beneficial 'public goods dimensions' (e.g. in terms of promoting efficient use of scarce resources and general consumer welfare in all trading countries). The UN Charter had conceptualized development as a collective task of providing global public goods in the framework of international organizations open to all UN member states. Section III focused on 'jurisdiction gaps' and related 'governance gaps' in the post-war system, such as the institutionalization of the world trading system outside the UN framework (as discussed by Evenett/Dawar),<sup>4</sup> the lack of a Global Environmental Organization (as discussed by Esty & Moffa), the cooperation between the WTO and UN Specialized Agencies (as discussed by Abbott and Pitaraki) and the ever larger number of regional and bilateral agreements filling the 'gaps' of worldwide regulation (as discussed by Hartmann and Penca). UN law and WTO law referred to most of the 'principles of fairness' necessary for successful negotiations over global public goods, such as: principles of reciprocity and mutual advantage, whose precise definition may legitimately vary in particular contexts (like non-reciprocal trade preferences for least-developed countries in the WTO); principles of equality and proportionality (e.g. regarding allocation of financial contributions,

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<sup>4</sup> The conference draft paper could not be included into this publication.

'common but differentiated responsibilities' in multilateral environmental agreements); respect for needs, acquired rights and for 'compensatory justice' (e.g. vis-à-vis former colonial territories); and procedural principles of 'justice as fairness' and 'voluntary acceptance' (cf. Albin, 2001). Yet, in worldwide UN and WTO negotiations, the pursuit of justice as a 'balanced settlement of conflicting claims' (cf. Albin, 2003, 263, 270 ff) was often distorted by intergovernmental power politics and 'rent-seeking' efforts (e.g. to avoid the costs of climate change mitigation by refusing reduction commitments for greenhouse gas emissions under the Kyoto Protocol). The emerging 'triangle of global governance' - based on the UN, UN Specialized Agencies and the G20 as a 'Global Economic Governance Executive' - was discussed in the keynote speech by P. Lamy and the contribution by J. Wouters & T. Ramopoulos. Yet, both Lamy and Wouters & Ramopoulos also emphasized the 'legitimacy deficits' and 'decision traps' of multilevel governance in the WTO, the G20 and UN institutions, which call for more participatory, multi-stakeholder decision-making on global public goods involving citizens, civil society and business (as discussed under Section IV).

### ***Multilevel Economic Governance by the G20***

The analysis by Wouters and Ramopoulos of *The G20 and Global Economic Governance: Lessons from Multilevel European Governance?* emphasizes that the G20 is in a powerful position to promote the global common good, and to make it prevail, at times, against a narrow, short-term interpretations of national interests. It is much less clear whether multilevel European governance offers lessons for institutionalizing the G20 as a global governance executive. For instance, the 'competence catalogues' of the Lisbon Treaty listing various categories of EU competences (cf. Articles 3-6 of the TFEU, 2009) on exclusive, shared, parallel and supporting competences), and limiting their exercise by constitutional principles (e.g. in Articles 2-6 of the TEU, 2009), neither prevented daily turf battles on shared competences nor newly emerging modes of multilevel governance (e.g. of the Eurozone crisis among 17 EU member states). The 27 EU member states have transferred more legislative and policy powers to supranational institutions than any other group of states. But a comparison of the European Coal and Steel Treaty of 1951 with the 2009 Lisbon Treaty shows that the design of EU institutions evolved through trial-and-error. According to Wouters, it is 'hard to draw generalizing lessons from this very specific process for the provision of global public goods' and for the organization of global governance institutions. For instance, does the transformation of the EU Council from a 'political directorate' operating outside the EU Treaties (essentially until 1986) into a Treaty institution (TEU, Article 15) offer lessons for reforming the G20 as today's 'premier forum for international economic cooperation'? How should the G20 be coordinated with alternative modes of governance (like markets, hierarchical organizations, informal networks)? Should the G20's currently informal mode of negotiating agreements as a 'diplomatic club' in a culture of reciprocity be changed, for instance by creating a permanent G20 Secretariat, transforming the G20 into a 'Council of Governors' of the Bretton Woods institutions and the WTO, or by otherwise promoting synergies through regular delegation of tasks to existing or new organizations (like the Financial Stability Board), thereby enhancing decision-making in international organizations (like the WTO) or 'rebalancing' and initiating reforms of existing institutions (like the IMF)? Could the 'representative voice' and deliberative legitimacy of G20 meetings be enhanced by stronger stakeholder-involvement (such as participation of NGOs) and by offering G20 membership also to the African Union (as South Africa remains the only G20 member from Africa)? Europe's declining influence in global governance, as illustrated by the European debt crisis overshadowing the 2011 G20 summit at Cannes and by related tendencies to re-nationalize European monetary and debt governance, rendered a 'Europeanization of the G20' inspired by principles of EU integration unlikely.

### ***Multilevel governance of the world trading system***

The three presentations by S.Evenett/K.Dawar on *Regulating International Trade and 'Sustainable Development' in the WTO: Lessons from Ten Years of Doha Development Round Negotiations*, by F.Abbott on *Multilevel Governance Problems at the Intersection of Trade, Health and the 'Global Knowledge Economy'*, and by A. Pitaraki on *Can the Development Dimension of the WTO be Secured without Stronger Synergies among the WTO and the World Bank?* explore the interrelationships between multilateral trade, health and development governance in the WTO and UN Specialized Agencies like the World Health Organization (WHO), WIPO and the World Bank Group. Evenett/Dawar gave an overview of the evolution of the Doha Development Round negotiations in the WTO since 2001 and of the many obstacles that continue to prevent a successful conclusion of these negotiations. While less-developed WTO members express dissatisfaction over inadequate commitments by developed countries (e.g. in terms of 'special and differential treatment', the 'enabling clause', liberalization of agricultural trade and of international movements of natural service providers), the latter criticize the former for maintaining too many welfare-reducing impediments and trade barriers. Certain WTO achievements - like increased 'trade facilitation' and 'aid for trade', the Advisory Centre for WTO Law assisting less-developed WTO members in WTO dispute settlement proceedings, reciprocal WTO commitments leading to ever more WTO Accession Protocols and WTO plurilateral agreements (e.g. on liberalization of trade in international technology products, financial and telecommunications services, government procurement) – are widely acknowledged. Yet, as long as trade policy-making remains dominated in most countries by protectionist interest groups, claims by governments maintaining trade barriers at home and requesting non-reciprocal trade liberalization abroad are bound to remain contested. In spite of the enormous 'opportunity costs' of the failure to conclude the proposed Doha Round Agreements, it remains uncertain whether the consensus-based WTO negotiations among more than 150 countries with often conflicting national and domestic interests will reach agreement on a 'single undertaking' by all WTO members on liberalizing and regulating international trade in goods, services, intellectual property rights and 'sustainable development'. Like most trade economists and diplomats, Evenett/Dawar did not use 'public goods theory' for analysing the failures of the Doha Round negotiations. As emphasized in the conference discussions, the actual policy responses of WTO members to the collective action problems in the Doha Round negotiations – such as recourse to ever more free trade agreements and plurilateral agreements (like the 2011 Government Procurement Agreement among 42 WTO members) pending the failure to conclude the Doha Round negotiations – reflect many insights from public goods theories (like the need to exclude 'free-riders' and to reform property rights regimes). Since the repeal of the British 'corn laws' in 1846, the world trading regime continues to evolve through dialectic processes of unilateralism, bilateralism and multilateralism. Just as the conclusion of GATT 1947 would hardly have been possible without the preceding conclusion of more than 30 trade liberalization agreements by the USA based on the US Reciprocal Trade Agreements Act of 1934, the conclusion of the 1994 WTO Agreement was preceded by dozens of free trade and 'plurilateral trade agreements' (like the Kennedy and Tokyo Round Agreements) setting incentives for joining the WTO Agreement. Conclusion of the Doha Round Agreements may, likewise, be possible only after many more free trade and 'plurilateral trade' agreements set sufficient incentives for third countries to join worldwide agreements.

The evaluation – in the contribution by F.Abbott – of the 10<sup>th</sup> anniversary of the 2001 Doha Declaration on the WTO Agreement on Trade-Related Intellectual Property Rights and Public Health concludes that research and funding for the development, procurement and distribution of medicines for diseases predominantly affecting individuals in less-developed countries have increased. Nonetheless, problems in providing essential health services remain to be addressed in both developed and less-developed countries. Even though cooperation has improved among the secretariats of the WHO, WIPO and WTO in the field of public health, Abbott notes that governments continue to choose among the alternative *fora* of WHO, WIPO, WTO, regional or bilateral mechanisms 'for

securing strategic advantage'. Abbott suggests promoting more cooperation among the legal services of the three Geneva organizations in order to avoid inconsistencies among WHO, WIPO and WTO rules. He also calls for expanding institutional coordination, for instance by involving the World Bank in coordinating new financing mechanisms for promoting public health. Abbott criticizes 'collective intrusion' by old and newly emerging powers 'content with rules imposed on others, but acting unconstrained for their own accounts'. The contribution by A. Pitaraki on cooperation among the WTO and the World Bank in promoting the 'development dimension' of WTO rules and policies likewise calls for stronger institutional cooperation and coordination of trade policy and financial policy instruments, as also required by the WTO's 1994 'coherence mandate' explicitly urging the WTO to strengthen its ties with the IMF and the World Bank in order to promote their common objectives (such as improving living standards, 'sustainable development' and international trade). The analyses of the interrelationships and potential synergies among the legally separate WTO, WIPO, WHO, World Bank and multilateral environmental regimes reveal, on the one side, the need for closer coordination between trade and environmental regulation of emission reductions, border tax adjustments, emission trading systems, subsidies and environment-related goods, services, intellectual property rights and dispute settlement proceedings; on the other side, only certain IMF, FAO and WIPO rules have become explicitly incorporated into WTO law, and the modes of cooperation between the WTO and other UN Specialized Agencies (like WHO, the World Bank) continue to evolve pragmatically.

### ***Multilevel environmental governance***

The analyses of the interrelationships and potential synergies among the legally separate WTO, WIPO, WHO and World Bank regimes were supplemented by three additional presentations analysing interrelationships between WTO rules and climate change policies and protection of other ecosystems like biodiversity. The contribution by D. Esty & A. Moffa analyses *Why Climate Change Collective Action has Failed and What Needs to be Done within and without the Trade Regime*. Climate change illustrates the 'collective action problems' and potential tragedy of the 'global commons' (like the atmosphere): neither can the harmful externalities of national greenhouse gas (GHG) emissions on global warming, sea level rise, changed rainfall patterns and increased hurricanes be successfully addressed by any nation acting alone; nor do countries agree on worldwide disciplines, institutions and the sharing of the related costs and benefits of emission-control necessary for preventing climate change and global over-exploitation of a limited resource. According to Esty&Moffa, the reasons for the failure of the complex web of institutions and programs aimed at mitigating climate change can be grouped into three main categories: (a) political economy considerations; (b) negotiation roadblocks; and (c) lack of disciplines on free-riding, which call for a new global governance mechanism specifically addressing these collective action problems. While the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC) implemented its principle of 'common but differentiated responsibilities' (Article 10) by exempting less-developed countries from binding GHG reduction commitments, the 'Durban Agreement' of 2011 envisages replacing the Kyoto Protocol by a new treaty providing for GHG reduction commitments also by less-developed countries like Brazil, China and India that have become major polluters. But the cost-benefit calculations regarding the optimal level of GHG reduction commitments of developed and less-developed countries, as well as of individual industries and companies, continue to differ enormously. Esty&Moffa emphasize that even their proposal for a new Global Environmental Organization (GEO) cannot succeed in regulating the 'commons problems' without support from other international bodies like the WTO so as to ensure that the gains from global market integration are available only to those who share the burdens of ecological interdependence. Esty&Moffa describe the legal-institutional fragmentation, disagreements over burden-sharing, and the lack of US leadership impeding climate change negotiations among more than 190 UN member states. Establishment of a new GEO could mitigate some of the collective action problems. But the interdependences among international trade and environmental regimes require

close coordination between trade and environmental regulation of emission reductions, border tax adjustments, emission trading systems, subsidies and environment-related goods, services, intellectual property rights and dispute settlement proceedings.

These latter problems are analysed in the case-study by M. Hartmann on *Decoding the Regulation of Climate Change: Carbon Emission Trading and Border Carbon Adjustments in Europe, North-America and Global Regimes (UNFCCC, WTO)*. Hartmann describes the transition from the worldwide recognition of climate change as a ‘common concern’ in the 1992 UNFCCC towards the progressive ‘institutionalization of polycentric regulation’ and ‘experimental regional climate change governance’ so as to fill the ‘regulatory vacuum’ at the global level (e.g. in the UNFCCC, the Kyoto Protocol and WTO law). His study focuses on regional emissions trading schemes in Europe and North-America and the complementary use of border tax adjustments; the transitional change of rights and obligations for protecting the global public good of GHG reductions is, however, paradigmatic also for the regulation of other ‘global environmental commons’ requiring a multitude of regulatory strategies and levels. The focus on market-based environmental regulation and on out-sourcing responsibilities for achieving emission reductions on behalf of states and international organizations illustrates the ‘regulatory multipolarity’ and ‘polycentric international regulatory order’ required for dealing with inter-generational, environmental problems affecting all states, billions of individuals and distorting the worldwide division of labour. The 2011 ‘Durban Agreement’, and the international dispute over the inclusion of foreign airlines into the EU’s carbon emission trading system, confirm Hartmann’s doubts ‘whether the marketization of carbon dioxide emissions accounts for an appropriate methodology of global public goods protection in the process of societal transformation’, notwithstanding the lack of political support for alternative regulatory strategies. Hartmann’s detailed comparison of European and North-American regulatory approaches identifies the numerous problems in the implementation of the EU Directive (e.g. over-allocation of permits in 2007/8, inadequate incentives for reducing CO<sub>2</sub> emissions on larger scales) as well as in sub-federal climate change regulations at state and local levels in the USA (e.g. US refusal to accept international GHG reduction commitments and to develop a federal emission trading scheme). Hartmann explains why ‘border carbon adjustments’ may be a necessary, supplementary policy instrument and legally justifiable under WTO law, notwithstanding risks of manipulating carbon taxes for protectionist purposes. Hartmann concludes that polycentric, market-based regulation may not change individual behaviour and reduce extensive carbon emissions ‘unless external authorities impose enforceable rules that change the incentives faced by those involved’ based on a ‘transnational rule of law’ system protecting coherence between private and public, national and international levels of governance for the benefit of citizens.

J. Penca’s analysis of *International Incentive Mechanisms for Conservation of Biodiversity and Ecosystem Services* offers another case-study of progressive, multilevel regulation of ‘global environmental commons’, i.e. the protection of biodiversity in the context of the 1992 UN Convention on Biodiversity (CBD) as the principal framework for biodiversity protection in a highly fragmented, multilevel biodiversity regime. Like Hartmann, Penca focuses less on ‘command-and-control regulation’ than on legal, economic and other tools to incentivise the private sector contribution to the protection of global environmental commons as a decentralized instrument for implementing a global environmental treaty and reducing related collective action problems. Even though the CBD aims at protecting primarily *national* resources by means of instruments different from those used for climate change protection, the ‘common concern’ at protecting biodiversity is recognized. Some market-based, regulatory instruments overlap with the Kyoto Protocol’s ‘flexible mechanisms’ (like the REDD mechanism aimed at Reduced Emissions from Deforestation and Forest Degradation); they confirm the importance of involving the private sector and changing individual behaviour. Penca discusses those parts of biodiversity conservation that are considered ‘public goods’ and subject to ‘custodial sovereignty’ (e.g. certain ecosystem services) or outside national jurisdictions (like certain marine resources); she also examines the use of incentives for sustainable biodiversity management, related distributional problems (e.g. regarding ‘fair and equitable benefit-sharing’ arising out of the utilization

of genetic resources, inadequate resources of the Global Environmental Facility), and the numerous, regulatory deficiencies of the CBD (e.g. its lack of effective enforcement provisions). As in the case of carbon emission trading systems, the increasing use of certification of environmental products, ecosystem services (like the REDD) and 'business biodiversity offsets', the use of environment-related codes of conduct (e.g. the Equator Principles and other Performance Standards used by the International Finance Corporation) and of 'green development mechanisms' illustrate that 'there can be a business case for investing in biodiversity conservation' and promoting private-sector integration in the CBD.

### ***Legal limitation of market failures and governance failures***

The acknowledgment - in the practices not only of WHO and WIPO, but also of the World Bank and more recently the WTO - of connections between human rights (e.g. of access to food and essential medicines, rights to private property, rule of law and legal remedies) and development is likely to enhance the 'primary legitimacy' (P. Lamy) not only of promoting international public goods through UN Specialized Agencies and trade institutions; also human rights law may benefit from the discourse among economic institutions and, e.g., UN human rights rapporteurs requesting international organizations to 'respect, protect and fulfil' human rights and adjust economic rules (e.g. WTO rules on liberalization of agricultural trade) (cf. de Schutter, 2011; and the criticism of its protectionist recommendations in an open letter by WTO Director-General P. Lamy, 2011, referring also to written comments by the WTO Secretariat on an earlier draft of the report). The democratic support necessary for limiting governance failures requires more participatory and democratic governance of public goods. In the conference discussion of the case-studies, some speakers argued that the comparative analyses of international 'aggregate public goods' illustrate the policy options for limiting economic and political 'market failures' and other collective action problems impeding supply of public goods. For instance, 'free-riding' can be limited by clarifying property rights and transforming public goods into 'club goods' administered by international organizations. Governance failures may be limited by promoting 'access rights', property rights, judicial remedies and 'rule of law'. Just as the regulation of trade policy instruments in GATT/WTO law has been based on the 'economic theory of optimal intervention' (e.g. as developed by Nobel Prize laureate J. Meade), economics is important for regulating alternative policy instruments in environmental agreements (e.g. promotion of 'positive externalities' from the use of forests as 'carbon sinks'). Yet, many regulatory problems require supplementing the *economic tools* of public goods theory by complementary *political and legal analyses*. For example, under what conditions should 'issue-by-issue regulation' (pursuant to J. Tinbergen's theory of 'separation of policy instruments') be replaced by 'issue-linkages' in order to promote regulatory coherence and overcome disputes over the distribution of costs and benefits? How should decision-making processes be designed in order to limit the risks of 'regulatory capture' by organized interest groups and enhance both 'input-legitimacy' as well as 'output-legitimacy'? How can agreed principles (like 'responsible sovereignty') and 'common concerns' be transformed into precise 'duties to protect' public goods in transnational relations vis-à-vis third countries that refuse to cooperate in global agreements?

The 'horizontal' as well as 'vertical interdependencies' between national and international monetary, trading, environmental, development and legal systems require economic, political as well as legal coordination mechanisms (as acknowledged in GATT Article XXIV and GATS Article V on regional trading systems). The failure of the G20 in offering effective leadership for concluding the Doha Development Round negotiations illustrates that many multilevel governance problems are related to lack of political support and 'public reason' at domestic policy levels. The continuing under-regulation of global financial markets is also due to political disagreements as to whether regional reforms (such as the creation of a 'Systemic Risk Board' inside the European Monetary Union) offer lessons for reforming the worldwide monetary and financial system. The case-studies on carbon-

emission trading systems and on private-public partnerships in biodiversity protection illustrated the importance of involving non-governmental actors for effective international trade and environmental regulation, for instance by empowering and incentivizing citizens and business (e.g. by means of land and other property rights) to use environmental resources efficiently and to act (e.g. by means of legal and judicial remedies) as advocates for decentralized enforcement of trade and environmental rules. It was argued that market-based instruments of economic regulation can complement democratic objectives of citizen-driven self-government and decentralized, self-interested enforcement of rule of law, provided there are adequate safeguards against abuses of private rights. The role of terrestrial and marine protected areas as 'green' and 'blue' carbon sinks was mentioned as example for the need to promote synergies among separate treaty regimes for promoting 'sustainable development'. Just as the WTO legal system is of crucial importance for resolving some of the collective action problems relating to energy security (e.g. by limiting quantitative restrictions, protecting non-discriminatory market access and transit trade), coordination of international trade, health protection and environmental rules is of crucial importance also for interdependent global public goods like GHG reductions (e.g. by means of carbon tariffs, non-discriminatory taxes), biodiversity and access to essential medicines. Environmental public goods illustrate the methodological importance of identifying where and how public goods are produced and consumed so that regulation can intervene directly at the source of market and governance failures without causing 'by-product distortions' of economic competition. The potential for avoiding multilateral collective action problems by recourse to bilateral agreements (e.g. on access to energy resources and genetic resources), or by 'localizing' and downscaling global challenges to smaller regional or local levels, depend on the type of public goods. National borders will continue to matter in the future as places where regulatory systems change and where domestic implementation of international rules requires democratic legitimization and protection of the rights of citizens.

#### **IV. Constitutional and Legal Problems of Multilevel Governance of Citizen-driven International Public Goods**

SECTION IV was devoted to the contribution of legal and constitutional theories to limiting and overcoming the collective action and multilevel governance problems identified in the preceding Sections. If legitimate 'governance' is defined as collective production of public goods by adjusting rules to the changing demands, needs and democratic rights of citizens, it is difficult to explain why public goods theory has so far neglected the constitutional dimensions of multilevel governance of interdependent public goods. Also international law as an intermediate 'global public good', the interrelationships between multilateral treaty rules and institutions for global public goods,<sup>5</sup> and the political need for their support by 'multi-layered issue communities' (Kaul et al., 2003, p.47) are neglected by many economists, political scientists and diplomats. Due to insufficient empirical and comparative analyses of international 'public goods regimes' and to disagreement on the appropriate political, economic and legal 'methodologies', the governance arrangements for transnational public

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<sup>5</sup> Kaul *et alii* (2003, p.44 ff) discuss 10 global public goods prioritized in a report by the UN Secretary-General:

(1) basic human dignity for all people, including universal access to basic education and health care; (2) respect for national sovereignty; (3) global public health, particularly communicable disease control; (4) global security or, put differently, a global public domain free from crime and violence; (5) global peace; (6) communication and transportation systems harmonized across borders; (7) institutional infrastructure harmonized across borders to foster such goals as market efficiency, universal human rights, transparent and accountable governance, and harmonization of technical standards; (8) concerted management of knowledge, including worldwide respect for intellectual property rights; (9) concerted management of the global natural commons to promote their sustainable use; and (10) availability of international arenas for multilateral negotiation between states as well as between state and non-state actors. Kaul *et alii* acknowledge that many of the multilateral agreements regulating these public goods 'lack even the first steps toward implementation: signature and ratification by all concerned nation-states'.



goods lack coherent theories. Also legal methodology in IEL research remains neglected and contested, for instance because legal interpretations might arrive at different conclusions depending on the respective ‘legal methodologies’ applied. If the term *legal methodology* is defined in terms of the respective conceptions of the sources and ‘rules of recognition’ of law, the methods of interpretation, the functions and systemic nature of legal systems, and of their relationships to other areas of law and politics, then the legislative and executive ‘governance modes’ and ‘judicial methodologies’ applied by worldwide, regional and national institutions often differ enormously. Many of the current governance problems in the WTO trading system (as the most developed worldwide legal and compulsory dispute settlement system) are likely to be experienced later in other international public goods regimes.

### ***Legal and constitutional theories of public goods***

As the provision of common or ‘public goods’ is the main justification of states and of other public organizations, legal and political research on ‘public goods’ is much older than the economic distinction between private and public goods in Adam Smith’s *The Wealth of Nations* (1776). From such a historical perspective, it is obvious that the different kinds of public organizations (e.g. since the ancient Greek city republics) for supplying public goods raise different kinds of legal and political governance problems. The different evolution of the various UN Specialized Agencies since World War II illustrates that, even within similar rules for multilateral provision of international public goods, the legal and political regimes may evolve in diverse and unpredicted ways. For instance, excludable but non-rival ‘club goods’ (like the GATT/WTO trading system) raise governance problems different from those of rival but non-excludable ‘common pool resources’ (like the High Seas, the ozone layer and other ‘environmental commons’). Also ‘best shot public goods’ (e.g. on promotion of scientific inventions) – even if they can be produced without international legal instruments – may raise transnational coordination problems requiring legal regulation (e.g. of trade implications of genetic ‘production technologies’, greenhouse gas mitigation through stratospheric aerosol injection). Production of ‘weakest link public goods’ may often focus on a few ‘weak states’ (e.g. in the fight against pirates, polio eradication, protection of UNESCO world heritage sites).

### ***Cosmopolitan legal strategies can generate democratic support***

Overcoming the collective action problems of ‘aggregate public goods’, by contrast, usually requires worldwide rules and multilevel governance institutions coordinating local, national, regional and worldwide public goods. The papers discussed at the Florence conference focused on the following two policy challenges identified by public goods theory:

- First, multilateral agreements among states on ‘joint intergovernmental production’ of public goods (e.g. in the context of an international organization or ‘networked cooperation’) are often preceded by bilateral ‘outward-oriented cooperation’ (i.e. cooperation with others perceived as necessary to enjoy a public good domestically) and ‘inward-oriented cooperation’<sup>6</sup> (i.e. global exigencies or regimes requiring national policy adjustments) based on conceptions of ‘common concerns’ and ‘duties to protect’: How can multilateral principles and institutions promote legal criteria justifying *unilateral protection* of recognized ‘common concerns’ in transnational relations (like the extension of the EU carbon emission trading system to foreign airlines landing in the EU) so as to induce ‘free-riders’ to participate in agreed cooperation for global public goods?
- Second, even though the non-rival nature of the benefits and provision of public goods may impede *private initiatives* for their production, such ‘market failures’ can be corrected by government

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<sup>6</sup> For explanations of the quoted terms see: Kaul *et alii* (note 1), p.10 ff.

interventions assigning private actors, market mechanisms and ‘public-private partnerships’ major roles in the collective supply of public goods (like reduction of GHG emissions, protection of biodiversity, promotion of public knowledge and freedom of information through the Internet).<sup>7</sup> The role of private and public, national and international law for constituting, justifying, regulating and limiting the building blocks for public goods, designing legal incentives, constraining abuses of power, and allocating liabilities for harmful ‘externalities’ needs to be further clarified with due regard to the human rights obligations of all UN member states. *National governments* are likely to remain the primary ‘duty bearers’ for providing international public goods. Yet, effective supply of globally integrated public goods (like the international trading and environmental systems) requires *multilevel governance reforms* supported not only by states and intergovernmental organizations, but also by public-private partnerships and ‘global citizens’ who need to be empowered by protection of cosmopolitan rights and judicial remedies enabling them to act as self-interested guardians of transnational rule of law. Can legal and judicial protection of cosmopolitan ‘access rights’ promote production and consumption of public goods?

The differences between national, regional and worldwide environmental regimes confirm that legal regulation of public goods may vary enormously depending upon the regulatory problems, the preferences of states, the distribution of related costs and benefits, and the legal traditions and strategies pursued by states. From the consumption perspective of citizens and people affected by global public goods (or ‘public bads’), human rights call for participatory and democratic decision-making on the production of public goods and for their governance on the basis of rule-of-law. The ‘production process’ of ‘aggregating’ and transforming national into international public goods (like the world trading system) calls for extending market regulations and constitutional safeguards (like market access rights) across frontiers. Comparative legal analyses confirm that rulemaking, rule-implementation and ‘public reason’ necessary for adjusting national and international legal regimes evolve differently in state-centred ‘Westphalian regimes’ focusing on the rights and interests of the rulers (e.g. in limiting judicial accountability vis-à-vis citizens) compared with cosmopolitan regimes (e.g. in Europe) protecting rights and interests of citizens (e.g. in holding governments accountable for their frequent violations of transnational rule of law). For instance, just as the UN Security Council has revised its ‘smart sanctions’ against alleged terrorists and enhanced ‘due process of law’ in response to judicial challenges (e.g. by the EU Court of Justice), the multilevel judicial protection of cosmopolitan rights (e.g. by the EU and EFTA Courts of Justice) has enhanced transnational rule of law throughout the common market of the 30 EEA countries. The increasing ‘judicialization’ of international economic and human rights law, and the customary law requirement of interpreting treaties and settling related disputes ‘in conformity with principles of justice’ and human rights (as codified in the 1969 Vienna Convention on the Law of Treaties), confirm that mere state consent may no longer offer an adequate justification of government interferences (e.g. into economic and human rights) and of government refusal to protect international public goods (like transnational rule of law for the benefit of citizens). Political governance failures in protecting international public goods can often be limited by rights-based judicial procedures and principle-based, judicial rule-clarification for the benefit of citizens.

### ***From ‘common concerns’ to ‘legal duties to protect’?***

The contributions by F. Francioni on *Responsible Sovereignty*<sup>8</sup> and T. Cottier on *The Emerging Principle of Common Concern* discuss the relationships of territoriality, public goods, multilevel governance and the emerging doctrines of ‘responsible sovereignty’ and ‘common concern’ in

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<sup>7</sup> On market efficiency and knowledge as global public goods see: I.Kaul *et alii* (note 2), p.126 ff ; on the necessity and diverse ways of involving non-state actors, see Edwards and Zadek, *Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors*, in Kaul *et alii* (note 1), p.200 ff.

<sup>8</sup> The contribution could not included in this publication.

international law. Francioni focused on the clarification of ‘duties to protect’ human rights at home and abroad in UN practices, including duties to protect ‘sustainable development’ as an explicit objective of WTO law and environmental law. Cottier starts from the premise that ‘international law based upon territorial allocation of jurisdiction increasingly fails to properly address global challenges’ like protection of global public goods. He argues that the principle of common concern, as applied so far mainly in international environmental agreements (like the UNFCCC and the CBD) for promoting duties of cooperation, has the potential of redefining responsibilities of states vis-à-vis the production and administration of transnational public goods by creating legal and institutional incentives for international cooperation and justifying unilateral action protecting public goods vital to humankind. According to Cottier, the ‘deep-seated perceptions of the exclusive domestic and territorial jurisdiction of States’ and of their ineffective *‘realpolitik’* are the main obstacle to more effective, multilevel governance of international public goods. In the absence of appropriate international institutional structures, global challenges – ‘in particular famine, genocide, other gross human rights violations and global warming’, but also other ‘vital interests to humankind’ – require states to assume extraterritorial responsibilities in order to protect ‘common concerns’ within and beyond their territorial jurisdictions. Cottier considers the ‘responsibility to protect’ doctrine applied by the UN Security Council ‘to be part of the emerging principle of common concern’; but he admits that ‘the scope of Common Concern is still largely undefined’ and depends upon interpreting positive law in conformity with common concerns (e.g. in WTO legal and dispute settlement practices regarding the labelling of products taking into account common health concerns). It is the combination of unilateral ‘bottom up’ and multilateral ‘top down’ approaches that is likely to promote progress in developing international law protecting common concerns of mankind and limiting unilateral, national measures with harmful externalities.

The conference discussions focused on how to limit unilateral measures that risk undermining rather than protecting international public goods and related ‘common concerns’ (e.g. the US intervention in Iraq on the ground that UN inspectors had failed to protect the public good of preventing dictators from having ‘weapons of mass destruction’). Under what conditions were formally illegal interventions (e.g. of NATO forces in Kosovo) justifiable in terms of protecting global public goods and related ‘common concerns’? Even if UN member states agreed on ‘common concerns’, they could invoke their national sovereignty and the ‘safeguard clauses’ in international agreements for protecting ‘national public interests’ and prioritizing ‘common concerns’ in very diverse ways. Arguably, the antagonistic evolution of international protection of many global public goods was an inevitable consequence of the power-oriented, pluralist structures of the global system (e.g. enabling unilateral definition of ‘national public interests’ and invocation of related safeguard clauses), of ‘free riding’, distributive conflicts and illegitimate abuses of power among states. The EU’s decision to extend the EU’s carbon emission trading system to international aviation from and to third countries offered an example which, even though legally contested by many third countries, could be justified by ‘common concerns’ as being consistent with the EU’s worldwide obligations (e.g. under WTO law, the Chicago Convention on Civil Aviation, the UNFCCC and its Kyoto Protocol) and bilateral treaties (e.g. the ‘open sky’ agreements with the USA).

### ***Empowering citizens and ‘courts of justice’ as ‘guardians of public goods’?***

Petersmann’s contribution on *Cosmopolitan ‘Aggregate Public Goods’ Must be Protected by Cosmopolitan Access Rights and Judicial Remedies* explains why ‘Westphalian agreements among sovereign states’ can protect international public goods more effectively by providing for cosmopolitan ‘access rights’ and judicial guarantees of transnational rule of law for the benefit of citizens. Just as ever more UN member states have been transformed into constitutional democracies in response to human rights revolutions of their citizens, the international public goods of efficient markets and ‘sustainable development’ must be protected by a ‘four-stage sequence’ (J.Rawls) of constitutional, legislative, administrative and judicial protection of ‘access rights’ to protection of non-

discriminatory conditions of competition and other public goods against abuses of power. As global public goods affect all (including poor people), human rights and democracy require producing and protecting their benefits in participatory, fair, inclusive and rights-based ways. Modern economics and constitutional theories confirm that public goods (like social welfare, rule of law) depend primarily on legal empowerment and collective responsibility of citizens for institutionalizing reasonable rules. By focusing on 'state sovereignty' rather than on 'responsible popular sovereignty' and human rights, UN and WTO diplomats and politicians prioritize their self-interests (e.g. in redistributing domestic income by discriminatory trade restrictions, avoiding legal accountability vis-à-vis citizens for violations of international law) over the rights of citizens.

European human rights, economic and environmental law illustrates that multilevel constitutional protection of cosmopolitan 'access rights' to supply and consumption of transnational public goods can effectively limit the welfare-reducing 'discriminatory traditions' of 'constitutional nationalism' with due respect for 'constitutional pluralism'. As 'market failures' (like environmental pollution) and 'governance failures' (like arbitrary violations of EU and WTO obligations ratified by national parliaments) are ultimately caused by *individual conduct* (e.g. of politicians) and organizations pursuing rational short-term self-interests at the expense of 'reasonable common long-term interests' of citizens, the intermediate public good of transnational rule of law has to be protected through constitutional, legislative, administrative and judicial safeguards of individual 'access rights' and other 'countervailing restraints' limiting the abuses of public and private power. Westphalian conceptions of 'international law among sovereign states' treating citizens as mere objects of authoritarian 'rule by law' rest on authoritarian assumptions (e.g. of benevolent, omnipotent 'sovereign rulers') that are inconsistent with the human reality of ubiquitous conflicts of interests requiring governance 'as closely as possible to the citizens' (subsidiarity principle). Mutual coherence of legal regimes depends on multilevel constitutional protection of constitutional and cosmopolitan rights of citizens. Just as economic markets can function efficiently only in a framework of common market and competition rules protecting equal rights of citizens (e.g. in their multiple roles as producers, workers, investors, traders and consumers), so can 'political markets' and multilevel governance avoid abuses of power and other 'governance failures' only in a framework of democratic and 'countervailing rights' of citizens and judicial 'checks and balances'. Paradoxically, the more complex multilevel economic and environmental regimes become, the stronger is the need for decentralized, cosmopolitan rule-of-law systems empowering private stakeholders to defend their rights to transnational rule of law. For instance, rather than transforming trade and investment disputes of private economic actors into international disputes among WTO member states or investment disputes among states in the International Court of Justice, such 'medieval politicization' of economic disputes can often be avoided by decentralizing and depoliticizing trade and investment disputes, e.g. by following the model of European economic law empowering citizens to enforce common market, competition, environmental rules and human rights directly in domestic and international courts. As human rights also protect individual and democratic diversity (e.g. diverse preferences for public goods, diverse traditions of majoritarian democracy), *jurisdiction gaps*, *governance gaps*, *incentive gaps*, *participation gaps* and *rule-of-law gaps* in multilevel governance of interdependent public goods may be inevitable; the peaceful resolution of the resulting conflicts has to be allocated not only to *political*, but also to *judicial institutions* protecting cosmopolitan rights, judicial remedies and respect for legitimate 'constitutional pluralism'. The diverse conceptions of international economic law (IEL) as (1) 'international law among sovereign states', (2) global administrative law, (3) multilevel economic regulation, (4) international 'conflicts law,' and (5) multilevel constitutional law, must be integrated by recognizing citizens as 'democratic principals' vis-à-vis national and international governance institutions whose legitimacy, as agents with limited powers, derives from protecting constitutional and cosmopolitan rights and rule of law. The European Economic Area Agreement, or the 'Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice

in Environmental Matters', offer practical examples for 'constitutionalizing' international public goods for the benefit of citizens among states with diverse constitutional traditions.

### ***Respect for 'constitutional pluralism' and its limits***

Petersmann's presentation gave rise to a discussion of whether his premise of 'constitutional pluralism' was consistent with his normative claim that cosmopolitan access rights to transnational public goods are a requirement of democratic self-government and justice (e.g. in the sense of rules-based, equal treatment of citizens). There seemed to be agreement that 'sovereign equality of states' and the reality of 'constitutional pluralism' will continue to be the legal foundation of international law in the 21<sup>st</sup> century. 'Sovereign equality of states' is not only a 'Westphalian principle' (focusing on voluntary consent of governments) but, if interpreted as 'responsible sovereignty', also a requirement of democratic responsibility to institutionalize 'reasonable rules' empowering people to protect human rights and public goods. The discussants agreed that the three major 'constitutional paradigms' practiced by UN member states – i.e. (1) rights-based constitutional democracies (e.g. in the 30 EEA countries), (2) 'communitarian democracies' focusing on 'parliamentary sovereignty' or 'majority regulation' of the economy (e.g. in many Anglo-Saxon democracies), and (3) 'authoritarian decent states' (e.g. as described in J.Rawls' *Theory of Justice*) with non-liberal constitutions – would continue to be part of the reality of 'constitutional pluralism' in the 21<sup>st</sup> century. Each of these diverse constitutional paradigms was related to competing conceptions of human rights and competing 'foreign policy paradigms' (e.g. rights-based common market regulation across Europe, intergovernmental regulation of free trade areas outside Europe). The disagreement focused on the question of whether – if 'reasonable disagreements' on 'constitutional pluralism' at national levels have to be respected - cosmopolitan conceptions of international economic law were still justifiable. Economists, political scientists, lawyers and diplomats often disagree with cosmopolitan conceptions of IEL:

- *Economists* prefer parsimonious models facilitating mathematical predictions, and rarely apply 'constitutional economics' to international relations. Even if the economic goal of maximizing consumer welfare could be promoted by recognizing individual 'market freedoms' (as proposed by *ordo*-liberalism and 'constitutional economics'), economic freedom as a utilitarian or constitutional value has to be reconciled with other constitutional values as decided by national parliaments (e.g. in order to protect a 'conservative welfare function' avoiding 'serious injury' to import-competing producers; for the claim that nations cannot simultaneously pursue majoritarian democracy, self-determination and economic globalization, see, e.g. Rodrik, 2001; Barfield, 2001).<sup>9</sup>
- *Political scientists* acknowledge that – in the multilevel supply of ever more public goods - the 'disaggregated state' (Slaughter) cooperating through ever more international organizations and intergovernmental networks tends to protect consumer welfare and other public goods more effectively than traditional 'Westphalian conceptions' of discretionary foreign policy. Yet, as explained by 'public choice theory', governments pursue self-interests in insisting on discretionary policy powers and in resisting legal and judicial accountability vis-à-vis citizens in international economic relations. This reality of 'member-driven governance' in international organizations prompts 'realist political scientists' to perceive 'cosmopolitan reforms' of UN and WTO law as utopian and 'academic'.
- *International lawyers* and legal advisors of governments justify state-centred conceptions of international law by the 'democratic gate-keeper' function of national parliaments to decide on domestic implementation of intergovernmental commitments requiring states to comply with certain agreed *results* without limiting national sovereignty to choose the most appropriate *instruments* for domestic implementation of international obligations. Arguably, the 'constitutional problems' of democratic

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<sup>9</sup> As illustrated by the Doha Round, without reciprocity of intergovernmental 'market access commitments', trade liberalization risks lacking political support by domestic constituencies.

constitution, justification, limited delegation, separation and restriction of multilevel governance can be resolved in the context of *national constitutionalism* (e.g. by constitutional restraints on delegation of powers to international organizations) without requiring, as argued by Petersmann, an integrated theory of *multilevel constitutionalism* on protection of public goods and cosmopolitan rights across national frontiers.

Petersmann's empirical and normative counter-argument was that European citizens – by limiting multilevel governance in the EU, the EEA as well as in the European Convention on Human Rights (ECHR) by constitutional, legislative, executive and judicial 'institutionalization of public reason' and multilevel judicial protection of cosmopolitan rights - had secured more regional public goods and constitutional rights than they had ever enjoyed before. Even if authoritarian states and 'majoritarian democracies' would continue prioritizing 'parliamentary freedom' and majority politics over rights-based conceptions of democratic self-government of citizens, their insistence on 'constitutional nationalism' and reciprocal 'Westphalian bargaining' offered no effective, legitimate strategies for limiting the collective action problems of global 'aggregate public goods'. 'Path-dependence' was no justification of the current reality of power politics protecting vested interests (e.g. in under-regulation of financial markets and environmental pollution). The keynote speech by P. Lamy seemed to support the argument that lack of democratic legitimacy of 'Westphalian multilevel governance' beyond constitutional democracies had to be compensated by 'participatory democracy' promoting 'primary democratic legitimacy' of the global economy based on protection of cosmopolitan rights and principles of democratic governance in international institutions (e.g. principles of transparency, accountability, access to information and to judicial remedies, inter-parliamentary meetings, principles of 'necessity', 'proportionality' and reason-giving, etc.). Just as the '2011 Arab Spring' confirmed the historical experience of earlier (e.g. American and French) 'human rights revolutions' that citizens had to struggle for *national public goods* like constitutional democracy and rules-based *social justice*, transforming Westphalian 'international law among states' into cosmopolitan IEL required legal and judicial struggles by citizens for their cosmopolitan rights. The progressive transformation of international human rights and investment law through multilevel judicial protection of human and economic rights confirmed that cosmopolitan 'access rights' promoting non-discriminatory supply and consumption of transnational public goods were normatively justifiable and politically feasible.

### ***The 'blind men' and the need for interdisciplinary research***

One major conclusion of the conference is that – as in the story of the blind men touching different parts of an elephant and describing the animal in mutually contradictory terms – the competing economic, political, legal and constitutional conceptions of 'public goods' and of 'international law' need to be integrated in order to promote more 'cosmopolitan public reason' necessary for mobilizing citizens to assert 'democratic ownership' for constituting, limiting, regulating and justifying multilevel political, legal and judicial governance of 'aggregate public goods'. Theories of justice, human rights and constitutional law require justifying governance for public goods in terms of justice and judicial remedies. Arguably, the universal human rights obligations of UN member states, the related requirement of a '4-stage-sequence' of constitutional, legislative, executive and judicial protection of public goods, and the need for governing interdependent public goods with due respect for legitimate 'constitutional pluralism' at national and international levels are 'constitutional building-blocks' for democratic, multilevel governance of international public goods in the 21<sup>st</sup> century. The 'human condition' of ubiquitous conflicts of interests (e.g. between emotions, rational egoism and limited reasonableness inside human minds) and related abuses of power remain the central 'constitutional challenge' requiring 'constitutionalization' of all human interactions at national, transnational and international levels. Yet, 'constitutionalizing' international law implies normative-theoretical conceptions of the role of 'legal principles', individuals, political and judicial institutions, human rights and 'state consent' in international law that remain deeply contested. Communitarian theories of 'majoritarian democracy', for instance, contest the human rights argument that cosmopolitan 'access

rights' and judicial remedies are necessary not only as 'external limitations' of transnational abuses of power by holding governments accountable for protecting individual autonomy, responsibility, public goods and market-driven use of decentralized knowledge of citizens that 'Westphalian rulers' inevitably lack; they are even more necessary as 'reasonable self-commitments' empowering, educating and constraining individual autonomy, promoting 'public reason' of social communities, and voluntary compliance with rules that are supported as promoting fairness and justice. The hundreds of national constitutional regimes and regional and worldwide treaty regimes for protecting public goods, like the ubiquity of 'governance failures' in coordinating national and international public goods and regulating their 'horizontal' as well as 'vertical interdependencies', offer a vast field for empirical and comparative research on interdependent public goods. The more economic and environmental resources are becoming scarce in relation to the expanding recognition of civil, political, economic, social and cultural human rights and cosmopolitan and democratic demands of citizens, the more important becomes justifying public goods theories not only in terms of procedural fairness and 'due process of law', but also in terms of distributive justice and cosmopolitan rights of citizens (cf. Petersmann, 2011a). It remains an open question whether mankind will be capable to institutionalize 'public reason' enabling human beings to constitute, limit, regulate and justify multilevel governance of interdependent public goods more effectively in the 21<sup>st</sup> century.

### ***The laboratory of regional law: the Eurozone as a white elephant?***

Rights-based European constitutional democracies often perceive EU law, EEA law, the ECHR and European Free Trade Area law and jurisprudence as advanced laboratories for designing more 'democratic international law' protecting international public goods more effectively for the benefit of citizens. European legal doctrine and judicial methodologies (such as 'proportionality balancing' of economic and human rights) have overcome the simplifications of economic 'public goods theories' and the neglect of human and constitutional rights by 'Westphalian legal regimes' as well as by Anglo-Saxon 'common law' traditions.<sup>10</sup> European integration law increasingly influences legal and judicial attempts in jurisdictions beyond Europe to limit abuses of public and private power. Yet, as illustrated by the judgment of the International Court of Justice of 3 February 2012 and by numerous WTO dispute settlement findings against EU regulations, European 'transnational legal innovations' also provoke adverse responses aimed at limiting abuses of power inside Europe.<sup>11</sup> The incomplete regulation and supervision of the European Monetary Union and the persistent violations of the EU treaty disciplines for national fiscal and debt policies (e.g. as defined in TFEU, 2009, Article 126 and Protocol No.12 on the excessive deficit procedure) by most of the 17 Eurozone member states have entailed economic, social and legal crises undermining the legitimacy of multilevel governance in the Eurozone. It remains uncertain whether the new EU Regulations, Directives and treaties among Eurozone members aimed at strengthening fiscal, debt and economic governance can realize their declared goal of 'stronger national ownership of commonly agreed rules and policies' so as to prevent private and public debt defaults and other breaches of the law.<sup>12</sup> Without more economic growth, the

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<sup>10</sup> On the higher levels of constitutional and judicial protection of 'negative' and 'positive liberties' in European economic law compared with Anglo-Saxon common law and constitutional law traditions, see Petersmann, 2012, chapters III and IV).

<sup>11</sup> Cf. ICJ, *Jurisdictional Immunities of the State (Germany v Italy)* (2012), finding, inter alia, 'that the Italian Republic has violated its obligations to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945'.

<sup>12</sup> Cf. the five Regulations and the Council Directive of November 2011 (*OJ 2011 L 306 Regulation (EU) 1173/2011, Regulation (EU) 1174/2011, Regulation (EU) 1175/2011, Regulation (EU) 1176/2011, Regulation (EU) 1177/2011, Council Directive 2011/85/EU*) on the strengthening of budgetary and economic surveillance in the Euro area, which explicitly aim at 'stronger national ownership of commonly agreed rules and policies' so as to render national compliance with EU law more effective. The 2012 draft 'Treaty on Stability, Coordination and Governance in the Economic and

European 'social model' risks becoming unsustainable. Just as multilevel governance conceptions of 'European public goods' remain contested, the multilevel governance regimes in regional economic agreements in Africa, Asia and in the Americas require constant 'balancing' and re-adjustment of national, regional and worldwide regulation and judicial review of claims to unilaterally protect public goods across frontiers (e.g. by border carbon tax adjustments, extension of carbon emission trading to third countries). It is this antagonistic disorder of individual, national, bilateral and regional 'trial and error' that may ultimately promote a new 'public reason' enabling more coherent multilevel governance and regulation of public goods. As emphasized also in F. Fukuyama's recent book on *The Origins of Political Order* (2011), describing the evolution of the modern 'rule of law state' as an antagonistic learning process triggered by increasing limitation of political powers and of their 'rule by law' through competing religious, civil and political powers insisting on transnational 'rule of law' (e.g. Roman law and ecclesiastical law as *jus commune* in Medieval Europe), the promotion of transnational rule-of-law systems is likely to be of crucial importance for more effective, multilevel governance of interdependent 'aggregate public goods'. The Florence conference revealed an obvious need for promoting education, research and innovation on multilevel governance and related theories of interdependent public goods in order to contain the 'arrogance of power' and interest group politics dominating the Westphalian system of international law. If, as suggested by Albert Einstein, madness is characterized by repeating the same method time and again in the hope of producing a different outcome, the 21<sup>st</sup> century requires moving away from 'Westphalian power politics' as the prevailing governance paradigm in UN and WTO institutions for the collective protection of global public goods.

(Contd.) \_\_\_\_\_

Monetary Union' ('TSCG', 2012) likewise aims at rendering the existing EU legal disciplines more effective in the domestic legal systems of Eurozone member states.



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## Global Governance: From Theory to Practice

Pascal Lamy\*

Dear President,  
Distinguished guests,  
Ladies and Gentlemen,

It gives me great pleasure to be here today to close this conference on ‘Multilevel governance of interdependent public goods.’ Since its establishment in the early 70’s, the European University Institute of Florence has remained true to its founding values of being a leading research centre on European integration and governance issues. Strongly anchored in Europe, but open to the world, the Institute is a privileged observatory of governance issues. What better place than this one to reflect on the question of global governance?

But before turning to today’s topic, I would like to pay tribute to a great Italian, a great European, and a great friend of the European University Institute, Tommaso Padoa-Schioppa, who took great interest in the issue of global governance and who – I understand – left his archives to the Institute.

Global governance is a complex issue, and I am sure the two days of discussions you have just had confirm this. Part of the difficulty in thinking global governance lies in the gap between theory and practice.

What does the dominant theory tell us? That the international system is founded on the principle of national sovereignty. That the Westphalian order remains the basis of the international architecture, and that global governance can only result from the action of sovereign States. In other words, that global governance is the globalization of local governance. This theory of governance, which has not substantially changed for centuries, is based on the transitivity of both coherence and legitimacy: as States are coherent and legitimate, global governance is necessarily coherent and legitimate as well.

Unfortunately, the practice tells us otherwise. It does not suffice to establish international organizations to ensure a coherent approach to address the global problems of our time. What my five years at the WTO have taught me is that when it comes to international action, States are often incoherent. The right hand often does not know what the left hand is doing. Nor does it suffice for organizations to be “member driven” to ensure their legitimacy in the eyes of citizens.

In order to remedy the ‘coherence gap,’ attempts have been made to establish legal bridges between international organizations. Clear and strong legal bridges have been built, for example, between the WTO and the World Intellectual Property Organization.

But this remains the exception, not the rule. Legal bridges between international organizations are often weak. This is the case in the field of environment, where the existing legal bridges are thin - but negotiations are underway under the Doha Development Agenda to try and strengthen them. In some other instances, these legal bridges have been overtaken by events, and their relevance is questioned by some, as is the case between the WTO and the IMF. Article XV of the GATT, which stipulates that Member States shall not, by exchange action, frustrate their trade opening commitments, made a lot of sense under a fixed exchange rate regime. But today we no longer have a fixed exchange rate regime.

As for the legal bridges between the WTO and the International Labour Organization, they are quasi-inexistent. Why that? You may have guessed: because Member States have opposed building

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\* Director-General of the WTO.

such bridges! We're back to the coherence problem. International organizations may endeavour to do their best to “deliver as One,” to refer to the well-known initiative launched by the United Nations a few years ago, but we still have to see “Member States delivering as One” in the different international organizations which make up the international system.

What these few examples show is that theory and practice do not match. And when the practice challenges the theory, the latter needs to evolve. But we cannot afford to wait for a new fully fledged theory to be developed and agreed upon. Today's world is confronted with major global challenges. We cannot afford to stay still and to passively observe what is happening in front of our eyes. We need to move forward. Pragmatic solutions need to be found now to enhance global governance and better address the problems that our world is facing.

If one looks at governance from a practical point of view, three elements are necessary. First, governance needs to provide ‘leadership’, the incarnation of vision, of political energy, of drive. Second, it needs to provide ‘legitimacy,’ which is essential to ensure ownership over decisions that lead to change. Ownership to prevent the in-built bias towards resistance to modify the *status quo*. Finally, a legitimate governance system must also ensure ‘efficiency.’ It must bring about results for the benefit of the people at a reasonable cost.

These three elements condition a fourth one, which you would have understood, is of critical importance in my view: coherence. A good governance system cannot be about the right hand not knowing what the left hand is doing. Or, even worse, it cannot be about knowingly moving them in different directions.

At the national level, the three elements I just mentioned - leadership, legitimacy and efficiency - are within the same hands: within the hands of the ‘government.’ But at the international level, delivering these three elements is much more complex: Who is the leader? Can legitimacy be assured by other means than citizens voting in a ballot? Are specialized international organizations, which are scattered all over the place, efficient? No wonder, under such circumstances, that building coherent global governance is a real challenge!

There is one place, however, where the Rubicon of supra-nationality has been crossed and where new forms of governance have been tested: in Europe. More than half a century ago Jean Monet said: “the sovereign nations of the past can no longer provide a framework for the resolution of our present problems: And the European Community itself is no more than a step towards the organizational forms of tomorrow’s world.” This was as valid then as it is now.

The European integration process is the story of a desired, defined, and organized interdependence between its member states. It is the story of 50 years of institutional integration aimed at bringing together, at the regional level, the three elements of leadership, efficiency, and legitimacy. Through the creation of a supranational body, the European Commission, which had the monopoly of initiating legislation - legislation which takes precedence over national law - and the power to implement policies. Through the European Court of Justice, whose decisions are binding on national judges. Through also a Parliament composed of a senate of member states and a house of representatives elected by European citizens and which has gained in competences over the years.

This institutional machinery made the European Union a radically new economic and political entity on the scene of international governance. It armed it to show leadership to implement policies and projects that have proved real successes. I think here of the creation of the internal market in 1992 and of the Euro in the late 1990s.

The picture is more nuanced with respect to external leadership, that is the capacity to influence world affairs. Europe is capable of exerting leadership when it can speak with a ‘single mouth’ and not as often coined with a single voice, as in international trade, where the European Union has positioned itself as one of the key player of the multilateral trading system. Overall, in terms of

leadership and efficiency, Europe, in my view, did score rather highly. A view shared by many Europeans if we are to believe recent polls which rank the European Union ahead of national governments in the way it acted to tackle the crisis.

Where the European Union fares not so well is with respect to legitimacy. We are witnessing a growing distance between European public opinions and the European project. One could have expected that the European institutional set up, with growing powers entrusted to the European Parliament would have resulted in greater legitimacy, but this is contradicted by the declining numbers participating in elections to the European Parliament. In theory there is no democratic deficit. Despite constant efforts to adapt the European institutions to democratic requirements, over the past 50 years, there has been no resulting democratic spark. Euroscepticism is on the rise. Europe continues to butt against the question of legitimacy.

What can the European integration process as conceived by the founding fathers, which was the most achieved system of supranational governance, teach us for global governance? Let me try to lay out a few pragmatic ideas for a possible way forward.

First, the European experience shows that supra-national governance can work.

Of course, this does not go without difficulties, and it is highly unlikely that what was done at the European level can be replicated at the international level. The cards are different. The European paradigm was developed under very specific conditions of temperature and pressure. It was shaped by the geographical and historical heritage of the European continent; a continent ravaged by two world wars and haunted by the Holocaust, which left millions dead. Hence a strong aspiration for peace, stability and prosperity.

It is my firm conviction, however, that one can find a way to better articulate the three elements of governance at the global level through what I have called the “triangle of coherence”.

On one side of the triangle lies today the G20, replacing the former G8 and providing political leadership and policy direction. The second side of the triangle is the United Nations, which provides a framework for global legitimacy through accountability. On the third side lie member-driven international organizations providing expertise and specialized inputs be they rules, policies or programmes.

The good news is that this ‘triangle’ of global governance is emerging. Bridges linking the G20 to international organizations, and to the UN system have started to be built. I myself participate in G20 meetings, alongside the heads of a number of other international organizations. Specific sessions dedicated to trade have been regularly organized during G20 summits, giving us, at the WTO, the political impetus we need to push through our agenda. The political backing of the G20 allowed me, at the dawn of the 2008 financial crisis, to launch a strengthened monitoring of trade policy developments, which has proved a useful and powerful tool to contain protectionism.

Several initiatives have also been taken to strengthen the links between the G20 and the United Nations. Joseph Deiss, the President of the UN General Assembly, organized informal debates at the General Assembly with the G20 presidencies, before and after the last G20 summit held in South Korea. Informal debates in which the UN Secretary General participated. Further such debates are scheduled prior and after the next G20 meeting. In addition, an informal debate of the General Assembly on global governance is planned for June to explore ways to revitalize the ECOSOC, the UN Economic and Social Council.

A revamping of the ECOSOC would, in my view, lend valuable support to the ‘Delivering as One’ project that the UN Secretary General launched a few years ago to enhance UN system-wide coherence. This would constitute a potent mix of leadership, inclusiveness and action to ensure more

coherent and effective global governance. In the longer term, we should have both the G20 and the international agencies reporting to the ‘parliament’ of the United Nations.

So things are moving! Maybe not exactly ‘à la Montesquieu.’ Maybe more in networking and informal mode. Mechanisms of information and exchange are being put in place. In parallel, improvements are also being made to strengthen the three sides of global governance.

Leadership has been strengthened by being made more representative. The G20 now embraces countries from both North and South America, Europe, Africa, the Gulf, Asia, and Oceania.

Efficiency is being improved through the establishment of co-operation mechanisms between international organizations, such as the Chief Executive Board of the United Nations, chaired by the UN Secretary General, which brings together twice a year the heads of all UN agencies, of the two Bretton Woods Institutions (the World Bank and the IMF), and of the WTO.

Joint initiatives have flourished. The WTO, for example, delivers a number of technical assistance activities in co-operation with UNDP, UNCTAD, WIPO, and the World Bank. It coordinates the delivery of technical assistance with other international organizations through the Aid for Trade initiative and the Enhanced Integrated Framework. The WTO has published several joint studies: with UNEP on ‘trade and climate change,’ with the ILO on ‘trade and employment,’ and ‘globalization and informal jobs,’ and more recently with the OECD, the ILO and the World Bank on ‘Seizing the Benefits of Trade for Employment and Growth’ in preparation for the G20 summit in Seoul. We also participate in the High Level Task Force on Food Security that the UN Secretary General established in 2008. Another recent initiative worth noting is the IMF/ILO conference that took place in Oslo in August last year to discuss ways of accelerating a job-rich crisis recovery. All these initiatives have one aim: to enhance coherence and efficiency of our global actions.

Finally, the legitimacy of international organizations has been enhanced through a readjustment of voting rights in the World Bank and the IMF. This is a positive development, but more will need to be done. The legitimacy of international organizations remains intrinsically Westphalian. It is based on State democracy, and only provides for what I call ‘secondary legitimacy’ - as opposed to the ‘primary legitimacy’ conferred by the direct participation of citizens. The specific challenge of legitimacy in global governance is to deal with the perceived too-distant, non-accountable and non-directly challengeable decision-making at the international level.

So a global governance architecture is emerging little by little. True, this architecture remains incomplete in terms of its scope. Certain issues, such as taxation and migration, still remain largely outside the realm of global governance. But here again things are moving. The question of tax heavens, for example, is now being addressed within the OECD. This step may be small, but it is not insignificant. Global governance cannot be built in a day. It is built little by little.

What is the *second* lesson that the European experience teaches us? That three ingredients are needed for a successful integration process: shared values, a common objective, and an institutional machinery. Institutions alone cannot do the trick. Our experience with global governance to date shows it. Neither can a well-thought-through common project deliver results if there is no institutional machinery.

Experience has shown that when two of these ingredients are there, the third one follows. The success of the European economic integration process is the result of the coming together of shared values and a common goal. It is the combination of these two elements that led to the establishment of an institutional machinery. The creation of the Euro is a project that took 30 years to mature between the Werner report of 1969 and the report of Jacques Delors on the Economic and Monetary Union. A clear choice was then made according to which the prime purpose of monetary policy was to ensure

price stability. The institutional structure then followed relatively quickly: the creation of the European Central Bank, the most federal of the European institutions, was decided in three weeks only.

Likewise, the development of strong multilateral trade rules was made possible because of the existence of shared values - the belief that opening trade is good, a belief which is enshrined in Article 133 of the Treaty of Rome - and of an institutional machinery.

So what are we missing in the case of global governance? We already have a set of institutional machineries in some areas, but these are not underpinned by a sufficiently strong set of core principles and values. This is, in my view, one area where global governance falls short.

One may argue that the adoption of the United Nations Charter in 1945 marked the emergence of such a set of global values and principles. A set that has been strengthened over time through the adoption of various declarations and covenants, such as the Universal Declaration of Human Rights in 1948, and the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights in 1966. However, this platform of values was developed at a time when globalization was not as tightly knit as it is today, and its implementation has remained patchy in many respects. It needs to be adjusted and strengthened.

This is precisely what German Chancellor Angela Merkel has proposed with the creation of a Charter for Sustainable Economic Activity. It is a commendable effort to provide a 'new global economic contract,' to anchor economic globalization on a bedrock of ethical principles and values which would renew the trust that citizens need to have that globalization can indeed work for them. It is a signal of our times that this initiative comes from Berlin, Germany, today a re-united country at the heart of Europe.

Finally, my third and last suggestion would be to further encourage and pay greater attention to regional integration processes, which permit a progressive familiarization with supra-nationality. Regional integration allows to address the questions of our time at a level where the *affectio societatis* is stronger. At a level where the feeling of belonging is more solid. For there is no governance without such feeling. Regional integration represents the essential intermediate step between the national and the global governance level.

Governance, be it at the national, regional or international level, presupposes a shared feeling of pursuing a common endeavour, of belonging to a community that needs governance. A feeling of 'togetherness.' Feeling that conditions the acceptance of constraints imposed in the name of such belonging. Feeling that finds its roots in shared values, a common history, and a collective cultural heritage. Feeling, however, that becomes more fluid and volatile as distance to power systems grows.

I had the chance, in my professional life, of working at three different levels of governance, which I often compare to the three states of mass: the national level, which in my view represents the solid state; the European level, which is liquid; and now the international level, which is more like the gaseous mass. The challenge with global governance today is to try to move from its current gaseous state to a more solid one.

In other words, and these will be my concluding thoughts, the solution is not to globalize local problems, as the theory suggests; it is to localize global problems; to make these more palatable to citizens in order to reinforce the sentiment of belonging I just referred to.

To go back to a point I previously made, 'secondary legitimacy,' which relies on assemblies of sovereign nation states, is too weak to cope with the necessities of global governance. What really matters is 'primary legitimacy,' the sovereignty of the people. How to increase this primary legitimacy of global governance remains, in my view, the main political challenge we are facing.

At this stage, the only avenue I can see is reaching out to civil society, unions, political parties, and parliamentarians to discuss and debate with them the global issues we are facing. We need global

governance. But global governance necessitates global citizens. It necessitates citizens inhabited by a sense of 'togetherness,' by a feeling of belonging to a global community. How many people today, when asked which country they come from, would answer, like the ancient Greek philosopher Diogenes of Sinope: "I am a citizen of the world?" In the absence of global elections, the global governance debate needs to be brought closer to citizens to instil this feeling of togetherness that is now missing. Bringing the global governance debate closer to citizens could also contribute to greater coherence at a global level. This would render governments more accountable in terms of coherence.

Modern information technologies can help us achieve this ambitious transformation towards a sense of togetherness. These are powerful tools to help create a 'polity' as we have just seen in Tunisia and Egypt. But we also need more input from social sciences. Not only economics or law, or political science. But also sociology, psychology, anthropology. And academies like the one that hosts us today can bring an invaluable contribution to build this new 'polity'. We want a world that is driven by ideas, not by instinct. So, ladies and gentlemen, please engage and help us all.

I thank you for your attention.



## **The EU and the European Parliament in International Trade and Climate Change Negotiations**

Josep Borrell\*

The multilevel governance of interdependent public goods is a crucially important topic for the academic and the policy-making communities alike. I am pleased to make a contribution to this book, which reflects on the topic and which offers a broad academic analysis of how ever more national public goods are being transformed into international public goods, and the kind of governance challenges this transformation leads to. As Professor Petersmann demonstrated in his introduction, this indeed poses one of the most pressing governance tasks of the 21<sup>st</sup> century and the provision of global public goods is a key aspect of the future of globalisation and global governance. I would like to use this opportunity to congratulate the editor of this book for offering a truly interdisciplinary analysis of this task. To my mind it is obvious that only a multidisciplinary approach, involving economists, political scientists and international lawyers has the potential to provide a practical and theory-informed account of the current global governance structures dealing with interdependent public goods.

In addition to interdisciplinary academic analyses of interdependent and global public goods, this book starts with some reflections by practitioners on the issue. I am glad to join Pascal Lamy by offering my own. In this contribution I will focus on the European Union (EU) and the European Parliament (EP) in global governance and the multilevel governance of interdependent public goods. I will begin in a more general manner with some brief reflections on the above-mentioned challenges and on global governance more broadly. Subsequently, I will refer to the EU and its integration process, with its supranational elements and the extent to which it attempts to be a global actor and to shape the global order. Finally, I will focus on the role of the EU and the EP in international trade and above all in climate change negotiations. Both policy areas offer good case studies of the functioning and the potential of the Union in multilateral negotiations and in providing global public goods.

### **Global governance and global public goods**

During much of my practical political experience as minister in the Spanish government and as President of the European Parliament, I was confronted with attempts to enhance the management of global public goods and to find more legitimate and effective governance systems for global trade and for multilateral financial, environmental and development systems. The fact in particular that the role of the state has considerably changed in the last three decades, and that the concept of national sovereignty has undergone a profound change, necessitates new approaches to dealing with global public goods and global governance (see for a historical perspective on public goods, and for the changing functions of the state in this regard, Desai, 2003). The distinction between the national and international levels is becoming increasingly blurred and the functioning of national governments needs to be adapted in an increasingly interdependent and globalised world. There is furthermore a growing recognition that many of today's most pressing political and societal issues cannot be efficiently handled at a national or regional level. Above all, environmental changes, which became increasingly obvious and threatening in the last decade, and the need to control international finance, which has become so urgent in the current crisis, require the transfer of functions of governance to the European and the global level. At the same time, the structure and the polarity of the global level is undergoing profound changes. International patterns of decision-making and the distribution of power in multilateral organisations is being modified due to the rise of important new players, such as Brazil,

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Russia, India and China (the so-called BRIC-countries) and other emerging powers who want to have their say in tackling global problems.

And many of the problems of globalisation and the development of a global governance order are related to the provision of global public goods (for a detailed analysis of this link see Kaul et al., 2003) Policy-makers need to answer key questions about which goods should be public and which should be private and whether they should be managed at local, regional, national or global levels. Indeed, “managing globalization requires understanding and shaping the provision of public goods so that all of the global public benefit – a daunting challenge considering the world’s diversity and complexity” (Kaul et al., 2003, p.2).

## **Global governance and the EU**

The EU officially recognises this challenge and claims in an often normative manner that it contributes to finding new approaches and providing solutions. Exemplarily, the Lisbon Treaty states that the EU intends to “promote an international system based on stronger multilateral cooperation and good global governance” (TEU, 2009, Article 21, 2(h)) and the idea of effective multilateralism has become part of the EU’s self-reflection, taking the form of a ‘doctrine’ (Hill et al., 2011). For the EU, effective multilateralism means a new approach to effective global governance, and with the external policy aims formulated in the Lisbon Treaty and with the creation of the European External Action Service (EEAS) the Union has formulated high ambitions for itself to become a strong and cohesive force in the global area. It often portrays itself as the multilateral player par excellence and on its agenda for global governance multilateral cooperation is a key element (Hill et al., 2011). In sum, the EU wishes to play a leading role in implementing effective multilateral cooperation and in defining rules for a legitimate and efficient global governance system. The fair and efficient management and provision of global public goods is implicit in the majority of the EU global governance aims and the Union recognises the growing importance of global public goods.

However, as so often when it comes to Europe’s external actions and the Union’s role as a global actor, its record on these ambitions has been ambiguous, with the EU struggling to find its role. Even though it is quite obvious that the EU member states would generally benefit from a European response to many global problems, national self-interest and a lack of political will often prevail. If the EU really intends to fulfil its often noble ambitions, it has to narrow the gap between rhetoric and action and develop a coherent strategic approach to reaching these aims.

Apart from these widely-recognised shortfalls between ambitions and reality, however, the question emerges (and was widely discussed during the conference in Florence in February 2011 on which this book is based) of the extent to which the EU, its integration process and its multilevel governance system can serve as an example or learning area for the development of a new global governance system. Many argue that the EU is an example of a successful form of governance beyond the nation state and suggest that the European model can – to some extent – be transferred to the global level. Such an assessment has regularly been put forward by the Director of the World Trade Organisation (WTO), Pascal Lamy, who has argued on several occasions that the EU model can be used on a global scale (see also his contribution in this book). When looking for the necessary elements of effective global governance, he argues that “there is one place, however, where the rubicon of supra-nationality has been crossed and where new forms of governance have been tested: in Europe” (2012). The lessons that the European experience teaches are that supra-national governance can work, that “shared values, a common objective and institutional machinery” are needed, and that greater attention should be paid to regional integration processes.

Let me add to these observations. A main challenge for global governance and interdependent public goods is one that is well known to the European integration process: hurdles in the cooperation

between sovereign states on shared challenges. Many elements of the integration process have provided general examples of how to manage international public goods. The EU and its integration process can teach much about collective action problems and the problems and incoherence of coordinating national interests in a rule-based multilateral setting. Throughout the decades of the integration process, European policy-making has been faced with the challenge of incentives for collective action and of getting national sovereign states to cooperate.

## **The EU and the EP in International Trade Negotiations**

However, although the EU wants to be a strong global player shaping the emerging global order, there are a few crucial preconditions: the ability of European governments to coordinate their positions, the coherence of European policies and institutions and the strengthening of the EU's representation in international institutions and negotiations. Overall, the EU institutions play diverging roles in the provision of different global public goods, which often implies the usual weakness of lacking coherence, or 'turf-battles' between the institutions. To shed some empirical light – linked to my personal practical experiences – on these challenges and on the earlier reflections, I want to turn to two policy fields which cover the provision of two significantly important global public goods and in which the EU has been very active in recent years: international trade and climate change policies and negotiations.

Beginning with the first policy area, one can say that possibly the most positive example of a powerful and effectively multilateral EU providing global public goods is its involvement in the establishment of a stable global trade system. The common commercial policy (CCP) is based on strong community powers and the Union acts in this policy field quite coherently. The gap between rhetoric and action is small and in most cases the Union manages to speak with one voice. In recent years, the European Union has positioned itself as a key player in the multilateral trade system and its reform, and has managed to overcome many of the structural shortcomings which frequently hinder the EU from being a strong global actor.

With the entry into force of the Lisbon Treaty, this role should become even stronger and the policy field offers the perfect testing ground for analysing how the complex multi-level policy-making system between the EP, the European Commission and the Council of Ministers can function with regard to the EU's involvement in providing global public goods. Amongst other things, the Lisbon Treaty provides for the Common Commercial Policy (CCP) to be linked in a stronger way to the broader external action of the Union and it significantly enhances the EP's role in the institutional balance of trade-related policy-making. Overall, the Treaty gives 'the European Parliament final and credible authority to approve or reject all trade and investment agreements and co-decision power in adopting framework legislation' (Kleimann, 2011, p.1).

Before the Lisbon Treaty came into force, the European Parliament only had a very limited role in the successful policy field of international trade. I vividly remember that we as the Parliament were often frustrated by being side-lined by the Council and Commission in such a successful policy field, which is so important for the provision of global goods to the global and European society. While the policy was very effective, democratic oversight by the Parliament was lacking. Indeed, the decision- and policy-making in Europe's international trade policy and the conduct of trade negotiations 'was arguably characterized by a lack of democratic legitimacy, scrutiny and transparency, but at the same time benefitted from technocratic efficiency' (Kleimann, 2011, p.3).

The Lisbon Treaty changed this status and gave the EP both co-decision-making powers regarding domestic framework legislation and the right to reject trade agreements that the Commission has negotiated with third countries (see for more details Kleimann, 2011) Overall, legislation in the EU's CCP will now be conducted under the ordinary legislative procedure and the EP is now a powerful and

credible institutional competitor, whose views have to be taken into account by the Commission and the Council in trade legislation and negotiations. One of the most interesting results of these changes in institutional powers and balances is the increasing politicisation which results from the European Parliament's involvement in the decision-making process. Furthermore, Kleimann rightly argues that the EP's increased powers in the EU's common commercial policy give it the potential to narrow the gap between European political preferences and perceptions and actual EU trade policies, and that this requires adequate knowledge and policy-making from members of the European Parliament (MEPs). The Parliament has to prove that its empowerment and enhanced democratic legitimacy do not lead to a deterioration in policy outcomes in the CCP, which so far has been so successful because of its continuity and predictability.

## **The EU and the EP in International Climate Change Negotiations**

The other policy area that I will deal with in some more detail is that of international climate change politics. In general terms, the issue of global environmental governance has become ever more significant and the number of environmental conventions and negotiations has multiplied over the last decade (Saunier and Meganck, 2009). This area is another key example of the provision of global public goods, and one specific and crucial global public good has in recent years made it to the top of the agenda for politicians, media and society: international regulation and negotiations to fight climate change. Without doubt, the attempt to build a solid climate change regime is one of the most important and complex global public goods, involving elementary economic interests and immense distributional consequences, and is surely a crucial litmus test of the ability to provide effective global governance.

Since 1995, global summits have been held in the context of the United Nations Framework Convention on Climate Change (UNFCCC) in a bid to create collective agreements to reduce greenhouse gas emissions and to mitigate the effects of climate change. Since the very beginning of these negotiations, the EU and many of its member states, who are responsible for ca. 14% of the global emissions of climate change inducing greenhouse gases (GHG), have been 'in the vanguard on action to tackle climate change' (Stern, 2009, p.188); the 'EU has established itself as the most prominent leader in international climate policy by pushing for stringent international commitments' (Kelly et al., 2010, p.13).

In adopting the decisive Kyoto Protocol at the end of 1997, the EU played a key role in the negotiations and pressured other industrialised countries to get on board. Finally, 37 industrialised countries agreed on an average GHG reduction of 5.2% for the period 2008-2012; the EU set the most ambitious target of 8%. Moreover, after the US announced its decision not to ratify the Kyoto Protocol, the EU took the diplomatic lead to save the Protocol and succeeded in convincing Russia to ratify it, so that it came into force in 2005. Further important negotiation rounds were launched in Bali in 2007 (the so-called Bali Roadmap), with the core aim of establish a global deal following the Kyoto protocol after its end in 2012. In working towards this aim, the EU always presented itself as a leader (for an overview of the various international negotiations and the EU's role, see Oberthür and Pallemarts, 2010; Wurzel and Connelly, 2010).

The whole development of the negotiations seemed to culminate in the Copenhagen climate change negotiations (COP 15) in December 2009, which attracted huge public attention with the attendance of numerous head of states. In his speech taking office in November 2009, the President of the European Council Herman Van Rompuy underlined that "[the] climate conference in Copenhagen is another step towards the global management of our planet" ('van Rompuy speech', 2009). However, this step delivered rather disappointing results: neither the outcome nor the process met the high expectations of the European Union. Overall, it turned out that the attempted EU leadership position was inefficient during the summit; the Union had much less influence than in previous conferences. The final accord was drafted by the US, China, India, Brazil and South Africa, with Europe being left out and only able

to rubber-stamp the agreement. In sum, the EU showed a low and diffuse profile during the negotiations; its possibility of being considered a leader in global governance *fora* was put in doubt. The question is clearly raised of whether this incident was just one-off or whether it was a sign of a new geopolitical reality.

Apart from its involvement in international negotiations, however, the EU led by example in developing strong internal policies to push for the provision of the global public good of climate change protection (for an overview of the evolution of EU climate change activities and policies, see Oberthür and Pallemmaerts, 2010; Jordan and Rayner, 2010; Wurzel and Connelly, 2010). At the beginning of the 1990s, there was insufficient progress EU-wide in emissions reduction; a credibility gap emerged because of the growing divergence between international leadership demands and the paucity of domestic action (Oberthür and Pallemmaerts, 2010; Jordan and Rayner, 2010). Following Kyoto, however, the EU accelerated its action to reduce emissions and various policies and directives from 2000 onwards brought it closer to its target.

Milestone decisions in this regard were the 2005 introduction of a successful European Carbon Market, the European Trading Scheme (ETS). This scheme certainly serves as a global model and constitutes a basis for a much needed global carbon market (for more information on the functioning and the relevance of the ETS, which certainly has the character of a role model and which has the potential to be a basis on which to develop global regulation mechanisms, see Asselt, 2010; Svensson, 2008, p.59 ff.; Skjærstedt and Wettestad, 2010). Furthermore, in 2007 the European Council decided to reduce EU emissions by 20% by 2020 (relative to 1990) and to aim for a 30% reduction in the case that other countries also increased their efforts in the form of a global deal (because it was furthermore agreed to reduce energy use by 20%, the decision has subsequently been referred to as the “20-20-20 package”). Following up on this “groundbreaking” (Svensson, 2008, p.22) climate strategy, a detailed climate and energy regulation package was agreed on in 2008, which entailed the review of the 2003 directive on the ETS, a new Renewable Energy Directive, and a Directive on Carbon Capture and Storage (CCS). This was a very comprehensive package and a major revamp of EU policies (for more on the internal EU policies, decisions, and discussions, see Giddens, 2009, p.192 ff.; Oberthür and Pallemmaerts, 2010; Jordan and Rayner, 2010).

As in the internal dimension, the European Parliament was always strongly involved in this external dimension – with varying success and power. Already in 1986, the European Parliament recognised the need for Europe to become active in the field of climate change and it was the first EU institution to show interest in the topic. Overall, the EP has co-decision power regarding EU climate legislation, but it only has an advisory role on the EU’s positions in international negotiations: ‘Members of the European Parliament attend the international climate conferences, but they are [not] allowed to attend the meetings where Member States and the Commission decide upon the EU position’ (Van Schaik, 2010, p.261).<sup>1</sup> But even though an intergovernmental model in the EU’s representation in international negotiations clearly prevails, with the Commission mainly being responsible for the new formulation of climate legislation within the EU and the Council adopting the EU positions (Van Schaik, 2010, p.261), the Parliament at least plays the role of a ‘cognitive leader’; it has consistently urged the Commission and the Council to take a leadership role on the international stage (Burns and Carter, 2010; The EP labelled itself as ‘voice of ambition’ and states that ‘[O]ver the years Parliament has become a voice of ambition, calling for EU leadership in the fight against climate change’, ‘EP delegation to Copenhagen’, 2008). A concrete example where the Parliament used its influence very well was in shaping details and the ambition of the EU’s climate change policy and in working out the ETS.

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<sup>1</sup> An official delegation of the Parliament was also represented at the Copenhagen Climate Conference, before which the EP passed an ‘EU Strategy for the Copenhagen climate change conference’ in November 2011.

However, I also remember very well the extent to which the publication of the Stern report in 2006 (making an economic case for international action on climate change) and of the fourth assessment report of the Intergovernmental Panel on Climate Change (IPCC) in 2007 (demonstrating how severely climate change and global warming are progressing) pushed many MEPs further towards pledging for a strong EU commitment to climate policies and a global regime. Amongst other factors, this led to the establishment of the Temporary Committee on Climate Change (CLIM) in 2007, which was prepared under my Presidency. In the same year, an EP report even accused the Commission and the member states of ‘a serious dereliction of duty’ (Jordan and Rayner, 2010); the EP very actively attempted to sharpen the climate change and energy package that the Council adopted in 2008. Furthermore, the final report of the CLIM formulated far-reaching aims for the EU regarding fighting climate change. And even though neither the report nor the Committee had legislative force, they contributed to making the EP’s opinion heard and to emphasising its role as cognitive leader.

As indicated earlier, it is above all this role that the EP has used so far to shape the EU’s climate change policy on the international level (see in this regard also *EU parliament resolution*, 2010). In this role, the EP continuously pushed for strong international and (external) EU action to combat climate change. While the Parliament co-legislates with member state governments on (internal) EU environment policy, the question arises to what extent the Lisbon Treaty’s entry into force can give the Parliament an even more prominent legislative role. As it is the case in international trade policy, the EP’s consent is now required for international treaties; it remains to be seen how the Parliament will use this role in shaping an new international agreement on climate protection.

## Conclusions

The EU strives to be an active player in shaping globalisation and in providing global public goods. Without doubt, it has the general potential to do so. The structural caveats, however, that hinder this intention and potential are well known and continuously jeopardise the Union’s role in shaping the global world. The challenge of the famously detected ‘capabilities-expectations gap’ (Hill, 1993) is as valid today as it was at the beginning of the 1990s. At the same time, however, the Union is an example for successful cooperation between sovereign states in multilateral regimes. Indeed, both the restraints and opportunities of the EU can be also detected to some extent in other efforts to establish multilateral governance settings for providing international public goods. And in this regard I agree with Pascal Lamy that the EU model can be used when looking for necessary elements of effective global governance.

In the complex multilevel governance setting of the Union that involves the various EU institutions and the member states, all them often having totally diverging interests, rhetoric and action are often too far apart. Studying the case of the EU’s engagement in international trade negotiations and climate policies allows for a good analysis of these settings and the extent to which they can hinder or enhance the Union’s performance as a global actor. To see how the multilevel governance system of the EU deals with the multifaceted challenge of climate change and the related multilevel international negotiations makes a very interesting case study (for a thorough analysis of the EU performance in the international climate negotiations and its ‘climate diplomacy’, see Van Schaik, 2010). The case of EU climate change policies also provides insight into how powerful EU decisions with international scope can be when the Commission, the Council and the EP work together with commitment – the case of the successful modelling and implementation of the ETS exemplarily demonstrates this. Furthermore, the establishment of an international regime to fight climate change poses various thorny collective action problems; it can be seen as example of such problems in the provision of global public goods more generally. Another factor that is interesting regarding the provision of other global public goods is the fact that EU climate policies have developed in close relation to the multilateral regime-building process.

More specifically, the crucial question now is whether the EU and the EP will still be able and willing to continue to drive forward action in the fight against climate change. The failure of Copenhagen in particular and the financial and economic crisis have taken away some enthusiasm in this regard. After the poor outcome and being side-lined in Copenhagen, the EU should regain leadership and credibility by 'leading by example' and by independent action. This would entail moving ahead with unconditional and independent action ahead of international agreements and with internal EU policies to make Europe the most climate friendly region in the world. Overall, I am convinced that the EU should strive for a low-carbon economy and energy system and for a general system change and green revolution. Policy-makers should even use the economic crisis as a chance to become leaders in an industrial and economic revolution. An industrial revolution and a low-carbon economy and society require an early deployment of new technologies and infrastructure and would allow the creation of a competitive edge for European companies in the key sectors of the future. Without doubt, such a strategy requires huge political will and action; it will be costly in the short-term. However, it would pay off in the long term and would allow the EU to be the key player in climate protection and hence in providing one of the most valuable global public goods of our times. In doing so, the EU could fulfil its claim of promoting effective multilateralism and good global governance.

Finally, a few more general reflections and policy proposition are in place. The augmented authority and co-decision powers of the EP lead by definition to an increased politicization of the EU's common commercial and climate change policies. Such a development is generally to be welcomed because it brings the EP closer to executing the tasks and functions of a 'proper' national parliament; but it also bears some risks. As this contribution has demonstrated, the Parliament and the Union are - in the two analysed policy areas - providing cognitive and general leadership. However, there is a risk that increased politicization endangers these capacities and Europe's leadership potential. It is crucial to establish mechanisms and a particular consciousness to avoid that the increased politicization results in interest groups or political groups hindering the leadership efficiency or capturing the policy agenda (Cf. Kleimann, 2011, who refers in this respect to the risks of 'regulatory capture' in the US Congress' trade and investment policy-making.). The strengthened role of the Parliament should not result in slowing down the pace or in damaging the continuity of the successful European trade and environmental policies. The best way to prevent this from happening is with a well-informed Parliament, political groups and MEPs that act responsibly and that put forward transparent policy proposals in these two areas, which are dominated by a multiplicity of powerful stakeholder interests. In sum, the EP should use its new powers in a constructive and independent way, without overstressing its ambitions and without losing the sensitive EU institutional balance out of sight. I am confident that this will happen and that the enhanced politicization will have a positive impact on the further development of European trade and climate change policy.

The final policy recommendation is as banal and as old as the EU's efforts as a global player, but it has not lost any of its relevance: only when the EU institutions and its member states avoid, or at least control, their usual turf battles and when they speak and act coherently, can they exert global leadership. To achieve this coherence remains the core challenge for the EU in being an influential global actor and in successfully providing interdependent public goods in a multilateral international setting. Overall, the Lisbon Treaty provides most of the instruments to act coherently. All that is needed is the political will and guidance to use these instruments in the right way.

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# Global Public Goods: Explaining their Underprovision

Inge Kaul\*

## Introduction

The world is trapped in an ever-denser web of global crises. Financial instability, climate change, communicable diseases, illicit trade, international terrorism, natural resource scarcities, and threats from new technologies are, together with other emerging risks, joining entrenched problems like those of nuclear proliferation, geopolitical conflict, and – still – on-going unconscionable human deprivation. What is worse, many of these crises are allowed to linger and fester despite the high costs they entail.

The evidence suggests failures of global governance are occurring. This is not altogether surprising, given that many global issues possess the properties of public goods. They constitute global public goods (GPGs), meaning that they affect all countries or, haphazardly, anyone, anywhere. According to standard economic theory public goods tend to be underprovided, because individual actors are tempted to free-ride. They may wait for others to step forward and provide the good, reckoning that when it becomes available, they, too, will benefit from it – free of charge.

Although standard public economics keeps mainly the national policy context in mind when discussing public goods, collective-action problems like free-riding may also contribute to the underprovision of GPGs. But do they explain the full extent of the challenges we are currently facing? Or, do other factors also come into play?

The present chapter begins to explore these questions, developing conjectures destined for further study in the subsequent chapters of this volume.

Section I introduces the concept of GPGs and examines in which respects the properties of these goods and the provision challenges they pose resemble or differ from those of national public goods. Drawing on this discussion and on various social and political-science literatures, Section II identifies factors that could, under certain circumstances, impede the provision of GPGs. Section III briefly looks at the current policymaking realities in order to ascertain whether contemporary policy debates and reform initiatives contain echoes of the identified impediments. They indeed do.

The findings indicate that GPGs, like public goods in general, are liable to suffer from collective-action problems such as free-riding. In fact, they may face a higher risk of encountering such problems than national public goods. The reason is that international negotiations resemble political markets in which states are individual actors pursuing particularistic, national interests, and not, necessarily, global concerns. Consequently, GPGs may suffer from dual – economic and political – market failure.

However, more than free-riding appears to matter. Global public goods tend to involve policy interdependence among countries, because in most instances no nation, however powerful, can self-provide these goods. They require international cooperation based on a blend of fairness and power politics, and hence, negotiating strategies that some countries, especially the conventional major powers, may yet have to work out and adjust to. Therefore, GPG provision is likely to be affected by the current shifts in global power relations towards increased multi-polarity.

Moreover, several GPGs, including climate change mitigation, pertain to another basic transformation that the international community must accomplish: a rethinking of the growth and development paradigms it has pursued to date so that it can move towards a low-carbon economy.

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Thus, it must be expected that policy reform efforts aimed at correcting the underprovision of GPGs will be surrounded by considerable technical, economic, and political uncertainty. They will disturb conventional governance systems, and hence, will encounter resistance and become bogged down in policy stalemates. In this vision, crises will persist and remain unresolved for quite some time – despite entailing high costs for many people, individual nations, and the world as a whole.

But, as the concluding section of this chapter – again, with further study and debate in mind – suggests, if some change processes were to be accelerated, notably those that aim at more open, participatory, and decentralized globalization, including regionalization, many other policy stalemates could perhaps also be resolved more speedily – to everyone’s benefit.

### **Conceptualizing Global Public Goods<sup>1</sup>**

Standard economic theory distinguishes between two main categories of goods: private goods and public goods.

Goods that can be parcelled out and made excludable, so that clear property rights can be attached to them, are categorized as private goods.

Public goods, by contrast, are goods that are non-excludable, meaning that the goods’ effects (benefits or costs) are there for all. If a good is non-excludable and non-rival in consumption so that one person’s use of the good or one person’s being affected by it does not diminish its availability for others, the good is said to be pure public. An example is the light of a candle, the service provided by a street sign, or also peace and security. If a good possesses only one of these properties it is impure public. The atmosphere, for example, is non-excludable but rival in consumption, because unrestricted pollution can change its gas composition and contribute to global warming. Patented pharmaceutical knowledge illustrates a non-rival good, whose use has, at least for a limited period of time, been made excludable. So, it, too, falls into the category of an impure public good.

The public effects of a good can be of different geographic – local, national, regional or worldwide – reach; and they can span across one or several generations. If a good’s benefits or costs are of nearly universal reach, spreading across all countries, or if it could potentially affect anyone anywhere, it is a global public good, a GPG. Together with regional public goods, GPGs constitute the category of transnational public goods.<sup>2</sup>

For an understanding of the policy challenges that GPGs pose and the provision constraints they may encounter, it is especially useful to consider the following aspects in more detail.

#### ***Publicness (and Privatness) as a Policy Choice***

The standard economics definition of public goods fails to distinguish between a good’s potential publicness and its *de facto* publicness. Yet this distinction is increasingly important. Due to a number of change processes, including technological advances, strengthened policy design skills, increased porosity between markets and states, as well as greater political and social freedoms, it has become more and more evident that publicness and privatness are in most cases not innate properties of a good but social constructs, a policy choice. Therefore, it is important to distinguish between the

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<sup>1</sup> This section draws on Kaul et al. (2003). More detailed discussions on public goods and transnational – regional and global – public goods can be found, among others, in Barrett (2007); Kaul et al. (1999); Sandler (2004).

<sup>2</sup> To be clear, the term ‘global,’ when used in reference to the consumption properties, the benefits or costs of a public good, means trans-boundary, border-transgressing or worldwide. When the term is used later in this chapter in reference to the provision path of a GPG, it indicates that action has to be taken by actors worldwide, and, as the case may be, nationally and internationally.

potential and *de facto* publicness of a good. For example, land can be freely accessible to all; or it can be fenced in and made excludable. Similarly, certain facts can be kept secret or be publicized.

Goods that are *de facto* public, which is to say, actually in the public domain, may be there for three main reasons. First, making them excludable may be technically impossible or too expensive. Second, they may have been deliberately placed into the public domain and made non-excludable and non-rival, as street signs have been. Third, goods may be public by default, due to policy neglect (which often allows air pollution to continue) or lack of information (which has, for example, led to harmful substances being consumed before their ill-effects were recognized).

### ***Globalness as a Special Form of Publicness***

Globalness, or the fact that the benefits and costs of some goods have nearly universal coverage, can be viewed as a special form of publicness and also as a policy choice. Certainly, some GPGs such as the moonlight have always had the property of global publicness. They are by nature global and public. Other public goods, however, have changed their properties from, for example, being national (including local) public goods to being GPGs. The reason is that globalization and GPGs are intrinsically linked. In fact, GPGs are both drive and result from globalization.<sup>3</sup>

An example of a GPG that facilitates the globalization process is the universal postal system. It has emerged through a harmonization of national postal systems and thus illustrates a case of the intended globalization of a formerly national public good. Another case in point is the multilateral trade regime that requires cross-border policy harmonization in a large number of policy domains. Today, more and more national public goods have been subjected to such behind-the-border harmonization. They range from trade and investment regimes to human rights norms. In all these cases, public goods that were formerly provided in more country-specific ways have undergone a globalization process, been turned from national public goods into GPGs, sometimes only after years of protracted multilateral negotiations.

Yet alongside intended globalization processes, like the creation of more integrated markets, has come unintended globalization, and with it, a further globalization of formerly national public goods. For example, more intense and frequent shipping and travel activity has facilitated the spread of communicable diseases. Financial market integration has allowed the contagion effects of financial crises to spread more speedily and more widely.

Increased openness of national borders has led to an ever-closer intertwining of national public domains and deepening interdependence among countries. As a result, the availability of more and more public goods, specifically GPGs, in any country today depends on policy actions taken or not taken in other countries.

### ***Publicness in Utility as Distinct from Publicness in Consumption***

Just as preferences for private goods (e.g. houses, books, or clothing) vary, so do preferences for public goods, especially those for GPGs. This is because many socio-economic and political differences are wider between countries, i.e. on the global level, than within countries.<sup>4</sup>

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<sup>3</sup> Much of what is being discussed here about the globalization of formerly national public goods would also apply to processes of regionalization. In fact, some formerly national public goods may simultaneously undergo both regionalization and globalization.

<sup>4</sup> In the present context, the term 'good' refers to things (products, services or conditions) that exist in the public domain and are public in consumption. It has no value connotation in the sense of 'good' as opposed to 'bad.'

Thus, publicness in consumption differs from publicness in utility. An African woman who faces a high risk of maternal mortality is more likely to prefer enhanced publicness of relevant medical and pharmaceutical knowledge than, say, international financial stability or even investment in mitigating climate change – even her children might not live long enough to face the full consequences of this latter change process.

In which way and to what extent a public good, notably a GPG, affects the welfare and well-being of different population groups depends not only on the overall provision level of the good but also on how it is shaped. For example, all countries face the same multilateral trade regime. But different groups of countries and even different groups of people within countries may in distinct ways gain or lose from this regime as a result of how particular norms have been shaped. Similarly, while many agree on the desirability of international peace and security, the views on how to generate this GPG vary widely, as debates in the United Nations Security Council have repeatedly shown.

### ***The Complexity of the GPG Provision Path***

The provision path of GPGs is comprised of two main strands: a political process and an operational process. Both strands tend toward highly complex, large-number processes involving public and private actors and the assembly of inputs from different sectors at national and international levels.

During the political process, concerned parties enter into negotiations and agreements about which goods to provide, how much to produce, how to shape the goods, and who is to contribute which of the goods' building blocks. Such negotiations will also determine how the costs and benefits of the intended policy interventions are likely to be distributed.

The operational process of GPG provision is concerned with the actual generation of the good, either based on voluntary, unilateral action, or as is most often the case, translating an international agreement into practical-political action.

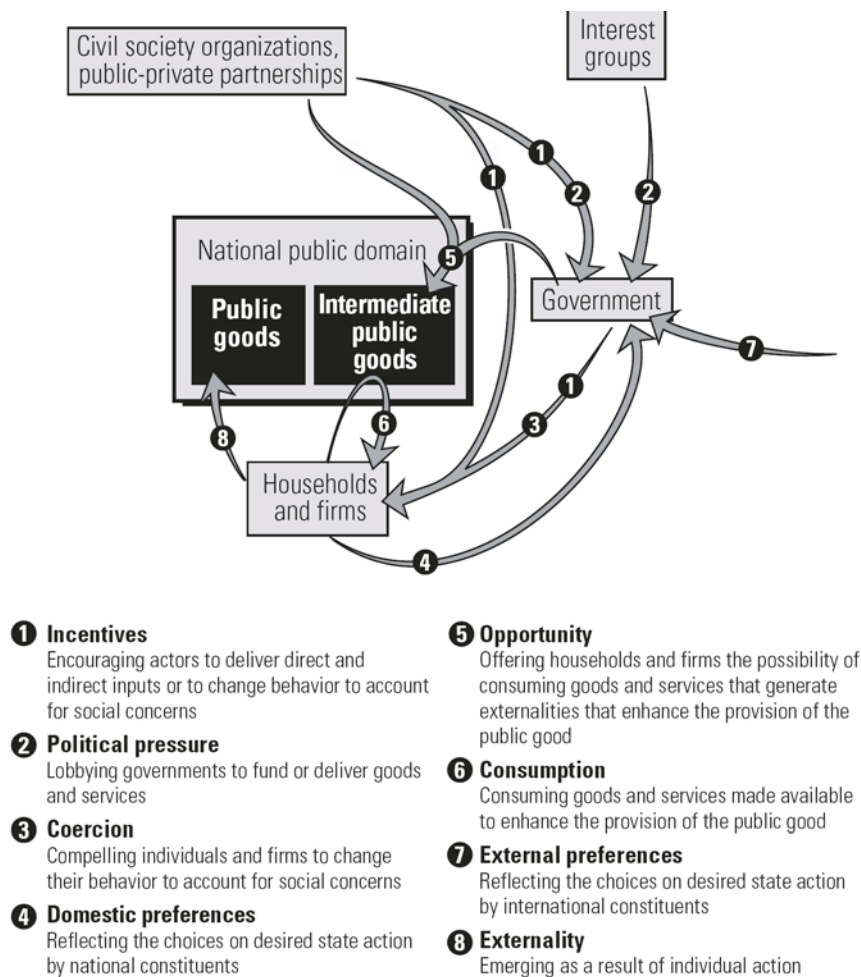
Figures 1 and 2 illustrate, respectively, the provision path of a national public good and that of a GPG. As can be seen from these figures, both provision paths are highly complex, with the GPG provision path being not only multi-actor and multi-sector but multilevel as well.

As Figure 2 shows, GPGs can constitute final goods, that is, the goods that people actually want to enjoy. Examples are international peace and security or the control of communicable diseases. In other cases, a GPG could be an intermediate good intended to feed into the provision of another, final GPG. Knowledge and technology elements may, for example, serve as intermediate goods for health-related final GPGs. The same holds for global principles and norms. Thus, multilateral trade agreements are an ingredient of the GPG “integrating markets”, and internal financial codes and standards, such as Basel III, are intended to foster the final GPG of enhanced financial stability.<sup>5</sup>

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<sup>5</sup> It should perhaps be noted that the institution of the market has public good properties. However, while market creation and embedding requires collective action, nationally and internationally, markets, as public goods, are designed to foster competitiveness. Therefore, the properties of markets have to be distinguished from the nature of the economic activity they are intended to facilitate.

**Figure 1: Production path of national public goods**



*Note:* The figure is based on the assumption that the good follows a “summation” aggregation technology. Intermediate public goods (like norms and standards) serve as inputs to a final public good.

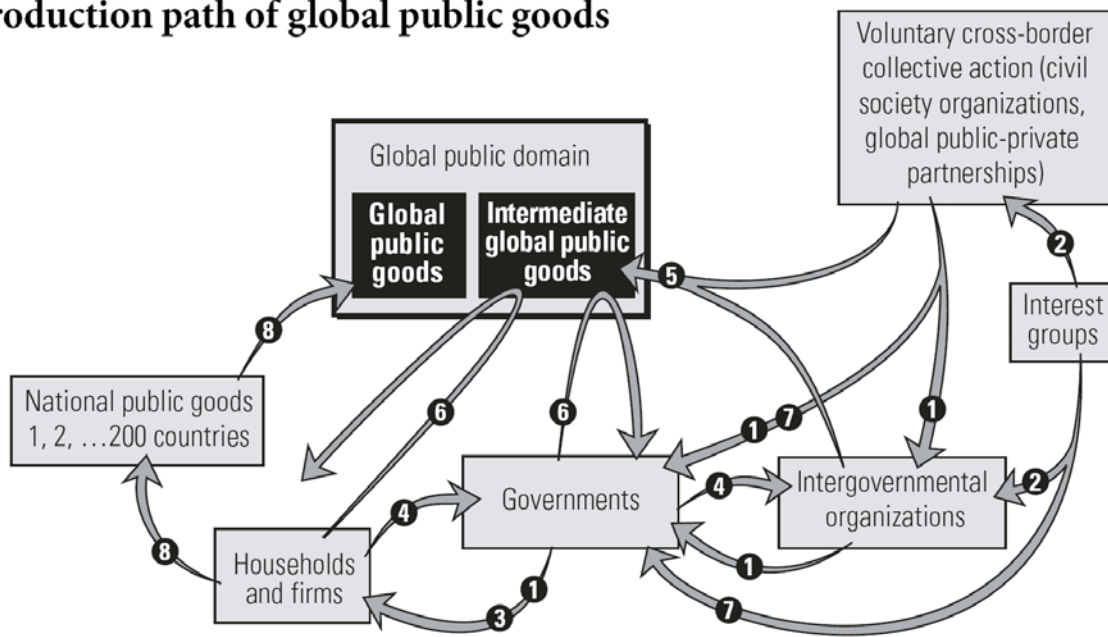
Source: Kaul and Conceição (2006, p. 12)

The policy interdependence among countries generated by GPGs Many, perhaps even most GPGs emerge from a summation process that brings together required national-level inputs, notably national public goods provided in a harmonized and concerted manner, complemented by international-level inputs. The latter could include elements like an international agreement that provides the common policy framework for the decentralized provision of national-level contributions. International-level inputs could also concern the creation of an international-level good like, for example, the establishment of an international organization to serve as a meeting and negotiating venue and secretariat.<sup>6</sup>

<sup>6</sup> Three main types of provision paths can be distinguished. Besides the above mentioned summation process they also include a weak-link process and a best-shot approach. Whereas in the case of a summation process the overall availability of the GPG depends on each actor’s contribution, it is the contribution of the weakest element of the supply chain that, in the case of a weak-link process, determines the good’s overall availability. Dyke building is an example of a weak-link effort. A best-shot approach results, when one actor, an individual, firm or any other entity, produces the good. An example is an invention like that of the wheel. Once invented and left in the public domain, it need not be reinvented.

**Figure 2: Production of Global Public Goods**

**Production path of global public goods**



- 1 Incentives**  
Encouraging actors to deliver direct and indirect inputs or to change behavior to account for social concerns
- 2 Political pressure**  
Lobbying governments to fund or deliver goods and services
- 3 Coercion**  
Compelling individuals and firms to change their behavior to account for social concerns
- 4 Domestic preferences**  
Reflecting the choices on desired state action by national constituents
- 5 Opportunity**  
Offering households and firms the possibility of consuming goods and services that generate externalities that enhance the provision of the public good
- 6 Consumption**  
Consuming goods and services made available to enhance the provision of the public good
- 7 External preferences**  
Reflecting the choices on desired state action by international constituents
- 8 Externality**  
Emerging as a result of individual action

*Note:* The figure is based on the assumption that the good follows a “summation” aggregation technology. Intermediate public goods (like norms and standards) serve as inputs to a final public good.

Source: Kaul and Conceição (2006, p. 14)

It is because many GPGs emerge from a summation process of primarily national-level inputs that more and more policymakers, even those of the most powerful countries, are beginning to recognize that no country alone can tackle GPG-type challenges. Meeting these challenges requires international cooperation.

Thus, GPGs entail consumption interdependence among countries, because they may affect all; and they entail provision or policy interdependence, because all may have to act, even if only one country wishes to change the current provision status of a GPG.

***In Sum: What is New and Different about GPGs***

While GPGs share with national public goods the key property of being public in consumption, they differ from their national counterparts in terms of the complexity – the multi-actor, multi-sector, multi-level nature – of their provision path, as well as in terms of the policy interdependence they entail,



namely the compulsion for policymakers to engage in international cooperation in order to ensure the availability of a desired GPG to national constituencies.

So, why do the present governance systems fail to address GPG-type challenges more effectively than appears to be the case at present? Do GPG-specific aspects matter? Or, is the underprovision of these goods symptomatic of problems that also affect other kinds of policy issues?

### **Why GPG Provision May Fail**

When searching for possible causes of GPG underprovision, it might be useful to rely, for a preliminary identification of possible impediments, on insights from the various literatures that study policy processes, including, among others, political science and international relations theories; behavioural, institutional and public economics; and issue-specific literatures like those on global environmental, financial, trade or health issues.

Judging from these different strands of literature, a host of factors is likely to contribute to the global challenges we are confronting today.<sup>7</sup> So, the possible impediments discussed below do, in no way, constitute a comprehensive list. Rather, they have been selected because of their potential to affect GPG provision on a cross-issue basis.

The list includes: dual – economic and political – market failure in the presence of public goods; fairness and efficiency deficits in the political markets, that is, in the international negotiation processes; organizational or public-management constraints; policy-change stalemates; and incompatibility among GPGs.

#### ***Dual – Economic and Political – Market Failure in the Presence of Public Goods***

As empirical studies have shown and public economics theory predicts, public goods are at risk of being underprovided because the very fact of their being public and available for all tempts individual actors into free-riding. This means that individual actors may not reveal their true preference and demand for a public good, lest they are asked to contribute to its provision. They avoid this commitment in the hope that others will step forward and provide the good, which they will then also be able to use and benefit from – free of charge. This is why public goods – in a manner similar to the spill over effects (or externalities) that arise from private consumption and production activities – make economic markets fail, providing a potential justification for state intervention, that is, for the state to step in and encourage or, if necessary, even coerce us as individual actors to contribute what is expected of us in terms of behavioural change, taxes, or both.<sup>8</sup>

But, as alluded to, standard public goods theory focuses on the national context. At the international level, the institution of the state has no full equivalent. Only a few international organizations, among them the United Nations Security Council and the World Trade Organization

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<sup>7</sup> It is perhaps useful to note that the utility of a public good, including that of a GPG can suffer not only due to the good being underprovided, i.e. incompletely supplied. It could also suffer due to malprovision – that is, due to how the good is being supplied and shaped. For example, law and order can be enforced through extensive policing or it can be created through measures that foster community development and social cohesion. Also, in the case of some goods, it is possible to determine whether or not they are adequately or fully provided. An example is polio eradication. It either is or is not achieved. Yet, adequate provision in the case of a good like “free multilateral trade” may be a moving target. Depending on how the world is developing, new aspects of free trade may have to be tackled, improvements in existing rules may have to be made possible, or change in decision-making patterns may have to become desirable.

<sup>8</sup> It is important to emphasize that economic theory speaks of a potential corrective role of the state because, as public choice theorists remind us, politicians and bureaucrats can also fail (see, for example, Mueller, 2003).

(WTO) have been endowed with limited coercive powers.<sup>9</sup> For the most part, international cooperation among states has to happen voluntarily. In fact, when appearing internationally, states, or more precisely, their national negotiating teams, tend to pursue national, particular (and hence, quasi-private) interests that may not necessarily be in line with global exigencies and goals. Moreover, during these negotiations, states bargain over the exchange of policy commitments. Accordingly, international venues can be likened to markets – be viewed as political markets.<sup>10</sup>

As a result, GPGs may even face a higher risk than national public goods of being exposed to free-riding, because they may cause economic market failure as well as state or political market failure.<sup>11</sup> Problems of such dual market failure could especially occur in the case of global challenges that have diffuse public effects and depend for their adequate provision on changed behaviour of a large number of actors as, for example, climate change does.<sup>12</sup>

### ***Fairness and Efficiency Deficits in the International Negotiation Processes***

However, not all reluctance to cooperate on the part of states necessarily reflects a collective-action problem like free-riding. Rather, it could signal that additional conditions exist which tend to make political markets fail. For example, international relations could be – and, in fact, were, and in some respects, still are – marked by unipolarity (resembling monopolistic conditions in economic markets), alliances among the major powers (resembling oligopolies), information asymmetries, or poorly defined rights and obligations of the transacting parties. These conditions are known to cause economic markets to fail; and most likely, they will also distort the functioning of political markets.

As long as global power relations were marked by bipolarity and unipolarity, and hence, the existence of a clear global divide between policy-defining and policy-taking countries, international cooperation was very much driven by power politics. But even then, judging from international relations studies, the effectiveness of international cooperation suffered from problems like renegeing, shallow compliance, or flexible interpretation of international agreements (Howse and Teitel, 2010; Raustiala and Slaughter, 2006), because agreed-upon policy decisions had not fully taken into account the often wide disparities in the preferences and priorities of different country groupings. As a result, fairness of process and fairness of outcome may have been lacking. Yet, as international relations scholars have emphasized for many years (Hardin, 1982; Axelrod, 1984), clear and significant net-benefits are important for international cooperation to work, because it has to happen voluntarily; therefore, it needs to be incentive compatible – all must be genuinely motivated to support, and act on, what was jointly decided (on the issue of process fairness, see, among others, Albin, 2003).

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<sup>9</sup> In the case of the United Nations (UN), for example, only very few decisions are of a binding nature, namely those taken by the UN Security Council under Chapter VII of the UN Charter (Malone, 2007). Another exception to the generally non-binding nature of international agreements is the Dispute Settlement System of the World Trade Organization.

<sup>10</sup> On the concept of political markets, see also Furubotn and Richter (2003, p.420).

<sup>11</sup> It should be noted that the type of state failure referred to here is not to be confounded with the government failure on which public choice scholars tend to focus and which is due to self-interested behavior of individual politicians and bureaucrats. The state failure identified here is of a systemic nature. It has its roots in the present world order that is still very much centered on the principles of national policymaking sovereignty.

<sup>12</sup> To illustrate, carbon emissions are diffuse externalities. Once emitted into the atmosphere they cannot be traced back to the emitter, although, of course, it is possible in other ways to assess the carbon footprint of countries. Diffuse externalities also tend to be substitutable so that a corrective action by one party could be offset by inaction on the part of others, a fact that makes it so important for all countries to move in tandem. However, at the same time, worldwide concerted action not only by all countries but by all people in all countries is difficult to achieve. Due to the large number of actors involved, its risk of suffering from free-riding is especially high, because each actor may view her/his contribution as not mattering a lot, and therefore, not be strongly motivated to contribute. Yet, if a large number of people acted in this way, a high level of underprovision would result.

Lack of effective follow-up may give rise to inefficiency, especially where the costs of delayed action outstrip those of corrective action and renegotiations of previously discussed issues entail high transaction costs, as, considering large-scale, complex processes like the climate changes negotiations, they are likely to in many cases (Conceição and Mendoza, 2006, present an overview of issue-specific case studies on the costs of inaction and action; see also Nkonya et al., 2011; N. H. Stern, 2007).

With the recent shift towards multipolarity issues of fairness have become more important. Especially the emerging-market countries, and with their support, also other developing nations, are no longer prepared to accept proposals for international cooperation that do not offer them the clear and significant net-benefits that they consider to constitute a fair bargain. Evidently, political markets are becoming more competitive. This may also enhance their efficiency. But, how efficient are they today? Have they become more incentive-compatible? Do countries, notably the conventional major powers take full account of the policy interdependence that has resulted from increased economic openness and the globalization of public goods – that in order to enjoy a particular GPG at home they depend on the effective cooperation of other countries?

Thus, it could be that the current underprovision of GPGs reflects two facts that relate to the structure and functioning of international political markets. First, the severity of some of the challenges may indicate that these markets have not been working efficiently for quite some time and a reform backlog exists; and second, it could signal that problems of getting the ‘price’ right, of making international cooperation incentive-compatible, persist.

### ***Organizational Constraints***

Global public goods tend to be positioned at the crossroads of the public-private and national-international axes; and they straddle across multiple scientific disciplines and multiple economic sectors. They require an issue-specific policy and management approach that mobilizes inputs from actor groups that have, conventionally, been quite separate.

Thus, GPG provision may not fit easily into conventional governance systems that were created during, and thus often for, a world order of sovereign states that, until not too long ago, pursued a policy of relatively closed national borders, and organized policy affairs mainly along geographic and sector lines.

As the conventional divide between foreign and domestic affairs still appears wide in many countries, it must be expected to impede the vertical – national/international – policy integration that many GPGs require. Similarly, the conventional organization of policy fields by sector could interfere with the smooth functioning of inter-sector cooperation, nationally and internationally.

GPG provision calls for the introduction of a new, additional organizational principle, namely, an issue-orientation. The need for such issue-orientation is particularly warranted at the international level. This is because international cooperation is in many instances aimed at correcting specific problems, notably at discouraging, in a targeted way, negative cross-border spillovers like pollution or encouraging positive spillovers like those that result from the national-level policy harmonization that countries might undertake in order to join international regimes such as the multilateral trade regime or the international civil aviation regime.

Yet, organizations and their underlying institutions, once established, can be difficult to change (Furubotn and Richter, 2000; North, 1990).<sup>13</sup> Problems of lock-in and path-dependency may arise and cause the provision path of GPGs to break down or associated reform attempts to be held up.

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<sup>13</sup> Following North’s (1990, pp.4, 5) terminology, institutions are “the framework within which human interaction takes place ...the rule of the game ...formal written rules as well as typically unwritten codes of conduct” (p.4). Organizations

### ***Policy Stand-Offs***

In today's multi-actor world, which is characterized by the progression of democracy at the national level and the involvement of more and more non-state actors at the global policy domain level, more than multilateral relations between nations impact the functioning of international cooperation. It is therefore important to look beyond the political market, that is, the intergovernmental negotiations discussed in the last section, and examine the broader policy context.

As studies on policy change have found, policy stand-offs and stalemates are the norm; and major policy reforms are the 'infrequent exception' (Repetto, 2006). A possible reason for the stalling of policy change efforts could be a standoff between the proponents and opponents of change that prevents issues from moving in any direction. Such a situation could especially arise in cases where changing the provision of a GPG is likely to have major distributional implications, as the intended global move towards a low-carbon economy certainly would (Eisenack, Klaus et al., 2010). As proponents and opponents promote more and more research and analyses to bolster their arguments, existing political rifts can widen rather than narrow, a problem that can be seen in both the climate change area and other fields. For example, assessments of the benefits developing countries could derive from the Doha Round differ quite widely (see for example Bhagwati, 2011; Jean-Pierre Lehmann, 2011; Scott and Wilkinson, 2011); and so do the policy proposals on how to tackle the 2008 financial crisis and the ensuing sovereign debt crisis in Europe.<sup>14</sup> At the same time, while crises stir up willingness to change, this willingness often wanes quickly once the worst is over, explaining, as (Reinhart and Rogoff, 2009) show, the recurrent nature of financial crises.

Fundamental policy transformations have indeed been rare during the past six to seven decades – breakthroughs like those we witnessed after World War II with the creation of the United Nations system and the establishment of the Bretton Woods institutions; or the change towards economic openness and market fundamentalism that accompanied the vanishing of the East/West divide in the 1980s. Yet, even the continuing relevance of these major policy reforms is now being questioned. Just consider the current debates on global governance in which the United Nations often figures only as one player among others, or the debate on a new – “green” – growth paradigm.<sup>15</sup>

Several of the 'sticky,' or severely underprovided, GPGs are closely linked to the current major reform debates: the need to change the growth and development paradigm pursued to date in order to promote enhanced environmental sustainability; the rebalancing of markets and states; and how to tackle the new security threats like communicable diseases or transnational crime and violence while, at the same time, maintaining economic openness. Moreover, although already fundamental and far-reaching in and by themselves, these and other issues must be tackled under unstable conditions – the aforementioned and ongoing major power shifts.

(Contd.) \_\_\_\_\_

include political bodies ..., economic bodies ..., social bodies ..., and educational bodies..” (p.5). They are seen as guided by but also influencing institutional change.

<sup>14</sup> The 2008 financial crises spawned a flurry of studies and commentaries on how to manage various aspects of the present crisis and strengthen financial regulation in the longer run. The disagreements between these contributions stem, in part, from the fact that some authors start from a more neo-liberal position and others from a more Keynesian approach. In part, as Helleiner et al. (2010) point out, authors arrive at different conclusions because of a differing analytical focus. Whereas some analyses focus on inter-state power, others focus on domestic politics or transnationalism in explaining the origins of and possible ways out of the crisis. Similar differences between the analytical frameworks could perhaps also be found in other issue areas, including multilateral trade, climate change, or global governance more broadly.

<sup>15</sup> For proposals on how to redesign the present system of global governance, see for a broad, overarching view, among others Samans et al. (2010); and for an outline of green growth strategies the OECD (2011). Yet again, as we are in the midst, or perhaps, only at the beginning of, a wave of worldwide rethinking on these and related issues, it must be stressed that the foregoing references offer but a glimpse of the blitz of reform ideas currently being generated.

Could it be that global crises are also escalating today because the world is going through a major period of transformation and uncertainty that often causes reform proposals to get trapped in policy stalemates? How far into this transformation are we? Are tipping points in sight that could unleash a new willingness to engage in international cooperation and resolve some of the pending issues?

### ***Inconsistency among GPGs***

Symptomatic of an era of transformation is also that the old order and the institutions that were built to support it will overlap with emerging new institutions and organizations, among them many that qualify as GPGs. Thus, inconsistencies could arise in the global public domain, notably as a result of clashing global norms and principles.

Global public goods are, as noted, goods that exist in the global public domain. However, different GPGs will have entered the global public domain at different points in time. Although, as just discussed, major policy change is rather the exception than the norm, it nevertheless happens. Therefore, GPGs belonging to different policy eras can exist side by side in the global public domain – and be, for many actors, difficult to reconcile. For example, many countries appear to be struggling with how to combine policymaking sovereignty and economic openness.

With more and more state and non-state actors getting involved in the global public domain, inconsistency among GPGs may also arise from the differences that various actor groups have for a particular good. Studies have shown that the national policy performance of governments is being monitored by some 170 indices designed and employed by different civil society organizations, private-sector actors, academics, individual governments, and multilateral organizations (Bandura, forthcoming). Thus, state and non-state actors face a puzzling array of not uncommonly contradictory and conflicting policy expectations and demands.

### ***Relative Recentness of Issues***

Not too long ago issues like health, education, law and order, or taxation were perceived as essentially domestic policy concerns. By now they have been globalized and are recognized as such. Also, not too long ago, the conventional major powers could have suggested a particular policy response to a global challenge and banked on other nations falling in line, but now they cannot. Other issues like cyber-based crime did not even exist a few years ago. So, many policy challenges today are new, as yet poorly understood, require study not only to understand their technical aspects but also their economics, and importantly, necessitate the development of new policy approaches and instruments.

As long as uncertainty about the existence of a particular problem, or uncertainty about the desirability and feasibility of possible technical and political response options exists, aversion to ambiguity is likely to impede action (Brock, 2006). This can be for valid reasons, because embarking prematurely on a new policy path, be it a choice for a particular technology (e.g. nuclear energy) or a particular policy approach (e.g. addressing carbon leakage from the producer rather than the consumer side) can trigger long-lasting and costly lock-in effects. Thus, it could sometimes be preferable to allow more time for learning and testing. But the longer policy innovation takes, the higher the risk that it gets interrupted by policy swings: election cycles and changes in governments that frequently contribute to the often only short-lived emergence of new policy ideas and reform attempts. As a consequence, incremental change may occur but not suffice to punctuate the present policy equilibrium.

***In Sum: More than Free-Riding Matters***

As argued above and summarized in Table 1 below, a number of factors might be causing the underprovision of GPGs we are experiencing. Their combination and the strength of each might differ from case to case. Underprovision is likely to be more severe, for example, where several factors coincide because their effects may add up or reinforce each other. It seems that GPG concerns which have emerged relatively recently and are seen as entailing significant distributional implications are especially liable to underprovision, notably when the adjustment or cost-burden falls on the conventional major powers.

Yet, we must not overlook that even today, despite the major transformations that are occurring, GPG provision functions quite adequately in a number of cases. This holds true especially for GPGs like the global transportation and communication systems, which are GPGs that not only enjoy strong support from private sector actors but also tend to spread their net-benefits quasi-automatically and relatively evenly across nations without much need for corrective policy intervention. Indeed, they offer benefits that state and non-state actors can easily access, provided they have the means (that is, the money) to post a letter or parcel, buy an air travel ticket, or make a long-distance call (Kaul et al., 2003).

That the provision of these GPGs functions quite well underlines, once again, the importance of fair and clear net-benefits to effective international cooperation. This condition usually goes unmet where policy initiatives for the global common good are controversial and contested: where meeting a global challenge would have benefits for all but not necessarily clear net-benefits, because some would need to shoulder relatively bigger burdens than others. Or, put differently, because publicness in consumption would not be matched by publicness in utility, a situation that can arise especially where publicness in decision-making, that is, process fairness, is lacking. Where such mismatch occurs, one might also find, as depicted in Figure 3, a low willingness on the part of concerned actors to engage in collective action – to generate the necessary collectiveness or publicness of provision – and thereby respond to the challenge of policy interdependence that GPGs tend to pose.<sup>16</sup>

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<sup>16</sup> While there exists some evidence that lends support to arguments about the links between the fairness and the effectiveness of international cooperation, a fuller understanding of when, why and how fairness matters would, as also Kapstein (2008) suggests, require much more research. One might certainly want to add a study on the relationships depicted in the rhombus of publicness to the research agenda that Kapstein presents.

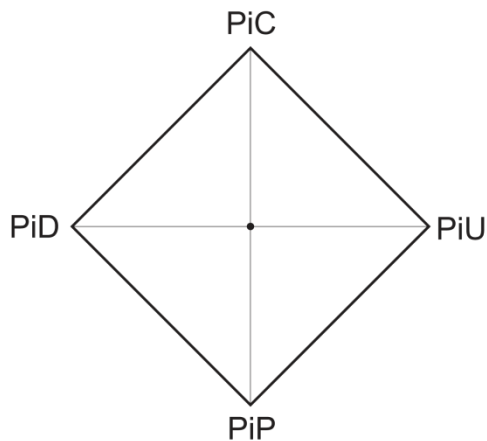
**Table 1: GPG provision challenges**

| <b>GPG-specific/related aspect</b>   | <b>Main provision impediment</b>   | <b>Factor contributing to underprovision</b>                                   |
|--|--|--|
| Publicness in consumption  | Political market (states as particular actors in international negotiations)   | Free-riding and other collective action problems                               |
| Policy interdependence resulting from the good's publicness in provision, i.e. the compulsion to engage in international cooperation | Mismatch between provision interdependence, on the one side, and lack of process fairness and mutuality of benefit, on the other side                  | Depressed willingness of countries to cooperate                                |
| Complexity of the provision path   | Organizational constraints, including a still pronounced foreign/domestic divide and sector-oriented policy approaches, nationally and internationally | Breakdowns in the GPG provision path   |
| Nationally and/or internationally varying preferences for a particular GPG or for how to provide it                                  | Standoffs between proponents and opponents of change   | Trapped corrective-action proposals  |
| Inconsistency among GPGs that exist in the global public domain  | Uncertainty among state and non-state actors about which GPG to maintain and include in one's own "consumption basket"                                 | Issue avoidance  |
| Recentness of issue  | Path-dependent initial responses; periods of issue study and innovation of technology and policy   | Lack of effective policy responses until new response options become available |

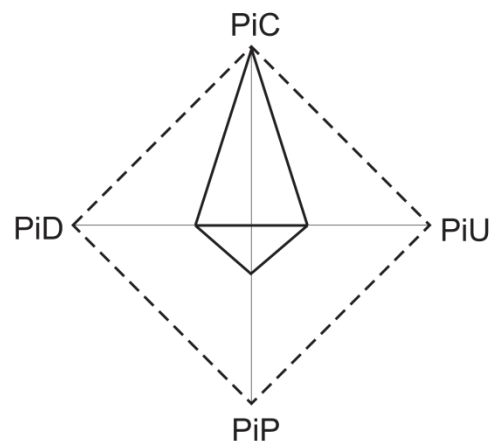
**Figure 3: The rhombus of publicness**

**Figure 3: The rhombus of publicness**

**3.a Aligned dimensions of publicness**



**3.b Mismatched dimensions of publicness**



**Note:**

PiC: Publicness in consumption; PiD: Publicness in decision-making (fairness of process)

PiP: Publicness in provision; PiU: Publicness in utility (the net-benefit to be derived from international cooperation in support of enhanced GPG provision by a particular actor [group])

Source: Author

**Recent Policy Responses to GPG Underprovision**

A comparison between the above-identified list of GPG provision impediments and the issues that either figure prominently in current policy debates or appear as stated aims of policy innovations reveals considerable overlap. This indicates that the list of provision impediments suggested in Section II points to relevant factors.

However, in line with the foregoing discussion, it also appears that change happens, at best, in fits and starts. Policy standoffs still exist in many issue areas.

Take the issue of fairness of process. Some analysts - like, for example, Nye - advocate the pursuit of 'smart power,' that is, power not wielded over someone but with others so that resources can be pooled and common purposes achieved more effectively (Nye, 2011, pp.207–234). The creation of the Group of Twenty (G-20) can be seen as an institutional innovation that reflects a shift towards 'smart power.' For more information on the G-20, see the ('Official Website of the G20', 2012); and for assessments of the work of the G-20, for example, ('University of Toronto on the G20', 2012)



and ('Bruegel on the G20', 2012). However, others (like, for example, Khanna, 2011) suggest that the solution of problems by those who have command over the necessary resources is more important than bothering with the more messy and perhaps more time-consuming process of consultation and participatory decision-making. Or, consider the clash between the norm of sovereignty and that of openness. Some countries, especially developing countries that are still in the process of building up their national policymaking capacity so that they can actually exercise their right to national self-determination in a meaningful way, tend to be wary about requests for cross-border policy harmonization, especially if this implies that developing countries have to adjust to the norms and standards of industrial countries. Most recently, even the countries that in earlier years were among the sternest supporters of globalization appear to be rethinking policies of economic openness now that more and more developing countries are emerging as strong competitors in international markets (Rodrik, 2011).

So, whereas some prefer to hold on, or revert, to the conventional, stricter notion of sovereignty, other reform ideas suggest a qualified notion of sovereignty. The norm of the responsibility to protect is an example. As set forth in the outcome document of the 2005 World Summit of Heads of State and Government, it stipulates that the international community has the responsibility to intervene where states fail to protect people within their jurisdiction against mass atrocities like genocide, war crimes, ethnic cleansing and crimes against humanity (UN. General Assembly, 2005).<sup>17</sup>

An even broader notion of responsible sovereignty calls for enhanced cross-border externality management by both industrial and developing countries so that the exercise of one country's sovereignty does not infringe on the sovereignty of other countries (see, for example, Jones et al., 2009; Kaul, 2010, 2011). For example, cooperation in strengthening financial norms and standards in order to prevent or, should they erupt, better manage financial crises could be part of such a move toward responsibly exercising sovereignty.

Additionally, calls for more national policy space and country-specific policy paths are pitted against calls for more binding multilateral decisions, more monitoring, and more reporting by states, and this, at times, in the same policy statement. Thus, the 2011 Cancun meeting on climate change advocated a more bottom-up strategy coupled with self-reporting by states on the measures they take with respect to mitigating climate change (see Stavins, 2010; UNFCCC, 2010). Similarly, the G-20 relaxed some of its earlier calls for international financial and monetary cooperation but now also expects governments to self-report on the national corrective steps they take, as well as to jointly review progress in terms of maintaining current account imbalances at sustainable levels (G-20, 2011). Steps such as these reflect policy struggles between states and markets as well as hesitance on the part of states to move towards a greater pooling of sovereignty.

Another balancing act ongoing in many issue areas concerns the challenge of how to have both: the privateness of a good and its publicness. This struggle is quite evident in the field of knowledge management, specifically in the policy debates on how to combine the agreement on Trade Related Intellectual Property Rights (TRIPs) with goals like fostering global poverty reduction. One relevant question is how to enhance pharmaceutical product availability to the poor, or, put differently, how to foster innovation and dynamic efficiency, the goal of TRIPs, alongside enhanced static efficiency, which is a critical ingredient of more broad-based development. Change in this field has, despite many obstacles, moved beyond the stage of debates to the testing of innovative proposals, including the instruments of advanced purchase commitments (Kremer et al., 2005) and differential patenting (Lanjouw, 2001). The concern about fostering a globally beneficial balance between dynamic and static efficiency also underpins the creation of the Green Climate Fund, mandated to facilitate, among

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<sup>17</sup> The emergence of the principle to protect within the UN context was facilitated by the work of the International Commission on Intervention and State Sovereignty (ICISS). For the Commission's report, see ICISS (2001).

other things, increased international cooperation for both mitigation of and adaptation to climate change (UNFCCC, 2010). But, as the current debates in the World Intellectual Property Organization (WIPO) show, answers to this question of what would be a desirable balance between static and dynamic efficiency are still far from consensus (see, for example, the news and debates presented on IP watch, 2012).

Deliberations within the WTO context also reflect some of the still unresolved tensions, not to mention the conflicts that exist between various GPGs – e.g. between free trade, on the one hand, and, on the other, goals like environmental sustainability, food security, health, financial stability, and, one might also add, peace and security. These tensions are of course coupled with the question of what next for global governance and the multilateral trading system (many of the above-mentioned issues figure on the agenda of the ‘WTO Public Forum 2011’, 2011).

As regards organizational frictions, a large number of single-issue international cooperation mechanisms have emerged in recent years (Conceição, 2006), introducing a more integrated, multi-sector, and public-private approach to the management of GPG provision. However, the conventional foreign aid community – accustomed to a more country-oriented approach to operational international cooperation – tends to be quite critical of these new delivery mechanisms (Reisen, 2010).

### ***In Sum: A Policy Equilibrium Waiting to Be Punctuated***

The above list could be lengthened much further, because the current global crises have given rise to innumerable studies, new ideas, and policy proposals. However, as the foregoing examples show, for the most part the reform measures imply incremental change; and many end up in policy stalemates with proponents and opponents weighing in equally vocally and blocking the measures from moving forward. Nevertheless, pressures for change appear to be multiplying.

## **Conclusion**

### ***Explaining Underprovision in its Historical Context***

The aim of this chapter has been to suggest, for further study and debate, conjectures about the possible causes of today’s underprovision of GPGs. Based on the theories and the evidence considered, it appears that at present underprovision is severe, partly because the world is going through major economic and political transformations, having to accomplish a change in its growth and development paradigm while also adjusting to global power shifts. At the same time, it also needs to rebalance market/state relations and, last but not least, find a way of combining openness and sovereignty.

In fact, GPGs, being drivers and consequences of greater economic openness, are at the centre of these transformations, notably the issue of openness and sovereignty. Decisions on their provision may thus be held up by the uncertainty, opposition, and conflict that accompany the ongoing debates about the basic economic and political parameters. These transformational factors, the chapter has argued, could presently exacerbate problems of underprovision that would even occur under more settled conditions, including collective-action problems like free-riding.

Indeed, free-riding in the presence of GPGs could be even more pronounced than in other public-good situations, because GPGs depend for their provision on two markets: economic markets and political markets. The latter refers to the international negotiation venues in which states are also individual actors tempted to pursue national, particularistic goals that may not necessarily fully overlap with global goals.

Clearly, the provision of GPGs is being shaped by factors that will always be relevant like the publicness of the goods, but it is also being shaped by highly context-specific factors, conditions that are important now but whose impact will change over time.

But, how fast are current policymaking realities likely to change? Are we left to face an accelerating downward spiral of global crises before the current reform backlog is finally tackled? Or, does the analysis in this chapter point to possible, more orderly ways of breaking the current political stand-offs so that the now-stalled issues could move forward and global growth and development return to more stable, sustainable paths? In fact, it does.

Re-examining Table 1 from this perspective, it seems that the current provision constraint that will likely come under ever-more pressure to evolve is the global pattern of decision-making on global issues, or put differently, the global governance system. Consider, in addition to the emergence of new state powers like Brazil, China, and India, the visible trend towards increased economic and political regionalism, the growth of world-wide social and political networks, the Arab Spring movements, and the demands for strengthened political legitimacy and accountability in the older democracies, and it appears that all these forces seem to be moving towards more publicness in decision-making, driven by a sense of a lack of publicness in utility. These forces could enhance national governments' motivation to engage in more effective international cooperation and pursue smart-power strategies, lest they – and indeed they would – lose more and more policymaking control. To the extent that this happens, it would also become more evident in practical political terms that under conditions of economic openness, states do not lose sovereignty when engaging voluntarily in international cooperation that makes economic and political sense. To the contrary, they can maintain and regain decision-making power.

So, the conventional powers' willingness might strengthen and create more room at international decision-making tables such that the voices of all concerned can be heard more effectively and taken into account in structuring international agreements and bargains. This could, in turn, rekindle the willingness of the newly emerging powers to share the costs of international cooperation by undertaking even more requisite national reform steps and to deepen their engagement in joint, international-level endeavours. As a result, a new, more bottom-up, open, and participatory era of globalization could be dawning – an era that might indeed see progress on some of the now contested, “sticky” global issues, be they in the area of the environment, trade, finance, health, global poverty, or peace and security.

This also suggests that we might, in retrospect, consider the current political stalemates as a productive phase: perhaps by fostering an examination of the pros and cons of various technology choices, policy approaches, and instruments, they are preventing us from getting locked into decisions that may later prove infeasible or undesirable. A certain amount of international relations and global decision-making ‘messiness’ could well prove, in the medium and longer-term, to be the more efficient policy path because it might broaden and deepen the political consensus on which change initiatives rest.

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## Problems of Policy-Design based on Insufficient Conceptualization: The Case of “Public Goods”

Friedrich Kratochwil\*

### The Public Goods Debates and the Issue of “Undersupply”

One of the consequences of the globalization debate has been that the issue of the “public domain” has been raised in a new and more radical form than in a previous discussion in which the narrower focus on market failure framed the controversy (for two seminal contributions that proposed a wider framework, see Litman, 1990; and , from the perspective of thinking through the implications of an information society, James Boyle, 1997). The original debate occasioned by (Olson, 1965) work focused primarily on the collective action problems resulting from the non-rivalry of consumption and the non-excludability characteristics of public goods. It was indebted to some themes that had already prompted (Hume, 1970b) to emphasize the need for a “magistrate” who relies on taxation for supplying these goods rather than on voluntary contributions or sales.

The more recent debate, on the other hand, foregrounds more the conceptual problems connected with the “*public*” nature of the goods (see e.g. the symposium of Duke Law school on the public domain and especially J. Boyle, 2003a), and with issues of policy design in order to counteract the undersupply of certain goods for which traditionally their public character has been blamed. I think there are several reasons for such a shift in attention which, singly and in conjunction, call into question the heuristic power of the conventional public goods approach, and, as we shall see, alerts us to the dangers of employing it for policy analysis, as it can lead to faulty policy prescriptions. The reason for this failure is that this approach is too narrow in taking *certain kinds* of market failures as its paradigm. I claim that we need at least a political economy approach that pays particular attention to the effects of property rights in order to advance our analysis of .public policy problems. Thus while public goods are certainly a case of market failure, not everything in even that rather restricted field (when compared to the much wider “set of puzzles” raised by problems of “cooperation” in international relations) is a public goods problem. Here issues of moral hazard or of information asymmetries come to mind since they bring into focus a quite different set of issues, not to speak of the problems raised by incomplete contracting, or rent-seeking that can be adduced for explaining certain sub-optimal outcomes. Without wanting to even touch these issues let me briefly enumerate a few reasons why the classical paradigm of public goods as outlined by Samuelson and popularized by Olsen is problematic.

The first mistaken assumption is of course that goods come either as public or as private ones, i.e. that they are defining characteristics of the goods in question, which then can be treated as if they were natural facts. This stance mystifies the constitutive process by which “goods” as well as “publics” are constructed, as (Kaul, 2012) correctly points out in this volume. I would however still go a bit farther by drawing out the implications of this “constructivist” insight. Here a second, widely shared (but erroneous) assumption comes to the fore, which allegedly determines how concepts in the social world “work” and attain their meaning. This second error compounds the flaws of the first one. I claim that the notion that “meaning” is conveyed by reference (like bringing the “thing out there” under a concept –as in the assertion “this is a dog”) rather than by *use* (how does this concept , e.g. sovereignty, link to other concepts in a semantic field, and what does it let me *do* i.e. does it relate to practice) is not helpful, particularly when we analyze the social world. For a further discussion of this point, see Kratochwil (2008, pp.80–99).

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If we take these objections seriously we can see that there are virtually no public goods that satisfy the two criteria supposedly defining them. Take “air”, which is often mentioned as an instantiation of this concept. It becomes obvious rather quickly that air might be a “good” in ample supply, but that it certainly does not qualify as a “public good” since it does not meet the non-rivalry of consumption criterion. Otherwise we would not have pollution problems and could not try to combat them by issuing pollution certificates which are then traded in a market. Or take national security also often labelled as a public good. Here too it becomes clear that while security might be a public good for the “members” of a “public” (although the existence of forts or ramparts might make certain areas safer than others and thus might re-introduce rivalry considerations) it certainly is “no good” – neither public nor private - for those *excluded*. Politics might be about creating a “common thing”, the *res publica* or polis of yesteryear, but we should not forget that the term *polis* presumably derives from *polizo* (I build a wall) and that by “caging” people and creating a public we are able to provide security for them- but also making them eligible for retaliatory action from those in front of the gates.

Second, some of the problems created by open access to a common resource – the typical “common’s” problems (or common pool problem) are really not problems of undersupply but “over-use” that might be alleviated by the assignment of private property rights or restricting access through regulation. While of course these were the traditional ways of dealing with the problem through either “privatization” or “regulation” (public policy), a brief reflection shows that these conceptual short-cuts are not that helpful either. For one, even the assignment of private property rights is not really a “private” solution, as property rights need public enforcement and “restriction” of access might again be secured in a variety of ways, mixing public and private measures, such as issuing licenses, making use of residency requirements, putting restrictions on the sale of entitlements, setting limits on taking (enforced by social control), limiting the taking to “seasons”, employing neighbourhood watches as surveillance mechanisms, etc. If we have learned anything from the long and detailed studies of resource regimes by Ostrom et al. (1994), it is this that there is not “one size fits all” solution to these problems that could be “brought under” a “parsimonious model” of *a priori* reasoning which is then applied to the real world. Not only are the available solutions much more numerous, most of them lie outside of the rigid public/private dichotomy, but what works depends more on local knowledge, on customs, and on hitting on an institutional solution that embeds the specific regime in a wider set of social understandings and relations, than on an “elegant” theory.

Let us return to our preliminary objections by “testing” the public goods idea in certain policy areas. Thus problems of public health do not seem to raise issues of public goods, save in the most spurious sense. We all probably enjoy being in a society in which most people are healthy and this enjoyment is a “good” that satisfies the non-rivalry criterion but again not that of non-exclusivity. The “public” element here is rather different. It concerns issues of contagion, as each of us might become a victim. But it is not a public “bad” either in the sense of non-exclusivity, since rigid separation (exclusion) schemes can prevent the spread, as do “private” measures such disinfection and hygiene. As far as the sub-optimal supply is concerned it results from the interaction of several factors such as the outbreak of an epidemic, of demographics (as an aging population affects the “supply” detrimentally even in the absence of an epidemic), the lack of access to prompt help, cultural inhibitions (not taking precautions, medicine), but above all from the lack of resources in both public and private budgets, i.e. mostly on “poverty” “plain and simple.

The failure to reap the benefits of free trade raises still some other problems, but they too have little to do with the public goods *problematique*. It rather results from the “capture” of an institution by certain interests that have their “rights” ensconced and are of course, not eager to re-open the discussion about the justifiability of the original assignment, and concomitantly by an agenda which draws the bounds of sense rather narrowly and rules out challenges as “not germane” or beside the point. The downside of this privileging hegemonic move is that the present actual dangers to a free trade regime that could lead to welfare losses, are then not even appearing on the “radar screen”. As



Pauwelyn (2008) has argued the existing regime is still largely mercantilist (rather than liberal) as everything turns on mutual concessions, and it is “producer- driven”, i.e. the threats identified are those of national protection by which producers try to shelter their markets. This narrow conception creates resentment by the developing countries, which arrived at the table much too late in the game, and which also come largely empty handed because of their economic weakness. But this epistemic hegemony also does not see that the present calls for “protection” do longer originate in producer groups, as industry has largely internationalized and trade is increasingly intra-firm trade. The protests of today are raised rather in groups which attempt to give voice to new issues, such as the environment, human rights (here Petersmann’ plea of a decade ago should not be construed too narrowly as a ‘right to free trade” as his argument is part of a larger ‘constitutionalization’ debate, cf. Petersmann, 2002), wage dumping, stock market bubbles etc. In short, they articulate concerns of the social implications of disembedding markets and above all the financial sector from the real economy. Thus it might be one thing to treat services like goods, and it is another to grant unimpeded access to the market to financial instruments of which we have only the vaguest idea of how they function and how they will affect market behaviour.

Finally when we try to assess the benefits we can reap from an extensive public domain in the area of knowledge when compared it to a regime that supposedly increases “production” of knowledge through the protection by exclusive property rights (see e.g. J. Boyle, 2003b), we face again a different problem. It seems highly ironic though, that with the advent of digitalized information and the unprecedented possibility of dissemination not subject to the traditional marginal cost barriers, we encountered an “enclosure” movement of gigantic proportions. Thus at a time in which information could be shared and thereby *increase in value*, we quite strangely reversed gears and opted for “solutions” that rely on highly problematic analogies to the free rider and the concomitant undersupply problems of open access regimes to natural resources. For a seminal discussion of the these problems in respect to resources, see (US) National Academy of Sciences (1986); for further detailed examination of property rights and resource management, see Ostrom (1990) and Ostrom et al. (1994). The pleas for further “privatization” become doubly ironic when the case for their extension is made on the basis of an argument that without such “incentives” no useful knowledge would be generated, since an inventor would be deprived of the fruits of his labour.<sup>1</sup> The first assertion misses the point since knowledge production is essentially a social enterprise and thus not like the hawking of some “private” ideas, the second invokes – *mirabile dictu* – the labour theory of value, which otherwise has become *anathema* in the economic discourse. The incoherence of this argument for the extension of property rights becomes downright ridiculous when e.g. for compilations of simple data, such as phone numbers in the public domain, special “copyrights” are demanded and even granted on the basis of the efforts spent in collecting them.

## **The Genealogy of “Public Good”**

The sneaking suspicion that our debates become so quickly muddled because of the inadequacy of our conceptual tools, gains plausibility when we take a closer look at the “genealogy” of the concepts and when we compare different conceptualizations of the public and the private realm over time. Significant shifts occur when the discussion of what is ‘good’ (*bonum*) – with the ambiguity of covering both the “thing” and its “property” - moves from an interest in the “commonality” of all goods to the individual evaluation of *considering* something to be good. Here of course both the possessive individualism and a change in the theory of value – moving from the labour theory to

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<sup>1</sup> See e.g. Humes’s argument for intellectual property rights in perpetuity: ” Who sees not, for instance, that whatever is produced or improved by a man’s art or industry ought, for ever, be secured to him in order to give encouragement to such useful habits and accomplishments. That the property ought also to descend to children and relations for the same useful purpose” (1970a, p.194).

individual assessment - matter, particularly for “private goods” which are now increasingly becoming mere “commodities”, The “public good” as *salus publica* is also affected thereby as it is increasingly discussed in terms of “charges” or duties of the sovereign which he is supposed to supply. But as we can see in the term “charge” (not so clearly in the German version of “Pflichten” of the sovereign and in the later conceptualization of “Staatsaufgaben”), the term “charge” emphasizes not only the addressee of such duties, but also the expenditures which have to be incurred for their implementation. Here the dynamics towards commodification by making the “charge” into a “public good” is already adumbrated, since the sovereign has to raise taxes as he cannot rely on contributions or sales, as already Hume points out. In the same vein Smith discusses this problem within the context of the “Revenue of a Sovereign or Commonwealth” - but he also points to the danger that the sovereign might actually spend this money not on public goods but use it for other adventures. This fear, in turn, stimulates thoughts about possible alternatives of “supply” – such as the privatization of highways that Adam Smith advocates- and it finally leads to the assumption that some of the “public charges” have properties that do not allow for their supply by markets, upon which later the public goods debate focuses as part of the larger problem of market failure.

Studying such changes provides us with important clues as to the particular problems underlying their constitution and to the effects of the subsequent practices they enjoin or authorize. In this context I found two texts illuminating. One was the already mentioned classic Smith (1838) on the *Wealth of Nations*, the other, an, at first, rather unlikely candidate for shedding light on our *problematique*, namely the *Institutiones* which are part of the Justinian Codex of Roman law (Gaius, 1871). There is of course no way in which I can do justice here to the complexities of both works. Nevertheless, they do give us, even at a first glance, some useful pointers for untangling some of the confusions of two contemporary debates: one still ongoing (global public goods) the other having run more or less its course (intellectual property rights) and has ended with the victory of the “enclosure movement” of the public knowledge domain. While here I am mainly concerned with the first debate a few side glances to the other are intended to show the heuristic usefulness of this approach focusing on property regimes.

### **Understanding the Commons: what the Property Regime of Roman Law can Teach us.**

The brief discussion above has shown that despite the familiar distinction between public and private “things”, drawing the boundary between them is subject to great historical variation; this fact, in turn, indicates that it is not so much the “things” themselves as the meta-regime that assigns their status which matter.<sup>2</sup>This of course should not come as a great surprise to lawyers or theorists dealing with “property”: “having” something is not determined by the relationship between the “thing” and a person; ‘property’ primarily refers to the regulation of the relationships *among actors*, vesting them with or withholding from them certain rights of access and use (for a discussion of the fundamental conceptual issues see Bell and Parchamovsky, 2007).

It is in this sense that forms of non-exclusive property provide some interesting templates for analyzing a variety of collective action problems that traditionally have been identified with “public” goods. Here the “tragedy of the commons” comes to mind, which dominated the debate for quite some time. Reducing everything to a “prisoners dilemma” that allegedly inevitably occurs in open access regimes, the image of the overuse of the commons provided a powerful justification for the “privatization” policies of the 80s. Quite paradoxically, privatization was also used in justifying the “second enclosure” through the assignment of exclusive intellectual property rights, despite the fact that the classical problem of overuse is not at all an issue there. In the case of information/knowledge

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<sup>2</sup> Similarly the notion of the “public” is here not a residual for all the problems the “market” cannot solve “efficiently” as Smith’s dictum that “defense is more important than opulence” seems at first to suggest, but apparently rests on a much more substantive notion of a community despite all “unseen hand arguments.”

and of most of the products available in cyber space we actually have the non-rivalry of consumption, that is mostly lacking when we deal with goods in real space.

When we have a look at Roman law whose distinctions of private and public realms has been fundamental for the subsequent development of Western legal orders, we notice that it contains a much more fine grained division. Roman law distinguished between *res nullius* (belonging to no one i.e. not yet appropriated such as fish or game, or abandoned property) (Gaius, 1871, point 2.1.7), *res communes* (open to all of a group such as the commons) (1871, point 2.1.1), *res publicae* (things belonging to the public, qua public (1871, point 2.1.2), such as public squares and roads), *res divini* (sacred things that cannot be owned by humans) (1871, point 2.1.8), or *res universitatis* (things belonging to a specific group in its corporate capacity) (1871, point 2.1.6). While the first and the third still are part of our political and legal discourse and while the last one survives in our “universities” conceived as corporations and in corporate law, the interest in the *res communes* and *res divini* was soon eclipsed after the revival of Roman law. For Grotius common property became something of an oxymoron and Locke in a very consequential conceptual move – “once the whole world was like America” as he stated (1952, paragraph 66) - simply reduced common property to some episode antecedent to modernity that is characterized by the establishment of exclusive private property rights. He thereby not only created an *optique* of progress from some “primitive” to “real” property, but he also devalued by a stroke of the pen communal property arrangements of non-European peoples and thereby provided the justification for their dispossession.

Discussing these issues within the wider framework of property rights (rather than goods) proves also to be heuristically fruitful, when analyzing some of the pitfalls of the public goods debate. Let us look again at Hardin’s seminal article “*Tragedy of the Commons*” which seemed to provide a striking illustration of the public goods *problematique* (Hardin, 1968; for an overview of the ensuing debate see Feeny et al., 1990). Given the inevitable overuse of the commons, Hardin claimed that the situation resembled a n-persons prisoner’s dilemma from which only governmental imposition or privatization provide a way out. But as the example of Roman law suggested, the conceptual problems lie deeper, since the very notion of a public domain is highly ambiguous to begin with, and so is the notion of what is “private”, as we shall see. As to the first, it is best exemplified in the definitions one finds in law dictionaries. Thus Oran’s Dictionary of Law states that the public domain is “land owned by the government” but also that it also means “something free for anyone to use or something not protected by patent and copyright” (2000). In the first conception we have an “owner” while the second suggests that there is *no owner* and, by implication, that this is frequently at the root of the problems we encounter.

Thus, it is perhaps not too surprising why many of the dire consequences predicted by Hardin did not materialize, as later studies by Ostrom (1990) found. After all, if overuse is the problem then by definition we do not have a public goods problem. The main conceptual error seems to be Hardin’s conflation of a degenerating common property regime, with the public character of the good governed by it. As was the case with historical common property, the “commons” was owned by a definite group who, as members, had open access to the resource. In terms of Roman law the distinction between *res communis* and *res nullius* is crucial. *Res nullius* is open to all (open access) – and overuse is usually the result of such an open access regime where - while a *res communis* is only open to the members. As the different grazing rights of nomadic people show such customary practices are frequently quite stable, even in the absence of central governments. A prominent property lawyer has therefore argued that we often observe – contrary to Hardin - a “comedy” of the commons, (taking the Aristotelian criterion for this genre i.e. its “happy ending” rather than humour, Rose, 1986).

The main factors undermining established common property regimes are less the difficulties of collective action, than technological development and population growth (or “newcomers”) that change both pillars of such orders: the customary practices that put limits on taking, and of that of limited access. Of course sometimes difficulties arise despite such limitations, due to the nature of the

resource in question. For example, fish in the sea or flowing waters cannot be “caged” and that means we might come close to an open access regime rather than a common property arrangement. In that case special enforcement problems arise. Where the resource is more stationary, remaining in certain habitats, regime effectiveness rest on the ability of limiting membership and on social pressures to respect the existing customs. Both factors can be found in tightly- knit communities, as we encounter them in fishing villages from Bali to Maine (Acheson, 1988). The upshot of the argument is however, that there is no automatic connection between common pool resources and any type of property regime, other suggestions notwithstanding.

In this context it is also useful, to specify a bit more clearly the nature of “ownership” and distinguish between different types of rights that may come singly or in bundles. Thus we can distinguish between rights of access, of extraction (rights to obtain resources), of management (right to regulate use pattern and transform the resources in question by improvements), of exclusion (granting and with drawing access and withdrawal rights), and of alienation (the right to sell or lease management- and exclusion rights).

Only the last right (full ownership) seems to contain all the others and property systems that do not contain specific provisions for alienation, therefore, are frequently considered deficient. But Blackstone notwithstanding (1979, p.2, where he defines property (very much in Roman law terms) as the “sole and despotic dominion... over the external things of the world, in total exclusion of the right of any other individual in the universe.”), the possibility of their distinction and the practical consequences flowing from their un-bundling indicate that not all rights need always come together. Thus the common property system of a corporation clearly distinguishes between ownership and management rights. Similarly, the example of tickets by which we purchase the “right of access” to a national park, makes it clear that we thereby are not becoming “claimants” for the use or taking of any of the resources we encounter in the park, even if we “mix” (Lockean or Marxian) labour with the good taken. The purchased access right actually categorically forbids any such attempt. And the duty to leave as much as possible the pristine character of these places – even removing native settlers - also distinguishes them from the *res communes* which belong to the public. Here we have then, something closer to the notion of *res divini* in that these things are not appropriable as they belong to the “gods”. Thus they inspire awe by being explicitly set aside as something “sacred”.

Finally, contrary also to our first impression of the “plenitude” of powers granted by the right of alienation, even the latter is not simply of one cloth. As the case of a trustee shows, s/he might possess access, extraction, management and alienation rights, but particularly the latter are frequently subject to certain provisions limiting the exercise of this right.

Another major mistake in drawing the “morals” from the *Tragedy* story is to assume that all public goods generating the collective action problems stem from a prisoners dilemma which requires either governmental intervention or privatization. A short reflection suffices to show that collective action problems arise in a variety of circumstances. Even in cases which resemble games of coordination where collective and individual rationality do not diverge - as when we try to settle on common technical standards but fail to agree due to sunk costs of the systems we use – the question remains whether government intervention and privatization are always the most effective means.

This leads me to the second “ambiguity” mentioned above, i.e. that of the “private” domain. After all, we should notice that “privatization” is not the simple opposite of governmental intervention since the exercise of private rights is, after all, dependent on the guarantee of “public” power. The case for privatization squarely rests on the assumption that private ownership will lead to the optimum investment in, and use of the resource. A farmer, for example, does not want to “kill the goose which laid the golden egg”. No such considerations are said to prevail in common access regimes. However, the argument needs a further support which consists in the (usually silent) assumption that the individual owner does not discount the future and has a stake in maintaining his way of life. But

nothing in the economic logic would prevent him from getting as much out of a resource as possible – slash and burn rather than be interested in a sustainable yield– when other alternatives are open to him and he can conceive of such possibilities. After all, private exclusive property has not prevented corporate raiding and of preferring short term over long term gains.

It is precisely because property and ways of life interact in significant ways that both customary orders develop and are sustained, even though they are very vulnerable as soon as they clash with other conceptions of a way of life and with alternative notions of property embedded in it. In that case even governmental intervention might not be sufficient, as historical experience shows. For example, when the concern for the preservation of resources mounted during the last century, particularly the weak former colonial states insisted on their “public” rights. They tried to counteract external as well internal attempts (often pushed by former colonial settlers) of defining private rights by nationalizing land and water.

Under these circumstances, traditional communal rights that customarily limited access and use, were not accorded or lost their legal standing due to their link to the former colonial regime which had sometimes extended its protection to such “native” arrangements, or had left them untouched. The upshot was that through nationalization government became suddenly the sole owner. But since governments in these states were usually weak and ineffective, the outcome was that resources that once upon a time had been under a de facto common property regime maintained by the “locals”, became now in fact an *open access* regime. The government as “owner” did not, or could not exercise its actual property rights. Thus, quite different from the problem that governments might use their property in a corrupt fashion and create thereby clients with the help of public resources- one of Smith’s subtexts - the argument here is different. It draws attention to the fact that even with the best of intentions, the adoption of “best practices” when introduced from the outside might not lead to the desired outcome if it is not compatible with prevailing habits and clashes with local “ways of doing things”. Here local knowledge rather than allegedly universally applicable prescriptions are important. One wished that many of the “aid” agencies, public or NGO-type and “best practice” freaks would learn from this.

These last remarks also cast considerable doubt on the proposition that the classical approach to public goods is sufficient for illuminating the complexities of the problems which are raised here. For one, the reliance on non-cooperative game theory eliminates by definition those factors that facilitate cooperation in the real world, such as communication, the making of promises, and the ability of identifying defectors and punishing them by shunning denying them access to social goods. Here the work of Elickson (1991) is particularly instructive. While, of course analogies between the behaviour in the international arena and domestic politics are always fraught with mistaken analogies, it is not so that all social constraints are missing among “persons of sovereign authority”, as the anarchy *problematique* suggests. Again details in the definition of the situation matter, and so do institutional rules.

Finally the existence of bottlenecks or cumulative asymmetric impacts crucially influence the provision public goods and call into question the classical assumption of summation and substitutability of each member’s contribution (each unit contributed to the public goods adds identically to the over-all level). As airport security shows, there is always a “weakest link” where security is lax and thus irrespective of the efforts of others, it is the “smallest contribution” (saving on staff and equipment) that determines the supply of the public good, i.e. the level of security for the public at large (here the analysis of Sandler, 2004 is illuminating). In the case of air pollution or acid rain the sulphur deposits on a given country are the sums of one’s own pollution and of that of other countries. One’s own pollution might be significant in checking some free rider tendencies in emission control regimes. But if prevailing wind patterns favour one country by depositing most of its externalities on others, cooperation is likely to be impaired. Thus the *Waldsterben* notice a few decades ago in Europe i.e. the devastation of pine forests in Germany and farther East was

significantly fuelled by the fact that the prevailing West winds blew away the noxious clouds from e.g. France and West Germany and deposited it on the forests in the East.

In these respect the discussions in the last two three decades have considerably clarified the various issues and corrected the notion that there is “one size fits all” approach to the effective provision of “public goods”. This point will become even clearer when we turn from the goods in tangible space to those we find in virtual space.

### **Learning from Smith: On the Charges of the Sovereign, his Revenues, and the Knowledge Commons**

In discussing these issues let us begin with our initial puzzle, i.e. Adam Smith’s (1838) seemingly strange argument for the inclusion of education as a public charge while arguing vociferously for the toll solution in the case of turnpikes, although education at his time is virtually exclusively “private”,<sup>3</sup> and roads have been since Roman times “public”. Of course, *certain aspects* of education might show some “public goods” elements, such as listening to a lecture which is non-rivalrous (if we can neglect crowding), but anyone who does not mistake transmission of information for education will notice that “teaching” is a largely “private” good. Since paying particular attention to the needs of individual students educating him or her, is subject to intense “rivalry” in the consumption of time of the teacher. Public roads on the other hand have since Roman times always been treated as *res communes* and have stood in a synergetic relationship to private property. Smith does not address these historical issues, but focuses on the “virtue” of making each user pay for his actual use and thus of the actual costs for maintaining the highway system in good repair. He also buttresses his argument by saying that in this way the sovereign who collects taxes allegedly for the upkeep of public roads is thus prevented from misusing it for other purposes.

The first argument addresses some issue of the supply problem familiar from the public goods debate. The second one is one about good government and keeping the sovereign “honest”. It seems to focus on an entirely different topic. On the surface these two examples do not let us see a common “public” element shared by both of them. But there are similarities that testify to the public character of both, albeit in an entirely different sense than the public goods debate would have us believe.

The dissemination of knowledge, like the distribution of tangible goods through exchanges, crucially depends on networks through which these activities can take place. Roads facilitate those exchanges as they are open to all, as they are *res publicae* (and not only *res communes* which denotes some common but exclusive property) but nevertheless, stand in a symbiotic relationship with private property. That is exactly why private land is worth more when access is guaranteed by public roads. Only in this way goods produced in excess of own demand can be brought to the market and exchanged, and thus the full benefits from the division of labour can be realized. Thus antecedent to all arguments about exchange is not only the assignment of property rights, but also the existence of an infra-structure that lets us realize scale effects. In a way here the old saw applies: the more the merrier. Thus despite the wear and tear inflicted by use and crowding effects, which we encounter in using this infra-structure, a quite different dimension of the “public” emerges here, one that should provide us with some food for thought. Restricting the notion of a “public” to supply questions, as seen from the angle of exclusionary property rights, without considering also its scale effects and their social functions, would thus entail a serious distortion.

Historically these networks had been created long before the victory of liberalism. Roman law represents here perhaps the oldest strand, as do the state-building efforts of territorial sovereigns and

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<sup>3</sup> The “public” nature of the “public school” system consisted in being non-sectarian rather than being a public good supplied by the government.

the rationales provided for “public projects” by mercantilist and advocates of natural monopolies. As both (Weber, 1921) and (Hirschman, 1981) have shown the bias of an economic “science” conceived in a naturalist mode is prone to forget the historical nature of its own foundations. But it also hides some important elements that come only in view when changing the perspective and when leaving the conceptualizations behind which inform the current debates. This is particularly true when we move from the realm of tangible to that of intangible goods and to the examination of the analogies that usually are made to get “a handle” on these problems.

It is here that an important similarity between education producing “public” knowledge and the above examples of public roads and of information networks comes to the fore. Both analogies emphasize the fact that “spreading the news” and having more people participate in the exchange of ideas serves us all. This is not only a tenet of democratic theory popularized by (Mill, 1974) *but of all knowledge* broadly conceived. While in the case of the information the “information super highway” information protocols still evoke this similarity to the traditional highways, places, and rivers that were in public trust. Science and art are also crucially dependent on the unimpeded use of data and cultural artefacts that remain in the public domain. “Originality” in both areas depends at least as much on the possibility of free combination and experimentation with existing forms and ideas, as on individual “labour” that allegedly has to be rewarded by granting exclusive property rights, far beyond the death of the creator.

But this argument hides another important element of all communication and of “creativity” within it. At first blush “creativity” and “ideas” seem like psychological states of an individual mind, which can be treated as a private domain. Essentially this is also the foundation on which the “privatization” argument rests on. While thinking is certainly an individual activity – as is speaking a language - but any system of meaning cannot be reduced to individual activities. It is more an ongoing communication involving not only others but also the stock of knowledge of existing theories and experiments, or of cultural forms, from Mozart’s music to figures like Don Quixote, Faust -- and perhaps even of Popeye or Mickey Mouse (to have the sublime meet the ridiculous). It thus differs explicitly from a private good which is “consumed” and which is undersupplied if no effective exclusive property rights are assigned.

Of course legislatures and courts, recognizing this dimension, have tried to secure some of the benefits derived from unimpeded access by developing a doctrine of “fair use”. But recent attempts both in the US in the aftermath of *Eldred v Ashcroft* (2003, upholding the Copyright Terms Extension Act (CTEA), in which even deceased authors (or rather heirs) could claim copy right protection), and of significant inroads into the traditional “fair use” exemptions,<sup>4</sup> and in the EU’s regulatory framework<sup>5</sup> these new regimes seem more in line with the call for increasing property rights than with the notion of a public domain. One need not be a partisan of the open source movement to realize that the labour theory of value can hardly provide a plausible justification for the “privatization” of creative works which traditionally have been in the public domain, precisely because the second leg on which such a justification depends, i.e., the dangers of overuse, is here simply inapplicable.

While the first enclosure was perhaps a required response to the disastrous consequences of an open access regime because tangible resources are subject to rivalry in consumption, no such limitation exists in the case of the realm of intangible goods. Here important synergies can only

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<sup>4</sup> See e.g. the case of Dimitry Sklyarov, a Russian programmer, who had developed a software to read e-books, such as *Alice in Wonderland*, which had been encrypted by Adobe as an e-Book. Under the *Digital Millennium Copyright Act* (1998), this was a criminal offense punishable by a jail term as it circumvented the Adobe license of the decryption equipment for reading the text (see Benkler, 2003).

<sup>5</sup> See Directive 96/9/EC (1996), which served also as the model for the database treaty proposed by the World Intellectual Property Organization which protects any compilation of data as long as the creator can show a “substantial” investment.” For a further discussion, see Marlin-Bennett (2004, chapter 5).

develop when this domain remains not only open to all but transaction costs are not imposed by obstructing use and exchanges, creating thereby a tragedy of the anti-commons.

Nevertheless, we also have to keep in mind that the distinction between the “network” and the “goods” transported seems more difficult to maintain in intellectual space, where the lanes and means of communication and the content are not easily separable. Having access means on the information highway means that I am also having the good available for use, and no artefact or tangible thing like a book has to change hands (for a general discussion see Hess and Ostrom, 2003). This is best exemplified that e.g. libraries become more and more “access regulators” for information, rather than lending institutions of books or journals which they are perhaps still keeping in their collection. Publishers also become less and less book sellers but can obtain “rents” by refusing to sell e.g. single journals but offer packages of a variety of publications under a licensing agreement. This is done officially because of the synergetic effects of these packages, but more likely to increase the value of otherwise products which would not sell.

Here a wider framework informed by Roman law seems useful, as it alerts us to the pitfalls of some current conceptualizations and forces us to re-think familiar problems. In the case of the erasure of the traditional distinction between means of communication (the “highways” of old) and “content” (the good traded) we are alerted to the fact that the solution might be provided by *time* rather than space, as we had in traditional patent legislation (this point is well made by Rose, 2003). There neither were the products protected if they were the result of standard knowledge (not constituting an innovation), nor were exclusive property rights granted for longer periods of time (patents, copyrights) in cases they proved to be innovative. Innovations and literary works rather quickly entered the public domain and thus made it possible that the notion of a *Republic of Letters* did not only remain an aspiration but became indeed a common domain and ongoing concern for its members.

At a time which seems to value increasingly only what we “own” exclusively it might be time to remind ourselves that the world of the “private”, of doing one’s own thing and excluding others without much concern what we have in common, was once considered as being the world of the “*idiotes*” (of the private person in the original meaning of the word), who did not share a common.

## Conclusion

This paper argued that the conventional public goods debate offers less than it promised for the analysis of social and political problems. Its rather specialized character taking only two specific reasons for market failure as its paradigm for generating the “puzzles” it seriously impoverishes our research agenda and diminishes our ability of finding welfare enhancing solutions under the more complex conditions of actual political praxis. Thus the enchantment with parsimony has its price as some of the elements left out of the analysis actually allow us to formulate policies that can improve our individual and collective lives.

I argued instead for a focus on property regimes where the public and the private, the individual, the social, – vide the resurgence of “civil society – and the political get shaped and which calls attention to the historical contingencies – is better able to serve as a framework for analyzing policy problems – domestic as well as “global” ones- than theory driven abstract models which generate solution in search of problems, rather than the other way around.



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# **The G20 and Global Economic Governance: Lessons from Multilevel European Governance?**

Jan Wouters and Thomas Ramopoulos\*

*'International cooperation is, in the long run, a necessary ingredient in the search for national prosperity. This should lead every country to look with a renewed sense of responsibility and discipline to the system as a whole. The G20 [...] would be in a powerful position to promote the global common good, and to make it prevail, including, at times, against a narrow, short-term interpretation of national interests.'* (Muchhala, 2009, p.17)

*'Just as the Eurozone is a microcosm of the global economy, the dysfunctional G20 is a macrocosm of the European Council. Its members, European Union leaders, also gather for high-profile summits. Each time they promise comprehensive solutions and fail to deliver. The parallels are remarkable.'* (Münchau, 2011)

## **Introduction**

As aptly described in the introduction to this special issue, “[g]lobalization ... contribut[es] to the transformation of ever more local and national goods into international public goods requiring new forms of governance, regulation and justification” (Petersmann, 2012, p.1). The present article aims to enrich the debate on multilevel governance of interdependent public goods with lessons drawn from the most advanced regional integration project, the European Union (EU). We discuss the insights gained from ‘multilevel European governance’ for global economic governance and, more specifically, for the collective action problems involved in procuring international public goods. Further, we specifically reflect on the question whether, drawing on the European experience, it is expedient for the G20 to be institutionalized as a ‘global economic governance executive’.

For reasons of analytical clarity, we first investigate multilevel European governance (Lessons from Multilevel European Governance) before examining the basic characteristics of the G20 (The G20: History, Functioning and Legitimacy). Building on the insights reached in the previous sections we then tackle the particular question of the G20’s institutionalization as a global economic governance executive, bearing in mind the outcome of the G20 Summit at Cannes in November 2011 (*Reforming the G20: Insights Gained from Multilevel European Governance*).

It should be observed from the outset that multilevel European governance is infinitely less complicated than a similar attempt on a global scale, given the mosaic of states and other players in the broader international community. However, it is submitted that for the most part the differences between the two are of degree and not of nature. The European example therefore constitutes an interesting precedent as a laboratory of economic, legal and political integration transcending national borders. It is worthwhile to examine it in order to discern the root causes of the difficulty to establish an efficient global economic governance regime.

## **Lessons from Multilevel European Governance?**

In answering the question whether and if so, which lessons can be drawn from multilevel European governance for the better provision of global public goods, we need, first of all, to consider some characteristics of multilevel European governance. A second set of reflections relates to EU institution-building and the particular role of the European Council.

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### ***Some Characteristics of Multilevel European Governance***

It has been rightly stressed that club goods require clear institutional borders and that states ought to be very careful to manage a multi-level, multi-*fora*, multi-good world. A multilevel system of governance is always a complex matter, both within states and, even more so, at the transnational level. In Europe, the question ‘who does what’ has been occupying policy-makers for many years. More than ten years ago, in its 2001 White Paper on Governance, the European Commission made the sobering remark that

‘the way in which the Union currently works does not allow for adequate interaction in a multi-level partnership; a partnership in which national governments involve their regions and cities fully in European policy-making’. (European Commission, 2001, p.12)

On the other hand, the Commission ended its White Paper with the strong recommendation that ‘the Union needs clear principles identifying how competence is shared between the Union and its Member States’ and it advocated

‘a Union based on multi-level governance in which each actor contributes in line with his or her capabilities or knowledge to the success of the overall exercise. In a multi-level system the real challenge is establishing clear rules for how competence is shared – not separated; only that non-exclusive vision can secure the best interests of all the Member States and all the Union's citizens.’ (European Commission, 2001, pp.34–35)

A decade later, in a post-Laeken, post-Convention, post-Constitution and post-Lisbon EU, it is worthwhile to revisit these remarks. We examine first whether the contemporary EU constitutional structure provides for a clear and working allocation of competences on the supranational, national and regional levels. Next, we discuss how successfully the EU has managed to embed the requirement for multi-level partnership at sub-national levels of governance.

The Lisbon Treaty, in force since 1 December 2009, has introduced a ‘competence catalogue’ which indicates which powers lie at the level of the EU and which powers are national, based on the principle of conferral and the recognition – for the first time explicitly enshrined in the Treaties – that competences not conferred upon the Union remain with the Member States (TEU, 2009, Article 5(1)(2) and Article 4(1)). It lies outside the scope of this article to discuss in detail the various categories of competences (exclusive, shared, parallel, supporting and complementary), although revisiting them in Articles 3–6 TFEU would have been in itself very interesting from the viewpoint of the provision of regional and global public goods. Still, some remarks need to be made in this respect. In the current constitutional set-up, the overwhelming majority of EU competences are shared (e.g. internal market, social policy, energy, environment, transport) (TFEU, 2009, Article 4) whereas only very few (i.e. customs union, trade, monetary policy, competition policy, conservation of marine biological resources and common commercial policy) are exclusive powers of the EU (TFEU, 2009 Article 3). The number of supporting competences (i.e. protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative co-operation) is also limited (TFEU, 2009, Article 6). It should be noted that the list of shared competences provided for in Article 4 TFEU is not exhaustive contrary to the ones of exclusive and supporting competences (TFEU, 2009 Article 4(1) and the opening sentence of Article 4(2); see among others Piris, 2010, pp.76–77; Lenaerts and Nuffel, 2011, pp.124–130).

It follows that the Lisbon Treaty did not establish indisputably ‘clear rules for how competence is shared’ or, in the words of the 2000 Nice Declaration on the Future of the Union, ‘a more precise delimitation of powers between the European Union and the Member States’ (Treaty of Nice - Declaration 23, 2001). The fact that the catalogue of competences is not final reflects the reality of the constantly evolving nature of the EU. However, it also makes for great volatility and uncertainty in this field, often impairing the effectiveness of EU policy-making, especially in the realm of external relations. In fact, since Lisbon the daily turf battles in Brussels on the exercise of shared competences

and the question what part of a policy field has become a Union competence and what still belongs to the Member States have been occupying EU institutions and Member States internally and externally more than ever before. An enormous rear-guard battle has been taking place, in which a number of Member States actively invoke Protocol No. 25 on the exercise of shared competence,<sup>1</sup> and other Treaty machinery, in order to keep as much powers as possible into their own hands.<sup>2</sup> With regard to the negotiation of international agreements (Article 218 TFEU), the Mercury affair epitomized these conflicts. This episode saw severe clashes between the Commission, Council and Member States and gave rise to an embarrassing spill-over into the international arena at the 2010 Stockholm conference of the International Negotiating Committee for the adoption of an International Agreement on mercury (European Council, 2010a; European Commission, 2010; European Council, 2010c, 2010d; The Mercury case is not an isolated incident. Another such example is the ongoing battle on the external representation of the EU by the Union delegation at the UN Borger, 2011; Jan Wouters, Odermatt, et al., 2011). Some of these disputes may eventually be brought before the Court of Justice of the European Union (CJEU), which constitutes an important constitutional safety valve in this respect with a high record of compliance by both institutions and Member States (C-45/07, 2009; C-246/07, 2010; Van Elsuwege, 2011).

Two preliminary findings can be made from the preceding considerations which will prove helpful in the further analysis. First, even in the most advanced transnational systems, multi-level governance structures often oscillate between the international and national level due to the difficulty to overcome the ultimate quest for sovereignty by states. Second, the EU has a unique institutional tool at its disposal to ultimately settle these tensions, if asked, namely the Court of Justice. Such a mechanism is either missing in intergovernmental arrangements or is prone to fail to retain its institutional autonomy and enforce implementation of its rulings.<sup>3</sup>

On the issue of the ‘multi-level partnership’ involving subnational authorities, to which the Commission referred in its White Paper, the Treaty of Lisbon has not offered definitive solutions either. Rather, it has reconfirmed that the EU should not meddle with structures below the nation-state level of its Member States. Article 4(2) TEU (2009) states explicitly among others that the EU must respect the ‘national identities [of Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.’ The Lisbon Treaty has brought some changes with regard to possibilities of action of the Committee of the Regions<sup>4</sup> and national parliaments (TEU, 2009, Article 12),<sup>5</sup> but this is all rather marginal in the face of the challenge of a

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<sup>1</sup> “With reference to Article 2(2) of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.”

<sup>2</sup> See also TFEU (2009, Article 2, point 2), which stipulates with regard to shared competences “[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.” See further (Priollaud and Siritzky, 2008, pp.156–158).

<sup>3</sup> The WTO dispute settlement system constitutes an exception to that since the Panels and Appellate Body Reports are quasi-automatically accepted by the Dispute Settlement Body, acting with ‘inverted consensus’. Still, when it comes to affecting major interests of a bigger member to the WTO, like the EU or the US, unwillingness to implement in a timely manner the outcome of the dispute settlement is observed. Such have been the *Hormones* case and the *US-Foreign Sales Corporations* case among others (Jan Wouters and Meester, 2007, pp.226–257).

<sup>4</sup> The Committee of the Regions has now the right to bring actions before the Court of Justice both against legislative acts for the adoption of which the TFEU provides that it be consulted (2009, Article 8, paragraph 2 of Protocol No. 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon - Protocol (No 2) (2010, p.208) and for the purpose of protecting its prerogatives (TFEU, 2009, Article 263, paragraph 3).

<sup>5</sup> The most significant changes introduced by the Lisbon Treaty in this respect have been the right given to national parliaments to receive information directly from EU institutions (Treaty of Lisbon- Protocol (No1), 2010) and the direct role of national parliaments in ensuring compliance with the principle of subsidiarity by EU institutions in the legislative procedure (TEU, 1992, Article 5; Treaty of Lisbon - Protocol (No 2), 2010; see among others Met-Domestici, 2009;

real ‘multi-level partnership’. A close examination of the relevant Treaty provisions indicates that their tasks are almost solely limited to advisory ones, as in the case of the Committee of the Regions, or that they have to act on very short notice in order to actually influence the decision-making procedure, as is the case with national parliaments. The envisaged ‘partnership’ has not come about in the light of the constitutional and political constraints which both the EU and subnational authorities face in this respect.

The above analysis illustrates that the EU Treaties do not establish clear institutional borders as a prerequisite for the efficient functioning of ‘multilevel European governance’. Even in the post-Lisbon setting the Treaty provisions fail to establish precisely how competences are to be shared and do not manage to foster a real multi-level partnership. These deficiencies partly explain why in practice modes of multilevel governance in the EU are emerging only gradually in the various policy fields and still face plenty of challenges. A telling example is the euro area sovereign debt crisis which broke out in 2010. The European response to this crisis is discussed in the following section since it further highlights the current role and power balance among EU institutions and Member States. At this point, it may already be observed that the experience of the reactions of the EU to the ongoing crisis reveals that, despite the highly refined constitutional structure of multilevel European governance, the Union continues only to react to – and very rarely foresees – urgent needs and international developments.

### ***EU Institution-Building – the Example of the European Council***

The uniqueness of the EU as a regional organization lies not only in the transfer of substantial policy- and law-making powers to a supranational level but also in its thoroughly institutionalized nature. Faithful to the ideas of Jean Monnet,<sup>6</sup> Member States have set up, in the course of the last 60 years, institutions in order for them to learn, accumulate knowledge and expertise and respond to new challenges. But one ought to be careful in arguing that the EU institution-building experience can bring lessons to the rest of the world.

First of all, European institution-building has been a process of experimentation rather than design. A comparison of the institutional set-up of the European Coal and Steel Treaty of 1951 (with a supranational High Authority with far-reaching powers, a Council, a non-directly elected Assembly and a Court of Justice that was mainly an administrative tribunal) with the one laid down sixty years later in the Lisbon Treaty, with not less than 7 EU institutions (TEU, 2009, Article 13(1))<sup>7</sup>, is illuminating in this regard. It indicates that in the course of six decades the European integration process has been going through many phases of institutional trial-and-error, rebalancing and redesigning, culminating in an extremely refined but also delicate institutional set-up. Such an approach would nevertheless seem at the very least counterproductive on the international level where no political consensus to move forward with deep structures beyond the intergovernmental level can be detected, at least at present and in the foreseeable future.

It is therefore hard to draw generalizing lessons from this very specific process for the provision of global public goods and the organization of *fora* and bodies at global governance level. Nevertheless, it is submitted that some interesting inferences and useful analogies can be drawn from the particular example of the European Council, which could be of use to the development of the G20.

(Contd.) \_\_\_\_\_

Kiiver, 2008; Louis, 2008). On the practice of parliamentary scrutiny and pre-Lisbon initiatives, see Jans and Piedrafita (2009).

<sup>6</sup> Inter alia expressed in his famous saying ‘Rien n'est possible sans les hommes, rien n'est durable sans les institutions’, (1976, p.360).

<sup>7</sup> The second paragraph reads: ‘The Union’s institutions shall be: the European Parliament, the European Council, the Council, the European Commission (...), the Court of Justice of the European Union, the European Central Bank, the Court of Auditors.’

The European Council is an invention of the mid-1970s (European Council, 1974). It has been particularly successful from the beginning since it has taken most of the major political decisions of the EC and EU (Westlake and Galloway, 2004; see also Werts, 2008, pp.85–146).<sup>8</sup> Interestingly, both the European Council and the original G7 sprung from the same mind, the French President Valéry Giscard d'Estaing. To some extent, the rationale for creating the European Council in those days was the same as the one underlying the elevation of the G20 to the level of Heads of State or Government in 2008. The idea was that in order to keep the European integration process moving in times of great economic and political difficulties, such as monetary crises, rises in commodity and energy prices and very high inflation, one needed impulses from the highest political level (Werts, 2008 points 1101-1104). This has always remained the mission statement of the European Council; from the Tindemans Report of 1975, that was unanimously approved by the European Council, and stated that the European Council is 'a driving force' able 'to give the continuing political momentum' necessary 'to build European union' (Tindemans, 1976) to the 1992 Maastricht Treaty on European Union onwards, its task has been defined as providing the Union with 'the necessary impetus for its development' and 'defin[ing] the general political guidelines thereof'. In today's Article 15(1) TEU (2009) the latter expression has been refined to 'defin[ing] the general political directions and priorities thereof' while the European Council continues 'not [to] exercise legislative functions'. It is useful for the ensuing analysis to keep in mind the particular role of the European Council in the area of economic policy-making, where it adopts 'conclusion[s] on the broad guidelines of the economic policies of the Member States and of the Union' (TFEU, 2009, Article 121(2) paragraph 2). It is in this capacity that the European Council functions 'at one and the same time [as] a forum, a policy initiator, and a decision-maker.' (Westlake and Galloway, 2004, p.188).

Although eight other summits had been held from 1957 to 1974, it was the Paris Summit of December 1974 that institutionalized the European Council as an organ outside the institutional framework of the then European Economic Community. As a historic parallel to the modern G20 it was decided to hold regular meetings of the Heads of State or Government of the Member States – together with their Ministers of Foreign Affairs – with the aim of reaching agreements and coordinating their actions in all fields of international relations that could influence the Community. The French proposal to create a small secretariat that would have facilitated the preparation of the meetings was not adopted.<sup>9</sup> On the contrary, the Ministers of Foreign Affairs Council configuration would act as a preparatory body of the meetings ensuring consistency and continuity of Community policies. Importantly, political leaders did not restrict the agenda of future European Councils to cooperation in areas within the scope of the Treaty (European Council, 1974, p.297). The European Council already adopted rules on the 'Organisation of European Council meetings' in 1977. There it distinguished between informal exchanges of views and discussions meant to lead to decisions, underlined the need for prior preparation of the meetings, upheld confidentiality of the negotiations and maintained the limited number of officials allowed to attend the meetings (European Council, 1977). These rules were updated with the Seville Rules of Procedure (European Council, 2002 Annex 1), that are currently reflected, with the necessary changes brought by Lisbon, in the 2009 Rules of Procedure of the European Council (*Council Decision 2009/882/EU*). Nowadays, European Council meetings are prepared in detail beforehand by the President of the European Council together with the country holding the rotating Presidency of the Council, the President of the Commission and the General Affairs Council. Summits last two days whereas the number of members of each delegation should not exceed twenty. Even today confidentiality of the discussions is respected and no minutes are held (Werts, 2008, p.75).

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<sup>8</sup> In Werts (2008), the author discusses the political milestones in the life of the European Council, from Intergovernmental Conferences to Economic and Monetary Union, enlargement, financial and budgetary issues, Common Foreign and Security Policy, economic and social issues, and terrorism.

<sup>9</sup> Even now the Treaty of Lisbon only provides in TFEU (2009, Article 235, point 4) that the European Council will be assisted by the General Secretariat of the Council.

Another similarity of the development of the European Council to the G20, to which we hinted above, has been the fact that for more than a decade – essentially until the Single European Act (SEA, 1986 Article 2) – the former functioned as a regime completely outside the scheme of the founding Treaties, whereas for the following decades until December 2009 it was mentioned in the Treaty but without being subjected to any of the constitutional constraints applicable to EU institutions. Only with the Lisbon Treaty has the European Council been formally elevated to the rank of EU institution (TEU, 2009, Article 13(1) 2nd paragraph, second indent). It now has a permanent President (TEU, 2009, Article 15, points 5, 6).<sup>10</sup> Further, it can adopt legally binding acts on a number of issues within the framework of the EU but has to comply with the relevant provisions in the EU Treaties providing for the legal basis of each act (for a comprehensive list of articles in the TEU and the TFEU allowing the European Council to take legally binding decisions, see Piris, 2010, pp.379–382). The European Council can also be brought before the Court of Justice of the EU (TFEU, 2009, Article 263, 265). Its budget forms part of the EU budget (TFEU, 2009, Article 316, paragraph 3). Finally, in accordance with the Lisbon Treaty the European Council adopted Rules of Procedure, as has been described above (TFEU, 2009, Article 235, point 3). Political realities led to the incremental empowerment of the European Council and this was subsequently legally confirmed with the Treaty revisions, rather than *vice versa* (Piris, 2010, p.236).

It would be wrong to infer from the aforementioned changes brought about by the Lisbon Treaty that intergovernmentalism in the EU, as embodied in the very essence of the European Council, is fading out. Rather, these changes constitute the culmination of a process whereby the embedded intergovernmental paradigm in the function of the European Council has been under constant refinement with even an incremental ‘communitarisation’, though often at the expense of the original Community method provided for by the *Regulation (EC) (1173/2011)* Treaties. A telling illustration is offered by recent developments in the field of ‘European economic governance’. Confronted with an existential crisis for the Eurozone and the European integration project as a whole, the European Council took the lead from other EU institutions, especially the Commission. In doing so it shaped almost on its own a new European economic governance architecture (see the legislative ‘six-pack’ – 5 regulations and 1 directive – which entered into force on 13 December 2011 (*Regulation (EU) 1173/2011, Regulation (EU) 1174/2011, Regulation (EU) 1175/2011, Regulation (EU) 1176/2011, Regulation (EU) 1177/2011, Council Directive 2011/85/EU*)),<sup>11</sup> which bears irrefutable intergovernmental characteristics (see, very critically Ruffert, 2011). Apart from an EU mechanism based on Article 122(2) TFEU, the European Financial Stabilization Mechanism (EFSM) (*Council Regulation (EU) 407/2010*), the current European economic governance mechanism further includes an intergovernmental Special Vehicle Mechanism established on 7 June 2010, the European Financial Stability Facility (EFSF) (*Council Decision 9614/10*, in this Decision all 27 Member States further ‘agree[d] that the Commission will be allowed to be tasked by the euro area Member States in th[e] context’ of the function of the EFSF; European Financial Stability Facility, 2011). These two mechanisms will be replaced in July 2013 by the European Stability Mechanism (ESM), a permanent intergovernmental mechanism set up by the euro area Member States to safeguard financial stability of the euro area (European Council, 2010b). The creation of a permanent mechanism has become possible thanks to a limited amendment of the EU Treaties decided by the European Council on 25

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<sup>10</sup> The first President elected was Mr. Herman Van Rompuy, former Belgian Prime Minister. On 2 March 2012, he was renewed by the European Council for a second and final term of two and a half years until 30 November 2014 (European Council, 2012, paragraph 45).

<sup>11</sup> The “European Semester” has also become part of the existing institutional framework: *Council Regulation (EC) 1175/2011*. The intergovernmental Euro Plus Pact remains outside of the existing institutional framework (European Council, 2011a).



March 2011 (*Council Decision 2011/199/EU*). The *ESM treaty* (2011) was finally signed on 11 July 2011 by the euro area MS.<sup>12</sup>

Thus the ESM constitutes the response by the Heads of State or Government to the European sovereign debt crisis. The then French Minister of Finance Christine Lagarde admitted that, in establishing ESM, European leaders knowingly ‘violated all the rules because [they] wanted to close ranks and really rescue the euro zone’ (Reuters, 2010). Although the detailed discussion of the legality of the aforementioned decisions from an EU law perspective falls outside the scope of this article, both the actions as well as their political justification are of importance to our analytical effort. They prove that, although the European Council’s freedom to act is now formally restricted since it has to follow established rules and some of its acts can be challenged before the EU judiciary, when political imperatives are at play, leaders tend to revert to intergovernmentalism even outside the scope of the Treaties. Therefore the European Council example retains its pertinence with regard to the function and development of the G20, since the former continues to maintain the reflexes and flexibility of an intergovernmental political organ.

A further observation is in order here. Since the advent of the sovereign debt crisis the European Council has demonstrated its flexibility by organizing informal summits of particular groups within the institution, such as the Heads of State or Government of the euro area. These worked in parallel with the actual meetings of the European Council. However, when confronted with insurmountable disagreement at the December 2011 European Council summit, euro area leaders took the further decisive step of going outside the ‘European Council Framework’ to move toward a ‘fiscal union’, based on an intergovernmental agreement among them. Due to the UK veto all other 26 Member States made a statement in addition to the Conclusions of the summit, whereby they expressed their agreement ‘to move towards a stronger economic union’ taking action in the directions of ‘a new fiscal compact and strengthened economic policy coordination’ and ‘the development of [...] stabilisation tools to face short term challenges.’ (European Council, 2011b, p.1). On 2 March 2012, this fiscal compact was signed by 25 EU Member States – the Czech Republic did not participate in the end (for the text of the treaty, see ‘TSCG’, 2012). This development is also closely linked to the *effet nombre*, the negative effect that the substantial increase of the number of participants in the European Council due to the subsequent enlargements exercises on the capacity to reach consensus (Werts, 2008, pp.164–169). Such a rift is difficult to expect within the G20 as it currently functions and given its rather stable and more limited membership. Still, it may be expedient to keep this precedent in mind as the G20 obtains a more permanent role in global economic governance while constantly enlarging the scope of its areas of interest.

Thus, at first sight the European Council seems to furnish an interesting precedent for the G20. It constitutes an intergovernmental political organ that was created outside established EU institutional frameworks with the goal to provide the EU with impetus from the highest political level. Although it has recently been included in the institutional framework of the Union, it continues to primarily obey political imperatives. In order to see whether and if so to what extent the European Council experience offers guidance to the G20, the nature and functioning of the latter will be analysed below.

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<sup>12</sup> Heads of State or Government are authorized to ask the European Commission in liaison with the European Central Bank to undertake specific tasks with regard to the ESM. Representatives of the two institutions will participate in the meetings of the Board of Governors of the ESM (ESM Treaty, 2011, Article 5, point 3). The Commission in liaison with the ECB will negotiate “the economic policy conditionality attached to each financial assistance, in accordance with Article 13(3)” (ESM Treaty 2011, Article 5, point 6g). They also will be responsible for the procedure of granting financial assistance from the point of assessment of the situation till the signing of a MoU and further monitoring (ESM Treaty, 2011, Article 13). Disputes arising within ESM will be settled by the European Court of Justice under Article 273 TFEU (ESM Treaty, 2011, Article 37, point 3).

## The G20: History, Functioning and Legitimacy

After a brief historical overview of developments that gave birth to the G20, the focus here lies on specific features of this forum which differentiate it from institutionalized intergovernmental organizations and international financial institutions (IFIs). In the light of this analysis the pertinence of the EU's multilevel governance experience for the institutionalization of the G20 as a global economic governance executive will be examined.

### *History*

The Asian financial crisis of the late 1990s proved that the G7 structure was not adequate to respond to the needs of a global economy. In light of this the G7 finance ministers and central bank governors proposed at their meeting in September 1999 'to establish a new mechanism for informal dialogue in the framework of the Bretton Woods institutional system, to broaden the dialogue on key economic and financial policy issues among systemically significant economies and promote cooperation to achieve stable and sustainable world economic growth that benefits all.' ('G7 Finance Statement', 1999, paragraph 19). The G20 was created with this broad agenda bringing around the table 'systematically significant' industrialized and emerging economies ('G20 Communiqué', 1999, paragraph 2; Kirton, 2001).

The composition of this 'new mechanism for informal dialogue' ('G20 Communiqué', 1999, p.2) arguably endeavours to be balanced in terms of geographic and population representation (G-20, 2012). It consists of 19 countries and the EU.<sup>13</sup> Other States are regularly invited to G20 meetings.<sup>14</sup> IFIs are also represented: the Managing Director of the IMF, the President of the World Bank and the chairs of the International Monetary and Financial Committee and of the Development Committee of the IMF and World Bank take part in G20 meetings 'on an ex officio basis' (G-20, 2012). Also the heads of WTO since the London Summit, OECD since Pittsburgh and ILO since Toronto have been invited to G20 meetings (for more information on the relationship between the G20 and the OECD, see J. Wouters and S. Van Kerckhoven, 2011). However, in practice all these actors influence G20 decision-making only to the extent that their views are asked for by the members of the G20 (J. Kirton, 2010).

G20 meetings have only been upgraded from the level of finance ministers and central bank governors to that of Heads of State or Government since the Washington D.C. Summit of 15 November 2008 convened by US President George W. Bush. The Summit aimed to provide a coordinated response to the financial crisis that had started in September 2008. For this purpose, leaders set themselves two overall priorities in the Washington Declaration: the restoration of global growth and the reform of financial regulation and institutions ('G20 Washington Declaration', 2008, paragraph 5–9).

Since the Washington Summit, five more G20 Summits were organized: in London (2 April 2009), Pittsburgh (24-25 September 2009), Toronto (26-27 June 2010), Seoul (11-12 November 2010) and Cannes (3-4 November 2011).<sup>15</sup> The next Summit is scheduled to take place in Los Gabos, Baja California in June 2012 under the Presidency of Mexico. In Pittsburgh, the Heads of State and Government decided to lift the G20 to the level of 'premier forum for international economic cooperation' ('The Pittsburgh Summit', 2009, paragraph 19, 50).

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<sup>13</sup> These 19 countries are (in alphabetical order): Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom and the United States.

<sup>14</sup> For instance, Equatorial Guinea, Ethiopia, Singapore, Spain and the United Arab Emirates were invited to the Cannes Summit of November 2011.

<sup>15</sup> The upcoming chairs of the G20 are Russia in 2013, Australia 2014 and Turkey 2015.

### **Functioning**

The post-2008 G20 has changed the international economic institutional architecture and thereby global economic governance as we knew it. It has introduced an informal element together with overtly political –rather than technocratic– imperatives at the top of the international system of economic governance.

The G20 is a very particular gathering of political leaders compared to formal international organizations or instruments. It is appropriate to call it a ‘club’ or a ‘network’ (Martinez-Diaz and Woods, 2009).<sup>16</sup> Its work is not governed, or constrained, by a commonly agreed upon legal text like a charter. It has no predetermined membership conditions or voting, decision-making or dispute resolution rules or mechanisms (Ngaire Woods, 2010, p.4; G 20, 2008, pp.5, 24). It purposefully lacks a permanent secretariat and a seat. G20 members depend on each other to reach agreements using diplomatic means in a culture of reciprocity and trust (Kjær, 2004, p.41, which compares markets, hierarchies and networks as systems of governance and notes that networks are based on reciprocity and trust). This informal structure has undeniably been sought for by the G20 Heads of State or Government when attempting to deal with the global financial crisis as well as with other acute international problems that have gradually been inserted in the agenda of the forum. See for instance ‘Cannes Summit Final Declaration’ (2011), where social, employment, economic, monetary and financial issues alongside food price, agriculture production, energy, marine environment, green growth and climate change, trade, development and corruption concerns were tackled. On several occasions, most recently the Cannes Summit (‘Cannes Summit Final Declaration’, 2011, paragraph 91), they reiterated their determination to maintain this *modus operandi*, avoiding any further institutionalization of the G20 (J. Kirton, 2005, p.7).

This particularity of the G20, that distinguishes it from international organizations to which States have delegated powers, is politically and legally significant. Based solely on political consensus the G20 enjoys the freedom and has the flexibility ‘to do other things: such as agenda-setting, coordinating policies and distributing tasks across existing institutions, and building consensus around norms and knowledge.’ (Ngaire Woods, 2010, p.4). This informal political forum moreover offers leaders the necessary space and freedom to make package deals across a wide range of fields and policies. In the same vein the lack of permanent staff or a secretariat prevents the gradual creation of a proper institutional logic with its own agenda and influence on the work of the forum. Nonetheless, being unencumbered by legal obligations may be a double-edged sword since the continued relevance and effectiveness of the forum depends exclusively on the political will of the participants therein.

The continuity in the G20’s work and management across host years is ensured by a Troika consisting of a revolving three-member management trio of past, present and future chairs (G-20 FAQ, 2012). Its chair rotates annually among members and regions represented.<sup>17</sup> Recognizing the significance of the Troika in the effectiveness of the work of the G20, it was decided at the Cannes Summit to formalize it (‘Cannes Summit Final Declaration’, 2011, paragraph 92). Therefore, the participants themselves play the biggest part in the agenda-setting process, with a particular role for the chair of the meeting. The chair will usually host an ‘agenda-setting meeting’ some months in advance of the actual meeting of the G20 finance ministers and central bank governors. There deputy finance ministers and senior central bank officials will discuss what the most prominent issues are that need to be on the agenda for the meeting at ministerial level. As for the G20 Summits, these are

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<sup>16</sup> Martinez-Diaz and Woods characterize a network as a forum where participants are involved in repeated and enduring relations. There is no delegation of authority to the network to make decisions. There is also no dispute settlement mechanism that can solve disputes when they arise. Networks can be distinguished from formal organizations in that they have no formal rules of membership, or structure of representation. There are no formal decision-making rules, and there is no authority to make, implement or enforce rules. Networks are typically used for agenda-setting, consensus-building, policy coordination, knowledge production and exchange and norm-setting and diffusion.

<sup>17</sup> In 2010, the G-20 chair was the Republic of Korea, and in 2011 it was France.

further prepared by the finance ministers and central bank governors always under the leadership of the chair. The political advisors of the Heads of State or Government, the so-called ‘Sherpas’, also play a significant role in this regard. Thus, during its chairmanship, Korea pushed hard to get development on the G20 agenda and succeeded in doing so (Kharas, 2011; Maxwell, 2011; for an insightful look into the agenda-setting process for the G-20 Summit in Seoul, Korea, in November 2010, see Se-jeong, 2010; and for a report on the concluding agenda-setting meeting, see ‘Deputy finance ministers of G-20 conclude agenda-setting meeting’, 2010), whereas France endeavoured to promote the strengthening of financial regulation during its 2011 Presidency (‘Cannes Summit Final Declaration’, 2011, paragraph 22–39). The chair will have the final say in the adoption of the agenda. However, pressure will be exerted from all delegations to take desired topics on board.

The description of the purely political government-driven agenda-setting at the G20 reveals an absence of domestic institutions and civil society from the process. As to the latter, the G20 has been criticized for the lack of an institutional obligation to involve stakeholders. NGOs can only passively participate in G20 meetings, by way of accreditation. They cannot voice their opinion during meetings and their responses afterwards seem to indicate uncertainty about the role of the G20 in global governance.<sup>18</sup> However, some chairs discuss the agenda beforehand with other stakeholders whereas NGOs organize amongst themselves from time to time in order to have a stronger voice (Huffington Post, 2003).<sup>19</sup> The French Presidency of the G20 took the above criticism into account and convened Business 20 (B20) and Labour 20 (L20) Meetings in parallel with the G20 Summit. These meetings produced reports and a joint statement, of which the G20 took note in its Cannes Summit Declaration (‘B20 Final Report’, 2011, ‘B20 L20 Joint Statement’, 2011, ‘Cannes Summit Final Declaration’, 2011, paragraph 7). However, it is at least unclear, if not highly improbable, that these side events influenced significantly the outcome of the Summit.<sup>20</sup> Further, with regard to the use of experts from private institutions and non-governmental organizations (NGOs), the G20 provides the possibility to invite them on an ad hoc basis to G20 meetings ‘in order to exploit synergies in analysing selected topics and avoid overlap.’ (G-20, 2012) Similarly, domestic institutions can only indirectly exert some influence on the work of the G20 in holding their governments accountable in parliament. Evidently, this only holds true for democratic regimes where the legislature consisting of directly elected representatives of the people and functions as a genuine check on the executive branch. The notion of a concrete ‘multi-level partnership’ with sub-national institutions (above 2.1) is eminently absent in the functioning of the G20.

This being said, the G20 interacts closely with other international organizations –sometimes controversially bypassing the formal decision-making agenda of the latter (J. Wouters and S. Van Kerckhoven, 2011) – and primarily with IFIs. It is indeed the major task of the G20 to complement existing financial institutions pushing for necessary reforms (Patrick, 2010, p.38). It is not an exaggeration to suggest that IFIs handling the repercussions of the most recent financial crisis and endeavouring to set the conditions for the prevention of future crises are de facto subordinated to this informal political organ (Camdessus, 2011). Cooperation is close with the IMF, WTO and OECD, ‘as the potential to develop common positions on complex issues among G20 members can add political momentum to decision-making in other bodies.’ (Camdessus, 2011; see also J. Wouters and S. Van Kerckhoven, 2011) The G20 also works with the Financial Stability Board and the Basel Committee

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<sup>18</sup> See ‘NGO Responses To The G20 Summit’ (2010) for a list of NGO responses to the G-20 Summit in Toronto, Canada. The NGOs seem to be unsure what to make of the G20; as a result their reactions are more about future G20 agenda items or the gap left by the G8.

<sup>19</sup> Amnesty International, Greenpeace, Oxfam, Care International and Save the Children joined forces to focus G-20 leaders attention on issues such as poverty and climate change.

<sup>20</sup> In this regard, the ‘B20 L20 Joint Statement’ (2011) stressed the need to tackle unemployment and augment social protection. However, although agreeing on an Action Plan for Growth and Jobs as well as making extensive reference to these issues in the communiqué and the ‘Cannes Summit Final Declaration’, 2011), G20 leaders in reality addressed these indirectly within their fiscal and financial stability agenda and only in the medium-term at best.

on Banking Supervision so that international and domestic policy reforms can be progressed. This influence on behalf of the G20 has also been called ‘complementary effect’ (Martinez-Diaz and Woods, 2009). It is supposed to generate political support for the swift decision-making in international organizations, thereby pressurizing them to accelerate their initiatives (on the influence of the G20 on the IMF reform see Jan Wouters and Sven Van Kerckhoven, 2012). For example, a sound often heard in the corridors of the WTO is that for the Doha Development Agenda (DDA) to be completed, what is really needed is the political will to reach an agreement. The required technical work itself has often been completed years ago. The complementary effect of G20 should help the decision-making process move forward. However, precisely the story of the DDA indicates that there are limits to such complementary effect: at the Cannes Summit, after years of encouraging statements (‘The Pittsburgh Summit’, 2009, paragraph 48–49, ‘G20 Seoul Summit Declaration’, 2010, paragraph 9 where the G20 recognizes ‘that 2011 is a critical window of opportunity, albeit narrow’), the G20 had to admit that ‘it is clear that we will not complete the DDA if we continue to conduct negotiations as we have in the past.’ (‘Cannes Summit Final Declaration’, 2011, p.66).

It has been suggested that the G20 will have two further effects, a ‘competitive’ and a ‘rebalancing’ effect (Martinez-Diaz and Woods, 2009, p.1). As to the former, it is expected that formal bodies such as the International Monetary and Finance Committee of the IMF and the Development Committee of the World Bank now have to compete with G20, as the latter tries to gain authority on these matters.<sup>21</sup> The ‘rebalancing’ effect consists in bringing in emerging economies into agenda-setting and coordination discussions. Furthermore, it may serve ‘as a catalyst for reform of formal international organizations’ in the same direction (Martinez-Diaz and Woods, 2009, p.3). This has most recently been highlighted by the seizure of the urgent matter of IMF reform at the Pittsburgh and Seoul Summits (‘The Pittsburgh Summit’, 2009, paragraph 21, ‘G20 Seoul Summit Declaration’, 2010, paragraph 16), addressing the issue of overrepresentation of European countries in the IMF and the simultaneous underrepresentation of other States (Smaghi, 2006, p.267; Alan Ahearne and B Eichengreen, 2007, pp.128–129; Pier Carlo Padoan, 2008, p.11).

### ***Legitimacy***

Despite its limited composition the G20 is a rather inclusive club compared with the heavily criticised G7/8, which reflected an older power balance as well as a global divide between the West and the rest (Kirton, 2001, p.143). G20 members account for more than 85% of global GDP, 80% of world trade (including intra-EU trade), and two-thirds of global population. Muslim countries have also been included in this new forum.<sup>22</sup> At the same time all major developed and emerging economies are represented from all regions of the world. The exception is Africa, which is only represented by South Africa. This has been considered problematic since South Africa can hardly purport to speak on behalf of such a vast and heterogeneous continent (Suruma, 2010, pp.13–14; Woods, 2010). Recognizing this deficiency, WTO Director-General Pascal Lamy has suggested offering G20-membership to the African Union (2009, p.68). Still, it is justified to say that G20 membership mirrors current international power balances and politico-economic realities (Krotz and Maher, 2009).

Despite the above the G20 has invited significant criticism from two fronts. It has been suggested that the developing world continues to be underrepresented with a forum that continues to be dominated by the same old players (Khor, 2009; Muchhala, 2009). Another line of criticism suggests that the G20 is not genuinely inclusive but rather constitutes an effort of the relatively declining

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<sup>21</sup> Prior to the fifth G20 Summit in Seoul in November 2010, a G20 High-level Development Conference was organized on 13 October 2010 in Seoul. The Seoul Summit Document included a paragraph entitled ‘The Seoul Development Consensus for Shared Growth’, which included a ‘Multi-year Action Plan on Development’.

<sup>22</sup> These are Indonesia, Saudi Arabia and Turkey.

Western powers to maintain their global role by adding some members to an exclusive club (Woods, 2010; Cooper, 2010, p.472).

Although these concerns are difficult to dismiss completely, they do not meet with our unconditional agreement. It is correct that genuine legitimacy – i.e. primarily representativeness – will be the decisive factor of the success and longevity of the G20 (Jan Wouters, Sterkx, et al., 2011, p.147). However, representativeness on the international plane cannot be construed as bearing exactly the same meaning as adequate and meaningful representation within democratic States. We would rather argue that just representation on the international plane is determined by both quantitative (representation of regions and populations) and qualitative criteria ('fair and equitable treatment and rules, and, above all, a sense of inclusiveness and meaningful participation', Beeson and Bell, 2009, p.73). The former are fulfilled by the G20 with the important exception of Africa. The qualitative criteria are harder to verify. It has been submitted, though, that emerging economies have left their mark in the deliberations and declarations of the post-2009 invigorated G20 in the fields of global growth, financial regulations, reforms of the IFIs and inclusion of new items in the agenda, such as development (Woods, 2011, pp.69–70). Further, in light of the indisputable economic ascendancy of the emerging economies, which inevitably elevates their position in relation to the established industrialized states, they are prone to assume an even more prominent role in global economic governance influencing significantly the G20 agenda and decision-making (Chin, 2011). Lastly, the fact that the G20 Presidency will be held in the coming years by states not belonging to the G7, will inevitably allow these to have an important input in the agenda setting of the group.

As to the issue of transparency, the record of the G20 is mixed at best and will possibly remain so. Public access to the substance of the work of the G20 is only possible after the end of the negotiations. The country holding the Chair of the G20 posts the Group's meetings and work programme on a dedicated website ('Official Website of the G20', 2012, for the Seoul Summit, 'Official Website of the Seoul Summit', 2011). The public is informed about what was discussed and agreed immediately after the meeting of ministers and governors or Heads of States and Governments has ended through a communiqué published by the G20. This communiqué records the agreements reached and the outlined measures to be taken. Stakeholders are prevented from participating in the negotiations although their views may randomly be asked by the G20 Presidency, as was the case with the French Presidency that convened the B20 and L20 Summits. Thus it is not an exaggeration to suggest that the public is to a great extent kept in the dark until after the end of the political process.

In addition to the above considerations for the G20 to gain legitimacy, it needs to prove its effectiveness. This point should be handled with care. It should be taken into consideration that the G20 aims to steer global economic governance in its capacity as a deliberative rather than a decision-making body (see also Carin, 2011, where he insists that the G20 should be judged 'as an agenda setter and steering committee.'). It is not an institution that implements, since this is the work of established international organizations and instruments (Woods, 2011, p.73). It would therefore be misguided to define effectiveness as if the G20 were a full-fledged international organization. One should also acknowledge that the so-called trade-off between legitimacy and effectiveness is not at play here: on the contrary, only through the legitimacy enjoyed thanks to the inclusion of emerging economies can the G20 ever be effective. The crisis has served to illustrate above all that a smaller directorate of like-minded states cannot steer global economic governance. Rather, the effectiveness of the G20 as an indication of a results-based legitimacy should be 'the degree to which it improves the way globalization works in the here and now and in the way it prepares for the road ahead.' (Martin, 2011, p.16). In this regard the G20 has been relatively successful until now. However, the outcome of the 2011 Cannes Summit seems to be mixed at best. On a number of serious issues, such as the need for the promotion of balanced and sustainable growth, the fight against corruption or the concrete decision to expand the resources of the IMF, no specific action plans were agreed upon by the G20 leaders.

To sum up, the G20 being a novel and constantly evolving creature in the international system, it is difficult to reach a definitive conclusion as to its legitimacy. In order to overcome this analytical hurdle we opted for a discussion that revolved around the issues of representativeness, transparency and effectiveness as the major indicators of legitimacy of an organ on the international level. Our analysis has illustrated the irrefutable shortcomings of the G20. Africa is ignored but for a sole exception in the composition of the forum. Still, the composition of the G20 makes it a significant improvement from previous power constellations in that it reflects the current international power balances, thereby giving a meaningful opportunity to significant states from all regions of the world to co-opt in the steering of global economic governance. Further, the political negotiations taking place within the G20 are not transparent to the public which is only presented with the compromisory outcome of these, whereas stakeholders play only a marginal role in the negotiations. Lastly, although the G20 has been effective in its role as a crisis committee up until now, the outcome of the 2011 Cannes Summit raises some questions as to the group's continued determination and capacity to steer global economy successfully out of its current state. Grounded in the above it is our submission that the G20 enjoys some degree of legitimacy whose existence is predicated upon the continued and more substantial fulfilment of the criteria of representation, transparency and effectiveness.

### **Reforming the G20: Insights Gained from Multilevel European Governance**

Earlier on in this article we have seen that the development of multilevel European governance structures has been a unique and rather arduous process. Nonetheless, it offers an excellent opportunity to study the difficulties, shortcomings and chances offered by such an effort on the international plane. This exercise is not purely academic. On the contrary, it corresponds to urgent practical needs. As a consequence of the most recent economic crisis states are confronted with the necessity to cooperate internationally on economic issues in order to provide global public goods. If they are to be successful in this endeavour, there is a need to examine previous relevant efforts and draw valuable conclusions from them.

The G20 has been the preferred forum for states to coordinate their actions in the effort to offset the repercussions of the most recent economic crisis and further prevent future similar crises from occurring. Thus its continued existence depends on its successful steering of the global economy out of the crisis. However, it is unclear how a possible institutionalization of the G20 as a 'global economic governance executive' would affect this effort. European multilevel governance offers invaluable insights in this respect.

Primarily it should be noted that an institutionalized multi-level global governance structure would fall prey to the constant assertion of national sovereignty when fundamental national interests would be at stake or when a State would read its relevant international obligations differently. Such a development is especially to be expected in an institutionalized system consisting of not like-minded actors with very divergent interests, cultures and political and legal traditions. Such a deadlock is often overcome in the EU – which is anyway much more homogenous than the G20 – thanks to its unique mixture of intergovernmental and supranational players like, in the latter case, the Commission, the European Parliament and the European Court of Justice. To just take the role of the judiciary, however, experience at global level has shown that only in very limited areas – the WTO stands out as the most successful exception - consensus is possible for entrusting the settlement of disputes to an independent judiciary (for the obvious limitations of the effectiveness of this mechanism see above note 3). Given the constantly increasing number of issues addressed by the G20 a consensus is extremely difficult to reach. In any case, neither the European Court of Justice nor the WTO Panels and Appellate Body have the competence to address the most pressing governance problems in the EU or in global trade. It would be misleading to expect judicial organs to fill in gaps of governance instead of governments.

In addition an institutionalization of the G20 through treaty-making, de jure placing it above IFIs, would seem counter-productive. This is the case not only because, as was observed above, these institutions are already de facto complying with the G20 decisions but for the further reason that the G20 would lose all the advantages which an informal forum of Heads of State or Government offers to the process of negotiating, compromising and effectively implementing reform at international level. Such an institutionalized system would quickly become rigid and irresponsive to urgent needs. Understanding this, David Cameron in his report to the G20 Cannes Summit praised '[t]he power of informality' of the G20, which allows it to react 'quickly, flexibly and effectively' to global economic needs (Cameron, 2011, p.14). The G20 endorsed this view in its Cannes Summit Declaration, insisting that the group 'is part of the overall framework of international governance' ('Cannes Summit Final Declaration', 2011, paragraph 91) and refusing in practice to follow recent proposals in the direction of further institutionalization of the G20 (Hillman, 2010, p.28; see also Palais-Royal Initiative, 2011; 'Reform blueprint gives G20 authority over IMF', 2011, 'G20 ponders more inclusive governance', 2011).

The experience of the EU in this respect is illuminating. Its highly institutionalized structures often prove outdated and slow to intervene in times of crisis like the ongoing sovereign debt crisis. In such cases, in parallel with relevant Union initiatives, EU Member States seem to turn as a default mode to intergovernmental processes of negotiation and decision-making in order to react in a timely and decisive manner. This tendency underlined the initial creation of the European Council back in the 1970s and may be safely said that it is even more prevalent at present. The particular example of the December 2011 European Council summit actually illustrates that European leaders are determined to go even further outside institutionalized forms of governance in order to achieve significant political goals. Thus a hypothetical institutionalization of the G20 would quickly be outdated by the inherently volatile nature of global power balances and economic needs. Then, judging from the example of the European Council, its members would have to revert to a more flexible coordination mechanism eventually putting into question the relevance of the G20 as a global forum of economic governance.

Nonetheless, the leaders of the G20 recognised that it 'must remain efficient, transparent and accountable' if it is to continue responding to global economic challenges ('Cannes Summit Final Declaration', 2011, paragraph 92). In order to better serve the first two of these goals they decided the institutionalization of specific aspects of the functioning of the G20. It was therefore agreed to formalise the Troika and to ask the 'Sherpas to develop working practices for the G20'. Multi-level engagement in a reciprocal manner with non-members, such as regional and international organizations as well as civil society has also been found to serve efficiency and transparency, as had already been underlined in the Cameron report (Cameron, 2011, pp.12–13). On the contrary, the Presidency will continue to rotate every year among different regional groups consisting of members of the G20 ('Cannes Summit Final Declaration', 2011, paragraph 92–94). However, the issue of accountability was at the very least marginally, if at all, tackled by the G20 Summit. The underlying reason for that is the fact that 'political accountability is essentially national.' (Cameron, 2011, p.10). Accountability on the international level can only be understood as peer review and peer pressure among states and only secondarily as control by civil society on governments. G20 leaders apparently acknowledge this and abstained from attempting to somehow remedying it.

These decisions bear a major resemblance to the early stages of the development of the European Council. Indeed, members of the G20 opted for a flexible, informal forum that forms part of the international economic governance architecture although it avoids getting entangled in legally binding agreements that may impede the process of political negotiations and compromises necessary for the successful steering of global economy. As with the European Council, G20 leaders are results-oriented in that they decided to institutionalize their cooperation only to the point that this will become more effective. One glaring difference with the European Council lies in the fact that the G20 is much more open to non-members. This can easily be explained by the fact that in the case of the European



Council all affected states have a say in the decision-making process whereas the Union structures are available to offer expertise input to the negotiations and subsequently implement the decisions of the political organ. By contrast, the G20 includes in its decision-making process only a number of the affected states whereas it needs the IFIs and other international organizations to realise its decisions.

The G20 has emerged in recent years as the indisputable steering committee of the international economic system. As an informal intergovernmental forum where leaders of the most powerful states exchange their views and endeavour to reach compromises on the appropriate direction of global economy, it follows political imperatives rather than legal rules. Therefore its longevity depends on its continued successful guidance of the global economy. The question that we tried to address in this article concerns the expediency of institutionalising the G20 in its role as ‘global economic governance executive’ grounded in the experience of European multilevel economic governance. Our analysis has illustrated the deficiencies of the European system despite its 60 years of development. There are no clear institutional borders and deep multilevel partnership is still lacking. The institutionalization of the EU structures often leads to a rigid outcome that prevents the EU from foreseeing international developments or at least reacting to them in a timely manner. The European Council with its particular intergovernmental characteristics offers some more insights to our discussion. The latter’s institutionalization and integration into the institutional framework of the EU has only come very gradually and, most importantly, has not deprived it of its political character. In other words, the European Council has seen its functions institutionalized within the EU in a step-by-step procedure with the aim of maintaining its qualitative advantages in relation to supranational institutions. These are its flexibility and capacity to offer the appropriate forum for leaders to strike sensitive political deals. It should be highlighted that when the European Council fails in this regard – notably due to the large number of EU Member States or diverging interests – European leaders have shown the flexibility to go outside the Treaties and reach agreements among smaller groups of like-minded states within the European Council. Based on these observations we submit that the G20 should not become another international organization but rather opt for just that degree of institutionalization that will improve its efficiency. The outcome of the Cannes Summit of November 2011 seems to echo this opinion. In so doing, the G20 will retain its relevance in global economic governance by offering world leaders the appropriate forum to strike mutually advantageous deals.

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## **Multilevel Governance Problems at the Intersection of Trade, Health and the ‘Global Knowledge Economy’**

Frederick M. Abbott\*

### **The Doha Declaration Plus Ten**

The year 2011 represents the 10th anniversary of the Doha Declaration on the TRIPS Agreement and Public Health. The anniversary is being recognized in a substantial number of forums, including with the joint participation of the Directors-General of the World Health Organization (WHO), World Intellectual Property Organization (WIPO) and World Trade Organization (WTO) (a more detailed account of the state of play with respect to medicines in the decade since the Doha Declaration, and proposals for the future, is in Frederick M. Abbott, 2011).

The social forces that gave rise to the Doha Declaration focused attention on public health and access to medicines problems confronting large parts of the world's population. Funding for procurement and distribution of medicines, particularly to treat HIV/AIDS, malaria and tuberculosis has risen. Support has increased for research and development (R&D) on drugs and vaccines for diseases predominantly affecting individuals in developing countries. Nonetheless, major problems involving innovation and access to health care and medicines remain to be addressed, including in the more advanced economies. The economic difficulties facing the advanced industrial economies in 2008-2011 have exacerbated, and will continue to exacerbate, problems in providing essential health services as countries at all levels of development are restricting payments for government services. It is an opportune occasion to reflect on multilateral institutional mechanisms for improving global public health.

### **Secretariat Cooperation, Member State Game-Play**

During the course of the past decade cooperation has improved among the secretariats of the WHO, WIPO and WTO in the field of public health. Cooperative projects have been carried out, including those involving the establishment of technical resource centres, conducting research on technical subject matter, and trilateral support of member state negotiating exercises. This cooperative work is undertaken both formally at the request of member states, and informally among individuals working for the institutions.

When attention is turned to relationships among the member states of the three institutions, the situation in respect of public health is more problematic. Governments continue to view the alternative forums of WHO, WIPO and WTO as mechanisms for securing strategic advantage. If negotiations in one forum take a problematic turn, proposals can be made in the other forums to limit or reverse the perceived adverse impact. Some of the larger advanced industrial actors appeared disaffected with the Geneva process as a whole, and have moved the principal focus of rulemaking and enforcement efforts to bilateral and regional forums.

It should not be surprising that individuals working in multilateral institution secretariats are better able to cooperate than are country/regional governments. Governments are complex enterprises whose officials are responding to various internal and external pressures that restrict their perspective. A senior government official negotiating in Geneva might consider some new proposal to be a reasonable approach to achieving a global objective, but that official's personal conclusion may be at

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odds with the perspective of important home-country constituencies. The complexity of each individual government is multiplied 150 times in the major multilateral institutions.

It is an interesting question whether the international community would be better served by according a more powerful role to the "technocrats" at institutions like WHO, WIPO and the WTO. On one hand, there would almost certainly be greater prospects for progress in the formulation of rules-making proposals. Simply in terms of numbers, it would be easier to craft agreement among 15 or 20 technocrats than it is to establish agreement among 150 governments (or 60 actively negotiating governments). On the other hand, the "democracy deficit" and potential for undue influence/corruption loom over any suggestion to enhance the role of the technocrats.

There is no self-evident solution to promoting cooperation among governments at the multilateral level -- as witnessed by the apparent failure of the Doha Development Round. It is certainly possible that the idea of intrusive multilateral governance is not feasible because of its inherent complexity and the constant pressures toward national autonomy.

### **New Instruments, Multiple Forums**

When governments are successful in negotiating new rules in individual multilateral forums, they are nonetheless left with problems of inconsistent rules. A lack of advance planning and legal integration was a major gap in the negotiation of the Nagoya Protocol (F. M Abbott, 2010), and is bound to lead to confusion and difficulty. It is not so difficult to foresee similar cases arising from new negotiating efforts.

For a not entirely hypothetical illustrative case: a number of ideas have been put forward at WHO on new mechanisms for funding R&D on new vaccines and treatments (Health Action International Global et al., 2001). It is possible that a new international legal instrument ("New Instrument") will emerge with some creative approach to promoting R&D. What if that new approach is inconsistent with some rule of the TRIPS Agreement?

In what is probably the easiest case, a WHO-sponsored New Instrument would be adopted by consensus of WHO members and, from the standpoint of the Vienna Convention on the Law of Treaties (VCLT), would be a later in time agreement with coincident parties as the WTO Agreement, with the later in time agreement governing (Article 30(3), VCLT). Given that the WTO Appellate Body has already recognized that the WTO is not a self-contained legal system (WTO Appellate Body, 1998), it seems unlikely that the Appellate Body would fail to give priority to a later in time inconsistent agreement among coincident state parties. The situation becomes more difficult if a WHO New Instrument was not accepted by one or more key economic actors. It would be effective among its state parties, including at the WTO (per Article 30(4) of the VCLT). But, rights and obligations in respect to parties that did not adopt the New Instrument would remain governed by the WTO Agreement, including, for example, the TRIPS Agreement. This could give rise to "material issues".

What if the New Instrument provided that a certain type of innovation is not subject to patenting, and an enterprise based in a state party that did not adopt the New Instrument sought to patent that type of innovation in a state party that did adopt it? Under Article 30(4) of the VCLT, the state party adopting the New Instrument presumptively would remain obligated to grant a patent further to Article 27.1 of the TRIPS Agreement. Would Article 27.1 allow the adopting state party to refuse patenting as justified on field of technology differentiation grounds in the sense of the panel report in the *Canada-Generics* case? (WTO Appellate Body, 2000).

The lawyers should spend some time working out these integration issues before they arise in a concrete way. This might be a useful area for cooperation among the legal divisions of the WHO, WIPO and WTO.

## **Expanding Institutional Coordination**

A number of proposals to put global public health on a more sustainable footing involve the creation of new financing mechanisms. None of the WHO, WIPO and WTO are set up as global financial managers. A logical fourth institution is the World Bank, which does considerable work in the field of public health, but largely separate from the Geneva institutions. Other institutions such as the Global Fund, UNITAID and UNICEF are important in the procurement context. Institutions such as UNCTAD work with developing countries on transfer of technology relating to public health. The Gates Foundation has become a major factor in global public health dialogue, and there are a number of nongovernmental organizations, such as DNDi and the Medicines Patent Pool, that are important. Advocacy NGOs continue to play an important role. There may be a space for the formation of something in the order of a Global Health Coordination Council that could and should help establish priorities and overall strategy for addressing problems of global public health.

## **Back to the Future**

From the early 1800s to 1995, nations relied on the principle of national treatment as the means to promote fair trade; and in the 1940s most-favoured-nation treatment was added as a means to promote global stability. The entry into force of the WTO Agreement represented a substantial intrusion into the regulatory sovereignty traditionally enjoyed by governments. This "experiment in intrusion" is not an unqualified success. As the major emerging market countries - Brazil, China, India - begin to behave more like the United States and European Union - content with rules imposed on others, but acting unconstrained for their own accounts - the problems facing multilateral institutions grow more acute. It is not so clear that the principle of national treatment has outlived its usefulness as the bedrock of international cooperation. Reciprocal fairness might be preferable to - or more pragmatic than - collective intrusion.

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# Can the 'Development Dimension' of the WTO Be Secured Without Stronger Synergies Between the WTO and the World Bank?

Anna Pitaraki\*

## Introduction

There is no consensus as to what 'global issues' are, but, when the question is posed, the answer is almost spontaneous: climate change, biodiversity, global poverty, financial stability, trade. Various authors and organizations have attempted a definition of global issues and an enumeration of their key characteristics. The United Nations itself maintains a list of issues perceived as global, without clarifying, though, its selection criteria (World Bank, 2012). Trade, development, and global public goods (GPGs) are issues that merit the characterization 'global'. They have a significant impact on a large number of people across national boundaries; they go beyond the capacity of any one nation to resolve; they are interconnected with each other as well as with other global issues; and, finally, their resolution requires a global regulatory approach because of the global economic and/or social concerns that are at stake (Bhargava, 2012, pp.1–2).

This contribution is situated in this broader debate of globalization, multilevel governance and GPGs, and seeks to examine whether and how international organizations contribute to the administration of GPGs. The case-study of the World Trade Organization (WTO) and the World Bank (including all its affiliates) weaves together four, independent at first glance, narrative threads: GPGs, development, trade and collaboration between international entities. Development and trade could not be classified among the typical GPGs.<sup>1</sup> The former is arguably neither non-rival nor non-exhaustible (pure GPG), whereas the latter is treated only by some as a GPG (club good) (Gardiner and Le Goulven, 2002). Rather, they could be more credibly perceived as global policy outcomes that sometimes suffer, especially in the case of development, from undersupply, which, in turn, gives rise to public bads (fragmented markets, financial crisis, poverty, civil strife etc.) (Kaul et al., 1999). Put differently, GPGs and trade are vehicles to achieving development and, hence, their supply is a key component of development (United Nations Development Programme, 2012).

Global trade and development 'walk hand-in-hand'. Ensuring adequate trade opportunities has inevitable spill-overs in the area of development. The dynamic interlinkage between trade and development plays out in various ways. Over the medium and long terms, increased efficiency and economic growth more or less guarantee poverty alleviation - even the most sceptical ones concede that there is no coherent evidence that trade restrictions boost growth (Rodriguez and Rodrik, 2000, p.317). In the shorter run, though, trade liberalization may induce dramatic changes in wages and prices and entail heavy 'adjustment burdens'<sup>2</sup> and infrastructure costs. The other side of the coin is that,

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<sup>1</sup> The World Bank defines GPGs as “commodities, resources, services, and systems of rules or policy regimes with substantial cross-border externalities that are important for development and poverty reduction, and that can be produced in a sufficient supply only through cooperation and collective action by developed and developing countries” (Development Committee, 2001); Morrisey et al. (2000) define GPGs as “a benefit providing utility that, in principle is available to the global population. They consider three types of benefits: provision of direct utility, risk reduction, and capacity enhancement.”

<sup>2</sup> According to the Specific Factors Model, the production factor that is specific to the import-competing sectors will benefit, whereas the factor specific to the export sector will benefit. This is the short-term effect. The Heckscher-Ohlin Model suggests that owners of a country's abundant factors gain from trade, while owners of a country's scarce factors will lose in relative terms. This loss could be neutralized by compensatory measures.

as it will be shown further on in greater detail, certain deviations from the principles of trade liberalization and multilateralism have been justified in the name of development and developing countries' needs (General Preferences, Special and Differential Treatment etc.).

It is often underscored that GPGs are not state-produced. For the case of GPGs, there exists no market or governmental mechanism appropriate for them (Samuelson, 1954). "There is no mechanism by which global citizens can make binding, collective decisions to slow global warming, to cure overfishing, or rein in dangerous nuclear technologies" (Nordhaus, 2005, p.7). Against this light, various institutional designs have been studied to reduce collaborative failures. In trade and development, there are just as many shades of privateness and publicness, of national and international. Although achieving development remains predominantly a state responsibility,<sup>3</sup> various international organizations, have been charged with the task of promoting it – to mention just a few: i) UN Economic and Social Council (2012); ii) 'The United Nations Development Programme' (2012); iii) 'The United Nations Conference on Trade and Development' (2011); iv) European Commission (2012). The liberalization of trade, on the other hand, has been entrusted to the WTO, which is an intergovernmental organization, premised upon an agreement between governments to behave in a way that is mutually decided upon and serves members' mutual interests. The application of these economic policies and the distribution of gains deriving therefrom is a matter of domestic politics.

Instead of the traditional conduits of cooperation, horizontal, among states and vertical, among international organizations and their member states, this article offers an insight into the politics and the mechanics of the collaboration between two historically bound yet organically distinct organizations, the WTO and the World Bank. Taking into account the global character of trade and the negative consequences of lack of development, it examines the independent, as well as the common practice of the WTO and the World Bank in the field of development policies (aid, capacity-building, technical assistance) and the potential of these policies to provide GPGs as a joint product. In doing so, it looks at the GPGs problem from a different angle – leaving aside the freeriding problem, it investigates into the multipolarity of actors and policies. Finally, it concludes with an assessment of these collaborative initiatives in constructing a more effective and legitimate governance system for the pursuit of development, despite any asymmetric expectations and different strands of development efficiency.

The first part commences with a description of the mandate, the diverging perception of development and their reflections on the various strategies that each of the above-mentioned institutions have independently applied in this direction. The second part, on the other hand, is dedicated to the joint actions that the WTO and the World Bank have launched together in the area of development. The final part theorizes the need for, the structure, as well as the underlying principles (systemic repercussions) of the interaction pattern between the WTO and the World Bank before setting out a future coherent agenda for development.

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<sup>3</sup> The UN Declaration on the Right to Development (UN. General Assembly, 1986) "recognizes that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their states"; Article 2, paragraph 3 states that: "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."; Article 3, paragraph 1, determines that: "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development", whereas paragraph 3 states that: "States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human right"; and Article 6, paragraph 3: "States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights."

## **Institutional Praxis in the Seek of Development**

### ***The World Bank and its "Aid for Development" Approach***

Both the GATT/WTO and the World Bank have employed a wide array of strategies in order to realize their 'development' mandate. In the case of the World Bank, the record is quite a straightforward. The post-war planners that convened in Bretton Woods in the summer of 1944 managed, despite the profound scepticism about internationalism that dominated the political scene, to lay the cornerstone of the international economic order. The International Monetary Fund (IMF) and the World Bank came into existence as a response to world poverty and a platform for post-war reconstruction that would result from the extinction of discriminatory exchange and trade controls.

As (Gardner, 2008, pp.63–64) has vividly described, “when, on the eve of Bretton Woods, the negotiators turned to the Bank [...], they were in a conservative mood,” and that reflected in its limited lending capacity as well as its tendency to finance specific projects with secure repayment perspectives; furthermore, it lent only on commercial terms - “with interest rates of 5 or 6 per cent and repayment schedules of ten or twenty years.” (Gardner, 1980, p. xxii).

It took the World Bank almost a decade to overcome its political, financial, and organizational inhibitions and redefine itself as a truly development-oriented agency. Steadily, it stimulated the flow of private capital that was later channelled into less-developed countries. The creation of the two World Bank affiliates – the International Finance Corporation and the International Centre for Settlement of Investment Disputes – forged ties of trust between private investors and national governments by creating an international forum for the resolution of their disputes. The establishment of the International Development Agency (IDA) was another significant step forward. Already by the 1960s, the World Bank, together with the IDA, were financing projects that would normally fall outside the normal bankers' field of interest, such as education, agriculture, and women's rights. In the 1970s, its focus shifted to policy lending, as a result of several failed projects and conditionality became more stringent as the World Bank had to respect its own budgetary limitations (Thomas and Allen, 2000, pp.205–206).

The international debt crisis in the 1980s was tackled with structural adjustment projects and technical assistance on investment planning and engineering. In pursuit of these projects, the World Bank introduced its 'landmark' policy, the structural adjustment loans (SAL), that were later accompanied by the sectoral adjustment loans supporting sector-specific reforms (SECAL). The economic proceeds of these projects would be utilized to remedy the acute balance of payments problem of the borrowing members while the latter would proceed with the reforms agreed under the adjustment program. The Baker initiative in 1985 paved the way for loan-granting to heavily-indebted countries to meet their exchange requirements (Bartlett, 1985). Since its initial introduction, adjustment lending has grown in size and duration and so did the general loan activity of the Bank.

In the 1990s, poverty alleviation and development were once again prioritized high on the agenda of the Bank which employed a two-pronged strategy: first, the utilization of developing countries' 'comparative advantage' (abundant cheap labour, raw materials etc.) for generating broad-based economic growth; and second the supply of social services (health, education, nutrition etc.) as prerequisites for the creation of new income-earning opportunities (World Bank, 1990). The launch of the Doha Round in 2001 'revamped' the Bank's interest in the general investment and trading climate which, consequently, has enhanced the funding towards institutional and infrastructure aspects, especially the ones regarding trade facilitation (Tsikata, 2006). Although trade lending is not an

altogether novel approach,<sup>4</sup> its resurgence serves the creation of a global system that will be more receptive and open to the 'development' needs of the less and least 'privileged' trade partners (World Bank, 2001, 2002), and the full integration of the latter in the world trade system on an equal basis with the developed countries (Pascal Lamy, 2006; for an interesting study on the importance of Agriculture for developing countries' economies as well as for the conclusion of the Doha Round, see Anderson, 2005). In furtherance of this initial 'trade incentive framework' policy, the Bank has launched a new trade strategy, identifying four pillars around which the Bank plans to structure its trade-related activities. These priorities include "trade competitiveness and diversification; trade facilitation and trade finance to cut transport costs; support for market access; international trade cooperation for better integrated regional and global markets; and managing external shocks." (ICTSD, 2011).

Over the arc of the years, the Bank's architecture and modus operandi have been scrutinized, praised<sup>5</sup> and criticized, at the same time (for a critical overview of the Bank's institutional mentality and its projects, see Woods, 2006).<sup>6</sup> Its contribution to development, though, has been by no means unimportant. As this brief account aims to demonstrate, the Bank, through its Presidency and Board of Directors, has sought to mould an institutional ethos insulate from member states' pressures,<sup>7</sup> and consistent with its mandate. The diversification and expansion of its strategies have assisted numerous countries to integrate into the world economy. The Bank has managed to mobilize private capital and distribute it to less and least developed countries, in the form of low-interest loans, interest-free credits, and grants. Additionally, with its training and expertise, as well as its technical assistance, research and other forms of knowledge sharing, the Bank aspires to spur economic growth in the developing countries.

The Global Trade Finance Program summarizes in a tangible way the key elements of the Bank's development work. Comprised of four development-related institutions, the World Bank, the Multilateral Investment Guarantee Agency (MIGA), the International Centre for Settlement of Investment Disputes (ICSID), and the International Finance Corporation (IFC), and owned by 179 shareholder countries, it has vested an international character while acting on a local basis. Its Investment and Advisory Services "support the goal of improving lives and raising living standards through sustainable private sector development" and with its flexible and tailored to a client's specific needs projects work to "promote open and competitive markets, support companies and other private sector partners, generate productive jobs and deliver basic services, and create opportunities for people to escape poverty and improve their lives." (IFC World Bank Group, 2008)

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<sup>4</sup> Trade lending flows were greater in the 1990s, yet of a different character. In the 1990s the emphasis was on funding for the purpose of achieving trade liberalization. This time the focus has been on dismantling "behind-the border" barriers in the global trading system.

<sup>5</sup> In 2009, the global economy was hit by one of the worst economic crisis since the times of the Great Depression. Notwithstanding all, the predictions made in the early years of 2000 were not completely falsified: despite the general decline, in the gross domestic product of numerous countries, East Asia and Pacific grew at 7.5 percent and South Asia at 7 percent. By 2010 many economies rebounded whereas developing countries' contribution to global growth has risen significantly and more consistently than that of developed countries. For more data regarding recession and economic growth, see World Bank (2011).

<sup>6</sup> Woods examines, among other, the case of Sub-Saharan Africa which has stirred an acrimonious debate with regard to the efficacy of the Bank to stir growth and development in the region. The case of Sub-Saharan Africa presented the Bank with a multi-prong test: it required significant resources, it required radical governmental reforms, and, finally, it required continuous flows of technical assistance and the Bank, in Woods opinion, failed to live up to the challenge (2006, p.141-178).

<sup>7</sup> Member States of the World Bank Group appoint Executive Directors of the International Bank for Reconstruction and Development (IBRD), International Development Agency, International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), who have a dual responsibility: they are representatives of the Bank's Member country or countries that appointed or elected them, and as Bank officials representing the interests and concerns of those countries. The Executive Directors are responsible for the conduct of the general operations of the Bank.



### ***The GATT/WTO and the "Aid for Trade" Approach***

The WTO, on the other hand, is a different kind of 'animal'. Its Members and Secretariat often refer to it as a 'contract organization', otherwise described as a 'member-driven institution' that facilitates negotiations, oversees the implementation of the resulting contractual commitments and issues judicial decisions upon request of a Member which wishes to have its WTO rights vindicated. The role of the Secretariat, unlike that of the President and the Board of Directors of the World Bank, comprises three main functions: first, to serve negotiations (taking place in various negotiating groups); second, to maintain an oversight of Members' compliance with their obligations (through the various councils and committees); and third, assist the dispute resolution in a pre-panel phase. Development, however, is a quite different enterprise (Shaffer, 2005, p.187).

One's view of the WTO's substantive rules and its role, in a conventional sense, will inevitably shape one's understanding of WTO's capacity to generate development-oriented policies. The inquiry into the nature of the WTO has created a chasm. Should the WTO rules be seen as reflections of political choices and contractual bargaining or as 'constitutive' segments in the formation of a global 'constitutional' order? A perusal of the Doha negotiations and the ones that preceded it suggests a predominance of the former - promises of development policies have been given to developing countries in exchange for their agreement to participate in various negotiations. The following analysis draws heavily on Group of Thirty (2004, chap.3); for another brief presentation of the history of trade negotiations in the WTO, see Matsushita (2006).

The conclusion of the Uruguay Round was celebrated as a vindication of the market system and trade liberalization, in particular. The crowning achievement was the establishment of the WTO, which, with its broader agenda and its robust enforcement mechanism, would plant the seed for further liberalization. Some issues were left for later completion (i.e. financial services) and a commitment was made for biennial ministerial meetings in order to keep the political momentum alive. The Ministerial in 1996 in Singapore inaugurated work programs on investment, competition policies, trade facilitation and government procurement and reiterated the Organization's commitment to stand by the side of developing countries. The same reassurances were given at the Ministerial in Geneva in 1998. But this time the atmosphere was already sour and developing countries started complaining about the implementation onus imposed upon them. By 1999, they had already fallen out of love with the trade liberalization as an economic policy and the inevitable collapse of the Seattle Ministerial was attributed exactly to that – the deep cleavage among the positions of the participants on various negotiating items.

The impetus for the Doha Round, otherwise dubbed 'Development Round', has partly derived from the determination to continue, despite all, with the trade liberalization agenda, and partly from the tragic events of 09/11 and the widespread belief that global poverty has bred terrorism and social unrest (Kleimann and Guinan, 2011). The 'Development Agenda' announced therein was long and complex. The main headings were: agriculture, services, manufacturing, special and differential treatment (SDT), the so-called 'Singapore issues', dispute settlement and institutional reform, rules on antidumping, TRIPS and public health, as well technical assistance and capacity building. On the whole, the Doha Development Round focused on the assistance of developing and least developed countries in their economic development and their capacity to participate in international negotiations.<sup>8</sup>

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<sup>8</sup> The Doha Ministerial Declaration (2001) dedicated more text to 'development' and technical assistance and capacity building than to any other issue treated therein. More particularly, paragraphs 38-41 address the overall technical assistance and technology and capacity building: "support domestic efforts for mainstreaming trade into national plans for economic development and strategy for poverty reduction"; "coordination between the relevant international agencies, bilateral donors, and beneficiaries..."; "ensure long-term funding for WTO technical assistance...". Paragraphs 42-43 focus on assistance to least developed countries, and paragraphs 2, 20-21, 23-24, 26-27, and 33 address assistance with regards to trade and investment, trade and competition policy, transparency in government procurement, trade

Unfortunately, the 'Development Agenda' proved too long and too complex to be realized. At the same time, the continuing discontent on the part of developing countries and the emergence of new economic powers (China, Brazil, Mexico, India etc.) gradually fermented new negotiating dynamics. The Ministerial Conference in Cancún in 2003 intended to be a reaffirmation of the Doha agenda and timetable. Instead, it ended in an acrimonious division over agriculture and the 'Singapore issues', with the U.S – E.U. standing on the one side, and the 'G20+'<sup>9</sup> on the other extreme. The former pressed for reduction in developing countries' industrial tariffs, whereas the latter called for deep cuts in agricultural tariffs and correction of market distortions in agriculture that dated back to the Tokyo Round (1973-1979). The Hong Kong Ministerial in 2005 yielded only commitments on Aid for Trade and Duty-Free and Quota-Free (DFQF) market access to least-developed countries, thus confirming what was already suspected: that the Doha Agenda could not live up to its moniker as a development round. The July 2008 Ministerial in Geneva shared the same destiny: it failed and the blame was once again put on diverging national interests to which the negotiators had succumbed, particularly those of farmer lobbies. Every attempt to reinvigorate the round ever since has been doomed with the last one (Easter 2011) coming to an abrupt end when China and the U.S. did not agree on 'sectorals'.

Post-Doha Round literature thrives in explanations about the causes and the consequences of its stalemate. Among the most prominent are the ones that emphasize “the 'member-driven' consensus practices in the WTO negotiations and the lack of powers of the WTO Director-General to initiate proposals defending the collective interests of its members.” (Petersmann, 2005, p.23). Another element to appreciate when considering the standstill of the Doha Round is the GATT/WTO's institutional vision and stance towards development. Development remains a controversial notion, premised, paradoxically, on a well-founded tenet, which is that trade liberalization paves the way to development.<sup>10</sup> The elusiveness of development under the auspices of the GATT/WTO has translated into a bifurcated development approach motivated by divergent economic rationales, which, nonetheless, converge into a common aim: facilitation of trade liberalization. This assumes the nature of technical assistance and capacity building. Moreover, the offer of development aid has served as a 'collateral' for keeping developing countries on the negotiation wagon with the ultimate goal of integrating them into world's economy and guaranteeing obstacle-free, open markets.

#### Trade preferences and non-reciprocity

Development and the 'special needs' of developing countries laid in the core of the 'Special and Differential Treatment' (SDT) program, a concept that emerged early in the GATT days,<sup>11</sup> became

(Contd.) \_\_\_\_\_

facilitation, and trade and environment, respectively. Technical assistance provisions are also included in paragraphs 2.2, 3.5-3.6, 5.1, 5.4 and 14 of the Decision on implementation-related issues and concerns (WTO Ministerial conference, 2001). See, also, World Trade Report (WTO Secretariat, 2003b, p.xix), which emphasizes the inclusion of technology transfer for the first time on the GATT/WTO agenda.

<sup>9</sup> The 'G20+' does not refer to the Group of Twenty comprised Finance Ministers and Central Bank Governors. Rather to a 'coalition' of several developing countries. The original membership was Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, Egypt, El Salvador, Guatemala, India, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, Venezuela. Since then, there have been some additions but also some losses.

<sup>10</sup> There is undisputed evidence that trade liberalization has contributed majorly in promoting growth and prosperity in the period after the Second World War. There is also strong evidence suggesting that further liberalization of trade by both industrialized and developing countries to the benefit of both groups of countries. Paragraph 1 of the Doha Ministerial Declaration noted that the “multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment through the past fifty years” and that “international trade can play a major role in the promotion of economic development and the alleviation of poverty.” (paragraph 2), see above, note 8.

<sup>11</sup> Part IV of GATT 1947 is dedicated on 'Trade and Development' as well as 1979 GATT Decision on 'Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries' (GATT, 1979); Also, see Low and Keck (2004).

effective through the so-called 'Enabling Clause' and has remained intact in the Doha Agenda.<sup>12</sup> SDT calls for preferential market access for developing countries, curbs reciprocity in negotiating rounds to levels 'consistent with development needs' and enables developing countries to employ practices otherwise prohibited by the GATT/WTO regime (Hoekman, 2005, pp.1–2). The 'infant industry' trade protection (GATT Article XVIII), (for an interesting analysis of the 'infant-industry' exception, particularly from an economic perspective, see Xu, 2006) and the 'preferential access to developed countries' market' (GSP) (Pal, 2007; also Antimiani et al., 2006) are also justified under the same rationale: trade liberalization through the Most-Favoured Nation (MFN) principle does not necessarily ensure growth of developing countries and the industries therein situated, which cannot compete with the developed countries industries on a level playing field (due to lack of technology, infrastructure, distribution channels etc.) and are, therefore, in need of protection from competition for a certain period. As Ismail has noted, this concept is essential in order to “ensure that there is proportionality in the commitments undertaken between developed and developing countries, reflecting their different levels of development and gains from the trading system.” (2005). Stiglitz and Charlton (2004) seem to agree with this proposition, and have insisted on unilateral concessions on behalf of developed countries to redress past injustices as well as to further the development of developing countries.

However, economic theory has questioned the soundness of this leeway granted to developing countries with regard to certain obligations they have accepted under the GATT. Economic evidence has shown that developing countries would benefit more from their steady and full integration “into the reciprocity-based world trade regime rather than continued GSP-style special preferences” (Özden and Reinhardt, 2003, pp.1, 22), and has steered WTO development efforts into a different direction: enhancing the capacity of developing countries to participate in shaping, understanding, interpreting, and enforcing international trade rules and also assisting them with the cost of implementation of these rules. And this is exactly the rationale that dominates the second development-oriented WTO strategy: capacity-building and technical assistance.

#### Capacity-building and technical assistance

Senior economists of the World Bank have indicated that WTO regulations little do appreciate the capacities of the least developed countries to carry out the functions that sanitary and phyto-sanitary standards, customs valuation, intellectual property and other regulations entail. For most of developing and transition economies money spent for that reason is money unproductively spent (Finger and Schuler, 2000, p.511; also Finger, 2001).

Until the creation of the WTO, technical assistance took the form of 'trade courses' taught in Geneva (for an interesting summary of the Technical Assistance and Training Plan Products, see Shaffer, 2005, pp.208–209). In 1995, with the perpetual proliferation of WTO rules and the increasing number of developing countries participating, the WTO launched a fund for technical assistance for LDCs. Consequently, in 1996, the WTO published guidelines for WTO Technical Cooperation to

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<sup>12</sup> In paragraph 44 of the Doha Ministerial Declaration Member States “[...] reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WTO General Council, 2001). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational...”. Also, acknowledging the seriousness of the concerns expressed by least-developed countries, Member States recognized in paragraph 42 that “[...] the integration of the LDCs into the multilateral trading system requires meaningful access, support for the diversification of their productions and export base, and trade-related technical assistance and capacity building...” and committed themselves “[...] to the objective of duty-free, quota-free market access for products originating in LDCs...”, as well as “[...] to additional measures for progressive improvements in market access for LDCs...”. Finally, paragraph 14 calls for “modalities for further commitments, including provisions for special and differential treatment [...] be established no later than 31 March 2003.”

“improve knowledge of multilateral trade rules” and “to assist in the implementation of commitments and full use of its provisions”. Training courses, materials and specialized seminars were once again the first modes of delivery of assistance (WTO Committee on Trade and Development, 1996). With the inauguration of the Doha Development Agenda Global Trust Fund, the trade-related assistance and capacity building augmented both in terms of program objectives and budget. The new strategy announced therein had a triple objective: making technical assistance more demand-driven; creating financial stability through the above-mentioned fund; and, enhancing the capacity of the WTO Secretariat to deliver assistance in accordance with its mandate and developing countries' needs (WTO Secretariat, 2001).

### Trade facilitation

Part of the infamous 'Singapore issues', trade facilitation has been one of the few loopholes the Doha Round has managed to close. The negotiations on trade facilitation correspond to the same rationale as that of technical assistance and capacity-building: developing countries have not fully exploited the development opportunities that international trade has to offer to them due to their limited access to developed countries markets but also to their own trade restrictions. The World Bank has estimated that, for example, the costs of shipping have been particularly high, adding a significant cost to trade, particularly in less effective markets.<sup>13</sup>

*Stricto sensu* trade facilitation addresses issues of transporting goods through ports and subsequently moving customs documentation associated with cross-border trade. *Lato sensu* trade facilitation, on the other hand, would include “the general environment in which trade transactions take place” (transparency, professionalism of customs and regulatory environment), as well as standard harmonization and integration of networked information technology (telecommunications for data flows and financial infrastructure etc.) (Wilson et al., 2004, pp.842–843). The Doha mandate has viewed it as a way of clarifying and improving relevant aspects of GATT Articles VI, VIII, and X ('freedom of transit', fees and formalities connected with importations and exportation', and 'publication and administration of trade regulations' respectively), “with a view of further expediting the movement, release, and clearance of goods, including goods in transit”, recognizing, though, that these improvements will require substantial funding and enhancement of technical support and capacity-building (WTO General Council, 2004, annex D, paragraph 1).

### Development: A WTO and World Bank Joint-Venture

The outcry for more substantial and practice-oriented technical assistance and capacity-building – rather than 'power-presentations' in Geneva regarding developing countries' obligations to fully integrate into the WTO regime and respect the obligations arising therefrom, is a parameter to be taken into account when considering the collaboration between the WTO and the World Bank. In broad strokes, the Bank has come through with what the GATT/WTO seems to have been lacking: a significantly greater amount of funding and expertise, as well as a broader spectrum of products and development strategies that permeate national institutions and societies ('behind-the-border' measures) and implicate a broader array of stakeholders.

The Doha Development Agenda (DDA) has given a new impetus to the relationship between the GATT/WTO and the World Bank,<sup>14</sup> but the collaborative efforts of the two institutions in the area of

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<sup>13</sup> Director-General Pascal Lamy, in a speech at the World Customs Organization said that the implementation of the Trade Facilitation measures could reduce total trade costs by 10%: “Every extra day required to ready goods for import or export decreases trade by 4%.” (2011).

<sup>14</sup> In the Doha Ministerial Declaration, Members committed to continue to work with the Bretton Woods institutions (IMF and the Bank) towards achieving greater coherence in the international economic policy-making (2001, paragraph 5).

development go back in time. From a formalistic legal point of view, these efforts are premised on two cooperation instruments: the Marrakesh Coherence Mandate and the Cooperation Agreement.

In 1994, WTO Members annexed to the WTO a normative instrument encouraging coordination, the Ministerial Declaration on Achieving Greater Coherence in Global Economic Policy Making. This instrument contained the so-called 'Coherence Mandate', which urges the WTO to strengthen its ties with the IMF and the World Bank to the aim of promoting their common objectives (improving living standards, achieving sustainable development, expanding international trade) (Pascal Lamy, 2006; WTO General Council, 1996a, 1996b; WTO Secretariat, 2003a). There are two main points in the Coherence Mandate worth emphasizing: first, the inter-linkages of policies with regard to trade, finance and macroeconomic policies with the purpose of expanding trade, growth and sustainable development, correction of external imbalances, as well as the links between trade and development (trade, aid, and debt), "whereby the need for adequate and timely flow of concessional and non-concessional financial and real investment resources and further efforts to address the debt are needed to complement trade liberalization in bringing growth and development." (Auboin, 2007, p.21); second, the social costs often associated with trade liberalization and the complementary role of the World Bank (and the IMF) in alleviating adjustment hardship.

The Cooperation Agreement, on the other hand, "provides the basis for carrying forward the WTO's Ministerial mandate to achieve greater coherence in global economic making." (WTO General Council, 1996a) Not only did it essentially formalize the informal relationship between the two institutions that went back to the days of the GATT 1947 but went beyond that: mutual granting of observer status, consultation between the secretariats and the staff of institutions, exchange of information and access to databases (WTO General Council, 1996a, paragraph 11).

In accordance with the spirit of the Cooperation Agreement, which sought to establish channels of interaction that, in the long run, would substitute for the lack of an international forum for the world's ministers of trade, finance, and development, a two-tier consultation mechanism has been set in motion. The high-tier comprises: i) The International Monetary and Finance Committee ("IMFC") is the primary advisory body of the IMF Board of Governors, where the World Bank participates as an observer and the WTO Director-General attends its meetings (WTO Secretariat, 2003a Annex 1, paragraph 57; Pascal Lamy, 2006); ii) The WTO's General Council functions as the main forum of coordination between the WTO and the World Bank. Its chairman holds special informal meetings on coherence which representatives of the Bank (as well as the IMF) are invited to attend (WTO General Council, 1999; WTO Secretariat, 2003a Annex 1 paragraph 61); iii) The Director-General of the WTO regularly consults with the President of the World Bank on issues of collaboration and coherence of policies and the product of their consultations reflects in their joint statements.<sup>15</sup>

The lower-tier consultations among staff members are distinguished in those that require a standing invitation and those for which special invitations are needed.<sup>16</sup> In both cases, the point is the acquisition of first-hand information and the contribution of all three institutions in coherent and mutually-supportive policies. It should be noted, though, that neither the World Bank, nor the IMF for that matter, have been granted an observer status in the Trade Negotiations Committee ("TNC") and its subsidiary bodies, despite the general right of participation under the Cooperation Agreement (Pascal Lamy, 2006, paragraph 13). These informal contacts between the staff of the two institutions have raised concerns of Member States with regard to jurisdiction, transparency, control etc. (Wouters and Coppens, 2006, p.20, referring to WTO Director-General, 1996, and Benedek, 1998, p.489). As a

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<sup>15</sup> After the failure of the Cancún Council, the heads of the World Bank and the IMF wrote to the WTO Members reminding them of the potential benefits that would accrue from the conclusion of the Doha Round (Rodrigo de Rato and Paul Wolfowitz, 2005)

<sup>16</sup> See WTO General Council (1996a, paragraph 5). The WTO's Secretariat enjoys a comparable observer status at the meetings of the Executive Directors of the World Bank, World Bank – WTO Cooperation Agreement, at paragraph 4.

response to these critiques, the Director-General of the WTO has reassured the Member states that, in case of inconsistency, he will first notify and consult with them, and will address the World Bank only upon their consent (Wouters and Coppens, 2006).

From an economic policy point of view, the collaboration between the two institutions merges two distinct approaches, the 'aid-for-development' pursued by the Bank and the 'trade-for-development' approach followed by the GATT/WTO. The former is broader, enveloping a multitude of strategies that target the elimination of all kinds of deprivations developing countries suffer from, and rendering trade an important tool in doing so. The latter, as explained above, has a narrower scope, focusing on the increase of developing countries' capacity to trade and, consequently, develop. The 'Aid for Trade' agenda that has sprung from this merger synthesizes elements that are commonplace in these two distinct, yet complementary approaches. At the same time, the 'Aid for Trade' is a two-pronged agenda.

The first prong scrutinizes the so-called supply-side constraints (i.e. regulations, infrastructure, investment climate etc.) that have so far impeded developing countries from producing and exporting on a level playing field in the trading system because of a lack of capacity and assistance. In this light, the Integrated Framework (IF), conceived at the 1996 Singapore Ministerial Conference (WTO Committee on Trade and Development, 2004) and inaugurated in 1997, at the High-Level Meeting on LDCs Trade Development, was supposed to function as a platform for coordinating trade-related capacity and technical assistance. It addressed issues concerning LDCs but it excluded developing countries. Several other bilateral and multilateral donors with experience in the field of development (World Bank, IMF, ITC, WTO, UNDP, and UNCTAD) joined the WTO in this effort.

Due to its initial implementation impediments,<sup>17</sup> the IF had to be "reinvented" as an Enhanced Integrated Framework (EIF) in order to serve more effectively three primary objectives: i) "mainstream trade into national development strategies"; ii) "set up structures needed to coordinate the delivery of trade-related technical assistance"; and iii) "build capacity to trade, which also includes addressing critical supply-side constraints." (see 'WTO Enhanced Integrated Framework', 2012). The EIF has a structure similar to that of the IF ('EIF Governance Framework', 2012): it is a partnership among six agencies (among which the World Bank is the main agency for trade mainstreaming),<sup>18</sup> donor, observer agencies (e.g. UNIDO), the Executive Secretariat, and the Trust Fund Manager. It is supported by a Multi-Donor Trust Fund – of US\$ 120 million as of January 20 – (for the complete list of partner agencies as well as donors, see 'Who we work with', 2012), and it is currently active in 47 countries.

The Standards and Trade Development Facility (STDF, 2012) is an additional channel for providing technical assistance and capacity-building to developing countries for the implementation of their SPS obligations. The STDF was established in 2002 with the participation of the World Bank, the WHO, the World Organization for Animal Health, the FAO, and the WTO. Its main operations are that of financing and coordinating. The project preparation grants (PPGs) are disbursed to developing countries who have a hard time complying with SPS standards. In this case, the beneficiaries could be both public and private organizations who work in the field of generating and/or harmonizing SPS

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<sup>17</sup> Discussing the handicaps of the IF, Wouters and Coppens (2006) have noted that the IF has been limited to LDCs although "a similar mechanism could be of use in other countries." Also, the Joint Integrated Technical Assistance Program (JITAP), established by the WTO, UNCTAD and ITC to "help African countries to benefit from the multilateral trade system by offering technical assistance" does not involve the World Bank or the IMF, "despite clear synergies with the IF in the deliverance of technical assistance." Other weakness associated with the IF are the inadequate financial and human resources, and responsibility and control dispersed among agencies and donors (Wouters and Coppens, 2006, p.24, note 137 therein and 25, cross-referring to WTO IFSC, 2006, p.3).

<sup>18</sup> The World Bank assists LDCs to draft their Diagnostic Trade Integration Study ("DTIS"), wherein their trade reforms and assistance priorities are listed. The WTO's TPR process and Secretariat are supposed to contribute in the process in accordance with (WTO Director-General, 2004, paragraph 21)

standards. In preparing projects that will later receive a grant, the SDTF cooperates with other SPS-related organizations and initiatives, such as the EIF.

Conformity with WTO Agreements has often proved to be a rather expensive enterprise not only in terms of extensive investment in the fields of technology, administration, and knowledge and expertise. Suffice to mention at this point that compliance with the SPS Agreement, for instance, presupposes the existence of a robust scientific network (laboratories, scientific tests and analyses, as well as personnel capable of conducting and analyzing these tests) ready to provide the evidence required for imposing and maintaining GATT-inconsistent restrictions or standards that are simply not identical to those found in some international convention (*WTO SPS*, 1994; *WTO-GATT*, 1994, Article 2, paragraph 1 and 2, and Article 3-5), and that, in any case, member states are required to guarantee transparency in the process of introducing and enforcing SPS regulations (*WTO SPS*, 1994 Article 7, 8). Governments must establish enquiry points and publish in advance all the SPS measures they adopt. Additionally, they have to notify foreign exporters as well as the relevant international bodies. The Bank has significantly assisted developing countries in implementing their SPS obligations. In most cases, this kind of assistance has been placed in a more general “development context” of increasing agricultural productivity, protecting health, and ensuring food security (Finger and Schuler, 2002).

The WTO Customs Valuation Agreement<sup>19</sup> and the WTO Intellectual Property Rights Agreement (*WTO TRIPS*, 1994) present similar implementation costs for developing countries, and thus render Bank's collaboration crucial. Customs practices in most developing countries differ significantly from those in the more trade-advanced countries: poorly trained officials, corruption, excessively long, non-codified procedures, and ineffective provisions for appeal. The Bank has adopted several potential reform programs (computerization, cargo controls, training of management and staff, rewriting of legislation etc.) which, in some cases, reach a cost of US \$ 10 million per country (Finger and Schuler, 2002, p.495). Equally, in the case of the TRIPS Agreement, scientific calibration, new legislation, and civil and criminal penalties for infringement of IPRs, if member states wish to abide with the obligations flowing from the IPR international conventions.

The examples of the SPS, Customs Valuation, and TRIPS Agreements illustrate what a substantial undertaking the implementation of the WTO is and how it requires financial resources that go beyond what is already budgeted by developing countries' governments. However, on top of the implementation costs, trade liberalization creates significant adjustment costs, which is the second prong of the Aid for Trade agenda. According to the OECD, adjustment is the use of policy instruments to facilitate the adaptation to a structural change in the economic environment (Bacchetta and Jansen, 2003). Preference erosion, introduction of more stringent food safety standards, agricultural liberalization are only some of the trade policies that place a heavy adjustment onus on developing countries, which, traditionally, have had less resources to neutralize the negative impacts of trade liberalization (through education, business support services and institutions, market analysis etc.). The Task Force that was introduced for the optimal operationalization of the Aid for Trade, has recognized that inadequate adjustment-cost support is one of the major gaps in the development strategies. However, trade-adjustment assistance is incorporated into the Aid for Trade activities only to the extent that these “activities have been explicitly identified as trade-related priorities in the recipient country's national development strategies.” (WTO Aid for Trade Task Force, 2006). The beneficiary country is urged to establish national Aid for Trade Committees, which should, among other tasks, assess the national adjustment needs and broker financing for such programs. The WTO has started paying particular emphasis on adjustment assistance as a means for tying developing countries to the negotiations wagon. Therefore, the Bank is under increasing pressure to deliver such

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<sup>19</sup> The Agreement was negotiated during the Uruguay Round of Multilateral Trade Negotiations to make Article VII of the (GATT, 1947) more precise and operative. Agreement on the Implementation of Article VII of the (WTO-GATT, 1994).

kind of assistance (Sutherland and WTO, 2004).<sup>20</sup> The World Bank Independent Evaluation Group has recommended the creation of a “concrete program of adjustment assistance [...] to respond to trade-related shocks that developing countries may face” (Wouters and Coppens, 2006, p.28). However, the Doha Round did not 'give birth' to a new funding facility.

Turning the possibility of Aid for Trade into reality relies on the concerted initiatives of the WTO and the Bank. The Director-General of the WTO has been quite explicit about that: “It has never been the goal of the WTO to direct or dictate how Aid for Trade should be delivered. We are not a development agency. Except for our involvement in training, we have little specific expertise and limited resources. The WTO is about making trade possible.” (Pascal Lamy, 2007). In the case of developing countries, development assistance is the necessary accompaniment to trade opening. For that reason, the involvement of other actors, the Bank's in particular, is crucial.

### **The WTO's 'Development' Dimension cannot be Secured without Stronger Synergies with the World Bank - Interaction Theories**

There are two hypotheses implicit in the title of this contribution. The first is that trade is an important ingredient in the 'development recipe'. The second hypothesis is a logical consequence that flows from the first one: trade and development institutions should collaborate in order to 'hit two birds with one stone'. In other words, the WTO's 'development dimension' could not be secured, or more accurately, could not be effectively secured outside the trade matrix and without stronger synergies between the World Bank and itself.

The key role of trade in achieving development has been emphasized throughout this article. But the exact quantification of the importance of trade to development relies heavily on the socio-economic standpoint one will adopt. We have seen that many WTO provisions reveal the economic logic behind its trade-oriented development instruments.<sup>21</sup> Other development organizations have espoused a similar, though not entirely tautological development perspective.<sup>22</sup> “Trade and trade liberalization are not ends in themselves...[but] they can enhance a country's access to a wider range of goods, services, technologies and knowledge.” (Organization for Economic Cooperation and Development (OECD), 2001, p.17)

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<sup>20</sup> In this report, it is mentioned that the World Bank's participation should be reinforced with regard to funding adjustment assistance for developing countries.

<sup>21</sup> The Preamble to the Marrakesh Agreement “recogniz[es] that the relations of [the Parties to the Agreement] in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development...” and “recogniz[es] further that there is need for positive efforts designed to ensure that developing countries, especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” (WTO, 1994).

<sup>22</sup> The Preamble of the International Development Association (IDA) Articles of Agreement establishes a “[...] mutual cooperation for constructive economic purposes, healthy development of the world economy and balanced growth of international trade foster international relationships conducive to the maintenance of peace and prosperity” and considers that “an acceleration of economic development which will promote higher standards of living and economic and social progress in the less-developed countries is desirable not only in the interests of those countries but also in the interests of the international community as a whole”, see IDA (1960). Also, Article I paragraphs 1 and 3 of the International Bank for the Reconstruction and Development Articles of Agreement include: “the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes” and the promotion of “the long-range balanced growth of international trade and maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members”, see IBRD (1989). Finally, according to the U.N. Resolution “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”, see UN. General Assembly (1986).



These different economic mentalities about trade, development and their interrelation explain and justify the reason why there exists a mass of international organizations, each of which has its own field of expertise and armoury for the attainment of its mandate-prescribed objectives. Tinbergen's theory of economic policy corroborates such a conclusion. According to its 'father', the main condition is that same economic policy instrument cannot accommodate two different economic policy objectives; better still, the number of policy instruments should equal the number of policy targets (Tinbergen, 1991, pp.247–248). In this vein, the jurisdiction of the WTO is confined to tariffs and trade, the World Bank and its affiliates address development issues without any regulatory authority to proscribe trade policies, and so on.

The second, more nuanced condition is that these separate instruments, because of their specialization, are supposed to interact among each other (Hallett, 1989). As a matter of fact, today's institutional reality is not at variance with this principle (Petersmann, 2001, pp.1–2). Not only collaboration between international institutions is no longer an anathema but, on the contrary, it has been elevated to a policy goal. The rhetorics of omens (financial crises, environmental depletion etc.) that multiply by day and transcend national borders is one way to narrate the story of international cooperation. Inquiring into the phenomenon of institutional cooperation through the lens of GPGs is another. The GPGs approach has both normative and systemic implications for development policies. To begin with, the GPGs paradigm has effectively linked together challenges and problems that have traditionally been treated as separate. For example, it has brought together under a single frame global inequalities, threats to peace and security, international financial stability, trade, and development. These overarching imperatives cut across nations as well as international organizations and catalyze collective actions at all levels.

Second, the GPGs concept draws attention to the limitations and inefficiencies of current political, legal, and institutional arrangements for addressing development issues. Although their role is not annihilated, states are increasingly aware of their incapacity to supply 'public goods' without voluntary cooperation and participation in international organizations which increasingly become the platform for creating international public goods and encourage harmony between national policies. Hence, GPGs could be supplied “without 'international governments' through internationally agreed restraints on national policy instruments with harmful effects on other countries.” (Petersmann, 1991, pp.217–218)

Third, GPGs can be further projected onto a globalization framework; a matrix within which the authorship of public policies has been redefined as the product of collaboration between private and public actors or solely between public actors, and has rebranded the question of compliance to the question of problem-solving on a global level. Contemporary globalization has given rise to a worldwide discontent because GPGs are not provided or are ill-provided. Specifically, Kaul (2001) has argued that global policymaking suffers from jurisdictional, participation and incentive gaps that lead to the under-provision or mal-provision of GPGs. Bridging these gaps will require reengineering of international cooperation among states and national stakeholders to create a clear jurisdictional loop. By the same token, linkages between organizations with overlapping mandates should tighten to reduce the inefficiencies and redundancies which result therefrom, as well as the antagonistic tendencies that occasionally develop between them.

More specifically, in the context of GPGs, institutional cooperation is not a question about primacy or finding the preferred organization but a way to compensate for the absence of a 'super' organization equipped with all these competences that are necessary to achieve a plethora of interrelated international goals. A normative reading of Article 26 of the Vienna Convention on the Law of Treaties (VCLT, 1969) could be seen as dictating such a 'duty of cooperation among international institutions' with regards to all policies that they have in common. It is titled '*Pacta Sunt Servanda*,' and stipulates that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Pursuant to this, the member states of each of the organizations commit

themselves to fulfilling the goals they have signed up to. The principle holds true for international organizations in their capacity as subjects of international law (for an analysis of international organizations as legal subjects of international law, Akande, 2006, pp.277–304). In the present case study, the WTO and the World Bank have pledged to promote development and they should do so with all the means at their disposal, including attempts to collaborate with each other.

Jurisdictional considerations aside, inter-institutional synergies are central to the provision of GPGs in terms of resources, knowledge transfers, negotiations and rule making (Kapur, 2002). Binger notes that “the information generated helps reduce transaction costs; create links across issues; and diffuse ideas, norms, and expectations.” (2003, p.8). The collaborative initiatives undertaken by the WTO and the World Bank illustrate how this framework could become a structure of incentive-giving and financial assistance towards developing and least-developed countries, with the World Bank providing a cushion against the negative shocks endemic in trade integration. This inter-institutional network of governance posits that international institutions generate operational policies and procedures which ensure that GPGs would be made available.

The third strategic obstacle (Kaul, 2001) has identified is the participation gap that is attributed to the international cooperation being essentially intergovernmental, thus excluding from multilateral arenas non-governmental and otherwise supra-governmental actors that nonetheless contribute to GPGs. The GPGs approach suggests that closing the participation gap require that all the relevant stakeholders gather around the same negotiating table to seek consensual solutions. But is cooperation between international organization truly an antidote to this lack of representation of all affected groups? Sceptics will immediately respond in the negative, claiming that cooperation between power-oriented organizations with 'underground policy-making procedures' cannot add but to the lack of transparency, accountability, and fairness. And, although they may have a point when arguing that there is still ground to cover for the creation of a democratic international governance system, we counter argue that such cooperation cannot but enlarge the pool of participants and increase the number of voices necessary for defining regulatory objectives and allocating responsibilities for GPGs. The World Bank, for instance, through its presence in many developing countries and its contacts with local governments, communities, businesses, and other marginalized groups could convey messages that would not otherwise reach the WTO.

All in all, the normative impact of the GPGs concept to development policies pushes for a 'humanization' of globalization and an infusion of broader social, economic, and technological considerations into trade practices.<sup>23</sup> For that to happen, development strategies have to supplement and complement each other under a common vision of development, which itself is a prerequisite for nations to take full advantage of the benefits of GPGs.

## Conclusion

Since the inception of the international economic order the relationship between the WTO and the World Bank has evolved in parallel with their missions. Development, in shifting shapes and shades, has always been part of their mandate. The 'added value' of the Doha Round, independently of its potential success, or its ultimate failure, lies in the fact that it has placed development squarely on the WTO agenda and has rendered the Bank's complementary assistance *a sine qua non* counterweight to the adverse effects that integration into the trading system may cause.

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<sup>23</sup> Already in 2006 the Director-General of the WTO called for the creation of a new “Geneva Consensus”, recognizing that: “trade opening is necessary, but is not sufficient in itself. It also implies assistance: to help the least-developed countries to build up their stocks and therefore adequate productive and logistical capacity; to increase their capacity to negotiate and implement the commitments undertaken in the international negotiating system” (Lamy, 2006b).

More specifically, the Zedillo Report, already in 2001, argued that the prospect of poverty eradication and further development of developing countries depends heavily on their capacity to reap the benefits of trade liberalization; to this end, effective participation of developing countries in the multilateral negotiations through secure and predictable financing of technical assistance and capacity-building as well as enhanced cooperation of the relevant stakeholders are required (Zedillo, 2001). The Aid for Trade has been conceived along these lines but the critical voices already talk about additional funding, improved organizational set-up and more coherence.

Recognizing the potential of the WTO and the Bank in promoting the balanced supply of GPGs necessitates their upscale engagement in promulgating coherent institutional strategies that will complement each other as well as complement national 'policy space'. In this respect, some suggestions, in lieu of a future agenda, would be:

- ^ Facilitating a common understanding of development;
- ^ Adopting a clear, common and coherent vision of the kind of development international institutions are after and how trade policies could improve the prospects of achieving development goals;
- ^ Ensuring that existing policy-making and financial mechanisms have the necessary robustness and flexibility to deal with GPGs funding needs;
- ^ Assigning institutional responsibilities and intensifying collaborative arrangements for GPGs so that inefficiencies of having many separate initiatives for the supply of GPGs are avoided;
- ^ Incentive-giving and encouraging domestic policies designed to strengthen national market institutions for the harvesting gains from trade and productivity.

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# Why Climate Change Collective Action has Failed and What Needs to be Done within and without the Trade Regime

Daniel Esty and Anthony Moffa\*

## Climate Change as a Collective Action Problem

Climate change stands out as the quintessential global-scale collective action problem with implications that require carefully managed policy coordination and multi-level governance. The build-up of greenhouse gases in the atmosphere threatening global warming, sea level rise, changed rainfall patterns (leading to shifting agricultural productivity), and increased intensity of hurricanes and typhoons cannot be successfully addressed by any one nation acting alone nor by governmental action at any one level of geographic scale (Ivanova, 2010, p.30).

The atmosphere into which greenhouse gases are emitted is inescapably shared by all nations, and the emissions from each travel freely across national borders. Although the emissions are global in scope, the polluting activities often require local, state/provincial, or national monitoring and control. Where a natural resource is shared among many countries as in the case of the atmosphere (or the oceans), fostering sustainable resource use often proves to be excruciatingly difficult. Some countries (or sub-jurisdictions) may not share the views of others as to how serious the problem is, how much should be invested in a policy response, or how to trade off a commitment to the shared problem versus other priorities. Will India pay for greenhouse gas controls – or insist that scarce environmental resources go toward expanded drinking water infrastructure? And some nations may act strategically – hoping to “free ride” on the efforts of others. Problems of the “global commons,” of which climate change is the ultimate example, thus highlight the need to manage ecological interdependence alongside economic interdependence and to develop versatile governance regimes that can manage across the multiple scales at which action will be required.

Without a commitment to managing interdependence, institutional flexibility, and carefully crafted policy instruments, this sort of “public good” will be under-provided, leading to a “tragedy of the commons,” where national policy optimization leads to global over-exploitation of a limited resource (see generally Olson, 1965).<sup>1</sup> In the case of climate change, this risk translates into an increased threat of global warming and the other harms identified above. Without cooperation and discipline on “free riding,” the environmental concerns related to climate change will go unaddressed. Moreover, any country acting unilaterally to reduce emissions – and bearing costs that others do not – faces the prospect of competitive disadvantage. For every nation, the benefit-cost calculus related to their own greenhouse gas emissions control efforts will be negative. Simply put, no nation will reap benefits from their own climate change mitigation efforts alone that would justify the costs. The case for action comes solely from the logic of reciprocity, supported by governance cooperation across both vertical and horizontal scales (Daniel C. Esty and Geradin, 2000).

Reciprocity and a commitment to manage interdependence systematically depends on the burden of responsive action being spread in a manner that engages all parties (or at least all major players) fully and fairly. In the case of climate change, two separate “burdens” must be considered: (1) the distribution of the harms from climate change (and thus the benefits of emissions control) and (2) the costs of emissions control. Unfortunately, the distribution of potential harms from climate change is neither evenly spread nor correlated with emissions. Small island states, for instance, emit very little

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<sup>1</sup> Highlighting public goods as the source of all collective action problems and defining them, in the traditional economic terms, as goods which are non-excludable (i.e. one person cannot reasonably prevent another from consuming the good) and non-rivalrous (one person’s consumption of the good does not affect another’s, nor vice-versa).

but are likely to bear high costs in the form of sea level rise and more severe windstorms. Likewise, some powerful political interests within the biggest emitters, including both China and the United States, perceive the benefits of a reduced threat of climate change to be less than the costs in the form of higher energy prices and potentially diminished economic growth.

Thus, while there is generally agreement on the need for “common but differentiated responsibility” (see e.g. Kyoto Protocol, 1997, p.22), no consensus exists on the particulars of what “burden-sharing” should look like in the climate change context. European nations have committed to action ahead of the pack. But other industrialized nations such as the United States (as well as Australia and Canada) have balked at taking action for fear of “free riding” on the part of major developing nations who have become trade competitors. China and India, the particular targets of this concern, continue to insist that they are too poor to be assigned greenhouse gas emissions control obligations. These emerging industrial powerhouses argue that the developed countries are responsible for most of the historic emissions and should therefore bear the responsibility for fixing the problem. Of course, some recently developed nations, such as South Korea, Mexico, Brazil, and Chile, acknowledge their greenhouse gas emission obligations and would accept targets in a “Beyond Kyoto” climate change treaty (Torre et al., 2009, p.50; see also Green Climate Fund, 2011 noting that the Republic of Korea offered to contribute to the start-up cost of the Green Climate Fund). Still many developing nations remain too poor to be asked to do very much at all, thus, each Conference of Parties to the United Nations Framework Convention on Climate Change, including Copenhagen in 2009, Cancun in 2010, and Durban in 2011, has simply resulted in aspirational agreements to agree at a later date (*Establishment of an Ad Hoc Working Group*, 2011).

Divergent values and priorities across the nations of the world exacerbate this burden-sharing problem. The higher discount rates used by poor countries with fast-growing economies make coordinated environmental governance even more difficult. Thus, even when costs and benefits are carefully calculated and the value judgments are made explicit; the various peoples around the world may come to different conclusions regarding the optimal level of commitment to emissions reductions. There has not yet been a unifying burden-sharing principle enunciated or even commitment to a sufficiently robust environmental governance mechanism to facilitate collective decisions – and more importantly, ensure adherence to an emissions control regime.

Climate change also presents a “commons problem” of a unique scale and complexity. Due to the wide range of greenhouse gas sources and issues, climate change implicates a large number of international, national, regional, state/provincial, and local regulatory bodies with overlapping jurisdiction and, at the same time, incomplete coverage and limited accountability. This phenomenon, dubbed a “regulatory commons problem,” results from hesitation of those with jurisdiction to act unilaterally (Buzbee, 2003). This second-order commons problem is further complicated by the challenge of sovereignty, with international institutions generally deferring to nation states to choose how to regulate their own citizens.

This paper argues that more effective global environmental governance will be needed to address climate change. In particular, we believe that a new environmental regime needs to be constructed with institutional capacities designed to respond to global-scale collective action problems in general and the specific challenges of climate change in particular. But we do not believe that even a robust Global Environmental Organization can succeed without support from other international bodies, most notably the World Trade Organization. In laying out this argument, we begin by providing a diagnostic profile of the current environmental regime’s failure. Although there have been numerous scholarly attempts to derive frameworks for international institutional *success* (Buzbee, 2003, describing a framework labelled the ‘three C’s,’ which claims that any effective action of environmental institutions is likely to increase concern or capacity, or improve the contractual environment; Barrett and Stavins, 2003, p.369), few studies have focused on the elements of failure. This gap persists despite the acknowledgement by many in the field that poor institutional design is

one of the core problems plaguing global environmental governance (Ivanova, 2010, p.46). We group the elements of institutional failure into three categories: (a) political economy considerations, (b) negotiation roadblocks, and (c) structural deficiencies with regards to ensuring adherence to shared commitments (i.e., lack of discipline on free riding). We present the specific characteristics in each of these problem areas and then develop the case for a Global Environmental Organization (GEO) to address the identified shortcomings (the proposed GEO expands upon and updates Daniel Esty's earlier models, see Esty, 1994a; Esty and Ivanova, 2003).

We go on to explain that even a well-functioning GEO will not be able to respond adequately to the climate change challenge. Given the nature of climate change costs and benefits as well as the disagreement over burden-sharing, the environmental regime must be reinforced by a broader framework of global governance – in particular an international trading system which ensures that access to the gains from economic integration made possible by global markets are available only to those who share the burdens of ecological interdependence. Ongoing cooperation to address a problem that requires all to bear costs cannot be achieved without a system of discipline – which is easier to base on withheld benefits than imposed through threats. In this regard, we note that the trading system (with its recognized benefits) has made great strides in moving toward greater recognition of environmental concerns, including climate change (Lamy, 2007; Esty, 2001), but still has some distance to go. We spell out the further steps required within the WTO to ensure that the trade regime plays a constructive role in reinforcing the proposed GEO and responding to climate change.

## **Diagnosis of Failed Climate Change Policymaking at the Global Institutional Scale**

Progress at the global scale in addressing climate change has been modest. The trajectory of global scale climate change policy progress has been flat, or even downhill, since the Framework Convention on Climate Change was signed in Rio de Janeiro in 1992. The two intervening decades of negotiations have failed to produce the serious international commitments needed to address the problem. Recent “conferences of the parties” in Copenhagen, Cancun, and Durban made strides with regard to financing mitigation and adaptation, deforestation, and adaptation strategy (see e.g. Green Climate Fund, 2011; *The Copenhagen Accord*, 2009, establishing ‘Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.’), but a real decision on a new over-arching climate change treaty has been repeatedly deferred.<sup>2</sup>

The burgeoning literature on the international climate change negotiations reveals a number of breakdowns. These diagnostic elements fall into three broad categories: political economy considerations, roadblocks to negotiation, and inadequate incentives for cooperation.

### ***Political Economy Considerations***

#### Complexity of the system

The first commonly identified source of regime failure is the complexity of the international environmental governance structure (Halvorssen, 2007; Alter and Meunier, 2009; Stavins, 2010; Asselt, 2007). A complex system makes directed and coordinated efforts especially difficult. The institutional inertia makes collective action even less likely. The overlapping jurisdiction of numerous

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<sup>2</sup> Most recently in Durban, South Africa the parties agreed only to establish yet another working group that has as its stated goal the development of a new “protocol, legal instrument or agreed outcome with legal force” by 2015, which will take effect by 2020. The Ad Hoc Working Group on the Durban Platform for Enhanced Action group is in addition to the existing Ad Hoc Working Group on Long-term Cooperative Action under the Convention (FCCC, 2011).

international bodies is particularly problematic in the climate change arena. With the FCC, UNEP, UNDP, UNCSD, UNFAO, WHO, WMO, and the World Bank all playing a role, coordination becomes difficult and accountability limited. Each of these institutions has a distinct mandate and divergent goals, core competences, and practices. This fragmented structure translates into limited environmental cooperation, lost opportunities for synergistic actions, and poor results. In addition, there has been little effort put into aligning the efforts of those with international environmental policymaking responsibilities with the goals and programs of the institutions with economic and development mandates. This means little integration between environmental cooperation efforts and other policies necessary to achieve sustainability goals (Esty, 2004, p.111).

#### Disagreement Concerning Burden-Sharing

Disagreement over burden-sharing represents another source of regime failure (Wiener, 1998; Stavins, 2010), the lack of fundamental reciprocity and the disparate impacts of climate change and costs of mitigation and/or adaptation across countries have been well-documented. The divergent views on national self-interest and whether the risks from climate change merit a significant response cuts across the traditional North-South divide. Europe favours a robust policy response while the United States has not yet agreed to take action. The plea from the island states for emissions controls has fallen on deaf ears in China and India.

Divergent perceptions about the scale, magnitude, and timing of climate change impacts – and thus the costs of *inaction* – have been exacerbated by disputes over who should bear the costs of intervention. The division is not so much between developed and developing nations (“North-South”) but rather among high-emitting nations as to who should take action and who should pay for emissions controls. Most notably, the United States has been unwilling to commit to action unless all nations (or at least all major emitters) also make commitments. But China, India, and some other emerging economies have pled poverty. They further argue that, as a historical matter, much of the current build-up of greenhouse gases in the atmosphere can be attributed to the nations that industrialized in the 20<sup>th</sup> Century, particularly the United States and Europe. In response, the United States and others have argued that China and other recently industrialized nations are no longer poor – and that they should bear a share of the burden of ecological interdependence as a price for the huge benefits they have gotten from global economic integration.

This “values divide” has become even more salient with the onset of the economic downturn, as the United States public has become unwilling to bear costs while China does not. Competitiveness tensions exacerbate this sense that free riding by China and India cannot be tolerated. Despite studies highlighting the cost of climate inaction (see generally Stern, 2007), the immediacy of job losses in developed nations has led many United States citizens to believe that the burden of international action would simply be too great unless major trade competitors, such as China and India, share the load.

#### ***Negotiation Roadblocks***

##### Large size of the group attempting coordination

Climate change negotiations have been strained from a purely practical standpoint by the sheer number of parties involved (Esty, 1999a; Harris, 2007; Stavins, 2010). Growing participation in climate change negotiations has had an inverse relationship with the productivity of the policy dialogue since 1992. While almost 200 countries now participate in the negotiations (up from roughly 150 in the early 1990s) the results have gotten worse, not better (Stavins, 2010; see also Esty and Mendelsohn, 1998). The number of seats at the table and the attention paid to new voices has grown to accommodate rising powers, such as China, India, and Brazil. Although a positive development from

an inclusiveness standpoint, this expansion has not made getting a consensus any easier. Quite to the contrary, collective action problems become increasingly challenging to solve as the size of the group grows. The logic of reciprocity becomes harder to recognize – and the balancing of divergent interests harder to reconcile (Harris, 2007, p.202). Likewise, the larger the number of parties that are included in a negotiation, the larger the transaction costs that must be incurred to reach an agreement (Stavins, 2010; Olson, 1965, noting ‘organizational costs’ among the difficulties of large group collective action; Esty and Mendelsohn, 1998). Negotiations with such a large group will inevitably fall victim to Arild Underdal’s “law of the least ambitious program,” holding that the effectiveness of an international agreement is limited by the commitment level of the agreement’s least interested party (Victor, 2006, p.90). Progress may thus require the convening of a smaller “key players” group. It might make sense to work out a basic framework among “pivotal states,” (Esty, 1999a) including the top 15 emitting nations and key regional representatives beyond this.

#### Lack of United States leadership

The lack of clear vision and forceful leadership represents another commonly cited functional deficiency in the negotiating process. The reluctance, in particular, of the United States to take a leadership role is seen by many as crippling (Schenck, 2008; Highum, 2006; Harris, 2007, p.222; Conti, 2010; Sugiyama and Sinton, 2005). As the world’s largest economy, the United States has played a major role in all of the most effective international environmental agreements and efforts (compare, e.g., the success of Montreal Protocol, 1987 which has U.S. support; with the resolute ineptitude of the Kyoto Protocol, 1997, which did not). Without the United States as a guiding and committed voice many nations have been hesitant to make any real commitments. What’s worse is that the actual negotiations are less focused and certainly not at all consolidated as a result (see Section on the Complexity of the System above; see also Ivanova, 2010, p.46, attributing most of UNEP’s deviations from its mandate as the global leader on the environment to the lack of support from member states, particularly the United States). Groups attempting to coordinate action develop intrinsic characters and interests as well as the capacities to pursue an autonomous line of thought, which further explains the need for a powerful guiding influence exerted by an individual leader (Ivanova, 2010, p.47).

The United States hesitation on climate change has been driven by many reasons including ideology, shifting scientific attitudes, and partisan politics. But economic concerns, magnified by the severe 2008 downturn, have shaken the United States public’s belief in globalization in general and trade liberalization in particular (Ahearn, 2009). Diminished competitiveness, leading to job losses and a perceived “hollowing out” of the United States industrial base, has angered many Americans – intensifying the need for creative thinking at the trade-environment interface. In the United States, popular opinion now holds that China, India, and other new developing nation competitors have profited at the expense of the United States – and thus cannot be exempted from bearing a share of the burden of environmental collective action. Thus, the United States, will not act until China and India commit to taking a share of climate change responsibility. And China and India will not make any such commitment until the United States shows that it will take the issue seriously, creating a chicken-egg problem. This negotiating standoff has completely stalled the possibility of any real collaborative efforts to mitigate climate change.

#### ***Lack of Institutional Discipline***

The breakdown in climate change cooperation has been further exacerbated by lack of a robust mechanism to ensure reciprocity and maintain the discipline of shared burdens. Without a well-functioning global environmental governance regime, those who will be asked to make sacrifices and bear costs cannot be sure that others will do the same (cf. A. Chayes and A. H. Chayes, 1998, pp.9–17,

detailing the reasons for non-compliance with international treaty obligations, including, inter alia, the indeterminacy of treaty measures). Fear of free riding and non-compliance with agreements makes concluding a serious climate change action commitment all the more difficult.

The structure of the climate change challenge – which requires parties to bear costs and forbear certain actions (which, when viewed from a national perspective yield benefits that exceed costs) – makes cooperation especially difficult. The logic of reciprocity may be insufficient to maintain discipline. In the face of a problem which has benefits that derive entirely from future risks not faced and costs not borne, the global environmental regime seems hopelessly inadequate. The advantages of international cooperation are much easier to make vivid where nations face the loss of perceived opportunities for gains. Thus, success in advancing a regime of global climate change cooperation seems hard to imagine without linkage to the broader structure of global governance – and the trading system in particular.

From a WTO point of view, such linkage may well be unwanted and appear burdensome. But the inescapability of the trade effects on the environment and environmental impacts on trade have been well-documented (Esty, 1994b, 2001; Charnovitz, 2008, 2007). So the real issue is not *whether* but *how* this relationship will be managed. And to be clear, absent a carefully worked out trade-environment structure, and in the face of significant uninternalized externalities in the form of greenhouse gas emissions, the trading system will (however inadvertently) produce results that are economically inefficient, lower social welfare, and produce fundamental unfairness across nations and within societies as well as on an intergenerational basis – not to mention generate significant environmental degradation.

### **How a Global Environmental Organization Addresses the Identified Shortcomings**

As the previous section demonstrates through the diagnosis of regime failure, improved global environmental governance is essential to climate change policy progress. The current gaps in issue coverage and a lack of clear lines of authority plague the international environmental regime in general and the prospect for action on climate change in particular. At present, no international institution seems up to the task of coordination. This gap needs to be filled. A Global Environmental Organization that is carefully crafted to avoid the identified pitfalls of regime failure and tightly coordinated with the trade regime provides a potential solution.

Climate change makes manifest the need for an overarching mechanism to support international cooperation in response to transboundary environmental problems (Esty, 1996, p.150; Lee, 2010, pp.328, 329, 336, arguing that global regulation from some type of world government organization may be the most efficient and only practical means of overcoming a climate change collective action problem). What is needed is a 21<sup>st</sup> century international organization that is sharply focused, lean, agile, and effective in leveraging the strengths of the rest of the international governance system to attain better environmental results (Ivanova, 2010, p.54). Although some observers have suggested that UNEP could fill this role, it was originally conceived as a “program” not an institution, and it has never been able to grow into conception broader institutional role because of the pathologies described previously (part I supra).

Some scholars have taken note of UNEP’s shortcomings and concluded that no international body has any real hope of solving a collective action problem of the magnitude of climate change (Ostrom, 2010, p.552, ‘Simply recommending a single governance unit to solve global collective-action problems—because of global impacts—needs to be seriously rethought.’). But the limitations of UNEP and the absence of systematic synergies with current U.N. bodies offer no real argument against the creation of a GEO (Esty and Ivanova, 2002, p.197). Indeed, the existing difficulties argue for overhauling the international environmental regime rather than tinkering with reforms to UNEP.

Undoubtedly, sovereignty concerns will make creation of any new international institution problematic. But, ecological interdependence is inescapable. The fact of our shared biosphere makes the issue not whether to have an international environmental policy mechanism, but what sort of institution to have. In this context, a new GEO offers an attractive option as it could be specifically designed to address the identified systematic failures that plague the current system.

### ***A Lean and Consolidated Organizational Structure***

A fresh start in global environmental governance would offer a way to rationalize the existing mass of confusing international entities and jurisdictional overlaps. A GEO could be fashioned from the consolidation or elimination of the existing international bodies that have some jurisdiction over the environment including UNEP, WMO, the CSD, and all of the existing environmental treaty secretariats. Modelled on the concept of “networked governance” (Slaughter, 2004, expounding on the concept of networked international governance; ‘Program on Networked Governance’, 2012), a GEO would offer a faster, problem-oriented entity with access to state of the art knowledge, and simultaneous proximity to decision-makers at the international, national, state/provincial, and city scales (Esty and Ivanova, 2002, p.197). It might also provide a compliance mechanism designed to track transboundary environmental harms and member states adherence to treaty commitments. Such a monitoring mechanism would function better if reinforced by the WTO. This new structure would make it possible to strengthen the overall coherence of international environmental governance by taking advantage of a coordinated approach to the range of existing environmental treaties and programs – minimizing potential or actual conflicts (Asselt, 2007, p.2). A GEO should be lean, flexible, and focused on the specific challenges presented by international environmental problems drawing on expertise from governments at all levels.

### ***A GEO Could Help Narrow the “Values Divide”***

A GEO could also help to bridge the gap with regards to burden-sharing and the “values divide.” A GEO would not only provide a mechanism for bargaining, but could also offer a forum for data collection and analysis, information exchange, policy benchmarking, identification of best practices, technology transfer, and dispute resolution functions (Esty and Ivanova, 2003). A GEO would enhance environmental policy cooperation by permitting jurisdictions to draw on each other's experiences, technologies, and training programs. High quality data with cross-country comparability is necessary to support an effective policy response – supporting efforts to define the scope of the problem, assess policy options, and evaluate the results of emissions control programs. Reduced technology and information gaps between nations might well narrow the values divide and facilitate agreements on policy instruments. The UNFCCC conventions have been conspicuously devoid of real efforts to provide an adequate forum and incentives for technology transfer between nations; a GEO would provide such a forum along with a structured process and incentives for technology transfers. To ensure that there is effective technology to exchange, a GEO would also help to create financing instruments for the development of innovative low-carbon technologies.

Furthermore, a GEO would provide a policy formation space that would facilitate coordination of regulatory policies so as to avoid a competitiveness-driven race toward the bottom. Such a collaborative process would also allow for some convergence of environmental standards across countries at similar levels of development – broadening the marketplace for clean energy solutions.

In addition to bridging gaps in technology and regulatory policy, a GEO could provide a mechanism to manage financial assistance to developing nations. Financial support is an essential element of any “global bargain” that might garner the support of nations with limited resources, many of whom feel that the “polluter-pays” principle argues for industrialized nations contributing more funds to climate change mitigation. A financial transfer instrument has become even more critical with

the recent global recession as many nations now fear that the policy instruments necessary to respond to climate change will chill economic recovery. Without a straightforward and streamlined formula and mechanism for financial transfers, the burden-sharing problem will continue to weigh down any effort to advance a global response to climate change.

### ***A GEO could Mitigate the Difficulties of Coordinating a Large Group***

Because of the global nature of the climate change problem and the necessarily comprehensive nature of any meaningful solution, coordination across many nations will be needed for policy success. But not everyone needs to be part of the negotiations or the administration of an agreed-upon policy response. The goal should be to craft a functioning regime that can respond systematically and coherently to the global collective action problem. A GEO might help with this task through several institutional design elements. First, a small and efficient organization – perhaps even a “virtual” organization in many respects – could be tightly focused on handling just the global-scale aspects of climate change. This “light” structure of global governance would need to leverage the capacities of national governments as well as provincial/state, regional, and local governments (Daniel C. Esty, 1999b). It would also be useful to draw on business, civil society, academic research, and community organizations.

Second, a GEO could serve as a forum for negotiations on rulemaking as well as coordination on strategy implementation. With a “pivotal states” Executive Committee guiding the collaboration, a GEO might avoid the stasis associated with reaching consensus among almost 200 nations on every minute detail of the international climate change policy agenda.

Finally, a GEO might provide a mechanism not only to support policy implementation on an international scale but also capacity building and policy coordination at the national and sub-national levels. Such a multi-tiered structure would make it easier to tailor policy instruments to local circumstances, traditions, risk preferences, and values. “Networked governance” and mechanisms to draw on the expertise and strengths of local organizations offers the prospect of a leaner and more efficient institutional structure better positioned to deliver on-the-ground-results.

### ***A GEO Presents a Leadership Opportunity for the United States***

Getting the world’s climate change process out of the Kyoto Protocol framework and into a new forum would provide a graceful way for the United States to move from being disengaged back into a leadership role. As noted above, the prospects for *real* action to control greenhouse gas emissions, enhance carbon sinks, and invest in appropriate adaptation in vulnerable places around the world will remain low until the United States reasserts itself in the process. While the push to reinvigorate global environmental policy cooperation through a GEO would not itself guarantee U.S. engagement on climate change, it would make it easier for a U.S. Administration to come back into a leadership position.

## **Climate Change and Trade – Why Separate but Coordinated Regimes are Necessary**

The recognized need for discipline on free-riders and a mechanism for enforcing international environmental obligations has led a number of commentators to look to the trading system for institutional muscle (Doelle, 2004; Esty, 1994b). While trade experts worry that the trade regime is itself fragile (highlighting the lack of success of the Doha Round) (Wolfe, 2007; contra Martin and Messerlin, 2007, arguing that it is not the trade system itself, but rather external factors that have made recent negotiations less fruitful), and that any attempt to enforce climate change commitments through



trade penalties will further weaken the WTO, the environmental world perceives the WTO as a venerable institutional success with dispute settlement procedures that deliver real results.

There exists, however, an undeniable link between trade and the environment – and a need to have those who are the beneficiaries of open world markets bear a share of responsibility for the burden of responding to global-scale environmental threats (Esty, 2001). Interdependence requires recognition of responsibilities as well as rights.

While economic integration is a policy choice, ecological interdependence is not. It is a physical fact that must be managed – or the world risks suboptimal outcomes from free trade including an increasing threat of climate change. The call to keep trade and environmental policymaking on separate tracks is not just normatively inadvisable; it is practically impossible.

As trade expands and the bonds of globalization thicken, the future of trade liberalization cannot be disentangled from transboundary environmental challenges in general and climate change in particular. Ignoring the environmental impacts of expanded trade poses not just a risk of ecological degradation but also a backlash against further economic integration. So the WTO must act to reinforce the global response to climate change not just out of some sense of social responsibility, but out of self-preservation. Successful management of ecological interdependence requires policy coordination at the global scale and action undertaken at more decentralized levels by governmental authorities with operational control over those responsible for emissions, capable of enhancing sinks, and positioned to mitigate harms.

The case for a GEO emerges from theory and practice. The matching principle (Butler and Macey, 1996) argues for policy collaboration at the scale of the harm to be addressed. In the case of climate change, this means worldwide. Thus, the need for an overarching global-scale action plan suggests that a Global Environmental Organization of some kind must be established. But in practical terms, those positioned to reshape the behaviour of the actual emitters – factories, farmers, vehicle drivers, etc. – must have operational control. Thus, the logic of multi-scale governance becomes overwhelming. The WTO, although a crucial player in the environmental regime, cannot be expected to do all the heavy-lifting. Coordinated and complimentary WTO and GEO institutions would bring environmental governance to fore of international policymaking and go a long way towards making environmental commitments real, as opposed to merely aspirational rhetoric.

## **Conclusion**

Climate change must be understood as an economic as well as an environmental issue – requiring “governance” in both an economic (WTO) and environmental (GEO) context to avoid market failures and ecological peril. The pervasive weakness of the UN Environment Programme and other existing international environmental bodies argues for a reconfiguration of the current global environmental regime – and the creation of a Global Environmental Organization. Success of any reengineered environmental regime, including a new GEO, would necessarily depend on cooperation with governmental entities at more disaggregated levels. Thus, progress in addressing climate change will require both horizontal and vertical investments in improved environmental governance. The world needs a GEO as a counterpart – and counterbalance – to the WTO. But it also needs multi-tier environmental policymaking so as to achieve operational success.

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# Global Public Goods and Asymmetric Markets: Carbon Emissions Trading and Border Carbon Adjustments

Moritz Hartmann\*

## Introduction

The provision of global public goods is based on a narrative of common concerns. As considerations of common concern can find individual or collective expression in a variety of different *fora*, meaningful political action can only be institutionalized by moving from international discourse to normative methodologies. Given the wide spectrum of common concerns, the identification of a global public good mostly entails the adoption of legal agreements that express common concern, and state the intention to move toward concerted action (Kaul et al., 2003, p.13). The challenge of enforcing international agreements concluded by sovereign entities, however, can be of a complex nature, as can the regulatory *vacuum* between the broad contours of stated objectives and effective political action (on the complexity of legal self-enforcement and compliance, see A. Chayes and A. H. Chayes, 1998). The binding implementation of agreed legal instruments, which define regulatory objectives and allocate responsibilities for the public goods to be protected, is therefore of pivotal interest for fostering state-based compliance. In addition, a provisional understanding of the regulatory composition of the good itself is required.

Taking into account the global nature that characterizes climate change, the efforts made by multiple institutions in the last decades to effectively protect the climate provide an integrated example of supranational and interdependent public goods regulation. Climate change is one of the very few policy challenges that corresponds very closely to the standard definition of a global public good and the tragedy of the commons: everyone producing carbon dioxide emissions contributes to increasing the risks of adverse climatic changes, and everyone reducing greenhouse gas emissions contributes to the mitigation of these risks (Hardin, 1968; Baettig and Bernauer, 2009; Heyvaert, 2010). Global warming, in that sense, refers to a global negative externality as it involves the “global environmental commons.” (Trebilcock and Howse, 2005, p.509).

As early as 1972, years before the normative concept of global public goods had become established, the United Nations Conference on the Human Environment in Stockholm addressed the fragile state of the global environment for the first time at an international level. The conference has therefore been considered to mark a turning point in the development of international environmental politics (Baylis et al., 2010, pp.454–455). The emergence of global environmental policies has indicated the (limited) carrying-capacity of the planet – referring to both the exploitation of natural resources and the decrease of environmental quality (Stavins, 2010, p.1). In this regard, the emergence of international environmental legal obligations facilitated a common understanding of climate change as a global public good. An unprecedented level of common concern is reflected by the multitude of regulatory levels, ranging from biodiversity; to water and air quality; hazardous waste; ozone layer protection; societal adaptation; and, most importantly, the global emissions of greenhouse gases. The severe management of climate change exceeds the limited scope of sovereign states and therefore requires cooperation on global scales. Considering that the effects of climate change have spread across continents, countries and communities, state and non-state authorities have been asked to create incentives at various policy levels for the promotion of public goods protection. Within the last two decades, the evolution of global climate governance has been shaped by incentives that are based on two regulatory assumptions: the integration of market-based approaches to environmental protection

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regimes, and the out-sourcing of responsibilities for achieving emission reductions on behalf of international organisations and nation states (Scott, 2011, pp.805–835; Winter, 2010a, pp.49–89).

The objective of this paper is therefore to examine the methodological nexus between global public goods protection and the regulation of climate change mitigation, and to connect some elements of the global regulatory puzzle on how, when, and why it can (not) work. In this regard, the paper considers different approaches to effectively averting anthropogenic climate change. I begin by examining the specific nature of climate change mitigation, for which I consider the inherent effects of regulatory multipolarity to decision-making and norm-making processes on European, international, and regional scales. The methodology itself will then be emphasized in the analytical context of three different case studies: the European Union's emissions trading scheme (EU ETS), regional trading initiatives in North America, and the conceptualization of Border Carbon Adjustments in transnational trade.

The paper aims to deconstructing the legal *code* of global climate change regulation and proposes to shed some light on the effectiveness of the mentioned instruments of regulation, from the perspective of long-term protection of the global public good that is climate change. As the future of global climate policy is likely to be built out of a collection of fragmented domestic commitments, these approaches are understood as being highly important for the *normative* understanding of different mechanisms set up on different regional levels.

## The Legal Code of Climate Change Regulation

Within the international regulatory sphere, there are very few inter-generational problems subject to the same multilevel character as the regulation of climate change. The mitigation of greenhouse gases, for example, requires new regulatory methodologies of environmental protection, and the global consumption of fossil fuels affects transnational inter-linkages between energy and security. Further to this, global warming undermines the architecture of global trading patterns, as well as our notions of growth and competition, welfare and technology transfer, investment policy, and sustainable development.

Moreover, the impacts of climate change may be severe for a number of nations, threatening economic structures or food production and maybe even requiring the relocation of effected communities (Biermann, 2010, p.284). Given that millions of individual or collective entities affect the global atmosphere, the *code* of climate change regulation is determined by a fundamental regulatory dilemma: “All benefit from reduced greenhouse gas emissions, but the problem is they benefit whether or not they pay any of the costs. In other words, beneficiaries cannot be excluded from the benefit of cleaner air. Trying to solve the regime of providing a public good is therefore a classic collective action dilemma.” (Ostrom, 2009, p.5).

In other words, it is a major problem of freeriding. As the joint 'good' is reducing a joint 'bad,' caused by increased emissions of greenhouse gases, air pollution and deforestation, solutions to abate the collective action problem of climate change are related to a multipolarity of policy fields and involved actors. While the standard model of international environmental law has been determined by norms set by agreements among states, the global regulatory *vacuum* averting climate change has enhanced different processes of policy diffusion, developing a multitude of regulatory arrangements (Ostrom, 2009, pp.8, 16). From this perspective, international regulation addressing climate change mitigation has been characterized by its 'fragmentation' of legal developments, its 'regionalization' of regulatory initiatives, and its lack of enforcement of norms and principles (Barrett, 2003, p.360; van Asselt et al., 2008, pp.423–449). In particular, the inadequate implementation of environmental rules in domestic legal systems vis-à-vis private polluters and governmental administrations has weakened treaty-based intergovernmental rules on this specific collective action problem (Petersmann, 2008, p.136 ff; Kingsbury, 2007, p.72 ff).

Therefore, in the absence of international agreements that effectively address the regulation of carbon emissions on global levels, the regulatory problem which is global in origin has become regional by regulation. The current policy regime, initiated by the inclusionary property regime of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) in Rio, and further institutionalized by the (Kyoto Protocol, 1997), has allocated considerable power to the implementation of economic instruments for the protection of the global environment (Louka, 2006, p.103). Assuming that hierarchical legal mechanisms have (so far) failed to provide adequate incentives to limit greenhouse gas emissions effectively, the use of economic instruments has been based on the regulatory belief that marketization can provide adequate incentives for guiding human behaviour. According to a European Commission report from 1990, economic instruments in environmental law can affect the “costs and benefits of alternative actions open to economic agents, with the effect of influencing behaviour in a way which is favourable for the environment.” (Sands, 2003, p.159; European Commission, 1990; see also OECD, 1991).

The Kyoto Protocol, which entered into force in 2005 (after the ratification of Russia as the 55th country joining the Protocol), established a number of mechanisms to induce international cooperation on climate change mitigation. It has influenced the set-up of regulatory arrangements on regional levels by transforming the global legal vacuum into the codification of regional initiatives. Since climate change was considered “the biggest market failure the world has ever seen,” (Stern, 2007) the Kyoto Protocol aimed to convert the market failure through the systemic marketization of carbon emissions. This was approached through flexible mechanisms: emissions trading, joint implementation (JI), and the clean development mechanism (CDM) are meant to provide for large-scale development of market instruments in environmental policies. The protocol’s rationale was based on the assumption that the economics of global public goods provision determine the potential gains from cooperation as well as the degree of cooperation that can be sustained by the polycentric international regulatory order (Barrett, 1999, p.216).

Even though the protocol set emission reductions of only 5.2% for developed countries compared to 1990 levels (2008-2012), it provided an initial step that is necessary for developing effective global carbon governance in response to the realities of global interdependence, which requires multilevel governance of interdependent public goods (Petersmann, 2012a). In addition, the Kyoto Protocol’s stumbling process of ratification over seven years has helped increase discursive awareness of climate change as a matter of international politics.

Regardless, the global political community was not able to successfully negotiate a post-2012 follow-up agreement of the Kyoto Protocol at the UNFCCC conferences in Copenhagen (2009), Cancun (2010), and Durban (2011). According to the 2007 *Bali Road Map* (UNFCCC, 2007), the parties to the Kyoto Protocol agreed on adopting a binding post-Kyoto agreement at the Copenhagen conference already. Due to asymmetric expectations between developing, newly industrialized and developed countries toward a proportional global burden sharing of carbon dioxide (CO<sub>2</sub>) emission reductions, the conferences have failed to transform the emerging awareness into legally binding and enforceable post-Kyoto targets. Moreover, the negotiations in both Copenhagen and Cancun revealed a renaissance of sovereign nation state interests undermining the evolution of binding international norms. For the sake of protecting domestic growth and national economic welfare, nation states agreed to negotiate a post-Kyoto agreement until the end of 2015 through the *Ad Hoc Working Group on the Durban Platform for Enhanced Action*, and have decided to begin the second commitment period under the Kyoto Protocol on 1 January 2013 (AWG-KP, 2011). Parallel to this, global carbon dioxide emissions reached a historical record high in 2010 (after a dip in 2009), which is thought to be caused by the global financial crisis. This is considered to represent a serious setback to limiting the global rise in temperature to no more than 2°C (for calculations on the remaining global budget of greenhouse gas emissions to reach an average global warming of 2°C by 2100, see M. Meinshausen et al., 2009; WMO, 2011). According to the latest estimates of the International Energy Agency (IEA, 2011),

around 80% of projected emissions from the energy sector in 2020 are already locked in, as they will come from power plants that are currently in place or under construction today.

From this perspective, and as will be further shown in the following analysis, it remains doubtful whether the current system will secure a transition to low-carbon societies and a limitation of greenhouse gas emissions to safe levels, which have recently been described as being around an atmospheric CO<sub>2</sub> concentration of 350-450 parts per million (Biermann, 2010, p.284). Considering the estimated time frame for reducing greenhouse gas emissions effectively, it remains questionable whether the marketization of carbon dioxide emissions represents an appropriate method of global public goods protection in the process of great (societal) transformation.

## **The Marketization of Public Goods: Carbon Emissions Trading**

The European Union's climate change policy is based on the 'colonisation' of regulatory approaches: the United States (U.S.) have initially favoured the integration of supranational cap-and-trade systems to promote CO<sub>2</sub> emission reductions, particularly during the Kyoto Protocol's preparatory negotiations, whereas the European Union has repeatedly argued in favour of domestic taxes on carbon dioxide emissions. As the ratification of the Kyoto Protocol has been impeded by internal American politics, the U.S. have then neither been subject to any greenhouse gas reduction commitments of international legal origin nor developed any trading schemes on the federal levels. Within the European Union, the integration of carbon taxes has instead been undermined by lacking European tax competences.

By contrast, the European Union has *translated* its Kyoto commitments to reduce greenhouse gas emissions by 8% into the directive: "establishing a scheme for greenhouse gas emission allowance trading within the Community."(European Council, 2003) In the meantime, the intra-European trading system of greenhouse gases has evolved into the regulatory centre of gravity of the European Union's climate change policy, reflecting both institutional success and functional disorder.

### ***Cap-and-Trade in the EU: Discourses and Principles***

The EU ETS coincided with the enlargements of the European Union in 2004 and 2007, which were interpreted as constituting a risk to further internal market integration, and thus also to the consolidation and intensification of environmental protection within the Member States. At the same time, the emerging discourse on environmental marketization highlighted its theoretical capacity to allow for both economic competitiveness and environmental protection (Krämer, 2007, p.875). Based on theoretical conceptions put forward in the 1960s, emissions trading follows the revolutionary idea of understanding pollution as a simple element of industrial production, pollution is thus transformed into transferable and scarce legal rights as the market – as opposed to the government – might play a crucial role in environmental regulation (for an early account, see Coase, 1960, pp.1–44; Demsetz, 1967; for a theory based account on emission trading, see Parry and Williams III, 1999; Oberthür and Ott, 1999; Babiker et al., 2002; OECD, 1991). Such a systemic marketization of emission allowances contrasts with classical modes of environmental governance through its implied understanding of the state, the market created, and the rights allocated. As pollution trading was initially conceptualized as optimizing the allocation of common resources, the market discourse likewise reflects different strands of economic efficiency, private properties, and command-and-control (Bogojević, 2009; Meckling, 2011). Following the economic rationale behind market-based instruments, emissions trading has therefore widely been considered "to ensure that emissions reductions required to achieve a pre-determined environmental outcome take place where the cost of reduction is the lowest." (European Commission, 2000, p.8). In a 2000 preparatory green paper on emissions trading, the European Commission stated that emissions trading



“is a scheme whereby entities such as companies are allocated allowances for their emissions. Companies that reduce their emissions by more than their allocated allowance can sell their 'surplus' to others who are not able to reach their target so easily. This trading does not undermine the environmental objective, since the overall amount of allowances is fixed. Rather, it enables cost-effective implementation of the overall target and provides incentives to invest in environmentally sound technologies.”(European Commission, 2000, p.4)

On the basis of the ETS Directive 2003/87/EC, the initial operating phase of the European emission trading scheme started in 2005. As the Kyoto Protocol has allowed its parties jointly to fulfil the committed reductions in the framework of regional integration organisations, the European Union has adopted an internal burden-sharing agreement in order to facilitate differentiated emission reductions (European Council, 2002, recital 12, stating that ‘contributions are differentiated to take account i.e. of expectations for economic growth, the energy mix and the industrial structure of the respective Member State’).

The implementation of the directive, however, caused a number of unforeseeable legal complexities; even though the Member States opted for a decentralized setting of the trading system, the multi-level institutional requirements have profoundly challenged domestic administrations and agencies. The marketization of emission allowances has required a radical translation of ecological conditions into economic categories, and the development of an environmental logic of markets, prices and certified allowances.

According to the decentralized structure of the trading scheme, the functioning of the market largely depends on national legal environments. The primary way in which Member States are meant to achieve their emission targets is by reducing emissions within their territory. On top of this, the states can relieve their economies by purchasing additional emission allowances through CDM/JI mechanisms (Winter, 2010c, p.2). For the first two allocation periods of the EU ETS (2005-2007 and 2008-2012), the emission allowances were based on so-called national allocation plans (NAPs). The NAPs are developed on domestic administrative levels and are required to correspond to a set of procedural criteria established in Articles 9-11 and Annex III of Council Directive 2003/87/EC. For each allocation period, Member States have the obligation to draw up NAPs determining the totality of allowances (*cap*) allocated on national levels (*macro-level*), and the totality of allowances allocated to each installation (*micro-level*).

Regarding the powers of the Commission to review and reject NAPs, the European Court of First Instance (CFI) has recalled the limited scope of the Commission to monitor the conformity of the measures taken by the Member States with the criteria set out in the Council Directive 2003/87/EC (CFI, 2009, paragraph 89, 123). The decentralized cap-setting process can thus be understood as mainly reflecting the results of political negotiations over what is ecologically necessary and economically feasible. Environmental duties to cut emissions are therefore weakened by diverging perceptions of global climate change, by different calculations of costs and externalities, and by different opinions about the resilience of economies in the face of *green* development (Winter, 2010c, p.16). According to the Commission’s report, the total amount of verified emissions within the first trading period of the EU ETS (2005-2007) was 6.094 billion tonnes of CO<sub>2</sub>. This was shared by 32.073 installations throughout the EU’s 24 member states (27 member states minus Bulgaria, Malta and Romania) and mainly included power, heat and steam generation, oil refineries, iron and steel, paper and pulp, and building materials such as cement (EU ETS, 2008). Departing from available data of verified emissions, the first trading period – labelled the 'learning-by-doing' phase – has seen a net increase of 1.9%.

### Carbon Market and Systemic Dysfunctions

The European marketization of greenhouse gases has been considered to constitute a *messianic* model of effectively protecting global public goods in the 21st century. While this may hold in theory, however, in reality market conditions are imperfect and information provision is asymmetric.

In particular, the matrix of supranational markets for emission allowances is determined by considerable gaps between theory and practice, or between environmental rationalities and actor-induced market behaviour. As far as the first five operational years of emissions trading within the European Union are concerned, the analytical perspective provides a contradictory picture of policy development. On the one hand, the supranational EU ETS marks an unprecedented success with regard to its institutional set-up. On the other hand, the effective regulatory impact in terms of reduced CO<sub>2</sub> emissions has only been moderately measurable, despite the initially promised “certainty of environmental outcome.” (European Commission, 2000, p.8). Although it is methodologically difficult to trace the concrete effects of a regulatory instrument, the conversion of ecological constraints (climate change mitigation) into market rationalities has caused a number of systemic malfunctions on both institutional and genuinely functional levels. In terms of the institutional sphere, the policy template establishing the supranational trading scheme itself has been challenging for the Member States. (Lodge, 2008) Even though the system has been characterized as a simple regulatory mechanism following the emergent market principle of ecological scarcity, the decentralized allocation of allowances created a great oversupply within the first trading phase.

Due to the imbalance of caps set in the Member States, the pricebuilding of carbon emissions has experienced significant price concessions and accompanying trade regressions (see figure 1).

**Figure 1: European Energy Exchange, EU Emission Allowances, Prices and Trading Volumes, August 2005-Mai 2011**



[www.eex.com](http://www.eex.com)

For this reason, the ETS allowance prices have often been set far below the market price for a tonne of CO<sub>2</sub>. The over-allocation of permits caused a price collapse in 2007/2008 as verified greenhouse gas

emissions in the first trading phase were about 4% lower than the number of allowances distributed to ETS installations (for an indication, see Ellerman and Buchner, 2008; McAllister, 2009, p.408).

In addition to this, the 95% free of charge allocation of emission allowances has been transformed into considerable, so-called *windfall-profits* by energy suppliers, in accordance with the preliminary pricing of permits. Furthermore, as the economic logic of emissions trading also affects the regulatory law that is traditionally employed in sectors beyond industry and energy, the limited scope of sectors involved in the ETS, as well as the domestic protection of coal-fired power plants by the means of differentiated NAPs, has caused extensive criticism (Winter, 2010c, p.19; Wegener, 2009; Czybulka, 2008; Rat von Sachverständigen für Umweltfragen, 2008, paragraph 170). The NAPs were too complex in the first trading period, and were therefore not sufficiently transparent to provide the required level of structural certainty.

The limited impact of the trading scheme is also bound up with the regulatory interferences of the European emissions trading scheme and domestic subsidies for renewable energies. Firstly, the substitution of fossil fuel energy resources by renewables prevents conventional energy suppliers from buying emission permits. Secondly, if the total quantity of emission permits will not be reduced accordingly, then overall prices of greenhouse gas allowances fall, which counterproductively decreases the pricebuilding of climate-intensive energy production. The varied approaches of environmental regulation and the use of subsidies holds the risk of undermining the policy objective of emission trading schemes. Furthermore, the amended allocation process – in the third trading period – will accentuate the problem of domestic subsidies, as the free-of-charge allocation of allowances will mainly be replaced by a centralized auctioning mechanism.

In this regard, transplanting the scheme's rationale into domestic administrative traditions has not only emphasized the limited responsiveness of imposed markets. It has also highlighted the requirement of robust monitoring and compliance regimes. Despite the limited effects of reducing greenhouse gases, the emissions trading scheme imposes significant transaction costs of administrative, as well as technical monitoring and economic supervision: costs that do not normally arise in standard regulatory law (Winter, 2010c, p.20). Taking into account the economic slowdown in the years of global recession, which has been strongly present in the sectors covered by the EU ETS, one can argue that the trading template was not able to provide efficient incentives to reduce CO<sub>2</sub> emissions on a larger scale. As the market itself has subordinated the ecological objective of the trading scheme to its systemic functioning, the EU ETS has failed to develop the capacity of market-based mechanisms to provide substantial protection of interdependent common goods.

### ***Post-2012 Amendments: EU ETS 2.0***

In accordance with its functional failure to provide an efficient policy design for the use of common resources within the first operational years, in 2008, the European Commission decided to amend the functional setting of the ETS for the third trading period (2013-2020). As the European Commission feared it would fail the UNFCCC's objective to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate systems, the Commission strengthened its efforts at avoiding increasing CO<sub>2</sub> emissions. The EU has repeatedly reaffirmed the position of the Intergovernmental Panel on Climate Change (IPCC) that an increase in the global mean surface temperature should not exceed 2°C above pre-industrial levels.

An important step for the EU to achieve this goal is the effective implementation of the Kyoto Protocol's commitments, with the EU ETS being the central instrument (Egenhofer, 2007; IPCC, 2001). Therefore, the Commission prepared an amendment of the EU ETS for the sake of tougher emission reduction targets for 2020 and beyond. The systematic amendment of the *EU ETS 2.0* seeks to ensure that, after 2013, the trading scheme allows for more stringent emission caps (European Council, 2009 recital 2, 4). The Directive's amendment therefore focused on increasing the scheme's

economic efficiency on the basis of fully harmonised conditions of allocation within the European Union. In this regard, the European Commission envisages an annual reduction of allocated emissions by 1.74% (*Council Directive 2009/29/EC*, 2009, Article 9(1)).

In addition to cutting back the requirement of national allocation plans, the Commission decided to institutionalize auctioning as the basic principle for allocation, given its widely considered capacity to avoid windfall profits (European Council, 2009 recital 11). Installations in sectors or subsectors exposed to significant risks of carbon leakage, however, will be allocated allowances free of charge according to (*Council Directive 2009/29/EC*, 2009 Article 10a). In other words, the decentralized cap-setting process will be amended from 2013 on, with the effects of centralizing the allocation of allowances under an EU-wide cap, extending auctioning as the principle allocation mechanism, and integrating (already from 2012) the aviation sector into the system (Hartmann, 2011). The trading scheme will also include further industrial greenhouse gases, and will exclude smaller installations from the trading system where other measures are applied (European Council, 2009 recital 11).

This section has shown that, on the one hand, the Commission has taken its 'learning-by-doing' understanding of the first trading phase of the EU ETS rather seriously. On the other hand, however, both the European Commission and the Member States have failed to engage together in normative discourses on whether the radical translation of environmental objectives into market elements (as a means to cope with environmental externalities) will have a regulatory future within the European Union and beyond (Winter, 2010b, 2010c, p.21).

### **Filling the *Shadow of Hierarchy*: Regional Trading Schemes**

As has been shown, the history of environmental regulation has seen the establishment of an emissions trading scheme in the European Union, although initially the US favoured the implementation of cap-and-trade systems. The Kyoto Protocol had two role models: the Montréal Protocol and the US Clean Air Act amendments. The latter policy has set a domestic ceiling for anthropogenic emissions, allocated a share to major polluting plants, and allowed these pollution entitlements to be traded. Even though the Clean Air Act has been considered to represent a regulatory success, climate change agreements are much more demanding in the sense that they intend cooperation on supranational levels (Barrett, 2003, p.398; United States Clean Air Act, 1963, significantly amended by 1990).

Both republican and democratic administrations have failed to adopt federal legislative acts on emissions trading, or more generally on reducing greenhouse gases. Lastly, the so-called Waxman-Markey Bill (Waxman-Markey, 2009), which has been considered a turning point in US climate change policy, passed in the House of Representatives, but failed to pass the Senate due to the lack of a majority. The bill's intention was to establish a cap-and-trade fully phased in 2016. It is therefore unlikely that the US will achieve real action on climate change mitigation at federal levels in the near future. In the shadow of this stall in federal legislation, however, US state and local governments have assumed the mantle of leadership over the past decade in addressing climate change and developing alternative programs (Snyder and Binder, 2009, p.232).

### ***The North-American Regional Greenhouse Gas Initiative***

The Regional Greenhouse Gas Initiative (RGGI) has been the first cap-and-trade system in the US to reduce greenhouse gas emissions developed on a *bottom-up* basis. The original plan dates back to 2003, when the Governor of New York Pitaraki called on North-Eastern governors "to develop a strategy that will help the region lead the nation in the effort to fight global climate change." (New York State Department of Environmental Conservation, 2006). Followed by ten North-eastern and Mid-Atlantic states, comprising nearly 20% of the US economy, a working group in 2005 proposed a Memorandum of Understanding which specified the trading program's aims: to stabilize, and

subsequently reduce, CO<sub>2</sub> emissions within the associated states, and to design a regional emissions budget and allowance trading that will regulate CO<sub>2</sub> emissions from fossil fuel-fired power plants with 25 MW or greater generating capacity (RGGI, 2005; for gross domestic product per state, see ‘U.S. Bureau of Economic Analysis’, 2011).

At the same time, Article 6 of the RGGI’s Memorandum of Understanding states a clear-cut provision for the transition of the signatory states into comparable federal programs – if adopted. In 2006, the RGGI further developed a Model Rule for the allocation process of allowances. In essence, beginning in 2009 and lasting until 2014, the cap is set at the estimated amount of average emissions in 2008. Thereafter, the cap will be decreased by 2.5% each year until 2018, resulting in a total decrease in emissions of 10% from the 2008 baseline (see generally Funk, 2009, p.354; Ostrom, 2009, p.20; RGGI, 2012). The Memorandum of Understanding has committed states to invest 25% of the revenues from carbon credits in clean energy technologies, although as of 2010 three states had used the major part of the money to balance their overall budgets. With regard to the EU ETS first trading phase experiences, the RGGI has decided to auction the major part of its CO<sub>2</sub> allowances as it ensures that all parties have access to CO<sub>2</sub> allowances under uniform terms. To date, the RGGI has organized eleven auctions, the eleventh edition in March 2011, allocating around 41.9 million CO<sub>2</sub> emission allowances. Nevertheless, the regional initiative has been estimated to be overallocated by 17% in its first year of operation: the power plants in the RGGI states which are subject to the program generated about 155 million tons of carbon dioxide in 2008, and the 2009 cap has been set at 188 million tons (Point Carbon, 2009). Consequently, the carbon price was set too low to unfold its demand-driving effect for clean energy and energy efficiency equipment; it becomes increasingly profitable for companies to shift to cleaner sources of energy instead of buying allowances to pollute (Pool, 2010).

Since the reduction of CO<sub>2</sub> emissions largely depends on agency determinations of the feasibility of effectively reducing greenhouse gases, the RGGI’s overallocation emphasizes the regulatory requirement that caps have to be set at levels which ensure the programs’ technological and economic feasibility (McAllister, 2009, p.444). In this regard, the net effective impact of the RGGI in reducing greenhouse gas emissions has been limited within the first two operational years. Although only the stabilization of emissions was envisaged, the transaction costs have been considerably measurable. For this reason, in May 2011, the Governor of New Jersey announced they will pull out of the RGGI scheme due to its failure to effectively reduce greenhouse gases. Nonetheless, the RGGI’s first compliance period provides a legitimate working model and case study that requires further development, since it seems too early to perform a final evaluation of the system’s impact on emissions reductions. Moreover, regional ‘voluntary’ commitments are generating demand for, and catalysing investments in, clean energy technology, infrastructure, and workforce development until federal (or better: international) legislation will be adopted.

### ***Regionalizing Emissions Trading: Western and Midwestern Initiatives***

When viewed from a meta-perspective, the RGGI has proven that a market-based price on power-sector emissions is institutionally feasible in the US, and furthermore it may be of an indicative nature for federal clean energy legislation. The RGGI is also not the only program in the US that is developing a regional cap-and-trade scheme in the void created by the lack of federal legislation. Apart from the *Midwestern Regional Greenhouse Gas Reduction Accord*, the *Western Climate Initiative* seeks to institutionalize trading systems on the basis of regional cooperation among states and provinces in both the US and Canada. The independent systems intend to take effect from 2012 onwards. Given the inclusion of California, the *Western Climate Initiative*’s goal to reduce greenhouse gas emissions by 15% – from 2005 levels – by 2020 covers the second largest emitter of carbon dioxide in the US, being itself the second largest CO<sub>2</sub> emitter in the world after China (EPA, 2009a). Irrespective of the regional scheme’s capacity to effectively establish its infrastructure, the regional initiatives indicate that even a patchwork of regional carbon markets can account for 41% of the US

emission reductions by 2020 as committed under the *Copenhagen accord* (FCCC, 2009), and can generate as much as 100 billion USD in revenue for clean energy investments at state levels (Point Carbon, 2010). The regional greenhouse gas trading schemes can thus serve as a temporary “Plan B” to fill the US energy efficiency vacuum, in the sense that a network of interlinked states and regional carbon markets, building off the existing institutional infrastructure of the RGGI and other initiatives, could be a workable backup plan in the face of internationally lacking agreements (Pool, 2010; see for global carbon governance, beyond the state, Biermann et al., 2010).

### ***Environmental Concern as a Matter of Health?***

Another indicator of environmental policy development has recently been taking shape in the US, with regard to the effective provision of global public goods. The Supreme Court, by a 5-4 majority in 2007, has ordered the US Federal Environmental Protection Agency (EPA) to rule whether heat-trapping gases cause harmful effects for both the environment and public health under the Clean Air Act definition of air pollutants (Houlihan, 2010). Prior to this, the EPA made two determinations in 2003. In the first, it stated its lack of authority under the Clean Air Act to regulate carbon dioxide and other greenhouse gases for climate change purposes. Secondly, the EPA confirmed its stance of refusing to set greenhouse gas emissions standards for vehicles in the case of such authority (2003). Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521 (a) (1) requires the EPA to set “standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

In addition to this, and as a consequence of the Supreme Court decision in *Massachusetts v. Environmental Protection Agency* (2007), the EPA, in 2009, formally declared that carbon dioxide and five other heat-trapping greenhouse gases are relevant pollutants endangering public health. After an examination of the scientific evidence and the assessment of numerous public comments, the EPA ruled that greenhouse gases threaten the public health and welfare of the American people, and that emissions from on-road vehicles are equally contributing to the detected threat. Its endangerment findings cover emissions of the six key greenhouse gases: carbon dioxide, methane, nitrous oxide, hydro fluorocarbons, per fluorocarbons, and sulphur hexafluoride (EPA, 2009b).

The EPA findings are perceived as systemically shifting the baseline in US environmental policy. Given the assessed disproportionate impact of climate change on the health of certain sectors of the population – such as the poor, the very young and elderly, those already in poor health, and indigenous populations dependent on natural resources –, the EPA’s regulatory categorization of greenhouse gases as a matter of public health is of substantial importance. See for an analytical nexus between climate change and human health IPCC (2007); World Health Organization (2003). As the perspective of US climate legislation shifts from diffuse global endeavours to mitigate carbon dioxide emission, to the domestic concerns of American public health, the legitimacy of federal legislation on emission reductions will increase accordingly. In this regard, the findings are likely to promote the *civil* understanding of regional emissions trading discourses on various levels in the near future.

### **Linking Global Trade and Climate Change Mitigation**

The provision of multi-level conditions for the supply of interdependent public goods entails complex legal constraints in a variety of *fora*: in trade, environment, energy and investments. The failure of the international political community to successfully adopt a post-Kyoto Agreement in Copenhagen, Cancun, and Durban, has furthered the re-conceptualization of Border Carbon Adjustments (BCA) as a matter of climate change mitigation policy. For the sake of enhancing cross-institutional coordination on climate change, the interlinkages between the post-Kyoto climate regime and the

institutional order of the World Trade Organization (WTO) appear to be of crucial importance. On the one hand, climate change and climate policies affect trade, while trade and trade liberalisation simultaneously affect climate change. On the other hand, the different regimes are subject to a number of overlapping policy processes such as supranational trading of emission allowances, unilateral policies and measures (cf. border tax adjustments, subsidies, and technical standards), and the transfer of climate-friendly goods, services and technologies (Biermann et al., 2010, p.3; van Asselt and Biermann, 2007; Zelli, 2007; Vranes, 2009).

Even though diametrically opposed positions have been expressed at the UNFCCC conferences with respect to the re-integration of trade measures, its decentralized function to *level the playing field* has repeatedly been restated. While a group of developing countries favoured the restriction of the use of unilateral trade measures as part of climate change policies, the EU opposed any provisions that would question the parties' right to apply trade measures in the context of climate change mitigation. As unilateral action to combat anthropogenic climate change may place different actors – such as the European Union – at a competitive disadvantage compared to international opponents, 'border carbon adjustments' have been brought into play.' In general, the imposition of carbon adjustments is repetitively claimed by policy-makers, while they simultaneously express their fear that high levels of internal climate policies – such as EU ETS – will lead to competitiveness problems for domestic industries.

'Carbon tariffs' as border taxes on imports from foreign energy intensive industries are therefore understood as encountering carbon leakage, reflecting a never-ending discourse on the legality of border adjustments under WTO law (Zane, 2011, p.204).

### ***Reassessing the Legal Nature of Border Tax Adjustments***

Border tax adjustments (BTAs) constitute a classical economic instrument of foreign trade (Ricardo, 1951). BTAs were intended to harmonize the international taxation of products in conformity with the *destination principle*. According to this fundamental principle of international trade, goods should be subject to taxes within the countries where the goods are used or consumed. Back traceable to the 18th century, border adjustments permitted domestic authorities to implement their own regimes of national taxation, whilst assuring that goods moving in international trade are neither exempt from taxation, nor subject to double taxation. In other words, BTAs allow an internal tax to be imposed on imported products as well as the remission of internal taxes on domestic products destined for export (Birmie et al., 2009, p.728; Petersmann, 2008, p.143). The Organization for Economic Co-operation and Development's (OECD) 1970 Working Party on Border Tax Adjustments has properly defined border tax adjustments as

“any fiscal measures which put into effect, in whole or in part, the destination principle (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products).” (GATT, 1947)

Adopted in the aftermath of the Second World War to re-stabilize the functioning of international trade, the 1947 General Agreement on Tariffs and Trade (GATT) still remains the “permanent institutional basis for the multilateral world trading regime.” (Trebilcock and Howse, 2005, p.23).

Even though the GATT was institutionally replaced by the WTO in 1994, it provides effective supervision of trade restrictions and prevents protectionist measures for the sake of promoting global competition. Therefore, the legality of trade-restrictive measures such as BTAs are subject to legal assessments under the GATT provisions (Zane, 2011, p.206; Matsushita et al., 2003, p.169).

On a general account, border tax adjustments are perceived as being legal under the GATT under limited circumstances for internal taxes. Thus Article II:2(a) states that contracting parties are allowed to impose on the importation of any product “a charge equivalent to an internal tax (...) consistently with the provisions of paragraph 2 of Article III.” In this regard, Article II:2(a) regulates the legality of customs duties, and clarifies that BTAs are falling under Article III:2 – even if they are collected at the respective border (*Superfund case*, 1987, paragraph 5.2.3).

For that purpose, however, it remains unclear what sort of internal taxes are eligible for border tax agreements. Since its origin in 1947, the GATT has upheld its basic distinction between taxes imposed on products (indirect taxes) and taxes on various forms of income and the ownership of property (direct taxes). In addition, as regards process-related indirect taxes, the aforementioned 1970 GATT Working Party could reach no consensus on categorizing so-called *taxes occultes* – including taxes on energy, advertising, machinery, and transport – in the context of border tax adjustment eligibility (Biermann and Brohm, 2004, p.293). In accordance with Article VI:4, only taxes imposed on products are therefore eligible for BTAs (Birnie et al., 2009, p.729). As the *US Superfund case* has initially inferred, and as has been confirmed in the framework of other disputes, the legal eligibility of taxes levied on products depends on its consistency with the national treatment standards of Article III. However, as the GATT does “not distinguish between taxes with different policy purposes,” it is required that ‘like’ imported and domestic products are equally taxed (Matsushita et al., 2003, p.167; *Superfund case*, 1987, paragraph 5.2.4; see further *Japan – Taxes on Alcohol Beverages*, 1996, paragraph 6.22, *Argentina – Hides and Leather*, 2001, paragraph 11.144)

### ***Environmental Concern and Carbon Taxation***

Based on the rationale of sustainable resource allocation, environmental taxes seek to manipulate the global overuse of public goods, or other natural resources, by imposing additional charges to discourage the consumption of goods and services that entail environmental harm. From this perspective, environmental taxes are theoretically combining regulatory patterns of global trade and environmental protection. As environmental taxes are considered to encourage producers to develop ecological production methods, *green taxes* are promoting the inclusive implementation of the *polluter pays principle*, which holds that the polluter should bear the expenses imposed upon society by exploiting under-priced natural resources (Birnie et al., 2009, p.728). *Green taxes*, in this regard, allow for both balancing economic competition and regulatory flexibility, as well as ecological consumption and sustainable resource use. Even though taxes have traditionally served as a means of assuring governmental expenses, global trade regimes increasingly resort to taxes for the sake of behavioural control: the more upstream the taxes are tied to the production process, the bigger the impact of taxes on controlling environmental behaviour. The regulatory shift from command-and-control regulation to price-based, indirect policy instruments therefore ensures that market prices reflect the full cost of production and consumption to society (Petersmann, 2008, p.137).

In spite of their regulatory and multi-level attractiveness, environmental taxes are subject to several concerns. As environmental taxes tend to cause complex networks of regulatory competition, the imposition of taxes would require a level of institutional maturity surpassing most international institutions (Louka, 2006, p.26). In addition, environmental taxes are understood as being a regressive instrument of policy choice, affecting developing countries the most, and causing an industrial backlash. The latter would be caused by the fact that nation states implementing environmental taxes are losing their competitive economic position on a global scale, and their industries would suffer in comparison to industries in countries without such taxes.

Trade restrictions and supranational agreements are therefore brought into play to enforce international cooperation for the protection of global public goods (Birnie et al., 2009, p.728; Esty, 1992, pp.32–36).



### **Carbon Border Adjustments**

From the above it can be seen that carbon border adjustments constitute a conceptual regulatory companion to the regulation of global trade distortions and polycentric environmental protection. As concern in industrialised countries has been raised that unilateral action in climate change policies could foster carbon leakage or asymmetric competition, numerous calls for carbon border adjustments have been made, particularly in the European Union and the US (Zane, 2011, p.204; Biermann and Brohm, 2004; Herman, 2009, p.196). While the economic literature has often shown that such schemes of carbon border adjustments, in theory, should have a role to play in reducing greenhouse gases, the legal literature is more ambiguous with regard to the legal consistency of carbon border adjustments in GATT/WTO law (for an economic account, see Burniaux et al., 2010; Ismer and Neuhoff, 2007; McKibbin and Wilcoxon, 2009; for legal examinations of carbon adjustments Burniaux et al., 2010; Howse and Eliason, 2009, pp.48–94; Aguilar, 2007, pp.356–367; Cendra, 2006, pp.131–145; Ruddigkeit, 2009; Sindico, 2008). Given their unilateral imposition, border adjustments are conceived – in the sense of economic efficiency – as being a regulatory tool characterized by simplicity and effectiveness, helping to reduce competitive advantages from countries with lax environmental mechanisms, and providing a vital link between trade regulation and climate change policies. Carbon border adjustments are to be implemented in several forms, including taxing imports produced under less stringent climate constraints or forcing importers of goods to surrender emission allowances under domestic emission trading schemes ( see the claim that the ‘GATT is not hostile to the environment but agnostic’, Esty, 1992, p.35). Nonetheless, the compensatory effect of border adjustments for domestic environmental regulation – such as the EU ETS – is put in question, and the functional feasibility of carbon adjustments is challenged (Petersmann, 2008, p.142). The ambivalence as to whether the imposition of carbon border adjustments is legal under the GATT reflects the possible violation of the Article III rule not to restrict trade based on specific production and process methods (Potts, 2008). But as the GATT allows for exceptions of restrictive trade measures for the purpose of environmental protection (Article XX), carbon border adjustments could be designed in such a way that an Article XX(b) (“related to the conservation of exhaustible natural resources”) or Article XX(g) (“necessary to protect (...) life or health”) exemption could be granted. The *chapeau* of Article XX specifically refers to measures taken in good faith in order to protect legitimate interests, and provides regulatory flexibility to take into account differing situations in different countries (Ahner, 2009, p.11; WTO Appellate Body, 1998, paragraph 158; *Brazil - Measures Affecting Imports of Retreaded Tyres*, 2007, paragraph 542).

In addition, the imposition of carbon border adjustments would require the estimation of the direct carbon content of imports, the total embodied carbon, including input in the value chain, or the content of comparable domestic goods (Burniaux et al., 2010, p.5). In the face of this, a rough approximation of the appropriate level could be an attractive alternative, but crudely calculated adjustments work less well at correcting leakage, and they are also susceptible to political manipulation: a convenient tool for protectionism. Even carefully calculated carbon border adjustments, however, are susceptible to manipulation, either for reasons of improvement of the terms of trade or for enhancing climate mitigation.(Barrett, 2003, p.388) In this regard, carbon border adjustments are facing a variety of legal complexities for the provision of long-term climate change prevention. As an alternative to this carbon adjustments might compensate for lacking international legislation, contributing to a regulatory patchwork that should give priority to *first-best* legal arrangements, not *second-best* trade measures.

### **“It’s the end of the world as we know it,” or Polycentric Risk Regulation**

*R.E.M.*, the American rock band, named one of their songs: *It’s the end of the world as we know it (and I feel fine)*. Reconsidering the regulatory framework for the mitigation of carbon dioxide emissions, one has to admit – without feeling fine – that both the increase of greenhouse gas emissions and the global rise in temperature are in fact questioning common narratives of the state, the market,

and the regulation of societal risks. Therefore, transboundary architectures to provide effective regulatory conditions for the reduction of CO<sub>2</sub> emissions are challenged by asymmetric market conditions, heterogeneous administrative capacities, and a multitude of national policy preferences on how to regulate the risk of global climate change. Rather than waiting for a holistic global effort in a world of 200 nation states (in which legal fragmentation describes the regular evolution of laws), polycentric approaches are perceived as referring to promising policy constellations. These seem to offer the benefits of microcultural, microeconomic and microregulatory insights at multiple scales. In addition, polycentric cooperation enhances experimental governance and encourages learning from a variety of different policy set-ups, allowing for the assessment of methods, benefits, and costs of particular strategies adopted in different ecosystems (Ostrom, 2009, p.31; Homeyer, 2010, pp.121–150; Sabel and Zeitlin, 2008, pp.271–327; Hutter, 2010, pp.3–23). In that sense, the Cities for Climate Protection (CCP) initiative has been recognized as an instrumental tool for the initiation of local mitigation and adaptation actions in both developed and developing countries, and for providing key input in global climate advocacy efforts of cities and local governments (ICLEI, 1995). The regionalization of climate change policies could therefore provide the regulatory *arena* in which the pillars of supranational legislation and polycentric risk governance are emerging.

Despite this, polycentric regulation must be complemented by the classical collective action theory, which predicts that individuals will not change their behaviour and reduce extensive resource usage unless external authorities impose enforceable rules, which change the incentives faced by those involved (Hutter, 2010, p.5).

Therefore, rather than changing institutions at global levels, a forum for the development of a transnational rule of law may provide coherence between private and public, national and international, levels of governance for the benefit of citizens (Petersmann, 2012b).

As global governance can be understood as the globalization of local governance, what may be termed its *genetic* code inherently requires *leadership*, *legitimacy* and *efficiency*. Therefore, only a ‘four-stage sequence’ (Rawls) of constitutional, legislative, administrative and judicial arrangements of rules, principles, and institutions can allow for polycentric policy mechanisms counteracting “the end of the world as we know it” on a global scale (on the ‘four-stage sequence’, see Rawls, 1971, p.195; see for the three elements of governance, Lamy, 2012).

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## **International incentive mechanisms for conservation of biodiversity and ecosystem services**

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### **Introduction**

This contribution examines a particular development within a legal regime, which is concerned with the provision of a global public good. The good is biodiversity, and the inquiry focuses on the processes within and around the Convention on Biodiversity (CBD, 1992) as the principal forum for biodiversity management within an otherwise highly fragmented biodiversity regime (Glowka et al., 1996; McGraw, 2002).<sup>1</sup> The phenomenon which will be looked at is the use of legal, economic, and discursive tools to incentivise the private sector contribution to the goals of the CBD regime, which is seen as the way towards improved action on biodiversity. The approach of exploring the incentives as regulatory tools for a better implementation of the CBD regime is an inquiry into options for improving the provision of a global public good. In this particular case, and indeed very often, collective action problems which are impeding (better) supply of global public goods can be framed as implementation problems that legal regimes have been facing.

Continuing downward trends in the variety of life on Earth, and a declining quality of numerous essential services that humans derive from nature, call for determined action (for recent accounts of the value of ecosystems and biodiversity to the economy, society, and individuals, and the necessity to protect them, see e.g. Secretariat of the CBD, 2010; Kumar, 2010; Brink, 2011). Contrary to its sister regime - the climate regime -, which receives a lot of attention from both the public and the legislators, biodiversity loss is still waiting for the same position among the headlines (see e.g. Ramesh, 2010), and a major legal stimulus to its goals.<sup>2</sup> Although no mechanisms similar to those in the climate regime are in place for the goal of conservation of biodiversity, the picture of the latter as a 'sleeping' policy field would be unrepresentative. A certain dynamic in the international arena is felt, and it takes some surprising shapes. Governments of countries hosting some of the richest ecosystems in the world are making pledges to stop exploiting them and forgo large revenues from resource extraction;<sup>3</sup> business conferences wind up forming long-term initiatives to prevent further impoverishment of the

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<sup>1</sup> The purpose of concluding the CBD was precisely to provide a framework for the myriad of conservation agreements in place before 1992 by providing central principles for biodiversity management. For an introduction to the historical setting of the conclusion of the Convention and its structure, see Glowka et al. (1996) and McGraw (2002).

<sup>2</sup> The problem of climate change was met with an array of legal responses, as a consequence of the adoption of the Kyoto Protocol. Among the vast literature on the topic, a comprehensive overview of a variety of responses across the countries is offered by Freestone and Streck (2010, 2005). For an overview of the EU's policies from the perspective of multilevel governance, see J. Scott (2011).

<sup>3</sup> In May 2010, the President of Indonesia, Susilo Bambang Yudhoyono, announced that his country would introduce a two-year moratorium on deforestation. This is part of an agreement reached between Indonesia and Norway, which pledged one billion dollars to partly offset the revenue forgone. The announcement did not go uncriticised: a conservation organisation, Greenpeace, warns that the moratorium does not go far enough; that areas under discussion will cover only a fraction of what is needed, and go barely any further than the existing Indonesian laws (see Greenpeace International, 2010). Another similar initiative was taken by Ecuador to protect its Yasuní National park, which is one of the world's most biologically diverse areas, and home to several indigenous groups. Under the "Yasuní-ITT initiative", Ecuador made a commitment not to exploit twenty per cent of its proven oil reserves which are found within the Park. An international trust fund was established by the UNEP and Ecuador to compensate Ecuador's foregone oil revenues. In exchange for contributions to the Yasuni Fund, certificates will be granted to donors, indicating the amount contributed and the amount of carbon emissions avoided in this manner.

Earth;<sup>4</sup> non-governmental conservation organisations are partnering with companies which they used to criticise,<sup>5</sup> and these same companies also accept to follow guidelines for their conduct;<sup>6</sup> pilot projects are being run to protect large areas of tropical forests in exchange for money,<sup>7</sup> and a similar mechanism is being discussed, aiming at the conservation of other ecologically significant areas.<sup>8</sup>

The storyline of these initiatives is (an attempt at) a direct correlation between protection of biodiversity and economic benefit, in an arrangement that crosses borders of nation states. Considering the biodiversity management of the past, these are unusual occurrences. Conservation was an activity from the margins of international politics, and to a large extent dissociated from the participation of businesses. A principal treaty regime placed the expectation for the realisation of its objectives (CBD, 1992, Article 1: ‘the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources’) almost entirely on states’ parties, and their ability to enact state legislation. There is a strong international component in the ecological and economic realities of the biodiversity problem. It is marked by an unequal distribution of biodiversity and financial wealth, with nevertheless (or precisely because of these differences) a common interest in preserving the former. These imbalances are implicit in the very establishment of a regime. Yet, the international or *transnational* (highlighting the private sector involvement) component was weakly expressed in the regime’s structure, both in terms of articulating specific rules for management of what are essentially national resources, as in terms of incorporating a dynamic approach to financing them. The drafters framed the international biodiversity problem in a monolithic vision of aid channelled from the developed Northern countries to the biodiversity richer South.

The CBD’s manner of managing a common goal is a poor reflection of the structure of contemporary global community and the multitudes of cooperation within it. Two distinct features of today’s governance environment are non-state actors and more innovative and closer methods of cooperation. Corporations themselves are looking for ways of “becoming involved”, either because of a perceived duty to good citizenship, their belief that their participation in the biodiversity efforts is beneficial for their public image (Neil Gunningham, 2009), or self-interest. Some areas of environmental law have come a long way from relying on the exclusively “moral” path of implementation towards integrating the dominant market ideology. (I elaborate on the paradigm shift in the environmental law and policy in the Section *Why incentivise?*). There is a demand from states and corporations to participate in the market structures; pragmatic governance avenues, it would seem, would be foolish not to accommodate this quest for market mechanisms.

The impetus for this study is provided by an interest in how the features of a changed governance architecture – more pronounced private sector involvement and greater use of market mechanisms in particular – have influenced the choice of instruments in the

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<sup>4</sup> For example, the UK government-sponsored ‘Global Business of Biodiversity Symposium’, (2010) brought together “eminent business leaders and experts from around the world.” The Third Business and the ‘2010 Biodiversity Challenge Conference’, (2009) adopted ‘The Jakarta Charter on Business and Biodiversity’, (2009), which expresses “deep concern” about the dominance of business over the resilience of ecosystems, and their interest in tackling the problem.

<sup>5</sup> An example is an ‘Agreement between the IUCN and Rio Tinto’ (2010); an earlier agreement between the IUCN and a different company from the extractive industry (Shell) was controversial, see (Kenneth Iain MacDonald, 2010).

<sup>6</sup> The International Council on Mining and Metals (2003), of which Rio Tinto is a member, issued its Position Statement on Mining and Protected Areas that pledges its members’ commitment to not explore or mine in World Heritage sites.

<sup>7</sup> These are taking place in the framework of preparation to introduce the Reduced Emissions from Deforestation and Forest Degradation (REDD) mechanism. The REDD is discussed below, in the Section on *International incentives for protection of biodiversity and ecosystems services* of the paper.

<sup>8</sup> The Green Development Mechanism (GDM) is a tentative name given to an idea for a mechanism that would resemble the Clean Development Mechanism, but with a biodiversity component – rather than carbon emissions – being the “trading element”.

biodiversity regime. The assumption is that the biodiversity arena has not been immune to these changes, even if its attitude has been more reserved than that found in some other areas of environmental law, notably different kinds of pollution. To understand the ramifications in terms of influencing the management of a ‘common concern,’ I am interested in the shape that emerging incentives are taking. But equally important are the avenues in which the incentives develop. One of the consequences of the increased presence of private actors in global governance is the exploration of the avenues outside the inter-state regime. My analysis of the emerging means of protecting biodiversity therefore starts out from the CBD, but looks beyond it to other *ad hoc* avenues with varying memberships. The incentives developing here indicate the weaknesses of the existing inter-state regime, and reveal the demand for institutional and instrumental structures. The incentives outside the CBD broaden the debate about instrument choice to include also workable institutional arrangements that could accommodate them.

The process of providing incentives may be analysed from different perspectives, which also depends on the definitional questions. For the purpose of this overview, an ‘incentive’ is defined broadly as anything which encourages the actors to do something,<sup>9</sup> in this case with regard to inducing compliance with the CBD, and advancing the goal of biodiversity conservation. Also, the CBD has employed a wide conception of a ‘positive incentive measure,’ seeing it as “an economic, legal or institutional measure designed to encourage beneficial activities” (CBD, 2008) - primarily the conservation and sustainable use of biological diversity (UNEP/CBD, 2002b) (UNEP/CBD, 2002a Annex I, paragraph 1). An incentive should be, and is commonly understood, as being separate from the obedience of the law for fear of retribution or coercive forces. One can define the regulatory field in terms of, not only managing instruments, but also supplying shared norms and institutions, where these norms are implemented. Viewed in this way, an incentive measure is a measure which exists separate from the prescriptive legislation. It includes market or economic instruments (which prompts economic interests), but also information-based approaches (which trigger action on normative grounds). Explicitly, my conception of an incentive is somewhat different from that which forms one part of the binary compliance assistance–incentives, applied in the context of environmental law Matz differentiates between compliance and incentives, based on the question of ‘What comes first?,’ and is of the opinion that compliance may be induced, but by compliance assistance, not incentives (2006). The view that compliance precedes, and is a condition for, incentives, and that compliance cannot be induced by incentives is apt in certain regimes, but not in the case of CBD. My claim is that the CBD is void of any compliance mechanisms as such, and that implementation of treaty obligations does not require an institutional structure. Because of that, I see compliance and incentives as more closely related to the case in point.

The chapter is structured as follows. The first part engages with the subject of inquiry by defining what parts of biodiversity are considered a global public good. The second part provides a starting point for the study of incentives: it articulates common action problems inherent in biodiversity management, and includes the weaknesses of the regime which was set up to tackle them. The third part describes the emerging international incentives being explored, both within and outside the CBD regime. These examples are not meant to be exhaustive or representative. Rather, I aim at introducing the variety of their appearances in terms of the actors involved and the strategies used. Finally, in the conclusion, I justify the importance of the process of incentivising biodiversity protection for lawyers, and conclude with an assessment of the implications for the legal category of a common concern, and public good as its economic ‘associate’. I should state at the outset that, while I indicate related issues

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<sup>9</sup> Indeed, a dictionary’s understanding of incentive (Oxford Dictionaries, 2010) is rather broad: “incentive” is a thing that prompts/encourages one to do something, but also as a payment or concession to stimulate greater output or investment; “incentive”.

of fairness in this chapter as important, I do not elaborate on them, leaving the value of this topic still to be researched.

## **Biodiversity as a Global Public Good**

Commonly described as the “diversity of life-forms” or “variety of life on Earth,” biodiversity captures complex ecological realities at the genetic, species, and ecosystem level. But beyond that, the term also delivers many different social concerns and motivations for action. ‘Biodiversity’ is a broad concept, used in justifying the establishment of wilderness areas and agricultural gene banks, technological enhancements of production processes, removal of invasive species, and preservation of traditional ways of life.<sup>10</sup> Its components are said to benefit people's health and wellbeing, production industries, and national economies (see e.g. Chivian and Bernstein, 2008). The term itself has been critiqued for being a terminological construct with little scientific value, apart from justifying research funding (Ghilarov, 1996, p.304).

In view of a rich variety of biodiversity debates, it is not surprising that some confusion surrounds biodiversity's status as a global public good, seeing as both biodiversity conservation, as well as biodiversity as such have been labelled ‘global public goods’ (Perrings and Gadgil, 2003; McNeely, 1988; Swanson and Mullan, 2010; Barrett, 1997; Brahy, 2008 argues that in fact, biodiversity is ‘double public good’ for its informational but also insurance value). Reconciling the two, a third view suggests that “biodiversity has both domestic and global public good characteristics.” (Barrett, 1997, p.284). These diverging notions demonstrate, as a practical example, a weak consensus on some of the aspects of the term “global public good” (Kaul et al., 1999, p. xxiii).

In establishing why - or which part of - biodiversity qualifies as a global public good, I resort to the original and uncontested parameters of a ‘public good’ which were defined by the economic discipline, and then apply them to the legal definition of biodiversity. Most economics textbooks put forward the two primary determinants of public goods: that of non-rivalry and non-excludability. Any other criteria for establishing ‘public goods’ are contested, ((Buchanan, 1968) viewed public goods as directly linked to their joint provision, but he was challenged on that by (Demsetz, 1970)). The ‘global’ dimension was added to the concept later in order to deal with problems that transgressed the borders of individual countries (Kaul et al., 1999). This emphasis on the cross-border character is perhaps the main advantage of approaching biodiversity issues through the lens of a ‘global public good’. The framework is a pragmatic attempt to find truly *global* solutions to the problem, without downplaying the distributional concerns, which are necessarily enshrined in ‘public goods’. Approaching the biodiversity issue as a global public good brings the spatially dispersed benefits of biodiversity to the forefront and at the same time the common dependence on them of all actors in the governance arena. Too often, biodiversity is treated only as a local and private asset.

While the local - or domestic - is certainly one of the two aspects of biodiversity, this contribution is more interested in the ways of managing its other side, i.e. biodiversity's global benefits. Biodiversity is a global public good to the extent that its benefits extend (well) beyond the borders of the countries which host the resources. In the following, I base my understanding of biodiversity as a global public good on two dichotomies which constitute two components of the public good. A reading of the Biodiversity Convention - in particular its provisions on definitional and jurisdictional aspects – along these dichotomies explains the nature of the term, and highlights its public-good aspects. ‘International’ draws attention to the international benefits of biodiversity, although the resources are governed by states and in possession by its peoples. ‘Biodiversity’ brings the value of

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<sup>10</sup> One method to understanding the variety of areas covered by the concept is to venture through the many decisions of meetings of State Parties to the CBD.

*diversity* to the forefront, as opposed to that of individual *resources*, and acknowledges the presence of a dimension that is beyond the known and tangible resources.

### Resources vs. diversity

The first informative dichotomy is one between biological resources and biological diversity. The CBD defines biodiversity as “the variability among living organisms from all sources including, *inter alia*, the terrestrial, marine and other aquatic ecosystems and the ecological complexities of which they are a part; this includes diversity within species, between species and of ecosystems” (CBD, 1992, Article 2). Biological resources are individual components of biological diversity that, as such, do not have a value of a global public good, whereas biodiversity does have it. When outlining the difference, it is commonly mentioned that biological resources are tangible, ‘real entities’, while biodiversity is an attribute of life on its own terms (Glowka et al., 1996, p.20). In other words, biodiversity is a conceptual idea which cherishes the existence of diversity of genes, species, and ecosystems, rather than the existence of these individual components per se.

On a less abstract level, the notion of biological resources does not capture the very essence of the utility of biodiversity: the resilience of the biota as a whole. In the past, views concerning nature used to focus on species' diversity. Since the 1990s, however, it is this more comprehensive conception which underpins the modern conservation science (Gaston, 2010, p.11). The refocus of conservation to include also ecosystems' diversity is therefore rather recent in the historical perspective. This is a proper policy goal for two reasons: not only does it ensure the best realisation of the current ethical, aesthetic, and utilitarian values, it is also most conducive to future evolution and adaptation (Doremus, 1991, p.282; the health of ecosystems and their capacity to adapt to changes has become an even more important policy target in the context of climate change, see Watson et al., 2002). The latter function is that of insurance for the future. It is provided both by the genetic information and by the variety of ecosystems services. The discipline of economics has been particularly valuable in exploring the value and options in the field (see Perrings and Gadgil, 2003). The insurance value is only attained when individual components, or resources, are seen in relation to, or in the context of, a larger pool of resources - that of biodiversity. As with any insurance scheme, it may be useful to us in the future, but it is characterised by a strong element of uncertainty, due to which it is impossible to determine what parts of it will be needed, and should therefore be preserved. In view of these uncertainties, the question about how much and what to preserve is essentially a question about the level of risk we are willing to take. (The question of acceptable levels of risk and its management is central to much of substantive environmental law; see e.g. Elizabeth Fisher, 2006. Also more broadly, increasing regulation is in large part due to increased risks imposed on the society and regulation is about ‘risk management of risk management’, see Grabosky, 1995; Gunningham and Grabosky, 1998; Parker, 2002). These insurance benefits have a character of a public-good, and are associated with biodiversity, not biological resources.

The value that the CBD promotes through the notion of ‘biodiversity’ is precisely the variability, heterogeneity or multiplicity of living organisms and their surroundings. In the treaty, the difference between biological resources and their diversity is acknowledged in at least two ways. The first one is within the definition of biodiversity which speaks about ‘ecological complexities’ occurring among individual categories of genetic, species and ecosystem diversity (CBD, 1992, Article 2). Biodiversity exists apart from the three groups of genes, species and ecosystems that may be seen as resources, and proves that the notion of biological diversity is more than the sum of its components. The mention of ‘complexities’ implies a wide range of processes, including some that are indefinable and as of yet perhaps unknown, which are to be observed at the most comprehensive, global level. The second recognition of biodiversity as a separate category from resources in the CBD is the mention of ‘intrinsic value’ of biodiversity in the preamble of the CBD. This term establishes that nature carries a value apart from its utility to humans as a resource.

## National vs. international

The second dichotomy useful for ascertaining the public-good-nature of biodiversity is the one between national jurisdiction over biological resources and the international interest in it. Although it is only in the last 50 years that “biodiversity loss has been constructed as an international problem,” (Kenneth I. MacDonald, 2003) the debate on the topic is well known in the field of international law. International legal rules state unequivocally that sovereignty over biological resources belongs to states (as stated in Article 3 of the CBD, 1992, which reiterates the so-called Stockholm Principle 21, which asserts state sovereignty over its natural resources), and the ownership to its peoples.<sup>11</sup> At the same time, the international community as a whole has an express interest in conserving these resources, for their benefits extend beyond the borders of a particular state. In the CBD, the relationship between state sovereignty and community interest is expressed through the notion of ‘common concern’, which appears in the preamble. Common concern refers to an action which needs to be undertaken, and the international interest associated with it (Juste Ruiz, 1999, p.414; Tim Swanson, 1999, pp.307–9). What is of ‘common concern’ is *conservation* of biodiversity, not the resources themselves.

The meaning and ramifications of the category of common concern are highly debated (Kiss, 1997; Shelton, 2009; Brunnée, 2007), expressing that while not appropriated by the international community, the resources may still have some special value to it. It is suggested that what is of common concern needs to be managed as a community matter, implying a certain level of international ‘interference’. This includes the right of each state, and essentially other actors, to have a voice and to take distributional concerns seriously. The management of common concern is also a dynamic process, associated with frequent meetings and consensual decision-making.

The shared interest is linked with certain responsibilities on both sides (Birnie and Boyle, 2001, chap.3, 136, draw attention to certain UN GA declarations that recognise these responsibilities), including the recognition of *erga omnes* obligations, and certain institutional arrangements which are conducive to the compliance with these obligations (Shelton, 2009, p.83). On the part of the states hosting biodiversity, the application of the notion of common concern means some limitation to the freedom in the way resources are being managed. On the part of those who have stakes, but lack actual biodiversity, duties mostly involve providing finance, but also capacity-building and technology; and additionally - to some extent - also the duty of, or right to, the elaboration of rules which guide the management of these resources (all these duties/rights are integrated in the CBD, 1992: Article 5 (Cooperation); Article 12 (Research and Training); Article 13 (Public Education and Awareness); Article 17 (Exchange of information); Article 15 (Technical and Scientific Cooperation); Article 20 (Financial Resources); Article 21 (Financial Mechanism); Article 23 (Conference of Parties), which delegates to the COP some law-making functions). In order to define this type of sovereignty in relation to the issue of biodiversity, the notion of ‘custodial sovereignty’ has been suggested (Scholtz, 2005, p.9).

Despite not being enforceable, and falling short of having a real weight in the states' decisions, the concept of common concern has some value, not least in the context of normative framework for management of public goods. Its existence and the corresponding institutional arrangements are a continual testimony of the porosity of state boundaries and a more interconnected world community. The shift towards a ‘community’ rather than ‘society of states’ is widely accepted, not only in the environmental context, but also elsewhere. The seminal work is by Wolfgang Friedmann (1964), although in Friedman’s book ‘environmental law’ is not included within ‘new fields of international law’ (Chapter 11), his arguments are widely relevant (see also Simma, 1994; Mahiou, 2008).

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<sup>11</sup> Many international legal sources, including the two human rights Covenants of 1966 (on civil and political rights and economic, social and cultural rights) affirm that the right to self-determination, including its attribute related to the control of natural resources, belongs to peoples, not states.

Nevertheless, scholars keep emphasizing the presence of the shared community values and their relevance for making sense of today's governance structures (Villalpando, 2010, follows manifestations of the 'community interest' in the international legal documents, and shows how changes in social intercourse at the global level have caused structural transformations of the international legal order; Stec, 2010, traces the notion of common concern back to the birth of the Westphalian nation state system, and recalls that the arrangement of international order around state sovereignty was in fact founded to uphold humanitarian principles, and that issues of common concern belong to that same 'law of humanity').

In debating the meaning of common concern and Principle 21 - as asserted under CBD -, one quickly forgets that certain, and indeed large, segments of global biodiversity lie outside national jurisdictions. Largely, these are marine resources because of the fact that large part of the oceans belong to areas outside national jurisdiction, and many species straddle between national borders and international areas. Although the principle of common concern is applicable to environmental concerns arising both beyond national jurisdictions and those within individual states, CBD's provisions about jurisdictions beyond national control do not apply to the components of biodiversity per se in the same manner as they do within national jurisdiction (CBD, 1992, Article 4). In areas beyond the limits of national jurisdiction, States have obligations to (a) ensure that activities within their jurisdiction or control do not damage the environment of other states or areas beyond the limits of national jurisdiction (Article 3), and (b) to cooperate with respect to the conservation and sustainable use of biological diversity in areas beyond national jurisdiction, either directly or through the appropriate international organization (Article 5). Instead, in these areas, states seem to rely even more on the cooperative methods of managing the issues, which are of their common concern.<sup>12</sup>

### ***Ecosystem Services as a Global Public Good***

As evident from the previous section, a broad definition of 'biodiversity' translates into opaque objectives of a governance framework. As such, it neither assists by establishing priorities nor by elaborating measures which are needed to maintain such biodiversity. It also hinders cost-effective measures in the circumstances of limited resources (Metrick and Weitzman, 1998; Weitzman, 1992). More generally, it implies also a weak and uncoordinated framework for action in a governance issue-area, possibly risking conflicting measures as a result of diverging understandings. Against this background, the notion of ecosystem services emerged in the international institutional arena as a useful concept to highlight - more comprehensively - the benefits of biodiversity.

The notion of ecosystem services is not entirely new (the Millennium Ecosystem Assessment attributes the first usage of the term to King, 1966, and Helliwell, 1969, MEA/World Resources Institute, 2005, p.56). Its usage, however, was firmly put on the research agenda by a study on valuation of world's ecosystems by Costanza et al. (1997). Costanza and his colleagues in 1997, while the 2005 *Millennium Ecosystems Assessment* MEA/World Resources Institute (2005) and 'The Economics of Ecosystems and Biodiversity (TEEB)' (2008), launched in 2008, are seen as important milestones in popularising it. The MEA highlighted the dependence on ecosystems for human wellbeing, and stressed the need to better describe, quantify, and value, the benefits of the goods and services provided by ecosystems and biodiversity. The term denotes all the services which nature provides to the benefit of humans, coming in the form of freshwater, fibre, food, flood control, water

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<sup>12</sup> Cooperative methods do not come automatically, and a complete failure to conserve fisheries by the international community in fact shows opposing picture than that of an exemplary cooperation of states. Rosemary Rayfuse (2007, p.366) succinctly notes that the difference between marine and terrestrial species has been perpetuated in the conventions pertaining to biological diversity, with the former more often being object of *protection* in the framework of efforts to conserve wildlife, while fisheries have mostly been seen as a resource, and have thus been excluded from the conservationist efforts.

purification, waste treatment, pollination, recreational and cultural services, etc. The full knowledge of the relationship between ecosystem services and biodiversity is still evolving, but it is generally accepted that it is one of mutual supportiveness: ecosystem services maintain biodiversity, but the diversity of life also supports the normal provision of services (Daily, 1997, p.3). Or, to put it differently, one may be part of the other: “Diversity [...] is a structural feature of ecosystems, and the variability among ecosystems is an element of biodiversity.” (MEA/World Resources Institute, 2005, p.51).

Generalisation about which ecosystem services qualify as a global public good is both a complex and subjective matter. The MEA has spatially differentiated between ecosystem services and those which are provided and used locally - such as medicinal plants, food, and soil erosion -, and those which, despite being provided locally, provide also global benefits - such as carbon sequestration and storage. But defining the public aspect of biodiversity based on the benefits it generates, may be problematic when different benefits (one local and the other global) originate in the same resource. For example, while a forest purifies air locally, it also provides a global climate benefit. In that respect, the benefit of the concept of ecosystem services is not so much conceptual as linguistic. It speaks the language of utility, and highlights certain aspects of nature that have long been obscured, but does little to define the boundaries of biodiversity as a global public good.

There seems to be no reason for these services not to find expression in the framework of the notion of biodiversity, as the concept of biodiversity can be broken down into a typology which accommodates the meaning of ‘ecosystem services’. Holly Doremus (1991) for instance, divided *biodiversity values* into direct economic benefits, indirect (supporting) ecosystem services, and aesthetic and cultural benefits. This classification strongly resonates with the MEA's classification of ecosystem services into regulating, provisioning, cultural, and supporting services (MEA/World Resources Institute, 2005).

The most significant contribution to the discussions on biodiversity by the notion of ecosystem services is therefore its role in presenting the utility of nature for humans more explicitly. It reinvented the issue of biodiversity among the private sector, and is likely to significantly affect the appreciation of biodiversity in international policy discourses. (A remark from a facilitator at a business conference is illustrative of the point that ‘Biodiversity’ is a concept that the business world is struggling to understand: ‘[S]everal of our participants today have mentioned during their self-introduction that they honestly do not understand what biodiversity is. I myself, having studied various materials as a novice, still don’t understand why it’s called biodiversity.’ (Taisei Corporation, 2010), whereas ‘ecosystem services’ seem to translate well into the language of acquisitions, purchases, and trading. The concept is composed of words with a customary meaning, thus easy to understand, denoting an act of delivering a benefit or utility, normally in return for payment. Presented in this manner, biodiversity issues will certainly echo more in the corridors of companies.

The introduction of a new term - indeed a new concept -, however, may represent a more significant change in the regime than purely improved communication. It re-frames the problem and the objectives of action, possibly opening up new avenues of dealing with it (Hajer, 1997). The introduction of a new concept may be problematic in the sense that different obligations, which may not be consistent with those assumed under the treaty, are implied to be too dependent on understandings of utility of particular periods or elites. The abstract notion of “diversity of life”, which adequately captured the element of uncertainty, has become reshaped into a source of more concrete, but also more limited duties. TEEB defines ecosystem services as ‘conceptualizations ... of the “useful things” ecosystems “do” for people, directly and indirectly, whereby it should be realized that properties of ecological systems that people regard as “useful” may change over time even if the ecological system itself remains in a relatively constant state.’ (Kumar, 2010, pp.12, 15).



## **Why Incentivise?**

Apart from having determined the subject of interest, the previous section has not established a normative framework for guiding the use of the matter. The status of a public good itself dictates neither the management, nor the solution to the common action problems. Instead, a treaty regime, the CBD, is in place with its own objectives, processes and institutions. In this section, I turn to it in order to, firstly, establish the policy goals, and secondly, determine which aspects of these goals need a particular regulatory boost.

### ***The regime***

The existence of a variety of objectives in the CBD reflects distinct interests which led to the establishment of this treaty, ranging from the desire to conserve nature to industrial concerns related to nature (Swanson, 1999). The CBD (1992, Preamble) confirmed all these interests as legitimate, as it ascribes biodiversity ecological, genetic, social, economic, scientific, educational, cultural, recreational, and aesthetic values.

Against this background, it will not come as a surprise that the conclusion of the CBD is to be seen as an agreement on how to reconcile and coordinate a wide range of interests which existed in the international community concerning the field of protection of nature. Despite having distinct goals, these movements also shared a common goal – that of “centralized development planning.” (Swanson, 1999). Reasons for international coordination in the field have long been present, as demonstrated not least by a number of conventions regulating the components of nature, some of which may rank among the oldest multilateral cooperation treaties.<sup>13</sup> By the time the CBD was born, all of the most important conservation treaties were in place.<sup>14</sup> Not only were the existing multilateral agreements targeting different aspects (from individual species to ecosystems), each also had its own regulatory techniques in place, including the type of commitments which they imposed on states parties, institutional arrangements, and mechanisms for designing and advancing policies. The CBD entered into a rich regulatory and institutional landscape.

Consonant with reasons of multilevel governance, more specific legislation on biodiversity was enacted at the national level, and further decisions were taken at the local level, where they, finally, were also implemented (Bilderbeek, 1992, p.13). Rather than overriding the latter, the aim of the CBD was to provide a coherent and comprehensive framework to a large body of previously concluded conservation instruments. Indeed, it succeeded to introduce “some order into disparate agreements regarding the protection of wildlife” (McGraw, 2002) by bringing in some overarching principles and

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<sup>13</sup> The “International Environmental Agreements Database Project,” which lists over 1000 multilateral, and over 1500 bilateral environmental conventions, implicates that the oldest convention which deals with an environmental resource is the Convention between Baden and Switzerland Concerning Fishing in the Rhine and its Fluxes, as well as in Lake Constance, dating from 1875, see *Convention pour l'accession de l'Alsace-Lorraine a la Convention conclue, le 25 mars 1875, entre la Suisse et le Grand Duché de Bade relativement à la pêche dans le Rhin et ses affluents ainsi que dans le Lac de Constance*, signed on 14 July 1877 (data from Mitchell, 2002). The date of this treaty has preceded many trading treaties, and is comparable to the establishment of the first international organisations. For example, the Universal Postal Union was established in 1874.

<sup>14</sup> For instance, all of the “big four conventions”, forming the core of international wildlife law, were already in place: the Ramsar Convention, (1971), Bonn Convention, (1979), World Heritage Convention, (1972), Convention on International Trade in Endangered Species, (1974). The term “the big four” was coined by Simon Lyster (1985). In addition, the Madrid Protocol to the Antarctic Treaty, putting in place a strict environmental regime on the Antarctic continent, was adopted in 1991 (Madrid Protocol to the Antarctic Treaty, 1991). It should be noted that the conservation and use of fishery resources have been developing quite apart from the terrestrial species and ecosystems. While the relevant global agreement – UN Convention on the Law of the Sea, (1982) – was already concluded, the more specific UN Fish Stocks Agreement (1995) and further regional treaties were only signed in the nineties.

rules. It also ‘married’ two other goals, and established institutions to enable the international management process (Bilderbeek, 1992; Glowka et al., 1996).

### ***Regime weaknesses***

It should be clear that the biodiversity regime should not be equated with the existence of the CBD. But at the same time, the CBD embodies the central institutional and normative aspects of the protection of biodiversity. The CBD is the primary source that one turns to in order to establish the guiding principles of biodiversity management. Its authority stems from the intention of the parties to grant it the status of a principal forum for protection of biodiversity, and the thoughtful scientific input into its drafting (Tinker, 1995, p.194). It is also a widely representative and inclusive forum of states.<sup>15</sup> In the course of its life, the CBD has become a principal institution to formulate policies in the field (Mackenzie, 2010).

Yet, most conservation treaties existed in the shadow of more pronounced international treaties. The common feeling that “international environmental conventions and treaties are often ineffective”<sup>16</sup> applies also to the CBD. In terms of its reach, it is a largely unknown specialized regime, unfamiliar to the wider public and to considerations of other regimes; a regime whose obligations do not trickle down as expressly to the people's lives as those of, for example, human rights. Beyond public perception, the regime has not positioned itself strongly among other legal regimes. On a few occasions in the process of policy drafting - and even law-making -, the CBD has proved a powerless promoter of its own norms, unable to stand up against the goals of other regimes.<sup>17</sup> Biodiversity also remained a marginal issue in adjudication, with courts hardly engaging in the debate.<sup>18</sup>

Even the Convention perceives itself as an underdog. A Strategic Plan, adopted ten years into the regime's functioning, identified twenty-nine impediments to the implementation of the CBD, ranging over eight issue areas (UNEP/CBD, 2002d, Annex). Listed among the obstacles are the lack of political will, lack of economic incentives, lack of mainstreaming and integration of biodiversity issues into other sectors, institutional weakness, lack of horizontal cooperation among stakeholders, insufficient use of scientific knowledge, and lack of appropriate policies and laws. In fact, there is hardly any significant issue which is not mentioned in this self-diagnosis. The CBD perceives itself as an unfortunate member of the global governance hype. Even more unfortunate is that these problems

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<sup>15</sup> As of 31 January 2011, the CBD has 193 State Parties, making it one of the most representative treaties in any field. Notably, the US is not a party, and neither are Andorra and the Holy See.

<sup>16</sup> The question ‘Why are international environmental conventions and treaties often ineffective?’ was posted at ‘Yahoo!answers’, (2011), which is a popular web-based avenue where the public can ask any type of question as an expression of a concern relevant for the public.

<sup>17</sup> Controversies involved the issues of biofuels and deforestation on a policy level, and an actual legal arrangement which allowed for CO<sub>2</sub> sequestration in the sub-seabed (see Bilderbeek, 1992; Koh and Ghazoul, 2008, on the clash between the rural development goals and carbon mitigation in biofuels; Rousseaux, 2005, on the systemic weaknesses of the CDM for possibly leading to harmful afforestation projects; Blessing, 2010, a case study on a village in Tanzania, where land-intensive projects negatively affected the livelihoods of people who rely on land for food and other resources; Penca, 2009, on an amendment to the London Convention that effectively leads to a lowering of environmental standards).

<sup>18</sup> Although general principles of environmental law (in the context of transboundary effects) apply to the biodiversity issues, the latter were specifically dealt with in only a few international cases: *Southern Bluefin Tuna Fish Case*, (1999); WTO Appellate Body, (1998) looked at *India etc. vs. United States – Import Prohibition of Certain Shrimp and Shrimp Products* Report; another case in the framework of the WTO was *The Tuna - Dolphin Case Mexico vs. United States* (GATT Panel, 1991), circulated on 3 September 1991, but not adopted; biodiversity claims were considered by The United Nations Compensation Commission (UNCC) and these are the only known occasions when loss of biodiversity was given a compensable value; finally, a case was submitted to the FTA dispute settlement body, (1990): *US – Canada Lobster Dispute* decision 21 May 1990.

impeding the regime's better performance were continual, and not just associated with a particular period.

Some of the major weaknesses are integral aspects of the CBD's design. Commentators have looked at the Convention extensively, but only few critical analyses of its internal deficiencies have been made. These have mainly exposed two sets of deficiencies: firstly, weakness, vagueness and "lack of teeth" (Wold, 1998, p.1; Hendricks, 1996; Guruswamy, 1999); and secondly, insufficient attention devoted to international financing (Hendricks, 1996).

These critiques are difficult to defeat. The Convention's language is indeed hortatory and unspecific, both on its own terms and in comparison with other multilateral agreements. While providing a comprehensive framework on the issue, it lays down almost no straightforward obligations. By becoming party to the CBD, states have accepted only a duty to manage their biodiversity in a sound manner within their sovereign territories, and to care similarly about areas beyond national jurisdictions, but the standards of defining acceptable biodiversity management are non-existent, or stretchable at best. The CBD is essentially another in the line of conservation treaties with broad statements of purpose and objectives, but a lack of express provisions for implementation (Bilderbeek, 1992, p.100). It has been argued that the CBD is doomed to ineffectiveness by giving insufficient means for the realisation of the stated objective of biodiversity conservation, and for failing to address the core causes of biodiversity loss, making the CBD an 'un-implementable' and 'non-compliable' agreement (Adam, 2010). This is so because protection of biodiversity is one of competing norms in a dense regulatory space. There are many incentives for states to pursue policies, or a development path, which diverts them from the objective of protecting biodiversity (these policies and practices which encourage conduct that leads to the degradation of biodiversity are called 'perverse incentives' by the UNEP/CBD, 2006c, Add.1).

The CBD's weakness extends beyond substantive provisions, including also structures for the management of the treaty regime. The CBD's lack of any enforcement provisions renders debates about enforcement almost irrelevant. "[T]here is little of [enforcement] in international law, let alone in international environmental law" (Brunnée, 2005, p.2), and even less so in its subsection of nature protection. There is equally little use in discussing compliance mechanisms in the context of the CBD. Contrary to most other treaties, the CBD does not contain them.<sup>19</sup> It does contain provisions which aim at inducing compliance, such as technology transfer, capacity building and reporting (CBD, 1992, Article 12, cooperation in research and training; Article 16, access to and transfer of technology to developing countries under fair and favourable terms; Article 18, technical and scientific cooperation in particular with developing countries; Article 26, Reports), but these are not compliance bodies in the service of controlling compliance and facilitating problem-solving (Brunnée, 2005, p.380). Finally, although the CBD contains dispute settlement mechanisms (1992, Article 27 defines negotiation, mediation, arbitration, conciliation (the procedure for these two is described in Annex II), and the submission to the ICJ, as ways of settling a dispute), these have not been used to date. Arguably, this is because the problems of the CBD are much more rudimentary, i.e. such disputes do not even arise.

The second critique is that of an inadequate financing scheme. Financing is one of the fundamental elements of successful environmental governance. It is generally accepted in international environmental law that non-complying parties, and almost all cases of non-compliance, are a consequence of a lack of funding or capacity - which is again related to funding -, see e.g. Brunnée (2005, p.3). In the context of the CBD, the need for a funding mechanism is well explained as follows:

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<sup>19</sup> The issues of compliance with environmental agreements, in particular various institutional structures, have been much debated. Among some of the most visible volumes on the matter, not a single contribution has studied the (non-)compliance arrangements under the CBD, which does not say as much about the irrelevance of the CBD as a treaty, but rather about the lack of any such mechanisms in it (see Beyerlin et al., 2006; Cameron et al., 1996; Zaelke et al., 2005; Treves et al., 2009; A. C. Kiss et al., 2003).

“The Convention [...] was presented as complex set of deals: a deal between North and South, a deal between the public sector and the private sector, a deal between national governments and local communities, and a deal between present and future generations. Deals imply some type of exchange be it in-kind or financial.” (UNEP and IUCN, 1998, p.2)

Few alternatives exist to the central problem of the global biodiversity conservation: that of compensation to the local communities for forgoing their immediate benefits from exploiting biological resources, or - more generally -, for making them follow a development route, which prioritises conservation or sustainable use of land over financial gains (McNeely, 1988, p. xiii; Perrings and Gadgil, 2003; Mullan et al., 2009). At least in the short term, this latter route is seen as less profitable.

It is not that the CBD has ignored the issue of financing. Rules on financial resources are built on the principles of common-but-differentiated-responsibilities (CBD, 1992, Article 20, Paragraph 4), and ‘full incremental costs’ (CBD, 1992, Article 20, Paragraph 2). There are provisions on a financial mechanism and financial resources. The role of the financial mechanism was entrusted to the Global Environmental Facility (GEF),<sup>20</sup> which was supposed to act as a primary economic incentive for the developed countries. The GEF operates on a grant basis, provided to projects in developing countries. Biodiversity is one of the two issue-areas receiving the vast majority of the GEF's funding, and is seen as a primary source of a greener aid (Hicks, 2008, p.207). Even so, the resources provided through GEF are insufficient, project-tied, and do not match the benefits provided by biodiversity (Menzel, 2005). Apart from insufficient funding, certain aspects of the GEF's governance have been seen as problematic. Initial critiques about its transparency and accountability have arguably been resolved (Lake, 1998), but a disproportionate influence of developed states (who provide most of the GEF's funding) over the allocation of funds is a lingering problem (Sjöberg, 1999).

As comprehensive as it may be, the CBD's financial model is obsolete. It is built on a rigid notion of the developed North providing *aid* to the South, a model that is akin to development assistance (Kaul et al., 1999, p.450, at xxiii, identify the ‘Incentive gap’ or the focus on aid mechanisms, rather than many other policy options, as part of three key weaknesses in the current arrangements which impede a better supply of global public goods). Yet, given that biodiversity provides a global benefit, resources provided to supply it should not be seen as ‘aid’ neither by the donor, nor the recipient. The concept of aid is burdened with polarised views of who owes what. The verbalisation of the transaction along the traditional division between the ‘developed’ and ‘developing’ countries further perpetuates the view of opposing ‘camps’, and obscures the CBD's original idea of a shared value. In a joint community that seeks ways of sustaining life, it is increasingly difficult to define which direction of the transaction is about ‘assistance,’ or which party is actually in a greater need of the other party. Rather than aid, the participation in biodiversity transactions is much closer to self-interest or global interest, if the blurry line between them can be ‘sharpened’ anyway (Cullet, 1999, pp.559–61).

### ***Incentives***

In essence, insufficient funding is a consequence of inadequate incentives for achieving the goals of the CBD. This section will provide an overview of the existing incentives in the Convention.

The Convention's most obvious built-in incentives are those that emerge from the objectives of the Convention. Although it is commonly assumed in the debates on biodiversity as a public good that the

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<sup>20</sup> The GEF was created by the World Bank in 1991, that is before the Rio Summit, to provide financing to developing countries in four main areas of environmental degradation, of which biodiversity loss was one. It was at first only a temporary financial mechanism of the CBD, but was later made permanent by a COP Decision (UNEP/CBD, 1996a). The relationship between the CBD and the GEF is governed by a Memorandum of Understanding, which is part of this decision.

proper policy goal is conservation of biodiversity, there are two other objectives: sustainable use of its components, and fair and equitable benefit-sharing, arising out of the utilization of genetic resources (CBD, 1992, Article 1). The CBD sees these objectives as easily reconcilable, and as achievable with synergetic measures in its implementation, both *in-situ* (in natural environment) and *ex-situ* (outside it). Over time, the concept of conservation itself has evolved to include a certain level of takings, in other words, the concept of 'conservation' in itself now includes some sort of "sustainable use." (Heijnsbergen, 1997). This has been accepted by the CBD, which sees sustainable use as a tool, or incentive, to promote conservation, and recognises that "sustainable use cannot be achieved without effective conservation measures." (Secretariat of the Convention on Biological Diversity, 2004a). Rather than antagonistic, as in the past, the goals of conservation and sustainable use have become seen as synergetic, and this is now widely accepted, with the support of numerous case-studies and policy recommendations.

Built into the Convention is also the goal of benefit-sharing, the purpose of which is to act as an incentive for the local communities in developing countries to conserve (Matz, 2006, pp.308–10, finds the scheme of benefit-sharing, in combination with access control and state sovereignty, an incentive in itself). To achieve those benefits, profit-sharing agreements between - mostly food and pharmaceutical - companies and the communities hosting biodiversity were anticipated as a legal tool for awarding local people for their conservation efforts. However, the system built on bilateral contracts has been critiqued for legitimising the inequality of contractual relationships, where the commercial parties are more powerful, and for being an inappropriate tool of sharing an international problem, as they tend to downplay some of the rules of the multilateral regime.<sup>21</sup> So far only very few agreements have been concluded, and only one such contract continues to be cited as a successful example.<sup>22</sup>

As it emerges, direct use has not been a sufficient means of ensuring a continual provision of ecosystem services, and synergies between the CBD's objectives as such are not sufficient incentives to ensure the provision of the public good aspects of biodiversity. Rather than relying on direct use, it has been suggested that ecosystems services themselves should be integrated into the global accounting system (Hutton and Leader-Williams, 2003). This suggestion implies valuation of biodiversity and its benefits, including in monetary terms.

Integration of biodiversity into the market mechanisms is not contrary to the CBD. The economic value is mentioned as one of values of biodiversity in the preamble. But this is the only expression of its economic benefits. It had been noted already at the time of the conclusion of the CBD that the Convention insufficiently advances the options of 'harnessing' markets for biodiversity conservation (Roberts, 1992, pp.341–2). Throughout the regime's operation, these weaknesses have become even more visible as a "modernisation," or a broader evolution, of the governance has occurred in other fields.

Just around the time of the conclusion of the CBD, the field of economics was becoming an ever more influential discipline in the formulation of national environmental policies (N. Gunningham, 2009, p.185), which had an effect on the international law a few years later.<sup>23</sup> Environmental law has moved away from employing prescriptive command-and-control regulation towards more reflexive

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<sup>21</sup> Because of space constraints, I do not engage further with the fairness concerns, concerning bilateral contracts. For issues involved, see e.g. Gaia/Grain (2000).

<sup>22</sup> That is the agreement between the U.S. pharmaceutical firm, Merck, and the National Biodiversity Institute (INBio), a scientific, non-profit organization created by the government of Costa Rica, struck in 1991. On the context and content of the agreement, see Coughlin Jr, (1993).

<sup>23</sup> The Kyoto Protocol was the first international instrument to incorporate economic instruments. In innovatively using a variety of regulatory techniques, it is seen as a "pioneer among the multilateral environmental agreements" (see Bothe, 2007).

law, which employs instruments that mimic the market, and are perceived as more efficient, and more conducive to innovation (see e.g. Driesen, 2006; Gunningham, 2009; Freeman and Kolstad, 2007; Ashford and Caldart, 2008). These shifts have redefined the regulatory options at hand by extending the ensuing regulatory toolbox.<sup>24</sup> Concurrently, environmental awareness of consumers and governments has increased, co-shaping a more conscious era of green consumerism, and a demand for green policies. Overall, markets have become the primary organisational principle.<sup>25</sup> This has been coupled with the private sector becoming more pronounced on the regulatory stage, at times equalling public actors in authority and power (C. Scott, 2002, providing an analysis and description of the range of forms which such private regulation takes in the United Kingdom; J. Freeman, 2000, demonstrating ‘a deep interdependence among public and private actors in accomplishing the business of governance’).<sup>26</sup> Universal fundamental rights have been diffused among the old – public –, and new – private –, players. The shifts have mostly been described in the simplistic form of ‘new’ law, which is replacing the ‘old’ regulation (see e.g. Teubner et al., 1994; Golub, 1998; Búrca and J. Scott, 2006).

The changes were mostly studied and applied in national environmental policies in the West and in the context of pollution control. From there, they have been spilling over to other areas and jurisdictions, but only slowly. On the international level, most of the regulatory options were pioneers in the context of the climate change regime, and most of the lessons have accumulated there. The flexible mechanisms of the Kyoto Protocol have contributed to, if not initiated, much legal activity for reducing greenhouse gasses on international, regional, and national levels (on this, see above footnote 1). Some market mechanisms involving private actors have also been set up in relation to biological resources in a national context. Particularly echoed is the example of the US wetland banking scheme, designed to achieve no net-loss of the US wetlands and uphold their benefits of watershed protection (see in particular Salzman and Ruhl, 2000, 2006; Ruhl and Gregg, 2001).

These new instruments have not gone un-criticised. They are supposedly damaging the core values of environmental law, and require too high a price for achieving efficiency, which may be undermining goals of biodiversity conservation (Robertson, 2004; Salzman and Ruhl, 2000, 2006). A close engagement of conservation activities with the private sector has also been criticised for commodifying nature, and surrendering to the larger project of neoliberal capitalism (MacDonald, 2010; Winter, 2010, criticising that in emissions trading the economic logics has supplanted ecological logics). In a way then, by not engaging with the private actors and economic mechanisms, the CBD has in fact distanced itself from being associated with the criticism these novelties have generated.

It took a few years for the CBD to position itself in these developments, embracing markets and the private sector. As the CBD identified, there are a number of reasons for the involvement of the private sector in the advancing of the goal of the Convention (CBD Secretariat, 2005). One is that of accountability: businesses have impact on biodiversity, while at the same time their activities draw on biodiversity for its resources. The other reason is that of a potential for norm promotion and communication, as the business world is supposed to have an influence on the public opinion, and thus has potential for raising the profile of the Convention and its objectives. Finally, there are the financial reasons: the private sector represents an important donor.

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<sup>24</sup> I borrow the notion of a toolbox from Elizabeth Fisher (2001), who argues that in the EU questions about regulatory design are obscuring questions about democratic governance, such as that of legitimacy and transparency of public institutions.

<sup>25</sup> Bobbitt (2008) argues that nation state is being superseded by a ‘market state’, which promises to maximise the opportunities of the people. The consequence of the rise of a market state is privatisation of many state activities, decrease of influence of voting and representative government and a state that is more responsive to the market.

<sup>26</sup> Generally, nothing better exemplifies the rise in importance of private actors than the whole body of literature on Transnational Private Regulation (TNP).

This section has ventured over the regime's deficiencies by sketching the discrepancy between its internal provisions and the expectations of the external environment. The purpose of the next section is to review the attempts to fill this gap. The CBD has the necessary institutional provisions to, not only maintain itself as a 'living treaty', but also to react to the external environment in the course of its life. In addition to adopting protocols (CBD, 1992, Article 28), amendments of the Convention (CBD, 1992, Article 29), the COP is explicitly authorised to "undertake any additional action that may be required for the achievement of the purposes of this Convention in light of experience gained in its operation." (CBD, 1992, Article 28, Paragraph 4 (i)). It is precisely because these structures enable the CBD to develop in a responsive manner that its conduct should be scrutinised.

## **International Incentives for Protection of Biodiversity and Ecosystems Services**

### ***The CBD process***

Aware of its limitations, the CBD put in place its own process of encouraging the implementation more actively. The parties' attention was first directed to incentives at the third COP in 1996 (UNEP/CBD, 1996b). Without defining 'incentives' at that stage, the parties recognised their "central importance to the realization of the objectives of the Convention," and agreed to include the issue on their agenda. From today's perspective, this decision marks the first phase of problem identification as lack of incentives, which will be followed by phases of identification of perverse incentives impeding better implementation of the Convention, exchange of experience on national incentives, and an attempt of the development of international incentives. Immediately, an important role in this process was predicted for the private sector.

At the beginning, and explicitly within the 2000 *Programme of work on incentive measures* (UNEP/CBD, 2000a), incentives were viewed as country-specific, and the work was focused on national incentives. Only later did the parties reveal that they also had in mind the possibility of international incentives. In that context, the UNFCCC (United Nations Framework Convention on Climate Change) seemed an attractive avenue, and incentives therein were explored to also benefit the biodiversity regime (UNEP/CBD, 2002a, 2011). Any incentives being developed with the primary purpose of protecting biodiversity were not actively explored, more in terms of integration, like an idea of a global initiative on banking, business, and biodiversity (UNEP/CBD, 2002c). Generally, the role of incentives was defined as: "the purpose of incentive measures is to change institutional and individual behaviour in order to achieve in whole or in part the [...] objectives of the Convention" (UNEP/CBD, 2002c).

The *Programme of work* was reviewed in 2008. If one expected self-standing incentive mechanisms, run by the CBD, progress was modest. On a closer look, however, these were not even the objectives of the work of the Convention on incentive measures. Rather than establishing institutional mechanisms as such, the aim of the efforts seems to have been set on enabling the process. In this context, the objectives of the activities related to incentive measures were a review of existing incentive measures; integration of information on biodiversity in consumer decisions; assessment of the values of biodiversity in order to internalise them in public policy initiatives and private-sector decisions; a consideration of biodiversity concerns in liability schemes; and integration of biodiversity concerns in all sectors (UNEP/CBD, 2000a, paragraph 2). These steps may well be preliminary, as the process started from scratch, and incentives may develop as to depend on institutions in the future.

Most of the work within the CBD relates to modest incentives at best, such as a collection of case studies and lessons learned.<sup>27</sup> One of the central tools is a web-based 'clearing house,' through which information on national incentive measures and good practices are shared. The parties are free - and encouraged - to use the information, but it does not have any prescriptive role. A mechanism that stands out from otherwise dominating documents is a funding mechanism called *LifeWeb*, aimed at funding protected areas, complementing the GEF in that. *LifeWeb* is a database which links donors and recipients of funds, but allows the former to choose which projects they will finance. This is an innovative way of dealing with demand and supply of funds, as it allows donors to be more flexible in choosing where their money goes, and the recipients to structure projects according to their needs, and then seek funding. It attempts to join both private and public funding. Although the private sector as well as NGOs are invited to participate alongside the governments, to date no projects have been funded from private sources.

An analysis of the CBD's work would be incomplete without its role in two less tangible, but influential processes: that of valuation and discursive change.

#### (Economic) valuation

The strategy on incentive measures within the CBD regime consisted for a large part of promoting the use of valuation methods in decision-making. A broad set of different methods fall under the term, which can take into account economic and other values (for an overview of methods, see Organisation for Economic Co-operation and Development, 2002). In its very first decision on incentive measures, the COP recognised the importance of highlighting the market and non-market values in any policy or programme (UNEP/CBD, 1995, paragraph 4). The COPs consistently drew attention to the economic valuation, as well as the social, cultural and ethical valuation, as important tools for well-targeted and relevant incentive measures (e.g. UNEP/CBD, 1998, 2006b). Valuation acts as an incentive in itself, but it is used also as a means of developing other incentives, as it breaks down various aspects of biodiversity and forces one to value them. Although biodiversity valuation is a fairly young strand of economics, and much of the research agenda is still to be fulfilled, the discipline has taken a huge step ahead in coming to terms with developing the right methodologies, and admitting its limitations. In this process, two studies have been extremely influential. One is the 2005 Millennium Ecosystem Assessment, and the second the TEEB research, both of which have not only carried out large scale assessments of the global ecosystems, but also popularised the notion of benefits derived from nature.

#### Change of discourses

The second of the salient processes, an incentive on its own, and also an illustrative consequence of the attempt to mainstream the business' case on biodiversity, can be noticed on a terminological level. In the documents of the ninth COP of the CBD (year 2008), one can observe the introduction of a number of new concepts to support the business' case for biodiversity and to appeal to the private sector. 'Business' is now mentioned alongside or instead of 'the private sector,' the private sector's 'contributions' have been transformed into 'investments', and the concept of 'ecosystem services' is consistently associated with, but separate from, 'biological diversity'. All these and other changes foster the idea that the biodiversity concerns may, and should be, integrated into the usual businesses processes, and do not represent a challenging of them (UNEP/CBD, 2011, the phrase in use throughout the document is "biodiversity and its associated ecosystem services").

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<sup>27</sup> Some of the documents that the CBD Secretariat has issued are Proposals for the Design and Implementation of Incentive Measures (2004) and Incentive measures for the conservation and sustainable use of biological diversity: Case studies and lessons learned (2011). Both of these, and other tools, are accessible at the ('CBD Incentive Tool Website', 2012).



These attempts to recast the norm of biodiversity conservation is a search to align it with the predominant norms. Social constructivists have suggested some features of more frequent - and thus more influential - norms. One is specificity and clarity of a norm, as opposed to complexity and ambiguity (Legro, 1997). The other is compatibility with existing dominant norms (Florini, 1996, pp.369, 376), among which free trade ranks highly (Cortell and Davis Jr, 1996, p.452). More recently, it has been shown that

“issues readily framed within the business case discourse are likely to garner the most interest. Conversely, ethical imperatives, such as claims to a fairer distribution of resources or moral arguments for cultural self-determination, are not so easily accommodated into the prevailing [...] discourse.” (Richardson, 2008, p.455)

The developments which are visible within the CBD documents, but are in fact the result of a much wider process, have effectively been about a promotion of a new norm for biodiversity protection, one that promises to be more successful in gaining support from the changed world of increased presence of private actors and market rationale. This evolution does not qualify as an incentive, but it very much sets the stage for incentives to develop. It is particularly conducive to economic ones.

### ***Mechanisms outside the CBD***

A more tangible, and therefore seemingly stronger, expression of the governance changes in the biodiversity field is to be detected outside the CBD. The avenues parallel to the state-centred regime share the norms of the treaty process, but they are not pre-determined by the type of actors who get involved, and the type of instruments which can be used. Incentives that develop there are more responsive to the determinants of the governance field, or in the language of economics, more reflective of demand. Below, I offer a short ‘tour’ of these more independent mechanisms, which developed outside the CBD. While the scale of the projects presented here should not be overstated, their importance is worth a reflection, as “they could serve as the precursors to larger, more broad-based biodiversity markets in the long term. Essentially, they demonstrate that there can be a business case for investing in biodiversity conservation.” (Bayon, 2008).

#### **Certification schemes**

The use of certification for products and services which are drawn from nature is perhaps the most widely used market mechanism for biodiversity conservation. The idea behind certification is to present the consumer with a choice to purchase a product at a premium price, and channel part of the revenue for conservation purposes. The benefit for the seller is improved markets access and a better price. The consumer is believed to get a better quality product, and to signal their support for the ecological option. The idea begun as an alternative to a failed inter-state governance structure in the field of forestry, and based on its relative success spread into fisheries and other areas, such as eco-tourism. Literature on certification schemes is abound. For a recent volume, see for instance Gulbrandsen, (2010). Its popularity is manifested in the widespread presence of eco-labels, even competing ones (for an excellent critique of the attempt to harmonise the diversity, created through different certification procedures and standards in the case of agrobiodiversity, see Mutersbaugh and Klooster, 2010). The certification programmes differ in the products and areas they cover, their design and institutional structures, and the level of protection they grant, but they are jointly regarded as one of the most innovative policy designs. In none of the existing certification schemes was the CBD an establishing party, but it has consistently encouraged their promotion, suggesting that further areas should be covered by similar schemes (UNEP/CBD, 2006a, paragraph 5).

## Biodiversity Investment Funds

The concept of 'biodiversity investment funds' commonly refers to funds that provide loans to small and medium-sized, sustainable enterprises, whose work contributes to conservation of biodiversity, and - strongly linked to that - local livelihoods. In insisting that the entrepreneurs share the cost of investment, rather than providing them outright with grants, these arrangements are endorsing the functioning of financial markets. All of the known cases of such funds, however, are run with some support from public or NGO funding, which suggest that these 'investment funds' do not share the fundamental features of collective investment undertakings, but are better described as investment vehicles. The institutions in charge of 'biodiversity funds' are usually located in North America or Europe, and invest in the 'developing world'. Two illustrative examples should be sufficient to paint the picture of these schemes. A fund called *EcoEnterprises* was developed in 2000 by the NGO The Nature Conservancy and the Inter-American Development Bank's Multilateral Investment Fund. The latter focuses its activities on Latin America and the Caribbean region. Another one, *Verde Ventures*, was created in 1998 as an investment in itself from the joint International Finance Corporation/Global Environmental Facility Small and Medium Enterprise program. Today it is managed by an NGO, Conservation International.

Apart from these strictly 'biodiversity' oriented funds, there is a fast expanding and intriguing world of 'sustainable' or 'ethical' investment, composed of a variety of financial instruments, and encompassing even more diverse sectors which are conceived as 'sustainable'. The extent to which these take into account, or are even motivated by, biodiversity considerations specifically, is poorly understood. A recent, excellent study in the field is by Benjamin Richardson, (2008). However, it does not look at the specific role of biodiversity considerations in ethical investments.

### (Business) biodiversity offsets

Built on the US-pioneered wetland banking,<sup>28</sup> biodiversity offsets are schemes that provide businesses with a possibility to make up for the damage to biodiversity which they have caused in the phase of developing their investment, or core-business projects. The underlying assumption of the scheme is that offsetting comes at the end of the so-called 'mitigation-hierarchy', i.e. after all measures for prevention and minimisation of damage have been accomplished (Ten Kate et al., 2004). Only when no further measures are possible on-site, offsetting should be pursued, and must be in kind. The goal of offsetting is at least 'no net loss' - compensation of the damage business is responsible for -, or even, taking it a step further, 'positive net loss' or 'net gain' - compensation that goes beyond 'no net loss,' by not only mitigating the impact, but also financing and providing for a completion of projects with an ecological value which is higher than the ones they are responsible for.

In view of the ambition of the concept, and the level of commitment required of the actors involved in an offsetting activity, it may be surprising to learn that business offsetting is required by law in around thirty countries around the world (Parker and Cranford, 2010). But legal obligation is only one source of commitment that companies undertake, and voluntary projects are at least just as common. Participating companies are mostly those that are involved in extractive industries, or businesses with a high impact on biodiversity and local livelihoods. They mainly seek to secure a positive image for themselves, and a "social license to operate" (Gunningham et al., 2004), but also an improved access to capital, and a first-comer advantage in case these become regulatory requirements in the future. On the international level, the activity is largely coordinated by the Business and Biodiversity Offsets Programme (BBOP). BBOP was established by two NGOs, but now has its own secretariat, based in

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<sup>28</sup> The wetland mitigation banking in the US is based on a legal requirement for all project developers to offset their residual impacts on wetlands by buying wetland credits from others. For literature suggestions, see in particular Salzman and Ruhl (2000 ;2006); Ruhl and Gregg, (2001).

Washington. BBOP implements the projects, shares and promotes relevant management practices, which are valuable contributions to the study of this complex scheme. An important element for its evaluation is the existence of appropriate standards against which to measure the success or failure in delivering results for biodiversity and the communities involved (Ten Kate et al., 2004).

#### Payments for ecosystem services

The market approach of payments for ecosystem services (PES) is based on the principle that those who help to provide environmental services should be paid, while beneficiaries of environmental services should pay for the benefits received. As the current economic system generally rewards those uses of land that do not necessarily preserve the flow of ecosystem services, PES are designed to provide incentives for land users or land owners to manage the land in such a way as to provide broader public benefits.

PES schemes have existed for a while in the national contexts (a prominent example is that of New York city paying for conservation of land where its water comes from, as a means of 'paying for the service' of watershed and water purification, see Daily and Ellison, 2002, chap.3; McManis, 2007, chap.7), but the only international mechanism for the payment for ecosystem services so far is the REDD mechanism (Reduced Emissions from Deforestation and Forest Degradation), which originated in the UNFCCC regime around 2005. The idea behind it is that preserving forests, in particular those in tropical countries, saves emissions, and that countries which forgo revenues from logging should be compensated for the benefit they provide to the global community. It is predicted that in the near future REDD will become a fully-fledged mechanism of the UNFCCC regime, similar to the Clean Development Mechanism, by which the countries will be able to fulfil their obligations.

One of the important issues in the complex, highly technical, and controversial, negotiations about REDD is the extent to which REDD activities will actually safeguard biodiversity. In that context, REDD presents itself as both an unprecedented opportunity for the forest regime and a potential threat. One of the real concerns is that the zeal to reduce carbon emissions will overshadow a number of other ecosystem services. While intergovernmental negotiations are ongoing, a number of projects are being run in the meantime on a voluntary carbon market and through bilateral arrangements. To safeguard the interests of biodiversity and communities, these projects use voluntary standards, the methodologies for which were developed by expert coalitions, exclusively outside the UNFCCC.<sup>29</sup> The compliance with these voluntary standards is the main assurance for the positive impact of REDD+ projects on biodiversity.

Efforts to secure the REDD scheme a credible future have failed to rebut harsh critiques. They are concerned with carbon policies undermining many other policy goals, including respect for local communities and preserving the integrity of nature. The case of REDD, in particular on careful examination, brings to mind of how dividing 'environmental' measures can be. Major challenges in designing an international PES will relate to the process of their design, the criteria and standards for measuring the services, the scale at which they are managed, the possibility of 'bundling' different ecosystem services together, and many other seemingly technical issues. Unavoidably, the real challenge lies in reconciling different conceptions of fairness, and in defining what 'environmental protection' - including 'conserving biodiversity' - is really about.

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<sup>29</sup> The Voluntary Carbon Standard (VCS) is a standard used to account greenhouse gases. In addition to that, many REDD projects undergo a separate certification process set by the Climate, Community and Biodiversity Project Design Standards (CCB) that attest of their compliance with additional environmental and social criteria beyond reducing emissions, such as respect for biodiversity and rights of local people (Harvey et al., 2010, p.54). See generally 'Climate, Community and Biodiversity Project Design Standards', 2005, on the CCB standards, 'Climate, Community and Biodiversity Projects' (2005), for a database of projects undergoing auditing.

### Attempts at a “Green Development Mechanism”

The international experience with flexible mechanisms in the context of carbon markets, in particular its ability to attract the private sector, has had direct consequences for the biodiversity regime. In 2006, the United Nations Environment Programme (UNEP) and the International Union for Conservation of Nature (IUCN), in cooperation with the Secretariat of the CBD, begun looking into the options for an ‘international payments for ecosystem services’ (IPBES) mechanism with a special emphasis on biodiversity, and a broad range of ecosystem services.<sup>30</sup> In these efforts, *Green Development Initiative* has asserted itself as a coordinator in the field. It intends to establish a standard and a certification process for land management, which would be based on the rules as provided by the CBD. Its aim is to mobilise the private sector financing of biodiversity “through an international, non-ODA, business-focused, voluntary, transparent, and politically supported approach.” (‘Green Development Initiative’, 2011). The high complexity of the mechanism accounts for this initiative still being at an early stage, but it seems that the direction is one of biodiversity banking, presented briefly above.

### *Integration, Mainstreaming Biodiversity*

Apart from creating separate incentive mechanisms, the CBD - as well as other avenues - have employed other strategies to incentivise biodiversity protection. In these cases, advantage is taken of existing methods of influencing decisions in order to promote goals of conservation. In this section, I outline some legal and policy tools and processes, which have accommodated biodiversity considerations. Obviously, the strategies presented here act as incentives for biodiversity conservation only to the extent that these unbinding, ‘soft,’ methods are used. Nevertheless, these are not necessarily marginal ways of making environmental commitments. Environmental law literature has dealt with the scope and effectiveness of the tools mostly as individual phenomena. I frame them within the debate on incentives as a way of suggesting that some of these successful strategies may work as a new impetus for biodiversity conservation if they are adjusted so as to accommodate biodiversity-related provisions.

#### Codes of conduct and guidelines

Codes of conduct are perhaps most representative of the new modes of governing global affairs, and their proliferation and elaboration have also had impact on biodiversity. The codes are being developed for individual production sectors and industries. Particularly targeted are the sectors of extractive industries, tourism, forestry, finance, and agriculture. The development of guidance has fallen mostly to the large environmental organisations – the CBD, IUCN, and UNEP –, but also international organisations outside the environmental field have been involved – such as the UNWTO(2010), in the case of guidelines for tourism; or the International Tropical Timber Organisation (ITTO and IUCN, 2009), in the case of tropical forest guidelines –, as well as NGOs and industry groups – International Council on Mining and Metals (ICMM, 2011), in the case of mining guidelines. In particular the IUCN, a hybrid organisation of governments and other NGOs, seems to enjoy the confidence and credibility of the private sector, and thereby the capacity to initiate and draft guidance for specific production sectors or elaborating the desirable conduct in certain policy fields - including those in sensitive sectors. Consistently, businesses themselves are involved in the preparation of relevant guidelines. Guidelines are usually presented as an attractive option for forward-looking businesses. Besides sector-specific guidelines, the CBD and the IUCN have drafted guidelines that provide more precise substantive framework on ways of managing biodiversity in general

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<sup>30</sup> See UNEP/CBD decisions UNEP/CBD/VIII/26, paragraph 6 (c); UNEP/CBD/VI/15 Annex, paragraph 37, and UNEP/CBD/VIII/13, paragraph 4.

activities, such as guidelines for sustainable use (Secretariat of the Convention on Biological Diversity, 2004a), impact assessment (Secretariat of the Convention on Biological Diversity, 2004b, 2006), or prevention of damage caused by alien invasive species (IUCN and Invasive Species Specialist Group, 2000).

Biodiversity considerations have also been incorporated in benchmarks by the financial institutions. Out of these, notably the IFC performance standards (2012)<sup>31</sup> and Equator principles ('Equator Principles', 2006)<sup>32</sup> spell out specific content that applies to biodiversity. On the legal nature, the origin, and significance, of the IFC Performance standards, and the Equator Principles as a case study, as rules filling the vacuum at the international level about what represents acceptable social and environmental behaviour, see Affolder (2006). The Global Reporting Initiative (GRI) acts in a similar way as the benchmarks of financial institutions. By mimicking financial reporting practices, which are rooted in the principle of transparency, it provides a framework for sustainability reporting. The GRI determines principles and indicators for sustainability reporting by corporations, in other words, it defines how and what should be reported. Based on this, participating corporations are invited to disclose their environmental, social, and governance performance. The requirements for biodiversity reporting are built on qualitative and quantitative indicators which highlight direct and indirect impact on biodiversity (Global Reporting Initiative, 2000).<sup>33</sup>

Common to these documents is that they enter into areas managed by the private sector, and provide a framework, or benchmark, for its conduct. They are perhaps the key instruments of corporate accountability. These standards function as an incentive for companies that wish to be associated with good corporate social practices. The compliance with these benchmarks increases the likelihood of an improved reputation. For the aim of corporate internalisation of biodiversity's goals, there is a certain benefit in delivering biodiversity in the package of already accepted obligations, and yet have it spelled out as a responsibility separate from pollution control, which is likely to exist already in corporate practices.

The idea of codes is that companies would use them in designing their activities, for example at the stage of environmental and social impact assessment. Although many codes address the private sector directly, some of them also address it through the states, asking the governments to enact appropriate legislation and make the private sector aware of these developments. While the codes mentioned here are drafted in a multi-stakeholder process, rather than by the industry alone, the most common type of questions which can be raised about the codes remain the same. They relate to a sufficient specificity

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<sup>31</sup> Relevant to the biodiversity considerations are the following IFC Performance Standards: One: Assessment and Management Environmental and Social Risks and Impacts; Six ("Biodiversity Conservation and Sustainable Management of living Natural Resources"); and Seven ("Indigenous Peoples) and Eight: Cultural Heritage").

<sup>32</sup> The Exhibit II, titled "Illustrative list of potential social and environmental issues to be addressed in the Social and Environmental Assessment documentation," promotes that: "In the context of the business of the project, the Assessment documentation will address, where applicable, the following issues: protection and conservation of biodiversity, including endangered species and sensitive ecosystems in modified, natural and critical habitats, and identification of legally protected areas".

<sup>33</sup> Biodiversity is one of nine aspects in the environmental dimension of sustainability reporting. The two core principles relate to: (a) "location and size of land owned, leased, managed in, or adjacent to, protected areas and areas of high biodiversity value outside protected areas;" and (b) "Description of significant impacts of activities, products, and services on biodiversity in protected areas and areas of high biodiversity value outside protected areas." The optional principles relate to (a) "habitats protected or restored" (measuring the prevention and redress of negative impacts on natural habitats resulting from the organization's activities); (b) "strategies, current actions, and future plans for managing impacts on biodiversity" (performance against internal programmes); and (c) "number of IUCN Red List species and national conservation list species with habitats in areas affected by operations, by level of extinction risk." Biodiversity value is acknowledged also in other indicators, for example in the optional indicator on discharges of water and runoff, or in spillover.

and rigour of rules which would ensure a high level of protection; to inclusiveness and legitimacy of the drafting process; and to institutions and mechanisms that enable verification of compliance.

#### Environmental management systems

A particular type of corporate practices is the environmental management systems (EMS). EMS are systems “of management policies, procedures, structures and practices that enables an organization to anticipate, identify and manage the environmental impacts of its activities” (Wood, 2002, p.134). EMS and EMS standards, such as the ISO 14000 series or EU EMAS, are tools of corporate governance in the field of environment, which are increasingly popular, and - while voluntary - are increasingly habitual in organisations. These standards have come to include particular provisions on biodiversity. An example is the revised EU EMAS, which came into effect in January 2011 (*Council Regulation (EC) 1221/2009*). For the first time, it defines basic indicators that have to be used by the participating organisations in their environmental statements and reports. Biodiversity (seen as land use) is a core indicator. Effects on biodiversity are also framed as a direct environmental aspect.

#### Poverty reduction process

Alleviation of poverty is an uncontested international policy goal, most influentially expressed through the Millennium Development Goals (MDGs), but also through other initiatives - such as the Highly Indebted Poor Countries Initiative (HIPC). As these initiatives receive full international support without the need for further justification, the CBD's closer alignment with them, and the integration of biodiversity considerations in the development processes, seems like a pragmatic decision (UNEP/CBD, 2002b, paragraph 8, 2006d, paragraph 6, 21). Also, the CBD's “2010 biodiversity target”, a policy goal set in 2002, justifies the conservation of biodiversity, not only on its own terms, but also “as a contribution to poverty alleviation” (UNEP/CBD, 2002d).

Poverty and biodiversity conservation are two closely related themes, but at the same time in a contesting relationship. In the past, cases of displacement of peoples in the name of conservation have not been uncommon, and an official marriage between economic development and environmental protection in 1992 by the concept of ‘sustainable development’ seemed like a basis for synergetic policies. While formally this goal remains the same, it has been suggested that the balance between the two has recently shifted to the benefit of poverty alleviation. Rather than adjusting human needs to the ecological limitations, the latter are being disregarded and “poverty alleviation has largely subsumed or supplanted biodiversity conservation.” (Sanderson and Redford, 2003, p.390). The CBD seems to be affirming this strategy in an attempt to foster biodiversity conservation through its inclusion into other goals rather than justifying it on its own.

#### Business-NGO/treaty partnerships

A visible expression of an increased presence and coordination between different actors in the policy arena are partnerships between conservation organisations and businesses. Traditionally antagonistic relationships have been transformed into cooperation, built on the idea that a partnership is of mutual benefit. The private sector wins expertise in managing environmental aspects of their activities and a positive reputation for being involved in a public affair, almost a stage on which to showcase its commitments to the environmental goals. The NGOs or treaty bodies benefit from gaining legitimacy and funding, and normally try to exert influence over production patterns of the partnering companies. The assumption is that a close cooperation between these kinds of institutions will lead to an improved corporate conduct. Yet, the partnerships have been condemned for subordinating conservation to the neoliberal capitalist policies and practices; for leading to a withdrawal from regulatory supervision;

and for promoting voluntary (unbinding) agreements rather than putting a stricter regulation in place (MacDonald, 2010).

As noted in different analyses (Affolder, 2010; Bled, 2009; Morgera, 2009, chapter 8), the CBD started its more active period of engagement with the private sector in 2006. But while this was the first time the COP passed a decision on the private sector, a closer look at the COP decisions in the past reveals that the private sector was on the radar of the regime since earlier. In fact, it begun to be addressed as early as 1996, first as a source of funding (UNEP/CBD, 1996b, see also 2000b), and only later as an equal stakeholder in the implementation of the regime, with knowledge and non-financial resources relevant to the attainment of the CBD objectives. The process of a greater involvement of the private sector with the CBD regime has influenced the regime in most far-reaching ways, such as the fact that the private sector has been invited to participate directly in the regime bodies, either as part of national delegations or directly as an addressee (UNEP/CBD, 2006a, paragraphs 2 and 7).

## **Conclusion**

The central question of biodiversity as a common action problem on a global scale, and the CBD regime as the central institution to administer it, is that of how to get actors - from states to communities and private actors - to manage their resources sustainably. The question can be recast in terms of available regulatory mechanisms. In this contribution, I have looked at the CBD regime through the lens of the regulatory mechanisms which it has offered to achieve its objective, and I have compared them with those that are sought outside it, which presumably represent a reflection of the actual needs.

My excursion through the existing incentives essentially suggests the following interrelated issues. More than building new workable mechanisms, the process of incentivising is - at this stage - about utilitarian and pragmatic discourses in biodiversity conservation; the involvement of private actors in the governance of a global resource; the suggestion to use of economic approaches in decision-making, and instruments that *imitate* real markets. To capture the processes, I argued that only a broad conception of 'incentive' is appropriate. But apart from the distinction between command-and-control and other type of instruments, the CBD experience suggests another conceptualisation of incentivising. Two (non-excludable) trajectories of fostering the biodiversity considerations in international governance may be distilled: one through building separate issue-focussed mechanisms; and the other one through the process of 'mainstreaming', or integrating, biodiversity concerns into existing norms, institutions, issue-areas, and decision-making strategies. The mission of 'mainstreaming' is to align biodiversity considerations with the 'predominant' norms, values, actors, and institutions; and to penetrate into the existing processes of decision-making in domains of public policy, and private spheres. These dynamic processes are largely occurring outside the inter-state CBD regime, but the CBD often functioned as their 'cradle,' and even their promoter. Just how active or passive the role of the CBD in these techniques has been, and how appropriate, remains a question for a different study.

In so far as it highlights the aspects which the reforming processes are targeting, the case in point also reveals some of the regulatory, institutional, and ethical premises of the 21st century governance. For institutions and regimes with a relatively weak political capital, such as CBD, the manner of implementation is a strategic choice. The dominant contemporary governance structure dictates that state implementation and prescriptive legislation are supplemented by other regulatory methods which are characterised by more flexibility, voluntary commitments, and market-oriented solutions, all of which envisage a greater role for the private sector. Indeed, the private integration is not always forced, but is often also self-initiated. The private sector itself reaches out to implement the international norms, often regardless of the state. It is commonly suggested that an effective regime for managing a community goal is bound to accommodate these shifts. Indeed, many fields of environmental law and policy have followed the impetuses of the market and private actors. Disregard

for similar adjustments in the field of biodiversity may mean losing out on an opportunity to increase the reach and effectiveness of the regime. But while this adjustment is often presented as the only choice the regimes have, this is not the case. They could just as well opt for a path of implementation which rejects these shifts, and remain loyal to the language and methods of resistance. This second option is rarely found in practice, and this lack of evidence partly explains the indeterminacy as to claiming one or the other method as more effective, or the correct one.

Where does all of this leave the status of biodiversity as a global public good? Despite the discomfort with the commodification of nature, there are no inherent conflicts in provisioning a public good *also* through private actors and market-based incentives. If new participants to the endeavour of managing a common matter have changed, so may some of the manners of doing so. The advantage of a renewed energy for action is not to be undervalued either. The experience in the field of human rights gives sufficient hope for harnessing the private sector's role in implementing "laws of humanity". However, it should be remembered that the approach of 'global public goods' is just one among many approaches, with a particular – not uncontested – focus on effectiveness. Many other considerations may get obscured with this particular methodological choice.

As the developments described are only recent, most of the 'incentives' are really only *initiatives*. Yet, the ambitions and directions in which some of them are developing indicate the terrain on which biodiversity policies will be built in the future. If expanded upon in the future, challenges, not solely legal ones, are to be faced with more commitments of private actors. One common tendency of the private sector is to be selective with regard to the obligations it assumes (Affolder, 2010). Other pathologies of the private sectors' involvement are a misleading representation of the efforts while maintaining dubious practices.<sup>34</sup> An essential task for the future is therefore to design, and put in place, safeguards to be included into eventual market mechanisms; and ensure appropriate quality standards for the private sector involvement. Regardless of the theoretical approach of scholars, it is clear that by becoming involved in the management of a common concern, the private sector has assumed the ethical obligations that public law attaches to it, and the expectation to conform to these is legitimate. If left unattended the private sector's step into the public sphere may recast the objectives of biodiversity protection in such a way as to fit its goals, without providing a broader public benefit. Thus, the discussion on the increased presence of the private sector in no way precludes the ongoing call to scale up the public management of biodiversity, implying the need for increased public financing, stronger public commitments, and better supervision of the private action. This contribution has in no way affected, indeed only reinforced, the acknowledgment of biodiversity as a public good being primarily in the public domain.

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<sup>34</sup> These practices have popularity been known as 'greenwash', or 'bluewash' in the case of corporations partnering with the UN and claiming adherence to its principles.



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# The Emerging Principle of Common Concern: A Brief Outline\*

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## Introduction

International law based upon territorial allocation of jurisdiction increasingly fails to properly address global challenges. It lacks appropriate institutions for dealing with global public goods. This note discusses the relationship of territoriality, public goods, multilevel governance and the emerging doctrine of common concern in international law. It suggests that common concern, adopted mainly for the purpose of instigating joint action and international cooperation in environmental law, has the potential to develop into a legal principle redefining responsibilities of states vis-à-vis the production and administration of public goods beyond their own borders. The principle of common concern – while yet to be defined in terms of its contours, in particular relating to obligations to act – has the potential to partly remedy the shortcomings of territorial allocation of jurisdiction and responsibility. It will trigger appropriate incentives for international cooperation and the creation of global institutions by allowing for measured unilateral action protecting public goods vital to humankind.

## Territoriality

Public international law of the Westphalian State system was essentially built upon the precepts of Roman law and the remnants of feudalism. It is founded on notions of contract, torts and property which civil and common law adopted and further developed. Public international law reflects these main institutions in manifold ways particularly with respect to property rights. They provide the basis for state sovereignty, for territoriality and exclusiveness of territorial claims. The territories of the world are, with the exception of Antarctica, divided into national and sub-national territories, similar to property rights allocated among private right holders within such territories. Over centuries, claims to land and resources were met by appropriation in conquest, war and settlement. The vast expanses of the sea, covering some seventy per cent of the globe's surface, were exposed to similar claims of *mare clausum* and appropriation, but eventually resulted in the doctrine of freedom of the High Seas. This regime offered freedom of navigation and communication. It allowed for unlimited exploitation of living resources beyond territorial waters, but excluded under terms of *res nullius* territorial appropriations of the seabed. Territorial claims concerned the territorial sea, growing from three to thirty miles commensurate with the fire power of coastal batteries (cannon-ball rule) and, in the 20<sup>th</sup> century, the Continental Shelf and the 200-mile Exclusive Economic Zone (EEZ). Threats to natural resources, in particular fisheries, were met with the enclosure movement and thus again, appropriation and territorial allocation of resources. The 200-miles- EEZ was a reaction by coastal states to overfishing by large factory fleets based in distant locations. It was perhaps the first reaction in international law to the depletion of natural resources in the 1970s and 1980s. Up to this point in time, international law had developed and operated under the assumption of endless and bountiful resources. True, land was scarce and subject to war and conquest, and even the extinction of cultures. But full exploitation of land and resources on the basis of territorial jurisdiction of states was rarely met with limitations and not seen in any way as conflicting with nature up to the point of depletion of fish stocks and of global warming in the 1990s. International law assumed that full sovereignty over

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natural resources by all the territorial states would undoubtedly result in increased welfare and would not lead to imbalances or even destruction. There was plenty for all. It borrowed against future generations, ignoring long-term costs or without knowing them. Territorial allocation of exclusive rights over natural resources, both land and minerals, among States was considered the most appropriate regime for effective exploitation either by the State or licensed private, and often, foreign companies and investors. The process of decolonization further reinforced these assumptions. Newly independent states were naturally keen to exercise full sovereignty over natural resources. It was an important part of freedom and independence. There was no need for Common Concerns, for shared responsibility in the exploitation of natural resources neatly allocated to nation states operating under exclusive jurisdiction. Eventually, efforts to establish the doctrine of Common Heritage of Mankind in response to depletion of biodiversity and the idea of joint management of natural resources largely failed. The doctrine entails a ban on appropriation, shared benefits, peaceful use, and exclusion of military activities and weapons of mass destruction, freedom of research, environmental protection and non-discriminatory treatment. It was partly realized in the 1967 Outer Space Treaty, banning nuclear weapons in space, the succeeding 1979 Moon Treaty and the 1959 Treaty on Antarctica. The concept of shared exploitation of natural resources in the deep seabed, in particular manganese nodules, entered the 1982 United Nations Convention on the Law of the Sea with the Area (the seabed beyond national jurisdictions), but remained without practical effect. The goal of access and benefit sharing under the Convention on Biodiversity is perhaps the most important field in which the principle of common heritage had considerable influence, most recently in adopting the 2010 Nagoya Protocol. Yet, realization of common heritage remains difficult; even here, the principle of permanent sovereignty over natural resources prevailed and is firmly anchored in international law. Developing countries supported the doctrine as long it offered them better access to technology. Eventually, the interest in controlling natural resources and exploiting them prevailed in all States alike.

The pattern of exclusive, national jurisdiction over natural resources translated into reinforcing the doctrine of national sovereignty and the principle of non-interference in domestic affairs. The two are mutually supportive and create tensions with international commitments and with goals of aspiration. While states increasingly pledged to observe universal human rights, at the same time they stressed their prerogatives of non-interference and protection of domestic affairs. Still today, the lack of effective international enforcement of human rights and the difficulties of international courts in effectively prosecuting war criminals recall how strongly the international community is still rooted in concepts of exclusive national jurisdiction.

## **Public Goods**

Territorial allocation of jurisdiction thus reinforced sovereignty of states and proved a more or less successful model for states to pursue their national interests in the organization of the exploitation of natural resources and the production of domestic common public goods. Territoriality is one of the conditions, albeit not a sufficient one in itself, for governments to produce or administer and maintain public goods. Pure public goods – like the air - are available to all and consumption does not diminish the asset (non-excludable and non-rivalrous). Public goods, however, while not excludable, are often subject to depletion and thus rivalrous, such as fisheries on the high seas. They are impure. The production of private goods, finally, essentially pertains to the private sector. Yet governments may also produce rivalrous goods, if access is limited to a certain group of people with given qualifications, or in commercial activities of public entities. Delineations between these categories are not clear-cut and are not able to capture the wealth and multitude of human activities. The point is that there is a close connection between territorial jurisdiction and the production of public goods, both pure and impure. Ideally, jurisdiction of a public entity is built around the need to produce appropriate public goods. Local, regional and national governments are assigned to produce or maintain appropriate public goods in their respective realm of influence and on their respective levels. While national and

social security may be a matter for central government, communication to and from a remote village will mainly be in the hands of that community and its inhabitants. The same is true for traditional commons and grazing rights. These are a public good of a local dimension. Others are of a regional dimension, such as a common market of a federation, such as the United States or the European Union. On the other side of the spectrum, we are able to identify global public goods in which all humankind shares a common interest. The preservation of international peace, legal security in international relations (the rule of law), legally secured market access rights and non-discrimination, the protection of global commons, the protection from genocide and from hunger, are goods and values shared by all of humankind. Yet, the production, maintenance and administration of these public goods and values largely lack appropriate public institutions on the global level. While the preservation of world peace is institutionally allocated to the UN National Security Council and may be accompanied by harsh sanctions, both military and economic, and market access and non-discrimination is subject to international dispute settlement and enforcement, other public goods are neither produced nor protected by appropriate international institutions. This is particularly true for global commons and basic human rights.

The depletion of fish stocks both within and outside the EEZ and global warming due to unrestricted greenhouse gas emissions under exclusive national jurisdiction and the sheer absence of jurisdiction over the High Seas and the global atmosphere, as well as continued gross violations of human rights testify to the absence of appropriate public goods, their production and management, on appropriate levels of government. The tragedy of the global commons is essentially due to the absence of an appropriate governance structure effectively dealing, in particular, with fisheries or global warming. The sum of national jurisdictions around the world does not meet the commonly aspired goals. It allows for too much free riding. Jurisdictions are able to benefit from efforts made by others without participating in burden sharing. In doing so, States are able to point to permanent sovereignty over natural resources, exclusivity of jurisdiction and to the principle of non-interference. They are responsible within the realm, and not beyond. They may pursue the tripartite goals of sustainable development at home, but will not be able to realize them in a broader, global context. The fine balance of economic, social and ecological goals calls for a global approach taking into account the needs of other countries and continents alike. It cannot be achieved in a contained jurisdiction. Agriculture is a case in point. The pursuit of sustainable production at home cannot ignore the balance and needs in other parts of the world.

The lack of appropriate institutions to bring about these public goods on the international level leaves them largely unattained. It is in the logic of focusing on local, regional and national public goods by government that global public goods are neglected and largely left to the realm of rhetoric in the field of environmental and human rights law. The same is partly true of international economic law. Territorial jurisdiction pre-empts the production and protection of global public goods. We largely lack an appropriate framework for addressing them.

## **Multilevel Governance**

The logic of producing and managing public goods on appropriate levels of government thus does not stop at the nation state and its sub-entities, federal or unitarian. What is appropriate within the State is equally appropriate beyond its bounds. The production of global and transnational public goods was at first assigned to intergovernmental cooperation. States worked together to produce such goods by creating and operating international organizations and shared treaties. The story is well known, from early organizations to the League of Nations and the United Nations and its specialized organizations; from the General Agreement on Tariffs and Trade (GATT) to the World Trade Organization (WTO) and the Bretton Woods Institutions of the World Bank and the International Monetary Fund. More advanced structures transferred powers to supra-national organizations. The advent of the European Union is the most important example of transcending the nation state in a post-nation state era. Certain

tasks were assigned to the Union, fully or partly, with a view to producing regional public goods and enhancing welfare throughout Europe. The establishment of a single market is by far the most important achievement and public good in that respect. In other areas, the goals remain to be achieved. Today, the financial and debt crisis shows that the public good of financial and monetary stability has yet to be achieved through the design of new and reformed institutions. The euro is subject to an insufficient architecture which needs to be further developed as a consequence of the crisis. Regional public goods often develop in a process of crisis and response. They take time to build. The same holds true for the global level of governance.

The idea of allocating appropriate powers to different layers of government is of equal, if not greater, importance on the global level. An integrated world economy characterized by extensive division of labour and mutual independence of states and companies alike, calls for appropriate layers of governance and institutions able to produce the public goods securing and stabilizing such interdependence. These institutions partly exist, but to a large extent they are still non-existent within the framework of international organizations. The United Nations Security Council assumes important functions in times of crisis and threat to international peace. As to other fields of policy making, the UN is heavily involved in preparatory work but has largely left leadership to informal groupings, in particular the G-20. The multilateral trading system of the WTO today amounts to the most advanced institution offering legal security and high levels of compliance with rules agreed to. International trade, for obvious reasons, depends upon legal security and the interest in producing and protecting this public good is widely shared. The WTO, despite inadequate decision-making and increasing preferentialism, has remained attractive, mainly for its institutions and system of legal dispute resolution and implementation. Again, the financial crisis of 2007 to 2010, and the current public debt crisis shows that appropriate and sufficient global institutions are missing not only on the regional, but also on the global level, producing the public good of financial stability. The taming of global financial markets and of speculation calls for appropriate instruments of governance. They need to go beyond soft law commitments under the Basel III accords of the Bank for International Settlements. The IMF is not sufficiently equipped to deal with conflicts relating to exchange rates and implied support of export industries by means of devaluation. There is no global authority managing competition of different currencies within the global monetary system. Serious deficiencies are equally evident in the fields of human rights and environmental protection. The international human rights system is unable to protect civilians from massive and arbitrary persecution even in constellations of failed states and revolution. The institutions set up to deal with global warming depend upon voluntary commitment and compliance. The United Nations Framework Convention on Climate Change (UNFCCC) is not equipped to stabilize the rising temperatures which are likely to be detrimental to vulnerable regions, in particular mountains and coastal areas. It invites free-riding and lacks incentives to join the effort.

The need to strengthen global governance in order to secure global public goods is obvious. Appropriate instruments to deal with finance, monetary affairs, human rights and environmental issues need to be created. This may be done by international organizations, supranational organizations, informal networks or de facto governance exercised by a number of states, such as the G-20 working in cooperation with existing organizations. The doctrine of multilevel or multilayered governance assists in bringing about appropriate solutions, transcending the fundamental and traditional divide between domestic and international law. Much as public goods are produced on the local, regional and national level, it is a matter of producing global public goods on the global level of governance. There is no inherent and fundamental difference between all these layers of government and governance which precludes venturing into limited and well defined areas of powers delegated to global governance structures. Harmonization of law may be brought about locally just as much as globally. It is an incremental and arduous process.

The challenge is less one of finding appropriate instruments, than of overcoming deep-seated perceptions of the exclusive domestic and territorial jurisdiction of States described above. The transfer of power to shared institutions is resisted as a matter of principle and considered contrary to what people call *realpolitik* – despite the fact that this type of *realpolitik* is unable to deal effectively with very real threats to human life and existence and the impossibility for states to deal with these problems appropriately on their own. The process of building appropriate institutions will depend upon appropriate incentives and trade-offs in relinquishing traditional domains and perceptions of sovereignty.

### **Common Concern Revisited**

The concept of Common Concern was introduced to foster international cooperation and shared responsibility in combating global warming and addressing the challenges of climate change. The UNFCCC expresses its tasks in terms of Common Concern of Mankind. Because climate is inherently a global public good vital for humankind, international efforts at cooperation are considered essential under the auspices of the doctrine of Common Concern. The framework invited States to participate, to share the global effort. It resulted in the Kyoto Protocol with its principles of shared but differentiated responsibility, the absence of the United States and commitments for emerging and developing economies. It resulted in extensive free-riding as key States continue to abstain from international commitments after negotiations to date have largely failed to find agreement on benchmarks, goals and instruments. The concept of Common Concern, as originally understood, failed to overcome the legacy of territoriality and sovereignty, reflecting the deficiency of the present international framework.

It is here that we need to revisit the original idea of Common Concern and ask to what extent it entails normative elements yet to be discovered and developed. We need to ask to what extent Common Concern can serve the undisputed need to produce global public goods in an integrated world economy other than by merely calling for appropriate international cooperation and institutions. We need to ask to what extent Common Concern can serve as an incentive to bring about such goods and institutions at the end of the day. We need to link Common Concern with traditional precepts of territoriality, State responsibility and explore its potential as principle and tool of unilateral policy of States in building global structures of multilayered governance. It is submitted that Common Concern, if properly developed, would assume an important role in fermenting new global structures.

The need to create urgently needed public goods and to manage them properly despite the general absence of common institutions begs the question of the responsibility of states and international actors. The cleavage between evident needs and current global instruments requires revisiting traditional territorial foundations of international law laid in, and for a, very different world more than 200 years ago. Global challenges, in particular, famine, genocide, other gross human rights violations and global warming cannot wait the advent of new international institutions. In the absence of appropriate international structures they need, in the first place, to be dealt with by States. Turning one's back in the face of such challenges not only impairs the fate of others, but will eventually fall back on all. Common Concerns of this type therefore are basic and fundamental concerns which affect the very livelihood and existence of humankind, the nature and balance of this globe, and the values to which we pledge in our legal orders. They do not allow shedding responsibility behind traditional concepts of state sovereignty and territoriality. They also trigger some kind of responsibility outside territorial jurisdiction since they are matters of Common Concern. And by doing so, they provide in return incentives to work towards enhanced structures of global governance.

In developing a doctrine of Common Concern, we need to distinguish Common Concerns and the principle of Common Concern, the latter providing the basis for defining appropriate rights and obligations.

### ***The Realm of Common Concerns***

Common Concerns are matters which affect the international system as a whole in terms of the stability and viability of the entire globe. They are not isolated and remote, but affect all in one way or the other, materially or morally, directly or indirectly, sooner or later. It is not possible to define Common Concerns for once and for all and in advance. Many of them are known, and others may arise tomorrow. New problems and challenges may yet arise in the course of globalization and technological advance. They may be recognized in treaty law, such as global warming. They may eventually be recognized as a matter of customary international law in the process of claims and response. A subject of international law may call for a concern to be common, and it may be accepted, or refuted, as such based upon expression and conduct by governments. Today, Common Concerns are mainly recognized in environmental law. They include global warming, the depletion of biodiversity and of fish stocks in the High Seas in response to the tragedy of the global commons. Common Concerns, however, are not limited to the environment and ecological balance. The stability of the international financial, monetary and trading system and the protection of basic human rights are Common Concerns of equal importance and should be recognized as such. While it started with climate change and environmental law, the concept of Common Concern is much broader in scope and affects all vital interests to humankind throughout the body of international law.

### ***The Principle of Common Concern***

Next to identifying proper areas of Common Concern we shall need to explore the normative content of the concept. It is submitted that international law should recognize and develop the principle of Common Concern of Mankind as a responsibility of States. Responsibility entails the authority and duty to address and respond to challenges in the realm of Common Concerns. As a principle, it offers broad guidance while leaving details to further specifications which may vary from field to field. It complements the principles of self-determination and of permanent sovereignty over natural resources. It does not replace them as the principle of common heritage of mankind intended to. The principle of Common Concern does not displace the fundamental precepts of sovereignty and territoriality of the nation state. It adds an additional layer defining additional and new responsibilities beyond the proper territorial realm of states.

#### Responsibilities at home

Common Concern primarily entails responsibilities to act within a given jurisdiction. States are entitled, but also obliged to primarily address Common Concerns, as defined by the international community, within their own boundaries. National efforts at abating global warming therefore emanate from this principle independently of treaty obligations, as much as efforts to stop depletion of fisheries within their own territorial waters and the exclusive economic zone. Other than the principle of permanent sovereignty, the principle of Common Concern not only authorizes, but obliges governments to take action in addressing the Common Concern within their own jurisdictions and territories.

#### Responsibilities abroad

The principle, however, also authorizes action in relation to facts relating to the Common Concern produced outside the proper jurisdiction of a State. Extraterritorial jurisdiction of States, under the traditional international law as expounded in the 1927 Lotus rule and mainly expounded in competition law and policy, requires sufficient attachment to the territory of the State. Rights and obligations relating to Common Concerns go beyond the traditional precepts of territoriality. While today action can be defended if the nexus to the own territory is sufficient, Common Concern does not



require such linkages but depends upon an examination of whether the measure and action are able to support the attainment of a Common Concern. The constellation is comparable to violations of *jus cogens* which trigger responsibility *erga omnes* and where action does not depend upon specific harm incurred. Territorial affiliation will often be a matter of practical expediency, as states are largely dependent upon attachment to their territory one way or the other in implementing laws and measures. The crucial point is not whether a foreign measure negatively affects persons and resources within a given jurisdiction, but whether it affects the attainment of the Common Concern. Common Concern thus goes beyond traditional precepts of international law and attachment to a particular jurisdiction. For example, anti-trust action against companies abroad can be taken to the extent that conduct of these companies negatively affects markets and prices within the jurisdiction. It is submitted that the principle of Common Concern transcends these limitations and allows, in principle, action to be taken if the conduct abroad has detrimental effects within the realm of the Common Concern as recognized by the international community. For example, governments are authorized to take appropriate action against highly polluting means of production bluntly ignoring the Common Concern of global warming under this responsibility. Likewise, governments are authorized to take action in response to blatant and systematic neglect of the Common Concern of protecting fundamental human rights and lives.

While Common Concern provides the foundations of authorization to act, the most difficult question relates to the problem of to what extent the principle entails obligations to act. There is a fundamental difference between authorization and obligation to act. While the former leaves the matter to the discretion of government, the latter compels it to engage and take necessary steps. Evidently, a principle of Common Concern entailing obligations to assume responsibility would be much stronger, but would also conflict with traditional foundations and precepts of international law and life. Such obligations are gradually emerging in one area which is of key importance to Common Concern.

The emerging responsibility to protect civilians in civil strife has been increasingly accepted. Unilateral and unauthorized air strikes led by the US, unauthorized by the UN Security Council, preventing genocide were mainly considered unlawful in Kosovo in March 1999. The intervention in Libya from March to October 2011 by NATO Forces amounts to the first case applying the doctrine of Responsibility to Protect (R2P). The doctrine of R2P can and should be considered to be part of the emerging principle of Common Concern. The protection of fundamental rights, in particular the right to life of civilian population, amounts to a Common Concern which arguably not only authorizes, but as a matter of principle obliges, States to intervene within the realm of the Common Concern. Obviously, the step to an obligation to act, as opposed to the right to intervene, is a major step. Appropriate responses and courses of action in response to challenges are often difficult to define and realize. Intervention is notoriously controversial in politics. But a basic obligation to intervene appropriately facilitates and supports decision-making at home in view of the state responsibility assumed. It prevents governments from looking away. It makes them responsible. It facilitates coordination among States to mount an international relief operation. The main challenges amount to finding appropriate tools and to equal treatment of comparable constellations. It will be argued that an obligation to act needs to be applied consistently, and cannot be subject to opportunism and unequal treatment. Yet, the impossibility of saving lives in one instance should not imply that lives in other instances cannot be saved. It will be a matter of taking into account all pertinent factors in assessing the obligation and then making a determination on a case by case basis.

We are about to enter new frontiers of international law guided by the principle of Common Concern. To what extent obligations to act and address Common Concerns outside domestic jurisdiction can be extended to areas other than humanitarian intervention and the immediate protection of human lives requires a full debate and discussion. The principle is unlikely to call for a uniform and single answer to this question. This is true not only for the fundamental question of

obligation, but also for the terms of authorization for taking unilateral action. The principle of Common Concern as a principle therefore will depend upon further specification of rules and scope for action. These rules vary from field to field. They will partly be framed by existing treaty obligations and they may partly be subject to the process of customary law. Today, the scope of Common Concern is still largely undefined and therefore depends upon positive law. This is particularly true in the field of trade relations which will bear the brunt of measures taken in response to Common Concerns

### Respecting existing obligations

The extent to which trade measures can be taken in response to Common Concerns depends on the remedies available in WTO law or bilateral agreements, unless other and different rules are defined. Assuming Common Concern responsibilities abroad typically works with and through trade instruments addressing the methods of production of a good or service. They are subject to most favoured nation treatment outside customs union and free trade agreements. They need to respect national treatment and thus the fundamental principles of non-discrimination and transparency. Labelling of products, both voluntary and mandatory, is an important tool to allow consumers to make their own decisions in an informed manner. Products supporting and taking into account a Common Concern may obtain preferential treatment in terms of tariffs and import regulation. They may obtain research support and development assistance. The crucial point here is that States are not only authorized to use WTO rights, but are under an obligation to do so in addressing the Common Concern at stake. In the context of climate change, Members of the WTO would thus find themselves under an obligation to adopt appropriate measures for addressing polluting ways of production, or those which degrade the biosphere, in terms of tariff and non-tariff policies within the bounds of WTO law. It will be argued that recourse to such measures having extraterritorial effect will amount to imperialism and protectionism in disguise mainly in support of domestic industries competing in new technologies. Such motives cannot be excluded. There is a thin line between the protection of Common Concerns and the protection of purely economic interests. There is little doubt that Common Concern will also invite economic protectionism, and it is a matter of assessing the merits of a claim. The difficulty in distinguishing legitimate from illegitimate measures, however, does not allow the concept of Common Concern to be refuted. Drawing a line is an ordinary operation which is also undertaken in other constellations and which is part of the normal business in the operation of international trade regulation. It is not unique to Common Concern but of a general nature. It can be properly handled by WTO dispute settlement if need be. Similar constraints to Common Concern policies may be operational under other existing treaty regimes in different fields of international law. The principle of Common Concern will thus be contained by treaty law. And this prospect in return, also provides an incentive for further developing appropriate structures of global governance at the end of the day.

### **Conclusion**

The principle of Common Concern offers the potential to rebalance international law currently based upon territoriality, sovereignty and lacking appropriate international institutions able to produce global public goods. The principle should be designed to address, in the first place, responsibilities of States in dealing with Common Concerns, both at home and abroad. The principle should entail responsibilities comprising the authority to act extraterritorially while respecting existing international agreements, and which partly may also assume obligations to do so in the pursuit of global common concerns.

The implementation of unilateral or concerted measures and policies relating to defined areas of Common Concern, in particular by large powers and markets, will be met with opposition, resistance and perhaps retaliation. Government will invoke traditional precepts of sovereignty and sovereignty

over natural resources. Yet, taking Common Concerns seriously, as a right and obligation to address these concerns beyond territorial jurisdiction has to take these tensions into account and channel them towards the establishment of global governance able to deal with these matters more effectively and based upon commonly agreed rules. The principle of Common Concern provides the incentives for working towards agreed regimes. It allows both for bottom up and top down approaches. It is the combination of the two which will bring about progress in international law and relations in addressing Common Concerns of Humankind.

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## Cosmopolitan ‘Aggregate Public Goods’ Must be Protected by Cosmopolitan Access Rights and Judicial Remedies

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### Introduction: ‘Public Goods Theory’ Must be Embedded into Constitutional Theory

In their Report on *The Doha Round: Setting a Deadline, Defining a Final Deal* of January 2011, the former WTO Director-General Sutherland and Bhagwati (2011) describe the failure to conclude the Doha Round negotiations since 2001 as ‘a failure of global leadership in some quarters that is difficult to comprehend for various reasons’:

- the market access commitments on offer would provide a global economic stimulus of more than 600 billion \$ in new trade annually;
- the legal binding of currently applied market access would act as an insurance policy against potential re-introduction of lawful tariffs that could destroy up to 900 billion dollars in trade;
- reform of farm trade and conclusion of the Doha Round negotiations would enable the WTO membership to deal with the new trade policy agenda *inside* the WTO rather than in ever more bilateral and regional agreements *outside* the WTO;
- the Doha Round agreements would offer special advantages for less-developed countries (LDCs) as illustrated by the ‘duty free, quota free’ trade liberalization for the 49 least-developed countries, their complete exclusion from any new obligations except binding their tariff schedules at current levels (the ‘Round for Free’), the various forms of ‘flexibilities’ for developing countries, and the ‘trade creation’ expected from the Agreement on Trade Facilitation worth more than 300 billion US dollars.

Just as the failure of the Doha Round negotiations risks causing severe damage to the world trade system and to economic welfare in many countries, the climate change negotiations in the context of the 1992 UN Framework Convention on Climate Change (UNFCCC) have so far failed to agree on effective reductions of greenhouse gas emissions (GHG) threatening the environment and social welfare in many countries. In spite of the increasing criticism of the ‘leadership vacuum’ in the ‘transition from the old governance of the old trade order to the new governance of a new trade order’ (Lamy, 2010), the domination of the 2011 G20 Summit in Cannes by Greece’s sovereign debt crisis and by the lingering Eurozone crisis offered another recent example of the obvious ‘governance failures’<sup>1</sup> in protecting international public goods, like the international trading, financial, environmental, development and related legal systems. Economic and political public goods theories tend to neglect law and the diverse ‘legal production methods’ for public goods as well as their normative foundations in constitutional theories.<sup>2</sup> Economics and ‘political realism’ offer no coherent

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<sup>1</sup> ‘Governance’ is defined here as the collective production of rules and public goods in order to adjust existing rule systems to the needs of the citizens living under them (cf. Héritier and Rhodes, 2011)

<sup>2</sup> The two leading research publications on global public goods published by the UN Development Program - i.e. Kaul et al. (1999, 2003) - did not include legal studies. Economists distinguish ‘pure global public goods’ that are non-excludable and non-rival (like moonlight) from impure public goods that are non-excludable but rival (like the atmosphere and other ‘natural commons’) or non-rival but excludable (like patented and published inventions). Private goods, by contrast, tend to be made excludable and rival by means of private property rights. While some global public goods are well-provided (like communication and transport networks), others are overused (like straddling fish stocks, the ozone layer) or under-provided (like public health care, environmental stability). Access to some global public goods remains restricted (e.g. industrial use of patented knowledge requires payment of royalties). Certain non-rival, human-made ‘collective goods’

theories for rendering multilevel governance of interdependent ‘aggregate public goods’ more effective. This paper explains why ‘Westphalian agreements among sovereign states’ can protect citizen-driven ‘cosmopolitan public goods’ (like efficient international markets) more effectively by providing for cosmopolitan ‘access rights’ and judicial guarantees of transnational rule of law for the benefit of citizens. Just as ever more UN member states have been transformed into constitutional democracies in response to human rights revolutions of their citizens, the international public goods of efficient markets and ‘sustainable development’ must be protected by a ‘four-stage sequence’ (Rawls) of constitutional, legislative, administrative and judicial institutions and citizen rights to legal and judicial protection of public goods against abuses of power.<sup>3</sup> As global public goods affect all (including poor people), human rights and democracy require producing and protecting their benefits in participatory, fair, inclusive, rules-based and rights-based ways for the benefit of citizens. Modern economics and constitutional theories confirm that public goods (like social welfare, rule of law) depend primarily on legal empowerment and collective responsibility of citizens for institutionalizing reasonable rules. By focusing on ‘state sovereignty’ and rights of governments rather than on ‘responsible popular sovereignty’ and human rights, UN and WTO diplomats and politicians prioritize their self-interests (e.g. in redistributing ‘protection rents’ through discriminatory trade restrictions in exchange for political support, avoiding legal accountability vis-à-vis citizens for violations of international law) over the rights of citizens. European human rights, economic and environmental law illustrate that multilevel constitutional protection of cosmopolitan ‘access rights’ to supply and consumption of transnational public goods can effectively limit the welfare-reducing ‘discriminatory traditions’ of ‘constitutional nationalism’ with due respect for ‘constitutional pluralism’. The prevailing ‘intergovernmental Westphalian structures’ of international law and organizations (like the UN, IMF and WTO) fail to protect international public goods effectively and need to be transformed into more legitimate and more flexible ‘multilevel governance structures’ addressing the major ‘collective action problems’ in the supply of international public goods. The intergovernmental rule-making, rule-application and rule-enforcement processes in worldwide organizations are inadequately supported and ‘constitutionally restrained’ by democratic rights of citizens, domestic parliaments, administrative law principles of ‘good governance’, constitutional and judicial ‘checks and balances’. For instance:

- Diplomats in distant worldwide organizations – such as WTO diplomats negotiating 10 years intergovernmental disciplines on welfare-reducing trade policy instruments (like tariff bindings at 50-100%) which governments should not use anyhow - often continue to act like monarchical rulers without democratic accountability vis-à-vis domestic citizens.
- Trade politicians assert ‘foreign policy discretion’ to redistribute income (e.g. ‘protection rents’) among domestic citizens in violation of WTO obligations ratified by domestic parliaments in blatant disregard of their legal duties to use transparent, non-discriminatory and welfare-enhancing policy instruments.

(Contd.) \_\_\_\_\_

are made non-exclusive on a global scale (e.g. respect for international law). Certain natural public goods are deliberately left in the global public domain (e.g. global gene pools to promote biodiversity preservation). Even though the legal regulation of the diverse kinds of ‘public goods’ must take into account their differences (e.g. among excludable ‘club goods’ and non-excludable public goods), this paper focuses on regulatory problems of global ‘aggregate public goods’ that are composed of interdependent local, national and regional public goods.

<sup>3</sup> On the ‘four-stage sequence’ of legitimate rulemaking inside constitutional democracies like the USA see Rawls (1971, p.195 ff).

- Domestic governments and courts ignore self-imposed international WTO obligations on the ground that WTO diplomacy requires 'freedom of maneuver'<sup>4</sup> to ignore international legal obligations ratified by parliaments.

This contribution argues that the ever-greater importance of international 'aggregate public goods' (like efficient world trading, financial and environmental regimes) for the welfare of citizens requires more coherence between multilevel governance based on stronger multilevel judicial protection of individual 'access rights' to public goods (like human rights to democratic governance and transnational rule of law for the benefit of citizens) as crucial incentives

- for citizen support and accountability of multilevel economic and environmental governance;
- for reducing transaction and coordination costs of the millions of private and public actors in worldwide economic, environmental and legal cooperation; and
- for limiting other 'collective action problems' in multilevel governance of interdependent public goods.

Unfortunately, neither public goods theories nor the prevailing theories of 'international law among sovereign states' based on 'constitutional nationalism' offer coherent theories for ensuring that 'multilevel governance' protects transnational public goods and human rights for the benefit of citizens. The prevailing 'Westphalian conceptions' of worldwide economic and environmental treaties as reciprocal contracts among sovereign rulers that governments may freely disregard and violate to the detriment of their citizens, undermine interdependent public goods - such as efficient world trading and transnational rule-of-law systems based on democratic and judicial respect for international treaties ratified by domestic parliaments for the benefit of their citizens. The democratic legitimacy, support by citizens and effectiveness of multilevel governance of interdependent public goods require justification by, and stronger incentives for, 'participatory democratic governance', 'stake-holder participation' and leadership by 'coalitions of the willing' in protecting international public goods and related 'common concerns' of citizens.

### **Worldwide Intergovernmental Cooperation Fails to Protect International Public Goods for the Benefit of Citizens**

Constitutional democracies and theories of justice (e.g. by Rawls) insist that governance and law need to be institutionalized and justified by a 'four-stage sequence' of constitutional, legislative, executive and judicial clarification of principles, rules and 'public reason' supported by citizens. Constitutional and cosmopolitan approaches to international governance claim that the governance failures of so many worldwide organizations are mainly due to inadequate 'constitutional restraints' on the delegation, limitation, regulation and justification of foreign policy powers and institutions.<sup>5</sup> In the European Union (EU) as well as in the larger European Economic Area (EEA), the public goods of a 'highly competitive social market economy' (TEU, 2009, Article 3) and protection of the environment (TFEU, 2009, Article 11) are justified not only in terms of 'output legitimacy' but also of 'input legitimacy' such as constitutional commitments to 'rule of law and respect for human rights' (TEU, Article 2), multilevel democratic legislation and judicial remedies of the more than 500 million

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<sup>4</sup> This term continues to be used by both the political EU institutions and the EU Court of Justice (e.g. *joined cases C-120/06 P* and *C-121/06 P*, 2008) as the main justification for their disregard of legally binding WTO rules and WTO dispute settlement rulings.

<sup>5</sup> For the 'functional use' of the term 'constitutionalism' as a political method for limiting abuses of power by using constitutional principles, rules of a higher legal rank and institutional 'checks and balances', and the distinction between 'enabling, constraining and supplemental constitutionalization', see Petersmann (1991, p.210 ff); Joerges and Petersmann (2006); Dunoff and Trachtman (2009).

European citizens as codified in the EU Charter of Fundamental Rights and the European Convention of Human Rights (ECHR). In conformity with the ancient European ideal of 'rule of law' as a constitutional restraint on 'rule by men' and their 'rule by law', all 30 EEA member states and 47 ECHR member states have accepted compulsory jurisdiction of international courts for judicial protection of cosmopolitan rights and transnational rule of law for the benefit of citizens. As European economic, environmental and human rights law is directly enforceable by EU citizens in domestic courts, the EU Court of Justice (ECJ) has had to render only 3 judgments in international economic disputes among today's 27 EU member states since the 1950s. This de-politicization and rights-based enforcement of international economic and environmental regulation has contributed not only to the democratic legitimacy and popular support of economic law throughout Europe. It has also enabled more effective protection of European public goods (like the common market, democratic peace, transnational rule of law) than ever before in European history. Similar to the multilevel cooperation among national and European courts and the decentralized judicial enforcement of EU and EEA law, national, EU and EEA governance institutions and regulatory agencies cooperate ever more closely, as illustrated by the decentralized coordination and enforcement of EU competition, environmental and consumer protection rules and policies through multilevel cooperation among national, EU and EEA competition and other regulatory authorities, courts and non-governmental organizations. The ECJ emphasizes that the EU is 'a Community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty' (*Case 294/83 Les Verts*, 1986, paragraph 23) and with the individual rights protected by EU law.

In the *external* relations, the EU institutions protect similar constitutional and cosmopolitan conceptions of international economic law in free trade, customs union and association agreements with numerous third countries. In worldwide organizations like the WTO, however, the prevailing power-oriented conceptions of WTO rules by the USA and other WTO members have prompted also EU governments and the ECJ to insist that EU compliance with WTO law and other worldwide economic treaties (like the UN Convention on the Law of the Sea) remains a matter of government discretion without effective legal and judicial remedies of EU member states and citizens against, e.g., welfare-reducing trade restrictions by the EU in blatant violation of the EU's rule-of-law obligations under WTO law and EU law (e.g. TEU, 2009, Articles. 2 and 3; cf. Petersmann, 2011).<sup>6</sup> The lack of effective constitutional, parliamentary and judicial restraints on foreign policy discretion to redistribute domestic income for the benefit of protectionist interest groups entails that, in most states, discretionary trade and foreign policy powers have become 'captured' by 'rent-seeking' interest groups (e.g. antidumping, agricultural and cotton lobbies in the US Congress) to the detriment of general consumer welfare and other general citizen interests. Transnational rule of law and respect for international treaties ratified by national parliaments for the benefit of citizens are not effectively secured. The WTO Agreement remains the only worldwide treaty system providing for compulsory jurisdiction and 'access to justice' at the international level among WTO members (as regulated in the WTO Dispute Settlement Understanding) as well as in domestic legal systems.<sup>7</sup> Yet, WTO rules only exceptionally require governments to enable private economic actors to 'challenge alleged breaches of

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<sup>6</sup> Arguably, the claim by the political EU institutions to 'freedom to violate WTO law' and to ignore WTO dispute settlement rulings, like the ECJ's judicial self-restraint and refusal to review the WTO consistency of EU trade restrictions - without effective judicial remedies of EU member states and EU citizens against adverse effects of illegal trade protectionism, are inconsistent with the EU's constitutional commitments to 'strict observance of international law' (TEU, 2009, Article 3), 'rule of law' (TEU, 2009, Article 2), protection of 'freedom to conduct a business in accordance with Union law' (*EU Charter of Fundamental Rights*, 2009, Article 16) and 'access to justice' (*EU Charter of Fundamental Rights*, 2009, Article 47).

<sup>7</sup> Cf. the comprehensive WTO legal guarantees of private access to domestic courts, for instance in the GATT (Article X), the *WTO Anti-dumping Agreement* (Article 13), the *WTO Agreement on Subsidies* (Article 23), GATS (1994, Article VI), and the TRIPS Agreement (Article 42 ff).



the Agreement' (Article XX Agreement on Government Procurement) in domestic courts and, thereby, to act as private advocates for government compliance with WTO law. Even though most national legal systems require courts to interpret domestic laws in conformity with the international legal obligations of the country concerned (based on the presumption that governments act in conformity with international law), this 'consistent interpretation principle' and the WTO dispute settlement jurisprudence are often neglected by domestic courts whenever citizens request protecting transnational rule of law in conformity with WTO law and WTO dispute settlement rulings. Multilevel governance of global public goods remains ineffective because governments all too often avoid legal and judicial accountability vis-à-vis citizens for compliance with international treaties protecting interdependent public goods.

### **Systemic Failures of 'Disconnected' Multilevel Governance**

Any democratic parliament failing - after more than 10 years of negotiations - to adopt monetary, financial, trade or environmental legislation necessary for protecting consumer welfare would lose democratic support by reasonable citizens. In worldwide institutions, however, such governance failures to protect public goods are not effectively controlled or sanctioned by parliaments and citizens. In the more than 30'000 pages of WTO law, for instance, 'constitutional requirements' such as promotion of 'consumer welfare', human rights and democratic accountability are nowhere mentioned.

### ***Disorder in the United Nations (UN) and Bretton Woods Systems***

The 'Bretton Woods' system of international monetary and 'soft' financial regulation has failed to prevent the destruction of millions of jobs and of private investments worth trillions of US dollars during the financial crises and 'great recession' since 2008. The related disputes over 'exchange rate manipulations' and excessive imbalances of currencies (e.g. due to the large US trade deficit and associated surpluses in China, Japan, Germany and oil-exporting countries), like the unrepresentative governance structures of the IMF, illustrate systemic 'governance failures' of the international monetary and financial system. The WTO has contributed to limiting protectionist responses to the international financial crisis as they happened during the 'beggar-thy neighbour' policies in the 1930s. But the inadequate progress made during 10 years of Doha Round negotiations, like the uncertainties over whether the WTO can ever implement future Doha Round agreements as a 'single undertaking', reveal 'governance failures' also in the world trading system. The failures of the UN system to protect human rights, prevent poverty and climate change, and protect many other international public goods have prompted former UN Secretary-General K. Annan to conclude – in his final address as UN Secretary-General to world leaders assembled in the UN General Assembly on 19 September 2006 - that the power-oriented international legal system is widely perceived as 'unjust, discriminatory and irresponsible' and has failed to effectively respond to the three global challenges to the United Nations: 'to ensure that globalization would benefit the entire human race; to heal the disorder of the post-Cold War world, replacing it with a genuinely new world order of peace and freedom; and to protect the rights and dignity of individuals, particularly women, which were so widely trampled underfoot.' According to Kofi Annan, these three challenges – 'an unjust world economy, world disorder and widespread contempt for human rights and the rule of law' – entail divisions that 'threaten the very notion of an international community, upon which the UN stands.' (Annan, 2006)

### ***Legal Disintegration of the World Trading System?***

The transformation of the fragmented '*GATT à la carte system*' into an integrated WTO legal and dispute settlement system among 153 WTO members remains the most successful example of

worldwide economic and legal cooperation in history. The failure of WTO members to conclude their 10 years of Doha Round negotiations entails not only enormous opportunity costs in terms of potential trade gains and consumer welfare (cf. the data and estimates in Messerlin, 2011; Hoekman and Nicita, 2010; Bhagwati and Sutherland, 2011). It also prevents moving from the ‘old agenda’ of ‘Uruguay Round leftovers’ to the ‘new trade agenda issues’ like liberalization and regulation of international services trade that are increasingly addressed outside the WTO in hundreds of bilateral and regional economic agreements. Beyond undermining the function of the WTO as a global forum for future negotiations on trade liberalization and regulation (e.g. of international food and energy security, trade-related competition rules, ‘multilateralizing’ bilateral and regional preferential trade regimes, contributing to the international climate change and water security regimes), a failure to conclude the Doha Round negotiations also risks undermining the WTO legal and dispute settlement system. The already more than 250 WTO panel reports, Appellate Body reports and arbitration awards adopted by the WTO Dispute Settlement Body since 1996 reflect a progressive judicial clarification and development of the WTO legal system that risks being challenged as lacking democratic legitimacy if the WTO rule-making system can no longer be used effectively for ‘balancing’ or correcting judicial clarifications of WTO rules. The increasing circumvention of the WTO by bilateral and regional rule-making outside the WTO should be used as ‘building blocks’ rather than ‘stumbling blocks’ of the world trading system (Gao and Lim, 2008); but the controversies over the WTO-consistency of many of these agreements (like the Anti-Counterfeiting Trade Agreement concluded in December 2011 among more than 30 WTO members) also illustrates the risk of increasing dispute settlement outside the WTO and of return to intergovernmental power politics.

***The ‘Constitutional Failures’ of ‘Disconnected’ Multilevel Governance Must be Limited by ‘Access Rights’ and Judicial Protection of Rule of Law***

Since World War II, the interrelationships between national and international public goods have prompted states to create ever more international organizations and intergovernmental networks for multilevel governance of international public goods. The US Reciprocal Trade Agreements Act of 1934 and the subsequent US ‘fast track legislation’ for concluding GATT Rounds reflected the constitutional insight that multilevel rule-making at international and domestic levels must be ‘linked’ (e.g. by congressional advance authorization of reciprocal trade liberalization negotiated by professionals out of the public eye) in order to limit welfare-reducing ‘protection biases’ against foreign goods and foreigners (Dam and Hull, 2005, pp.83–96). Just as the human rights commitments under the UN Charter and UN human rights instruments condition the democratic legitimacy of UN law on protecting human rights, so should WTO law acknowledge that WTO market access commitments and trade regulation derive their democratic legitimacy from protecting freedom, transnational rule of law and consumer welfare for the benefit of citizens. The refusal by the US Congress to extend the 2002 fast-track legislation to conclude the Doha Round negotiations, like its refusal to grant fast-track legislation for climate change negotiations, has inhibited the US ability to exercise leadership in international negotiations by weakening the capacity of ‘partisan congressional politics’ to compromise. The inadequate cooperation among national and international rulemaking, administrative and judicial governance institutions undermines the legitimacy and effectiveness of multilevel governance and of transnational rule of law. The global government networks have been created in response to the realities of global interdependence requiring multilevel governance of interdependent public goods. Yet, their increasingly ‘disaggregated sovereignty’ (Slaughter, 2004) remains without adequate constitutional restraints; the ‘disconnections’ among worldwide and domestic rule-making and judicial procedures weaken the capacity and constitutional restraints of governments to protect international public goods.

In the US Congress, for instance, rent-seeking interest-group politics often justifies hegemonic trade and environmental regulation by introverted ‘constitutional nationalism’ such as claims that US

domestic law should not be 'infected' by incorporation of non-democratic intergovernmental regulation, and US courts should not limit hegemonic use of US power politics and 'efficient breaches of international law'. Yet, insistence by trade politicians on 'freedom of maneuver' for intergovernmental power politics entails that – also inside constitutional democracies – 'democratic government, if nominally omnipotent, becomes as a result of unlimited powers exceedingly weak, the playball of all the separate interests it has to satisfy to secure majority support' (Hayek, 1982, p.99). The often one-sided influence on positive law of 'standards' elaborated by non-governmental lobbies illustrates the frequent accountability problems, anti-competitive distortions (e.g. by government-supported cartels), and inadequate constitutional restraints of intergovernmental economic regulation accommodating organized interest groups.<sup>8</sup> The more worldwide institutions (like the WTO) for the collective supply of international public goods build on 'private-public partnerships' protecting *national* and *regional public goods* 'bottom-up' (e.g. national and regional standard-setting institutions), the stronger becomes the need for extending national and regional 'access rights' and judicial remedies of citizens beyond national and regional borders. Authoritarian 'Westphalian regulatory approaches' whose treatment of citizens as mere objects lacks democratic legitimacy and support, fail to adequately regulate the legal, political and economic interrelationships between the different governance levels and related collective action problems of international public goods – like the 'coherence gap' and 'legitimacy gap' discussed in the keynote speech by P. Lamy, and the 'jurisdiction gaps', 'governance gaps', 'incentive gaps', 'participation gaps' and 'rule of law gaps' discussed in the following Section.<sup>9</sup>

## **'Westphalian Multilevel Governance' of Public Goods Lacks Adequate Constitutional Restraints**

### ***New Modes of Multilevel Economic Governance without Effective Constitutional Restraints for the Benefit of Citizens***

International governance among diplomats – often claiming broad foreign policy discretion, but denying legal and judicial accountability vis-à-vis domestic citizens (e.g. for their violations of international economic agreements ratified by domestic parliaments) – is progressively transformed by new modes of 'multilevel governance'. Examples include:

- economic coordination among heads of governments or finance ministers in the Group of 20 systematically important economies;
- delegation by the G20 of specified tasks to existing international organizations like the Bretton Woods institutions and the WTO;
- creation of new governance institutions by the G20 like the Financial Stability Board established in 2009;
- delegation by the G20 of certain tasks to intergovernmental networks like the central bank cooperation in the framework of the Bank for International Settlement;
- increasing inter-parliamentary networks - like the regular inter-parliamentary meetings during WTO Ministerial Conferences - so as to better inform and coordinate national parliaments in their control of multilevel governance;

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<sup>8</sup> See the case-studies in Joerges and Petersmann (2006, chapter 7-14).

<sup>9</sup> On the 'jurisdiction gap', 'incentive gap' and 'participation gap' see Kaul et al. (1999, p.450 ff; Petersmann, 2011b).

- explicit rules and procedures for coordinating the functionally limited, but often ‘overlapping jurisdictions’ of worldwide governance institutions (e.g. based on Article V WTO Agreement, the joint ‘Development Committee’ of the IMF and World Bank Boards of Governors);
- rules, procedures and institutions for coordinating worldwide and regional economic organizations (e.g. based on Articles XXIV GATT and V GATS and the WTO Committee for Regional Trade Agreements), regional and national governance networks (e.g. the ‘comitology procedure’ inside the EU and the EEA), or national and international judicial proceedings (e.g. the preliminary ECJ ruling procedure at the request of national courts in the EU, the preliminary EFTA Court and MERCOSUR opinion procedures at the request of national courts in the EEA and MERCOSUR);
- international treaty rules (e.g. in the WTO Agreements on Technical Barriers to Trade and (Phyto)Sanitary Standards) providing for participation of contracting parties in the work of non-governmental organizations (e.g. for preparation of technical regulations, product and production standards, sanitary standards) and for legal presumptions that compliance with privately agreed standards is also treaty-consistent;
- cooperation among regional and worldwide networks of competition, environmental, central bank and other regulatory agencies;
- informal networks of producers of agricultural, mineral, industrial and medical products as well as of internet and financial services cooperating in the elaboration of international product and production standards (e.g. for drugs, cosmetics, breast milk substitutes, conflict diamonds); and
- ever more diverse ‘private-public partnerships’ in the conduct of, e.g., WTO dispute settlement proceedings, carbon emission trading systems, protection of common environmental concerns (like biodiversity) and promotion of ‘corporate social responsibility’.

The more complex, informal and non-transparent such interactions among private and public, national and international governance levels are, the stronger becomes the need for multilevel, legal and institutional ‘checks and balances’ limiting regulatory abuses and addressing collective action problems more coherently. Claims of ‘autonomous systems’ (like ‘member-driven WTO law’) and of the need for ‘confidential negotiations’ (rather than public ‘ideal speech situations’ promoting ‘reasonable solutions’) are often motivated by selfish claims of ‘national interests’ and vested group interests.

### ***Multilevel ‘Jurisdiction Gaps’ and resultant ‘Governance Gaps’***

The *jurisdiction gap*, i.e. the limited jurisdiction and incapacity of individual states to provide most global public goods unilaterally without international cooperation, requires delegation of limited powers to, and their collective exercise in, international institutions subject to multilevel restraints of abuses of public and private power. Constituting, limiting, regulating and justifying joint governance powers of more than hundred states with often conflicting short-term interests raises difficult ‘constitutional questions’. For instance:

- Which powers of initiative, rule-making, rule-application, adjudication and rule-enforcement should be transferred to a higher level?
- Should the delegated powers be of an exclusive nature (e.g. for international adjudication of disputes among states) or concurrent powers (e.g. for clarification and enforcement of rules) with due regard to the ‘principle of subsidiarity’, i.e. that governance powers should be exercised ‘as closely as possible to the citizens’?
- Does the economic theory of ‘separation of policy instruments’ justify the separate mandates of UN Specialized Agencies? How should the coherence and cooperation between monetary, trade,

development and environmental agencies be strengthened (e.g. following the model of European integration law) in order to promote synergies and reduce collective action problems (e.g. in the WTO's 'Development Round')?

- To what extent should the membership of international economic and environmental organizations go beyond governments and provide for rights and duties also of non-governmental and parliamentary institutions and civil society as the 'democratic owner' and legitimate beneficiary of governance institutions?

Answers to such question may differ depending on the policy area concerned. For instance, multilateral negotiations in the UN and WTO could be enhanced by granting the UN Secretary-General and WTO Director-General more 'powers of initiative'. Synergies between regional and global public goods could be promoted by stronger incentives for using regional agreements (e.g. on free trade areas, environmental regulation) as 'building blocks' for global public goods. 'Jurisdiction gaps' exist not only at national levels but also at international levels, for instance in terms of inadequate constitutional and judicial protection of transnational rule of law for the benefit of citizens. They entail multilevel *governance gaps*, as illustrated by the WTO dispute settlement system which – as it fails to connect the compulsory WTO jurisdiction for the settlement of trade disputes at the international level with the WTO guarantees of judicial remedies at national levels – secures neither transnational rule of law for the benefit of citizens nor decentralized compliance with WTO rules in domestic courts. The lack of political agreement on adequate WTO competition, investment and environmental rules entails risks of 'legal fragmentation' and coordination challenges that may require judicial dispute settlement and rule-clarification. Independent 'international guardians' of reasonable citizen interests in public goods (e.g. following the model of the EU Commission) and impartial, international adjudication based on 'due process of law' and principle-based, transparent reasoning may be in a better position to overcome conflicting claims of national jurisdictions than political negotiations dominated by interest group politics. The differences between the compulsory jurisdiction of WTO dispute settlement bodies and the 'compliance procedures' of multilateral environmental agreements focusing more on fact-finding, mediation, financial assistance and capacity-building illustrate that international dispute settlement procedures must be tailored to the specific regulatory problems. For instance, whereas multilevel *rule-making* may be most effective if based on internationally agreed minimum standards, multilevel *administration* and *rule-enforcement* are often more effective and more democratically acceptable at decentralized, *national* or *private levels* rather than international levels. Examples include

- the 'global corporate economy' governed by private law structures;
- the decentralized enforcement of European economic law by citizens empowered by effective legal and judicial remedies in national courts;
- the governance of the Internet based on US corporate law, administrative law and intergovernmental coordination; or
- the use of the US Alien Torts Claims Act for holding multinational corporations legally accountable for harmful violations of international law (like abuses of workers' rights) in foreign jurisdictions.

Yet, the effectiveness and legitimacy of multilevel governance depend on bottom-up support by citizens and parliaments as well as on legal protection of the overall coherence of multilevel governance among private and public, national and international actors. Empowerment of individuals and transnational protection of public goods can be promoted by multilevel protection of cosmopolitan rights and judicial remedies as provided for in European economic law, international investment treaties, in the WTO Protocol on the Accession of China, and regional human rights treaties.

The *governance gap*, i.e. the inability of most intergovernmental organizations to regulate and govern the collective supply of international public goods democratically and effectively, requires new forms of multilevel constitutional, legislative, administrative and judicial commitments and institutions for collective protection of public goods. As explained by J. Rawls' *Theory of Justice*, legitimate rulemaking in conformity with the human rights obligations of governments requires a 'four-stage sequence' (Rawls, 1971) of constitutional, legislative, executive and judicial clarification of principles, rules and 'public reason' supported by citizens. The 'monarchical model' of 'Westphalian diplomacy' focuses on foreign policy discretion by government executives without legal and judicial accountability vis-à-vis citizens (e.g. for welfare-reducing trade protectionism and inadequate financial regulation). Democratic self-government and the 'subsidiarity principle' call for legal empowerment of citizens and decentralized government 'as openly as possible and as closely as possible to the citizens' (TEU, 2009, Article 1). As claimed by most economists in conformity with J. Rawls' theory of justice, the poverty in most LDCs is unnecessary and due to lack of reasonable rules and institutions limiting welfare-reducing abuses of public and private power;<sup>10</sup> hence, civil society and parliaments must insist on stronger cosmopolitan rights, constitutional restraints of multilevel economic and environmental governance, and on compliance with international treaties ratified by parliaments.

European integration confirms that overcoming discriminatory 'legal nationalism' requires 'international guardians of public goods' based on joint leadership, independent Commissions with rights to initiate rule-making and promote 'deliberative democracy', multilevel judicial protection of transnational rule of law, and accountability for violations of internationally agreed rules. The transformation of the power-oriented GATT 1947 into the rules-based WTO trading system with compulsory, national and international jurisdiction for the peaceful settlement of disputes and judicial protection of rule of law was achieved by 'intergovernmental leadership' by constitutional democracies (e.g. insisting on the compulsory WTO dispute settlement system and on terminating GATT 1947). The 'governance failures' in concluding the 'Development Round' negotiations in the WTO illustrate the need for additional governance reforms of the WTO legal system, for instance by promoting leadership based on an enlarged mandate of the WTO Director-General, creation of a WTO Executive Committee, regular review of the WTO legal and dispute settlement systems by a WTO Legal Committee, institutionalizing the inter-parliamentary cooperation inside the WTO, and introducing more flexibility for 'plurilateral trade agreements' among WTO members. Extending national public goods to international relations requires support by 'private-public partnerships' and non-governmental stakeholders participating in the collective supply of international public goods; the 'incentive gap' for such civil society support can be reduced by legal and judicial protection of 'access rights' and judicial remedies enabling civil society to challenge welfare-reducing violations of international rules. Starting the long process of 'piecemeal reforms' of global economic governance and of its necessary 'constitutionalization' for the benefit of citizens might be assigned best to the G20, whose mandate would need to be extended (e.g. to multilevel environmental governance) and institutionally supported (e.g. by using the OECD Secretariat).

### ***Multilevel 'Incentive Gaps' and resultant 'Participation Gaps'***

Westphalian conceptions of *international law among sovereign states* have also proven incapable of effectively regulating the 'incentive gap' and 'participation gap' impeding multilevel governance of interdependent public goods. The *incentive gap*, i.e. the inherent temptation of free-riding in the

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<sup>10</sup> Cf. Rawls (1999, pp.37–38, 106–120): 'the crucial element in how a country fares is its political culture – its members' political and civic virtues – and not the level of its resources' (p.117). For instance, China and India – whose trade liberalization since the 1990s has helped to lift hundreds of millions out of poverty – could have avoided the impoverishment of many of their citizens if they had complied with GATT rules since 1948.

collective supply of international public goods whose costs and benefits are distributed unevenly, requires making 'common but differentiated responsibilities' for private and public, national and international actors more effective. UN financial and technical assistance for poor countries (e.g. if they provide transnational environmental services by protecting tropical forests that are of global importance for bio-diversity and carbon-reduction), like the WTO provisions for capacity-building and trade facilitation assisting less-developed countries in participating in world trade and supporting WTO rule-making, illustrate how legal and financial incentives for private and public participation in the supply of international public goods may assist in limiting 'governance failures' and promoting equitable sharing of adjustment costs. The limited incentives for less-developed countries to make use of the power-oriented GATT dispute settlement system was successfully reduced by the WTO provisions for legal assistance for LDCs (cf. Article 27 DSU) and by the establishment of a separate Advisory Center on WTO Law offering comprehensive legal and technical assistance for developing countries participating in the WTO dispute settlement system so that less-developed WTO members have become very active users of WTO legal and judicial remedies. The European experiences with financial redistribution (e.g. by EU regional, structural and development funds), capacity-building and 'human rights conditionality' illustrate how citizen-oriented 'community law' and rights-based 'integration law' can transform power politics by effective protection of cosmopolitan rights, development assistance and rule of law. The focus of the 'Development Round' on assisting the majority of less-developed WTO member countries to benefit from trade and from welfare-increasing trade regulation may have been a necessary incentive for promoting participation of LDCs in the consensus-practice of the WTO; yet, the continuing disagreement on how to maximize the developing countries' gains from trade – as illustrated by the US insistence on reciprocal trade liberalization and India's insistence on 'policy space' for protecting import-competing producers against trade competition – illustrates the need for limiting consensus-based WTO negotiations by more legal flexibility for 'plurilateral trade agreements' among 'coalitions of the willing'.

The *participation gap*, i.e. the need for inclusive consensus-building promoting worldwide participation, requires empowerment of citizens by cosmopolitan 'access rights' to public goods, legal and institutional protection of 'deliberative governance by discussion', institutionalized leadership (e.g. by international organizations with mandates for initiating rule-making for global public goods) and financial assistance for 'capacity building' by 'coalitions of the willing' so that all relevant public and private actors cooperate in the collective supply of global public goods. As in European economic law, multilevel governance must be promoted by international duties of cooperation (e.g. among national governments and international organizations, national and international courts) and competition among 'alliances of the willing'. WTO law encourages 'competing liberalization' at worldwide and regional levels, as illustrated by the increasing recourse to free trade areas, customs unions and preferential agreements among LDCs as 'second best' policies in the absence of worldwide consensus on concluding the Doha Round negotiations. International economic and environmental public goods are also crucially dependent on private stake-holder participation, for instance private industries developing 'green technologies', participating in decentralized 'carbon emission trading systems' and contributing to the financing of adjustment to climate change. As first explained by Kantian legal theories of 'multilevel constitutionalism' promoting citizen-driven 'struggles for equal rights' and 'public justice' (cf. Petersmann, 2012 chapter III) and illustrated by the citizen-driven structures of the diverse European economic, legal and human rights regimes, international economic, environmental and legal public goods (like 'rule of law' for the benefit of citizens) cannot become effective and legitimate without rights of all affected citizens to have recourse to legal and judicial remedies against unjustified restrictions of individual rights and market distortions.

### ***Need for Reducing the ‘Rule of Law’ Gap in Multilevel Economic Governance***

The ‘coherence gap’ discussed in the keynote speech by P. Lamy results from the *rule-of-law-gap* caused by the *legal fragmentation* among hundreds of national, international and transnational legal regimes and by parochial disregard for the ‘coherent interpretation requirements’ in national and international legal systems. International law, international institutions and globalization transform national constitutions into ‘partial constitutions’ that can no longer secure the welfare of domestic citizens without international cooperation (e.g. on energy and environmental security). As illustrated by the diverse European legal and judicial regimes, transnational rule of law requires multilevel constitutional restraints on multilevel governance so as to limit abuses of intergovernmental ‘rule by law’. Legal predictability, rule of law and legal protection of legitimately diverse conceptions of justice, human rights and ‘constitutional pluralism’ are essential for the collective supply of global public goods. Transnational rule of law must be promoted by recognizing, ‘balancing’ and reconciling competing rights and constitutional claims on the basis of common constitutional principles, with due respect for legitimately diverse interpretations in conformity with different national constitutional traditions and democratic preferences. As intergovernmental rules may lack democratic legitimacy and may unduly restrict individual rights, transnational ‘rule of law’ – as a constitutional, jurisdictional and judicial restraint protecting equal individual rights against abuses of ‘rule by law’ - may require and justify departures from the prevailing Westphalian conceptions of ‘rule of international law’, as illustrated by the *Kadi*-judgments of the ECJ refusing to apply UN Security Council sanctions that violate human rights.<sup>11</sup>

In the global division of labour, transnational rule of law and its justification in terms of respect for the human rights obligations of all UN member states and of democratic self-governance become ever more important for a number of reasons. For instance:

- As emphasized by P. Sutherland and J. Bhagwati, ‘a growing gap is emerging between 20<sup>th</sup> century trade governance and 21<sup>st</sup> century trade’ characterized by the internationalization of supply chains (Bhagwati and Sutherland, 2011, p.9). This spread of globally integrated production chains coordinated by multinational corporations is likely to prompt also the ‘emerging economies’ (like Brazil, China and India) to engage in more bilateral and regional trade liberalization. The ‘legal fragmentation’ makes reduction of transaction costs and coordination costs through a decentralized, but predictable and enforceable rule-of-law system ever more important.
- The ineffectiveness of multilateral rulemaking inside the WTO has prompted the US, the EU and Japan to negotiate ever more free trade and investment agreements outside the WTO. The EU, for instance, has presented its new free trade agreement with Korea as a new paradigm for a future network of ‘deep economic integration’ agreements with countries all over the world. The resultant risk of mutually inconsistent national, bilateral, regional and worldwide trade and investment rules and related dispute-settlement rulings – as illustrated by the national, regional and WTO dispute settlement proceedings in the *Mexican soft drinks* dispute, the *Brazilian tyres* dispute, the *EU bananas* and *GMO disputes*<sup>12</sup>, their ‘jurisdictional competition’ and sometimes inadequate regard to ‘judicial comity’ and the ‘consistent interpretation principle’ – confirm that many WTO disputes could be avoided if governments would apply domestic rules in conformity with their international legal obligations and recognize legal and judicial remedies of citizens to protect themselves against arbitrary violations of the rule of law. The

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<sup>11</sup> *Kadi case* (2008, paragraph 284) ‘It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C-112/00, *Schmidberger* [2003] ECR I-5659, paragraph 73 and case-law cited).’ For an explanation of the importance of ‘human rights coherence’ and respect for legitimate ‘constitutional pluralism’ for the interpretation, legitimacy and effectiveness of modern international economic law, see Petersmann (2012, chapter II to IV).

<sup>12</sup> On the need for avoiding such conflicting dispute settlement findings by ‘judicial comity’ and cooperation among courts see Lavranos (2009) and Petersmann (2008).



ever larger number of free trade agreements among 'coalitions of the willing' increases the importance of the WTO legal and institutional system (e.g. for trade consultations, trade monitoring, dispute settlement and rule-enforcement) for those WTO members that risk becoming further marginalized due to their own failure to engage in trade liberalization agreements.

- Similar to Kofi Annan's criticism of 'the widespread contempt for human rights and the rule of law' in UN politics (Annan, 2006), the 2011 report by Bhagwati and Sutherland warns that 'the steady erosion of the WTO's centrality could sooner or later bring the world to a tipping point – a point beyond which ... nations feel justified in ignoring WTO norms since everyone else does', and 19<sup>th</sup>-century-style power politics prevails once again over respect for transnational rule of law for the benefit of citizens. The more the worldwide division of labour and innovation are driven by demand and supply by thousands of corporations and billions of producers, workers, investors, traders, consumers and other citizens, the more civil society will challenge authoritarian treatment of citizens as mere objects of mercantilist economic and environmental regulation and of welfare-reducing disregard for transnational rule of law by diplomats and ruling elites (e.g. in many LDCs) benefitting from trade protectionism. 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 UN resolutions (the quotation is from *UN GA A/60/L.1*, 2005, paragraph 134), neither the UN Charter nor other UN treaties protect transnational 'rule of law' as a constitutional restraint on 'the rule of men' and their 'rule by law'.

### **Democratic Legitimacy and Effectiveness of Multilevel Public Goods Require Multilevel Constitutionalism'**

Law and democratic governance require justification by principles of justice, democratic constituencies and *domestic* constitutional systems in order to be supported by citizens as efficient, legitimate and coherent instruments for protecting constitutional rights and other public goods. The less national parliaments control rule-making, administration and adjudication in distant international organizations like the WTO, the more depends the *legitimacy of constitutional democracy* on supplementing 'parliamentary democracy' by rights-based 'participatory democracy' and 'deliberative democracy' - especially in those areas of international relations which, like international trade and pollution, are driven by citizens and derive their legitimacy from promoting general consumer welfare. The diverse forms of rights-based economic law in the EU, the EEA and in free trade agreements with third countries, like the international legal protection of individual trading rights, investor rights, intellectual property rights and judicial remedies in the 2001 WTO Protocol on China's Accession, in Chapters 11 and 19 of the North American Free Trade Agreement (NAFTA) and in ever more investment treaties, illustrate that legal and judicial empowerment of citizens in international economic law is not a cosmopolitan dream – provided diplomats recognize that limiting their trade policy discretion by legal and judicial remedies of citizens and 'cosmopolitan constituencies' benefitting from international trade will actually assist governments in protecting international public goods for the benefit of citizens.<sup>13</sup>

Also the *effectiveness of democratic self-governance* in consumer-driven markets and of many other 'aggregate public goods' depends on legal incentives for 'stake-holder participation' based on individual rights and judicial remedies of citizens to protect themselves against 'market failures', 'discourse failures' as well as 'governance failures', including violations of the 'rule of law' (e.g. by the recent thefts of carbon licenses in the European Emissions Trading System). Such 'countervailing rights' to challenge welfare-reducing market access barriers, pollution and abuses of power can contribute to limiting 'governance failures' in protection of international public goods. The diverse forms of European integration law in the EU, the EEA, or in the ECHR confirm that effective protection of 'aggregate public goods' - like open markets, 'sustainable development', transnational

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<sup>13</sup> On Pascal Lamy's arguments in support for 'cosmopolitics' and 'cosmopolitan constituencies' supporting multilevel governance of interdependent public goods, see Charnovitz (2004, pp.437–446).

rule of law and multilevel democratic governance throughout the 30 EEA countries - depends on multilevel legal and judicial constraints (e.g. by the ECJ, EFTA Court, European Court of Human Rights) on foreign policy discretion limiting discrimination on grounds of nationality and protecting rights of citizens across frontiers. In order to remain effective and legitimate, 'member-driven' *international governance* in worldwide institutions like the WTO depends ever more on *multilevel support* and control by domestic constituencies balancing the often one-sided, 'rent-seeking' pressures from protectionist producer interests by democratic and consumer-support for welfare-enhancing trade liberalization and regulation of 'market failures'.

### **The WTO's 'Rule of International Law System' is of Systemic Importance for International Public Goods**

Ever more international public goods (like food and health security) depend on individual access to an open world trading system. As emphasized by Pascal Lamy: 'Open trade is more crucial than ever to the world economy – and a rule-based multilateral trading system has never been more critical to global prosperity and peace' (2010, p.3). WTO law offers the only worldwide 'rule of international law' system based on legal guarantees of freedom, non-discrimination and compulsory, international adjudication. The collective supply of many international public goods outside the WTO – like international protection of environmental resources, prevention of climate change, food and health security, energy security, poverty reduction and transnational rule of law for the benefit of citizens – is closely interrelated with, and dependent on, the WTO legal system. For instance:

- Similar to past GATT/WTO disputes over national measures for the protection of environmental resources (like endangered species, pollution), the introduction of GHG reduction commitments, carbon taxes and related border tax adjustments, or the consistency of carbon emission trading systems with the GATS obligations of WTO members, risk triggering environment-related WTO dispute settlement proceedings.
- International agreements on energy security may give rise to WTO disputes if the WTO obligations of the respective countries (e.g. regarding non-discrimination, freedom of transit, prohibition of export restrictions, taxation of energy products and services) are neglected.
- International food and health security may require government measures (like import restrictions, export subsidies, risk assessment procedures, compulsory licensing of patents) that risk being challenged in WTO dispute settlement proceedings.
- Poverty reduction and promotion of economic growth require the opening and regulation of markets (e.g. government taxation, subsidies, preferential treatment and trade facilitation) in conformity with the WTO legal and world trading system.

Economists, politicians and lawyers often confuse 'rule of law' with formal conceptions of 'rule by law' and 'legal security' without addressing the constitutional task of promoting the democratic legitimacy of international law and its coherence with national legal systems. Constitutionalism has emphasized since antiquity that rule of law differs from 'rule by law' and 'rule by men' in terms of constitutional and judicial protection of principles of justice (e.g. legal equality, due process of law) vis-à-vis all citizens and public authorities. Even though the WTO legal and dispute settlement system promotes 'rule by law' in intergovernmental relations among WTO members, it fails to protect 'rule of law' for the benefit of citizens due to the selfish insistence of governments that domestic courts should

not apply and enforce WTO obligations of governments so as to avoid legal and judicial accountability vis-à-vis citizens for the frequent, welfare-reducing violations of WTO obligations.<sup>14</sup> For instance:

- The often mutually incoherent adjudication of trade disputes (e.g. over EU import restrictions on bananas and genetically modified organisms, Brazilian import restrictions on retreaded tyres, US anti-dumping practices) at national, regional and WTO levels illustrates that transnational rule of law in international trade, and the related welfare gains and reduction of transaction costs, depend on coordinating private and public, national, regional and worldwide trade regulation on the basis of mutually 'consistent interpretations' of WTO rules and WTO dispute settlement rulings. Both domestic legal systems as well as the customary methods of treaty interpretation require interpreting international treaties in conformity with other legal obligations of states (cf. the Preamble and Article 31 of the 1969 Vienna Convention on the Law of Treaties). Yet, WTO member governments all too often collude with rent-seeking protectionist groups in redistributing consumer income through illegal trade restrictions and in preventing domestic courts from protecting 'rule of law' for the benefit of citizens in conformity with WTO legal obligations.
- The small number of only 3 judgments by the ECJ, since the 1950s, in international trade disputes among the 27 EU member states illustrates that most international trade disputes could be 'decentralized', 'depoliticized', prevented and settled more efficiently at domestic levels provided citizens and courts are empowered to protect rule of law in transnational trade in conformity with the international legal obligations of the countries concerned. The politicization of trade disputes in the WTO remains medieval, costly and inefficient; by treating citizens as mere objects without effective legal and judicial remedies, it also lacks democratic legitimacy and effective remedies against governments intent on maintaining welfare-reducing violations of their WTO obligations.
- The ever greater influence in international economic law of transnational, *private* 'advocacy networks' and *private* litigation against multinational companies, human rights violators and host states of foreign direct investors confirms that 'adversarial legalism' is becoming an ever more important tool of limiting transnational 'governance failures'. The social functions and public policy goals of private law and private litigation justify empowering citizens to act as private 'attorneys general' who, through the pursuit of their own interests (e.g. in challenging arbitrary government violations of WTO obligations, requesting compensation in litigation related to product liability, environmental harms, restrictive business practices or corporate accountability for human rights violations), serve also social purposes of regulation and rule of law.
- The customary rules of international treaty interpretation, and their requirement of interpreting treaties and settling related disputes 'in conformity with the principles of international law' and human rights (cf. Preamble and Article 31 VCLT), reflect constitutional principles of justice requiring coherent conceptions of 'rule of law' in the private and public, national and international sub-systems of multilevel 'network governance'. Respect for 'reasonable disagreement' among individuals as well as among countries calls for reconciling diverse conceptions of justice on the basis of common constitutional principles (such as judicial comity, the 'consistent interpretation principle', 'proportionality balancing' of competing rights and obligations) so as to protect transnational rule of law and rights and obligations not only of governments, but also of citizens as main actors and 'sources of value' in the international division of labour.

In all previous GATT Rounds of multilateral trade negotiations, the results were implemented by 'Tariff Schedules' and self-standing trade agreements without recourse to the procedures for amending GATT. Conclusion of future Doha Round Agreements as a 'single undertaking', as envisaged in the 2001 Doha Round Declaration, will require amending the WTO Agreement and may turn out to be the biggest 'collective action problem' in reforming the WTO. WTO members have failed so far to clarify whether the cumbersome, time-consuming WTO amendment procedures are flexible enough for

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<sup>14</sup> On the explicit exclusion, for instance in the EU and US legislation implementing the Uruguay Round Agreements, of 'direct applicability' of WTO rules in domestic courts – except at the request of the EU and US governments in order to enforce WTO rules vis-à-vis state restrictions – see Petersmann (1997, pp.19 ff, 245 ff).

implementing future Doha Round Agreements as a ‘single undertaking’ without many years of delays, two classes of WTO membership, and ‘free-riding’ by those WTO members which, following the entry into force of WTO amendments upon ratification by two-thirds of WTO members, may prefer benefiting from the WTO non-discrimination commitments without ratifying the Doha Round Agreements (Kennedy, 2011). The flexibility of European economic law – as illustrated by the monetary union among 17 Euro zone member states, the common market among 27 EU member states, the multilaterally agreed extension of the EU’s common market rules to EEA member states subject to separate institutional and judicial rules, and the bilaterally agreed adaptations of the EU common market rules and customs union rules to the political needs of other third countries like Switzerland and Turkey – reflect the need for legal flexibility in multilateral treaty systems so as to respect legitimate ‘constitutional pluralism’ at national and regional levels. As amendments of WTO rules require ratification either by all or two-thirds of the WTO members, the small number of only 31 ratifications (by 2011) of the 2005 WTO Protocol amending Article 31 of the WTO Agreement on Trade-Related Intellectual Property Rights suggests that a single *Doha Round Agreement* modifying and complementing the WTO Agreement – e.g. by means of new GATT Tariff Schedules, GATS commitments, amendments of WTO agreements, integration of additional agreements into the WTO legal and dispute settlement system (like the new Agreement on Trade Facilitation) and adoption of other WTO legal instruments (like WTO Ministerial Decisions) - will not enter into force for all WTO members simultaneously; such ‘fragmentation’ could pose the biggest test so far for the WTO legal and dispute settlement system.

### **Conclusion: Cosmopolitan ‘Aggregate Public Goods’ Require Protecting Transnational ‘Rule Of Law’ through ‘Access Rights’ and Judicial Remedies**

Rawls’ *Theory of Justice* explains why - in view of the ‘fact 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’ - the democratic exercise of coercive power over one another 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.’ (2001, p.41) The human rights obligations of all UN member states entail that the constitutional task of ‘institutionalizing public reason’ through constitutional, legislative, administrative and judicial rules and institutions supported by citizens must be accepted also for limiting *multilevel* governance of interdependent public goods. The necessary multilevel constitutional constraints of multilevel governance must be based on ‘rule of law’ – as a constitutional restraint on ‘rule by law’ for the benefit of citizens and their constitutional rights – no less than inside constitutional democracies. Constitutional and ‘public choice’ theories offer additional reasons why multilevel economic and environmental governance can protect constitutional rights and reasonable self-interests of citizens effectively only in a multilevel framework of constitutional, legal and institutional restraints justifying ‘input legitimacy’ and promoting ‘stakeholder participation’ in, and ‘output legitimacy’ of, multilevel economic and environmental regulation.

Compared with UN law and international monetary, financial and environmental regulation, the world trading system has evolved into the most developed, multilevel governance, legal and dispute settlement system. As the financial crisis since 2008 originated in regulatory failures *inside* the USA, the 2010 US Dodd-Frank legislation focused on *internal* financial reforms rather than on regulating *international* systemic risks (e.g. concerning sovereign debts, IMF surveillance of international exchange rate manipulation and of imbalances of currency reserves, common capital requirements for systemically important international banks and hedge funds, supervision of rating agencies and of excessive bank bonuses). The EU member states, by contrast, responded to the fiscal and financial governance failures inside the Eurozone by adopting *international agreements* strengthening fiscal, monetary and financial disciplines and institutional safeguards (like the temporary European Financial

Stability Facility, a permanent European Stability Mechanism, the European Systemic Risk Board, three new EU agencies to monitor securities, banks and insurance companies). At the worldwide level, the increasing calls for reforming the G20, the IMF, the WTO and the Kyoto Protocol to the UNFCCC have so far failed to bring about agreed reforms of international monetary, trade, financial and environmental agreements. Reforming the consensus-based models of intergovernmental WTO negotiations and 'UN rulemaking' by more flexible, more legitimate and more citizen-oriented models of multilevel trade, environmental and economic governance with less 'system frictions' remains the greatest challenge to global economic governance in the 21<sup>st</sup> century. The current focus on bilateral and regional agreements *outside* the WTO should be reversed by facilitating recourse to plurilateral agreements *inside* the WTO (like the 2011 Government Procurement Agreement, the 1996 Information Technology Agreement) and by 'multilateralizing' preferential trade agreements among WTO members. The complexity and fragmentation of international economic regulation must be limited by strengthening rule of law for the benefit of citizens. Without stronger cosmopolitan rights and their judicial protection, UN and WTO diplomats are unlikely to rise to this challenge of transforming intergovernmental economic and environmental governance into more effective tools for protecting consumer welfare and the human rights of citizens.

As the rhetoric at the G20 summit meetings in 2008, 2009 and 2010 in favour of concluding the Doha Round negotiations has not been followed-up by concrete actions in the WTO negotiations and in national capitals of the leading trading nations, many observers conclude that 'we are now living in a G-Zero world, one in which no single country or bloc of countries has the political and economic leverage – or the will – to drive a truly international agenda' (Bremmer and Roubini, 2011). As illustrated by the opposition of US automobile producers against the US-Korea free trade agreement, the limited scope of new market access commitments offered so far in the Doha Round negotiations by emerging economies like Brazil and India has weakened business support in many developed countries for concluding the Doha Round. The lack of leadership by the BRICS has prompted the USA, the EU and Japan to increasingly resort to bilateral and regional free trade agreements focusing on 'club goods' rather than on the global public good of an open, well-regulated world trading system. The history of GATT 1947 confirms that overcoming the collective action problems undermining the world trading system is politically possible.<sup>15</sup> The Doha Round negotiations demonstrate that – even if governments have succeeded in narrowing the 'jurisdiction gap' for the collective supply of global public goods – they risk failing to resolve the 'governance gaps', 'incentive gaps', 'participation gaps' and 'rule-of-law gaps' in collectively supplying the global public good of an efficient world trading system; for instance, part of the Doha Round negotiating mandate (e.g. for trade-related competition and investment rules) was abandoned in 2003, and concluding the Doha Round by a 'single undertaking' has been postponed without any collective strategy for overcoming the numerous 'decision traps' confronted during 10 years of Doha Round negotiations. The future of the WTO trading and legal system will depend on 'multilevel governance reforms' – either by more G20 leadership for concluding the Doha Round negotiations or through multilevel trade liberalization and regulation outside the WTO legal system. The dialectic evolution, since the 19<sup>th</sup> century, of international monetary, trade, investment, labour and environmental law through unilateral legislation

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<sup>15</sup> When I joined the GATT Secretariat in 1981 as first 'legal officer' ever employed by the GATT, 'GATT 1947' lacked a coherent legal and dispute settlement system, did not even have a 'Legal Office' and was politically 'captured' by powerful protectionist lobbying interests insisting on welfare-reducing discrimination in favor of cotton, textiles, agricultural and other organized business interests. The most important lessons from my participation as legal advisor in the Uruguay Round Negotiating Groups leading to the adoption of the WTO Dispute Settlement Understanding and to a completely new legal and institutional framework of the WTO trading system was that 'multilevel governance' (e.g. in the context of the complex structures governing the Uruguay Round negotiations 1986 to 1994) – if appropriately 'engineered' - could indeed enable the transformation – within less than 10 years – of the power-oriented '*GATT à la carte*'-system into a worldwide treaty system with compulsory jurisdiction and ever-more jurisprudence for the peaceful settlement of international and domestic trade disputes.

and bilateral, regional and worldwide agreements suggests that overcoming the collective action problems of international public goods can succeed through 'trial and error' if there is leadership based on 'responsible sovereignty' and progressive recognition of 'common concerns' and 'duties to protect' cosmopolitan rights of citizens to more effective legal and judicial protection of transnational public goods.-

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