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Constituting, Limiting, Regulating and Justifying Multilevel Governance of Interdependent Public Goods: Methodological Problems of International Economic Law Research

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Abstract

This contribution discusses legal and methodological problems of multilevel governance of the international trading, development, environmental and legal systems from the perspective of "public goods theories" and related legal theories. The state-centred, power-oriented governance practices in worldwide organizations fail to protect effectively human rights, transnational rule of law and other international public goods for the benefit of citizens. Their criticism by civil society, democratic parliaments and courts of justice prompts increasing opposition to non-inclusive, intergovernmental rule-making, as in the case of the 2011 Anti-Counterfeiting Trade Agreement rejected by the European Parliament. The "democracy deficits" and morally often unjustified power politics underlying "Westphalian intergovernmentalism" weaken the overall coherence of multilevel regulation of interdependent public goods that interact "horizontally" (e.g., the monetary, trading, development, environmental and related legal systems) as well as "vertically" (e.g., in case of "aggregate public goods" composed of local, national, regional and worldwide public goods). The "laboratory" of European multilevel governance offers lessons for reforming worldwide governance institutions dominated by executives. The integration of nation states into an interdependent, globalized world requires a multilevel integration law in order to protect transnational public goods more effectively. Legal and constitutional theories need to be integrated into public goods research and must promote stronger legal, judicial and democratic accountability of intergovernmental rule-making vis-à-vis citizens on the basis of "cosmopolitan constitutionalism" evaluating the legitimacy of national legal systems also in terms of their contribution to protecting cosmopolitan rights and transnational public goods.

Keywords

Constitutionalism; cosmopolitanism; G20; human rights; justice; legal methodology; multilevel constitutionalism; multilevel governance; public goods; multilateral trading system; UN; WTO.

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CONSTITUTING, LIMITING, REGULATING AND JUSTIFYING MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS:

METHODOLOGICAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW RESEARCH

Ernst-Ulrich Petersmann[*]

I. Introduction: Methodological and Legitimacy Problems of Multilevel Governance

This contribution argues that the universal recognition of "inalienable" human rights by all UN member states requires a "cosmopolitan paradigm change" in interpreting and developing international law in the 21st century so that citizens can conceive themselves not only as addressees but also as authors of international law and protect their national and international public goods more effectively. Human rights require justification of all legal and governance systems *vis-à-vis* citizens as democratic "principals" of all governance powers and co-authors of legitimate law-making; in the 21st century, also state sovereignty and state consent to international rules are legitimate only to the extent that they recognize citizens as free and equal subjects of human rights and "agents of justice" on the basis of general and reciprocal reasons and constitutional safeguards that interpret state sovereignty in conformity with popular and "individual sovereignty" as protected by human rights.[1] This "emancipatory function" of human rights to challenge and change historically power-oriented structures of legal systems has not yet been realized in the law of most worldwide organizations like the United Nations (UN) and the World Trade Organization (WTO). The prevailing "Westphalian model" of international law and UN institutions remains characterized by power-oriented, intergovernmental claims

- to limit international law to rights and obligations of states without regard to the democratic legitimacy of governments in UN member states and to the necessary protection of human rights and popular self-determination against abuses of power and of "state sovereignty";
- to focus on "national interests" as defined by national interest groups rather than on protection of human rights and general consumer welfare that are not mentioned in most worldwide economic and environmental agreements;
- to separate national and international legal systems and exclude legal and judicial remedies of citizens against welfare-reducing violations of international treaty obligations; and
- to treat citizens as mere objects of international law—without democratic justification of the welfare-reducing under-supply of international public goods (like protection of human rights, transnational rule of law, democratic self-government, efficient trading and environmental systems) and of the unnecessary poverty of more than 1 billion people living on one dollar or less per day.

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[1] *See* ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY. CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS (2012), chapters II and III. "General" refers to reasons that can be supported by all human beings in view of their common interests in human rights; "reciprocity" of reasons excludes claims (e.g., of paternalism) that do not concede the same rights and principles to all other human beings; *see* RAINER FORST, THE RIGHT TO JUSTIFICATION. ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE (2012).

Most UN member states do not even attempt to justify UN law and WTO law in terms of protecting human rights and general consumer welfare. The denial by governments of legal and judicial accountability *vis-à-vis* citizens for the intergovernmental failures to protect international public goods does not serve reasonable interests of citizens. The UN Charter, UN human rights conventions and many other international treaties (like the 1969 Vienna Convention on the Law of Treaties (VCLT)) explicitly recognize that human rights are "the foundation of freedom, justice and peace in the world"; "respect for the obligations arising from treaties and other sources of international law" requires settlement of international disputes "in conformity with the principles of justice and international law," including human rights and universal fundamental freedoms (Article 1 UN Charter, Preamble VCLT). Yet, most international economic and environmental treaties neither refer to human rights and "principles of justice" nor succeed in realizing their declared treaty objectives—like "sustainable development"—for the benefit of citizens. Likewise, international economic and environmental dispute settlements outside Europe only rarely refer to human rights; in interpreting human and democratic autonomy (e.g., economic freedoms and property rights) and related responsibilities, international economic and environmental courts often fail to adequately take into account the diverse "contexts of justice" protected by human rights (e.g., the different dimensions of human autonomy rights) such as:

- *private freedoms* of citizens (e.g., freedoms of the Internet) to define and develop one's individual identity in private communities with due respect for the legitimate diversity of individual and social conceptions of a "good life";
- *moral freedoms* of all members of global humanity (e.g., to respect for, and protection of, "inalienable" and "indivisible" human rights and other moral "principles of justice") in their relationships with other human beings inside and beyond states;
- *legal freedoms* of citizens to equal treatment and participation in legal communities, including "negative freedoms" from unjustified government restrictions and "positive freedoms" of participation and development of one's human capacities;
- *political freedoms* of citizens to participate as co-authors of democratic legislation in the democratic exercise of national governance powers;
- *cosmopolitan freedoms* of citizens (e.g., in their roles as producers, investors, traders and consumers cooperating in the global division of labour) to be recognized and legally protected as "world citizens" in national and international law in order to be able to exercise their collective responsibility for jointly supplying transnational public goods, including entitlement "to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Article 28 Universal Declaration of Human Rights).[2]

The often "feudal domination" of international law and institutions by power-oriented governments insisting on foreign policy discretion to violate international rules in exchange for political support from rent-seeking interest groups (e.g., agricultural, textiles and steel lobbies in national parliaments) undermines the effectiveness of international legal systems to protect international public goods, for instance by de-legitimizing international rules and excluding rights of citizens to invoke and enforce international rules in domestic or international "courts of justice." The more UN law and WTO law fail to protect human rights and other cosmopolitan freedoms without democratic justification of welfare-reducing governance failures to protect interdependent public goods, the less citizens have

[2] The different private, legal and political "contexts of justice" in particular communities, and of moral and cosmopolitan principles in the world community of human beings, have been recognized in human rights declarations since the *Déclaration des droits de l'homme et du citoyen* of 1789; *see* PETERSMANN, *supra* note 1, and RAINER FORST, CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM (2002). On the inadequate "judicial methodologies" in international trade and investment adjudication, *see* Ernst-Ulrich Petersmann, *The Judicial Task of Administering Justice in Trade and Investment Law and Adjudication*, *JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT* Vol. 4 (2013) No.1.

reasons to accept and support power-oriented "Westphalian international law" treating citizens as mere objects rather than subjects and "democratic owners" of international law and institutions. The main thesis of this contribution is that human rights law (HRL) requires stronger protection not only of private, legal and democratic autonomy rights and responsibilities in national legal systems, but also of cosmopolitan rights in modern international law and institutions in order to protect interdependent, national and international public goods more effectively.

A. Governance Challenges of International Public Goods

In contrast to *private goods* that are spontaneously produced, financed and distributed in private markets and communities, the production and financing of *public goods*—whose consumption (e.g., in case of "intermediate public goods" like human rights and rule of law) is, by definition, open to all ("non-excludable") and does not reduce their availability to others ("non-rivalrous")—entails additional governance challenges in order to limit "free riding" and other "collective action" problems. Globalization continues to transform ever more local and national "public goods" traditionally supplied by states into *international "aggregate public goods"* requiring new forms of multilevel governance, regulation and justification. The more these new private and public governance spheres (e.g., of globally integrated financial markets) lack adequate regulation and provoke systemic crises, the more citizens, civil society and the newly emerging "transnational communities" (e.g., of citizens cooperating in the global division of labour and in protecting the environment) criticize the obvious governance failures to protect public goods like "financial stability," a liberal world trading system, prevention of climate change, and the human rights obligations of all UN member states. The world financial crises since 2008, the European debt crises since 2010, the failures of the Doha Round and climate change negotiations, and the unnecessary poverty of more than 2 billion people living on two dollars or less per day are "public bads" illustrating systemic failures of the prevailing "Westphalian model" of intergovernmental regulation of "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). As first explained by Immanuel Kant's "cosmopolitan constitutionalism," the legitimacy of intergovernmental rule-making cannot be adequately ensured through national democratic procedures alone; in the 21st century, the legitimacy of transnational legal systems needs to be evaluated also in terms of their contribution to protecting cosmopolitan rights and transnational public goods demanded by citizens rather than only in terms of *national constitutions* that depend ever more on *international law and institutions* as legal preconditions for protecting international public goods.[3] In a globalizing world, international law and institutions for the collective supply of *transnational public goods* require constitutional safeguards of human rights no less than national law and institutions for the supply of *national public goods*.

B. Legitimacy Deficits of "Westphalian Path-Dependence"

The UN and its specialized agencies continue to be based on the principle of "sovereign equality of states" and fail to effectively limit power-oriented "Westphalian conceptions" of "international law among sovereign states" (i.e., focusing on effective control by governments over a population in a limited territory) by constitutional protection of human rights and democratic governance. The more the dynamically evolving UN HRL requires all UN member states to respect, protect and fulfil "inalienable" human rights, the more citizens, civil society and "people" no longer perceive state-consent to international rules as a sufficient justification of international law and of the under-supply of international public goods demanded by citizens. The treatment of citizens as mere objects rather

[3] On Kantian "multilevel cosmopolitan constitutionalism" and the need for evaluating the legitimacy of constitutional democracies also in terms of their use of international law for protecting human rights and other international public goods for the benefit of citizens, *see* PETERSMANN, *supra* note 1, chapters II and III.

than subjects of international law and "democratic owners" of all governance institutions leads to increasing criticism that the inadequate "output legitimacy" of UN law focusing on rights and obligations of states and of their often authoritarian rulers is due to its insufficient "democratic input legitimacy" resulting from the domination of foreign policy powers by executives and from their frequent neglect for cosmopolitan rights, democratic governance, judicial remedies and other "principles of justice" necessary for justifying law and governance in the 21st century.

Also inside the European Union (EU), the increasing "euro-scepticism" reflects distrust by citizens *vis-à-vis* multilevel governance of public goods distorted by persistent violations by most EU member governments of rule of law (e.g., of the agreed budget, debt and economic convergence disciplines in the Lisbon Treaty) and by injustices caused by interest group politics (e.g., due to under-regulation of financial markets, government bailouts of private industries in exchange for political support). Better regulation of interrelated public goods requires more adequate theories, rules and institutions for providing, maintaining and financing interdependent local, national, regional and global public goods. The agreed policy objective of "sustainable development," for instance, calls for reconciling not only economic, environmental, social and human rights objectives; multilevel governance must also remain democratically justifiable *vis-à-vis* domestic citizens and avoid imposing harmful externalities on future generations (e.g., in terms of public debt, environmental harms). As the under-supply of international public goods affects the welfare of people in all UN member states, authoritarian governments (e.g., in many less-developed countries) and the "Westphalian traditions" of intergovernmental regulation in UN institutions are increasingly challenged by civil societies and circumvented by recourse to sub-optimal regional, plurilateral, bilateral or unilateral policy alternatives (like regional trade agreements, bilateral investment treaties, regional carbon-emission trading systems, humanitarian interventions based on "duties to protect" agreed "common concerns"). Regional HRL, economic integration law and international investment law and adjudication challenge the methodological premises of "Westphalian intergovernmentalism" by justifying law and governance in terms of constitutional and cosmopolitan rights and judicial remedies in order to limit and improve governance institutions for collective supply of international public goods. Yet, even inside the EU, it remains deeply contested to what extent democratic control at national levels and democratic representation of EU citizens and national peoples in EU institutions need to be supplemented by "cosmopolitan democracy" based on sovereignty of citizens rather than of their nation states.[4] Also EU institutions increasingly insist on "freedom of manoeuvre"[5]—in the sense of freedom to violate WTO law, UN conventions and other international legal obligations of the EU ratified by national parliaments—without legal and judicial accountability *vis-à-vis* EU citizens adversely affected by such violations of the EU's constitutional commitment to "strict observance of international law" (Article 3 TEU).[6]

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[4] On competing models of national and cosmopolitan "democracy from below" and a multinational, federal EU democracy whose decision-making and legislation can be directly legitimated at the EU level, *see* RETHINKING DEMOCRACY AND THE EUROPEAN UNION (Erik Oddvar Eriksen & John Erik Fossum eds., 2011).

[5] This term continues to be used by both the political EU institutions and the EU Court of Justice (e.g., in Joined cases C-120 and C-121/06 P, FIAMM, 2008 ECR I-6513, para. 119) as the main justification for their disregard of legally binding WTO rules and WTO dispute settlement rulings.

[6] For an overview of the case-law of the EU Court of Justice denying EU citizens rights to invoke and enforce WTO obligations in national and European courts and request compensation for injury caused by persistent violations of the EU's WTO obligations, *see* Ernst-Ulrich Petersmann, *Can the EU's Disregard for "Strict Observance of International Law" (Article 3 TEU) Be Constitutionally Justified?*, *in* LIBER AMICORUM FOR J. BOURGEOIS 214 (M. Bronckers, V. Hauspiel & R. Quick eds., 2011).

C. Need for Comparative Legal-Institutional Analyses of Multilevel Governance

Section II of this contribution begins with a brief overview of why two of the most successful international organizations for the collective supply of international public goods—i.e., the WTO and the EU—are currently facing severe "multilevel governance failures." Section III identifies additional collective action problems impeding collective supply of interdependent public goods from the perspective of economic, political and legal theories and analyses. Section IV discusses case-studies of multilevel governance of "interface problems" of the international trading, environmental, development and related legal systems; by comparing the legal regulation of diverse, international "aggregate public goods," lessons can be drawn for more efficient, legitimate and effective governance of interrelated public goods and for institutional alternatives. These comparative analyses are based on more than 20 case-studies of multilevel governance of international public goods presented and discussed at two international conferences at the European University Institute (EUI) at Florence in February and October 2011.[7] There is broad agreement today that "the provision of global public goods occurs largely without the benefit of relevant, up-to-date theory. Public goods research 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 multiactor world."[8] Apart from noting that the international law principle of "sovereign equality of states" prevents coercing "free-riding states" into cooperating in the supply of international public goods, the existing research has neglected legal theory[9] as well as the common principles underlying the hundreds of multilateral agreements accepted by UN member states for protecting international public goods. Global public goods theories and "Westphalian legal practices" prevailing in worldwide organizations also neglect "legal methodology," for instance because foreign policies remain dominated by "realist," i.e., state-centred and power-oriented approaches challenging legal interpretations if they arrive at different conclusions based on different "legal methodologies." The term *legal methodology* is used here for 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. Even though the "inalienable" human rights obligations of all UN member states are founded on "normative individualism" and require justifying modern international law in terms of human rights, the legislative and executive "governance modes" and "judicial methodologies" applied by most worldwide institutions continue focusing on rights and obligations of the rulers without effectively limiting their often non-inclusive, intergovernmental procedures by cosmopolitan rights and other constitutional and judicial restraints. Also the WTO and the EU—i.e., the two most developed, multilevel legal and compulsory dispute settlement systems for governing the international trading system—are increasingly confronted with national governance failures undermining international public goods like a liberal (i.e., liberty-based) world trading and stable financial system protecting consumer welfare and transnational rule of law for the benefit of citizens. For instance, the private and public debt crises and economic crises in the

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[7] Twelve of these case-studies are published in Ernst-Ulrich Petersmann (ed.), Multilevel Governance of Interdependent Public Goods. Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century (RSCAS 2012/13, Global Governance Programme Working Paper, 2012). Seven additional case-studies have been published in the 23 Eur. J. Int'l L. (2012), 643-791.

[8] Providing Global Public Goods. Managing Globalization (Inge Kaul, Pedro Conceição, Katell Le Goulven, & Ronald U. Mendoza eds., 2003), at 5.

[9] The two leading research publications on global public goods published by the UN Development Program—i.e., Global Public Goods. International Cooperation in the 21st Century (Inge Kaul, Isabelle Grunberg & Marc Stern eds., 1999) as well as Kaul et al. (*supra* note 8)—did not include legal studies. The book edited by Keith E. Maskus & Jerome H. Reichman, International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime (2005), focused on knowledge as "perhaps the quintessential public good" (at 47) and on its decentralized supply by means of intellectual property rights excluding "free riders" and setting incentives for innovation.

EU are closely related to the fact that 23 out of 27 EU member states no longer comply with the fiscal and debt disciplines agreed upon in the Lisbon Treaty.

D. HRL Requires Reviewing Legal Methodologies of Global Governance

Sections V and VI conclude by exploring constitutional, legal and methodological problems of multilevel governance of citizen-driven "aggregate public goods." Multilevel governance and public goods theories must be made more legitimate by strengthening deliberative and participatory democracy based on constitutional theories of justice giving citizens, civil society, parliaments and courts of justice more incentives for holding governments legally, judicially and democratically accountable. As only citizens and people—but not states—have moral and human rights, the democratic legitimacy of international law depends on its approval by individuals, people and their democratic representatives and on its "human rights coherence"; incentives for cooperation in collective supply of international public goods must be strengthened through stronger cosmopolitan rights, judicial remedies and "constitutional limitations" of "state sovereignty" by "duties to protect" international public goods beyond state borders based on modern HRL and related concepts of "responsible sovereignty." For instance, HRL may justify

- cosmopolitan economic and social rights for holding governments more accountable for failures to protect international public goods, as illustrated by the judgment of the German Constitutional Court of 18 July 2012 recognizing a fundamental right of asylum seekers and other foreign migrants in Germany to receive higher cash benefits for their "dignified minimum existence" protected by their human right to dignity (Article 1, Sec. 1 of the German Basic Law) in conjunction with the constitutional guarantee of a social welfare state (Article 20, Sec. 1);[10]
- additional rights of "access to justice," to justification and judicial review of governmental restrictions, as illustrated by guarantees of judicial remedies in regional HRL, in the EU Charter of Fundamental Rights (Article 47) and international economic law (IEL);[11]
- "duties to protect common concerns," corresponding judicial remedies (e.g., pursuant to Article VIII:2(b) International Monetary Fund (IMF) Agreement concerning the non-enforceability of exchange contracts violating IMF rules), and sanctions *vis-à-vis* gross human rights violations by dictatorial governments or "free-riding countries" refusing to participate in the joint reduction of environmental harms;[12]
- the transformation of public goods into "club goods" excluding "free riders" (like countries unwilling to accept the legal disciplines of WTO law or regional free trade agreements);
- and the granting of public or private property rights in "common pool resources" (like deep seabed minerals, fishery resources) so as to prevent the "tragedy of the commons."

E. HRL Calls for "Cosmopolitan Reforms" of Multilevel Governance of Public Goods

HRL calls for empowerment of citizens by cosmopolitan rights and other constitutional limits of the pervasive governance failures to protect public goods like an efficient world trading system based on transnational rule of law for the benefit of citizens. Human rights and recognition of "common concerns" (like public health and environmental protection) may justify decentralized "private-public

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[10] Judgment, July 18, 2012 (1 BvL 10/10, 1 BvL 2/11).

[11] Examples include Article 8 UDHR, Article 13 ECHR, Article 47 EU Charter of Fundamental Rights, Articles 3 and 7 African Charter of Human and People's Rights, Articles 8 and 25 Inter-American Charter of Human Rights; *see* ACCESS TO JUSTICE AS A HUMAN RIGHT (Francesco Francioni ed., 2007).

[12] An example is the unilateral extension of environmental protection measures to polluters from third countries as discussed by Lorand Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, *23 EUR. J. INT'L L.* 429 (2012).

partnerships" of citizens and governments at national and international levels so as to reinforce incentives for promoting public goods through more accountable modes of co-operation in conformity with the "subsidiarity principle." As illustrated by recognition of human rights to governmental protection of public goods (like rule of law), by "privatization" of the supply of public goods (like access to water), or by the close co-operation of many UN Specialized Agencies like the World Health Organization (WHO), the International Labour Organization (ILO) and the World Intellectual Property Organization (WIPO) with non-governmental organizations (NGOs) in their collective supply of public goods (like public health, protection of labour rights, governance of the Internet), the "publicness" and "privateness" of many goods are socially and legally constructed rather than innate properties. Also HRL is based on respect for private and public autonomy protecting diverse conceptions of individual, communitarian and democratic self-determination. HRL requires justifying intergovernmental restrictions and reviewing the "rules of recognition" of public international law (e.g., as codified in Article 38 of the Statute of the International Court of Justice) in order to better reconcile the private and public law dimensions of IEL and of other areas of multilevel governance of interdependent public goods. Cosmopolitan constitutionalism argues for more coherent regulation of the "horizontal" and "vertical" interdependencies between the national and international components of the international trading, environmental, development and related legal systems based on more coherent conceptions of "transnational rule of law" for the benefit of citizens and stronger respect for cosmopolitan rights in transnational economic, social and legal cooperation.

In order to be supported by citizens, civil society and by national parliaments, the necessary legal and institutional adjustments of multilevel governance to the regulatory needs of globalization in the 21st century require new forms of democratic and legal justification. At the *national level* of constitutional democracies, the dual justification of the democratic legitimacy of law and governance in terms of human rights (e.g., protecting individual dignity, autonomy and responsibility) and democratic supply of public goods (e.g., through parliamentary, participatory and deliberative democracy based on rule of law) must take into account that ever more "aggregate public goods" can no longer be secured unilaterally and depend on international co-operation based on international law and institutions. At the *transnational level* of multilevel governance beyond states, the traditional forms of justifying international rules and institutions through parliamentary ratification no longer suffice in view of the fact that most national parliaments no longer effectively control the thousands of international agreements and hundreds of international institutions dominated by government executives. The exercise of legislative, administrative and judicial powers by international organizations for the collective supply of international public goods requires additional democratic justification and multilevel control. Even though globalization entails new transnational communities (e.g., of producers, investors, traders and consumers cooperating in the global division of labour), democratic people remain constituted and limited by *national constitutions*, even inside the EU. Arguably, the absence of transnational "peoples," the inadequacy of parliamentary control of multilevel governance and the "legal pluralism" of private and public, transnational legal regimes require new forms of democratic legitimization beyond national populism by means of "cosmopolitan constitutionalism" focusing on cosmopolitan rights, participatory and deliberative "bottom up democracy" beyond state borders and stronger "constitutional checks and balances" limiting harmful "externalities" of national governance failures in order to protect international public goods. The reality and normative legitimacy of "constitutional pluralism" at national and international levels reflects "reasonable disagreement" among citizens and democratic governments and must remain respected, as illustrated by "deferential interpretations" of "public interest exceptions" in multilateral economic regulation (like Article XX GATT) aimed at coordinating competing public goods with due respect for national "margins of appreciation" and democratic disagreements on how to define and protect "principles of justice."[13]

[13] On the need for "cosmopolitan IEL" justifying the legitimacy and coherence of IEL in terms of human rights, *see* PETERSMANN, *supra* note 1. On the successful example of transnational parliamentary, representative, participatory and

II. Multilevel Governance of Interdependent Public Goods: "Governance Failures" in the World Trading and Financial System

The thousands of worldwide, regional, national, public and private organizations for the governance of international monetary, trade, development and environmental relations differ enormously. At the global level of UN and WTO law, civil society and political leaders increasingly criticize "the gap between theory and practice" in analysing and regulating global governance.

A. The Gap between "Theory" and Practice" in Global Governance

In the words of WTO Director-General Pascal Lamy, the prevailing "Westphalian conceptions" of "international law among sovereign states" and of intergovernmental rule-making postulate that "as States are coherent and legitimate, global governance is necessarily coherent and legitimate as well."[14] 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," WTO Director-General 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 European public goods like the common market. But the declining participation in elections of the European Parliament and the rising euro-scepticism in public opinion reveal the limits of legitimacy also of the EU. Lamy supports the emerging "triangle of coherence" based on (1) the Group of 20 systemically most important developed and emerging economies 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. Lamy also 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. But the "secondary legitimacy" deriving from state democracy must be reinforced by more "primary legitimacy" deriving from direct participation of citizens. Hence, 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 adequate institutions. According to Lamy, the UN human rights values and regional integration are "the essential intermediate step between the national and the global governance level" and 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"—supporting a "global community" and the necessary building of a new "polity"—requires "localizing global problems" and remains "the main political challenge we are facing."

(Contd.)

deliberative democracy in European economic integration, *see* Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, *23 EUR. J. INT'L L.* 315 (2012).

[14] WTO Director-General Pascal Lamy, *Global Governance: From Theory to Practice*, *in* Petersmann, *supra* note 7, at 25–30. The following quotations in the text are from this speech by Lamy.

B. Politicization of Global and Regional Governance of Public Goods

Most global governance institutions, like the UN specialized agencies and the WTO, are dominated by government executives and administrative "experts" searching for "technically right" solutions to international regulatory problems (e.g., of monetary, health and climate change policies, "risk assessment procedures") and avoiding democratic politics and parliamentary control. European governance institutions like the EU, the European Economic Area (EEA) among 30 member countries, the Council of Europe and its European Convention on Human Rights (ECHR) among 47 European countries are limited to democratic member states willing to submit their multilevel governance to multilevel constitutional restraints like human rights and multilevel legislative, parliamentary, judicial and other civil society institutions. Since the entry into force of the Lisbon Treaty in December 2009, the problems of constitutionalizing multilevel economic governance have intensified also inside the EU, for example due to the transfer of additional commercial policy powers to the European Parliament and the persistent violations of the agreed fiscal and debt disciplines by 23 out of 27 EU member states. European politicians like Josep Borrell (a former member of the Spanish government and former president of the European Parliament as well as of the EUI) emphasize the need for additional forms of "multilevel democratic governance," even if the "politicization" of the EU's common trade and environmental negotiations resulting from the co-decision powers of the European Parliament risks augmenting also the "capabilities-expectations gap" in EU foreign policies as well as the risks of "regulatory capture" by vested interests.[15] The diverse democratic preferences and national, regional and worldwide governance structures explain the diversity of 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 entails "jurisdiction gaps," "governance gaps," "incentive gaps," "participation gaps" and transnational "rule of law gaps" impeding collective supply of global public goods.[16] The EU model of reducing such "gaps" by regional "communitarization," legalization and "constitutionalization" of economic and environmental policy powers and multilevel governance institutions has 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—has not been followed by other regional trade organizations. The co-decision powers of the directly elected European Parliament go far beyond the more limited powers of parliamentary bodies in other multilateral treaties. The additional layer of parliamentary "input legitimacy" in multilevel European governance has entailed increasing "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 and implementing the 1997/2005 Kyoto Protocol and enabling the 2012 "Durban agreement" on a new climate prevention convention are successful examples of EU leadership in promoting global public goods and setting decentralized incentives for their collective supply (e.g., through the European carbon-emission trading systems and its inclusion of foreign airlines flying to and from the EU). The non-discriminatory nature of the EU's carbon-emission trading regime and the global recognition of the need for carbon-emission reductions in order to limit the risks of irreversible climate change suggest that the opposition by third countries to the inclusion of their airlines into the European carbon-emission trading system is based more on political than on legal and environmental grounds.[17]

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[15] See Josep Borrell, The EU and the European Parliament in International Trade and Climate Change Negotiations, in Petersmann, supra note 7, at 31–39.

[16] For a discussion of these "gaps," see Kaul, Grunberg & Stern, supra note 9, at 450 et seq.; Ernst-Ulrich Petersmann, International Economic Law and Multilevel Governance of Interdependent Public Goods, 14 JOURNAL OF INTERNATIONAL ECONOMIC LAW 23 (2011), at 33 et seq.

[17] See Bartels, supra note 12.

C. Legitimacy Problems of Multilevel "Governance Failures"

The failure of concluding the Doha Round negotiations after more than 11 years of worldwide negotiations, like the failure of the European Monetary Union to prevent the persistent violations of the Lisbon Treaty's fiscal, debt and economic convergence disciplines by 23 out of 27 EU member states leading to private and public debt crises ushering in EU bailout agreements with ever more EU member governments (like Greece, Ireland, Portugal, Spain and Cyprus) at the expense of European taxpayers, illustrate the limits of multilevel governance even in the most developed worldwide and regional organizations. Most UN institutions likewise fail to realize their declared policy objectives effectively such as poverty reduction, food security, international peace, rule of law, and global protection of human rights and of the environment. Just as the fiscal, debt, economic growth and rule of law crises in some EU member states are caused by *national* governance failures (e.g., to respect the agreed fiscal, debt and economic convergence disciplines) and by collusion among economic and political interest groups (e.g., offering subsidies and bailout agreements in exchange for political support and the financing of government bonds),[18] so is the opposition against additional market access commitments and market regulation in the Doha Round negotiations due to vested interest groups benefitting from protectionism at the expense of consumer welfare (e.g., politicians and customs officials in less-developed countries, agricultural interest groups in developed countries).

Human rights and democracy support Lamy's call for compensating government-based "secondary legitimacy" by additional, citizen-based "primary legitimacy" of "intergovernmental regulators" of international cooperation among citizens (like the UN and the WTO). Yet, diplomats tend to benefit from the lack of legal, judicial and democratic accountability of their discretionary foreign policy powers and often deny that intergovernmental rule-making should be held to be illegitimate if international organizations cannot achieve what governments do not allow them to do and often fail to do themselves. Also "private-public partnerships" (e.g., in the "UN Global Compact" for "Corporate Social Responsibility" with more than 8,000 transnational corporations) and "tripartite structures" (as in the ILO) risk being abused for corporatist purposes undermining non-discriminatory market regulations.[19] Public and private power structures prevail over the reasonable self-interests of citizens in individual and democratic self-government based on cosmopolitan rights and transnational rule of law. From the perspective of citizens and their human rights, the "composite nature" of the global division of labour and of other "aggregate public goods" calls for protecting rights of citizens (e.g., as main economic actors, consumers and "democratic principals") no less than rights of governments and states. The often artificial "foreign-domestic policy divide" entails that—even though "aggregate international public goods" extend national public goods across frontiers and international law requires 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 fail to effectively protect international public goods for the benefit of citizens. Intergovernmental rule-making treating citizens as mere objects is also inconsistent with the requirement of modern theories of justice that protection of constitutional rights of citizens requires constitutional, legislative, executive, judicial and international transformation of the constitutionally agreed principles of justice into national and international legislation, rules-based administration and judicial protection of "rule of law" for the benefit of citizens.[20] Theories of justice explain why—for instance in European economic law as well as in international investment and human rights law—"courts of justice", like the EU Court (CJEU) and the European Free Trade Area (EFTA)Court, legitimately protect cosmopolitan and human rights *vis-à-vis* welfare-reducing violations of international agreements. Transnational rule of law for the benefit of citizens is an "intermediate public good" of constitutional importance for protecting interdependent "aggregate public goods" (like

[18] *See* Carlo Bastasin, Saving Europe. How National Politics Nearly Destroyed the Euro (2012).

[19] *See* Petersmann, *supra* note 1, chapter IV.

[20] *Id*., chapter III.

human rights, international common markets); governmental violations of transnational rule of law risk undermining the overall coherence of public goods as well as the legitimacy of multilevel governance *vis-à-vis* citizens. Modern economics rightly postulates that human welfare depends more on the "human capital" of a people to realize its human capacities and collective responsibility to institutionalize reasonable rules (e.g., for an efficient division of labour, 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 illustrates why Westphalian "state sovereignty" has to be re-interpreted as "responsible sovereignty" requiring protection of human rights and other public goods for the benefit of citizens. Both the global governance crises in UN institutions and the WTO as well as regional crisis of multilevel governance in European integration require additional "constitutional reforms."[21]

D. Global Market Integration Must Be "Constitutionally Embedded"

As more than half of world trade is today composed of parts and components for "international production" of final products, the further reduction of transaction costs through additional Doha Round Agreements tends to offer benefits for all trading countries and consumers (e.g., according to the World Bank and the Organization of Economic Cooperation and Development, reduced transaction costs worth US$900 billion in case of conclusion and implementation of the draft "Trade Facilitation Agreement"). Yet, many less-developed countries make their agreement to concluding the Doha Round negotiations dependent on additional preferential, financial and technical assistance commitments by developed WTO members. European integration confirms that the success of transnational market integration and policy integration often depends on complementary legal and constitutional integration. Also, HRL and the constitutional requirement of justifying governmental restrictions of equal freedoms suggest that

- the liberalization of international movements of goods, services, persons, capital and related payments require free trade and common market rules empowering citizens and economic actors, limiting the regulatory powers of governments, promoting legal security, reducing transaction costs and protecting the fundamental rights of all affected citizens as well as their democratic responsibilities for institutionalizing "cosmopolitan public reason" (e.g., in terms of national treatment of foreign goods, services and persons);
- the necessary limitation of transnational "market failures" as well as of "governance failures" (such as inter-state policy externalities) calls for the constitution of transnational legislative, administrative and judicial powers, whose exercise—like all public authority—needs democratic justification, constitutional restraints and safeguards of human rights;
- the political justification of economic market integration and of collective supply of international public goods requires supplementing constitutional and parliamentary democracy at national levels by transnational participatory and deliberative democracy based on inclusive decision-making processes, transnational rule of law and respect for "principles of justice" and civic solidarity.

Like non-discriminatory market competition inside states, non-discriminatory market access beyond states and undistorted, transnational market competition are legal constructs rather than gifts of nature.Even though transnational economic market integration and related legal and policy integration remain functionally limited and embedded into legitimately diverse, national legal systems, the economic, social and political forces acting and cooperating across national borders must be "constitutionally restrained" by the "empowering," "limiting" and "supplementing constitutional functions" of transnational legal order: cosmopolitan rights and the constitution and limitation of

[21] *See, e.g.*, Jürgen Habermas, *The Crisis of the EU in the Light of a Constitutionalization of International Law*, 23 EUR. J. INT'L L. 335 (2012).

regulatory powers for the collective supply of international public goods must be "constitutionally embedded" into transnational participatory and deliberative democratic decision-making, judicial review and legal protection of cosmopolitan rights complementing national democratic systems and parliamentary and judicial control in the name of national "peoples."[22] In contrast to claims that economic globalization and international legal restraints on national policy autonomy are inconsistent with national democratic autonomy,[23] states remain free to negotiate and accept binding international rules in conformity with their national constitutional systems and national interests (e.g., in limiting harmful practices of other states). International HRL and other guarantees of equal freedoms and rule of law across national frontiers can extend national "principles of justice," rule of law and constitutional guarantees of fundamental rights to mutually beneficial, transnational cooperation among citizens. Yet, such "constitutional functions" of IEL and self-limitations of "national sovereignty" remain subject to "general exceptions" protecting sovereign rights to adopt non-protectionist national regulation and give priority to non-economic public interests.[24]

III. Collective Action Problems Impeding Supply of Interdependent Public Goods

Most global UN institutions rest on power-oriented "Westphalian principles" of "sovereign equality of states" and intergovernmental negotiations without effective constitutional limitations of regulatory powers in order to protect human rights and democratic governance. Some UN and WTO institutions do provide for limited constitutional safeguards, such as protection of labour rights and tripartite representation of public interests by governments, trade unions and employers in the ILO, or the compulsory dispute settlement system of the WTO aimed at "providing security and predictability to the multilateral trading system" through preserving "the rights and obligations of Members under the covered agreements" (Article 3 WTO Dispute Settlement Understanding). Yet, due to the "dualist conceptions" of national and international legal systems prevailing in most countries and to the frequent disregard for the "consistent interpretation principles" underlying both national and international legal systems, many UN member states do not incorporate their international legal obligations into effective domestic legislation and prevent domestic citizens and courts from enforcing, e.g., UN human rights, ILO and WTO obligations for the benefit of domestic citizens.[25] Public goods theory emphasizes that the "supply strategies" for the different types of public goods—such as "best shot," "weakest link" and "aggregate 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).[26]

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[22] On the need for transforming international into cosmopolitan communities based on human and democratic rights and responsibilities, *see also* JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION. A RESPONSE (2012), at 53 *et seq.*; PETERSMANN, *supra* note 1, chapter III.

[23] *See* DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMIC (2011).

[24] On legitimating international guarantees of freedom, non-discrimination, rule of law and sovereign rights to protect other "public interests" in terms of their "constitutional functions" to protect equal freedoms, transnational rule of law and other "public interests" for the benefit of domestic citizens within the limits of legitimate "constitutional pluralism," *see* ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991).

[25] *See* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009). In his introductory chapter, Sloss argues that—in order to reduce the "remedy gap" resulting from international treaties providing for rights without enforcement mechanisms—domestic courts should provide remedies to promote treaty compliance based on a customary law obligation of states to allow private claims for treaty violations in domestic courts. Similar arguments were developed by PETERSMANN (*supra* note 24) for construing national and international guarantees of freedom of trade and rule of law in mutually consistent ways for the benefit of citizens.

[26] On the different kinds of public goods and their diverse "production technologies," *see* SCOTT BARRETT, WHY COOPERATE ? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS (2007).

A. Diverse Public Goods May Require Diverse Supply Strategies

Economists distinguish between 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 their 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."[27] As the publicness and privateness of goods are often social constructs rather than innate properties, the policy choices and preferences of countries *vis-à-vis* public goods may legitimately differ. Some global public goods—like global transportation and communication systems—are better provided for than others, for instance due to 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 standoffs (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, many reform measures imply only incremental change or 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."

B. Public Goods Regimes Often Depend on the Related Property Regimes

Political scientists argue that the economic focus on non-rivalry and non-exclusivity of public goods neglects many additional reasons for the under-supply of public goods like lack of resources, inadequate regulation of property rights, and "capture" of regulatory institutions by organized interest groups: "the conventional public goods debate offers less than it promised for the analysis of social and political problems."[28] Economic and political analyses of the different "supply conditions" of public goods, of alternative instruments and institutional designs for constructing public goods, or for transforming public goods into "club goods" (such as the WTO) often differ. In view of the few examples of "pure public goods" as defined by economists, political discourse often uses the term "public goods" 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.[29] 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

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[27] These and the following quotations are from Inge Kaul, *Global Public Goods: Explaining Their Underprovision*, *in* Petersmann, *supra* note 7, 41–60.

[28] Friedrich Kratochwil, *Problems of Policy Design Based on Insufficient Conceptualization: The Case of "Public Goods," in* Petersmann, *supra* note 7, at 61–72.

[29] On expanded definitions of public goods, *see also* Kaul *et alii* (*supra* note 8), 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?), and 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."

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. Even though there is no "one size fits all" solution to the problems of "common pool resources," sub-optimal supply of many international public goods (like sustainable high seas fisheries) is often related to the property regime, whose change may—as explained by Kratochwil—transform the "tragedy of the commons" by 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) may enable more effective provision of public goods.

C. Need for Comparative Legal and Institutional Analyses of Public Goods Regimes

As national public goods continue to be supplied by states with legislative, executive and judicial powers (e.g., to tax and coerce citizens) that rarely exist in international institutions, the collective supply of transnational public goods remains characterized by multilevel, legal and institutional experimentation. The diversity of UN Specialized Agencies and of other worldwide and regional agreements on protection of international public goods offers empirical evidence for the theoretical insights that

- the regulatory governance problems and institutional needs of "aggregate public goods" tend to be different from those of "best effort public goods" and "weakest link public goods," whose supply may be possible within more limited legal and institutional frameworks;
- the legal design of the collective supply of international "aggregate public goods" (such as human and labour rights) may legitimately differ in response to their regulatory problems, for instance regarding the decision-making procedures of political UN institutions (e.g., the veto powers of the permanent members of the UN Security Council), financial UN institutions (e.g., the weighted voting powers of members of the Bretton Woods institutions) and the ILO with its tripartite membership and voting rules;
- the "horizontal" legal regulation of "overlaps," cooperation and conflicts between interdependent public goods (e.g., the relationships of GATT and the WTO to other UN Specialized Agencies) tends to be incomplete and to dynamically evolve in response to newly emerging regulatory challenges, as illustrated by the GATT/WTO rules (such as GATT Articles XII to XV) and declarations on cooperation with the Bretton Woods institutions, the ILO, WIPO, WHO and environmental organizations;
- also the regulation of the "vertical interactions" among international and domestic legal regimes reveals a variety of legal approaches, as illustrated by the more limited remedies for reparation of injury caused by treaty violations in the WTO compared with the rules on state responsibility applied by the International Court of Justice (ICJ).

Comparative analysis of the existing reality of "international legal and institutional pluralism" suggests that citizen-driven, rights-based human rights conventions (like the ECHR) and economic integration agreements in Europe (like the EU and the EEA) have protected cosmopolitan rights, judicial remedies and transnational rule of law for the benefit of citizens more comprehensively and effectively than state-centred human rights and economic agreements (e.g., in Africa) without equivalent individual and judicial remedies against violations of *erga omnes* obligations (like human rights, fundamental freedoms of EU and EEA law). While the supply of some global public goods has been assigned to UN Specialized Agencies, the supply of other global public goods has been attributed to institutions with limited membership (such as the Basel Committee on Banking Supervision elaborating international rules on bank capital requirements). UN conventions providing for legal and institutional protection of "common heritage of mankind" beyond national jurisdictions (like the 1982 UN Convention on the Law of the Sea) appear to have been more effective than multilateral

conventions recognizing merely "common concerns" (like the 1992 UN Conventions on Biological Diversity and on Climate Change). Multilateral agreements on the protection of the environment have been more successful if they included financial support for rule-compliance in less-developed countries and sanctions against "free-riding" third countries (as in the case of the 1987 Montreal Protocol on the Protection of the Ozone Layer). The common patterns of many multilateral environmental agreements—e.g., their initial design as framework conventions without enforcement powers, whose rules were progressively supplemented by additional Protocols with more precise regulations—illustrates how international institutions can promote learning processes and incentives for progressive rule-clarification in cooperation with non-governmental interest groups. Treaty provisions on "enhanced cooperation" among "coalitions of willing countries" (e.g., pursuant to Article 20 TEU), on "plurilateral agreements" among some of the WTO member states (like the 2011 Government Procurement Agreement), and on regional trade agreements (e.g., pursuant to Articles XXIV GATT and V GATS) may likewise set incentives for "competing regulation" and institutional experimentation. 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).

The legitimacy and effectiveness of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons was undermined by the fact that the nuclear powers neither complied with their own commitments to phase out the number of nuclear war materials nor prevented strategically important countries (like Israel and India) from developing nuclear bombs. Many other "weakest link public goods" (like eradication of polio, prevention of pirates) were undermined by unwilling or unable "failing states" lacking the resources or the political capability to protect agreed international public goods. International assistance for overcoming such "weakest-link public goods problems" may sometimes be solved through unilateral action by a few donor nations without necessitating worldwide governance mechanisms.[30] Yet, external coercion may be an inevitable *ultima ratio* against "rogue states" deliberately undermining international public goods (like the Taliban government in Afghanistan destroying cultural world heritage like the Giant Buddha at Bamiyan and promoting terrorism abroad). Also in the case of "single-best effort goods problems" which can be supplied by one or few actor(s), the international governance problems (e.g., of climate change "geo-engineering" through injection of stratospheric aerosols) may not require global organizations with legislative and enforcement powers. Yet, unilateral supply of international public goods may create international conflicts due to adverse externalities for states that would benefit from the undersupply of the international public good concerned (e.g., climate change promoting the melting of the ice and new opportunities of mineral exploitation in the Arctic).

D. Rule-Making and Compliance Depend on Procedural Fairness and "Responsible Sovereignty"

International agreement on which and how many public goods to provide often depends on the "input legitimacy" of the rule-making procedures and on the distribution of the respective costs and benefits. For instance, the US leadership for the elaboration and adoption of the 1944 Bretton Woods Agreements, the 1945 UN Charter, the General Agreement on Tariffs and Trade (GATT 1947) and for the 1948 Universal Declaration of Human Rights (UDHR) was not only due to the hegemonic position of the United States after World War II and to the US willingness to cover most of the "negotiating costs" (e.g., of the 1944 Bretton Woods, 1945 San Francisco and 1947 New York conferences); no less important for securing broad international consent were the US efforts at promoting inclusive negotiations and "principled justifications" of a liberal post-war international order based on

[30] See Daniel Bodansky, What's in a Concept ? Global Public Goods, International Law and Legitimacy, 23 EUR. J. INT'L L. 651 (2012).

"sovereign equality of states," decolonization and respect for human rights. Even though all UN member states have accepted human rights obligations under UN treaty law as well as under general international law, governments and academics continue to disagree on whether the legitimacy and efficiency of the law of international organizations and of multilevel governance institutions can be promoted best by "constitutional approaches," "global administrative law approaches" or "legal pluralist approaches" to multilevel regulation of transnational public goods.[31] The under-supply of international public goods reveals a "leadership vacuum" in most UN and WTO institutions. 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 was 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 failure to conclude the Doha Round negotiations, and other "governance gaps" confirm the "legitimacy deficits" and "constitutional limits" of intergovernmental power politics as a legitimate tool for protecting global public goods. Waiting for global consensus (e.g., among 158 WTO members) has proven to be an unreasonable negotiation strategy, just as the "single undertaking method" and consensus-based amendment procedures of WTO law risk being impractical "implementation strategies."

In the worldwide Doha and climate change negotiations, some of the "governance failures" to reach agreement are related to disagreements on the distribution of costs and benefits (e.g., in less-developed countries refusing WTO disciplines on welfare-reducing government practices like non-transparent government procurement). Harmful "externalities" are 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 prior US compliance with the WTO dispute settlement rulings of November 2001 on US cotton subsidies; this continuing US non-compliance illustrates how rent-seeking lobbies financing the election campaigns of US politicians are often politically more powerful than consumer interests in rules-based, liberal trade and avoidance of wasteful subsidy practices violating US legal obligations under WTO law. Reconciling national and transnational self-interests requires "responsible sovereignty" based on the neglected insight that—as a result of the transformation of ever more national into international public goods—national constitutions have become "partial constitutions" that can protect ever more "aggregate public goods" only in conformity with international law and international institutions for the collective supply of international public goods. If governments do not engage in international cooperation in the enlightened national self-interest to protect interdependent "aggregate public goods," the cooperating countries may decide to transform global public goods into "club goods" and provide for sanctions against free-riding third countries (e.g., under the Montreal Protocol on substances that deplete the ozone layer); violations of the legal obligations of all UN member states to respect, protect and fulfil human rights *erga omnes* as well as of other "duties to protect" internationally agreed "common concerns" may also justify recourse to international dispute settlement procedures and reprisals from adversely affected third countries.

[31] On these competing "regulatory approaches" and conceptions of the law of international organizations, *see* PETERSMANN, *supra* note 1, chapter II, and Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, *23 EUR. J. INT'L L.* 669 (2012).

IV. Lessons from Case-Studies of the "Interface Problems" of the World Trading, Environment and Development Systems

The new global governance institutions (like the G20 group of 19 "systemically significant" industrialized and emerging economies plus the EU) and collective action problems in multilevel trade, development and environmental governance can be evaluated best by case-studies.

A. How to Improve the Multilevel Economic Governance by the G20

The G20 was established in 1999 pursuant to a proposal by the G7 finance ministers and central bank governors in response to the experience during the Asian financial crisis of the late 1990s that the G7 structure did not enable adequate responses to global financial and economic crises. The G20 is in a powerful position to promote the global common good, and to make it prevail, at times, against narrow, short-term interpretations of national interests.[32] But it is much less clear whether the needed improvements of "G20 governance" should be inspired by lessons from multilevel European governance, for instance in order to institutionalize the G20 as a more effective and more legitimate global governance executive. For example, the "competence catalogues" of the Lisbon Treaty listing various categories of EU competences (cf. Articles 3–6 of the TFEU on exclusive, shared, parallel and supporting competences), and limiting their exercise by constitutional principles (e.g., in Articles 2–6 of the TEU), 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 and Ramopoulos, 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 (Article 15 TEU) 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 and 2012 G20 summit meetings and by related tendencies to re-nationalize European monetary and debt governance, render a "Europeanization of the G20" inspired by principles of EU integration unlikely.

[32] See Jan Wouters & Thomas Ramopoulos, The G20 and Global Economic Governance: Lessons from Multilevel European Governance, in Petersmann, supra note 7, at 73 et seq.

B. How to Improve Multilevel Environmental Governance?

The very limited results of the successive UN conferences on climate change prevention raise urgent policy questions about how worldwide and regional efforts at climate change prevention can be rendered more successful. The case-study by Daniel Esty and Anthony Moffa[33] 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 and 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: political economy considerations, negotiation roadblocks, and inadequate institutional structures ensuring adherence to shared commitments in the UN Framework Convention on Climate Change (UNFCCC). Overcoming these collective action problems requires establishing a Global Environmental Organization and close coordination of the world trade and climate change regimes. While the 1997 Kyoto Protocol to the 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.

In view of the increasing unlikelihood of an effective UN convention on climate change prevention, the examination of national and regional policy alternatives is ever more important. The case-study by Moritz Hartmann[34] 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). Comparing regional emissions trading schemes in Europe and North-America and the complementary use of border tax adjustments for protecting the global public good of GHG reductions is 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 outsourcing 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," or the international dispute over the inclusion of foreign airlines into the EU's carbon-emission trading system,[35] reflect widespread doubts whether "marketization" of carbon dioxide emissions is the best methodology of climate change prevention. Hartmann's detailed comparison of European and North American regulatory approaches identifies numerous problems in the implementation of the EU's emission trading system (e.g., over-allocation of permits in 2007–2008, inadequate incentives for reducing CO_2 emissions on larger scales) as well as in sub-federal climate change regulations at state and local levels in response to the US refusal to accept international GHG reduction commitments and develop a federal emission trading scheme. Recent proposals to link regional carbon-emission trading systems

[33] See Daniel Esty & Anthony Moffa, Why Climate Change Collective Action Has Failed and What Needs to Be Done Within and Without the Trade Regime, in Petersmann, supra note 7, at 119 et seq.

[34] Moritz Hartmann, Carbon Emission Trading and Border Carbon Adjustments in Europe, North-America and Global Regimes (UNFCCC, WTO), in Petersmann, supra note 7, at 131 et seq.

[35] See Bartels, supra note 12.

(e.g., in Australia, California and the EU) have not yet been realized. "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. Yet, polycentric, market-based regulation may neither change individual behaviour nor reduce extensive carbon emissions unless external authorities impose enforceable rules that change the incentives faced by environmental polluters 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.

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 offers another case-study of progressive, multilevel regulation of "global environmental commons."[36] The CBD's focus is less on "command-and-control regulation" than on legal, economic and other tools to incentivise the private sector contribution 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 Reduced Emissions from Deforestation and Forest Degradation (REDD mechanism)); they confirm the importance of involving the private sector and changing individual behaviour by incentives for sustainable biodiversity management based on duties of "custodial sovereignty." Jerneja Penca identifies the regulatory deficiencies of the CBD (e.g., its lack of effective enforcement provisions) and 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). As in the case of carbon-emission trading systems, the increasing use of certification of environmental products, ecosystem services (like the REDD), "business biodiversity offsets," 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. The increasing number of bilateral initiatives supporting the implementation of the 2010 Nagoya Protocol on Access and Benefit-Sharing illustrates that—as in the case of the bilateral trade agreements concluded by the EU and United States with explicit references to other worldwide environmental agreements like the 1973 UN Convention on International Trade in Endangered Species—unilateral and bilaterally agreed initiatives for the protection of global environmental goods can offer important "second-best instruments" and non-judicial enforcement incentives as long as multilateral environmental framework rules do not yet include effective worldwide compliance and enforcement mechanisms: universal recognition of "common but differentiated responsibilities" may justify private and public, unilateral, bilateral and plurilateral leadership initiatives and "legal building blocks" for protecting global public goods.[37]

C. "Disconnected Governance" of Interconnected Public Goods?

A liberal world trading system can be perceived as a global public good offering potential gains from trade also for those countries that do not join more limited "club goods" like the WTO and regional free trade agreements. Yet, trade liberalization may also cause adjustment costs to import-competing industries inside countries even if the importing country might use some of its national "gains from trade" for compensating the losers. The rule-making and dispute settlement functions of international trade organizations like the WTO provide additional public goods, for instance by progressively

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[36] *See* Jerneja Penca's analysis of *International Incentive Mechanisms for Conservation of Biodiversity and Ecosystem Services*, *in* Petersmann, *supra* note 7, at 151 *et seq*. The citations in the text are from the analysis by Penca.

[37] *See* the case-study by Elisa Morgera, *Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law*, 23 EUR. J. INT'L L. 743 (2012).

clarifying the meaning of WTO rules, addressing harmful "externalities" of unilateral trade policy actions, negotiating new trade rules on the liberalization and regulation of trade, and "providing security and predictability to the multilateral trading system" (Article 3 WTO Dispute Settlement Understanding).[38] Article V of the WTO Agreement also requires the WTO General Council to "make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO" (para. 1); the General Council "may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO" (para. 2). The "horizontal" and "vertical" interconnections between the international trading, environmental, "sustainable development" and related legal systems are regulated more specifically in a number of GATT/WTO provisions (like GATT Articles XII–XV, XVIII) and WTO Declarations on the relations of WTO law and institutions with UN institutions (like the ILO, WHO, WIPO), "sustainable development" and environmental agreements in order to avoid the risk of circumventing separate legal regimes by resorting, for example, to monetary policy or environmental measures that "nullify or impair" previous trade commitments in terms of GATT Article XXIII. The common core of these WTO rules is that—even though the UN Charter conceptualizes "sustainable development" as a collective task of providing global public goods in a network of international organizations open to all UN member states, and the UN Specialized Agencies and other institutions outside the UN framework (e.g., GATT and WTO) evolved in diverse ways—UN law, GATT/WTO law and domestic legal systems must be construed in mutually coherent ways in conformity with the "consistent interpretation principles" underlying national and international legal systems.[39]

UN law and WTO law also refer to most of the "principles of fairness" necessary for successful negotiations over global public goods, such as principles of distributive justice (like "sovereign equality of states," equal human rights), corrective justice (like state responsibility, reparation of injury caused by violations of international law), commutative justice (like *pacta sunt servanda*, *reciprocity* and mutual advantage) and equity, whose precise definition may legitimately vary in particular contexts (like non-reciprocal trade preferences for least-developed countries in the WTO); principles of proportionality (e.g., regarding allocation of financial contributions, "common but differentiated responsibilities" in multilateral environmental agreements); respect for human needs, acquired rights and for "compensatory justice" (e.g., *vis-à-vis* former colonial territories); and procedural principles of "justice as fairness," "voluntary acceptance" and peaceful settlement of disputes.[40] Yet, in worldwide UN and WTO negotiations, the pursuit of justice as a "balanced settlement of conflicting claims"[41] continues to be 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 "triangle of global governance" (Pascal Lamy)—based on the UN, Specialized Agencies and the G20 as a "Global Economic Governance Executive"—remains characterized by "legitimacy deficits" and "decision traps" such as the "consensus principle" impeding the conclusion of GATT and WTO Rounds of multilateral trade negotiations. In the Doha Round negotiations, for example, 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

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[38] *See* Petros C. Mavroidis, *Free Lunches? WTO as Public Good, and the WTO's View of Public Goods*, *23 EUR. J. INT'L L.* 731 (2012).

[39] *See, e.g.*, the various "conflict of law" principles agreed upon in Article 31 VCLT as well as in Article XVI WTO Agreement like: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements" (Article XVI:4).

[40] *See* CECILIA ALBIN, JUSTICE AND FAIRNESS IN INTERNATIONAL NEGOTIATION (2001).

[41] *See* Ceciali Albin, *Getting to Fairness: Negotiations over Global Public Goods*, *in* Kaul et al. (*supra* note 8), at 263 *et seq.*, at 270.

trade barriers. Even though the World Bank estimated that conclusion of the draft *Agreement on Trade Facilitation* in the context of the Doha Round negotiations could offer additional trading gains in the order of US$900 billion, several less-developed WTO members make their consent to concluding this Doha Round agreement conditional on additional commitments by developed WTO members. 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 domestic interests will ever 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." The 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"); 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 ushering in the 1994 WTO Agreement only after ever more regional and "plurilateral agreements" (like the 1979 Tokyo Round Agreements among limited numbers of GATT contracting parties) had set sufficient incentives for third countries to join worldwide agreements.

The need for more participatory, multi-stakeholder decision-making on global public goods involving citizens, civil society and business is also evident in the UN and WTO efforts at protecting public health.[42] The 2001 Doha Declaration on the WTO Agreement on Trade-Related Intellectual Property Rights and Public Health has promoted cooperation (e.g., among the WHO, WIPO and WTO), research and funding for the development, procurement and distribution of medicines for diseases predominantly affecting individuals in less-developed countries. Nonetheless, problems in providing essential health services and limiting harmful tobacco consumption remain to be addressed in both developed and less-developed countries. The negotiation and conclusion outside the WTO framework of the 2011 Anti-Counterfeiting Trade Agreement among more than 20 countries, and the initiation—in 2012—of WTO dispute settlement procedures and investment arbitration challenging the tobacco plain packaging legislation of Australia, illustrate how governments continue to choose among alternative multilateral *fora*, regional or bilateral mechanisms "for securing strategic advantage." 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) has enhanced cooperation among the WTO and the World Bank in promoting the "development dimension" of WTO rules and policies.[43] The UN and its specialized agencies provide only for limited, compulsory jurisdiction for the judicial settlement of international disputes (e.g., by the ICJ, WIPO arbitration) and for alternative remedies and sanction procedures (e.g., by the UN Security Council, the World Bank Inspection Panel procedure and sanctions procedures in case of corruption, fraud, coercion and collusion). Most international disputes over potential conflicts between the legally separate WTO, WIPO, WHO, World Bank and multilateral environmental regimes—for instance, in case of trade and environmental regulations of emission reductions, border tax adjustments, emission trading systems, subsidies and environment-related goods, services and intellectual property rights—are, therefore, likely to be submitted to the compulsory WTO dispute settlement system. As only few IMF, FAO and WIPO rules have become explicitly incorporated into WTO law, the modes of cooperation between the WTO and other UN

[42] See Frederick Abbott, Multilevel Governance Problems at the Intersection of Trade, Health and the "Global Knowledge Economy," in Petersmann, supra note 7, at 95 et seq.

[43] See Anna Pitaraki, Can the "Development Dimension" of the WTO be Secured Without Stronger Synergies Between the WTO and the World Bank?, in Petersmann, supra note 7, at 99 et seq.

Specialized Agencies and related dispute settlement procedures (e.g., over exchange rate manipulations) continue to evolve pragmatically.

D. Limitation of Multilevel Governance Failures through Democratic and Constitutional Reforms?

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 development and human rights (e.g., of access to food and essential medicines, rights to private property, rule of law and legal remedies) is likely to enhance not only the "primary legitimacy" (Pascal Lamy) of promoting international public goods through UN Specialized Agencies and trade institutions; also HRL may benefit from the discourse among economic institutions and UN human rights bodies and UN human rights rapporteurs requesting international organizations to "respect, protect and fulfil" human rights by adjusting economic rules (e.g., WTO rules on liberalization of agricultural trade).[44] The need for justifying law and governmental restrictions of equal freedoms of citizens can be perceived as an integral part of human rights and as a precondition of institutionalizing "public reason" and "principles of justice" through democratic discourse.[45] In view of the only limited control by national parliaments of multilevel economic and environmental governance, the democratic support necessary for limiting governance failures in IEL and for protecting international public goods more effectively requires more involvement of citizens in participatory and deliberative democratic governance of public goods. For instance,

- "free riding" can be limited by clarifying property rights and judicial remedies of citizens and transforming public goods into "club goods" administered by international organizations;
- other governance failures may be limited by promoting "access rights," property rights and multilevel judicial protection of "rule of law";
- the citizen-driven reforms of European competition, common market and human rights law through multilevel democratic and "judicial governance" illustrate that cosmopolitan rights and judicial remedies of citizens can limit and transform intergovernmental power politics into rights-based, transnational cooperation among citizens.

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 James 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"). 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 Jan 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" of regulation? How can 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

[44] *See* the 2011 report by Olivier de Schutter, UN Human Rights Council's Special Rapporteur on the Right to Food, on *The WTO and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Food System* (published on the website of the UN Office for the High Commissioner for Human Rights) and the criticism of its protectionist recommendations in an open letter by WTO Director-General Pascal Lamy posted on the WTO website on 14 December 2011 (referring also to written comments by the WTO Secretariat on an earlier draft of the report).

[45] *See* FORST, *supra* note 1.

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 "public reason" and democratic support at domestic policy levels. The continuing under-regulation of global financial markets is also related 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. Citizen-driven, market-based instruments of economic regulation can complement democratic self-government and decentralized, self-interested enforcement of rule of law, provided there are adequate safeguards against abuses of private rights. The increasing importance of terrestrial and marine protected areas as "green" and "blue" carbon sinks illustrates the need for promoting synergies among separate treaty regimes so as to enhance "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 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 can be produced most efficiently; regulation should 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 legally and politically as places where regulatory systems change and where domestic implementation of international rules requires democratic legitimation and protection of the rights of citizens.

V. Constitutional and Legal Problems of Multilevel Governance of Public Goods

The universal recognition, for instance in more than 100 UN human rights instruments, of human rights and of the need for democratic governance require justifying law and governance through participatory, deliberative and representative democratic procedures and other "principles of justice" recognizing citizens as legal subjects of legal and democratic self-governance. 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,[46] and the political need for their

[46] Kaul et al., *supra* note 8, discuss (at 44 *et seq.*) 10 global public goods prioritized in a report by the UN Seceretary-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*

support by "multi-layered issue communities"[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 goods lack coherent theories. Legal methodology—e.g., 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—remains neglected and contested in IEL research and practices, for instance because legal interpretations might arrive at different conclusions depending on the respective "legal methodologies" applied. Due to "Westphalian path-dependence," also the legislative and executive "governance modes" and "judicial methodologies" applied by worldwide institutions continue to differ from those applied by constitutionally more limited regional and national governance institutions. 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.

A. Public Goods Theory Must Integrate Legal and Constitutional Theories

As the provision of "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). 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. Yet, as explained by John Rawls's *Theory of Justice*, the legitimacy and coherence of legal governance systems depends on their justification by, and progressive implementation of "principles of justice" through constitutional, legislative, executive and judicial rules and institutions, including international law and institutions for the collective supply of transnational public goods.[48] As UN law has never adopted effective constitutional, legislative and judicial safeguards of human rights, the lack of legitimacy of UN power politics continues to undermine the effectiveness of UN rules and institutions. The diverse evolutions of the various UN Specialized Agencies since World War II illustrate that—even within similar rules for multilateral provision of international public goods—legal and political regimes may develop in diverse and unpredicted ways.

Integration of legal and other public goods theories is impeded also by the fact that—similar to the story of the blind men touching different parts of an elephant and describing the same animal in contradictory ways—private and public, national and international lawyers continue to perceive IEL from competing perspectives, for instance as (1) public international law (e.g., the Bretton Woods Agreements), (2) "global administrative law" (e.g., the legal practices of UN Specialized Agencies and the WTO), (3) "conflicts law" (e.g., international commercial law and arbitration), (4) multilevel constitutional regulation (e.g., rights-based European economic law and adjudication) or (5) multilevel economic regulation of the economy (e.g., North America Free Trade Agreement (NAFTA) law) within the limits of national, democratic constitutionalism.[49] The conceptions of IEL differ because economic regulation and "rule of law" tend to be justified in diverse ways, for instance on grounds of

- national or individual utility (e.g., "national interests," public goods, welfare);
- state consent and "sovereignty" (e.g., to adopt national legislation violating IEL);

(Contd.)

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" (at 44).

[47] Kaul et al., *supra* note 8, at 47.

[48] *See* JOHN RAWLS, A THEORY OF JUSTICE. REVISED EDITION (1999), at 171 *et seq.*; PETERSMANN, *supra* note 1, at 18 *et seq*., 145 *et seq*.

[49] For a discussion of these five competing conceptions of IEL, *see* PETERSMANN, *supra* note 1, chapter I.

- democratic or individual consent (e.g., to "regulatory takings" of property rights);
- "public choice" (e.g., majority and interest group politics);
- principles of "good governance," human rights and other constitutional values (like private and public autonomy of arbitral tribunals).

The universal human rights obligations of all UN member states and the customary law requirements of interpreting treaties, and settling related disputes, "in conformity with the principles of justice" and human rights (as codified in the Preamble and Article 31 of the VCLT) require interpreting and justifying IEL treaties in conformity with human rights and other principles of justice, as it is done by governments and national and European courts in all 30 member states of the EEA[50] and increasingly also in regional economic and human rights courts in Latin-America[51] as well as in investor-state arbitration.[52] Such "constitutional interpretations" of economic freedoms and their "balancing" with other fundamental rights are likely to differ depending on whether individual freedom of action is protected broadly (e.g., as a constitutional "right of subjective freedom" as justified by Kant and Hegel) or merely as a "common law freedom" subject to whatever restrictions approved by legislative majorities.[53]

B. International Public Goods Regimes Must Remain Consistent with Human Rights

As mentioned in the Introduction, human rights and justice require justifying also *international rules vis-à-vis* citizens through general and reciprocal arguments that respect the equal private ethical, moral, legal, democratic and cosmopolitan autonomy of citizens and cannot be reasonably rejected by citizens as democratic authors of legitimate rules.[54] Many UN and WTO member states do not make efforts at justifying their economic UN and WTO agreements in terms of promoting human rights and consumer welfare and resist legal accountability in domestic courts of justice for government violations of UN and WTO treaty obligations. Given the diversity of moral, legal and political conceptions and legal traditions of human rights and "principles of justice" and the "post-modern scepticism" about the objectivity of moral reasoning, governments and economic courts often prefer avoiding controversies about the democratic legitimacy of governments and of their competing conceptions of human rights and "principles of justice" if legal arguments, judgments and dispute settlement can be justified on the basis of textual, contextual and functional interpretations of economic rules. As long as international law-making remains dominated by government executives drafting international treaties in terms of rights and obligations of governments without effective legal and judicial accountability *vis-à-vis* citizens, intergovernmental power politics and discretionary foreign policies taxing and redistributing domestic income through discriminatory border restrictions are likely to evade constitutional restraints, effective democratic control and self-government of citizens. Due to the interdependence between national and international public goods, foreign policy discretion of government executives and delegation of ever more governance powers to international

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[50] For examples, *see* Urfan Khaliq, Ethical Dimensions of the Foreign Policy of the EU. A Legal Appraisal (2008).

[51] *See*, *e.g.*, the MERCOSUR arbitral award of 6 September 2006 in the "Bridges case" between Argentina and Uruguay (*see* Lucas Lixinski, *Human Rights in MERCOSUR*, *in* The Law of MERCOSUR (Marcílio Toscano Franca Filho, Lucas Lixinski & María Belén Olmos Giupponi eds., 2010), at 351 *et seq.*

[52] *See, e.g.*, the UNCITRAL Arbitral Decision on Liability of 30 July 2010 in *AWG v. Argentina* (i.e., one of the more than 40 arbitration proceedings against Argentina's restrictions in response to its financial crisis in 2001), at para. 262: "In the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive." The investment arbitral awards cited in this contribution are available online at <http://ita.law.uvic.ca/>.

[53] On the diversity of jurisprudence interpreting "market freedoms" as *individual* or merely *objective freedoms*, *see*, Petersmann, *supra* note 1, chapter III, and Wayne McCormack, *Lochner, Liberty, Property and Human Rights*, *1 NYU Journal of Law & Liberty* 432 (2005).

[54] *See* Forst, *supra* notes 1 and 2.

organizations risk undermining democratic self-government also at national levels. In view of the still limited effectiveness of participatory, deliberative and representative democracy beyond states, multilevel governance requires multilevel constitutional restraints based on "principles of justice" and multilevel judicial protection of transnational rule of law for the benefit of citizens and their human and constitutional rights.

Limiting foreign policy discretion in the collective supply of international public goods raises many additional "constitutional problems." As legal and political incentives for the collective supply of international public goods often differ from country to country, political support for international public goods requires additional, international and cosmopolitan (dis)incentives. For instance, as most international public goods regimes are based on incomplete treaty rules and institutions, provisions for periodical renegotiation of rules, access to international courts clarifying incomplete rules, and international financial institutions assisting in domestic treaty implementation and adjustment measures may offer incentives for progressive development of public goods regimes. 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., 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," adverse externalities of 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 polio eradication, protection of UNESCO world heritage sites) and generate "positive externalities" (e.g., of the fight against pirates) prompting third private and public actors to share the costs of protecting public goods.

C. Cosmopolitan International Legal Strategies Can Generate Democratic Support

From the *Déclaration des droits de l'homme et du citoyen* (1789) up to the Universal Declaration of Human Rights (UDHR 1948), many human rights instruments illustrate their emancipatory function by asserting individual rights of resistance and of judicial remedies ("access to justice") against abuses of power. Limiting intergovernmental abuses of power and other collective action problems in supplying global "aggregate public goods" requires mainstreaming human rights into the law of worldwide organizations so that worldwide rules and multilevel governance institutions can serve "constitutional functions" for transforming local and national into regional and worldwide public goods.[55] Public goods theories emphasize the following two policy challenges:

- 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"[56] (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 cooperate in providing 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 interventions assigning private actors, market mechanisms and "public-private

[55] See Ernst-Ulrich Petersmann, Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, 13 EUR. J. INT'L L. 621 (2002).

[56] For explanations of the quoted terms, see Kaul et al., supra note 8, at 10 et seq.

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).[57] 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" empowered by cosmopolitan rights and judicial remedies enabling them to act as self-interested guardians of transnational rule of law. Empirical evidence (e.g., in European economic and human rights law) confirms that citizen-driven "struggles for rights," judicial protection of cosmopolitan "access rights," corresponding legal and judicial remedies and accountability of governments can set incentives for democratic support, production and consumption of public goods.

The differences between national, regional and worldwide environmental regimes confirm that legal regulation of public goods may vary depending upon the regulatory problems, the legitimately diverse preferences of peoples, 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 rule-making, 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 protecting rights and interests of citizens (e.g., in holding governments accountable for violations of transnational rule of law). For instance, just as the UN Security Council has revised its "smart sanctions" against alleged terrorists and has 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 VCLT), 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. European integration law illustrates how—provided foreign policy discretion is constitutionally restrained—political governance failures in protecting transnational public goods may be limited by rights-based judicial procedures and principle-based, judicial rule-clarification for the benefit of citizens and their human and constitutional rights.

[57] On market efficiency and knowledge as global public goods, see Kaul et al., supra note 8, at 126 et seq.; on the necessity and diverse ways of involving nonstate actors, see Michael Edwards & Simon Zadek, Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors, in Kaul et al., supra note 8, at 200 et seq.

D. "Responsible Sovereignty" and "Common Concerns" May Justify Legal "Duties to Protect"

The human rights of citizens entail "responsible sovereignty" requiring governments to respect, protect and fulfil human rights and related public goods, such as "sustainable development" as an explicit objective of UN law, WTO law and environmental law. As international law based upon territorial allocation of jurisdiction increasingly fails to properly address global challenges like protection of global public goods, 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.[58] 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. The "responsibility to protect" doctrine applied by the UN Security Council is an integral part of the emerging principle of common concern; but "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). European integration law illustrates how combining unilateral "bottom up" with multilateral "top down" approaches can promote progress in developing international rules protecting common concerns of mankind and limiting unilateral, national measures with harmful externalities.

"Responsible sovereignty" entails the risk that unilateral measures may undermine rather than protect international public goods and related "common concerns" (e.g., the US intervention in Iraq based on claims that UN inspectors had failed to protect the public good of preventing dictators from having weapons of mass destruction). It also requires clarifying the conditions under which procedurally illegal interventions (e.g., of NATO forces in Kosovo without prior authorization by the UN Security Council) may be justifiable in terms of preventing gross violations of human rights and related "common concerns." Even if UN member states agree on "common concerns," they may invoke their national sovereignty and the "safeguard clauses" in international agreements for protecting "national public interests" and prioritizing "common concerns" in diverse ways. Arguably, the antagonistic evolution of international protection of many global public goods is an inevitable consequence of the power-oriented, pluralist structures of the global system enabling unilateral definition of "national public interests" and invocation of related safeguard clauses; abuses of power can be limited best through progressive "constitutionalization" of international law, for instance by compulsory jurisdiction for the peaceful settlement of disputes over harmful externalities caused by "free riding," distributive conflicts and illegitimate abuses of power among states. The EU's decision to extend its carbon-emission trading system to international aviation from and to third countries offers 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 UNFCC and its Kyoto Protocol) and bilateral treaties (e.g., the "open sky" agreements with the United States).[59]

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[58] *See* Thomas Cottier, *The Emerging Principle of Common Concern*, *in* Petermann, *supra* note 7, at 185–194. The following citations are from Cottier's contribution.

[59] *See* Bartels, *supra* note 12.

E. Empowering Citizens and "Courts of Justice" as "Guardians of Public Goods"?

Human rights require recognizing individual persons and their diverse ethical, moral, legal, democratic and cosmopolitan autonomies and responsibilities as constitutional foundations also of UN law and IEL in the 21st century. European integration suggests that "Westphalian agreements among sovereign states" (including the EEC Treaty of 1957) can protect international public goods more effectively by providing for cosmopolitan "access rights," judicial guarantees of transnational rule of law for the benefit of citizens, and for "cosmopolitan democracy" promoting democratic discourse, community institutions, participatory, deliberative and representative democracy beyond nation states.[60] 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" (John Rawls) of constitutional, legislative, administrative and judicial protection of "access rights" to protection of non-discriminatory conditions of competition and other public goods. 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 many public goods (like 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 HRL and 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 the legitimate reality of "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 must be protected through constitutional, legislative, administrative and judicial safeguards of individual "access rights" and other "countervailing restraints" limiting abuses of public and private power. Cosmopolitan rights set incentives for limiting the "rational ignorance" of many citizens *vis-à-vis* transnational politics, such as Westphalian conceptions of "international law among sovereign states" treating citizens as mere objects of authoritarian "rule by law" based on authoritarian assumptions (e.g., of benevolent, omnipotent "sovereign rulers") that are inconsistent with the human reality of ubiquituous conflicts of interests requiring governance "as closely as possible to the citizens" (subsidiarity principle). Mutual coherence of national and international legal regimes requires 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 "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 states in the ICJ or in WTO dispute settlement bodies, such "medieval politicization" of economic disputes and related "trade wars" can often be avoided by decentralizing and depoliticizing

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[60] *See* Ernst-Ulrich Petersmann, *Cosmopolitan "Aggregate Public Goods" Must Be Protected by Cosmopolitan Access Rights and Judicial Remedies*, *in* Petersmann, *supra* note 7, at 195 *et seq*.

trade and investment disputes following the model of European economic law empowering citizens to enforce common market, competition, environmental rules and human rights directly in domestic courts and arbitration. 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;[61] 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 IEL as (1) "international law among sovereign states," (2) global administrative law, (3) multilevel economic regulation, (4) international "conflicts law" or (5) multilevel constitutional law[62] must be integrated by recognizing citizens as "democratic principals" *vis-à-vis* national and international governance institutions as agents with limited powers, whose legitimacy derives from protecting constitutional and cosmopolitan rights and rule of law. The EEA Agreement, or the "Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters," offer practical examples of successful "constitutionalization" of international public goods for the benefit of citizens among states with diverse constitutional traditions.

F. Respect for "Constitutional Pluralism" and Its Limits

The need for respecting "constitutional pluralism" and deliberative democracy entails that limiting "nationalist biases" against protecting international public goods by means of stronger cosmopolitan rights and "cosmopolitan democracy" (e.g., by recognizing "UN citizenship rights" similar to EU citizenship rights) will often take a long time. "Sovereign equality of states" and "constitutional pluralism" will remain foundational principles of international law in the 21st century. "Sovereign equality of states" is not only a "Westphalian principle" but, if interpreted as "responsible sovereignty," also a requirement of democratic responsibility to institutionalize "reasonable rules" empowering people to protect human rights and other public goods responding to the preferences of the people. The diverse democratic and "constitutional paradigms" practiced by UN member states—such as (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 Rawls's *Theory of Justice*) with non-liberal constitutions—are part of the reality of "constitutional pluralism." Each of these diverse constitutional paradigms is 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). Respect for "reasonable disagreements" and "constitutional pluralism" at national levels are not inconsistent with cosmopolitan conceptions of IEL in regional economic communities and in the global division of labour. 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 economists acknowledge that 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

[61] *See supra* note 16.

[62] *See supra* note 49.

function" avoiding "serious injury" to import-competing producers).[63] The failure to conclude the Doha Round negotiations illustrates that—without reciprocity of intergovernmental "market access commitments"—trade liberalization and trade regulation (such as the draft Agreement on Trade Facilitation) risk lacking political support.

- *Political scientists* acknowledge that—in the multilevel supply of ever more public goods—the "disaggregated state" 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, especially inside nation states dominated by interest group politics (e.g., in the US Congress) and by executive foreign policy discretion (e.g., in hegemonic countries).
- *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. The NAFTA countries, for example, claim that the "constitutional problems" of democratic 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 an integrated theory of *multilevel constitutionalism* on protection of public goods and cosmopolitan rights across national frontiers. Yet, the weak institutional structures of NAFTA and the breakdown of the intergovernmental NAFTA dispute settlement procedures (e.g., due to refusal by the United States to submit to Chapter 20 NAFTA dispute settlement panels) confirm the experience of other regional free trade areas dominated by "hegemonic countries" (like SADEC dominated by South Africa, MERCOSUR dominated by Argentina and Brazil) that transnational rule of law cannot be effectively protected if governments insist on "Westphalian freedom" to violate international rules.

European citizens—by limiting multilevel governance in the EU, the EEA as well as in the ECHR by constitutional, legislative, executive and judicial "institutionalization of public reason" and multilevel judicial protection of cosmopolitan rights—have secured more regional public goods and constitutional rights than they had ever enjoyed before. Also European "majoritarian democracies" (e.g., Anglo-Saxon democracies) have accepted multilevel limitations of "parliamentary freedom" and majority politics in favour of rights-based conceptions of cosmopolitan self-government of citizens (e.g., in the common market among the 30 EEA countries). The financial crises in the United States and Europe have prompted additional financial regulation at national and European levels based on protection of cosmopolitan rights and consumer protection (e.g., principles of transparency, accountability, access to information and to judicial remedies). Just as the "2011 Arab Spring" confirmed the historical experience of earlier (e.g., American and French) "human rights revolutions" that citizens have to struggle for human rights and other *public goods* (like constitutional democracy), transforming Westphalian "international law among states" into cosmopolitan IEL requires 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

[63] For the claim that nations cannot simultaneously pursue majoritarian democracy, self-determination and economic globalization, *see*, *e.g.*, RODRIK, *supra* note 23; CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY. THE FUTURE OF THE WTO (2001).

economic rights confirms that cosmopolitan "access rights" and transnational judicial remedies are normatively justifiable, politically feasible, and capable of promoting non-discriminatory supply and consumption of transnational public goods.

G. Constitutional Problems of Constructing Transnational Regulatory Communities

Reconciling the competing economic, political, legal and constitutional conceptions of "public goods" and of "international law" calls for promoting "cosmopolitan public reason" 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 "principles of justice," including judicial remedies by "courts of justice." Arguably, the universal human rights obligations of UN member states, the related requirement of a "four-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 21st century. The "human condition" of ubiquitous conflicts of interests (e.g., between diverse ethical conceptions for a "good life," 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. Whereas "constitutionalization" of national legal systems inside historically grown nation states and communities often succeeded through human rights revolutions and civil wars, "constitutionalizing" international law can succeed peacefully only through deliberative and participatory democracy, "cosmopolitan re-interpretations" and constitutional protection (e.g., by national and international courts) of the "principles of justice" underlying UN law, WTO law and multilevel HRL, such as multilevel guarantees of equal freedoms and multilevel judicial protection of transnational rule of law, democratic rights and obligations to protect human rights and other public goods.

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 21st century. As human rights also protect individual and democratic diversity (such as legitimately diverse conceptions of a "good life" and "social justice"), national and cosmopolitan constitutionalism must be coordinated on the basis of respect for legitimate "constitutional pluralism" and "subsidiarity." 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 regimes not only in terms of procedural fairness and "due process of law," but also in terms of distributive justice and cosmopolitan rights of citizens.[64] Cosmopolitan "access rights" and judicial remedies are necessary not only as "external limitations" of abuses of national governance powers by holding governments accountable for protecting individual autonomy, limiting welfare-reducing border discrimination, and protecting public goods and market-driven use of decentralized knowledge of citizens that "Westphalian rulers" inevitably lack. They are even more necessary as reciprocal, "reasonable self-commitments" of citizens enabling, promoting and limiting mutually beneficial cooperation across frontiers based on rules that are recognized and supported as promoting fairness and justice.

[64] PETERSMANN, *supra* note 1.

H. 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 EFTA 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) challenge the neglect of human and constitutional rights by "Westphalian legal regimes" as well as by Anglo-Saxon "common law" traditions.[65] 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.[66] The incomplete regulation and supervision of the persistent violations of the EU treaty disciplines for national fiscal and debt policies (e.g., as defined in Article 126 TFEU 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.[67] Without more economic growth, the 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 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 Francis Fukuyama's recent book *The Origins of Political Order*,[68] 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." 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 21st 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.

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[65] 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, *supra* note 1, chapters III and IV.

[66] *See* ICJ, Jurisdictional Immunities of the State (Germany v. Italy), Judgment (Feb. 3, 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 commited by the German Reich between 1943 and 1945").

[67] *See* the five Regulations and the Council Directive of November 2011 (OJ EU L 306 of 23 November 2011) 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 "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union" likewise aims at rendering the existing EU legal disciplines more effective in the domestic legal systems of Eurozone member states.

[68] FRANCIS FUKUYAMA, THE ORIGINS OF POLITICAL ORDER. FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION (Profile Books, 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)).

VI. Methodological Problems of International Public Goods Research

In order to contain the "arrogance of power" and interest group politics dominating the Westphalian system of international law, there is an obvious need for promoting education, research and innovation on multilevel governance and related theories of interdependent public goods.

A. Need for "Democratic Leadership"

Following the "Atlantic Charter" of 1941, the United States initiated a historically unique "global leadership" for reconstructing a liberal (i.e., liberty-based) international order by preparing drafts and convening international conferences on, *inter alia*, the 1944 Bretton Woods Agreements, the 1945 UN Charter, the 1947 General Agreement on Tariffs and Trade (GATT 1947) and the 1948 Universal Declaration of Human Rights, i.e., the multilateral legal and treaty foundations of the post-war international legal, political and economic order promoting 65 years of peaceful international cooperation. Such "hegemonic leadership" cannot be repeated in the 21st century, for instance because the US acceptance of the Bretton Woods Agreements, the UN Charter and of GATT 1947 was conditional on "veto rights" which the United States could exercise in the Bretton Woods institutions, the UN Security Council and in GATT/WTO rule-making based on consensus procedures. As the necessary "constitutionalization" and "civilization" of international public goods regimes in the 21st century must be justified, legitimized and "decentralized" in terms of human and other cosmopolitan rights and "principles of justice," the necessary leadership must come from democratic countries in the form of bilateral, regional and plurilateral agreements (e.g., pursuant to Article II:3 WTO Agreement, Article XXIV GATT, Article V GATS) insisting on "human rights coherence" and on respect for legitimate "constitutional pluralism" of international public goods regimes. This normative premise is in conformity with the increasing practice of negotiating bilateral, regional and plurilateral economic and environmental agreements in order to circumvent the consensus principles impeding the conclusion of new worldwide public goods regimes in UN institutions and the WTO.

B. Human Rights, "Principles of Justice" and "Cosmopolitan Constitutionalism" Offer Common Legal Methodologies for Diverse Public Goods Regimes

Inside nation states, the universal recognition of human rights calls for participatory, deliberative and representative forms of democratic self-governance; yet, the law and institutions of national democracies and of their collective supply of national public goods tend to differ from country to country. This contribution perceived protection of equal freedoms and corresponding, constitutional rights and obligations of justifying governmental restrictions of equal freedoms as a "first principle of justice," including respect for the legitimate diversity of such democratic and judicial justifications "balancing" civil, political, economic, social and cultural rights and other public goods at national and international levels. European integration illustrates the inevitable "democratic deficit" of supranational governance beyond national people constituting a "demos" that remains committed to preserving its "unity in diversity" in international cooperation: neither the representation of the 27 national "peoples" in the EU institutions nor the EU citizen rights of 500 million EU citizens aim at creating a single "European people" with a single "democratic space" constituting a single European identity based on Europe-wide democratic discourse of EU citizens legitimating EU legislation and decision-making directly at the EU level. As the powers of international organizations (including the EU) remain limited compared with national parliamentary powers (e.g., to tax citizens, to legislate and enforce law by means of coercion), most EU citizens continue to view the EU as a functionally limited, regulatory regime, whose democratic legitimacy depends on delegation and control by national parliaments and constitutional courts of justice. Beyond the unique multilevel governance system of the EU, most national parliaments do not effectively control the dynamic evolution of worldwide treaty regimes, notwithstanding certain attempts at promoting transnational consultative, parliamentary institutions in some UN agencies, the WTO and regional agreements. In view of the

"enabling, limiting and supplementing functions" of international organization to enable collective supply of international public goods by limiting national governance failures and supplementing "incomplete national legal systems," the legitimacy of international public goods regimes must be constituted, limited, regulated and justified not only in terms of national parliamentary democracy, but also by protection of human rights and other "principles of justice" in the transnational cooperation among citizens for the collective supply of international public goods.[69] By recognizing citizens and democratic "people" as "primary sovereigns" also of international public goods regimes, "cosmopolitan constitutionalism" and international law and institutions are necessary complements of national legal systems for the collective supply of public goods.

As human rights and cosmopolitan constitutionalism aim at protecting individual and popular diversity, they make it possible to share a common legal methodology for international public goods regimes with due respect for the legitimate diversity of national constitutional, legal and political regimes and conceptions for a "good life" and "political justice."[70] As emphasized in the UN Charter (e.g., Article 1) and numerous other treaties, "international disputes should be settled by peaceful means and in conformity with the principles of justice and international law," including "human rights and fundamental freedoms for all" (Preamble VCLT). The UN Charter provisions on the International Court of Justice (e.g., Article 38 ICJ Statute) codify the sources of international law (e.g., international conventions, custom, general principles of law) and the "rules of recognition" (e.g., recognition by states, "civilized nations," "judicial decisions and the teachings of the most highly qualified publicists") not only in terms of state consent, but also in terms of "civilized nations," judicial decisions and "public reason" of citizens and public discourse, thereby providing not only for "conservative justice" (e.g., in terms of rule-following) but also for "reformative justice" (e.g., in terms of distributive, corrective, commutative justice and equity as defined by human rights jurisprudence). Following the ancient European law traditions of defining law as "participation in the idea of justice" and conceiving "justice as a prerequisite to living a civic life, to living in community" (Plato),[71] international law and public goods regimes must remain justifiable in terms of justice, human rights and democratic self-government in the 21st century, with due respect for the diverse "contexts of justice" (e.g., at national, cosmopolitan and international levels) and for the legitimately diverse conceptions of HRL at national, regional and worldwide levels of regulation. In contrast to "Westphalian discourse" focusing on rights and obligations of states and democratic discourse focusing on parliamentary democracies, cosmopolitan discourse and transnational justice centre on different dimensions of human autonomy, popular self-determination and cosmopolitan rights.[72] Yet, even though the UN Charter and the law of many other international organizations explicitly refer to "principles of justice," cosmopolitan conceptions of "global justice" and of an international "law of peoples" remain disputed.[73] European courts and the ICJ refer regularly to requirements of "proper administration of justice" in clarifying procedural principles of due process of law and substantive principles of justice. The ICJ, for instance, takes it for granted that:

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[69] PETERSMANN, *supra* note 1, chapters II–IV.

[70] *See* STEVEN R. RATNER & ANNE-MARIE SLAUGTHER, APPRAISING THE METHODS OF INTERNATIONAL LAW: A PROSPECTUS FOR READERS, *93 AM. J. INT'L L.* 291 (1999), who define methodology as "the application of a conceptual apparatus or framework—a theory of international law—to the concrete problems faced in the international community" (at 292).

[71] *See* CARL J. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE (1963), chapters II and XX.

[72] Jürgen Neyer, *Justice, Not Democracy: Legitimacy in the European Union*, 48 JOURNAL OF COMMON MARKET STUDIES 903 (2010).

[73] *See, e.g.*, GILLIAN BROCK, GLOBAL JUSTICE. A COSMOPOLITAN ACCOUNT (2009); RAWLS'S LAW OF PEOPLES (Rex Martin & David Reidy eds., 2006).

Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable."[74] "Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it."[75]

Yet, "reasonable disagreement" among citizens and governments over the interpretation of human rights and other "principles of justice" is likely to remain a permanent reality in view of legitimately diverse conceptions for a "good life," diverse communitarian and democratic preferences, legal traditions and "constitutional pluralism" in the 193 UN member states.[76]

C. Legal Positivism and Legal Pluralism

In view of the limited mandates of (inter)national courts deciding disputes on the basis of the applicable rules of law and the customary methods of textual, contextual and functional treaty interpretation (cf. Articles 31–33 VCLT), legal positivism has become the generally accepted starting point in interpreting and developing legal regimes. Legal systems are perceived as a union of "primary rules of conduct" and "secondary rules" of recognition, change and adjudication[77] that dynamically interact with changing *legal practices* by private and public legal actors, who often justify legal claims and interpretations of rules by invoking *legal principles*.[78] Hart claimed that international law "resembles, (. . .) in form though not at all in content, a simple regime of primary or customary law" and, due to its incomplete "secondary rules," a "primitive legal order."[79] Yet, in contrast to other areas of international law where third-party adjudication remains an exception to the rule of "auto-interpretation," regional HRL and IEL are today characterized by an ever stronger role of national and international courts in clarifying, progressively developing and enforcing transnational rule of law, thereby transforming regional HRL and IEL into more developed legal systems than other areas of the Westphalian "international law among sovereign states." The distinction between "international public law among states" (considering states as exclusive subjects and objects of international law) and "international private law" (based on national choice-of-law rules) is increasingly blurred by the emergence of "transnational legal systems" recognizing individuals as legal subjects deriving individual rights from international agreements (e.g., on human rights, investment and intellectual property law, regional economic and environmental agreements) and creating autonomous, de-nationalised legal systems (like *lex mercatoria*, *lex sportiva*, *lex digitalis* of the Internet).[80] The new

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[74] North Sea Continental Shelf ((Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment (Feb. 29, 1969), ICJ REPORTS 1969, at 48–49, para. 88. For other references to the relevant ICJ jurisprudence, *see*, *e.g.*, RÉPERTOIRE DE LA JURISPRUDENCE DE LA COUR INTERNATIONALE DE JUSTICE—REPERTORY OF DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (1947–1992), 2 volumes (Giuliana Ziccardi Capaldo ed., 1995), at 777, 781, 825, 855, 935.

[75] ICJ, Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment (Feb. 24, 1982), 1982 ICJ REPORTS at 60, para. 71.

[76] In his book on *Politics*, Aristotle already claimed that "all men cling to justice of some kind," but they do not agree on what justice is: "their conceptions are imperfect and they do not express the whole idea"; *see* ARISTOTLE, THE POLITICS AND THE CONSTITUTION OF ATHENS (1996), at xiv.

[77] *See* Herbert L.A. Hart, The Concept of Law (1994), chapter V.

[78] This constant interaction between "law as a legal order" and "law as legal practices" is emphasized by "critical legal positivism," according to which law and its legal changes should be examined on (1) the surface level of positive law, (2) the legal culture, and (3) the deep structures of law; *see* Kaarlo Tuori, Critical Legal Positivism (2002). In his contribution on *A New Legal Realism: Method in International Economic Law Scholarship* to the book edited by Colin Picker, Isabella Bunn and Douglas Arner, International Economic Law. The State and Future of the Discipline (2008), Gregory Shaffer distinguishes four varieties of IEL scholarship: formalist/doctrinal, normative/activist, theoretical/analytical, and empirical.

[79] Hart, *supra* note 77, at 214.

[80] On the different forms of "rights cosmopolitanism" not only in EU and EEA law, but also in the ECHR since the entry into force of its Protocol No.11 and the judicial recognition of its supra-legislative status in national legal systems throughout

"legal pluralism" based on *functional* rather than *territorial* legal sub-systems (e.g., WTO membership admitting not only states but also sub- and supranational customs territories like Hong Kong and the EU) entails conflicts of jurisdiction challenging the boundaries and cultures of national, transnational and international legal and judicial systems and related legal pre-conceptions (*Vorverständnis*) of legal actors.[81] The diplomatic focus on "member-driven governance" (e.g., in WTO law) illustrates that "legal pluralism," European perceptions of independent and impartial judges as the primary paradigm of justice and of authoritative interpretation of law, individual rights and judicial remedies of "market citizens" and other non-governmental economic actors enforcing IEL as "private attorneys general" remain contested by "realist claims" of intergovernmental power politics. European legal research is characterized by continuous attempts at integrating positive law, empirical, normative and moral dimensions of legal integration. Yet, it remains controversial also in European integration law to what extent cosmopolitan rights and individual access to justice should be protected (e.g., in the foreign policy area), and whether "European law" should be conceived as one single legal system (e.g., a "Union based on the rule of law" including EU law and the national legal systems of the 27 EU member states) or as a "multilevel, composite system" composed of diverse, national and international legal orders, which often serve as "laboratories" for progressively improving European economic law.

D. "Dual Nature" and Policy Conceptions of Legal Systems

Legal positivism and textual interpretations of rules often leave open normative questions. Due to the worldwide recognition—in more than one hundred UN human rights instruments—of "inalienable" human rights obligating all UN member states to respect, protect and promote human rights, natural law theory has become an integral part of positive international law; it may be relevant for interpreting, e.g., the systemic nature of human rights (e.g., as legal rights derived from moral principles and political procedures),[82] the relationships between "rules" and "principles" in human rights law and IEL, the legal clarification of "common, but differentiated responsibilities" in international environmental law, and the need for respecting the diverse preferences of human beings and their diverse, democratic governance systems. The human rights jurisprudence of European courts confirms that the recognition of *jus cogens* and of other legal hierarchies (e.g., of *constitutional* over *legislative* and *administrative rules*) may justify judicial findings that unjust rules (e.g., "smart economic sanctions" by the UN Security Council disregarding human rights) may not be a valid part of positive European law. The legal "validity" of legal rules has to be identified, *inter alia*, by the criteria provided in the "rules of recognition" and their interpretation by citizens, governments and courts. In the absence of clear legal hierarchies among competing functional and regional legal regimes, their diverse legal obligations need to be mutually reconciled through 'consistent interpretation' (cf. Article 31 VCLT) and adjudication. In constitutional democracies, the multilevel human rights obligations of states constitutionally limit the "rules of recognition" by permitting recognition of only such rules and institutions as legitimate and legally valid that respect constitutional rights and "principles of justice" as defined in democratic law-making and judicial proceedings.[83] Diplomats interested in maintaining their foreign policy discretion often dislike this "dual nature" of modern legal systems—i.e., as positive law (e.g., represented by authoritative issuance and social

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Europe, *see* A Europe of Rights: The Impact of the ECHR on National Legal Orders (Helen Keller & Alec Stone-Sweet eds., 2008).

[81] For case-studies of competing jurisdictions of national, European, international and arbitral courts *see*, *e.g.*, Nikolaos Lavranos, Jurisdictional Competition. Selected Cases in International and European Law (2009).

[82] On the diverse conceptions of "economic justice" and "ecological justice," *see*, *e.g.*, GARY CHARTIER, ECONOMIC JUSTICE AND NATURAL LAW (2009) (examining legal questions of ownership, production, distribution and consumption on the basis of a natural law theory of ethics).

[83] In order to avoid legal uncertainty, only violations of human rights, constitutional rights and other forms of "extreme injustice" are likely to affect the validity of legal rules; *see* ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE (2010).

efficacy of rules) as well as "inalienable" human rights and open-ended "principles of justice," which can be of crucial importance for legal interpretation and dispute settlement.[84]

Legal analyses of international public goods regimes tend to share the positivist legal premises that positive law must be distinguished from normative proposals for changing the existing rules; positive law must therefore also remain separable from moral principles that have not been incorporated into positive law; and the efficacy of legal systems requires that "primary rules" of conduct and "secondary rules" of recognition, change and adjudication must be established as "social facts" reflected in social practices and sources of law. Yet, as illustrated by European economic law, transforming "anarchy" into "constitutional order" in international economic relations may require going beyond legal analyses of positive IEL by challenging authoritarian *normative legal doctrines* (e.g., concerning state sovereignty) through re-interpreting international rules in conformity with the human rights obligations of states and their underlying "constitutional principles" (e.g., popular sovereignty entailing "duties to protect" and "responsible sovereignty"). As Albert Einstein famously remarked: "We can't solve problems by using the same kind of thinking we used when we created them." The "New Haven School"'s conception of international law as a "constitutive process of authoritative decision-making" by individuals and democratic constituencies[85] explains why jurisprudence is also about making and developing international law through reasonable policy choices protecting human rights, democratic self-governance and a just social order. The less the "IEL in the books" succeeds in realizing its development objectives, the stronger becomes the need for reviewing the "IEL in action" from the diverse legal and policy perspectives of the various actors like individuals, firms, parliaments, intergovernmental law-makers, national and international administrators, diplomats and judges. Normative legal and constitutional theory concentrates on the reasonable relationships between legal principles, rules and institutions and on their diverse perceptions depending on the "observational standpoint" (e.g., of diplomats, parliaments, international judges, impartial and reasonable citizens, non-governmental civil society organizations). The needed *policy-oriented legal analysis* must also take into account the social, economic and political conditions necessary for realizing legal and constitutional policy objectives. As customary international law requires settling international disputes in conformity with principles of justice and the human rights obligations of states, textual, systemic and functional interpretation of rules—with due regard to relevant legal principles and human rights obligations of states—should be as transparent as possible in order to be persuasive and promote inclusive "public reason" and critical review. Yet, this function of courts as "exemplars of public reason" (John Rawls) may conflict with their specific dispute settlement function in jurisdictions (like GATT 1947 and the WTO) depending on voluntary acceptance and implementation of dispute settlement findings by governments with political self-interests in confidential dispute settlements. Different legal actors (e.g., law-makers, judges, commercial arbitrators, policy-makers) are likely to

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[84] *See* Robert Alexy, *The Dual Nature of Law*, 23 RATIO JURIS 167 (2010), who concludes that "legal positivism is an inadequate theory of the nature of law" (at 180). But the inclusion of human rights and principles of justice into modern international and constitutional law permits accommodating the dual nature of law within a broad concept of positive law.

[85] On the interdisciplinary "New Haven methodology" of analyzing national and international law as decision-making processes that are both "authoritative and controlling" in the pursuit of a "public order of human dignity" enabling individuals to realize their human aspirations in their "civic order," proceeding from the equal worth of all individuals and the right to individual self-development as constitutional core values, *see* Myres S. McDougal, *The World Constitutive Process of Authoritative Decision*, *in* INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY. CASES AND MATERIALS (Myres S. McDougal & W. Michael Reisman eds.,1981), at 191 *et seq.*; W. Michael Reisman, Seigfried Wiessner & Andrew W. Willard, *The New Haven School: A Brief Introduction*, *32 THE YALE JOURNAL OF INTERNATIONAL LAW* 587 (2007). The policy-oriented "democratic participant perspective" of the New Haven School is justified in international law by the worldwide recognition of human rights by all UN member states. "Realist" claims of "impartial description" of the continuing reality of power-oriented state practices refute neither the normative limitations of state sovereignty by modern human rights law nor the increasing recognition of individual rights and judicial remedies of individuals in ever more fields of positive international law.

perceive, use and evaluate legal rules, democratic and dispute settlement procedures, and legal methodologies from different perspectives.

Many past doctrinal disputes among "legal positivists," "natural rights theorists" and social conceptions of law—for instance, whether positive law includes only "rules" or also "principles" of law, and whether judges enjoy discretion in the absence of applicable rules—have become outdated: "general principles of law" are today universally recognized sources of international law (*see* Article 38 ICJ Statute); almost all international courts acknowledge today that, in disputes over the contested meaning of imprecise rules, judges must find the "right answer" through "administration of justice," the customary methods of legal interpretation and "balancing" of rules in the light of applicable principles, rules and procedures, including democratic and judicial clarifications and justifications of rules.[86] WTO dispute settlement bodies, investor-state arbitration and other economic courts often have good reasons to pragmatically avoid controversial questions about justice in IEL, for instance in the WTO dispute over differential, yet "non-discriminatory" treatment of less-developed countries benefitting from the Generalized System of Trade Preferences, or in WTO dispute settlement rulings on the requirement of "fair price comparisons" in anti-dumping investigations.[87] The options of "exit, voice and loyalty" may be used not only for explaining the dynamic evolution of *regional* economic law;[88] they also influence the decreasing loyalty to the post-war IEL system (as illustrated by the termination of GATT 1947 in 1995, recourse to regional trade agreements as alternatives to concluding the WTO Doha Round negotiations) and the often antagonistic recourse to "legal pluralism" in IEL (as illustrated by ever more *bilateral* agreements on investments, movements of natural persons, energy supply, double taxation, intellectual property rights) as well as to *unilateralism* (e.g., the EU's extension of its carbon-emission trading system to flights from and to third countries). Designing and evaluating decentralized legal reforms—especially if they are aimed at protecting international public goods more effectively by "moving from the world of Hobbes to the world of Kant"[89]—may require interdisciplinary analysis of law justifying legal interpretations in terms of "responsible sovereignty" and "duties to protect" internationally agreed "common interests" across frontiers for the benefit of citizens and their human rights.

E. International Public Goods Require Interdisciplinary Research

International relations theories focusing on states (like realism, institutionalism, functionalism) or also on individual and non-governmental actors (like "public choice" and constitutional theories) try to explain the rational choices of political actors rather than "legal methodologies" (e.g., for interpreting legal rules). Many "realist" claims (e.g., that political morality does not reach beyond national legal

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[86] On the increasing resort—in international human rights law, labour law, trade and investment law and adjudication—to "principle-oriented" interpretations and adjudication, *see* Ernst-Ulrich Petersmann, *Judging Judges: From "Principal-Agent Theory" to "Constitutional Justice" in Multilevel Judicial Governance of Economic Cooperation among Citizens*, *11 JOURNAL OF INTERNATIONAL ECONOMIC LAW* 827 (2008). On legal "interpretivism" treating law as an interpretive concept based not only on rules but also on justifying principles (like justice, liberty, equality, democracy) requiring "just interpretation" of law, *see* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011), chapter 19.

[87] For a discussion, *see*, *e.g.*, ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY (2009), at 248 *et seq*., 261 *et seq.*, 314 *et seq*.

[88] *See* Joseph Weiler, *The Transformation of Europe*, 100 YALE LAW JOURNAL 2403 (1990), explaining constitutional and economic law reforms in the EU by their dependence on a political equilibrium between "voice, exit and loyalty" (*see* ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY—RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970)). On older, *ordo*-liberal conceptions of "interdependence of legal, economic and political orders," on the risk of "social dis-embedding" by globalization, and the need for "democratic re-embedding of IEL" through stronger protection of human rights and "struggles for individual rights," *see* PETERSMANN, *supra* note 1, chapters IV and VII.

[89] *See* Pascal Lamy, who—in his speech of 6 October 2011 on *What Multilateral Trading System for the Future?* (accessible on the WTO website)—stated: "we need to do for international monetary relations what we already did for trade: move from the world of Hobbes towards the world of Kant."

systems) are empirically inconsistent with the increasing impact of international law, international regulatory agencies and of multilevel adjudication on social and legal practices. "Realist neglect" of international law as the most important instrument for constructing international "aggregate public goods" all too often reflects ignorance or "capture" of regulators by powerful lobbies benefitting from interest group politics at the expense of "rationally ignorant consumers." Economic analysis of law may be important not only for understanding "economic structures" of private and public law[90] but also for interpreting legal rules based on principles of economics.[91] Political theories of justice and other legal philosophies may be of direct, normative relevance for the interpretation of rules and the legal design of institutions, for instance by justifying inherent powers of "courts of justice" and respect for "reasonable disagreement" among citizens and polities. Yet, as illustrated by the failures of economics to predict the global financial crises since 2008, the numerous "market failures" (like information asymmetries, lack of transparency, non-accountability of abuses of power) prompt ever more economists to call for "a new economic paradigm" (Joseph Stiglitz).[92] From the point of view of theories of justice, equal freedoms (as "first principle of justice") and the human capacity of reasonable autonomy (as recognized in numerous human rights instruments like Article 1 UDHR) require justification of all governmental restrictions of equal freedoms through legal "institutionalization of public reason" based not only on fair procedures (e.g., deliberative and parliamentary democracy, impartial adjudication, "balancing" of competing civil, political, economic, social and cultural human rights). HRL and IEL are also influenced by *substantive* "principles of justice" (e.g., in the EU Charter of Fundamental Rights), institutional "checks and balances" (like "courts of justice") and other legal safeguards protecting "sovereign equality of states," "reasonable disagreement" and the reality of "constitutional pluralism" (e.g., among constitutional, majoritarian and non-liberal democracies).

The legitimacy and effectiveness of law as an instrument of social governance depend on the social acceptance, democratic support and legal practices not only by government agents but also by citizens (as "democratic principals"). Hence, law has to be analysed with due regard to its social context and legal practices. The context of IEL—for instance, regarding multilevel judicial protection of cosmopolitan rights (like trading and investor rights, intellectual property and labour rights, access to justice)—differs from the context and functions of other fields like human rights and international criminal law. For instance:

- in order to protect freedom of contract and reduce transaction costs for the billions of producers, investors, traders and consumers participating in the worldwide division of labour, IEL relies more on decentralized, market-driven information-, coordination-, steering- and sanctioning-mechanisms as well as on cosmopolitan rights (e.g., in commercial, trade, investment, intellectual property, labour, economic integration law and arbitration) than most other fields of international cooperation and regulation;
- the current European private and sovereign debt crises illustrate the strong interdependencies between national, regional and worldwide market regulations; inadequate regulation of profit-driven "market forces" (e.g., in globally integrated financial markets) can entail systemic violations of rule of law by private and public actors (e.g., defaulting on their contractual debt obligations);
- the large number of private and public, (sub)national and international actors participating in the legal regulation (e.g., of more than half of world trade taking place inside and among some 80,000 transnational corporations with 10 times as many subsidiaries) illustrates the need for

[90] *See* JOEL TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW (2008).

[91] *See Symposium: Public International Law and Economics*, UNIVERSITY OF ILLINOIS LAW REVIEW 1–245 (2008); LAW AND METHOD OF INTERDISCIPLINARY RESEARCH INTO LAW (Bart van Klink & Sanne Taekema eds., 2011).

[92] *See, e.g.*, THE WASHINGTON CONSENSUS RECONSIDERED. TOWARDS A NEW GLOBAL GOVERNANCE (Narcís Serra & Joseph E. Stiglitz eds., 2008).

transnational rule of law protecting not only rights of governments, but also the rights of citizens and other economic actors;

- IEL provides for more "international rule-of-law institutions" (such as multilevel regulatory and judicial authorities, quasi-judicial dispute settlement procedures, supervision by international organizations) for international rule-making and dispute settlement than other fields of international law; yet, the prevailing "Westphalian conceptions" of "international law among sovereign states" offer citizens no effective legal and judicial remedies against welfare-reducing violations of UN and WTO law;
- compulsory jurisdiction and jurisprudence of international dispute settlement bodies in IEL (e.g., in the WTO, regional trade courts, treaty-based or commercial investor-state arbitration) tend to be more frequently invoked and legally more developed (e.g., in terms of "balancing" of public and private rights and interests) than in most other areas of international relations; hence, the more citizens participate in transnational governance and adjudication as "global citizens" and insist on supply of global public goods, the more citizens have reasons to claim cosmopolitan rights and democratic ownership of transnational governance institutions.

F. International Adjudication Must Take into Account the Diverse "Contexts of Justice"

"Justice is the first virtue of social institutions, as truth is of systems of thought."[93] In contrast to the search for truth in the natural sciences, the justification of law and jurisprudence (e.g., in the sense of the right application of the law on the basis of objective criteria) are often less about "truth" (e.g., in case of establishing legal facts) than—notably in case of normative decisions—about "institutionalizing public reason" providing for "reasonable procedures" of rule-making, rule-administration and rule-enforcement based on "balanced judgments" (e.g., resulting from democratic discourse among free and equal citizens, representative parliamentary decision-making, judicial procedures administered by impartial and independent judges so as to secure "rule of law," "balancing" among competing human and constitutional rights based on principles of non-discrimination, necessity and proportionality). Arguably, reasonable judgments and justice (e.g., in the sense of reasonable justification) are the equivalent in normative social sciences to truth in the natural sciences.[94] Access to justice and judicial "administration of justice" are necessary "constitutional building blocks" of the multilevel governance structures through which citizens, people and states seek to deliver public goods.[95] Both legal theory and practice suggest that multilevel judicial protection of transnational rule of law for the benefit of citizens—e.g., by limiting power-oriented claims of government executives to freely violate international guarantees of equal freedoms, non-discrimination and rule of law in order to protect domestic interest groups in exchange for their political support—are necessary for protecting transnational public goods more effectively; just as national constitutional courts have to protect agreed "principles of justice" and "the higher law" against abuses of power inside states, international courts have to protect international public goods against abuses of powers in transnational relations.

Questions of justice arise from social conflicts, for instance whenever citizens claim conflicting rights or request the elimination of arbitrary distinctions and the fair settlement of their disputes on the basis of "just principles" and "fair procedures" reviewing and "balancing" the competing claims and justifying the final judgment. The need for peaceful settlement of disputes over conflicting claims for justice, for judicial protection of transnational rule of law and judicial remedies based on principles of

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[93] RAWLS, *supra* note 48, at 3.

[94] *See* Robert Alexy, *The Reasonableness of Law*, *in* *REASONABLENESS AND LAW* 5 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009); similarly, *see* DWORKIN, *supra* note 86, chapter 2.

[95] *See* Andre Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, *23 EUR. J. INT'L L.* 769 (2012).

justice is today more recognized in IEL than in most UN public goods regimes. Since Aristotle, distributive, corrective, commutative justice and equity continue to be recognized as important "spheres of justice" in the design of dispute settlement systems (e.g., for "violation complaints," "non-violation complaints" and "situation complaints" pursuant to GATT Article XXIII); post-colonial IEL also includes "principles of transitional justice" (e.g., in Part IV of GATT and in the Dispute Settlement Understanding of the WTO). This contribution has argued that "Westphalian focus" on rights and obligations of states and lack of adequate rights and judicial remedies of *individuals* are among the main reasons why most UN public goods regimes do not effectively protect the common self-interests of citizens. UN agreements focusing on dispute settlement procedures among states offer no effective protection of human rights, consumer welfare of citizens and access to justice inside countries. The lack of "cosmopolitan justice" also hinders producers, investors, traders and consumers to use and develop IEL for maximizing consumer welfare, transnational rule of law and protection of citizen rights more effectively. As long as national and international judges do not cooperate in protecting transnational rule of law for the benefit of citizens, "intergovernmental governance" and inadequately regulated "private self-governance" of the worldwide division of labour remain characterized by numerous "market failures" and "governance failures" to the detriment of equal rights of citizens and their consumer welfare.

The customary law requirement of settling disputes in conformity with "inalienable" and "indivisible" human rights and other "principles of justice" requires "balancing" of all civil, political, economic, social and cultural rights[96] with due regard to the diverse "contexts of justice" such as:

- the different contexts of the private, moral, legal, democratic and cosmopolitan freedoms of citizens protecting diverse ethical conceptions of a "good life" as well as moral, legal, democratic and cosmopolitan rights to equal respect and human rights;[97]
- the utilitarian principles of economic efficiency underlying multilevel economic regulation, such as the legal ranking of trade policy instruments in GATT/WTO law according to their respective economic efficiency, or the commitment of EU law to a "highly competitive social market economy" within "an area of freedom, security and justice" (Article 3 TEU) among 27 EU member states;[98]
- the sometimes one-sidedly libertarian focus on economic liberties and property rights in international investment law and adjudication as well as in some other fields of economic and commercial law and arbitration (e.g., on intellectual property protection);[99]
- the legal prioritization of human and constitutional rights over utilitarian "common goods" in democratic constitutions and human rights instruments, based on "discourse justifications" of human rights and "principles of justice" (e.g., recognizing social discourse as reasonable only to

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[96] On "balancing" as the dominant technique of rights adjudication in national and international legal systems, and on the diverse elements of "proportionality balancing," *see* MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY (2012).

[97] *See supra* note 2 and the related text.

[98] By treating citizens as mere objects of governmental "utility maximization" and neglecting human rights, the utilitarian focus on efficient production and distribution offers no guarantee for taking into account the non-economic dimensions of human welfare, for instance whenever restrictive business practices or emergency situations price out poor people of access to water, essential food and medical services. The utilitarian assumption that morality consists in weighing and aggregating costs and benefits and "maximizing happiness" (e.g., by governmental redistribution of the "gains from trade" at the whim of the rulers) also risks being inconsistent with the moral principles underlying modern human rights (like respect for human dignity and "inalienable" human rights).

[99] On libertarian justice in initial holdings" and "justice in transfer," *see* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974). In the 21st century, libertarian claims to unrestricted self-ownership (e.g., to sell one's body parts), freedom of voluntary exchange (e.g., for outsourcing pregnancy for pay) and compensation for "regulatory takings" of foreign investor rights, like libertarian opposition to governmental taxation for financing the supply of public goods, risk being increasingly inconsistent with modern human rights and democratic legislation.

the extent that the discourse partners implicitly and autonomously recognize each other as free and equal participants in their discursive search for truth);[100] whereas John Locke invoked God for justifying human rights, constitutional democracies, European and UN human rights law derive "inalienable human rights" from respect for human autonomy and reasonableness, including a right "to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Article 28 UDHR);[101]

- even though the universal recognition of human rights (e.g., in UN law) as constitutional foundation of all governance powers confirms the legal priority of equal human freedoms (as defined by human rights) as integral part of positive, national and international legal systems in the 21st century, most human rights guarantees remain subject to communitarian restrictions in order to protect public goods; yet, in contrast to English conceptions of parliamentary sovereignty and American conceptions of civil and political human and constitutional rights as "trumping" in case of conflicts with democratic majority legislation, European courts acknowledge that legislative and administrative restrictions of human rights require "balancing" of competing civil, political, economic, social and cultural rights in order to establish whether governmental restrictions are suitable, necessary and proportionate means for reconciling competing human or constitutional rights in reasonable procedures.[102]

VII. Conclusion: Human Rights and Justice Require Cosmopolitan Conceptions of Transnational "Aggregate Public Goods"

Republicanism, constitutionalism and human rights argue in different, yet complementary ways for empowering citizens to assume control of the limited powers delegated to multilevel governance institutions so as to exercise democratic responsibility for their common property of public goods (*res publica*). As individuals are born into families, grow up in social communities, and their individual control over the forces governing individual lives is diminishing with "globalization," liberal conceptions of individuals as "freely choosing, unencumbered selves" are criticized from communitarian perspectives.[103] For instance, the "burdens of judgment" prompted Rawls—in his *Political Liberalism*—to limit his Kantian interpretation of the "first principle of justice" by re-interpreting the demanding "Kantian moral imperative" in terms of procedural "discourse justice" in a hypothetical "original position" of reasonable human beings agreeing on equal *basic freedoms* (rather

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[100] On discourse theory, and the implicit, moral respect of discourse partners as having reasonable autonomy and dignity, as justification of human rights "without metaphysics," *see* Robert Alexy, *Menschenrechte ohne Metaphysik?*, *52 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE* 15 (2004). For a comparison of Kant's moral and Rawls's contractual justifications of principles of justice, human rights and hypothetical "social contracts," and for their criticism from communitarian perspectives, *see*, *e.g.*, MICHAEL J. SANDEL, JUSTICE. WHAT'S THE RIGHT THING TO DO? (2009), chapters 5 and 6. Similar to Kant's justification of his cosmopolitan "right of hospitality" on moral grounds, the legal interpretation of EU "market freedoms" as "fundamental rights" can be justified on moral rather than only utilitarian grounds (e.g., as representing "generalizable human interests" of all EU citizens). Similarly, the derivation of individual investor rights and judicial remedies from international investment treaties, like the derivation of labour rights from ILO conventions, can be justified not only on utilitarian grounds, but also on human rights principles.

[101] Kantian, Rawlsian and other modern theories of justice (e.g., by Ronald Dworkin and Bruce Ackerman) explain why moral respect for human autonomy and reasonableness requires the priority of equal liberty rights (as "first principle of justice") over particular conceptions of the "good life" and the "common good." According to both Kant and Rawls, a just society protects the equal freedoms of its citizens to pursue their own, often diverse conceptions for a good life—provided such conceptions remain compatible with equal freedoms for all—without imposing any particular conception of a good life; *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

[102] For comparative studies of the different American and European judicial standards of reviewing economic legislative and administrative acts *see*, PETERSMANN, *supra* note 1, chapters III and VIII.

[103] For a criticism of the liberal conception of human persons and of their "moral autonomy" from a communitarian perspective, *see*, *e.g.*, MICHAEL J .SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

than *maximum equal freedoms*) as "first principle of justice."[104] Also individual consent to "social contracts" and agreements—even if reflecting ideals of autonomy and reciprocity—does not prove the fairness of contracts if their conclusion was due to unequal bargaining power and information asymmetries. As all liberal "autonomy rights" need to be determined and justified on general and reciprocal reasons through social discourse in private, political and legal communities, liberal and communitarian conceptions of justice must be reconciled through social and democratic discourse.[105] The moral and legal "human rights imperative" of treating all persons as ends of humanity and as autonomous, reasonable "principals" of governments can be reconciled with very diverse conceptions of democratic self-governance, communitarian supply of public goods and republican conceptions of common ownership of public goods (*res publica*). Yet, this contribution has argued that—beyond legitimately diverse constitutional democracies—democratic representation in international organizations and parliamentary control of the law and practices of worldwide organizations remain inevitably weak. Hence, the deficit in representative democracy in the multilevel governance of global public goods must be compensated by participatory, deliberative and "cosmopolitan democracy" based on cosmopolitan rights and corresponding legal and judicial accountability of multilevel governance of international public goods. In the 21st century, denial by governments of their legal and judicial accountability *vis-à-vis* citizens for the often arbitrary violations of international law and for their under-supply of other international public goods can no longer be justified in terms of reasonable self-interests of citizens.

A. Cosmopolitan Constitutionalism beyond Liberalism and Communitarianism

The individual and social identity of most people depends on their mutual recognition and respect as members of social, political and legal communities.[106] Similar to the transformation of authoritarian into democratic national legal systems resulting from "struggles for human rights," the recognition of citizens as legal subjects in ever more fields of international law—like international labour law, HRL and IEL—often resulted from "struggles for justice" beyond nation states, for instance by trade unions following World War I and in the context of European integration and decolonization following World War II. The "emancipatory functions" of cosmopolitan rights are to protect individual autonomy and responsibility by empowering people in their mutually beneficial cooperation across state borders, to set incentives for participatory and deliberative democracy beyond the state, to institutionalize "public reason," to enhance "checks and balances" limiting abuses of power (e.g., by means of judicial remedies), and to better protect public goods (like transnational rule of law for the benefit of citizens).

Recognition of citizens as subjects of international law—e.g., in terms of membership of representatives of employers and workers in ILO bodies, or "EU citizenship" as defined in Articles 20–23 TFEU—often goes far beyond liberty rights. For instance, European HRL and integration law have limited libertarian claims of "self-ownership" of one's body if such claims neglect human dignity and other human rights limitations of market freedoms (e.g., labour rights). Also libertarian opposition to redistribution of "market outcomes" based on "justice in holdings" and "justice in transfers" (Robert Nozick) has not prevented the "social market economies" in Europe from adopting ever more comprehensive EU social regulations protecting disadvantaged people (e.g., foreign workers and their families in EU member states). The social pressures for governmental supply and protection of "public goods" satisfying the unlimited demand of citizens for scarce goods, services and other resources increasingly prompt democracies to liberalize international trade and investments and design IEL in conformity with utilitarian and libertarian principles of economic efficiency, market competition and protection of property rights. Yet, this instrumental "economic rationality" of modern IEL has not

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[104] *See* JOHN RAWLS, POLITICAL LIBERALISM (1993), at 54 *et seq*.

[105] *See* FORST, *supra* note 2.

[106] *See* Axel Honneth, The Struggle for Recognition: The Moral Grammar of Social Conflicts (1995).

prevented international legal limitations of "utilitarian efficiency" whenever utilitarian conceptions of IEL neglect human rights (e.g., by abusing child work and gender discrimination as *means* for the happiness of others), ignore general consumer welfare (e.g., by one-sidedly prioritizing "producer welfare"), or neglect the legitimacy of economically inefficient, social contestation (e.g., labour strikes, social protests) and the need for respecting reasonable "constitutional pluralism."

Arguably, constitutional and cosmopolitan rights to private and democratic self-governance as well as to "access to justice" through judicial review of governmental restrictions of individual freedoms are necessary not only for protecting civil, political, economic, social and cultural human rights with due respect for their often different protection in different jurisdictions with diverse constitutional traditions and democratic preferences. As explained by the Kantian theory of cosmopolitan multilevel constitutionalism,[107] the moral arguments for "principles of justice" protecting maximum equal cosmopolitan liberties of citizens apply also to mutually beneficial, transnational cooperation among citizens in the global division of labour and collective supply of international public goods. Kant's proposals for multilevel, constitutional protection of cosmopolitan freedoms were based on Kant's categorical imperative of maximizing equal freedoms as a universal law by treating persons as legal subjects rather than mere objects. Kant argued that the ever more precise, legal clarification of equal freedoms and cosmopolitan rights and remedies would not only promote mutually beneficial trade, but contribute also to limiting the "unsocial sociability" of rational egoists by institutionalizing "public peace." Similarly, Rawls has argued that institutionalizing "public reason" limiting human rivalry and protecting rule of law in social cooperation requires a "four-stage sequence" of constitutional, legislative, executive and judicial rule-making and institutions protecting an "overlapping consensus" on "principles of justice" and rule of law among citizens and governments with often conflicting value preferences and self-interests.[108] Empirical evidence confirms that rights-based international public goods regimes—like the common market law of the EU and EEA—have protected not only rights of citizens and their consumer welfare through mutually beneficial economic cooperation across frontiers; the multilevel judicial protection of transnational rule of law has also transformed the European economic integration treaties into the most effective peace treaties in European history. As an instrument of promoting economic welfare and human autonomy rights, rights-based IEL has proven to be more effective than the prevailing "Hobbesian conceptions" of "international law among states" denying citizens individual rights to invoke, e.g., liberal trade rules in domestic courts in order to protect transnational rule of law for the benefit of producers, traders, investors and consumers. The free movement of persons and "EU citizenship rights" inside the EU illustrate that protection of cosmopolitan rights can broaden and enrich, rather than undermine communitarian conceptions of a just and diverse society and of a good life embedded into social solidarity.

Hence, many advocates of human and cosmopolitan rights argue that, in contrast to Rawls's refusal to extend his principles of justice for a constitutional democracy beyond the state to an international *Law of Peoples*,[109] neither "Rawlsian tolerance" *vis-à-vis* non-liberal but "decent people" and states, nor the individual and democratic responsibilities of citizens for their own, individual and social welfare justify neglecting transnational human and cosmopolitan rights and obligations in IEL. As illustrated by the unnecessary poverty of so many people in less-developed countries, the prevailing "Westphalian conceptions" of "international law among sovereign states" fail to protect citizens against widespread abuses of foreign policy powers and undersupply of international public goods. Diplomatic insistence on "member-driven governance" (e.g., in the Bretton Woods institutions, GATT and the WTO) reflects pre-democratic Hobbesian claims that, once the people have conferred powers to the rulers, citizens have surrendered their authority rather than remaining "democratic principals"

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[107] Petersmann, *supra* note 1, chapter III.

[108] On the "four-stage sequence" of legitimate rule-making inside constitutional democracies like the United States, *see* RAWLS, *supra* note 48.

[109] *See* JOHN RAWLS, LAW OF PEOPLES (1999).

and holders of "inalienable rights" to individual and democratic self-government under the rule of law. The more globalization transforms national constitutions into "partial constitutions" that cannot unilaterally protect transnational "aggregate public goods" in a globally integrated world (like mutually beneficial, international monetary, trade, financial, environmental and rule of law systems composed of national public goods), the more do citizen welfare and effective protection of economic rights within and beyond state borders require "cosmopolitan constitutionalism" based on human rights, democratic self-governance and transnational rule of law rather than only on state consent.[110] As already universally acknowledged in Article 28 of the UDHR (1948), stronger protection of the economic welfare and human rights of billions of citizens in today's globally integrated world economy depends on whether IEL will succeed in regulating the "collective action problems" of a mutually beneficial world trading, financial, environment and development system more effectively for the benefit of citizens and their cosmopolitan rights. Republicanism, constitutionalism and human rights argue for limiting the ubiquity of governance failures and market failures in international economic relations by stronger legal and judicial protection of cosmopolitan rights embedding "cosmopolitan states" into international law and multilevel institutions protecting transnational public goods.

B. Public Goods Regimes Must Be Embedded into "Multilevel Constitutionalism" Constituting, Limiting, Regulating and Justifying Multilevel Governance of Public Goods

Rawls's *Theory of Justice* explains why "the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body" requires that the democratic exercise of coercive power over one another can be recognized as being 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."[111] In contrast to *majoritarian democracies* focusing on "freedom of parliament" rather than on constitutional rights of citizens, *constitutional democracies* share the common experience (e.g., in the United States) that protecting constitutional rights *vis-à-vis* abuses of public and private power requires constitutional, legislative, administrative and judicial protection of fundamental rights and other "principles of justice." From the point of view of citizens and their cosmopolitan rights, "constitutional safeguards" are no less necessary *vis-à-vis* the ever more governance powers transferred to international organizations for the collective supply of international public goods. International agreements constituting, limiting, regulating and justifying international institutions for mutually beneficial governance of interrelated, national and international public goods (like efficient monetary, trading, financial and related rule-of-law systems) aim at limiting national governance failures and can serve "constitutional functions" for protecting producers, investors, traders, consumers and other citizens engaged in mutually beneficial cooperation across frontiers against welfare-reducing border discrimination and other harmful abuses of discretionary foreign policy powers.[112] But the increasing transformation of *national* into *international public goods* with "horizontal" as well as "vertical interdependencies" (e.g., among national and international markets for goods, services, persons and capital movements) also entails new private and public powers (e.g., of private actors in global financial markets, international organizations) that risk being abused in the absence of adequate constitutional and democratic restraints, as illustrated by the under-regulation of international financial markets ushering in the private and public debt crises since 2008. This increasing gap between the "law in the books" and the "law in action" rightly prompts "new legal

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[110] PETERSMANN, *supra* note 1, chapters III and VII, and Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship of Constitutionalism in and Beyond the State*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 258 (Jeffrey L. Dunoff & Joel P. Trachman eds., 2009).

[111] John Rawls, Justice as Fairness: A Restatement (2001), at 41.

[112] *See* Petersmann, *supra* note 24.

realist scholars" to call for multidisciplinary analyses of the "new legal world" and legal problems caused by globalization and by its increasing connection of national and international legal regimes.[113]

Arguably, the less national parliaments, courts and citizens control intergovernmental rule-making in distant international organizations and the more rent-seeking interest groups "capture" transnational economic regulation (e.g., the EU banana and the US cotton policies), the more must the deficit in parliamentary and deliberative democracy be compensated by rights-based constitutionalism and multilevel judicial protection of constitutional rights and "participatory democracy" across frontiers. As explained by Rawls, "in a constitutional regime with judicial review, public reason is the reason of its supreme court;[114] transparent, rules-based and impartial judicial reasoning, subject to procedural guarantees of due process of law, makes independent courts less politicized "*fora* of principle" than political institutions dominated by interest-group politics; principle-oriented judicial reasoning is also of constitutional importance for an "overlapping, constitutional consensus" necessary for legally stable and just relations among free, equal and rational citizens who tend to remain deeply divided by conflicting moral, religious and philosophical doctrines. In Europe, the EU Courts, the European Court of Human Rights, the EFTA Court and national courts have interpreted the international EC, EU, EEA treaties and the ECHR as constitutional orders founded on respect for human rights. Multilevel judicial protection of cosmopolitan rights (such as human rights, trading rights, investor rights, intellectual property rights) can promote incremental "judicial constitutionalization" also of other international trade, investment and environmental treaty regimes for the benefit of citizens. Yet, in view of the "constitutional prioritization" of civil and political rights over economic and social rights of citizens in many countries outside Europe, multilevel judicial protection of economic and social rights remains contested. As explained by Immanuel Kant's theory of multilevel constitutional guarantees of equal freedoms (as "first principle of justice") in all human interactions at national, transnational and international levels, multilevel constitutionalism is neither based on naïve assumptions about individuals' moral capacities nor on utopian calls for a "global Constitution"; it is necessary for protecting "public reason" against abuses of power in transnational relations with due respect for the legitimate reality of "constitutional pluralism" so that—even in a "society of devils" (Immanuel Kant)—human interactions remain constitutionally restrained.[115] The diverse forms of multilevel constitutionalism in the EU, the EEA and the ECHR, like the multilevel judicial protection of cosmopolitan rights in international commercial, trade, investment, regional integration and human rights law outside Europe, illustrate that "multilevel constitutionalism" has become a politically feasible and realistic conception of "constitutional justice" protecting *individual freedom* to decide how an individual wishes to prioritize civil, political, economic, social and cultural dimensions of personal autonomy in order to "live well" with due respect for the ethical responsibility not only of oneself, but also of other people.[116] Arguably, the legitimacy of "cosmopolitan IEL" and of "multilevel constitutional restraints" of "intergovernmentalism" and international organizations derives from protecting human rights, other "principles of justice" and national democracies' promise of self-governance of citizens within the limits of rule of law.

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[113] *See* Stewart Macaulay, *The New versus the Old Legal Realism: Things Ain't What They Used to Be*, *Wisconsin Law Review* 365 (2005); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, *95 Cornell Law Review* 61 (2009). On the need for "sociological jurisprudence," *see already* Roscoe Pound, *Law in Books and Law in Action*, *44 American Law Review* 12 (1910), at 15.

[114] *See* Rawls, *supra* note 104, at 231 *et seq.* Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004) claims, by contrast, that there is little evidence why people should put more trust in highest courts as guardians of the constitution than in legislators.

[115] On Kantian "multilevel constitutionalism" and its justification of multilevel constitutional safeguards of equal liberty rights, *see* PETERSMANN, *supra* note 1, chapter III.

[116] *See* DWORKIN, *supra* note 86, at 419: "The two ethical ideals—living well and having a good life—are different."

C. International Public Goods Regimes and Reasonable Disagreement

From the perspective of democratic discourse treating citizens as free and equal, national and international public goods regimes may be perceived as structured forms of agreed law creation requiring legal and judicial protection of equal freedoms.[117] Globalization interconnects national and international legal regimes and promotes both "centrifugal legal reforms" (e.g., by legal empowerment of nonstate actors creating special legal regimes) as well as "legal integration" (e.g., due to universal human rights obligations and universal membership in the UN, UN Specialized Agencies and increasingly also the WTO). The coexistence of non-hierarchical, transnational legal orders and the increasing civil society claims for cosmopolitan rights protecting individual and democratic self-government beyond state borders give rise to a new "global legal pluralism" challenging state-centred conceptions of international law. For instance, the citizen-driven structures of IEL argue for interpreting human rights and related principles of democracy and subsidiarity in favour of stronger protection of cosmopolitan rights, non-discriminatory conditions of competition and transnational rule of law for the benefit of citizens rather than in favour of "Westphalian presumptions" of state sovereignty to withhold state consent to collective protection of internationally recognized public goods necessary for protecting human rights and "sustainable development."[118]

Reasonable citizens with legitimately diverse conceptions for a good life and "social justice" often reasonably disagree among themselves on how distributive justice, corrective justice, commutative justice or "equity" and "transitional justice" should be realized in economic regulation inside "well-ordered societies" as well as in transnational, power-oriented relations. Even though philosophical reflection on the nature of law, justice and "governance by law" is as old as philosophy itself, neither legal practitioners nor academics agree on a single theory and methodology of international law and IEL. This reality of "methodological pluralism," just as cosmopolitan conceptions of IEL and rights-based conceptions of democracy, are likely to remain contested, for instance by proponents of majoritarian democracy and of "rational choice" theories prioritizing pursuit of rational self-interests over "reasonable" regard to, and "balancing" of, cosmopolitan interests. Reasonable disagreement over legal protection of international public goods is likely to remain a permanent fact of life that tends to be respected in most treaties explicitly (e.g., in their "public interest clauses" reserving sovereign rights to protect national public goods) or implicitly (e.g., as being implied in the customary requirement of interpreting treaties "in conformity with principles of justice" and human rights). Also at national levels of legal regulation, some societies will continue defining democracy in terms of "parliamentary sovereignty" (as in England) or prioritize civil and political constitutional rights over economic and social "common law freedoms" (as in the United States); other societies are likely to continue prioritizing economic and social rights (as in China) or, as in Germany, prioritize "individual sovereignty" through constitutional protection of "maximum equal liberties" (including "positive liberties" and welfare rights) in view of the historical experience of Germany's Weimar Republic that parliamentary powers may be usurped and abused by dictatorial regimes. In view of the legitimate reality of "constitutional pluralism" as well as of "methodological pluralism" in public goods research, legal scholarship should reveal its normative preconceptions and acknowledge the need for respecting

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[117] *See* LAW AS COMMUNICATION (David Nelken ed., 1996).

[118] The Lisbon Treaty on the EU defines the "subsidiarity principle" in terms of constitutional, representative, participatory and deliberative democracy so that "decisions are taken as openly as possible and as closely as possible to the citizens" (*see* Articles 1, 9–12 TEU). As the "intergovernmentalism" of UN and WTO institutions prioritizes rights and self-interests of governments (e.g., in limiting their legal and judicial accountability *vis-à-vis* citizens) over rights of citizens (e.g., human rights and consumer welfare are nowhere mentioned in the Bretton Woods, GATT and WTO Agreements), it risks undermining constitutional democracy without stronger, multilevel constitutional restraints protecting more inclusive decision-making and judicial safeguards of transnational rule of law for the benefit of citizens and their human rights.

legitimate "constitutional pluralism" rather than pretend to have found "the one and only right answer to a legal problem."[119]

In contrast to the claims by the German philosophers Hegel and Marx, neither the nation state nor communist ideology has brought about "the end of history." All UN member states have committed themselves to the need to protect global public goods. Yet, UN law and policies continue to be dominated by "Westphalian conceptions" of "international law among sovereign states" that obviously fail to protect global public goods effectively—like an efficient world trading and financial system, prevention of greenhouse gas emissions, poverty reduction and universal fulfilment of human rights. Globalization transforms national constitutions into "partial constitutions" that cannot unilaterally protect "aggregate public goods" across national borders without stronger respect for international law. The less "constitutional nationalism" and "Westphalian intergovernmentalism" succeed in realizing their declared policy goals, the more it becomes necessary to acknowledge the need for multilevel constitutionalism based on respect for the reality of "constitutional pluralism" and "methodological pluralism" in multilevel, legal limitations of "market failures" as well as "governance failures." The increasing interactions among national and international legal regimes require judges to settle disputes, promote mutual coherence and protect legal security on the basis of common constitutional principles. Rather than pretending that textual, contextual and functional interpretation of economic rules may lead to "objectively true" judgments, IEL scholarship and adjudication should respect reasonable disagreement in view of the fact that cosmopolitan moral and legal principles for relations among individuals, like moral and legal principles for international relations among states, are not governed by objectively existing "natural morons" (Ronald Dworkin); hence, the value premises, preconceptions and methodological choices underlying public goods research should be explicitly revealed and justified in the light of "public reason." Contrary to pretentious claims that "doctrinal legal research is dead" and "black letter legal research" should be buried, legal methodology and doctrinal legal research need to be "revitalized" in order to resist the increasing "instrumentalization of law" for the benefit of powerful interest groups and the degeneration of international legal research into "case law journalism" (Pierre Schlag).[120] Conceptualizing international public goods regimes as "integration law" aimed at integrating private and public, national and international regulation for the benefit of citizens, their human rights and legitimate demands for protecting "global public goods" through stronger cosmopolitan rights is a doctrinal perspective that has hardly begun being explored by self-proclaimed "realist lawyers," political scientists and economists.

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[119] *See* Rob van Gestel & Hans-Wolfgang Micklitz, *Revitalizing Doctrinal Legal Research in Europe: What About Methodology?*, *in* EUROPEAN LEGAL METHOD—PARADOXES AND REVITALIZATION (Ulla B. Neergaard, Ruth Nielsen & Lynn M. Roseberry eds., 2011), 25, at 33. Shaffer, *supra* note 31, likewise concludes that there is no single "correct approach" to IEL scholarship.

[120] For a discussion of the citations, *see* van Gestel & Micklitz, *supra* note 119, at 25 *et seq*.