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THE FUTURE OF INTERNATIONAL ECONOMIC LAW:
A RESEARCH AGENDA

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Abstract

This final chapter draws conclusions from the second edition of *Constitutionalism, Multilevel Trade Governance and International Economic Law* by discussing the diverse conceptions of international economic regulation presented by Profs. Joerges, Stewart, Cottier and other contributors to this book. Section I begins with methodological questions of conceptualizing and analyzing international economic law (IEL). Section II discusses private ‘conflicts law approaches’ and criticizes their inadequate criteria for identifying under which conditions public international law ‘deserves recognition’. Section III gives an overview of the diverse ‘global administrative law’ (GAL) approaches and criticizes their often inadequate methodologies for determining ‘law’ as well as their neglect of constitutional rights. Section IV discusses the various ‘multilevel constitutional’ approaches to analyzing IEL and their foundation in ‘constitutional pluralism’. Section V suggests that collective supply of ‘global public goods’ – like protection of human rights, a mutually beneficial world trading system, international rule of law and prevention of climate change – requires more systematic, legal analysis of the collective action problems and of the interrelationships among national and international public goods. The various private and public, constitutional, administrative, international and cosmopolitan conceptions of international economic regulation complement each other without addressing the most important challenge of IEL in the 21st century, i.e. how global public goods can be collectively protected more effectively. Section VI concludes that – in citizen-driven areas like IEL and environmental pollution - the ‘collective action problems’ impeding effective protection of ‘global public goods’ require strengthening the ‘cosmopolitan’, rights-based foundations of IEL. The chapter identifies research questions meriting further research in order to make IEL a more effective instrument for promoting and protecting not only economic and human welfare, but also human rights, international rule of law and other international public goods beneficial for all human beings. My own ‘cosmopolitan propositions’ for addressing some of the regulatory problems are summarized in Tables 1 to 4 and explained in more detail in another, forthcoming monograph.¹

Keywords

conflicts law; constitutional law; constitutionalization; ECHR; ECJ; economic law; EEA; EU law; global administrative law; human rights; international economic law; legal pluralism; multilevel constitutionalism; public goods; rule of law

¹ Cf. E.U.Petersmann, *Human Rights, Constitutional Pluralism and International Economic Law in the 21st Century* (Oxford: Hart Publishing, 2010).

I. How Should IEL Be Conceptualized?

The state-centered ‘Westphalian system’ of international law emerged from the power struggles against the Church, the Holy Roman Empire and, following the peace treaties of Westphalia (1648), from struggles against colonialism and imperialism in support of a new system of states with ‘sovereign equality’ (Article 2 UN Charter). It continues to dominate UN law. But the ever more comprehensive human rights obligations acknowledged by all 192 UN member states since the entry into force of the UN Charter in 1945 also lend support to calls for cosmopolitan conceptions of international law, especially in those areas where production, investments, trade, environmental pollution and consumption of scarce resources are driven by private actors. The ‘conflicts law’ approach advocated by Joerges in Chapter 15, the ‘global administrative law’ (GAL) approach advocated by Stewart and Rattón Sanchez Badin in Chapter 16, and the multilevel ‘constitutional pluralism’ advocated by Cottier in Chapter 17, as well as by myself in Chapter 1, all aim at resolving conflicts and legal problems caused by state-centered, intergovernmental regulation. These diverse conceptions are also reflected in the leading textbooks on IEL and complement - rather than contradict - each other.

IEL as ‘Public International Law Regulating the International Economy’?

The ‘Westphalian focus’ on international rights and duties among states, as well as on international organizations regulating international movements of goods, services, persons, capital and related payments among states, continues to dominate international state practice and most textbooks on IEL.² The 1944 Bretton Woods Agreements establishing the International Monetary Fund (IMF) and the World Bank, the 1945 UN Charter, GATT 1947 and the UN Specialized Agencies engaged in regulating international services - like the Universal Postal Union, the International Telecommunications Union, the International Civil Aviation Organization and the International Maritime Organization - were all negotiated by states, under the leadership of the most powerful industrialized countries, and provide for reciprocal rights and obligations among states. As governments tend to view international economic treaties as instruments for advancing state interests, they remain reluctant to delegate policy powers (e.g. for supervision of monetary, trade, development and labor policies) to worldwide organizations. Their ‘member-driven governance’ focuses on state interests as defined by domestic rulers and organized interest groups, often with systemic biases against politically less powerful, general citizen interests in the supply of national and international ‘public goods’ like an open trading system maximizing consumer welfare. The jurisdictions of international organizations for rule-making, coordination and adjudication are carefully limited and allocated among separate regional and worldwide organizations. State sovereignty for domestic implementation of treaty obligations and domestic compliance with other international obligations remains protected. Coordination among intergovernmental organizations tends to be ‘member-driven’ and decentralized. For example, the ‘general exceptions’ included into their constitutive treaties enable each state to depart from economic treaty obligations so as to protect non-economic ‘public interests’ (e.g. pursuant to Articles XX and XXI GATT) and meet obligations under other international treaties.

‘Public international law conceptions’ of international economic regulation, based on the sources of international law and ‘rules of recognition’ as defined in Article 38 of the Statute of the International Court of Justice (*i.e.* treaties, customary law, general principles of law), are sometimes criticized for their ‘dangerously naïve tendency towards legalism – an idealistic belief that law can be effective even in the absence of legitimate institutions of governance’, and to neglect the fact that ‘whatever their

² See, e.g., A.H. Qureshi/A. Ziegler, *International Economic Law* (London: Sweet & Maxwell, 2nd ed. 2007), at ix: ‘This book focuses on that branch of Public International Law which is concerned with international economic relations between States.’

professed commitments, all nations stand ready to dispense with international agreements when it suits their short- or long-term interests'.³ 'Public international law approaches' tend to leave domestic rule-implementation to the sovereign discretion of states without providing citizens with effective legal and judicial remedies against non-compliance. The democratic legitimacy of 'international law among states' and its contribution to 'rule of law' often remain contested, for instance if non-democratic governments deny individual economic rights and restrict human rights like freedom of expression.⁴ Arguably, the focus on rights and obligations of states without rights of citizens to invoke international rules in domestic jurisdictions explains why most worldwide agreements have failed to protect 'international public goods'⁵ effectively and why treaty obligations are often not enforced in national courts of justice.

IEL as Functionally Interrelated 'Private and Public, National and International Economic Regulation'?

An alternative conception of IEL as multilevel economic regulation underlies many international trade and investment agreements. It focuses on the 'functional unity' of private and public, national and international regulation of the economy⁶, on the advantages of mutually coherent, decentralized forms of market regulation (e.g. by means of multilevel competition rules) and dispute settlement as provided for in Chapters 11 and 19 of the North American Free Trade Agreement (NAFTA), and on individual economic rights and judicial remedies as provided for in bilateral investment treaties, intellectual property rights conventions and in the law of the European Economic Area (EEA). This 'multilevel economic law perspective' emphasizes potential synergies of 'public-private partnerships'. For instance, private regulation can supplement and complement incomplete, intergovernmental regulation and offers decentralized enforcement mechanisms empowering citizens as self-interested guardians of the rule of law. Public-private co-regulation may also increase the legitimacy, effectiveness and scope of economic regulation. But it also risks facilitating 'protectionist collusion' and restrictive business practices to the detriment of consumer welfare. In contrast to the universally agreed 'rules of recognition' of public international law as codified in Article 38 of the Statute of the International Court of Justice, multilevel economic regulation at public and private levels lacks a single unifying rule of recognition in view of its broad coverage of private and public, national and international sub-systems of IEL. It understands and analyzes IEL as interdependent 'social practices', which regulate economic activities and transactions such as the 'private ordering' of the international division of labor among billions of producers, investors, traders and consumers in 192 UN member states. The functional interrelationships between public regulation (e.g. by means of competition law, banking law, investment law, labor law, environmental law) and private legal practices (such as agreed restraints of competition) are perceived as core problems of economic regulation. Compared with

³ E.A. Posner, *The Perils of Global Legalism* (Chicago: University of Chicago Press, 2009), who claims that 'most European scholars are global legalists' with an 'excessive faith in the efficacy of international law' who lose 'sight of the social function of law' (at xii); Posner justifies the 'pattern of American international lawbreaking' (at xi) on grounds of national cost-benefit analyses by the foreign policy elites.

⁴ See, e.g., the WTO Appellate Body report on China – Publications and Audiovisual Products (WT/DS363/AB/R), adopted 19 January 2010.

⁵ On the defining characteristics of 'public goods' (like their non-excludable and non-exhaustible use benefiting all citizens), the 'collective action problems' impeding the supply of international 'public goods' (like the 'jurisdictional gap', the 'participation gap', 'incentive gap' and 'prisoner dilemmas'), and on the increasing democratic insistence on devolving decision-making powers to the lowest possible level ('subsidiarity') in order to promote 'stakeholder participation' in the decentralized implementation and enforcement of multilevel regulation, see: I. Kaul/I. Grunberg/M.A. Stern (eds), *Global Public Goods. International Cooperation in the 21st Century* (New York: OUP, 1999).

⁶ The concept of 'functional unity' tends to be construed in diverse ways by different authors depending on their legal, political and economic methodologies; cf. E.U. Petersmann, *International Economic Theory and International Economic Law*, in: R.S.J. Macdonald/D.M. Johnston (eds), *The Structure and Process of International Law* (The Hague: Nijhoff Publishers, 1983), at 239 ff.

‘public international law top-down conceptions’ that may neglect the ‘optimal level’ of legal regulation, ‘multilevel regulation conceptions’ emphasize:

- Private international law (*i.e.* the national and international rules coordinating the effects of domestic private laws across borders by harmonizing private law systems, allocating jurisdiction, and providing for mutual recognition and enforcement of judgments and arbitral awards) offers decentralized systems for self-governance across borders (e.g. by means of contract law, company law, competition law, tort law). These also include decentralized enforcement by domestic courts or arbitration, subject to supervision and control by governments. As illustrated by investor-state arbitration and private litigation against transnational corporations (e.g. under the US Aliens Tort Act), such decentralized self-governance may be more efficient and offer more effective legal and judicial remedies than centralized governance systems.⁷
- Private law enables not only the pursuit of private interests (such as settlement of individual conflicts among private parties) but also of public and social interests, for instance whenever national courts exercise judicial comity vis-à-vis foreign jurisdictions or judicial deference vis-à-vis domestic government interests.
- IEL must aim at dovetailing the potential synergies of public and private economic rules and institutions, as illustrated by the increasing number of international treaties harmonizing certain areas of international private law, coordinating national jurisdiction (e.g. by means of providing for mutual recognition and enforcement of foreign civil, commercial and arbitral judgments in national courts), or limiting the legitimate scope for private self-regulation by means of international competition rules, public risk regulation limiting private standard setting, or international framework rules of the International Civil Aviation Organization limiting private self-regulation of international air transport in the context of the International Air Transport Association.

Multilevel Constitutional Conceptions of IEL?

Almost all UN member states have adopted written or unwritten, national constitutions for the supply of public goods like rule of law and peaceful conflict resolution. In view of the legal primacy of constitutional rules over post-constitutional rule-making, most countries apply a ‘constitutional approach’ to international law, for instance by granting international treaties only an *infra-constitutional* legal rank in domestic legal systems, by limiting ‘direct applicability’ of international law rules in domestic courts, by interpreting international law’s claim to legal primacy in substantive rather than in formal ways (e.g. protecting higher national human rights guarantees than at international levels), and by using international law as one among many other policy instruments for advancing national interests subject to constitutional restraints on foreign policy powers. Even though international law asserts legal primacy vis-à-vis national law, human rights law justifies the practice of most national constitutions to subject the incorporation of international rules into their respective domestic legal systems to constitutional safeguards like respect for human rights and parliamentary ratification of treaties subject to ‘later-in-time rules’ protecting the sovereign right of parliaments to override the domestic law effects of international treaties by later legislation. In Europe, ‘multilevel economic regulation’ is limited by ‘multilevel constitutional systems’ with due respect for the reality and legitimacy of ‘constitutional pluralism’. The multilevel constitutional and regulatory systems vary depending on whether, for instance, the economic regulations are governed by EU constitutional law as interpreted by the ECJ, by EEA law as interpreted by the European Free Trade Area (EFTA) Court, or by the European Convention on Human Rights (ECHR) as interpreted by the European Court of

⁷ See the examples discussed by R.Wai, *Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation*, in: C. Joerges/E.U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart Publishing, 2006), 229-262.

Human Rights (ECtHR) in close cooperation with national courts.⁸ ‘Multilevel constitutionalism’ can be justified not only by the need for respecting ‘reasonable disagreement’ by means of coordinating the inevitable conflicts of interests through fair procedures and by protecting ‘legal pluralism’ through a ‘multi-storey constitutional house’. The need for respecting legitimate individual, democratic and legal diversity can also be explained in terms of resolving conflicts of interests by protecting ‘equal liberties’ as ‘first principle of justice’ and by ‘balancing’ economic liberties with all other human rights so as to justify the legitimacy and reasonable boundaries of IEL in conformity with multilevel human rights law (see Table 1).⁹

Proposition 1: The legitimacy of IEL depends on its ‘human rights coherence’

- The human rights obligations of all UN member states entail that human rights - as ‘the foundation of freedom, justice and peace in the world’ (UDHR) – and constitutional democracies are the constitutional foundations of the legitimacy of IEL. ‘Equal freedoms’ as ‘first principle of justice’ and welfare economics justify liberalization of mutually beneficial international division of labor among free citizens. Protection of human rights by rule of law across frontiers, and limitation of international ‘market failures’ as well as of ‘governance failures’, require constitutional restraints of abuses of power.
- The UN principles of ‘sovereign equality of states’ and of ‘self-determination of peoples’, and the ‘subsidiary function’ of UN human rights law, justify national and regional diversity of human rights conceptions. IEL must respect reasonable disagreement about interpreting human rights. This justifies also the intergovernmental practice of separating economic regulation (e.g. in the WTO) from human rights protection on the basis of ‘exception clauses’ recognizing sovereign rights to protect human rights (e.g. on the basis of Article XXIV GATT if construed in conformity with the human rights obligations of all WTO members).
- Human rights require treating citizens as subjects and ‘democratic principals’ of international regulation of mutually beneficial economic cooperation among citizens. Just as economic competition derives its constitutional legitimacy from protecting ‘equal freedoms’ (as ‘first principle of justice’) and general consumer welfare, so does international economic regulation derive its constitutional legitimacy from protecting equal rights of citizens and constitutionally agreed ‘public goods.’ Unnecessary poverty, violation of human rights, treatment of citizens as mere objects and environmental pollution in so many states undermine the legitimacy of authoritarian ‘Westphalian paradigms of IEL’. Rules will not remain effective unless they are recognized by citizens and parliaments as fair and enforceable in domestic courts of justice.
- Multilevel economic regulation requires multilevel constitutional protection of equal rights, democratic governance and judicial protection of Rule of Law. IEL should be conceived not only as ‘international law among states’, but also as ‘law of peoples’ and ‘cosmopolitan law’ with individual rights to Rule of Law, including judicial protection of precise and unconditional international guarantees of freedom, non-discrimination, Rule of Law and social justice.

‘Multilevel constitutional approaches to IEL’ based on human rights arguments emphasize not only the need for cosmopolitan, citizen-driven conceptions of IEL in order to enhance the legitimacy and effectiveness of international economic regulation as an instrument for promoting consumer welfare and human rights of citizens. They also point to empirical evidence that collective supply of national and international public goods has proven to be possible only in the context of ‘constitutional frameworks’ (cf. Table 2) with judicial protection of rule of law for the benefit of citizens. Arguably,

⁸ See: E.U. Petersmann, Human Rights, International Economic Law and ‘Constitutional Justice’, in: EJIL 19 (2008), 769-798.

⁹ Cf. E.U. Petersmann, Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade Law, in: University of Pennsylvania Journal of International Economic Law 27 (2006), 273-366.

the judicial transformation of the international treaties establishing the European Communities into constitutional systems protecting cosmopolitan rights enhanced not only the democratic legitimacy of EU law, but also the effectiveness of its protection of European public goods like the common market and judicial protection of human rights and rule of law.

Proposition 2: Democratic supply of public goods requires a ‘multilevel constitutional house’ based on respect for ‘constitutional pluralism’

<p>Long-term constitutional principles, rules and procedures of a higher legal rank approved by ‘the people’ justify post-constitutional democratic law-making, administration, ‘judicial governance’ and individual self-governance at local, national and transnational levels.</p>
<p>The powers of multilevel legislative, executive and judicial governance institutions must remain constitutionally limited and subject to rule of law and mutual ‘checks and balances’. Multilevel constitutionalism is necessary for compensating the inevitable ‘constitutional deficits’ and ‘democracy deficits’ at national levels in a globally integrated world.</p>
<p>Individual and democratic self-governance require protection by constitutional rights, ‘public reason’ and citizen-driven economic markets as well as ‘political markets’ as decentralized ‘dialogues about values’, information- and coordination mechanisms.</p>
<p>Constitutions recognize international law as a necessary complement of national legal systems for the supply of public goods in a globally integrating world composed of 192 sovereign UN member states. The diversity of democratic preferences and of legitimate human rights conceptions requires respect for ‘constitutional pluralism’ as a normatively legitimate reality of social cooperation. The national and international constitutional principles, rules and institutions must be based on common ‘principles of justice’ (like human rights and judicial protection of rule of law) in order to promote their complementary ‘constitutional functions’ and synergies for the benefit of citizens.</p>

Different Conceptions of ‘Constitutional Pluralism’ in IEL?

Multilevel human rights law rests on a ‘bottom-up conception’ of inalienable human rights that may be protected at higher levels in national and regional legal systems than in UN human rights conventions. Multilevel trade law, by contrast, rests on a ‘top-down conception’ of WTO market access and national treatment commitments that tend to go far beyond what most trading countries provide autonomously in their domestic trade laws. The legal interactions among multilevel trade and human rights law must take into account the broad margin of discretion which the minimum standards of UN human rights law tend to respect regarding

- how human rights must be protected in national economic regulation;
- how civil, political, economic, social and cultural rights need to be mutually reconciled; and
- how respect for the democratic preferences of people, for their available resources and other historical circumstances (e.g. in societies confronted with mass poverty or problems of ‘transitional justice’ vis-à-vis victims of mass violations of human rights) justifies ‘constitutional pluralism’ respecting democratic freedom to choose among a variety of legitimate ‘constitutional approaches’ for the collective supply of public goods.¹⁰

¹⁰ On the diverse conceptions and practices of ‘constitutional pluralism’ see, e.g.: M. Avbelj/J. Komarek (eds), *Four Visions of Constitutional Pluralism*, EUI Law Working Paper No. 21 (2008). On the diversity of theories of justice for the constitutional design of democratic self-governance and representative legislative, administrative and judicial institutions see: E.U.Petersmann, *Constitutional Justice and the Perennial Task of ‘Constitutionalizing’ Law and Society through ‘Participatory Justice’*, EUI Working Paper Law 2010/03. On the problems of ‘transitional justice’ in post-conflict societies reconciling the need for ‘criminal justice’ with other human needs (e.g. in terms of ‘democracy

My own publications have claimed that only citizen-oriented ‘constitutional bottom up approaches’ to IEL can effectively limit the ‘collective action problems’ in the supply of international public goods. The diverse common market and rule-of-law systems in the EU, in the EEA, and in other ‘multilevel constitutional democracies’ (e.g. in federal states like Switzerland, the USA, India and South Africa) illustrate the numerous, possible combinations of national and international constitutional rules, economic regulations and institutions. Yet, unless intergovernmental economic regulation is justifiable vis-à-vis domestic citizens in terms of their domestic ‘constitutional principles’, intergovernmental ‘top-down economic regulation’ risks remaining opposed by citizens, parliaments and courts as being inconsistent with domestic constitutional values.¹¹ For instance, international regulation and intergovernmental supervision of financial markets failed to prevent the 2008 financial and banking crisis due to inadequate international and national rules holding bankers, hedge funds, rating agencies and supervisory bodies accountable for abuses of public and private powers (like sales of fraudulent financial products, excessive risk-taking by banks that were ‘too big to fail’) destroying private savings and investments worth trillions of US dollars.¹² As human rights protect *individual* as well as *collective exercises* of fundamental freedoms (e.g. freedom of profession and property rights owned by corporations, collective labor rights exercised by trade unions), human rights also require protecting the institutions necessary for collective exercises of fundamental rights, like private companies, private media, collective bargaining among employers and employees, private markets as ‘dialogues about values’ among producers and consumers and as citizen-driven information mechanisms coordinating supply and demand. Without constitutional, legislative and administrative protection and regulation of market competition and judicial protection of individual rights, the ubiquitous ‘market failures’ and conflicts among private and public interests cannot be effectively prevented.

Do ‘Legal Pluralism’ and Different Methodologies Exclude Common Terminologies?

The text of many legal rules remains inevitably indeterminate and contested depending on the interests pursued by the interpreters. For instance, in interpreting the contested meaning of ‘incomplete agreements’, government officials may focus on their ‘government discretion’, legislators may insist on their ‘democratic discretion’, judges may justify their judicial interpretations on grounds of ‘administration of justice’, and citizens are likely to favor interpretations reflecting their self-interests and constitutional rights. ‘Courts of justice’ should rationalize their inevitable ‘balancing’ of competing rights of domestic and foreign citizens, legislators, administrators, judges and (non)governmental organizations in terms of constitutional principles (like respect for human rights, rule of law, proportionality of government restriction of individual rights) so as to promote transparent ‘public reason’ rather than one-sided claims (e.g. of diplomats invoking alleged ‘realities’ of intergovernmental power politics and ‘rule by law’). The realities of ‘legal pluralism’ and ‘methodological pluralism’ entail that proponents of ‘conflicts law’, ‘global administrative law’ and ‘constitutional approaches’ to IEL often use legal terms like ‘law’, ‘constitution’, ‘constitutionalism’, ‘constitutionalization’ and ‘constitutional approach’ in diverse ways. In my own publications, for instance:

(Contd.) _____

building’ and protecting human rights) see: M.C. Bassiouni (ed), *Post-Conflict Justice* (Ardsey: Transnational Publishers, 2002); N. Roht-Arriaza (ed), *Transitional Justice in the 21st Century* (New York: Cambridge University Press, 2006).

¹¹ On this need for ‘anchoring’ the ‘constitutional functions’ of international guarantees of freedom, non-discrimination, rule of law and social justice in the corresponding national constitutional principles see: E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: Fribourg University Press, 1991).

¹² Cf. L. Phillips, Icelandic report on the crash finds web of greed and negligence, euobserver.com of 13 April 2010, citing the following comment by the Icelandic Prime Minister on the 2,300-page report of the ‘truth commission’ investigating the Icelandic banking crisis: ‘The private banks failed, the supervisory system failed, the politics failed, the administration failed, the media failed, and the ideology of an unregulated free market utterly failed.’ On the regulatory failures in the 2008 worldwide financial crisis see, e.g.: H. James, *The Creation and Destruction of Value* (Cambridge: Harvard University Press, 2009).

- *Constitution* refers to a coherent set of long-term principles and rules of a higher legal rank constituting the basic order of a political community (e.g. in a state), or of a functionally limited community (e.g. based on an international ‘treaty constitution’ for the collective supply of international public goods), with legislative, administrative and dispute settlement functions for the maintenance of rule of law for the benefit of citizens. This general concept of a constitution allows a variety of more specific conceptions of particular national constitutions or international treaty constitutions such as the EU Treaty as interpreted by European courts. Constitutions serve multiple functions, both constituting and constraining constitutional rights and governance powers and coordinating national and international legal systems. The main constitutional task in the 21st century is to protect human rights, rule of law, democratic participation and judicial remedies also beyond state borders so as to empower citizens to increase their welfare through mutually beneficial cooperation across frontiers. Many national rules and international ‘treaty constitutions’ can serve ‘constitutional functions’ for protecting equal rights, rule of law and transparent self-governance of citizens across frontiers even if the respective rules are not formally designated as ‘constitutional’, for instance in the few countries without a written, national constitution.
- *Constitutionalism* refers to the political method of using constitutional principles, rules and institutions (such as constitutional conventions elaborating constitutional rules) for the collective supply of national and international public goods that benefit all citizens concerned. Multilevel constitutionalism uses constitutional principles, rules and institutions at national and international levels of governance for the collective supply of international public goods (e.g. functionally limited trade organizations constituting legislative, executive and judicial powers protecting rule of law among citizens). The legitimacy of multilevel constitutionalism depends on democratic participation of citizens and on parliamentary, administrative and judicial protection of general citizen interests as defined by their human rights and equal constitutional rights. While the term ‘constitutionalism’ tends to be used today only for liberal conceptions of a constitution, constitutions may exist also in non-democratic countries without ‘constitutionalism’, referring both to substantive as well as to procedural rules (e.g. establishing governance institutions and the ‘secondary rules’ on how ‘primary rules of conduct’ are created, interpreted, changed and enforced).
- *Constitutionalization* refers to legal methods aimed at strengthening constitutional principles, rules and institutions (like protection of constitutional rights by democratic governance and ‘courts of justice’) in the diverse forms of national and international rule-making, rule-administration and rule-enforcement. While citizens emphasize the need for systemic ‘constitutional constraints’ on governance powers, governments have self-interests in limiting such constraints and their own judicial accountability. Empirical evidence confirms that – notably in European economic integration law, human rights law and in international investment law – constitutional rights of citizens and their judicial protection have proven to be the most effective means for empowering citizens to challenge welfare-reducing discrimination by governments. By arguing for a *constitutional approach* to interpreting and progressively developing IEL, my own publications emphasize that legislative, administrative and also intergovernmental regulation must be interpreted with due regard to the constitutional context and ‘principles of justice’ of the legal system concerned, as required by the customary law requirement of interpreting treaties, and settling disputes, ‘in conformity with principles of justice’ and human rights.¹³

¹³ On the codification of this customary law requirement of treaty interpretation in the Preamble of the Vienna Convention on the Law of Treaties (VCLT), and on the reasons for its frequent neglect in the international practice of states and international courts, see: E. U. Petersmann, Administration of Justice in the WTO: Did the WTO Appellate Body Commit ‘Grave Injustice’? in: *The Law and Practice of International Courts and Tribunals* 8 (2009) 329-373.

Contextual Relevance of International Relations Theories Underlying IEL Approaches?

Law - as one among many other political instruments for social ordering - is influenced by political, economic and social theories and conceptions prevailing among citizens and governments. State-centered 'top-down conceptions' of IEL, citizen-oriented 'bottom-up conceptions' and 'constitutional conceptions' of IEL are often influenced by international relations theories, such as realism, institutionalism, liberalism and constructivism as the four major theoretical policy science approaches to, and explanations of, international relations and international law.¹⁴ When, based on my personal experiences as legal advisor in the Uruguay Round Negotiating Groups which elaborated the WTO Dispute Settlement Understanding (DSU) and the institutional framework of the WTO Agreement, I published one of the first books on the GATT/WTO dispute settlement system following the entry into force of the WTO Agreement, I emphasized the need to use these simplifying theories in complementary rather than mutually exclusive ways in order to understand the power-oriented context of international economic regulation, its frequent neglect for 'normative individualism' focusing on citizen interests, the asymmetries in WTO decision-making processes and the 'constitutional functions' of the WTO dispute settlement system.¹⁵

- *Realism*: The 'realist' focus on states as the principal actors in international politics, and on their power-oriented pursuit of national security and other state interests, is consistent with the intergovernmental structures of WTO law. It depicts the 'member-driven' nature of reciprocal bargaining in GATT and WTO negotiations and the reliance of the WTO dispute settlement system on self-help in case of violations of WTO obligations (e.g. recourse to WTO dispute settlement procedures and to countermeasures *vis-à-vis* WTO members refusing to implement WTO dispute settlement rulings). Yet, the prevailing realist approaches to international relations leave the definition of 'national interests' to the discretion of national rulers, with inadequate regard for transnational 'external effects' caused by protectionism and violations of international law, and without a coherent theory for the collective supply of international public goods.
- *Institutionalism*: The institutional changes from GATT to the WTO confirm the premise of institutional theories that rational governments can reduce the collective action problems (such as uncertainty and free-riding in intergovernmental negotiations), that impede collective supply of international public goods, by deliberately changing the legal and institutional incentives for non-cooperation. The compulsory jurisdiction of WTO dispute settlement bodies for independent, factual as well as legal dispute settlement findings and the ever stronger influence of judicial clarification of 'incomplete agreements' on intergovernmental rule-making and domestic legal practices illustrate how institutional changes have helped WTO members to legally limit their recourse to unilateral self-help and welfare-reducing trade sanctions. European integration suggests that collective supply of international public goods requires additional institutional changes, such as institutions with independent powers for defending 'community interests' in global public goods (e.g. by proposals for collective rule-making) *vis-à-vis* conflicting national interests and private self-interests.
- *Rational choice theory*: Economists, political scientists and lawyers tend to agree today that - inside citizen-driven markets and constitutional democracies - analyses of the economy, polity and law should proceed from normative individualism (i.e. values must be derived from individual consent) and from the assumption of rational choices of individuals confronted with scarcity of resources as well as competition among rational egoists for scarce goods and services (e.g. educational and medical services, job opportunities). The trade policies of constitutional

¹⁴ Cf. K. W. Abbott, Toward a Richer Institutionalism for International Law and Policy, 1 *Journal of Int'l Law and Int'l Relations* (2006) 9-34; S. R. Ratner/A. M. Slaughter (eds), *The Methods of International Law* (Washington: ASIL, 2004).

¹⁵ Cf. E.U. Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (The Hague: Kluwer Publishers, 1997), at 4-24.

democracies are primarily shaped by arguments of economic, political and legal liberalism, welfare economics and ‘public choices’ in response to rational pursuit of rent-seeking self-interests, as illustrated by political resistance to trade liberalization by import-competing producers who are often politically more influential and easier to organize than consumer interests in trade liberalization. In view of this strong political influence of export industries and import-competing producers on reciprocal market access negotiations among governments responding to the pressures, demands and rational choices of their domestic constituencies, legalistic perceptions of states as ‘black boxes’ risk neglecting the domestic origins of intergovernmental negotiations (e.g. the influence of private rent-seeking), the ‘domestic policy functions’ of trade rules, and the policy-impact of non-governmental organizations on intergovernmental relations.

- *Constructivism*: The successful transformation of the European ‘international law among states’ into a European ‘community law’ protecting peaceful cooperation among 500 million ‘EU citizens’ across national frontiers, confirms not only that international power politics can be legally limited and submitted to institutional ‘checks and balances’ by constitutional restraints of foreign policy powers, parliamentary control of their exercise, and judicial protection of constitutional rights. It also shows that – by subjecting the ‘realist’ focus on state power in intergovernmental relations to broader constitutional and democratic discourse restraining the diverse policy approaches to international economic regulation by constitutionally limited, citizen-oriented ‘public reason’ – economic integration could help put an end to centuries of power politics among European states. This European experience suggests that rights-based ‘cosmopolitan conceptions’ of IEL, based on the human rights obligations of all UN member states, could likewise contribute to limiting the ‘governance failures’ in the collective supply of global public goods resulting from ‘Westphalian conceptions’ of international law and power politics.

Methodological Pluralism in the Interpretation of IEL?

The economic theory of comparative advantage explains the mutually beneficial welfare effects of worldwide division of labor and is often described as the only area of economics where economists from all over the world tend to agree.¹⁶ These economic principles underlying WTO rules, free trade areas, customs unions and trade policies, like the incorporation of natural law assumptions (e.g. of human rights deriving from respect for human dignity) into positive national and international law, have grafted normative and descriptive, economic and political theories of law together. Hence, the arguments of *legal positivism* – that legal rules and principles derive from human enactment pursuant to formal law-creating processes and ‘rules of recognition’ (H.L.A.Hart) that distinguish ‘ought’ (which is desirable) from ‘is’ (which legally exists) and law from other social rules – can no longer obviate the normative question of how incomplete systems of legal rules and principles *ought* to be interpreted in order to realize their declared legal objectives most effectively (such as protecting human rights and ‘sustainable development’). The more citizens and governments engage in economic activities using IEL for realizing economic and non-economic objectives (such as individual self-development and promotion of ‘democratic peace’ through the common market law of the EU), the more important becomes the necessary ‘balancing’ of legal, political and economic principles, rules and objectives in the interpretation, application and progressive development of IEL rules.

Most legal principles (like justice and equality) and rules (like human rights to protection of life, liberty and property) use words with ‘open texture’ and competing meanings to be clarified through interpretation by legislatures, governments and courts. Intergovernmental rule-making, judicial clarification of contested interpretations of ‘incomplete agreements’, and national rule-application by

¹⁶ For an overview of modern trade theories see, e.g. B.M.Hoekman/M.M.Kostecki, *The Political Economy of the World Trading System* (Oxford: OUP, 2009).

governments and private actors tend to interact dynamically in many treaty regimes. Legal positivism claims that legality does not depend on the moral merit of rules, and that judges exercise discretion when faced with a dispute to which no statute or previous decision applies.¹⁷ Human rights challenge the positivist separation of ‘what is’ from ‘what ought to be.’ The more national and international ‘primary rules of conduct’ evolve dynamically in response to ‘globalization’ (e.g. of the economy, the human environment, communications and legal systems), the more urgent becomes the need for reviewing the ‘secondary rules’ for changing the law, adjudicating disputes over conflicting legal claims and for identifying valid rules by exploring the *opinio juris* not only of governments but also of citizens as ‘democratic principals’.¹⁸ Methodological pluralism entails that the traditional ‘rules of recognition’ of international law (as codified in Article 38 of the Statute of the International Court of Justice) must no longer be interpreted only from the point of view of governments. Respect for human rights also requires examining the *opinio juris sive necessitatis* with due regard to the legal claims of civil society, democratic parliaments and independent ‘courts of justice’. In the public clarification of such claims through ‘deliberative democracy’, human rights further demand respect for ‘reasonable disagreement’ among individuals and democratic societies.

If IEL is understood as an economic and legal ‘system’ based on ‘primary rules of conduct’ and ‘secondary rules’ for identifying valid rules, changing the law and settling disputes peacefully, then the definition of IEL – as a sub-system of public international law or as a dynamic integration of private and public, national and international rules and institutions - is likely to influence ‘systemic’ and ‘functional interpretations’ of IEL rules calling for a coherent understanding and normative justification of interpretations. For instance, just as political science recommendations on international relations are shaped by their respective methodologies (e.g. of state-centered ‘realism’, ‘institutionalism’ and ‘constructivism’ versus individual-centered ‘liberalism’), so are legal interpretations and reform proposals (e.g. on customs union rules, common market rules and related dispute settlement procedures) influenced by their respective normative and legal premises.

II. IEL as ‘Conflicts Law’?

Several contributors to this book – notably Wai’s analysis of ‘*Conflicts and Comity in Transnational Governance*’ (Chapter 8) and Joerges’ ‘*Three-Dimensional Conflicts Law as Constitutional Form*’ (Chapter 15) – emphasize the lessons from private international law for coordinating and resolving conflicts among jurisdictions, among government regulations, and among transnational governance mechanisms. As the concept of ‘global governance suggests unrealistic and undesirable goals of consolidated top-down control’, Wai emphasizes the need for ‘a more critical, active conception of transnational comity’ which acknowledges the reality of conflict and contestation in transnational society and uses private international law concepts for resolving ‘conflicts among multiple systems of rules of both state and private ordering.’¹⁹ This is justified by the social functions and public policy

¹⁷ On legal positivism see: S.J. Shapiro, The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed, in: A. Ripstein (ed), Ronald Dworkin (Cambridge: CUP, 2007), 22-55.

¹⁸ On law as a union of ‘primary rules’ of conduct and ‘secondary rules’ of change, adjudication and recognition, see H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 2nd ed. 1994), chapter V. Hart’s emphasis on law as social practices depending on agreed sources of law and rules of recognition would justify, for instance, that international treaty rules focusing on recognition by ‘the international community of states as a whole’ (Article 53 VCLT) for the determination of jus cogens must today be interpreted in conformity with the obligations of all UN member states to respect, protect and promote ‘inalienable’ human rights deriving from respect for human dignity. Like the ‘constitutional distinction’ between constitutional, legislative, executive and judicial rules and institutions, the distinction between primary and secondary rules is of crucial importance for understanding the systemic character and dynamic evolution of IEL as an integrated, legal system of private and public, national and international legal sub-systems which can protect ‘justice’ and human rights across borders only in a multilevel constitutional framework protecting overall coherence, legitimacy and ‘public reason’.

¹⁹ R. Wai, in: Joerges/Petersmann (note 7), at 230.

goals of private law and private litigation by private ‘attorneys general’ who, through the pursuit of their own interests (e.g. in receiving compensation in litigation related to product liability, environmental harms, restrictive business practices and corporate accountability for human rights violations), serve also social purposes of regulation. The ever greater influence in IEL of transnational, *private* ‘advocacy networks’ and transnational, *private* litigation against multinational companies, human rights violators and host states of foreign direct investors illustrates that ‘adversarial legalism’ is becoming an ever more important tool of transnational governance.²⁰

Private ‘conflict of laws’ doctrines (like the effects doctrine, judicial restraint doctrines, principles for mutual recognition of foreign standards and court judgments) may also assist in resolving the coordination problems resulting from competing private and public *regulation* systems. They may provide helpful solutions to issues such as the lack of coordinated international regulatory authorities, the lack of representation in national regulatory bodies of adversely affected foreign interests, regulatory gaps or asymmetric mobility of business actors (as compared to consumers and workers) favoring business interests in transnational private ordering, for instance through contracts, ‘*lex mercatoria*’ and international commercial arbitration.²¹ The private law experiences in mediating ‘conflicts of normative orders’ may assist in resolving conflicts among national and international public law regimes, as discussed also in the contributions to this book by Pauwelyn²² and Joerges. This is illustrated by use of ‘judicial comity’ in the sense not only of deference of national courts towards their own legislatures in case of cross-jurisdictional conflicts of policy, but also in the cosmopolitan sense of regard to legitimate interests of foreign jurisdictions, transnational governance procedures and the need for judicial protection of transnational ‘principles of justice’, with due regard to ‘the value of both conflict and comity in the relationship among regulatory orders, whether they be public or private, domestic or foreign, or international or transnational’.²³

Joerges rightly emphasizes that both private and public international law have to overcome their ‘methodological nationalism’ and ‘nationalist and parochial legacy’ in resolving conflicts of laws existing at all levels of governance. Similar to the long-standing public law argument that international guarantees of freedom, non-discrimination and rule of law can compensate for deficiencies in national constitutional rules and democratic processes²⁴, Joerges acknowledges that ‘democracy – as nation states organize it – is *necessarily* deficient, whereas European law has the potential to cure such deficits.’²⁵ Joerges’ inquiry into procedures and substantive principles for determining whether foreign jurisdictions, conflicting government regulations and transnational governance mechanisms ‘deserve recognition’ re-interprets the rights-based ‘judicial balancing’ of European courts. According to Joerges, the judicial balancing should rely less on fundamental freedoms and human rights than on conflicts law principles for mutual recognition, procedures like ‘comitology’, and ‘the need for modern modes of governance to liaise with non-governmental bodies.’ Joerges’ proposals for ‘re-interpreting WTO law as conflicts law’ illustrate the problems resulting from Joerges’ unwillingness to identify the relevant ‘principles of justice’ which justify recognition of international law: Even though the WTO agreements (e.g. on science-based risk regulation and provisional sanitary measures in ‘cases where scientific evidence is insufficient’) have been ratified by parliaments and the WTO dispute

²⁰ Wai (note 7), 232-236.

²¹ Wai (note 7), 236-241.

²² J. Pauwelyn, in: Joerges/Petersmann (note 7), Chapter 7.

²³ Cf. Wai (note 7), at 262. On conflicts and peaceful dispute settlement as sources for mutual learning see also Petersmann (note 9).

²⁴ Cf. E.U. Petersmann, Constitutional Functions of Public International Economic Law, in: P. Verloren van Themaat et alii (eds), *Restructuring the International Economic Order. The Role of Law and Lawyers* (The Hague: Kluwer Publishers, 1987), at 49 – 75.

²⁵ Joerges, Chapter 15 in this book, at....

settlement system protects international rule of law, Joerges criticizes the WTO dispute settlement rulings in the GMO dispute as ‘an illegitimate assumption of decision-making powers’. Joerges accepts the WTO Appellate Body findings against the EC’s hormone beef restrictions, but rejects the WTO panel findings against the EC’s approval procedures for genetically modified organisms without explaining his concerns in terms of WTO law, EU law (note that the EU accepted the GMO panel finding without appeal to the Appellate Body) or of parliamentary democracy. Instead, he claims that ‘the WTO simply lacks the legitimate power to take a definite stance on true conflicts which concern matters of high political sensitivity and far-reaching economic implications.’²⁶

This principled refusal of recognizing the importance and legitimacy of international agreements and adjudication for resolving international conflicts of ‘high political sensitivity and far-reaching economic implications’ reflects a nationalist bias in favor of *domestic*, albeit illegal and ‘populist’ decision-making by governments on collective action problems of ever greater existential importance for citizens that can only be resolved in conformity with international law as ratified by parliaments and, if necessary, clarified by international adjudication. Joerges’ communitarian disregard for constitutional rights and fundamental freedoms in IEL entails that his plea against the WTO’s dispute settlement ruling on the EC’s import restrictions on genetically modified products – notwithstanding the parliamentary ratification and judicial application of these WTO rules compensating for domestic regulatory deficits inside the EU (such as EU non-compliance with procedural requirements under the SPS Agreement concerning science-based EU risk assessments of GMO products and approval procedures ‘without undue delay’) – can hardly be justified by ‘constitutional democracy’ or other ‘principles of justice’. ‘Conflicts law’ approaches calling for nationalist disregard of international adjudication – even if the international rules have been ratified by parliaments in order to protect constitutional values like liberty, non-discrimination, rule of law and informed, science-based ‘deliberative democracy’ - risk undermining international ‘public reason’ and international rule of law protecting ‘public goods’, like a rules-based world trading system respecting parliamentary democracy and limiting national ‘discourse failures’ by science-based risk assessments and precautionary measures.²⁷

‘Conflicts law’ proposals for disregarding international law rules should be based on universalizable ‘constitutional principles’ (like human rights) that remain consistent with the need for international law as an inevitable instrument for protecting reasonable citizen interests in collective supply of international public goods. Populist disregard for international guarantees of freedom, non-discrimination and rule of law ratified by parliaments – including WTO rules on open markets, non-discriminatory conditions of competition, science-based risk regulation, precautionary measures, international third-party adjudication and transnational rule of law – risks undermining parliamentary democracy and rule of law. Similarly, re-interpretation of the rights-based case law of the ECJ in terms of procedural ‘conflicts law’, like criticism of WTO adjudication as failing to contribute to ‘a Kantian

²⁶ Joerges (Chapter 15), at, who claims that his call for disregarding WTO dispute settlement rulings applying WTO rules ratified by parliaments ‘is a defence of both the rule of law and of the expectation that judicial administration by bodies need ... to be legitimated by us, the peoples’. Yet, even though Joerges acknowledges a ‘legal duty of co-operative problem-solving’ and the capacity of EU law ‘to compensate the democracy failures of nation states’, he fails to explain why WTO rules on science-based risk regulation and precautionary measures lack democratic legitimacy notwithstanding their parliamentary ratification and contribution to informed public debate.

²⁷ Note that the illegality of national prohibitions of GMO products (e.g. in Austria) – after their approval by EU authorities – had also been established in ECJ judgments (e.g. Joined cases T-366/03 and T-235/04, Land Oberösterreich and Republic of Austria v Commission of the EC, judgment of 5 October 2005). If ‘constitutional pluralism’ is understood as excluding claims to ultimate authority and requiring willingness to reasonably discuss the ‘ontological reality that there are different legal orders which have to find terms of accommodation between each other’ (N. Walker, in: Avbelj/Komarek, note 10, at 19), then the heterarchical (rather than hierarchical) relationships between national and international legal systems (including WTO law) need to be clarified through ‘harmonious-discursive constitutionalism’ (Avbelj/Komarek, note 10, at 3) aimed at maximizing protection of human rights on the basis of ‘universalizable’ principles of justice.

Rechtszustand (“lawful condition”)²⁸, should explain why the long-standing, multilevel judicial protection of common market freedoms is not justifiable by Kantian principles of justice.²⁹ Even though Joerges rightly acknowledges that ‘constitutionalizing transnational governance through conflicts law’ cannot be reduced to the ‘compensation of democracy failure in parochial national decision-making’, his ‘conflicts law’ approach fails to address the main concern of ‘multilevel constitutionalism’, i.e. the ever more dangerous ‘constitutional failures’ of governments to protect global public goods of existential importance for the welfare of citizens by means of legal ‘unity in diversity’ beyond nation states.

III. IEL as Global Administrative Law?

In Chapter 16 on *The WTO and Global Administrative Law*, Stewart and Ratton Sanchez Badin argue that ‘the challenges faced by the WTO can be addressed by greater application of GAL decision-making mechanisms of transparency, participation, reason-giving, review and accountability to the WTO’s administrative bodies including its councils and committees and the Trade Policy Review Body.’³⁰ According to these authors, ‘(m)uch global regulatory governance – especially in fields as trade and investment, financial and economic regulation – can now be understood as administration, by which we include all forms of law-making other than treaties or other international agreements on the one hand and episodic dispute settlement on the other.’³¹ As multilevel economic governance aims at regulating the conduct not only of states but also of private actors, they acknowledge that the traditional inter-state paradigm of international law needs to be adjusted to the pluralistic and cosmopolitan regulatory realities so as to ensure that ‘global regulatory decision-makers are accountable and responsive to all of those who are affected by their decisions.’³² According to the authors, GAL principles and procedures should be strengthened in three dimensions:

- the efficacy and legitimacy of the internal WTO governance structures and decision-making procedures could be improved by strengthening transparency, participation, reason-giving and the law-making role of the WTO’s regulatory, administrative and adjudicatory bodies;
- in the vertical interrelationships between the WTO and its regulation of members’ domestic administrations, the incorporation of GAL principles and procedures into domestic administrative rules and procedures could strengthen rule of law, transparency of trade regulation, uniform and impartial administration, due process of law and judicial review;
- in the increasingly close ‘horizontal linkages’ among different global regulatory institutions, the WTO should recognize (e.g. pursuant to the WTO Agreements on Sanitary and Phytosanitary Standards and Technical Barriers to Trade) regulatory standards issued by other global regulatory bodies only if generated through transparent procedures and ‘regulatory due process’ affording rights of participation and based on ‘public reason’ supported by the decisional record and reflecting fair consideration of all affected interests.

The authors emphasize that the focus of GAL norms on the procedural elements of administrative law has ‘served not only to secure implementation of the substantive norms of liberalized trade but also to promote broader goals including open administration, even-handed treatment of foreign citizens, and the rule of law’. Thereby, the standards are seeking ‘to provide safeguards against abuse of power,

²⁸ Cf. note 112 and related text in Joerges (Chapter 15).

²⁹ Cf. Petersmann (note 1), section 8.

³⁰ Stewart/Ratton Sanchez Badin, manuscript at p. 1.

³¹ Stewart/Ratton Sanchez Badin, at (2).

³² Stewart/Ratton Sanchez Badin, at (2).

counter-factional capture, and temper the tunnel vision of specialized regulatory bodies.³³ Yet, they also admit that – due to the absence of democratic legislation, democratic accountability and compulsory jurisdiction at the global level – ‘procedural mechanisms alone may be relatively ineffective in overcoming disparities in power and the biases of specialized mission-oriented organizations.’³⁴ ‘To the extent GAL procedures enable a broader range of social and economic actors and interests, especially those that tend to be disregarded, to more effectively scrutinize and have input to decisions, and also foster broader discussion and debate, they may also promote a democratic element in global regulatory governance.’³⁵

Systemic Problems: ‘Global Administrative Law’ without Constitutional Restraints and ‘Constitutional Justice’?

Proposals for GAL have emerged as pragmatic responses to the ‘accountability gaps’ in the administrative practices of international institutions and the recognition that the ‘ultimate aim of many of these regimes is to regulate the conduct of private actors rather than states; private actors including NGOs and business firms and associations as well as domestic government agencies and officials’.³⁶ Yet, the legal foundations and powers of international bodies and their administrative activities continue to be extremely diverse, as illustrated by the legal, administrative and judicial practices of UN and ILO Administrative Tribunals and jurisprudence; of European courts, WIPO arbitration and administrative practices concerning disputes over internet domain names; World Bank legal and inspection practices, WTO dispute settlement practices and investor-state arbitration applying administrative rules; regulations and administration implementing Part XI of the UN Law of the Sea Convention regarding deep seabed mining; and environmental agreements providing for administrative bodies identifying, reviewing and restricting harmful activities. GAL advocates acknowledge the lack of international agreement on a uniform ‘constitutional foundation’ or ‘rule of recognition’ for determining GAL principles, rules and practices by the diverse private and public, national and international actors. Nor do UN member states agree on the emergence of new customary GAL resulting from these often informal, administrative practices in very different legal and institutional contexts.

In spite of this reality of ‘legal pluralism’, including ‘constitutional pluralism’³⁷, GAL scholars propose – either *de lege ferenda* or *de lege lata* based on interpreting general provisions in ‘incomplete’ and under-theorized international agreements – uniform principles of transparency, ‘publicness’³⁸, participation, reason-giving, review and accountability in order to reduce legal and administrative, transnational governance problems such as discrimination and exploitation of foreign citizens and firms. Some GAL proponents disregard or deny the relevance of ‘constitutional

³³ Stewart/Ratton Sanchez Badin, at (25-26).

³⁴ Stewart/Ratton Sanchez Badin, at 29: ‘powerful states and financed interests are well equipped to use procedural mechanisms to advance their interests. By taking institutions largely as it finds them and relying on procedural disciplines to improve their governance, GAL risks providing a patina of legitimacy without effecting any basic change, and may divert attention from the need for more fundamental reform.’

³⁵ Stewart/Ratton Sanchez Badin, at (30).

³⁶ Stewart/Ratton Sanchez Badin, at (2).

³⁷ In contrast to the claim of N. Krisch, *The Pluralism of Global Administrative Law*, in: *EJIL* 17 (2006), 247 ff, modern constitutionalism tends to emphasize the reality and normative legitimacy of ‘constitutional pluralism’ (cf. note 10 above) at national and international levels and the need for substantive ‘balancing’ of legal principles and rules rather than relying on formal, constitutional hierarchies and uniform principles.

³⁸ According to B. Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, in: *EJIL* 20 (2009), 23 ff, at 32-33, ‘requirements of publicness in GAL’ include the principle of legality, the principle of rationality, proportionality, rule of law and basic human rights, i.e. basic constitutional principles (called ‘constitutive administrative law’ in Kingsbury’s terminology). Kingsbury fails to identify to what extent his ‘general principles of public law’ are already part of the positive law of international organizations or merely proposals *de lege ferenda*.

approaches' in view of the inevitable 'democratic deficits' of global governance and the controversies - notably in common law countries - about basing administrative law on human rights. Their 'problem-solving' focus on improving 'output legitimacy' based on claims regarding the 'inner morality' and 'publicness of law' often neglects whether, and how, GAL principles can be justified as part of the applicable international rules of positive law (e.g. as general principles of law, customary law or treaty rules). Justifying application of GAL principles by international bodies on grounds of US administrative law practices, or applying human rights, 'rule of law' and 'proportionality' as 'general principles of public law' as proposed by Kingsbury, remains deeply contested among diplomats from many countries in view of the limited powers of international bodies and the limited scope of their applicable law rules. For instance, as WTO agreements mention neither human rights nor rule of law nor 'proportionality balancing', WTO judges risk exceeding their limited powers if they were to apply good governance proposals as part of their limited judicial mandate of settling disputes on the basis of the applicable WTO rules.

Inside constitutional democracies, administrative law refers to one out of several, interrelated governance functions, like constitution-making, democratic legislation, administration, adjudication and foreign policy-making for protecting peace, rule of law and collective supply of public goods in international relations. National democratic constitutions and 'treaty constitutions' (like the EU Treaty) define and constitutionally limit the objectives, legitimacy, legal principles, lawful instruments, institutions and powers of economic administration. As explained in theories of justice from I. Kant to J. Rawls, they do so based on the premise that all legislative, administrative and judicial governance activities derive their legitimacy from constitutional 'principles of justice' approved by the people and defined in national constitutions. Since World War II, such principles of justice are increasingly recognized also in the law of international organizations - like the human rights obligations under the UN Charter, the right to health protection protected by the WHO Constitution (*sic*), the right to education protected by the UNESCO Constitution (*sic*), the right to food protected by the FAO Constitution (*sic*), labor rights protected by the ILO Constitution (*sic*), and the human rights guarantees of the EU Charter of Fundamental Rights and the ECHR. The Lisbon Treaties on European Union and on the Functioning of the European Union, for instance, begin by defining the 'principles' and 'common provisions having general application', before defining the institutions and limited, delegated powers of the EU. As - in the modern 'age of rights'³⁹ - national and international administrative regulations and decisions increasingly impact on individual rights, administrative powers lack legitimacy unless they are properly constituted by limited delegation of powers. These in turn are subject to constitutional rights, judicial remedies and other constitutional restraints (such as Kingsbury's 'principles of public law') as defining elements of administrative law and policies.

Definitions of 'global administrative law as the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make'⁴⁰ neglect that the rights of citizens, and the 'rule of law' conditions for their administrative restriction, are today based on human rights, constitutional rights, democratic legislation and judicial review. The frequent focus of GAL proponents on 'accountability' in terms of *ex post* review and administrative remedies disregards this constitutional requirement of democratic 'input legitimacy.' Alternative definitions of GAL, by including requirements of 'publicness', generality of law, rule of law, human rights and proportionality, propose to 'constitutionalize' and limit the legal authority of administrative bodies and administrative practices

³⁹ Cf. N. Bobbio, *The Age of Rights* (Cambridge: Polity Press, 1996); L. Henkin, *The Age of Rights* (New York: Columbia University Press, 1990).

⁴⁰ B. Kingsbury, N. Krisch & R. Stewart, *The Emergence of Global Administrative Law*, in: *Law and Contemporary Problems* 68 (2005), at 15 ff.

through broadly defined ‘general principles of public law’⁴¹ and ‘constitutive administrative law’.⁴² Some GAL approaches focus – as during the emergence of European administrative law systems in monarchical and authoritarian states during the 19th century – on ‘rule by law’ rather than on protection of human rights and ‘rule of law’, thereby neglecting the human rights obligations of all UN member states and the ‘constitutional functions’ of administrative law as ‘applied constitutional law.’ Rather than proposing reforms of ‘procedural global administrative law’ *de lege ferenda* in order to promote constitutional values like legality, rationality, proportionality, rule of law and human rights’, or claiming that such constitutional principles are already part of the *de lege lata* ‘public law principles’ constituting GAL, it would seem methodologically more persuasive to follow the example of European law and interpret the law of international organizations in conformity with the multilevel human rights obligations and constitutional commitments of states as constituting only limited regulatory, administrative and judicial powers for the benefit of citizens and their human rights.⁴³

Need for Clarifying the Concepts of ‘Law’ and ‘Administrative Constitutionalism’ in Multilevel ‘Rule of Law’ Systems with Due Respect for ‘Legal Pluralism’

Kingsbury’s recent clarification of the concept of ‘law’ in GAL research admits that the ‘legal constitution of the global administrative body’ by ‘a kind of constitution-making’ amounts to an international exercise of ‘constitutive power’ and ‘constitutionalist commitment to publicness’.⁴⁴ Yet, rather than exploring the constitutional principles governing the ‘primary law’ and ‘secondary law’ of international organizations (which may include non-transparent decision-making as under GATT 1947) and of courts at regional and worldwide levels⁴⁵, Kingsbury claims: ‘Constitutionalism implies a coherence of structure which global legal and institutional arrangements do not currently have... While constitutive power is certainly exercised internationally, international constitutionalism in its richer forms is still, at most, in *statu nascendi*’.⁴⁶ Arguably, the hundreds of international agreements constituting international organizations with limited rule-making, administrative and dispute-settlement functions, like the hundreds of international human rights instruments and judgments of international courts, justify a different conclusion: the law of international organizations, human rights law and the jurisprudence of international courts – even in their legal practices relating to administrative law – continue to apply and clarify ‘constitutional principles’ without supporting Kingsbury’s general re-definition of the concept of ‘law.’ The clarification of such principles - like, *inter alia*, legality, limited delegation of powers, transparency, non-discrimination, necessity, proportionality, due process of law, individual rights and their legal and judicial protection limiting the administrative powers of international institutions – must remain context-specific respecting the legitimate diversity in the legal systems of international organizations. While European integration has

⁴¹ Cf. Kingsbury (note 38), 23 ff, at 31: ‘Publicness is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence.’ This claim – i.e. that the principles of legality, rationality, proportionality, rule of law and human rights are ‘requirements of publicness’ and part of positive international law (cf. Kingsbury at 32-33) – amounts to ‘constitutionalizing GAL’ by re-defining ‘law’ in ways contested by presumably most UN member states. Arguably, it would be more consistent with positive international law to infer such GAL principles from the existing human rights obligations of UN member states, and from their agreed constitutional restraints in national constitutions as well as in the law of international organizations, as general ‘constitutional principles’ limiting administrative practices.

⁴² Cf. Kingsbury (note 38), at 34.

⁴³ On such ‘constitutional functions’ of multilevel economic regulation see: Petersmann (note 11).

⁴⁴ Kingsbury (note 38), at 34-36.

⁴⁵ Cf. N. Blokker/H. Schermers, *International Institutional Law* (The Hague: Kluwer Publisher, 4th ed. 2003).

⁴⁶ Kingsbury (note 38), at 36. The empirical and comparative legal principles and rules identified by Blokker/Schermers as part of the law of international organizations seem to contradict the claim by Kingsbury.

given rise to 'European administrative law' based on common 'administrative constitutionalism',⁴⁷ constituting and limiting national and European administrative practices in the implementation of EU and EEA law, the administrative law dimensions of the law of *worldwide organizations* tend to remain more contextual (i.e. limited and defined by their respective constitutional rules), fragmented and pluralist rather than being part of a universally agreed 'global administrative law'. Without more thorough empirical, comparative and contextual legal research into the transformation of administrative practices into positive 'global law', GAL claims – including Kingsbury's 'natural law interpretation'⁴⁸ of the 'general principles of public law' - risk being criticized as wishful thinking rather than as methodologically convincing determinations of positively existing law.

The law of many international organizations presents itself as a legal system, such as the 'multilateral trading system' and 'dispute settlement system' constituted by the Agreement establishing the WTO and its Dispute Settlement Understanding. Just as national administrative law forms an integral part of broader legal systems based on national constitutional, legislative, administrative, judicial and international rules, so can international administrative law not be properly interpreted by isolating its administrative rules from their systemic legal context. Some GAL advocates admit that national human rights law requires reviewing 'rule by law' in the constitutional context of the applicable 'rule of law' system.⁴⁹ Many GAL proponents disregard, however, that the customary rules of treaty interpretation (Article 31 VCLT) and UN and regional human rights instruments require interpreting also international administrative rules with due regard to the human rights obligations of states, as emphasized in the jurisprudence of European courts. Kingsbury's proposal to view the international agreements constituting regulatory, administrative and judicial powers as integral parts of GAL appears to be narrower than E. Fisher's multilevel analysis – in Chapter 11 of this book - of risk regulation and risk management in terms of 'administrative constitutionalism' based on WTO law, EU law and national legal systems. Separating administrative law from its constitutional context obscures the function of constitutional rules to operate as 'checks and balances' protecting citizens against abuse of administrative powers. International law recognizes that such constitutional safeguards (e.g. in treaties constituting international organizations) are beyond the limited powers of administrative bodies and constitutionally limit the legitimate scope of administrative law (e.g. the 'secondary law' adopted by international organizations). Constitutional law and administrative law pursue different, yet complementary constitutional functions, as illustrated by principles of 'separation of powers' and judicial review by 'courts of justice' inside constitutional democracies and in European law.

As emphasized by the ECJ in its judicial review of national and EU administrative measures inconsistent with human rights⁵⁰, the multilevel human rights obligations of states constitutionally limit the 'rules of recognition' by recognizing only such rules and institutions as legitimate and valid which respect multilevel human rights obligations and their underlying 'constitutional principles of justice'. Administrative practices violating human rights obligations cannot be recognized as valid law on constitutional grounds, as rightly emphasized by the ECJ and by national courts in Europe.

⁴⁷ Cf. Chapter 11 to this book by E. Fisher, *Beyond the Science/Democracy Dichotomy: The WTO Sanitary and Phytosanitary Agreement and Administrative Constitutionalism*.

⁴⁸ Cf. A. Somek, *The Concept of 'Law' in Global Administrative Law: A Reply to B. Kingsbury*, in: *EJIL* 20 (2010), 985 ff, at 990 f, who criticizes the lack of clarity in some GAL research on legal and non-legal practices in 'law as it is' and 'law as it is not.'

⁴⁹ Cf. D. Dyzenhaus, *The Concept of (Global) Administrative Law*, IILJ Working Paper New York University 2008/7 (www.iilj.org).

⁵⁰ See joined cases C-402/05P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the European Communities* (judgment of 3 September 2008), para. 284: 'It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C-112/00, *Schmidberger* [2003] ECR I-5659, paragraph 73 and case-law cited).'

Similarly, administrative assessments of ‘risks to human health’ pursuant to WTO law (e.g. on the basis of the Agreements on Sanitary and Phytosanitary Measures and TRIPS), and judicial review of national health protection measures by WTO dispute settlement bodies⁵¹, are limited by principles of transparency, non-discrimination, necessity, proportionality and rule of law that are integral parts of WTO law as well as of national administrative and constitutional laws in many WTO member states. Their constitutional foundations, often disputed interpretation and judicial clarification may require deference by international courts whenever such ‘constitutional principles’ are interpreted differently by different jurisdictions depending on their respective constitutional and human rights obligations. For instance, the human rights obligations of WTO members may require interpreting trade rules in ways that avoid conflicts between WTO obligations under the TRIPS Agreement to grant patent protection for pharmaceuticals and human rights obligations of WTO members to grant access to essential medicines in less-developed countries.⁵² As emphasized by the European Court of Justice in the *Kadi dispute*, the multilevel character of human rights law may justify invocation of stricter human rights standards at national and regional levels as relevant context for interpreting international rules even if such human rights guarantees have not been effectively protected in UN legal practices.⁵³

Kingsbury’s proposal to distinguish ‘constitutive administrative law’, ‘substantive administrative law’ and ‘procedural administrative law’ as ‘three categories of public global administrative activity’ - without reference to specific, multilevel guarantees of human rights and other constitutional limitations of GAL – risks undermining human rights and constitutional democracy in the field of administrative law. This concern applies at least in European civil law systems which, in contrast to some common law systems, emphasize the constitutional restraints of national and international administrative authorities. Kingsbury’s acknowledgment – that ‘(c)onstitutive power is exercised internationally, most obviously in the constitution of international organizations’⁵⁴ – lends support to Fisher’s conclusion that the increasing recognition of ‘common constitutional principles’ by international courts, arbitration and by quasi-judicial dispute settlement systems (e.g. in the WTO) may constitutionally limit GAL and multilevel economic governance in terms of ‘administrative constitutionalism’. Such functionally limited ‘multilevel constitutionalism’ reflects the emergence of overlapping ‘transnational polities’ (e.g. in regional integration agreements) and of multilevel rule-making, administrative and ‘judicial governance’ for the collective supply of international public goods.⁵⁵ Rather than denying the normative reality of ‘multilevel constitutionalism’ and of its protection of human rights and constitutional rights against abuse of administrative powers on the obvious ground that the utopia of centralized ‘global constitutionalism’ is neither feasible nor

⁵¹ Cf. M.Matsushita, Human Health Issues in Major WTO Dispute Cases, in: Asian Journal of WTO & International Health Law and Policy 4 (2009), 1-26.

⁵² Cf. H.Hestermeyer, Human Rights and the WTO. The Case of Patents and Access to Medicines (Oxford: OUP, 2007), who argues that – as the TRIPS Agreement may give rise to conflicts with the customary law obligation of access to life-saving medicines in the face of national health emergencies – customary law requires WTO dispute settlement bodies to interpret TRIPS provisions (e.g. on parallel imports, compulsory licences) in conformity with the human rights obligations of WTO members.

⁵³ Joined cases C-402/05P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the European Communities* (judgment of 3 September 2008), para. 299: ‘It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.’

⁵⁴ Kingsbury (note 38), at 35.

⁵⁵ Stewart/Ratton Sanchez Badin rightly distinguish the internal GAL dimension of WTO governance from its ‘vertical’ and ‘horizontal’ GAL dimensions in the WTO’s interactions with other international organizations and national administrations. Their proposals for review by the WTO Appellate Body of standard-setting practices in other international organizations and of national administrative actions raise ‘constitutional questions’ that can be properly answered only in the broader context of the WTO rules constituting the ‘WTO dispute settlement system’ providing for ‘security and predictability to the multilateral trading system’ (cf. Article 3 DSU).

desirable⁵⁶, it is important to acknowledge that functionally limited ‘multilevel constitutionalism’ (e.g. in multilevel human rights law and trade law) – like constitutional democracies – is based on respect for ‘constitutional pluralism’ in terms of legitimate diversity of constitutionalism, human rights conceptions and economic regulation at national, regional and worldwide levels.

‘Rule of Law’ as a Constitutional Restraint of ‘Rule by Law’

From the constitutional perspective of ‘rule of law’ as a constitutional restraint on ‘rule by law’, some ‘GAL conceptions’ of delegated ‘private ordering’ (e.g. in case of ‘privatizing’ governmental tasks to commercial security services, health services and other ‘services of public interest’) raise doubts about the constitutional validity of some of the ‘administrative law’ involved.⁵⁷ Examining such contested legality of administrative practices vis-à-vis citizens depends on their constitutional justifiability as ‘rule of law’ rather than on administrative law claims of ‘rule by law’, administrative procedures (e.g. justifying administrative decisions by ‘review, reason-giving and publicity/transparency’⁵⁸) and claims about the ‘inner morality’ of law, for instance as defined by L.L. Fuller in respect of eight moral principles governing relations between ‘ruler and ruled’ in pre-democratic, national legal systems⁵⁹ - yet contested in respect of international law. Acknowledgment of the fact that ‘there are specific rules of recognition in particular governance regimes’ of global administrative law⁶⁰ must not obscure the fact that customary international law requires interpreting these ‘overlapping rules of recognition’ in special treaty regimes in conformity with the human rights obligations of the countries concerned. These human rights obligations of UN member states at national, regional and UN levels, like the law of international organizations, have led to increasing recognition of ‘common constitutional principles’ limiting the legal validity and rules of recognition of international administrative practices.⁶¹ The administration of justice and protection of European human rights standards in the *Kadi* judgment by the ECJ illustrate that UN law might justify multilevel judicial protection of human rights even vis-à-vis UN Security Council sanctions.⁶²

⁵⁶ Kingsbury (note 38), at 36; Stewart/Ratton Sanchez Badin (Chapter 16), at (27); N.Krisch, *Global Administrative Law and the Constitutional Ambition*, LSE Working Paper 10/2009. For a criticism of the unrealistic conception of the UN Charter as the ‘constitution of the international community’ see already: E.U. Petersmann, *How to Reform the UN System? Constitutionalism, International Law and International Organizations*, in: *Leiden Journal of International Law* 10 (1997), 421 ff. My description of UN human rights law as part of an emerging ‘multilevel human rights constitution’ emphasizes the functions of human rights to protect individual and democratic diversity and criticizes the lack of judicial remedies in UN human rights law..

⁵⁷ Cf. Dyzenhaus (note 49).

⁵⁸ Kingsbury (note 38), at 41 ff.

⁵⁹ On ‘rule of men’ as domination, and ‘rule of law’ as non-domination, see: P.Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: OUP, 1997). L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 2nd ed. 1969), identifies (in chapter 2) eight moral requirements as being constitutive of ‘rule of law’, i.e. generality, clarity, promulgation, stability, consistency of rules and social behavior, non-retroactivity and non-contradictory nature of rules which must also not require the impossible. J. Raz, *The Authority of Law* (Oxford: OUP, 1979), at 214 ff, emphasizes the need for additional requirements (such as judicial independence, judicial review, fair hearings).

⁶⁰ Kingsbury (note 38), at 57.

⁶¹ Kingsbury’s proposal of ‘incorporating into Hartian approaches to the concept of law, and even into the rule of recognition, a requirement of publicness’ (note 38, at 57) may lead to similar, yet methodologically more contested legal interpretations.

⁶² Cf. note 53 above.

IV. IEL as Part of a Multilevel Constitutional House?

Conflicts law approaches, GAL approaches and constitutional approaches to IEL share the view that the ‘current reality requires a reframing of the inter-state paradigm of traditional international law to a more pluralistic and cosmopolitan framework.’⁶³ They disagree about whether ‘the divisions and differences in regimes, interests and values are too wide and deep to support, at this point a constitutionalist paradigm for global governance.’⁶⁴ Their different responses to the global governance problems appear to be largely due to the different perspectives of private lawyers, constitutional, administrative and international lawyers. Lawyers from common law countries with more nationalist constitutional traditions rejecting rights-based, international ‘treaty constitutions’ deliberately use administrative law terms (like international ‘constitutive administrative law’) rather than constitutional terms for the law of international organizations like the international treaty ‘constitutions’ (*sic*) establishing the ILO, UNESCO, WHO and FAO. While European lawyers tend to emphasize the reality and normative legitimacy of multilevel ‘constitutional pluralism’ - even inside the EU, whose diverse national and regional constitutional sub-systems bear witness to its ‘Leitmotiv’ of ‘unity in diversity’ (as underlined in the 2004 draft ‘Treaty establishing a Constitution for Europe’) –, Anglo-Saxon common lawyers often misunderstand proposals for ‘constitutionalizing international law’ as utopian insistence on a ‘single design or order’⁶⁵, or as a hegemonic European project aimed at compensating Europe’s comparative lack of ‘hard power’ by additional ‘legal power’ based on European conceptions of ‘global constitutionalism’.⁶⁶ As the diverse private law, constitutional law, administrative law and international law conceptions describe and assess the ‘globalization’ of IEL from different perspectives, it appears inappropriate to present GAL and constitutionalist conceptions of the law of international organizations as ‘alternatives’.⁶⁷ Nor is it realistic to present international organizations as ‘administrative agencies’ without constitutional constraints. The legal analysis of ‘global administrative law’ would benefit from acknowledging the diverse legal contexts of national and international administrative rules and of their judicial review, which renders clarification of their respective legal status as customary law or general principles of law more difficult.

International Law and Multilevel Order as a ‘Five Storey House’?

Cottier’s contribution in Chapter 17 offers the most comprehensive analysis of the reality of constitutional and legal pluralism by systematically interfacing the diverse, yet fragmented constitutional, administrative and international legal and political science schools so as to explain the need for a coherent architecture of the different local, cantonal, national, regional and worldwide layers of governance and legal regulation. In contrast to the incremental ‘conflicts law’ and GAL approaches, Cottier uses the image of a ‘five storey house’ in order to demonstrate the need for integrating the different ‘partial conceptions’ of IEL under a common roof based on a common foundation. His ‘five storey house’ not only describes the existing realities of multilevel governance more precisely than the Westphalian notion of ‘national sovereignty’. It also offers a more coherent

⁶³ Stewart/Ratton Sanchez Badin (Chapter 16), at (2).

⁶⁴ *Idem*.

⁶⁵ Stewart/Ratton Sanchez Badin (Chapter 16), at (28)

⁶⁶ On European conceptions of the diverse private and public, national and international legal sub-systems of European and global governance as a mutually supportive, functional unity to be interpreted in the light of human rights and other ‘constitutional contracts’ of citizens see A. von Bogdandy/P. Dann/M. Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in: *German Law Journal* 9 (2008), 1375 ff. On the increasing acknowledgment also by US lawyers of ‘enabling constitutionalization’, ‘constraining constitutionalization’ and ‘supplemental constitutionalization’ by means of ‘international constitutional norms’ see: J.L. Dunoff/J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge: CUP, 2009), at 10 ff.

⁶⁷ Stewart/Ratton Sanchez Badin (Chapter 16), at (26).

normative conception of multilevel economic governance and of its ‘constitutional analysis’. Like the ‘conflicts law’ approach, Cottier perceives conflicting interests and legitimate disagreements as pervasive characteristics of national and international societies and their legal systems. Even though the higher degree of shared community values inside constitutional democracies might enable a higher degree of majority decisions in constitutional, legislative, administrative and judicial rule-making at national levels, the large number of internal conflicts confirms that peace remains ‘at risk as much at home as abroad’. As the effectiveness of and voluntary compliance with rules depends on their perceived legitimacy and on competing rights and interests, the maintenance of agreement on common principles and rules must be promoted through procedural fairness, human rights protection, equal conditions of competition and balancing of competing interests on all levels of the ‘constitutional house’. Cottier emphasizes, like an increasing number of other international lawyers, that the ‘task of regional and global storeys, namely, to secure a proper balance and to prevent and remedy state failures, is of key importance to the overall constitutional system.’⁶⁸ He convincingly criticizes parochial balancing of interests that fails to define the proper scope of boundaries, for instance by refusing to distinguish between scientific risk assessment and political risk management and by neglecting adverse impacts of EU and US agricultural policies on less-developed countries.

The more frequent and more effective recourse to international adjudication in IEL than in UN human rights law leaves ‘no doubt that the underlying principles of international economic law enjoy advanced levels of protection and implementation’ compared with the more controversial conceptions of liberties and distributive justice underlying UN human rights law: ‘people agree on general concepts, but inherently disagree on specific contours of basic values such as freedom, democracy or equality’ inside democracies as well as in transnational relations.⁶⁹ This normality of rational disagreement and of ‘incomplete contracts’ justifies the emphasis on process, reasonable legal pluralism and ‘global coherence’ rather than on substance on all levels of governance. Conflict and peaceful dispute settlement of disputes must be acknowledged as sources of mutual learning and of searching for ‘principled consistency’ on the basis of ‘substantive rather than formal hierarchy.’⁷⁰ The ‘main constitutional function’ of WTO law is defined as ‘shaping predictable and stable framework conditions for domestic trade regulation, assuring agreed levels of market access, non-discrimination and fair conditions of competition.’⁷¹ Cottier concludes by identifying a number of constitutional principles that ‘can be globally shared and form the common core of global 21st century Constitutionalism’: rule of law; human rights; non-discrimination; mutual support; ‘equal legitimacy of storeys’; ‘appropriate structure-substance pairings’; appropriate allocation of powers; representation and voice; vertical and horizontal checks and balances; shared sovereignty; hierarchies of storeys based on fundamental values rather than formal ranking; effective decision-making and dispute resolution.⁷² Based on such principles, his paradigm of a ‘five storey house’ offers a ‘constitutional framework of potentially shared values while leaving ample room for divergence and cultural difference’.⁷³

⁶⁸ Cottier (Chapter 17), at (21).

⁶⁹ Cottier, at (23-24).

⁷⁰ Cottier, at (25).

⁷¹ Cottier, *idem*.

⁷² Cottier, (27-30).

⁷³ *Idem*, at (30)

A ‘Constitutional Approach’ to IEL and Multilevel Economic Governance beyond Europe?

Cottier justifies the need for multilevel constitutionalism primarily in terms of respect for reasonable disagreement and peaceful settlement of disputes through fair procedures and mutually coherent principles and rules. My own publications have also emphasized that the universal recognition of human rights requires ‘constitutional’ and ‘cosmopolitan conceptions’ of IEL so as to supply global public goods more effectively. The legitimate functions, regulatory problems, systemic nature and dynamic evolution of IEL should be normatively conceived, and coherently developed, in the broader context of the multilevel human rights obligations and common constitutional principles accepted by all UN member states (cf. Table 1 above). As an example might serve multilevel economic regulation in Europe, which can be understood only as an integral part of multilevel constitutional systems providing for constitutional rights of citizens and legislative, administrative and judicial institutions designed to protect constitutional rights. The proposed ‘bottom-up multilevel constitutional approach’ to international economic regulation shares the ‘realist premises’ that

- ‘legalism’ has no intrinsic value;
- ‘law cannot control behavior unless legal institutions support it’; and
- without legal institutions – ‘legislatures, enforcers, courts – international law is unavoidably weak’.⁷⁴

Yet, in contrast to the often arbitrary ‘cost-benefit’ justifications of ‘utilitarian arguments’ for ‘efficient violations’ of international law, constitutionalism argues for limiting ‘rule by law’ through constitutional safeguards of ‘rule of law’ across frontiers based on respect for human rights and the legitimate diversity of constitutional democracies. The ‘conflicts law’ and GAL approaches also aim at promoting transnational ‘rule of law’ through fair procedures. But their different private law- and common law-pedigrees avoid human rights and ‘constitutional justice’ as constitutional principles for IEL⁷⁵, for instance on the ground that domestic constitutionalism should remain the primary site for controlling problems of global governance and protecting human rights. Some GAL proponents acknowledge that ‘constructing the accountability of global governance around delegation and control – and thus addressing legitimacy issues through the prism of *domestic* constitutionalism – bears only limited promise.’⁷⁶ For, even if citizens have more trust in and democratic control over domestic governance institutions, the individual influence of most states on global governance institutions remains marginal. For instance, ‘opting-out’ international agreements may entail prohibitive costs like exclusion from the markets of other WTO members.

European integration law illustrates how ‘multilevel constitutional strategies’ of empowering, limiting and complementing multilevel regulatory institutions can enhance individual and democratic self-governance and the problem-solving capacities of governments. Not only national constitutions, but also international treaties constituting, limiting and complementing multilevel governance powers for the collective supply of international public goods differ enormously depending on their respective constituencies and regulatory problems. The empirical interrelationships between diverse criteria of ‘input-legitimacy’ and ‘output-legitimacy’ of international organizations remain contested and offer no universally agreed model for realizing democratic self-governance across borders in order to protect ‘global public goods.’⁷⁷ For instance, the less ‘parliamentary democracy’ can effectively represent and protect all affected interests in transnational regulatory bodies, the stronger may be the need for

⁷⁴ Posner (note 3), at xiv.

⁷⁵ Cf. Petersmann (note 8).

⁷⁶ Krisch (note 56), at 3.

⁷⁷ Cf. D. Held, *Democracy and the Global Order* (Oxford: OUP, 1995); J. Bohman, *Democracy across Borders* (Oxford: OUP, 2007).

compensatory ‘participatory democracy’ and ‘deliberative democracy’ recognizing procedural as well as substantive cosmopolitan rights of all citizens affected by international economic regulation.⁷⁸ Yet, proposals for rights-based democracies remain contested from both libertarian and communitarian perspectives, notably by lawyers in common law countries that deny the ‘indivisibility’ of human liberty rights and constitutional protection of economic liberties subject to their legal ‘balancing’ with all other constitutional rights.⁷⁹ Without ‘countervailing cosmopolitan rights’, the necessary strengthening of global institutions for the collective supply of global public goods risks reinforcing power asymmetries and historical privileges not only among countries (e.g. in the UN Security Council and the Bretton Woods institutions), but also among non-governmental civil society organizations to the benefit of powerful, industrial lobbies.

V. Why Does IEL Fail to Protect Global Public Goods?

Due to their limited ambition to improve the legitimacy and accountability of transnational governance institutions only incrementally without reforming the ‘constitutional failures’ of international law, neither ‘conflicts law’ nor ‘GAL approaches’ offer systemic analyses of the ever more important policy problem of why governments fail to protect ‘global public goods’ effectively. In their evaluation of international rules and adjudication, ‘conflicts law’ and ‘GAL approaches’ tend to focus on ‘state interests’ rather than on the collective interests in more effective protection of human rights and other ‘global public goods’ that are of ever more existential importance in the 21st century. For instance, US proposals for transferring the ‘Chevron doctrine’ in US administrative law (requiring executive and judicial deference vis-à-vis the legislator) to WTO law could undermine the explicit objective of the WTO dispute settlement system to provide ‘security and predictability to the multilateral trading system’.⁸⁰

Why Do Governments Fail to Protect ‘Global Public Goods’ and Prevent the ‘Tragedy of the Commons’?

The climate change crisis and the destruction of biodiversity illustrate the ‘tragedy of unregulated commons’: without appropriate regulation, self-interested individuals, acting independently and rationally, risk depleting shared limited resources even if this is not in anyone’s long-term interest.⁸¹ As overuse of shared ‘common goods’ (like the earth’s atmosphere) and other ‘market failures’ are caused by ‘rational egoism’, the ‘collective action problems’ in protecting ‘common goods’ and ‘public goods’ confirm the need for constitutional regulation mandating individuals and institutions to correct ‘market failures’ and ‘governance failures’ through constitutionally agreed ‘principles of justice’ which, in order to become effective, need to be institutionalized by means of democratic legislation, administrative regulation, judicial remedies and other accountability mechanisms. ‘Governance failures’ in the collective supply of *international* public goods - like transnational rule of law, human rights, an efficient common market, democratic peace and ‘sustainable development’ – are caused by ‘rational egoism’ and harmful ‘externalities’ that can often be ‘internalized’ most effectively by providing adversely affected citizens and states with ‘countervailing rights’ and institutional and

⁷⁸ Cf. Petersmann, From State Sovereignty to the ‘Sovereignty of Citizens’ in the International Relations Law of the EU? in: N. Walker (ed), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003), 145-165

⁷⁹ Cf. R.E. Howard-Hassmann/C.E. Welch (eds), *Economic Rights in Canada and the United States* (Philadelphia: University of Philadelphia Press, 2006).

⁸⁰ Cf. E.U. Petersmann, Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice, in: *JIEL* 10 (2007), 529-552.

⁸¹ The ‘tragedy of the unregulated commons’ was first described by G. Hardin, *The Tragedy of the Commons*, in: *Science* 162 (1968), 1243-1248.

judicial remedies. Inside states, the diverse regulatory solutions to ‘public goods problems’ - such as human rights⁸², regulation like competition rules and permit/sanctions systems, privatization and collective property rights in limited resources – tend to acknowledge this need for actionable rights of individuals such as access to information, participatory decision-making, access to justice and judicial protection of rule of law. At the international level, however, the Westphalian paradigm of ‘international law among sovereign states’ continues to impede cosmopolitan conceptions of IEL and stronger institutions capable of protecting international rule of law and other international ‘public goods’. Without enlisting and empowering individuals, business and civil society in the joint production of public goods, ‘Westphalian top-down approaches’ of UN law – as illustrated by the intergovernmental coordination approach of UN environmental agreements – will continue to fail protecting human rights, rule of law and other, often interrelated international public goods. Like democratic governance, economic and environmental governance based on environmental law principles like ‘polluter pays’, ‘precautionary protection’, ‘sustainable development’, prohibition of transboundary harm and ‘common but differentiated responsibilities’ cannot become effective without rights-based, participatory regulation within a ‘constitutional bottom-up framework’ protecting individual rights, responsibilities and judicial remedies in order to limit ‘governance failures’ in the supply of international public goods.

Modern ‘public choice theory’ emphasizes that the human rationality of the *homo economicus*’ private choices in economic markets within the existing rules may not be different from the rationality of the *homo politicus*’ choices in ‘political markets’ for new rules. Hence, the increasing regulation - at private and public, national and international levels – of transnational economic activities often pursues not only ‘public interests’ like governmental correction of ‘market failures’ and collective supply of public goods. Regulation of economic markets is often ‘simply an instrument (...) which market actors lobby for, deploy, avoid, or simply ignore in the pursuit of their own interests.’⁸³ The inadequate financial market regulation and banking supervision resulting in the financial crisis of 2008, like the powerful lobbying and political opposition against new international regulation (e.g. of ‘hedge funds’ and ‘banking bonuses’), illustrate that banking and company laws often protect business interests more effectively than consumer welfare and ‘shareholder value.’ Similarly, public international trade law continues to be all too often manipulated by producer lobbies and regulators for the benefit of powerful ‘producer interests’ at the expense of consumer welfare, which is nowhere mentioned in WTO law. In 2009, the political opposition - by a Republican minority in the US Senate with support from thousands of industry lobbyists - of health care reform and other legislative proposals for job creation, climate change prevention, banking and financial regulation, and conclusion of trade agreements illustrated the limited ‘problem-solving capacity’ even of the world’s ‘single superpower’ to remedy obvious ‘market failures’ and ‘regulatory failures’. According to former Vice-President Al Gore, ‘the failure by the Senate to pass legislation intended to cap American emissions before the Copenhagen meeting guaranteed that the outcome would fall far short of even the minimum needed to build momentum toward a meaningful solution’.⁸⁴

⁸² The dual nature of human rights – as both ultimate ends (such as recognition and protection of human dignity and human liberty as ‘inalienable’ and ‘indivisible’ human rights) and means to an end (such as civil, political, economic and social human rights as means for protecting human dignity and individual self-realization) – is well reflected in UN human rights law.

⁸³ Cf. J.Black, Empirical Legal Studies in Financial Markets: What Have We Learned? in: LSE Law, Society and Economy Working Papers 4/2010, at 1.

⁸⁴ Cf. Al Gore, We Can’t Wish Away Climate Change, in: International Herald Tribune March 1, 2010, at 8, according to whom the reasons for the heightened opposition to constraints on the use of carbon-based fuels as our principal source of energy are primarily economic: ‘some industries and companies whose business plans are dependent on unrestrained pollution of the atmospheric commons ... are ferociously fighting against the mildest regulation – just as tobacco companies blocked constraints on the marketing of cigarettes for four decades after science confirmed the link of cigarettes to diseases of the lung and the heart.’

Time for a ‘Paradigm-Shift’ in International Economic Regulation?

The collective action problems in supplying ‘global public goods’ – like a mutually beneficial world trading system, international energy security, prevention of climate change, and international rule of law – illustrate the need for citizen-oriented conceptions of IEL in order to promote market-driven incentives for rule-compliance, stakeholder participation, consumer-driven competition, citizen-driven democratic governance and legal and judicial accountability in the supply of international public goods. The universal recognition of ‘inalienable’ human rights justifies interpreting the ‘primary rules’ of conduct and ‘secondary rules’ of recognition, change and adjudication of international law no longer only in terms of rights and obligations of states, but also of their citizens.⁸⁵ Such a ‘paradigm change’ is justified also by the neglected customary law requirement of interpreting international treaties, and settling international disputes, ‘in conformity with the principles of justice and international law’, including human rights – as explicitly recalled in the Vienna Convention on the Law of Treaties (VCLT) and Article 1 of the UN Charter.⁸⁶

All UN member states have acknowledged the need for ‘sustainable development’ focusing no longer one-sidedly on economic growth, but also on protection of the environment and of human rights as normative bases for evaluating ‘human development’. Citizens also share the historical experience that democratic supply of ‘national public goods’ for the benefit of citizens and their human rights has required ‘legal systems’ protecting the legitimacy and effectiveness of ‘rule of law’ by means of five different kinds of rules and institutions: (1) constitutional, (2) legislative, (3) administrative, (4) judicial and (5) international rules and institutions for democratic governance and protection of constitutional rights by means of ‘rule of law.’ Similar to the adoption of national constitutions by almost all UN member states (including a few unwritten ‘common law constitutions’), the collective supply of ‘international public goods’ requires a multilevel ‘constitutional system’ limiting the inevitable ‘collective action problems’ among states and among citizens by international rules and institutions with constitutional, legislative, administrative and judicial functions, in close cooperation with domestic legal systems controlling and implementing international rules at national and sub-national levels. European integration confirms that such ‘multilevel constitutionalism’ integrating the different local, national and international layers of legal, economic and environmental governance is not a utopian fantasy. But it can only succeed by protecting constitutional rights of citizens, rule of law, respect for democratic governance and allocation of powers in conformity with principles of ‘subsidiarity’. Even though multilevel governance for international public goods focuses on functionally limited fields - like on open and mutually beneficial world trading system, international monetary stability and freedom of payments, development assistance for LDCs, protection of the environment -, the horizontal and vertical interrelationships among public goods’, and their dependence on transnational rule of law and ‘human rights coherence’, call for a mutually coherent approach based on multilevel ‘constitutional pluralism.’

⁸⁵ Arguably, Harts’ conception of international law - as stated in the first edition of his ‘Concept of Law’ published in 1961 and repeated in the second 1994 edition - as a mere set of ‘primary rules of obligation’, lacking a unified ‘legal system’ of primary and secondary rules (cf. Hart, note 18, at 214), is no longer justifiable for many areas of modern economic integration law as interpreted and applied by national, European and worldwide jurisdictions and compulsory dispute settlement systems.

⁸⁶ The relevant text in the Preamble of the VCLT - ‘Having in mind the principles of international law embodied in the Charter of the United Nations, such as ...universal respect for, and observance of, human rights and fundamental freedoms for all’ – refers not only to ‘conditions under which justice and respect for the obligations arising from treaties can be maintained’, but also to ‘principles of justice and international law’ in the preceding sub-paragraph. This is in conformity with the recognition in numerous legal systems that human rights constitute not only individual rights, but also corresponding obligations of governments and ‘principles of law’ to be taken into account in legislation, administration and adjudication.

Proposition 3: Need for a ‘paradigm shift’ in interpreting and developing IEL so as to protect global public goods more effectively

- The prevailing conception of IEL as ‘public international law regulating the economy’ lacks legitimacy and effectiveness due to its treatment of citizens as mere objects of international law, its neglect of human rights coherence, and its inadequate protection of global public goods. Proposals for transforming national administrative law principles (like the US Chevron doctrine of judicial deference) into ‘global administrative law’ may lack constitutional justification at the international level.
- The competing conception of IEL as ‘multilevel economic regulation’ (e.g. in trade, investment and environmental agreements) remains too often dominated by industry lobbies to the detriment of general consumer welfare and global public goods (as illustrated by the 2008 financial crisis and its ‘regulatory gaps’, one-sided investor-state arbitration, or prevention of international competition rules by producer lobbies).
- European ‘multilevel constitutionalism’ has protected human rights, consumer welfare, international rule of law and ‘sustainable development’ in the 30 EEA countries more effectively than in other regional regimes. The history of constitutionalism and of governance failures in the collective supply of international public goods suggests that international economic regulation, like other fields of international law, should be conceived from a constitutional perspective as a ‘fourth branch of governance’ that can protect international public goods effectively only in ‘multilevel constitutional systems’ promoting legitimacy and coherence among the local, national, regional and worldwide levels of governance and rights of citizens.
- The increasing recourse to regional ‘economic coalitions of the willing’ must be supplemented by ‘functional coalitions’ for collective supply of international public goods (e.g. countries accepting carbon reduction commitments, emission trading, joint implementation and clean development mechanisms for climate change protection). EU law confirms that such ‘regulatory competition’ can promote higher regulatory standards and public goods without a ‘race to the bottom.’

VI. Need for Cosmopolitan Conceptions of International Regulation of ‘Global Public Goods’?

Ever more international trade, investment, labor and environmental agreements follow the trend in other fields of international law (like human rights law, international criminal law) of recognizing individuals and non-governmental organizations as subjects of legal rights not only under domestic laws but also under international law. As all 192 UN member states have accepted human rights obligations under UN law and have time and again reconfirmed the ‘universal, indivisible, interrelated, interdependent and mutually reinforcing’ nature of human rights⁸⁷, natural persons – rather than juridical persons like states, international organizations and non-governmental organizations (like companies) - have become ‘the primary international legal persons and the primary members of the global constitutional community’.⁸⁸ The principle of state sovereignty ‘has already been relegated to the status of a second-order norm which is derived from and geared towards the protection of basic human rights, needs, interests, and security.’⁸⁹ As ‘everyone has the right to recognition everywhere as a person before the law’ (Article 6 UDHR, Article 16 ICCPR), human rights call for a ‘humanization

⁸⁷ Quoted from UN Resolution 63/116 of 10 December 2008 on ‘the 60th anniversary of the Universal Declaration of Human Rights’ (UN document A/RES/63/116 of 26 February 2009).

⁸⁸ Cf. A. Peters, Membership in the Global Constitutional Community, in: J. Klabbers/A. Peters/G. Ulfstein, *The Constitutionalization of International Law* (Oxford: OUP, 2009), at 157.

⁸⁹ A. Peters, Humanity as the Alpha and Omega of Sovereignty, in: *EJIL* 20 (2009), 513, at 544.

of international law'.⁹⁰ In addition to the rights and duties conferred by international treaties on individuals and legal persons, also general rules of international law may be applicable to non-state actors, including implied powers as derived by international courts from 'the necessities of international life'.⁹¹ Especially in citizen-driven areas of international law like international economic relations where competition, investments, savings, production, trade and consumption are dominated by individuals, citizens and their 'human right to have international rights' must be integrated into the international legal process. Hence, IEL rules should be interpreted for the benefit of citizens as protecting individual rights to democratic participation (at least by 'voice' if not by 'vote') in international economic regulation as well as individual legal and judicial remedies vis-à-vis economic regulation.⁹² As in consumer-driven competition and common market rules inside constitutional democracies, citizens must be legally recognized and constitutionally protected as primary legal subjects also in their *transnational* division of labor and economic cooperation across national frontiers. Customary international law requires interpreting treaties and settling international disputes 'in conformity with principles of justice' and human rights – as explicitly recalled in Article 1 of the UN Charter, in the Preamble of the VCLT, as well as in the jurisprudence of international courts regarding legal and social responsibilities of non-governmental organizations.

In Europe, citizen-oriented, rights-based conception of IEL have proven to be a constitutional precondition for reducing the collective action problems in protecting human rights, democratic peace, a common market, rule of law and sustainable development across the 30 member states of the EEA. These European experiences are relevant also for protecting human rights, rule of law and protection of the environment beyond Europe. The continuing 'global warming' illustrates not only the urgency of overcoming the false dichotomy of the international economy, the environment and constitutional democracy. As international 'market failures', pollution of the environment and 'governance failures' are caused by individual conduct of citizens and politicians, the necessary protection of 'sustainable development' calls for additional 'constitutional restraints' protecting and promoting 'public reason' as defined by human and constitutional rights of citizens more effectively beyond state borders in order to enhance stakeholder-participation, legitimacy and effectiveness in international rule-making and rule-enforcement. As it is citizens who produce and consume goods and services, invest their savings, pollute the environment, compete in economic markets and shape democratic governance, citizens must be recognized as legal subjects and 'democratic owners' also of IEL with individual rights to challenge harmful governance restrictions, restrictive business practices and environmental pollution in courts of justice. Discretionary governance powers to restrict mutually beneficial trade, distort competition among citizens, and permit adverse environmental pollution run counter not only to welfare economics (focusing on market-driven decision-making) and 'public choice economics' (focusing on political decision-making processes), but also to the constitutional mandates of governments to promote human welfare by protecting human rights.

In order to protect citizens more effectively against abuses of foreign policy powers, the rules and institutions of IEL must be designed no longer only as 'international law among states' (as in the United Nations and UN Specialized Agencies) but also as 'cosmopolitan law among individuals' and 'international law among peoples' (as in European economic law). Human rights require conceiving markets no longer as neutral arenas for private competition and self-regulation but rather as 'constitutional constructs'. As in the common market governed by EU law, protection of general consumer welfare, of non-discriminatory conditions of competition and of 'sustainable development'

⁹⁰ Cf. T. Meron, *The Humanization of International Law* (Oxford: OUP, 2006).

⁹¹ Cf. F. Green, *Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality*, in: *Melbourne Journal of International Law* 9 (2008), 47 ff.

⁹² On the long-standing international law traditions of recognizing individuals as legal subjects of international law see: Peters (note 88), at 158 ff; J.E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (Oxford: OUP, 2004).

depend also on empowering citizens and their constitutional rights in a multilevel legal framework providing for constitutional, legislative, administrative and judicial protection of equal citizen rights and common interests of citizens. The extension of the EU's common market to EFTA countries by means of EEA law and bilateral free trade agreements (e.g. with Switzerland) illustrates the potential diversity of legitimate rules and institutions for realizing agreed policy objectives. The legal and institutional choices necessary for transforming IEL into a more effective instrument for protecting international public goods depend not only on economic and political efficiency arguments as explained by welfare economics, public choice theory and comparative institutional analyses⁹³, but also on international agreement on 'overlapping principles of justice' and their multilevel constitutional, legislative, administrative and judicial protection.

Proposition 4: Collective supply of public goods requires a multilevel constitutional framework institutionalizing human rights and cosmopolitan 'public reason'

- Just as citizens in all states have found it necessary to establish (un)written constitutions for democratic supply of national public goods, so do transnational 'collective action problems' require 'constitutional principles of justice' and their protection by transnational rule-making, multilevel administration and judicial protection of Rule of Law. European law illustrates the legitimate diversity of competing 'treaty constitutions' (like the ECHR, the EU and EEA treaties) and the need for respecting 'constitutional pluralism.'
- The need for 'multilevel constitutionalism' is confirmed by the 'composite nature' of international public goods like human rights, Rule of Law and sustainable development, whose international protection must build on their local and national protection in conformity with 'principles of subsidiarity'. National and cosmopolitan constitutionalism may be perceived as complementary floors of 'constitutional houses' protecting citizens.
- The 'discourse failures' inside states underlying harmful 'transnational externalities' require 'institutionalized leadership' for promoting 'global public reason' and global public goods (eg independent institutions for monitoring, assessment, early warning, coordination and for legislative proposals concerning international public goods following the example of the EU Commission as guardian of 'community interests'). National democracy must be supplemented by transnational 'deliberative democracy' and rights-based 'participatory democracy' in order to promote democratic support for international public goods and limit 'xenophobic populism'.
- Human rights and other 'cosmopolitan principles of justice' require co-financing of international public goods and of 'coalitions of the willing' in order to promote 'capacity building' (e.g. based on the principle of 'common but differentiated responsibilities') and social 'solidarity on the ground'.
- The Rule of Law necessary for the collective supply of international public goods requires multilevel judicial protection not only at the discretion of the rulers, but for the benefit of citizens based on coherent 'principles of justice' (such as individual access to justice, 'judicial comity', 'human rights coherence').

⁹³ Cf. N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Chicago: University of Chicago Press 1994); idem, *Law's Limit: The Rule of Law and the Supply and Demand of Rights* (Cambridge: Cambridge University Press 2001).

