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INTERNATIONAL ECONOMIC LAW AND 'PUBLIC REASON':  
WHY DO GOVERNMENTS FAIL TO PROTECT  
INTERNATIONAL PUBLIC GOODS MORE EFFECTIVELY?

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## **Abstract**

Is the ineffective protection of international public goods (like an efficient world trading and financial system), and thereby also of interrelated national public goods (like a common market undistorted by anti-dumping laws and other border discrimination), the inevitable fate of humanity? The negative answer to this question in *Section I* argues that the ineffective protection of international public goods is mainly due to lack of adequate theories, rules and institutions for overcoming the ‘collective action problems’ in the multilevel governance of interdependent public goods. *Section II* reviews the competing conceptions of ‘international economic law’ (IEL) such as public international law approaches, multilevel economic law approaches, ‘global administrative law’ approaches, ‘conflicts law approaches’ and ‘multilevel constitutional approaches’. *Section III* argues that – similar to the experience of all democracies that ‘national public goods’ can be supplied only in a framework of constitutional, legislative, administrative and judicial rules and procedures supported by domestic citizens – the multilevel governance of ‘international public goods’ requires a multilevel constitutional framework for multilevel rule-making and judicial protection of rule of law and constitutional rights accepted and supported by domestic citizens as ‘primary’ legal subjects of IEL and of a citizen-driven, worldwide division of labour. *Section IV* concludes that multilevel governance for protecting the national self-interest in international public goods must no longer be designed only as ‘foreign policy’, but rather as an ever more important part of ‘multilevel constitutionalism’ for the protection of essential citizen interests. Rather than relying on hierarchical claims (e.g. regarding national primacy of state sovereignty, international primacy of international law over domestic law), the diverse national and international legal regimes must be coordinated with due respect for ‘constitutional pluralism’, ‘deliberative democracy’, ‘balancing’ of competing rights and values, and international duties of cooperation (e.g. among national and international courts of justice). ‘Westphalian conceptions’ of international law as an instrument for advancing national interests in an anarchic world remain important for protecting ‘national public goods’ (like national security). Yet, as illustrated by the diverse forms of European law (such as EC, EU, EEA law and the ECHR), more effective protection of interdependent (inter)national public goods requires new forms of multilevel governance and of multilevel constitutional restraints limiting the ‘collective action problems’ in transforming national into international public goods (e.g. protection of common markets and the environment).

## **Keywords**

Constitutional pluralism; ECJ; economic law; EEA; EU law; global administrative law; human rights; international economic law; multilevel governance; public goods; rule of law.





## Introduction

### Rationality Vs 'Public Reason' in International Economic Regulation of Public Goods

Why do governments fail to protect international public goods – like an efficient world trading, financial and development system, protection of the global environment and transnational rule of law - more effectively? How can the ubiquity of conflicts between individual rationality and 'public reason' in international economic regulation – as illustrated by the governance failures to conclude the 'Doha Development Round' negotiations in the World Trade Organization (WTO) since 2001, to prevent the international financial crisis since 2008 and climate change – been overcome? What are the interrelationships between 'market failures', 'governance failures' and public 'discourse failures' caused by 'rational ignorance' of individuals towards, e.g., the systemic risks from tobacco consumption, climate change and complex financial instruments? Why do worldwide organizations continue disregarding the historical experience of European legal systems that collective supply of interrelated, national and international public goods<sup>1</sup> requires more coherent 'constitutional approaches' to the regulation of multilevel governance so as to hold governments and non-governmental actors more accountable towards citizens as the ultimate source of democratic legitimacy? This paper begins exploring these policy questions by recalling two basic 'constitutional problems' of intergovernmental regulation: The pursuit of 'justice' and 'public reason' governing national regulation of 'public goods' remains deeply contested in international relations. Hence, virtually all governments give priority to protecting *national* rather than international public goods even if intergovernmental 'Westphalian power politics' adversely affects national public goods, for instance due to the trade-distorting and welfare-reducing effects of trade protectionism, currency manipulations, environmental pollution, nuclear proliferation and international terrorism.

### *Justice and 'Public Reason' in IEL Remain Deeply Contested in International Law*

Since the beginnings of written history, religious, moral and constitutional principles and legislation continue to dynamically evolve in order to limit the ubiquitous conflicts between human rationality and reasonableness by commitments to principles of justice. Whereas 'enlightened' religions and morality may leave such self-commitments to individual reason and freedom of conscience, legal systems reflect, promote and depend on 'public reason'.<sup>2</sup> The founding father of liberal economics, Adam Smith, justified his 'system of natural liberty' for a mutually beneficial division of labour on considerations of both economic welfare and justice: 'Justice is the main pillar that upholds the whole edifice. If it is removed, the immense fabric of human society ... must in a moment crumble into atoms'<sup>3</sup> Modern constitutional democracies and the law of the European Union (EU) rest on similar constitutional insights that voluntary cooperation among free citizens can be maintained over time only if constitutionally agreed 'principles of justice' remain protected in legislation, administration, adjudication and supported by citizens. Does the unnecessary poverty and lack of secure access of some 2 billion peoples to water, food, essential medicines, rule of law and protection of human rights

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<sup>1</sup> On the defining characteristics of 'public goods' (like their non-excludable and non-rivalrous use benefiting all citizens) see: I. Kaul/I. Grunberg/M.A. Stern (eds), *Global Public Goods. International Cooperation in the 21<sup>st</sup> Century* (Oxford: OUP, 1999).

<sup>2</sup> On the Kantian distinction between rationality and reasonableness, and the constitutional insight that legislation, administration and adjudication must be justifiable and constitutionally restrained by 'principles of justice' and 'public reason', see: J. Rawls, *Political Liberalism* (Cambridge: Harvard University Press, 1993).

<sup>3</sup> A. Smith, *The Theory of Moral Sentiments* (Oxford: Clarendon Press, 1759/1976), at 167.

prove the lack of legitimacy of IEL, as claimed by many governments, citizens and philosophers? Does the destruction by the 2008 financial crisis of private savings and investments worth trillions of US dollars prove systemic failures of IEL to supply international ‘public goods’ more effectively?

Arguably, modern IEL reflects basic ‘principles of justice’ which, like all comprehensive theories of justice, remain inevitably contested among citizens and governments with often conflicting self-interests and value preferences.<sup>4</sup> For instance:

- The regional ‘market freedoms’ (e.g. in EU law) and worldwide liberalization of market access for movements of goods, services, persons, capital and related payments may be justified not only on utilitarian grounds<sup>5</sup>, but also as imperfect, cosmopolitan extensions of Rawls’ ‘first principle of justice’, defined in terms of equal rights of citizens to ‘the most extensive total system of equal basic liberties compatible with a similar system of liberty for all’.<sup>6</sup>
- The worldwide and regional rules on preferential treatment of less-developed countries (e.g. by means of non-reciprocal tariff preferences, financial and technical assistance, ‘trade facilitation’ and capacity-building), human and social rights can be interpreted as an international extension of Rawls’ ‘second principle of justice’ calling for differential treatment of the poor.
- The ‘general exceptions’ and numerous safeguard clauses in worldwide and regional economic agreements can be construed as reflecting the Rawlsian claim that, as national welfare depends more on a country’s social institutions than on its natural resources, each people can and should agree on social and constitutional arrangements that provide its citizens with the natural and social goods essential for satisfying basic needs.<sup>7</sup>
- The ever more comprehensive compulsory jurisdiction of national and international courts for protecting rule of law in international economic cooperation, and the customary law requirement of interpreting international treaties and settling related disputes ‘in conformity with principles of justice’ and the human rights obligations of states, can be seen as protecting ‘constitutional justice’ (e.g. in the sense of access to independent ‘courts of justice’) as one of the oldest paradigms of legal systems.<sup>8</sup>

The universal recognition of human rights and the increasing dependence of citizens’ welfare on globalization and collective supply of international ‘public goods’ challenge traditional claims that national law and international law must remain based on categorically different kinds of public reason

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<sup>4</sup> Cf. E.U. Petersmann, *International Economic Law in the 21<sup>st</sup> Century: Human Rights, Constitutional Pluralism and Global Public Goods* (Oxford: Hart Publishing, 2011), chapter VI. On T.Pogge’s moral criticism of IEL and Pogge’s disregard for basic principles of international law see: R.Howse/R.Teitel, *Global Justice, Poverty and the International Economic Order*, in: S.Besson/J.Tasioulas, (eds), *The Philosophy of International Law* (Oxford: OUP, 2010), 437-449.

<sup>5</sup> On utilitarian Anglo-Saxon theories of ‘justice as efficiency’ see: R.Posner, *Economic Analysis of Law* (Boston: Little Brown, 2<sup>nd</sup> ed., 1977), at 10: ‘Efficiency means exploiting resources in such a way that “value” – human satisfaction as measured by aggregate consumer willingness to pay – is maximized’.

<sup>6</sup> J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), at 250.

<sup>7</sup> See J.Rawls, *Law of Peoples* (Cambridge: Harvard University Press, 1999), at 37-38, 106-120 (‘the crucial element in how a country fares is its political culture – its members’ political and civic virtues – and not the level of its resources’, at 117). Petersmann (note 4) calls this the ‘democratic, social responsibility principle’ and infers from this – and other ‘constitutional principles’ (like respect for human dignity in the sense of individual autonomy and responsibility) the need for a rights-based regulation of international economic cooperation among citizens at national and international levels.

<sup>8</sup> Cf. E.U. Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, in: *EJIL* 19 (2008), 769-798.

(e.g. citizen-oriented democratic legislation vs inter-state rules).<sup>9</sup> Notably advocates of human rights and of 'global public goods' argue in favour of cosmopolitan conceptions of international law, at least in relations among constitutional democracies. Whereas international trade liberalization can be justified in terms of welfare economics and protection of human rights, the longstanding traditions of trade protection and other kinds of discrimination against foreign goods, services, 'foreigners' and less-developed countries are often driven by non-transparent forms of power politics for the benefit of domestic 'rent-seeking interest group' at the expense of general consumer welfare. The European common market rules, for example their replacement of protectionist anti-dumping laws by welfare-maximizing competition rules among the 30 member countries of the European Economic Area (EEA), confirm the constitutional insight that – within a reasonable framework of rules and institutions – power politics can be legally transformed for the benefit of citizens not only inside states, but also in international relations among states which, for centuries, had engaged in wars and mutually harmful protectionism. Yet, constitutional democracies like Australia, Canada and the USA (i.e. the GATT member countries which proposed and most frequently used GATT anti-dumping rules during GATT 1947) claim that also WTO anti-dumping rules are justifiable on grounds of 'fair trade' and domestic politics.<sup>10</sup> Can the 'rational addiction' of US congressmen to using antidumping laws for 'buying political support' by means of non-transparent redistribution of domestic income to powerful lobbies and domestic constituencies be overcome through international agreements?

### ***Democracies Prioritize National over International Public Goods***

Apart from the conflicts among individual rationality and reasonableness in economic regulation, the neglect for 'international public goods' in intergovernmental cooperation is also due to the fact that most states continue using international law as an instrument for advancing *national* interests and *national* rather than international public goods. European integration has demonstrated that inter-state treaties – like those establishing the EU, the EEA and the European Convention on Human Rights (ECHR) - can be successfully transformed into 'multilevel constitutional systems' protecting international public goods (like a common market among the 30 EEA member states, transnational rule of law, protection of human rights, 'democratic peace' and social welfare for the benefit of 500 million EU citizens. Outside Europe, however, most states continue insisting on 'state sovereignty'). The failure of the US Congress to renew trade legislation mandating conclusion of the Doha Development Round negotiations, and to adopt environmental legislation for US leadership on prevention of climate change, reflects the prioritization of regulating *national* public goods (e.g. the 2009 congressional legislation on health protection, the 2010 Dodd-Frank legislation on reforming the financial system). As *international* public goods (like transnational rule of law, international financial and energy security) are composed of, and dependent on, national public goods, prioritization of national public goods is morally justifiable and democratically inevitable. Yet, protection of national public goods often remains incomplete without simultaneous protection of international public goods (e.g. providing for reciprocal elimination of border discrimination and transnational pollution undermining national public goods). The often contested demarcation between national and international public goods is illustrated by the claims of US congressmen that antidumping laws, regardless of their contested economic justifiability and *de facto* use as a selective safeguard clause for

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<sup>9</sup> Rawls' moral justification of the different 'public reason' underlying national and international law (cf. note 7) is challenged notably by human rights advocates. According to Rawls, 'the idea of public reason specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government's relationship to its citizens and their relations to one another' (at p.132). Even though former UN Secretary-General K. Annan convincingly claimed that 'the poor are poor not because of too much globalization, but because of too little' (UN doc. SG/SM/7411 of 22 May 2000), the prevailing 'public reason' in many countries does not (yet) support global economic integration.

<sup>10</sup> Most economists and lawyers agree today that most antidumping practices cannot be justified on grounds of welfare economics.

protecting import-competing US producers, are a necessary political condition for the democratic approval of US participation in the WTO world trading system. In most national parliaments, protecting social justice at home is a political precondition for supporting additional international trade liberalization and regulation.

***‘Constructive Internationalism’ Requires New Kinds of ‘Public Reason’***

If the creation of a liberal trading, financial and development system in the 1940s was a ‘political miracle’ due to the postwar US leadership for ‘constructive internationalism’<sup>11</sup>: What does the failure of US leadership for further trade liberalization in the WTO and prevention of climate change, like the failure of EU leadership for WTO competition and environmental rules, tell us about prospects for extending legal protection of national public goods to international relations? If the worldwide adoption of national constitutions is based on the insight that the ubiquity of conflicts between individual rationality and reasonableness requires constitutional protection of ‘public reason’: why has ‘multilevel constitutionalism’ for the protection of international public goods been effectively applied in various European treaty regimes (like the EC, EU and EEA treaties and the ECHR) but hardly beyond Europe? Why are domestic economic and constitutional reforms (e.g. of welfare-reducing border discrimination) so often politically feasible only on the basis of reciprocal agreements rather than unilaterally?<sup>12</sup> Will such multilateral agreements – similar to the UN Charter prohibitions of certain abuses of colonial and imperial power politics – be politically acceptable only after the application of welfare-reducing power politics (e.g. based on anti-dumping laws) by ever more countries render their harmful effects and lack of ‘public reason’ obvious for everyone? Why have multilateral economic agreements (like the EU and WTO agreements) been of crucial importance for promoting *non-economic* public goods like rule of law, peaceful settlement of disputes and the transformation of the EEC Treaty into the most effective European peace treaty of all times?<sup>13</sup> Why is the legal and dispute settlement system of the WTO of ‘constitutional importance’ also for the collective supply of so many other ‘overlapping international public goods’ like international food, energy and financial security and prevention of climate change?

This paper argues that - rather than hoping for ‘political miracles’ that were possible in the unique context of postwar US leadership for adopting the UN Charter, the 1944 Bretton Woods agreements, GATT 1947 and the 1948 Universal Declaration of Human Rights - ‘constructive internationalism’ requires extending the ‘cosmopolitan public reason’ underlying the universal commitment to human rights and national constitutions to the law of worldwide organizations for the collective supply of international public goods. Just as adoption of the US Constitution was preceded by promotion of a new kind of constitutional ‘public reason’ (e.g. as explained and discussed in the ‘Federalist Papers’) persuading citizens of the need for federal constitutionalism for supplying public goods, responsible governments and reasonable citizens need to engage much more in public deliberation on legal and political strategies for overcoming the ‘collective action problems’ in IEL and the supply of

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<sup>11</sup> Cf. R.Gardner, *The Bretton Woods-GATT System After Sixty-Five Years: A Balance Sheet of Success and Failure*, in: *Columbia Journal of Transnational Law* 47 (2008), 31-71, at 33.

<sup>12</sup> On such ‘constitutional functions’ of IEL see: E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland* (Fribourg: Fribourg University Press, 1991; Chinese translation published in 2004 by Higher Education Press, 600 pages).

<sup>13</sup> The conference book edited by P.Ala’l/T.Broude/C.Picker, *Trade as Guarantor of Peace, Liberty and Security?* (ASIL 2006) focuses on the effects of trade and economic integration on the emergence of wars and armed conflict and the development of international economic law as a positive tool in promoting peace. The role of commerce as a driver not only of ‘sociability’ and norm-structured interactions, but also of colonialism and imperialism was already discussed by the founding fathers of the Westphalian system of ‘international law among states’ like Grotius, Hobbes and Pufendorf, cf.: B.Kingsbury/B.Straumann, *State of Nature versus Commercial Sociability as the Basis of International Law*, in: S.Besson/J.Tasioulas (note 4), 33-52.

international public goods. The perennial conflicts between rational egoism and limited reasonableness of individuals, and their frequently 'rational ignorance' *vis-à-vis* alleged harmful externalities resulting from complex economic, environmental and political processes (like the impact of tobacco smoking and climate change on individual welfare), often entail 'discourse failures' that need to be limited by 'public reason'. This paper argues that the interrelated 'domestic globalization agenda'<sup>14</sup> (e.g. for promoting domestic adjustment assistance and political support for import competition) and 'transnational globalization agenda' (e.g. for constituting and limiting multilevel governance) depend on mutually coherent, constitutional justifications supported by domestic citizens and parliaments. Demonstrating the national interest in the collective, common interest is a necessary precondition for preparing common action at national and international levels for the supply of international public goods.

## **I. 'Collective Action Problems' and 'Governance Failures' in Protecting 'International Public Goods'**

The traditional 'Westphalian conception' of international law focuses on states as primary subjects of international law and on reciprocally agreed rules of international law as instruments for advancing 'national interests' as defined by national rulers. State sovereignty was understood in terms of internal autonomy and external freedom to decide on how the rulers defined 'state interests' and the collective supply of national 'public goods'. This power-oriented 'Westphalian conception' of international law continues to dominate the foreign policies of most governments outside Europe and their international law practices. Most international lawyers and 'political realists' outside Europe justify this conception on the ground that, *inter alia*,

- the reality of international power politics requires governments to focus on 'state interests' rather than on utopian 'international community interests';
- self-interested, rational citizens will not support cosmopolitan or supra-national forms of 'world governance' for the collective supply of international public goods; and
- 'rule of international law' may be neither legitimate nor in the national interest.<sup>15</sup>

### ***'Collective Action Problems' Can Be Overcome by International Law and Institutions***

The effective supply of international public goods in the framework of the diverse forms of European integration law – e.g. in the European Communities (EC) prior to the entry into force of the Lisbon Treaty in December 2009, in the EU as designed by the Lisbon Treaty, in the EEA and in the ECHR – empirically refutes the above-mentioned claims that the anarchical structures of international relations make collective supply of international public goods legally and politically impossible.<sup>16</sup> As globalization renders international public goods ever more important for the welfare of citizens, responsible governments and reasonable citizens should no longer disregard this European experience that international rules, procedures and institutions *can* be designed in legitimately diverse ways enabling governments and citizens to overcome 'collective action problems' in protecting international public goods more effectively. Yet, rather than emulating the European forms of regional integration law which responded to particular European problems and legal traditions, UN member states may have to explore new forms of multilevel governance in the context of worldwide and regional organizations for more effective supply of international public goods.

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<sup>14</sup> Gardner (note 11), at 63.

<sup>15</sup> Cf. J.L. Goldsmith/E.A. Posner, *The Limits of International Law* (Oxford: OUP, 2005).

<sup>16</sup> Cf. Petersmann (note 4).

### ***Regulatory Challenges of the Five Main 'Collective Action Problems' in Multilevel Governance of Interdependent Public Goods***

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.<sup>17</sup> 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 legal restraints of 'market failures' and 'governance failures' on the basis of constitutionally agreed 'principles of justice' that must become an integral part of the legal order by means of democratic legislation, administrative regulation, judicial remedies, private self-regulation and other accountability mechanisms. 'Governance failures' in the collective supply of international public goods - like transnational rule of law, human rights, a mutually beneficial common market, democratic peace and 'sustainable development' – likewise require constitutional and legislative restraints on 'rational egoism'; their harmful 'externalities' can often be 'internalized' most effectively by providing adversely affected citizens and states with 'countervailing rights' and institutional and judicial remedies.

Inside states, the constitutional and legislative rules and institutions for the collective supply of 'public goods' - such as constitutional protection of human rights, common markets and competition rules, permit/sanctions systems, privatization, or collective property rights in limited resources – tend to acknowledge this need for actionable rights of individuals like access to information, participatory decision-making, access to justice and judicial protection of rule of law. At the international level, Westphalian conceptions of 'international law among sovereign states' oppose citizen-/rights-based conceptions of IEL and stronger institutions capable of protecting international rule of law and other international 'public goods'. Without more coherent regulatory approaches enlisting and empowering not only governments, but also individuals, business and civil society in the joint production of public goods, 'Westphalian top-down approaches' of UN law – as illustrated by the failures of the intergovernmental coordination approach of the United Nations Environmental Program – will continue to fail protecting human rights, rule of law and international public goods. Also environmental law principles like 'polluter pays', 'precautionary protection', 'sustainable development', prohibition of transboundary harm, and 'common but differentiated responsibilities' can hardly become effective without rights-based, participatory regulation within a 'constitutional bottom-up framework' limiting 'governance failures' and protecting international public goods for the benefit of citizens.

Collective supply of global public goods has become the most challenging foreign policy problem of the 21<sup>st</sup> century. The history of European integration confirms that collective supply of international public goods requires rules, institutions and governance mechanisms going beyond those of the Westphalian system of 'international law among sovereign states', including also the post-war economic 'Washington consensus' and 'Washington security doctrine'. Collective supply of global public goods depends on rules and institutions limiting the five main 'collective action problems' impeding supply of international public goods:

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<sup>17</sup> The 'tragedy of the unregulated commons' was first described by G. Hardin, *The Tragedy of the Commons*, in: *Science* 162 (1968), 1243-1248. Using the example of a common pasture shared by local herders, Hardin explained the long-term degradation of the pasture by the unequal division of costs and benefits: the individual herder gains all the short-term advantages from adding additional animals, but the long-term disadvantage from overuse of the pasture is shared among all herders unless they can agree on 'enclosure' and privatization of commons.

- The *jurisdictional gap*, i.e. the incapacity of every state to provide global public goods without international cooperation, requires new forms of multilevel governance in international organizations with limited, international jurisdiction.
- The *governance gap*, i.e. the inability of most intergovernmental organizations to regulate and govern the collective supply of international public goods effectively, requires new forms of multilateral, multilevel rules with limited constitutional, legislative, administrative and judicial functions. The existing forms of intergovernmental rule-making at worldwide levels tend to lack adequate rules and institutions for multilevel governance of interdependent public goods in ways that are supported by domestic citizens as 'just' (e.g. legally and democratically justified).
- The *incentive gap*, i.e. the inherent temptation of free-riding in the collective supply of international public goods - whose consumption is by definition 'non-excludable' and 'non-rivalrous' - requires common, but differentiated responsibilities not only among states but also for civil society and business. Examples include financial incentives for poor countries that provide transnational environmental services by protecting tropical forests that are of global importance for bio-diversity and carbon-reduction. Consensus-based WTO negotiations lack adequate financial and other incentives for less-developed WTO members (e.g. in terms of capacity-building, trade facilitation) to participate in and support new WTO rules limiting market failures (e.g. by means of WTO competition and environmental rules) and protecting global public goods (e.g. in terms of promoting international food and energy security). Rules must be justifiable - at all levels of multilevel governance - in terms of satisfying the reasonable interests of all affected citizens and governments. Multilevel regulation of citizen-driven market competition should provide for stronger participation rights and legal remedies (e.g. empowering citizens to enforce international trade, competition and investment rules in domestic courts against arbitrary violations of the rule of law).
- The *participation gap*, i.e. the need for inclusive consensus-building and worldwide participation, requires leadership, incentives and financial assistance for 'capacity building' by 'coalitions of the willing' so that all relevant public and private actors cooperate in the collective supply of global public goods. Citizen-driven economic and environmental systems cannot function legitimately and effectively without rights of all affected citizens to participate in multilevel decision-making and have recourse to legal and judicial remedies against unjustified restrictions of individual rights and market distortions.
- The *rule-of-law-gap* results from the inevitable *legal fragmentation* among hundreds of national, international and transnational legal regimes interacting in the supply of global public goods. Legal predictability, rule of law and legal protection of legitimately diverse conceptions of justice, human rights and 'constitutional pluralism' are essential for the collective supply of global public goods. Transnational rule of law must be promoted by recognizing, 'balancing' and reconciling competing rights and constitutional claims on the basis of common constitutional principles, like the human rights obligations of all 192 UN member states; the legitimate diversity of national constitutional traditions and democratic preferences must be respected. As inter-state rules may lack democratic legitimacy and may unduly restrict individual rights, transnational 'rule of law' - as a constitutional, jurisdictional and judicial restraint protecting equal individual rights against abuses of 'rule by law' - may require and justify departures from 'rule of international law'.

### **'Public Choice' Problems in the Supply of Global 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 national and international 'public interests' like governmental correction of 'market failures' and collective supply of public goods. Economic regulation (e.g. of financial markets) is often 'simply an instrument (...) which market actors lobby for, deploy, avoid, or simply ignore in the pursuit of their own interests.'<sup>18</sup> The inadequate financial market regulation and supervision resulting in the financial crisis of 2008, like the powerful lobbying and political opposition against new international regulation of 'hedge funds' and 'banking bonuses', illustrated 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 2009/2010, the political opposition to Congressional mandates for concluding the Doha Development Round negotiations and an environmental agreement on preventing climate change 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'... 'Global political paralysis has thus far stymied work not only on climate, but on trade and other pressing issues that require coordinated international action.'<sup>19</sup>

Adam Smith discovered already during the 18th century that - within an appropriate structure of 'laws and institutions' - the pursuit of individual interests can further the interests of others without requiring individual agents to understand the overall structure of the regulatory system. Why then do citizens and governments fail to agree on such 'laws and institutions' transforming the current economic, environmental, food and poverty crises into mutually beneficial cooperation? Why - in spite of many years of preparatory work and of international negotiations - do governments fail to conclude the Doha Development Round negotiations in the WTO and the worldwide negotiations on a Kyoto II Protocol on climate change prevention? Can IEL prevent or resolve the ubiquitous conflicts between private self-interests and 'public interests' in international markets without additional 'constitutional safeguards' like judicial protection of rule of law and of individual rights which have proven to be indispensable for peaceful and mutually beneficial cooperation among citizens inside constitutional democracies? Is the reality of national and international governance failures in the collective supply of global public goods the inevitable consequence of the 'Westphalian public international law ideology' of benevolent governments maximizing 'state interests' without recognizing citizens as legal subjects and 'democratic owners' of international law?

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<sup>18</sup> 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.

<sup>19</sup> 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.'



### ***Need for a 'Paradigm Change' in Multilevel Economic and Environmental Regulation***

Many IEL rules refer, e.g., to the 'multilateral trading system' (Preamble of the WTO Agreement) and 'dispute settlement system' (WTO Dispute Settlement Understanding) without specifying the systemic, legal relationships between the private and public, national and international actors in international economic cooperation. 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<sup>20</sup>, 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 influenced by their respective normative and legal premises.

My publications have argued long since in favour of a 'cosmopolitan paradigm' in IEL - similar to the citizen-oriented paradigm shift in European economic law based on bottom-up 'multilevel constitutionalism' – in order to protect human rights, constitutional and other rights of citizens more effectively in international economic regulation: Multilevel governance for protecting the national self-interest in extending national public goods (like a common market) across frontiers must no longer be perceived only in terms of 'foreign policies' but also as an ever more important part of protecting domestic citizen interests by means of 'multilevel constitutionalism'.<sup>21</sup> The following Section II explains why a citizen-oriented, rights-based conception of IEL is a constitutional precondition for reducing the collective action problems in global economic and environmental governance in order to supply international public goods more effectively. The continuing 'global warming pollution' illustrates not only the urgency of overcoming the false dichotomy of the international economy, the environment and constitutional democracy. As international 'market failures' (like pollution of the environment) and 'governance failures' are caused by selfish conduct of citizens and politicians, the necessary protection of 'sustainable development' calls for additional 'constitutional protection' of individual rights. 'Public reason' - as defined by human rights, constitutional and legislative rights of citizens, 'rule of law' and 'deliberative democracy' - must be protected 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 – as subjects of human rights – are responsible for democratic governance, citizens must be recognized as 'primary legal subjects' and 'democratic owners' also of IEL with individual rights and responsibilities to challenge harmful 'market failures' as well as 'governance failures'. Discretionary foreign policy powers to restrict mutually beneficial trade, distort competition among citizens, and permit adverse environmental pollution run counter not only to welfare economics and basic principles of justice, but also to the constitutional mandates of governments to promote consumer welfare and 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 UN law and UN Specialized Agencies) but also as 'cosmopolitan law among individuals' and 'international law among peoples' (as in European economic and human rights law). Human rights require overcoming Anglo-Saxon conceptions of markets as neutral arenas for private competition in 'private law societies' governed by common law. Non-discriminatory competition is a 'constitutional construct' which – as in the common markets

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<sup>20</sup> On law as a union of 'primary rules' of conduct and 'secondary rules' of recognition, change and adjudication see: H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 2<sup>nd</sup> ed. 1994), chapter V.

<sup>21</sup> Cf. Petersmann (note 4).

governed by EU law and federal constitutions – can protect general consumer welfare, ‘sustainable development’ and human rights only in a multilevel legal framework providing for constitutional, legislative, administrative and judicial protection of equal citizen rights, undistorted competition and other common interests of citizens.

The main proposition of this paper is that – just as collective supply of private and public goods inside constitutional democracies depends on consumer-driven competition and citizen-driven governance within a constitutional framework limiting legislation, administration and adjudication by constitutional rights of citizens – the collective supply of international public goods depends on stronger constitutional restraints on multilevel regulation, administration and judicial settlement of transnational disputes for the benefit of citizens and their constitutional rights. The importance of international rule of law and of the WTO legal and world trading system for the collective supply of many other global public goods - like international food security, energy security and climate change prevention – illustrates the systemic interdependence of ‘overlapping public goods’, which remain composed of national public goods and often cannot be effectively regulated without taking into account their functional interrelationships (e.g. between the international payments, monetary and trading system, food, energy and environmental security). Promoting stronger ‘constitutional legitimacy’ of IEL raises numerous controversial questions on which citizens and governments often legitimately disagree. For instance, do individual ‘market freedoms’ have constitutional foundations (e.g. in constitutional freedoms of expression, profession, property and other human and labour rights) with corresponding constitutional obligations limiting governmental restrictions and collective exercises of market freedoms (e.g. by corporate obligations to respect and protect human rights in the exercise of private economic power)? How to define the limits of ‘reasonable disagreement’ among citizens and of ‘constitutional pluralism’ reflecting diverse conceptions of human rights and of democratic self-governance? Is it appropriate for WTO law and other worldwide agreements to leave the answers to such controversial questions to individual governments, ‘deliberative democracy’ and ‘courts of justice’ whenever they have to reconcile and ‘balance’ conflicting constitutional claims?

## II. Competing Conceptions of International Economic Law

The state-centered ‘Westphalian conception’ of international law, which emerged from the power struggles against the Church, the Holy Roman Empire and colonialism in support of a new system of states with ‘sovereign equality’ (Article 2 UN Charter), continues to dominate UN law in spite of 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. The history of constitutional democracies and of European law confirms that judicial interpretation (e.g. of judicial powers to interpret constitutional rules, review and annul legislation, protect individual rights) is of crucial importance for the systemic evolution of legal systems. Textbooks on IEL tend to describe and analyze the systemic features of IEL from three competing perspectives:

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

The ‘Westphalian conception’ - focusing on international rights and duties among states and international organizations regulating governmental restrictions of international movements of goods, services, persons, capital and related payments among states – continues to dominate international state practice and most textbooks on IEL.<sup>22</sup> The 1944 Bretton Woods Agreements establishing the International Monetary Fund (IMF) and the World Bank, the 1945 United Nations Charter, GATT 1947 and the UN Specialized Agencies engaged in regulating international services - like the

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<sup>22</sup> See, e.g., A.H. Qureshi/A. Ziegler, *International Economic Law* (London: Sweet & Maxwell, 2<sup>nd</sup> ed. 2007), at ix: ‘This book focuses on that branch of Public International Law which is concerned with international economic relations between States.’

Universal Postal Union (UPU), the International Telecommunications Union (ITU), the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO) - 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 by using national power (e.g. in reciprocal GATT/WTO negotiations), they remain reluctant to delegate powers (e.g. for supervision of monetary, trade, development and labour policies) to worldwide organizations. 'Member-driven governance' tends to focus on state interests as defined by domestic rulers and organized interest groups, often with systemic biases (e.g. in anti-dumping practices) to the detriment of general citizen interests and without effective control by domestic parliaments and courts. As the foreign policy discretion enables governments to redistribute domestic income (e.g. by means of trade protection) without effective 'constitutional checks and balances', intergovernmental power politics risks undermining domestic constitutional democracy. The jurisdictions of international organizations for intergovernmental rule-making tend to be allocated to separate organizations without effective legal and judicial restraints of state sovereignty regarding domestic implementation of treaty obligations. Coordination among the hundreds of separate, intergovernmental organizations remains 'member-driven' and decentralized due to the 'general exceptions' included into international treaties, which 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).

'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', especially if it is neglected that 'whatever their professed commitments, all nations stand ready to dispense with international agreements when it suits their short- or long-term interests'.<sup>23</sup> '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 in case of non-compliance. The democratic legitimacy and contribution to 'rule of law' of foreign power politics remains contested, for instance if non-democratic governments deny individual economic rights and restrict human rights like freedom of expression.<sup>24</sup> Arguably, the focus on rights and obligations of states rather than of citizens explains why many 'global public goods' (like civil, political, economic, social, cultural and environmental rights of citizens) are not effectively protected.

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

This alternative conception of IEL as multilevel economic regulation, which underlies many international trade and investment agreements, focuses on the functional unity of private and public, national and international regulation of the economy<sup>25</sup> and on the advantages of decentralized forms of market regulation and dispute settlement as provided for in Chapters 11 and 19 of the North American Free Trade Agreement (NAFTA) as well as in European economic law. This 'multilevel economic law

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<sup>23</sup> Cf. E.A. Posner, *The Perils of Global Legalism* (Chicago: Chicago University 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.

<sup>24</sup> See, e.g., the WTO Appellate Body report on *China – Publications and Audiovisual Products* (WT/DS363/AB/R), adopted 19 January 2010.

<sup>25</sup> See, e.g., 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* (Deventer: Kluwer, 1983), at 239 ff.

perspective' emphasizes potential synergies of public-private partnerships, for instance if private regulation can supplement and complement incomplete, intergovernmental regulations and offers decentralized enforcement mechanisms (e.g. for citizen-driven enforcement of investment rules in NAFTA, competition and common market rules in the EU and EEA). Public-private co-regulation may 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 (e.g. in case of government support of domestic and export cartels). 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 analyzes IEL as interdependent 'social practices' regulating economic activities and transactions, including the 'private ordering' of the international division of labour among billions of producers, investors, traders and consumers in 192 UN member states and the functional interrelationships between public regulation (e.g. by means of competition law, banking law, investment law, labour law, environmental law) and private legal practices (such as agreed restraints of competition). 'Multilevel economic regulation' approaches tend to be critical of authoritarian 'top-down conceptions' of intergovernmental economic regulation, for instance by drawing attention to the ineffectiveness of most intergovernmental commodity agreements (e.g. for coffee, cocoa and tin) aimed at guaranteeing 'stable, fair and remunerative' commodity prices. Identifying the 'optimal level of legal regulation', and promoting mutual synergies between private and public, national and international economic regulation, are perceived as central regulatory challenges:

- Private international law, including 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) subject to control by national governments and decentralized enforcement by domestic courts or arbitration. 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.<sup>26</sup>
- 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.
- 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 (e.g. by means of international competition rules, public risk regulation limiting private standard setting, ICAO rules limiting private self-regulation of international air transport in the context of the International Air Transport Association), illustrate potential synergies of dovetailing public and private economic rules and institutions.

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<sup>26</sup> 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.

### ***Multilevel Constitutional Conceptions of IEL***

The diverse 'multilevel constitutional approaches to IEL' emphasize that the legitimacy and effectiveness of IEL – as an instrument for promoting consumer welfare and human rights of domestic citizens - depends on its consistency with human rights and other constitutional obligations of governments as well as on multilevel judicial protection of rule of law for the benefit of citizens, with due respect for the legitimate diversity of constitutional democracies. The legal primacy of constitutional rules over post-constitutional rule-making may justify granting international treaties only an infra-constitutional legal rank in domestic legal systems and excluding 'direct applicability' of international law rules in domestic courts. As international law's claim to legal primacy must remain subject to constitutional restraints, constitutional democracy may require higher levels of national protection of human rights than prescribed in international human rights treaties. However, whenever *international* guarantees of freedom, non-discrimination and rule of law go beyond those of national legal systems – as in many areas of IEL -, constitutional democracy may justify using IEL for limiting 'constitutional failures' and 'government failures' of states, for instance by empowering citizens to invoke and enforce regional economic liberties and related human rights (e.g. in European law) in national courts vis-à-vis discriminatory restrictions of mutually beneficial economic cooperation among citizens across national frontiers. Even though international law asserts legal primacy vis-à-vis national law, human rights law justifies the practice of virtually all national constitutions to subject the incorporation of international rules into domestic legal system to constitutional safeguards like respect for human rights and parliamentary ratification of treaties, often 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 designed and reviewed in 'multilevel constitutional systems' which legitimately vary depending on whether the economic regulations are governed by EU constitutional law as interpreted by the European Court of Justice (ECJ), by EEA law as interpreted by the EFTA Court, or by the ECHR as interpreted by the European Court of Human Rights (ECtHR) in close cooperation with national courts operating in diverse national systems of 'constitutional democracy'.

Arguably, as most public goods can be defined in terms of individual (civil, political, economic, social, cultural and environmental) rights of citizens, only citizen-oriented 'constitutional bottom up approaches' to IEL can effectively protect human rights and limit the 'collective action problems' in multilevel governance of interdependent public goods. The diverse rule-of law systems of the 30 EEA member countries illustrate the potential variety of combining national and international constitutional rules and institutions. Without linking international to domestic rules and justifying both in terms of domestic constitutional principles, top-down 'public international law conceptions' of IEL risk failing to protect consumer welfare and human rights effectively. As human rights protect *individual* as well as *collective exercises* of fundamental freedoms (e.g. property rights owned by corporations, collective labour rights exercised by trade unions), human rights and constitutional law must also protect the institutions necessary for such collective exercises of fundamental rights, like private property, private companies, private newspapers and private markets as 'dialogues about values' among producers and consumers and citizen-driven information mechanisms coordinating supply and demand. Without constitutional, legislative and administrative regulation of market competition and judicial protection of individual rights, the ubiquitous conflicts among private and public interests cannot be adequately resolved in economic markets.

### *IEL as 'Conflicts Law'?*

Economic globalization continues to link hundreds of diverse national and international legal systems and thousands of governmental and non-governmental regulations influencing international trade and comparative advantages of producers, investors and countries competing to attract investments and other scarce resources. Some private lawyers emphasize not only

- the reality of conflict and contestation in transnational society;
- the inevitable limits of 'top-down global governance';
- the lessons from private international law for coordinating and resolving conflicts among jurisdictions, among government regulations, and among transnational governance mechanisms;
- as well as the advantages of using private international law concepts for resolving 'conflicts among multiple systems of rules of both state and private ordering'.<sup>27</sup>

They also draw attention to the social functions and *public policy* 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), may 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 the systemic importance of 'adversarial legalism' as a tool of transnational governance. Private 'conflict of laws' doctrines (like the effects doctrine, judicial restraint doctrines, principles for mutual recognition of foreign standards and court judgments) may assist in resolving the coordination problems resulting from competing private and *public regulation* systems, for instance in case of inadequate coordination among regulatory authorities, inadequate representation in national regulatory bodies of all adversely affected foreign interests, or other regulatory gaps favouring business interests in transnational private ordering (for instance through contracts and international commercial arbitration privileging the asymmetric mobility of business actors as compared to consumers and workers). Private law experiences may contribute to mediating 'conflicts of normative orders' among national and international public law regimes 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'.<sup>28</sup>

Yet, does this fact that private and public international law are increasingly confronted with common regulatory problems – such as the need for overcoming their 'methodological nationalism' and parochial legacies of discriminating against foreigners – justify conceptualizing IEL as 'conflicts law'?<sup>29</sup> This paper argues that the recognition by almost all 192 UN member states of human rights obligations and other constitutional restraints of governance powers requires justifying IEL in terms of human and constitutional rights of citizens rather than only in terms of economic utilitarianism or private law principles. 'Conflicts law principles' of private law for determining whether foreign jurisdictions, conflicting government regulations and transnational governance mechanisms 'deserve recognition' cannot substitute for the necessary review of the 'human rights coherence' of IEL and of

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<sup>27</sup> R. Wai (note 26), at 230.

<sup>28</sup> Cf. Wai (note 26), emphasizing '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' (at 262).

<sup>29</sup> As suggested by C. Joerges, 'Three-Dimensional Conflicts Law as Constitutional Form', in: C. Joerges/E.U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford: Hart Publishing, 2<sup>nd</sup> ed. 2010), chapter 15.

the need for legal and judicial 'balancing' of constitutional principles and human rights in applying and interpreting IEL 'in conformity with principles of justice' and the human rights obligations of governments, as required by national and international law.<sup>30</sup>

### ***IEL as 'Global Administrative Law' (GAL)?***

An increasing number of administrative lawyers argue that '(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.'<sup>31</sup> 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.' For instance, '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.' 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.

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<sup>30</sup> For my criticism of Joerges' proposals for re-interpreting IEL as 'conflicts law' see: E.U.Petersmann, *The Future of International Economic Law: A Research Agenda*, in: EUI Working Papers Law 2010/6, at 11 f.

<sup>31</sup> R.Stewart/R. Sanchez Badin , *The WTO and Global Administrative Law*, in: C. Joerges/E.U. Petersmann (note 29), chapter 16. The following quotations in the text are from the same authors.

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, counter-factional capture, and temper the tunnel vision of specialized regulatory bodies.’ Yet, GAL proponents acknowledge 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.’ ‘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.’

### ***GAL without Constitutional Restraints?***

GAL policy proposals 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’.<sup>32</sup> Yet, the legal context of administrative activities of international organizations with limited competences differs fundamentally from national constitutional and administrative laws, as illustrated by

- the legal, administrative and judicial practices of UN and ILO Administrative Tribunals and jurisprudence;
- regulations and administration implementing Part XI of the UN Law of the Sea Convention regarding deep seabed mining;
- the jurisprudence of European courts, WIPO arbitration concerning disputes over internet domain names, World Bank legal and inspection practices, WTO dispute settlement practices and investor-state arbitration applying administrative rules;
- or environmental agreements providing for ‘compliance procedures’ identifying, reviewing and restricting harmful activities.

The administrative law practices of international organizations and courts remain embedded in their specific legal contexts of ‘primary’ and ‘secondary law’. 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 seem to agree on new customary GAL resulting from the often informal, administrative and legal practices in different institutional contexts with limited jurisdictions and diverse memberships of states.

European integration has given rise to ever more comprehensive ‘European administrative law’ based on common ‘administrative constitutionalism’ constituting and limiting national and European administrative practices in the implementation of EU and EEA law.<sup>33</sup> The administrative law dimensions of the law of *worldwide organizations*, by contrast, tend to remain contextual (i.e. limited and defined by their respective constitutional rules), fragmented and diverse, impeding the emergence of general, 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 risk being criticized as wishful thinking rather than as

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<sup>32</sup> Stewart/Sanchez Badin (note 31).

<sup>33</sup> Cf. E. Fisher, Beyond the Science/Democracy Dichotomy: The WTO Sanitary and Phytosanitary Agreement and Administrative Constitutionalism, in: Joerges/Petersmann (note 26), chapter 11.



methodologically convincing determinations of positively existing international law. For instance, Kingsbury's concept of 'law' in GAL research<sup>34</sup> has been rightly criticized as a 'natural law interpretation'<sup>35</sup> of the 'general principles of public law' without methodologically convincing determinations of positively existing law. Kingsbury 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'.<sup>36</sup> Yet, rather than exploring the constitutional principles governing the 'primary law' and 'secondary law' of international organizations and of their judicial interpretation at regional and worldwide levels<sup>37</sup>, 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*'. Arguably, the methodological assumptions of Kingsbury are inconsistent with the reality of 'constitutional pluralism' and contribute to 'GAL claims' that are inconsistent with both the diversity of administrative law practices in international organizations and the contextual contingency of administrative law systems.<sup>38</sup>

### **III. The Reality of 'Legal Pluralism' Does Not Exclude Multilevel Constitutional Restraints on Multilevel Economic Governance**

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.'<sup>39</sup> 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.'<sup>40</sup>

#### ***Clarifying and Using Constitutional Terminology as Generic Terms for Multilevel Delegation and Limitation of Governance Powers***

The pervasive reality of 'constitutional pluralism' at national levels – as illustrated by the fact that, apart from a few common law countries (like Israel, New Zealand and the United Kingdom), almost all UN member states have adopted written, national constitutions which differ depending on the constitutional traditions, democratic preferences and historical experiences of the citizens concerned - is unlikely to change in view of the 'sovereign equality of states' and the human right to popular self-determination as constitutional principles of the UN Charter (cf. Article 2) and of UN human rights

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<sup>34</sup> 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). Yet, 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*.

<sup>35</sup> 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.

<sup>36</sup> According to Kingsbury (note 34), at 34-36, '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*.

<sup>37</sup> Cf. N. Blokker/H. Schermers, *International Institutional Law* (Deventer: Kluwer Publisher, 4<sup>th</sup> ed. 2003).

<sup>38</sup> Cf. Petersmann (note 30), at 14 ff. The constitutional principles and rules identified by Blokker/ Schermers (note 37) as part of the law of international organizations seem to contradict the claims by Kingsbury.

<sup>39</sup> Stewart/Ratton Sanchez Badin (note 31).

<sup>40</sup> *Idem*.

law (cf. Articles 1 of the 1966 UN human rights conventions). Just as human rights protect individual and democratic autonomy of interpreting and developing rules of law inside states on the basis of legitimately diverse reasons of morality and ‘public reason’, so do international law and the universal recognition of inalienable human rights protect ‘pluralist constitutional structures’ in private and public, national and international legal systems governing transnational relations among states. In contrast to the unifying and steering ambitions of national ‘foundational constitutional monism’, the ‘constitutional principles’ underlying UN law, the ‘constitutions’ (*sic*) establishing specialized UN Agencies, and international human rights law protect legal diversity, subsidiarity, ‘constitutional pluralism’ and competing jurisdictions of ever more (inter)national and non-governmental organizations with limited legal autonomy.

The different responses to the global governance problems appear to be largely due to the different perspectives of private lawyers, constitutional, administrative and international lawyers. Anglo-American lawyers tend to reserve constitutional terminology for national constitutionalism in spite of the explicit use of the term ‘constitution’ for the constitutive treaties establishing, for instance, the International Labour Organization (ILO), the UN Education, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO) and the Food and Agricultural Organization (FAO); they misperceive and reject proposals for ‘constitutionalizing international law’ as utopian insistence on a ‘single design or order’, 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’.<sup>41</sup> European lawyers, by contrast, emphasize the reality and normative legitimacy of multilevel ‘constitutional pluralism’ aimed at limiting abuses of power and at protecting ‘unity in diversity’ in multilevel European constitutional law.<sup>42</sup> As the diverse private law, constitutional law, administrative law and international law conceptions describe and analyze the ‘globalization’ of IEL from different perspectives, it appears inappropriate to present GAL and constitutionalist conceptions of the law of international organizations as ‘alternatives’. Nor is it realistic to present international organizations as ‘administrative agencies’ without constitutional constraints. National and international administrative law practices cannot be appropriately understood without taking into account the diverse constitutional contexts and restraints of administrative law systems. Administrative law doctrines (like the US ‘Chevron doctrine’ in favour of judicial deference towards statutory interpretations delegated to specialized regulatory agencies) may be justifiable in specific domestic constitutional contexts which may not be relevant for different *international legal contexts* without parliamentary legislation and democratic control of administrative agencies. *Sections III and IV* explain why a *functional* rather than *nationalist* use of constitutional theory and terminology is of crucial importance for limiting abuses of power and ‘collective action problems’ in the law of both, national as well as international ‘regulatory agencies’:

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<sup>41</sup> 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.

<sup>42</sup> On European conceptions of 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.

- *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 21<sup>st</sup> century - *i.e.* to protect human rights, rule of law, democratic participation and judicial remedies beyond state borders so as to empower citizens to increase their welfare through mutually beneficial cooperation across frontiers – cannot be realized without extending the diverse national 'constitutional approaches' to transnational governance for the collective supply of international public goods. 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 regardless of whether the respective rules are 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 the 'European conventions' which elaborated the EU Charter of Fundamental Rights and the 2003 Draft Treaty for a Constitution of Europe) for the collective supply of national and international public goods that benefit all citizens concerned. The more globalization transforms national governments into networks of multilevel governance, the stronger becomes the need for multilevel constitutionalism, for instance by using constitutional principles, rules and institutions also at international levels of governance for the collective supply of international public goods (e.g. regional economic organizations with 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 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. In contrast to rational citizens’ interests in systemic ‘constitutional constraints’ on all governance powers, governments and diplomats have self-interests in limiting such constraints and their own legal and judicial accountability. Empirical evidence – notably in European economic integration law, human rights law and in international investment law – confirms that constitutional rights of citizens and their judicial protection have proven to be the most effective means for protecting citizens against welfare-reducing abuses of power. By arguing for a *constitutional approach* to interpreting and progressively developing IEL, my 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, in conformity with the customary law requirement of interpreting treaties, and settling disputes, ‘in conformity with principles of justice’ and human rights.<sup>43</sup>

### ***Multilevel ‘Constitutional Pluralism’ as Constitutional Restraint of IEL***

Economic, environmental, legal and political globalization increasingly limits national autonomy. Due to ever more delegation of regulatory powers to international and non-governmental organizations, the worldwide division of labour is characterized by dynamic interactions among hundreds of national, international and non-governmental legal regimes (e.g. based on private contract and company law regulating corporate governance and internet governance) claiming limited legal autonomy. Some international treaties constituting limited rule-making, administrative and/or judicial powers are explicitly designated as treaty ‘constitutions’ (like the ‘constitutions’ establishing the ILO, the WHO, FAO, UNESCO) and, in their primary and secondary laws, refer to their ‘constitutional functions’ for the benefit of citizens (such as promotion of ILO labour rights and of human rights to health protection, food and education). The ever larger number of international treaty regimes providing for international courts and quasi-judicial dispute settlement bodies entails ever more international jurisprudence (e.g. by UN tribunals like the ICJ, the Law of the Sea Tribunal and international criminal courts, WTO dispute settlement bodies, regional economic and human rights courts, investor-state arbitral tribunals) enforcing domestic compliance with international rules. Kingsbury’s acknowledgment – that ‘(c)onstitutive power is exercised internationally, most obviously in the constitution of international organizations’<sup>44</sup> – lends support to the 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) legally limits GAL and multilevel economic governance in terms of ‘administrative constitutionalism’ (Fisher) and multilevel, legal and judicial restraints. Such functionally limited ‘checks and balances’ promote overlapping ‘transnational polities’ (e.g. of the 500 million EU citizens) for multilevel rule-making, administrative and ‘judicial governance’ for the collective supply of international public goods. Rather than denying this normative reality on the obvious ground that the utopia of centralized ‘global constitutionalism’ is

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<sup>43</sup> 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.

<sup>44</sup> Kingsbury (note 34), at 35. 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 multilevel guarantees of human rights and other constitutional limitations of GAL – risks undermining human rights and constitutional democracy in the field of administrative law.

neither feasible nor desirable, the functionally limited 'multilevel constitutionalism' should be welcomed (e.g. in multilevel human rights law and trade law) – like the diversity of national constitutional democracies – as protecting legitimately diverse conceptions of constitutionalism, human rights and economic regulation at private, national, regional and worldwide levels.

### ***Competing Conceptions of 'Constitutional Justice' as Constitutional Restraint of IEL***

Individual access to justice in terms of legal and judicial remedies against governmental restrictions of economic freedoms and property rights continues to be protected ever more comprehensively in IEL by ever more national and international courts.<sup>45</sup> The UN Charter (e.g. Article 1) and the customary rules of international treaty interpretation (as codified in the Preamble and Article 31 of the VCLT) require interpreting treaties and settling disputes 'in conformity with principles of justice' and the human rights obligations of states. National and international 'courts of justice' increasingly emphasize - like the ECJ in its judicial review of national and EU restrictions of fundamental rights<sup>46</sup> - that 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'. 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, reflect legitimately diverse conceptions of multilevel governance (e.g. in the EU and NAFTA) and of its underlying 'principles of justice'. Respect for the legal autonomy and legitimate diversity of individuals and democratic communities entails that the billions of participants in the global division of labour are unlikely to ever agree on any comprehensive 'theory of justice'. An 'overlapping consensus' on a few 'principles of justice' (e.g. as reflected in UN human rights law and in other worldwide agreements) among individuals and governments with often conflicting self-interests and diverse value preferences is all that can be hoped for; it is of essential importance for justifying transnational conceptions of rule of law. The judicial cooperation and sometimes antagonistic 'judicial dialogues' among national and European courts (like the ECJ, the EFTA Court and the ECtHR) in the interpretation, progressive clarification and 'judicial balancing' of European integration law, human rights law and constitutional law confirm the view of J. Rawls that 'courts of justice' may be more 'principled', independent and impartial 'exemplars of public reason'<sup>47</sup> than self-interested majority decisions by governments responding to political pressures from organized interest groups and political constituencies. The regular compliance by governments with the hundreds of WTO and investor-state dispute settlement rulings, as well as with the thousands of judgments by regional economic and human rights courts, empirically confirms the reality of multilevel constitutional, legal and judicial restraints on discretionary governance powers.

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<sup>45</sup> Cf. F.Francioni (ed), *Access to Justice as a Human Right* (Oxford: OUP, 2008).

<sup>46</sup> 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).'

<sup>47</sup> Cf. J. Rawls (note 2), at 235; E.U.Petersmann, 'Constitutional Justice' Requires Judicial Cooperation and 'Comity' in the Protection of 'Rule of Law', in: F.Fontanelli/G.Martinico/P.Carozza (eds), *Shaping Rule of Law Through Dialogue* (Antwerpen: Intersentia, 2009), 1-19.

***The Unity of International Law and the Reality of Multilevel ‘Rule of Law Communities’ Derive their Legitimacy from Respect for Human Rights and ‘Constitutional Pluralism’***

Constitutionalism admits that ‘legalism’ and ‘rule by law’ have no intrinsic value unless they are constitutionally constrained by ‘rule of law’ and supported by citizens as ‘just’ (e.g. democratically justifiable).<sup>48</sup> Without transnational ‘rule of law’ as a legitimate constitutional restraint on ‘rule by law’, many international public goods – like a rules-based and legally predictable division of labour – cannot be effectively protected. Since the 1993 Vienna Declaration by the World Conference on Human Rights, numerous UN resolutions have called for promoting democratic governance in all states. For instance, the 2005 World Summit documents reaffirmed that

‘democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, ... and reaffirm the necessity of due respect for sovereignty and the right to self-determination’ ...<sup>49</sup>

UN instruments also acknowledge that ‘(t)he weak influence of traditional democracy in matters of global governance is one reason why citizens of the world are urging greater democratic accountability of international organizations.’<sup>50</sup> At national levels, constitutional democracies increasingly complement representative, parliamentary democracy by ever more constitutional guarantees of human rights, constitutional rights, ‘participatory democracy’ and ‘deliberative democracy’ (as illustrated by Article 11 of the 2009 Lisbon Treaty on ‘citizens initiatives’ for EU regulations). The ever greater impact of globalization and fragmented governance on domestic citizens, like the practical limits of parliamentary and other forms of representative democracy beyond national and regional communities, entail that the traditional ‘two-track model’ of democratic self-government - through constitutional and parliamentary democracy inside states and state-consent to inter-state rules of international law elaborated through deliberative forms of diplomacy – can no longer ensure the democratic ideal that the people decide, through democratic procedures, all policy issues that are politically decidable.<sup>51</sup> The ideal of ‘deliberative democracy’ that only ‘those action norms are valid to which all possible affected persons could agree as participants in rational discourses’<sup>52</sup>, calls for a ‘four-track model’ of democratic self-governance with additional, multilevel guarantees of transnational ‘participatory democracy’ and ‘global deliberative democracy’: In addition to the diverse forms of (1) constitutional democracy at national levels and (2) intergovernmental, representative decision-making at international levels, there is also a need for (3) stronger, transnational ‘rights-based democracy’ based on legal and judicial protection of human rights and other cosmopolitan rights empowering citizens to participate more actively in (4) deliberative, multilevel governance so as to protect cosmopolitan rights against unnecessary or disproportionate intergovernmental restrictions. Only democratic governance justifies a rebuttable presumption that national and international rules can and should be construed in mutually coherent ways (‘consistent interpretation principle’) unless national legislators deliberately depart from their international obligations. Departures from international rules may be justifiable by domestic constitutional guarantees of human rights and democratic governance if – as in the *Kadi* judgment of the ECJ of September 2008 - they protect

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<sup>48</sup> On ‘rule of law’ as the constitutional, rights-based foundation and jurisdictional protection of a fair and just society limiting unnecessary and disproportionate government restrictions of constitutional rights, governmental claims to ‘rule by law’ and pursuit of the ‘public good’ see: T.Bingham, *The Rule of Law* (London: Penguin Books, 2010); G.Palombella/ N.Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009).

<sup>49</sup> UN doc. A/RES/60/1 of 24 October 2005, para. 135.

<sup>50</sup> Cf. the 2004 UN report on *We the Peoples: Civil Society, the United Nations and Global Governance* (UN doc. A/58/817 of 11 June 2004), at 8.

<sup>51</sup> Cf. S.Wheatley, *The Democratic Legitimacy of International Law* (Oxford: Hart Publishing, 2010).

<sup>52</sup> J. Habermas, *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996), at 107.

human rights more effectively than intergovernmental rules and, thereby, strengthen democratic 'checks and balances' on intergovernmental rule-making.<sup>53</sup> Even though a state 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty' (Article 27 VCLT), the human rights obligations of states may require (e.g. pursuant to Article 31 VCLT) interpreting treaty provisions as not preventing states to protect higher standards of human and constitutional rights and democratic governance than set out in international minimum standards.

### ***Democratic Functions of Multilevel Judicial Protection of Constitutional Rights***

National, regional and worldwide 'courts of justice' increasingly insist on their autonomous 'constitutional authority' in settling disputes, 'administering justice' and protecting 'rule of law' in conformity with human rights and other constitutional limitations of governance powers.<sup>54</sup> In rights-based international relations covered by IEL and human rights law, the relationships between the diverse principles, procedures and institutions of national and functionally limited, international 'constitutional systems' are increasingly governed by legal 'checks and balances' and competing claims for protection of human rights and other constitutional rights, democratic self-governance, rule of law and 'public reason' rather than by intergovernmental power politics or formal claims to *a priori* legal hierarchies. The 'internal pluralism' inside national and regional 'constitutional democracies' (like the EU) continues to differ from the 'external constitutional pluralism' in the external relations among constitutional democracies and worldwide organizations for the collective supply of international public goods.<sup>55</sup> The universal recognition of human rights, the increasing jurisdiction of international courts and the constitutional legitimacy of the ever stronger, multilevel judicial protection of individual rights offer convincing arguments for coordinating 'legal pluralism' on the basis of cosmopolitan principles of human rights, other fundamental rights, rule of law and constitutional democracy.<sup>56</sup> Yet, legal perceptions of transnational 'legal pluralism', of its systemic unity and ultimate source of legitimate authority remain inevitably contested, just as 'constitutional interpretations' inside constitutional democracies often remain contested among citizens and the legislative, executive and judicial branches of government. National and international courts acknowledge that claims to 'rule of international law' and to legal certainty and predictability in transnational relations must be limited and balanced by respect for human rights and other constitutional principles of justice, including 'access to justice' and to legal and judicial justification of restrictions of fundamental rights. The strong influence of national and European courts on the dynamic evolution of European law confirms that - in international relations - the independent, impartial and 'principled' reasoning of 'courts of justice' based on 'due process of law' may be more likely than political majority decisions to promote legitimate order among the different layers of

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<sup>53</sup> Cf. M. Kumm, The Legitimacy of International Law: a Constitutionalist Framework of Analysis, in: *EJIL* 15 (2004), 907 ff; Wheatley (note 41), at 376: 'The construction of a multiverse of democratic visions of global governance orders by democratic states will have the practical consequence of democratizing the international law order, providing democratic legitimacy for international law.'

<sup>54</sup> On judicial protection and clarification of 'common constitutional principles' as a means for 'administering justice' in the settlement of international disputes and judicial coordination of the plurality of normative orders see: E.U. Petersmann (notes 43 and 47).

<sup>55</sup> On the 'internal' and 'external dimensions' of constitutionalism in the EU and in the jurisprudence of the European Court of Justice see: M. Póitres Maduro, Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism, in: Dunoff/Trachtman (note 41), 356-380.

<sup>56</sup> On 'cosmopolitan constitutionalism' see: M. Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in: Dunoff/Trachtman (note 41), 258-325.

private and public, national, regional and worldwide law and to justify changing interpretations of law by balancing competing rights and clarifying principles of ‘constitutional justice’.<sup>57</sup>

Respect for the diversity of national constitutions protecting diverse lists of agreed human rights and constitutional rights calls for clarifying common ‘constitutional principles of justice’ in international economic regulation, notwithstanding the legitimately diverse ways of regulating interactions among national and international constitutional rights, judicial remedies, economic and environmental rules. As explained in my 1991 monograph on *Constitutional Functions and Constitutional Problems of International Economic Law*<sup>58</sup>, the need for ‘embedding’ international economic regulation in domestic constitutional systems requires due respect for the legitimate diversity of national, regional and worldwide approaches to the regulation of transnational movements of goods, services, persons, capital and related payments. For example, domestic laws should be interpreted in conformity with self-imposed international legal obligations pursuant to the ‘consistent interpretation principle’ recognized in most national legal systems, unless compliance with international legal obligations risks undermining domestic constitutional rights. Treating citizens as legal subjects entitled to the ‘rule of law’ may justify judicial protection also of *international* guarantees of freedom, non-discrimination, rule of law and social protection of citizens, as it is increasingly practiced in national and European courts.<sup>59</sup> The existing legal restraints of foreign policy powers deriving from multilevel, legal guarantees of human rights, IEL, democratic participation and judicial protection of rule of law need to be strengthened with due respect for the legitimate diversity of national and regional constitutional traditions and their domestic implementation of cosmopolitan human rights.

### ***Multilevel Economic and Human Rights Law and their Judicial Protection are of Constitutional Importance for Protecting ‘Overlapping International Public Goods’***

The move to transnational and global regulation has shifted vast regulatory powers to the executive branches of powerful states as well as to private actors with mobile economic resources without adequate institutional safeguards for holding public and private international regulation legally and democratically accountable. In most worldwide economic organizations, international economic regulation continues to be designed in close cooperation among governments and business without effective control by national parliaments, courts and civil society; in contrast to rule-making inside constitutional democracies, intergovernmental rule-making often lacks effective constitutional restraints, for instance by human rights, ‘deliberative democracy’ and judicial remedies of adversely affected citizens. Hence, as in the dynamically evolving ‘European constitutional law’ of the EU, the EEA and the ECHR<sup>60</sup> where national and European courts interpret European economic regulation with due regard to ‘principles of justice’ (e.g. as defined by human rights, constitutional democracy and multilevel judicial protection of rule of law), also worldwide courts and investor-state arbitral tribunals should interpret IEL with due respect for constitutional rights and other constitutional restraints.

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<sup>57</sup> On the increasing use by national and international courts of ‘proportionality balancing’ as the ‘ultimate rule of law’ see: D.M. Beatty, *The Ultimate Rule of Law* (Oxford: OUP, 2004). On ‘constitutional justice’ see Petersmann (notes 8 and 47).

<sup>58</sup> Cf. Petersmann (note 4).

<sup>59</sup> Cf. H. Keller/A. Stone Sweet (eds), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: OUP, 2008).

<sup>60</sup> On the impact of the EU Charter of Fundamental Rights, the future EU membership in the ECHR, the future relationships between the ECJ and the ECtHR, and other constitutional changes of the Lisbon Treaty on European constitutional law see: J.Wouters et alii (eds), *European Constitutionalism beyond Lisbon* (Antwerp: Intersentia, 2009); B.Rittberger/F.Schimmelfennig, *The Constitutionalization of the European Union* (London: Routledge, 2009).



As predicted by the Kantian theory of multilevel constitutionalism and cosmopolitan rights, the most important achievements of the multilevel constitutional guarantees of the EC Treaty, the EU Treaty, the EEA Treaty and the ECHR have been 'democratic peace' across the 30 EEA member states and social welfare based on rule of law. The multilevel, judicial protection of fundamental rights of EU and EEA citizens respected the diversity of national constitutional traditions, as illustrated by the non-application of many supra-national EU law principles in the more decentralized EEA legal system.<sup>61</sup> Respect for 'cosmopolitan constitutional pluralism' requires exploring to what extent the fragmented national and international legal regimes share common 'constitutional foundations', for instance in UN human rights law and general international law, justifying and promoting transnational rule of law as a precondition for the collective supply of many other international public goods. The Lisbon Treaty's incorporation of the EU Charter of Fundamental Rights into European constitutional law illustrates the increasing differences between rights-based, multilevel constitutionalism in Europe and the 'constitutional nationalism' prevailing in most countries outside the EU. For instance, EU law recognizes not only much more comprehensive dignity rights, liberty rights, equality rights, democratic rights, social rights and corresponding judicial remedies at national and European levels than most other constitutional democracies. The constitutional and judicial protection of equal liberties in the European economy no less than in the polity, the protection of constitutional rights as simultaneous 'constitutional principles' to be clarified by judicial 'balancing' with all other constitutional rights, and the cosmopolitan conception of European law differ fundamentally from Anglo-Saxon constitutional traditions, such as Dworkian conceptions of constitutional rights as 'trumps' and Rawlsian conceptions of an 'international law among states and peoples' with only minimal human rights guarantees.<sup>62</sup> Constitutional pluralism requires interpreting also worldwide IEL, and designing worldwide organizations for the collective supply of international public goods, with due respect for the legitimate diversity of constitutional democracies.

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'<sup>63</sup> 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.' Some GAL approaches focus – as during the emergence of European administrative law systems in monarchical and authoritarian states during the 19<sup>th</sup> 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.' Perhaps most importantly, GAL proposals neglect the 'constitutional functions' of IEL for overcoming 'constitutional failures' of nationalist legal systems (e.g. their systemic discrimination against foreign goods, services and foreigners) in protecting public goods. The following *Section IV* argues that collective supply of international public goods requires constitutional theories for constituting, constraining and supplementing multilevel governance and overcoming 'collective action problems' that cannot be remedied by GAL proposals focusing on 'procedural global administrative law' reforms *de lege ferenda*. 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 (e.g. to grant patent protection for pharmaceuticals) and human rights

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<sup>61</sup> Cf Petersmann (note 12), chapter II.

<sup>62</sup> Cf. Petersmann (note 12), chapters III, V and VI.

<sup>63</sup> B. Kingsbury, N. Krisch & R. Stewart, The Emergence of Global Administrative Law, in: *Law and Contemporary Problems* 68 (2005), at 15 ff.

obligations of WTO members (e.g. to protect access to essential medicines in less-developed countries).<sup>64</sup> 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 and, if necessary, refusing to apply international rules if such human rights guarantees have not been effectively protected in intergovernmental practices.<sup>65</sup>

#### IV. Need for Multilevel Regulation of the ‘Collective Action Problems’ in Global Economic Governance

*Sections II and III* argued that the ‘constitutional failures’ of ‘legal nationalism’ and the ‘collective action problems’ identified in *Section I* require conceptualizing multilevel governance and IEL as parts of multilevel, pluralist constitutional frameworks protecting transnational rule of law, ‘human rights coherence’ and democratic legitimacy of multilevel regulation by empowering private and public, national and international actors to participate in multilevel regulation, administration and dispute settlement proceedings for extending national public goods across national frontiers. The diverse, multilevel constitutional, legislative, administrative and judicial approaches practised in the EC, the EU, the EEA, the ECHR as well as in a few other regional and worldwide agreements confirm that ‘constitutional pluralism’ offers a large variety of practical strategies rather than an academic utopia. Similar to the Rawlsian insight that democracies can remain stable and legitimate over time only in a constitutional framework justified by ‘overlapping principles of justice’ that must be protected by legislation, administration, adjudication and ‘public reason’ supported by citizens and civil society, international law and institutions for the collective supply of international public goods must be based on, and justified by, multilevel constitutional, legislative, administrative and judicial rules and institutions supported by citizens and civil society as just (e.g. in terms of being democratically justifiable for promoting the general interests of domestic citizens).

#### *Constitutional Responses to the Five Major ‘Collective Action Problems’*

The legitimate diversity of individual and democratic preferences and the moral arbitrariness of the distribution of many resources entail that – just as national democracies legitimately differ from each other – the law of international organizations for multilevel governance of international public goods may legitimately differ among problem areas and international jurisdictions with limited memberships. While UN law imposes common legal minimum standards on the 192 UN member states, *Sections II and III* explained why intergovernmental UN approaches have failed to protect many international public goods effectively, notwithstanding the important contributions from UN Specialized Agencies and of the ICJ to promoting peaceful international cooperation. Rendering multilevel governance more effective requires additional rules and institutions (e.g. for the decentralized enforcement of UN human rights conventions and the UN Law of the Sea Convention) addressing and limiting the above-mentioned ‘collective action problems’ and legitimacy deficits more specifically.

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<sup>64</sup> 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.

<sup>65</sup> 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.’

- The *jurisdictional gap*, i.e. the incapacity of every state to provide global public goods without international cooperation, requires – as in European integration law – promoting international duties of cooperation (e.g. among national and international organizations and courts) and competition among ‘alliances of the willing’. WTO law rightly promotes ‘competing liberalization’ at worldwide and regional levels, as illustrated by the increasing recourse to free trade areas, customs unions and preferential agreements among less-developed countries as ‘second best’ policies in the absence of worldwide consensus on concluding the WTO Development Round negotiations. Yet, UN law and WTO law remain deficient regarding the task of ‘multilateralizing’ regional agreements (e.g. on human rights, regional security systems, trade preferences, economic and environmental regulation), conferring worldwide jurisdiction for initiating regulation and protection of global public goods, and for coordinating interdependent ‘overlapping public goods regimes’. The ‘global corporate economy’ governed by private law structures, the governance of the internet based on US corporate law, administrative law and intergovernmental coordination<sup>66</sup>, and the use of the US Alien Torts Claims Act for holding multinational corporations legally accountable for abuses of workers’ rights in foreign jurisdictions<sup>67</sup>, illustrate that the use of *national* rather than international legal systems may offer regulatory alternatives for addressing certain regulatory problems (such as the ‘jurisdiction gap’ in treaty-based global economic governance).
  
- The *governance gap*, i.e. the inability of most intergovernmental organizations to regulate and govern the collective supply of international public goods democratically and effectively, requires new forms of multilateral constitutional, legislative, administrative and judicial commitments and institutions for collective protection of public goods. European integration law suggests that overcoming discriminatory ‘legal nationalism’ requires ‘international guardians of community interests’ like independent Commissions with rights to initiate rule-making and promote ‘deliberative democracy’ and judicial accountability for violations of common rules. The transformation of the power-oriented GATT 1947 into the rules-based WTO trading system with compulsory, national and international jurisdiction for the peaceful settlement of disputes and judicial protection of rule of law was achieved by ‘intergovernmental leadership’ of constitutional democracies. Yet, the ‘governance failures’ in concluding the ‘Development Round’ negotiations in the WTO illustrate the need for additional governance reforms of the WTO legal system (e.g. by establishing a WTO Executive Committee and WTO Legal Committee, broadening the mandate of the WTO Director-General and institutionalizing the inter-parliamentary cooperation inside the WTO). Most importantly, extending national public goods to international relations requires support by ‘private-public partnerships’ and non-governmental stakeholders based on legal and judicial protection of individual rights and remedies against violations of international rules.
  
- The *incentive gap*, i.e. the inherent temptation of free-riding in the collective supply of international public goods - requires making ‘common but differentiated responsibilities’ for private and public, national and international actors more effective. The far too limited UN financial and technical assistance for poor countries (e.g. if they provide transnational environmental services by protecting tropical forests that are of global importance for biodiversity and carbon-reduction), like the WTO provisions for capacity-building and trade

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<sup>66</sup> Cf. R.Uerpman-Witzack, Multilevel Internet Governance Involving the EU, Nation-States and NGOs, in: Follesdal/Wessel/Wouters (eds), *Multilevel Regulation and the EU* (Deventer: Kluwer, 2008), 145-168.

<sup>67</sup> For examples see: Wai (note 26) and S.Sassen, Neither global nor national: novel assemblages of territory, authority and rights, in: *Ethics & Global Politics* 1 (2008), 1-19, at 4.

facilitation assisting less-developed countries in participating in and supporting WTO rule-making, are justifiable not only in terms of 'principles of justice'; they may also assist in limiting 'governance failures' and promoting 'constitutional justice'. The European experiences with financial redistribution (e.g. by EU regional, structural and development funds), capacity-building and 'human rights conditionality' suggest that only citizen-oriented 'community law' and rights-based 'integration law' may effectively transform power politics (e.g. in less-developed countries) by more effective protection of cosmopolitan rights, development assistance and rule of law.

- The *participation gap*, i.e. the need for inclusive consensus-building promoting worldwide participation, requires legal and institutional protection of 'deliberative governance by discussion', institutionalized leadership (e.g. by international organizations with mandates for initiating rule-making for global public goods) and financial assistance for 'capacity building' by 'coalitions of the willing' so that all relevant public and private actors cooperate in the collective supply of global public goods. As first explained by Kantian legal theories of 'multilevel constitutionalism' promoting citizen-driven 'struggles for equal rights' and 'public justice'<sup>68</sup> and illustrated by the citizen-driven structures of the diverse European economic, legal and human rights regimes, international economic, environmental and legal public goods cannot become effective and legitimate without rights of all affected citizens to participate in multilevel decision-making and have recourse to legal and judicial remedies against unjustified restrictions of individual rights and market distortions.
  
- The *rule-of-law-gap* inevitably results from the *legal fragmentation* among hundreds of national, international and transnational legal regimes transforming national constitutions into 'partial constitutions' that can no longer secure protection of human rights through centralized, nationalist legal systems. As illustrated by the diverse European legal and judicial regimes, transnational rule of law requires multilevel constitutional restraints on multilevel governance and on their intergovernmental 'rule by law'. Legal predictability, rule of law and legal protection of legitimately diverse conceptions of justice, human rights and 'constitutional pluralism' are essential for the collective supply of global public goods. Transnational rule of law must be promoted by recognizing, 'balancing' and reconciling competing rights and constitutional claims on the basis of common constitutional principles, with due respect for their legitimately diverse interpretations and legal implementation in conformity with different national constitutional traditions and democratic preferences. As intergovernmental rules may lack democratic legitimacy and may unduly restrict individual rights, transnational 'rule of law' – as a constitutional, jurisdictional and judicial restraint protecting equal individual rights against abuses of 'rule by law' - may require and justify departures from 'rule of international law'.

***'Constitutional Pluralism' Requires Respect for 'Competing, Multilevel Rule-Making' and Multilevel Judicial Protection of Constitutional Rights***

Globalization not only accelerates processes of 'de-nationalization' and 'disaggregation' of traditional, national and international systems of law and ever more complex dispersal of power. At the end of the first decade in the 21<sup>st</sup> century, the ever larger number of crises in the international trading, financial, environmental, development and legal systems also underline the need for re-ordering the new reality of thousands of interdependent, private and public, national, transnational and international governance institutions. As global public goods are composed of national and regional public goods and are essential for overcoming national biases and harmful border discrimination, the 'constitutional

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<sup>68</sup> Cf. Petersmann (note 4), chapter II.

logic' of international public goods must go beyond the logic of 'constitutional nationalism' and its systemic discrimination against foreigners. Multilevel governance mechanisms may legitimately differ depending on the particular context of the regulatory problems. For instance, decentralized private-public partnerships have enabled efficient governance of the global internet.<sup>69</sup> The financial crisis since 2008, by contrast, suggests that the 'global corporate economy' based on 'private-public co-regulation' of financial services has led to harmful governance failures (such as destruction of private savings and investments worth trillions of US dollars). Conflicts between rational self-interests of economic actors (e.g. bankers allocating to themselves huge financial bonuses for excessive risk-taking at the expense of shareholders and taxpayers) and 'public reason' are ubiquitous and inevitable in the dynamic transformation of the global economy. Historical experience in Europe confirms the Kantian insight that multilevel, constitutional protection of cosmopolitan rights of citizens and of 'public justice' can offer effective and legitimate restraints on antagonistic conflicts among rational self-interests of individuals and governments.

The relocation of governance powers to transnational and international levels continues to erode traditional forms of 'constitutional checks and balances' by national parliaments, courts and national 'civil societies'. The emergence of global civil society and global communication networks limits some of the 'information asymmetries' and 'discourse failures' impeding transnational 'deliberative democracy' in an intergovernmental 'inter-state system'. Yet, 'foundational constitutionalism' for the constitution and administration of 'global governance' remains a *utopia* in view of the ubiquity of conflicts of interests and legitimately diverse, individual and democratic preferences and conceptions of 'justice' and 'public reason.' European experience confirms that – just as 'courts of justice' can operate inside constitutional democracies as 'exemplar of public reason',<sup>70</sup> protecting constitutional rights of citizens against abuses of power by majority decisions of the political branches of government – the ever larger number of European and international courts can be justified on similar reasons as 'compensatory constitutionalism' necessary for 'piecemeal protection' of individual rights and rule of law in transnational relations. In addition to dispute prevention and adjudication, courts also increasingly engage in 'multilevel judicial governance' by clarifying disputed interpretations of rules, principles and incomplete agreements and by contributing to the progressive adjustment and development of under-theorized, national and international legal systems and their underlying 'principles of justice'.<sup>71</sup> The more 'inter-governmentalism' evades effective control by domestic parliaments, courts, citizens and civil society, the more may impartial and independent, multilevel judicial review and protection of cosmopolitan rights be justifiable on constitutional grounds. In European integration, the member states of the EU, EEA and ECHR have been willing to delegate vast powers to European 'courts of justice' (like the ECJ, the EFTA Court and the ECtHR) enabling 'multilevel judicial governance' to evolve into the most active guardian of constitutional rights of EU citizens and of constitutional control of multilevel governance powers. The multilevel judicial cooperation and 'judicial dialogues' have interpreted the systemic nature and constitutional legitimacy of European law and 'European public reason' in terms of new 'rules of recognition' limiting intergovernmental rule-making by ever more constitutional restraints, thereby facilitating the incorporation of the EU Charter of Fundamental Rights of December 2000 into European constitutional law as a result of the 2009 Lisbon Treaty. As most states outside Europe remain unwilling to follow the European examples of multilevel integration law, they should explore alternative rules and institutions for limiting the 'collective action problems' in protecting

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<sup>69</sup> Cf. note 66.

<sup>70</sup> J. Rawls (note 1), at 216, 235. Rawls suggests that his account of what judges may justifiably decide seems to be similar to R. Dworkin's conception of judicial reasoning in 'hard cases' involving conflicts between constitutional rights and public interests: R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

<sup>71</sup> Cf. E.U. Petersmann, Constitutional Theories of International Economic Adjudication and Investor-State Arbitration, in: P.M.Dupuy/F.Francioni/E.U.Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP, 2009), 137-194.

(inter)national public goods more effectively at national and international levels. For example, even though the hundreds of WTO dispute settlement findings contribute to the progressive clarification and development of contested interpretations of WTO rules, the WTO membership should respond to these sometimes controversial legal interpretations by establishing a WTO Legal Committee proposing ‘authoritative interpretations’ of WTO rules or identifying systemic problems in the application of WTO law.

### **Conclusion: ‘Governing Interdependent Public Goods’ Requires Multilevel Constitutional Restraints of Multilevel Governance**

The propositions of this paper can be summarized as follows:

- (1) Globalization entails governance problems involving billions of private and public, national and international actors with often conflicting interests and diverse value preferences. The ‘harmful externalities’ of globalization (like pollution) increasingly undermine also the capacity of ‘legal nationalism’ to protect *national* public goods effectively without international cooperation. Just as almost all UN member states have adopted national constitutions for the collective supply of national public goods, so can multilevel ‘governance of interdependent (inter)national public goods’ remain legitimate and effective only within multilevel, yet decentralized constitutional frameworks that remain consistent with the human rights obligations and constitutional commitments of all 192 UN member states. In view of the limited ‘overlapping consensus’ on the interpretation of human rights and constitutional rules, the coordination of the diverse legal regimes necessary for promoting transnational rule of law must respect ‘reasonable disagreement’ and the reality and legitimacy of ‘constitutional pluralism’ and related theories of justice.
- (2) Democratic support for international public goods must be prepared by demonstrating to domestic citizens the common national self-interest in reciprocal extension of national public goods across frontiers as an instrument for reducing ‘constitutional failures’ at national levels (like border discrimination reducing consumer welfare and undistorted competition). In addition to emphasizing common self-interests in international public goods that protect domestic citizens against harmful ‘external effects’ (like foreign pollution, terrorism, health pandemics), there is also a need for new kinds of ‘cosmopolitan public reason’ supporting mutually beneficial ‘multilevel globalization agendas’ for adjusting national and international political and legal systems to the requirements of international public goods. Recognizing the ‘national interest’ in the collective interests in international public goods will not lead to common action unless the five major ‘collective action problems’ (i.e. the ‘jurisdiction gap’, the ‘governance gap’, the ‘participation gap’, ‘incentive gap’ and ‘rule of law gap’) are more adequately regulated.
- (3) Liberalization and regulation of international movements of goods, services, persons, capital and related payments can be justified more convincingly in terms of welfare economics and human rights than most forms of discriminatory import protection (e.g. based on anti-dumping laws) and political opposition (e.g. based on ‘common law conceptions’ of private self-regulation and ‘market fundamentalism’) against WTO competition and environmental rules. WTO law and institutions are essential, but inadequate for promoting national self-interests in a rules-based global division of labour. For instance, the ‘protection bias’ in national decision-making procedures needs to be compensated by mandating international institutions to demonstrate the common self-interests in the ‘globalization benefits’ and to propose new rules necessary for overcoming ‘collective action problems’. Even though WTO law rightly permits ‘second-best policies’ (like free trade areas, customs unions, trade preferences for LDCs), the WTO rules for supervising and ‘multilateralizing’ such preferential trade liberalization and for protecting equal rights of citizens remain inadequate. Extending the ‘cosmopolitan public

reason' underlying the rights-based, European economic integration law to certain fields of intergovernmental WTO law and environmental regulation could depoliticize and decentralize the resolution of many conflicts of interests.

- (4) The ubiquity of conflicts of interests among rational individuals and governments renders worldwide agreement on comprehensive theories of justice utopian. The customary law requirement of interpreting international treaties and settling international disputes 'in conformity with principles of justice' and the human rights obligations of governments require respect for both 'cosmopolitan principles of justice' (e.g. as defined by multilevel human rights) as well as for the diverse, national constitutional principles of justice (e.g. based on the Rawlsian justification of different kinds of 'principles of justice' in national and international legal systems).
- (5) The 'overlapping nature' of international public goods and their ever greater importance for the welfare of citizens requires limiting the 'governance failures' in the law and practices of worldwide organizations. Civil society, non-governmental organizations, parliaments and 'courts of justice' have good reasons for insisting on 'constitutional reforms' of multilevel governance in order to protect common interests more effectively. The diverse forms of 'multilevel constitutionalism' accepted by citizens and member states in the EU, EEA and ECHR go far beyond what citizens and governments outside Europe appear willing to accept. Promotion of inter-parliamentary cooperation (as inside the WTO and in the EU-US Transatlantic Partnership), private-public partnerships (e.g. like the UN Global Compact for 'corporate social responsibility'), multilevel cooperation among national and international courts (e.g. as in the EU, EEA and ECHR) and 'deliberative democracy' should be used for increasing the pressure on governments to accept 'piecemeal constitutional reforms' of their 'Westphalian' intergovernmental regulation. Even though states remain the principal actors in 'governing interdependent public goods', citizens must be recognized as 'primary subjects' and 'democratic owners' also of IEL and of international organizations for reciprocal extension of national public goods across frontiers.-







