



EUI Working Papers

LAW 2012/18

DEPARTMENT OF LAW

METHODOLOGICAL PLURALISM AND ITS CRITICS IN
INTERNATIONAL ECONOMIC LAW RESEARCH

Ernst-Ulrich Petersmann

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
DEPARTMENT OF LAW

Methodological Pluralism
and its Critics in International Economic Law Research

ERNST-ULRICH PETERSMANN

EUI Working Paper **LAW** 2012/18

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

ISSN 1725-6739

© 2012 Ernst-Ulrich Petersmann

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

This paper (accepted for publication in the *Journal of International Economic Law* 15 (2012)) uses the term 'legal methodology' as referring to the conceptions of the sources and 'rules of recognition' of law, the methods of interpretation, the functions and systemic nature of legal systems like international economic law (IEL), and their relationships to other areas of law and politics. It begins with discussing six competing theories of justice justifying international economic regulation. This overview of theories of justice is followed by a discussion of competing moral, economic, political and legal conceptions of the 'primary' and 'secondary rules' of IEL. Due to the 'dual nature' of modern legal systems resulting from the universal recognition of human rights and of other principles of justice, legal positivism, natural law theories, social and policy conceptions of national, transnational and international legal systems must be applied in mutually coherent ways. As law and jurisprudence are less about 'truth' than about 'institutionalizing public reason', positive and normative legal arguments must respect legitimate 'constitutional pluralism' and 'reasonable disagreement' about interpretation and legal protection of civil, political, economic, social and cultural human rights as relevant context for interpreting IEL. The paper explains why, due to 'globalization' and the transformation of ever more *national* into *transnational public goods*, national Constitutions have become 'partial constitutions' that can no longer protect many public goods without international law and institutions. Constitutional and 'public goods' theories confirm that the five competing conceptions of IEL must be embedded into a multilevel constitutional framework limiting abuses of public and private power in all human interactions at national, transnational and international levels. The paper includes case-studies illustrating the need for comparative institutional research on which multilevel legal, institutional and regulatory approaches protect human rights, other cosmopolitan rights of citizens and related public goods most effectively. The obvious 'governance failures' in protecting interdependent public goods call not only for 'democratic empowerment' of citizens by cosmopolitan rights compensating the inadequate parliamentary control of multilevel governance by new forms of 'participatory', deliberative and cosmopolitan democracy. The obvious abuses of 'Westphalian conceptions' of 'international law among states' must also be limited by stronger multilevel judicial protection of cosmopolitan rights in order to hold governments more accountable for their failures to protect interdependent public goods more effectively.

Keywords

Constitutionalism; human rights; legal and constitutional methodology; economic adjudication; international economic, trade and investment law; judicial governance; principles of justice; WTO law.

Author Contact Details:

Ernst-Ulrich Petersmann,
Emeritus Professor of International and European Law,
European University Institute,
Villa Schifanoia,
Via Boccaccio 121,
50133 – Florence,
Italy

Email: ulrich.petersmann@eui.eu

TABLE OF CONTENTS

Justice in IEL? Six Competing Conceptions.....	2
<i>Diverse Spheres of Justice in Dispute Settlement and IEL Adjudication?</i>	3
<i>Justice as Efficiency and Maximization of Utility?</i>	4
<i>Justice as Libertarian Freedom and Self-Ownership?</i>	4
<i>Justice as Priority of Human and Constitutional Rights over the Common Good?</i>	5
<i>Justice as Communitarian Democracy?</i>	6
<i>Should IEL be based on ‘Cosmopolitan Justice’?</i>	7
How to Justify IEL in the 21st Century?	9
<i>Conceptions of IEL Depend on the Value Premises</i>	9
<i>Conceptions of IEL also Differ among International Relations Theories</i>	10
Legal Positivism, Natural Law, Social and Policy Conceptions of IEL and Transnational Law. 12	
<i>The ‘Dual Nature’ of Modern Legal Systems</i>	13
<i>Competing Normative Policy Conceptions of IEL</i>	14
<i>Social Foundations, Interdisciplinary and ‘Contextual’ Dimensions of IEL</i>	15
Constitutional and ‘Public Goods’ Theories of IEL.....	17
<i>Lessons from ‘Judicial Constitutionalization’ of IEL in Europe?</i>	17
<i>‘Public Goods Theories’ can help clarifying the Regulatory Tasks of IEL</i>	18
Need for Comparative Institutional Research.....	20
<i>Comparative Economic and ‘Public Choice’ Analyses of IEL</i>	21
<i>Comparative ‘Systems-Analyses’: Lessons from the Transformation of International Investment Law?</i>	21
Cosmopolitan IEL Resulting from ‘Struggles for Rights’?	24
<i>Lessons from the Historical Evolution of IEL?</i>	24
<i>Development of Substantive IEL through Cooperation among courts?</i>	25
<i>IEL as a ‘Struggle of Citizens’ for Cosmopolitan Rights?</i>	27
Democratic Legitimacy of Judicial Protection of ‘Cosmopolitan IEL?	29
<i>Need for Empirical Case-Studies of ‘Judicial Reforms’ of IEL</i>	30
<i>‘Democratic Functions’ of Judicial ‘System-Building’?</i>	32
IEL and Reasonable Disagreement.....	34

METHODOLOGICAL PLURALISM AND ITS CRITICS IN INTERNATIONAL ECONOMIC LAW RESEARCH

*Prof. Dr. Ernst-Ulrich Petersmann**

The Introduction to the first issue of the *Journal of International Economic Law* (JIEL) in 1998 emphasized the wish of the editors to promote multi-disciplinary, theoretical as well as practice-oriented research on international economic law (IEL) understood broadly, i.e. comprising private and public, national and international law and practices ‘blending legal analysis with political science, economics and other fields’. In the opening essay on *What Is International Economic Law?* in Volume 14 (1), S.Charnovitz concluded that IEL – even though it is one of the oldest fields of national and international law – has not yet developed a general theory; ‘if there is a way to achieve a conceptual unification of IEcL..., it will come from placing individual economic and social actors at the center of the analysis of how to maximize market freedom while respecting human dignity’.¹ Is it possible to share a common methodology for IEL research without a common theory of IEL, of its normative value premises, and of multilevel governance of international public goods?² Legal methodology in IEL research remains contested among practitioners and academics also because legal interpretations might arrive at different conclusions depending on the respective methodologies applied. The purpose of this contribution is to identify methodological research questions and invite future contributors to JIEL to engage in more *JIEL debate* on their respective legal and comparative research methodologies so as to stimulate mutual learning and innovation. The term *legal methodology* is used here as referring to the respective conceptions of the sources and ‘rules of recognition’ of law, the methods of interpretation, the functions and systemic nature of legal systems like IEL, and of their relationships to other areas of law and politics.

* Associate editor of JIEL; emeritus professor of international and European Law, European University Institute, Florence; visiting professor at LUISS University, Rome, and Jiaotong University, Xi’an (China).

¹ JIEL 14 (2011), at 22. For a new analysis of IEL proceeding from this methodological premise see: E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford: Hart Publishing, 2012).

² Cf. S.R.Ratner/A.M.Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, in: *AJIL* 93 (1999), 291, who define methodology as ‘the application of a conceptual apparatus or framework – a theory of international law – to the concrete problems faced in the international community’ (at 292).

Justice in IEL? Six Competing Conceptions

The main entrance to the WTO's *Centre William Rappard* at the Lake of Geneva is flanked by two statues representing 'peace' and 'justice', the two central objectives and justifications of legal systems since ancient times. Yet, even though the sculptor positioned the statues on either side of the entrance door in order to remind all people entering the building of the human ideals of justice and peace,³ hardly any trade lawyer and trade diplomat has ever argued in a GATT/WTO dispute settlement proceeding that 'peace' and 'justice' are among what the Preamble to the WTO Agreement calls 'the basic principles and objectives underlying this multilateral trading system'. Article 1 of the UN Charter and the Preamble of the Vienna Convention on the Law of Treaties (VCLT) recall that 'international disputes should be settled by peaceful means and in conformity with the principles of justice and international law'. The UN Charter provisions on the International Court of Justice (ICJ) not only codified the sources (eg, international conventions, custom, general principles of law) and 'rules of recognition' of international law (eg, recognition by states, 'civilized nations', 'judicial decisions and the teachings of the most highly qualified publicists', cf Article 38 ICJ Statute) as they were perceived in 1945; their regulation of the ICJ as 'the principal judicial organ of the United Nations' (Article 92) also reflects the ancient legal traditions of independent, impartial judges administering justice by 'weighing' the arguments of both sides (*justitia* holding the scales) and enforcing the existing law (*justitia* holding the sword). The common linguistic core of the legal terms *jus*, *judex* and *justitia* (or *justice* and the designation of judges as *Lord Justice*) likewise recalls the European traditions of recognizing justice as the main objective of law and 'courts of justice' as an indispensable part of legitimate governance. Ancient Greek law, for example, conceived 'justice as a prerequisite to living a civic life, to living in community' (Plato); law was defined as 'participation in the idea of justice'.⁴ In view of the lack of democratic legitimacy of 'Westphalian conceptions' of 'international law among states' and of their justification of inhumane, colonial and imperial legal practices by 'the white man's burden' (R.Kipling), many scholars propose to substitute the discourse on the 'democratic deficit' of international organizations and their multilevel governance with a discourse on their contribution to transnational justice: In contrast to 'Westphalian discourse' focusing on rights and obligations of states and democratic discourse focusing on parliamentary democracies, 'the discourse on justice centres on the people, puts primary emphasis on power asymmetries and on overcoming the obstacles to justifiable political outcomes'.⁵ Yet, even though the UN Charter and the law of many other international organizations explicitly refer to 'principles of justice', cosmopolitan theories on 'global justice' and alternative theories of justice for an international 'law of peoples' remain highly disputed.⁶ European courts and the ICJ refer regularly to requirements of 'proper administration of justice' in clarifying procedural principles of due process of law and substantive principles of justice. The ICJ, for instance, takes it for granted that:

³ Cf. the explanations of the statues by their sculptor: L Jaggi in *Centre William Rappard. Home of the World Trade Organization* (WTO: Geneva, 2011) 34. Instead of representing 'justice' in the traditional way as a blind-folded woman holding a scale and a sword, the artist sculptured 'justitia' holding a dove (representing truth) and checking a serpent (symbolizing lying and deceitfulness) with her feet. Note that the *Centre William Rappard* had been built for the International Labour Organization whose 'Constitution' (*sic*) of 1919 began with a reference to the need for 'lasting peace' that 'can be established only if it is based upon social justice'.

⁴ Cf. C.J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago: Chicago University Press, 1963), chapters II and XX.

⁵ J.Neyer, Justice, Not Democracy: Legitimacy in the European Union, in: *Journal of Common Market Studies* 48 (2010), 903-921.

⁶ See, eg: G.Brock, *Global Justice. A Cosmopolitan Account* (Oxford: OUP, 2009); R.Martin/ D.A.Reidy (eds), *Rawls's Law of Peoples* (Oxford: Blackwell, 2006).

‘Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable.’⁷ ‘Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it.’⁸

International customary law (eg, as codified in the Preamble and Article 31 VCLT) requires interpreting treaties and settling related disputes ‘in conformity with principles of justice’ and human rights. Yet, ‘reasonable disagreement’ among citizens and governments over the interpretation of human rights and other ‘principles of justice’ is likely to remain a permanent reality in view of legitimately diverse, individual and democratic preferences, legal traditions and ‘constitutional pluralism’ in the 193 UN member states. In his book on *Politics*, Aristotle claimed that ‘all men cling to justice of some kind’, but they do not agree on what justice is: ‘their conceptions are imperfect and they do not express the whole idea’.⁹ Modern IEL continues to be influenced by six competing conceptions of justice:

Diverse Spheres of Justice in Dispute Settlement and IEL Adjudication?

Questions of justice arise whenever citizens claim conflicting rights or request the elimination of arbitrary distinctions and the fair settlement of their disputes on the basis of ‘just principles’ and ‘fair procedures’ reviewing and ‘balancing’ the competing claims and justifying the final judgment. The need for peaceful settlement of disputes over conflicting claims for justice, for judicial protection of transnational rule of law and judicial remedies based on principles of justice is today more recognized in IEL (e.g. in the national and international judicial remedies and compulsory jurisdictions of ‘courts of justice’ protected in international trade, investment and regional economic law) than in most other areas of international law. Since Aristotle, distributive, corrective, commutative justice and equity continue to be recognized as important ‘spheres of justice’ in the design of national and international dispute settlement systems (eg, for ‘violation complaints’, ‘non-violation complaints’ and ‘situation complaints’ pursuant to GATT Article XXIII); post-colonial IEL also includes ‘principles of transitional justice’ (eg, in Part IV of GATT and in the Dispute Settlement Understanding of the WTO). Yet, the ‘Westphalian’ focus on rights and obligations of states and the lack of adequate rights and judicial remedies of *individuals* in IEL are, arguably, among the main reasons why the prevailing ‘Westphalian conceptions’ of IEL do not prevent the unnecessary poverty of more than 1 billion poor people and the inadequate protection of human rights and transnational rule of law for billions of other people. The prevailing ‘Westphalian paradigm’ of most worldwide IEL agreements focusing on dispute settlement procedures among states protects neither human rights and consumer welfare of citizens nor individual access to justice inside countries. Arguably, the lack of ‘cosmopolitan justice’ hinders producers, investors, traders and consumers to use and develop IEL for maximizing consumer welfare, transnational rule of law and protection of citizen rights more effectively. As long as national and international judges do not cooperate in protecting transnational rule of law for the benefit of citizens, the pre-democratic ‘intergovernmental governance’ and inadequately regulated ‘private self-governance’ of the worldwide division of labour remain characterized by numerous ‘market failures’ and ‘governance failures’ to the detriment of equal rights of citizens and their consumer welfare.

⁷ North Sea Continental Shelf, Judgment ICJ Reports 1969, pp. 48-49, para. 88. For other references to the relevant ICJ jurisprudence see, e.g., G.Ziccardi Capaldo (ed), *Repertory of Decisions of the International Court of Justice 1947-1992, Vol II* (The Hague: Kluwer, 1995), at pp.777, 781, 825, 855, 935.

⁸ Continental Shelf (Tunisia v Libyan Arab Jamahiriya, Judgment ICJ Reports 1982, p.60, para. 71.

⁹ Cf. Aristotle, *The Politics and The Constitution of Athens* (ed. by S.Everson, Cambridge: CUP, 1996), at xiv.

Justice as Efficiency and Maximization of Utility?

The Bretton-Woods Agreements, GATT/WTO law and most other areas of IEL outside Europe are based on utilitarian principles of economic efficiency aimed at enhancing ‘total national welfare’. For instance, GATT/WTO law ranks trade policy instruments and subsidies according to their respective economic efficiency by allowing use of non-discriminatory product and production regulations, production subsidies and ‘unbound’ tariffs, but legally limiting the imposition of tariffs in excess of market access commitments and prohibiting discriminatory non-tariff trade barriers, discriminatory import and export subsidies, or ‘unnecessary’ technical regulations and sanitary standards. Yet, in contrast to rights-based European economic law committed to a ‘highly competitive social market economy’ within ‘an area of freedom, security and justice’ (Article 3 TEU) among 27 EU member states, the prevailing utilitarian conceptions of IEL outside Europe offer neither effective protection of ‘consumer welfare’ (which is nowhere mentioned in the 30’000 pages of WTO law) nor adequate justification of the often one-sided, utilitarian focus on redistributing income in favour of powerful producer interests (‘producer welfare’). Utilitarians ignore the impossibility of measuring, comparing and maximizing all human preferences, values (eg, competing moral ideals) and other forms of happiness (‘utilities’) on a single scale. The welfare of a nation, the quality of the life of citizens and their ‘life satisfaction’ (eg, in terms of health, education, democratic self-government) cannot be inferred from measuring national income. By treating citizens as mere objects of governmental ‘utility maximization’ and neglecting human rights, the utilitarian focus on efficient production and distribution offers no guarantee for taking into account the non-economic dimensions of human welfare, for instance whenever restrictive business practices or emergency situations price out poor people of access to water, essential food and medical services. The utilitarian assumption that morality consists in weighing and aggregating costs and benefits and ‘maximizing happiness’ (eg, by governmental redistribution of the ‘gains from trade’ at the whim of the rulers) also risks being inconsistent with the moral principles underlying modern human rights (like respect for human dignity and ‘inalienable’ human rights). Can the utilitarian goal of maximizing welfare (eg, in terms of the greatest happiness for the greatest number) be reconciled with other theories of justice claiming, for instance, that the distribution of goods should be based on libertarian rights of self-ownership (eg, over one’s body, labour and ‘fruits of labour’), on egalitarian equal freedoms and human rights, or on virtue and moral desert? Do the IEL practices of focusing on reciprocal market access commitments (eg, in GATT/WTO law) subject to ‘exceptions’ reserving sovereign rights to unilaterally protect non-economic public interests (eg, in GATT Articles XIX – XXI) adequately reconcile IEL with human rights?

Justice as Libertarian Freedom and Self-Ownership?

Since ancient Greek, Roman and Italian republicanism up to the human rights revolutions during the 18th century, the republican ideal of freedom and self-government of citizens for the common good (*res publica*) was linked to the idea of not being subject to anyone’s domination: citizen rights to freedom, ownership of the public goods and collective self-determination and control of the government (as agent with limited powers delegated by the citizens as the principals) were limited to property-owners who were not subject to anyone’s domination and did not depend on the good will of another.¹⁰ Commercial law, arbitration and the ‘merchant republics’ during the Italian *renaissance* were likewise shaped by libertarian claims that personal self-ownership of one’s body, labour, ‘fruits of labour’, property rights, investments, freedom of contract and other ‘market freedoms’ must be legally respected and protected against government interferences provided the economic development and distribution were based on ‘justice in initial holdings’ and ‘justice in transfer’.¹¹ Also mercantilist trade policies and the development of IEL were driven by power-oriented colonialism, imperialism

¹⁰ Cf. P.Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford : OUP, 1997).

¹¹ Cf. R.Nozick, *Anarchy, State and Utopia* (Oxford : Blackwell, 1974).

and the evolution of some trading countries (like England, Portugal and Spain) into powerful hegemony protecting their foreign investments and shipping monopolies abroad, whereas other countries were subjected to colonial and imperial exploitation or remained poor without engaging in welfare-enhancing division of labour. Modern economic theory and theories of justice (eg, of J. Rawls) emphasize that the welfare of people and states depends on reasonable rules, institutions and 'human resources' rather than on natural resources. Hence, the fact that some countries without natural resources (like Hong Kong, Singapore, Switzerland) have become rich and industrialized, whereas some resource-rich countries remain less-developed (like many LDCs in Africa), can be explained most convincingly in terms of their respective legal systems for protecting economic freedoms, property rights and other legal preconditions of a welfare-enhancing division of labour. Yet, in the 21st century, libertarian claims to unrestricted self-ownership (eg, to sell one's body parts), freedom of voluntary exchange (eg, for outsourcing pregnancy for pay) and compensation for 'regulatory takings' of foreign investor rights, like libertarian opposition to governmental taxation for financing the supply of public goods, are increasingly inconsistent with modern human rights and democratic legislation.¹² Libertarianism also offers no coherent theory for multilevel governance and protection of international public goods aimed at limiting 'harmful externalities' of national policies (eg, in terms of pollution of the environment and the 'tragedy of global commons') and protecting reasonable, common citizen interests in interdependent 'aggregate public goods' such as efficient, transnational monetary, trading, financial and rule-of-law systems promoting international division of labour and consumer welfare.

Justice as Priority of Human and Constitutional Rights over the Common Good?

Utilitarian inference of moral and legal principles from satisfaction of human desires, like libertarian derivation of moral and legal claims from 'freedom as non-domination', privilege the powerful and leave the rights of weaker persons vulnerable. Can 'market freedoms' and mutually beneficial, voluntary market transactions be justified also on other than libertarian and utilitarian grounds of 'instrumental rationality', for instance as integral parts of existential and professional self-realization of reasonable human persons whose discursive and social nature requires participating in social cooperation among free and equal citizens for realizing their reasonable autonomy? Even though social discourse and market transactions (including 'opinion markets') are part of the empirical, sensible world that may be governed by *heteronomous* 'laws of nature' rather than by *autonomous moral actions*, social discourse is reasonable only to the extent that the discourse partners implicitly and autonomously recognize each other as free and equal participants in their discursive search for truth.¹³

Contrary to utilitarian conceptions of individuals as being 'the slaves of our desires' and libertarian acceptance of many people remaining subject to domination by others, human rights require respecting the dignity, the human capacity of reasonable autonomy, the 'inalienable birth rights' and freedoms of choice of every human being. European economic law protects and enforces the common market freedoms among the 30 member states of the European Economic Area (EEA) as fundamental,

¹² On the need for 'human rights coherence' of IEL see: Petersmann (note 1), chapter IV.

¹³ On discourse theory, and the implicit, moral respect of discourse partners as having reasonable autonomy and dignity, as justification of human rights 'without metaphysics' see: R.Alexy, *Menschenrechte ohne Metaphysik?* in: *Deutsche Zeitschrift für Philosophie* 52 (2004), 15-24. For a comparison of the metaphysical, Kantian and Rawlsian moral justifications of principles of justice, human rights and hypothetical 'social contracts' see, eg: M.J.Sandel, *Justice. What's the Right Thing to Do?* (New York: Farrar/Strauss/Giroux, 2009), chapters 5 and 6. While Kant justified his cosmopolitan 'right of hospitality' on moral grounds, it remains contested whether the legal interpretation of EU 'market freedoms' as 'fundamental rights' can be justified on moral grounds only (eg, as representing 'generalizable human interests' of all EU citizens). Similarly, the derivation of individual investor rights and judicial remedies from international investment treaties, like the derivation of labour rights from ILO conventions, can be justified not only on utilitarian grounds, but also on human rights principles.

cosmopolitan rights that must be exercised in conformity with, and remain consistent with all human rights. Whereas John Locke invoked god for justifying human rights, UN and European human rights law derives human rights from respect for human autonomy and reasonableness as ‘inalienable rights’, including a right ‘to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’ (Article 28 Universal Declaration of Human Rights). Kantian, Rawlsian and other modern theories of justice (eg, by R.Dworkin and B.Ackerman)¹⁴ explain why moral respect for human autonomy and reasonableness requires the priority of equal liberty rights (as ‘first principle of justice’) over particular conceptions of the ‘good life’ and the ‘common good’. According to both Kant and Rawls, a just society protects the equal freedoms of its citizens to pursue their own, often diverse conceptions for a good life – provided such conceptions remain compatible with equal freedoms for all – without imposing any particular conception of a good life. Arguably, regardless of moral and philosophical theories and conceptions of human agents and their ‘individual sovereignty’¹⁵, the universal recognition of human rights (eg, in UN law) as constitutional foundation of all governance powers confirms the legal priority of equal human freedoms (as defined by human rights) as integral part of positive, national and international legal systems in the 21st century. Yet, it remains contested whether, and to what extent, the moral and legal ‘priority of right over the good’ constitutionally limits democratic legislation to protect agreed ‘common goods’. In contrast to Anglo-Saxon conceptions of civil and political human and constitutional rights as ‘trumping’ in case of conflicts with democratic majority legislation, European courts acknowledge that legislative and administrative restrictions of human rights may be aimed at protecting other constitutional rights requiring ‘balancing’ of competing civil, political, economic or social rights protection in order to establish whether governmental restrictions were suitable, necessary and proportionate means for reconciling competing human or constitutional rights in reasonable procedures.¹⁶

Justice as Communitarian Democracy?

As individuals are born into families, grow up in social communities and their individual control over the forces governing individual lives is diminishing with ‘globalization’, the liberal conception of individuals as ‘freely choosing, unencumbered selves’ is criticized from communitarian perspectives.¹⁷ Also voluntary consent to ‘social contracts’ and agreements – even if reflecting ideals of autonomy and reciprocity – does not prove the fairness of contracts, for instance if their conclusion was due to unequal bargaining power and information asymmetries. The moral and legal ‘human rights imperative’ of treating all persons as ends in themselves and as autonomous, reasonable ‘principals’ of governments with limited, delegated powers justifies conceptions of democratic self-governance and communitarian supply of public goods that go far beyond republican conceptions of common ownership of public goods (*res publica*) by property-owning citizens contributing to the republican institutions. Constitutional democracies in Europe increasingly limit libertarian claims of ‘self-ownership’ of one’s body, labour and ‘fruits of labour’, for instance if such claims neglect human dignity and other human rights limiting market freedoms (eg, labour rights). Also libertarian opposition to redistribution of ‘market outcomes’ based on ‘justice in holdings’ and ‘justice in transfers’ (R.Nozick) has not prevented the ‘social market economies’ in Europe from adopting ever more comprehensive social legislation, taxation and welfare payments for the poor. The unlimited

¹⁴ Cf. R.Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); B.Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980).

¹⁵ On protection of transnational ‘cosmopolitan liberty’ and ‘individual sovereignty’ in IEL by ‘inalienable’ human rights see Petersmann (note 1), chapters III and VIII.

¹⁶ For comparative studies of the different American and European judicial standards of reviewing economic legislative and administrative acts see: Petersmann (note 1), chapters III and VIII.

¹⁷ For a criticism of the liberal conception of human persons and of their ‘moral autonomy’ from a communitarian perspective see, eg: M.J.Sandel, *Liberalism and the Limits of Justice* (Cambridge: CUP, 1982).

demand of citizens for scarce goods, services and other resources and the need for governmental supply and protection of ‘public goods’ increasingly prompt democracies to liberalize international trade and investments and design IEL in conformity with utilitarian and libertarian principles of economic efficiency, market competition and protection of property rights. Yet, this instrumental ‘economic rationality’ of modern IEL does not prevent democracies from limiting the ‘utilitarian efficiency’ of regulation whenever utilitarian conceptions of IEL neglect human rights (eg, by treating some individuals as *means* for the happiness of others), ignore general consumer welfare (eg, by one-sidedly prioritizing ‘producer welfare’), or neglect the legitimacy of economically inefficient, social contestation (eg, labour strikes, social protests) and the need for respecting reasonable ‘constitutional pluralism’.

Should IEL be based on ‘Cosmopolitan Justice’?

Republicanism, constitutionalism and human rights argue in different, yet complementary ways for empowering citizens as ‘democratic principals’ to assume democratic control and responsibility of the limited powers delegated to governments and of their common property of public goods (*res publica*). Arguably, republican, human and constitutional rights to private and democratic self-governance as well as to ‘access to justice’ through judicial review of governmental restrictions of individual freedoms are necessary not only for protecting civil, political, economic, social and cultural human rights with due respect for their often different protection in different jurisdictions with diverse constitutional traditions and democratic preferences. As explained by the Kantian theory of cosmopolitan multilevel constitutionalism¹⁸, the moral arguments for ‘principles of justice’ protecting maximum equal cosmopolitan liberties of citizens apply also to mutually beneficial, transnational cooperation among citizens in the global division of labour. Kant’s proposals for multilevel, constitutional protection of cosmopolitan freedoms were based on Kant’s categorical imperative of maximizing equal freedoms as a universal law by treating persons as legal subjects rather than mere objects. Kant argued that the ever more precise, legal clarification of equal freedoms and cosmopolitan rights and remedies would not only promote mutually beneficial trade, but contribute also to limiting the ‘unsocial sociability’ of rational egoists by institutionalizing ‘public peace’. Similarly, Rawls has argued that institutionalizing ‘public reason’ limiting human rivalry and protecting rule of law in social cooperation requires a ‘four-stage sequence’ of constitutional, legislative, executive and judicial rulemaking and institutions protecting an ‘overlapping consensus’ on ‘principles of justice’ and rule of law among citizens and governments with often conflicting value preferences and self-interests.¹⁹ Empirical evidence seems to confirm that rights-based IEL regimes – like the common market law of the EU and EEA Agreements, regional free trade areas (eg, chapters XI and XIX of NAFTA) and investment treaties protecting individual rights and judicial remedies - have protected not only rights of citizens and their consumer welfare through mutually beneficial economic cooperation across frontiers; the multilevel judicial protection of transnational rule of law has also transformed the European economic integration treaties into the most effective peace treaties in European history. As an instrument of promoting economic welfare and human autonomy rights, rights-based IEL has proven to be more effective than the prevailing ‘Hobbesian conceptions’ of ‘international law among states’ denying citizens individual rights to invoke, eg, GATT and WTO rules in domestic courts in order to protect transnational rule of law for the benefit of producers, traders, investors and consumers. The free movement of persons and ‘EU citizenship rights’ inside the EU further illustrate that protection of cosmopolitan rights can broaden and enrich, rather than undermine communitarian conceptions of a just and diverse society and of a good life embedded into social solidarity.

¹⁸ Cf. Petersmann (note 1), chapter III.

¹⁹ On the ‘four-stage sequence’ of legitimate rulemaking inside constitutional democracies like the US, see J.Rawls, *A Theory of Justice* (Oxford: OUP, 1972) 195 ff.

Hence, many advocates of human and cosmopolitan rights argue that, in contrast to Rawls' refusal to extend his principles of justice for a constitutional democracy beyond the state to an international *Law of Peoples*²⁰, neither 'Rawlsian tolerance' vis-à-vis non-liberal, but 'decent people' and states nor the individual and democratic responsibilities of citizens for their own, individual and social welfare justify neglecting transnational human and cosmopolitan rights and obligations in IEL. As illustrated by the unnecessary poverty of so many people in less-developed countries (LDCs), the prevailing 'Westphalian conceptions' of 'international law among sovereign states' fail to protect citizens against widespread abuses of foreign policy powers and under-supply of international public goods. Diplomatic insistence on 'member-driven governance' (eg, in the Bretton Woods institutions, GATT and the WTO) reflects pre-democratic Hobbesian claims that, once the people have conferred powers to the rulers, citizens have surrendered their authority rather than remaining 'democratic principals' and holders of 'inalienable rights' to individual and democratic self-government under the rule of law. The more globalization transforms national constitutions into 'partial constitutions' that cannot unilaterally protect transnational 'aggregate public goods' (like mutually beneficial, international monetary, trade, financial, environmental and rule of law systems composed of national public goods) in a globally integrated world, the more do citizen welfare and effective protection of economic rights within and beyond state borders require 'cosmopolitan constitutionalism' based on human rights, democratic self-governance and transnational rule of law rather than only on state consent.²¹ As already universally acknowledged in Article 28 of the Universal Declaration of Human Rights (1948), stronger protection of the economic welfare and human rights of billions of citizens in today's globally integrated world economy depends on whether IEL will succeed in regulating the 'collective action problems' of a mutually beneficial world trading, financial, environment and development system more effectively for the benefit of citizens and their cosmopolitan rights. Republicanism, constitutionalism and human rights argue for limiting the ubiquity of government failures and market failures in international economic relations by stronger legal and judicial protection of cosmopolitan rights.

²⁰ Cf J. Rawls, *Law of Peoples* (Cambridge: Harvard University Press, 1999).

²¹ Cf. Petersmann (note 1), chapters III and VII, and M.Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship of Constitutionalism in and beyond the State, in : J.L.Dunoff/J.P.Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge : CUP, 2009), 258-325.

How to Justify IEL in the 21st Century?

Law and governance need justification: ‘Justice is the first virtue of social institutions, as truth is of systems of thought’.²² In contrast to the search for truth in the natural sciences, law and jurisprudence (e.g. in the sense of the right application of the law on the basis of objective criteria) are often less about ‘truth’ (e.g. in case of establishing legal facts) than – notably in case of normative decisions – about ‘institutionalizing public reason’ providing for ‘reasonable procedures’ of rule-making, rule-administration and rule-enforcement based on ‘balanced judgments’ (e.g. resulting from democratic discourse among free and equal citizens, representative parliamentary decision-making, judicial procedures administered by impartial and independent judges so as to secure ‘rule of law’, ‘balancing’ among competing human and constitutional rights based on principles of non-discrimination, necessity and proportionality). Arguably, reasonable judgments and justice (e.g. in the sense of reasonable justification) are the equivalent in normative social sciences to truth in the natural sciences.²³ The current ‘Euro-crises’ triggered by private and public debt crises and the increasing ‘spread’ among financial interest rates for indebted Eurozone countries illustrate the direct link between legitimacy and IEL: The ‘spread’ emerged in financial markets as a rational response to increased risks of private and public debt defaults (i.e. breaches of contract law) in Eurozone member countries persistently violating the fiscal and debt disciplines of European Union law (e.g. Article 126 TFEU). In view of the ‘bail-out prohibitions’ in Articles 123-125 TFEU, democratic legitimacy and rule of law necessitated concluding the various bail-out agreements (for Greece, Ireland and Portugal) through intergovernmental *ad hoc* agreements approved by national parliaments within the limits of their respective constitutional laws (e.g. as specified by German Constitutional Court judgments emphasizing the constitutional limits for Germany’s participation in such bail-out agreements). Arguably, the financial, economic and social ‘Eurozone crises’ resulted from deeper ‘rule of law’ crises. Yet, what does ‘rule of law’ mean in a system of private and public, national and international regulation of interdependent, integrated economies by multilevel governance institutions tolerating non-compliance with EU legal disciplines? Is economic regulation by ‘majoritarian democracies’ based on ‘parliamentary sovereignty’ and by non-democratic UN member states subject to similar legal restraints as in the constitutional democracies of the EU?

Conceptions of IEL Depend on the Value Premises

Similar to the story of the blind men touching different parts of an elephant and describing the same animal in contradictory ways, private and public, national and international lawyers continue to perceive IEL from competing perspectives, for instance as (1) public international law (e.g. the Bretton Woods Agreements), (2) ‘global administrative law’ (e.g. the legal practices of UN Specialized Agencies and the WTO), (3) ‘conflicts law’ (e.g. international commercial law and arbitration), (4) multilevel constitutional regulation (e.g. rights-based European economic law and adjudication) or (5) multilevel economic regulation of the economy (e.g. NAFTA law) within the limits of national, democratic constitutionalism. The conceptions of IEL differ because economic regulation and ‘rule of law’ tend to be justified in diverse ways, for instance on grounds of

- national or individual utility (e.g. ‘national interests’, public goods, welfare);
- state consent and ‘sovereignty’ (e.g. to adopt national legislation violating IEL);
- democratic or individual consent (e.g. to ‘regulatory takings’ of property rights);
- ‘public choice’ (e.g. majority and interest group politics);

²² Rawls (note 19), at 3.

²³ Cf. R.Alexy, *The Reasonableness of Law*, in: G.Bongiovanni/G.Sartor/C.Valantini (eds), *Reasonableness and Law* (Heidelberg: Springer Verlag, 2009), 5-15.

- principles of ‘good governance’, human rights and other constitutional values (like private and public autonomy of arbitral tribunals).

The universal human rights obligations of all UN member states and the customary law requirements of interpreting treaties, and settling related disputes, ‘in conformity with the principles of justice’ and human rights (as codified in the Preamble and Article 31 of the VCLT) require interpreting and justifying IEL treaties in conformity with human rights and other principles of justice, as it is done by governments and national and European courts in all 30 member states of the EEA²⁴ and increasingly also in regional economic and human rights courts in Latin-America²⁵ as well as in investor-state arbitration.²⁶ Such ‘constitutional interpretations’ of liberty rights and their ‘balancing’ are likely to differ depending on whether individual freedom of action is protected broadly (e.g. as a constitutional ‘right of subjective freedom’ as justified by Hegel) or merely as a ‘common law freedom’ subject to whatever restrictions approved by legislative majorities.²⁷ Yet, given the diversity of moral, political and legal conceptions and legal traditions of human rights and ‘principles of justice’ and the ‘post-modern scepticism’ about the objectivity of moral reasoning, many governments and economic courts prefer avoiding controversies about ‘sovereignty’ (e.g. in terms of the legitimate ‘right to rule’), democracy (e.g. in terms of ‘constitutional democracy’ vs majoritarian democracy), competing human rights conceptions (e.g. moral, political and constitutional interpretations of fundamental rights) and ‘principles of justice’ whenever legal arguments, judgments and dispute settlement can be justified on the basis of textual, contextual and functional interpretations of economic rules.

Conceptions of IEL also Differ among International Relations Theories

International relations theories focusing on states (like realism, institutionalism, functionalism) or also on individual, group and government actions (like ‘public choice’ and constitutional theories) try to explain the rational choices of political actors rather than ‘legal methodologies’ (e.g. for interpreting legal rules). Many ‘realist’ claims (e.g. that political morality does not reach beyond national legal systems) are empirically inconsistent with the increasing impact of international law (e.g. human rights law), international regulatory agencies (e.g. multilevel monetary and competition authorities in the EU), multilevel adjudication or ‘human rights revolutions’ on transnational relations; ‘realist neglect’ of international law all too often reflects ignorance or ‘capture’ of regulators by powerful lobbies benefitting from interest group politics at the expense of ‘rationally ignorant consumers’. Economic analysis of law, by contrast, may be important not only for explaining ‘economic structures’ of private and public law²⁸ but also for interpreting legal rules based on principles of economics.²⁹ Also political theories of justice and other legal philosophies may be of direct, normative relevance for

²⁴ For examples see: U.Khaliq, *Ethical Dimensions of the Foreign Policy of the EU. A Legal Appraisal* (Cambridge: CUP, 2008).

²⁵ See, e.g., the MERCOSUR arbitral award of 6 September 2006 in the ‘Bridges case’ between Argentina and Uruguay (cf. L.Lixinski, Human Rights in MERCOSUR, in: M.T.F.Filho/ L.Lixinski/ M.B.O.Giupponi (eds), *The Law of MERCOSUR* (Oxford: Hart Publishing, 2010), at 351 ff.

²⁶ See, e.g., the UNCITRAL Arbitral Decision on Liability of 30 July 2010 in *AWG v Argentina* (i.e. one of the more than 40 arbitration proceedings against Argentina’s restrictions in response to its financial crisis in 2001), at para. 262: ‘In the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive’. The investment arbitral awards cited in this contribution are electronically available (eg, at: ita.law.uvic.ca/).

²⁷ On the centrality of jurisprudence for interpreting equal liberty rights of citizens as *individual* or merely *objective freedoms* see: Petersmann (note 1), chapter III, and W.McCormack, Lochner, Liberty, Property and Human Rights, in: NYU Journal of Law & Liberty 1 (2005), 432 ff.

²⁸ Cf. J.Trachtman, *The Economic Structure of International Law* (Cambridge: Harvard University Press, 2008).

²⁹ Cf. *Symposium: Public International Law and Economics*, in: University of Illinois Law Review Vol. 2008, 1-435; B. von Klink/S.Taekema (eds), *Law and Method of Interdisciplinary Research into Law* (Tübingen: Mohr & Siebeck, 2011).

the interpretation of rules and the legal design of institutions, for instance by justifying inherent powers of 'courts of justice', calling for respect for 'reasonable disagreement' among citizens and polities, and explaining the ubiquity of conflicts of interests not only in terms of rational self-interests of the *homo economicus* but also in view of conflicts inside human minds (e.g. between sentiments, 'animal spirits', rationality and limited reasonableness). Yet, as illustrated by the failures of economics to predict the global financial crises since 2008, the numerous 'market failures' (like information asymmetries, lack of transparency, non-accountability of abuses of power) prompt ever more economists to call for 'a new economic paradigm' (J.Stiglitz).³⁰ From the point of view of theories of justice, equal freedoms (as 'first principle of justice') and the human capacity of reasonable autonomy (as recognized in numerous human rights instruments like Article 1 of the 1948 Universal Declaration of Human Rights) require justification of all governmental restrictions of equal freedoms through legal 'institutionalization of public reason' based not only on fair procedures (e.g. deliberative and parliamentary democracy, impartial adjudication, 'balancing' of competing civil, political, economic, social and cultural human rights). IEL is also ever-more influenced by *substantive* 'principles of justice' (eg, in the EU Charter of Fundamental Rights), institutional 'checks and balances' (like 'courts of justice') and other legal safeguards protecting 'sovereign equality of states', 'reasonable disagreement' and the reality of 'constitutional pluralism' among constitutional democracies, majoritarian or non-liberal democracies.

³⁰ See, e.g., N.Serra/J.E.Stiglitz (eds), *The Washington Consensus Reconsidered. Towards a New Global Governance* (Oxford : OUP, 2008).

Legal Positivism, Natural Law, Social and Policy Conceptions of IEL and 'Transnational Law'

In view of the limited mandates of international courts deciding disputes on the basis of the applicable rules of law and the customary methods of textual, contextual and functional treaty interpretation (cf. Articles 31-33 VCLT), legal positivism has become the generally accepted starting point in research about IEL. Hence, legal systems are perceived as a union of 'primary rules of conduct' and 'secondary rules' of recognition, change and adjudication³¹ that dynamically interact with changing *legal practices* by private and public legal actors, who often justify legal claims and interpretations of rules by invoking *legal principles*.³² Hart claimed that international law 'resembles, (...) in form though not at all in content, a simple regime of primary or customary law' and, due to its incomplete 'secondary rules', a 'primitive legal order'.³³ Yet, in contrast to other areas of international law where third-party adjudication remains an exception to the rule of 'auto-interpretation', many areas of IEL are today characterized by an ever stronger role of national and international courts in clarifying, progressively developing and enforcing transnational rule of law, thereby transforming IEL into a more developed legal system than other areas of the Westphalian 'international law among sovereign states'. The state-sovereigntist distinction between 'international public law among states' (considering states as exclusive subjects and objects of international law) and 'international private law' (based on national choice-of-law rules) is increasingly blurred by the emergence of 'transnational legal systems' recognizing individuals as legal subjects deriving individual rights from international agreements (eg, on human rights, investment and intellectual property law, regional free trade, economic integration and environmental agreements) and creating autonomous, de-nationalised legal systems (like *lex mercatoria*, *lex sportiva*, *lex digitalis* of the Internet).³⁴ The new 'legal pluralism' based on *functional* rather than *territorial* legal sub-systems (eg, WTO membership admitting not only states but also sub- and supranational customs territories like Hong Kong and the EU) often entails conflicts of jurisdiction challenging the boundaries and cultures of national, transnational and international legal and judicial systems and related legal pre-conceptions (*Vorverständnis*) of legal actors.³⁵ The diplomatic focus on 'member-driven governance' (e.g. in WTO law) illustrates that 'legal pluralism', European perceptions of independent and impartial judges as the primary paradigm of justice and authoritative interpretation of law, and individual rights and judicial remedies of 'market citizens' and other non-governmental economic actors enforcing IEL as 'private attorneys general' remain contested by 'realist claims' of intergovernmental power politics. European legal research is characterized by continuous attempts at integrating positive law, empirical, normative and moral dimensions of legal integration. Yet, also in European integration law, it remains controversial, for

³¹ Cf. H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 1994), chapter V.

³² This constant interaction between 'law as a legal order' and 'law as legal practices' is emphasized by 'critical legal positivism', according to which law and its legal changes should be examined on (1) the surface level of positive law, (2) the legal culture, and (3) the deep structures of law; cf. K.Tuori, *Critical Legal Positivism* (Aldershot, 2002). In his contribution on 'A New Legal Realism: Method in International Economic Law Scholarship' to the book edited by C.B.Picker/I.D.Bunn/D.W. Arner (eds), *International Economic Law. The State and Future of the Discipline* (Oxford: Hart Publishing, 2008), G.Shaffer distinguishes four varieties of IEL scholarship: formalist/doctrinal, normative/activist, theoretical/analytical, and empirical.

³³ Hart (note 31), at 214.

³⁴ On the different forms of 'rights cosmopolitanism' not only in EU and EEA law, but also in the European Convention of Human Rights since the entry into force of its Protocol No.11 and the judicial recognition of its supra-legislative status in national legal systems throughout Europe see: H.Keller/A.Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Orders* (Oxford: OUP, 2008).

³⁵ For case-studies of competing jurisdictions of national, European, international and arbitral courts see, eg: N.Lavranos, *Jurisdictional Competition. Selected Cases in International and European Law* (Groningen: Europa Law Publishing, 2009).

example, to what extent individual access to justice should be protected (eg, in the foreign policy area), and whether ‘European law’ should be conceived as one single legal system (e.g. a ‘Union based on the rule of law’ including EU law and the national legal systems of the 27 EU member states) or as a ‘multilevel, composite system’ composed of diverse, national and international legal orders, which often serve as ‘laboratories’ for progressively improving European economic law.

The 'Dual Nature' of Modern Legal Systems

Legal positivism and textual interpretations of rules often leave open normative questions. Due to the worldwide recognition – in more than hundred UN human rights instruments - of ‘inalienable’ human rights ‘deriving from respect for human dignity’ and obligating all UN member states to respect, protect and promote human rights, natural law theory has become an integral part of positive international law; it may be relevant for interpreting, e.g., the systemic nature of human rights (e.g. as legal rights derived from moral principles and political procedures)³⁶, the relationships between ‘rules’ and ‘principles’ in human rights law and IEL, the legal clarification of ‘common, but differentiated responsibilities’ in international environmental law, and the need for respecting the diverse preferences of human beings and their diverse, democratic governance systems. The human rights jurisprudence of European courts confirms that the recognition of *jus cogens* and of other legal hierarchies (e.g. of *constitutional* over *legislative* and *administrative rules*) may justify judicial findings that unjust rules (e.g. ‘smart economic sanctions’ by the UN Security Council disregarding human rights) may not be a valid part of positive European law. The legal ‘validity’ of legal rules has to be identified, *inter alia*, by the criteria provided in the ‘rules of recognition’ and their interpretation by citizens, governments and courts. In constitutional democracies, the multilevel human rights obligations of states constitutionally limit the ‘rules of recognition’ by permitting recognition of only such rules and institutions as legitimate and legally valid that respect constitutional rights and ‘principles of justice’ as defined in democratic law-making and judicial proceedings.³⁷ Diplomats interested in maintaining their foreign policy discretion often dislike this dual nature of modern legal systems – i.e. as positive law (e.g. represented by authoritative issuance and social efficacy of rules) as well as ‘inalienable’ human rights and open-ended ‘principles of justice’, which can be of crucial importance for legal interpretation and dispute settlement.³⁸

Many past doctrinal disputes among ‘legal positivists’ and ‘natural rights theorists’ – for instance, whether positive law includes only ‘rules’ or also ‘principles’ of law, and whether judges enjoy discretion in the absence of applicable rules – have become out-dated: ‘general principles of law’ are today universally recognized sources of international law (cf. Article 38 ICJ Statute); almost all international courts acknowledge today that, in disputes over the contested meaning of imprecise rules, judges must find the ‘right answer’ through ‘administration of justice’, the customary methods of legal interpretation and ‘balancing’ of rules in the light of applicable procedures and principles of law.³⁹

³⁶ On the diverse conceptions of ‘economic justice’ and ‘ecological justice’ see, e.g., G. Chartier, *Economic Justice and Natural Law* (Oxford: OUP, 2009) (examining legal questions of ownership, production, distribution and consumption on the basis of a natural law theory of ethics).

³⁷ In order to avoid legal uncertainty, only violations of human rights, constitutional rights and other forms of ‘extreme injustice’ are likely to affect the validity of legal rules; cf. R. Alexy, *The Argument from Injustice* (Oxford: OUP, 2010).

³⁸ Cf. R. Alexy, The Dual Nature of Law, in: *Ratio Juris* 23 (2010), 167-182, who concludes that ‘legal positivism is an inadequate theory of the nature of law’ (at 180). But the inclusion of human rights and principles of justice into modern international and constitutional law permits accommodating the dual nature of law within a broad concept of positive law.

³⁹ On the increasing resort – in international human rights law, labour law, trade and investment law and adjudication - to ‘principle-oriented’ interpretations and adjudication see: E.U. Petersmann, Judging Judges: From ‘Principal-Agent Theory’ to ‘Constitutional Justice’ in Multilevel Judicial Governance of Economic Cooperation among Citizens, in: *JIEL* 11 (2008) 827-884.

WTO dispute settlement bodies, investor-state arbitration and other economic courts often have good reasons to pragmatically avoid controversial questions about justice in IEL, for instance in the WTO dispute over differential, yet ‘non-discriminatory’ treatment of less-developed countries benefitting from the Generalized System of Trade Preferences, or in WTO dispute settlement rulings on the requirement of ‘fair price comparisons’ in anti-dumping investigations.⁴⁰ The options of ‘exit, voice and loyalty’ may be used not only for explaining the dynamic evolution of *regional* economic law⁴¹; they also influence the decreasing loyalty to the post-war IEL system (as illustrated by the termination of GATT 1947 in 1995, recourse to regional trade agreements as alternatives to concluding the WTO Doha Round negotiations) and the often antagonistic recourse to ‘legal pluralism’ in IEL (as illustrated by ever more *bilateral* agreements on investments, movements of natural persons, energy supply, double taxation, intellectual property rights) as well as to *unilateralism* (e.g. the EU’s extension of its carbon emission trading system to flights from and to third countries). Designing and evaluating decentralized legal reforms – especially if they are aimed at ‘moving from the world of Hobbes to the world of Kant’⁴² – may require interdisciplinary analysis of law justifying legal interpretations in terms of ‘responsible sovereignty’ and ‘duties to protect’ internationally agreed ‘common interests’ across frontiers for the benefit of citizens and their human rights (e.g. by the NATO interventions in Kosovo and Libya).

Competing Normative Policy Conceptions of IEL

Legal analyses of IEL tend to share the positivist legal premises that positive law must be distinguished from normative proposals for changing the existing rules; positive law must therefore also remain separable from moral principles that have not been incorporated into positive law; and the efficacy of legal systems requires that ‘primary rules’ of conduct and ‘secondary rules’ of recognition, change and adjudication must be established as ‘social facts’ reflected in social practices and sources of law. Yet, as illustrated by European economic law, transforming ‘anarchy’ into ‘constitutional order’ in international economic relations may require going beyond legal analyses of positive IEL by challenging authoritarian *normative legal doctrines* (e.g. concerning state sovereignty) through re-interpreting international rules in conformity with the human rights obligations of states and their underlying ‘constitutional principles’ (e.g. popular sovereignty entailing ‘duties to protect’ and ‘responsible sovereignty’). As Albert Einstein famously remarked: ‘We can’t solve problems by using the same kind of thinking we used when we created them.’ The ‘New Haven School’s conception of international law as a ‘constitutive process of authoritative decision-making’ by individuals and democratic constituencies⁴³ explains why jurisprudence is also about making and developing

⁴⁰ For a discussion see, eg: I.Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: OUP, 2009), at 248 f, 261 f, 314 f.

⁴¹ Cf. J.Weiler, The Transformation of Europe, in: *Yale Law Journal* 100 (1990), 2403 ff, explaining constitutional and economic law reforms in the EU by their dependence on a political equilibrium between ‘voice, exit and loyalty’ (cf. A.Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations and States* (Cambridge: Harvard University Press, 1970). On older, *ordo*-liberal conceptions of ‘interdependence of legal, economic and political orders’, on the risk of ‘social dis-embedding’ by globalization, and the need for ‘democratic re-embedding of IEL’ through stronger protection of human rights and ‘struggles for individual rights’, see Petersmann (note 1), Chapters IV and VII.

⁴² Cf. P.Lamy, who – in his speech of 6 October 2011 on *What Multilateral Trading System for the Future?* (accessible on the WTO website) – stated: ‘we need to do for international monetary relations what we already did for trade : move from the world of Hobbes towards the world of Kant’.

⁴³ On the interdisciplinary ‘New Haven methodology’ of analyzing national and international law as decision-making processes that are both ‘authoritative and controlling’ in the pursuit of a ‘public order of human dignity’ enabling individuals to realize their human aspirations in their ‘civic order’, proceeding from the equal worth of all individuals and the right to individual self-development as constitutional core values, see: M.S. McDougal, The World Constitutive Process of Authoritative Decision, in: M.S. McDougal/W.M. Reisman, *International Law in Contemporary Perspective: The Public Order of the World Community. Cases*

international law through reasonable policy choices protecting human rights, democratic self-governance and a just social order. The less the 'IEL in the books' succeeds in realizing its development objectives, the stronger becomes the need for reviewing the 'IEL in action' from the diverse legal and policy perspectives of the various actors like individuals, firms, parliaments, intergovernmental law-makers, national and international administrators, diplomats and judges. Normative legal and constitutional theory concentrates on the reasonable relationships between legal principles, rules and institutions and on their diverse perceptions depending on the 'observational standpoint' (e.g. of diplomats, parliaments, international judges, impartial and reasonable citizens, non-governmental civil society organizations). The needed *policy-oriented legal analysis* must also take into account the social, economic and political conditions necessary for realizing legal and constitutional policy objectives. As customary international law requires settling international disputes in conformity with principles of justice and the human rights obligations of states, textual, systemic and functional interpretation of rules – with due regard to relevant legal principles and human rights obligations of states - should be as transparent as possible in order to be persuasive and promote inclusive 'public reason' and critical review. Yet, this function of courts as 'exemplars of public reason' (J.Rawls) may conflict with their specific dispute settlement function in jurisdictions (like GATT 1947 and the WTO) depending on voluntary acceptance and implementation of dispute settlement findings by governments with political self-interests in confidential dispute settlements. Different legal actors (eg, lawmakers, judges, commercial arbitrators, policy-makers) are likely to perceive, use and evaluate legal rules, democratic and dispute settlement procedures, and legal methodologies from different perspectives.

Social Foundations, Interdisciplinary and 'Contextual' Dimensions of IEL

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

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

(Contd.)

and Materials (Mineola: Foundation Press, 1981), at 191 ff; W.M. Reisman/S. Wiessner/A.R. Willard, The New Haven School: A Brief Introduction, in: *The Yale Journal of International Law* 32 (2007), 587-594. The policy-oriented 'democratic participant perspective' of the New Haven School is justified in international law by the worldwide recognition of human rights by all UN member states. 'Realist' claims of 'impartial description' of the continuing reality of power-oriented state practices refute neither the normative limitations of state sovereignty by modern human rights law nor the increasing recognition of individual rights and judicial remedies of individuals in ever more fields of positive international law.

80'000 transnational corporations with 10 times as many subsidiaries) illustrates the need for transnational rule of law protecting not only rights of governments, but also the rights of citizens and other economic actors;

- IEL provides for more 'international rule-of-law institutions' (such as multilevel regulatory and judicial authorities, quasi-judicial dispute settlement procedures, supervision by international organizations) for international rule-making and dispute settlement than other fields of international law; yet, the prevailing 'Westphalian conceptions' of 'international law among sovereign states' offer citizens no effective legal and judicial remedies against welfare-reducing violations of UN and WTO law;
- compulsory jurisdiction and jurisprudence of international dispute settlement bodies in IEL (e.g. in the WTO, regional trade courts, treaty-based or commercial investor-state arbitration) tend to be more frequently invoked and legally more developed (e.g. in terms of 'balancing' of public and private rights and interests) than in most other areas of international relations;
- in view of the ubiquity of 'market failures' and 'governance failures', economic courts throughout Europe insist on the customary law requirement of interpreting treaties, and settling disputes, 'in conformity with principles of justice' and human rights, as reflected in the increasing references by economic courts throughout Europe to the jurisprudence of the European Court of Human Rights;
- hence, the more citizens invoke rights beyond their national citizenship for participating in the global division of labour, redressing social in justice and acting as 'global citizens' in support of supply and consumption of global public goods, the more citizens have reasons to claim cosmopolitan rights and democratic ownership of transnational public goods and to challenge pre-democratic 'Westphalian conceptions' of IEL disregarding the customary law requirement of interpreting international law in conformity with human rights and 'principles of justice'.

Constitutional and 'Public Goods' Theories of IEL

J.Rawls' *Theory of Justice* explains why 'the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body' requires that the democratic exercise of coercive power over one another can be recognized as being democratically legitimate only when 'political power [...] is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason'.⁴⁴ In contrast to *majoritarian democracies* focusing on 'freedom of parliament' rather than on constitutional rights of citizens, *constitutional democracies* share the common experience (e.g. in the USA) that protecting constitutional rights vis-à-vis abuses of public and private power requires a 'four-stage-sequence' of constitutional, legislative, administrative and judicial protection of fundamental rights and other 'principles of justice' (like judicial review). From the point of view of citizens and their cosmopolitan rights, 'constitutional safeguards' are no less necessary vis-à-vis the ever more governance powers transferred to international organizations for the collective supply of international public goods. International agreements constituting, limiting, regulating and justifying international institutions for mutually beneficial governance of interrelated, national and international public goods (like efficient monetary, trading, financial and related rule-of-law systems) can serve 'constitutional functions' for protecting producers, investors, traders, consumers and other citizens engaged in mutually beneficial cooperation across frontiers against welfare-reducing border discrimination and other harmful abuses of discretionary foreign policy powers.⁴⁵ But the increasing transformation of *national* into *international public goods* with 'horizontal' as well as 'vertical interdependencies' (e.g. among national and international markets for goods, services, persons and capital movements) also entails new private and public powers (e.g. of private actors in global financial markets, international organizations) that risk being abused in the absence of adequate constitutional and democratic restraints, as illustrated by the under-regulation of international financial markets ushering in the private and public debt crises since 2008. This increasing gap between the 'law in the books' and the 'law in action' rightly prompts 'new legal realist scholars' to call for multidisciplinary analyses of the 'new legal world' and legal problems caused by globalization and by its increasing connection of national and international legal regimes.⁴⁶

Lessons from 'Judicial Constitutionalization' of IEL in Europe?

Arguably, the less national parliaments, courts and citizens control intergovernmental rulemaking in distant international organizations and the more rent-seeking interest groups 'capture' transnational economic regulation (e.g. the EU's banana and the US cotton policies), the more must the deficit in parliamentary and deliberative democracy be compensated by rights-based constitutionalism and multilevel judicial protection of constitutional rights and 'participatory democracy' across frontiers. As explained by Rawls, 'in a constitutional regime with judicial review, public reason is the reason of

⁴⁴ John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, Cambridge, 2001) 41.

⁴⁵ E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: Fribourg University Press and Boulder Press, 1991). On multilevel governance and multilevel constitutionalism for the collective supply of international public goods see: Petersmann (note 1).

⁴⁶ Cf. S.Macaulay, The New versus the Old Legal Realism: Things Ain't What They Used to Be, in: *Wisconsin Law Review* 2005, 365-403; V.Nourse/G.Shaffer, Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory? in: *Cornell Law Review* 95 (2009), 61-138. On the need for 'sociological jurisprudence' see already R.Pound, Law in Books and Law in Action, in: *American Law Review* 44 (1910), 12, at 15.

its supreme court'⁴⁷; transparent, rules-based and impartial judicial reasoning, subject to procedural guarantees of due process of law, makes independent courts less politicized '*fora of principle*' than political institutions dominated by interest-group politics; principle-oriented judicial reasoning is also of constitutional importance for an 'overlapping, constitutional consensus' necessary for legally stable and just relations among free, equal and rational citizens who tend to remain deeply divided by conflicting moral, religious and philosophical doctrines. In Europe, the EU Courts, the European Court of Human Rights, the EFTA Court and national courts have interpreted the international EC, EU, EEA treaties and the ECHR as constitutional orders founded on respect for human rights. Multilevel judicial protection of cosmopolitan rights (such as human rights, trading rights, investor rights, intellectual property rights) could promote incremental 'judicial constitutionalization' also of other international trade, investment and environmental treaty regimes for the benefit of citizens. Yet, in view of the 'constitutional prioritization' of civil and political rights over economic and social rights of citizens in many countries outside Europe, multilevel judicial protection of economic and social rights remains contested. As explained by I. Kant's theory of multilevel constitutional guarantees of equal freedoms (as 'first principle of justice') in all human interactions at national, transnational and international levels, multilevel constitutionalism is neither based on naïve assumptions about individuals' moral capacities nor on utopian calls for a 'global Constitution'; it is necessary for protecting 'public reason' against abuses of power in transnational relations with due respect for the legitimate reality of 'constitutional pluralism' so that - even in a 'society of devils' (I.Kant) - human interactions remain constitutionally restrained.⁴⁸ The diverse forms of multilevel constitutionalism in the EU, the EEA and the ECHR, like the multilevel judicial protection of cosmopolitan rights in international commercial, trade, investment, regional integration and human rights law outside Europe, illustrate that 'multilevel constitutionalism' has become a politically feasible and realistic conception of 'constitutional justice' protecting *individual freedom* to decide how civil, political, economic, social and cultural dimensions of personal autonomy should be 'prioritized'. Arguably, the legitimacy of 'cosmopolitan IEL' and of 'multilevel constitutional restraints' of 'intergovernmentalism' and international organizations derives from protecting human rights, other 'principles of justice' and national democracies' promise of self-governance of citizens limited by rule of law.

'Public Goods Theories' can help clarifying the Regulatory Tasks of IEL

In contrast to *private goods* produced privately in response to private demand and supply, *public goods* are confronted with 'market failures' and 'regulatory failures' requiring government intervention or governmental supply of public goods. Public goods theories analyse the diverse 'production strategies' and optimal legal instruments for limiting the respective 'collective action problems' impeding supply of public goods, such as transformation of public goods into 'club goods' or protection of 'common pool resources' by allocation of property rights. Economists distinguish 'pure global public goods' that are non-excludable and non-rival (like moonlight) from impure public goods that are non-excludable but rival (like the atmosphere and other 'natural commons') or non-rival but excludable (like patented and published inventions). Private goods tend to be made excludable and rival by means of private property rights. While some global public goods are well-provided (like communication and transport networks), others are overused (like straddling fish stocks, the ozone layer) or under-provided (like public health care, environmental stability). Access to some global public goods remains restricted (e.g. industrial use of patented knowledge requires payment of royalties). Certain non-rival, human-made 'collective goods' are made non-exclusive on a global scale

⁴⁷ Cf. J.Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), at 231 ff. R.Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004) argues, by contrast, that there is little evidence why people should put more trust in highest courts as guardians of the Constitution than in legislators.

⁴⁸ On Kantian 'multilevel constitutionalism' and its justification of multilevel constitutional safeguards of equal liberty rights see: Petersmann (note 1), chapter III.

(e.g. respect for international law). Certain natural public goods are deliberately left in the global public domain (e.g. global gene pools to promote biodiversity preservation). The main conclusion of public goods theories is that the legal regulation of the diverse kinds of ‘public goods’ must take into account their differences (e.g. among excludable ‘club goods’ and non-excludable public goods) in order to determine the most efficient and legitimate ‘production technologies’. For example:

- ‘*single best effort public goods*’ (like scientific inventions) may be supplied unilaterally, for instance by ‘private-public partnerships’ promoted by public financing of private research for public use;
- collective supply of ‘*weakest-link public goods*’ (like nuclear non-proliferation, global prevention of polio and pirates) may have to focus on financial, technical and other support for a limited number of ‘weak states’;
- global ‘*aggregate public goods*’ (like efficient monetary, trading, environmental and security systems) are composed of interdependent local, national and regional public goods and must be supplied by a ‘summation process’ requiring coordination of multilevel legal and governance systems so as to address the ‘vertical’ as well as ‘horizontal interdependencies’ (e.g. between monetary and trade rules and policies).⁴⁹

As discussed in the *Mini-Symposium on Multilevel Governance of Interdependent Public Goods* in issue 3 of *JIEL* 2012, economic and political public goods theories have so far neglected the legal dimensions and much older legal theories of public goods. Yet, in contrast to economic public goods theories, political and legal public goods theories all too often remain based on *methodological legal nationalism* with inadequate regard to international law and institutions and to the historical experience that, at both national and international levels of governance, the collective action problems impeding democratic supply of ‘aggregate public goods’ (like open markets with non-discriminatory conditions of competition) have been overcome only by resorting to *methodological legal constitutionalism*. As the private and public debt crises in the Eurozone since 2009 were caused by lack of supervision and enforcement of internationally agreed fiscal and debt disciplines (notably in Greece, Portugal, Italy and Spain) and ‘externalized’ some of the harmful effects on other Eurozone countries (eg, in terms of debt defaults, bail-out agreements, monetary speculation), the EU ‘six-pack’ regulations adopted in November 2011 and the new *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* signed by 25 EU member states in March 2012 provide for stronger, multilevel parliamentary, executive and judicial governance in the European Monetary Union, ‘which should be built on stronger national ownership of commonly agreed rules and policies and on a more robust framework at the level of the Union for the surveillance of national economic policies’.⁵⁰ Arguably, multilevel cosmopolitan constitutionalism offers more appropriate constitutional, legal and democratic foundations for the collective supply of certain transnational ‘aggregate public goods’ based on economic liberalism and cosmopolitan rights (like a citizen-driven trading system) than state-centred ‘legal nationalism’ cultivating welfare-reducing border discrimination.

⁴⁹ For a discussion of the different kinds of public goods and related ‘production strategies’ see: S.Barret, *Why Cooperate? The Incentive to Supply Gobar Public Goods* (Oxford: OUP, 2007).

⁵⁰ The quoted text is from the preambles of the five EU regulations and one EU directive on the strengthening of both the preventive and corrective fiscal and debt disciplines in EU law, which entered into force in December 2011 (OJ 2011 L 306). As money is a ‘common resource good’ owned by citizens whose supply must remain limited and function as a ‘hard budget restraint’, the Eurozone remains characterized by ‘moral hazards’ and incentives for some of its 17 member states to ‘free-ride’ on their partners. Even though these externalities make stronger common economic and monetary policies desirable, the fiscal, debt, economic and labour market policies remain primarily national responsibilities inside the EU in conformity with the ‘subsidiarity principle’ (Article 5 TEU). It remains contested to what extent theories of national fiscal federalism can be transferred to the supranational Eurozone governance in view of the small EU budget (corresponding to only 1% of the overall national budgets) and the primarily *national* fiscal, budget, economic policy and labour market competences and responsibilities.

Need for Comparative Institutional Research

Almost all UN member states have adopted national Constitutions as well as functionally limited international ‘treaty constitutions’ (eg, establishing the ILO, UNESCO, WHO and FAO whose constitutive agreements are explicitly called ‘constitutions’) that

- constitute polities, citizen rights and limited government powers (the ‘enabling function’ of constitutions);
- subject governments to constitutional restraints, institutional ‘checks and balances’ and international legal obligations (the ‘limiting function’ of constitutions);
- commit government policies to constitutionally defined objectives (like protection of human rights) and regulatory instruments (the ‘regulatory function’ of constitutions); and
- legitimize law and governance by ‘principles of justice’ (the ‘justificatory function’ of constitutions).

The more national Constitutions become ‘partial constitutions’ due to their increasing dependence on international law for protecting interdependent (inter)national public goods for the benefit of citizens, the more important become the functional interdependencies between ‘big C constitutionalism’ constituting national polities and ‘small c constitutionalism’ for protecting functionally limited, international public goods. As human rights and national Constitutions say little about economic regulation and the relative efficiency of alternative policy instrument, there is need for learning through comparative institutional research identifying not only legal similarities and differences, but explaining also the legal reasons and relative efficiencies of alternative constitutional principles, rules and institutions. All democratic constitutions, including functionally limited ‘treaty constitutions’ (e.g. establishing rule-making, executive and judicial powers and citizen rights in the EU, EEA and ECHR), acknowledge the need for six basic types of rulemaking (ie, constitutional, legislative, administrative, judicial, international and private) and of corresponding institutions necessary for democratic self-governance and ‘deliberative democracy’ based on public discussion. One defining element of constitutional democracies is that all six types of rule-making and related institutions interact as multilevel systems and compete in their search for protecting human rights and other ‘principles of justice’. The institutionalization and evolution of the ‘public reason’ necessary for maintaining democratic self-governance legitimately differ among countries depending on their historical experiences and democratic preferences, for instance regarding the controversial relationships between majoritarian political institutions, non-majoritarian regulatory agencies and courts of justice. From a constitutional perspective, both political and judicial institutions are ‘agents’ with limited constitutional mandates. Arguably, the constitutional and democratic legitimacy of independent ‘courts of justice’ protecting constitutionally agreed rights of citizens is not inherently weaker than the legitimacy of majoritarian, political processes that tend to be less independent and less constrained by ‘principles of justice’. As emphasized by comparative constitutional and institutional analyses, the comparative advantages of constitutional, legislative, administrative, judicial and intergovernmental processes depend on which institution is in a better position to protect the constitutional values inherent in the relevant rules and arbitrate competing legal claims.⁵¹

⁵¹ Cf. the interdisciplinary constitutional, legal, economic and ‘public choice’ analyses of multilevel economic regulation in: M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law* (Deventer: Kluwer, 1993). On participation-oriented ‘comparative institutional analysis’ of alternative decision-making processes like markets, political processes and judicial procedures see: N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Choice* (Chicago: Chicago University Press, 1994); *idem*, *Law’s Limit: The Role of Courts, the Rule of Law and the Supply and Demand of Rights* (Chicago: Chicago University Press, 2001); G.Shaffer/ J.Trachtman, *Interpretation and Institutional Choice at the WTO*, in: *Virginia Journal of International Law* 52 (2011), 1-52.

Comparative Economic and 'Public Choice' Analyses of IEL

Judges and legal practitioners often focus on 'how to find the applicable law' without much interest in 'why the law says what it says'.⁵² National and international law-makers and legal researchers, by contrast, often focus on legal policy questions that require exploring 'law in context' in order to understand why legal rules may operate and affect people differently depending on their social and legal context. In order to learn from such 'why questions' and use law as an efficient policy instrument, economic analyses of 'market failures' and 'public choice' analyses of 'governance failures' in IEL must be supplemented by 'constitutional choice' analyses of 'constitutional failures' and 'comparative institutional economics' evaluating alternative decision-making processes, like citizen-driven market processes, political processes, judicial procedures and regulatory interventions (e.g. based on the diverse competition law systems in North-America and Europe). One major objective of protecting cosmopolitan rights (e.g. in competition and common market regulation) is to empower citizens – as the 'democratic principals' – to exercise control over their agents based on legal and judicial remedies against the ubiquitous abuses of delegated powers to regulate international economic transactions. Arguably, cosmopolitan rights serve not only utilitarian functions (like promoting efficient economic exchanges) but also constitutional functions protecting cosmopolitan and democratic self-development rather than merely nationalist citizen rights limited by welfare-reducing border discrimination.⁵³ 'Constitutional economics' explains why long-term constitutional rules of a higher legal rank (e.g. in EU competition and common market rules) are important for limiting rule-making, administrative and judicial powers for the benefit of citizens and of their constitutional rights.⁵⁴ Economic analysis of law and 'public choice theories' examine the comparative costs and benefits of 'institutional choices' between alternative decision-making processes such as decentralized markets, majoritarian political processes and non-majoritarian decision-making by independent regulatory agencies and 'courts of justice'. 'Welfare economics' focuses on the regulation of 'market failures'. 'Public choice economics' focuses on regulating political 'governance failures' resulting, *inter alia*, from political collusion between rent-seeking interest groups and periodically elected politicians (e.g. US Congressmen depending on political and financial support from local constituencies). Comparative institutional analysis completes the economic analysis of law and public policies by comparing and evaluating the decision-making alternatives used in diverse institutional systems (eg, diverse national and regional regulatory agencies and UN Specialized Agencies).⁵⁵

Comparative 'Systems-Analyses': Lessons from the Transformation of International Investment Law?

Comparative research is also necessary for exploring under which conditions legal practices and 'jurisprudence' developed in one legal regime may assist in reforming another legal regime or enabling a 'paradigm change' in economic regulation, as it happened in diverse ways in regional economic law (e.g. due to the jurisprudence of the EU Court and EFTA Court). For instance, are there political lessons from the dynamic evolution of international investment law for similar cosmopolitan reforms in other fields of IEL? Until the judgment by the International Court of Justice (ICJ) in the *ELSI* dispute⁵⁶, most international investment disputes were decided either by recourse to domestic

⁵² M.McConville/W.Hong Chui (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007), at 2.

⁵³ On competing conceptions of 'equal freedoms' as 'first principle of justice' protecting negative as well as positive, national as well as cosmopolitan freedoms and human capacities see Petersmann (note 1), chapter III.

⁵⁴ Cf. G.Brennan/J.M.Buchanan, *The Reason of Rules. Constitutional Political Economy* (Cambridge: CUP, 1985).

⁵⁵ See also: D. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: CUP, 1990).

⁵⁶ *United States v Italy, ELSI* case, ICJ Reports 1989, 15.

courts or by diplomatic protection of the foreign investor by the home state which, occasionally, submitted the dispute to international courts like the ICJ or its predecessor, the Permanent Court of International Justice. Yet, as illustrated by the *ELSI* judgment delivered by the ICJ more than 20 years after the dispute between the US investor and the local authorities in Sicily arose, most foreign investors perceive the prior exhaustion of local remedies in national courts and ‘politicized’, lengthy procedures of diplomatic protection and disputes among states in international courts as offering inadequate legal and judicial safeguards of investor rights. The transformation of international investment law from a ‘Westphalian’ into a more ‘cosmopolitan system’ evolved since the 1960s in essentially five phases:

- Since the conclusion of the first bilateral investment treaty (BIT) between Germany and Pakistan in 1959, the number of BITs has dynamically increased to now more than 2’800 agreements. Yet, the ‘first generation BITs’ did not yet provide for direct access of the foreign investor to independent international arbitration.
- The 1965 World Bank Convention establishing the International Center for the Settlement of Investment Disputes (ICSID), which entered into force already in 1966 (following 20 ratifications), offered a multilateral legal framework for institutionalized, transnational arbitration of investment disputes based on consent between the states and investors involved. The first ICSID disputes were based on investor-state contracts⁵⁷ or on national legislation providing for direct access of foreign investors to international arbitration.⁵⁸
- Treaty-based investor-state arbitration was provided for only in the ‘second generation BITs’ concluded since about the 1970s. In view of its many advantages for private investors (e.g. in terms of direct access to independent international arbitration usually without prior exhaustion of local remedies, direct control of the procedures without dependence on ‘diplomatic protection’, availability of institutionalized ICSID procedures), most modern BITs provide for treaty-based investor-state arbitration.⁵⁹
- In contrast to the less than 400 BITs concluded prior to 1989, the number of new BITs increased dramatically since the 1990s and approaches now 3’000 BITs or corresponding treaty provisions in free trade agreements (like NAFTA Chapter XI) and other sectorial agreements (like the Energy Charter Treaty which entered into force in 1998), including increasingly also BITs among LDCs.
- Since the 1990s, also the number of treaty-based ICSID disputes, or investor-state disputes based on UNCITRAL or other commercial arbitration procedures, and the emergence of case-law referring to the today almost 400 known investor-state arbitral awards and related ‘annulment decisions’ or national court decisions as relevant precedents, increased dramatically.

Foreign direct investments offer obvious economic advantages (e.g. in terms of transfer of capital and know-how) to the host state justifying legal ‘investment incentives’ compensating for the less secure legal status and potential discrimination of foreigners in the domestic legal system of host states. The ‘political economy’ for the regulation of transnational movements of other natural and legal persons (like foreign workers, traders, portfolio investors, tourists, refugees) offers less incentives for host states to commit to multilevel guarantees of cosmopolitan and judicial remedies in transnational legal systems. Even most regional human rights courts offer individual access only after prior exhaustion of local judicial remedies. With only few exceptions (like the ‘domain name dispute settlement arbitration’ established in the context of the arbitration centre of the World Intellectual Property Organization, the ‘preshipment inspection arbitration’ established in the context of the WTO

⁵⁷ The first ICSID dispute based on an investor-state contract was *Holliday Inns v Morocco*, ICSID Case No. ARB/72/1.

⁵⁸ The first ICSID dispute based on national legislation was *SPP v Egypt*, ICSID Case No. ARB/84/3.

⁵⁹ The first ICSID dispute based on a BIT clause was *AAPL v Sri Lanka*, ICSID Report IV, at 250.

Agreement on Preshipment Inspection), ‘cosmopolitan dispute settlement institutions’ similar to institutionalized arbitration and its quasi-automatic enforceability in domestic legal systems (e.g. due to the ICSID Convention and, in case of commercial arbitration, the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards) do not (yet) exist in most other fields of IEL. Nor are governments in most UN member states politically willing to submit to compulsory international jurisdiction for the protection of other cosmopolitan rights of citizens (eg, labour rights protected by ILO Conventions). Yet, this current reluctance of governments to limit their ‘Westphalian privileges’ (e.g. in terms of limited legal and judicial accountability vis-à-vis foreigners under WTO law) by additional legal and judicial guarantees of cosmopolitan rights may change, for instance – as in the field of investment treaties - by recognition of individual legal and judicial remedies by international courts and the ever larger number of multilevel legal and judicial safeguards of cosmopolitan rights in regional economic integration agreements, human rights agreements and intellectual property conventions.

Cosmopolitan IEL Resulting from ‘Struggles for Rights’?

The preceding survey has revealed a variety of competing, legal and normative conceptions of IEL and the need for respecting and coordinating the legitimate reality of ‘constitutional pluralism’ based on ‘heterarchy’ rather than hierarchy.⁶⁰ As diplomats and other political actors often pursue narrow self-interests (e.g. in avoiding legal and democratic accountability for their frequent neglect of consumer interests), the needed constitutional and cosmopolitan reforms of IEL are often triggered by ‘struggles for rights’ by citizens and their judicial protection by ‘courts of justice’ rather than by political institutions dominated by rent-seeking interest groups (including politicians lobbying for their re-election). As illustrated by Mohammed Bouazizi, the young Tunisian street vendor whose protests against arbitrary market restrictions triggered Tunisia’s human rights revolution in 2011, arbitrary political oppression of individual economic freedom may justify a human rights revolution. According to Mohammed’s younger brother, the identification of millions of disempowered Arab people during the ‘Arab revolutionary spring 2011’ with the self-immolation of Bouazizi reflected a common suffering: ‘that the poor also have the right to buy and sell’⁶¹. Modern economics and theories of justice confirm that social welfare depends on reasonable rules and institutions protecting economic freedoms, property rights and non-discriminatory conditions of competition of citizens to engage in mutually beneficial division of labour, subject to legal constraints of ‘market failures’ as well as ‘governance failures’. Just as the arbitrary confiscation of the merchandise and other means of trade owned by Bouazizi destroyed his private business and prospects of autonomous self-development, millions of protesters in the ‘Arab spring’ are challenging authoritarian, welfare-reducing government restrictions impeding individual and democratic self-development and emancipation of the poor.

Lessons from the Historical Evolution of IEL?

Since ancient times, trade law (e.g. since the trade agreements among ancient city republics in the Mediterranean), investment law (e.g. since the Italian city republics during the Renaissance) and cosmopolitan rights (e.g. since the American and French human rights revolutions/declarations during the 18th century) often evolved through antagonistic processes of unilateral, bilateral and multilateral regulation. Arguably, these often dialectic rule-creating processes – not only inside human minds but also in social interactions - offer lessons for the modern experience that worldwide agreements (e.g. on trade, investment and environmental regulation) may often only be politically supported after prior tensions between unilateral, bilateral and regional regulation have revealed the necessity of additional multilateral coordination.

Also commercial adjudication and modern arbitration law (e.g. the English Arbitration Act of 1996) originate in ancient dispute settlement usages (e.g. since the Roman *praetor peregrinus*, the English Arbitration Act of 1697) which, for instance in the constitutional instruments resulting from the French Revolution, led even to the proclamation of a constitutional right of citizens to resort to privately agreed arbitration. Coordination among the fragmented legal systems and jurisdictions was often promoted by national and international courts, like the thousands of judgments by the Imperial Chamber Court (*Reichskammergericht*) covering numerous countries and jurisdictions since the 16th century and the ever closer cooperation among national courts and transnational commercial arbitration (as administered, e.g., by the International Chamber of Commerce and regional courts of transnational arbitration in Paris, London or Stockholm) in the worldwide recognition and

⁶⁰ Cf. D. Halberstam, Constitutional Heterarchy: The Centrality of Conflict in the EU and the USA, in: Dunoff/Trachtman (note 21), at 326-355.

⁶¹ Quoted from: H. de Soto, *The free-market secret of the Arab revolutions*, in: Financial Times 9 November 2011, at 9.

enforcement of commercial arbitral awards (e.g. on the basis of the 1958 New York Convention) and investor-state arbitration (e.g. based on the 1965 ICSID Convention). Compulsory jurisdiction is increasingly accepted in regional economic and human rights agreements and in WTO law. But it remains contested in UN law, where only about one third of UN member states have accepted the compulsory jurisdiction of the ICJ. The thousands of disputes settled by the Iran-US Claims Tribunal at The Hague and by the UN Compensation Commission established after the first Iraq War (both institutions using the UNCITRAL arbitration rules) illustrate that even politically most sensitive disputes and mass claim adjudications can be resolved on the basis of arbitration rules. Due to 'globalization', the diverse private and public, national and international parts of IEL now interact in ever more complex and often contested ways. In spite of the legitimate diversity of judicial procedures in diverse jurisdictions⁶², the increasing cooperation among private and public, national and international courts entails the emergence of a transnational 'common law of adjudication'⁶³ demonstrating the political and legal feasibility of transnational rule of law with due respect for 'reasonable disagreement' among jurisdictions based on 'heterarchy' rather than hierarchy.

Development of Substantive IEL through Cooperation among Courts?

Similar to the judicial development of 'equity law' in the English legal system, multilevel judicial cooperation and jurisprudence (e.g. by WTO dispute settlement bodies) is progressively developing and transforming international trade, investment and regional economic integration law. For instance, regardless of whether commercial arbitration is conceived as (1) a component of the national legal order at the seat of arbitration (assimilating the arbitrator to a national judge), as (2) being anchored in a plurality of national legal orders (e.g. of all states recognizing and enforcing the arbitration award) or as (3) a transnational arbitral legal order (e.g. being part of transnational commercial and investment law), arbitrators and courts increasingly interpret their powers to adjudicate, the applicable rules and procedures governing the arbitration process and the legal effects of the award with due respect not only for the legal autonomy of the parties and of the arbitrators, but also for the interrelationships of the national and international legal systems involved and for legitimately diverse legal conceptions of international arbitration.⁶⁴ Most ICSID tribunals no longer perceive themselves as exclusively 'private dispute resolution service providers' referring only to arguments presented by the parties to the dispute. Due also to the judicial review by ICSID annulment committees, arbitrators increasingly acknowledge the 'public law dimensions' of investor-state disputes; they also make their own independent, legal assessments following the maxim of *jus novit curia*, according to which a court should – of its own motion – apply rules of law relevant to the facts and to the dispute resolution, even if the applicable rule of law has not been explicitly pleaded (except for 'exception clauses' whose invocation remains within the discretion of the parties to the dispute).⁶⁵ Hence, investment tribunals

⁶² See, e.g., L.B.Solum, *Procedural Justice (University of San Diego Public Law and Legal Theory Research Paper Series: Working Paper 2, 2004)*, who distinguishes between an 'accuracy model' (assuming that the aim of dispute resolution is correct application of the law to the facts), a 'balancing model' (assuming that the aim of dispute settlement procedures is to strike a fair balance between the costs and benefits of adjudication), and a 'participation model' of dispute settlement (assuming that the very idea of a correct outcome must be understood as a function of process that guarantees fair and equal participation). As it is usually a condition for the fairness of a dispute settlement procedure that those who are to be finally bound shall have a reasonable opportunity to participate in the proceedings, the 'participation principle' requires rights of participation (e.g. in the form of notice and opportunity to be heard) that must be satisfied in order for a procedure to be considered fair.

⁶³ C.Brown, *A Common Law of International Adjudication* (Oxford: OUP, 2007); idem, *The Cross-Fertilization of Principles Relating to Procedures and Remedies in the Jurisprudence of International Courts and Tribunals*, in: *Loyola of Los Angeles International and Comparative Law Review* 30 (2008), 219-246.

⁶⁴ Cf. E.Gaillard, *Legal Theory of International Arbitration* (Leiden: Nijhoff Publishers, 2010).

⁶⁵ On the two types of 'dispute-oriented tribunals' and 'legislator-oriented tribunals' see: O.K.Fouchald, *Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, in: *EJIL* 19 (2008), 301-364.

have challenged both private claims focusing one-sidedly on cosmopolitan investor rights as well as government claims that tribunals must always defer to government discretion and to intergovernmental interpretations limiting the jurisdiction of tribunals even retroactively in pending investment disputes.⁶⁶ In *EDF Services v Romania* (2009), the arbitral tribunal rightly interpreted the ‘fair and equitable treatment’ (FET) standard by emphasizing:

‘The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State’s normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate nor reasonable.’⁶⁷

The increasing ‘multilevel judicial dialogues’ – for instance among national courts and the EU Court of Justice (ECJ), the EFTA Court, other regional economic and human rights courts, or among ICSID arbitral panels and ICSID annulment committees, commercial arbitral tribunals and national courts – prompt ever more adjudicators to acknowledge the need for ‘balancing’ all public and private interests involved rather than defining the relevant ‘epistemic community’ in narrow nationalist or commercial terms.⁶⁸ Similar to the function of laboratories in natural sciences, comparative law, ‘judicial dialogues’ and ‘judicial comity’ among courts from different jurisdictions can promote legal reforms by identifying ‘best practices’ and ‘general principles’ common to diverse legal systems.⁶⁹ For instance, the 2005 *Mangold* judgement by the EU Court of Justice on age discrimination in employment - which was widely criticized for exceeding the borderline separating law from policy - was reluctantly accepted by the German Constitutional Court as a ‘methodologically justifiable development of the law’⁷⁰; such conditional cooperation among supreme courts illustrates that the validity and legitimacy of legal rules may depend no less on respect for legitimately diverse legal methodologies than on the outcome of judicial decisions.

⁶⁶ See the ‘Interpretive Note’ issued by the NAFTA Federal Trade Commission on 31 July 2001 in order to limit the judicial articulation of stricter standards by NAFTA investment tribunals: ‘The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens’.

⁶⁷ *EDF (Services) Ltd v Romania*, ICSID Arbitral Award of 8 October 2009 (Case No ARB/05/13), at para. 217.

⁶⁸ Cf. P.M.Haas, Introduction : Epistemic Communities and International Policy Coordination, in : *International Organizations* 46 (1992), at 1 ff, who defined an epistemic community as ‘a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area’.

⁶⁹ For examples see the numerous case-studies in: F.Fontanelli/G.Martinico/P.Carozza (eds), *Shaping Rule of Law Through Dialogue* (Antwerpen: Intersentia, 2009), including my Introduction to this book: E.U.Petersmann, ‘Constitutional Justice’ Requires Judicial Cooperation and ‘Comity’ in the Protection of ‘Rule of Law’, at 1-19.

⁷⁰ Case C-144/04 *Mangold* ECR 2005 I-9981; BVerfGE 2 BvR 2661/06 of 6 July 2010 (‘Dem Gerichtshof ist auch die Rechtsfortbildung im Wege methodisch gebundener Rechtsfortbildung nicht verwehrt’).

IEL as a 'Struggle of Citizens' for Cosmopolitan Rights?

F.Fukuyama's recent book on *The Origins of Political Order*⁷¹ explains the evolution of the modern 'rule of law state' as an antagonistic learning process triggered by increasing limitation of political powers and of their 'rule by law' through competing religious, civil and political powers insisting on transnational 'rule of law' (e.g. Roman law and ecclesiastical law as *jus commune* in Medieval Europe). Almost a century ago, the German jurist R.Jhering noted that the 'life of the law' often depends on citizens struggling for their rights; such 'struggle for his rights' may be a 'duty of the person whose rights have been violated' as well as a 'duty to society'.⁷² Both in US antitrust law as well as in European economic law, individual plaintiffs invoking and enforcing common market and competition rules have been likened to the function of an 'attorney general' promoting 'community interests' rather than pursuing only individual self-interests.⁷³ Following the post-war recognition of human rights and other 'principles of justice' as integral parts of national and international legal systems, ever more national and international courts throughout Europe have interpreted international guarantees of freedom, non-discrimination and rule of law for the benefit of citizens even if the international rules were addressed to states without explicitly providing for cosmopolitan rights:

'the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 *Defrenne v Sabena* [1976] ECR 455, par. 31). Such consideration must, *a fortiori*, be applicable to Article 48 of the Treaty, which ... is designed to ensure that there is no discrimination on the labour market'.⁷⁴

Arguably, the increasing legal and judicial guarantees of 'access to justice'⁷⁵ and of cosmopolitan rights offer similar instruments in the hands of individuals to enforce IEL in decentralized and de-politicized ways against illegal government restrictions. The need for legal and judicial 'balancing' of civil, political, economic, social and cultural human rights makes 'constitutional justice' (e.g. multilevel constitutional protection of equal freedoms and human rights) and multilevel judicial protection of transnational rule of law on the basis of 'legal balancing' the 'ultimate rule of law'.⁷⁶ This is also true for IEL reconciling economic freedoms with non-economic rights and public interests subject to requirements of transparency, non-discrimination, 'suitability', necessity, 'proportionality *stricto sensu*' and legal accountability. Examples include:

- the reconciliation of human rights and IEL in the jurisprudence and 'balancing methods' of national and European Courts, and increasingly also in international investment law⁷⁷ and regional economic integration law beyond Europe;⁷⁸

⁷¹ F.Fukuyama, *The Origins of Political Order. From Prehuman Times to the French Revolution* (Profils Books, 2011).

⁷² R. Jhering, *The Struggle for Law* (Chicago: Callaghan, 1915), chapters II to IV. A similar 'natural duty of justice' requiring citizens 'to support and to comply with just institutions that exist and apply to us ... (and) to further just arrangements not yet established' is emphasized by Rawls (note 20), at 115, 246, 334.

⁷³ This conception was emphasized by the ECJ in its *Van Gend en Loos* judgment (Case 26/62, ECR 1963, 1), where the ECJ stated that 'the vigilance of the individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by (ex) Articles 169 and 170 to the diligence of the Commission and the Member States'.

⁷⁴ Cf. Case C-281/98, *Angonese* [2000] ECR I-4139.

⁷⁵ Examples include Article 8 UDHR, Article 13 ECHR, Art.47 EU Charter of Fundamental Rights, Arts. 3 and 7 African Charter of Human and People's Rights, Arts. 8 and 25 Inter-American Charter of Human Rights; cf. F.Francioni (ed), *Access to Justice as a Human Right* (Oxford: OUP, 2007).

⁷⁶ Cf. D.M.Beatty, *The Ultimate Rule of Law* (Oxford: OUP, 2004).

⁷⁷ See note 25 above.

⁷⁸ See E.U.Petersmann, Human Rights, International Economic Law and 'Constitutional Justice', in: *EJIL* 19 (2008), 769-798.

- the development of the customary international law rules for the protection of aliens, which require states to provide decent justice to foreigners and ‘to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected’⁷⁹, into ever more comprehensive judicial remedies in IEL; and
- the progressive ‘multilateralization’ of bilaterally agreed protection standards in the more than 2,800 BITs through hundreds of investor-state arbitral awards and related judicial decisions by, e.g., ICSID annulment committees and national courts reviewing and enforcing arbitral awards on the basis of internationally agreed standards (e.g. in the 1965 ICSID Convention, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Table 1: Judicialization and Multilateralization of Investment Disputes

- In contrast to the very limited number of international investment disputes among states in the ICJ, its predecessor (the PCIJ) and in the Permanent Court of Arbitration at The Hague, the hundreds of national and international arbitral awards, court decisions, ICSID annulment decisions and other judgments by specialized dispute settlement bodies (e.g. the Iran-US Claims Tribunal) deciding investor-state disputes and enforcing arbitration awards continue to clarify and develop international investment law on the basis of a *de facto* system of judicial precedents and ‘judicial dialogues’.
- The increasing convergence of objectives, structures and protection standards in BITs (e.g. national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security, protection against direct and indirect expropriation, umbrella clauses transforming contract claims into treaty claims, capital transfer and dispute settlement provisions) and their non-discriminatory application by governments and adjudicators promote ‘multilateralization’ of rather uniform investment law principles.
- Investor-state arbitrators, BITs and ICSID increasingly promote transparency of arbitration proceedings and of arbitral awards and ‘reasonable regard’ to third-party interests affected by the arbitration (e.g. by accepting *amicus curiae* briefs and engaging in ‘proportionality balancing’).

⁷⁹ J. Paulsson, *Denial of Justice in International Law* (Cambridge: CUP, 2005), at 7, 36.

Democratic Legitimacy of Judicial Protection of ‘Cosmopolitan IEL?’

In the 21st century, the legitimacy of law derives from democratic consent of citizens rather than from authoritarian claims of rulers and their diplomats. The preceding analyses suggest that - even though human rights and constitutional principles say little about the optimal design of IEL and legal institutions (such as independent regulatory agencies) - comparative institutional analyses reveal that rights-based ‘cosmopolitan regimes’ in transnational commercial, trade, investment and regional economic and environmental law reconcile private and public interests in protection of interdependent public goods more effectively and more legitimately than state-centred ‘Westphalian regimes’ (cf. *Table 2*). History is replete of authoritarian government decisions invoking ‘state interests’ in order to curtail the human rights of their citizens. Yet, as illustrated by the current banking and financial crises in the EU and the USA, even in constitutional democracies does limitation of ‘market failures’ as well as of ‘governance failures’ remain a perennial regulatory task. National governance systems and economic regulation (e.g. of ‘Islamic banking’) will continue to legitimately differ depending on the respective constitutional traditions of people. History and comparative research suggest that protecting international public goods requires ‘bottom-up strengthening’ of constitutional and cosmopolitan rights of citizens and their democratic representatives against abuses of intergovernmental ‘Westphalian governance’ colluding with rent-seeking interest groups to the detriment of general consumer welfare and cosmopolitan rights of citizens.

Table 2: From ‘Westphalian IEL’ to Regionally or Functionally Limited ‘Cosmopolitan IEL’

Westphalian IEL	focuses on reciprocal rights/obligations among ‘sovereign states’ and separation of international from national legal systems, usually (e.g. in UN law) without compulsory jurisdiction for peaceful settlement of disputes; the treatment of citizens as mere objects, the lack of effective protection of ‘transnational rule of law’ and of human rights, and ineffective parliamentary and democratic control of UN law in many states undermine the moral and democratic legitimacy of ‘Westphalian international law’.
Cosmopolitan IEL	focuses on rights and obligations of individuals and their multilevel legal and judicial protection across national frontiers (e.g. in transnational investment law); it protects transnational rule of law and strengthens the ‘constitutional limits’ of state sovereignty, popular sovereignty and ‘constitutional justice’, for instance in regional EU law, EEA law and the ECHR.
EU law	integrates international and national, legal and judicial guarantees of common market freedoms, transnational rule of law, human rights and other cosmopolitan rights on the basis of multilevel constitutional principles (e.g. of legal primacy, direct effect and direct applicability of EU legal rules) and EU institutions.
EEA law	integrates international and national, legal and judicial guarantees of Common market freedoms, transnational rule of law, human rights and other cosmopolitan rights on the basis of more deferential constitutional principles (e.g. of quasi-primacy and quasi-‘direct applicability’ of EEA rules after their incorporation into domestic law) and EEA institutions.
ECHR law	has evolved into a multilevel legal and judicial system protecting human rights and access to justice in the legal and judicial systems of the 47 member states for the benefit of more than 800 million citizens.

Law merchant (<i>lex mercatoria</i>)	continues to evolve into cosmopolitan commercial, investment and arbitration law with multilevel judicial protection of individual freedoms (e.g. of contract), property rights and transnational rule of law empowering citizens.
---	--

Need for Empirical Case-Studies of ‘Judicial Reforms’ of IEL

Most IEL specialists find it ever more difficult to follow the hundreds of dispute settlement reports by, e.g., the WTO Appellate Body, WTO dispute settlement panels and investment arbitration awards, and the thousands of judgments by regional economic and human rights courts relating to interpretation of economic rules. In European economic law, the ‘judicial constitutionalization’ of intergovernmental economic regulation for the benefit of citizens and of their constitutional rights was progressively accepted and incorporated into legislation by national parliaments and governments in EU and EEA member states. Arguably (cf. *Table 3*), the multilevel judicial protection of ‘cosmopolitan rights’ (e.g. investor rights derived from BITs) and increasing regard to human rights obligations of governments render regional economic and investment law and jurisprudence more consistent with human rights compared with the prevailing ‘Westphalian conceptions’ of IEL in ‘inter-state’ adjudication (e.g. in the ICJ, WTO dispute settlement bodies), notwithstanding the lack of explicit references in most BITs to human rights and investor responsibilities. The one-sided focus of BITs on protection of vaguely formulated investor rights has prompted some countries to withdraw from the ICSID Convention (like Bolivia and Venezuela) or to refrain from providing for investor-state arbitration in future economic agreements (like Australia). Other countries have responded by providing for ‘general exceptions’ and appellate review procedures in their ‘new generation BITs’ (like Canada and the USA) or by encouraging ICSID annulment proceedings to admit – as stated by the 2010 ICSID *ad hoc* Committee annulling the award in *Sempra v Argentina* - ‘that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers’.⁸⁰ The fact that judicial decisions and scholarly opinions have become the most frequently used interpretive arguments in ICSID jurisprudence illustrates the primary role of judges and jurisprudence in the ‘recognition’ and interpretation of the general principles and standards characteristic of modern investment law. Yet, the legitimacy of some investment tribunals continues to be undermined by the non-publication of arbitral awards and the confidentiality and lack of transparency of arbitral procedures. The ECJ’s case-law on the inconsistency of EU member states’ BITs with EU law, and on the lack of standing of arbitral tribunals for requesting preliminary rulings from the ECJ, is influenced by this lack of transparency of investment arbitration and the fear that arbitrators may neglect or incorrectly apply EU law as relevant context for the settlement of commercial and investment disputes.⁸¹

⁸⁰ According to this ICSID *ad hoc* Committee, the arbitration award amounted to a manifest excess of powers owing to the erroneous interpretation of the treaty-based emergency exception in terms of the customary law defence of necessity (as codified in Article 25 of the ILC Articles on State Responsibility) rather than in terms of Article XI of the underlying BIT. Previous ICSID jurisprudence had excluded the erroneous application of the proper law as a valid reason for annulment, cf. I.Marboe, ICSID Annulment Decisions: Three Generations Revisited, in: Binder/Kriebaum/Reinisch/Wittich (eds), *International Investment Law for the 21st Century. Essays in Honour of C.Schreuer* (Oxford: OUP, 2009), at 200-220; K.P.Sauvant (ed), *Appeals Mechanisms in International Investment Disputes* (Oxford: OUP, 2008).

⁸¹ On the new EU investment policy competence under Article 207 TFEU, the relevant ECJ jurisprudence, the *amicus curiae* briefs submitted by the EU Commission in investor-state arbitration proceedings inside the EU, and the EU proposals for terminating intra-EU BITs among EU member states see: M.Bungenberg/J.Griebel/S.Hindeland (eds), *International Investment Law and EU Law* (Heidelberg: Springer, 2011); N.Lavranos, Member States’ BITs: Lost in Transition? (29 September 2011), available at SSRN: <http://ssrn.com/abstract=1935625>.

Table 3: Judicial ‘Proportionality Balancing’ of Public Interests and Individual Rights Promoting ‘Constitutionalization’ of Investment Law

- Principles used by tribunals for resolving jurisdictional overlaps include, *inter alia*, ‘*lis pendens*’, ‘*res judicata*’, comity, ‘*forum non conveniens*’, ‘fork in the road preclusion’ (*electa una via*), joinder or *de facto* consolidation of different claims, agreed settlement of disputes, voluntary waiver of the right to initiate proceedings, agreed designation of a specific *forum*, or withdrawal of consent to a certain dispute settlement mechanism.⁸²
- Principles used by tribunals for deciding whether a regulatory activity (e.g. by a government-owned corporation) can be ‘attributed’ to the State (in terms of state responsibility) include, *inter alia*: formal authority to exercise public power; functional exercise of government power; private action under governmental control and instructions; agreed *lex specialis* rules (e.g. ‘umbrella clauses’) in BITs; State failure to grant ‘full protection and security’ and prevent ‘denial of justice’.⁸³
- On ‘balancing’ of competing ‘development dimensions’ see *Lemire v Ukraine* (2010): ‘Economic development is an objective which must benefit all, primarily national citizens and companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments *per se*, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.’⁸⁴
- Principles for examining ‘indirect expropriation’ include, *inter alia*: ‘non-discriminatory treatment’ and ‘regulation for a public purpose, which is enacted in accordance with due process’ without impairing ‘specific commitments’ by the government to the foreign investor; ‘fair and equitable treatment’ (FET); ‘interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State’⁸⁵; ‘substantial deprivation’ or permanent ‘disappearance’ of the economic value of the investor’s property; legitimate public interests; ‘fair balance’ or ‘proportionality balancing’ of public and private interests involved.⁸⁶

⁸² For case-examples see, e.g., L.Guglya, The Interplay of International Dispute Resolution Mechanisms : the Softwood Lumber Controversy, in : *Journal of International Dispute Settlement* 2 (2011), 175-207.

⁸³ For case-examples see: A.Mills, Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration, in: *JIEL* 14 (2011), 469 ff, at 500-502.

⁸⁴ *Lemire v Ukraine*, ICSID Award on Jurisdiction of 14 January 2010 (Case No ARB/06/18), para. 273.

⁸⁵ *Metalclad v Mexico*, ICSID Final Award of 30 August 2000 (Case No ARB/97/1), 40 ILM 36, para. 103.

⁸⁶ Cf. *LG&E v Argentina*, ICSID Award of 3 October 2006 (Case No ARB/02/1), at para. 194: ‘The question remains as to whether one should only take into account the effects produced by the measure or if one should consider also the context within which a measure was adopted and the host State’s purpose. It is this Tribunal’s opinion that there must be a balance in the analysis both of the causes and the effects of a measure in order that one may qualify a measure as being of an expropriatory nature. It is important not to confound the State’s right to adopt policies with its power to take an expropriatory measure’. On the competing ‘public purpose’-, ‘police powers’- and ‘effects-doctrines’ in the relevant case-law see: U. Kriebaum, Regulatory Takings: Balancing the Interests of the Investor and the State, in: *Journal of World Investment and Trade* 8 (2007), 717-744; P.M. Dupuy/F. Francioni/E.U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP, 2009).

- Even though most BITs do not refer to human rights, human rights are increasingly being raised in investment treaty lawsuits by host states, investors, third parties or judges in order to justify governmental restrictions or ‘affirmative action policies’, investment treaty breaches, protection of investor rights or interpretations of investment rules (e.g. on FET, ‘protection and security’ obligations, a ‘state of necessity’, ‘public order’, ‘just compensation’) in conformity with human rights of third parties (such as rights of access to water, essential medicines and information, rights of indigenous people). Due to their different procedures, jurisdictions and applicable laws, investment and human rights tribunals risk resolving ‘overlapping disputes’ (e.g. over property expropriations, denial of justice, due process claims, claims for moral damages arising out of government interferences into rights of investors) in different ways.⁸⁷

‘Democratic Functions’ of Judicial ‘System-Building’?

By interpreting, clarifying and progressively developing the contested meaning of rules and principles, judicial decisions narrow the scope of competing interpretations, produce legal effects and stabilize normative expectations beyond individual disputes, as acknowledged in Article 38 ICJ Statute (referring to judicial decisions as ‘subsidiary means for the determination of rules of law’). From the perspective of human rights and ‘constitutional democracy’, judicial protection of human rights and other cosmopolitan rights – like judicial review of the ‘constitutionality’ of majority legislation and of administrative decisions – can serve ‘democratic functions’ and limit democratic deficits in intergovernmental rule-making and specialized economic organizations that often elude effective parliamentary control and are dominated by vested interest groups. Empirical studies confirm that most national parliaments no longer effectively control many developments of IEL, notably the obvious ‘governance failures’ to protect general citizen interests in enhancing consumer welfare through open ‘social market economies’ based on non-discriminatory conditions of competition, monetary stability, respect for human rights and transnational rule of law for the benefit of citizens. Hence, the less ‘majoritarian democracies’ control intergovernmental rule-making in IEL, the less convincing becomes communitarian criticism that judicial clarification of the contested meaning of human rights and IEL principles amounts to undemocratic ‘judge-made law’. International law promotes governmental acceptance and implementation of judicial decisions by providing for international surveillance of domestic compliance with international legal and judicial obligations, for instance by worldwide institutions (such as the WTO Dispute Settlement Body adopting and supervising domestic implementation of WTO dispute settlement rulings) and regional institutions (like the EU Commission as guardian of rule of law inside the EU, the Council of Europe’s Council of Ministers supervising the enforcement of judgements by the European Court of Human Rights). Judicial precedents and citations - not only of the legally binding *ratio decidendi*, but also of non-binding *obiter dicta* of national and international judgments (e.g. in their judicial balancing and ‘proportionality analyses’) – influence ‘public reason’, law-making and administrative decisions in IEL and human rights law.

⁸⁷ For overviews of the relevant case-law (like *Mondev v USA*, *Tecmed v Mexico*, *Azurix v Argentina*, *CMS Gas Transmission Company v Argentina*, *Grand River Enterprises v USA*, *Glamis Gold Ltd v USA*, etc) see: Dupuy/Francioni/Petersmann (note 84); L.E.Peterson, *Human Rights and Bilateral Investment Treaties. Mapping the role of human rights law within investor-state arbitration* (Rights & Democracy: Montreal, 2009). The pertinent ISCID jurisprudence is also influenced by the different roles of host states, foreign investors and third parties (e.g. as perpetrators or victims of human rights violations) and the diverse legal contexts; in *Biloune and Marine Drive Complex Ltd v Ghana* (UNCITRAL Award of 27 October 1989, 95 ILR 184), for instance, Ghana had neither ratified the ICCPR nor the African Convention on Human Rights.

The legal limitation of *political governance* by ever stronger, multilevel *judicial governance* clarifying and adjusting specific rules influences also the systemic development of IEL (e.g. WTO law, investment law, regional economic law) and of human rights agreements and their domestic implementation. Notwithstanding the lack of legally binding precedents (*stare decisis*), the comprehensive jurisprudence by the WTO Appellate Body, ICSID arbitration and annulment awards, EU and EFTA Court judgments and the ECtHR (e.g. its ‘pilot judgments’) promotes ‘principled coherence’ and ‘judicial dialogues’ (e.g. on standard-setting precedents) in multilevel judicial protection of cosmopolitan rights and ‘judicial balancing methods’.⁸⁸ From a constitutional perspective focusing on deliberative and rights-based democracy, such ‘judicial rule-clarification’ may be no less justifiable for clarifying ‘incomplete agreements’ and promoting ‘public reason’ in legal interpretations of vaguely formulated, general principles (such as ‘national treatment’, ‘fair and equitable treatment’, ‘full protection and security’ of foreign investors, sovereign rights to protect ‘public morals’ and ‘public order’) than legislative and administrative rulemaking. Judicial decisions – provided they are justified convincingly, transparently, with due regard to all interests affected, and in language that remains comprehensible for ordinary citizens (e.g. avoiding WTO panel reports with more than 1’000 pages of legal findings drafted in technical WTO jargon) – are essential for protecting constitutional rights of citizens and transnational rule of law vis-à-vis the ubiquity of abuses of power in IEL. The more intergovernmental rulemaking (e.g. in the WTO, BITs, UN environmental negotiations, EU violations of WTO obligations) continues to neglect human rights and consumer welfare in IEL, the more may ‘dynamic’ and ‘systemic’ judicial interpretations and judicial ‘balancing’ of economic and non-economic interests contribute to legal protection of cosmopolitan rights as required by customary international law. Even if WTO rules, BITs, arbitration agreements and certain other areas of IEL fail to specifically mention human rights and consumer welfare, the customary methods of legal interpretation and the modern reality of ‘overlapping legal pluralism’ justify interpreting the inherent powers of national and international judges broadly so as to protect all affected interests and human rights more effectively.

⁸⁸ Cf. S.W.Schill, System-Building in Investment Treaty Arbitration and Lawmaking, in : *German Law Journal* 12 (2011), 1083-1110.

IEL and Reasonable Disagreement

From the perspective of democratic discourse treating citizens as free and equal, national and international legal systems may be perceived as constitutionally structured forms of agreed law-creation requiring legal and judicial protection of equal freedoms.⁸⁹ Globalizations and its increasing interconnection of national and international legal regimes (eg, for judicial settlement of disputes) promote both ‘centrifugal legal reforms’ (eg, by legal empowerment of non-state actors creating special legal regimes) as well as ‘legal integration’ (eg, due to universal human rights obligations, universal membership in the UN, UN Specialized Agencies and increasingly also in the WTO). The coexistence of non-hierarchical, transnational legal orders and the increasing civil society claims for cosmopolitan rights protecting individual and democratic self-government beyond state borders give rise to a new ‘global legal pluralism’ challenging state-centred conceptions of international law and ‘sovereigntist legal interpretations’. Reasonable citizens with legitimately diverse conceptions for a good life and ‘social justice’ often also reasonably disagree among themselves on how distributive justice, corrective justice, commutative justice or ‘equity’ and ‘transitional justice’ should be realized in economic regulation inside ‘well-ordered societies’ as well as in transnational, power-oriented relations. Even though philosophical reflection on the nature of law, justice and ‘governance by law’ is as old as philosophy itself, neither legal practitioners nor academics agree on a single theory and methodology of international law and IEL. Just as this reality of ‘methodological pluralism’ will continue to be criticized, so will cosmopolitan conceptions of IEL, like rights-based conceptions of democracy, remain contested, for instance by proponents of majoritarian democracy and of ‘rational choice’ theories prioritizing pursuit of rational self-interests over ‘reasonable’ regard to, and ‘balancing’ of, cosmopolitan interests. Reasonable disagreement over the value premises of IEL is likely to remain a permanent fact of life that tends to be respected in most IEL treaties explicitly (e.g. in their ‘public interest clauses’ reserving sovereign rights to restrict market access commitments and property rights on grounds of protection of non-economic public interests) or implicitly (e.g. as being implied in the customary requirement of interpreting treaties ‘in conformity with principles of justice’ and human rights). Also at national levels of legal regulation, some societies will continue defining democracy in terms of ‘parliamentary sovereignty’ (as in England) or prioritize civil and political constitutional rights over economic and social ‘common law freedoms’ (as in the USA); other societies are likely to continue prioritizing economic and social rights (as in China) or, as in Germany, prioritize ‘individual sovereignty’ through constitutional protection of ‘maximum equal liberties’ (including ‘positive liberties’ and welfare rights) in view of the historical experience of Germany’s ‘Weimar Republic’ that parliaments might delegate powers to a dictator suppressing both constitutional rights and democratic self-governance. In view of this legitimate reality of ‘constitutional pluralism’ as well as of ‘methodological pluralism’ in IEL research, legal scholarship should reveal its normative preconceptions and choice of legal methods rather than pretending to have found ‘the one and only right answer to a legal problem’.⁹⁰

In contrast to the claims by the German philosophers Hegel and Marx, neither the nation state nor communist ideology have brought about ‘the end of history’. All UN member states have committed themselves to the need to protect global public goods. Yet, UN law and policies continue to be dominated by ‘Westphalian conceptions’ of ‘international law among sovereign states’ that obviously fail to protect global public goods effectively – like an efficient world trading and financial system, prevention of greenhouse-gas emissions, poverty reduction and universal fulfilment of human rights.

⁸⁹ Cf. D. Nelken (ed), *Law as Communication* (Oxford: OUP, 1996).

⁹⁰ Cf. R. van Gestel/H.W.Micklitz, Revitalizing Doctrinal Legal Research in Europe: What About Methodology? in: U.Neergard/R.Nielsen/L.Roseberry (eds), *European Legal Method – Paradoxes and Revitalization* (DJOF Publishing, Copenhagen, 2011), 25, at 33. G.Shaffer (note 32) likewise concludes that there is no single ‘correct approach’ to IEL scholarship.

Globalization increasingly transforms national constitutions into ‘partial constitutions’ that cannot unilaterally protect ‘aggregate public goods’ across national borders without respect for international law. The less effective ‘constitutional nationalism’ and ‘Westphalian intergovernmentalism’ realize their declared policy goals, the more it becomes necessary to acknowledge the need for multilevel constitutionalism based on respect for the reality of ‘constitutional pluralism’ (and its underlying ‘value pluralism’) and ‘methodological pluralism’ in multilevel, legal limitations of ‘market failures’ as well as ‘governance failures’. The increasing interactions among national and international legal regimes require judges to settle disputes, promote mutual coherence and protect legal security on the basis of common constitutional principles. Rather than pretending that textual, contextual and functional interpretation of economic rules may lead to ‘objectively true’ judgments, IEL scholarship and adjudication should respect reasonable disagreement in view of the fact that cosmopolitan moral and legal principles for relations among individuals, like moral and legal principles for international relations among states, are not governed by objectively existing ‘natural morons’ (R.Dworkin); hence, the value premises, preconceptions and methodological choices underlying IEL research should be explicitly revealed and justified in the light of ‘public reason’. Contrary to pretentious claims that ‘doctrinal legal research is dead’ (E.Posner) and ‘black letter legal research’ should be buried, legal methodology and doctrinal research in IEL need to be ‘revitalized’ in order to resist the increasing ‘instrumentalization of IEL’ for the benefit of powerful interest groups and the degeneration of IEL research into ‘case law journalism’ (P.Schlag).⁹¹ Conceptualizing IEL broadly as ‘integration law’ aimed at integrating private and public, national and international economic regulation for the benefit of citizens, their human rights and legitimate demands for protection of ‘global public goods’ is a doctrinal perspective that has hardly begun being explored by self-proclaimed ‘realist lawyers’, political scientists and economists. Fortunately, the antagonistic, unilateral, bilateral and multilateral efforts at institutionalizing public reason in IEL (e.g. in monetary regulation and governance in the Eurozone) remain subject to collective learning from ‘trial and error’ and changing conceptions of ‘public reason’.

⁹¹ For a discussion of the citations see: van Gestel/Micklitz (note 90), at 25 ff.

