

Narrating “International Economic Law”: Methodological Pluralism and Its Constitutional Limits

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Abstract

Parts I and II discuss five competing “narratives” of international economic law (IEL) as (1) power-oriented “Westphalian public international law”; (2) utilitarian multilevel economic regulation; (3) multilevel constitutional regulation; (4) international private and “conflicts law”; and (5) “global administrative law” (GAL). The jurisprudential and doctrinal incoherencies among these conceptions of IEL contribute to the fact that the worldwide monetary, financial, trading, investment, environmental, development and commercial law systems are often studied and regulated as “fragmented sub-systems” without adequate regard to “interface problems” and to the need for limiting “legal fragmentation” through mutually coherent interpretations of “overlapping treaty regimes”, as required by the customary rules of treaty interpretation. Part III explains that the diverse narratives of IEL result from diverse regulatory objectives and “principles of justice” pursued by rational economic and political actors; human rights call for respecting individual and democratic diversity and related “methodological pluralism” in IEL, bounded by the “constitutional limits” resulting from the “dual nature” of modern legal systems incorporating “inalienable” human rights, constitutional law and *jus cogens* as integral parts of positive law. Part IV concludes that the universal human rights obligations of all United Nations (UN) member states require integrating human rights law (HRL) and IEL through “cosmopolitan constitutionalism” so as to hold the limited “constituted powers” for multilevel governance of transnational “aggregate public goods” more accountable to citizens as holders of “constituent powers”.

As illustrated by rights-based transnational economic transactions and cooperation among citizens, cosmopolitan rights, democratic accountability mechanisms and judicial remedies are the best incentives for civil society, democratic governments and courts of justice to engage with “globalization” and “institutionalize cosmopolitan public reason” challenging the domination of UN and World Trade Organization (WTO) governance by inter-governmental power politics. Such “constitutional reforms” can be realized “bottom-up” by taking the customary rules of treaty interpretation and adjudication more seriously, as illustrated by multilevel legal and judicial protection of cosmopolitan rights in international commercial, investment, criminal law, regional economic and HRL.

I. Introduction and Overview

During my years as research assistant of Professors *H. Mosler* and *R. Bernhardt* at the Heidelberg Max Planck Institute for International and Comparative Public Law during the 1970s, I used my position as “Referent” for IEL for reporting regularly – in the Institute’s *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* – on new developments in IEL, such as the “new law of North-South trade”, “international commodity agreements”, “legal reforms of international monetary law”, “the Third World in IEL” and “national deep seabed mining regulations and the law of the sea”.¹ Apart from emphasizing the need for a “law and economics methodology” for understanding international economic regulation, these reports followed the then prevailing “state-centered positive law” methodology for analyzing international law as being dominated by governments negotiating treaties, deciding on “state practices” and “managing” multilevel economic governance in international institutions in order to advance national interests. My reports on the foreign relations powers and international law practices of the European Communities (EC) and on the different kinds of “association agreements” concluded by the EC (such as “accession associations”, “free trade associations”, “development associations”)² raised, however, also broader “constitutional questions”. For instance, as EC member states and EC law recognize citizens and “We the people” as the legitimate holders of “constituent power” who delegate only limited “constituted powers” to national and EC governments, I argued for extending “constitutionalism” – as the most effective and most legitimate *governance method* for the democratic supply of national public goods (PGs) demanded by citizens – also to the collective supply of international PGs in the context of the EC’s association agreements with third states, for example by recognizing “common market freedoms”, other fundamental rights and judicial remedies of citizens also in EC “accession associations” (e.g. with Greece, Turkey, Austria, Portugal and Spain) and “free trade associations” (e.g. with Switzerland and the Maghreb countries) so as to enable citizens to hold governments more accountable for violations of international law.

¹ For the precise titles of these articles in *ZaöRV* 32 (1972), 339 et seq.; *ZaöRV* 33 (1973), 489 et seq.; *ZaöRV* 34 (1974), 452 et seq.; *ZaöRV* 36 (1976), 492 et seq.; *ZaöRV* 41 (1981), 267 et seq., see my list of publications in: M. Cremona/P. Hilpold/N. Lavranos/S. S. Schneider/A. Ziegler (eds.), *Reflections on the Constitutionalisation of International Economic Law – Liber Amicorum for Ernst-Ulrich Petersmann*, 2014, at 611 et seq.

² Cf. *ZaöRV* 33 (1973), 266 et seq.; *ZaöRV* 35 (1975), 213.

When I left the Max Planck Institute in order to accept job offers as legal advisor in the Foreign Trade Department of the German Ministry of Economic Affairs and, later, in the Secretariat of the General Agreement on Tariffs and Trade (GATT 1947), the methodological contradictions among “constitutional approaches” and “utilitarian management approaches” to multilevel governance became even more apparent. As representative of Germany in EC and UN institutions, it was part of my professional responsibilities to justify German government positions in parliamentary inquiries in committees of the German Bundestag and in judicial proceedings in German courts and the EC Court of Justice (ECJ). As first “legal officer” ever employed by the GATT Secretariat in 1981, however, I learnt that – even though the first and second GATT Directors-General (i.e. *Wyndam White* and *Olivier Long*) had both been lawyers by training – they had agreed with the GATT contracting parties that establishing a “GATT Office of Legal Affairs” and insisting on rule of law risked undermining the “member-driven GATT pragmatism” and secretive, intergovernmental rule-making cherished by trade diplomats, including the representatives from the EC and the USA. It was only in 1982/83 that the new GATT Director-General *Arthur Dunkel* finally decided to establish an Office of Legal Affairs in response to the public criticism of poorly argued and politicized GATT dispute settlement rulings.³ One of my first missions as “GATT legal counsellor” was to the ECJ at Luxembourg in order to discuss with ECJ judges the legal requirements of “consistent interpretation” of the EC customs union rules with the EC’s GATT obligations, including the interrelationships between the “GATT jurisprudence” of the ECJ and the power-oriented “management” of GATT dispute settlement proceedings by EC politicians who, until the mid-1980s, objected to the presence of lawyers from the EC Commission’s Legal Service in the EC’s GATT mission at Geneva and in EC litigation in GATT panel proceedings. *Pierre Pescatore* remained the only ECJ judge who openly supported my legal arguments that many GATT market access rules were more precise and unconditional than the often vague customs union rules in the EC Treaty; as GATT rules protect sovereign rights and policy discretion to protect *non-economic PGs*, EC citizens – as holders of “constituent power” and “democratic owners” of EC institutions – should be recognized as “agents of justice” entitled to transnational rule of law in their transnational economic cooperation in conformity with the GATT obligations which national parliaments had rati-

³ Cf. *E. U. Petersmann*, The Establishment of a GATT Office of Legal Affairs and the Limits of “Public Reason” in the GATT/WTO Dispute Settlement System, EUI Working Papers Law 2013/10.

fied for the benefit of citizens without granting the EC powers to engage in welfare-reducing GATT violations.⁴ Yet, even though the 2009 Lisbon Treaty further strengthened the European Union (EU) constitutional requirements of "rule of law" (Art. 2 Treaty on European Union [TEU]) in the EU, including "strict observance of international law" (Art. 3 TEU) by all EU institutions, EU politicians continue to claim "freedom of manoeuvre" to violate UN and WTO obligations ratified by parliaments for the benefit of citizens;⁵ EU trade diplomats often pride themselves of their "realist violations" of GATT/WTO legal obligations and object to judicial protection of a "right to an effective remedy and to a fair trial" of adversely affected citizens, notwithstanding the constitutional guarantee of such rights in Art. 47 of the EU Charter of Fundamental Rights of the EU.⁶ The Eurozone crises since 2010, the persistent violations by most EU member states of the budget and debt disciplines imposed by the Lisbon Treaty (e.g. in Art. 126 Treaty on the Functioning of the European Union [TFEU]), and the increasing number of national constitutional court judgments in EU member states challenging the legal consistency of EU crisis measures with fundamental rights and with the limited powers of EU institutions, illustrate that legal and judicial conceptions of IEL, including narratives of the EU as a "rule of law community", become ever more contested.⁷

Similar to the different histories and conceptions of law inside "common law" and "civil law" countries, "methodological pluralism" remains a defining feature of international legal research and entails a variety of diverse narratives also of IEL.⁸ Following World Wars I and II, some European international lawyers advocated interpreting the 1919 Covenant of the League of Nations and the 1945 UN Charter as "constitutions of the international community", often based on formal conceptions of the term "constitution" (e.g. in the sense of the basic legal order of a community regulating its struc-

⁴ Cf. *E. U. Petersmann*, Application of GATT by the Court of Justice of the European Communities, CML Rev. 20 (1983), 397 et seq.

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

⁶ Cf. *E. U. Petersmann*, Can the EU's Disregard for "Strict Observance of International Law" (Art. 3 TEU) Be Constitutionally Justified? in: M. Bronckers/V. Hauspiel/R. Quick (eds.), *Liber Amicorum for J. Bourgeois*, 2011, 214 et seq.

⁷ Cf. *K. Tuori/K. Tuori*, *The Eurozone Crisis. A Constitutional Analysis*, 2014.

⁸ Cf. *E. U. Petersmann*, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, 2012.

ture, organization and allocation of competences).⁹ But such academic proposals (e.g. by *H. Lauterpacht, A. Verdross, H. Mosler, C. Tomuschat, B. Simma*) for recognizing the “international community” as an ontological and legal reality engendering communitarian “duties to protect” community interests beyond states remain contested, especially if they are prioritizing the “international community of states” (Art. 53 Vienna Convention on the Law of Treaties [VCLT]) over the rights of citizens and of other, non-governmental actors as subjects of international law. I criticized proposals for “global constitutionalism” mainly on two grounds:

- “Constitutionalism” should focus on the constitutional rights of citizens for protecting human rights and holding “constituted powers” accountable vis-à-vis the holders of “constituent powers”. As long as UN institutions remain dominated by power politics without effective legal and judicial protection of human rights, the exclusion of citizens from UN law and politics undermines democratic constitutionalism.¹⁰
- International guarantees of equal freedoms, non-discriminatory treatment, rule of law and social justice (e.g. in UN HRL and IEL) can serve “constitutional functions” for the benefit of citizens only to the extent they are embedded in domestic constitutionalism through “consistent interpretations” with corresponding domestic constitutional guarantees. GATT, WTO law, free trade and investment agreements enlarge equal freedoms, non-discrimination and rule of law across frontiers by protecting rights-based, mutually beneficial economic cooperation among citizens. UN law, by contrast, fails to effectively protect constitutional rights in most countries, for instance because governments do not ratify or effectively implement UN law, and the often vague minimum standards (e.g. of the UN Covenant on Economic, Social and Cultural Rights: ICESCR) offer no effective judicial remedies. As the “constitutional functions” of IEL differ depending on the domestic constitutional systems, comparative constitutionalism and the experiences in federal states with multilevel judicial protection of “common market freedoms” of citizens, competition and social laws are of crucial importance for “constitutionalizing IEL”.¹¹

This citizen-oriented “bottom-up constitutionalism” emphasized, since the 1980s, the “constitutional functions” of IEL guarantees of equal

⁹ For an overview see *B. Fassbender*, *The United Nations Charter as the Constitution of the International Community*, 2009.

¹⁰ Cf. *E. U. Petersmann*, *How to Reform the UN System? Constitutionalism, International Law and International Organizations*, *LJIL* 10 (1997), 421 et seq.

¹¹ Cf. *E.U. Petersmann*, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law and Policy in the United States, the European Community and Switzerland*, 1991.

freedoms, non-discrimination and transnational rule of law for limiting power-oriented foreign policies and for "connecting multilevel governance" through "consistent interpretations" and judicial protection of multilevel legal guarantees of equal freedoms (as "first principle of justice" in terms of *Kantian* and *Rawlsian* legal theories) for the benefit of citizens and their cosmopolitan rights.¹² Yet, it remains no less contested than "global constitutionalism". Diplomats, economists, lawyers and human rights advocates (like *P. Alston*) from countries without comprehensive constitutional protection of human rights (including common law countries, like Australia, without a "human rights charter" limiting "parliamentary sovereignty") often oppose my proposals for "mainstreaming human rights and constitutional rights" into IEL and jurisprudence.¹³ They misunderstand European constitutional protection of "maximum equal freedoms" (e.g. in Art. 2 German Basic Law, EU common market law) – subject to democratic regulation – as privileging economic freedoms, and are even less interested in the "constitutional lessons" from common market regulations inside federal states.¹⁴ How should reasonable citizens and constitutional democracies respond to the "limits of international law"¹⁵ resulting from the fact that UN and WTO decision-making processes remain dominated by selfish government interests opposing effective implementation of UN and WTO rules for the benefit of citizens? Why do also European and North-American diplomats exercise no leadership for "constitutionalizing UN and WTO law", for instance in terms of transforming UN HRL and UN/WTO guar-

¹² Cf. *E. U. Petersmann*, Constitutional Functions of Public International Economic Law, in: K. Mortelmans/P. Van Dijk/F. van Hoof/A. Koers (eds.), *Restructuring the International Economic Order. The Role of Law and Lawyers*, Colloquium on the occasion of the 350th anniversary of the University of Utrecht, 1987, 49 et seq.; *E. U. Petersmann*, Trade Policy as a Constitutional Problem. On the "Domestic Policy Functions" of International Trade Rules, in: *Aussenwirtschaft* 41 (1986), 405.

¹³ Cf. *E. U. Petersmann*, Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, in: *EJIL* 13 (2002), 621 et seq. For my response to *Alston's* misrepresentation of my arguments see *E. U. Petersmann*, Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston, in: *EJIL* 13 (2002), 845 et seq. Unfortunately, the "*Alston-Petersmann* debate" (in *EJIL* 2002, at 621 et seq., 815 et seq.) remained a "non-debate" due to *Alston's* refusal to explain his opposition to "mainstreaming human rights" into WTO law and policies in a conference book supported jointly by the International Law Association and the American Society of International Law; cf.: *T. Cottier/J. Pauwelyn/E. Bürgi* (eds.), *Human Rights and International Trade*, 2005 (see my contribution on: *Human Rights and International Trade Law: Defining and Connecting the two Fields*, in: *T. Cottier/J. Pauwelyn/E. Bürgi* (note 13), at 29 et seq.).

¹⁴ Cf. *M. Hilf/E. U. Petersmann* (eds.), *National Constitutions and International Economic Law*, 1993.

¹⁵ Cf. *J. L. Goldsmith/E. Posner*, *The Limits of International Law*, 2005.

antees of judicial remedies into effective safeguards of cosmopolitan rights and transnational rule of law? Why are most narratives of IEL and “statist conceptions” of the “global constitutional community” not challenging the reality of intergovernmental UN and WTO power politics undermining constitutional and cosmopolitan rights of citizens?¹⁶

Part II recalls that – as in the Indian story of the blind men touching different parts of an elephant and describing the same animal in contradictory ways – economic lawyers tend to describe and analyze IEL from at least five different perspectives, summarized as (1) power-oriented “Westphalian public international law”; (2) utilitarian multilevel economic regulation; (3) multilevel constitutional regulation; (4) private and “conflict law” approaches; and (5) “global administrative law” (GAL) approaches. These different narratives of IEL reveal jurisprudential and doctrinal incoherencies contributing to the “legal fragmentation” of multilevel governance of transnational PGs without adequate regard to “interface problems” (like trade-distorting effects of currency manipulations, other “market failures” and “governance failures”) and to the need for limiting “legal fragmentation” through mutually coherent interpretations of “overlapping treaty regimes”, as required by the customary rules of treaty interpretation. Part II concludes that the regulatory incoherencies risk undermining not only the legitimacy and effectiveness of IEL in meeting legitimate demands of citizens and democratic institutions to protect general consumer welfare and other international PGs. Disregard for human rights and inadequate protection of basic human needs (e.g. through fair rules, procedures and mutually coherent, multilevel governance) also undermine protection of PGs and rule of law *inside* democracies. Part III explains how the diverse narratives of IEL result from diverse regulatory objectives and “principles of justice” pursued by rational economic and political actors; they call for respecting “methodological pluralism”, bounded by the “constitutional limits” resulting from the “dual nature” of modern legal systems incorporating “inalienable” human rights, constitutional law and *jus cogens* into positive law. 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,

¹⁶ See, however, A. Peters, Membership in the Global Constitutional Community, in: J. Klabbers/A. Peters/G. Ulfstein, *The Constitutionalization of International Law*, 2009, 153 et seq. (convincingly explaining why “the ultimate international legal subjects are individuals” ... “Global constitutionalists abandon the idea that sovereign states are the material source of international norms. In consequence, the ultimate normative source of international law is – from a constitutionalist perspective – humanity, not sovereignty”, at 155). Yet, also Peters makes few specific proposals for transforming UN and WTO law into effective cosmopolitan rights.

the functions and systemic nature of legal systems like IEL, and of their relationships to other areas of law and politics.¹⁷ Part IV concludes that the universal human rights obligations of all UN member states require integrating HRL and IEL through "cosmopolitan constitutionalism" so as to render multilevel governance of transnational "aggregate PGs" more effective and more legitimate.

II. Competing Narratives, Conceptions and Justifications of IEL: *Cui Bono?*

Transformations of authoritarian governance regimes into constitutional democracies are fed by various narratives of "civilization" and "constitutionalization" at national levels of governance. Similarly, the transformation and globalization of international economic relations entail diverse narratives of IEL and of its multilevel governance. Such narratives reflect disagreement on the regulatory functions of economic regulation and on the diverse "theories of justice" justifying IEL in terms of "order", "justice", "efficiency", consumer welfare, rights of citizens or "republican governance" of PGs (*res publica*). As illustrated by the financial crises since 2008, "Westphalian conceptions" of IEL (e.g. the Bretton Woods Agreements), GAL conceptions (e.g. as reflected by the "conditionality" and GAL principles imposed by the Bretton Woods institutions in exchange for their financial lending), constitutional conceptions (e.g. underlying the European common market and monetary union) and "economic utilitarianism" (e.g. as reflected by financial self-regulation by private banks) have not prevented systemic governance failures such as unsustainable private and public debts ushering in private bankruptcies, public insolvencies and violations of rule-of-law (e.g. of the budget and debt disciplines prescribed by the Lisbon Treaty); they often reveal broader "constitutional failures", for example to regulate international financial markets and monetary policies in ways that protect general consumer welfare and legal security against abuses of public and private power. The more globalization transforms *national* into *international* "aggregate PGs" (like the international monetary, trading, environmental, development and related legal systems), the stronger becomes the need for reviewing inadequate methodologies for multilevel governance at worldwide, regional and national levels so as to better fulfill the existing le-

¹⁷ Cf. E. U. Petersmann, JIEL Debate: Methodological Pluralism and Its Critics in International Economic Law Research, JIEL 15 (2012), 921 et seq.

gal obligations to protect human rights and self-determination of peoples. Just as utilitarian “welfare economics” (e.g. “gross domestic product [GDP] approaches” and “Kaldor-Hicks efficiency” concepts underlying the Bretton Woods institutions and the WTO) are challenged by “human development approaches” focusing on basic needs and “capabilities” of citizens¹⁸, so are the power-oriented “Westphalian justifications” of intergovernmental power politics in UN and WTO institutions criticized by civil societies for their failures to protect human rights and legal, democratic and judicial accountability of multilevel governance vis-à-vis citizens.

1. IEL as “Public International Law Regulating the International Economy”

The state-centered “Westphalian narrative” of international law emerged from power struggles against imperialism, colonialism and the Church in support of a new system of states with “sovereign equality” (Art. 2 UN Charter). Westphalian conceptions continue to dominate UN law and UN Security Council practices in spite of the ever more comprehensive human rights obligations acknowledged by all UN member states in more than hundred UN human rights instruments. Most textbooks on IEL describe it as consisting primarily of international rights and duties among states and international organizations regulating governmental restrictions of international movements of goods, services, persons, capital and related payments among states.¹⁹ The 1944 Bretton Woods Agreements establishing the International Monetary Fund (IMF) and the World Bank, the 1945 United Nations Charter, GATT 1947 and the UN Specialized Agencies regulating economic services – like the Universal Postal Union, the International Telecommunications Union, the International Civil Aviation Organization and the International Maritime Organization – were all negotiated by states, under the leadership of the most powerful industrialized countries, and provide for reciprocal rights and obligations among states. Governments tend to view international economic treaties as instruments for advancing

¹⁸ On the necessary limitation of economic “gross domestic product” approaches by human rights approaches and complementary “capabilities” and “human development approaches” to international economic regulation see *M. C. Nussbaum, Creating Capabilities. The Human Development Approach*, 2011.

¹⁹ See, e.g., *A. H. Qureshi/A.R. Ziegler, International Economic Law*, 2007, at ix: “This book focuses on that branch of Public International Law which is concerned with international economic relations between States.”

state interests in a world characterized by rivalry and power politics; they remain reluctant to delegate policy powers (e.g., for supervision of monetary, trade, development and labor policies) to worldwide organizations.

Hence, "member-driven governance" focuses on state interests as defined by domestic rulers and organized interest groups, often with systemic biases to the detriment of general citizen interests (notably inside less-developed and non-democratic countries without constitutional safeguards of general citizen interests). Powers for intergovernmental rulemaking, administration and adjudication tend to be allocated to separate international organizations following the economic proposition of "separation of policy instruments". The functionally limited powers of UN Specialized Agencies, the WTO and other international organizations often lack effective constitutional and judicial restraints protecting reasonable interests and rights of citizens against abuses of power; they secure neither effective domestic implementation of treaty obligations nor effective coordination among the hundreds of specialized organizations and "fragmented legal regimes".²⁰ UN and WTO institutions regulate "overlapping" and interdependent PGs (like the international monetary, trade, development, environmental and related legal systems) without adequate coordination (e.g. of HRL and IEL). Even though the regulatory powers and "general exceptions" recognized in the separate treaty regimes enable each state to unilaterally depart from the respective treaty obligations (e.g. pursuant to Arts. XX and XXI GATT authorizing unilateral restrictions of international trade on grounds of non-economic public interests), the overall legal consistency among the hundreds of national and international, legally fragmented regimes is not secured (notably in the many non-democratic UN member states).

Westphalian international law conceptions, based on the sources of international law and "rules of recognition" as defined in Art. 38 of the Statute of the International Court of Justice, reflect a "dangerously naïve tendency towards legalism – an idealistic belief that law can be effective even in the absence of legitimate institutions of governance", especially neglecting that "whatever their professed commitments, all nations stand ready to dispense with international agreements when it suits their short- or long-term interests".²¹ Domestic implementation of UN and WTO rules should not be left

²⁰ For instance, many less-developed countries in Africa do not appear to have incorporated the 1994 WTO Agreement into their domestic legal systems and to have adjusted their national trade and economic legislation accordingly. On typologies of "legal regimes" and of their "fragmentation" see *M. A. Young* (ed.), *Regime Interaction in International Law. Facing Fragmentation*, 2012.

²¹ *E. A. Posner*, *The Perils of Global Legalism*, 2009, who claims that "most European scholars are global legalists" with an "excessive faith in the efficacy of international law" who

to the sovereign discretion of states without providing citizens with effective legal and judicial remedies in case of non-compliance, as explicitly recognized in the UN and WTO guarantees of individual access to justice. As foreign policy powers include powers to tax and restrict domestic citizens and redistribute their domestic income in welfare-reducing ways (e.g. through import tariffs, quantitative restrictions, foreign loan agreements enriching the rulers), “*Hobbesian* conceptions” of IEL facilitate abuses of foreign policy powers for the benefit of powerful interest groups, for instance if non-democratic governments deny individual rights, use international loans and domestic resources for the benefit of the rulers (e.g. “blood diamonds”), and restrict human rights like freedom of information and privacy in the internet.²² Arguably, the focus on rights and obligations of states rather than of citizens explains why worldwide “Westphalian agreements among sovereign states” often fail to protect human rights and other “global PGs” effectively.

2. IEL as “Multilevel Economic Regulation” Embedded into “Constitutional Nationalism”

The conception of IEL as multilevel economic regulation underlies many international trade and investment agreements and focuses on the functional unity of private and public, national and international regulation of the economy.²³ It emphasizes the advantages of decentralized forms of market regulation and dispute settlement, for example as in Chapters 11 and 19 of the North American Free Trade Agreement, provided the economic regulation remains embedded in the law of constitutional democracies. In contrast to the multilevel constitutionalism inside the EU, constitutionalism in North American Free Trade Agreement (NAFTA) member states (Canada,

lose “sight of the social function of law” (at xii); *Posner* justifies the “pattern of American international law-breaking” (at xi) on grounds of national cost-benefit analyses by the foreign policy elites.

²² See, e.g., the WTO Appellate Body report on “China – Publications and Audiovisual Products” (WT/DS363/AB/R) adopted on 19.1.2010.

²³ Many American textbooks on IEL – e.g. by *A. Lowenfeld*, *International Economic Law*, 2nd ed. 2008, and *J. Jackson*, *The World Trading System: Law and Policy of International Economic Relations*, 1997 – were written by lawyers who had started their academic career as private law teachers and acknowledged the importance of “law and economics”. Also the *Internationales Wirtschaftsrecht* (edited by *C. Tietje*, 2009) and *M. Herdegen’s Principles of International Economic Law*, 2013, include chapters on “international business law” and transnational private law.

Mexico, USA) focuses on "constitutional nationalism", protecting broader national foreign policy discretion of these states to pursue "national interests" subject to only a few constraints by NAFTA law and NAFTA institutions.

In conformity with the economic theory of "optimal intervention" (e.g. through non-discriminatory internal taxes, product and production regulation rather than through trade-distorting subsidies and border discrimination) and political principles of "subsidiarity" of economic regulation, multilevel economic regulation in free trade areas emphasizes the efficiency gains and democratic legitimacy gains of citizen-driven market competition and potential synergies of public-private partnerships (e.g. in economic and environmental regulation as closely as possible to the affected citizens, decentralized settlement of investor-state disputes through commercial arbitration). It stresses that private regulation can supplement and complement incomplete, intergovernmental regulations and offer decentralized accountability and enforcement mechanisms (like arbitration, Art. 1904 NAFTA dispute settlement panels established at the request of private complainants and replacing domestic judicial review of anti-dumping and countervailing duty orders in NAFTA countries). Private-public co-regulation is particularly necessary for using private expertise in the elaboration of technical and sanitary product and production standards and may increase the effectiveness of economic regulation provided private self-regulation remains legally and democratically accountable. It may justify legal presumptions – as in the case of the WTO Agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures – that privately or inter-governmentally coordinated production, product and (phyto)sanitary standards are consistent with public international law rules (e.g. of WTO law) unless they are successfully challenged in intergovernmental dispute settlement proceedings.²⁴ Yet, private-public partnerships also risk facilitating "protectionist collusion" and restrictive business practices to the detriment of consumer welfare.

Multilevel economic regulation at public and private levels lacks a single unifying rule of recognition in view of its broad coverage of private and public, national and international sub-systems of IEL. It understands IEL as interdependent regulatory practices, including the "private ordering" of the international division of labor among billions of producers, investors, traders and consumers in UN member states. The synergies, functional interre-

²⁴ On the many problems of such legal presumptions see the contributions by *T. Hüller*, *M. L. Maier*, *R. Howse*, *H. Schepel* and others to *C. Joerges/E. U. Petersmann* (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2006, chapters 9 to 14.

relationships and “optimal levels” of public regulation (e.g., by means of competition law, banking law, investment law, labor law, environmental law) and private regulation (such as “corporate governance” of the ever larger share of world trade carried out inside multinational corporations) are perceived as major regulatory challenges. “Multilevel economic regulation” approaches tend to be critical of authoritarian “top-down conceptions” of intergovernmental economic regulation that may be undermined by the rational self-interests of private economic actors. For instance, they draw attention to the ineffectiveness of most intergovernmental commodity agreements (e.g., for coffee, cocoa and tin) aimed at guaranteeing “stable, fair and remunerative” commodity prices. Yet, they recognize (e.g., in NAFTA Chapter 19 on multilevel judicial review of national antidumping and countervailing duty determinations, and NAFTA Chapter 11 on investor-state arbitration) that international legal and procedural guarantees may be necessary for limiting “protection biases” in national laws and institutions.

Identifying the “optimal level of legal regulation”, and promoting mutual synergies between private and public, national and international economic regulation, may differ among jurisdictions with different legal and political contexts. Private international law – such as the national and international rules coordinating the effects of domestic private laws across borders by harmonizing private law systems, allocating jurisdiction and providing for mutual recognition and enforcement of judgments and arbitral awards – offers decentralized systems for self-governance across borders (e.g., based on contract law, company law, competition law, tort law) subject to control by national governments and decentralized enforcement by domestic courts or arbitration. As illustrated by investor-state arbitration and private litigation against transnational corporations (e.g., under the US Aliens Tort Act), such decentralized self-governance may be more efficient and offer more effective legal and judicial remedies than centralized governance systems.²⁵ Private law approaches may promote not only the pursuit of private interests (such as settlement of individual conflicts among private parties), but also of public and social interests. For instance, national courts deciding on questions of international private law may exercise judicial comity vis-à-vis foreign jurisdictions or judicial deference vis-à-vis domestic government interests depending on the private and public interests involved. The increasing number of international treaties harmonizing certain areas of international

²⁵ See the examples discussed by R. Wai, *Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation*, in: C. Joerges/E. U. Petersmann (note 24), at 229 et seq.

private law, coordinating national jurisdictions (e.g., by means of providing for mutual recognition and enforcement of foreign civil, commercial and arbitral judgments in national courts), or limiting the legitimate scope for private self-regulation (e.g., by means of international competition rules, public risk regulation limiting private standard setting, International Civil Aviation Organization [ICAO] rules limiting private self-regulation of international air transport in the context of the International Air Transport Association) illustrate potential synergies of dovetailing public and private economic rules aimed at avoiding regulatory conflicts.

3. Multilevel Constitutional Conceptions of IEL

A number of diverse “multilevel constitutional approaches to IEL” aim at overcoming the “*Lockean* dilemma” of foreign policies, that is, their frequent exemption from effective constitutional restraints facilitating “regulatory capture” by powerful interest groups lobbying for restrictions of transnational economic regulation as a means for redistributing domestic income in exchange for political support (e.g. by import-competing producers benefitting from “protection rents” at the expense of consumer welfare).²⁶ Multilevel constitutionalism argues that the legitimacy and effectiveness of IEL – as a means for promoting consumer welfare and human rights within states – depend on its consistency with national and international human and constitutional rights and on parliamentary, judicial and other constitutional restraints limiting abuses of power. For instance, multilevel judicial review of foreign policy measures by the ECJ, the European Free Trade Area (EFTA) Court and the European Court of Human Rights (ECtHR) in cooperation with national courts protects transnational rule of law in international economic cooperation among citizens throughout the European Economic Area (EEA), with due respect for the legitimate diversity of constitutional democracies. Multilevel parliamentary legislation in European law promotes representative, participatory and “deliberative democracy” beyond state borders as required by the Lisbon Treaty (cf. the “democratic principles” prescribed in Arts. 9-12 TEU and the “cosmopolitan principles” prescribed in Art. 21 TEU for the EU’s external actions). As citizens are the legitimate holders of “constituent power” and delegate only

²⁶ On the “*Lockean* dilemma” of constitutionalism see *E. U. Petersmann* (note 11), chapter VIII; *P. Hilpold*, The “Politization” of the EU’s Common Commercial Policy – Approaching the “Post-*Lockean*” Era, in: *M. Cremona/P. Hilpold/N. Lavranos/S. S. Schneider/A. Ziegler* (note 1), at 21 et seq.

“limited constituted powers” to multilevel governance institutions subject to “rights retained by the people” (in the words of the Ninth Amendment of the US Constitution), multilevel governance of transnational PGs cannot remain effective without constitutional and cosmopolitan rights of citizens to hold multilevel governance institutions accountable for their frequent violations of the rule of law.

The legal primacy of constitutional rules over post-constitutional rule-making may justify granting international treaties only an *infra*-constitutional legal rank in domestic legal systems and limiting “direct applicability” of international law rules in domestic courts. As international law’s claim (e.g., in Art. 27 VCLT) to legal primacy over domestic law must remain subject to constitutional restraints, constitutional democracies often insist on higher levels of *national* protection of human rights than the minimum standards prescribed in UN HRL. However, whenever international guarantees of freedom, non-discrimination and rule of law go beyond those of national legal systems – as in many areas of IEL – constitutional democracy may justify using IEL for limiting “constitutional failures” and “government failures” inside nation states practicing border discrimination against foreign goods, services, persons and investments to the detriment of domestic consumer welfare.²⁷ For instance, EU and EEA law empower citizens to invoke and enforce common market freedoms and other fundamental rights in national courts vis-à-vis welfare-reducing, national restrictions of mutually beneficial economic cooperation among citizens across frontiers. HRL justifies the practice of virtually all national constitutions to subject the incorporation of international rules into the domestic legal system to constitutional safeguards like respect for human rights and parliamentary ratification of treaties, often subject to “later-in-time rules” protecting the sovereign right of parliaments to override the domestic law effects of international treaties by later legislation. “Multilevel economic regulation” in the EU, the EEA, NAFTA, the Andean Common Market or in the South-American Common Market (MERCOSUR) remains constitutionally restrained by diverse “multilevel constitutional systems” and judicial remedies. Hence, legal and judicial assessments of economic regulation may dif-

²⁷ On the many examples in IEL for this kind of “compensatory constitutionalism” (A. Peters) see E. U. Petersmann (note 11). As IMF, GATT and WTO legal guarantees of economic freedoms, non-discrimination and rule of law often go beyond the corresponding legal guarantees inside domestic legal systems, “constitutional functions” of “compensatory multilevel constitutionalism” are more developed in IEL than in many other fields of international law (often prescribing only minimum standards of conduct that do not go beyond the guarantees in domestic laws); cf. A. Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, in: LJIL 19 (2006), 579 et seq.

fer depending on whether they are governed by EU constitutional law as interpreted by the Court of Justice of the European Union (CJEU), EEA law as interpreted by the EFTA Court, by the European Convention on Human Rights (ECHR) as interpreted by the ECtHR, NAFTA tribunals or by regional economic and human rights courts in Latin America in close cooperation with national courts operating in diverse multilevel systems of functionally limited treaty regimes.²⁸

Cosmopolitan constitutionalism claims that only citizen-oriented "constitutional bottom-up approaches" to IEL can effectively protect human rights – including the right "to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized", as universally recognized in Art. 28 of the Universal Declaration of Human Rights (UDHR) and reconfirmed in numerous UN Resolutions on the "right to development" as a human right of citizens and of peoples.²⁹ They limit the "collective action problems" in the supply of international PGs by linking governmental duties to protect PGs to corresponding rights of citizens, judicial remedies and other "accountability mechanisms" so as to ensure that – also in times of economic crisis – governmental restrictions are publicly justified, remain non-discriminatory and protect fundamental rights and the welfare especially of the poorest and most vulnerable.³⁰ Cosmopolitan constitutionalism suggests that the successive procedures for elaborating and progressively clarifying "principles of justice" for multilevel governance of international "aggregate PGs" – through "constitutional contracts" (e.g. based on mutual recognition of inalienable human rights), constitutional conventions, democratic legislation, administration, adjudication, international agreements, multilevel governance institutions and civil society practices – are understood best as cosmopolitan "deliberative", "participatory" and legally limited "constitutional democracy", whose success depends on "active citizenship" and democratic struggles against abuses of power ("*démocratie de tous les jours*"). The common market and rule of law systems of the 31 EEA member countries illustrate the potential variety of combining diverse national and international constitutional rules and institutions. Without linking international rules to their domestic "constitution-

²⁸ See, e.g., *M. T. Franca Filho/L. Lixinski/M. B. Olmos Giupponi* (eds.), *The Law of MERCOSUR*, 2010; *S. S. Schneider*, *Access to Justice in Multilevel Trade Regulation: Brazil, MERCOSUR and the WTO*, EUI doctoral thesis 2014.

²⁹ Cf. *E. U. Petersmann*, *Human Rights Require "Cosmopolitan Constitutionalism" and Cosmopolitan Law for Democratic Governance of Public Goods*, *Contemporary Readings in Law and Social Justice* 5 (2013), 47 et seq.

³⁰ Cf. *Protecting Fundamental Rights during the Economic Crisis*, EU Agency for Fundamental Rights, Working Paper December 2010.

al foundations”, top-down “public international law conceptions” of IEL risk failing to protect consumer welfare and human rights effectively. As human rights protect *individual* as well as *collective exercises* of fundamental freedoms (e.g., property rights owned by corporations, collective labor rights exercised by trade unions), human rights and constitutional law must also protect the institutions necessary for such collective exercises of fundamental rights. Hence, IEL must safeguard the institutions necessary for the proper functioning of citizen-driven market economies, such as private property, private companies, private newspapers and private markets as “dialogues about values” among producers and consumers and citizen-driven information mechanisms coordinating supply and demand. Without constitutional, legislative and administrative protection and regulation of market competition and judicial protection of individual rights, the ubiquitous conflicts among private and public interests cannot be effectively protected over time in economic markets.

4. IEL as “Conflicts Law” Inspired by International Private Law Approaches?

Transnational commercial law has dynamically evolved – since ancient times – on the basis of contract law, the Roman *jus gentium* governing trade with foreigners, the medieval *lex mercatoria*, codifications of national and international private law and modern commercial practices as applied and further developed through thousands of national court decisions and commercial arbitral awards supervised and enforced by national courts. Some textbooks on IEL proceed from this “bottom-up” perspective of private contract law regulating international trade, financial, services, investment and related transactions.³¹ Economic globalization continues to link hundreds of diverse national and international legal systems and thousands of governmental and non-governmental regulations. It impacts on international trade and comparative advantages of producers, investors and countries competing to attract investments and other scarce resources. This competition and rivalry make some private lawyers emphasize not only the reality of conflict and contestation in transnational society and the inevitable limits of “top-down global governance”; they also emphasize the lessons from private international law for coordinating and resolving conflicts among

³¹ An example is: B. Schöbener/J. Herbst/M. Perkams, Internationales Wirtschaftsrecht, 2010.

jurisdictions, among government regulations and transnational governance mechanisms, and the advantages of using private international law concepts for resolving “conflicts among multiple systems of rules of both state and private ordering”.³²

“Conflict of laws” approaches also draw attention to the social functions and *public policy* goals of private law and private litigation by private “attorneys general” who – through the pursuit of their own interests – may also serve social purposes of regulation. For example, individuals claiming compensation in litigation related to product liability, environmental harms, restrictive business practices, abuses of intellectual property rights and corporate accountability for human rights violations may contribute to limiting “market failures” and “governance failures”. The ever greater influence in IEL of transnational, *private* “advocacy networks” and transnational, *private* litigation against multinational companies, human rights violators and host states of foreign direct investors illustrates the systemic importance of “adversarial legalism” as a tool of transnational governance. Private “conflict of laws” doctrines (like the effects doctrine, judicial restraint doctrines, principles for mutual recognition of foreign standards and court judgments) may assist in resolving the coordination problems resulting from competing *private* and *public regulation* systems. They may also facilitate coordination among regulatory authorities, representation in national regulatory bodies of all adversely affected foreign interests, and reduce other regulatory gaps favouring business interests in transnational private ordering (for instance through contracts and international commercial arbitration privileging the asymmetric mobility of business actors as compared with consumers and workers). Private law experiences may argue for mediating “conflicts of normative orders” among national and international public law regimes by use of “judicial comity”. National courts may not only pay deference towards their own legislatures in case of cross-jurisdictional conflicts of policy, but also to legitimate interests of foreign jurisdictions and transnational governance procedures. Such conflict rules may promote judicial protection of transnational “principles of cosmopolitan justice”.³³

Yet, does this confrontation of private and public international law with common regulatory problems – such as the need for overcoming “methodological nationalism” and parochial legacies of discriminating against foreign-

³² R. Wai (note 25), at 230.

³³ Cf. R. Wai (note 25) emphasizing “the value of both conflict and comity in the relationship among regulatory orders, whether they be public or private, domestic or foreign, or international or transnational”, (at 262).

ers – justify conceptualizing IEL as “conflicts law”?³⁴ Arguably, the recognition by all UN member states of human rights and other constitutional restraints of governance powers requires justifying IEL in terms of human and constitutional rights of citizens rather than only in terms of economic utilitarianism or private law principles. “Conflicts law principles” of private law for determining whether foreign jurisdictions, conflicting government regulations and transnational governance mechanisms “deserve recognition” are no substitute for the necessary review of the “human rights coherence” of IEL. They cannot replace legal and judicial “balancing” of constitutional principles and human rights in applying and interpreting IEL “in conformity with principles of justice” and the human rights obligations of governments, as required by national and international law in order to justify limited “constituted powers” vis-à-vis citizens as the holders of “constituent powers”.³⁵

5. IEL as “Global Administrative Law” (GAL)?

An increasing number of administrative lawyers argue that “(m)uch global regulatory governance – especially in fields as trade and investment, financial and economic regulation – can now be understood as administration, by which we include all forms of law-making other than treaties or other international agreements on the one hand and episodic dispute settlement on the other”.³⁶ As multilevel economic governance aims at regulating the conduct not only of states, but also of private actors, they acknowledge that the traditional inter-state paradigm of international law needs to be adjusted to the pluralistic and cosmopolitan regulatory realities. GAL ap-

³⁴ As suggested by C. Joerges, Three-Dimensional Conflicts Law as Constitutional Form, in: C. Joerges/E. U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, 2011, chapter 15.

³⁵ For my criticism of Joerges’ proposals for reinterpreting IEL as “conflicts law” see E. U. Petersmann, *The Future of International Economic Law: A Research Agenda*, in: C. Joerges/E. U. Petersmann (note 34), chapter 18. On the need for defining law not only by authoritative issuance and social efficacy of rules, but also by principles of justice see R. Alexy, *The Argument from Injustice*, 2010; according to Alexy, only “extreme injustice” and violations of human rights affect the validity of legal rules. For a discussion of whether “global constitutionalism” should address the “international community of states”, transnational “stakeholder communities”, or citizens and peoples as democratic holders of “constituent power” see also A. O’Donoghue, *Constitutionalism in Global Constitutionalisation*, 2014.

³⁶ R. Stewart/R. M. Ratton Sanchez Badin, *The WTO and Global Administrative Law*, in: C. Joerges/E. U. Petersmann (note 34), chapter 16. The following quotations in the text are from these authors, who refer extensively to the vast GAL literature.

proaches wish to ensure that "global regulatory decision-makers are accountable and responsive to all of those who are affected by their decisions". For instance, "the challenges faced by the WTO can be addressed by greater application of GAL decision-making mechanisms of transparency, participation, reason-giving, review and accountability to the WTO's administrative bodies including its councils and committees and the Trade Policy Review Body". GAL principles and procedures could strengthen rule of law and legal accountability in multilevel governance of international PGs especially in the following three dimensions:

- a) The efficacy and legitimacy of the internal governance structures and decision-making procedures of international organizations (like the WTO) could be improved by strengthening transparency, participation, reason-giving and the law-making role of their regulatory, administrative and adjudicatory bodies.
- b) In the vertical interrelationships of multilevel governance (e.g. between the WTO and its regulation of members' domestic administrations), the incorporation of GAL principles and procedures into domestic administrative rules and procedures could strengthen rule of law, transparency of trade regulation, uniform and impartial administration, due process of law and judicial review.
- c) In the increasingly close "horizontal linkages" among different global regulatory institutions, the UN Specialized Agencies and the WTO should recognize (e.g. pursuant to the WTO Agreements on Sanitary and Phytosanitary Standards and Technical Barriers to Trade) regulatory standards issued by other global regulatory bodies only if generated through transparent procedures and "regulatory due process" affording rights of participation and based on "public reason" supported by the decisional record and reflecting fair consideration of all affected interests.³⁷

The focus of "GAL norms" on the procedural elements of administrative law has "served not only to secure implementation of the substantive norms of liberalized trade but also to promote broader goals including open administration, even-handed treatment of foreign citizens, and the rule of law". Thereby, the standards are seeking "to provide safeguards against abuse of power, counter-factional capture, and temper the tunnel vision of specialized regulatory bodies". Yet, GAL proponents acknowledge that – due to the absence of democratic legislation and democratic accountability at the global level – "procedural mechanisms alone may be relatively inef-

³⁷ Cf. also A. Pitaraki, *Institutional Linkages: WTO – IMF, World Bank, WIPO, WHO. A Global Administrative Law Approach as a Means for Supplying Public Goods*, EUI Doctoral Thesis 2014.

fective in overcoming disparities in power and the biases of specialized mission-oriented organizations". "To the extent GAL procedures enable a broader range of social and economic actors and interests, especially those that tend to be disregarded, to more effectively scrutinize and have input to decisions and also foster broader discussion and debate, they may also promote a democratic element in global regulatory governance". As GAL proposals have emerged as pragmatic responses to the "accountability gaps" in the administrative practices of international institutions, the legal status of GAL principles – e.g. as general principles of law, customary law or "principles" underlying international treaty law – remains often contested, for instance because the "ultimate aim of many of these regimes is to regulate the conduct of private actors rather than states; private actors including non-governmental Organizations (NGOs) and business firms and associations as well as domestic government agencies and officials".³⁸ The legal context of administrative activities of international organizations with limited competences also differs fundamentally from the constitutional context of national administrative laws. For example, the constitutional constraints and parliamentary control characteristic of administrative law inside constitutional democracies are absent in the law of worldwide organizations. Some GAL proposals by United States (US) administrative lawyers draw analogies with US constitutional law constraints without explaining why the particular features of US constitutional and administrative law (such as limited judicial review pursuant to the "Chevron doctrine" in view of congressional regulation and oversight of delegated administrative powers) should be appropriate for worldwide organizations that elude effective parliamentary control at the international level as well as inside most states. Most worldwide organizations also fail to provide effective judicial remedies for adversely affected citizens, with only a few exceptions such as the UN and International Labor Organization (ILO) Administrative Tribunals protecting international civil servants, Part XI of the UN Law of the Sea Convention regarding deep seabed mining, World Intellectual Property Organization (WIPO) arbitration concerning disputes over internet domain names, and World Bank inspection panels. Moreover, many worldwide organizations offer frameworks for intergovernmental coordination rather than for independent administration (e.g., of international loans by the World Bank Group). Their review and dispute settlement procedures – like the "compliance procedures" of multilateral environmental agreements identifying, reviewing and restricting harmful activities – are often politicized and lack the independence necessary for "administration of justice".

³⁸ R. Stewart/R. M. Ratton Sanchez Badin (note 36).

As the administrative law practices of international organizations and courts remain embedded in their specific functional contexts of "primary" and "secondary law", GAL advocates acknowledge the lack of international agreement on a uniform "constitutional foundation" or "rule of recognition" for determining GAL principles and rules by the diverse private and public, national and international actors. Nor is there agreement on the holders of "constituent powers" justifying GAL³⁹ or on new customary GAL resulting from the often informal, administrative and legal practices in different institutional and treaty contexts with limited jurisdictions and diverse memberships of states. European integration has given rise to ever more comprehensive "European administrative law" based on common "administrative constitutionalism" constituting and limiting national and European administrative practices in the implementation of EU and EEA law.⁴⁰ The administrative law dimensions of the law of *worldwide organizations*, by contrast, tend to remain functionally limited, fragmented, diverse and without effective constitutional restraints. These differences impede the emergence of general, universally agreed GAL. Without more thorough empirical, comparative and contextual legal research into the transformation of administrative practices into positive "global law", GAL claims risk being criticized as wishful thinking rather than as methodologically convincing determinations of positively existing international law. For instance, *Kingsbury's* concept of "law" in GAL research⁴¹ has been criticized as a "natural law interpretation"⁴² of the "general principles of public law" without methodologically convincing determinations of positively existing law. *Kingsbury* admits that the "legal constitution of the global administrative body" by "a kind of constitution-making" amounts to an international exercise of "constitutive power" and "constitutionalist commitment to pub-

³⁹ Cf. A. O'Donoghue (note 35), at 231 (noting that the domestic constituencies for electing national state agents and the constituencies for international civil servants "are not contiguous ... preventing any claim to a democratic process in the appointment of the non-elected official").

⁴⁰ Cf. E. Fisher, *Beyond the Science/Democracy Dichotomy: The WTO Sanitary and Phytosanitary Agreement and Administrative Constitutionalism*, in: C. Joerges/E. U. Petersmann (note 34), chapter 11.

⁴¹ According to B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, EJIL 20 (2009), 23 et seq., 32 et seq., "requirements of publicness in GAL" include the principle of legality, the principle of rationality, proportionality, rule of law and basic human rights, i.e., basic constitutional principles (called "constitutive administrative law" in *Kingsbury's* terminology). Yet, *Kingsbury* fails to identify to what extent his "general principles of public law" are already part of the positive law of international organizations or merely proposals *de lege ferenda*.

⁴² Cf. A. Somek, *The Concept of "Law" in Global Administrative Law: A Reply to Kingsbury*, EJIL 21 (2010), 985 et seq., 990 et seq.

licness”.⁴³ Yet, rather than exploring the constitutional principles governing the “primary law” and “secondary law” of international organizations and of their judicial interpretation at regional and worldwide levels⁴⁴, *Kingsbury* claims:

“Constitutionalism implies a coherence of structure which global legal and institutional arrangements do not currently have ... While constitutive power is certainly exercised internationally, international constitutionalism in its richer forms is still, at most, in *statu nascendi*.”

Arguably, *Kingsbury*'s methodological assumptions are inconsistent with the reality of “constitutional pluralism” and the functions of human rights to protect individual and democratic diversity. They risk contributing to “GAL claims” that are incompatible with the diverse administrative law practices in functionally limited, international organizations and with the contextual contingencies of their administrative law systems.⁴⁵

The five different “narratives” of IEL summarized in Part II recall the “cave allegory” of *Plato*, in which the ancient Greek philosopher compared the human condition with prisoners in a cave interpreting the shadows on the wall in diverse ways without knowing the reality in the sunlight outside the cave entrance. *Plato* described the truth-conditions of the diverse interpretations by the prisoners of the shadows as relationships between the limited cognitive capacities of human beings and the outside world. Yet, law and governance are less about discovering objective truth existing “out there” than about institutionalizing “public reason” among citizens so as to enable human beings to reconcile their rational self-interests with their common, reasonable long-term interests in mutually beneficial cooperation respecting the individual and democratic autonomy and equal rights of citizens. The following Part III explains why “constitutionalism” – as a “*Kantian* moral imperative” demanding reconciliation of rational self-interests with the reasonable, common interests of all others through reciprocal commitments to cosmopolitan “principles of justice” and constitutional rules of a higher legal rank – calls for “constitutionalization” of multilevel governance powers through never-ending democratic processes and “struggles for equal rights” so as to prevent national constitutionalism (as the historically most effective governance method for democratic supply of national PGs) from being undermined by foreign policy discretion and inter-

⁴³ Cf. *B. Kingsbury* (note 41), 34 et seq.

⁴⁴ Cf. *N. Blokker/H. Schermers*, *International Institutional Law*, 4th ed. 2003.

⁴⁵ The constitutional principles and rules identified by *N. Blokker/H. Schermers* (note 44) as part of the law of international organizations contradict the claims by *Kingsbury*.

governmental power politics in the collective supply of transnational "aggregate PGs".

III. Limiting the Diversity of IEL Narratives: "Methodological Pluralism" and Its Constitutional Limits

One apparent lesson from the different narratives of IEL is that IEL as a social fact and positive law – for instance in terms of "authoritative issuance" and social efficacy of principles, rules and institutions supported by *opinio juris sive necessitatis* and social compliance by private and public actors – is much more complex than any single narrative and narrator can tell. Part III begins with exploring the diverse motives, value premises and research interests underlying the diverse conceptions of IEL (section 1). Understanding "IEL in context" requires descriptive as well as normative analyses (section 2). HRL and the customary rules of treaty interpretation and adjudication require justifying IEL by "principles of justice" (section 3) in order to "institutionalize public reason" in multilevel governance of PGs demanded by citizens (section 4). Due to the "sovereign equality" of all UN member states and the diverse histories and legal preferences of national peoples, the traditional "horizontal divisions" of constitutional, legislative, administrative and judicial powers inside national democracies may not be transferable to consent-based international law for the collective supply of international PGs through international organizations dominated by national governments and multilevel governance institutions with very diverse constitutional systems and rational self-interests. Hence, as the universal recognition of human rights by all UN member states requires transnational rule of law and "constitutionalization" of multilevel governance, section 5 argues for "cosmopolitan constitutionalism" as a decentralized governance method for rendering IEL more consistent with HRL and with the legitimate reality of "constitutional pluralism". Doctrinal conceptions of IEL should reveal their underlying jurisprudential conceptions of law and justice (section 6) so as to promote informed, private and public choices among alternative governance methods – with due respect for interdisciplinary and comparative institutional analyses of IEL (section 7).

While "democratic constitutionalism" has been identified as the "best practice" for democratic supply of *national PGs*, there are no simple strategies for "constitutionalizing" the diverse and inevitably fragmented "vertical, multilevel governance systems" for supplying *international PGs* demanded by citizens in 193 sovereign UN member states. Different kinds of

PGs – like “single best efforts PGs” (such as development of a new medicine), “weakest link PGs” (such as a dike, nuclear non-proliferation) and “aggregate efforts PGs” (like human rights, international rule of law, an efficient global market) – are confronted with different “collective action problems” requiring different “production strategies”.⁴⁶ Hence, the legal diversity of UN Specialized Agencies and of GATT/WTO legal regimes is likely to remain a permanent fact; it may justify diverse conceptions of “participatory multilevel constitutionalism” with different “functional separation” and “geographical fragmentation of powers” targeting the particular “collective action problems” of the diverse kinds of international PGs so as to enhance “constitutional accountability” of the holders of national, regional and worldwide “constituted power” vis-à-vis local holders of “constituent power”. The disadvantages of “legal fragmentation” must be limited by the “constitutional embedding” of specialized international legal regimes into general international law and common constitutional principles (like HRL) in order to make multilevel governance more legitimate and more effective for the benefit of citizens and their human rights.

1. Diverse Motives, Concepts, Value Premises and Research Interests of Narrators

Narratives can be described as stories making known individual interpretations of reality. The conception of the narrator interpreting reality may depend on his legal pre-conceptions, motives and objectives, for instance whether the narrative purports to present objective truth (e.g. the judicial justification of dispute settlement through deductive legal reasoning), legal advocacy (e.g. presenting the law in favor of a complainant or defendant), political compromise (e.g. the justification by a lawmaker of a legislative proposal through inductive legal reasoning), or whether the legal narrative serves the self-interests of the narrator (e.g. a tobacco lobbyist privileging “freedom to smoke” over public health protection). As illustrated by the criticism of “GAL” conceptions (see Section II. 5 above), it remains often unclear what indeterminate legal terms used in IEL narratives (like “law” and “justice”) represent in reality. For instance, legal positivism, natural law theories and sociological conceptions of law define “law” in different ways referring to different social realities; they often disagree on whether the term “justice” represents something precise in reality (e.g. in terms of Pla-

⁴⁶ Cf. E. U. Petersmann (note 8), at 25 et seq.

tonic "ideal reality"). If the meaning of legal terms is defined by different customs (as proposed by "conventionalism") rather than by the real existence of the things they name (as claimed by "naturalism"), then narratives of IEL have to define their legal terms in order to be meaningful. For instance, when the American Supreme Court Justice *Oliver Wendell Holmes* responded to the greeting by a friend – "do justice, Justice" – by stating: "That is not my job", the two lawyers used the indeterminate legal term of "judicial administration of justice" in different ways.

Natural scientists often share a larger agreement on the object of their studies (e.g. physical objects and causalities) than *social scientists* studying ephemeral human conduct, ideas, and their practical effects on individual reasoning and "public reason" governing social institutions. Due to their diverse value preferences, reasonable people often disagree on comprehensive doctrines of justice and the conditions under which positive legal rules cede to be legally binding in the face of extreme injustice. *Kantian* "categorical moral imperatives" (such as respecting "maximum equal freedoms") and corresponding constitutional requirements (e.g. in Art. 2 of the German Basic Law) have been criticized by American lawyers as being too burdensome for many people so as to serve as part of an "overlapping consensus" for a political conception of justice in a constitutional democracy.⁴⁷ Some international lawyers even believe that the attempt at distinguishing international law from politics by its "greater objectivity ... has been a failure": the "practice of law (is) politics"; law – in view of its indeterminacy – "is incapable of providing convincing justifications to the solution of normative problems".⁴⁸ In view of the complexity of the global economic division of labor and of its multilevel regulation by private and public, national and international law, also the global economy and its regulation by IEL are highly complex systems subject to often diverse, factual and normative interpretations by lawyers, economists, politicians, private and public economic actors. Even the quasi-universal membership in the Bretton Woods institutions and the WTO hardly proves the successful realization – among individuals and governments with diverse comprehensive conceptions of justice – of a stable "overlapping consensus" on what the Preamble to the WTO Agreement calls "the basic principles and ... objectives underlying this multilateral trading system". For instance:

⁴⁷ Cf. *J. Rawls*, The Domain of the Political and Overlapping Consensus, in: S. Freeman (ed.), *John Rawls. Collected Papers*, 1999, 473 et seq.

⁴⁸ Cf. *M. Koskeniemi*, From Apology to Utopia. The Structure of International Legal Argument, Reprint 2007, at 16, 69, and 601.

- Can and should the WTO treaty objective of “sustainable development” be construed in conformity with the pertinent UN resolutions on the “right to development” as a human right of citizens and peoples rather than as a right of governments distributing some of the “gains from trade” to citizens without recognizing individual rights to invoke WTO rules in domestic courts?⁴⁹
- Does the customary law requirement of treaty interpretation and adjudication “in conformity with principles of justice”, including also “human rights and fundamental freedoms for all”, require interpreting the WTO guarantees of individual access to domestic judicial remedies in conformity with the human rights obligations of all WTO members, including human rights of access to justice?⁵⁰
- As international trade is based on rights-based transactions among citizens and the WTO Dispute Settlement Understanding (DSU) is committed to “providing predictability and security to the multilateral trading system” (Art. 3 DSU): Should WTO legal guarantees of market access for private economic actors – subject to the WTO rules on sovereign rights to protect non-economic PGs – be construed from the perspective of reasonable citizens interested in transnational rule of law rather than from the perspective of politicians interested in political discretion to violate WTO rules so as to grant “protection rents” to domestic interest groups in exchange for political support?⁵¹
- If the objective of HRL is the institutionalization of “public reason” as an agreed framework for individual, social and democratic self-development: Do the human rights obligations of all WTO members and the UN and WTO agreements ratified by democratic parliaments sufficiently clarify the “constitutional limits” of reasonable disagreement on conceptions of IEL and of legitimate “methodological pluralism” in IEL research?

⁴⁹ Cf. C. Tietje, The Right to Development within the International Economic Legal Order, in: M. Cremona/P. Hilpold/N. Lavranos/S. S. Schneider/A. Ziegler (note 1), 543 et seq.

⁵⁰ On Resolution No. 5/2008 adopted by the International Law Association (declaring that “WTO members and bodies are legally required to interpret and apply WTO rules in conformity with the human rights obligations of WTO members under international law”) see E. U. Petersmann, International Trade Law, Human Rights and the Customary International Law Rules on Treaty Interpretation, in: S. Joseph/D. Kinley/J. Waincymer (eds.), *The WTO and Human Rights*, 2009, 69 et seq. ILA Resolution 4/2014 recommends “that domestic and international dispute settlement bodies in trade law duly respect the “consistent interpretation” and “judicial comity” requirements of national and international legal systems in order to promote the transnational rule of law for the benefit of citizens”. Both ILA resolutions were elaborated upon my initiative as chairman of the ILA’s International Trade Law Committee and illustrate how civil society may assist courts of justice in re-interpreting IEL for the benefit of citizens.

⁵¹ For a comprehensive criticism of modern IEL from the point of view of reasonable citizens see E. U. Petersmann (note 8).

2. Understanding "Law In Context" Requires Descriptive and Normative Analyses

Similar to *Fuller's* characterization of law as "subjecting human conduct to the governance of rules" that aim at establishing a "just order",⁵² the UN Charter defines its legal objectives in terms of both international order (e.g. based on "sovereign equality of states") and respect for human rights and self-determination of peoples (cf. Arts. 1, 55, 56), thereby limiting power-oriented rules (such as recognition of states if governments effectively control a people in a territory) by principles of justice and justification of law as democratically legitimate. Legal sociology and other *descriptive legal theories* analyze law as facts and seek to explain what the law is and which theories can best explain the existing rules and their social consequences. Most textbooks on IEL *describe* national and international rules of law governing economic activities and their impact on utility-maximizing behavior of economic actors, for instance by distinguishing international monetary law, trade law, competition law, investment law, migration law and environmental regulation. Yet, such analytical and doctrinal legal distinctions may not be relevant for interpreting IEL treaties in conformity with the text, context, objective and purpose of treaty provisions as well as "in conformity with principles of justice and international law", including "human rights and fundamental freedoms for all", as required by the customary rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties (cf. the Preamble and Arts. 31-33 VCLT).

Legal philosophy and other *normative legal doctrines* explore what the law ought to be and which "principles" (values) can justify the interpretation of legal rules in the most reasonable and coherent way, thereby evaluating rules, principles and their social context (e.g. "markets") either from "ideal perspectives" (e.g. which rules would create the best legal system if the rules were politically achievable?) or "non-ideal" perspectives (e.g. what are the political constraints impeding agreement on, and compliance with, ideal rules?). Also *normative legal theories* tend to proceed from understanding law and social institutions as facts (e.g. "Pareto efficiency", market competition), just as *descriptive legal theories* also imply normative assumptions (e.g. of the *homo economicus* maximizing "utility" through "free markets"). Hence, there is often no clear-cut distinction between normative and descriptive legal theories, just as the legal limitation of the scope of WTO appellate review to "issues of law covered in the panel report and legal in-

⁵² L. L. Fuller, *The Morality of Law*, 1969, at 96.

terpretations developed by the panel” may not exclude appellate review also of factual issues and of application of the law to the facts.⁵³ Both normative theories (e.g. of legal philosophy justifying law by “principles of justice”) and descriptive legal theories (e.g. legal sociology exploring the social effectiveness of rules) are necessary for understanding IEL and the overall coherence of legal (sub)systems. *Ronald Dworkin’s* theory of “law as integrity” explains why a descriptive reading of the “black letter law” may not enable the “best understanding” of the rules unless the interpreter also explores the normative principles underlying the rules in order to justify why a certain interpretation “fits best” the objectives of the legal system concerned.⁵⁴ As international economic regulation is embedded into thousands of interdependent private and public, national and international legal regimes (e.g. contract and company laws governing multinational enterprises), the plurality of different legal sources and jurisdictions requires analyzing IEL and its impact on social behavior in its diverse economic, political and legal contexts, with due respect for general international law as common framework of specialized treaty regimes. Competition laws and policies, for instance, tend to regulate restrictive business practices and governmental market distortions in diverse ways in diverse jurisdictions (e.g. “antitrust law” in the USA compared with China) due to diverse, underlying economic, political and legal policy decisions. In view of the global interdependence of private and public, national and international economic regulation, all textbooks and narratives of IEL tend to remain incomplete and “partial” in their selective focus on particular fields and problems of multilevel economic regulation. Why are so many IEL textbooks so rarely challenging the “justice” of IEL agreements negotiated secretly among governments and treating citizens as mere objects of intergovernmental regulation? How should negotiators and parliaments respond to the increasing civil society pressures to reject such inter-governmental agreements (like a future Transatlantic Trade and Investment Partnership Agreement among the EU and the USA) following the example of the Anti-Counterfeiting Trade Agree-

⁵³ Cf. *E. U. Petersmann*, Judicial Standards of Review and Administration of Justice in Trade and Investment Law and Adjudication, in: L. Gruszczynski/W. Werner (eds.), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation*, 2014, 19 et seq., at 30.

⁵⁴ For a recent summary of *Dworkin’s* methods of legal and judicial interpretation see *R. Dworkin*, *Justice in Robes*, 2006, at 9 et seq.

ment (ACTA) rejected by the European Parliament following its signature in 2012?⁵⁵

3. UN Law and the “Dual Nature” of Modern Legal Systems Require Justifying IEL by “Principles of Justice”

UN HRL proceeds from the constitutional premise that, “(i)n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society” (Art. 29 UDHR). Hence, the human rights to justification and of access to justice (cf. Art. 8 UDHR) can be conceived as being among the most important constitutional rights of citizens.⁵⁶ The customary rules of treaty interpretation, the UN Charter (e.g. Art. 1) and many other international treaties and courts of justice recognize that also IEL treaties and related adjudication must be construed and justified “in conformity with principles of justice”, including “human rights and fundamental freedoms for all” (Preamble and Art. 31 VCLT), in order to be consistent with the human rights foundations of modern legal systems.

In contrast to the natural sciences, law is not about discovering “scientific truth out there”; it is rather about “institutionalizing public reason” enabling individuals to peacefully cooperate and voluntarily comply with law in order to realize their individual, social and democratic self-development. From a human rights perspective recognizing human dignity, human autonomy and human rights to collective supply of PGs as ultimate legal values, both IEL and HRL are *instruments* to empower individuals to live a life in dignity. All UN member states have committed themselves to promoting a human right “to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (Preamble, Art. 28 UDHR). Yet, – as illustrated by the unnecessary poverty crises in many countries, by the financial crises since 2008, the climate change crisis and by human rights violations in so many UN member states –, human rights are not effectively protected in many UN member states. “Constitutionalism”

⁵⁵ Cf. M. Cremona, International Regulatory Policy and Democratic Accountability: The EU and the ACTA, in: M. Cremona/P. Hilpold/N. Lavranos/S. S. Schneider/A. Ziegler (note 1), 155 et seq.

⁵⁶ Cf. R. Forst, The Right to Justification. Elements of a Constructivist Theory of Justice, 2012; E. U. Petersmann (note 8), at 22 et seq.

explains why, notwithstanding the rhetorical support in numerous UN Resolutions of the “right to development” as an individual and popular human right and the universally agreed “Millennium Development Goals” of “eradicating extreme poverty and hunger” and protecting human rights more effectively, mere governmental commitments alone cannot effectively protect human rights and economic welfare without being transformed into constitutional rights of citizens protected by legislation, administration, adjudication and “public reason”. In order to limit selfish power politics, citizens must institutionalize their “public reason” by holding governments accountable to citizens and their constitutional rights as free and equal “agents of justice”, “democratic principals” and communicative human beings responsible for “participatory”, “representative” and “deliberative democracy” within constitutionally agreed limits protecting rights of citizens against abuses of limited governance powers.

Another consequence of the universal recognition of human rights is that many past doctrinal disputes among “legal positivists” and “natural rights theorists” – for instance, whether positive law includes only “rules” or also “principles” of law, whether the validity of law depends on its authoritative issuance and social effectiveness rather than on its morality, and whether judges enjoy discretion in the absence of applicable rules – have become outdated: “general principles of law” are universally recognized sources of international law; “inalienable” human rights have become integral parts of positive law; and the “rules of recognition” of international law (cf. Art. 38 ICJ Statute) acknowledge that the law-creating “*opinio juris*” may depend more on democratic and parliamentary consent and clarification of indeterminate rules by “courts of justice” than on the “*fiat*” of government executives and their diplomats. Also international courts recognize 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 through “balancing” of rules in the light of applicable procedures and principles of law. HRL requires justification also of IEL systems vis-à-vis citizens as democratic “principals” and co-authors of legitimate lawmaking. In the 21st century, international rules are legitimate only to the extent that they recognize citizens as free and equal subjects of human rights and interpret state sovereignty in conformity with popular and “individual sovereignty” as protected by human rights and democratically defined by citizens as “agents of justice”.

European law has responded to the “*Lockean* dilemma” of inadequate constitutional restraints of foreign policy powers by strengthening multi-level parliamentary, judicial and other “constitutional restraints” on foreign

policy discretion.⁵⁷ Constructing "public reason" beyond a national "democratic demos" must not be left to government executives or their trade diplomats.⁵⁸ As long as democratic representation of national "peoples" beyond the state (e.g. through consultative parliamentary assemblies in international organizations) and effective democratic control of multilevel governance of international PGs remain so limited, the "cosmopolitan rights and responsibilities" of citizens must be strengthened as "countervailing powers" through promotion of "participatory" and "deliberative democracy" and institutionalization of "cosmopolitan public reason" (e.g. by strengthening UN human rights bodies and democratic and judicial accountability mechanisms beyond the state). The obvious failures of worldwide UN and WTO institutions to protect international PGs effectively illustrate that the "emancipatory functions" of human rights to challenge and change power-oriented abuses of legal systems have not yet been realized in many multilevel governance systems. Legal philosophy and the "dual nature" of modern legal systems require interpreting and developing IEL for the benefit of citizens; they justify legal and judicial "struggles for rights" in order to realize their constitutional protection by the "rule of law" as a constitutional restraint on abuses of power based on "rule by law".

Legal theory requires overall coherence of multilevel legal systems so as to avoid legal inconsistencies and promote transnational rule of law and democratic legitimacy (e.g. in terms of respect for international agreements ratified by national parliaments for the benefit of citizens so as to protect "aggregate PGs" across national frontiers). Legal sociology confirms that – if "public reason" is defined as a "system of reasons that all can participate in" – shared "public reasons" are essential, reciprocal "coordinating devices" in societies that depend on decentralized support of rules and their justification by "principles of justice" for voluntary compliance with, and stability and legitimacy of legal regimes like IEL governing billions of individual economic actors in their global division of labor and rational pursuit of self-interests. Yet, in view of the permanent fact of "reasonable disagreement"

⁵⁷ Cf. *P. Hilpold* (note 26) and *E. U. Petersmann*, Integrating Human Rights into EU Trade Relations – The EU as a Global Role Model?, in: T. Takacs/A. Ott/A. Dimopoulos (eds.), *Linking Trade and Non-Commercial Interests: The EU as a Global Role Model?*, The Hague: CLEER Working Papers 2013/4, 15-26; *P. Hilpold*, Multilevel Judicial Protection of "Access to Justice" and the EU's Duty to Contribute to "Strict Observance and Development of International Law", in: M. Avbelj/F. Fontanelli/G. Martinico (eds.), *Kadi on Trial. A Multifaceted Analysis of the Kadi Trial*, 2014, 187 et seq.

⁵⁸ Cf. *P. Lomba*, Constructing a "We": Collective Agency and the EU, in: M. Cremona/P. Hilpold/N. Lavranos/S. S. Schneider/A. Ziegler (note 1), 97 et seq.

among citizens over their respective conceptions of a “good life” and over comprehensive theories of political justice, public reason must be limited to an “overlapping consensus” (*J. Rawls*) among people with often conflicting moral and political worldviews.

4. Institutionalizing Public Reason Requires “Multilevel Constitutionalism” Holding Multilevel Governance Accountable to Citizens as “Constituent Powers”

Since republican constitutionalism in ancient Greece, almost all states have learned through “trial and error” the need for adopting national (capital C) Constitutions (written or unwritten) as a necessary legal framework for democratic supply of *national PGs* (like rule of law, a common market). Since World War II, all 193 UN member states have joined functionally limited treaty constitutions like the (small c) constitutions (*sic*) of the International Labor Organization (ILO), the World Health Organization (WHO), the UN Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO) and of other multilevel governance institutions for the collective supply of *international PGs*. The “constitutional functions” of this functionally limited “UN multilevel constitutionalism” include (1) establishing multilevel governance institutions through multilateral treaties; (2) limiting their legislative, executive and dispute settlement powers; (3) regulating their collective supply of functionally limited “aggregate PG” through “primary rules of conduct” and “secondary rules of recognition, change and adjudication”; and (4) justifying the governance systems, for instance in terms of protecting labor rights and “social justice” through ILO law, fundamental rights to health protection through WHO law, human rights to education, justice and “rule of law” through United Nations Educational, Scientific and Cultural Organization (UNESCO) law, or “ensuring humanity’s freedom from hunger” through FAO law. Arguably, the explicit justification of these UN Specialized Agencies in terms of fundamental rights of citizens also justify other “constitutional features” of these UN institutions, such as the “tripartite structures” of ILO institutions (composed of representatives of governments, workers and employers) and the power of the World Health Assembly (under Art. 19 of the WHO Constitution) to “adopt conventions or agreements” (like the 2003 Framework Convention on Tobacco Control) and other international health regulations (under Art. 21 WHO Constitution) by a two-thirds vote. International agreements among democratic states – like the

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EU, EEA, Council of Europe and North Atlantic Treaty Organization (NATO) agreements – also provide for parliamentary institutions and other constitutional safeguards in multilevel governance of transnational "aggregate PGs".

Similar to modern brain research emphasizing the need for reviewing the spontaneous "fast thinking", "basic instincts" and value traditions of rational egoists by more reasonable "slow thinking" (e.g. accepting our moral responsibilities vis-à-vis others),⁵⁹ modern theories of justice emphasize the need for limiting the utility-maximizing pursuit of self-interests by rational economic and political actors through constitutional "checks and balances" so as to promote "public reason" through constitutional, legislative, administrative, judicial and international clarification of agreed "principles of justice" and accountability mechanisms protecting equal rights of citizens and "participatory" and "deliberative democracy" against abuses of public and private power.⁶⁰ In order to remain *reasonable* (e.g. in the sense of respecting the legitimate interests of all others as well as the permanent fact of reasonable disagreement in societies) rather than only *rational* (e.g. in terms of promoting merely rational self-interests at the expense of legitimate interests of others), narratives of IEL must not only remain embedded in the "basic constitutional structures" of constitutional democracies committed to realizing the human rights obligations that UN member states have accepted under UN law and HRL. They must also ask what private and public, national and international "basic legal structures" are required in order to realize and protect over time a fair global division of labor among free and equal citizens mutually benefitting from economic and social cooperation and multilevel, democratic governance of international PGs.

The emerging "multilevel human rights constitution" justifies the normative proposition that all multilevel governance powers must remain justifiable and legally restrained in terms of constitutional rights, rule of law and

⁵⁹ On the distinction – as two dialectic thinking processes characteristic of human rationality – of "unconscious, intuitive fast thinking" from "conscious slow thinking" based on deductive reasoning double-checking of the cognitive biases of human instincts and intuition, see *D. Kahneman, Thinking, Fast and Slow*, 2012.

⁶⁰ Modern theories of justice emphasize the dependence of constitutional democracies on a "four-stage sequence" (cf. *J. Rawls, A Theory of Justice*, 1972, at 195 et seq.) of transforming agreed "principles of justice" into constitutional and legislative rules and their administrative and judicial enforcement subject to democratic accountability mechanisms and judicial remedies of citizens. On the need for adapting *Rawls'* theory of "perfect justice" for a closed society to the realities of the global economy see *E. U. Petersmann* (note 8), chapter VI.

democratic accountability vis-à-vis citizens.⁶¹ HRL – as a rights-based limitation of the exercise of public power by all institutions exercising public powers – calls for designing the “basic structures” of IEL in ways that protect “rule of law” and cosmopolitan rights of producers, investors, traders and consumers participating in the global division of labor – not only in commercial and investment law (e.g. contractual rights, property rights, freedom of arbitration and of access to national courts), but also in trade and constitutional law, with due respect for the reality of legitimate “constitutional and legal pluralism”.⁶² Hence, similar to *Rawls*’ conception of liberal justice as a shared basis for justifying the “basic structure” for constitutional, legislative, administrative and judicial institutionalization of “public reason” inside a constitutional democracy, also the stability and democratic legitimacy of IEL depend on protecting equal freedoms, transnational rule of law and social rights of citizens inside and beyond states whenever producers, investors, traders and consumers cooperate in mutually beneficial ways in the global division of labor. Such “liberal” and “egalitarian principles of justice” can be legally protected and politically “balanced” in many diverse ways without imposing a comprehensive doctrine of justice, as illustrated by the legitimately diverse regulatory approaches inside constitutional democracies to the regulation of free trade inside and beyond states (e.g. in common markets like the EU and MERCOSUR and regional free trade agreements like the EEA and NAFTA).⁶³ Yet, the more globalization transforms *national* into *international* PGs that states can provide and protect only collectively through multilevel legal and governance systems, the more IEL narratives must address also the “constitutional challenge” of protecting the demand by citizens for international PGs – like mutually beneficial monetary, trading, financial, investment, environmental, development and related legal systems – more effectively through IEL.⁶⁴ A cosmopolitan design of the future Transatlantic Trade and Investment Partnership Agreement (e.g. regarding citizen-driven rather than intergovernmental modes of trade and investment adjudication) could set a globally important precedent

⁶¹ Cf. *E. U. Petersmann* (note 8), chapters II. 5 and IV. On human rights as constitutional rights see also *S. Gardbaum*, *Human Rights as International Constitutional Rights*, EJIL 19 (2008), 749 et seq.

⁶² Cf. *E. U. Petersmann* (note 8), chapter V.

⁶³ Cf. *E. U. Petersmann* (note 11).

⁶⁴ On the non-rival and non-excludable nature of “pure PGs” that prevent their production in private markets, see *E. U. Petersmann* (ed.), *Multilevel Governance of Interdependent Public Goods: Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century*, Florence: RSCAS Working Paper 2012/23.

for strengthening cosmopolitan rights in IEL beyond Europe and North America.

5. Making IEL Consistent with HRL Requires “Cosmopolitan Constitutionalism” with Due Respect for “Constitutional Pluralism”

Due to their power-oriented foreign policy traditions and the “Lockean dilemma” of inadequate constitutional control of abuses of foreign policy discretion, most UN member states have not effectively implemented UN law and WTO law inside their domestic legal systems for the benefit of citizens. Even though citizens are “agents of justice” whose human rights and democratic consent condition the legitimacy of law and governance, governments continue to treat citizens in UN and WTO lawmaking as mere objects without effective remedies to protect themselves against violations of UN human rights guarantees and WTO guarantees of economic freedoms, property rights, rule of law, non-discrimination and judicial remedies in domestic courts. The “rules or recognition”⁶⁵ of international law – as codified in Art. 38 International Court of Justice (ICJ) Statute – continue to be construed by governments without adequate regard to the customary law requirement of interpreting treaties in conformity with “human rights and fundamental freedoms for all” and other “principles of justice”. The “judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law” (Art. 38, c and d ICJ Statute) should be used more actively for justifying legal presumptions that precise and unconditional treaty guarantees of freedom, non-discrimination and rule of law must be construed for the benefit of the corresponding constitutional rights of citizens; multilevel dispute settlement systems should interpret multilevel economic regulation in mutually consistent ways for the benefit of citizens, as required by the “consistent interpretation” and “judicial comity” principles underlying national and international legal systems.

For instance, the more trade transactions are integral parts of “global supply chains”, the stronger become arguments for construing WTO rules – like international commercial and investment rules – as protecting reasonable expectations not only of governments, but also of non-governmental

⁶⁵ On “legal systems” as a union of “primary rules of conduct” and “secondary rules” of recognition, change and adjudication see *H. L. A. Hart, The Concept of Law*, 1994, chapter V.

economic actors and citizens relying on transnational rule-of-law in their global division of labor. The numerous WTO guarantees of individual access to domestic courts and judicial remedies – e.g. in the field of GATT (Art. X), the WTO Antidumping Agreement (Art. 13), the WTO Agreement on Customs Valuation (Art. 11), the Agreement on Pre-shipment Inspection (Art. 4), the Agreement on Subsidies and Countervailing Measures (Art. 23), the General Agreement on Trade in Services (Art. VI GATS), the Agreement on Trade-Related Intellectual Property Rights (Arts. 41-50, 59 TRIPS) and in the Agreement on Government Procurement (Art. XX) –, like the WTO obligations that “each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations” under WTO law (Art. XVI:4 WTO Agreement) and settle disputes “consistent(ly) with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding” (Art. 23 DSU), offer additional arguments for interpreting multi-level trade rules in mutually consistent ways protecting transnational rule-of-law, non-discriminatory conditions of competition, general consumer welfare, access to justice and “human welfare” (rather than only “*Kaldor-Hicks*-efficiency”) as parts of the “basic principles underlying this multilateral trading system” (cf. the Preamble to the WTO Agreement). The explicit justification of functionally limited “treaty constitutions” by their protection of human rights – for instance, in the constitutions (*sic*) establishing the ILO, the WHO, the UNESCO, and the FAO – justifies similar “constitutional arguments” for limiting multilevel governance institutions for the collective supply of international PGs by constitutional principles of democracy, cosmopolitan rights and judicial remedies against exercises of public power restricting human rights and fundamental freedoms. The Lisbon Treaty on European Union (e.g. Arts. 2, 3, 9-12, 21 TEU) explicitly recognizes constitutional requirements of extending the “trias” of human rights, democracy and rule of law beyond national boundaries by means of participatory, representative and deliberative democracy supplementing the inadequate parliamentary control of foreign policy powers.⁶⁶ The existing “cosmopolitan” HRL and IEL regimes (e.g. in regional agreements) have proven to regulate “collective action problems” and protect PGs more effectively than the “Westphalian structures” of UN and WTO law. Yet, as human rights also protect individual, democratic and cultural diversity, IEL must respect legitimate “constitutional pluralism” (e.g. in Commonwealth countries with “parliamentary sovereignty” without constitutional human rights

⁶⁶ Cf. A. von Bogdandy, *The European Lesson for International Democracy: The Significance of Arts. 9-12 EU Treaty for International Organizations*, EJIL 23 (2012), 315 et seq.

guarantees) and reasonable disagreement on legal and judicial interpretations of "principles of justice" in IEL (e.g. the procedural, distributive, corrective, commutative justice and equity principles justifying the GATT/WTO distinctions between "violation complaints", "non-violation complaints" and "situation complaints" in Arts. XXIII of GATT and GATS).⁶⁷

6. Doctrinal Conceptions of IEL Should Reveal Their Underlying Jurisprudential Conceptions of Law and Justice

Most textbooks and other narratives of IEL describe and explore particular fields of economic regulation (like commercial contract law and arbitration, competition, trade and investment law) from historical, legal, economic and political perspectives without linking and justifying their often narrow "*doctrinal conceptions*" of economic regulation to HRL and other "principles of justice" underlying modern constitutionalism.⁶⁸ For instance, similar to the UN Charter, the postwar international economic agreements – like the 1944 Bretton Woods agreements establishing the IMF, the World Bank and GATT 1947 – focused on "sovereign equality", rights of governments and "specialized agencies" using separate policy instruments and legal regimes for the collective supply of specialized international PGs (like mutually beneficial monetary, development and trading systems). Due to the political East-West divide and the principle of "separation of policy instruments", human rights and corresponding governmental duties to respect, protect and fulfill fundamental rights and general consumer welfare were nowhere mentioned in the IMF, World Bank and GATT agreements. From 1948 until the early 1980s, GATT 1947 was dominated by "realist" power politics, as illustrated by the deliberate avoidance of establishing a GATT Office of Legal Affairs protecting quasi-judicial administration of GATT dispute settlement procedures in order to hold trade politicians judicially accountable for their frequent violations of GATT rules to the detriment of consumer welfare. The "member-driven GATT pragmatism" reflected an authoritarian, outcome-oriented rather than rules-based "man-

⁶⁷ Cf. E. U. Petersmann, *The GATT/WTO Dispute Settlement System*, 1997, chapter 4.

⁶⁸ A typical example is A. T. Guzman/A. O. Sykes (eds.), *Research Handbook in International Economic Law*, 2007. On the distinction between "semantic", "jurisprudential", "doctrinal" and "judicial approaches" to legal interpretation see R. Dworkin (note 54). For broader "contextual analyses" of international law see e.g. J. Crawford/M. Koskeniemi (eds.), *The Cambridge Companion to International Law*, 2012.

agement approach” aimed at accommodating powerful interest groups (e.g. cotton, textiles and agricultural lobbies dominating trade policy-making in the EC and USA) in exchange for political support of periodically elected politicians – without transparent policymaking, democratic and judicial accountability vis-à-vis adversely affected domestic citizens.⁶⁹

Just as UN and GATT/WTO member governments emphasize the need for “member-driven governance”, so do many academics describe IEL in terms of international rights and duties among states setting-up international organizations regulating international movements of goods, services, persons, capital and related payments among states. Westphalian conceptions of IEL do not deny that there are other (e.g. private law) rules and principles governing international economic transactions; they deliberately limit the scope of specialized international economic treaties so as to increase the incentives for support by governments by separating monetary, trade, investment and environmental regulation from redistributive policy questions, human rights obligations of member states and democratic accountability.⁷⁰ This state-centered focus is supported by economic conceptions of international trade agreements as being aimed at limiting *domestic* “governance failures” (“*commitment theory*” explaining trade agreements in terms of reciprocal commitments to limit mutually harmful trade protectionism) as well as at limiting *international* coordination problems (e.g. “*terms of trade theory*” explaining trade agreements as reciprocal commitments to avoid harmful international externalities that affect world prices and “terms of trade”).⁷¹ Both economic conceptions tend to be content with “*Kaldor-Hicks*-efficiency” (i.e. focusing on national gains from trade and increased “gross domestic product”) without limiting such “GDP approaches” by legal government duties to distribute the efficiency gains so as to protect human welfare of all citizens and “Pareto efficiency”. Such power-oriented

⁶⁹ On these “grey area trade policies” and their costly redistribution of domestic income (e.g. through “voluntary export restraints”) see *E. U. Petersmann* (note 11), chapters V and VI. On “managerialism” as a power-oriented ideology for justifying “hegemonic regimes” see *M. Koskenniemi*, *Hegemonic Regimes*, in: *M. A. Young* (note 20), at 305 et seq.

⁷⁰ See, e.g., *G. Schwarzenberger*, *The Principles and Standards of International Economic Law*, RdC 117 (1966), 1 et seq.; *I. Seidl-Hohenveldern*, *International Economic Law*, RdC 198 (1986), 3 et seq.

⁷¹ The “terms of trade” explanation of trade agreements by some economists is rejected by most non-economists on the ground that there is little empirical evidence for terms-of-trade manipulation in view of the pervasive information problems; the increasing regulation of domestic “market failures” and “governance failures” in trade agreements confirms their “domestic policy” and “constitutional functions”; cf. *E. U. Petersmann* (note 11) and *D. H. Regan*, *What are Trade Agreements For? Two Conflicting Stories Told by Economists, with a Lesson for Lawyers*, in: *JIEL* 9 (2006), 951 et seq.

conceptions of IEL justifying utilitarian power politics and the widespread disregard in many UN and WTO member states of governmental duties to respect, protect and fulfill human rights contribute to the alienation of poor people and civil society vis-à-vis the Bretton Woods institutions, GATT and the WTO.

From the perspective of an "impartial spectator" (*Adam Smith*) and of reasonable citizens as holders of "constituent power" (e.g. in their impartial "original position" described in *J. Rawls' Theory of Justice*), the five diverse "doctrinal conceptions" of IEL discussed in Part II differ because of their prioritization of different "principles of justice", methodological and policy approaches and diverse political justifications of IEL (e.g. in utilitarian rather than "constitutional" terms). For instance:

- Westphalian conceptions of "IEL as intergovernmental regulation of the global economy through public international law" tend to focus on power-oriented "Westphalian justice" protecting "sovereign equality of states", international order and reciprocal bargains among governments ("commutative justice"); they often neglect the political abuses of "*Hobbesian* justice as state sovereignty" (such as the "resource privilege" and "borrowing privilege" of governments regardless of their democratic legitimacy) that remain characteristic for state-practices in many UN institutions and UN member states as well as in the WTO.
- "GAL conceptions of IEL" tend to proceed from "constitutional nationalism" (e.g. underlying the "New Haven approach" justifying hegemonic US foreign policies) so as to limit abuses of multilevel governance powers by multilevel administrative law principles underlying national laws and the law of some international organizations (e.g. UN, ILO and EU Administrative Tribunals), without adequate justification of the constitutional foundations of GAL principles (such as transparency, legal accountability, limited delegation of powers, due process of law, judicial remedies) and of their recognition as positive international law.
- IEL conceptions of multilevel economic regulation often proceed from utilitarian economic values justifying only weak international governance and dispute settlement institutions (e.g. in many regional trade agreements in Africa, Asia and in the Americas).
- EU law – and to a much lesser extent also the law of the EEA – justify their IEL through multilevel constitutionalism embedding common market regulation into fundamental rights of citizens and multilevel democratic governance institutions, yet without effective "constitutionalization" of EU monetary and commercial policies and adjudication violating IEL (e.g. WTO dispute settlement rulings).

- Transnational commercial and investment law and arbitration emphasize the reality of “legal pluralism” and the advantages of coordinating competing jurisdictions through decentralized “conflict of law” principles, cosmopolitan rights and multilevel judicial protection of transnational rule of law for the benefit of private economic actors and citizens.

The doctrinal differences and conflicting policy objectives (e.g. in terms of “national interests” vs “basic needs” and fundamental rights of citizens) do not prevent agreement on common *sociological* and *taxonomic conceptions* of IEL (e.g. in terms of *Hartian* conceptions of a “legal system”, economic conceptions of promoting “aggregate PGs” and “efficiency” through IEL). Arguably, as discussed in Part IV, the customary rules of treaty interpretation (as codified in the VCLT) and the “rules of recognition” (as codified in UN law) offer strong *jurisprudential arguments* for reconciling the five IEL conceptions in mutually coherent ways based on inclusive “principles of justice” protecting citizens and their human rights rather than only rights and obligations of governments, multilevel “managerialism” or non-inclusive nationalism. Courts of justice must use their independence, impartiality and “due process” obligations for interpreting, justifying and developing IEL from all five doctrinal perspectives in order to promote “legal coherence” by interpreting treaties and settling disputes “in conformity with principles of justice”, the human rights obligations of all UN member states and the related “sovereign responsibilities” and “duties to protect” basic needs and fundamental rights of citizens, yet with due respect for the only limited “overlapping consensus” on “principles of justice” among governments and citizens with reasonably diverse conceptions of a “good life” and “political justice”. Principle-oriented constitutionalism and “courts of justice” – due to their “veils of ignorance” (*J. Rawls*) promoting “reasonableness” rather than only rational pursuit of self-interests of individual actors – are often more capable than political majorities in legislative and executive institutions to limit and justify their decisions by “principles of justice”.⁷² Hence, the neglect of “principles of justice”, human rights and

⁷² Cf. *E. U. Petersmann* (note 8), chapter III. On this need for reconciling utility-maximizing models of rational pursuit of self-interests with sociological evidence that people also act according to norms and principles requiring constitutional and democratic justification of autonomy and social justice, see *P. Clements*, *Rawlsian Political Analysis. Rethinking the Microfoundations of Social Science*, 2011. On the importance for people to agree on shared reasons for just laws coordinating a “stable equilibrium” in the decentralized application and enforcement of rules by individual agents that will support the institutions and interactions required by a political conception of justice only if they can be reasonably assured that they will benefit as a result, see *G. K. Hadfield/S. Macedo*, *Rational Reasonableness: To-*

“cosmopolitan constitutionalism” in power-oriented, intergovernmental UN and WTO rulemaking needs to be limited by stronger “multilevel constitutionalism” and multilevel judicial protection of cosmopolitan rights in order to protect more effectively transnational “aggregate PGs” demanded by citizens.⁷³

7. “Public Choices” Among Alternative Governance Methods Require Interdisciplinary and Comparative Institutional Analyses

Constitutionalism explains why multilevel governance of “aggregate PGs” requires constitutional, legislative, administrative, judicial and private decision-making processes inside and beyond states holding “constituted powers” accountable vis-à-vis citizens as the holders of “constituent power”. The more national Constitutions become “partial constitutions” that can protect interdependent “aggregate PGs” only through multilevel governance based on international law and institutions, the more important become the functional interdependencies between “big C constitutionalism” constituting national polities and “small c constitutionalism” for constituting, limiting, regulating and justifying functionally limited, multilevel governance of international PGs. Yet, national Constitutions and UN HRL say little about multilevel economic regulation and the relative efficiency of alternative policy instruments. Hence, there is need for learning through comparative institutional research identifying and explaining the relative (dis)advantages of alternative constitutional principles, rules, institutions and decision-making procedures.⁷⁴

All democratic constitutions, including functionally limited “treaty constitutions” (e.g. constituting rule-making, executive and judicial powers and citizen rights in regional agreements like the EU, EEA and ECHR), acknowledge the need for *six basic types of successive rulemaking* (i.e. constitutional, legislative, administrative, judicial, international and private) and

ward a Positive Theory of Public Reason, in: University of Southern California Law and Economics Working Paper Series: Working Paper 127 (2011).

⁷³ Cf. E. U. Petersmann, Competing “Principles of Justice” in Multilevel Commercial, Trade and Investment Adjudication: Need for More “Judicial Dialogues” and Legal “Cross-Fertilization”, in: The Global Community Yearbook of International Law & Jurisprudence 2013, 163 et seq.

⁷⁴ On this neglect in IEL research of the necessary “constitutional embedding” of multilevel economic governance see the interdisciplinary constitutional, legal, economic and “public choice” analyses in: M. Hilf/E. U. Petersmann (note 14).

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of corresponding institutions necessary for democratic self-governance, “deliberative democracy” and interdependent governance decisions based on public discussion. One defining element of constitutional democracies is that all six types of rule-making and related institutions interact as multi-level governance systems, whose support by citizens requires constant justification in terms of protecting individual rights, PGs and “principles of justice”. The public use, institutionalization and evolution of “public reason” necessary for maintaining democratic self-governance stable over time 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, courts of justice and constitutional rights of citizens limiting regulatory powers and empowering citizens to hold governments accountable for their “governance failures” to protect PGs effectively. From a constitutional perspective, both political and judicial, national and international institutions are “agents” with limited “constituted powers” that must remain accountable and justifiable vis-à-vis citizens as democratic “principals” of all governance institutions.⁷⁵ Also in IEL, it is up to citizens and democratic people to ensure that the general principles of procedural, distributive, corrective, commutative justice and equity are progressively specified through democratic legislation, administration and adjudication for the benefit of citizens. Contrary to the selfish claims of many UN and WTO diplomats interested in limiting their democratic and judicial accountability, 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 pursue rational self-interests subject to lesser constraints 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 justifying the relevant rules, to arbi-

⁷⁵ Cf. Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda (UN Human Rights Office of the High Commissioner, 2013), at 10: “Accountability from a human rights perspective refers to the relationship of Government policymakers and other duty bearers to the right holders affected by their decisions and actions”, notably in terms of responsibility (e.g. through clearly defined duties and performance standards enabling transparent and objective assessments), answerability (e.g. through reasoned justifications of actions to those they affect) and enforceability (e.g. through institutions monitoring, sanctioning and correcting non-compliance with established standards).

trate competing legal claims, and to promote rule-compliance.⁷⁶ As long as human rights, general consumer welfare and "principles of justice" are nowhere mentioned in the law of the Bretton Woods institutions, GATT and the WTO, citizens have good reasons for insisting that impartial, independent courts of justice should "administer justice" in their judicial review of welfare-reducing, governmental violations of IEL agreements ratified by parliaments for the benefit of citizens.

IV. Constitutionalism Requires Multilevel Protection of Cosmopolitan Rights in Multilevel Economic Governance of "Aggregate PGs"

Empirical comparisons of the five competing governance conceptions and related IEL regimes (as described in Part II) from the perspective of "methodological pluralism" and its "constitutional limits" explored in Part III suggest four legal and policy conclusions for "constitutionalizing" IEL and multilevel governance of international PGs on the basis of decentralized "cosmopolitan constitutionalism".

1. The Regulatory Failures of "Constitutional Nationalism" and of "International Treaty Constitutions" Require "Cosmopolitan Countervailing Rights"

The human rights obligations of all UN member states confirm that "the individual is the ultimate unit of all law, international and municipal";⁷⁷ the "global constitutional community" includes no longer only states and international organizations, but also all natural persons and other non-governmental, legal persons constituting a transnational "civil society" calling for stronger protection of human, constitutional and other cosmopoli-

⁷⁶ 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*, 1994; *N. Komesar*, *Law's Limit: The Role of Courts, the Rule of Law and the Supply and Demand of Rights*, 2001; *G. Shaffer/J. Trachtman*, *Interpretation and Institutional Choice at the WTO*, *Va. J. Int'l L.* 52 (2011), 1 et seq.

⁷⁷ *H. Lauterpacht*, *The Grotian Tradition of International Law*, *BYIL* 23 (1946), 1 et seq., at 27.

tan rights beyond national democracies.⁷⁸ In contrast to private goods produced in private markets, the “non-excludable” and/or “non-exhaustive” characteristics of many (“pure” and/or “impure”) PGs demanded by citizens entail “market failures” requiring collective supply of PGs which – in the case of “aggregate PGs” – must build on interdependent local, national and transnational supply chains. Apart from adopting national Constitutions (written or unwritten) as necessary legal framework for collective supply of national PGs, all 193 UN member states have also joined functionally limited treaty constitutions like the constitutions (*sic*) of the ILO, the WHO, UNESCO and the FAO for multilevel governance of “aggregate PGs”. Yet, due to their power-oriented foreign policy traditions, most UN member states have not effectively implemented UN law and WTO law inside their domestic legal systems for the benefit of citizens. For example, citizens often lack effective remedies to enforce UN human rights guarantees and WTO guarantees of economic freedoms, property rights, rule of law, non-discrimination and judicial remedies in domestic courts. Most foreign policies continue to pursue “national interests” based on power-oriented “political realism” and diplomatic justifications of “politically efficient breaches” of international law so as to satisfy powerful interest groups without adequate protection of international PGs and judicial accountability of the rulers vis-à-vis adversely affected citizens.

UN HRL calls explicitly (e.g. in Arts. 6 UDHR, 16 International Covenant on Civil and Political Rights [ICCPR]) for the legal empowerment of individuals also in international law. The duties of all governance institutions to respect, protect and fulfill human rights inside and beyond state borders are increasingly linked to democratic “accountability mechanisms”.⁷⁹ The codification of the “rules of recognition” of international law

⁷⁸ Cf. A. Peters (note 16); A. Peters, Dual Democracy, in: J. Klabbbers/A. Peters/G. Ulfstein (note 16), 263 et seq.

⁷⁹ On human rights to democratic governance see, e.g., Art. 21(3) UDHR: “The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”. The UDHR guarantees of freedom of expression (Art. 19), freedom of assembly (Art. 20) and democratic participation (Art. 21) are confirmed in many UN and regional human rights conventions and national constitutions and render non-democratic governance powers illegitimate. On “the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms” see the Vienna Declaration and Programme of Action adopted at the UN World Conference on Human Rights by more than 170 states on 25.6.1993 (A/CONF.157/24, para.5). This “universal, indivisible, interrelated, interdependent and mutually reinforcing” nature of human rights was reaffirmed by all UN member states in numerous human rights instruments such as UN Resolution 63/116 of 10.12.2008 on the “60th

in Art. 38 ICJ Statute – notably of “international custom as evidence of a general practice accepted as law”, the “general principles of law recognized by civilized nations”, and “judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law” – refutes claims of diplomats that authoritarian rulers and their diplomats remain the “doorkeepers” controlling the emergence of new international law rules and changes of existing international law. HRL requires not only mutual coherence and democratic and judicial “balancing” of civil, political, economic, social and cultural rights and corresponding duties of governments; it also calls for reconciling and integrating competing conceptions of IEL and their diverse value premises (e.g. human rights, popular self-determination, “civilized nations”, “sovereign equality of states”, administrative accountability, economic efficiency, sustainable development) on the basis of inclusive “principles of justice” (like human rights) as explicitly required by the customary rules of treaty interpretation and dispute settlement. More inclusive methodologies reveal what the partial narratives of IEL neglect, for instance that private law, administrative law and “realist foreign policy” principles must remain embedded in – and limited by – constitutional law principles like the “rule-of-law” and “integration principles” underlying the customary rules of treaty interpretation calling for mutually coherent legal interpretations of UN and WTO law. As IEL is based on legal and judicial protection of economic rights of private economic actors, IEL treaties ratified by parliaments should be construed for the benefit of citizens as protecting not only rights of governments, but also of citizens and non-governmental economic actors. In order to protect multilevel governance of international PGs more effectively, courts of justice and civil society have good reasons to challenge persistent violations by EU institutions and EU member states of international treaty obligations and related dispute settlement rulings (e.g. the 15 GATT/WTO dispute settlement rulings against the EU’s illegal import restrictions on bananas from 1991 to 2012). Just as citizens have become progressively recognized as being entitled to judicial enforcement of international treaties regulating commercial law, investment law, intellectual property law, consular protection, regional economic, environmental, criminal and human rights law, they should also be recognized as legal subjects and beneficiaries of UN law and WTO law entitled to invoke and enforce international guarantees of non-discriminatory market access, rule of law and

anniversary of the Universal Declaration of Human Rights” (UN Doc A/RES/63/116 of 26.2.2009).

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access to justice in domestic courts in conformity with the human rights obligations of states.⁸⁰

National Constitutions increasingly acknowledge the need for international law and institutions based on the insight that – the more globalization transforms national PGs into global “aggregate PGs” – national (big C) Constitutions turn out to be “partial constitutions” that can protect international PGs only in cooperation with other states through international law and multilevel governance institutions. Yet, due to path-dependent, inter-governmental power politics focusing on “state sovereignty” – rather than on “popular sovereignty”, “individual sovereignty” and related “sovereign responsibilities” –, neither the UN and UN Specialized Agencies nor the WTO have succeeded in realizing their objectives to protect international PGs effectively. As first explained by *Kantian* legal theory, state-centered “multilevel constitutionalism” cannot effectively protect human rights and other international PGs without additional multilevel constitutional safeguards of cosmopolitan rights and corresponding constitutional restraints on abuses of power in all human interactions at national, transnational and international levels.⁸¹ Power-oriented “Westphalian conceptions” of international law focusing on foreign policy discretion for maximizing “national interests” – often without effective parliamentary control, judicial review and other constitutional restraints of intergovernmental power politics and of its welfare-reducing effects on domestic citizens – become all too often captured by rent-seeking interest groups abusing import protection and non-transparent financial deals (e.g. loan agreements, concession agreements, government procurement contracts) for generating “protection rents” and political support for politicians and powerful producer interests at the expense of consumer welfare. Overcoming the “protection biases” in domestic policy-making and supplying international PGs democratically and more effectively requires empowering civil society by “countervailing rights” to challenge abuses of multilevel governance powers. There is also need for a more coherent justification of multilevel constitutional con-

⁸⁰ On legal guarantees of access to justice (e.g. in Art. 8 UDHR, Art. 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) see *F. Francioni* (ed.), *Access to Justice as a Human Right*, 2007; *A. Peters* (note 16), at 163 et seq. On the ongoing processes of strengthening governmental “responsibilities to protect” and making international organizations accountable towards citizens and non-governmental organizations see *A. Peters* (note 16), at 189 et seq., 210 et seq., 227 et seq.

⁸¹ Cf. *E. U. Petersmann* (note 8), chapters II and III.

straints based on the emerging “multilevel human rights constitution”⁸² acknowledging that

a) states, international organizations and also international treaties among states derive their democratic legitimacy from protecting human, constitutional and other cosmopolitan rights of citizens as holders of constituent power and “democratic principals” of all institutions exercising public authority;⁸³

b) the de-legitimization resulting from the inadequate parliamentary control of multilevel governance (e.g. in UN and WTO institutions) must be compensated by promoting “participatory”, “deliberative” and “contestatory democracy” based on empowering citizens through cosmopolitan rights and accountability mechanisms for constituting, limiting, regulating and justifying more inclusive, multilevel governance of aggregate PGs;⁸⁴

c) cosmopolitan legal regimes based on multilevel protection of human rights, rule of law and democratic governance have empirically proven to protect “aggregate PGs” more effectively than alternative, power-oriented “Westphalian legal regimes” that prioritize rights of rulers over rights of citizens without effective legal and democratic accountability mechanisms protecting human rights.⁸⁵

2. Cosmopolitanism Limits “Legal Fragmentation” of the “Washington Consensus” and the “Geneva Consensus”

Empirical evidence confirms that “constitutional” and “cosmopolitan” conceptions of IEL – e.g. of European common market law as protected by national and European courts, investment law as protected by investor-state arbitral jurisprudence supervised and assisted by national courts, commercial law as enforced by national courts and arbitration, and HRL protected

⁸² My proposal of justifying international law and governance by reference to an “emerging multilevel human rights constitution” has been progressively developed since *E. U. Petersmann*, Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution, in: F. A. Abbott/C. Breining/T. Cottier (eds.), *International Trade and Human Rights*, 2006, at 29 et seq. A “bottom-up constitutional justification” of multilevel governance of PGs by cosmopolitan and democratic rights and responsibilities of citizens to protect equal constitutional rights and transnational rule of law beyond states complements the “public law authority” justification of international law and institutions developed by *A. von Bogdandy*, *Prinzipien von Staat, supranationalen und internationalen Organisationen*, in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland XI*, 2013, at 275 et seq.

⁸³ On the universal recognition (e.g. in UN HRL and numerous UN resolutions) of human rights to democratic governance see *A. Peters* (note 78), at 273 et seq.

⁸⁴ Cf. *A. Peters* (note 78), at 263 et seq. (arguing for a “dual accountability of international institutions” to states and citizens).

⁸⁵ Cf. *E. U. Petersmann* (note 8), at 145 et seq.

by multilevel legal and judicial remedies – protect cosmopolitan rights of citizens, transnational rule of law, non-discriminatory conditions of competition, consumer welfare and citizen-driven “aggregate PGs” more effectively than authoritarian IEL regimes based on “Westphalian international law among states” or nationalist, hegemonic conceptions of IEL. Multilevel “judicial balancing” of economic market access commitments (e.g. under WTO law) with sovereign rights to protect non-economic PGs (e.g. in conformity with UN HRL, the law of UN Specialized Agencies like the WHO and ILO) also promotes legal clarification of the often vaguely drafted “objectives” and “general exceptions” in IEL agreements for protecting non-economic PGs. “Realists” and “radical pluralists” often emphasize the inevitable conflicts among competing legal regimes, for instance due to

- diverse, and often tacit, *internal value assumptions of legal actors* justifying the legal coherence, validity and hierarchy of national and international “self-contained legal regimes” from different legal perspectives (e.g. a different “*Grundnorm*” and “*Vorverständnis*” in terms of *H. Kelsen’s* legal theory of the “*Stufenbau*” of national and international legal orders deriving their respective legitimacy from a presumed, national or international “basic norm”);
- diverse, interest-driven, *strategic self-interests of legal actors* and of institutional biases of specialized legal regimes (e.g. of trade law, investment law, intellectual property law, environmental law, UN HRL, UN Security Council regulations) whose respective legal priorities and conflicting legal claims and self-interests may be irreconcilable; or due to
- different explanations of inherent inter-regime conflicts by their self-contained, “*autopoietic dynamic of social differentiations*” following the particular rationality of social sub-systems (like the economy, security protection, internet regulation) and related, functionally oriented conflict rules and remedies.⁸⁶

In contrast to such one-sided focus (e.g. by “critical legal studies” and “radical pluralists” like *M. Koskenniemi*) on inescapable conflicts and adversarial rivalries among fragmented legal regimes and “autopoietic systems” (*N. Luhmann*), the common cosmopolitan values underlying UN and WTO law promote increasing cooperation among UN and WTO political and legal institutions aimed at limiting “legal fragmentation” through mutu-

⁸⁶ For an analysis of these “three versions of radical pluralism” (*Kelsen’s* legal orders, *Koskenniemi’s* imperial international law regimes, *Luhmann’s* autopoietic social systems) see *K. Tuori*, *Transnational Law: On Legal Hybrids and Legal Perspectivism*, in: *M. Maduro/K. Tuori/S. Sankari* (eds.), *Transnational Law. Rethinking European Law and Legal Thinking*, 2014, 11-57, at 34 et seq.

ally "consistent interpretations", judicial comity and multilevel judicial protection of transnational rule of law for the benefit of citizens, as required by the customary rules of treaty interpretation and adjudication and illustrated by the WTO commitments to making trade consistent with protection of core labor rights, food security, access to medicines, the environment, health protection and poverty reduction.⁸⁷ European "multilevel constitutionalism" illustrates the political possibility of "institutionalizing public reason" so as to progressively reconcile the rational self-interests of the *homo economicus* with the common reasonable interests of responsible citizens, legislators, administrators and judges interpreting, applying and progressively developing rules of law.⁸⁸ For instance, the transformation of the EC customs union into EU constitutional law, and of GATT 1947 into the global WTO legal and compulsory dispute settlement system, confirm the earlier experiences of "merchant republics" (e.g. in Florence during the Renaissance) and nation states that liberal trade, customs unions (like the "German Zollverein" during the 19th century) and common markets can set important incentives for "constitutionalizing" legal systems for the benefit of citizens. By limiting abuses of discretionary policy powers and protecting "countervailing rights" of citizens to challenge abuses of public and private power (e.g. in competition law, consumer protection law, intellectual property law, environmental law) through judicial remedies specifying more precisely the governmental duties to limit "market failures" as well as "government failures", constitutional and cosmopolitan conceptions of IEL promote mutually beneficial, peaceful cooperation and conflict prevention (e.g. through "human rights impact assessments", "environmental impact assessments", "risk assessment analyses" by independent regulatory agencies), thereby confirming the "democratic peace hypothesis".⁸⁹

⁸⁷ Cf. E. U. Petersmann (note 53); P. Lamy, *The Geneva Consensus. Making Trade Work for All*, 2013; A. Pitaraki (note 37).

⁸⁸ M. Koskeniemi, in his "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization", in: *Theoretical Inquiries in Law* 8 (2007), 9 et seq., recalls the *Kantian* understanding of constitutionalism as a "mindset" rather than only an "institutional architecture". Yet, even though *Kantian* "categorical imperatives" require recognizing moral duties to judge autonomously what the principles of human rights, rule of law and democracy might require in the real world of conflict, contestation and transnational cooperation, Koskeniemi considers liberals as his "enemies" in view of the indeterminacy and abuses of libertarian rules: "while the rhetoric of human rights has historically had a positive and liberating effect on societies, once rights become institutionalized as a central part of political and administrative culture, they lose their transformative effect and are petrified into a legalistic paradigm that marginalizes values and interests that resist translation in rights-language" (M. Koskeniemi, *The Politics of International Law*, 2011, at 133).

⁸⁹ Cf. A. Peters (note 78), at 280 et seq.

Constitutional and cosmopolitan conceptions of IEL can claim more democratic legitimacy because they extend the “citizen-driven self-governance” ideal of democratic constitutionalism to rights-based market regulation, collective supply of international PGs and citizen-driven, decentralized enforcement mechanisms (as illustrated by EU citizenship rights, common market freedoms and other EU fundamental rights and related judicial remedies). Economic theories on PGs (*res publica*) need to be complemented by political and legal “republican theories” explaining, e.g., why “pure PGs” as defined by economists (e.g. in terms of non-excludable and non-exhaustive supply, like sunshine or a lighthouse in the night) remain rare; and how the production strategies and “collective action problems” for the different kinds of “impure PGs” can be regulated more effectively if, for instance, PGs are transformed into “club goods” excluding “free-riders”, and “best-effort PGs” (like medical inventions) are successfully promoted by new kinds of private-public partnerships.⁹⁰

3. “Cosmopolitan Constitutionalism” Promotes Accountability of Multilevel Governance vis-à-vis Citizens and Justifies “Cosmopolitan Re-interpretation” of IEL

Cosmopolitan constitutionalism avoids the utopia of “global constitutionalism” and “global democracy”. It argues that transnational legal regimes derive their legitimacy from protecting civil, political, economic, social and cultural human and constitutional rights of citizens in a globally interdependent world, including rights to be recognized and empowered as free and equal legal subjects participating in the global division of labor and in multilevel governance as “agents of justice” and “democratic principals” of the emerging global polity. The legal empowerment of citizens promotes accountability, transnational rule of law and public discourse on how UN and WTO rules and their domestic legal implementation can and should be improved for the benefit of citizens. For instance, by linking demands for improving access to medicines, public health law and food security systems to human rights, constitutional rights and IEL rules, civil society has suc-

⁹⁰ On the need for “reconceptualizing health aid” through social mobilization and new forms of innovative “private-public partnerships” in health governance see *L. O. Gostin*, *Global Health Law*, 2014, at 18 et seq., 380 et seq. See also *E. U. Petersmann*, *Constituting, Limiting, Regulating and Justifying Multilevel Governance of Interdependent Public Goods: Methodological Problems of International Economic Law Research*, in: *EUI Working Papers Law* 2013/08.

ceeded in advancing health protection and access to food in many countries (e.g. less-developed constitutional democracies like Brazil, Colombia, India and South-Africa) – not only through changing social awareness and “public reason”, mobilizing individual litigation, democratic pressures and collective social action, and persuading governments and courts of justice to protect human rights more effectively in multilevel governance of health care and food security systems,⁹¹ but also by promoting adjustments of WTO rules, policies and adjudication in cooperation with UN institutions like the WHO and WIPO.⁹² Cosmopolitan rights protect not only *ex post* legal remedies against illegal restrictions of fundamental rights; they also protect *ex ante* rights of participation (e.g. through “voice” and contestation) and promote political and legal “public reason” on the need for protecting “normative individualism” in transnational cooperation among citizens. Public discourse on the consistency of UN and WTO governance with human rights, rule of law and democratic governance can provide ambitious benchmarks challenging the “feudal domination” of UN and WTO governance by bureaucrats and diplomats. Interpreting UN and WTO rules on transnational rule of law, multilevel governance and domestic implementation of UN and WTO guarantees of equal freedoms, non-discrimination, rule of law and judicial remedies in terms of “cosmopolitan rights” could promote a “paradigm change” in UN and IEL for the benefit of citizens.

Yet, HRL also protects individual, popular and democratic diversity, as illustrated by the fact that the written and unwritten Constitutions of UN member states and their constitutional conceptions of human rights and democratic governance differ from country to country, for instance in view of the “margin of appreciation” for constitutional, legislative, administrative and judicial protection of human rights and democratic preferences. Cosmopolitan constitutionalism must respect legitimate “constitutional pluralism”, for example regarding the legislative and judicial “balancing” of civil, political, economic, social and cultural human rights in national, regional and functionally limited UN and WTO legal regimes. Yet, “cosmopolitan accountability” complementing parliamentary and other forms of “democratic accountability” (such as public consultations in trade negotiations, the annual “public *fora*” in the WTO) can contribute to improving the quality of intergovernmental decision-making and the overall legal coherence of

⁹¹ On the “development of rights-based approaches to health” and related litigation in domestic courts see *J. Harrington/M. Struttford* (eds.), *Global Health and Human Rights: Legal and Philosophical Perspectives*, 2010; *J. Tobin*, *The Right to Health in International Law*, 2012; *L. O. Gostin* (note 90), chapter 8.

⁹² Cf. *L. O. Gostin* (note 90), chapter 9; *P. Lamy* (note 87).

interdependent, multilevel governance systems, for instance if they are focusing one-sidedly on “investor rights” – without equal protection of consumer rights and human rights – in response to narrow interest group politics and “rent-seeking”. “Cosmopolitan democracy” responds best to the human rights requirements of decentralized decision-making respecting “subsidiarity” and “proportionality” principles, “regulatory competition” and democratic diversity, without imposing any “one size fits all” model on the competing traditions of “constitutional”, parliamentary, representative, participatory and “deliberative democracy” and other multilevel “checks and balances”.

The unnecessary poverty (e.g. in many African states) and financial crises illustrate that the path-dependent reality of “legal pluralism” inside nation states must remain constitutionally restrained by HRL and multilevel legal accountability. Cosmopolitan “re-interpretations” and new narratives of IEL regimes may justify “legal fragmentation” as a means of reforming “Westphalian international law” (e.g. judicial re-interpretation of bilateral investment and free trade agreements in terms of cosmopolitan rights and judicial remedies). The universal endorsement of the UN resolutions on the “right to development” as a human right of citizens and peoples, and the recognition of “sustainable development objectives” (reconciling economic, social and environmental policy interests of present and future generations) in international agreements (like the WTO Agreement) reflect increasing consensus on the need for replacing one-sided “GDP conceptions” of economic growth by “human development conceptions” empowering individuals to develop their human capacities so as to live their individual conceptions of a “good life” which they have reason to value. Just as the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen triggered revolutionary constitutional transformations even though their cosmopolitan demands did not reflect the political power realities prevailing in 1776/1789, civil society insistence on “cosmopolitan constitutionalism” offers a “realistic utopia” for changing the narratives and realities of IEL so as to empower citizens to exercise more democratic control over the failures of UN and WTO governance to protect human rights effectively.

4. Cosmopolitanism Requires Stronger Judicial Remedies and Judicial Protection of Cosmopolitan Rights

The public European debates on the "justice deficits" of European integration are signs of the increasing maturity of the "European civil society" and "deliberative democracy".⁹³ The increasing number of national constitutional court decisions challenging multilevel governance measures during the Eurozone crisis also reflects the maturity of the EU's "multilevel constitutional system" committed to "principles of justice" (Art. 2 TEU) and judicial administration of justice (cf. Art. 19 TEU). From the perspective of national and cosmopolitan citizenship, the ultimate value of international legal commitments depends on their protection of equal rights and enforceable remedies of citizens, with due respect for the customary law requirements of interpreting international law and settling international disputes "in conformity with principles of justice" and the human rights obligations of states. The human and constitutional rights of access to justice⁹⁴ require courts of justice to recognize citizens as "agents of justice" entitled to justification of governmental restrictions in terms of human rights.

National and also international courts exercise limited, delegated powers for (a) settling disputes through legally binding decisions; (b) applying, clarifying and protecting rule-of-law through due process of law in inclusive dispute settlement procedures; (c) impartially and independently reviewing and controlling the exercise of public and private power; and (d) justifying "judicial administration of justice" in terms of procedural, distributive, corrective, commutative justice and equity, thereby contributing to the legitimization of law through "public reason". National courts tend to render their judgments "in the name of the people". Democratic legitimacy of the exercise of limited, delegated *public authority* by international institutions (including judicial powers) must be derived not only from the plurality of peoples whose parliaments have ratified international treaties and the "applicable law" in international disputes; legitimacy also depends on protecting the rights of non-governmental parties to the dispute (e.g. human rights, constitutional rights, cosmopolitan trading, investor, intellectual property, labor and social rights), with due regard for national margins of appreciation and other democratic and constitutional principles (like subsidiarity, participation of all affected parties, deliberative democracy, transparency, proportionality). Hence, as states are only legal constructs for protecting

⁹³ Cf. *G. de Burca/D. Kochenov/A. Williams* (eds.), *Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls and Ryanair*, EUI Working Papers Law 2013/11.

⁹⁴ See note 80.

the common reasonable interests of citizens as defined by human rights and democratic procedures, “cosmopolitan justice” and “constitutional justice” are more important for legitimating IEL adjudication of disputes involving non-state actors than “Westphalian justice” prioritizing rights of states over those of their citizens.

Interpreting IEL “in conformity with principles of justice” is also necessary for identifying the often diverse “contexts of justice”, for example, the “distributive” and “corrective justice” principles underlying “violation complaints” pursuant to Arts. XXIII of GATT and GATS and the different “commutative justice” and “equity principles” underlying “non-violation complaints” and “situation complaints” provided for in the same Arts. XXIII of GATT and GATS. The multilevel GATT/WTO legal guarantees of “access to justice” at national, transnational and international levels illustrate that the explicit objective of “the dispute settlement system of the WTO” of “providing security and predictability to the multilateral trading system” (Art. 3 DSU) requires judicial clarification of the question of whether, and to what extent, WTO rules protect not only rights and duties of WTO members, but also of private economic actors and citizens engaged in international trade and benefitting from the global division of labor. In clarifying this question, courts of justice should proceed from recognizing individuals as bearers of inalienable human rights and fundamental freedoms (e.g. of profession) to engage in, and benefit from international trade subject to legitimate democratic regulation.⁹⁵ The systemic logic of general principles of procedural, distributive, corrective, commutative principles of justice and equity needs to be progressively clarified and developed in legal systems through constitutional, legislative, administrative, judicial and international rules and institutions depending on the respective democratic preferences and “public reason” of the citizens concerned. Integrating the competing narratives and conceptions of IEL from constitutional, democratic and judicial “bottom-up perspectives” can strengthen the legitimacy and “constitutional effectiveness” of multilevel economic regulation and promote synergies among different fields of international law and adjudication. The democratic and cosmopolitan responsibilities of citizens for protecting transnational “aggregate PGs” require “struggles for cosmopolitan rights” and for constitutional and judicial protection of transnational rule of law in multilevel governance. The increasing parliamentary control of multilevel economic regulation in Europe and the multilevel judicial protection of cosmopolitan rights in the jurisprudence of European economic and hu-

⁹⁵ On the diversity of constitutional guarantees of equal freedoms as “first principle of justice” subject to democratic legislation see *E. U. Petersmann* (note 8), chapter III.

man rights courts illustrate how such "struggles for rights" can succeed in reforming IEL if supported by parliaments and courts of justice. Yet, the permanent fact of "reasonable disagreement" among citizens, peoples and governments on conceptions of a "good life" and on "political justice" also justifies "doctrinal" and "methodological pluralism" in IEL practices and research.

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